

Legislative and Regulatory Update: A Busy Month for the Paycheck Protection Program

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Earlier this month, the Small Business Administration (SBA) launched the Paycheck Protection Program (PPP), Congress's headline-making small business relief program under the historic Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The launch was met with news reports of implementation challenges, as banks struggled to apply the eligibility rules and meet enormous demand, and regulators responded with increased incentives for them to participate. After funds quickly ran out and Congress turned its attention to renewal, news reports then highlighted objections to how larger businesses, like Shake Shack, were participating in the program, even as many smaller businesses were essentially locked out. Separately, litigation accused certain banks of favoring existing customers over new ones in accepting applications.

On April 23, 2020, Congress passed the Paycheck Protection Program and Health Care Enhancement Act (Enhancement Act), providing an additional \$310 billion for PPP. Most of those issues were left unaddressed, with Congress leaving the preexisting eligibility rules in place, but appropriating \$60 billion dollars for smaller lenders in an attempt to encourage lending to smaller businesses. Treasury and the SBA, in turn, issued guidance noting that certain larger businesses—especially public companies with access to the capital markets—were likely ineligible for the program and therefore should not be applying for the loans. The guidance advised that those who previously did so should consider returning the money by May 7, 2020. The SBA further capped the amount each lender could issue at 10% of the total PPP funds, or approximately \$60 billion.^[1] The program reopened earlier today, April 27, 2020, though not without glitches, with the SBA's program for processing loans, E-Tran, once again crashing within minutes of reopening.^[2]

With new funding, additional businesses will be positioned to apply for PPP loans, although early news reports suggest that the money may be spoken for in already pending applications.^[3] The reports from the front lines of the first installment suggest that larger businesses will need to think carefully about whether they can fit within eligibility rules constantly being adjusted by SBA guidance, and, even if they do, assess the political and public relations risk of participation. This is because although the SBA and Treasury are not yet releasing the identity of borrowers in the program, publicly traded companies may need to disclose the loans and, more generally, given the Federal Reserve's recent announcement that it will publicly disclose participants in its CARES Act lending facilities, it is likely a question of when, not if, other borrowers will be similarly disclosed in the PPP.

This client alert summarizes the most significant PPP developments. It builds on our prior alerts (available [here](#) and [here](#)) about the program. First, it provides an overview of the Enhancement Act. Second, it describes updated guidance concerning the PPP's eligibility rules. Third, it describes clarifications to the affiliation rules for counting employees. Last, it notes certain developments concerning lenders.

What follows below is a summary of the currently available information. Given the fast-changing nature of this space, companies should consult the most updated guidance. Links to available resources are listed at the end of the alert. We encourage you to follow up with any questions or concerns. Jenner & Block offers a wide array of resources and lawyers with experience necessary to help our clients

navigate the implications of these important new programs, led by our COVID-19 Response Team. This team, described more fully at the end of this alert, includes lawyers who played key, leading roles in the country's response to the last economic crisis and who have been recognized nationally for their insight in this one. It includes government veterans whose senior positions meant that they were intimately involved in the design of many of the government's most recent bailout programs, oversaw the loan application and distribution processes that were a key part of them, and ran and responded to the investigations that followed. It also includes transactional lawyers who are already engaged with clients seeking to avail themselves of aspects of the government programs described in this and our prior alerts.

I. Congressional Action to Renew Funding

On April 24, 2020, the President signed the Enhancement Act, which, among other things, will provide an additional \$310 billion in funding to replenish the PPP. On its own, the new law does not change the eligibility rules that previously defined the program. It does, however, include provisions intended to drive more loans to smaller and minority-owned businesses—likely responding to news reports that larger publicly-traded restaurant chains, like Shake Shack and Ruth's Chris Steakhouse, obtained a significant amount of funding under the program,^[4] and that some of the biggest participating banks prioritized larger and more established customers over smaller companies.^[5] To do so, the act specifically set aside \$30 billion for banks and credit unions with consolidated assets of between \$10 billion and \$50 billion. An additional \$30 billion has been set aside for banks and credit unions with below \$10 billion in assets, community financial development institutions (institutions with “the goal of expanding economic opportunity in low-income communities by providing access to financial products and services for local residents and businesses”^[6]), and minority-owned depository institutions. This new focus on funding smaller lenders, in the hopes of reaching smaller businesses, may also allow fintech firms, which these smaller businesses more often use for lending, to play a larger role in this round of funding. See below Part IV for a discussion of these fintech lenders under the PPP.^[7]

