

Strafford

Presenting a live 90-minute webinar with interactive Q&A

New Round of Paycheck Protection: SBA Application, Rules for First and Second Draws, Eligibility and Parameters

WEDNESDAY, FEBRUARY 24, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Kiamesha-Sylvia G. Colom, Partner, **Taft Stettinius & Hollister**, Indianapolis

Ralph F. (Chip) MacDonald, III, Of Counsel, **Jones Day**, Atlanta

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

New Round of Paycheck Protection:

SBA Application, Rules for First and Second Draws, Eligibility and Parameters

Presented by:

Kiamesha-Sylvia G. Colom

kcolom@taftlaw.com

Chip MacDonald

Cmacdonald@jonesday.com



February 24, 2021

Agenda

- The New PPP Act – *Economic Aid Act*
 - funds available and timeline
- Revisions to the PPP
 - Borrower eligibility
 - First Draw loans
 - Second Draw loans
- Loan forgiveness
- Tax treatment
- Alternative Stimulus Assistance

What did the New PPP Act: “PPP 2.0” change?

- Signed into law Dec. 27, 2020.
- Guidelines issued through Interim Final Rules released on:
 - January 6, 2021: [Interim Final Rule on Paycheck Protection Program as Amended by Economic Aid Act and Interim Final Rule on Second Draw Loans](#)
 - January 19, 2021: [Interim Final Rule on Loan Forgiveness Requirements and Loan Review Procedures as Amended by Economic Aid Act](#)
- SBA Procedural Notices
- Updated FAQs dated January 29, 2021
- PPP loan application expiration date is March 31, 2021
- Focus shift & balancing act

What did the New PPP Act: “PPP 2.0” change?

- An additional \$284.45 billion for initial and "second draw" PPP loans applied for by March 31, 2021.
- First Draw
 - Retroactive changes to “covered period”, expanded borrower eligibility, tax-deductibility (check your state rules), repeal of EIDL advance deduction, use of funds, etc.
 - First draw loan increases, “hold code” issues
- Second Draw
 - Limits borrower eligibility, strict size standard
 - Limited loan amounts

What are the specific changes to Borrower Eligibility?

- The “second draw” of PPP funding has a different set of eligibility requirements than the PPP did when originally introduced.
- Under the Stimulus Act, businesses are eligible if they:
 - Have less than 300 employees, or 500 employees if there is more than one physical location, or if the business fits under a size exception; and
 - Demonstrate a gross receipts reduction of 25% or more for any quarter of 2020 as compared to the same quarter of 2019, or a 25% reduction over the year of 2020.
- 501(c)6 non-profits are now eligible for second draw PPP Loans.
- Publicly-traded companies are no longer eligible.
- Entities with an association with China and, or Hong Kong are no longer eligible

What are the rules regarding allowable expenses?

- 60/40 percent split remains
- New eligible expense items under these retroactive new rules include:
 - Cloud-computing or work-from-home expenditures.
 - Property damage caused by civil unrest in 2020 that was not covered by insurance.
 - Certain supplier costs for perishable or other goods purchased under a written agreement.
 - Worker protection expenses, including PPE.
 - Certain additional employee group benefit premium payments.

What are the rules regarding allowable expenses?

- The payroll maximum per employee remains at \$46,154 for a 24-week covered period.
- However, the maximum amount is still \$15,385 for borrowers using the original 8-week covered period.
- Owner-employees, self-employed individuals and general partners are limited during the 8-week period to \$15,385, and \$20,833 during the 24-week period.

What are the loan amounts allowed under a “Second Draw” PPP Loan?

- Limits all “second draw” PPP loans to no more than \$2 million, or \$4 million for a corporate group
- NAICS code businesses beginning with 72 (accommodations and food service) can use the multiplier of 3.5 times the average 2019 or 2020 monthly payroll amount, instead of 2.5 times

What are some Loan Forgiveness issues that are currently being discussed?

