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Use of CARES Act Provider Relief Funds

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Healthcare providers who received or receive payments from the CARES Act Provider Relief Fund ("PRF") may only use the payment for permissible purposes, must document and report the proper use, and return any excess funds to HHS. This alert summarizes the most recent guidance we have concerning these important issues.

Permissible Uses. The PRF includes both General Distributions (to all eligible providers) and Targeted Distributions (to specific provider segments, such as certain rural hospitals, hospitals in high impact areas, and skilled nursing facilities). Under the PRF Terms and Conditions applicable to each,¹ Recipients of the PRF Payments must certify "that the Payment will only be used to **prevent, prepare for, and respond to coronavirus, and that the Payment shall reimburse the Recipient only for health care related expenses or lost revenues that are attributable to coronavirus.**" (See, e.g., <https://www.hhs.gov/sites/default/files/terms-and-conditions-provider-relief-20-b.pdf>, emphasis added).

The CARES Act itself confirms that PRF payments may be used "for building or construction of temporary structures, leasing of properties, medical supplies and equipment including personal protective equipment and testing supplies, increased workforce and trainings, emergency operation centers, retrofitting facilities, and surge capacity." (Pub. Law 116-139, Title I, at <https://www.congress.gov/116/plaws/publ139/PLAW-116publ139.pdf>).

On June 2, HHS issued updated FAQs further clarifying permissible uses under the Terms and Conditions:

The term "health care related expenses attributable to coronavirus" is a broad term that may cover a range of items and services purchased to prevent, prepare for, and respond to coronavirus, including:

- supplies used to provide healthcare services for possible or actual COVID-19 patients;
- equipment used to provide healthcare services for possible or actual COVID-19 patients;
- workforce training;
- developing and staffing emergency operation centers;
- reporting COVID-19 test results to federal, state, or local governments;
- building or constructing temporary structures to expand

capacity for COVID-19 patient care or to provide healthcare services to non-COVID-19 patients in a separate area from where COVID-19 patients are being treated; and

- acquiring additional resources, including facilities, equipment, supplies, healthcare practices, staffing, and technology to expand or preserve care delivery.

Providers may have incurred eligible health care related expenses attributable to coronavirus prior to the date on which they received their payment. Providers can use their Provider Relief Fund payment for such expenses incurred on any date, so long as those expenses were attributable to coronavirus and were used to prevent, prepare for, and respond to coronavirus. HHS expects that it would be highly unusual for providers to have incurred eligible expenses prior to January 1, 2020.

The term "lost revenues that are attributable to coronavirus" means any revenue that you as a healthcare provider lost due to coronavirus. This may include revenue losses associated with fewer outpatient visits, canceled elective procedures or services, or increased uncompensated care. Providers can use Provider Relief Fund payments to cover any cost that the lost revenue otherwise would have covered, so long as that cost prevents, prepares for, or responds to coronavirus. Thus, these costs do not need to be specific to providing care for possible or actual coronavirus patients, but the lost revenue that the Provider Relief Fund payment covers must have been lost due to coronavirus. HHS encourages the use of funds to cover lost revenue so that providers can respond to the coronavirus public health emergency by maintaining healthcare delivery capacity, such as using Provider Relief Fund payments to cover:

- Employee or contractor payroll
- Employee health insurance
- Rent or mortgage payments
- Equipment lease payments
- Electronic health record licensing fees

(<https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/faqs/index.html>). Consistent with the foregoing, the webpage for SNF Payments states that SNF Payments “may help nursing homes address critical needs such as labor, scaling up their testing capacity, acquiring personal protective equipment and a range of other expenses directly linked to this pandemic.”

(<https://www.hhs.gov/about/news/2020/05/22/hhs-announces-nearly-4.9-billion-distribution-to-nursing-facilities-impacted-by-covid19.html>).

Impermissible Uses. In addition to non-coronavirus related expenses, the PRF Terms and Conditions prohibit certain specific uses of funds. For example, Recipients must certify that they “will not use the Payment to reimburse expenses or losses that have been reimbursed from other

sources or that other sources are obligated to reimburse.” (<https://www.hhs.gov/sites/default/files/terms-and-conditions-provider-relief-30-b.pdf>). In addition, Recipients may not use the funds for certain esoteric or political purposes listed in the Terms and Conditions, e.g., to pay the salary of an individual at a rate in excess of Executive Level II (\$197,300); abortions; lobbying; etc. (*Id.*).