The new law does not change the eligibility rules, including the special exceptions for restaurants and hospitality businesses at the center of the current controversy surrounding Shake Shack and other large restaurant and hospitality chains. Instead, the SBA has issued guidance barring certain firms, such as hedge funds, from participating, and indicating that larger publicly-traded companies with access to capital markets will be “unlikely” to qualify under the existing rules, and encouraging such firms that previously received funds to consider returning them by May 7, 2020.^[8]

The new legislation also provided an additional \$60 billion to the Emergency Injury Disaster Loan program, which Congress had originally funded with \$17 billion, and which features \$10,000 emergency grants to applicants.

II. Eligible Businesses

With a new round of funding—and public attention on business eligibility—a careful assessment of the rules is important for any business. Since its launch, the SBA has continued to publish guidance to clarify what kinds of “small businesses” are eligible for the PPP's forgivable loans. This section provides an overview of the most salient updates.

A. The Basic Eligibility Categories Under the Act

Generally speaking, the PPP applies to any for-profit business,^[9] 501(c)(3) nonprofit, 501(c)(19) veterans' organization, or tribal business concern with 500 or fewer employees (whose principal place of residence is the United States). The CARES Act also makes eligible businesses that have more than 500 employees but fewer than the SBA's employee-based size standards for its industry, based on North American Industry Classification System (NAICS) code.^[10] For example, businesses with NAICS

code 511110 (newspaper publishers) must have fewer than 1,000 employees to be considered a small business.

Also eligible, regardless of number of employees, are “small business concerns,” small for-profit US companies,^[11] that meet the **non-employee-based** size threshold set by the SBA, defined in the footnote below.^[12]

As recent headlines emphasize, the CARES Act also includes a provision specifically for the hospitality industry, permitting businesses with an NAICS code starting with 72 (for “Accommodation and Food Services”) to apply for PPP loans, so long as they have fewer than 500 employees **per physical location**. Under that provision, for instance, a restaurant chain with over 500 employees in total, but no more than 500 employees at any given restaurant location, is eligible for the program (the loan goes to the business, not each location).

Although this exception has been widely described as a “loophole,” it was no oversight: it was an explicit requirement set forth by Congress that such firms would benefit from the PPP, and that requirement was later reflected in the original guidance set forth by Treasury and the SBA.

Recent guidance by the SBA, however, appears intended to discourage some of the larger companies from participating. Rather than address the issue head on, however, it reinterpreted one of the key eligibility requirements. Since the program’s inception, all PPP applicants have had to certify in their application that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” This ambiguous provision was originally interpreted to signal that the SBA and Treasury wanted to encourage broad participation. Indeed, it is hard to imagine that more than a handful of businesses that have been forced to close as part of the nationwide lockdown would not meet this standard, particularly if they were trying to maintain payroll. In its “FAQ” document, however, the SBA has provided guidance that now narrows eligibility in a manner that was not previously stated: borrowers now should take into account their current business activity and their ability to access other sources of funding that would support their ongoing operations “in a manner that is not significantly detrimental to the business.” The SBA further explains that “it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith,” and that any such company should be prepared to “demonstrate” to the SBA that it could meet this revamped necessity standard. Companies that have already received funds will not have to demonstrate such necessity if they repay the loan by May 7, 2020, which a number of companies have already indicated they will do.^[13]

B. Additional Eligibility Requirements Imposed by Lenders

In addition to the eligibility rules set by regulation, a federal court has recently opined—in an early PPP case involving Bank of America—that a lender is permitted to impose its own, additional eligibility requirements on potential borrowers before accepting PPP loan applications.^[14] In that case, Bank of America initially required applicants to have a deposit *and* lending account at the bank before being considered for a PPP loan, and later revised those requirements to allow deposit-only customers to apply, as long as that customer did not have a lending account (including a credit card) elsewhere. Neither of these requirements exist in the CARES Act or related rules or guidance. The court rejected claims by businesses whose applications Bank of America rejected for not meeting these criteria, reasoning that the CARES Act “does not constrain banks such that they are prohibited from considering other information when deciding from whom to accept applications, or in what order to process applications it accepts.” In light of this ruling, potential borrowers should check with their banks for additional restrictions on eligibility.^[15] Similar lawsuits are also pending.

