




# Don't Hide Under the Desk When the Government Knocks:

## Tools to Prepare for CARES Act Audits and Enforcement Efforts

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# Agenda



- CARES Act Considerations Overview
- Early Enforcement Efforts
- Focus on the PRF
- Audit Priorities
- Audit Preparation and Response
- Potential Consequences and Risk Mitigation
- Closing Thoughts and Questions

# CARES Act Considerations

## Overview



# Relevant CARES Act Funds and Considerations



- CARES Act – over \$2 trillion across all sectors of the economy
- Paycheck Protection Program
- Provider Relief Fund
- Programs are in the audit and enforcement phases
- Government is committed to post-pandemic enforcement- but how ?
- Terms and Conditions of the programs
- Single Audit Requirement – applicability to the PRF, compliance
- Confusion and shifting guidance
- Breadth and alacrity; this was new and in a global emergency
- Amount of money at issue

# Early CARES Act Enforcement Efforts





 AMERICAN HEALTH LAW ASSOCIATION

# CARES Act Enforcement - Ongoing



- By Q1 2022:
  - Criminal charges against over 1000 defendants
  - Alleged losses exceeding \$1.1 billion
  - Seizure of EIDL proceeds
  - Over 240 civil investigations of over 1800 individuals and entities
  - Alleged loans totaling over \$6 billion
- What's on the horizon:
  - Audits
  - Enforcement Actions
  - FCA cases. . .?



# The Provider Relief Fund



- Three sets of distributions totaling \$178 billion
  - *Four phases of General Distributions*
  - *Targeted Distributions*
  - *Uninsured and Underinsured Programs*
- Terms and Conditions restrict eligibility and use of the funds
- These are mandatory, even if the funds were not applied for
- Reporting obligations through the PRF Reporting Portal
  - *In 2022 HRSA notified providers who were non-compliant with reporting policies and asked thousands of them to return funds*



# Internal and External Audits



Reporting Portal  
Terms and Conditions of the Program

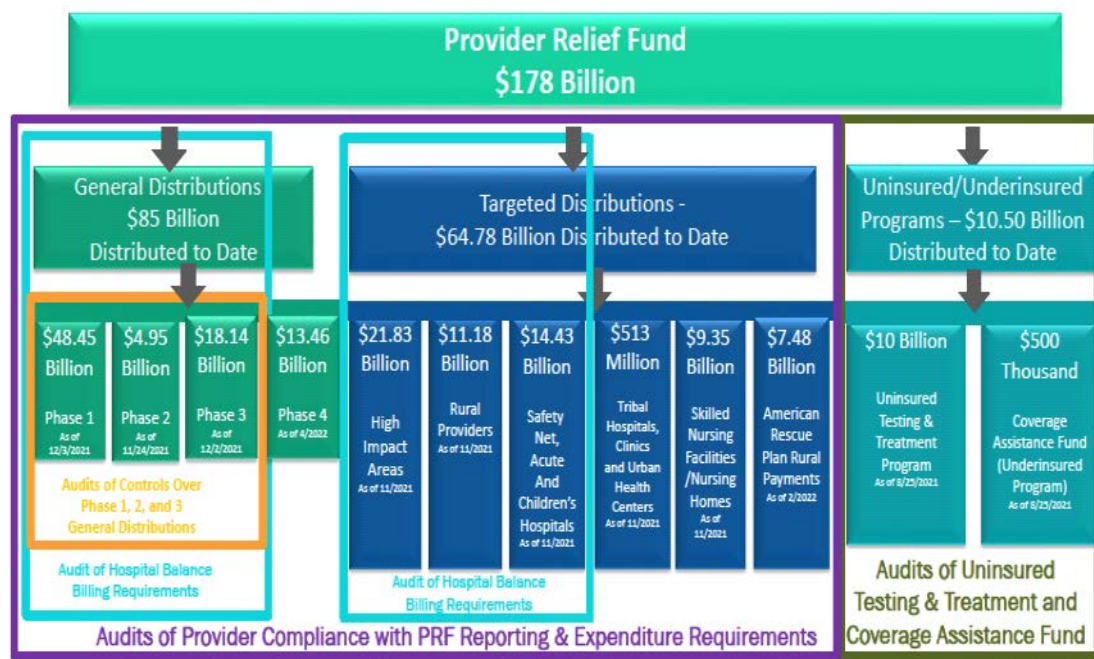
Internal or Single Audits  
*Recipients of amounts in excess of \$750,000*  
*Applicability to the PRF*

HHS OIG retains the right to externally audit  
*Any program, any recipient, any amount*

# Audits and Audit Priorities



# Audit Coverage of the Provider Relief Fund



\*\$17.72 billion in funds are undistributed.

