Current Federal Tax Developments

Week of August 17, 2020

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CURRENT FEDERAL TAX DEVELOPMENTS
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SECTION: 408
TAXPAYER THAT TOOK IRA FUNDS TO MAKE CASH OFFER ON RESIDENCE DENIED LATE ROLLOVER RELIEF

Citation: PLR 2020033008, 8/15/20

While the IRS has issued numerous private letter rulings over the years granting taxpayers relief for late IRA rollovers, far fewer rulings have been issued denying relief. But in PLR 2020033008[1] the IRS did just that for a taxpayer's request for permission to make a late rollover, as the taxpayer had effectively attempted to borrow the funds from the IRA to make a cash offer on a residence.

Most advisers have heard it claimed that taxpayers can use the rollover rules to allow that taxpayer to borrow funds from the IRA and then roll the funds back in. This "loan" provision referred to is found at IRC §408(d)(3)(A):

> (A) In general Paragraph (1) does not apply to any amount paid or distributed out of an individual retirement account or individual retirement annuity to the individual for whose benefit the account or annuity is maintained if—
>
> > (i) the entire amount received (including money and any other property) is paid into an individual retirement account or individual retirement annuity (other than an endowment contract) for the benefit of such individual not later than the 60th day after the day on which he receives the payment or distribution; or
> >
> > (ii) the entire amount received (including money and any other property) is paid into an eligible retirement plan for the benefit of such individual not later than the 60th day after the date on which the payment or distribution is received, except that the maximum amount which may be paid into such plan may not exceed the portion of the amount received which is includible in gross income (determined without regard to this paragraph).
>
> For purposes of clause (ii), the term "eligible retirement plan" means an eligible retirement plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B).

The IRS has conceded that, if the requirements are strictly followed, the taxpayer can do what he/she wishes to do with the funds, a key requirement being returning the funds within 60 days.

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[1] PLR 2020033008, August 15, 2020 https://www.irs.gov/pub/irs-wd/202033008.pdf (retrieved August 15, 2020)

While IRC §408(d)(3)(I) does grant the IRS the authority to waive a late rollover "where the failure to waive such requirement would be against equity or good conscience," the agency has stated clearly that returning a "loan" late will not meet that criteria. The agency's view is that while the "borrowing" noted above is permitted since nothing in the IRC bars it, that was not the purpose of the rollover provision. That provision was meant to allow taxpayers to move funds from one account to another and, in the view of the agency, it is not against "equity or good conscience" to deny relief when a taxpayer was using the provision for other purposes.

But this taxpayer was hopeful that the situation the taxpayer faced was different enough to allow for such relief:

> In Year 1, Taxpayer A and his spouse worked with a real estate agent in selling their existing home and purchasing a new one. The real estate agent advised Taxpayer A to make a cash offer for the purchase of a new residence using funds from IRA B. The real estate agent assured Taxpayer A that he could repay the amount back into his IRA at a later time, after the sale of his current residence, and made no mention of the 60-day rollover period.
>
> Lacking other available funds and acting on the advice of the real estate agent, Taxpayer A completed a distribution request form provided by Financial Institution C. Taxpayer A indicated on the form that the purpose for the distribution was to purchase a new home. Financial Institution C's distribution request form stated that the individual requesting a distribution and signing the form understands that a 10 percent tax penalty and ordinary income taxes may apply to the distribution, and the individual agrees to obtain legal and tax advice to make this determination. Although the form provided a rollover option, it made no mention of the 60-day rollover period.
>
> On Date 2, Taxpayer A withdrew Amount 1 from IRA B to purchase the new residence. On Date 3, Taxpayer A used the distribution of Amount 1 for the purchase of his new house. On Date 4, after the expiration of the 60-day rollover period, Taxpayer A's prior residence was sold. After this sale, Taxpayer A contacted Financial Institution C to try to repay Amount 2 (a portion of total distribution Amount 1), back into IRA B. However, Financial Institution C informed him that it could not accept the repayment of Amount 2 because the 60-day rollover period had passed.[2]

The taxpayer argued that since the financial institution had not informed the taxpayer about the 60-day rollover rule, the IRS should grant relief based on what the taxpayer saw as an error of the financial institution.