- Simplified forgiveness application now applies to loans under \$150,000
- If the borrower has received forgiveness a “first draw” loan can no longer be increased.
- Some of the retroactive changes adjust a borrowers loan forgiveness application
- Borrower can choose a unique “covered period” as any time frame between eight and 24-weeks.
- Deferral period

What are some Loan Forgiveness issues that are currently being discussed?

- Loan necessity forms 3509 and 3510
- The EIDL Advance deduction has been repealed
- Resubmissions of loan forgiveness applications using form 3508S
- 150 days loan forgiveness timeline
- Correcting a loan forgiveness application
- Application of safe harbors

What are the federal tax rules related to the PPP?

- Section 1112 payments are excluded from gross income for the purposes of the Internal Revenue Code.
- Sec. 276 of the Consolidated Appropriations Act of 2021 clarified the tax treatment for PPP loans that are forgiven, it states:
 - “no amount shall be included in the gross income of the eligible recipient by reason of forgiveness ...”, and
 - “no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income ...”

What are some of the other stimulus benefits under the act?

- Allows for an extension and expansion of payroll tax credits.
- Provides an extension of SBA debt relief.
- Includes targeted expansion of the EIDL Program.
- Shuttered Venue Operators Grant

What does the targeted expansion of the EIDL Program consist of?

- Provides additional \$10,000 grants to eligible applicants.
- Applicants must:
 1. Be in a low-income community,
 2. Have suffered an economic loss of greater than 30 percent, and
 3. Have not more than 300 employees.

What is the additional SBA debt relief offered?

- Borrowers with qualifying loans approved by the SBA prior to the CARES Act to receive an additional three months of principal and interest (P&I), starting in February 2021.
- Payments capped at \$9,000 per borrower, per month.
- After the three month period ends, borrowers considered to be underserved (namely the smallest or hardest-hit by the pandemic) may receive an additional five months of P&I payments, also capped at \$9,000 per borrower, per month.
- For all SBA loans approved between Feb. 1 and Sept. 30, 2021, SBA will make payments of P&I for the first six months of newly approved loans (also capped at \$9,000 per month).

Are there any additional stimulus benefits clients can benefit from?

- Employee Tax Retention Credit (originally established under the CARES Act and were applicable through July 1, 2021) extended and expanded.
- Eligibility expanded by reducing the required quarter-over-quarter decline in gross receipts from 50% to 20%, or full/partial suspension of business.
- Threshold for treatment as a ‘large employer’ modified by increasing the 100-employee delineation for determining the relevant qualified wage base to employers with 500 or fewer employees.

Are there any additional stimulus benefits clients can benefit from?

- Limit on per-employee qualified wages raised from \$10,000 for the year to \$10,000 for each quarter.
- Has a per employee maximum of \$14,000.
- Expansion of SBA lending programs
 - **7(a) and Express Loan Programs**
 - Increases a lender's guaranty to 90 percent of the loan amount on 7(a) loans, including for Community Advantage loans, until Oct. 1, 2021.
 - Increase from \$350,000 to \$1 million for SBA Express loans on Jan. 1, 2021, through Sept. 30, 2021, at which point on Oct. 1, 2021, it will be reduced to \$500,000.
 - The Express Loan guaranty amount for loans of \$350,000 or less is temporarily increased from 50 percent to 75 percent, and for loans above \$350,000, the guarantee remains at 50 percent. On Oct. 1, 2021, the guarantee reverts to 50 percent for all Express Loans.

Are there any additional stimulus benefits my clients can benefit from?

- **504 Low-Interest Refinancing**

- Enhances the 504 refinancing rules in order to create reciprocity for refinancing between 504 and 7(a) programs.
- Grants authority through Sept. 30, 2023, for the SBA to establish a 504 Express Loan Program for the most experienced and successful 504 lenders to expedite 504 loans of less than \$500,000.

