

SBA Interim Final Rule on PPP Participants with Foreign Affiliates Creates a Safe Harbor for Borrowers

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In answer to a question hanging over the PPP loan program since its inception, the SBA on May 18 offered a safe harbor to borrowers who did not originally count its foreign employees, and those of its affiliates, in its loan application. The SBA indicates that borrowers should have counted those foreign employees; however due to confusing FAQs, the SBA has ‘exercised its enforcement discretion’ and will not find any borrower who did so to be ineligible if they applied prior to May 5, 2020. The relevant text of the Interim Final Rule is as follows:

“Are employees of foreign affiliates included for purposes of determining whether a PPP borrower has more than 500 employees?”

Yes. The CARES Act specifies that an entity is eligible for a PPP loan only if it is (1) a small business concern, or (2) a business concern, nonprofit organization described in section 501(c)(3) of the Internal Revenue Code, veterans organization described in section 501(c)(19) of the Internal Revenue Code, or Tribal business concern described in section 31(b)(2)(C) of the Small Business Act that employs not more than the greater of 7 500 employees, or, if applicable, SBA’s employee-based size standard for the industry in which the entity operates. SBA’s affiliation regulations provide that to determine a concern’s size, employees of the concern “and all of its domestic and foreign affiliates” are included. 13 C.F.R. 121.301(f). Therefore, to calculate the number of employees of an entity for purposes of determining eligibility for the PPP, an entity must include all employees of its domestic and foreign affiliates, except in those limited circumstances where the affiliation rules expressly do not apply to the entity. Any entity that, together with its domestic and foreign affiliates, does not meet the 500-employee or other applicable PPP size standard is therefore ineligible for a PPP loan.

However, as an exercise of enforcement discretion due to reasonable borrower confusion based on SBA guidance (which was later resolved through a clarifying FAQ on May 5, 2020), SBA will not find any borrower

that applied for a PPP loan prior to May 5, 2020 to be ineligible based on the borrower's exclusion of non-U.S. employees from the borrower's calculation of its employee headcount if the borrower (together with its affiliates) had no more than 500 employees whose principal place of residence is in the United States. Such borrowers shall not be deemed to have made an inaccurate certification of eligibility solely on that basis.

Under no circumstances may PPP funds be used to support non-U.S. workers or operations.”

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