However, the IRS pointed out the following:

> However, unlike a plan qualified under section 401(a), the Code does not impose a requirement on an IRA custodian to inform individuals

[2] PLR 2020033008, August 15, 2020, p. 2

> of the rollover rules, and the failure of the realtor and the financial institution to provide this information does not rise to the level of financial institution error.[3]

Thus, the IRS goes on to deny the taxpayer's request for relief:

> In this case, the information and documentation submitted show that Taxpayer A withdrew Amount 1 from IRA B for use as a short-term, interest-free loan to purchase a new home. One of the factors in Rev. Proc. 2003-16 is the use of the amount distributed, for example, whether the amount was cashed. The Committee Report describing legislative intent indicates that Congress enacted the rollover provisions to allow portability between eligible plans including IRAs. Using a distribution as a short-term loan to cover personal expenses is not consistent with the intent of Congress to allow portability between eligible plans. Therefore, under the facts and circumstances presented in this case, the Service declines to waive the 60-day rollover requirement with respect to the distribution of Amount 2 from IRA B.[4]

SECTION: 469
NINTH CIRCUIT PANEL AGREES THAT MANAGEMENT COMPANY WAS NOT THE CUSTOMER FOR THE TAXPAYERS' VACATION RENTAL PROPERTIES

Citation: Eger v. United States, CA9, Case No. 19-17022, 8/13/20

In what may initially seem like an odd argument for both parties to make, the IRS successfully argued that vacation homes were not rentals in the case of *Eger v. United States*, USDC Northern District California, Case No. 18-cv-00199-DMR.[5] The taxpayer's attempt to get the decision overturned on appeal failed when the Ninth Circuit affirmed the District Court decision.[6]

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[3] PLR 2020033008, August 15, 2020, pp. 3-4

[4] PLR 2020033008, August 15, 2020, p. 4

[5] *Eger v. United States, USDC Northern District California*, Case No. 18-cv-00199-DMR https://ecf.cand.uscourts.gov/doc1/035118366526, August 30, 2019, Pacer registration required

[6] *Eger v. United States*, CA9, Case No. 19-17022, August 13, 2020 https://cdn.ca9.uscourts.gov/datastore/memoranda/2020/08/13/19-17022.pdf (retrieved August 15, 2020)

Original District Court Decision

We discussed this case when the District Court rendered its decision in 2019, details of which can be found in the article published on the Current Federal Tax Developments website.[7] Quickly summarizing, the taxpayers were real estate professionals who attempted to include in their rental grouping three vacation homes that they registered to be rented through agreements with management companies.

The IRS argued that these properties were not rentals of real estate as their average period of use by a customer was less than seven days. Under Reg. §1.469-1T(e)(3)(ii)(A) such property rented to customers for an average use period of less than seven days would not be rental real estate. Taking this property out of the grouping with other rental properties would cause the vacation home activity to fail to meet any of the requirements to show material participation.

The taxpayer argued that the IRS was looking to the wrong party as the customer—that it was the time period the property was available for the management company to rent that should be measured, as the management company was the customer. The Tax Court disagreed, finding the management company simply acted as the taxpayer's agent and the individuals who booked time in the vacation home via the management company were the customers.

The taxpayer decided to appeal the decision to the Ninth Circuit Court of Appeals.

