

CBA LPRC POSITION REQUEST FORM

The CBA Commercial Law and Bankruptcy Section position request is as follows:

1) Proposed legislative or regulatory concept:

A. First, the Section proposes that the United States Small Business Administration (the “SBA”) amend questions 1 and 2 on the *Paycheck Protection Program Second Draw Borrower Application Form* (the “Application”) immediately as described below:

a. The SBA should immediately amend Question 2 of the Application to define the term “delinquent” as follows:

For purposes of this Application, the term “delinquent” shall mean the failure to make a payment when due for a reason other than caused by COVID-19 or related governmental closure orders. If the delinquency occurred prior to March 13, 2020 the applicant shall not be eligible for a Second Draw PPP loan. If the delinquency occurred on or after March 13, 2020, the applicant shall be entitled to a Second Draw PPP loan provided that the other elements of eligibility have been met.

b. The SBA should immediately amend Question 1 of the Application to add the following sub-question:

If you answered “yes” to question 1, have you filed for bankruptcy under Subchapter V of Chapter 11, or Chapter 12 or Chapter 13?

B. Second, the Section proposes that the SBA Administrator should immediately issue the notice referenced in Section 320(f) of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* (“CARES II”).

2) A plain language explanation and rationale for advancing this position:

A. Question 2 Must be Modified, or Virtually Every Business Impacted by COVID-19 and that Has an Outstanding SBA Loan May Be Precluded from a Second Draw PPP Loan

Most businesses that have been impacted by COVID-19 (in particular small family owned restaurants and hospitality businesses) have received deferral of any outstanding SBA loans.¹ Thus, under one definition of delinquent, these businesses - the very firms that Second Draw PPP loans are most geared to help - will be ineligible. For example, “delinquent” can be defined as simply “being overdue in payment.” *Merriam Webster Dictionary*, available at: <https://www.merriam-webster.com/dictionary/delinquent> (Visited Jan. 17, 2021). Thus, applicants who have not made a payment when due, irrespective of the reason why, including, the existence of a forbearance arrangement, government order, etc., could be out of luck when attempting to avail themselves of the Second Draw PPP loan.

However, given the purpose of the CARES II Act, the regulations related thereto, and simple common sense, in this context, a more appropriate definition of “delinquent” should be with reference to an unpaid obligation for which there is no (a) COVID-19 related reason excusing non-

¹ <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/sba-debt-relief>
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payment and (b) effort by the applicant to resolve the debt or reach accommodation with its lender. It is antithetical to the purpose of the SBA to prevent the most impacted businesses from accessing the Second Draw PPP loans because COVID-19 caused preexisting loans to become delinquent.

B. Congress Intended for Small Businesses and Self-Employed Individuals to Be Able to Obtain PPP Loans While in Bankruptcy

CARES II § 320 manifests Congress' clear intent to allow certain bankrupt individuals and entities to obtain PPP loans. As long as used properly, these loans are entirely forgivable. Further, Congress built in protections for lenders if they are not. At present the SBA is *still* refusing to allow such otherwise eligible businesses and individuals from accessing PPP loans, because the notice referenced in CARES § 320(f)(1) has not been issued:

The amendments made by subsections (a) through (e) shall— (A) take effect on the date on which the Administrator submits to the Director of the Executive Office for United States Trustees a written determination that, subject to satisfying any other eligibility requirements, any debtor in possession or trustee that is authorized to operate the business of the debtor... would be eligible for a [PPP 2nd draw loan]

There can be no justifiable reason for the SBA not to issue this notice. Moreover, the use of the term “shall” means that the SBA must do so within a reasonable time.

C. The Application Should Be Amended to Give Effect to CARES II § 320(f)

As presently written, the Application states that a “yes” answer to question 1 will disqualify the applicant. However, CARES II § 320(f) states that is not the case. If a debtor in bankruptcy has filed under subchapter V of Chapter 11 (small business cases), Chapter 12 (family farmers), or Chapter 13 (individual wage earners), said debtors are permitted to receive Second Draw PPP loans.

3) Is draft regulation, legislation or proposed bill included?

Yes. Please see the response to #1 above.

4) What is the date of any legislative hearing, if known?

None.

5) Was this position previously approved by the CBA? If so, when does/did it expire?

No.

6) Is the CBA section or committee seeking to join a previously approved CBA section or committee position?

No.

7) Potential or actual CBA opposition from another CBA section or committee?

None known or anticipated.

- 8) Strength of section position (including process and results of section vote taken on issue):

The executive committee of the Section voted to support the Potential legislation on January 27, 2021.

- 9) Fiscal impact (on the state):

Numerous small businesses affected by COVID-19 in the State of Connecticut are ineligible to apply for Second Draw PPP loans due to the way the Application is currently drafted. Without the benefit of the loans, they are likely to fail, with no real prospect of reorganizing in bankruptcy. Thus, it is difficult to quantify the fiscal impact on the State, but it would be extremely negative.

- 10) Are you seeking "fast-track" approval? ¹

Yes.¹ The time to apply for Second Draw PPP Loans close on March 31, 2021. If these changes are not made to the Application, myriad small businesses will not qualify for the loans and be forced to close their doors without the PPP loans.

¹ A "fast track" recommendation will be submitted to the House of Delegates (HOD) or Board of Governors (BOG) at its next scheduled meeting (or, if between meetings of the HOD or BOG and during the legislative session, to the Executive Committee), and is warranted only when the Legislative Policy & Review Committee concludes that further analysis and study is unnecessary and where there is legitimate time pressure to address pending legislation.