

May 2020

## Client Advisory

### Important Notice Regarding Recent SBA Guidance Relative to Paycheck Protection Program Calculation of 500 Employee Limit and Foreign Affiliations

Recent guidance promulgated by the SBA has caused confusion among loan applicants and practitioners with regard to how the Paycheck Protection Program's (PPP) employee size limitation is determined. The PPP is limited by the CARES Act to those businesses having 500 or fewer employees whose principal place of residence is in the United States, or meeting the SBA employee-based size standards for the industry in which the business operates (if greater). Guidance taking the form of Interim Final Rules and "Frequently Asked Questions" (FAQ) has up to this point offered a consistent interpretation as to how this limitation is calculated. However, a new "FAQ" was promulgated late this week which appears inconsistent with the component of previous guidance dealing with employees "whose principal place of residence is in the United States" and those of "affiliated entities." Applicants for, and recipients of, PPP loans should carefully review the following information if they have foreign affiliates that could cause the overall combined number of employees to exceed the program's 500 employee limit.

Previous guidance has offered, to this point, a consistent interpretation of the PPP's 500 employee limit. Section 2(a) of the Interim Final Rule issued by the Treasury Department with respect to the administration of the PPP loan program clearly states that the employee eligibility test is based upon employees with a principal place of residence in the US. FAQs 3 and 33 also specifically refer to this US residency requirement as being applicable to the 500 employee test and guide applicants as to how to determine US residency for this purpose.

On May 6th, FAQ #44 was released and it initially appeared that this guidance was intended to confirm that PPP affiliation rules were still in effect and employees of foreign affiliates who had their principal residence in the US still had to be counted toward the program's 500-employee limit. However, upon closer review, there is now an argument to be made that all employees of foreign affiliates may need to be counted when determining PPP eligibility. While there is nothing in FAQ #44 which expressly indicates that it reverses the earlier position taken by the SBA as to employees only being counted if they had their principal residence in the US, there is also nothing in FAQ #44 which references the US principal place of residence requirement. FAQ #44 simply refers to counting all employees for purposes of calculating compliance with the PPP's 500 employee eligibility standard. As such, this apparent inconsistency has caused confusion among program participants and practitioners.

Although the SBA has not yet addressed this apparent inconsistency, there is concern that it has changed the eligibility rules such that all employees of the applicant and its affiliates (wherever located) must be counted. If this interpretation of FAQ #44 is correct, it may be another attempt by the SBA to block out previously eligible companies which are now viewed by the media and the public as being "too large" to properly qualify for PPP small business funds. Several companies with less than 500 United States employees (but with large affiliates overseas) have reportedly returned their PPP funds as a result of the ambiguity created by FAQ #44.

Given the fact that FAQ #44 is the most recent SBA guidance on this issue and it does not expressly reference the US principal place of residence language, unless the SBA issues further guidance reconciling its seemingly contradictory position on this point, there is at least a possibility that a company with a large number of non-United States based affiliate employees may no longer be deemed eligible for the PPP program. Any clients who have received a PPP loan or are considering applying to the program – and have over 500 employees when counting affiliated entities – should reach out to their Archer attorney or any member of Archer's COVID-19 Task Force to discuss this new guidance in advance of the PPP safe-harbor date of May 14th.

Please reach out to your Archer contact or any member of Archer's COVID-19 Task Force with any questions you may have.

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