Reporting. The PRF Terms and Conditions require PRF Payment Recipients to

submit reports as the Secretary determines are needed to ensure compliance with conditions that are imposed on this Payment, and such reports shall be in such form, with such content, as specified by the Secretary in future program instructions directed to all Recipients.

(<https://www.hhs.gov/sites/default/files/terms-and-conditions-provider-relief-20-b.pdf>). More specifically, the Terms and Conditions state:

Not later than 10 days after the end of each calendar quarter, any Recipient that is an entity receiving more than \$150,000 total in funds under the Coronavirus Aid, Relief, and Economics Security Act (P.L. 116-136), the Coronavirus Preparedness and Response Supplemental Appropriations Act (P.L. 116-123), the Families First Coronavirus Response Act (P.L. 116-127), or any other Act primarily making appropriations for the coronavirus response and related activities, shall submit to the Secretary and the Pandemic Response Accountability Committee a report. This report shall contain: the total amount of funds received from HHS under one of the foregoing enumerated Acts; the amount of funds received that were expended or obligated for reach project or activity; a detailed list of all projects or activities for which large covered funds were expended or obligated, including: the name and description of the project or activity, and the estimated number of jobs created or retained by the project or activity, where applicable; and detailed information on any level of sub-contracts or subgrants awarded by the covered recipient or its subcontractors or subgrantees, to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 allowing aggregate reporting on awards below \$50,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

(*Id.*). We have not received much additional detail concerning the required reports yet. The most recent PRF FAQs state:

All providers receiving Provider Relief Fund payments will be required to comply with the reporting requirements described in the Terms and Conditions and specified in future directions issued by the Secretary. The specific reporting obligations imposed on providers receiving \$150,000 or more from any Act primarily making appropriations for the coronavirus response and related activities, which is a statutory requirement, begins for the

calendar quarter ending June 30. The Secretary may request additional reports prior to that date. HHS will provide guidance in the future about the type of documentation we expect recipients to submit. Additional guidance will be posted at <https://www.hhs.gov/provider-relief/index.html>.

(<https://www.hhs.gov/sites/default/files/provider-relief-fund-general-distribution-faqs.pdf>).

Recoupment. HHS may recoup PRF payments that exceed permissible and documented costs and expenses:

The Provider Relief Fund and the Terms and Conditions require that recipients be able to demonstrate that lost revenues and increased expenses attributable to COVID-19, excluding expenses and losses that have been reimbursed from other sources or that other sources are obligated to reimburse, exceed total payments from the Relief Fund. Generally, HHS does not intend to recoup funds as long as a provider's lost revenue and increased expenses exceed the amount of Provider Relief funding a provider has received. HHS reserves the right to audit Relief Fund recipients in the future to ensure that this requirement is met and collect any Relief Fund amounts that were made in error or exceed lost revenue or increased expenses due to COVID-19. Failure to comply with the Terms and Conditions may be grounds for recoupment.

(<https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/faqs/index.html>). Accordingly, providers should carefully track and document their permissible use of PRF funds and compliance with the remaining Terms and Conditions.

Stay Tuned. As PRF participants know, government guidance is evolving as regulators sort through PRF issues. We anticipate further reporting instructions shortly. Providers should continue to monitor HHS's PRF websites and FAQs to ensure timely and continued compliance as new instructions come out: <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/index.html> and <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/faqs/index.html>.

For questions regarding this update, please contact:

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¹This alert is limited to PRF payments under the General Distribution, High Impact Relief Fund Payments, Rural Provider Relief Fund Payments, and Skilled Nursing Facility Relief Fund. Other CARES Act programs have different terms and conditions, e.g., Uninsured Relief Fund Payments, RHC Testing Payments, FFCRA Relief Fund Payments. See, e.g., <https://www.hhs.gov/sites/default/files/terms-and-conditions-uninsured->

relief-fund.pdf, <https://www.hhs.gov/sites/default/files/terms-and-conditions-rural-testing-relief-fund.pdf>; and <https://www.hhs.gov/sites/default/files/terms-and-conditions-ffcra-relief-fund.pdf>.

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