

COVID-19: BIDEN ADMINISTRATION ISSUES FIRST MAJOR UPDATE TO PROVIDER RELIEF FUND REQUIREMENTS: REPORTING PORTAL OPENS 1 JULY 2021

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Health Care and FDA Alert

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On Friday, 11 June, the Department of Health and Human Services (HHS) released long-awaited updates to its reporting requirements for recipients of Provider Relief Fund (PRF) payments.¹ HHS's updated Post-Payment Notice of Reporting Requirements supersedes the notice of requirements released on 15 January 2021 and constitutes the Biden Administration's first material changes to PRF requirements.² HHS issued the updated notice of reporting requirements a few weeks before PRF recipients were initially required to expend their funds amid pressure from stakeholders and Congress to issue guidance on the requirements and provide them with flexibility given the change in administration. The updated notice provides greater flexibility with regard to the deadline to use funds and reporting time periods and clarifies steps for reporting and key data elements. HHS announced that PRF recipients will be able to start submitting information in the PRF Reporting Portal on 1 July 2021.³

Key takeaways include:

- **Deadline to Use Funds.** HHS updated the period of time in which recipients must use funds received to cover allowable expenses or lost revenue attributable to COVID-19. While HHS had provided guidance that funds must be expended no later than 30 June 2021, HHS has now provided some PRF recipients with extensions based on the date of payment received.⁴
- **Reporting Time Periods.** Recipients are required to report for each "Payment Received Period" in which they received one or more payments exceeding US\$10,000 in the aggregate during the applicable "Reporting Time Period."⁵ As a practical matter, recipients of PRF payments will now have a 90-day period to complete reporting rather than a 30-day reporting period.
- **Steps for Reporting.** HHS has outlined the order in which information will be reported, namely, interest earned on payments, other assistance received, use of Skilled Nursing Facility (SNF) and Nursing Home Infection Control Distribution payments (if applicable), use of General and Other Targeted Distribution payments, net unreimbursed expenses, and lost revenues reimbursement.⁶
- **Reporting Data Elements.** HHS provided information on new reporting data elements, including a reporting entity (Reporting Entity) overview; a subsidiary questionnaire; information on acquired/divested subsidiaries; personnel, patient, and facilities metrics; and a survey on the impact of payments during the period of availability.⁷ In addition, HHS provided additional information on reporting on the use of General

and Other Targeted Distribution Payments among the parent and its subsidiaries. In the updated guidance, HHS noted that a “comprehensive user guide” and supporting worksheets will be available to assist Reporting Entities with completion of reports.⁸

- **Returning Unused Funds.** In updated guidance, HHS provided that recipients will be able to return unused funds through the PRF Reporting Portal when the first reporting period begins.⁹

BACKGROUND

As described in our client alert [here](#), PRF recipients have been awaiting updates to their reporting obligations since the change in administration. On 15 January 2021, the Trump Administration opened the PRF Reporting Portal for registration while also announcing that it was delaying the reporting window previously scheduled to run from 15 January 2021 to 15 February 2021.¹⁰ Along with the announcement, HHS released updated PRF reporting guidance, a PRF Reporting Portal User Guide, and FAQs. 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.

As the Biden Administration took office, PRF recipients advocated for greater flexibility and guidance with respect to PRF requirements, particularly in light of their reporting requirements and initial deadline to expend their funds by 30 June 2021.¹¹ Notably, the Biden Administration did not make material changes to PRF requirements during its first 100 days, perhaps due to the time it took for Congress to confirm key HHS and Centers for Medicare & Medicaid Services (CMS) officials, including HHS Secretary Xavier Becerra, HHS Deputy Secretary Andrea Palm, Assistant Secretary for Health Dr. Rachel Levine, and CMS Administrator Chiquita Brooks-LaSure.

