

COVID-19: PROVIDER RELIEF FUNDS: WHAT TO EXPECT AS REPORTING BEGINS IN 2021

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U.S. Health Care Alert

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In an effort to address the impact of COVID-19 on health care providers and other stakeholders, Congress appropriated US\$175 billion to the Public Health and Social Services Emergency Fund (Provider Relief Fund). The U.S. Department of Health and Human Services (HHS) has distributed more than US\$148 billion in Provider Relief Fund payments and issued evolving guidance on program requirements and reporting on the use of funds. This alert provides an overview of key Provider Relief Fund developments and what to expect as reporting begins, including the status of distribution of US\$24.5 billion in Phase 3 General Distribution payments, program changes enacted as part of the Consolidated Appropriations Act, 2021, and the opening of the Provider Relief Fund Reporting Portal and updates to the reporting guidance.

Key takeaways include:

- Phase 3 General Distributions are being paid out currently, but HHS has suggested that as many as 35,000 providers will not qualify for additional funding.
- On 15 January 2021, HHS issued new reporting guidelines for recipients of Provider Relief Funds, materially altering guidance on reporting COVID-19 expenses and lost revenues, in part to comply with changes in the Consolidated Appropriations Act, 2021. Providers should carefully review these changes as they prepare for the first reporting period.
- On 15 January 2021, HHS opened the Provider Relief Fund Reporting Portal for registration while also announcing it is delaying the reporting window previously scheduled to run from 15 January 2021 to 15 February 2021.
- Providers should be alert for further changes to the Provider Relief Fund requirements as the new Biden administration takes office, given that there is a significant possibility that the new HHS leadership could issue further reporting extensions or offer other flexibilities as it addresses the handling of the Provider Relief Fund to date.

PHASE 3 GENERAL DISTRIBUTION

HHS has completed its review of Phase 3 General Distribution applications and is in the process of distributing payments to over 70,000 providers. On 16 December 2020, HHS announced that it would be distributing US\$24.5 billion in Phase 3 payments, up from the US\$20 billion initially announced.¹ HHS explained that the increased funding will be distributed to providers up to 88 percent of their reported losses.² HHS indicated that over 35,000 Phase 3 distribution applicants will not receive an additional payment either because they experienced no change

in revenues or net expenses attributable to COVID-19 or because they have already received funds that equal or exceed reimbursement of 88 percent of reported losses.³

Notably, HHS indicated in guidance that some Phase 3 General Distribution applicants may not receive the full amount because HHS determined that the patient care revenues and operating expenses that the applicants reported in their applications “included figures that were not exclusively from patient care (as defined in the instructions), reported figures were not reflected in submitted financial documentation, or reported figures were extreme outliers in comparison to other applicants of the same provider type.”⁴ The statement comes as funding recipients have struggled to report their program service revenue in light of constantly evolving guidance and the lack of a formal definition. HHS said that it capped the amount paid to these providers based on industry estimates of revenue and operating expenses from patient care.

CONSOLIDATED APPROPRIATIONS ACT, 2021

On 27 December 2020, President Trump signed into law a US\$900 billion COVID-19 relief package as part of the Consolidated Appropriations Act, 2021 (H.R. 133).⁵ The package contains various provisions impacting the Provider Relief Fund, including US\$3 billion in additional funding and clarifications on lost revenue calculations and payment distributions by parent organizations.

Additional Funding

In addition to the US\$175 billion appropriated to the Provider Relief Fund as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)⁶ and Paycheck Protection Program and Health Care Enhancement Act,⁷ the Consolidated Appropriations Act, 2021, appropriates an additional US\$3 billion.⁸ Notably, the US\$3 billion appropriated is below the US\$35 billion for which provider groups had advocated. The lesser amount could be due to the amount of Provider Relief Fund remaining that has not been allocated by HHS. The Consolidated Appropriations Act, 2021, directs HHS to spend funds not yet allocated, approximately US\$27 billion of the US\$175 billion appropriated for the Provider Relief Fund, and reallocate returned funds based on applications that consider financial losses and changes in operating expenses occurring in the third or fourth quarter of calendar year 2020 or the first quarter of calendar year 2021.⁹

Lost Revenue

The Consolidated Appropriations Act, 2021, also clarifies certain Provider Relief Fund reporting requirements. Specifically, the law clarifies that funding recipients may calculate lost revenue “using the FAQ guidance released by HHS in June 2020, including the difference between such provider's budgeted and actual revenue budget if such budget had been established and approved prior to 27 March 2020.”¹⁰ In this regard, the June 2020 lost revenue guidance provided that funding recipients could use “any reasonable method of estimating the revenue during March and April 2020 compared to the same period had COVID-19 not appeared.”¹¹ HHS noted that, if recipients have a budget prepared, that estimated lost revenue could be “the difference between your budgeted revenue and actual revenue.”¹² HHS further stated that it would “also be reasonable to compare the revenues to the same period last year.”¹³

