




**COVID-19**

UPDATE:  
August 27, 2020

**Coronavirus / COVID-19  
Response Team**


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**Update on the Process for  
Appealing PPP Loan  
Determinations**

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## Today's Topics

- Current Status of Paycheck Protection Program (PPP)
- Overview of Appeals Process Interim Final Rule (IFR)
- Key Takeaways from Appeals Process IFR
- Summary
- PPP Compliance Readiness Program

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## Current Status of PPP

- PPP closed to new loan applications on August 8, 2020
  - Appx. \$134 billion in “leftover” appropriations
- SBA’s forgiveness application portal opened to participating lenders on August 10, 2020
- Some banks accepting forgiveness applications
- Other banks still developing internal portals or awaiting further SBA/Treasury guidance

## PPP Appeals Process IFR Overview

- Interim Final Rule issued on August 11, 2020, relating to process for appealing SBA loan eligibility and forgiveness determinations
- Describes process for administrative review of SBA determinations and steps that must be followed in order to preserve appeal rights to federal court
- IFR favors the SBA’s initial determination and makes appeals lengthy, opaque and costly

## IFR Takeaway 1: Who can lodge an appeal?

- Only the actual PPP borrower may file an appeal
- Therefore, individual owners of a borrower and lenders do not have standing to appeal

## IFR Takeaway 2: What can be appealed?

- Only applies to final SBA decisions
  - Prior to a final SBA decision, the lender will make a determination and submission to the SBA, and the borrower may have some ability to respond to questions or provide additional information
- The appeals IFR explicitly does not apply to the initial “back-and-forth” among the lender, borrower and the SBA – only the SBA’s final determination as to the following:
  - Ineligibility for a PPP loan
  - Ineligibility for the amount of the PPP loan received
  - Unauthorized uses of PPP loan proceeds
  - Ineligibility for forgiveness (in full or part) as determined by the lender
  - Ineligibility for forgiveness in any amount when the lender has issued a full denial decision to SBA

## IFR Takeaway 3: To Whom Are Appeals Made?

- The appeal of a final SBA determination would be directed to the SBA Office of Hearings and Appeals (OHA)
- The appeal must include (among other information), a variety of financial data/info and 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”
  - Limited to 20 pages
  - No new materials may be added to record (more later)

## IFR Takeaway 4: How Quickly Must An Appeal Be Made?

- The appeal must be made within thirty (30) calendar days after the earlier of:
  - the appellant’s receipt of the final SBA loan review decision; or
  - notification by the lender of the final SBA loan review decision
- Not a tremendous amount of time to gather (or, worse, reconstruct) all necessary information and arguments for appeal if the borrower is unprepared

## IFR Takeaway 5: What Standards Of Review / Burdens Of Proof Apply?

- The standard of review is whether the SBA loan review decision was based on a clear error of fact or law
- The borrower has the burden of proof, by a preponderance of the evidence

## IFR Takeaway 6: Who Reviews The Initial Appeal?

- If an appeal is timely and properly made, OHA will assign the appeal to an Administrative Law Judge or an Administrative Judge
  - Not a federal district court judge or magistrate (yet)
  - SBA and borrower may, however, mutually agree to alternative dispute resolution at any point

## IFR Takeaway 7: Will There Be Any Discovery On Appeal?

- Generally, there will be no discovery at the OHA/administrative appeal level
- Furthermore, SBA is generally charged with providing the administrative record on which it based the determination being appealed
  - The administrative record is generally limited to the documents and information that SBA had available to it at the time of its determination
  - Borrowers may object to the absence of documents or information that it believes should have been included in the administrative record, but which SBA omitted

## IFR Takeaway 8: Will There Be Any Oral Hearings On Appeal?

- Generally, there will be no oral hearings
  - Only if "there is a genuine dispute of material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses"
- In addition, the borrower generally will have no opportunity to reply to the SBA's response to its appeal petition

## IFR Takeaway 9: Is Alternative Dispute Resolution An Option?

- Yes, but only if mutually agreed
- The borrower and SBA may submit a joint motion for ADR at any time during an appeal

## IFR Takeaway 10: Are There Any Other Avenues For Appeal?

- Request for reconsideration by OHA
  - OHA may also reconsider its own decision at its own initiative
- Appeal to the Administrator of the SBA for review
- A determination by the SBA Administrator may then be appealed to federal district court
  - A borrower must first seek review by the SBA Administrator in order to preserve its ability to appeal to federal court
  - Otherwise, the right to appeal to federal court is waived by the borrower



## **IFR Takeaway 11: Does An Appeal Delay Loan Repayment Timing?**

- No
- The IFR makes clear that an appeal does not extend the loan deferral period

## **IFR Takeaway 12: Are Attorneys' Fees Recoverable On Appeal?**

- No
- A prevailing borrower will not be entitled to recover attorneys' fees from SBA

## Summary

- Appeals process favors the SBA's initial decision
- Rules limit the ability to introduce new information not provided to your lender or SBA earlier in the process (e.g., with the loan forgiveness application)
- Process to work through administrative appeals will be winding with no right to recover attorneys' fees
- Risk of confidential or sensitive information working its way into the public record through publication of administrative rulings, etc.
- Be prepared and, perhaps, proactive early in process



**COVID-19  
RESPONSE TEAM**

**PPP Compliance  
Readiness Program**

Miller Johnson's interdisciplinary team of corporate and litigation attorneys will work with you to identify and gather relevant documents and performance data to ensure your business is best positioned to comply with the ever-changing rules governing the Paycheck Protection Program (PPP) and any resulting inquiry or investigation related to your business's application for, and receipt of, PPP funds.

**Services**

- Assist with identifying and compiling records and performance data to support the good faith "need certification" made at the time the PPP loan application was made.
- Review use and accounting of funds to support your application for loan forgiveness.
- Compliance assessment based on review of information received.
- Advise on best practices and evolving rules and guidance related to the PPP.
- Development of audit preparedness plan.
- Advise on enforcement defenses and evidentiary support for the same.

**Pricing**  
*Flat Fee\* based on amount of PPP loan.*

<b>\$5,000</b>	Loan amount of \$2MM+
<b>\$5,500</b>	Loan amount between \$1MM - \$1,999MM
<b>\$3,000</b>	Loan amount between \$500K - \$999K
<b>\$2,000</b>	Loan amount between \$250K - \$499K
<b>\$1,500</b>	Loan amount less than \$250K

\*Legal services related to responding to, or otherwise participating in, an informal or formal inquiry, investigation, audit or any other enforcement action (collectively, "PPP Enforcement Action") are excluded from the scope of legal services offered in this Compliance Readiness Program.

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## Back to Work Resource Center

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Resource Center

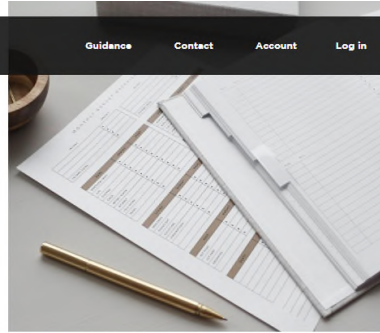
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Our **Back to Work Resource Center** provides a single source option for employers who are wrestling with the legal and practical consequences of a changed world.

For less than the cost of a typical handbook update, you gain access to an extensive collection of resources and Miller Johnson work product that we are confident will provide meaningful support to your efforts to navigate waters that are not only choppy but continuously changing direction.

Here is a sampling of what subscribers will find:

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- Industry Specific Guidance - pages devoted to industries singled



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