However, as Secretary Becerra testified before House and Senate congressional committees last week on the FY 2022 HHS Budget Request, policymakers urged him on behalf of their constituents to provide greater flexibility and clarity to recipients about the requirements pertaining to their use of funds. Secretary Becerra assured policymakers that HHS would be issuing updated reporting guidance to ensure “everyone meets the deadlines as best as possible,” adding that HHS understood the need for flexibility.¹²

DEADLINE TO USE FUNDS

Accordingly, HHS updated the period of time in which recipients must use funds received to cover allowable expenses or lost revenue attributable to COVID-19. HHS had provided guidance that funds must be expended no later than 30 June 2021. With only a couple of weeks before the deadline, HHS has now provided that recipients must use payments during “the period of availability,” which is based on the date of payment (i.e., deposit date for automated clearing house payments or the check cashed date).¹³ HHS clarified that recipients may use payments for eligible expenses incurred prior to receipt of funds, but it noted that it would be unusual to have incurred eligible expenses prior to 1 January 2020.¹⁴

Period	Payment Received Period	Deadline to Use Funds
Period 1	10 April 2020 to 30 June 2020	30 June 2021
Period 2	1 July 2020 to 31 December 2020	31 December 2021

Period 3	1 January 2021 to 30 June 2021	30 June 2022
Period 4	1 July 2021 to 31 December 2021	31 December 2022

In updated guidance, HHS reinforced that recipients that have remaining funds that they cannot expend on permissible expenses or losses by the relevant deadline will need to return their funding to the department. HHS indicated that recipients will be able to return unused funds through the PRF Reporting Portal when the first reporting period begins.¹⁵ HHS also reinforced that it is authorized to recoup any amounts that were made in error or exceed lost revenue or expenses, as well as in cases of noncompliance.

REPORTING TIME PERIODS

HHS provided that recipients are required to report for each “Payment Received Period” in which they received one or more payments exceeding US\$10,000 in the aggregate during the applicable “Reporting Time Period.”¹⁶ HHS stressed that recipients that do not report within the applicable period will be considered out of compliance with payment Terms and Conditions and may be subject to recoupment.¹⁷ In general, recipients will have a 90-day period to complete reporting rather than a 30-day period.

Period	Payment Received Period	Reporting Time Period
Period 1	10 April 2020 to 30 June 2020	1 July 2021 to 30 September 2021
Period 2	1 July 2020 to 31 December 2020	1 January 2022 to 31 March 2022
Period 3	1 January 2021 to 30 June 2021	1 July 2022 to 30 September 2022
Period 4	1 July 2021 to 31 December 2021	1 January 2023 to 31 March 2023

STEPS FOR REPORTING

PRF recipients will report on the use of funds using their normal basis of accounting in the order below:¹⁸

- Interest Earned on Payments.** For Reporting Entities that held the payment(s) in an interest-bearing account, the dollar value of interest earned on those payment(s) must be reported.
- Other Assistance Received.** The Reporting Entity will report on other assistance received by quarter during the period of availability, including Department of the Treasury and/or Small Business Administration Assistance, Federal Emergency Management Agency programs, HHS Cares Act Testing payments, insurance, and local, state, and tribal government assistance.
- Use of SNF and Nursing Home Infection Control Distribution Payments (if applicable).** The Reporting Entity will report on infection control expenses paid for with payments received through the SNF and Nursing Home Infection Control Distributions (including interest earned).

4. **Use of General and Other Targeted Distribution Payments.** The Reporting Entity will report on expenses paid for with payments received through the General and Targeted Distribution payments (excluding SNF and Nursing Home Infection Control Distribution payments).
5. **Net Unreimbursed Expenses Attributable to COVID-19.** The Reporting Entity will report on unreimbursed expenses attributable to COVID-19 (net after other assistance received and PRF payments are applied) by quarter for the period of availability, broken out as “General and Administrative” and/or other “Health Care-Related Expenses,” as described further below.
6. **Lost Revenues Reimbursement.** PRF payment amounts (excluding SNF and Nursing Home Infection Control Distribution payments) not fully expended on health care-related expenses attributable to COVID-19 may then be applied to patient care lost revenues. Recipients may choose to apply PRF payments toward lost revenues using one of three options, up to:
 - **Option I:** the difference between actual patient care revenues
 - **Option II:** the difference between budgeted (prior to 27 March 2020) and actual patient care revenues
 - **Option III:** the amount calculated by any reasonable method of estimating revenues