Distributions by Parent Organizations

In addition, the Consolidated Appropriations Act, 2021, modifies Provider Relief Fund guidance in regard to transferring distributions.¹⁴ Previous guidance had provided that, while a parent organization can accept and

allocate funding from General Distribution allocations at its discretion to its subsidiaries, it could not transfer funding from Targeted Distribution allocations (i.e., Skilled Nursing Facility, Safety Net Hospital, Rural, Tribal, and High Impact Area allocations).¹⁵ The Consolidated Appropriations Act, 2021, revises that requirement and provides that for any Provider Relief Fund payment to “an eligible health care provider that is a subsidiary of a parent organization,” the parent organization may “allocate all or any portion of such reimbursement among the subsidiary eligible health care providers of the parent organization,” including targeted distribution payments, “among subsidiary eligible health care providers of the parent organization except that responsibility for reporting the reallocated reimbursement shall remain with the original recipient of such reimbursement.”¹⁶

PROVIDER RELIEF FUND REPORTING

On 15 January 2021, HHS opened the Provider Relief Fund Reporting Portal for registration while also announcing that it is delaying the reporting window previously scheduled to run from 15 January 2021 to 15 February 2021. Along with the announcement, HHS released updated Provider Relief Fund reporting guidance,¹⁷ a portal user guide,¹⁸ and FAQs.¹⁹ Notably, HHS materially updated its reporting guidance from November 2020 with several changes to the reporting of expenses and lost revenues, in part driven by the changes to lost revenues reporting required by the Consolidated Appropriations Act, 2021.

Eligible Expenses

Provider Relief Fund recipients that received one or more payments exceeding US\$10,000 in the aggregate are required to report their use of payments using their normal method of accounting (cash or accrual basis) by submitting information regarding healthcare related expenses attributable to COVID-19 that another source has not reimbursed and is not obligated to reimburse, which includes General and Administrative and/or other healthcare related expenses.²⁰ Of note, HHS has deleted previous guidance stating that “expenses attributable to coronavirus may be incurred both in treating confirmed or suspected cases of coronavirus, preparing for possible or actual coronavirus cases, maintaining healthcare delivery capacity,”²¹ and has now indicated that eligible healthcare related expenses “are limited to costs incurred to prevent, prepare for, and/or respond to coronavirus.”²² This appears to be a potentially significant change intended to only permit incremental COVID-19 expenses to be allocated to Provider Relief Funds.

Lost Revenue

Payment amounts not fully expended on healthcare related expenses attributable to COVID-19 will be applied to patient care lost revenues.²³ HHS is no longer requiring a negative change in year-over-year net patient care operating income. The updated guidance incorporates the changes to the calculation of lost revenue enacted as part of the Consolidated Appropriations Act, 2021, outlined above. Specifically, the updated guidance provides that funding recipients may calculate lost revenue using one of the following options:

The difference between 2019 and 2020 actual patient care revenue

Recipients will need to submit revenue from patient care payer mix for 2019 calendar year (by quarter).

The difference between 2020 budgeted and 2020 actual patient care revenue

Recipients that elect to use 2020 budgeted patient care revenue must use a budget that was approved prior to 27 March 2020. Recipients will need to submit their 2020 budgeted amount of patient care revenue. Recipients will also need to submit: 1) a copy of their 2020 budget, which must have been approved before 27 March 2020, and

2) an attestation from their Chief Executive Officer, Chief Financial Officer, or similar responsible individual, attesting under 18 USC § 1001 that the exact budget being submitted was established and approved prior to 27 March 2020.

Any reasonable method of estimating revenue

Recipients that elect this method will need to submit a description of the methodology and an explanation of why the methodology is reasonable. They will need to establish how the identified lost revenues were a loss attributable to coronavirus as opposed to a loss caused by any other source. HHS stated that all recipients seeking to use an alternate methodology face “an increased likelihood of an audit by HRSA.”²⁴

Distributions by Parent Organizations

As described above, Provider Relief Fund guidance had provided that, while a parent organization can accept and allocate funding from General Distribution allocations at its discretion to its subsidiaries, it could not transfer funding from Targeted Distribution allocations. The Consolidated Appropriations Act, 2021, clarified that the parent organization may allocate payments among subsidiaries, including Targeted Distribution payments.²⁵ While the updated guidance permits transfers of Targeted Distribution payments in accordance with the new law, the updated reporting guidance notes that Targeted Distribution recipients that are a subsidiary of a parent organization must still report on the use of each targeted distribution received separately (i.e., consolidated reporting is not permitted as to transferred Targeted funds, which HHS has generally otherwise permitted).²⁶ The subsidiary that is the reporting entity must indicate the amount of any of the Targeted Distributions it received that were transferred to the parent entity.²⁷ Further, HHS stated that entities that “transferred Targeted Distributions face an increased likelihood of an audit by HRSA.”²⁸

Interest Earned on Provider Relief Funds

The updated reporting guidance also provides that recipients that held Provider Relief Fund payments in an interest-bearing account will need to report the dollar value of interest earned on those payments.²⁹ The total reportable use of distributions will be inclusive of the interest earned on those distributions.³⁰

