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CARES Act appeals: Key steps in addressing denials and repayments

by Hannah Cross, Esq., CHC; and Shane Duer, Esq., CIPP-US

With the onset of the COVID-19 pandemic, Congress initiated several programs to help businesses weather the difficult economic conditions. The Coronavirus Aid, Relief, and Economic Security (CARES) Act provided two of these programs: the Paycheck Protection Program (PPP) and the Provider Relief Fund (PRF), which were utilized by healthcare providers nationwide—often in tandem—to sustain operations and meet the unprecedented demands of the pandemic. Providers generally participated in the programs with the expectation that the money they received would not need to be repaid; however, since the public health emergency ended in May 2023, the programs have been increasingly demanding repayment where certain terms and conditions were not met. There are appeal avenues that providers can take in both circumstances; however, each is unique to the laws, implementing regulations, and respective agencies.

PPP

The PPP was established as a temporary program under Section 1102 of the CARES Act and is run through the U.S. Small Business Administration (SBA). The PPP provides relief to qualified participants via an SBA-backed loan that helped keep workforce members employed during the COVID-19 crisis.

The program ended on May 31, 2021, and eligible borrowers had the opportunity to apply for full loan forgiveness if, during the eight- to 24-week covered period following loan disbursement, the provider could show that:

- Employee and compensation levels were maintained;
- The loan proceeds were spent on payroll costs and other eligible expenses; and
- At least 60% of the proceeds were spent on payroll costs.

After a business applies for loan forgiveness via a Loan Forgiveness Application Form 3508, the SBA will issue a final loan review decision (final decision). If the loan has been denied forgiveness or provides only partial forgiveness, the final decision will likely list one of the following reasons:

- The provider was not initially eligible for a PPP loan;
- The provider was not eligible for the PPP loan in the amount that it received;

- The provider was not eligible for the forgiveness amount the lender approved for its business; or
- The provider was not eligible for any forgiveness amount because the original lender submitted a denial decision to the SBA.^[1]

PPP appeal process

Appeals of the final decision must be made within 30 calendar days after the appellant's receipt of the final decision; they must be filed with the SBA's Office of Hearings and Appeals (OHA) through an online appeal portal. The OHA may affirm, reverse, or remand a final decision, and only the borrower on loan—or its legal successor in interest—has standing to appeal the final decision to OHA.^[2] However, the borrower may elect to have an experienced attorney prepare the documentation and appeal on their behalf.

The appeal petition must include 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, borrowers must follow certain requirements, such as clearly labeling exhibits and attachments, as well as including a copy of the final SBA loan review decision with the appeal. The standard of review is whether the final SBA loan review decision was based on a clear error of fact or law.^[3] The appellant has the burden of proof.

The general process for appealing a final decision is summarized as follows:

- Borrower appeal submission
 - Borrower or attorney representative submits an appeal based on the SBA's final decision within 30 days of receipt of the final decision.
- OHA appeal review (~3 days)
 - The appeal is assigned to an OHA Administrative Law Judge or Administrative Judge (OHA Judge).
 - The OHA Judge reviews the appeal and issues an order (Notice and Order or Order to Show Cause) with additional directions to the appellant and/or the SBA.
 - The Notice and Order establishes a deadline for production of the administrative record and specifies a date by which the SBA may respond to the appeal.^[4]
- Administrative record and SBA response (45 days)
 - The 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. An OHA Judge may also order a more definite appeal petition on their own initiative.
 - The SBA uploads an administrative record of the case within 20 calendar days from the notice and order.
 - The administrative record contains all nonprivileged, relevant documents that the SBA considered when making its final decision, including all documents provided by the appellant to the SBA during the loan application and forgiveness process.^[5]
 - Appellant may object to the administrative record within 30 calendar days from the Notice and

Order. Objections can include, but are not limited to, the absence of documents that the appellant believes should have been included in the administrative record.^[6]

- SBA may respond to the appeal within 45 days from the Notice and Order.
- OHA initial decision (45 days)
 - OHA will review the merits of the case and render an initial decision containing findings of fact and conclusions of law, the reasons for such findings and conclusions, and any relief ordered.
- Reconsideration of initial decision and final decision
 - If the initial decision is adverse to the appellant, the appellant may file a petition to have it reconsidered (request for reconsideration). If a request for reconsideration is not filed, the initial decision will become the final decision after 30 calendar days after its service upon the appellant.^[7]
 - The OHA Judge will decide on the request for reconsideration, and OHA's decision on the request for reconsideration is a "reconsidered initial decision" that resets the 30-day countdown to make the decision a final decision.
- Administrator review
 - Within 30 calendar days after the service of an initial decision or a reconsidered initial decision of an OHA 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.^[8] It is unknown what facts or circumstances would compel or encourage the administrator to exercise their unilateral review powers.
 - If the administrator does elect to review and/or reverse an initial decision and a timely request for reconsideration of an OHA Judge's initial decision is also filed by an appellant, the administrator will consider such request for reconsideration. The administrator's decision will become the final decision of the SBA upon issuance.

An appeal to OHA is an administrative remedy that must be exhausted before judicial review of a final decision may be sought in a federal district court. However, courts give decisions made by the OHA special deference where the SBA's expertise and familiarity with administrative rules and intricacies are at issue.^[9] A provider should be cautious if pursuing judicial review of a final SBA loan review decision unless they are confident that the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."^[10]

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