COVID-19: UPDATED HHS DELIVERS INITIAL $30 BILLION OF CARES ACT PROVIDER RELIEF FUNDING DIRECTLY TO MEDICARE PROVIDERS AND SUPPLIERS AND QUICKLY UPDATES TERMS AND CONDITIONS

Date: 16 April 2020

U.S. Health Care Alert

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On 10 April 2020, the Department of Health and Human Services (HHS) began delivering the initial $30 billion in relief funding under the recently passed Coronavirus Aid, Relief, and Economic Security (CARES) Act to Medicare providers and suppliers in support of the national response to COVID-19. The funding is a portion of the $100 billion of funding that will be distributed under the CARES Act to support health care-related expenses or lost revenue attributable to the COVID-19 pandemic and to ensure uninsured Americans will be provided access to needed testing and treatment without surprise billing from a provider or supplier.

While the release of the funds will provide a significant boost to health care providers and suppliers in the midst of the COVID-19 fight, within 30 days of receipt of the funds — which many providers have reported already receiving — providers must sign an attestation confirming the receipt of funds and assenting to HHS's additional terms and conditions for their use (Terms and Conditions).[1] On 13 April 2020, HHS updated its guidance on the HHS.gov website as well as the Terms and Conditions, but had yet to post additional guidance.

This funding is separate from the Centers for Medicare and Medicaid Services' (CMS) expanded Accelerated and Advance Payment Program, which has also delivered billions of dollars to health care providers and suppliers to help ensure those entities have the resources needed to combat COVID-19. See our previous client alert on this program here.

This alert was initially posted on 13 April 2020, and has been updated to reflect HHS's revisions to its guidance on the HHS.gov website as well as the Terms and Conditions. Specifically, as further outlined below, HHS clarified that providers and suppliers that have ceased operation as a result of the COVID-19 pandemic are eligible to receive funding as long as they provided diagnoses, testing, or care for individuals with possible or actual cases of COVID-19, noting that care does not have to be specific to treating COVID-19. Importantly, HHS notes in the updated guidance that it “broadly views every patient as a possible case of COVID-19.”

In this regard, HHS updated the terms and conditions to provide that recipients certify that they currently provide or provided after 31 January 2020, diagnoses, testing, or care for individuals with possible or actual cases of COVID-19. In addition, with payment conditioned on acceptance of the terms and conditions, HHS provided that it will view failure to return payment within 30 days of receipt as an acceptance.

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CARES ACT PROVIDER RELIEF FUND PAYMENTS

In a press release summarizing the release of CARES Act funding, HHS states that the $30 billion in funding will be released immediately, with payments having arrived in provider accounts via direct deposit as early as 10 April 2020.[2] HHS indicates that all facilities and providers that received Medicare fee-for-service (FFS) reimbursement in 2019 are eligible to receive a portion of the initial $30 billion payment.

HHS emphasizes that the payments are not loans and will not need to be repaid. However, as a condition on the receipt of funds, providers must agree to a detailed set of terms and conditions that are outlined below.

HHS indicates that this initial $30 billion payment was automatically apportioned among providers based on their percentage share of total Medicare FFS reimbursements in 2019. HHS suggests that providers can estimate the amount they may receive by dividing the total amount of Medicare FFS payments they received in 2019 by $484 billion (total Medicare FFS payments nationwide in 2019), and multiplying the result by $30 billion. Payments are separated by each provider's billing tax identification number (TIN), meaning that large health care providers, such as health systems, will receive individual payments for each billing TIN.

HHS contracted with UnitedHealth Group (UHG) to rapidly distribute the funds via each provider's Automated Clearing House information on file with UHG or CMS, and many providers reported receiving payments on 10 April. For providers who normally receive payments via paper check, HHS indicates a paper check for this payment will be distributed through the mail within the next few weeks.

HHS indicates that the Trump administration is working to quickly issue targeted distributions using the remaining $70 billion in CARES Act funding for direct payments. HHS suggests that providers in areas that are heavily impacted by the COVID-19 outbreak, providers in rural areas, providers of services with lower shares of Medicare reimbursement or who predominantly serve Medicaid populations, and providers who request reimbursement for the treatment of uninsured Americans are most likely to be the focus of additional funding.

