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SMALL BUSINESS ADMINISTRATION

13 CFR Part 134

[Docket Number SBA–2020–0042]

RIN 3245–AH55

Borrower Appeals of Final SBA Loan Review Decisions Under the Paycheck Protection Program

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Final rule.

SUMMARY: This final rule adopts with changes portions of the previously issued interim final rule published in the *Federal Register* on August 27, 2020, on Appeals of SBA Loan Review Decisions Under the Paycheck Protection Program. This final rule provides procedures for appeals of certain final SBA loan review decisions under the Paycheck Protection Program, which is a temporary SBA 7(a) loan program, authorized by, *inter alia*, the Coronavirus Aid, Relief, and Economic Security Act and the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act.

DATES:

Effective date: This rule is effective September 14, 2021.

Applicability date: This final rule applies to all appealable final SBA loan review decisions under the Paycheck Protection Program. The rule applies to all appeals filed after the effective date of the rule and to those appeals filed before the effective date for which a Notice and Order has not been issued.

FOR FURTHER INFORMATION CONTACT: An SBA Office of Hearings and Appeals (OHA) Representative at 202–401–8200.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all

States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide have experienced and continue to experience economic hardship as a direct result of the Federal, State, tribal, and local public health measures that have been taken to minimize the public’s exposure to the virus. These measures, some of which are government-mandated, have been implemented nationwide and include the closures of and restrictions on restaurants, bars, gyms, and other businesses. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, were being and continue to be implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the CARES Act temporarily permitted SBA to guarantee 100 percent of 7(a) loans under a new program titled the “Paycheck Protection Program” (PPP) under Section 7(a)(36) of the Small Business Act. Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP.

On April 2, 2020, SBA posted its first PPP interim final rule (85 FR 20811) (the First Interim Final Rule). Subsequently, SBA issued a number of other interim final rules implementing the PPP. On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), which provided additional funding and authority for the PPP.

On May 22, 2020, SBA and Treasury posted an interim final rule on Loan Review Procedures and Related Borrower and Lender Responsibilities

(85 FR 33010) (Loan Review interim final rule (IFR)). The rule stated that SBA would be issuing a separate interim final rule addressing the process for appealing certain SBA loan review decisions under the PPP. On June 5, 2020, the Paycheck Protection Program Flexibility Act of 2020 (Pub. L. 116–142) (Flexibility Act) was signed into law, amending the CARES Act. On June 22, 2020, SBA and Treasury posted an interim final rule that in part revised the Loan Review IFR to incorporate the relevant Flexibility Act amendments, address revisions to the Loan Forgiveness Application (SBA Form 3508), and include a new alternative Loan Forgiveness Application (SBA Form 3508EZ) (85 FR 38304) (Second Loan Review IFR).

On July 4, 2020, Public Law 116–147 extended the authority for SBA to guarantee PPP loans to August 8, 2020. On August 11, 2020, SBA and Treasury posted an interim final rule on Appeals of SBA Loan Review Decisions Under the Paycheck Protection Program (85 FR 52883) (OHA Appeal IFR), inviting the public to submit comments on or before September 28, 2020.

On October 8, 2020, SBA and Treasury posted an interim final rule which made additional revisions to the Loan Review IFR and Second Loan Review IFR (85 FR 66214) (Third Loan Review IFR). The Third Loan Review IFR provided additional guidance concerning the forgiveness and loan review processes for PPP loans of \$50,000 or less and, for PPP loans of all sizes, lender responsibilities with respect to review of borrower determinations of eligible costs for forgiveness in excess of a borrower’s PPP loan amount.

On December 27, 2020, the President signed the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (Economic Aid Act) (Pub. L. 116–260), which, among other things, reauthorized lending under the PPP through March 31, 2021, authorized second draw PPP loans under Section 7(a)(37) of the Small Business Act, modified PPP provisions relating to forgiveness of PPP loans, and codified Section 1106 of the CARES Act under Section 7A of the Small Business Act. On January 19, 2021, SBA and Treasury posted an interim final rule to consolidate prior rules related to forgiveness and reviews of PPP loans

and incorporate changes made by the Economic Aid Act (86 FR 8283) (Fourth Loan Review IFR).

On March 11, 2021, the American Rescue Plan Act of 2021 (American Rescue Plan Act) was enacted to, among other things, expand eligibility for first and second draw PPP loans and revise the exclusions from payroll costs for purposes of loan forgiveness. On March 18, 2021, SBA and Treasury posted an interim final rule on PPP to incorporate the American Rescue Plan Act's amendments to the PPP, as well as other changes (86 FR 15083). On March 30, 2021, the PPP Extension Act of 2021 (Pub. L. 117-6) was enacted, extending SBA's PPP program authority through June 30, 2021. On July 30, 2021, SBA published an interim final rule on PPP establishing a direct borrower forgiveness process for loans of \$150,000 or less, among other changes (86 FR 40921).

As described below, this final rule sets forth procedures for PPP borrowers and Lenders on the process for a PPP borrower to appeal certain final SBA loan review decisions under the PPP to the SBA Office of Hearings and Appeals (OHA). The interim final rule supplemented the interim final rule on Loan Review Procedures and Related Borrower and Lender Responsibilities posted on SBA's and Treasury's websites on May 22, 2020 (published on June 1, 2020, in the **Federal Register**), as revised by the interim final rules posted on SBA's and Treasury's websites on June 22, 2020, October 8, 2020, and January 19, 2021 (published on June 26, 2020, October 19, 2020, and February 5, 2021, respectively), and as further amended.

II. Notice and Comment and Immediate Effective Date

This rule revises subpart L, as added by the interim final rule posted on the websites of the SBA and the U.S. Department of the Treasury on August 11, 2020 (published in the **Federal Register** on August 27, 2020), to reflect SBA's responses to public comments on the interim final rule. The revision to § 134.102, *Jurisdiction of OHA*, is adopted without change.