Ninth Circuit Decision

The Ninth Circuit began its review by noting that the term "customer" is not defined in the IRC or the Regulations, deciding that in such a case the common meaning controls:

> Because neither the Code provisions nor Treasury regulations at issue define "customer," we interpret words "as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). When deciding who is a customer between individuals paying to stay in a property and the company responsible for marketing the property and managing payments, few people who are not creative tax lawyers would argue it is the latter.[8]

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[7] Ed Zollars, CPA, "Use of Management Company Did Not Allow Real Estate Professional to Include Vacation Properties in Rental Grouping under §469(c)(7)," *Current Federal Tax Developments Website*, September 4, 2020 https://www.currentfederaltaxdevelopments.com/blog/2019/9/4/use-of-management-company-did-not-allow-real-estate-professional-to-include-vacation-properties-in-rental-grouping-under-469c7 (retrieved August 15, 2020)

[8] *Eger v. United States*, CA9, Case No. 19-17022, p. 4

The panel also found that looking at the term in the context of how the term is used in the regulation leads to the same result:

> Moreover, we must read this regulation, and the term "customer," "in their context and with a view to their place in the overall statutory scheme." *Wilderness Soc'y v. United States FWS,* 353 F.3d 1051, 1060 (9th Cir. 2003) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). As discussed above, the Code definition of "rental activity" is "any activity where payments are principally for the use of tangible property." 26 U.S.C. § 469(j)(8). So the payment is tied to the "use" of the property. The regulations then state that "rental activity" is generally when "tangible property held in connection with the activity is used by customers or held for use by customers." 26 C.F.R. § 1.469-1T (e)(3)(i)(A). Reading these provisions together, the individual paying to use the property is the "customer." In this case, it is the renters, not management companies, paying to use the properties.[9]

The Ninth Circuit noted that the taxpayer's agreement with the management company was also consistent with the view that the management company simply operated as the taxpayer's agent:

> Appellants' agreements with the management companies show that they were intended to pay the management companies a percentage of rent received at the vacation properties in exchange for services the management companies provided. The management companies acted as Appellants' representatives, not customers of the properties.[10]

For completeness, the panel looked to the dictionary definition of a customer:

> Finally, we reach the same conclusion when consulting dictionary definitions of "customer," which is appropriate to better understand the plain language of the regulations. See *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1088 (9th Cir. 2007). The American Heritage dictionary defines a "customer" as "one that buys goods or services." *The American Heritage Dictionary of the English Language* 450 (4th ed. 2000). The most relevant definition in Black's Law Dictionary is similar, saying a customer is "[a] buyer or purchaser of goods or services; esp., the frequent or occasional patron of a business establishment." *Customer*, Black's Law Dictionary (11th ed. 2019). These dictionary definitions further support the conclusion that the renters of the vacation properties were the customers, because they were the ones actually purchasing a service, as opposed to the rental companies

[9] *Eger v. United States*, CA9, Case No. 19-17022, pp. 4-5

[10] *Eger v. United States*, CA9, Case No. 19-17022, p. 5

> who were themselves being paid for providing a service to Appellants.[11]

Not surprisingly, the Ninth Circuit panel did not find in favor of the taxpayer, stating "[a]ppellants have not demonstrated that the use of the properties fell within the definition of 'rental activity.'"[12]

SECTION: 6657
DUE TO DELAYS IN PROCESSING PAYMENTS MAILED TO THE IRS, AGENCY ANNOUNCES DISHONORED CHECK PENALTY RELIEF

Citation: "IRS Operations During COVID-19: Mission-critical functions continue," IRS Website, 8/13/20

As many advisers have discovered due to clients (especially trusts) receiving notices regarding payments supposedly due on tax returns where payments had been mailed in when the return was filed at July 15, the IRS is behind in processing items mailed to the agency and that includes certain tax payments. Due to this delay, the IRS has updated guidance on its website to provide relief for taxpayers who end up with a check being dishonored by their bank when the IRS finally gets around to processing that July 15 check.[13]

The IRS provides the following additional data on the page related to payments sent to the agency:

> **Pending Check Payments and Payment Notices:** If a taxpayer mailed a check (either with or without a tax return), it may still be unopened in the backlog of mail the IRS is processing due to COVID-19. Any payments will be posted as the date we received them rather than the date the agency processed them. To avoid penalties and interest, taxpayers should not cancel their checks and should ensure funds continue to be available so the IRS can process them.
>
> To provide fair and equitable treatment, the IRS is providing relief from bad check penalties for dishonored checks the agency received between March 1 and July 15 due to delays in this IRS processing. However, interest and penalties may still apply.

