

SMALL BUSINESS ADMINISTRATION

Docket No. SBA-2020-[]

13 CFR Part 121

Business Loan Program Temporary Changes; Paycheck Protection Program

RIN []

AGENCY: U. S. Small Business Administration.

ACTION: Interim Final Rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) issued an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID-19). This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA’s implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES: Effective Date: This interim final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability Date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment Date: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

You may submit comments, identified by number SBA-2020-[] through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: The local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID-19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance

from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (P.L. 116-136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency.

Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the “Paycheck Protection Program.” Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. On April 2, 2020, SBA issued an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Act. A more detailed discussion of sections 1102 and 1106 of the Act is found in section III of the Initial Rule.

This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA’s implementation of sections 1102 and 1106 of the Act and requests public comment.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America’s small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)). Specifically, small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as

possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately apply for the loan with a better understanding of loan terms and conditions. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title 1 of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule. These comments must be submitted on or before [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Affiliate Rules for Paycheck Protection Program

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. Additional information about the PPP is available in the Initial Rule.

1. Affiliation Rules Generally

Are affiliates considered together for purposes of determining eligibility?

In most cases, a borrower will be considered together with its affiliates for purposes of determining eligibility for the PPP.¹ Under SBA rules, entities may be considered affiliates based on factors including stock ownership, overlapping management,² and identity of interest. 13 CFR § 121.301.

How do SBA's affiliation rules affect my eligibility and apply to me under the PPP?

An entity generally is eligible for the PPP if it, combined with its affiliates, is a small business as defined in section 3 of the Small Business Act (15 U.S.C. 632), or (1) has 500 or fewer employees whose principal place of residence is in the United States or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry, and (2) is a tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, a Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business concern. Prior to the Act, the nonprofit organizations listed above were not eligible for SBA Business Loan Programs under section 7(a) of the Small Business Act; only for-profit small business concerns were eligible. The Act made such nonprofit organizations not only eligible for the PPP, but also subjected them to SBA's affiliation rules. Specifically, section 1102 of the Act provides that the provisions applicable to

¹ Section 7(a)(36)(D)(iv) of the Small Business Act (15 U.S.C. § 636(a)(36)(D)(iv), as added by the Act, waives the affiliation rules contained in section 121.103 for (1) any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a North American Industry Classification System code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; and (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681). This interim final rule has no effect on these statutory waivers, which remain in full force and effect. As a result, the affiliation rules contained in section 121.301 also do not apply to these types of entities.

² In order to help potential borrowers identify other businesses with which they may be deemed to be affiliated under the common management standard, the Borrower Application Form, SBA Form 2483, released on April 2, 2020, requires applicants to list other businesses with which they have common management. The information supplied by the applicant in response to that information request should be used by applicants as they assess whether they have affiliates that should be included in their number of employees reported on SBA Form 2483.

affiliations under 13 CFR 121.103 apply with respect to nonprofit organizations and veterans organizations in the same manner as with respect to small business concerns. However, the detailed affiliation standards contained in section 121.103 currently do not apply to PPP borrowers, because section 121.103(a)(8) provides that applicants in SBA's Business Loan Programs (which include the PPP) are subject to the affiliation rule contained in 13 CFR 121.301.

2. *Faith-Based Organizations*

This rule exempts otherwise qualified faith-based organizations from the SBA's affiliation rules, including those set forth in 13 CFR part 121, where the application of the affiliation rules would substantially burden those organizations' religious exercise. This exemption is required, or at a minimum authorized, by the Religious Freedom Restoration Act (RFRA) (P.L. 103-141), which provides that the "[g]overnment shall not substantially burden a person's exercise of religion" unless the government can "demonstrate[] that application of the burden" to the person is both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1.

A substantial burden under RFRA includes both government action that compels a person to violate his sincere religious beliefs or suffer a penalty, *see, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014), and the imposition of a substantial burden through "indirect" measures. *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717-18 (1981). Notably, the government imposes a substantial burden on religious exercise when it "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief." *Id.* at 718. For example, in

Sherbert v. Verner, 374 U.S. 398 (1963), a State denied the plaintiff unemployment benefits because she would not work on Saturday, the Sabbath of her faith. *Id.* at 400-01. Even though no “sanctions directly compel[led]” her to work on Saturday, the Supreme Court held that the State’s denial of benefits “puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.” *Id.* at 404. As the Court observed, the State’s framework “forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.” *Id.* Consistent with these precedents, RFRA explicitly contemplates that “the denial of government funding, benefits, or exemptions” may violate its protections. 42 U.S.C. 2000bb-4.