This final rule adopts with changes portions of the previously-published interim final rule on Appeals of SBA Loan Review Decisions Under the Paycheck Protection Program. This rule revises 13 CFR part 134, subpart L, as added by the interim final rule, to reflect SBA's responses to public comments on the interim final rule, as detailed in Part III below. This final rule has accordingly satisfied the

Administrative Procedure Act's advance notice-and-comment requirements.

SBA has found that there is good cause to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. The intent of the CARES Act is to afford SBA the flexibility to provide relief to America's small businesses expeditiously. This intent, along with the need to provide lenders and borrowers with certainty regarding PPP loan forgiveness (if any), provides good cause for immediate implementation of changes to the OHA appeal feature of this program. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning the OHA appeal process as rapidly as possible. Borrowers have been applying for loan forgiveness, lenders have been issuing loan forgiveness decisions to SBA, and SBA has been reviewing PPP loans in connection with those forgiveness applications and decisions. SBA currently has pending final SBA loan review decisions that are ready to be issued and is continuing to conduct loan reviews and make final SBA loan review decisions that will need to be issued. Borrowers and lenders are expecting these decisions to be issued in accordance with the statutory and regulatory timelines requiring SBA to remit the appropriate forgiveness amount to the lender (if any), within 90 days of the lender issuing its decision to SBA, subject to any SBA review of the loan or the loan application. This final rule will allow SBA to immediately issue such decisions and provide certainty around the appeals process to these potential appellants without further delay. Because this final rule also provides increased accessibility to borrowers in response to comments previously received by the public, allowing the borrowers that receive an appealable final SBA loan review decision to immediately appeal under the final rule is in the best interests of the borrowers.

III. Summary of Comments Received

The comment period for the OHA Appeal IFR was open from August 27, 2020, to September 28, 2020, and SBA received 16 comments. This section includes a description of the comments and SBA's response.

Two of the comments received proposed an extension of time to file an appeal to account for appellants who may be unfamiliar with the appeals process. In the interest of efficiency and to ensure a speedy resolution of disputes concerning final SBA loan review decisions, the 30-calendar day requirement will remain. To promote

clarity and fairness, SBA will no longer begin counting days to file an appeal based on when an appellant receives notification from the lender that a final SBA loan review decision has been issued without actually receiving the final loan review decision document detailing the reasons for the decision. Instead, the clock for counting days will begin only after the borrower has received the actual final SBA loan review decision document. This will provide the borrower with 30 calendar days to formulate its arguments as to why the decision is clearly erroneous. *See* 13 CFR 134.1202(a).

Two of the comments raised issue with the inability of the borrower to file arguments after the administrative record has been transmitted to OHA. Although OHA's general rules of procedure found at 13 CFR 134.206(e) allows for a party to request leave to reply to a response, this final rule explicitly directs a party to seek leave to file a reply or supplemental pleading. (13 CFR 134.1208(e).) Also, an appellant is given 30 calendar days after the issuance of the Notice and Order to file any objections to the administrative record, should the appellant find the administrative record is incomplete. *See* 13 CFR 134.1207(e).

One comment proposed that the time to file an objection to the administrative record should be extended to 15 calendar days. The commenter reasoned that a non-attorney may have difficulty understanding the role of the administrative record, what documents are included and excluded from the record, and the applicable privileges. Because the appellant will have participated in the process of providing documents submitted by the lender to SBA during the loan forgiveness process and the loan review process, the appellant should be familiar with the documents included in the administrative record, making 30 calendar days from the issuance of the Notice and Order (where the administrative record is due 20 calendar days after issuance of the Notice and Order) a sufficient time to assert an objection. The Notice and Order that will be issued under 13 CFR 134.1206 will provide a description of the documents included in the administrative record and will note the appellant's ability to object to the administrative record by the due date. The appellant can also avail itself of 13 CFR 134.1207, which provides more detail on the administrative record and appellant's ability to object to the administrative record. Appellant will also have the ability to request leave to file a supplementary pleading after

review of the SBA's appeal response, should one be filed, and administrative record under 13 CFR 134.1208(e) and 134.211 (Motions), which is incorporated into subpart L.

One comment proposed that the SBA should disclose that the appellant may object to the administrative record at the time of the transmission of the administrative record. Such notice is included in 13 CFR 134.1207 and will be provided to the appellant in the Notice and Order under 13 CFR 134.1206, which SBA deems sufficient notice of the ability to object to the administrative record.

Two comments were received regarding the need for simplicity of the appeals process as there is a large number of appellants who will be filing their appeals without the assistance of an attorney. Overall, the commenters requested a more simplified process in light of the information appellant is required to submit to OHA at the time of the appeal. One commenter suggested that *pro se* litigants should disclose their status so that OHA will assist the appellant throughout the appeals process and construe their filings liberally, taking into consideration their non-attorney status. The rules, policies, and procedures of OHA are tailored to address and accommodate all appellants, regardless of whether they are represented by an attorney. The information an appellant is required to file with an appeal is minimal, but necessary for the Judge to render a decision based on the relevant facts and law. In furtherance of OHA's commitment to ensure the appeals process is accessible to all appellants, OHA has reduced the information required to file an appeal. See 13 CFR 134.1204. OHA will also provide appellants with an electronic case management system (<https://appeals.sba.gov>) that will provide a simple electronic way to file, process, and track the appeal before OHA, including the automation of serving parties, and accessing appeal documents and the administrative record.