C. Ineligibility

SBA guidance also makes certain businesses ineligible for PPP loans, as reported on in our prior

alerts, including restrictions that are otherwise applicable to all SBA borrowers, such as businesses that primarily engage in “providing prurient sexual material” (which would include businesses like strip clubs), lending or investment,^[16] speculative businesses,^[17] passive businesses, life insurance companies, businesses promoting religion, government-owned entities, and businesses that have caused a prior loss to the federal government.^[18] SBA guidance does exempt companies that receive revenue from legal gambling, making them eligible for PPP loans, even though the general SBA rules would otherwise exclude them.^[19]

Also declared ineligible in recent guidance are hedge funds, private equity funds (although not necessarily their portfolio companies, as discussed below), and businesses in bankruptcy. Further, if a business goes into bankruptcy before the loan is disbursed, the borrower must request cancellation of the loan.^[20] A prior iteration of this provision is currently under legal challenge.^[21] A recent judicial decision also found that lobbyists are prohibited from receiving PPP loans.^[22]

III. Affiliation Rules

Eligibility in most cases depends on determining a business’s number of employees (or revenue, depending on the manner of eligibility). For companies that are related to others, the PPP typically requires them to include in its head count and revenue calculations **all company affiliates**—considered to mean when one party “controls or has the power to control the other, or a third party or parties controls or has the power to control both.”^[23]

The SBA has issued recent guidance on the affiliation rules applicable to PPP loans. This section describes various guidance and details relating to those rules.

A. Waiver of Affiliation Rules

The PPP program waives these affiliation rules for certain businesses.^[24] In addition to waiving affiliations for restaurant and hospitality businesses with fewer than 500 employees, franchise brands outside of those industries can also apply for a waiver to allow each franchise business to be eligible for the loan, if each franchise is separately owned but associated with the name brand (and also has fewer than 500 employees). A list of companies that have received these waivers, such as 7-11, can be found [here](#).^[25]

B. Additional Guidance on How to Interpret the Affiliation Rules

The SBA has also issued guidance on how to determine when potentially affiliated parties should be counted for eligibility purposes. The guidance details four affiliation tests:

- **Ownership or Control.** An individual, concern, or entity is deemed affiliated with another if one owns or has the power to control more than 50% of the voting equity of the other. In addition, a minority shareholder is deemed in control if, by the business’s charter, bylaws, or a shareholder agreement, it can prevent a quorum or block action by the directors or shareholders. The SBA has clarified that if a minority shareholder irrevocably gives up those rights, the minority shareholder would no longer be considered an affiliate.^[26]
- **Stock options, convertible securities, and agreements to merge.** The SBA will consider any stock options, convertible securities, or agreements to merge as if the entity with the rights to control has actually exercised those rights and taken control, even if it never actually has. If that control would make them an affiliate under other affiliation rules, then the holders of the options, securities, or agreements would be considered affiliates of the business. This rule has certain exclusions and rules for particular applications which companies should review carefully.

- **Management.** If the same person controls the management of two or more businesses, whether as CEO or other manager or by controlling the boards of directors, those businesses are considered affiliates.
- **Identity of Interest.** Individuals or entities are considered affiliates when they are run by close family members and conduct business with each other, such as sharing employees, locations, or resources, so that the businesses have identical or substantially identical business or economic interests. For instance, if one person runs Business A and their spouse runs Business B—but they share office space, share two employees, and Business A has loaned Business B money—then the two businesses would be considered affiliates.^[27]

These general affiliation rules also apply to venture capital and private equity backed businesses, which often means that such companies will not be eligible for PPP loans, subject to the exceptions listed above.^[28] Although some companies have reportedly taken advantage of this guidance to permanently give up control rights in companies in which they have a minority interest in order to allow those companies to participate in the PPP, before doing so companies should carefully consider the revised eligibility guidance discussed above. Indeed, in the same interim rule in which the SBA has stated that hedge funds and private equity funds themselves are ineligible due to the speculative nature of their businesses, it also stated that private equity portfolio companies should “carefully review” the certification provision discussed above that states “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”^[29]

IV. Updates for Lenders

A. Federal Reserve’s Paycheck Protection Program Liquidity Facility

In order to encourage lenders to participate in the PPP, the Federal Reserve has launched the PPP Liquidity Facility. Through this program, discussed in further detail in a prior [client alert](#), the Federal Reserve will make non-recourse loans to banks using only the PPP loans as collateral, effectively financing them. While currently all bank lenders are eligible for this program, the Federal Reserve has stated that the program will be expanded to non-bank lenders as well as soon as possible.^[30] Interested lenders can find more information [here](#).

