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## NEW PAYCHECK PROTECTION PROGRAM GUIDANCE ON AGGREGATING LOANS TO AFFILIATED BORROWERS AND COUNTING NON-U.S. EMPLOYEES

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The Small Business Administration (“SBA”) recently published guidance that clarifies how it will treat (1) loans to affiliated borrowers and (2) employees whose principal place of residence is outside of the United States, for purposes of determining eligibility and loan forgiveness under the Paycheck Protection Program (“PPP”). Below is a summary of the SBA’s stance on these items. If you have any questions about this or other issues related to the PPP, please contact us.

1. **Aggregating Loans to Affiliated Borrowers.** The SBA previously stated that it will review PPP loans in excess of \$2 million to determine if the borrower was in fact eligible to receive a PPP loan. The SBA recently clarified that it will also review a loan if the borrower, together with its affiliates, received loans that are \$2 million or more in the aggregate. In other words, a borrower that received a loan of less than \$2 million may still have its loan reviewed by the SBA if its loan, plus any loans to its affiliates, totals \$2 million or more. Every borrower that applies for loan forgiveness is required to state on its loan forgiveness application whether it, together with its affiliates, received loans in excess of \$2 million in the aggregate. The SBA’s affiliation rules are complex and highly fact-specific, so we strongly encourage borrowers that have not already done so to consult with their attorneys about how the SBA’s affiliation rules apply to them. More information about this can be found in the SBA’s Interim Final Rule on affiliates, which can be found at:

<https://home.treasury.gov/system/files/136/SBA%20IFR%202.pdf>.

2. **Counting Non-U.S. Employees.** Generally, a business is eligible to receive a PPP loan if it has no more than 500 employees. The SBA previously stated that borrowers should only count their U.S. employees for purposes of determining if they meet this size standard. However, the SBA recently published new guidance that directly contradicts this. To determine if a business is eligible for a PPP loan, that business must count all of its U.S. and foreign employees plus all of the employees of its U.S. and foreign affiliates. Recognizing that many borrowers relied on its earlier guidance to determine their eligibility for a PPP loan, the SBA has created a safe harbor: any borrower that applied for a PPP loan before May 5, 2020 will not be found to be ineligible for the loan if it has no more than 500 employees whose principal place of residence is in the U.S. It is worth noting that even though both U.S. and foreign employees are counted for purposes of determining eligibility for a PPP loan, only employees whose principal place of residence is in the U.S. are counted for purposes of calculating PPP loan forgiveness. More information about this can be found in the SBA’s Interim Final Rule on foreign affiliates, which can be found at:

<https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Treatment-of-Entities-with-Foreign-Affiliates.pdf>.

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