



NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

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SBA Economic Injury Disaster Loan Program Eligibility Criteria

Real estate licensees in Louisiana, Mississippi and Alabama will have problems participating in the SBA's Economic Injury Disaster Loan (EIDL) program because of the way in which SBA has defined the Small Business Act's requirement that EIDL participants be "independently owned and operated".

Currently, SBA's guidelines for the EIDL program interpret that program requirement to mean that a business operation must be "free from significant control by other entities." The SBA guidebook goes on to state that this significant control criteria disqualifies our independent contractor real estate agents from participation. The rationale given is that since a real estate agent must be affiliated with a broker by state law that this supervision implies that an agent is not free from significant control by the broker.

While someone unfamiliar with the workings of the broker/agent relationship could assume that the broker's role is one of "significant control," in fact, the control is one more related to state law rather than any sort of any day-to-day control over what the agent does, how they conduct their business, build their clientele, market their services, etc. Today, many agents operate to a great deal independently of the broker with their own websites, marketing materials/programs, and may even have their own staff including licensed assistants and transaction coordinators that they employ, etc.

The second criteria used - "substantial business risk" - is one that many of our members would not have a hard time meeting. Many agents these days work from primarily home-based or mobile offices with all of the technology that most office workers use each day in their work. Their financial obligations continue whether they make money or not.

Given that NAR's Gulf Coast agent members in the three affected states will face a very limited post-Katrina real estate market for some time - and that there are a growing number of similarly placed free-lance, independent contractor small businesses evolving in our more information/service based economy who may be similarly impacted - any help that might be possible in getting clarifications made as to these guidelines in Katrina-related legislation and/or regulatory guidance would be appreciated.

The fix could be as simple as language that states that in determining what constitutes an independently owned and operated business that a state licensing requirement that requires an independent contractor to work in conjunction with a licensed firm does not, in and of itself, disqualify an IC from participation in the EIDL program.

The intent is not to create a special exemption but rather to just let this component of the small business community be considered and not just rejected out of hand.

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SBA

SOP 50 30 5

**Disaster Assistance
Program**

Office of Disaster Assistance

U.S. Small Business Administration



**SMALL BUSINESS ADMINISTRATION
STANDARD OPERATING PROCEDURE**

National

SUBJECT: Disaster Assistance Program	S.O.P.		REV
	SECTION 50	NO. 30	5

INTRODUCTION

1. Purpose. To provide policy and procedure for the Disaster Assistance Program.
2. Personnel Concerned. All SBA personnel involved in administering the Disaster Assistance Program.
3. Directives Cancelled. SOP 50 30 4.
4. Originator. Office of Disaster Assistance.

AUTHORIZED BY: Herbert L. Mitchell Associate Administrator for Disaster Assistance		EFFECTIVE DATE May 6, 2004
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- (2) Loss Activity. Once you determine that the main activity is eligible, identify the activity for which the loss is being claimed (loss activity). Both the applicant's main activity and loss activity must be eligible. Agricultural enterprises are the most common ineligible activities conducted by sole proprietors. If this is the main activity, the proprietor is ineligible regardless of the nature of the activity claiming the loss. (For the specific policy concerning the eligibility of agricultural enterprises, see subparagraph 120 b. (5)).
- c. Size. An applicant for an EIDL must be a small business concern. You can find guidance on size determinations in appendix 21 and in 13 CFR Part 121. EIDLs are subject to a two-part size test:
- (1) The affiliated group to which the applicant business belongs must meet the size standard for the primary activity of that group; and
 - (2) The applicant business, excluding any affiliates, must meet the size standard for its main business activity.

118. INDEPENDENTLY OWNED AND OPERATED BUSINESS

Section 3(a) of the Small Business Act states: "For the purpose of this Act, a small business concern . . . shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation . . ." You decide these issues on a case by case basis.

- a. Critical Factors. You must examine two critical factors to determine if a business is independently owned and operated.
- (1) The owner(s) must have a substantial business risk resulting from investing in facilities or equipment and by incurring significant expenses which must be paid regardless of whether the operation generates a profit. The owner must share the risk of both the profits and the losses.

For example, an individual participates as a crewmember on a fishing boat and does not have a significant investment in the boat or equipment. The crewmember works for a share of the catch, reduced by certain trip expenses (fuel, food, etc.), which are deducted from the catch before the split. If there is no catch, or the catch is insufficient to cover the expenses, the crewmember incurs no significant liability for trip expenses and is not obligated to make continuing payments on the boat or other fixed expenses. Because the crewmember does not have a substantial business risk and has no significant investment, only time is lost if the operation fails to generate sufficient income. Thus, this individual is not a small business concern and is not eligible for EIDL assistance.

- (2) The business operation must be free from significant control by other entities (e.g., the customers or businesses that pay for its services).

For example, under the Tax Code (26 USC 3508), qualified real estate agents are treated as self employed for Federal income tax purposes. However, in many cases, we cannot consider these individuals as small business concerns because their business activities are controlled by a real estate broker. Also, in many states, State law requires real estate agents to be affiliated with licensed real estate brokers who are required to supervise the agent's activities. This supervision implies that a real estate agent is not free from significant control by the broker who pays for the agent's services.

However, it is possible, considering all relevant circumstances, to find that the agent is an independently owned and operated business.

If the agent had a sizeable investment in facilities and equipment, and demonstrated significant other factors showing independence from control by the broker, they may be eligible. Possession of a broker's license in and of itself does not create eligibility. If the applicant is a franchise, refer to counsel for eligibility guidance.

- b. Effect of IRS Guidelines. Not all self employed persons or independent contractors for tax purposes rise to the level of "small business concern" as required for EIDL eligibility. Merely filing a Schedule C with the Federal Tax Return does not qualify the individual as an independently owned and operated business. We aren't bound by IRS guidelines for determining if an individual is an employee or an independent contractor. EIDL eligibility is contingent upon compliance with the business risk and freedom from control factors.

119. APPLICANTS GENERALLY ELIGIBLE

Generally, applicants eligible for regular SBA business loans [7(a)] are also eligible for EIDLs. However, owners of rental property (landlords) are eligible for EIDLs, although not for regular SBA business loans.

120. INELIGIBLE EIDL APPLICANTS

- a. The following applicants are not eligible for EIDL or 7(a) assistance.
 - (1) Religious Organizations.
 - (2) Eleemosynary (Charitable) Organizations.
 - (3) Nonprofit Organizations.