B. Additional Lenders

As detailed in our prior alerts, the CARES Act allows for additional non-bank lenders to participate in PPP lending. Although initially the only approved PPP lenders were banks already issuing SBA loans, the CARES Act and further guidance opened the doors to additional lenders to participate. SBA published an application form for such lenders, which is available [here](#), and a group of fintech companies—including PayPal, Square, and Intuit—have all reportedly received approval to issue loans under the PPP.

C. Lending Caps

A memo issued by the SBA on Sunday, April 26, 2020, just before the PPP was set to reopen, ordered that no single lender could lend more than 10% of the PPP funds, or approximately \$60 billion.^[31]

Relevant Resources

The SBA anticipates regularly updating the guidances as more questions arise. Therefore, interested parties should consult the resources below regularly for new content. In addition, the SBA may also issue additional guidance on loan forgiveness. The available resources can be found at:

- [Treasury PPP Resource Page](#)

- [PPP Interim Final Rule](#)
 - [PPP Loans Frequently Asked Questions](#)
 - [PPP Affiliation Rules](#)
 - [PPP Information Sheet: Borrowers](#)
 - [SBA Size Standards](#)
 - [PPP New Lender Application \(Non-Bank Lenders\)](#)
 - [PPP Interim Final Rule on Promissory Notes, Authorizations, Affiliation, and Eligibility](#)
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About Our COVID-19 Response Team

As noted above, Jenner & Block is well positioned to help our clients manage the challenging issues related to the current crisis, from applications for funds, to managing workforce concerns, to the Congressional oversight and government investigations that inevitably come along with any such financial assistance. Our COVID-19 Response Team includes alumni from various government agencies and other lawyers involved in the fallout from the 2008 financial crisis whose experience can prove invaluable in times like these. The team include includes:

- [Neil Barofsky](#), the former Presidentially-appointed first Special Inspector General of the \$700 billion Troubled Asset Relief Program (SIGTARP). In his role as SIGTARP, Mr. Barofsky established and supervised the audit division that oversaw the financial assistance provided to corporations after the 2008 financial crisis, and provided real time advice and oversight as the Treasury Department developed and implemented many of the TARP programs. He also created and oversaw its law enforcement division, which conducted the criminal and civil investigations of those who abused the bailouts, and helped provide transparency through his testimony dozens of times to Congress;
- Firm Chair [Tom Perrelli](#), who draws on his experience as Associate Attorney General, the third-ranking official at the US Department of Justice, where, among other things, he led the government's investigation and eventual \$25 billion settlement into the mortgage servicing abuses that arose out of that crisis and served as the lead Department of Justice representative involved in the American Recovery and Reinvestment Act in 2009;
- Partner [Erin Schrantz](#), who represented global clients who came under Congressional and Justice Department scrutiny related to their receipt of TARP funds;
- Partner [Damon Smith](#), who served as liaison to the Financial Crisis Inquiry Commission during his five years at the US Department of Housing and Urban Development, where he served as acting general counsel; and
- Lawyers who advised Partner [Anton Valukas](#), in his role as the court-appointed Examiner in the Lehman Brothers Holdings bankruptcy, an event many commentators point to as the precipitating event triggering the 2008 financial crisis.

Additional materials prepared by the COVID-19 Response Team are available on Jenner & Block's [COVID-19 Resource Center](#). For more information on the CARES Act, please reach out to CARESAct@jenner.com or your primary Jenner & Block contact.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our [COVID-19 / Coronavirus Resource Center](#).

[Click here to visit our COVID-19 / Coronavirus Resource Center](#)

[1] Michelle Price & Chris Prentice, *U.S. Will Cap How Much Each Bank Can Lend Under Emergency Coronavirus Program: Memo*, Reuters (Apr. 26, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-lending/u-s-will-cap-how-much-each-bank-can-lend-under-emergency-coronavirus-program-memo-idUSKCN2280Q1>.