SBA is aware of the existence of faith-based organizations that would qualify for relief under the CARES Act but for their affiliation with other entities as an aspect of their religious practice. Supreme Court precedent has long recognized that the organizational structure of faith-based entities may itself be a matter of significant religious concern and that faith-based organizations are therefore guaranteed the “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Moreover, an assessment of the extent to which questions concerning religious polity rest upon theological or other religious foundations presents particular difficulties, for the First Amendment “forbids civil courts” from “the interpretation of particular church doctrines and the importance of those doctrines to the religion.” *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969). A number of faith-based organizations understand their affiliation with other religious entities as a part of their exercise of religion, as a mandate given

the “hierarchical or connectional” structure of their church, *Jones v. Wolf*, 443 U.S. 595, 597 (1979), or as an expression of their sincere religious belief. *Cf.* 1 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* § 8.19 (Westlaw rev. ed. 2017) (“Religious organizations, such as parishes or mission centers, normally tend to choose the civil-property-holding structures that most closely mirror their own ecclesiology or polity.”). Either affiliation decision falls within the definition of “religious exercise” that applies to RFRA, which “includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *See* 42 U.S.C. 2000cc-5(7)(A); 2000bb-2(4) (“the term ‘exercise of religion’ means religious exercise, as defined in section 2000cc-5 of this title”).

As applied to these faith-based organizations, the affiliation rules would impose a substantial burden. The affiliation rules would deny an important benefit (participation in a program for which they would otherwise be eligible under the CARES Act) because of the exercise of sincere religious belief (affiliation with other religious entities).

The Administrator has also concluded that she does not have a compelling interest in denying emergency assistance to faith-based organizations that are facing the same economic hardship to which the CARES Act responded and who would be eligible for PPP but for their faith-based organizational and associational decisions. This conclusion is reinforced by the fact that the affiliation rules already contain numerous exemptions, *see generally* 13 C.F.R. 121.103(b), ranging from “[b]usiness concerns owned and controlled by Indian Tribes, Alaska Native Corporations, [and] Native Hawaiian Organizations,” *id.* 121.103(b)(2)(i) to “member shareholders of a small agricultural cooperative.” *Id.* 121.103(b)(7). In light of these exemptions, it is difficult to maintain that denying relief to these faith-based organizations is necessary to further a compelling government interest, let alone the least restrictive means of

doing so. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (“[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.”) (cleaned up); *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (applying same principle under RFRA). SBA accordingly must exempt faith-based organizations that would otherwise be disqualified from the PPP based on features of those organizations’ affiliations that are a matter of sincere religious exercise as defined in 42 U.S.C. 2000bb-2.

This action is also supported by 15 U.S.C. 634(b)(6), which authorizes the Administrator to “make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter.” As relevant here, the CARES Act expanded eligibility for the covered loans during the covered period for nonprofit organizations that employ not more than 500 employees or, if applicable, the size standard in number of employees established by the Administrator for the industry in which the nonprofit organization operates. 15 U.S.C. 636(a)(36)(D)(i). That expansion posed unique concerns for the Administrator, who is tasked with applying the “provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor thereto, . . . with respect to a nonprofit organization and a veterans organizations in the same manner as with respect to a small business concern.” *Id.* 636(a)(36)(D)(vi). Although these rules may easily be applied to faith-based organizations in many cases, their application to certain faith-based organizations presents significant challenges, in particular because of the large number of faith-based organizations who would now be eligible for the PPP but for their religious exercise.

As discussed above, carrying the affiliation rules over to all faith-based organizations without modification would raise concerns under RFRA. Moreover, application of the affiliation

rules, which, for example, provide for assessment of whether one faith-based organization “controls or has the power to control” another organization, 13 C.F.R. 121.103(a)(1), could involve SBA in questions of church governance concerning “the allocation of power within a (hierarchical) church so as to decide . . . religious law (governing church polity),” in violation of the First Amendment. *Serbian E. Orthodox Diocese for the U.S.A. & Canada v. Milivojevich*, 426 U.S. 696, 709 (1979) (internal quotation marks omitted)). Finally, affiliation rules developed in the context of for-profit enterprises present significant administrative difficulties where faith-based organizations are concerned. For example, “the notion of corporate subsidiarity or affiliation in civil law is entirely foreign to the polity of religious organizations,” and there is a significant risk that civil authorities will “mischaracterize or misinterpret the polity of a religious body.” I W. Cole Durham & Robert Smith, *Religious Organizations and the Law* §§ 8.19, 8.21 (discussing examples of judicial mischaracterizations). Consistent with these concerns, it is also notable that other areas of federal law approach issues analogous to affiliation differently for religious organizations. *See, e.g.*, 26 U.S.C. 512 (b)(12).

