

Interim Final Rule Guidance from the SBA on Section 7(a) Paycheck Protection Program Loans

The attorneys at Bodman PLC summarized the SBA's latest guidance on SBA 7(a) (Paycheck Protection Program or "PPP") affiliation rules, which was released late on Friday, April 3, 2020. This guidance impacts loan eligibility for small business concerns that may have related third parties, including parent companies, subsidiary companies, or related entities under common control.

The full SBA guidance in the Interim Final Rule published on Thursday, April 2nd can be found [here](#).

See also the SBA's PPP Loan Information website for updates and further guidance on related matters. It can be found [here](#).

1. General Q&A

- a. Why is this being released?
 - i. The interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA PPP loan applications.
- b. What are the general principles of Affiliation?
 - i. Generally, affiliation exists when one business controls or has the power to control another or when a third party (or parties) controls or has the power to control both businesses. Control may arise through ownership, management, or other relationships or interactions between the parties. SBA's regulations on affiliation are contained in 13 C.F.R. § 121.103 (available at www.sba.gov/size).
- c. What are the general guidelines to remember when looking for affiliation?
 - i. Four tests for affiliation based on control apply to participants in the Paycheck Protection Program. Following is a summary of the applicable affiliation tests. Please review the latter portion of this Client Alert for examples directly from the SBA.

- 1. Test #1: Affiliation based on ownership.** For determining affiliation based on equity ownership, a concern is an affiliate of an individual, concern, or entity that owns or has the power to control more than 50 percent of the concern's voting equity. If no individual, concern, or entity is found to control, SBA will deem the Board of Directors or President or Chief Executive Officer (CEO) (or other officers, managing members, or partners who control the management of the concern) to be in control of the concern. SBA will deem a minority shareholder to be in control, if that individual or entity has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.
- 2. Test #2: Affiliation arising under stock options, convertible securities, and agreements to merge.**
 - a. In determining size, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.
 - b. Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered "agreements in principle" and are thus not given present effect.
 - c. Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.
 - d. An individual, concern or other entity that controls one or more other concerns cannot use options, convertible securities, or agreements to appear to terminate such control before actually doing so. SBA will not give present effect to individuals', concerns', or other entities' ability to divest all or part of their ownership interest in order to avoid a finding of affiliation.
- 3. Test #3: Affiliation based on management.**
 - a. Affiliation arises where the CEO or President of the applicant concern (or other officers, managing members, or partners who control the management of the concern) also controls the management of one or more other concerns. Affiliation also arises where a single individual, concern, or entity that controls the Board of Directors or management of one concern also controls the Board of Directors or management of one of more other concerns. Affiliation also arises where a single individual, concern or

entity controls the management of the applicant concern through a management agreement.

4. Test #4: Affiliation based on identity of interest.

- a. Affiliation arises when there is an identity of interest between close relatives, as defined in 13 CFR 120.10, with identical or substantially, identical business or economic interests (such as where the close relatives operate concerns in the same or similar industry in the same geographic area). Where SBA determines that interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

d. Are there exemptions?

i. Yes. There are waivers for:

1. Faith-based organizations. A faith-based organization's relationship to another organization is not considered an affiliation with the other organization if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion. A faith-based organization seeking loans under this program may rely on a reasonable, good faith interpretation in determining whether its relationship to any other person, group, organization, or entity is exempt from the affiliation rules under this provision, and SBA will not assess, and will not require participating lenders to assess, the reasonableness of the faith-based organization's determination
2. any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a North American Industry Classification System code beginning with 72 (Accommodation and Food Services, e.g., hotels, motels, RV parks, restaurants and bars)(see: <https://www.naics.com/six-digit-naics/?code=72>)
3. any business concern operating as a franchise that is assigned a franchise identifier code by the SBA; and
4. any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681).

2. Q&A on why Affiliation Rules are important

a. *Are affiliates considered together for purposes of determining eligibility?*

- i. In most cases, a borrower applying for a PPP loan will be considered together with its affiliates for purposes of determining eligibility for the PPP. Under SBA rules, entities may be considered affiliates based on multiple factors including stock ownership, overlapping or common management, and identity of interest. 13 CFR § 121.301.

b. *How do SBA's affiliation rules affect my eligibility and apply to me under the PPP?*

- i. An entity borrower generally is eligible for the PPP if it, combined with its affiliates, is a "small business concern" (as defined in section 3 of the Small Business Act (15 U.S.C. 632).) Generally, that means it is an entity organized for profit that:
 1. has 500 or fewer employees whose principal place of residence is in the United States; or
 2. it is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry; or
 3. it is a tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, a Tribal business concern described in section 31(b)(2)(C) of the Small Business Act.
 - a. **NOTE:** Other than with respect to the qualified faith-based organization exemption discussed above, nonprofits are subject to affiliation rules just like for profits businesses.

