

Borrowers Should Build a Record to Prepare for PPP Loan Forgiveness Appeals

Authors: Donald Jeffrey Wagner

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The Small Business Administration's (SBA) Paycheck Protection Program (PPP) loan forgiveness data shows that more than 182,000 PPP loan forgiveness applications are currently "under review" by the SBA. A March 22, 2021 joint letter to SBA's Administrator, which was jointly written by all fifty state banking associations, confirms that lenders and borrowers are struggling with the significant uncertainty that is caused by SBA's delays in completing loan reviews. However, as SBA continues to work through this review process, borrowers can take steps now to build a record for any potential appeal of the denial of loan forgiveness by the SBA. Borrowers that do not build a record during the SBA review process may find it difficult to do so later during an appeal of the denial of loan forgiveness.

History of SBA's Guidance About the Certification of Need and PPP Loan Reviews

When the SBA first released the PPP loan application on April 2, 2020, it included a one-line certification that borrowers were required to initial confirming that "[c]urrent economic uncertainty makes this loan request necessary to support ongoing operations of the Applicant" (referred to below as the "Certification of Need"). Of course, when PPP loan applications could first be submitted on April 3, 2020, many businesses in the United States could make the Certification of Need in good faith due to, among other things, recently issued full shutdown orders not allowing persons to work or businesses to open. Record numbers of Americans subsequently filed for unemployment benefits, overwhelming state unemployment benefit offices and websites. If one word could describe economic outlook at that time for most businesses, it would be "uncertain."

However, after a significant number of borrowers had already applied for PPP loans and after particular scrutiny was placed on publicly traded companies that received the loans, on April 23, 2020, the SBA released FAQ 31 in which it warned borrowers for the first time that it would scrutinize the borrowers' individual situations to determine whether borrowers really needed their PPP loans and could make the Certification of Need in good faith. To reinforce this point, on April 29, 2020 (26 days after large numbers of borrowers had already applied for PPP loans), the SBA then issued [FAQ 39](#) in which it stated that "[t]o further ensure PPP loans are limited to eligible borrowers in need, the SBA has decided, in consultation with the Department of the Treasury, that it will review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application." Even later, on May 13, 2020, the SBA then issued [FAQs 46-47](#) in which it confirmed that borrowers that received loans below \$2 million (when including affiliates) would be deemed to have made their Certifications of Need in good faith and would not lose forgiveness on that basis.

However, also on May 13, 2020, the SBA confirmed that borrowers with loans above \$2 million (when including affiliates) would be subject to the following procedures:

SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for

loan forgiveness. If the borrower repays the loan after receiving notification from SBA, *SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request*. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

While SBA has provided the above procedures related to the Certification of Need, the SBA has never provided guidance describing the factors for a borrower above the \$2 million threshold that would allow the borrower, in good faith, to make the Certification of Need. The SBA has vaguely stated that "[b]orrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business," but SBA has not identified what amount of liquidity, cash-on-hand, available credit, outside capital, or other potential sources of funds would make a borrower ineligible.

On Monday, November 2, 2020, several months after most borrowers had already used their PPP loan funds, the SBA then issued the PPP loan necessity questionnaires (Forms [3509](#) (for-profit borrowers) and [3510](#) (non-profit borrowers)). These forms must be completed by borrowers that, together with affiliates, received PPP loans with an original principal amount of \$2 million or greater and include several specific questions requiring borrowers to provide a variety of information about their liquidity and finances that was never previously requested or discussed in any prior SBA guidance. The forms include very specific questions about a borrower's business activity and liquidity, both before and during the borrower's covered period,¹ but give the borrower very little opportunity (maximum of 1,000 characters in only a few places) to provide comments about the particular circumstances affecting the borrower's situation or expectations going in applying for (or keeping) a PPP loan. The necessity questionnaires have been challenged in the Federal District Court for the District of Columbia in a case that is still pending², but at this point all borrowers must still complete them and the SBA has stated that it intends to review them.

As shown above, the greatest uncertainty related to the Certification of Need is what exactly SBA will require in order to justify a borrower's certification. Therefore, a borrower who is denied full or partial forgiveness based on the SBA's review of the Certification of Need should talk to an attorney who has handled SBA appeals to evaluate your potential rights to challenge that decision because your appeal rights may be strong.

