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PPP Loan Forgiveness Appeal Process: What Businesses Need to Know

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The implementation of the CARES Act's Paycheck Protection Program (PPP) has caused great uncertainty among borrowers, lenders, lawyers, and accountants (among others) as to how to properly comply with the intricacies of the CARES Act and related guidance. The confusion around eligibility, necessity, use of funds, and fund forgiveness, in particular, has left many borrowers concerned that they could potentially lose loan forgiveness eligibility or be subject to civil and criminal penalties.

The Small Business Administration (SBA) has the authority to review all loans disbursed under the PPP. It has announced its intention to review all loans greater than *\$2 Million*, including separate loans to affiliated borrowers that total more than *\$2 million*, for compliance with the certification of need provisions of the loan applications. As borrowers start to apply for PPP loan forgiveness, prudent borrowers are already beginning to prepare for the worst case scenario – an adverse SBA loan review decision exposing the borrower to liability. To be fully prepared, borrowers need to fully understand the audit process and should already be compiling the necessary documentation to respond to any potential adverse ruling.

On August 11, 2020, the SBA released an Interim Final Rule providing guidance for borrowers to appeal SBA loan review decisions under the PPP. Borrowers may be able to appeal an SBA loan review decision to the SBA Office of Hearings and Appeals (OHA). Specifically, borrowers may be able to appeal an SBA loan review decision when the SBA finds that a borrower:

- Was ineligible for a PPP loan;
- Was ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses;
- Is ineligible for PPP loan forgiveness in the amount determined by the lender in its full approval or partial approval decision issued to the SBA; and/or

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- Is ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to the SBA.

A borrower must file an appeal petition with the OHA “within 30 calendar days after (1) the borrower’s receipt of the final SBA loan review decision, or (2) notification by the lender of the final SBA loan review decision, whichever is earlier.” Among other requirements, the appeal petition must include a copy of the SBA loan review decision being appealed, a statement as to why the SBA loan review decision is erroneous, the relief being sought by borrower, copies of federal tax returns filed with the IRS, and copies of federal and state payroll tax, wage reports, and unemployment insurance tax filings. Because of the short window for appeal, as well as the amount of information required to be submitted along with the appeal, borrowers need to be in a position to act quickly once the SBA has issued an adverse decision.

Once a borrower has filed an appeal petition with the OHA, the OHA will assign the matter to either an Administrative Law Judge or Administrative Judge for review. The Judge will review the entire administrative record, borrower’s appeal petition, the SBA’s response, admitted evidence, and oral arguments, if any, in determining whether the SBA loan review decision was based on clear error of fact or law. The “OHA may affirm, reverse, or remand an SBA loan review decision.”

The Judge’s decision on appeal is an initial decision that will become a final SBA decision, within 30 calendar days after its service, if the borrower, SBA or Judge does not request reconsideration or the borrower or SBA does not request a formal review by the Administrator. “An appeal to OHA and request for review by the Administrator of a disputed initial decision or reconsidered initial decision are administrative remedies that must be exhausted before judicial review of an SBA loan review decision may be sought in a federal district court.”

The Butzel Long CARES Act Specialty Team will continue to monitor guidance provided by the Department of Treasury and the SBA on the PPP loan review decision appeal process. In the meantime, if you have any questions or concerns about the PPP loan review decision appeal process or how the SBA’s guidance may impact your business, or if you would like to engage members of the Specialty Team to review your documentation, prepare for and/or pursue any SBA appeal, please feel free to contact us.

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