

Debt Financing The Tech Group White Collar Criminal Defense

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A Primer on Second Draw PPP Loans

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Certain provisions of the coronavirus/COVID-19 economic stimulus legislation are subject to the issuance of government regulations and other government action; thus, certain details regarding the legislation may be clarified or added.

I. Introduction

On December 27, 2020, President Trump signed the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act) into law to provide continued assistance to individuals and businesses that have been financially impacted by the ongoing coronavirus pandemic. The Economic Aid Act authorizes the U.S. Small Business Administration (SBA) to guarantee additional loans under the Paycheck Protection Program (PPP), which was originally established under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Section 311 of the Economic Aid Act added a new temporary section 7(a)(37) to the Small Business Act (15 U.S.C. 636(a)(37)). This new section authorizes the SBA to guarantee PPP Second Draw Loans (PPP Second Draw Program), under generally the same terms and conditions available under the PPP established under section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)). Under section 311 of the Economic Aid Act, SBA may guarantee loans under the PPP Second Draw Program through March 31, 2021 (Second Draw PPP Loans) to borrowers that previously received a PPP loan under section 7(a)(36) of the Small Business Act (First Draw PPP Loans) and have used or will use the full amount

of the initial PPP loan for authorized purposes on or before the expected date of disbursement of the Second Draw PPP Loan. On January 6, 2021, the SBA published an interim final rule (Second Draw IFR), which announces the implementation of key provisions of the Economic Aid Act.

II. Highlights of the Key Terms of Second Draw PPP Loans

Second Draw PPP Loans are generally subject to the same terms, conditions, and requirements as First Draw PPP Loans.¹ However, there are a few noteworthy distinctions:

a. Eligibility

In general, the Economic Aid Act made the eligibility requirements for Second Draw PPP Loans narrower than the eligibility requirements for First Draw PPP Loans. The following guidelines are applicable to borrowers seeking a Second Draw PPP Loan:

1. Borrower has 300 or fewer employees;²
2. Borrower experienced a 25 percent or greater revenue reduction in 2020 relative to 2019;³
3. Borrower previously received a First Draw PPP Loan; and
4. Borrower has used, or will use, the full amount of the First Draw PPP Loan (including the amount of any increase on such First Draw PPP Loan) on or before the expected date on which the Second Draw PPP Loan is disbursed to the borrower.⁴

¹ These terms include, but are not limited to, the following terms: (1) guarantee percentage is 100%; (2) no collateral will be required; (3) no personal guarantees will be required; (4) the interest rate will be 100 basis points or one percent, calculated on a non-compounding, non-adjustable basis; (5) the maturity is five years; and (6) all loans will be processed by all lenders under delegated authority, and lenders will be permitted to rely on certifications of the borrower to determine the borrower's eligibility and use of loan proceeds.

² Under the CARES Act, as an exception to the affiliation test, any single business that is assigned a NAICS code beginning with 72 and employs not more than 500 employees per physical location is eligible to receive a First Draw PPP Loan. Section 317 of the Economic Aid Act modified this provision for Second Draw PPP Loans by reducing the limit on employees per physical location to 300. Additionally, eligible news organizations with a NAICS code beginning with 511110 or 5151 (majority-owned or controlled by a business concern with those NAICS codes) if they employ 300 or fewer employees per physical location. See Section III, below.

³ See paragraph 7(a)(37)(A)(iv) of the Small Business Act.

⁴ See paragraph 7(a)(37)(O) of the Small Business Act.

b. Revenue Reduction Requirement

The borrower must have experienced a revenue reduction of 25 percent or greater.⁵ The Second Draw IFR specifies that any amount of a First Draw PPP Loan that a borrower received in calendar year 2020 is excluded from a borrower's gross receipts.⁶ This clarification ensures the effectiveness of the second draw loan program by ensuring that a borrower is not disqualified from receiving a Second Draw PPP Loan because it received forgiveness on a First Draw PPP Loan.

III. Affiliation Rules

The same affiliation rules and waivers that apply to First Draw PPP Loans apply to Second Draw PPP Loans, with a few exceptions⁷ as provided in the Second Draw IFR. The Economic Aid Act adds a waiver for:

- a. Eligible news organizations with a NAICS code beginning with 511110 or 5151 (majority-owned or controlled by a business concern with those NAICS codes) if they employ 300 or fewer employees per physical location;⁸ and
- b. Business concerns with a NAICS code beginning with 72 qualify for the affiliation waiver for the Second Draw PPP Loans if they employ 300 or fewer employees.

IV. Excluded Entities

An entity that is ineligible to receive a First Draw PPP Loan under the CARES Act is also ineligible for a Second Draw PPP Loan. For clarity, a borrower that received a First Draw PPP Loan despite being ineligible to receive the loan is not eligible to receive a Second Draw PPP Loan. The Economic Aid Act also prohibits several additional categories of borrowers from receiving a Second Draw PPP Loan. These categories are:

- a. A business concern or entity primarily engaged in political activities or lobbying activities, including any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or that describes itself as a think tank in any public documents;
- b. Certain entities organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or with other specified ties to the People's Republic of China or the Special Administrative Region of Hong Kong;

c. Any person required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938 ([22 U.S.C. 612](#));

d. A person or entity that receives a grant for shuttered venue operators under section 324 of the Economic Aid Act;

e. Entities in which the President, the Vice President, the head of an Executive department, or a Member of Congress, or the spouse of such person owns, controls, or holds at least 20 percent of any class of equity; and

f. A publicly traded company, defined as an issuer, the securities of which are listed on an exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934 ([15 U.S.C. 78f](#)).