DATA ELEMENTS

As noted above, HHS provided information in the updated notice on new reporting data elements. HHS also announced that the PRF Reporting Portal will open to start submitting information on 1 July 2021 and that a “comprehensive user guide” is still forthcoming, which will likely contain more detailed information on the information requested.¹⁹ HHS said supporting worksheets will be available to assist with reports.

Reporting Entity Overview

The Reporting Entity will report (i) the taxpayer identification number (TIN) associated with the eligible health care provider that is filing the report; (ii) the business name of the Reporting Entity as it appears on Internal Revenue Service (IRS) Form W-9; (iii) “Doing Business As” information, as applicable; (iv) the address as it appears on IRS Form W-9; (v) contact information of the person responsible for submitting the report on behalf of the Reporting Entity; and (vi) the provider type or subtype that best describes the Reporting Entity selected from a list.²⁰

Subsidiary Questionnaire

Reporting Entities with subsidiaries will report the TINs of subsidiaries that are eligible health care providers and an indication whether the Reporting Entity is reporting on behalf of the subsidiary's General Distribution payment(s).²¹ Reporting Entities with subsidiaries will also report the TINs of subsidiaries that are eligible health care providers and were acquired or divested during the period of availability.²²

Reporting Entities that are subsidiaries will report the TINs of any parent entity reporting on behalf of the Reporting Entity (for General Distribution payments only), if applicable.²³ They will also report the total dollar amount of Targeted Distribution payment(s) transferred to/by a parent entity, if applicable.²⁴

Acquired/Divested Subsidiaries

Reporting Entities that acquired or divested of related subsidiaries during the period of availability must indicate the change in ownership, providing the following data for each relevant TIN: (i) TINs included in the acquisition/divestiture, (ii) the effective date of acquisition or divestiture, (iii) the PRF payment received for TIN acquired or divested, (iv) whether the Reporting Entity holds a controlling interest in the entity, (v) the percent of ownership for acquisition or divestiture, and (vi) the TIN of the acquiring entity, if applicable.²⁵

Interest Earned on PRF Payments

Reporting Entities that held the payments being reported in an interest-bearing account must report the dollar value of interest earned on those payments.²⁶ The total reportable use of distributions will include the interest earned on those PRF payments. Reporting Entities will provide the dollar amount of interest earned on SNF and Nursing Home Infection Control Distribution payments, as well as other PRF payments.

Tax and Single Audit Information

Reporting Entities will provide the following tax and audit information: (i) the designated business type associated with the Reporting Entity's primary TIN used for filing taxes, (ii) the exempt payee code as designated on IRS Form W-9, (iii) the exempt from Foreign Account Tax Compliance Act Reporting code as designated on IRS Form W-9, (iv) the fiscal year-end date (i.e., the month in which the Reporting Entity reports its fiscal year-end financial results), and (v) whether it is subject to Single Audit requirements during 2019 through current fiscal years, and if yes, whether payments are included in the Single Audit.²⁷

Other Assistance Received

Reporting Entities must enter other assistance received by quarter during the period of availability, including Department of the Treasury and/or Small Business Administration Assistance, Federal Emergency Management Agency programs, HHS Cares Act Testing payments, insurance, and local, state, and tribal government assistance.²⁸ If the Reporting Entity is reporting on behalf of subsidiaries, the assistance received for each category must be aggregated across each of the subsidiaries in the report.

