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PPPローン申込資格と米国中小企業庁（SBA）発表のFAQ #44ー依然として不明瞭な申込資格

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Practices: コーポレート／ファイナンス／M&A

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EXECUTIVE SUMMARY

The Small Business Administration's ("SBA") Frequently Asked Questions ("FAQs") publications on the Paycheck Protection Program ("PPP") have created more confusion on which businesses are eligible for PPP loans.

FAQ 3 (issued April 6, 2020) provided that a business is eligible for a PPP loan if:

- it has 500 or fewer employees and its employees' principal place of residence is in the U.S.; **or**
- its business meets the SBA employee-based or revenue-based size standards for its NAICS code.

Interim Final Rule on Applicable Affiliation Rules, 85 FR 20817 (originally posted April 3, 2020, and updated April 15, 2020) ("Interim Final Rule on Affiliates") provided the following:

"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 or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry, **and** (2) 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, **or any other business concern**.

However, FAQ 44 was later issued stating the employees of all affiliates of a borrower must be counted. FAQ 44 did not reference the Interim Final Rule on Affiliates, FAQ 3 or FAQ 17 (discussed below).

The FAQ from the SBA have not provided clear guidance regarding analysis of affiliate employees.

What is clear is that a borrower is eligible for the PPP loan if the borrower is otherwise eligible and the number of employees in the borrower's affiliated group, no matter where the employees are located in the world, is 500 (or such higher number of employees as permitted by the applicant's North American Industry Classification System ("NAICS") code) or less.

What is not clear is whether a borrower with an affiliate group that has more than 500 employees worldwide, but only 500 or fewer employees in the group reside in the United States ("United States or "U.S."), or higher employee headcount based upon the applicable NAICS code qualifies for the PPP loan.

What is also not clear is if Interim Final Rule on Affiliates and FAQ 17 (see below) will provide protection for borrowers that submitted their PPP loan applications based upon Interim Final Rule on Affiliates and FAQ 3 and received PPP loans, and it is determined that they are not eligible for the PPP loans due to failure to satisfy affiliation rules. The risk to these borrowers is not only potential civil and criminal charges under the CARES Act, but potential claims under the False Claims Act ("FCA"). The FCA provides for criminal and civil liability for "knowingly" or acting in reckless disregard and submitting a false claim to the U.S. federal government, including the PPP loan application and the need for the PPP loan. Potential exposure under the FCA includes treble damages, monetary penalties and the payment of attorneys' fees.

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Those borrowers who do not want to risk a determination that they are not eligible have until May 18, 2020, as of the date of this publication, to return the PPP loan funds to avoid any potential liability.

The CARES Act authorizes PPP loan availability for certain small businesses (those that do not employ more than 500 employees) between March 1, 2020 and December 31, 2020.

Depending upon NAICS code of the potential borrower, certain businesses can have up to a maximum of 1,500 employees and still qualify for a PPP loan.

The SBA continues to try and provide more clarification to the PPP loan requirements, but in some cases, it creates more confusion in its FAQs.

As you may recall, we previously wrote about FAQ 3 that a business is eligible for a PPP loan if:

- it has 500 or fewer employees and its employees' principal place of residence is in the U.S.; **or**
- its business meets the SBA employee-based or revenue-based size standards for its NAICS code.

FAQ 3 (issued April 6, 2020) stated:

"**Question 3**: Does my business have to qualify as a small business concern (as defined in section 3 of the Small Business Act, 15 U.S.C. 632) in order to participate in the PPP?

Answer: No. In addition to small business concerns, a business is eligible for a PPP loan if the business has 500 or fewer employees, whose principal place of residence is in the United States, or the business meets the SBA employee-based size standards for the industry in which it operates (if applicable)..."

At that time, we also noted some inconsistencies between current rules and regulations, and that some SBA lenders may disagree with providing PPP loans based upon counting employees only residing in the U.S.

Interim Final Rule on Affiliates 85 FR 20817 (originally posted April 3, 2020 and updated April 15, 2020) provided the following:

"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 or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry, **and** (2) 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, **or any other business concern**.

"What is a business concern? A business concern means that the entity is organized for-profit; has a physical place of business in the United States; and, operates primarily in the United States."

The Interim Final Rule on Affiliates and FAQ 3 opened the door to more businesses being able to apply for and receive PPP loans to keep or bring back employees on payroll than permitted under the CARES Act.

Then, more than one month later, FAQ 44 was issued on May 5, 2020.

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"**Question 44**: How do SBA's affiliation rules at 13 C.F.R. 121.301(f) apply with regard to counting the employees of foreign and U.S. affiliates?

Answer: For 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, absent a waiver of or an exception to the affiliation rules. 13 C.F.R. 121.301(f)(6). Business concerns seeking to qualify as a "small business concern" under section 3 of the Small Business Act (15 U.S.C. 632) on the basis of the employee-based size standard must do the same."