# Anticipated Auditors



- US Department of Health and Human Services (HHS) – Office of Inspector General (OIG)
- Office of Management and Budget (OMB) Single Audits
- HRSA or HRSA contractors involvement such as with targeted distributions reallocated to parent company by subsidiary

# Audit Readiness – OMB



- Non-profit, government and institutes of higher education once Federal expenditures reach \$750,000 in the auditee's fiscal year
- Commercial entities once they receive Federal awards of \$750,000 in the auditee's fiscal year, if the single audit option is selected under 45 CFR 75.501(i)
- Be familiar with HRSA FAQs for the program
- HRSA has not developed the reporting matrix which will drive the triggers for Single Audits

# PRF Reporting Requirements



PRF Amounts	Reporting Obligation
Under \$10,000	No reporting obligation, <i>BUT</i> HHS reserves right to require report later
\$10,000+ <i>retained</i>	Must file reports
\$10,000-\$499,999	Must classify expenses as general and administrative (G&A) or other healthcare-related expenses
>\$500,000	More detailed reports required

# OAS Audit Work Plan



Announced or Revised	Agency	Title	Component	Report Number(s)
May 2021	Health Resources and Services Administration	<a href="#">Audit of CARES Act Provider Relief Funds— Payments to Health Care Providers That Applied for General Distribution Under Phases 1, 2, and 3</a>	Office of Audit Services	W-00-21-35873
October 2020	Health Resources and Services Administration	<a href="#">Audit of HRSA's Controls Over Medicare Providers' Compliance with the Attestation, Submitted-Revenue-Information, and Quarterly Use-of-Funds Reporting Requirements Related to the \$50 Billion General Distribution of the Provider Relief Fund</a>	Office of Audit Services	W-00-21-59060
August 2020	Centers for Medicare and Medicaid Services	<a href="#">Audit of CARES Act Provider Relief Funds— General and Targeted Distributions to Hospitals</a>	Office of Audit Services	W-00-20-35855
May 2020	OS	<a href="#">Audit of CARES Act Provider Relief Funds— Distribution of \$50 Billion to Health Care Providers</a>	Office of Audit Services	W-00-20-35847



# Auditing the PRF



- HHS' calculation of PRF payments and distributions to eligible providers
- HRSA's controls over requirements: attestation, submitted revenue information, and quarterly-reporting requirements
- Providers' adherence to the post-payment reporting requirements
- HRSA's Covid-19 Uninsured program

# CARES Act Criteria in the Context of an Audit



# Appropriate Uses of PRF



- Expenses
  - General & Administrative
    - Includes expenses such as mortgage/rent, personnel, and operations.
  - Other healthcare expenses
    - Includes expenses such as supplies, PPE, and equipment.

# Inappropriate Uses of PRF



- Lobbying
- Executive Compensation above \$197,300
- Abortion services, with limited exceptions
- Embryo research
- Gun control efforts
- Promotion of legalization of controlled substances
- Pornography
- ACORN funding
- Funding for needle exchange programs
- Per FAQ: Repayment of CMS Advanced Accelerated Payments

# PRF Reporting Lost Revenue



- Difference between actual patient care revenues/net charges 2019 vs. 2020
- Difference between 2020 budgeted vs. 2020 actual patient care revenue
- “Reasonable alternative methodologies”

# Office of Investigations



- Initial cases, price gouging and hoarding of supplies
- Shifted to bad actors
- Similar fraud schemes to previous cases (e.g., billing for services not rendered)

# Audit Preparation and Response





# PRF Audit Preparation – Best Practices



- Conservative approach: return/reject funds
- Maintain detailed documentation
  - Expenses (G&A, other healthcare expenses)
  - Lost Revenues (methodology of how calculated, budget approval records, etc.)
  - Retain for 3 years from date of final expenditure
  - Maintain it in one centralized location
- Report
  - Timeliness of report (3-month extension possible for OMB Single Audit)
  - Apply other sources of funds before PRF (“payment of last resort”)
  - Interest earned on PRF

# PRF Preparation – Best Practices



- Stay current on HHS Guidance/FAQs
- Assign a PRF owner/team to manage documentation, allocation, and response
- Consider a mock audit to test audit readiness
- Memorialize conversations and meetings including documentation of decisions made and guidance that was provided
- Have a plan/defense strategy
- Legal counsel

# Single Audits – Uniform Guidance Audit Basics



- Determines whether financial statements of the auditee are represented fairly in all material aspects in accordance with generally accepted accounting principles
- Uses Compliance Supplement to review auditee's internal controls over other programs
- Determines whether auditee has complied with federal statutes, regulations and terms of the federal awards

# Single Audits – Uniform Guidance Audit Basics



- Scope
  - Financial statements
  - Schedule of expenditures of federal awards
  - Compliance with federal awards, including controls over compliance
- Timing
  - Deadline for submission is the earlier of 30 calendar days after receipt of the auditor's reports or nine months after the end of the audit period
  - COVID Impact: Six-month extensions granted for fiscal year-ends through June 30, 2021; no further extensions available at this time
  - Performed annually, unless certain criteria are met for biennial audits