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[11] *Eger v. United States*, CA9, Case No. 19-17022, pp. 5-6s

[12] *Eger v. United States*, CA9, Case No. 19-17022, p. 6

[13] "IRS Operations During COVID-19: Mission-critical functions continue," IRS Website, August 13, 2020, https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue (retrieved August 15, 2020)

Due to high call volumes, the IRS suggests waiting to contact the agency about any unprocessed paper payments still pending. See www.irs.gov/payments for options to make payments other than by mail.[14]

SECTION: PPP LOAN
SBA UPDATES PPP FAQ WITH INFORMATION ON THIRD PARTY FEES AND INSURANCE QUALIFYING AS PAYROLL COSTS

Citation: Paycheck Protection Program Loans Frequently Asked Questions (FAQs), Small Business Administration, August 11, 2020 Revision, 8/11/20

The SBA added two new questions to their first FAQ on Payroll Protection Loans,[15] dealing with the impact on paying or not paying agent fees on the SBA's guarantee of a PPP loan or the payment of fees to the lenders and on insurance that qualifies as a health care benefit for forgiveness.

Impact of Payment of Fees on Lenders

The FAQ provides the following assurance to lenders that the payment or nonpayment of fees to an agent or other third party will not impact the SBA guarantee of a PPP loan or payment of fees to lenders:

> **50. Question: What effect does the payment or nonpayment of fees of an agent or other third party have on SBA's guarantee of a PPP loan or SBA's payment of fees to lenders?**
>
> **Answer**: The payment or nonpayment of fees of an agent or other third party is not material to SBA's guarantee of a PPP loan or to SBA's payment of fees to lenders. Additional information about such fees can be found in paragraph III.4.c of the initial Paycheck Protection Program interim final rule.[16]

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[14] "IRS Operations During COVID-19: Mission-critical functions continue," IRS Website, August 13, 2020

[15] *Paycheck Protection Program Loans Frequently Asked Questions (FAQs)*, Small Business Administration, August 11, 2020 Revision, https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf (retrieved August 12, 2020)

[16] *Paycheck Protection Program Loans Frequently Asked Questions (FAQs)*, Small Business Administration, August 11, 2020 Revision, Question 50

The answer links to the discussion of agent fees at https://www.govinfo.gov/content/pkg/FR-2020-04-15/pdf/2020-07672.pdf.

Health Care Benefits

The final question provides clarification on what is considered a health care benefit that would qualify as a payroll cost for forgiveness:

> **51. Question: Do payments required for the provision of group health care benefits, including insurance premiums, include vision and dental benefits?**
>
> **Answer**: Yes.[17]

SECTION: PPP LOAN GUIDANCE ISSUED IN THE FORM OF FAQS ON INTERACTION OF EIDL ADVANCES AND PPP LOAN FORGIVENESS

Citation: Paycheck Protection Program Frequently Asked Questions (FAQs) on PPP Loan Forgiveness, Small Business Administration, August 11, 2020 Revision, 8/11/20

The SBA added a new "Economic Injury Disaster Loan (EIDL) FAQs" section to the PPP Loan Forgiveness FAQ on August 11, 2020.[18] The FAQs are the first significant guidance issued on the interaction of EIDL advances and PPP loans.

Under the CARES Act a business that receives an EIDL advance and a PPP loan will have its PPP loan forgiveness reduced by the amount of the EIDL advance.

