

## Treatment of PPP Borrowers with Foreign Affiliates

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*On May 18, 2020, the United States Small Business Administration (“SBA”) released an Interim Final Rule applicable to borrowers with foreign affiliates who relied on the pre-May 5 guidance (the “IFR on Foreign Affiliates”), under which the SBA indicated that it would not find a borrower ineligible for a PPP loan solely because the borrower excluded non-U.S. employees of foreign affiliates from the calculation of its employee headcount in reliance on the prior SBA guidance, provided that the borrower (i) applied for a PPP loan prior to May 5, 2020, (ii) had no more than 500 employees whose principal place of residence is in the United States on the date of its PPP loan application, and (iii) does not use PPP funds to support non-U.S. workers or operations. This safe harbor relates only to the employee test and borrowers must still be otherwise eligible for the PPP.*

### Background

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act of 2020 (the “CARES Act”) into law. Section 1102 of the CARES Act temporarily permits the SBA to guarantee 100% of loans granted under the Paycheck Protection Program (“PPP”). The PPP is a loan guarantee program, administered by the United States Treasury and SBA, through which financial institutions can make forgivable loans to small business concerns, business concerns with fewer than 500 employees, and certain other eligible borrowers. Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP.

PPP applicants are subject to certain affiliation rules, which deem entities to be affiliates based on a variety of factors including stock ownership, overlapping management, and identity of interests. The affiliation rules provide that, to calculate the number of employees of an entity for purposes PPP eligibility, employees of the borrower “and all of its domestic and foreign affiliates” should be included in the determination of the borrower’s headcount (except in certain limited circumstances). An entity that has more than 500 employees (in the aggregate, among its domestic and foreign

affiliates) is ineligible for a PPP loan.

In response to confusion around whether to include employees of affiliates who are domiciled outside of the U.S. (“Foreign Employees”) in the calculation of an entity’s size, the SBA stated in its [Frequently Asked Questions](#) on May 5, 2020 that, for the “purposes of the PPP’s 500 or fewer employee size standard, an applicant must count all of its employees and the employees of its U.S and foreign affiliates.”

## **Interim Final Rule on the Treatment of Entities with Foreign Affiliates**

On May 18, 2020, the [SBA released the IFR on Foreign Affiliates](#) in recognition of “reasonable borrower confusion” around the calculation of employee headcount with respect to Foreign Employees. The IFR on Foreign Affiliates makes clear that borrowers who applied for a PPP loan before May 5, 2020 and who did not include Foreign Employees in their employee headcount calculation would not, solely on that basis, be deemed ineligible for a PPP loan. That is, such borrowers “shall not be deemed to have made an inaccurate certification of eligibility” due to their confusion on the treatment of Foreign Employees. The guidance makes clear, however, that such borrowers must not use PPP loan funds to support non-U.S. employees or operations, and that such borrowers must have had 500 or fewer employees whose principal place of residence is within the United States as of the date of its application.

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