RELIEF FUND PAYMENT TERMS AND CONDITIONS

Although the funds are payments, not loans, to health care providers, and will not need to be repaid, the funds are subject to a significant number of terms and conditions, some of which appear to indicate that the federal government intends to treat these funds very much like federal grants for clinical services or research, including the following:

- The recipient of the funds must certify that:
  - It billed Medicare in 2019; provides or provided after 31 January 2020 diagnoses, testing, or care for individuals with possible or actual cases of COVID-19; is not currently terminated from participation in Medicare; is not currently excluded from participation in Medicare, Medicaid, and other federal health care programs; and does not currently have Medicare billing privileges revoked.[3]

> *This certification may be of particular concern to providers in regard to Medicare providers that are currently voluntarily closed or subject to mandatory closure as a result of state emergency declarations.*

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> *However, HHS clarified on April 13 that health care providers that have ceased operation as a result of the COVID-19 pandemic are eligible to receive funding as long as they provided diagnoses, testing, or care for individuals with possible or actual cases of COVID-19, noting that care does not have to be specific to treating COVID-19. Importantly, HHS notes in the updated guidance that it "broadly views every patient as a possible case of COVID-19."*[4]

- The funds received will only be used to prevent, prepare for, and respond to COVID-19, and shall reimburse the recipient only for health care-related expenses or lost revenues attributed to COVID-19.

> *HHS will likely need to provide additional guidance as to the above requirements given many providers will have lost revenues as result of COVID-19, but it is unclear if these lost revenues must also be tied to preventing, preparing for, or responding to COVID-19.*

- It will not use the funds to reimburse other expenses or losses that have received or are expected to receive reimbursement from other sources.

> In this regard, providers that are also participating in other federal response programs (e.g., Federal Emergency Management Agency emergency response funding) will have to carefully track that expenses or losses are not claimed twice.

- For all care for a possible or actual case of COVID-19, it will not seek to collect more than in-network cost-sharing amounts from out-of-network COVID-19 patients.

> *In light of HHS's statement on the Provider Relief Funding website "HHS broadly views every patient as a possible case of COVID-19," it is unclear whether HHS has unintentionally indicated that cost-sharing amounts should be waived for all out-of-network COVID-19 patients, even if COVID-19 is not suspected. Providers will have to work closely with their billing department to implement these rules; although in many instances insurers are otherwise requiring no cost-sharing amounts for all COVID-19 care.*

- The recipient is required to submit reports to the HHS Secretary to ensure compliance with the conditions imposed on the funds.

> *While no such reporting mechanism is currently outlined (other than the reporting requirement details outlined below), HHS indicates that it will clarify further instruction on this requirement in future program guidance.*

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- Recipients receiving more than $150,000 under any appropriations mechanism related to COVID-19 must submit a report within 10 days of the end of each quarter detailing certain information on use of the funds, including the following:
  - The total amount of funds received from HHS;
  - The amount of funds received that were expended or obligated for each 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 subcontracts or subgrants awarded by the recipient or its subcontractors or subgrantees, including all information required to comply with the Federal Funding Accountability and Transparency Act of 2006 (such as the name and location of the entity receiving the award; the amount of the award; information on the award, including transaction type, funding agency, etc.; the location of the entity receiving the award; and the names and compensation of highly compensated officers).[5]
- Recipients are required to maintain appropriate records and cost documentation as required by 45 C.F.R. § 75.302 and 45 C.F.R. §§ 75.361–.365.

> *These regulations are located within in the Uniform Administrative Requirements, Cost Principles, and Audit Requirement for HHS Awards and outline requirements applicable to federal award recipients and subrecipients. Under 45 C.F.R. § 75.302, federal award recipients must have in place accounting and internal control systems that provide for appropriate monitoring of grant accounts to ensure compliance with federal statutes, regulations, and the terms and conditions of the federal award and permit the preparation of reports required by general and program-specific terms and conditions and tracing of funds adequate to establish that funds have been used appropriately. Sections 75.361 through 75.365 outline requirements related to retention, transfer, collection, transmission, storage, and access to financial records related to federal award funding. HHS also indicates that it may publish future program guidance regarding record keeping related to funds received.*

In addition to the above requirements, the terms and conditions also require compliance with a number of requirements outlined in the Consolidated Appropriations Act, 2020[6] and Further Consolidated Appropriations Act, 2020[7] or other requirements applicable to HHS funding. In particular, some of these requirements include:

- *Executive Pay.* No funds received may be used to pay the salary of any individual, whether through a grant or other payment mechanism, at a rate in excess of Executive Level II.

