

# Forgiveness denied: protecting your rights during the PPP loan appeal process

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In 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act established the Paycheck Protection Program (PPP). Under the PPP, eligible businesses could receive loans for support through unprecedented times. Loan forgiveness was all but promised by not only lenders processing the loans, but the Small Business Administration (SBA) which was tasked with implementing the program.

Now, the SBA is ‘clawing-back’ loans to entities that they believe were never eligible to receive the loan in the first place. SBA is either *carte blanche* denying loan forgiveness or, in other circumstances, reducing the claimed amount of loan forgiveness based on a multitude of interim final rules released between 2020 and 2022.

PPP loan eligibility and forgiveness continues to cause confusion among businesses, especially federal contractors, years after applications were submitted. Indeed, attorneys are seeing an uptick in SBA final loan review decisions (FLRDs) denying loan forgiveness. **With SBA planning to claw-back PPP loans for years to come, borrowers should be aware of how to protect their rights when appealing an FLRD.**

## Background

Once an SBA FLRD is handed down, which can come even after SBA approved forgiveness, borrowers have the right to appeal the FLRD to SBA’s Office of Hearings and Appeals (OHA). To borrowers’ (and counsels’) dismay, the level of detail in these decisions varies greatly, often only containing one sentence to support denying hundreds of thousands of dollars in loans.

Other FLRDs contain substantially more detail, but remain vague, open-ended, and ambiguous. This makes the task of appealing to OHA extremely difficult. Before venturing to the PPP Appeals Portal<sup>1</sup> and either filing an appeal *pro se* or engaging counsel to represent you through the appeal, several important considerations must be taken into account.

## Timeliness

After receipt of an FLRD, borrowers have 30 calendar days to file an appeal with OHA. Note that FLRDs are generally provided to your lender, who then distributes it to you (the borrower). Be aware that you have 30 days from the date you received the decision, which may or may not be the date on the FLRD itself.

At a minimum, the appeal must contain the following:

- (1) a copy of the FLRD and the date it was received;
- (2) a full and specific statement as to why the FLRD is alleged to be erroneous, along with all factual information and legal arguments to support the allegations;
- (3) the name, address, telephone number, email address, and signature of the borrower or the borrower’s attorney; and
- (4) a certificate of service.

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The appeal cannot exceed 20 pages and any exhibits must be clearly labeled. Other items, as described more fully in OHA’s procedural regulations, may also need to be included. Indeed, OHA will likely dismiss your appeal if these basic elements are not present in the initial filing, leaving you with little to no recourse to get your loan decision overturned and loan forgiven.

## Legal burden of proof

The most important aspect of the appeal includes a full and specific statement as to why the FLRD is erroneous since you only get one shot to convince SBA that an error was made in issuing the denial. Borrowers must make clear arguments focusing on specific issues cited in the denial.

Remember, OHA will only overturn an FLRD that is based in “clear error of fact or law.” So, explaining how you may not be able to repay the loan, how much you have been harmed by the pandemic, or other issues will only be relevant if those points directly address the bases for SBA’s denial.

Otherwise, while you can include background into your company and situation for ‘flavor,’ you should not spend time or pages on

those issues. Instead, you need to make legal arguments as to why you were eligible for the loan and for forgiveness and why SBA's determination to the contrary was flawed.

Some issues occurring, and OHA's commonly-held views on the same, include:

- (1) Independent contractors. OHA believes that, according to certain interim final rules, independent contractors should not be included in maximum loan amount calculations.
- (2) Insufficient or incorrect documentation. Correct and missing information must be included in the initial appeal filing. If clearly presented on appeal, the SBA may be willing to review it and take corrective action if said documentation proves eligibility.
- (3) Affiliation. This is the most common issue that we're seeing. In certain circumstances, SBA takes the position that both its loan and government procurement affiliation rules (located at 13 C.F.R. §§ 121.301 and 121.103, respectively) applied to all borrowers, unless a specific waiver applied (e.g., restaurants). If this is an issue on appeal, it is highly recommended to engage counsel who know, understand, and have extensive experience in the SBA's affiliation rules due to their irregular and nuanced nature. Note that these affiliation rules often go against principles of 'affiliation' as that term is used in the private sector.

### Providing your lender with a copy of the appeal

You must provide your lender with a copy of the appeal. This action places your loan into deferment status until a final decision is issued. It may also help to have a conversation with the lender to assure them that you are disputing the decision. Attorneys are seeing collections and/or offsets made by certain federal agencies against PPP loans. These are improper since the PPP loans are not in fact delinquent or past due as long as a timely appeal to OHA was submitted and a decision is still pending.

