



Presented by:
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The *NEW* SOP 50 10 5 (I)

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SBA Eastern District Office

Presenter



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Ethan's areas of practice focus on government guaranteed lending, commercial lending, banking, real estate and commercial law. Ethan has closed thousands of government guaranteed loans nationwide and has assisted hundreds of lenders recover millions of dollars of impaired SBA guarantees.

Starfield & Smith, P.C. is a boutique law firm specializing in all aspects of SBA-guaranteed lending, from origination through liquidation, for lenders nationwide. Starfield & Smith closes over \$800 million of SBA guaranteed loans for its lender clients every year. For more information about Starfield & Smith, visit www.starfieldsmith.com.

SOP 50 10 5(I) “Fast Facts”

- Information Notice 5000-1399
 - Issued November 22, 2016
- Effective 1/1/2017
- Changes are applicable to “Advantage” (7a) and “Grow” (504) programs
- Reported to be the last of the 50 10 5 series

50 10 5 (I) Changes

What's new?

- Credit Elsewhere
- Collateral
- Businesses which restrict patronage
- Franchise Eligibility

Credit Elsewhere

Removes:

- Need to sell on the secondary market; and
 - Exceeds legal lending limit (but not Lender's policy limit)
- ...as acceptable credit elsewhere criteria.

Borrower-centric!

Collateral

Includes “*new*” considerations:

- Evaluate impact of restrictive covenants on value or adequacy of collateral
- Evaluate impact of environmental requirements/restrictions (i.e.: extraction wells, subsurface barrier walls, etc.) on adequacy of collateral

Document your File!!!

Businesses Which Restrict Patronage

Discussion of these businesses is expanded

- No restrictions, except capacity related
- Businesses may target specific groups, provided no discrimination
 - Affidavit
 - Independent evidence
 - Facility characteristics
 - Membership demographics

Franchises

New Rule: 13 CFR 121.301(f)(5):

Franchises do not create affiliation provided:

- Franchisee has right to profit from its efforts
- Bears risk of loss commensurate with ownership

Lenders only need consider Franchises of the applicant.

Franchises (continued)

SOP Guidance:

New rules apply to:

- “Franchises” as defined by Federal Trade Commission (16 CFR § 436.1)
- Agreements covered by the Petroleum Marketing Practices Act (“PMPA”)

Franchises (continued)

What is a “Franchise”?

Franchise means any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:

Franchises (continued)

- (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;
- *Trademark* includes trademarks, service marks, names, logos, and other commercial symbols

Franchises (continued)

(2) The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and

Franchises (continued)

(3) As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

- *Required payment* means all consideration that the franchisee must pay to the franchisor or an affiliate, either by contract or by practical necessity, as a condition of obtaining or commencing operation of the franchise. A required payment does not include payments for the purchase of reasonable amounts of inventory at bona fide wholesale prices for resale or lease.

Franchises (continued)

So, do I have a Franchise?

- All 3 criteria must be met:
 1. Trademark
 2. Control
 3. Required Payment
- If not, no franchise.

Franchises (continued)

PMPA:

- Gas Stations
- Fuel Supply Agreements

Franchises (continued)

If you have a Franchise:

- SBA Addendum (SOP 50 10, Appendix 9)
 - Transfer:
 - Franchisor cannot unreasonably withhold consent
 - Transferor must be released from ongoing liability
 - Options to purchase:
 - Assets – must be for fair value
 - Real estate
 - Cannot force sale
 - Can require lease, but it must be for fair value

Franchises (continued)

If you have a Franchise:

- SBA Addendum (SOP 50 10, Appendix 9)
 - Real Estate owned by Franchisee
 - No deed restrictions on use
 - No branding restrictions
 - No environmental use restrictions
 - Franchisor will not control Franchisee's employees

Franchises (continued)

If you have a Franchise:

- SBA Addendum (SOP 50 10, Appendix 9)

Must be signed without modification!

If signed, no affiliation, but don't forget that the Lender still has responsibility for eligibility and credit determinations.

Franchises (continued)

Lender Obligations:

- Executed Franchise Agreement and Addendum (and all other franchise related documents) prior to disbursement
- Ensure Franchisee Applicant and Franchise concept meet all SBA Eligibility Requirements
 - See: SOP 50 10 5(I) pp 78-104
- Submit all Franchise related documents with purchase requests

Franchises (continued)

Lender Obligations:

- Consider effect of franchise agreement provisions on credit underwriting
 - “adequate assurance of repayment”?
 - Collateral issues

These are not “new” ...

Franchises (continued)

Franchise Summary:

1. Franchise/Fuel Supply Agreement?
2. If yes, Obtain Addendum (and other docs)
3. If yes (or no), read applicable documents and consider effect on:
 - Eligibility;
 - Ability to Repay (credit); and
 - Collateral

Questions



Thank you!

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