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> *This amount is currently set at $197,300.00.*[8]

- *Privacy Act.* No funds received may be used in contravention of section 552a of title 5, U.S. Code (the "Privacy Act") and its implementing regulations.[9]

> *The Privacy Act mandates how federal agencies maintain records about individuals and establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies, such as under the Freedom of Information Act. The Privacy Act also provides individuals with a means by which to seek access to and amendment of their records, and it sets forth various agency record-keeping requirements.*

- *Confidentiality Agreements*. No funds received may be made available for a contract, grant, or cooperative agreement with an entity that requires employees or contractors to sign internal confidentiality agreements that would prohibit or restrict such employees or contractors from lawfully reporting fraud, abuse, or waste.

> *While many providers would operate in compliance with this requirement, providers should carefully review particularly employee exit and severance documents that might implicate this requirement.*

- *Nondisclosure Agreements.* No funds received may be used to implement or enforce any nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain a nondisclosure provision, unless a limited exception applies.

> *HHS has provided specific language required for this provision, which is included in the Terms and Conditions.*[10] *However, given the requirement is specific to not using the funds to implement or enforce such a nondisclosure policy, form, or agreement, it would not appear to materially impact provider's ability to receive or utilize the funds.*

- *Unpaid Federal Tax Liability.* Entities receiving the funds may not have any unpaid federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being timely paid, unless a federal agency has considered and determined that suspension or debarment of the corporation is not necessary.
- *Human Subjects Protections.* If the funds will be used to support activities involving human subjects in any research activities, the recipient must provide satisfactory assurances of compliance with the participant protection requirement of the HHS Office of Human Research Protection (OHRP) prior to implementation of those research components.

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The terms and conditions also note that the HHS Inspector General will be accepting tips and complaints from all sources about potential fraud, abuse, waste, and mismanagement of CARES Act funding.

HHS has clarified that providers must sign an attestation confirming receipt of the funds and agreeing to the Terms and Conditions within 30 days of receiving the payment, and that not returning the payment within 30 days of receipt will be viewed as acceptance of the Terms and Conditions. HHS expects the portal for signing the attestation will be open the week of 13 April 2020, and will be linked on the HHS.gov website. To the extent a provider receives payment and does not wish to comply with these terms and conditions, the provider must contact HHS within 30 days of receipt of payment and then remit the full payment to HHS, which instructions will also be posted on HHS.gov.[11]

LOOKING AHEAD: PRIORITIES FOR THE REMAINING $70 BILLION AND POTENTIAL ADDITIONAL FUNDING

As mentioned above, HHS has indicated that for the remaining $70 billion it is planning on making targeted distributions focused on "providers in areas particularly impacted by the COVID-19 outbreak, rural providers, providers of services with lower shares of Medicare reimbursement or who predominantly serve the Medicaid population, and providers requesting reimbursement for the treatment of uninsured Americans."[12] In this regard, CMS Administrator Seema Verma indicated during a call with reporters on April 15 that the next round of CARES Act funding could start going out by the end of the week.[13] According to Inside Health Policy, she indicated that a portion would be targeted at providers in areas that have been hit hardest by COVID-19 and that the agency will be looking at "providers across the board, whether they serve Medicare patients, Medicaid, or private insurers, to make sure that all providers across the country are addressed," and that details are forthcoming.[14]