However, to prepare for that possible appeal, borrowers should also provide as much *helpful* information as possible when completing the loan necessity questionnaire and when answering any additional questions received from the SBA during the loan review process to build a strong record for an appeal related to the Certification of Need issue and any other issues that the borrower foresees as a potential problem. Notably, while reviews of PPP loans were developed because of the Certification of Need, the SBA has never stated that it would analyze only the Certification of Need during the loan review and borrowers should expect SBA to evaluate other aspects of the PPP loan, including other eligibility factors such as SBA's affiliation rules.

Loan Forgiveness Appeals and the Importance of the Administrative Record

Within 30 calendar days³ after a borrower receives the final SBA loan review decision, the borrower has the right to appeal that decision if SBA finds that the 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 approval or partial approval decision issued to SBA; and/or
4. is ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to SBA.

Appeals must be filed "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." The appeal must be filed with the SBA's Office of Hearings and Appeals (OHA). SBA's OHA will also make the determination of the merits of each appeal. SBA's OHA is the same judicial body that decides SBA size protests related to government contracts.

Significantly, the standard of review for PPP loan appeals "is whether the SBA loan review decision was based on clear error of fact or law" and the appellant has the burden of proof by a preponderance of the evidence.⁴ Therefore, when appealing any decision related to a PPP loan, the appellant will be in the best possible position if it can show that the SBA made a clear error of fact or law based on the information that was before SBA at the time when SBA made its decision. This means that the PPP loan borrower should include as much helpful information as possible in the record *before* SBA makes its final decision. For example, when OHA decides size appeals in the government contracts context, it frequently rules that information that was not before SBA when the formal size determination was made is not relevant to the appeal.⁵ While SBA size protest cases show that OHA does sometimes allow supplementation of the record when the new evidence "is relevant to the issues on appeal, does not unduly enlarge those issues, and clarifies the facts on those issues,"⁶ it is still best for the borrower to include as much helpful information as possible in the administrative record. Therefore, borrowers should make every effort to get information into the administrative record that it believes will assist its PPP loan review by the SBA or any appeal of the SBA's decision.

The PPP loan appeal rules confirm that the administrative record is composed of the following⁷:

(a) *Contents*. The administrative record shall include relevant documents that SBA considered in making its final decision or that were before SBA at the time of the final decision. The administrative record need not, however, contain all documents pertaining to the appellant. In addition, SBA may claim privilege as to certain materials. The administrative record must be certified and authenticated that it is, to the best of the signatory's knowledge, complete and correct.

For purposes of attempting to get helpful information into the record, borrowers should take the following steps:

1. If the borrower has not yet applied for forgiveness, it should include information with its PPP loan forgiveness application that provides support for areas where it believes an explanation might be necessary.

The SBA has issued a [PPP loan forgiveness application](#) form through which borrowers can request loan forgiveness. Several banks also have created their own online forgiveness portals that use the SBA's forgiveness application as a guide but automate the process. In either case, the borrower completes the forgiveness application and submits it to the bank so that the bank can make the initial forgiveness recommendation to the SBA within 60 days after receiving the application. When submitting the PPP loan forgiveness application to its bank, if there are particular areas in its application that it believes need an explanation, the borrower should attempt to add a brief letter or description addressing the issue. For example, if the borrower has concerns about the Certification of Need and wants to explain the significant uncertainty that it was addressing in April 2020, it can attempt to do that by adding a letter providing the explanation. Several

of the online portals allow borrowers to include documents supporting its application as well. Borrowers should speak directly with their banker about the best ways to provide this information.

2. If you are required to submit a Form 3509 or a 3510, use the comment areas wisely to ensure that you include helpful information that should at least prompt a later question from SBA and make sure to include all supporting documents.

