



CRISIS PRACTICE

Coronavirus

JANUARY 11, 2021

For more information,
contact:

Steve Cave
+1 703 245 1017
scave@kslaw.com

Lauren Horneffer
+1 703 245 1020
lhorneffer@kslaw.com

King & Spalding

Northern Virginia
1650 Tysons Blvd
Suite 400
McLean, VA 22102
Tel: +1 703 245 1000

PPP Round Three: Second Draws and Second Chances

On December 27, 2020, Congress passed the Economic Aid Act, another COVID-19 relief bill with changes to the Paycheck Protection Program (“PPP”) and the opportunity for many PPP loan recipients to apply for a second loan, called a “Second Draw.” On January 6, 2021, the Small Business Administration (“SBA”) issued two interim final rules: one with specific guidance on Second Draw loans and one with guidance on First Draw loans. First Draw loans are subject to the previous CARES Act requirements for eligibility and loan maximums. Second Draw loans are different: the loan limits are smaller, and eligibility is narrower. The dichotomy suggests that the SBA is attempting to narrow the field of eligible businesses for a second loan and discourage larger businesses from participating. Additionally, the new bill expands the list of forgivable (and permissible) uses for the PPP funds and simplified the forgiveness process for First Draw loans under \$150,000.

Who can obtain a loan under the new program?

1. New applicants who have never received a PPP loan; or
2. Borrowers that participated under the CARES Act that:
 - a. Returned some or all of the first loan¹; or
 - b. Kept the loan and used all of the proceeds for permissible purposes.

What are the eligibility criteria for a Second Draw loan?

- 300 or fewer employees (instead of 500 employees under the previous iteration), including all affiliates and foreign employees.
- Exceptions to affiliation:
 - Businesses with a primary NAICS code beginning with 72 (hotels and restaurants) are eligible if they employ 300 or less employees per location

(these entities continue to be exempt from broader affiliation issues, subject to the physical location limitation);



- News organizations with a primary NAICS code beginning with 511110 or 5151 (or majority-owned or controlled by a business concern with those NAICS codes) may qualify for the affiliation waiver for Second Draw PPP Loans if they employ 300 or fewer employees per physical location;
- Franchises assigned a franchise identifier code by SBA; and
- Businesses that receive a loan from an approved SBIC lender, under the Small Business Investment Act.
- In the absence of an applicable affiliation waiver, the same affiliation rules established and implemented under the CARES Act apply
- The borrower was in operation on February 15, 2020.
- The borrower is not a publicly traded company.
- The borrower is not in bankruptcy proceedings.
- The borrower is not a hedge fund or private equity firm.
- The loan must be *necessary to support the ongoing operations of the company*.
 - SBA has issued a Necessity Questionnaire confirming that the agency will closely scrutinize necessity certifications for businesses with first draw loans exceeding \$2 million. The form is intended to help the agency flesh out numerous facts about the borrower's finances and financial performance. Upon issuance of the form, many companies chose to repay PPP loans.
- The borrower must have used all of the funds from its first loan on permitted expenses (or, at least all of the funds retained by the borrower).
- The borrower must have had at least a 25% reduction in gross receipts in the first, second or third quarters of 2020 as compared to the same quarter in 2019.
 - The previous PPP loan is not included in gross receipts.
 - Gross receipts of a former corporate affiliate are not included.
 - Gross receipts of a segregable division of another business acquired in 2020 will not be included, but the receipts of a segregable division sold in 2020 will be included.
 - The IFR allows borrowers to compare 2020, as a whole, to 2019 – by using annual tax forms to demonstrate a 25 percent decline.

How much can a company borrow?

- First Draw loans: 2.5x the average monthly payroll up to \$10 million.
 - The prior \$20 million aggregate cap for affiliated corporate groups still applies.
- Second Draw loans: 2.5x the average monthly payroll up to \$2 million.
 - For companies with a primary NAICS code starting with 72, the company can borrow up to 3.5x monthly payroll, up to \$2 million.
 - There is a \$4 million aggregate cap for affiliated corporate groups on Second Draw loans.

What may the funds be used for?



The statute and interim final rules expand on the allowable, forgivable uses for PPP loan funds. These expanded uses also apply to previously issued PPP loans if the loan has not been forgiven as of the date of the Economic Aid Act. In addition to the costs and expenses that were permitted and forgivable under the CARES Act, borrowers may also use (and obtain forgiveness of) PPP funds for:

- Covered operations expenditures (such as software, human resources, and accounting needs);
- Covered property damage repairs related to public disturbances that occurred in 2020 (not covered by insurance or other compensation);
- Covered supplier costs (expenditures made by a borrower to a supplier of goods that are essential to operations of the borrower and made pursuant to a contract in place before the covered period for the applicable loan)
- Covered worker protection expenditures
 - Drive through window facility;
 - Air pressure ventilation or filtration system;
 - Physical barriers such as sneeze guards;
 - Expansion of indoor/outdoor business space;
 - Health screening capability; and
 - Personal protective equipment used to comply with federal, state, or local health and safety guidelines

The borrower must still use at least 60 percent of the PPP funds for payroll costs.

What changes were made to forgiveness?

- Economic Injury Disaster Loans (EIDLs) are no longer deducted from forgiveness payment amounts.
- Borrowers with First Draw PPP loans of \$150,000 or less are no longer required to submit any application or documentation in order to achieve forgiveness. They are still subject to audit and must maintain their employment records for four years, and all other records for three years following loan forgiveness.
- 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.
- Second Draw loans are generally subject to the same rules on forgiveness as First Draw loans.

The last day to apply for and receive a PPP loan is March 31, 2021.



ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 22 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising." View our [Privacy Notice](#).

ABU DHABI	CHARLOTTE	GENEVA	MOSCOW	RIYADH	TOKYO
ATLANTA	CHICAGO	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
AUSTIN	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	
BRUSSELS	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE	

¹ Special rules apply if the borrower returned part of the loan. The value of the second loan will be reduced by the amount of the first loan that was retained, subject to the relevant cap.