For these reasons, in addition to the RFRA mandate, the Administrator has determined that it is appropriate to exercise the authority granted under 15 U.S.C. 634(b)(6) to exempt from application of SBA’s affiliation rules faith-based organizations that would otherwise be disqualified from participation in PPP because of affiliations that are a part of their religious exercise.

Accordingly, the SBA’s affiliation rules, including those set forth in 13 CFR part 121, do not apply to the relationship of any church, convention or association of churches, or other faith-based organization or entity to any other person, group, organization, or entity that is based on a sincere religious teaching or belief or otherwise constitutes a part of the exercise of religion.

This includes any relationship to a parent or subsidiary and other applicable aspects of organizational structure or form. A faith-based organization seeking loans under this program may rely on a reasonable, good faith interpretation in determining whether its relationship to any other person, group, organization, or entity is exempt from the affiliation rules under this provision, and SBA will not assess, and will not require participating lenders to assess, the reasonableness of the faith-based organization's determination.

3. Additional Information

SBA may provide further guidance, if needed, through SBA notices and a program guide which will be posted on SBA's website at www.sba.gov.

Questions on the Paycheck Protection Program 7(a) Loans may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance with Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612).

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth

in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose recordkeeping or reporting requirements under the Paperwork Reduction Act (“PRA”). SBA has obtained emergency approval under OMB Control Number 3245-0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form) and SBA Form 2484 (Paycheck Protection Program Lender’s Application for 7(a) Loan Guaranty), and is approved for use until September 30, 2020.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the Federal Register. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a

nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The agency must, however, publish the certification in the Federal Register at the time of publication of the rule, “along with a statement providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA’s waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the Federal Register at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Ac. Ch.1. p.9*. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

List of subjects in 13 CFR part 121

Administrative practice and procedure, Authority delegations (Government agencies), Intergovernmental relations, Investigations, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Small Business Administration revises 13 CFR Part 121 as set forth below:

1. The authority citation for part 121 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36); 662, and 694a(9), Pub. L. No. 116-136, Section 1114.

2. Revise § 121.103(b) by adding (b)(10) to read as follows:

§ 121.103 How does SBA determine affiliation?"

(b) ***

(10)(i) The relationship of a faith-based organization to another organization is not considered an affiliation with the other organization under this subpart if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion. In addition, the eligibility criteria set forth in 15 U.S.C. 636(a)(36)(D) are satisfied for any faith-based organization having not more than 500 employees (including individuals employed on a full-time, part-time, or other basis) that pays federal payroll taxes using its own Internal Revenue Service Employer Identification Number (EIN) or that would be eligible for a deduction under the second sentence of 26 U.S.C. 512(b)(12) if the organization earned unrelated business taxable income. For purposes of this paragraph, the term "faith-based organization" includes, but is not limited to, any organization associated with a church or convention or association of churches within the meaning of 26 U.S.C. 414(e)(3)(D). The term "organization" has the meaning given in 26 U.S.C. 414(m)(6)(A). The terms "church" and "convention or association of churches" have the same meaning that they have in 26 U.S.C. 414.

(ii) No specific process or filing is necessary to claim the benefit of this exemption. In applying for a loan under the PPP, a faith-based organization may make all necessary

certifications with respect to common ownership or management or other eligibility criteria based upon affiliation, if the organization would be an eligible borrower but for application of SBA affiliation rules and if the organization falls within the terms of the exemption described above. If a faith-based organization indicates any relationship that may pertain to affiliation, such as ownership of, ownership by, or common management with any other organization, on or in connection with a loan application, and if the faith-based organization applying for a loan falls within the terms of the exemption described above with respect to that relationship, the faith-based organization may indicate on a separate sheet that it is entitled to the exemption. That sheet may be identified as addendum A, and no further listing of the other organization or description of the relationship to that organization is required. A sample "Addendum A" is attached to the rule, but this format need not be used as long as the substance is the same.

3. Add Addendum A to part 121 to read as follows:

[Sample]

ADDENDUM A

- ✓ The Applicant claims an exemption from all SBA affiliation rules applicable to Paycheck Protection Program loan eligibility because the Applicant has made a reasonable, good faith determination that the Applicant qualifies for a religious exemption under 13 C.F.R. 121.103(b)(10), which says that “[t]he relationship of a faith-based organization to another organization is not considered an affiliation with the other organization . . . if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion.”

Dated:

Jovita Carranza,
Administrator