3. *SBA Affiliation Examples*

- a. Examples of the application of the SBA's affiliation rules to borrowers are provided below. Note that the affiliate analysis is intensely fact dependent and each borrower should consult their attorney or a professional service provider with expertise in SBA PPP loans before submitting an application. The borrower must also review all applicable regulations carefully before certifying a business's size status to an SBA lender.
- b. The following are some of the affiliation rules that may apply to a business concern. When the term "person" is used, it means an individual, entity, or business concern. Where the example or guidance notes that a presumption is "rebuttable," a borrower may be able to provide additional facts or context that would change the conclusion of the example.

Affiliation based on equity ownership (13 C.F.R. § 121.103(c))

a. Control of 50% or more of voting stock.

- i. A person is an affiliate of a concern if the person owns or controls, or has the power to control, 50% or more of the concern's voting stock.
 1. Example 1: Company A is the majority owner of Companies B, C and D (54.5%, 81%, and 60% respectively). Company A has the power to control Companies B, C and D. The companies are all affiliated. The receipts and/or number of employees of all four companies will be aggregated in determining the size of any one of them.

b. Control of less than 50% voting stock, but large compared to others.

- i. Affiliation may also occur when a person owns and controls, or has the power to control, a block of voting stock that is large compared to all other outstanding blocks of stock.
 1. Example 1: Company A owns 40 percent of the voting stock of Company B and the next largest share is 2 percent. Company A controls Company B due to the fact it owns the largest block of voting stock compared to all other outstanding blocks of voting stock. Company A and Company B are affiliates. In addition, all other companies controlled by Company A will be considered affiliates of Company B.
 2. Example 2: Two individuals each own blocks of shares of Company A. One individual owns 46.67% of the business and the other owns 33.333%. The individual that owns 46.67% of the stock owns the largest single block, which is large compared to any other block, and therefore probably has the power to control the concern. This individual also controls Company B. There is affiliation between Company A and Company, but it is rebuttable.

c. Control of less than 50% voting stock by multiple minority owners.

- i. In addition, if two or more persons each owns or controls (or has the power to control) less than 50% of a concern's voting stock and (i) the minority holdings are all approximately equal in size and (ii) all of the minority holdings taken together are large compared to any other stock holdings, affiliation is presumed to exist with each of those persons. It is important to note that this is a rebuttable presumption.
 1. Example: Investor X, Investor Y, and Company A each own 23% of Company B. No other stockholder owns more than 5% of Company B. All three persons will be presumed to control Company B, unless they successfully rebut this presumption. If the presumption is not overcome, then Company A and Investors X and Y will all be considered affiliates of Company B. In addition, all companies controlled by Company A and Investors X and Y are affiliates of Company B.

d. Voting stock is widely held.

- i. When a concern's voting stock is widely held and no single block of stock is large as compared with all other stock holdings, the business concern's Board of Directors and Chief Executive Officer (CEO) or President are deemed to have the power to control the concern unless evidence is provided to show otherwise.
 1. Example: In a corporation where no one stockholder has a block of voting stock sufficient to give it control or the power to control the concern, control instead rests in each member of the Board of Directors and the CEO or President. This means that any business controlled by a member of the Board and by the CEO or President is an affiliate of the business concern in

question, unless the individual Board members and CEO or President can rebut this presumption.

e. Stock options, convertible securities, and agreements to merge (13 C.F.R. § 121.103(d))

- i. SBA treats each of these cases as though the rights granted have been actually exercised. Regulations give present effect to an agreement to merge (including an agreement in principle) or to sell stock. If these rights have been granted and they confer the power to control, affiliation exists.
 1. Example 1: If Company A holds an option to purchase a controlling interest in Company B, the situation is treated as though Company A had exercised its rights and had become owner of the controlling interests in Company B. Company A and B are affiliates. In addition, all companies controlled by Company A will be considered affiliates of Company B.
 2. Example 2: Company A and Company B are in discussion about a merger between the two of them. Both companies' representatives have met several times over the past two months. There is neither a formal nor informal agreement to merge, although merging -the two companies is their stated objective. Unless the two companies have an agreement to merge, SBA will not find affiliation between the two companies based on these open and continuing discussions of merger alone.

Affiliation based on common management (13 C.F.R. § 121.103(e)).

- a. If one or more officers, directors, managing members, or general partners of a business controls the Board of Directors and/or the management of another business the businesses are affiliates. SBA usually finds affiliation in these examples:
 - ii. Example 1: Members of Company A's Board of Directors occupy three out of five positions in Company B's Board of Directors. Company A has control of Company B and the two concerns are affiliated. In addition, all companies controlled by Company A will be considered affiliates of Company B.
 - iii. Example 2: A member of Company A's Board of Directors has veto rights over the majority decisions of Company B's Board of Directors. By possessing such negative control, Company A has control of the Board of Directors of Company B and the two concerns are affiliated. In addition, all companies controlled by Company A will be considered affiliates of Company B.