We did not issue an immediate PPP loan update, because it is still not clear how FAQ 44 interplays with the Interim Final Rule on Affiliates, FAQ 3 and FAQ 17.

FAQ 17 states:

"**17. Question**: I filed or approved a loan application based on the version of the PPP Interim Final Rule published on April 2, 2020. Do I need to take any action based on the updated guidance in these FAQs?

Answer: No. Borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application. However, borrowers whose previously submitted loan applications have not yet been processed may revise their applications based on clarifications reflected in these FAQs."

This leaves open many questions, such as: did FAQ 44 override the Interim Final Rule on Affiliates, FAQ 3 and FAQ 17, and if yes, why did the SBA not update the Interim Final Rule or remove FAQ 3 or mention the Interim Final Rule, FAQ 3 or FAQ 17 in FAQ 44? Will further guidance be issued?

As you may recall, the CARES Act required employees of all affiliates to be counted in determining if there were 500 or more employees in the affiliated group (or higher number permitted by the applicable NAICS code), not just the number of employees residing in the U.S.

Interim Final Rule 1 issued (originally posted April 2, 2020, and updated April 15, 2020) ("Interim Final Rule 1") stated:

"2. What do borrowers need to know and do? a. Am I eligible? 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**: i. You are: A. A small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632), and subject to SBA's affiliation rules under 13 CFR 121.301(f) unless specifically waived in the Act; or B. A tax-exempt nonprofit organization described in section 501..."

The Interim Final Rule 1 with the inclusion of "and" did not change the analysis under the CARES Act. It was the Interim Final Rule on Affiliates and FAQ 3 that changed the "and" to "or" and opened the door for more PPP loan applications.

FAQ 44 can be interpreted in two ways: (1) FAQ 44 clarifies that you count affiliates' U.S. based employees when determining if you are small business with 500 or fewer employees, whose principal place of residence is in the U.S., as provided in Interim Final Rule on Affiliates or FAQ 3; or (2) that FAQ 44 means that you ignore

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the Interim Final Rule on Affiliates and FAQ 3 and go back to the traditional SBA small business concern calculation as provided in the CARES Act.

Our initial guidance was to wait and see if further guidance would be issued by the SBA regarding FAQ 44. However, with the deadline of May 18, 2020 quickly approaching, and no further guidance from the SBA as of yet, a decision must be made.

It is not clear to us which position the SBA will take with respect to FAQ 44 since the Interim Final Rule on Affiliates, FAQ 3 and FAQ 17 remain unchanged and the ultimate goal of the PPP was to keep Americans employed during the COVID-19 crises. We have been debating the merits of both interpretations above, ever since FAQ 44 was issued. However, because the FAQs specifically note that they do not “carry the force and effect of law independent of the statute and regulations on which it is based[,]” The only way to avoid any risk is to follow the CARES Act itself which states that you count the employees of the affiliates wherever located and if there are more than 500 employees, the applicant is not eligible. It is not clear if Interim Final Rule on Affiliates or FAQ 17 will provide any protection for borrowers that submitted their PPP loan applications and received funding before FAQ 44 was issued and have not returned the loan on or before May 18, 2020.

A borrower is clearly eligible for the PPP loan if the applicant is otherwise eligible and the number of employees in the borrower’s affiliated group, no matter where the employees are located in the world, is 500 (or such greater number of employees as permitted by the applicant’s NAICS code) or less.

What is not clear is whether a borrower’s affiliated group that has more than 500 employees worldwide, but only 500 or fewer employees in the group residing in the United States, qualifies for the PPP loan.

Thus, a PPP loan borrower should review its employee limit for its NAICS code at (link) and, if that number is greater than 500, compare that limit, or the 500 maximum employee limit to the employees in its worldwide affiliated group and determine if it wants to keep the PPP loan or return the PPP loan funds to avoid a risk that it is determined later that it is not qualified. Borrowers should consider all other eligibility requirements as well.

The risk to borrowers that keep PPP loan funds and are later determined not be qualified for the PPP loan is not only potential civil and criminal charges under the CARES Act, but potential claims under the FCA. The FCA provides for criminal and civil liability for "knowingly" or acting in reckless disregard and submitting a false claim to the U.S. federal government, including the PPP loan application and the need for the PPP loan. Potential exposure under the FCA includes treble damages, monetary penalties and the payment of attorneys' fees.

The SBA has provided a “safe harbor” deadline up to May 18, 2020 to return PPP loan funds if a borrower determines that it is not eligible. If this deadline is met all certifications will be deemed to have been true. This means, there are no claims for civil or criminal penalties against the signatory to the PPP loan application if the PPP loan funds are returned by May 18, 2020, or not taken.

See below FAQ 47 published the evening of May 13, 2020:

“**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

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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."

Please contact Jennifer R. Watson or a member of the Corporate, Finance and Acquisitions Group with any questions regarding PPP loans.

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