

A PPP Borrower's Predicament – When The SBA Denies Loan Forgiveness – Contest It - Appeal!

Before the SBA “Reviews” Your Loan for “Forgiveness” – Be Prepared! If the SBA Denies Loan “Forgiveness” – You MUST Appeal!

1. The PPP Program And SBA “Reviews.”

The SBA heads up the Paycheck Protection Program (PPP) Loan program established under § 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116-136). Billions of dollars have been lent under that PPP program. Now, the SBA is pursuing “reviews” of those loan applications to determine if the PPP loan will be “forgiven” in whole or in part. A “decision” by the SBA that the loan will not be forgiven, in whole or in part, will require the borrower to pay back the loan.

The SBA announced in the fall of 2020 that it will start with “reviews” of “loan eligibility” for loans over \$2 million. That does not mean loans under that level are “off the hook.” This is just where the SBA is starting its process.

The process begins with a “review” by the lender or the SBA of “loan eligibility” as of the time when the loan was made. The notice of a “review” could show up any day and the advance notice time could be short. So, the borrower must be prepared. Waiting until the SBA advises the borrower it will commence “review” could be too late. That means that the borrower must have its “ducks in a row” before the SBA comes calling. Careful and thorough preparedness can be accomplished with the assistance of experienced accountants, business consultants, and lawyers.

This review is not a full “audit” process. An “audit” could be demanded years later after the “review.” Among other things, in the course of the “review,” the SBA can consider the borrower’s use of the funds borrowed, the borrower’s financial performance subsequent to the funding of the loan, and the accuracy of the information provided with the loan application.

2. Appeal From An Adverse SBA Decision.

Should the SBA review the borrower’s documentation and decide “loan forgiveness” will

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not be allowed in whole or in part, the borrower can either accept the “decision” or fight it. The only way to fight the adverse “decision” is to appeal!

The only appeal process allowed by law is set out in the SBA regulations found at 13 CFR § 134.1204, *et seq.* The decision on the appeal will be made by an administrative law judge (ALJ) who will review the petition filed by the borrower, the response of the SBA, and the “record,” that is the documentation submitted by the borrower and the SBA. However, in order to obtain a reversal of the denial of loan forgiveness, the borrower must convince the ALJ that “the SBA loan review decision was based on clear error of fact or law.” 13 CFR § 134.1212. That is very difficult to prove because courts have ruled that “clear error of fact or law” means that “although there is evidence to support [the decision], the [administrative law judge] . . . is left with the definite and firm conviction that a mistake has been committed.” *Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 622, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993); *see also, PGBA, LLC v. United States*, 389 F.3d 1219, 1224 (Fed. Cir. 2004). All of that means that thorough preparation and diligent prosecution of the appeal is absolutely necessary.

Deadlines are critical in this appeal process. The appeal must be perfected or filed with the SBA’s Office of Hearing and Appeals (OHA) *within 30 calendar days* after the appellant’s receipt of the final SBA loan review decision, or notification by the lender of the final SBA loan review decision, whichever is earlier.

This 30-day deadline is rigid. Even if the borrower thinks the SBA “decision” will be that the PPP loan is forgiven, the borrower must be prepared to appeal a “surprise” denial of loan forgiveness. The commencement of that appeals process requires far more than just telling the OHA the borrower is appealing. The appeal process must begin with the filing of an Appeal Petition. 13 CFR § 134.1202.

That appeal petition must include seven specific points of information. Some of those points require attachment of very confidential, signed payroll tax filings with the Internal Revenue Service and state authorities. Note in particular points 5 and 6 below. Here is a summary of those points:

1. The basis for OHA's jurisdiction, including, but not limited to, 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 as to why the SBA loan review decision is alleged to be erroneous, together with all factual information and legal arguments supporting the allegations;
4. The relief being sought;
5. *Signed copies of payroll tax filings actually filed with 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. 13 CFR § 134.1202. (Emphasis added).

This appeals process is supposed to last a relatively short time as compared to court litigation. For instance, the documentation that the administrative law judge must review is what is in the record or on file, 45 days after the appellate petition is filed. 13 CFR § 134.1207. Then, the regulations require the ALJ issue his/her opinion “*within 45 calendar days after the close of record, as practicable.*” (Emphasis added) 13 CFR § 134.1213. That “as practicable” qualifier is a clear message that the decision of the ALJ could be issued well after the expiration of 45 days. The full extent of that time period will probably depend, among other things, on the workload of the ALJ.

The ALJ’s decision is obviously critical, but one last step is available for review. That is after the ALJ’s decision is final, the losing party may appeal to the federal court for review. 13 CFR § 134.1215; § 134.1216. That court will review the same issues as were reviewed by the ALJ. If the court decides the ALJ’s decision was in error, that decision could be reversed.

Many critical issues can crop up during the course of the appeal process. That could include the need for the borrower to seek protective orders from the ALJ respecting the production to the SBA of attorney-client privileged information or confidential information that must be protected from access by competitors. So, in that regard, even though the appellate process could be completed in a relatively short period of time, vigilance and preparedness is mandatory.

3. Preparedness Is Critical.

Essential to this whole process is thorough advance preparation. Without full preparedness, a borrower could be surprised and lose the fight.