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September 28, 2020

Submitted via www.regulations.gov

Jovita Carranza, Administrator
U.S. Small Business Administration
409 3rd Street, SW
Washington, D.C. 20416

RE: Docket No. SBA-2020-0042, Interim Final Rule on Appeals of SBA Loan Review Decisions Under the Paycheck Protection Program

Dear Administrator Carranza:

On behalf of the National Association of Professional Insurance Agents (PIA National)¹, I hereby submit the following comments in response to the August 27, 2020 Interim Final Rule (IFR)² published by the U.S. Small Business Administration (SBA) regarding the process for appealing SBA loan decisions under the Paycheck Protection Program (PPP).

Overview

The PPP was created by H.R. 748, the Coronavirus Aid, Relief, and Economic Security (CARES) Act ([Pub. L. 116-136](http://www.govinfo.gov/content/pkg/FR-2020-08-27/pdf/2020-17895.pdf)), which was signed into law in late March. Beginning in early April, the SBA began to issue interim final rules implementing and clarifying various aspects of the PPP. The May 22 Interim Final Rule on Loan Review Procedures and Related Borrower and Lender Responsibilities said the SBA would issue an additional interim final rule regarding the process for appealing certain SBA loan review decisions made pursuant to the PPP. The IFR to which we now respond sets forth the process for a PPP borrower to appeal certain SBA loan review decisions made in connection with a PPP loan to the SBA Office of Hearings and Appeals (OHA).

Like many of the other IFRs issued by the SBA in accordance with the CARES Act, this one is permitted to take effect without advance notice and comment because of the provision of the CARES Act that authorizes the SBA to regulate without adherence to the advance notice requirements provided in the Administrative Procedures Act (APA), presumably because of the exigent circumstances surrounding the need to quickly implement the provisions of the CARES Act, including the loan forgiveness process. The SBA's loan forgiveness application portal

¹ By way of background, PIA is a national trade association founded in 1931. It represents member insurance agents in all 50 states, Puerto Rico, Guam, and the District of Columbia. PIA members are small business owners and insurance professionals who can be found across America.

² <https://www.govinfo.gov/content/pkg/FR-2020-08-27/pdf/2020-17895.pdf>

opened to lenders on August 10. At the time of this writing, however, the SBA has not granted or denied any forgiveness applications, despite having received nearly 100,000 of them.

Appropriately, Only Final Decisions Eligible for Appeal

According to the IFR, the OHA will serve as the venue for appeals of certain SBA PPP loan review decisions, as well as “any other PPP matter referred to OHA by the [SBA] administrator.” While that language is broad, the IFR also states that borrowers may not file OHA appeals of decisions made by lenders, nor are they permitted to file OHA appeals of decisions made by the SBA Office of the Inspector General (OIG).

Decisions eligible for appeal through the OHA are known as “SBA loan review decisions,” and they are defined as follows:

A PPP loan reviewed by the SBA, in which the SBA concludes, in writing, that the borrower:

- was ineligible for a PPP loan;
- was ineligible for the PPP loan amount received, or made unauthorized use of their loan proceeds;
- is ineligible for PPP loan forgiveness in the amount determined by the lender in its full or partial approval decision issued to SBA (except for the deduction of any Economic Injury Disaster Loan [EIDL] advance, in accordance with the relevant provision of the CARES Act); and/or
- is ineligible for PPP loan forgiveness in any amount when the lender has issued a complete denial decision to SBA.

Additionally, only PPP borrowers can file OHA appeals; lenders do not have access to the OHA appeals process, be it on behalf of a borrower, or to settle a dispute between a lender and borrower. Like the scope provisions outlined below, these rules may ensure OHA appeals are filed infrequently enough to be adjudicated in a timely way.

EIDL Advances Should Not Be Deducted from Loan Forgiveness

In previous comments, PIA expressed its concern about the deduction of the EIDL advance, and those concerns have persisted. As we noted previously, many small businessowners obtained emergency EIDL advances while their PPP loan applications were pending. Indeed, EIDL advances were essential for many businesses, because they were readily available when the PPP application process was complex and its outcome uncertain.³ During that time, borrowers who obtained EIDL advances did not know that their advances would be deducted from the forgiveness of any loans they would ultimately receive from the PPP.

Borrowers who sought both the EIDL advance and a PPP loan might have borrowed less PPP money, spent that money differently, or not have sought a PPP loan at all, if they would have had realized their advances would be deducted from their PPP loan forgiveness. In fact, the borrowers most affected by this decision are those that acted most aggressively to protect their

³ Lending institutions were not prepared for the influx of PPP loan applications they would receive, and the SBA’s website was similarly unprepared for the volume of PPP applications.

businesses. In that sense, the deduction of EIDL advances punishes those who responded proactively to the looming economic crisis.

This part of the final regulation may have been intended to prevent borrowers from being reimbursed twice for the same expenditures. However, the language that accompanied the EIDL advance applications led borrowers—and some lenders—to conclude that said advances would not need to be repaid regardless of future borrowing, and that language was misleading. The confusion it caused was exacerbated by the fact that the permissible-use categories for EIDL advances and PPP loans had a lot of overlap; businesses could use one or the other for many of the same expenses. This confusion demonstrates the complexity of the CARES Act and the need for consequences—intended and unintended—to be fully understood before legislative and regulatory action is taken or finalized.

Even if the rest of their PPP loan is eventually forgiven, some borrowers will owe money to their lenders in the form of repayment of the EIDL advance. Lenders, too, have learned that many will likely be in the uncomfortable position of having to request money back from their borrowers.