[2] Pete Schroeder & Michelle Price, *U.S. Banks in Another Mad Grab for \$310 Billion in New Small Business Aid*, Reuters (Apr. 27, 2020), <https://www.reuters.com/article/us-health-coronavirus-banks-lending/u-s-banks-gird-for-mad-grab-of-another-310-billion-in-new-small-business-aid-idUSKCN2291D6>.

[3] Ken Sweet & Joyce Rosenberg, *\$310B for Small Business Loans Likely Spoken For, Banks Say*, AP News (Apr. 23, 2020), <https://apnews.com/006fa2721ae868d48e05a2355e8a3b12>.

[4] According to reports, Shake Shack obtained a \$10 million loan from the PPP because it is a restaurant that does not employ more than 500 employees per physical location, which made it eligible as noted below. Greg Iacurci, *Here's How Big Companies Used a Loophole To Get Paycheck Protection Program Loans*, CNBC (Apr. 20, 2020), <https://www.cnbc.com/2020/04/20/how-shake-shack-potbelly-and-ruths-chris-got-small-business-loans.html>. Reporting further found at least twenty publicly traded companies with market capitalization of greater than \$100 million received PPP loans. Nathan Vardi, *71 Publicly Traded Companies Got Paycheck Protection Funding Before Money Ran Out*, Forbes (Apr. 20, 2020), <https://www.forbes.com/sites/nathanvardi/2020/04/20/seventy-one-publicly-traded-companies-got-paycheck-protection-funding-before-money-ran-out/#3fda34885087/>.

[5] Phillip Rosenstein, *Fintech To Play Central Role in Small Biz Lending Efficiency*, Law360 (Apr. 21, 2020), https://www.law360.com/banking/articles/1265548/fintech-to-play-central-role-in-small-biz-lending-efficiency?nl_pk=90026c7a-4c51-40ff-8177-a8d402009d8a&utm_source=newsletter&utm_medium=email&utm_campaign=banking.

[6] US Dep't Treasury, CDFI Fund, *What Are CDFIs*, https://www.cdfifund.gov/Documents/CDFI_infographic_v08A.pdf (last visited Apr. 26, 2020).

[7] Rosenstein, *supra* n.5.

[8] US Small Bus. Admin, *Business Loan Program Temporary Changes; Paycheck Protection Program –Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility* (Apr. 24, 2020), <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf>.

[9] Separately, an individual operating as a sole proprietor or as an independent contractor, or eligible self-employed individual, is eligible for a PPP loan if they were in operation as of February 15, 2020. Applications for these kinds of borrowers opened on April 3, and are not addressed in detail in this alert.

[10] These size standards can be found at the SBA's [Size Standards Tool](#) or [table of size standards](#). The SBA's size standards are alternatively based on employee numbers or annual receipts; this applies only to businesses in industries with size standards based on employee numbers.

[11] Specifically, the business must be physically located and operated in the United States or have an operation in the United States that makes a "significant contribution" to the US economy through payment of taxes or use of American products, material, or labor. US Small Bus. Admin., *Size Standards*, <https://www.sba.gov/federal-contracting/contracting-guide/size-standards> (last visited Apr. 8, 2020).

[12] This means that the business either: (1) has both a maximum tangible net worth of no more than \$15 million *and* an average net income (after federal income taxes but excluding carry over losses) of no more than \$5 million for the full two years before the date of application. For the purposes of the PPP, a business must meet this test as of March 27, 2020 or (2) is below the industry standard for small businesses set by the SBA, measured *in annual receipts*. This is because for certain industries, the SBA table measures business size by annual receipts, *not* by numbers of employees. Thus, a business in such industries can be an eligible even with more than 500 employees. For instance, businesses with NAICS code 511210 (software publishers) must have less than \$41.5 million in annual receipts. US Small Bus. Admin., Paycheck Protection Loans: Frequently Asked Questions (FAQs) (Apr. 26, 2020), <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>; US Small Bus. Admin., *Size Standards*, *supra* n.11.

[13] Paycheck Protection Loans: Frequently Asked Questions (FAQs), *supra* n.12; Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility, *supra* n.8.

[14] *Profiles, Inc. v. Bank of America Corp.*, No. SAG-20-0894 (D. Md. Apr. 13, 2020) (order denying temporary restraining order).

[15] Additional details concerning the Bank of America ruling will be contained in a future alert.