Affiliation based on identity of interest between individuals or businesses, including family members (13 C.F.R. § 121.103(f))

- a. Individuals or firms that have identical (or substantially identical) business or economic interests may be treated as though they are affiliated unless they can demonstrate otherwise. Family members, persons with common investments, or firms that are economically dependent through contractual (or other) relationships, are among those treated this way. However, individuals or firms may seek to demonstrate that no affiliation exists by providing convincing proof that apparently identical interests are, in fact, separate. Patterns of subcontracting, commingling of staff and/or facilities, and other veiled attempts to disguise the true nature of the relationship may evidence an identity of interest.
 - iv. Example 1: Several officers of Company A are also officers of Company B. The two companies are in the same line of work and extensively subcontract with each other. The interrelationship between the two companies results in them acting as one, and therefore, the two are considered affiliates.
 - v. Example 2: Company A and B share office space and equipment in the same location and also share key employees. In addition, Company A has sent a substantial amount of business to Company B for each of the last three years. All this, taken together, is an indication that the two companies have combined their resources to each other's benefit, and therefore, are likely to be affiliated.
 - vi. Example 3: When three of four members of a concern's Board of Directors have investments in common with each other outside the concern and have also provided the concern with substantial financial assistance, they may be viewed as sharing an identity of interest. The three directors would be deemed to control the Board and to therefore also control the business. Each outside business that these three directors control would be an affiliate of the business concern in question.
 - vii. Example 4: A husband and wife founded an accounting firm in 1974. Their daughter was a division head for two years in 2005-2007. In 2008, the daughter opened an office supply store using her own funds and a bank loan. Her parents purchase supplies from the daughter's store, and sales to her parents represent 10% of the daughter's revenues. Although the parents and daughter have business dealings, they are minimal in nature. There are no other business interactions between the daughter and her parents. If there are no other indicia of affiliation, SBA would find that affiliation due to family relationships is rebuttable.

Affiliation based on contractual relationships or economic dependency (13 C.F.R § 121.103(a),(f) and (g))

- a. A concern that is unlikely to be able to survive on its own or is economically dependent upon another person will probably be found to be affiliated with the concern(s) on which it is dependent.
 - i. Example 1: Company A performs subcontracts for Company B, and Company B accounts for 90% of Company A's revenues. Company A's existence depends on work from Company B and the two are deemed affiliates.
 - ii. Example 2: Company A provides significant loans to Company B and guarantees other loans to Company B. Company B's over reliance of dependence on Company A's financial support (both direct and indirect) results in their affiliation.
 - iii. Example 3: A loan between two businesses is not an arm's-length transaction and the terms and conditions of the loan demonstrate financial dependence by one business on the other. The two are deemed affiliates.
 - iv. Example 4: Company A obtained a patent for a product it developed. It licenses the use of the product to Company B, and makes it available for other companies to obtain a license. No affiliation exists between Company A and Company B based solely on the licensing agreement.

Please contact your Bodman attorney or Brian Kersey at 616-205-3129 or bkersey@bodmanlaw.com or Darren Burmania at 616-205-3313 or dburmania@bodmanlaw.com for more information. 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.

SBA Publishes Guidance and Resources on Section 7(a) Paycheck Protection Program Loans Application Certifications

Bodman attorneys are closely monitoring and analyzing issues relating to the recently released SBA PPP loan application, and answering many questions from clients, including financial institutions, on its content. In our continuing effort to provide guidance in this developing area, we are providing notes on each of the application's required certifications. The borrower application form can be found [here](#).

The full SBA guidance in the Interim Final Rule published on Thursday, April 2nd can be found [here](#).

In addition, the SBA's PPP Loan Information website includes regular updates and ongoing guidance on related matters. It can be found [here](#).

Required Certifications

The SBA PPP application requires eight separate certifications. Each certification must be made in good faith by an authorized representative of the applicant who is legally authorized to certify on behalf of the borrower. The specific certifications appear on page two of the application, and are reprinted below in their entirety.

First, it is important to note that several certifications are unclear and therefore causing concern for both lenders and prospective borrowers. We expect additional guidance from the SBA, but in the meantime the following certifications include unclear standards and should be closely reviewed by both borrower and lender. We encourage you to take note of the following observations from Bodman attorneys:

- “To the extent feasible, I will purchase only American-made equipment and products.”
 - **Bodman note:** It is unclear whether this allows an applicant to purchase any non-American-made equipment or products and what makes that requirement “feasible” versus impractical.