Four comments were received regarding the exhaustion of remedies requirement under 13 CFR 134.1216 that required an appellant to request review by the SBA Administrator before appealing an OHA decision to Federal district court. One comment suggested that OHA should provide language in the decision disclosing an appellant's ability to request review of OHA's decision by the SBA Administrator. The commenters also argued that this exhaustion of administrative remedies requirement was in violation of the Administrative Procedures Act and

deprives appellants of due process. A number of commenters asserted that the Administrator's review of OHA's decision is a circular review process since the commenters believed that the Administrator would issue the final SBA loan review decision. The Administrator will not be issuing the final SBA loan review decision. The decision will be made by the appropriate SBA official in accordance with published delegations of authority. Additionally, various commenters asserted that OHA's ability to render an independent decision on a final SBA loan review decision is in question because OHA is a subordinate office to the Administrator. Although SBA disagrees with the assertions in those comments, SBA has determined to remove the requirement for a borrower to request a review by the SBA Administrator before any further appeal because of the limited resources within the Office of the Administrator to render a decision on the anticipated high number of requests for review. In addition, SBA believes that it is appropriate, consistent with due process requirements, and most efficient for borrowers to be able to seek relief in Federal district court, without requiring review by the Administrator. Therefore, borrowers have the option to either (1) request reconsideration by the presiding OHA judge under 13 CFR 134.1211(c) and then appeal the final decision to Federal district court under 13 CFR 134.1211(g); or (2) appeal a final decision directly to the appropriate Federal district court under 13 CFR 134.1211(g).

In lieu of the provision requiring the borrower to request review by the Administrator and in order to vest reviewable discretion with the appropriate SBA official, SBA will add a provision giving the SBA Administrator the option to review or reverse an initial OHA decision or a reconsidered initial OHA decision, in the Administrator's sole discretion. Although the Administrator has the discretion to review or reverse such decisions, borrowers may not request, and are not required to request, a review from the Administrator in order to exhaust administrative remedies before appealing to the appropriate Federal district court. See 13 CFR 134.1211(d).

Three comments were received regarding the standard of review and burden of proof for PPP appeals. One commenter stated that OHA should remove the requirement that the appellant establish a clear error of fact or law by SBA and only require appellant to establish error. The suggestion, however, is based on the

commenter's inaccurate understanding of the administrative process, stating that OHA is reviewing a lender's decision and is not reviewing the decision of a public officer, *i.e.*, an SBA official. This is incorrect, as OHA's jurisdiction is limited to reviewing final SBA loan review decisions as provided for in 13 CFR 134.1201(b). Further, the regulation establishing OHA's jurisdiction explicitly states that it will not accept an appeal based solely on a lender's decision. See 13 CFR 134.1201(c). One commenter suggested a *de novo* review of the final SBA loan review decision due to the lack of guidance on the loan review process. Another commenter voiced concern with the use of the preponderance of the evidence standard in conjunction with the requirement to establish clear error on the part of SBA. The commenter found issue with the preponderance of the evidence standard because such a standard is usually required at the initial review level, and the commenter disagreed with the use of the clear error standard in light of the lack of guidance on the loan review process. The commenters also stated the appellant will be completely deprived of the opportunity to review any evidence.

SBA has determined that it will remove the burden of proof requirement of preponderance of the evidence. However, a decision by an SBA official is entitled to the deference afforded by the clear error standard. Therefore, it is appropriate and reasonable for OHA to assess the final SBA loan review decision using a clear error standard. An appellant will not be completely deprived of the opportunity to review the evidence. An appellant will be provided with a copy of the final SBA loan review decision that will set forth the reasons for the decision prior to filing an appeal, and an appellant should be familiar with the documents included in the administrative record because the appellant will have participated in the process of providing documents submitted by the lender to SBA during the loan forgiveness process and the loan review process. In addition, an appellant has the opportunity to review and object to the administrative record as provided for in 13 CFR 134.1207(e).

Three comments were received regarding the inability of appellants to request discovery, while allowing SBA to request discovery. SBA has determined that an OHA decision should be based on a review of the administrative record, the appeal petition, any response, any reply or supplemental pleading, and filings related to objection to the administrative

record. See 13 CFR 134.1209(c). Thus, neither discovery nor oral hearings will be permitted for appellant or SBA. See 13 CFR 134.1209(b).

One comment received suggested that OHA provide a description of the OHA procedural rules incorporated into subpart L in addition to citing to those rules. SBA agrees that such a change is minimal and promotes clarity and guidance. Thus, this final rule provides a description of each rule incorporated into subpart L at 13 CFR 134.1201(h).

One comment received proposed a change in the rule to account for borrowers who may have been acquired by another entity between the time the initial PPP loan was issued and the filing of a PPP appeal. The rule now includes language to address both borrowers and their legal successors under 13 CFR 134.1203.

Six commenters argued that SBA should have regulations which formalize the procedures for final SBA loan review decisions. They assert that the existing interim final rules are too broad and lacking in specifics about the process and have no criteria for making the decisions or compiling the administrative record. One commenter also requested that more information be provided on the loan forgiveness process. As to the administrative record, this final rule sets forth what should be included in the administrative record at 13 CFR 134.1207. As to the criteria for making final SBA loan review decisions and the loan forgiveness process, SBA has issued various rules and guidance on the process for SBA loan reviews including, but not limited to, the Loan Review IFR;¹ Second Loan Review IFR;² Third Loan Review IFR;³ Fourth Loan Review IFR;⁴ SBA Procedural Notice: Procedures for Lender Submission of Paycheck Protection Program Loan Forgiveness Decisions to SBA and SBA Forgiveness Loan Reviews;⁵ and SBA Procedural Notice: PPP Borrower Resubmissions of Loan Forgiveness Applications Using Form 3508S, Lender Notice Responsibilities to PPP Borrowers, and Offset of Remittances to Lenders for Lender Debts.⁶ Additional information is available at <https://www.sba.gov/>

funding-programs/loans/covid-19-relief-options/paycheck-protection-program and <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-small-businesses/paycheck-protection-program>. SBA has issued sufficient guidance for the loan forgiveness process and the issuance of final SBA loan review decisions. SBA received a few other comments which recommended changes to the loan forgiveness application process. Such comments are not relevant to this final rule and need not be addressed here.

