

PPP Eligibility: Counting Non-U.S. Employees of Foreign Affiliates

The Paycheck Protection Program (PPP), as enhanced by the Paycheck Protection Program and Health Care Enhancement Act, authorizes up to \$659 billion in forgivable loans to eligible small businesses to help pay their employees during the COVID-19 crisis. Under the Interim Final Rules as published in the Federal Register and effective on April 15, 2020, a business will be eligible, among other potential grounds for eligibility, if, combined with its affiliates, it “has 500 or fewer employees whose principal place of residence is within the United States.”

For many entities, the question becomes how is the number of employees calculated for eligibility purposes. This requires application of various regulations and guidance with respect to what employees are counted, including with respect to when employees of related entities must be aggregated under “affiliation” rules.¹ An issue of particular confusion relates to businesses that have fewer than 500 employees residing in the United States, but that have employees, or affiliated employees, which, if aggregated, would result in more than 500 employees worldwide. Does the business have to count employees “whose principal place of residence” is not within the United States?

The initial rule may seem straightforward since it specifically limits the standard to employees “whose principal place of residence is within the United States,” but guidance in the form of Frequently Asked Questions (FAQs) from the Small Business Administration (SBA) have muddled this particular requirement.

Initially, on April 6, the SBA released FAQ #3, which generally clarifies that a business does not have to qualify as a “small business concern” as defined under the Small Business Act in order to participate if “the business has 500 or fewer employees *whose principal residence is in the United States*.” It repeats the language limiting employees counted as those residing in the United States.

Later, on May 5, the SBA released FAQ #44, which addresses the application of the SBA’s affiliation rules with regard to counting the employees of foreign and U.S. affiliates. It says, “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.”

¹ The Interim Final Rules provide some notable exceptions to the affiliation rules, including for the accommodation and food services sector.

There is currently debate about how to interpret this seemingly inconsistent guidance.

Some have read the reference in FAQ # 44 to foreign affiliates to mean that an applicant must include worldwide employees of foreign affiliates, and the SBA, in considering eligibility, will disregard the reference in the original rule that would otherwise limit counting to U.S.- resident employees. It may be another attempt by the SBA to block previously eligible companies which have been publicly perceived as too large to properly qualify for the PPP program, similar to SBA guidance backtracking eligibility for public companies.

Under another interpretation though, FAQ # 44 can be read consistently with previous statements that employees will only be counted if they reside in the United States. For example, when it says that all employees of foreign and U.S. affiliates must be counted, it may mean that if a U.S. company has employees that reside in the U.S., and a foreign affiliate of that U.S. company has employees that reside in the U.S., those two sets of U.S. residing employees must be counted together. Outside of FAQ #44, the SBA has fairly consistently included the language counting employees only to the extent they reside in the U.S. for the 500 or fewer employee size standard, and this interpretation would be consistent with those other statements. Furthermore, Question #44 does not specifically address the question of employees not resident in the United States – it is about affiliation. The SBA may just have left out the additional residency language inadvertently since that was not the core issue of the question.

Therefore, there are two viable interpretations of whether employees that reside outside the U.S. must be counted. While the SBA has been frequently updating its FAQs, it is unclear at this point whether additional guidance will be forthcoming.

Other factors may also weigh on which interpretation a business adopts when determining eligibility.

There are issues of the authority behind the FAQs. For example, to a certain extent, the FAQs as a matter of law hold less weight than the Interim Final Rules, where the U.S. residency limitation is explicit. The FAQs themselves state in the first footnote, "This document does not carry the force and effect of law independent of the statute and regulations on which it is based." That being said, there is still a practical risk of ignoring the FAQ guidance because, on a practical basis, the guidance is published by the SBA, who has a key role in enforcing whether eligibility requirements have been met. There is significant risk in ignoring how the rulekeeper understands the rules.

There are also issues of perception and scrutiny. To be eligible for a PPP loan, the business must certify in good faith that the "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." A business with a large number of foreign employees should consider how its need for the loan might be perceived, publicly and by regulatory authorities. As a matter of perception, businesses with large numbers of foreign employees may find themselves under public pressure not to utilize the PPP program, and foreign borrowers may receive even less favorable treatment and greater scrutiny by virtue of their foreign status, particularly given the current political climate.

In the end, there is no clear answer to the question of whether a business with less than 500 U.S. resident employees, but more than 500 worldwide employees, is eligible for the PPP program based on the fewer than 500 employee size eligibility standard. Penalties for obtaining a loan without meeting eligibility requirements range from criminal and civil penalties, to ineligibility for the loan forgiveness aspects of the PPP Program. Businesses trying to make this determination should consult counsel with respect to their particular situation, as well as to gain a better understanding of other eligibility standards that may be available.

If we can be of assistance and to discuss various options and specific situations, please feel free to contact any of the Buchalter Corporate Attorneys.



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