

Reed Smith LLP
1301 K Street, N.W.
Suite 1000 - East Tower
Washington, D.C. 20005-3373
+1 202 414 9200
Fax +1 202 414 9299
reedsmith.com

From: James F. Segroves
Direct Phone: +1 202 414 9294
Email: jsegroves@reedsmith.com

To: Clifton J. Porter II

Date: April 1, 2020

**Subject: Eligibility Requirements for New Small Business Administration
Loan Program Enacted by the Coronavirus Aid, Relief, and
Economic Security Act, Pub. L. No. 116-136 (2020)**

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136. Section 1102 of the CARES Act creates a “paycheck protection program” by which small business concerns and certain other employers can obtain loans through a new program administered by the Small Business Administration (“SBA”). The eligibility requirements for the new loan program are outlined below. The application of those eligibility requirements to skilled nursing facilities (“SNFs”) and assisted living facilities (“AL”) will necessitate an examination of each organization’s unique facts and circumstances, particularly as it relates to application of the SBA’s affiliation rules that are used to determine an organization’s size.

- **Two categories of eligible loan applicants.** As is relevant here, the CARES Act establishes two categories of eligible loan applicants: (1) “small business concerns” and (2) other concerns with no more than 500 employees.*
- **Small business concerns.** A “small business concern” must be for-profit, independently owned and operated, not dominant in its field of operation, and comply with size standards established by the SBA. 15 U.S.C. § 632(a). In the context of SNFs and AL, the SBA has established size standards in terms of maximum annual receipts: \$30 million (in the case of SNFs) and \$12 million (in the case of AL). 13 C.F.R. § 121.201.
- **Other concerns with no more than 500 employees.** The CARES Act provides that other concerns, regardless of profit status, are eligible if they have no more than 500 employees.

* The CARES Act also provides that if the SBA has established a number-of-employees standard greater than 500 for a particular industry, the higher number-of-employees standard will apply. CARES Act § 1102(a)(2) (to be codified at 15 U.S.C. § 636(a)(36)(D)(i)(II)). However, the SBA has not established a number-of-employees standard for SNFs or AL, having instead established an annual-receipts standard only. *See* 13 C.F.R. § 121.201.

▪ **Application of SBA affiliation rules.**

- SBA regulations provide that “[i]n determining the concern’s size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue *and* all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.” 13 C.F.R. § 121.103(a)(6) (emphasis added).
- SBA regulations also provide that “[c]oncerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.” 13 C.F.R. § 121.103(a)(1).
- Although the CARES Act waives application of the SBA’s affiliation rules in certain limited instances (e.g., for concerns in the hospitality and food industries), none of those waivers generally apply to SNFs or AL. *See* CARES Act § 1102(a)(2) (to be codified at 15 U.S.C. § 636(a)(36)(D)(iv)).
- The CARES Act also specifically provides that the SBA’s affiliation rules apply to non-profits. CARES Act § 1102(a)(2) (to be codified at 15 U.S.C. § 636(a)(36)(D)(vi)).
- Therefore, depending on an organization’s particular facts and circumstances, the SBA may aggregate its revenue and employee totals, making it ineligible for the new loan program.

#