Five comments received stated that the requirement to repay the loans should be held in abeyance pending appeal. SBA has determined that, in order to avoid the potential administrative burden of having to reverse implementation of the final SBA loan review decision, including the refund of borrower payments by the Lender and the processing of forgiveness payments by SBA, a timely appeal by a PPP borrower of a final SBA loan review decision should extend the deferment period of the PPP loan. Payment of the PPP loan will be deferred until there is a final decision on an appeal under 13 CFR 134.1211. In addition, SBA believes that allowing for continued deferment is in the best interest of the borrower.⁷ This decision has been added to the regulation at 13 CFR 134.1202(d).⁸

SBA also received some comments from borrowers that sought relief from SBA for a PPP loan application that was denied by a Lender. Such comments are not relevant to this final rule and cannot be addressed here. Further, the rule, at 13 CFR 134.1201(c), provides that a borrower cannot directly file an appeal of a decision made by a lender concerning a PPP loan to OHA.

IV. Technical Amendments

This rule makes technical amendments to ensure efficiency, transparency, and consistency throughout the appeals process. This includes: Removal of the deduction of any Economic Injury Disaster Loan (EIDL) advance (located in the OHA Appeal IFR at 13 CFR 134.1201(b)(3)) to be consistent with Section 333 of the Economic Aid Act which repealed the CARES Act provision at section

1110(e)(6) requiring SBA to deduct the EIDL advance; explicitly stating that a borrower cannot directly file an appeal of a decision by a lender concerning a PPP loan to OHA (13 CFR 134.1201(c)); informing an appellant that they must first file an appeal of the final SBA loan review decision with OHA before appealing to Federal district court (13 CFR 134.1201(d)); and incorporating provisions from OHA's General Rules of Practice into this section with descriptions of those provisions (13 CFR 134.1201(h)).

This final rule makes a procedural change to require appellants to use the OHA Case Portal to file and manage their appeals (13 CFR 134.1202(a)); this provision also establishes "Commencement of Appeals of Final SBA Loan Review Decisions" to outline the process of how and when an appeal must be filed (13 CFR 134.1202); and removes the requirement that timeliness of the appeal could be based on a notification by the lender of a final SBA loan review decision rather than actual receipt of the final SBA loan review decision (13 CFR 134.1202(a)).

SBA has also simplified the information required to file an appeal by eliminating a requirement to provide a basis for jurisdiction and relief sought; only requiring the borrower to produce a final SBA loan review decision (and not merely a description of a final SBA loan review decision) and the date it was received to determine timeliness of the appeal; removing requirements that the appellant provide tax documents; and removing the requirement that a borrower include a certificate of service with its appeal or any other subsequent documents filed with OHA. (13 CFR 134.1204). This rule also requires borrowers to provide their lender with a copy of their appeal in order for the lender to extend the deferment period of the PPP loan until a final decision is issued under § 134.1211. (13 CFR 134.1202(b)).

This rule also specifies that lenders and individual owners of a borrower entity do not have standing to file an appeal. (13 CFR 134.1203). The new provision, titled "Notice and Order," now provides an overview of the information that will be included within the Notice and Order (13 CFR 134.1206). This rule provides for the deadline to produce the Administrative Record within the "Administrative Record" provision (13 CFR 134.1207(a)); clarifies that SBA may, but is not required to, respond to an appeal and, if SBA does not respond it will not be construed against SBA (13 CFR 134.1208); provides that a response to an appeal is due 45 calendar days from the date of

¹ 85 FR 33010 (June 1, 2020).

² 85 FR 38304 (June 26, 2020).

³ 85 FR 66214 (October 19, 2020).

⁴ 86 FR 8283 (February 5, 2021).

⁵ See <https://www.sba.gov/document/procedural-notice-5000-20038-procedures-lender-submission-paycheck-protection-program-loan-forgiveness-decisions-sba-sba>.

⁶ See <https://www.sba.gov/document/procedural-notice-5000-20077-ppp-borrower-resubmissions-loan-forgiveness-applications-using-form-3508s-lender-notice>.

⁷ Interest will continue to accrue on the PPP loan during the deferment period. See, Interim Final Rule on Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act (86 FR 3692, 3703, January 14, 2021).

⁸ See also, Interim Final Rule on Business Loan Program Temporary Changes; Paycheck Protection Program—COVID Revenue Reduction Score, Direct Borrower Forgiveness Process, and Appeals Deferment (86 FR 40921, 40925, July 30, 2021).

the Notice and Order instead of from the appeal filing date (13 CFR 134.1208(b)); removes language making final decisions precedential (13 CFR 134.1211 (b) & (e)); discloses that final decisions rendered under this section may be published by OHA within its discretion with any necessary redactions (13 CFR 134.1211(f)); and removes language pertaining to protective orders, as the only parties involved in PPP appeals are the appellant and SBA, both of which will already have access to all documents that will not be accessible to the public; and adds language in 13 CFR 134.1207 to provide for a non-waiver provision.

V. Borrower Appeals of Final SBA Loan Review Decisions Under the Paycheck Protection Program

This final rule adopts with changes portions of the previously-issued interim final rule on Appeals of SBA Loan Review Decisions Under the Paycheck Protection Program. This final rule does not make any changes to 13 CFR 134.102(w) regarding OHA's jurisdiction over PPP appeals, and the current provision in the Code of Federal Regulations will remain the same. This final rule revises the authority citation for subpart L to incorporate 15 U.S.C. 636(a)(37) and 15 U.S.C. 636m, which were included in the Economic Aid Act. This final rule also revises subpart L as set forth in the prior interim final rule.

Section 134.1201, Scope of rules in this subpart, provides a process for appeal to OHA of certain final SBA loan review decisions under the PPP and any other PPP matter referred to OHA by the Administrator. PPP loans include first draw PPP loans made under Section 7(a)(36) of the Small Business Act and second draw PPP loans made under Section 7(a)(37) of the Small Business Act. Subpart L provides that an appealable final SBA loan review decision is an official written decision by SBA, after SBA completes a review of a PPP loan, that a 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.