- “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”
 - **Bodman note:** It is unclear whether this imposes a need-based standard for PPP loans or what “necessary” means in the context of “support... ongoing operations.”
- “I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.”
 - **Bodman note:** There is currently no clear guidance on how loan expenditures will be reported and forgiveness calculated.
- “I will comply, whenever applicable, with the civil rights and other limitations in this form”
 - **Bodman note:** If no limits are set forth in the application, at a minimum we expect general compliance with law requirements to apply.

Page 2 of the application includes the following:

CERTIFICATIONS AND AUTHORIZATIONS

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant’s industry.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
- To the extent feasible, I will purchase only American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.
- Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

For Applicants who are individuals: I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

CERTIFICATIONS

The authorized representative of the Applicant must certify in good faith to all of the below by **initialing** next to each one:

_____ The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.

_____ Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.

_____ The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

_____ The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.

_____ I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.

_____ During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.

_____ I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

_____ I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Please contact your Bodman attorney or Brian Kersey at 616-205-3129 or bkersey@bodmanlaw.com or Darren Burmania at 616-205-3313 or dburmania@bodmanlaw.com for more information. 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.

Summary of SBA Section 7(a) Paycheck Protection Program Loans

The attorneys at Bodman PLC summarized the SBA's latest guidance on SBA 7(a) (Paycheck Protection Program) loan eligibility, loan terms (including forgiveness), loan amount calculations and other PPP loan-related information that may be useful for borrowers and lenders.

This Update originated from the SBA's guidance in the Interim Final Rule published on Thursday, April 2nd can be found [here](#). It will be updated from time to time as additional or different guidance arises.

1. General Q&A

- a. Are rules still being made by the SBA that may impact a loan?
 - i. Yes, guidance on how to determine how loans are forgiven, how forgiveness is calculated, and how to determine who is an "Affiliate" of a borrower are subject to further rulemaking
- b. When does the loan program begin and end?
 - i. The SBA has informed banks it will open applications as of April 3, 2020. The SBA is authorized to fully guarantee loans under the PPP through June 30, 2020.
- c. Can I use e-signatures or e-consents if a borrower has multiple owners?
 - i. Yes, e-signature or e-consents can be used regardless of the number of owners.
- d. Is the PPP "first-come, first-served?"
 - i. Yes.
- e. My lender is not currently accepting applications for a PPP loan; is the PPP program delayed?
 - i. No, while certain lenders may have notified their customers that they are delaying the processing of Paycheck Protection Loans, or limiting applications to its existing clients given the high demand, any such delay or limitation is being instituted by such

individual lender only. The Paycheck Protection Program is otherwise effective, and you may apply today to any SBA lender currently accepting applications.

1. FAQ for Borrowers

a. How do you know if you are eligible?

- i. You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States, or are a business that operates in a certain industry and meet the applicable SBA employee-based size standards for that industry, and:
 - A. You are:
 - A small business concern (generally less than 500 employees when you count related / “Affiliated” entities) unless specific exceptions apply;
 - A tax-exempt 501(c)(3), a tax-exempt veterans organization, or Tribal business concern described in section 31(b)(2)(C) of the Small Business Act; and
 - B. You were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.
- ii. You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship or as an independent contractor or eligible self-employed individual, and you were in operation on February 15, 2020.

b. What makes a borrower ineligible?

- i. You are ineligible for a PPP loan if, for example:
 - A. You are engaged in any activity that is illegal under federal, state, or local law;
 - B. You are a household employer (individuals who employ household employees such as nannies or housekeepers);
 - C. An owner of 20% or more of the equity of the applicant is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years; or
 - D. You, or any business owned or controlled by you or any of your owners, has ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.
 - **NOTE:** also that existing SBA rules prohibit the

following types of businesses, among others, from obtaining SBA (including PPP) loans: banks, financial institutions, foreign businesses, gambling operations, passive businesses, and lobbying or speculative businesses.

c. How much can I borrow?

- i. Under the PPP, the maximum loan amount is the lesser of: (A) \$10 million and (B) 2.5x your average monthly payroll costs (see calculation below)

d. How to calculate the amount you can borrow?

Step 1: Aggregate payroll costs (defined below) from the last 12 months for employees whose principal place of residence is the United States.

Step 2: Subtract any compensation paid to an employee in excess of an annual salary of \$100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of \$100,000 per year.

Step 3: Calculate average monthly payroll costs (divide the amount from Step 2 by 12).

Step 4: Multiply the average monthly payroll costs from Step 3 by 2.5.