Use of General and Other Targeted Distribution Payments

Reporting Entities that received between US\$10,001 and US\$499,999 in aggregated PRF payments during each Payment Received Period are required to report on the use of funds in two general categories: (i) General and Administrative (G&A) Expenses, and (ii) Health Care-Related Expenses.²⁹ Reporting Entities that received US\$500,000 or more in aggregated PRF payments during each Payment Received Period are required to report on the use of funds in greater detail according to subcategories of expenses.³⁰

Net Unreimbursed Expenses Attributable to COVID-19

Reporting Entities will report unreimbursed health care expenses attributable to COVID-19, net of other reimbursed sources in two categories: (i) G&A Expenses, and (ii) Health Care-Related Expenses.³¹

Lost Revenues Attributable to COVID-19

Reporting Entities that expend all PRF payments on expenses or those with only SNF and Nursing Home Infection Control payments will need to submit patient care revenues for 2019 through the most recently completed calendar year.³² Reporting Entities using PRF payments for lost revenues will provide information used to calculate lost revenues attributable to COVID-19 depending on the method they choose: (i) the difference

between actual patient care revenues, (ii) the difference between budgeted (prior to 27 March 2020) and actual patient care revenues, and (iii) another method of estimating revenues.

Notably, with respect to option i and option ii, HHS revised the requirement that Reporting Entities submit revenues/net charges from patient care for calendar year 2020, providing instead that Reporting Entities will submit revenues/net charges from patient care (prior to netting with expenses) by payer mix (including out of pocket charges), and by quarter for each quarter during the period of availability. Reporting Entities electing Option i will provide actuals and Option ii will provide budgeted and actuals.³³

In addition to the information above, Option ii Reporting Entities must submit a copy of a budget, which must have been approved before 27 March 2020, and an attestation from the Reporting Entity's chief executive officer, chief financial officer, or similar responsible individual, attesting under 18 U.S.C. § 1001 that the exact budget being submitted was established and approved prior to 27 March 2020.³⁴

Reporting Entities choosing Option iii must submit a narrative document describing methodology, an explanation of why the methodology is reasonable, and a description establishing how lost revenues were attributable to COVID-19, as opposed to a loss caused by any other source, as well as a calculation of lost revenues attributable to COVID-19 using the methodology described in the narrative document.³⁵

Personnel, Patient, and Facility Metrics

Reporting Entities will report on personnel, patient, and facility metrics by quarter for CY 2019 through the current period of availability.³⁶ Personnel metrics include the total number of clinical and nonclinical personnel by labor category (full time, part time, contract, furloughed, separated, hired). Patient metrics include the total number of inpatient admissions, outpatient visits (in-person and virtual), emergency department visits, and facility stays (for long-term and short-term residential facilities). Finally, facility metrics include the total number of staffed beds for medical or surgical, critical care, and other.

Impact of Payment Survey

Reporting Entities will answer certain questions regarding the impact of payments during the period of availability covering (i) overall operations, (ii) maintenance of solvency and prevention of bankruptcy, (iii) retention of staff and prevention of furlough, (iv) rehire or reactivation of staff from furlough, (v) facilitation of changes needed to operate during the pandemic, (vi) ability to care for and treat patients with COVID-19 (for applicable treatment facilities), and (vii) impact on business or patient services.³⁷

Use of SNF and Nursing Home Infection Control Distribution Payments (if applicable)

Reporting Entities that received between US\$10,001 and US\$499,999 in aggregated payments during each Payment Received Period are required to report on the use funds in two categories: (i) G&A Expenses and (ii) Health Care-Related Expenses.³⁸ Reporting Entities that received US\$500,000 or more in aggregated payments during each Payment Received Period are required to report on the use of these infection control payments in greater detail according to subcategories of expenses.³⁹

WHAT TO EXPECT NEXT

Along with the updated Post-Payment Notice of Reporting Requirements, HHS released updated PRF FAQs⁴⁰ making conforming changes, as well as updated versions of the PRF Reporting Portal Registration User Guide⁴¹ and Reporting Portal FAQs.⁴² While the PRF Reporting Portal opens for submissions on 1 July 2021,

HHS is encouraging PRF recipients to complete their user registrations prior to the opening of the portal. As noted above, HHS indicated that a “comprehensive user guide” is still forthcoming, which will likely contain more detailed information on the data requested.

