Proskauer

Paycheck Protection Program – Borrower Appeals of Final SBA Loan Review Decisions

September 24, 2021

On September 16, 2021, the U.S. Small Business Administration ("SBA") issued an Interim Final Rule (the "Borrower Appeal Rule") detailing the (largely technical) procedures for a Paycheck Protection Program ("PPP") borrower to appeal certain final PPP loan review decisions to the SBA's Officer of Hearings and Appeals (the "OHA").[i] The below summarizes the process for appealing a final SBA loan review decision. For a more complete guide on PPP in general, please see our standing client alert *Paycheck Protection Program – Where Are We Now*, a leading resource on the Paycheck Protection Program.

Scope of Appeals.[ii] A final SBA loan review decision that is appealable is an official written decision by the SBA, after the SBA completes a review of a PPP loan (whether a first draw PPP loan or second draw PPP loan), in which it finds a borrower: (1) was ineligible for a PPP loan; (2) was ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses; (3) is ineligible for PPP loan forgiveness in the amount determined by the lender in its full or partial approval decision issued to the SBA; and/or (4) is ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to the SBA. A borrower **cannot** directly appeal to OHA a decision made by a lender concerning its PPP loan in respect of that borrower's application for PPP loan forgiveness. Such a borrower must first request an SBA review of a lender decision and then such final review by the SBA would be subject to an OHA appeal. An appeal to OHA is an administrative remedy that must be exhausted before judicial review of a final SBA loan review decision may be sought in a federal district court.

Commencement of Appeals; Standing.[iii] To be timely, an appeal petition must be filed with OHA within 30 days (or if the 30th day is a weekend or federal holiday, the next business day) after the appellant's actual receipt of the final SBA loan review decision. The appellant must file and manage its appeal on the OHA Case Portal which can be accessed at https://appeals.sba.gov. Under the Interim Final Rule published on July 28, 2021, the SBA provided that if a borrower timely files an appeal petition, then the deferment period for the borrower's PPP loan will be extended until OHA issues a final decision on the appeal. The borrower is required to notify the PPP lender of the appeal (by providing a copy of such appeal) so that the lender can extend the deferment period. Only the borrower itself, or its legal successor in interest, have standing to bring an OHA appeal (individual owners of a borrower entity and lenders do not have such standing). A party may represent itself in an appeal or may (but need not be) represented by an attorney.[iv]

The Appeal Petition.[v] The appeal petition must include the following information: (1) a copy of the final SBA loan review decision that is being appealed and the date it was received by the borrower; (2) a full and specific statement as to why the final SBA loan review decision is alleged to be erroneous, together with all factual information and legal arguments supporting the allegations; and (3) the name, address, telephone number, email address and signature of the appellant or its attorney.

An appeal petition that fails to contain all of the above-required information may be dismissed, with or without prejudice, or the SBA or Judge (i.e., an Administrative Law Judge or Administrative Judge) may make a motion for a more definitive statement. The maximum permissible length of an appeal petition (not including attachments) is 20 pages. A table of authorities is required only for petitions citing more than 20 cases, regulations or statutes. All exhibits and attachments must be clearly labeled.

Notice and Order.[vi] Upon receipt of an appeal challenging a final SBA loan review decision, OHA will assign the matter to a Judge, who will issue a Notice and Order utilizing the OHA Case Portal, which will establish a deadline for the production of the administrative record (outlined below) and specify the date by which the SBA may respond to the appeal.

The Administrative Record; Evidence.[vii] The administrative record will typically be due within 20 calendar days after issuance of the Notice and Order. The administrative record will include all non-privileged, relevant documents that the SBA considered when making its final decision.[viii] It does not, however, need to include all documents pertaining to the appellant. The SBA will file the administrative record with OHA and serve it on the appellant using the OHA Case Portal. The appellant may object to the administrative record (or any absence of any document from the administrative record). Such an objection must be filed with OHA (and served on SBA) via the OHA Case Portal not later than 30 days after the issuance of the Notice and Order.[ix]

A Judge is not permitted to admit evidence beyond the administrative record, and there is to be no discovery or oral hearings. An appeal is to be decided solely on the basis of the administrative record, the appeal petition, any SBA response, any reply or supplemental pleading and any objection filings related to the administrative record.

SBA Response.[x] Only the SBA may respond to an appeal petition (and the SBA is not required to do so). However, OHA can request the SBA to respond for good cause shown by OHA. SBA's response, if provided, is to set forth the relevant facts and legal arguments to the issues presented on appeal. If the SBA determines not to respond to an appeal, such election is not construed as an admission or waiver of any allegation. An SBA response must be delivered within 45 calendar days of the Notice and Order.

Standard of Review.[xi] In bringing an appeal, the borrower has the burden of proof to establish that the SBA loan review decision was based on a clear error of fact or law.

Attorney's Fees.[xii] A prevailing appellant is not entitled to recover attorney's fees.

Decision on Appeal.[xiii] The Judge will issue his or her initial decision within 45 calendar days after the close of record (which is 45 calendar days from the issuance of the Notice and Order unless otherwise determined by the Judge), and the decision will be served upon the appellant and the SBA utilizing the OHA Case Portal. A decision must contain findings of fact and conclusions of law, the reason therefor and any relief ordered. OHA may affirm, reverse or remand a final SBA loan review decision.[xiv] If there is no request for reconsideration or administrator review within a 30 calendar day period after the Judge's initial decision, such initial decision becomes final.