[16] A recently filed lawsuit is challenging the application of these preexisting ineligibility rules to the PPP and asking for a temporary restraining order to prevent the SBA from applying the rules. See Complaint, *Payday Loan, LLC v. US Small Bus. Admin.*, No. 1:20-cv-1084 (D.D.C. Apr. 25, 2020).

[17] Despite reports that some hedge funds are applying for PPP funds, updated SBA guidance states that the provisions excluding lending companies (such as banks, finance companies, and investment companies) and speculative businesses (which include businesses “[d]ealing in stocks, bonds, commodity futures, and other financial instruments”) preclude hedge funds from receiving PPP loans. See Katherine Burton & Joshua Fineman, *Hedge Fund Managers Claiming Bailouts as Small Businesses*, Bloomberg (Apr. 14, 2020), <https://www.bloomberg.com/news/articles/2020-04-14/hedge-fund-managers-are-claiming-bailouts-as-small-businesses>; Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility, *supra* n.8.

[18] 13 C.F.R. § 120.110; US Small Bus. Admin, SOP 50 10 5(K): Lender and Development Company Loan Programs 104–117 (Apr. 1, 2019), https://www.sba.gov/sites/default/files/2019-02/SOP_50_10_5%28K%29_FINAL_2.15.19_SECURED_copy_paste.pdf.

[19] Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility, *supra* n.8.

[20] *Id.*

[21] See Complaint, *Starplex Corp. v. Carranza*, No. 2:20-bk-02208-DPC (Bankr. D. Ariz. Apr. 13, 2020); Application for Temporary Restraining Order, *Starplex Corp. v. Carranza*, No. 2:20-bk-02208-DPC (Bankr. D. Ariz. Apr. 13, 2020). At the time the case was filed, the SBA had not clarified outside the application that businesses in bankruptcy were ineligible.

[22] Eric Larson, *Small Business Rescue Cash Isn't for Lobbyists, Judge Rules (1)*, Bloomberg L. (Apr. 22, 2020), <https://news.bloomberglaw.com/banking-law/small-business-rescue-cash-isnt-for-lobbyists-judge-rules>.

[23] US Small Bus. Admin., Affiliation Rules Applicable to US Small Business Administration Paycheck

Protection Program (Apr. 3, 2020), https://home.treasury.gov/system/files/136/Affiliation_rules_overview%28for_public%29.pdf. It is irrelevant whether that control is actually exercised, as long as the power to exert it exists.

[24] In addition, the preexisting exceptions to affiliation, found in the SBA's rules, still apply, such as business concerns that are part of the approved SBA "pools of concerns" for a joint research and development program or for defense productions are not considered affiliates of other concerns in that pool. 13 C.F.R. § 121.103.

[25] Other particular rules are also waived. For example, the PPP waives the rules for businesses that receive "financial assistance" from a Small Business Investment Company licensed under § 301 of Small Business Investment Act of 1958. Such investment companies are licensed and regulated by the SBA and lend to small businesses, and the affiliation rules are waived for a business who has received such funding. Relationships between faith-based organizations, such as an individual church and the overarching ministry, are also exempted when the relationship is based on religion.

[26] Paycheck Protection Loans: Frequently Asked Questions (FAQs), *supra* n.12. In response to these rules, commentators have urged funders to irrevocable waive this control so portfolio companies can gain access to their funds. Ed Zimmerman et al., *SBA Loans Under PPP: Please Don't Require VC-Backed Startups To Amend Their Charters*, Forbes (Updated Apr. 7, 2020), <https://www.forbes.com/sites/edwardzimmerman/2020/04/05/sba-loans-under-ppp-please-dont-require-vc-backed-startups-to-amend-their-charters/#7bac45c1763f>.

[27] Affiliation Rules Applicable to US Small Business Administration Paycheck Protection Program, *supra* n.23. The SBA's determination that there is an identity of interest can be rebutted with evidence showing the interests are in fact separate.

[28] Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility, *supra* n.8.

[29] *Id.*

[30] Press Release, *Federal Reserve Announces It Is Working To Expand Access to Its Paycheck Protection Program Liquidity Facility (PPPLF) for Additional SBA-Qualified Lenders As Soon As Possible*, Fed. Reserve (Apr. 23, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200423b.htm>.

[31] Price & Prentice, *supra* n.1.

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