- **Recovery Assistance Under the Micro-loan Program**

- Enhances the micro-loan program to increase access to micro capital and technical assistance under the program for businesses impacted by the COVID-19 pandemic.
- Temporarily increases the amount of time that borrowers can repay their loans from six to eight years.
- Temporarily increases the outstanding aggregate amount each intermediary may borrow from \$6 million to \$10 million to expand their capacity to deploy more capital to small businesses.

PPA Loans Approved – SBA Report (Feb. 2, 2021)

Summary of All PPP Approved Lending

Loans Approved	Total Net Dollars	Total Lender Count
7,065,800	\$662,705,618,919	5,468

Summary of 2021 PPP Approved Lending

Loans Approved	Total Net Dollars	Total Lender Count
1,918,663	\$140,280,566,497	5,158

PPA Loans Approved – SBA Report (Feb. 2, 2021)

Loan Size for 2021 PPP

Loan Size	Loan Count	Net Dollars	% of Count	% of Amount
\$50K and Under	1,375,351	\$23,984,710,695	71.7%	17.1%
>\$50K - \$100K	230,155	\$16,482,705,016	12.0%	11.7%
>\$100K - \$150K	116,071	\$14,386,411,945	6.0%	10.3%
>\$150K - \$350K	121,011	\$27,401,341,139	6.3%	19.5%
>\$350K - \$1M	60,078	\$33,521,387,797	3.1%	23.9%
>\$1M - \$2M	15,836	\$23,782,123,068	0.8%	17.0%
>\$2M - \$5M	114	\$362,987,203	0.0%	0.3%
>\$5M	47	\$358,899,634	0.0%	0.3%

Administration Changes – February 22, 2021

- Institute a 14-day period, starting February 23, during which only businesses with fewer than 20 employees can apply for relief through the Program. 98 percent of small businesses have fewer than 20 employees.
- Help sole proprietors, independent contractors, and self-employed individuals receive more financial support. 70% of these businesses are owned by women and people of color. The loan calculation formula for these applicants offers more relief, and a \$1 billion set aside is made for businesses in this category without employees located in low- and moderate-income (LMI) areas.

Administration Changes – February 22, 2021 (cont'd)

- Eliminate an exclusion that prevents small business owners with prior non-fraud felony convictions from obtaining PPP relief. Currently, a business is ineligible for PPP if it is at least 20% owned by an individual who has either:
 - (1) an arrest or conviction for a felony related to financial assistance fraud within the previous five years; or
 - (2) any other felony within the previous year. Bipartisan reforms included in the PPP Second Chance Act are implemented by administrative action to eliminate the one-year look-back, unless the applicant or owner is incarcerated at the time of the application.

Administration Changes – February 22, 2021 (cont'd)

- Eliminate an exclusion that prevents small business owners who are delinquent on their federal student loans from obtaining Paycheck Protection Program Loans. Currently, the PPP is not available to any business owned at least 20% by an individual who is currently delinquent or has defaulted within the last 7 years on a federal debt, including a student loan.
- Ensure access for non-citizen small business owners who are lawful U.S. residents by permitting Individual Taxpayer Identification Numbers (ITINs) to be used for PPP applications. All lawful U.S. residents may access the program, but a lack of SBA guidance causes inconsistency in access for ITIN holders like Green Card holders or those here on a visa. The SBA will issue guidance.

Administration Changes – February 22, 2021 (cont'd)

- Addressing waste, fraud, and abuse across all federal programs. Unlike the previous round of the PPP, loan guaranty approval is now contingent on passing SBA fraud checks, Treasury's Do Not Pay database, and public records. The SBA now also conducts manual loan reviews for the largest loans in the PPP portfolio and a random sampling of other loans. The SBA has worked, and will continue to work, with its lender partners to create streamlined processes to resolve issues.
- Promoting transparency and accountability by revamping the PPP loan application.
- Working to update the SBA websites to help applicants find resources on these programs, understanding relief options and completing applications.