Step 5: Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020 (but subtract the amount of any “advance” under an EIDL COVID-19 loan because such “advance” does not have to be repaid).¹

Examples:

<p>Example 1 –</p> <p>No employees make more than \$100,000</p> <p>Annual payroll: \$120,000</p> <p>Average monthly payroll: \$10,000</p> <p>Multiply by 2.5 = \$25,000</p> <p>Maximum loan amount is \$25,000</p>	<p>Example 2 –</p> <p>Some employees make more than \$100,000</p> <p>Annual payroll: \$1,500,000</p> <p>Subtract compensation amounts in excess of an annual salary of \$100,000 (e.g. \$300,000): \$1,200,000</p> <p>Average monthly qualifying payroll:</p>
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¹ Note: if such EIDL loan was used to pay payroll costs, the SBA loan must be used (in part) to refinance that EIDL Loan (and such portion of EIDL loan proceeds used for payroll costs will be considered to have been used for “payroll costs” for purposes of the requirement that 75% of SBA loan proceeds be used for payroll costs, as discussed below)

	<p>\$100,000 Multiply by 2.5 = \$250,000</p> <p>Maximum loan amount is \$250,000</p>
<p>Example 3 – No employees make more than \$100,000, outstanding EIDL loan of \$10,000.</p> <p>Annual payroll: \$120,000</p> <p>Average monthly payroll: \$10,000</p> <p>Multiply by 2.5 = \$25,000</p> <p>Add EIDL loan of \$10,000</p> <p>Maximum loan amount is \$35,000</p>	<p>Example 4 – Some employees make more than \$100,000, outstanding EIDL loan of \$10,000</p> <p>Annual payroll: \$1,500,000</p> <p>Subtract compensation amounts in excess of an annual salary of \$100,000 (e.g. \$300,000): \$1,200,000</p> <p>Average monthly qualifying payroll: \$100,000</p> <p>Multiply by 2.5 = \$250,000</p> <p>Add EIDL loan of \$10,000</p> <p>Maximum loan amount is \$260,000</p>

e. What costs are included in “payroll costs?”

- i. Payroll costs consist of:
 - ii. compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation;
 - iii. cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips);
 - iv. payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal;
 - v. payment for the provision of retirement costs and employee benefits costs consisting of group health care coverage, including insurance premiums;
 - vi. payment of state and local taxes assessed on compensation of employees; and
 - vii. for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

f. What is expressly excluded from the definition of payroll costs?

- i. Any compensation of an employee whose principal place of residence is outside of the United States;
- ii. The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;

- iii. Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee's and employer's share of FICA and Railroad Retirement Act taxes, and income taxes required to be withheld from employees; and
 - iv. Families First Coronavirus Response Act (FFCRA) costs, including qualified sick and family leave wages for which a credit.
- g. Do independent contractors count as employees for purposes of PPP loan calculations?*
- i. No, independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan calculation.
- h. Can I apply for more than one PPP loan?*
- i. No. The Administrator, in consultation with the Secretary, determined that no eligible borrower may receive more than one PPP loan (and any such PPP loan must be made by June 30, 2020).
- i. Can my PPP loan be forgiven in whole or in part?*
- i. Yes. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes described below and employee and compensation levels are maintained. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan.
 - ii. However, not more than 25% of the loan forgiveness amount may be attributable to non- payroll costs. In fact, borrowers are prohibited from using more than 25% of the loan for non-payroll costs.
 - iii. SBA will issue additional guidance on loan forgiveness.
- j. Do independent contractors count as employees for purposes of PPP loan forgiveness?*
- i. No, independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan forgiveness.
- k. What forms do I need and how do I submit an application?*
- i. The applicant must submit SBA Form 2483 (Paycheck Protection Program Application Form) and payroll documentation, as described above. The lender must submit SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) electronically in accordance with program requirements and maintain the forms and supporting documentation in its files.

l. How can PPP loan proceeds be used?

i. The proceeds of a PPP loan may be used for:

A. payroll costs;

- **Note:** at least 75 percent of the PPP loan proceeds **shall** be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included (see subsection G. below). For purposes of loan forgiveness, however, the borrower will have to document the proceeds used for payroll costs (including proceeds originally from the EIDL) in order to determine the amount of forgiveness.

B. costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;

C. mortgage interest payments (but not mortgage prepayments or principal payments);

D. rent payments;

E. utility payments;

F. interest payments on any other debt obligations that were incurred before February 15, 2020; and/or

G. Refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020. If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

m. What happens if PPP loan funds are misused?

- i. If you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use. The SBA PPP Application requires certain certifications from the borrower and its owners.