Subpart L applies to loan review decisions made by SBA after SBA completes a review of a PPP loan as set forth in Part III.1 and Part III.2c. of the Loan Review IFR, as amended by the Second Loan Review IFR, Third Loan

Review IFR, and Fourth Loan Review IFR and as further amended. Subpart L further provides that any decision by a lender concerning a PPP loan, including a borrower's PPP loan application or a borrower's PPP loan forgiveness application, may not be appealed directly to OHA. In addition, this section sets forth other types of decisions and determinations that are not covered by subpart L, and makes clear that subpart C, Rules of Practice for Appeals From Size Determinations and NAICS Code Designations, is not applicable to appeals from final SBA loan review decisions. This section sets forth the specific provisions from subpart B, OHA's general Rules of Practice, that are applicable to subpart L. Other provisions from subpart B that are not specifically referenced in subpart L do not apply to subpart L. As stated above, a timely appeal by a PPP borrower of a final SBA loan review decision will extend the deferment period of the PPP loan until a final decision is issued pursuant to § 134.1211. However, if SBA remits to the lender the PPP loan forgiveness amount set forth in the decision issued by the lender to SBA, the borrower may not file an OHA appeal, and the borrower must begin repayment of any remaining balance of its PPP loan. This section makes clear that a borrower must file an appeal with OHA on a final SBA loan review decision before appealing to the appropriate Federal district court.

Section 134.1202, Commencement of appeals of final SBA loan review decisions, provides that an appellant must file its appeal with OHA within 30 calendar days of receipt of the final SBA loan review decision and references OHA's website, where an appellant will be able to file and manage its appeal using the OHA Case Portal. By utilizing the OHA Case Portal, an appellant's appeal will automatically be served upon the Associate General Counsel for Litigation at OLITService@sba.gov. The section also provides specific information on how to calculate days. In addition, this section makes clear that a timely appeal by a PPP borrower of a final SBA loan review decision extends the deferment period of the PPP loan until a final decision is issued pursuant to § 134.1211. This section also requires an appellant to provide the lender with a copy of its appeal in order for the lender to extend the deferment period of the PPP loan until a final decision is issued pursuant to § 134.1211.

Section 134.1203, Standing, provides that only the borrower on a loan for which SBA has issued a final SBA loan review decision has standing to appeal

the final SBA loan review decision to OHA. Individual owners of a borrower entity and lenders do not have standing to appeal a final SBA loan review decision.

Section 134.1204, The appeal petition, provides that an appeal petition must include the following information: (1) A copy of the final SBA loan review decision that is being appealed and the date it was received; (2) a full and specific statement as to why the final SBA loan review decision is alleged to be erroneous, together with all factual information and legal arguments supporting the allegations; and (3) the name, address, telephone number, email address and signature of the appellant or its attorney. This section makes clear that a Notice of Paycheck Protection Program Forgiveness Payment does not provide a borrower with a right to appeal to OHA. This section further provides that an appeal petition that does not include the above may be dismissed by the Judge and permits SBA to move for a motion for more definite statement or otherwise comply with the requirements of this section.

Section 134.1205, Dismissal, provides that the Judge must dismiss the appeal if: (1) The appeal is beyond OHA's jurisdiction as set forth under § 134.1201; (2) the appeal is untimely under § 134.1202; (3) the appellant lacks standing to appeal under § 134.1203; or (4) is premature because SBA has not yet made a final SBA loan review decision. This section also provides that the Judge may dismiss the appeal if, among other things, the appeal does not, on its face, allege specific facts that if proven to be true, warrant reversal or remand of the final SBA loan review decision.

Section 134.1206, Notice and Order, provides that upon receipt of an appeal challenging a final SBA loan review decision, OHA will assign the matter to either an Administrative Law Judge or an Administrative Judge in accordance with § 134.218. Unless the appeal will be dismissed under § 134.1205, the Judge will issue a Notice and Order establishing a deadline for production of the administrative record and specifying the deadline by which SBA may respond to the appeal.

Section 134.1207, The administrative record, provides that the administrative record is due 20 calendar days after issuance of the Notice and Order. The administrative record shall include non-privileged, relevant documents that SBA considered in making its decision or that were before SBA at the time of the decision. The administrative record need not, however, contain all

documents pertaining to the appellant. SBA will file the administrative record with OHA and serve it on appellant utilizing the OHA Case Portal. This provision states that in the event that privileged or confidential information is disclosed in the administrative record, such disclosure shall not operate as a waiver of any claim of privilege or confidentiality by SBA. This section permits the appellant to object to the absence of any document from the administrative record that the appellant believes should have been included in the administrative record. Generally, such objections must be filed with OHA and served on SBA no later than 30 calendar days after issuance of the Notice and Order utilizing the OHA Case Portal. The Judge will rule upon such objections and may direct or permit that the administrative record be supplemented.

Section 134.1208, Response to an appeal petition, prescribes that only SBA, though not required, may respond to an appeal. In addition, OHA can request SBA to respond for good cause shown by OHA. The response should set forth the relevant facts and legal arguments to the issues presented on appeal. If SBA elects not to respond to the appeal, such election shall not be interpreted to be an admission or waiver of any allegation of law or fact. Except for good cause shown, a response filed after the close of record established by the Judge will not be considered. If SBA elects to respond, SBA must file its response with OHA and serve a copy of the response upon the appellant utilizing the OHA Case Portal. No reply to a response will be permitted unless the Judge directs otherwise.

Section 134.1209, Evidence beyond the record, discovery and oral hearings, provides that, generally, the Judge may not admit evidence beyond the written administrative record. Neither discovery nor oral hearings will be permitted in appeals from final SBA loan review decisions. All appeals under subpart L will be decided solely on a review of the written administrative record, the appeal petition, any response, any reply, and filings related to objection to the administrative record.