Administration Changes – February 22, 2021 (cont'd)

- Continuing extensive outreach to learn more about challenges and opportunities in the implementation of current emergency relief programs. And as part of the Administration's efforts to support America's small businesses, especially those in LMI communities, the Vice President spoke with the CEOs of major banks, to highlight the critical period ahead, the vital role that lenders have to play during this time, and the Administration's focus on PPP lending to underserved small businesses. The administration will continue to engage with communities to inform the design and delivery of vital programs that meet their needs.

Administration Changes – February 22, 2021 (cont'd)

- Enhancing the current lender engagement model. The SBA is launching a new initiative to deepen its relationships with lenders. This model will increase opportunity for lenders to provide recommendations and ask questions about the PPP and drive resolution of open questions and concerns.

PPP – Considerations for Lenders and Their Relationships with PPP Borrowers

- Existing Borrowers
 - Consents and Amendments to Permit PPP Loans
 - What restrictions and requirements to impose to ensure the PPP funds are used for Payroll Costs and other forgivable costs, to maximize loan forgiveness?
 - What effect does the PPP loan have on financial covenants?
 - Will the PPP loan violate any negative covenants on the incurrence of additional debt?
 - Will the PPP loan trigger any mandatory prepayment provisions?
 - KYC, AML/BSA and OFAC risks?
- New Borrowers
 - Effect on existing loan document with other bank (if any)?
 - KYC, AML/BSA and OFAC risks heightened concerns?
 - Increased fraud risks

PPP – Considerations for Lenders and Their Relationships with PPP Borrowers (continued)

- All Borrowers
 - Covenants in existing and subsequent credit documents
 - Default provisions
 - Set-off and deposit relationships
 - Preparing for and assisting PPP loan forgiveness
 - Mergers and acquisitions

Other Bank and Lender Issues

- Bank Business Continuity
 - Bank regulators encourage depository institutions to provide continuity of critical services and support to their customers and communities
 - PPP loans are one way that depository institutions can perform such services.
 - FDIC FIL 33-2020 (Apr. 2, 2020):

“The FDIC encourages financial institutions to consider using these programs in a prudent manner as they actively work with small business borrowers with less financial flexibility to weather near-term operational challenges due to the Coronavirus Disease 2019.”

Other Bank and Lender Issues (cont'd)

- Lender Compensation
 - Lenders will receive processing fees solely from the SBA for making PPP loan. Lenders' agents, including consultants, lawyers, accountants and other enumerated "agents" will receive fees payable solely from the lenders as follows:

Loan Amount	Processing Fee
Up to \$50,000	Lesser of \$2,500 or 50% of the loan amount
\$50,000 - \$350,000	5.00%
Greater than \$350,000 to \$2 million	3.00%
Greater than \$2 million	1.00%

- Lenders are not permitted to charge any fees to PPP borrowers.

Other Bank and Lender Issues (cont'd)

- What is an “agent,” and how is that relationship and service sufficiently established?
 - Documentation
 - The December 20 ‘Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act’ added PPP Lender Protections
 - Section 305 amends Section 7A of the Small Business Act to expands the liability protection to PPP lenders for initial and second draw loans
 - lenders may rely on any certification or documentation submitted by an applicant for an initial or second draw PPP loan or an eligible recipient or eligible entity receiving initial or second draw PPP loan that—
 - (A) is submitted pursuant to all applicable statutory requirements, regulations, and guidance related to initial or second draw PPP loan, including under paragraph (36) or (37) of section 7(a) and under this section; and
 - (B) attests that the applicant, eligible recipient, or eligible entity, as applicable, has accurately provided the certification or documentation to the lender in accordance with the statutory requirements, regulations, and guidance described in subparagraph (A).

