Client Alert: Five Things to Know About PPP Loan Audits

BY MARISSA • APRIL 20, 2021

The Paycheck Protection Program was one of the more innovative and written-about of the CARES Act's fiscal stimulus packages. The U.S. Treasury and Small Business Administration (SBA) leveraged the private banking sector to deliver capital infusions to thousands of businesses and independent contractors. As PPP winds down (for good?) on June 1st, and businesses apply for forgiveness, what can you expect from a SBA audit? Here are five things to understand.

1. WHO IS AUDITED?

The SBA may review any borrower's PPP loan at any time. Nevertheless, the Treasury and SBA have created a "safe harbor" for borrowers that received less than $2 million in PPP funds. These borrowers are deemed to have requested their PPP loan with the good faith belief at the time of borrowing that the funds were necessary to support ongoing operations. The SBA will automatically audit borrowers who received $2 million or more, however.

2. WHAT IS THE SBA LOOKING FOR?

The SBA can review all aspects of the PPP loan in connection with a forgiveness audit, including whether the borrower was eligible to participate in PPP, calculated the loan amount correctly, spent loan proceeds on allowable uses, and is entitled to loan forgiveness. Borrowers who received $2 million or more must submit a "Loan Necessity Questionnaire" with their forgiveness application. The SBA uses the Questionnaire to evaluate the borrower's good-faith certification of loan necessity.

The Questionnaire covers borrower performance during the PPP loan period, including whether it had to shut down, its cash flows, revenue performance, and whether the business undertook new capital projects. The business must also disclose owner compensation over $250,000, and equity draws. Failure to complete the Questionnaire and provide the required supporting documentation may result in forgiveness denial and the SBA may seek repayment of the loan. If the SBA suspects that individuals committed fraud in connection with the application, it may refer the matter to the U.S. attorney.

3. WHAT SHOULD YOU DO IF YOU ARE AUDITED?

Based on the information it receives from the Questionnaire and supporting documentation, the SBA may request additional information. For example, the SBA might request a narrative explanation of the basis for the borrower's good faith loan necessity certification.

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4. WHAT IS THE STANDARD OF REVIEW?

Although the SBA audit looks at how the business performed *after* it received the PPP funds, the audit is focused on the time of the application, and specifically, the principal's certification, made under the pains and penalties of perjury, that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." The certification is *subjective*, however. Necessity is in the eyes of the borrower at the time it applied. The SBA's determination of whether some or all of the PPP loan is ineligible for forgiveness will be based on the totality of the borrower's circumstances at the time it applied for PPP funds.

5. WHAT HAPPENS NEXT?

If the SBA determines that the borrower's certification was not made in good faith, the lending bank will deny the forgiveness application and the SBA it will seek repayment of the outstanding PPP loan balance. The SBA has indicated that if the borrower repays the amount of the loan that is ineligible for forgiveness, it will not pursue administrative enforcement or referral to other agencies based on its determination with respect to the veracity of the certification.

A borrower may request the SBA to review a lender's decision to deny a forgiveness application. It can appeal a final written decision by the SBA to the SBA Office of Hearings and Appeals (OHA). Appeals are due within 30 days of the SBA's decision. The administrative record on appeal will include all documents that were before the SBA at the time of its final decision. For this reason, it is critical that the borrower provide comprehensive answers to any audit requests along with supporting documentation (which may include financial records demonstrating the business's cash position at the time it applied for the loan). A borrower must exhaust the review process at OHA before seeking judicial review in a federal district court.

If the SBA contacts you requesting further information in connection with a PPP loan audit, professional advisors can help preparing your response and creating the appropriate record for administrative review in the event that an appeal of an adverse decision is necessary.

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