Section 134.1210, Standard of review, provides that the standard of review is whether the final SBA loan review decision was based on clear error of fact or law. The appellant has the burden of proof.

Section 134.1211, Decision on appeal, provides that 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 upon appellant and SBA utilizing the OHA Case Portal. The Judge's decision on the appeal is an initial decision. However, unless a request for reconsideration is filed pursuant to paragraph (c) of § 134.1211 or the Administrator, solely within the Administrator's discretion, decides to review or reverse the initial decision pursuant to paragraph (d) of § 134.1211, an initial decision shall become the final decision of SBA 30 calendar days after its service and is thereafter appealable to the appropriate Federal district court. This section allows for a request for reconsideration pursuant to paragraph (c) of § 134.1211 by SBA or appellant. This section also provides the Administrator, solely within the Administrator's discretion, with the right to review or reverse an initial OHA decision or a reconsidered initial OHA decision pursuant to paragraph (d) of § 134.1211. Such discretionary authority of the Administrator does not create additional rights of appeal on the part of an appellant not otherwise specified in SBA regulations. This section also provides that decisions rendered by OHA under subpart L are not precedential. This section provides that final decisions rendered under this section may be published by OHA within its discretion with any necessary redactions of confidential business and financial information or personally identifiable information. Lastly, this section provides that final decisions may be appealed to the appropriate Federal district court only.

Section 134.1212, Effects of the decision, provides that OHA may affirm, reverse, or remand a final 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 final SBA loan review decision.

Section 134.1213, Equal Access to Justice Act (EAJA), provides that a prevailing appellant is not entitled to recover attorney's fees. Appeals to OHA from final SBA loan review decisions under the PPP are not proceedings that are required to be conducted by an Administrative Law Judge under § 134.603.

Section 134.1214, Confidential information, provides that if a filing or other submission made pursuant to an appeal in subpart L contains confidential business and financial information; personally identifiable information; source selection sensitive information; income tax returns; documents and information covered under § 120.1060; or any other exempt

information, that information is not available to the public pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552.

Compliance With Executive Orders 12866, 12988, 13132, and 13563, the Congressional Review Act, Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866 and 13563

OMB's Office of Information and Regulatory Affairs (OIRA) has determined that this final rule is economically significant for the purposes of Executive Orders 12866 and 13563 SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

Congressional Review Act

OIRA has also determined that this rule is a major rule under Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act or CRA), 5 U.S.C. 804(2). If a rule is deemed major, the CRA generally provides that the rule may not take effect until at least 60 days following its publication unless the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 808. For the reasons discussed in Section II above, SBA finds

that there is good cause to dispense with the CRA effective date requirement. The agency believes that delaying the effective date of this final rule would be contrary to the public interest.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch. 1. p. 9. Since this rule finalizes an interim final rule that was exempt from notice and comment and did not require an initial regulatory flexibility analysis, SBA is likewise not required to conduct a regulatory flexibility analysis.

List of Subjects in 13 CFR Part 134

Administrative practice and procedure, Claims, Equal access to justice, Lawyers, Organization and function (Government agencies).

For the reasons stated in the preamble, the Small Business Administration interim rule amending 13 CFR part 134, which was published at 85 FR 52883 on August 27, 2020, is adopted as final with the following changes:

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 1. The authority citation for part 134 is revised to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657t and 687(c); 38 U.S.C. 8127(f); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 38 U.S.C. 8127(f)(8)(B).

Subpart K issued under 38 U.S.C. 8127(f)(8)(A).

Subpart L issued under 15 U.S.C. 636(a)(36); 15 U.S.C. 636(a)(37); 15 U.S.C. 636m.

■ 2. Subpart L is revised to read as follows:

Subpart L—Borrower Appeals of Final SBA Loan Review Decisions

Sec.

- 134.1201 Scope of the rules in this subpart.
- 134.1202 Commencement of appeals of final SBA loan review decisions.
- 134.1203 Standing.
- 134.1204 The appeal petition.
- 134.1205 Dismissal.
- 134.1206 Notice and Order.
- 134.1207 The administrative record.
- 134.1208 Response to an appeal petition.
- 134.1209 Evidence beyond the record, discovery, and oral hearings.
- 134.1210 Standard of review.
- 134.1211 Decision on appeal.
- 134.1212 Effects of the decision.
- 134.1213 Equal Access to Justice Act.
- 134.1214 Confidential information.

§ 134.1201 Scope of the rules in this subpart.

(a) The rules of practice in this subpart apply to appeals to OHA from certain final SBA loan review decisions under the Paycheck Protection Program (PPP) as described in paragraph (b) of this section, and to any other PPP matter referred to OHA by the Administrator of SBA. The PPP was established as a temporary program under section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116–136), as amended. PPP loans include first draw PPP loans made under Section 7(a)(36) of the Small Business Act and second draw PPP loans made under Section 7(a)(37) of the Small Business Act.

(b) A final SBA loan review decision that is appealable under this subpart is an official written decision by SBA, after SBA completes a review of a PPP loan, that finds a 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.

(c) A borrower cannot directly file an appeal of a decision made by a lender concerning a PPP loan with OHA.

(d) An appeal to OHA is an administrative remedy that must be exhausted before judicial review of a final SBA loan review decision may be sought in a Federal district court.

(e) Any determination by SBA's Office of Inspector General concerning a PPP loan is not appealable to OHA.

(f) This subpart does not create any right to appeal any SBA decision on any

7(a) loans (*see* part 120 of this chapter) other than PPP loans.

(g) The Rules of Practice for Appeals From Size Determinations and NAICS Code Designations in subpart C of this part do not apply to appeals of final SBA loan review decisions or to the PPP.