- n. What certifications does the SBA PPP application require?
- i. An authorized representative of the applicant that is legally authorized to certify on behalf of the borrower must certify in good faith to all of the below:
 - A. The applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.
 - B. Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.
 - C. The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable such as for charges of fraud. As explained above, not more than 25 percent of loan proceeds may be used for non-payroll costs.
 - D. Documentation verifying the number of full-time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight week period following this loan will be provided to the lender.
 - E. Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. As explained above, not more than 25 percent of the forgiven amount may be for non-payroll costs.
 - F. During the period beginning on February 15, 2020 and ending on December 31, 2020, the applicant has not and will not receive another loan under this program.
 - G. The authorized representative must further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.
 - H. The authorized representative must further acknowledge that the lender will confirm the eligible loan amount using tax documents I have submitted. The authorized representative

must affirm that these tax documents are identical to those submitted to the Internal Revenue Service. The authorized representative must further acknowledge that he or she understands, acknowledges, and agrees that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

- o. A few important notes on SBA PPP loan application certifications:
- i. Many of the certifications are unclear and causing concern for both lenders and prospective borrowers. Additional guidance is expected but note that the following certifications contain un-clear standards and should be closely reviewed by the borrower and lender:
 - “To the extent feasible, I will purchase only American-made equipment and products.”
 - **Bodman note:** It is unclear whether this allows an applicant to purchase any non-American-made equipment or products and what makes that requirement “feasi-ble” versus impractical.
 - “Current economic uncertainty makes this loan request necessary to support the ongoing opera-tions of the Applicant.”
 - **Bodman note:** It is unclear whether this imposes a need-based standard for PPP loans or what “necessary” means in the context of “support... ongoing operations.”
 - “I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.”
 - **Bodman note:** There is currently no clear guidance on how loan expenditures will be reported and forgiveness calculated.
 - “I will comply, whenever applicable, with the civil rights and other limitations in this form”
 - **Bodman note:** If no limits are set forth in the application, at a minimum we expect general compliance with law requirements to apply.

2. Loan Terms

- a. *What is the interest rate on a PPP loan?*
 - i. The interest rate will be 1%.
- b. *What will be the maturity date on a PPP loan?*
 - i. The maturity is two years.
- c. *When will I have to begin paying principal and interest on my PPP loan?*

- i. You will not have to make any payments for six months following the date of disbursement of the loan. However, interest will continue to accrue on PPP loans during this six-month deferment period.
- d. *What are the loan terms and conditions?*
- i. Loans will be guaranteed under the PPP under the same terms, conditions and processes as other 7(a) loans, with certain changes including but not limited to:
 - ii. The guarantee percentage is 100 percent.
 - iii. No collateral will be required.
 - iv. No personal guarantees will be required.
- e. *Are there fees for the Borrower?*
- i. There will be no up-front guarantee fee payable to SBA by the Borrower;
 - ii. There will be no lender's annual service fee ("on-going guaranty fee") payable to SBA;
 - iii. There will be no subsidy recoupment fee; and
 - iv. There will be no fee payable to SBA for any guarantee sold into the secondary market.
 - v. Note: origination/processing fees earned by lenders are paid by SBA.

Please contact your Bodman attorney or Adam Weiner (313) 392-1076 or aweiner@bodmanlaw.com for more information. 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.

PPP Loans: Calculation of Forgiveness

During the last several weeks, there has been a great deal of attention paid to the availability and eligibility of PPP loans. Guidance from the SBA has been slow and at times inconsistent. With the funding mostly complete, attention has now turned to the critical element of loan forgiveness. Unfortunately, the SBA has not yet issued detailed guidance regarding the calculation of forgiveness and potentially disqualifying conditions (one such potentially disqualifying condition is lack of eligibility for the PPP loan at funding). However, in the meantime companies that receive PPP loans must gather information now necessary to document their future applications for loan forgiveness. This article provides a summary of what we currently know about how forgiveness will be calculated with an eye toward future applications for forgiveness. This information will undoubtedly be modified upon further guidance from the SBA.

How do companies determine the amount of PPP funds eligible for forgiveness?

The amount of loan forgiveness is equal to the amount of PPP funds the borrower spent on eligible items during the 8-week period following the origination of the loan (Measurement Period). Eligible items are:

- Payroll costs (using the definition of payroll costs used to determine loan amount);
- Interest on mortgage obligations incurred before February 15, 2020;
- Rent paid or leases entered into before February 15, 2020; and
- Utilities for services that began before February 15, 2020.

Importantly, not more than 25% of the forgiven amount may be used for non-payroll costs. As a result, companies should ensure that, to the extent possible, the PPP funds are fully expended during the Measurement Period and that at least 75% of PPP funds are applied to eligible payroll costs. Companies should also ensure that adequate documentation is retained to support payroll expenditures during the Measurement Period.

What other factors could impact the amount of forgiveness?

In addition to determining the amount of PPP funds eligible for forgiveness based on eligible expenditures during the Measurement Period, companies must also consider any reduction in their workforce or payroll. Although specific guidance from the SBA is limited, the amount of the loan forgiveness will be reduced based on either a reduction in the Full-Time Equivalent Employees (FTEs) or a reduction in employee compensation during the Measurement Period.

