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SECOND DRAW PPP LOANS – WHO'S "IN" AND WHO'S "OUT"

On January 11, 2021, the United States Small Business Administration reopened the Paycheck Protection Program economic stimulus program which began under the CARES Act of 2020. In addition to making additional funds available to first time borrowers and further clarifying general PPP eligibility, Congress gave a subset of existing PPP borrowers a chance at a Second Draw loan. Eligibility for Second Draw loans is much narrower than the original PPP requirements and potential Second Draw borrowers should carefully review their eligibility before seeking a Second Draw PPP loan.

BACKGROUND

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act of 2020 (the "CARES Act") into law. Section 1102 of the CARES Act temporarily permits the SBA to guarantee 100% of loans granted under the Paycheck Protection Program ("PPP"). Under the PPP, the United States Small Business Administration (the "SBA") guaranteed forgivable loans to small business concerns and other qualifying borrowers. On December 27, 2020, the President signed the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (the "**Economic Aid Act**") and, among other things, extended the PPP to new first time borrowers and created a more stringent "Second Draw" regime for existing PPP borrowers to take additional forgivable loans.

SECOND DRAW ELIGIBILITY REQUIREMENTS

Like the original (now called "First Draw") PPP, potential Second Draw PPP borrowers must meet certain eligibility criteria. Borrowers who knowingly misrepresent their eligibility may be committing bank fraud or otherwise be civilly and criminally liable under applicable law.

As an initial matter, a borrower is eligible for a Second Draw PPP only if it (A) is a type of business concern or other entity or individual that is expressly eligible under the Second Draw PPP rules,^[1] (B) has 300 or less employees, taking into account the applicable SBA affiliation rules (unless an exception to these SBA affiliation rules applies), and (C) has experienced at least one fiscal quarter during 2020 where gross receipts were at least 25% less than the corresponding quarter in 2019 (although the reference quarter may vary for seasonal businesses or businesses that weren't in business during the corresponding fiscal quarter in 2019). In addition, the potential Second Draw borrower must also (1) have received a First Draw PPP loan and (2) have already used or will use its full First Draw PPP loan only on authorized uses under the PPP.

CONTINUED

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Several types of potential borrowers were per se ineligible persons under the First Draw PPP (such as hedge funds, illegal businesses, household employers, businesses in bankruptcy, and felons), whether or not they met the employee thresholds. The Second Draw PPP added to the enumerated list of per se ineligible persons by also including:

- Persons or entities primarily engaged in political activities or lobbying activities;
- Entities with significant investors organized in the People’s Republic of China or the Special Administrative Region of Hong Kong or with significant operations in such jurisdictions;
- Entities with a board member who is a resident of the PRC;
- Persons or entities registered under the Foreign Agents Registration Act of 1938 (which likely includes many law firms);
- Shuttered venue operations that receive grants under another section of the Economic Aid Act;
- Entities with significant investors who are senior members of government or their spouses;
- Public companies (which are now also *per se* ineligible for First Draw PPP loans);
- Those that have previously received a Second Draw PPP loan; and
- Entities that have permanently closed.

- First Draw PPP borrowers whose eligibility is currently being challenged by the SBA are also ineligible for a Second Draw PPP loan until the challenge is resolved.

SECOND DRAW PPP LOAN TERMS

Second Draw PPP loans generally have the same terms as First Draw PPP Loans (i.e., unsecured, five-year maturity, 1% simple interest, deferred payments, etc.) and loans are based on multiples of payroll costs. However, Second Draw PPP Loans are generally capped at \$2,000,000 in the aggregate. Newer businesses, franchises, farmers and ranchers, self-employed individuals and other types of borrowers may have different maximum borrowing amounts.

As with the First Draw PPP, Second Draw PPP borrowers must certify, among other things, that current economic uncertainty makes the loan request necessary to support ongoing operations of the applicant.

OTHER CHANGES TO PPP TERMS

The Economic Aid Act expanded the permitted uses of PPP loans to include not only payroll and benefits costs, rent, utilities and mortgage and other interest costs, but also covered operations expenditures, covered property damage costs, covered supply costs, and covered worker protection expenditures. These expanded permitted uses apply to both new First Draw PPP and Second Draw PPP loans.

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This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

The Economic Aid Act also clarified the tax treatment of expenses paid with PPP loan proceeds, which is discussed separately in connection with the other tax-related provisions of the Economic Aid Act.

CONCLUSIONS

Reopening the First Draw PPP and creating the Second Draw PPP provides welcome relief to businesses who continue to struggle with the effects of the COVID-19 pandemic and the related economic downturn. As with the First Draw PPP, borrowers should carefully

review their eligibility and intended use of proceeds to ensure that Second Draw PPP loans are properly obtained and used and to ensure the best chance at forgiveness once the loan proceeds are used up.

Visit Wiggin and Dana’s COVID-19 Resource Center [here](#) for additional publications and helpful links on multi-disciplinary topics that are relevant during the current COVID-19 global pandemic.