

## Resources

### PPP Loan Insights: Forgiveness Does Not Mean Forgotten – Part IV

September 1, 2021

#### ***SBA Updates Guidance on Appeals of PPP Loan Decisions***

The Small Business Administration (SBA) recently issued an interim final rule governing the appeals process for decisions regarding Paycheck Protection Program (PPP) loans. The rule, which took effect July 28, 2021, permits borrowers to defer principal and interest payments until after the SBA rules on a borrower's timely appeal and thus making an appeal especially attractive to borrowers. To prepare for the appellate process, it is important to know what is appealable and how to properly file an appeal, especially given that the SBA is still evaluating PPP loans and rendering decisions, and the SBA "may undertake a loan review at any time in the SBA's discretion."

Recent trends make clear that there will be an increase in challenges to eligibility based on SBA's ramped-up initial loan review process, coupled with the inevitable audits that can occur up to six years after the loan forgiveness date. The SBA continues to ask for additional documentation for loans, especially loans of more than \$2 million and those borrowers it perceives as higher-risk (e.g., private equity-backed, public companies, foreign businesses, etc.), and has hired hundreds of forensic accountants and investigators to perform those reviews. Finally, independent organizations and government entities are analyzing loan data and continue to find massive levels of fraud and misrepresentation, which could result in legal challenges (e.g., regulatory enforcement actions, subpoenas, indictments, whistleblower/qui tam, etc.) and potentially provide the SBA, and other government agencies such as the SBA OIG, SIGPR, and DOJ with information that will likely be used to help inform which loans should be challenged. These developments amplify the importance of understanding and preparing for the appeals process.

A decision is appealable if the SBA, after review, finds that the borrower (1) was ineligible for a PPP loan; (2) was ineligible for the loan amount received or used the PPP loan proceeds in a manner not authorized by the loan; (3) is ineligible for loan forgiveness in the amount determined by the lender; or (4) is ineligible for loan forgiveness in any amount.

The appeal must be filed with the Office of Hearings and Appeals (OHA) within 30 days of the earlier of (1) the borrower's receiving the SBA's decision or (2) notification by the lender of the final SBA decision. Only the borrower itself may appeal the decision. Shareholders and members of the borrower cannot file appeals.

An appellate petition must include:

- the basis for the OHA's jurisdiction;
- a copy of the decision being appealed;
- a statement, supported by all available evidence, explaining why the decision was incorrect;
- the relief requested;
- signed copies of payroll tax filings, or an explanation of why they are not relevant or available;
- Signed copies of applicable federal tax returns filed, with appropriate schedules documenting income for self-employed individuals or partners in a partnership, or an explanation of why they are not relevant or not available; and
- contact information for the appellant or the appellant's attorney.

Once the SBA receives the appeal, the OHA will assign it to an administrative law judge. Unless the appeal is dismissed, the judge will issue a notice and order establishing a deadline for production of the administrative record, which will typically be

due within 20 days of issuance. The record will close 45 calendar days from the date of the OHA's receipt of the appeal unless additional time is requested and granted. All parties or their attorneys will receive a copy of the notice and order.

The judge will issue a decision within 45 days of the closing of the record. That decision will become a final SBA decision 30 days after its service unless the borrower files a request for final review or request for final consideration with the SBA administrator. An appeal to the OHA and request for review constitute administrative remedies, which must be exhausted before lenders can bring their disputes before the court.

The stakes can be high when contesting loan forgiveness determinations, and deadlines pass quickly. It is important to follow procedures carefully and to be cognizant of the many rules governing the review or challenge of an SBA decision. A knowledgeable and prepared team can make all the difference in prevailing on appeal.

Both Dykema and Stout have professionals on staff who have handled similar government reviews, denials, and appeals, both for the government in areas outside of PPP, and against the government. We are able to apply that experience and knowledge to help you assess your position under the PPP, prepare administrative appeals, and ultimately, challenge adverse SBA and lender decisions in court. We also are able to provide other *ad hoc* PPP loan assistance to meet the needs of our clients based on each client's specific facts and circumstances.

Watch for our PPP Loan Insights:

- Forgiveness Does Not Mean Forgotten – Part I
  - SBA Post-Form 3509/3510 Information Requests, July 27, 2021
  - [Video] PPP Loan Insights: Forgiveness Does Not Mean Forgotten – Part I
- Forgiveness Does Not Mean Forgotten – Part II
  - Ongoing SEC Disclosure Obligations, August 3, 2021
  - [Video] PPP Loan Insights: Forgiveness Does Not Mean Forgotten – Part II
- Forgiveness Does Not Mean Forgotten – Part III
  - Preparing for Your SBA Audit and Appeal, August 10, 2021
- Forgiveness Does Not Mean Forgotten – Part IV
  - SBA Updates Guidance on Appeals of PPP Loan Decisions, September 1, 2021
- Forgiveness Does Not Mean Forgotten – Part V
  - Preparing for M&A/Financing Due Diligence Examinations, Release Pending
- Forgiveness Does Not Mean Forgotten – Part VI
  - Preparing for Government Contract Reimbursement Audits, Release Pending

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## Practice Areas

Business & Commercial

PPP Loan Insights: Forgiveness Does Not Mean Forgotten – Part IV (Cont.)

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