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MEMORANDUM

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TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker, LLP

RE: *HHS Revises Reporting Requirements and Guidance on Use of Provider Relief Funds*

The U.S. Department of Health and Human Services (HHS) recently issued a series of updates to its reporting requirements and FAQs on the permitted uses of Provider Relief Fund (PRF) payments. On September 19, 2020, HHS issued detailed *Post-Payment Notice of Reporting Requirements* (Reporting Requirements) on the use of PRF monies made available to health care providers through the Coronavirus Aid, Relief, and Economic Security (CARES) Act, P.L. 116-136. The September notice caused some concern among health care providers, as it could be interpreted to restrict the use of PRF funds for lost revenues. The September guidance defined lost revenue as a negative change in year-over-year net patient care operating income, net of the healthcare related expenses attributable to coronavirus.

In response to push back from provider groups, HHS has now revised its September guidance to loosen the restriction on use of PRF funds for lost revenues. On October 22, 2020, HHS issued new Reporting Requirements along with a *Reporting Requirements Policy Update* (Policy Update) to explain the changes.¹ HHS's Policy Update explains that the agency's June 2020 Frequently Asked Questions encouraged providers to use PRF monies in place of lost revenues to maintain healthcare delivery capacity.² It went on to explain that its September 2020 instructions for reporting on the use of PRF distributions placed a new limitation on the use of funds, prohibiting most providers from using PRF payments to become more profitable in 2020 than in 2019 (pre-pandemic).³

HHS has now clarified that in response to feedback from stakeholders and members of Congress, it is now allowing PRF payments to be used for all lost revenues, without limitation.⁴ The updated Reporting Requirements confirm "the full applicability

¹ The full *Reporting Requirements Policy Update* is available at <https://www.hhs.gov/sites/default/files/reporting-requirements-policy-update.pdf>.

² Reporting Requirements at 1.

³ *Id.*

⁴ *Id.* at 2. We note that the September 19, 2020 guidance was not entirely clear. The lack of clarity in that guidance led to the pushback from providers and this clarification.

[of] PRF distributions to lost revenues." They say that "[r]ecipients may apply PRF payments toward lost revenue, up to the amount of the difference between their 2019 and 2020 actual patient care revenue."⁵

HHS issued another clarification to its Reporting Requirements on November 2, 2020. In its November 2, 2020 clarification, HHS eliminated the requirement that lost revenues be net of healthcare expenditures. We note that this is consistent with the CARES Act itself, which does not put any limitation on the use of PRF fund payments for lost revenues.

Following is a brief update on the reporting requirements as they currently stand, as well as an update and a link to the most current FAQs on the permitted use of Provider Relief Funds. Please note that all of these requirements apply only to Provider Relief Funds you received directly from the Health Resource Services Agency (HRSA). They do not apply to any of the funds you received from the Indian Health Service (IHS) through your funding agreements or other coronavirus relief funds you may have received.

The Self-Governance Communication and Education Tribal Consortium is hosting a webinar with the Inspector Generals (IGs) of the Treasury Department and HHS on November 17, 2020 from 2:00 – 3:30 pm Central Time. The IGs will go over what tribal providers can expect to be audited for regarding coronavirus stimulus funds. We will be covering this meeting and will report back to you any new information. To register, please use the following link:

https://us02web.zoom.us/webinar/register/WN_HxOvRPzpSzOnAuNj9b9A9g

Reporting Requirements Overview

The reporting requirements apply to all providers who received at least \$10,000 in PRF funds. As reported, the new Reporting Requirements impose time limits on the use of PRF funds that are not in the CARES Act. Under the new guidance, providers will have to begin submitting reports to HHS on their use of provider relief funds on January 15, 2021, when the reporting portal will open. Providers will have from January 15, 2021 to February 15, 2021 to submit the required reports. Providers that did not spend all of their PRF funds by December 31, 2020 will have until July 31, 2021 to report on those funds. As a result, the Reporting Requirements effectively require all providers to spend PRF funds by June of 2021.

The new Reporting Requirements state that "[i]f recipients do not expend PRF funds in full by the end of calendar year 2020, they will have an additional six months in which to use remaining amounts toward expenses attributable to coronavirus but not

⁵ Reporting Requirements at 1.

reimbursed by other sources, or to apply toward lost revenues in an amount not to exceed the difference between 2019 and 2021 actual revenue."

