

PPP Loan Audits: What to Expect, and How to Appeal

Practices

Banking and Finance

Corporate Law

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The Paycheck Protection Program (PPP), as established by the CARES Act and subsequent guidance found in the PPP Interim Final Rules, provides loans and loan forgiveness based on borrower's certifications and documentation provided by the borrower. Given the politically sensitive nature of the program, including a fair amount of public scrutiny and the heavy reliance on borrower-provided information, the SBA has announced that it will be auditing loans. This client alert provides a brief insight into what a business should expect should their loan be audited, including what will be considered, and how to file an appeal of an SBA decision. Note the PPP parameters are constantly evolving, including the audit process, and information contained herein is subject to change.

Who will be audited, and when might an audit be expected?

The SBA decided, in consultation with the Department of Treasury, that it will review all loans in excess of \$2 million following the lender's submission of the borrower's loan forgiveness application. That being said, the SBA has reserved the right to also audit loans in any amount at any time, and will likely "spot check" loans in lower amounts. If SBA decides to audit a loan, SBA will notify the lender in writing, and the lender then will notify the borrower in writing within five business days of the correspondence from the SBA.

Note the borrower must retain PPP documentation in its files for six years after the date the loan is forgiven or repaid in full, and the borrower must permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.

What will likely be considered?

According to an interim final rule issued by the SBA, the following factors will be considered:

Eligibility: The SBA Administrator will consider whether a borrower was eligible for a PPP loan under the CARES Act and SBA rules/guidance available at the time of the borrower's application. Note the following from the SBA's FAQ:

"When submitting a PPP application, all borrowers must certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.

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Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance."

Loan Amount: The SBA Administrator may review whether a borrower calculated the loan amount correctly.

Use of Proceeds: The SBA Administrator will analyze whether the borrower used the proceeds for the purposes Congress enumerated and in line with the CARES Act's central purpose of keeping workers paid and employed. Proceeds will need to have been spent on allowable uses specified under the CARES Act: payroll costs, interest on mortgages, rent, utilities, and interest on any other debt obligations incurred before February 15, 2020.

Loan Forgiveness Calculation: The SBA Administrator will analyze whether the subject borrower calculated its expected loan forgiveness amount properly on its application (the SBA Form 3508 or a lender's equivalent form).

May a borrower respond to an audit?

Yes. The SBA may require the lender to contact the borrower in writing to request additional information, or the SBA may request the information directly from the borrower. The SBA has stated that it will consider all information provided by the borrower in response to such an inquiry. If a borrower fails to respond to such a request for information, the SBA may determine the borrower was ineligible for the loan, or for forgiveness in whole or in part. As such, it is crucial your business respond promptly, and thoroughly, to any and all requests.

Is there an appeal process?

Yes. According to a recent interim final rule issued by the SBA, the appeal will be heard by the SBA Office of Hearings and Appeals (OHA). The appeal must be filed within 30 calendar days after (1) the appellant'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. Note an appeal by a borrower of the SBA's decision does not extend the deferral period of the PPP loan.

The appeal petition must include the following information:

1. The basis for OHA's jurisdiction, including, but not limited to, evidence the appeal is timely filed in accordance with § 134.1204;
2. A copy of the SBA loan review decision 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 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.

The appellant must serve a copy of the appeal petition with attachments on the following:

Associate General Counsel for Litigation

U.S. Small Business Administration

409 Third Street SW

Washington, DC 20416

OLITService@sba.gov

Once an appeal is filed, an Administrative Law Judge or Administrative Judge will be assigned to the appeal. The judge will consider the SBA's administrative record, the appellate petition, and the SBA's answer when making a decision. The judge will issue a decision within 45 calendar days after the close of record, as practicable, which will have findings of fact and conclusions of law, the reasons for said findings and conclusions, and any relief ordered. This decision will be served on each party. The judge's decision is an initial decision, but unless a request for review is filed pursuant to § 134.228(a), or a request for reconsideration is filed pursuant to paragraph (c) of § 134.1213, an initial decision will become the final decision of SBA 30 calendar days after its service.

The information herein is by no means exhaustive, and is subject to change. Please reach out to a member of our robust team for help if your business is currently involved in an audit by the SBA, or if your business would like to file an appeal of a decision by the SBA.