Lastly, as required by the Economic Aid Act, any entity that has previously received a Second Draw PPP Loan may not receive another Second Draw PPP Loan.

V. Payroll Cost Calculation

Section 307 of the Economic Aid Act provides that the maximum loan amount for a Second Draw PPP Loan is equal to the lesser of two-and-a-half months of the borrower's average monthly payroll costs or \$2 million. Unlike the First Draw PPP Loans, the Economic Aid Act provides that the relevant time period for calculating a borrower's payroll cost for a Second Draw PPP Loan is either the twelve-month period prior to when the loan is made or calendar year 2019.

The Second Draw IFR also includes tailored payroll calculation methodologies for seasonal businesses, new entities that did not exist for the full twelve-month period preceding the Second Draw PPP Loan, and borrowers assigned a NAICS code beginning with 72 at the time of disbursement. For borrowers assigned a NAICS code beginning with 72 at the time of disbursement, the Economic Aid Act provides that the maximum loan amount is equal to 3.5 months of payroll costs rather than 2.5 months. These subsections also provide that, for a borrower with a NAICS code beginning with 72 that would fall into more than one category (for example, a business with a NAICS code beginning with 72 that is also a seasonal business or is also a new entity without 12 months of payroll costs), the borrower may calculate its average monthly payroll costs based on the methodology that applies to the entity but may use the 3.5 multiplier applicable

⁵ See paragraph 7(a)(37)(A)(iv) of the [Small Business Act](#). For clarity, a borrower must calculate this revenue reduction by comparing the borrower's quarterly gross receipts for one quarter in 2020 with the borrower's gross receipts for the corresponding quarter of 2019. Further, a borrower that was in operation in all four quarters of 2019 is deemed to have experienced the required revenue reduction if it experienced a reduction in annual receipts of 25 percent or greater in 2020 compared to 2019 and the borrower submits copies of its annual tax forms substantiating the revenue decline.

⁶ See <https://home.treasury.gov/system/files/136/PPP-IFR-Second-Draw-Loans.pdf> at pages 7-8 (for a more detailed discussion of the definition of "gross receipts" as it applies to both revenue and revenue reduction).

⁷ See [Second Draw IFR](#) footnote 16 (at page 10) for a list of exceptions.

⁸ In addition, any such news organization must make a good faith certification that the proceeds of the loan will be used to support expenses associated with producing or distribution locally focused on emergency information.

to businesses with a NAICS code beginning with 72. The Economic Aid Act also includes details on payroll calculations for First Draw PPP Loans for ranchers and farmers, but not for Second Draw PPP Loans.⁹

Additionally, the Second Draw IFR includes tailored calculation methodologies for self-employed individuals and partnerships. These methodologies have been adjusted to eliminate the provision for refinancing of an EIDL, which does not apply to Second Draw PPP loans, and to apply the choice of time period for calculating payroll costs, consistent with other Second Draw PPP Loans.

Finally, the Second Draw IFR provides that businesses that are part of a single corporate group shall in no event receive more than \$4 million of Second Draw PPP Loans in the aggregate.¹⁰

VI. Second Draw PPP Loan Application and Documentation Requirements

The documentation required to substantiate an applicant's payroll cost calculations is generally the same as documentation required for First Draw PPP Loans. The applicant must submit to the lender SBA [Form 2483-SD](#). No additional documentation to substantiate payroll costs will be required if the applicant (i) used calendar year 2019 figures to determine its First Draw PPP Loan amount, (ii) used calendar year 2019 figures to determine its Second Draw PPP Loan amount (instead of calendar year 2020), and (iii) the lender for the applicant's Second Draw PPP Loan is the same as the lender that made the applicant's First Draw PPP Loan.¹¹ For loans with a principal amount greater than \$150,000, the applicant must also submit documentation adequate to establish that the applicant experienced a revenue reduction of 25 percent or greater in 2020 relative to 2019.

VII. Loans to Borrower with Unresolved First Draw PPP Loans

If a borrower's First Draw PPP Loan is under review by SBA and/or information in SBA's possession indicates that the borrower may have been ineligible for the First Draw PPP Loan it received or for the loan amount it received, the lender will receive notification from SBA when the lender submits an application for a guaranty of a Second Draw PPP Loan and will not receive an SBA loan number until the issue related to the unresolved borrower's First Draw PPP Loan is resolved. SBA will set aside available appropriations to fund Second Draw PPP Loans applied for by unresolved borrowers in the event they are approved.

VIII. Loan Forgiveness

Loan forgiveness of Second Draw PPP Loans and the loan review process for Second Draw PPP Loans are generally subject to the interim final rules regarding loan forgiveness and SBA loan review procedures and related borrower and lender responsibilities. However, Second Draw PPP Loan Borrowers with a principal amount of \$150,000 or less are required to provide documentation of revenue reduction if such documentation was not provided at the time of the loan application.

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⁹ The Second Draw IFR clarifies that the same general calculation for farmers and ranchers applicable to First Draw PPP Loans applies to Second Draw PPP Loans, with adjustments that (i) eliminate the provision for refinancing of an Economic Injury Disaster Loan (EIDL), which does not apply to Second Draw PPP Loans, and (ii) apply the choice of time period for calculating a farmer's or ranger's payroll costs for Second Draw PPP Loans, consistent with other Second Draw PPP Loans.

¹⁰ For clarity, this figure of \$4 million is viewed as proportional to the \$20 million limit on the First Draw PPP Loans for such corporate groups.

¹¹ Note that the lender is still permitted to ask for additional documentation if the lender concludes that it would be useful in conducting a good-faith review of the borrower's loan amount calculation.

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