SBA Notification of Lender of Amount of PPP Forgiveness Reduction Due to EIDL Advance

The first question outlines how the lender will be notified of the amount of the reduction of the PPP loan forgiveness due to the EIDL advance:

> **1. Question: SBA will deduct the amount of any Economic Injury Disaster Loan (EIDL) advance received by a PPP borrower from**

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[17] *Paycheck Protection Program Loans Frequently Asked Questions (FAQs)*, Small Business Administration, August 11, 2020 Revision, Question 51

[18] *Paycheck Protection Program Frequently Asked Questions (FAQs) on PPP Loan Forgiveness*, Small Business Administration, August 11, 2020 Revision, https://home.treasury.gov/system/files/136/PPP--Loan-Forgiveness-FAQs.pdf (retrieved August 12, 2020)

the forgiveness amount remitted to the lender. How will a lender know the amount of the EIDL advance that will be automatically deducted by SBA?

Answer: If a borrower received an EIDL advance, SBA is required to reduce the borrower's loan forgiveness amount by the amount of the EIDL advance. SBA will deduct the amount of the EIDL advance from the forgiveness amount remitted by SBA to the lender. The lender will be able to confirm the amount of the EIDL advance that will be automatically deducted by SBA from the forgiveness payment by reviewing the borrower's EIDL advance information in the PPP Forgiveness Platform.[19]

Treatment of Remaining Balance on PPP Loan

The second question outlines the treatment of the remaining balance of the PPP loan after the reduction of forgiveness for the EIDL advance:

2. Question: How should a lender handle any remaining balance due on a PPP loan after SBA remits the forgiveness amount to the lender?

Answer: If a PPP loan is not forgiven in full (including if there has been a reduction in the forgiveness amount for an EIDL advance), any remaining balance due on the PPP loan must be repaid by the borrower. The lender is responsible for notifying the borrower of the loan forgiveness amount remitted by SBA and the date on which the borrower's first loan payment is due. The lender must continue to service the loan. The borrower must repay the remaining loan balance by the maturity date of the PPP loan (either two or five years). If a borrower is determined to have been ineligible for a PPP loan for any reason, SBA may seek repayment of the outstanding PPP loan balance or pursue other available remedies.[20]

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[19] *Paycheck Protection Program Frequently Asked Questions (FAQs) on PPP Loan Forgiveness*, Small Business Administration, August 11, 2020 Revision, Economic Injury Disaster Loan (EIDL) FAQs, Question 1

[20] *Paycheck Protection Program Frequently Asked Questions (FAQs) on PPP Loan Forgiveness*, Small Business Administration, August 11, 2020 Revision, Economic Injury Disaster Loan (EIDL) FAQs, Question 2

EIDL Advance Amount in Excess of PPP Loan

In the case where a borrower received a PPP loan that was less than the EIDL advance amount, there would be no loan forgiveness on the PPP loan. Question 3 provides:

> **3. Question: What should a lender do if a borrower received an EIDL advance in excess of the amount of its PPP loan?**
>
> Answer: A borrower that received an EIDL advance in excess of the amount of its PPP loan will not receive any forgiveness on the PPP loan, because the amount of an EIDL advance is deducted from the PPP loan forgiveness amount. The lender is responsible for notifying the borrower of the date on which the borrower's first loan payment is due. The lender must continue to service the loan. The borrower must repay the remaining loan balance by the maturity date of the PPP loan (either two or five years). If a borrower is determined to have been ineligible for a PPP loan for any reason, SBA may seek repayment of the outstanding PPP loan balance or pursue other available remedies.[21]

SECTION: PPP LOAN
SBA PUBLISHES INTERIM FINAL RULE ON APPEAL PROCEDURES FOR CERTAIN SBA DECISIONS REGARDING A BORROWER'S PPP LOAN

Citation: RIN 3245-AH55, Appeals of SBA Loan Review Decisions Under the Paycheck Protection Program, Small Business Administration, 8/11/20

The previously promised guidance on the appeals process for PPP borrowers who are wholly or partially denied forgiveness has been released as an interim final rule (IFR) by the Small Business Administration.[22]

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[21] *Paycheck Protection Program Frequently Asked Questions (FAQs) on PPP Loan Forgiveness*, Small Business Administration, August 11, 2020 Revision, Economic Injury Disaster Loan (EIDL) FAQs, Question 3