Companies must determine their baseline average number of monthly FTEs, which is calculated using either the period of February 15, 2019 through June 30, 2019, or January 1, 2020 through February 29, 2020 (“Baseline FTEs”). The company must then calculate their number of average monthly FTEs during the Measurement Period (“Current FTEs”). The Current FTEs are divided by the Baseline FTEs and that percentage is multiplied by the company’s payroll cost during the Measurement Period to determine a reduction in forgiveness.

Companies must then determine whether any employee’s wages were reduced by greater than 25% during the most recent quarter when compared to 2019 wages. The amount of reduction of wages in excess of 25% for any employee (other than employees who earned more than \$100,000) is then subtracted from the company’s payroll cost during the Measurement Period.

However, reductions in employment or wages that occurred between February 15, 2020, and April 26, 2020, shall not reduce the amount of forgiveness if, no later than June 30, 2020, the company has fully eliminated the reduction in FTEs or wages referenced above.

Please contact your Bodman attorney for assistance or Darren Burmania at (616) 205-3313 or dburmania@bodmanlaw.com or Adam Weiner at (313) 392-1076 or aweiner@bodmanlaw.com on what this new guidance means for you or your business. 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.

PPP Loans – The Employee Retention Credit

In response to recent SBA guidance regarding eligibility for PPP loans, many companies are following the SBA's advice to reevaluate the certifications on their PPP loan application. The SBA has given companies until May 14, 2020, to utilize a "safe harbor" and return PPP funds or otherwise withdraw their application. The SBA has now issued guidance, in the form of FAQ 45, to clarify that an alternative source of relief remains for companies that elect to utilize this safe harbor.

What is FAQ 45?

On May 6, 2020, the SBA supplemented its existing FAQs to add the following:

45. Question: Is an employer that repays its PPP loan by the safe harbor deadline (May 14, 2020) eligible for the Employee Retention Credit?

Answer: Yes. An employer that applied for a PPP loan, received payment, and repays the loan by the safe harbor deadline (May 14, 2020) will be treated as though the employer had not received a covered loan under the PPP for purposes of the Employee Retention Credit. Therefore, the employer will be eligible for the credit if the employer is otherwise an eligible employer for purposes of the credit.

For companies that have been evaluating their options following the SBA's issuance of [FAQs 31, 37 and 39](#), the Employee Retention Credit should be carefully considered as an alternative to PPP funding. Importantly, companies are not eligible for both PPP loans and the Employee Retention Credit.

What is the Employee Retention Credit?

The Employee Retention Credit is a **fully refundable** tax credit for employers equal to 50 percent of qualified wages (including allocable qualified health plan expenses) that Eligible Employers pay their employees. This Employee Retention Credit applies to qualified wages paid after March 12, 2020, and before January 1, 2021. The maximum amount of qualified wages taken into account with respect to each employee for all calendar quarters is \$10,000, so that the maximum credit for an Eligible Employer for qualified wages paid to any employee is \$5,000.

The Employee Retention Credit is available to Eligible Employers. For purposes of the Employee Retention Credit, an Eligible Employer is an employer that carries on a trade or business during calendar year 2020, including a tax-exempt organization, that either:

- Fully or partially suspends operation during any calendar quarter in 2020 due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19; or
- Experiences a significant decline in gross receipts during the calendar quarter.

While the Employee Retention Credit may be a smaller benefit to most companies when compared to a PPP loan, the Employee Retention Credit may be a safer alternative for some companies in light of recent confusing and ambiguous guidance from the SBA. Additional details regarding the Employee Retention Credit are available and need to be carefully considered as part of any company's analysis of its options.

If you have questions about this information, please contact your Bodman attorney or Darren Burmania at (616) 205-3313 or dburmania@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.

PPP Loans – New Guidance on the Necessity Certification for Borrowers

In response to recent SBA guidance regarding eligibility for PPP loans, many companies are following the SBA's advice to reevaluate the certifications on their PPP loan application. The SBA has given companies until May 18, 2020, to utilize a "safe harbor" and return PPP funds or otherwise withdraw their application. The SBA issued additional guidance, in the form of FAQ #46, to clarify how borrowers should expect to be treated with respect to the necessity certification in the PPP application.

UPDATE: The SBA further clarified the safe harbor date with the release of FAQ #47 after business hours on May 13th. To take advantage of the repayment "safe harbor", funds must be repaid by May 18th, 2020 (not May 14th.) FAQ #47 has been excerpted below for reference.

Summary:

On May 13, 2020, the SBA issued an updated FAQ with further clarification on a borrower's good faith certification that the PPP loan was "necessary" for ongoing operations. The updated FAQ is available [here](#).

With this new guidance, any borrower, together with its affiliates, that received PPP loans in an amount less than \$2 million is assumed to have made the necessity certification in good faith, which means the SBA will assume the borrower did not have access to other sources of liquidity. To the extent a borrower received a loan of less than \$2 million (including PPP loans extended to its affiliates), the latest guidance suggests these borrowers will be presumed to have a *per se* need for the loan and such borrowers will not be audited with respect to necessity for the loan.