(h) In addition to the provisions in subpart B of this part specifically referenced in this subpart, the following regulations from subpart B of this part also apply to this subpart: §§ 134.207 (Amendments and supplemental pleadings); 134.208 (Representation in cases before OHA); 134.209 (Requirement of signature); 134.211 (Motions); 134.212 (Summary judgment); 134.217 (Settlement); 134.218 (Judges); 134.219 (Sanctions); and 134.220 (Prohibition on ex parte communications). Other provisions from subpart B of this part that are not specifically referenced in this subpart do not apply to this subpart.

§ 134.1202 Commencement of appeals of final SBA loan review decisions.

(a) An appeal petition must be filed with OHA within 30 calendar days after the appellant's receipt of the final SBA loan review decision. To file and manage an appeal of a final SBA loan review decision with OHA, refer to the OHA Case Portal at <https://appeals.sba.gov>. An appellant is required to use the OHA Case Portal to file and manage their appeal.

(b) Appellant must provide their lender with a copy of the timely appeal petition upon filing in order for the lender to extend the deferment period of the PPP loan until a final decision is issued under § 134.1211.

(c)(1) Do not count the day the time period begins, but do count the last day of the time period.

(2) If the last day is Saturday, Sunday, or a Federal holiday, the time period ends on the next business day.

Example: On a Thursday, a borrower receives a final SBA loan review decision. The time period begins on Thursday, so the first day to count is Friday. Because the 30th calendar day after receipt of the decision is a Saturday, the appeal deadline extends to the next business day, which is Monday.

(3)(i) A Judge may modify any time period or deadline, except:

(A) The time period governing commencement of a case (*i.e.*, when the appeal petition may be filed); and

(B) A time period established by statute.

(ii) A party may move for an extension of time pursuant to § 134.211.

(d) A timely appeal by a PPP borrower of a final SBA loan review decision

extends the deferment period of the PPP loan until a final decision is issued under § 134.1211.

§ 134.1203 Standing.

Only the borrower on a loan, or its legal successor in interest, for which SBA has issued a final SBA loan review decision that makes a finding in § 134.1201(b)(1) through (4) has standing to appeal the final SBA loan review decision to OHA. Lenders and individual owners of a borrower entity do not have standing to appeal a final SBA loan review decision.

§ 134.1204 The appeal petition.

(a) *Content.* The appeal petition must include the following information:

(1) A copy of the final SBA loan review decision that is being appealed and the date it was received by the borrower. A Notice of Paycheck Protection Program Forgiveness Payment does not provide a borrower with a right to appeal to OHA.

(2) A full and specific statement as to why the final SBA loan review decision is alleged to be erroneous, together with all factual information and legal arguments supporting the allegations. There is no required format for an appeal petition. However, the appeal petition must meet the following requirements:

(i) The maximum length of an appeal petition (not including attachments) is 20 pages. A table of authorities is required only for petitions citing more than twenty cases, regulations, or statutes.

(ii) Clearly label any exhibits and attachments.

(3) The name, address, telephone number, email address, and signature of the appellant or its attorney.

(b) *Dismissal.* An appeal petition that does not contain all of the information required by paragraph (a) of this section may be dismissed, with or without prejudice, at the Judge's own initiative, or upon motion of SBA.

(c) *Motion for more definite statement.* (1) SBA may, no later than five calendar days after receiving a Notice and Order on 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.

(2) 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.

(3) If the appellant does not comply with the Judge's order to provide a more

definite appeal petition or otherwise fails to comply with applicable regulations in this subpart, the Judge may dismiss the petition with prejudice.

§ 134.1205 Dismissal.

(a) The Judge must dismiss the appeal if:

(1) The appeal is beyond OHA's jurisdiction as set forth under § 134.1201;

(2) The appeal is untimely under § 134.1202;

(3) The appellant lacks standing to appeal under § 134.1203; or

(4) The appeal is premature because SBA has not yet made a final SBA loan review decision.

(b) The Judge may dismiss the appeal in accordance with § 134.1204(b) or (c)(3), or if the appeal does not, on its face, allege specific facts that if proven to be true, warrant reversal or remand of the final SBA loan review decision.

§ 134.1206 Notice and Order.

Upon receipt of an appeal challenging a final SBA loan review decision, OHA will assign the matter to either an Administrative Law Judge or an Administrative Judge in accordance with § 134.218. Unless the appeal is dismissed under § 134.1205, the Judge will issue a Notice and Order, utilizing the OHA Case Portal, establishing a deadline for production of the administrative record and specifying a date by which SBA may respond to the appeal.

§ 134.1207 The administrative record.

(a) *Time limits.* The administrative record will be due 20 calendar days after issuance of the Notice and Order unless additional time is requested and granted.

(b) *Contents.* The administrative record shall include non-privileged, relevant documents that SBA considered in making its final loan review decision or that were before SBA at the time of the final loan review decision. The administrative record need not, however, contain all documents pertaining to the appellant.

(c) *Non-waiver.* In the event that privileged or confidential information is disclosed in the administrative record, such disclosure shall not operate as a waiver of any claim of privilege or confidentiality by SBA.

(d) *Filing.* SBA will file the administrative record with OHA and serve it on appellant utilizing the OHA Case Portal.

(e) *Objections.* (1) Any objection to the administrative record must be filed with OHA and served on SBA no later than 30 calendar days after the issuance

of the Notice and Order, utilizing the OHA Case Portal. If additional time to file the administrative record was requested and granted by a Judge, appellant will have 10 calendar days from the date SBA is required to file the administrative record under the judge's order granting an extension in which to file an objection to the administrative record.

(2) 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.

(3) The Judge will rule upon such objections and may direct or permit that the administrative record be supplemented.

§ 134.1208 Response to an appeal petition.

(a) *Who may respond.* SBA may respond to an appeal as determined in its discretion, but SBA is not required to respond. If SBA elects not to respond, such election shall not be interpreted as an admission or waiver of any allegation of law or fact. In addition, after review of the appeal petition, OHA may request SBA to respond for good cause shown by OHA. Only SBA may respond. If filed, the response should set forth the relevant facts and legal arguments to the issues presented on appeal.