[22] RIN 3245-AH55, Appeals of SBA Loan Review Decisions Under the Paycheck Protection Program, Small Business Administration, August 11, 2020 https://home.treasury.gov/system/files/136/PPP-IFR-Appeals-of-SBA-Loan-Review-Decisions-Under-the-PPP.pdf (retrieved August 12, 2020)

The appeal will be heard by the SBA Office of Hearings and Appeals (OHA) and will involve appealing certain SBA loan review decisions.[23]

The preamble describes the items covered by the SBA loan review decision, as "an official written decision by SBA, after SBA completes a review of a PPP loan, that finds a borrower"

- Was ineligible for a PPP loan;
- Was ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses;
- 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 advance); and/or
- Is ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to SBA.[24]

The appeals provisions are found in a new Subpart L of 13 CFR Part 134 added by this IFR.

Note that the process is a formal legal process, with representation of the borrower limited to attorneys. The special status granted to CPAs to practice before the IRS does not carry over to practice before the Small Business Administration.

This information is being provided not to suggest CPAs who are not licensed attorneys should be representing clients in such matters, nor providing detailed advice in the background as the client tries to handle the appeal on his/her own. Rather, a basic knowledge of these issues will help the CPA advise the client regarding actions the client would need to take if the client wishes to challenge the SBA's decisions, and that advise will most often be to look towards obtaining legal counsel if the borrower wishes to consider moving forward with a formal appeal.

Scope of the Rules for Appeals of PPP Program Loans

13 CFR §134.1201 provides the scope of the rules for this subpart. It is important to note that this appeal is *only for specific decisions of the SBA*—a decision of the lender is *not*

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[23] RIN 3245-AH55, Appeals of SBA Loan Review Decisions Under the Paycheck Protection Program, Small Business Administration, SUPPLEMENTARY INFORMATION, Section I

[24] RIN 3245-AH55, Appeals of SBA Loan Review Decisions Under the Paycheck Protection Program, Small Business Administration, SUPPLEMENTARY INFORMATION, Section III

subject to this review program.[25] Similarly, the appeals program is not available for any decision of the SBA's Office of Inspector General.[26]

Rather, the appeals process is strictly limited to the SBA loan review decisions noted earlier.

The Appeals Petition

The IFR requires the following information be included with an appeals petition:

- The basis for OHA's jurisdiction, including, but not limited to, evidence that the appeal is timely filed in accordance with § 134.1204;
- A copy of the SBA loan review decision that is being appealed, or a description of that decision if a copy is unavailable;
- 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;
- The relief being sought;
- Signed copies of payroll tax filings actually filed with the Internal Revenue Service (IRS), and State quarterly business and individual employee wage reporting and unemployment insurance tax filings actually reported to the relevant state, for the relevant periods of time, if not provided with the PPP Loan Forgiveness Application (SBA Form 3508, SBA Form 3508EZ, or lender's equivalent), or an explanation as to why they are not relevant or not available;
- Signed copies of applicable federal tax returns actually filed with the IRS with appropriate schedules (e.g., IRS Form 1040 with Schedule C/F) documenting income for self-employed individuals or partners in a partnership, if not provided with the PPP Borrower Application Form (SBA Form 2483 or lender's equivalent), or an explanation as to why they are not relevant or not available; and
- The name, address, telephone number, email address and signature of the appellant or its attorney.[27]

The petition must also meet the following format rules:

> The maximum length of an appeal petition (not including attachments) is 20 pages, unless leave is sought by the appellant and granted by the

[25] 13 CFR §134.1201(c)

[26] 13 CFR §134.1201(d)

[27] 13 CFR §134.1202(a)

> Judge. A table of authorities is required only for petitions citing more than twenty cases, regulations, or statutes.[28]

The IFR requires an additional copy of the petition be filed with the SBA Associate General Counsel for Litigation:

> In addition to filing an appeal with OHA in accordance with § 134.204(b), the appellant must serve a copy of the appeal petition with attachments on the Associate General Counsel for Litigation, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416, OLITService@sba.gov.[29]