Other Bank and Lender Issues (cont'd)

- No enforcement actions may not be taken against the lender, and the lender shall not be subject to any penalties relating to loan origination or forgiveness of the initial or second draw PPP loan, if—
 - (A) the lender acts in good faith relating to loan origination or forgiveness of the initial or second draw PPP loan based on that reliance; and
 - (B) all other relevant Federal, State, local, and other statutory and regulatory requirements applicable to the lender are satisfied with respect to the initial or second draw PPP loan.
- Effective date – retroactive and effective as if included in the CARES Act

Other Bank and Lender Issues (cont'd)

- Internal Controls and Safety and Soundness
 - Banks and their holding companies are subject to accounting and internal controls requirements under FDIC Regs. Part 363 and safety and soundness requirements under FDIC Regs, Part 364.
 - All public lenders are subject to internal controls and disclosure requirements under federal securities laws (SOX) and SEC regulations
 - These need to be considered in establishing and administering a PPP loan program, including loan forgiveness.

Other Bank and Lender Issues (cont'd)

- Capital
 - Loans are assets included in the denominator for calculating regulatory capital requirements. These include leverage ratio and risk-based capital requirements.
 - The SBA guarantee makes the risk weight of the PPP loans zero and the PPP provisions of CARES Act Section 1102 explicitly exclude PPP loans from risk-weighted capital.
 - The SBA guarantee of PPP loans will not, however, affect the calculation of the Tier 1 leverage ratio. Tier 1 tangible leverage ratios are important to regulators and investors. Community banks that have adopted the community bank leverage ratio as their sole capital measure should be especially careful when considering the capital needed to support PPP loans.
 - PPP loans financed by non-recourse loans from the Federal Reserve's PPP Lending Facility ("PPPLF") are not included in the leverage capital ratios. Interagency Interim Final Rule 85 FR 20387 (Apr. 13, 2020).

Other Bank and Lender Issues (cont'd)

- Bank Lending Limits
 - Section 84 of the National Bank Act and Office of the Comptroller of the Currency (“OCC”) Regs. Part 32 impose lending limits on borrowers and their related parties. Federal thrifts state depository institutions and credit unions have similar loan to one borrow limits.
 - OCC Regs. §32.3(b) provides special lending limits for U.S. government guaranteed loans, including loans to the extent guaranteed as to repayment of principal by the full faith and credit of the U.S. government, provided these guarantees are payable in cash or its equivalent within 60 days after demand for payment is made. The SBA should make clear that the PPP guarantees are payable within 60 days to qualify for this exception.
 - A loss of the SBA guarantee of a PPP loan because of borrower fraud would subject the PPP loan together with other loans of the borrower and other persons considered together with the borrower under OCC Regs. §32.5 to the OCC lending limits.

Other Bank and Lender Issues (cont'd)

- Bank Lending Limits

- State laws may not be as clear. Wild card laws allowing state institutions to exercise the same powers as national banks may be useful, but are not always self-executing, and may require implementation by the state regulators with respect to PPP loans.

- Regulation O and Loans to Bank Insiders

- Reg. O, including prior board of directors' approval, applies when making PPP loans to insiders and their related persons.
- Bank Interagency Interim Final Rule effective April 22, 2020 to temporarily allow banks to make PPP loans to businesses owned by their directors and certain shareholders, subject to certain limits and without favoritism, consistent with SBA's rules and restrictions.

Other Bank and Lender Issues (cont'd)

- Secondary Sales
 - CARES Act permits secondary sales of PPP loans without affecting SBA guarantee. See also SBA FAQ 30 (Jan. 20, 2021)
 - Such sales will require customary seller representations and warranties and buyback obligations for breaches, including breaches by the borrowers and loss of the SBA 100% guarantee, consistent with true sale considerations.
- Community Reinvestment Act and Other Bank Lender Benefits
 - Bank participation in PPP is expected by the government and may be viewed favorably by customers and regulators.
 - Participation should enhance banks' Community Reinvestment Act ("CRA") performance. Earnings will be increased mostly by the origination processing fee, not the fixed low rate of interest.
 - Loans made indirectly through CDFIs may be useful for CRA purposes.
 - Over the long term, returns on assets and capital may be reduced by PPP loans and investors may discount PPP fee income as transitory.