K&L Gates' health care and FDA practice will continue to monitor these developments. K&L Gates provides guidance to health care providers regarding the PRF, including compliance with reporting and other requirements, as well as other funding programs available as a result of the pandemic.

FOOTNOTES

¹ See U.S. Department of Health and Human Services, General and Targeted Distribution Post-Payment Notice of Reporting Requirements (June 11, 2021) [hereinafter June 2021 Notice of Reporting Requirements], <https://www.hhs.gov/sites/default/files/provider-post-payment-notice-of-reporting-requirements-june-2021.pdf>.

² See U.S. Department of Health and Human Services, General and Targeted Distribution Post-Payment Notice of Reporting Requirements (Jan. 15, 2021), <https://www.hhs.gov/sites/default/files/provider-post-payment-notice-of-reporting-requirements-january-2021.pdf>.

³ See U.S. Department of Health and Human Services, HHS Issues Revised Notice of Reporting Requirements and Reporting Timeline for Recipients of Provider Relief Fund Payments (June 11, 2021), <https://www.hhs.gov/about/news/2021/06/11/hhs-issues-revised-reporting-requirements-timeline-for-provider-relief-fund-recipients.html>.

⁴ June 2021 Notice of Reporting Requirements at 1–2.

⁵ *Id.* at 2.

⁶ *Id.* at 4–5.

⁷ *Id.* at 5–12.

⁸ See U.S. Department of Health and Human Services, Frequently Asked Questions (last updated June 11, 2021), <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/faqs/index.html>.

⁹ *Id.*

¹⁰ See U.S. Department of Health and Human Services, General and Targeted Distribution Post-Payment Notice of Reporting Requirements (Jan. 15, 2021), <https://www.hhs.gov/sites/default/files/provider-post-payment-notice-of-reporting-requirements-january-2021.pdf>.

¹¹ See Richard J. Pollack, *AHA Outlines Initial Policy Priorities for Biden Administration*, AM. HOSP. ASS'N (Dec. 11, 2020), <https://www.aha.org/lettercomment/2020-12-11-aha-outlines-initial-policy-priorities-biden-administration>.

¹² See House Ways and Means Committee, Hearing on the President's Proposed Fiscal Year 2022 Budget with the Department of Health and Human Services Secretary Becerra (June 8, 2021), <https://waysandmeans.house.gov/legislation/hearings/ways-and-means-committee-hearing-presidents-proposed-fiscal-year-2022-budget>.

¹³ June 2021 Notice of Reporting Requirements at 1–2.

¹⁴ *Id.* at 2.

¹⁵ See U.S. Department of Health and Human Services, Frequently Asked Questions (last updated June 11, 2021), <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/faqs/index.html>.

¹⁶ June 2021 Notice of Reporting Requirements at 2.

¹⁷ *Id.*

¹⁸ June 2021 Notice of Reporting Requirements at 4–5.

¹⁹ See U.S. Department of Health and Human Services, Frequently Asked Questions (last updated June 11, 2021), <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/faqs/index.html>.

²⁰ June 2021 Notice of Reporting Requirements at 5.

²¹ *Id.* at 5–6.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 6.

²⁶ *Id.*

²⁷ *Id.* at 6–7.

²⁸ *Id.* at 7.

²⁹ *Id.* at 9–10.

³⁰ *Id.*

³¹ *Id.* at 10.

³² *Id.*

³³ June 2021 Notice of Reporting Requirements at 11.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 7–9.

³⁹ *Id.*

⁴⁰ See U.S. Department of Health and Human Services, Frequently Asked Questions (last updated June 11, 2021), <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/faqs/index.html>.

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