Finally, the appellant must attach a signed certificate of service:

> The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).[30]

Failing to provide all of the items listed above may result in the petition being dismissed, potentially with prejudice (that is, no ability to file a new petition):

> An appeal petition which does not contain all of the information required by paragraphs (a) through (d) of this section may be dismissed, with or without prejudice, at the Judge's own initiative, or upon motion of SBA.[31]

The regulation also provides the SBA with the option to move to require a more definite petition, as well as allowing the Judge to do so independently:

> SBA may, not later than five days after receiving an appeal petition, move for an order to the appellant to provide a more definite appeal petition or otherwise comply with this section. A Judge may order a more definite appeal petition on his or her own initiative.
>
> > (1) A motion for a more definite appeal petition stays SBA's time for filing a response. The Judge will establish the time for filing and serving a response and will extend the close of the record as appropriate.
> >
> > (2) If the appellant does not comply with the Judge's order to provide a more definite appeal petition or otherwise fails to

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[28] 13 CFR §134.1202(b)

[29] 13 CFR §134.1202(c)

[30] 13 CFR §134.1202(d)

[31] 13 CFR §134.1202(e)

> comply with applicable regulations, the Judge may dismiss the petition with prejudice.[32]

13 CFR 1202(g) also provides a rule for counting days for any deadline set based on a number of days:

> Do not count the day the time period begins, but do count the last day of the time period. If the last day is Saturday, Sunday, or a Federal holiday, the time period ends on the next business day.[33]

Standing and Deadline to Appeal

Only a borrower on a loan for which the SBA has issued a *final SBA loan review decision*, as defined earlier, has standing to file an appeal with the OHA.[34]

The appeal must be filed by the borrower within 30 days after the *earlier* of:

- The borrower's receipt of the final SBA loan review decision, or
- The borrower's notification by the lender of the final SBA review decision.[35]

The Judge is required to dismiss the appeal petition if:

- The appeal is beyond OHA's jurisdiction as set forth in these rules;
- The appellant lacks standing to appeal; or
- The appeal is untimely or is premature (the SBA has not yet made a final SBA loan review decision).[36]

Process

Once an appeal is filed, the appeal will be assigned to an Administrative Judge or Administrative Law Judge. If the appeal is not dismissed, the Judge will issue a notice and order establishing a deadline for production of the administrative record.[37]

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[32] 13 CFR §134.1202(f)

[33] 13 CFR §134.1202(g)

[34] 13 CFR §134.1203

[35] 13 CFR §134.1204

[36] 13 CFR §134.1205

[37] 13 CFR §134.1206

The Administrative record will be the key item to be reviewed in determining the validity of the SBA's decision and the position advanced in the appeal. The SBA will produce that record and it is to contain:

> 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.[38]

The borrower will be given a copy of this record at the time it is filed with the OHA.[39]

The borrower does have the right to make the following objections to the production of the record:

> The appellant may object to the absence of any document from the administrative record that the appellant believes should have been included in the administrative record. An appellant also may object to any claim that documents in the administrative record are privileged. Such objections must be filed with OHA and served on SBA no later than 10 calendar days after the appellant's receipt of the administrative record. The Judge will rule upon such objections and may direct or permit that the administrative record be supplemented.[40]

Note that the administrative record, which already exists before the appeal is filed, is generally going be the most significant portion of what the Judge will consider. The IFR provides that the Judge ordinarily "may not admit evidence beyond the written administrative record or permit any form of discovery."[41]

A request for discovery is limited to the SBA, not the borrower, and in that case will be permitted only if the SBA has made a showing of good cause for discovery.[42]

As well, normally there will be no oral hearing, with the IFR providing:

> Oral hearings will not be held on an appeal of an SBA loan review decision, unless, following the motion of a party, or at the Judge's own initiative, the Judge orders an oral hearing upon concluding that there is a genuine dispute of material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses. If an oral hearing is ordered, the proceeding shall be conducted in accordance

