

COVID-19 PPP Loans – New Guidance for PPP Eligibility of Entities with Foreign Affiliates

As a result of conflicting SBA guidance regarding the inclusion of employees of foreign affiliates when determining eligibility for a PPP loan, the SBA has provided additional guidance and a new safe harbor. The SBA released an Interim Final Rule to clarify whether borrowers with foreign affiliates should include all employees of such affiliates for purposes of certification of eligibility in the PPP application and created a safe harbor for borrowers that did not count their non-U.S. employees for purposes of eligibility.

Summary:

In a final interim rule issued May 18, 2020, the SBA clarified that borrowers must count all employees of domestic and foreign affiliates, including employees residing outside the United States, for purposes of determining whether a borrower has more than 500 employees. Any entity that, including domestic and foreign affiliates, has more than 500 employees (or other applicable size standard) is ineligible for a PPP loan.

Importantly, in this new guidance, the SBA acknowledged confusion created by prior guidance relating to whether the 500-employee limit related only to employees whose principal place of residence is the United States. Companies with a significant foreign workforce but less than 500 employees residing in the U.S. may have viewed the prior guidance from the SBA as an exception to existing SBA affiliation principles. In acknowledging the confusion it created with mixed guidance, the SBA has now stated that any borrower that applied for a PPP loan prior to May 5, 2020, will not be found ineligible based on the borrower's exclusion of non-U.S. employees from the borrower's calculation of its employee headcount.

The Reason for New Guidance:

The SBA published an interim final rule regarding PPP affiliation rules on April 15, 2020, which provided that, "An entity generally is eligible for the PPP if it, combined with its affiliates, is a small business as defined in section 3 of the Small Business Act (15 U.S.C. 632), or (1) has 500 or fewer employees whose principal place of residence is in the United States...and (2) is...any other business concern." Accordingly, companies with 500 or fewer employees residing in the U.S. but with a larger workforce abroad or with foreign affiliates with foreign employees considered this a welcome expansion of existing SBA affiliation rules. However, such companies and their advisors were concerned that perhaps the language of the April 15 interim final rule did not accurately articulate the SBA's intended position on affiliation rules.

On May 5, 2020, in an apparent effort to clear up the existing confusion, the SBA issued additional guidance, in the form of FAQ 44. The answer to FAQ 44 stated, "an applicant must count all of its employees and the employees of its U.S. and foreign affiliates" when determining if the applicant had 500 or fewer employees. Unfortunately, FAQ 44 did not clear up the language in the prior guidance that

was creating confusion, which is whether the SBA was only concerned with, “employees whose principal place of residence in the United States.” For example, an applicant with 300 employees residing in the United States, but foreign affiliates with 2,000 global employees outside the U.S. would be eligible pursuant to the April 15 guidance. However, FAQ 44 (and existing SBA affiliation rules) suggested that the SBA intended that, “an applicant must count all of its employees and the employees of its U.S. and foreign affiliates” against the 500 employee limit.

As a result of the conflicting guidance from the SBA, companies with 500 or fewer employees in the U.S. but with a larger presence outside the U.S. were unsure how to interpret the SBA’s guidance. The May 18 interim final rule finally provides clarity. The SBA clarifies that it intends for applicants to count all employees of domestic and foreign affiliates against the 500 employee cap (or other applicable size standard) without regard to the employee’s country of residence. However, the SBA also acknowledges the confusion it created and, “as an exercise of enforcement discretion due to reasonable borrower confusion based on SBA guidance” has determined that any applicant that applied before May 5, 2020, that has no more than 500 employees whose principal place of residence was in the United States is not ineligible for a PPP loan.

If you have questions about this information, please contact your Bodman attorney or Darren Burmania at (616) 205-3313 or dburmania@bodmanlaw.com or Joseph Morrison at (734) 930-2942 or jmorrison@bodmanlaw.com or Brian Kersey at (616) 205-3129 or bkersey@bodmanlaw.com or Adam Weiner at (313) 392-1076 or aweiner@bodmanlaw.com. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.