

PUBLICATION

SBA Extends Safe Harbor Deadline to May 14, 2020 and Confirms that Foreign Affiliate Employees Must be Counted for Size Purposes

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May 06, 2020

Updated (May 18, 2020) – In another example of the constantly changing guidance related to PPP loans, on Monday, May 18, 2020, the SBA issued an Interim Final Rule on Treatment of Entities with Foreign Affiliates that confirms that "as an exercise of enforcement discretion due to reasonable borrower confusion," 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 affiliates) had no more than 500 employees whose principal place of residence is in the United States. While this is good news for those who applied for PPP loans before May 5th and kept the money, it likely is infuriating news to borrowers who applied before May 5th and then returned the money in accordance with the May 18th Safe Harbor Deadline because of the SBA's May 5th guidance.

Original Alert (May 6, 2020) – Late on May 5, 2020 the Small Business Administration (SBA) issued another round of Frequently Asked Questions (FAQs) that extended the Safe Harbor Deadline to return Paycheck Protection Program (PPP) loan funds from May 7, 2020 to May 14, 2020. Significantly, the SBA also confirmed that its rules regarding foreign affiliates are applied to PPP applicants in the same manner as its other programs. Loan applicants should closely review the most updated version of the [SBA's FAQs](#) and talk to their counsel about the best way to proceed.

Safe Harbor Extended from May 7, 2020 to May 14, 2020

As discussed in a [prior alert](#), on April 23, 2020 (20 days after applications could first be submitted for PPP loans), the SBA issued FAQ 31 that significantly increased the requirements surrounding an applicant's certification that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." In the strongly worded FAQ 31, the SBA stated that "[b]orrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business." Unfortunately, as of the date of this alert, neither the Department of Treasury (Treasury) nor the SBA have issued any further guidance beyond the above sentence to confirm how applicants actually make this determination. On April 28, 2020, the SBA also confirmed that FAQ 31 equally applies to both public and private companies.

In addition to issuing FAQ 31, the SBA also issued an initial Safe Harbor Deadline of May 7, 2020 to return PPP loans. This May 7, 2020 Safe Harbor Deadline has now been extended to May 14, 2020. Under FAQ 43 that was issued on May 5, the SBA and Treasury are allowing borrowers to return PPP loan funds by May 14, 2020. For those borrowers that return funds by May 14, the SBA and Treasury have confirmed that they will deem the certification regarding "need" to have been made in good faith. The SBA also has confirmed that it intends to issue additional guidance on how it will review the "need" certification before May 14, 2020.

While the SBA's recent guidance does not specifically reference any eligibility certifications outside of the "necessity" for the loan, a borrower knowing that it has a separate eligibility issue should seek counsel about addressing that issue before the extended deadline of May 14, 2020.

Frustration and confusion abound since the issuance of FAQ 31 and FAQ 37. There are several questions that Treasury has not adequately answered. Until further guidance is issued, applicants are faced with a difficult choice of keeping funds with the risk that the government may later hold the unclear guidance against them, or refuse the funds and accept the impacts that go along with that, including a possible reduction of employees.

Applicants across the country have been raising these complaints, and Treasury has at least initially responded by extending the deadline to May 14, 2020. We hope that Treasury will also soon issue additional FAQs or rules to confirm the parameters for which businesses can in good faith certify the need for a PPP loan.

Borrowers Must Count Employees of Foreign Affiliates When Determining Eligibility for a PPP Loan

The SBA also issued FAQ 44 on May 5, which confirms that borrowers must count both foreign and domestic affiliates when determining eligibility for PPP loans. FAQ 44 has significant impacts on businesses which applied for PPP loans without counting the employees of foreign affiliates.

As a reminder, SBA's regulations confirm that "[c]oncerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both." [13 C.F.R. § 121.301\(f\) \(February 5, 2020\)](#). The [PPP Loan Affiliation Rules](#) describe how the SBA determines affiliation for PPP loans.

SBA's rules for determining size have long required participants in SBA's programs to count both foreign and domestic affiliates. See [13 CFR §§ 121.103\(a\)\(6\), 104\(a\), 106\(b\)\(1\), and 301\(f\)\(6\)](#) (confirming that both foreign and domestic affiliates should be considered for size purposes).

However, when the SBA issued the PPP Loan Affiliation Rules, it did not include the pre-March 11, 2020 version of [13 C.F.R. § 121.301\(f\)\(6\)](#)¹, which confirms that foreign affiliates should be counted. The PPP Loan Affiliation Rules do not reference Section (f)(6). The [Interim Final Rule](#) first issued on April 2, 2020 and SBA's FAQ 3 also states that borrowers are eligible for a PPP loan "if the business has 500 or fewer employees whose principal place of residence is in the United States," *or* meets other criteria.

The use of the term "principal place of residence in the United States" in the Interim Final Rule and SBA's FAQs created confusion about whether employees of foreign affiliates actually needed to be counted for PPP loan eligibility. For those who have long worked with SBA's rules, it seemed that not counting foreign affiliates would be a significant change from SBA's past implementation of its regulations, but the clear language in the above sources made it reasonable to openly consider that question to determine if the SBA was handling the PPP loan program differently.

On May 5, the SBA confirmed that PPP loans are consistent with its other programs and borrowers must count foreign affiliates when considering size:

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.

See FAQ 44.

Businesses which have already applied and know that foreign affiliates would cause them to exceed the relevant size standard should discuss this with their counsel to closely evaluate next steps on how to proceed. It would be wise to consider and address this before the May 14, 2020 Safe Harbor Deadline.

For specific guidance on this issue, please contact [Jeff Wagner](#). For more information and general guidance on how to address other legal issues related to COVID-19, please visit the [Coronavirus \(COVID-19\): What You Need to Know information page](#) on our website.

¹ As discussed in a [prior alert](#), the CARES Act rescinded a rule that took effect on March 11, 2020 that would have increased affiliation rules for the loan program and instead went back to the pre-March 11, 2020 version of the affiliation rules for loans.