

September 3, 2021

Submitted via email to: PFD-LTSS@hhs.texas.gov

Texas Health and Human Services Commission
Provider Finance Department
Mail Code H-400
P.O. Box 149030
Austin, TX 78714

Re: Texas Hospital Association Comments on Proposed Rule 21R146 Relating to Novel Coronavirus (COVID-19) Fund Reporting

To Whom it May Concern:

On behalf of our more than 475 member hospitals and health systems, including rural, urban, children's, teaching and specialty hospitals, and private psychiatric facilities, the Texas Hospital Association is pleased to submit these comments on proposed Texas Administrative Code, Title 1, Part 15, new §355.7201 implementing Senate Bill 809 and Rider 143 passed in the 87th Legislature, Regular Session. The bill and rider institute statewide reporting requirements for health care institutions receiving federal COVID-19 relief funding via the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Consolidated Appropriations Act of 2021, and the American Rescue Plan Act (ARPA) of 2021. Considering the ongoing COVID-19 public health emergency, THA appreciates HHSC's attempt to minimize reporting that would be burdensome or that repeats reporting hospitals already perform on these funds. Consistent with the intent lawmakers communicated clearly throughout the legislative process, THA's comments aim to ensure the final rule provides for streamlined, clear, and unduplicated reporting and puts providers in position to successfully achieve compliance with the new statute.

1. HHSC should delay the reporting period by one month because the current reporting period begins before the notice and comment period is closed.

As explained in the proposed rule and in a notice issued by HHSC on August 25, the reporting requirements begin on September 1, 2021. However, the rule comment period does not end until Sept. 3. To decide what data to collect and begin the provider reporting process on Sept. 1, HHSC will be implementing the policies articulated in the proposed rule before providers have an opportunity to comment on them.

After the comment period closes, the rule cannot possibly be effective earlier than Sept. 27 – three days before the reporting period ends on Oct. 1. Non-compliant providers are to be penalized after that date. That effective date is possible only if HHSC, *in less than one business day*, considers all comments received; makes changes based on the comments; develops its written responses to the comments; goes through the internal approval process; and submits the adopted rule to the Secretary of State on Sept. 7. This result is not consistent with meaningful notice and comment rulemaking.

To avoid this result, HHSC could delay the first reporting period by one month and still meet its deadline to submit its report to the Governor, Legislative Budget Board, and Legislative committees on December 1. Doing so would allow HHSC to modify the reporting process based on comments received *before* the rule is adopted.

2. The proposed rules require reporting of more information than the legislature authorized.

The proposed rule purports to authorize HHSC to require providers to report “information related to direct or indirect costs associated with COVID that have impacted the provider’s business operation and any other information HHSC deems necessary to appropriately contextualize the moneys received.” While THA appreciates HHSC recognizing the importance of context in reporting on these funds, the statement “any other information HHSC deems necessary” is overly broad and exceeds authority granted the agency in S.B. 809 or Rider 143.

S.B. 809 requires only that health care institutions report “money received” from federal sources for assisting during the public health emergency. It does not require providers to report on *costs, uses, or any other information*. Rider 43 directs HHSC to develop a report on the “total value and uses” of COVID-19 funds by hospitals and nursing facilities, and on “the cost to nursing facilities” to implement certain requirements. It does not, however, authorize HHSC to collect cost data from any other provider, nor “any other information HHSC deems necessary” from any health care institution.

HHSC has indicated that the COVID-19 Impact Survey emailed to contracted service providers on August 9, 2021 requests similar information to reports required for S.B. 809 and Rider 143 compliance. This survey contains up to 79 items including costs and other information unrelated to “money received.” Many hospitals opted not to respond to the voluntary survey given competing demands created by the ongoing COVID-19 surge and are cautioning that monthly S.B. 809 reporting will prove onerous if the reporting tool resembles the survey already distributed. Because much of the data collection falls outside what S.B. 809 and Rider 143 permit, THA encourages HHSC to amend the rule and revise reporting instruments as necessary to conform to statute and reduce administrative burden.

3. The proposed rule requires reporting that is duplicative of that reported to the federal government, contrary to statute. HHSC has not made clear which non-duplicative data it will be requesting.

S.B. 809 instructs HHSC to the extent practicable, to “avoid requiring institutions to report information that is duplicative of information that institutions are required to report to the federal government.” The proposed rule does not achieve this benchmark. Texas hospitals are overwhelmed with the clinical and administrative burden brought on by the recent surge in COVID-19 cases. Repetitive reporting requirements are unnecessary and unhelpful.

Information hospitals already report to the federal government is extensive:

- Any provider that received more than \$10,000 in Provider Relief Funds (PRF) must submit a quarterly report to the federal Department of Health and Human Services (HHS).
- Providers who expended more than \$750,000 in provider relief funds are subject to federal single audit requirements under 45 CFR 75 Subpart F. The single audit must be submitted to the Federal Audit Clearinghouse at the Office of Management and Budget and is made publicly available.

For health care institutions other than nursing facilities, the information reported to the federal government appears to include all information required in Rider 143 and S.B. 809 (*i.e.*, moneys received and uses). Rider 143 requires HHSC to collect data from nursing facilities that may not be included in the federal report.

To obtain the information it needs while avoiding requiring institutions to report duplicative information, THA recommends that HHSC require institutions monthly to submit a copy of their most recent federal PRF report to HHSC, and within 10 days of submitting it through the federal portal. Where a Texas hospital PRF reporting to HHS on the federal portal is completed on a consolidated basis by its Parent company (as permitted by HHS), these hospitals can provide HHSC a subsidiary schedule that identifies PRF monies received by the Parent company on behalf of its Texas hospitals which are included in the consolidated HHS filing. THA believes the PRF report and/or single audit supply adequate contextual information on funds received, achieves compliance with statute, and fulfills legislative intent not to repeat a data gathering process hospitals have already performed. Additional information HHSC needs from nursing facilities should be separately obtained, but other institutions should not be burdened with additional reporting requirements.