Single Audit Reporting

On 22 December 2020, the Office of Management and Budget (OMB) provided guidance on Provider Relief Fund compliance requirements and audit procedures for accountants and other organizations funding recipients will rely on to perform audits.³¹ In light of the late issuance of the audit guidance, OMB provided that federal agencies must allow recipients with due dates from 1 October 2020, through 30 June 2021 an extension for up to three months beyond the normal due date in the completion and submission of Single Audit reporting.³² HHS has incorporated the extension into its Provider Relief Fund guidance, noting that for providers that received payments with fiscal years ending on or after 31 December 2020, the auditor will need to test compliance of the Provider Relief Fund report.³³

WHAT TO EXPECT NEXT

While HHS has delayed the reporting window on the use of Provider Relief Funds, recipients should assess the evolving guidance on Provider Relief Fund reporting and other material changes to HHS' Provider Relief Fund Frequently Asked Questions, which contain the most comprehensive overview of funding requirements. As

recipients are aware, HHS continues to update its guidance on a regular basis as it receives feedback from provider groups and other stakeholders on key program requirements.

The American Hospital Association (AHA), for example, has been in ongoing discussions with HHS on Provider Relief Fund distributions and compliance. Most recently, the AHA sent a letter to President-elect Joe Biden requesting, among other things, the changes that were ultimately included as part of the Consolidated Appropriations Act, 2021.³⁴ As the new administration takes office, there is a significant possibility that it could issue further reporting extensions or offer other flexibilities as it addresses Provider Relief Fund requirements to date.

K&L Gates LLP has created a resource library to address the legal implications of the COVID-19 outbreak on businesses generally and health care providers in particular. K&L Gates' health care and FDA practice will continue to monitor these developments. The practice regularly provides guidance to health care providers regarding the Provider Relief Fund, including compliance with reporting and other requirements, as well as other funding programs available as a result of the COVID-19 pandemic.

FOOTNOTES

¹ See [U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HHS INCREASES AND BEGINS DISTRIBUTING OVER \\$24 BILLION IN PHASE 3 COVID-19 PROVIDER RELIEF FUNDING](#) (Dec. 16, 2020).

² *Id.*

³ *Id.*

⁴ See [U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PROVIDER RELIEF FUND FREQUENTLY ASKED QUESTIONS](#) (last visited Jan. 2021).

⁵ Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. (2019–2020).

⁶ Pub. L. No. 116-136, 134 Stat. 563 (2020).

⁷ Pub. L. No. 116-139, 134 Stat. 622 (2020).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See [U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PROVIDER RELIEF FUND FREQUENTLY ASKED QUESTIONS](#) (last visited June 2020).

¹² *Id.*

¹³ *Id.*

¹⁴ Consolidated Appropriations Act, 2021, H.R.133, 116th Cong. (2019–2020).

¹⁵ See [U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PROVIDER RELIEF FUND FREQUENTLY ASKED QUESTIONS](#) (last visited Jan. 2021).

¹⁶ Consolidated Appropriations Act, 2021, H.R.133, 116th Cong. (2019–2020).

¹⁷ See [U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, GENERAL AND TARGETED DISTRIBUTION POST-PAYMENT NOTICE OF REPORTING REQUIREMENTS](#) (Jan. 15, 2021).

[U.S. Department of Health and Human Services, General and Targeted Distribution Post-Payment Notice of Reporting Requirements](#) (Jan. 15, 2021).

¹⁸ See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PROVIDER RELIEF FUND REPORTING PORTAL (Jan. 15, 2021).

¹⁹ See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORTING PORTAL FAQs (Jan. 15, 2021).

²⁰ See [U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, GENERAL AND TARGETED DISTRIBUTION POST-PAYMENT NOTICE OF REPORTING REQUIREMENTS](#) (Jan. 15, 2021).

²¹ See [U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, GENERAL AND TARGETED DISTRIBUTION POST-PAYMENT NOTICE OF REPORTING REQUIREMENTS](#) (Nov. 2, 2020).

²² See [U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, GENERAL AND TARGETED DISTRIBUTION POST-PAYMENT NOTICE OF REPORTING REQUIREMENTS](#) (Jan. 15, 2021).

²³ *Id.*

²⁴ *Id.*

²⁵ Consolidated Appropriations Act, 2021 (H.R.133) - 116th Congress (2019-2020).

²⁶ See [U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, GENERAL AND TARGETED DISTRIBUTION POST-PAYMENT NOTICE OF REPORTING REQUIREMENTS](#) (Jan. 15, 2021).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See [OFFICE OF MANAGEMENT AND BUDGET, 2020 COMPLIANCE SUPPLEMENT ADDENDUM – 2 CFR PART 200 APPENDIX XI](#) (Dec. 22, 2020).

³² *Id.*

³³ See [U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PROVIDER RELIEF FUND FREQUENTLY ASKED QUESTIONS](#), (last visited Jan. 2021).

³⁴ See [Richard J. Pollack, AHA Outlines Initial Policy Priorities for Biden Administration, AMERICAN HOSPITAL ASSOCIATION](#) (Dec. 11, 2020).

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