Reporting Expenses. Providers who receive between \$10,000 and \$499,999 in PRF payments are subject to less detailed reporting requirements. They will be required to report net health care related expenses attributable to coronavirus in two categories: (1) general & administrative expenses; and (2) health care related expenses.

Recipients of over \$500,000 in PRF funds are required to provide more detailed information about their expenses in those two categories. For G&A expenses, they will be required to report on expenses in the following categories: Mortgage/Rent, Insurance, Personnel, Fringe Benefits, Lease Payments, Utilities/Operations and Other G&A expenses. For health care related expenses, providers will have to report on the following categories: Supplies, Equipment, Information Technology, Facilities, and other health care related expenses.

Reporting Revenues. Providers are required to provide "information used to calculate lost revenues attributable to coronavirus, represented as a negative change in year-over-year actual revenue from patient care related sources. Revenues and expenses in this section include all lost patient care revenues and patient care cost/expense impacts." Providers with unused funds as of December 31, 2020 will have to submit a new report for the period between January 1, 2021 and June 30, 2021.

The Reporting Requirements require providers to report their revenues from the following payers in 2019 and 2020: Medicare Part A+B, Medicare Part C, Medicaid, Private Insurance, Self-Pay and other. They also require providers to report on any funds received from other sources in 2020, including Treasury funds and other CARES Act funding. Although it does not say so explicitly, other CARES Act funding would include the IHS CARES Act funding Indian health care providers received. The following additional funds must also be reported: FEMA CARES Act funding, CARES Act testing funding, local, state and tribal government assistance, business insurance and other assistance, including "other federal sources of funding." This would appear to include IHS funding.

Please refer to the Reporting Requirements themselves (attached) for more detailed information.

Summary of New FAQs on Permissible Use of PRF Funds

On October 28, HHS updated its FAQs on reporting requirements and permissible uses of PRF funds. The FAQs are subject to change, and can be accessed [here](#).

The new FAQs address a number of topics. Among other things, they clarify that health care expenses are no longer required to be netted against lost revenue. They also clarify that fringe benefits not covered by other sources can be included as expenses.

The FAQs state that providers should identify all their expenses, and then offset all sources of revenue/reimbursement. The PRF funds can then be applied to remaining costs. The FAQs clarify that PRF funds can be used to cover marginal expense increases due to coronavirus. As an example, they state that if a pre-pandemic office visit had a cost of \$80, and a post-pandemic office visit had a cost of \$85, then the \$5 marginal increase could be paid for using PRF funds, unless some other source of funding already covered that marginal increase.

To calculate the increase in G&A expenses, the FAQs clarify that the marginal increase in G&A due to coronavirus not covered by other sources would be covered, i.e., the additional administrative costs associated with new hires needed to respond to coronavirus. To calculate expenses attributable to coronavirus, the FAQs state that providers should calculate their expenses for supplies, equipment, IT, facilities, employees, and other healthcare related costs/expenses for calendar years 2019 and 2020, then "calculate the change in year over year expenses and identify the portion that is attributable to coronavirus."

The FAQs establish a maximum amount of PRF funds that can be allocated to lost revenues. Under the FAQs:

"Unreimbursed expenses attributable to coronavirus are considered first in the overall use of funds calculation. Provider Relief Fund payment amounts not fully expended on unreimbursed healthcare related expenses attributable to coronavirus are then applied to lost revenues for 2020, which is capped at the change in 2019 to 2020 actual revenue from patient care (i.e., patient care revenue in 2019 less patient care revenue in 2020)."

The FAQs go on to say that providers that have increased revenues in 2020 over 2019 from patient care would not be considered to have lost revenues, but could use PRF funds for coronavirus expenses not covered by other sources.

For services that are reimbursed by CMS through cost reports, the FAQs clarify that if full costs are reimbursed through this method, then there are no expenses to report because costs were fully reimbursed by another source. However, if the cost report reimbursement method does not fully reimburse costs, those amounts not reimbursed qualify for PRF funding.

We will continue to monitor any new developments in Provider Relief Funding requirements. For further information, please contact Elliott Milhollin (emilhollin@hobbsstrauss.com or 202-822-8282), Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745), or Akilah Kinnison (akinnison@hobbsstrauss.com or 202-822-8282).