Some stakeholders and provider groups have voiced their concerns with the initial distribution method. America's Essential Hospitals, for example, cautioned that "an allocation methodology that consists only of Medicare FFS revenue could tilt the playing field against some essential hospitals, which care for disproportionate numbers of uninsured and Medicaid patients."[15] Some congressional delegations, like the New Jersey delegation, have raised concerns that the methodology used to distribute the funding does not address the losses of health care providers in the hardest-hit states, asking HHS to prioritize areas with the highest number of COVID-19 cases in the next tranche of funding.[16] New Jersey delegation's letter comes as the House Ways and Means Committee released a state-by-state breakdown of the distribution.[17]

Stakeholders and provider groups continue to work with the administration and Congress regarding the remaining $70 billion in funding under the CARES Act, as well as additional funding for health care providers. The Greater New York Hospital Association, for example, has noted that it is in near daily contact with Senate Minority Leader Chuck Schumer (D-NY) regarding its concerns with the distribution.[18] Leader Schumer has been actively advocating for Congress to include an additional $100 billion for health care providers as part of the next coronavirus relief measure, in hopes that it can be included in the coronavirus interim relief measure for small businesses that is currently under active negotiation in Congress.[19] While it is unclear whether the additional funding will be included in the interim measure, it is likely to remain a priority as congressional leaders work on a more comprehensive fourth coronavirus relief measure.

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We have created a HUB webpage to address the legal implications of the COVID-19 outbreak on businesses generally and health care providers, in particular, the firm's health care and FDA practice can provide guidance to providers and suppliers on this funding, compliance with the terms and conditions, and other available funding programs available as a result of the COVID-19 pandemic.

FOOTNOTES

[1] HHS, Relief Fund Payment Terms and Conditions, available here. [hereinafter, HHS, Terms and Conditions].
[2] Dep't of Health and Human Srvs. (HHS), CARES Act Provider Relief Fund (10 Apr. 2020) [hereinafter, HHS, CARES Act Provider Relief Fund].
[3] Prior to 13 April 2020, the terms and conditions stated "It billed Medicare in 2019; currently provides diagnoses, testing, or care for individuals with possible or actual cases of COVID-19; is not currently terminated from participation in Medicare; is not currently excluded from participation in Medicare, Medicaid, and other federal health care programs; and does not currently have Medicare billing privileges revoked."
[4] HHS, CARES Act Provider Relief Fund.
[5] Pub. L. 116-94, H.R. 1865 (20 Dec. 2019) (outlining requiring the conditions located in General Provisions in FY2020 Consolidated Appropriation, in terms and conditions at 2–5).
[6] U.S. Office of Personnel Management, Salary Table No 2020-EX: Rates of Basic Pay for the Executive Schedule (EX) (effective Jan. 2020).
[7] The Privacy Act of 1974, codified at 5 U.S.C. § 552a; *see also* 45 C.F.R. pt. 5b (implementing the Privacy Act with respect to HHS).
[8] *See* Terms and Conditions at 6.
[9] HHS, CARES Act Provider Relief Fund.
[10] *Id.*
[11] *See* Press Briefing, White House, Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing (7 Apr. 2020).
[12] *See* News Release, America's Essential Hospitals, Hospital Fund Distribution Plan Could Disadvantage Hospitals in Greatest Need (7 Apr. 2020).
[13] Inside Health Policy, Verma: More CARES Act Grants Coming By End Of This Week (15 Apr. 2020).
[14] *Id.*
[15] *See* Press Release, Sen. Robert Menendez, Menendez, Booker, Pascrell Lead NJ Delegation Demanding Fair Share of Hospital Funding (10 Apr. 2020).
[16] *See* House Ways and Means Committee, Public Health and Social Service Emergency Fund (10 Apr. 2020).
[17] *See*Greater New York Hospital Association, CMS Expected to Release Initial $30 Billion from $100 Billion Health Care Relief Fund (8 Apr. 2020).
[18] *See* Press Release, House Speaker Nancy Pelosi, Pelosi and Schumer Joint Statement on Interim Emergency Coronavirus Relief (8 Apr. 2020).
[19] *See* Greater New York Hospital Association, CMS Expected to Release Initial $30 Billion from $100 Billion Health Care Relief Fund (8 Apr. 2020).
[20] *See* Press Release, House Speaker Nancy Pelosi, Pelosi and Schumer Joint Statement on Interim Emergency Coronavirus Relief (8 Apr. 2020).

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