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[38] 13 CFR §134.1207(a)

[39] 13 CFR §134.1207(b)

[40] 13 CFR §134.1207(c)

[41] 13 CFR §134.1209(a)

[42] 13 CFR §134.1209(b)

> with §§ 134.214 and 134.222 in subpart B of this part as the Judge deems appropriate.[43]

The decision will be based entirely on the following items:

> All appeals under this subpart L will be decided solely on a review of the written administrative record, the appeal petition, and response(s) filed thereto, any admitted evidence, and an oral hearing, if held.[44]

In the normal case, this means the Judge will be looking at the SBA's administrative record, the appellate petition and the SBA's answer, and the Judge's decision will be based on his/her review of those items. As should be clear, it will be extremely important that the taxpayer provide complete information to the SBA as part of the initial loan review process, as well as ensure that all relevant information is included in the petition for appeal.

Decisions

The time limit for issuing the decision and content of a decision are outlined as follows:

> The Judge will issue his or her decision within 45 calendar days after the close of record, as practicable. The decision will contain findings of fact and conclusions of law, the reasons for such findings and conclusions, and any relief ordered. The decision will be served on each party.[45]

The IFR outlines the following process for issuance of an original decision and when it will become final if that decision is not appealed or a reconsideration is not requested:

> The Judge's decision on the appeal is an initial decision. However, unless a request for review is filed pursuant to § 134.228(a), or a request for reconsideration is filed pursuant to paragraph (c) of this section, an initial decision shall become the final decision of SBA 30 calendar days after its service. The final OHA decision creates precedent only for appeals involving the PPP. Any OHA decision pursuant to this subpart L applies only to the PPP and does not apply to SBA's 7(a) Loan Program generally or to any interpretation or application of the regulations in part 120 or part 121 of this title.[46]

Either party, or even the Judge, may request a reconsideration of the initial decision:

> An initial decision of the Judge may be reconsidered. Either SBA or the appellant may request reconsideration by filing with the Judge and

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[43] 13 CFR §134.1209(c)

[44] 13 CFR §134.1209(d)

[45] 13 CFR §134.1213(a)

[46] 13 CFR §134.1213(b)

> serving a petition for reconsideration within 10 calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative within 20 calendar days after service of the written decision.[47]

All parties may ask for a formal review of the Judge's decision. Note that this step is required before a party may take the matter to the courts:

> Within 30 calendar days after the service of an initial decision or a reconsidered initial decision of a Judge, any party, or SBA's Office of General Counsel, may file and serve a request for review by the Administrator pursuant to § 134.228(a). In order for a borrower to exhaust its administrative remedies and preserve its right to seek judicial review of an SBA final decision in a federal district court, a borrower that disputes an initial decision or reconsidered initial decision must file and serve a request for review of the initial decision or reconsidered initial decision by the Administrator pursuant to § 134.228(a). If a request for review is filed pursuant to § 134.228(a), the provisions in § 134.228 will apply.[48]

The OHA can issue the following types of decisions in the appeal:

> OHA may affirm, reverse, or remand an SBA loan review decision. If remanded, OHA no longer has jurisdiction over the matter unless a new appeal is filed as a result of a new SBA loan review decision.[49]

Decisions Will Be Published

The OHA's decisions in these cases will normally become public information and, as noted earlier, will serve as precedent for later decisions on PPP loans. The IFR provides:

> OHA decisions are normally published without redactions on OHA's website. A decision may contain confidential business and financial information or personally identifiable information where that information is either decisionally significant or otherwise necessary for a comprehensible decision. Where no protective order is in place, a party may request a redacted public decision by contacting OHA. Where a protective order is in place, the Judge will usually issue the unredacted decision under the protective order and a redacted version for public release.[50]

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[47] 13 CFR §134.1213(c)

[48] 13 CFR §134.1213(d)

[49] 13 CFR §134.1214

[50] 13 CFR §134.1213(e)