

# CLIENT ALERTS

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## PPP Update: SBA Provides Limited Safe-Harbor for Mis-Application of SBA's Foreign Affiliation Rules

5.18.2020

On May 18, 2020, the SBA issued a new "Interim Final Rule" (Docket Number SBA-2020-0030) providing a safe harbor for certain borrowers who may have misunderstood the SBA's foreign affiliation rules under the Paycheck Protection Program (PPP).

As a preliminary matter, the SBA reiterated in this Interim Final Rule that employees of a PPP loan applicant's foreign affiliates must be included for purposes of determining whether an applicant has more than 500 employees. However, the SBA also acknowledged that its earlier guidance in question 3 of its FAQ (which can be found [here](#)) may have misled borrowers into thinking that they could exclude their affiliates' non-U.S. employees. The SBA cleared up this confusion with question 44 of its FAQ, issued May 5, 2020, but acknowledged "reasonable borrower confusion" based on its earlier guidance. Therefore, in the new Interim Final Rule, the SBA has determined that it will exercise its enforcement discretion and that:

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-US 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.

The SBA further determined that those borrowers will "not be deemed to have made an inaccurate certification of eligibility solely on that basis."

### ***What Does This Mean for PPP Borrowers?***

If a borrower applied for a PPP loan prior to May 5, 2020, and did not include the employees of its foreign affiliates when determining whether it had 500 or fewer employees, that

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borrower will remain eligible to receive and utilize the PPP loan, so long as (a) the borrower, together with all affiliates (subject to limited exceptions to the affiliation rule expressly set forth in the CARES Act), had 500 or fewer US employees at the time of the application, and (b) the borrower otherwise meets the eligibility requirements under the CARES Act and related guidance. The borrower also will not be deemed to have made an inaccurate certification of eligibility solely because it excluded the foreign employees. However, any borrower applying after May 5 may not rely on this safe harbor when determining its eligibility for a PPP loan.

The Butzel Long CARES Act Specialty Team will continue to monitor guidance provided by the Department of Treasury and Small Business Administration, including concerns regarding eligibility, SBA affiliation rules, and loan calculations and forgiveness, as well potential modifications to the PPP by Congress.

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