

PPP Loans and Small Business Debtors in Bankruptcy

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After the Paycheck Protection Program (the "PPP") was established in The Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), enacted on March 27, 2020, debtors in bankruptcy cases applied for PPP loans. The Small Business Administration (the "SBA") opposed PPP loans for debtors, and courts were split as to whether the SBA could block debtors from qualifying for and receiving PPP loans. Then Congress passed the Consolidated Appropriations Act, 2021 (Act) (Pub. L. No. 116-260), which was signed into law on December 27, 2020 (the "CAA"). The CAA amends the United States Bankruptcy Code to permit PPP loans to certain debtors, namely Subchapter V small business debtors, Chapter 12 family farmer debtors, and self-employed Chapter 13 debtors. However, there was a catch. The CAA further provides that PPP loans will be available only if the SBA Administrator in its discretion sends a letter to the Director of the Executive Office for United States Trustee acquiescing to PPP loans in bankruptcy. To date, the SBA has not acquiesced.

On March 3, 2021, the SBA released guidance in its FAQs with respect to borrowers who received PPP loans under the Cares Act and later became debtors in a bankruptcy case.

If a borrower that was eligible for a First Draw PPP Loan files for bankruptcy protection after disbursement of the First Draw PPP Loan, that borrower is eligible for loan forgiveness, provided it meets all requirements for loan forgiveness set forth in the PPP Interim Final Rules, including but not limited to, loan proceeds are used only for eligible expenses and at least 60% of the loan proceeds is used for eligible payroll costs."

FAQ No. 59. This is in line with what debtors in applicable bankruptcy cases have been doing – seeking loan forgiveness. The SBA further discussed whether a borrower that was eligible for a First Draw PPP Loan and files for bankruptcy protection after disbursement of the First Draw PPP Loan is eligible to apply for a Second Draw PPP Loan. According to FAQ No. 60:

No. Each applicant for a Second Draw PPP Loan must certify on the Second Draw Borrower Application Form (SBA Form 2483-SD) that the applicant and any owner of 20% or more of the applicant is not presently involved in a bankruptcy proceeding. Thus, a borrower that received a First Draw PPP Loan and files for bankruptcy protection after disbursement of the First Draw PPP Loan is not eligible to apply for a Second Draw PPP Loan.

This does not address the situation where the Second Draw Borrower has since exited bankruptcy and therefore "is not presently involved in a bankruptcy proceeding." Small businesses that have confirmed bankruptcy plans and are looking to receive a second draw should be able to apply so long as the First Draw PPP Loan can be forgiven and the SBA does not suffer a loss. The application for a Second Draw Loan asks, in part, whether the SBA suffered a loss as opposed to whether a default occurred. Having a default under the loan by the filing of the bankruptcy case does not necessarily mean that there has been a loss suffered by the SBA.

In the meantime, there remains no avenue for chapter 11 debtors to receive PPP Loans during the course of the bankruptcy case.

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