Other Bank and Lender Issues (cont'd)

- The PPP may have significant regulatory, customer and economic benefits. It is unlikely to boost bank shareholder value significantly except through long-term customer relationships. Tangible capital levels will remain critical measures to bank regulators and investors.
- The regulators' relief for banks' services to their communities during the current pandemic national emergency is limited by the need to provide such service prudently and consistent with safe and sound banking practices.
- Careful planning, underwriting and management of a PPP loan program and establishing aggregate limits on PPP loans held as part of a capital allocation strategy should be carefully considered by bank PPP lenders.
- Fintech “partnerships”

The Federal Reserve PPP Liquidity Facility (“PPPLF”)

- The Federal Reserve announced the PPPLF for depository institutions on April 9, 2020 and expanded it to all SBA eligible PPP lenders on April 30, 2020.
- Significant Terms:
 - Only PPP Loans guaranteed by the SBA are eligible collateral for the Facility. An eligible borrower may pledge SBA-guaranteed PPP Loans that it has originated or purchased. Extra documentation needs to be supplied for PPPLF loans secured by purchased PPP loans.

The Federal Reserve PPP Liquidity Facility (“PPPLF”) (cont’d)

- Federal Reserve Term Sheet (Nov. 30, 2020)
- Eligible borrowers
 - Depository institutions, including
 - CDFIs
 - Farm Credit System members
 - SBA lenders under 13 C.F.R. 120.10
 - Other eligible lenders
- Amount of PPPLF loan = principal amount of PPP loans.

The Federal Reserve PPP Liquidity Facility (“PPPLF”) (cont’d)

- The maturity date of the Facility’s extension of credit is the loan maturity date. Maturity also will be accelerated upon:
 - the extent of any loan forgiveness reimbursement received by the eligible borrower from the SBA;
 - Sale of PPP loans; or
 - The PPP loan goes into default

- Interest is 35 BP annually with no fees

- PPPLF originally terminated September 30, 2020, but has been extended by the Federal Reserve and the Treasury to March 31, 2021

- Capital – PPP loans have -0- capital required under leverage and risk capital rules.

- The Federal Reserve has extensive FAQs further defining the PPPLF

Enforcement and Oversight

- The CARES Act has a Congressional Oversight Committee similar to the TARP oversight committees and a House Select Committee on COVID-19 Pandemic
- SBA (including its IG)
- Office of the Special Inspector General for Pandemic Recovery provided by Section 4018 of the CARES Act
- Department of Justice

Enforcement and Oversight (cont'd)

- FDIC Inspector General and other bank regulators' IGs
 - FDIC IG has been active in PPP fraud cases.

Equal Credit Opportunity Act

- The Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. 1691 *et seq.*, as implemented by CFPB Regulation B, prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age.
- Regulation B prohibits creditors from requesting and collecting specific personal information about an applicant that has no bearing on the applicant’s ability or willingness to repay the credit requested and could be used to discriminate against the applicant.
 - CFPB FAQs (May 6, 2020)

SBA Nondiscrimination – Interim Final Rule

- On April 5, 2020, the SBA issued interim final rules addressing nondiscrimination and PPP eligibility criteria;
 - SBA regulations Part 113 impose regulatory requirements “to reflect to the fullest extent possible the nondiscrimination policies of the Federal Government as expressed in the several statutes, Executive Orders, and messages of the President dealing with civil rights and equality of opportunity.”
 - With respect to any loan or loan forgiveness under the PPP, the nondiscrimination provisions in the applicable SBA regulations incorporate the limitations and exemptions provided in corresponding Federal statutory or regulatory nondiscrimination provisions. . . .”

QUESTIONS?



Kiamesha-Sylvia G. Colom
Partner
kcolom@taftlaw.com
(317) 713-4430



Chip MacDonald
Of Counsel
cmacdonald@jonesday.com
(404) 581-8622