(b) *Time limit.* If an SBA response is filed, it must be filed within 45 calendar days after issuance of the Notice and Order.

(c) *Close of record.* The record will close 45 calendar days from the issuance of the Notice and Order, unless the Judge decides otherwise. Generally, filings after the close of record will not be considered.

(d) *Service.* If a response is filed, the SBA must file its response with OHA, and serve a copy of the response upon the appellant or its attorney, as applicable by utilizing the OHA Case Portal.

(e) *Reply to response.* Generally, a reply to a response is not permitted unless the Judge directs otherwise. See § 134.206(e). However, upon motion (see § 134.211), and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the filing and service of a supplemental pleading after review of SBA's response and/or the administrative record. The proposed supplemental pleading must be filed and served with the motion utilizing the OHA Case Portal.

§ 134.1209 Evidence beyond the record, discovery, and oral hearings.

(a) Generally, the Judge may not admit evidence beyond the administrative record.

(b) Neither discovery nor oral hearings will be permitted in appeals from final SBA loan review decisions.

(c) All appeals under this subpart will be decided solely on a review of the administrative record, the appeal petition, any response, any reply or supplemental pleading, and filings related to objection to the administrative record.

§ 134.1210 Standard of review.

The standard of review is whether the final SBA loan review decision was based on clear error of fact or law. The appellant has the burden of proof.

§ 134.1211 Decision on appeal.

(a) *Time limits and contents.* 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 upon appellant and SBA utilizing the OHA Case Portal.

(b) *Initial decision.* The Judge's decision on the appeal is an initial decision. However, unless a request for reconsideration is filed pursuant to paragraph (c) of this section or the SBA Administrator, solely within the Administrator's discretion, decides to review or reverse the initial decision pursuant to paragraph (d) of this section, an initial decision shall become the final decision of SBA 30 calendar days after its service. The discretionary authority of the Administrator does not create any additional rights of appeal on the part of an appellant not otherwise specified in SBA regulations in this chapter. Any decision pursuant to this subpart 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 121 of this chapter.

(c) *Reconsideration.* An initial decision of the Judge may be reconsidered. If a request for reconsideration is filed and the SBA Administrator does not exercise discretion to review or reverse the initial decision under paragraph (d) of this section, OHA will decide the request for reconsideration and OHA's decision on the request for reconsideration is a reconsidered initial OHA decision.

(1) Either SBA or appellant may request reconsideration by filing with the Judge and serving a petition for reconsideration within 10 calendar days after service of the Judge's decision. The request for reconsideration must clearly

show an error of fact or law material to the decision. SBA does not have to have filed a response to the borrower's appeal petition to request reconsideration of the initial decision of the Judge.

(2) The Judge may also reconsider a decision on his or her own initiative within 20 calendar days after service of the Judge's decision.

(3) A reconsidered initial OHA decision becomes the final decision of SBA 30 calendar days after its service unless the SBA Administrator, solely within the Administrator's discretion, decides to review or reverse the reconsidered initial OHA decision under paragraph (d) of this section. The discretionary authority of the Administrator does not create any additional rights of appeal on the part of an appellant not otherwise specified in SBA regulations in this chapter.

(d) *Administrator review.* Within 30 calendar days after the service of an initial OHA decision or a reconsidered initial OHA decision of a Judge, the SBA Administrator, solely within the Administrator's discretion, may elect to review and/or reverse an initial OHA decision or a reconsidered initial OHA decision. In the event that the Administrator elects to review and/or reverse an initial OHA decision and a timely request for reconsideration of a Judge's initial decision is also filed by an appellant pursuant to paragraph (c) of this section, the Administrator will consider such request for reconsideration. The Administrator's decision will become the final decision of the SBA upon issuance.

(e) *Precedent.* Neither initial nor final decisions rendered by OHA under this subpart are precedential.

(f) *Publication.* Final decisions are normally published without redactions on OHA's website. PPP decisions will likely contain confidential business and financial information and/or personally identifiable information. Therefore, OHA, within its full discretion, may publish final decisions issued under this section with any necessary redactions.

(g) *Appeal to Federal district court.* Final decisions may be appealed to the appropriate Federal district court only.

§ 134.1212 Effects of the decision.

OHA may affirm, reverse, or remand a final 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 final SBA loan review decision.

§ 134.1213 Equal Access to Justice Act.

A prevailing appellant is not entitled to recover attorney's fees. Appeals to

OHA from final SBA loan review decisions under the PPP are not proceedings that are required to be conducted by an Administrative Law Judge under § 134.603.

§ 134.1214 Confidential information.

If a filing or other submission made pursuant to an appeal in this subpart contains confidential business and financial information; personally identifiable information; source selection sensitive information; income tax returns; documents and information covered under § 120.1060 of this chapter; or any other exempt information, that information is not available to the public pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552.

Isabella Casillas Guzman,
Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2021-0701; Project Identifier MCAI-2021-00365-T; Amendment 39-21704; AD 2021-18-03]

RIN 2120-AA64

Airworthiness Directives; Yaborá Indústria Aeronáutica S.A. (Type Certificate Previously Held by Embraer S.A.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2020-26-02, which applied to certain Yaborá Indústria Aeronáutica S.A. (type certificate previously held by Embraer S.A.) Model ERJ 190-400 airplanes. AD 2020-26-02 required amending the existing airplane flight manual (AFM) to incorporate a new limitation and revise certain normal procedures. This AD retains those requirements and also requires upgrading the electronic engine control (EEC) software, as specified in an Agência Nacional de Aviação Civil (ANAC) AD, which is incorporated by reference. This AD was prompted by a report of an in-flight shutdown (IFSD) due in part to failure in the low-pressure compressor (LPC) rotor 1 during operation in high altitude at high thrust settings, and by the development of updated EEC software, which would