Certain categories of sums authorized through the CARES Act, Consolidated Appropriations Act of 2021, and ARPA may not already be reported to the federal government because they flowed indirectly through other agencies or payment mechanisms, or reduced the state share without resulting in a higher payment to the provider. In many cases where a payment was enhanced, these payments are directly tied to patient care or reimbursement for patient care, are not tracked against specific expenses, and would therefore not be readily available for hospitals to report uses in the manner HHSC proposes. The proposed rule does not clearly state how reporting of such funds would be handled. THA recommends HHSC affirm that it does *not* consider these funds reportable, and that hospitals would not run afoul of requirements for not being able to report on uses of these funds: Medicare advanced payments (including sums already repaid and those yet to be repaid), Medicare sequestration, Medicare add-on payments for COVID-19 treatment and testing, payments for uninsured COVID-19 patients billed to HRSA, Medicaid DSH, Medicaid enhanced FMAP, employee retention credits, payroll tax delays, and direct grants from HHS or CDC (for example, grants for COVID-19 surveillance activities).

THA also notes that S.B. 809 requires that HHSC “collects monthly reports from health care institutions.” The first report will capture the period from January 31, 2020 to August 31, 2021 and subsequent monthly reports will cover the 30-day period two months prior to each deadline. THA cautions it is probable that some or all data HHSC receives could be unaudited at time of submission. THA encourages HHSC to include an annotation to this effect in its quarterly reporting to the legislature and wherever else the data is made available for public consumption.

4. The proposed rule does not include any instructions on how to report the receipt of federal funds, how much information will be requested, or whether facilities who received no relevant federal funding are required to report.

The proposed rule includes information on who is required to report, reporting frequency, and prescribes penalties for noncompliance. However, there is no information in the proposed rule regarding the actual mechanics of reporting. Given the effective date of the reporting requirements, facilities are entitled to notice on how to report.

Similarly, if HHSC intends to collect “any other contextual information HHSC deems necessary to appropriately contextualize money received,” hospitals are entitled notice on what those additional items would be. We advise HHSC that while hospitals may know amounts of federal funds received, costs or other items HHSC deems contextual may not be known at the time reports are due. Although as previously stated THA believes HHSC is not authorized to collect information other than “money received,” hospitals could be at risk of noncompliance and penalties if the additional required items are not available for the specified period. We encourage HHSC to clarify precisely which reportable information is necessary to achieve compliance, and which items respondents could exclude if not known.

The proposed rule also does not describe what facilities who have received no relevant federal funding should do. It is unclear whether these facilities should report to HHSC that they received no federal funding or if they are simply excused from this reporting requirement. To ease the burden on providers, THA recommends the latter approach or, at the very least, a single report indicating that the facility has not received any relevant funds.

5. The proposed rules are not clear whether hospital reporting ought to be decoupled from nursing facility payments.

Per Rider 143, the proposed rule text holds the state’s nursing facility payments for FY 2023 contingent upon submission of Dec. 1, 2021 and Jun. 1, 2022 reports to the Governor, Legislative Budget Board, and appropriate standing committees. It calls for HHSC to “suspend all payments to providers” if reports are not completed due to “insufficient reporting from providers” until HHSC is reauthorized to spend its nursing facility appropriations. Further, Rider 143 states “any facilities that do not provide information requested by the commission necessary to complete the report shall be identified in the report.”

The term “facilities” in context of Rider 143 appears directed toward nursing facilities and their payments. However, the use of “providers” and “facilities” in §355.7201(g) could be interpreted ambiguously to encompass hospitals or other health care institutions required to complete monthly reports. As drafted, this language appears to have the effect of tying nursing facility payments to reporting from hospitals. THA encourages a clarifying edit to ensure nursing facility payments are not put at risk by hospital reporting in any way, and that hospitals are not identified in the report if Rider 143 intends for nursing facilities to be identified for failing to provide requested information.

Suggested revision:

*(g) Penalties for failure to report. Specified ~~providers~~ **health care institutions** are required to report information as requested on a monthly basis to HHSC.*

*(1) A **nursing** facility that does not report requested information will be identified by name and a unique identifying number, such as National Provider Identification number, in HHSC's legislatively-mandated reports.*

(2) Failure to report 2 or more times in a 12-month period will result in notification to the appropriate licensing authority who may take disciplinary action against a health care institution that violates this chapter as if the institution violated an applicable licensing law.

*(3) Failure to report will result in the issuance of a vendor hold on future payments to the identified **provider health care institution** after 30 days following the due date of the required report. The vendor hold will be released after the **provider health care institution** has submitted all delinquent reports to HHSC.*

*(4) Appropriations in 2022-23 General Appropriations Act, Senate Bill (S.B.) 1, 87th Legislature, Regular Session, 2021 (Article II, HHSC) Strategy A.2.4, Nursing Facility Payments, for fiscal year 2023 are contingent on the submission of the reports due December 1, 2021, and June 1, 2022. If HHSC is unable to utilize appropriations for nursing facilities from Strategy A.2.4 as a result of insufficient reporting from **providers nursing facilities**, HHSC will suspend all payments to **providers nursing facilities** until such a time as HHSC is authorized to continue making expenditures under Strategy A.2.4.*

THA appreciates HHSC's consideration of these comments and reiterates that a one-month pause in the initial reporting period would permit thoughtful review and integration of comments received. We look forward to working with you on these issues. Should you have any questions, please do not hesitate to contact me at astelter@tha.org or 512/465-1556.

Respectfully submitted,



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