### Proceedings before OHA

The normal course of events after an appeal is filed with OHA is as follows:

- (1) An administrative law judge and SBA attorney are assigned to the case. The OHA judge will generally first determine whether the appeal meets the pleading requirements. Appeals can be dismissed for lack of completeness, being untimely, or other deficiencies.
- (2) If the OHA judge determines the appeal meets the pleading requirements, they issue a notice and order setting the schedule. If it does not meet those requirements, OHA either dismisses the appeal or issues an order to show cause requesting appellants provide reasons for why their appeal should not be dismissed.
- (3) Generally, the SBA is required to file the Administrative Record (AR) within 20 days after issuance of the notice and order. The notice and order sets the schedule and may vary the timelines, so be sure to pay close attention to it.

- (4) After the AR is filed, appellants will normally have 10 days to file objections to the AR, arguing that certain documents are missing from it and/or should have been included and utilized by the SBA in coming to the FLRD. OHA may order the SBA to supplement the record with additional documents based on these objections.
- (5) The SBA has the ability to substantively respond to the appeal with legal arguments supporting the accuracy of the FLRD. The regulations require this response to be filed within 45 days after the notice and order is issued, or roughly two weeks after your objections are due.
- (6) Appellants have the ability to seek leave to file a reply to this response. Note, there are important motions' practice and procedural practice points that must be well-understood before filing, otherwise, the motion could be denied and the record closed.

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After an appeal is filed, there could be requests for additional information but do not bank on that occurring. Instead, make sure you provide every factual detail — supported by documentation and citations — in the original appeal. If you fail to include information bolstering your assertions in the appeal itself, you may be out of luck.

Thus, it is important to have clear and accurate arguments, as well as understanding when and how to rebut claims made by the SBA during the appeal proceedings. So, be prepared to not only file the appeal, but also defend your eligibility before the OHA judge. While this is generally in writing, OHA may request hearings on complex subjects, something else borrowers, and more likely their counsel, may have to contend with.

### The decision

There is no time limit for decisions to be issued by OHA. Attorneys are seeing OHA hand down decisions on fairly complex issues within 2-3 months after closing the record. However, in other instances, decisions were not handed down for over 7 months after the initial appeal was filed.

Unfortunately, OHA is hesitant to order the SBA to find borrowers' eligible for specific amounts of forgiveness. Instead, OHA normally grants the appeal and remands the FLRD back to the SBA to conduct another loan review and/or loan forgiveness eligibility review.

If SBA decides to fight, a vicious cycle can form with borrower's needing to repeatedly file new appeals of new FLRDs. Such a

path can be costly and time-consuming, all while prolonging the *potentially* inevitable result of needing to pay back the PPP loan in full.

It is therefore extremely important for all borrowers to receive a frank and honest opinion as to the merits of the decision from the outset to the extent that is practicable. Certain issues are of course more likely to prevail, while others are ultimately uphill battles. Nevertheless, occasionally the likelihood of success will be difficult to discern due to the regulations being ambiguous and the lack of published, precedential decisions creating a body of instructive case law.

### Recourse after an unfavorable decision

If you receive a denial of loan forgiveness (either in whole or in part), while your chances of obtaining favorable relief become slimmer, it is not the end of the road.

Borrowers have 4 paths to navigate:

- (1) File a petition for reconsideration with OHA contending their decision was clearly grounded in an error of fact or law material to the decision. This option can be difficult to prevail on, and generally is not recommended unless OHA glossed over a key fact or matter of legal significance. The timeline to file a PFR is 10 days from OHA's decision. While it may seem unfair or unreasonable, attorneys generally see PFRs assigned to the same judge that issued the initial decision.
- (2) Request the SBA Administrator reconsider OHA's final decision. This option involves sending correspondence to the SBA Administrator requesting that she review the OHA final

decision. The SBA Administrator, in their sole discretion, can decide whether to review and/or revise an initial OHA decision or a reconsidered initial OHA decision within 30 days of that decision. As you can imagine, PPP loan appeals are not a top priority for the SBA Administrator. It is possible that the appeal is immediately tossed by an assistant or sit on a desk until 30-days elapses.

- (3) Request the lender and/or SBA reconsider eligibility under revised regulations pursuant to a recent procedural notice.<sup>2</sup> Some key revisions were recently made to the relevant loan affiliation rules, including material changes to the ownership affiliation rules. If you think your circumstance would benefit from a reconsideration, this route may be the most cost-effective after receiving an unfavorable decision.
- (4) File a suit in federal district court arguing the SBA's decision was in violation of the Administrative Procedure Act. The last option (and the costliest) is appealing the decision to federal district court alleging the agency violated the Administrative Procedure Act. This will generally be an uphill battle due to the deference federal courts afford executive branch agencies (i.e., the SBA). This option will take much longer than the above three options and several significant considerations must be taken into account prior to proceeding to district court. Simply put, it would be wise to engage with an attorney experienced in litigating such matters for this option.

### Notes

<sup>1</sup> <https://bit.ly/3SuzLmH>

<sup>2</sup> <https://bit.ly/47PrX3A>

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