OHA’s Appellate Scope is Properly Narrow

The SBA has an obligation to ensure that loans are being provided only to those businesses who are eligible for them, and loan funds are being spent appropriately. The IFR gives broad latitude to the SBA to “undertake a loan review at any time” of a “PPP loan of any size.” This SBA review process is meant to supplement the OHA appeals process. If the SBA gives the lender the PPP loan forgiveness amount set forth in the decision issued by the lender to the SBA, other than any EIDL advance deduction, the borrower cannot file an OHA appeal.

The IFR states that PPP borrowers may not use the OHA to appeal any decisions made by a lender apart from the previously defined “SBA Loan Review Decisions.” The OHA’s limited scope fits within the generally applicable administrative law canon. In accordance with the broad discretion afforded to the SBA, PPP borrowers may request an SBA review of lender decisions, and borrowers may also “exercise any other rights it has under applicable law against a PPP lender regarding a lender decision.”

This is an appropriate division of labor between review processes and may help keep OHA appeals from undue delay.

Required Elements of Appeal Are Unduly Burdensome

The appealing PPP borrower must include an array of items in their petition:

1. The basis for OHA jurisdiction, including evidence that the appeal is being filed in a timely way
2. A copy of the SBA loan review decision being appealed, or a description of it, if the decision itself is not available
3. A specific statement about why the decision is wrong, including “all factual information and legal arguments supporting the allegations”

4. The relief requested
5. Signed copies of payroll tax filings
6. Signed copies of applicable federal tax returns
7. The name, contact information, and signature of the appellant or their attorney

This process will present challenges to many small businessowners. First, small businesses that took PPP loans with an expectation of reimbursement are unlikely to have the means to hire an attorney to undertake this appeal. However, without an attorney, many small businessowners may be challenged by the requirement that they state the basis for OHA jurisdiction. Second, small businessowners who are not themselves attorneys are unlikely to be familiar with the legal arguments supporting their allegations, even when such arguments exist. Additionally, the requirements that the appeal include the contact information and signature of the “appellant or its attorney” is an implicit acknowledgement that these items will be challenging for borrowers to assemble without the aid of an attorney. Finally, the appeal itself must be served, with attachments, “on the Associate General Counsel for Litigation,” along with “a signed certificate of service.”

Failure to provide any one of these items will be grounds for an OHA judge to dismiss the appeal altogether, and, should the materials be found to be inadequate, the SBA will be permitted “to move for a motion for more definite statement.” The appeal must be filed within 30 calendar days after the borrower receives the SBA’s loan review decision or after the lender notifies the borrower of said decision, whichever is earlier. The borrower, then, has, at most, a month in which to conclude that the decision was wrong, hire an attorney to assemble the necessary documentation, and serve the SBA. The judge may dismiss the appeal if it is beyond OHA’s jurisdiction, the appellant does not have standing, the appeal is not timely or is premature, or if the appeal does not allege facts that, if true, warrant reversal of the SBA’s decision.

Even if small business owners have the means to successfully mount an appeal, they are not entitled to recover attorneys’ fees. So even appellants that ultimately win will have to use their own money to pay their attorneys, if they have the means to retain them in the first place.

Finally, small and large businesses alike have found the loan forgiveness application process complex, and many lenders report having to return forgiveness applications to businesses for the to fix problems. Considering lenders are already experiencing challenges with the loan forgiveness application process, it would make sense to simplify the appeals process.

Timing of Repayment of Loan Is Concerning

PIA was disappointed to find that the OHA appeals process does not stop the PPP loan repayment process; borrowers may not further defer their loan repayment based on a pending OHA appeal. This could put some small businesses in the untenable position of having their loan forgiveness improperly denied and yet having to begin making repayments during the time the appeal is pending. Small businesses in such a position may find themselves collapsing under the weight of a debt they never anticipated, even leaving aside the EIDL repayment issue.

Banks and credit card companies customarily freeze disputed charges while their validity is being adjudicated. In these challenging economic times, when every accommodation granted or denied may change the odds of a small business's survival, small business owners should be permitted to defer repayment of the loan until the OHA has fully adjudicated their appeal.

Conclusion

PIA National remains concerned about the SBA's plan to deduct EIDL advances from PPP loans that would otherwise be completely forgiven, especially considering how many lenders and borrowers alike seem not to have contemplated that when PPP loans were being authorized.

More importantly, though, PIA National is concerned that the appellate process is overly burdensome for small businesses. The process set forth in the IFR is so demanding that it risks discouraging borrowers from appealing, thereby protecting erroneous loan forgiveness decisions from the scrutiny they deserve. If the appeals process must be this complex, SBA could make it easier by allowing borrowers who prevail to have their attorneys' fees reimbursed or giving borrowers longer than 30 calendar days in which to mount their appeal.

PIA National recognizes and appreciates the SBA's attention to the small businesses that the PPP is meant to help most. We also acknowledge that, as of the time of this submission, in each chamber of Congress, bills are pending that could change the PPP, and that those bills, introduced after the publication of this IFR, are thus outside its scope. We look forward to continuing to work with policymakers and the SBA going forward to examine and improve the PPP loan forgiveness and appeals processes so that they provide the type and level of support needed for the nation's small businesses to survive and thrive in this challenging environment.

As always, PIA National is grateful for the opportunity to provide the independent agent perspective. Please contact me at laurenpa@pianet.org or (202) 202-1414 with any questions or concerns. Thank you for your time and consideration.

Sincerely,



Lauren G. Pachman
Counsel and Director of Regulatory Affairs
National Association of Professional Insurance Agents