



CRISIS PRACTICE

Coronavirus

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PPP Loan Review Appeals

The Small Business Administration Office of Hearings and Appeals (SBA OHA) has begun accepting appeals of certain SBA loan review decisions under the Paycheck Protection Program (PPP), pursuant to an SBA interim final rule on PPP Loan Appeals, effective August 25, 2020. The interim final rule provided rules of practice for appeals of SBA loan review decisions under 13 CFR part 134. SBA had previously made it clear that it could review a loan at any time, at its discretion, pursuant to its interim final rule on Loan Review. Under the CARES Act, eligibility for the PPP loans is largely determined and certified by the borrower. This self-certification means that the SBA may subsequently determine that a borrower was ineligible for a PPP loan, and direct the lender to deny the loan forgiveness application (in addition to seeking repayment of the outstanding PPP loan balance and potentially pursuing other remedies). The denial of a forgiveness application is the only decision that can be appealed to OHA. Here are some key things to know about these appeals:

APPEAL PETITION

After having a request for loan forgiveness denied, the borrower may appeal the decision. The appeal petition must include the following information:

1. The basis for OHA's jurisdiction (this should include evidence that the appeal is timely filed in accordance with § 134.1204);
2. A copy of the SBA loan review decision that is being appealed, or a description of that decision if a copy is unavailable;
3. A full and specific statement detailing why the SBA loan review decision is erroneous, together with all factual information and legal arguments supporting the allegations;
4. The relief being sought (loan forgiveness);
5. Signed copies of payroll tax filings actually reported to the Internal Revenue Service (IRS), and State quarterly business and individual employee wage reporting and unemployment insurance tax filings actually reported to the relevant state, for the relevant periods of time, if not provided with the PPP Loan Forgiveness Application (SBA Form 3508,



SBA Form 3508EZ, or lender's equivalent), or an explanation as to why they are not relevant or not available;

6. Signed copies of applicable federal tax returns actually filed with the IRS with appropriate schedules (e.g., IRS Form 1040 with Schedule C/F) documenting income for self-employed individuals or partners in a partnership, if not provided with the PPP Borrower Application Form (SBA Form 2483 or lender's equivalent), or an explanation as to why they are not relevant or not available; and
7. The name, address, telephone number, email address and signature of the appellant or its attorney.

Although these requirements are generally consistent with OHA's rules, they add financial information that is integral to assessing compliance with PPP requirements, and eligibility more broadly.

FILING PROCESS

The appeal petition must be served on the Associate General Counsel for Litigation, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416, OLITService@sba.gov. In addition to the appeal petition, appellants must attach a signed certificate of service meeting the requirements of 13 CFR § 134.204(d).

TIMELINESS

Appeal petitions must be filed within *30 calendar days* of (i) the appellant's receipt of the final SBA loan review decision, or (ii) notification by the lender of the final SBA loan review decision, *whichever is earlier*. Untimely petitions will be dismissed.

STANDING

Only borrowers on a PPP loan for which SBA has issued a final SBA loan review decision has standing to appeal the decision to OHA. Individual owners of a borrower and lenders do not have standing to appeal. Borrowers may not appeal a *lender's* decision regarding PPP loans to OHA but must instead appeal that decision to SBA. Appeals may be dismissed for lack of standing.

ADMINISTRATIVE RECORD

Upon receipt of an appeal, the matter will be assigned to an Administrative Law Judge or Administrative Judge who will issue a Notice and Order establishing a deadline for production of the administrative record. Typically, the administrative record is due 20 calendar days after the issuance of the Notice and Order and the record will close 45 calendar days from OHA's receipt of the appeal.

SBA is required to produce all relevant documents that it considered in making its final decision, though it may claim privilege to certain materials. The record must be certified and authenticated as complete and correct. The appellant may object within *10 calendar days* to any privilege claims or to the absence of any document in the administrative record that the appellant believes should have been included.

Evidence beyond the record and discovery are generally not permitted in OHA's appellate proceedings. SBA may request discovery and the Judge may permit it upon a showing of good cause. The Judge may order an oral hearing upon concluding there is a genuine dispute of material fact that cannot be resolved without taking testimony and confronting witnesses.



CONFIDENTIAL INFORMATION

If a filing or other submission made pursuant to an appeal contains confidential business and financial information, personally identifiable information, source selection sensitive information, income tax returns, or other exempt information, such information is not available to the public under the Freedom of Information Act.

SBA or the appellant may seek a protective order over any document or information filed pursuant to an appeal.

SBA RESPONSE

Prior to the close of record, SBA may respond to the appeal with a Response setting for the relevant facts and legal arguments to the issues presented on appeal. No reply to the Response is permitted unless the Judge directs otherwise.

DECISION

The Judge will issue a decision within 45 calendar days of the close of record, containing findings of fact and conclusions of law. The standard of review for the Judge's decision is clear error of fact or law, and the appellant has the burden of proof. The clear error standard of review is highly deferential; the Judge must determine that a finding is unsupported by substantial, credible evidence.

The Judge's decision is only an initial decision, which appellant may request for review or request reconsideration.

REMEDIES

OHA may affirm, reverse, or remand an SBA loan review decision. If remanded, OHA will no longer have jurisdiction unless a new appeal is filed as a result of a new SBA loan review decision. Appellants are not entitled to recover attorney's fees under the Equal Access to Justice Act.

APPEALS

Reconsideration: OHA's decision may be reconsidered. Either SBA or the appellant may file a request for reconsideration with the Judge within 10 calendar days of service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. A Judge may also reconsider a decision on his or her own initiative within 20 calendar days of service of the written decision.

Review by the SBA Administrator: Any party, or SBA's Office of General Counsel, may file and serve a request for review by the Administrator within 30 calendar days of service of an initial decision or reconsidered initial decision. A borrower must request Administrator review in order to exhaust its administrative remedies and preserve its right to seek judicial review of an SBA final decision in a federal district court.

District Court: After an appellant has exhausted all administrative remedies, including review by the Administrator, it may file its appeal with a federal district court.

CASE LAW

OHA decisions are generally published and are available on SBA's website. So far, OHA has not yet issued any decisions on PPP Loan Review appeals. If appeals are filed promptly after the interim final rule, the decisions would likely be available approximately 90 days after filing (45 days for the record to close and 45 days for the Judge's decision). Until then, these appeals remain novel and the guiding case law in other OHA size protest decision will only be of limited use.



King & Spalding has helped hundreds of small businesses obtain PPP loans and we have unique insight, expertise, and market data relevant to borrowers. Our attorneys are ready to assist with all aspects of loan forgiveness including an appeal if one is necessary.

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.

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