Additionally, if borrowers with loans in an amount greater than or equal to \$2 million are audited and found not to have had a good faith basis for the necessity certification, the penalty will be repayment of the loan with interest and without any forgiveness.

Detailed Analysis for FAQ #46:

Bodman Analysis:

We view this new guidance to have three important parts:

1. If a borrower and its affiliates have a cumulative loan amount of less than \$2 million, absent fraud, the certification of necessity will not be reviewed by the SBA. This decision was made by the SBA to promote certainty for small businesses that may be struggling to determine what the necessity certification means and how they could be penalized in the future. This FAQ should provide significant relief and certainty to small businesses.

2. If a borrower and its affiliates have a cumulative loan amount of \$2 million or more, the borrower may be audited but will have a chance to prove the loan was “necessary” in light of the circumstances in which the borrower applied for the PPP loan. As previously discussed, documenting a borrower’s financial situation, including financial projections and the impact of COVID-19 on a borrower’s business and employee needs, is critical to proving the loan was necessary. Borrowers with loan amounts of \$2 million or more should be diligently documenting their need for the loan now (if they have not already.)
3. In the event that a borrower with a cumulative loan amount of \$2 million or more is unable to prove to the SBA that the PPP loan was necessary, the SBA will instruct the borrower to pay the loan back, with interest, and no portion of the loan will be forgiven. Absent any other actionable conduct, if the loan is repaid, the SBA will not take further enforcement action or refer the matter to any other agency.

The FAQ reads as follows:

46. Question: How will SBA review borrowers’ required good-faith certification concerning the necessity of their loan request?

Answer: When submitting a PPP application, all borrowers must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA’s review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA’s determination concerning the certification regarding the necessity of the loan request will not affect SBA’s loan guarantee.

47. Question: An SBA interim final rule posted on May 8, 2020 provided that any borrower who applied for a PPP loan and repays the loan in full by May 14, 2020 will be deemed by SBA to have made the required certification concerning the necessity of the loan request in good faith. Is it possible for a borrower to obtain an extension of the May 14, 2020 repayment date?

Answer: Yes, SBA is extending the repayment date for this safe harbor to May 18, 2020, to give borrowers an opportunity to review and consider FAQ #46. Borrowers do not need to apply for this extension. This extension will be promptly implemented through a revision to the SBA's interim final rule providing the safe harbor. ²¹

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.

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.

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COVID-19 PPP Loans – Paycheck Protection Program Flexibility Act of 2020

In response to significant pressure from small businesses, Congress passed the Paycheck Protection Program Flexibility Act of 2020 (“PPP Flexibility Act”), which was signed into law on June 5, 2020. The PPP Flexibility Act provides significant additional flexibility to small businesses obtaining PPP loans.

Increased Flexibility for Use of PPP Loan Funds:

The PPP Flexibility Act extended from eight weeks to 24 weeks (but no later than December 31, 2020) the covered period during which PPP loan funds may be used by borrowers and eligible for forgiveness. This extension allows borrowers more time to use the funds while the economy begins to reopen.

The PPP Flexibility Act also lowered from 75% to 60% the portion of PPP loan funds that must be used for payroll costs. This reduction allows borrowers to use a greater portion of PPP loan funds (up to 40%) on rent, mortgage interest, and utilities.

In addition, the PPP Flexibility Act extended from June 30, 2020, to December 31, 2020, the deadline for borrowers to reverse employment or wage reductions in order to utilize a safe harbor for loan forgiveness. PPP loans are subject to forgiveness reductions if a borrower reduced its full time equivalent employees or reduced wages more than 25% between February 15, 2020, and April 26, 2020. This extension allows borrowers more time to return their workforce to employment and compensation levels that existed prior to the pandemic.

Increased Deferral Period and Loan Term:

Any portion of PPP loans that are not forgiven must be repaid. The PPP Flexibility Act allows borrowers to defer principal and interest payments on a PPP loan until the SBA pays the lender the amount of the loan forgiveness. Borrowers that do not apply for forgiveness within ten months of the expiration of the borrower’s covered period must begin making principal and interest payments at that time. This extends the prior deferral period of six months.

The PPP Flexibility Act also extends the loan term for new PPP loans that are not fully forgiven to a minimum of five years. The term of PPP loans that were made before June 5, 2020, may be extended from the existing two year maturity if the borrower and lender agree.

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An Update From Bodman PLC

Bodman PLC | [COVID-19 Response Team Website](#)

July 2020

Payroll Protection Plan Loan Recipients

On July 6, 2020, the SBA released the names of companies who received Payroll Protection Plan loans. On the same day, Crain's Detroit published a searchable list of those companies. Please feel free to call your Bodman lawyer with any further questions with respect to the SBA's action.

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.