Reconsideration.[xv] The Judge's initial decision may be reconsidered if a request for reconsideration is filed by the appellant or the SBA within 10 days after service of the Judge's initial decision. Such a request must clearly show an error of fact or law material to the decision. The Judge may also reconsider an initial decision on his or her own initiative within 20 calendar days after service of the decision. Such reconsideration will be decided by OHA. Such a reconsidered decision becomes final in 30 calendar days after its service unless the SBA Administrator decides to review and reverse OHA's decision.

SBA Administrator Review.[xvi] In addition to the appellant or the SBA having the ability to request a reconsideration, the SBA Administrator, solely within its discretion, may also choose to review and/or reverse an initial decision (or a decision that was issued after reconsideration) within 30 calendar days of service of each such decision. The SBA Administrator's decision will become the final decision of the SBA upon issuance.

All initial and final decisions are not precedential. Final decisions may be appealed to an appropriate Federal district court only.

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[i] On May 22, 2020, the SBA and Treasury posted the Interim Final Rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities (13 C.F.R. § 120), which was the first interim final rule pertaining to loan reviews; on June 22, 2020, the SBA and Treasury posted the Interim Final Rule on Revisions to Loan Forgiveness and SBA Loan Review Procedures Interim Final Rules (13 C.F.R. § 120), which was the second interim final rule pertaining to loan reviews; on October 8, 2020, the SBA and Treasury posted the Interim Final Rule on Additional Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules (13 C.F.R. § 120), which was the third interim final rule governing loan reviews; and on January 19, 2021, the SBA and Treasury posted the Interim Final Rule on Loan Forgiveness Requirements and Loan Review Procedures as Amended by Economic Aid Act (13 C.F.R. § 120), which was the fourth interim final rule governing loan reviews. Additionally, on August 11, 2020, the SBA and Treasury posted the Interim Final Rule on Appeals of SBA Loan Review Decisions Under the PPP (13 C.F.R. § 134), which was the first interim final rule pertaining to appeals of loan review decisions. The interim final rule discussed in this article, posted by the SBA and Treasury on September 16, 2021, adopts with changes portions of the interim final rule that was previously posted on August 11, 2020.

[ii] 13 C.F.R. § 134.1201. A borrower cannot appeal a determination by SBA's Office of Inspector General concerning a PPP loan to OHA. 13 C.F.R. § 134.1201(e). The Borrower Appeal Rule incorporates expressly specific Rules of Practice (13 C.F.R. 134 – Subpart B) governing matters in front of OHA: §§ 134.207 (Amendments and supplemental pleadings); 134.208 (Representation in cases before OHA); 134.209 (Requirement of signature); 134.211 (Motions); 134.212 (Summary judgement); 134.217 (Settlement); 134.218 (Judges); 134.219 (Sanctions) and 134.220 (Prohibition on *ex parte* communications). All other provisions of Subpart B expressly do not apply to Subpart L (134.1201 *et seq*).

[iii] 13 C.F.R. §§ 134.1202; 134.1203.

[iv] 13 C.F.R. § 134.208 ("A party may represent itself, or be represented by an attorney. A partner may represent a partnership; a member may represent a limited liability company; and an officer may represent a corporation, trust, association, or other entity.").

[v] 13 C.F.R. § 134.1204.

[vi] 13 C.F.R. § 134.1206. A Judge may be an Administrative Law Judge or an Administrative Judge as determined pursuant to 13 C.F.R. § 134.218.

[vii] 13 C.F.R. §§ 134.1207; 134.1209.

[viii] In the event that the SBA discloses in the administrative record (i.e., in the OHA Case Portal) any privileged or confidential information, such disclosure is not a waiver of any claim of privilege or confidentiality by the SBA. *See* 13 C.F.R. § 134.1207.

[ix] If additional time was requested by the SBA and granted by the Judge to file the administrative record, the appellant will have 10 calendar days to file an objection from the date the SBA is required to file the administrative record. *See* 13 C.F.R. § 134.1207(e).

[x] 13 C.F.R. § 134.1208. Generally, an appellant may not reply to the SBA's response unless the Judge directs otherwise. Upon a motion, a Judge may permit an appellant to file a supplemental pleading following its review of the SBA's response or the administrative record. *See* 13 C.F.R. § 134.1208(e).

[xi] 13 C.F.R. § 134.1210.

[xii] 13 C.F.R. § 134.1213.

[xiii] A Judge may also dismiss an appeal if (1) the appeal is beyond OHA's jurisdiction under 134.1201; (2) the appeal is not timely made under 134.1202; (3) the appellant lacks standing under 134.1203 or (4) the appeal is premature because the SBA has not yet rendered a final decision. *See* 13 C.F.R. § 134.1205.

[xiv] 13 C.F.R. § 134.1212.

[xv] 13 C.F.R. § 134.1211(c).

[xvi] 13 C.F.R. § 134.1211(d).

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Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, the Consolidated Appropriations Act, 2021, the American Rescue Plan Act, related rules and regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

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