

Compliance Today – December 2023



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CARES Act appeals: Key steps in addressing denials and repayments

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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]

PRF

The PRF was also established under the CARES Act; however, the program is run through the Health Resources & Services Administration (HRSA) rather than the SBA. The purpose of the PRF was to support healthcare providers who faced solvency challenges during the COVID-19 pandemic, and funds received by providers could be used towards lost revenue attributable to the pandemic as well as authorized healthcare-related expenses. As opposed to the PPP loan, the PRF served as a grant where retention and use of the funds were permitted so long as certain terms and conditions were met.

Starting in December 2022, HRSA began issuing final repayment request notices (final repayment notice) to providers instructing them to return their PRF payments due to failure to meet the PRF's terms and

conditions.^[11] PRF recipients may receive a repayment notice for one of the following circumstances:

- Providers who rejected the PRF Terms and Conditions in the PRF Application and Attestation Portal, but never returned funds.
- Providers who failed to submit a required report must return all funds not reported during a specific reporting period or the subsequent request to report late due to extenuating circumstances.
- Providers deemed required to repay funds as a result of audit findings.
- Providers deemed ineligible or noncompliant by indictment or other information not revealed through audit.

HRSA will request repayment several times before issuing a final repayment notice. Providers that fail to repay funds upon request from HRSA will be subject to initiation of debt collection.

PRF decision review process

The PRF appeal process is less formal than the PPP's process; however, providers only have one opportunity to appeal final repayment notices via a request for a "decision review."^[12] The general decision review process is as follows:

- Review the final repayment notice sent by HRSA, which contains important information needed for the decision review process, including:
 - Reason for noncompliance
 - Last three digits of tax ID number
 - Unique repayment ID
 - Repayment amount
 - Web address for the decision review portal
- Visit the Decision Review Portal and submit a decision review request using the unique repayment ID within 60 days of the date of the final repayment notice.
- HRSA will notify providers once a decision is made or if additional information is required. HRSA will not begin review of these requests until the end of the 60 calendar days that providers have to submit their requests and aim to review and respond to these requests within 60 days of the start of their review.

If a decision review request is not submitted, providers must return the funds identified by HRSA within the 60-day period. Providers must be aware that all decisions from HRSA are final, and results of a decision review that upholds the initial finding for repayment may be sent to the U.S. Department of Health and Human Services' Program Support Center for debt collection.

It is imperative that providers carefully compile their decision review request to include all relevant documentation and arguments on why they believe they are entitled to retain the funds. Decision review requests should include arguments as to why the provider initially failed to satisfy the PRF's terms and conditions, including any extenuating circumstances that made reporting impossible. HRSA considers extenuating circumstances to include:

- Severe illness or death
- Impacted by natural disaster
- Lack of receipt of reporting communications from HRSA
- Failure to click “submit” (where the provider registered and prepared a report in the PRF Reporting Portal but failed to take the final step to click submit prior to deadline)
- Internal miscommunication or error
- Incomplete targeted distribution payments (where a subsidiary did not report on a target distribution)^[13]

Providers should also include all relevant documentation attached as exhibits to support their arguments and position, as well as take the position that the provider is now ready, willing, and able to report on the appropriate use of the funds. As providers only have one attempt at putting forth their cases, the final decision by HRSA could have serious financial implications for the provider.

Compliance tips

Appealing an SBA denial of PPP loan forgiveness and requesting a decision review of HRSA’s repayment demand are materially different processes. While both programs were included in the CARES Act to provide pandemic relief, their unique nature dictates different implementation and appeal processes.

On the one hand, the SBA providing a loan to an entity requires meeting eligibility for the loan and utilizing the loan in a compliant manner. Any appeal of the SBA’s decision to deny loan forgiveness must follow the letter of the law—the administrative appeals process provides no room for equitable arguments (e.g., fairness or good faith). An appellant must exhaust all administrative remedies prior to filing a case in federal court; even then, equitable arguments may not succeed. This is due, in part, to the deference awarded to final agency decisions by federal courts and a high standard of judicial review.

On the other hand, HRSA granting monies to a provider requires attesting to the terms and conditions of the grant. If a provider fails to meet those terms and conditions by, for example, and perhaps most commonly, failing to meet a reporting requirement on the use of the monies, HRSA will send a repayment demand. Providers have limited time to request a decision review, and the process does not hold any further appeal rights as the PPP appeal process does. However, HRSA has demonstrated more flexibility in its acceptance of decision reviews, signaling that it intends for the monies to be a grant that providers keep so long as they are used properly. This follows HRSA’s purpose and mission as one of the governmental partner agencies to providers, supporting that HRSA is invested in providers receiving support and beneficiaries receiving medically necessary services.

It is apparent that while these funds originate from the same law and serve complementary purposes, their requirements and appeal avenues are uniquely different. Compliance officers should consider these distinctive complexities and systematic differences when navigating CARES Act appeal issues.

Takeaways

- The Paycheck Protection Program grants loans to businesses mainly to be applied toward payroll expenses, although other business-related expenses are also permitted.
- The U.S. Small Business Administration (SBA) provides full or partial loan forgiveness to eligible businesses who submitted a Loan Forgiveness Application Form 3508 and met the requisite conditions.

- Businesses denied full loan forgiveness may follow the SBA’s administrative appeals process and likely encounter little flexibility.
- The Provider Relief Fund (PRF) provided grants of monies to healthcare providers for eligible expenses, and retention of this money required compliance with the terms and conditions.
- Provider must wait for a final repayment notice to request a decision review of a PRF request for repayment.

11 3 C.F.R. § 134.1201(b).

2 13 C.F.R. § 134.1203.

3 13 C.F.R. § 134.1210.

4 13 C.F.R. § 134.1206.

5 13 C.F.R. § 134.1207(b).

6 13 C.F.R. § 134.1207(e).

7 13 C.F.R. § 134.1211(b).

8 13 C.F.R. § 134.1211(d).

9 E.g., *Superior Optical Labs, Inc. v. United States*, 21–1580, 262 (Fed. Cl. 2022).

10 5 U.S.C. § 706.

11 Health Resources & Services Administration, “Terms and Conditions,” last reviewed June 2023, <https://www.hrsa.gov/provider-relief/compliance/terms-conditions>.

12 Health Resources & Services Administration, “Decision Review,” last reviewed June 2023, <https://www.hrsa.gov/provider-relief/compliance/decision-review>.

13 Health Resources & Services Administration, “Request to Report Late Due to Extenuating Circumstances,” last reviewed June 2023, <https://www.hrsa.gov/provider-relief/reporting-auditing/late-reporting-requests>.

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