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PPP Loan Eligibility and Interim Final Rule on Treatment of Entities with Foreign Affiliates – Some Much Needed Clarity

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Practices: Corporate, Finance & Acquisitions

EXECUTIVE SUMMARY

The Small Business Administration's ("SBA") Interim Final Rule on Treatment of Entities with Foreign Affiliates issued May 18, 2020 ("May 18 Interim Final Rule") clarifies which businesses are eligible for the Paycheck Protection Program ("PPP") and provides an exception to allow those that applied prior to May 5, 2020 to keep the PPP loan.

Thus, if you applied for a PPP loan prior to May 5, 2020, you can keep the PPP loan funds if you and your affiliates have 500 (or greater number depending upon your NAICS code) or fewer employees residing in the United States.

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 to provide more clarification to the PPP loan requirements and has done so with the May 18 Interim Final Rule. Please see our prior article on May 14, 2020 regarding the confusion on which employees must be counted for PPP loan eligibility ([link](#)).

The SBA has now clarified that:

"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.**

Thus, if you applied for the PPP loan prior to May 5, 2020, you can keep the PPP loan funds provided you use them to support only U.S. workers or operations and if your affiliated group has 500 (or greater amount permitted by your NAICS code) or fewer employees resident in the United States.

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.

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