# Single Audits – Preparation



- At year-end
  - Gather and summarize federal grant information
  - Create a detailed draft of the SEFA
  - Review written policies and procedures
  - Prepare internal control documentation and consider documentary evidence of controls
- Throughout the year
  - Draft written policies and procedures and update for changes in systems, processes, and personnel
  - Keep informed of the latest standards, guidance, and developments
  - Identify and address issues and problem areas in advance
  - Review written policies and procedures
  - Continue regular risk assessment and monitoring

# Single Audits – Internal Controls Components



- Internal control over compliance requirements for federal programs must establish:
  - Processes to provide reasonable assurance that a non-federal entity is managing federal awards in compliance with federal statutes, regulations, and the terms and conditions of the federal award
- Objectives of the control environment
  - Transactions are properly recorded and accounted for
  - Transactions are executed in compliance with federal statutes, regulations, and the terms and conditions of the federal award
  - Safeguarding of property and assets
  - Reliable reporting

# Single Audits – Management Responsibilities



- Establish and maintain an effective system of internal control over federal awards
- Comply with U.S. Constitution, federal statutes, regulations, and the terms and conditions of the federal awards
- Evaluate and monitor the entity's compliance with federal statutes, regulations, and the terms and conditions of federal awards
- Take prompt action when instances of noncompliance are identified - includes any noncompliance identified in audit findings
- Take reasonable measures to safeguard PPI/PHI or other sensitive information



# Single Audits – Establish Specific Controls



- New Grants
  - Identify control objective
  - Understand any applicable business processes
  - Evaluate risks of what could go wrong
  - Understand the controls available or investigate new controls
  - Design or implement existing controls and place into operation
  - Monitor and adjust controls as necessary
- Additional considerations
  - Engage external parties
  - Large vs. small entities
  - Benefits and costs

# Single Audits – Internal Control Best Practices



- Adoption of Green Book - standards for internal control in the federal government
- COSO - Internal Control Integrated Framework
- Communications with awarding agency
- Establish summaries of compliance items for each award
  - Document entity-wide and specific controls

# Potential Consequences and Risk Mitigation



# Anticipated Audit Risk Areas for the PRF



- Reporting non-compliance
- Ineligible recipients
- Ineligible expenses
- Improperly calculated lost revenues
  - Budget approval and certification requirements
  - Bogus alternative methodologies
  - Failure to report patient care revenues
- Expenses paid or payable by other sources (*e.g.*, PPP loans, FEMA, insurance)
- Balance billing
- Changes of ownership
- Unused funds – *awaiting HHS guidance re: process to return*

# Anticipated Consequences



- “Recoupment and other legal action” for inaccurate information provided to HHS
- For intentional wrongdoing in payment applications or reporting:
  - Criminal: restitution + possible imprisonment
  - FCA or other civil penalties
  - Administrative penalties
  - Revocation of Medicare billing privileges
  - Exclusion from federal programs
- False Claims Act liability: attestation + materiality in PRF Terms and Conditions

# Anticipated Consequences – Single Audit



- Repay grant awards
- Suspension of grant awards
- Categorized as a "high-risk auditee" and subject to additional audits
- Findings are public information

# Real Life Examples – Criminal



- First charge of misappropriation of PRF – Michigan 2021
  - Theft of Government property
  - Allegedly received funds for home health agency that had never operated during the pandemic, and used funds for personal use
- June 2021 – California
  - Theft of Government property
  - Allegedly kept auto-deposited PRF funds even though home health agency was defunct, in violation of terms and conditions
- March 2022 – Tennessee
  - Theft of Government property
  - Former owner of defunct hospice allegedly received PRF money, paid himself, submitted a false attestation
- April 2022 – California
  - Theft of Government property
  - Allegedly kept auto-deposited PRF funds even though home health agency was defunct, in violation of terms and conditions



# Real Life Examples – Civil



- September 2021 – Texas
  - False attestation in reporting portal about Medicare billing privileges
  - Civil Monetary Penalties
- September 2021 – Florida
  - False attestation in reporting portal about Medicare billing privileges
  - Civil Monetary Penalties
- January 2022 – California
  - False attestation that physician was providing care for COVID patients
  - Civil Monetary Penalties

# MITIGATING RISK AND SURVIVING SCRUTINY



- DOJ has indicated it does not plan to pursue
  - inadvertent technical mistakes
  - honest misunderstandings of rules, terms and conditions, or certification requirements
  - cases against entities who access CARES Act programs in good faith and in demonstrably considered compliance with the rules
- But DOJ has signaled it will vigorously enforce the FCA to combat CARES Act fraud
- Build a record demonstrating good faith
- Get skilled legal counsel involved early
- Beware of investigations proceeding on dual tracks
- Remember the applicable statutes of limitation

# Closing Thoughts and Questions



# Questions



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