

SBA AFFILIATION REVIEW GUIDANCE FOR THE EXCEPTION UNDER 13 CFR § 121.301(f)(4)(iv)(B)

The U.S. Small Business Administration (SBA) is issuing this guidance to specify the process by which SBA will review contracts entered into by loan applicants in SBA's financial assistance programs for an affiliation exception under 13 CFR § 121.301(f)(4)(iv)(B) (effective March 11, 2020).

Under SBA's affiliation rules for the financial assistance programs, SBA may find a loan applicant to be affiliated with another concern if (i) the loan applicant derived more than 85 percent of its receipts over the previous three fiscal years from a contractual relationship with the other concern, and (ii) the contract restricts the loan applicant from selling the same type of products or services to another purchaser.¹ This type of "economic-dependence" affiliation is particularly relevant in certain agricultural enterprises, such as poultry or hog production, or similar industries in which a single large business customer purchases the vast majority of any given business's products through a contract that includes restrictions on selling the same products to another buyer. Because SBA determines size based on the aggregate size of a loan applicant with all its affiliates, affiliation through the contractual relationship might cause the loan applicant to be ineligible for SBA financial assistance.

In SBA's interim final rule published February 10, 2020, SBA introduced a review process whereby SBA may issue an exception from economic-dependence affiliation if SBA determines that a loan applicant's contract does not provide control to the other party in the contract (i.e., the large business that purchases the vast majority of the loan applicant's products). SBA will accept review requests from SBA Lenders, loan applicants, and businesses that are purchasers under such contracts (such as poultry and hog integrators), as well as their authorized representatives or agents.

To initiate a review request, the requestor should send an email to EconomicDependence@sba.gov with the requestor's phone number and email address. The requestor should attach the contract for review to the email or obtain instructions from SBA for secure electronic transmission.

In determining whether to grant an exception from affiliation, SBA will consider the following factors:

1. The volume of sales that the contract covers – SBA will consider whether the contract restricts the loan applicant from increasing its sales to the purchaser—particularly when the applicant has additional capacity—or expanding its operations to other activities or products.
2. The contract's termination provisions – SBA will consider the contract provisions that allow the purchaser to terminate the contract, including whether the purchaser may terminate without cause, whether the purchaser must provide advance notice of termination and the requirements for such notice, and whether there is an opportunity to cure prior to termination.
3. The business's right to profit from its efforts – SBA will consider whether the loan applicant has a right to profit from its efforts and whether the contract permits the purchaser to control the applicant's ability to receive profits from its operations.
4. The risk that the business bears under the contract - SBA will consider whether the loan applicant bears the risk of loss associated with being an independent business and whether the contract places risk on the applicant for areas within the purchaser's control.

¹ If the firm has been in business for less than three fiscal years, SBA considers a firm's receipts for the full term of its operations. This is consistent with SBA's calculation of annual receipts under 13 CFR 121.104(c)(4). For a firm with no receipts, SBA considers the firm's projected receipts.

5. The rationale for restrictions that the contract places on the business – SBA will consider the reasons for restricting the loan applicant from selling to other buyers or engaging in other operations.
6. Other factors raised by the specific provisions of the contract - SBA will consider any specific provisions of the contract that provide the purchaser with unreasonable control over the loan applicant.

SBA will make available a list of reviewed contracts that have been approved for the affiliation exception, without disclosing the terms of the contracts.