As noted above, a borrower that together with its affiliates received PPP loans with an original principal amount of \$2 million or greater is required to complete the Form 3509 if it is a for-profit entity or Form 3510 if it is a non-profit entity. Within those forms, there are a few comment sections that allow the borrower to include explanations, but these sections are limited to a maximum 1,000 characters. We have encouraged our PPP loan borrower clients to take full advantage of those comment sections by including information that would be helpful to the forgiveness analysis. For example, if economic uncertainty was significant in April 2020, but overall the company completed the year by exceeding expectations, it would be helpful to include a sentence in the form confirming why economic uncertainty was significant when the borrower actually applied for the loan, including statistics and examples if possible. Similarly, if borrowers had significant disruptions due to COVID shut-down orders or incurred unexpected costs related to Personal Protective Equipment (PPE), borrowers should also include as much of that information as possible in the Forms to confirm how those issues also impacted the Certificate of Need. The Form 3509 and Form 3510 also require borrowers to include certain documents, such as financial statements and other documents, for purposes of the loan review. Borrowers should make sure to include this information with their completed forms as well.

While the Forms 3509 and 3510 detrimentally do not provide sufficient space to give full explanations, borrowers should attempt to strategically use as much of the forms as possible so that there are at least placeholders of key facts that would allow the borrower to argue later on an appeal that the SBA should have investigated or inquired about that fact during the loan review.

3. If you get questions from the SBA during the loan review, answer them wisely, potentially with the help of an attorney.

The SBA may ask follow-up questions during the loan review to request specific documents, facts, or explanations related to the forgiveness analysis. To the extent that borrowers are asked questions by the SBA, those borrowers should closely review the SBA's questions and should provide full and complete answers to those questions. Borrowers should avoid getting into a quick email exchange of sending information back and forth to the SBA, and should instead think through each response and ensure that it is a complete response before sending it. Moreover, borrowers also would be wise to engage an attorney to ensure that the information provided in response to SBA's questions will support a later appeal, if necessary. While an attorney would not change any of the underlying facts included in the answers to SBA's questions, an attorney can assist to make sure that the answer is directly responding to the questions and can also help with providing a complete response that would be beneficial for a later appeal.

Conclusion

As noted above, great uncertainty has existed related to SBA's requirements for the Certification of Need since PPP loan applications were first due in April 2020. As a result of the very short period of time to lodge an appeal, if a borrower is denied forgiveness on that basis or any other basis, it should *quickly* engage an attorney with SBA appeals experience to evaluate whether an appeal should be made. However, to help prepare for that process now, all borrowers should also make efforts to build the record during the SBA loan review to ensure that the SBA has access to helpful information when making the loan forgiveness determination. Our team of attorneys and advisors continue to monitor these issues and will provide further updates about these matters. For additional guidance, please contact [Jeff Wagner](#) or your regular Baker

Donelson attorney. For more information and general guidance on how to address other legal issues related to COVID-19, please visit [Coronavirus \(COVID-19\): Navigating the Path Ahead information](#) page on our website.

¹ Some borrowers have received requests for additional information following submission of Form 3509 or 3510, including questions regarding the borrower's financial results during the covered period.

² See *The Associated General Contractors of America, Inc. v. United States Small Business Administration, et. al*, Case No. 1:20-cv-03567-BAH. The Complaint in this case was filed in December 2020, but the SBA has still not filed an answer as of the date of this alert.

³ See 13 C.F.R. § 134.1204 and 13 C.F.R. § 134.1201, *et. seq.*.

⁴ 13 C.F.R. § 134.1212

⁵ See *Size Appeal of Oak Grove Techs., LLC*, SBA No. SIZ-6051, 2020 WL 2107083, at *9 (Apr. 20, 2020) (denying motion to admit new evidence into the record) and *Size Appeal of Washington Patriot Constr., LLC, Appellant*, SBA No. SIZ-5447, 2013 WL 1784800, at *5 (Feb. 11, 2013) (denying motion to admit new evidence). These referenced SBA size protest cases do not specifically apply to PPP loan appeals; however, administrative record cases in several different contexts show that there is a risk that SBA OHA will exclude information that was not considered by SBA when making the final decision.

⁶ *Size Appeal of Dawson Bldg. Contractors, Inc., Inc.*, SBA No. SIZ-4501, 2002 WL 31844931, at *3 (Aug. 2, 2002) (allowing the admission of new evidence). Furthermore, borrowers also have decent arguments that SBA should consider the information provided in the appeal petition because that is one of the items that SBA OHA must consider when making its decision, 13 C.F.R. § 134.1209(d), but borrowers should not wait to rely on SBA's interpretation of that provision and should instead include as much helpful information as possible in the administrative record during the review.

⁷ 13 C.F.R. §134.1207(a).