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## GETTING A HANDLE ON CARES ACT RELIEF PAYMENTS AND AVOIDING COMPLIANCE PITFALLS

The Coronavirus Aid, Relief and Economic Security Act (the "CARES Act"), signed into law by President Trump on March 27, 2020, provided an initial appropriation of \$100 billion to the Department of Health and Human Services ("HHS") for the Public Health and Social Services Emergency Fund to provide aid to "eligible health care providers" fighting the COVID-19 pandemic (the "Provider Relief Fund"). "Eligible health care providers" is defined as public entities, Medicare or Medicaid enrolled suppliers and providers, and for-profit entities and not-for-profit entities within the United States, that provide diagnoses, testing or care for individuals with possible or actual cases of COVID-19.

Many eligible health care providers already received Provider Relief Fund payments, which have come as a welcome relief to those struggling under the pandemic's crushing financial and operational challenges. But these funds are not being provided free and clear; there are many strings attached, including specific limitations on the use of the funds and reporting requirements. Wide distribution of the funds means that some payments were made to ineligible providers and will need to be returned. Other providers may be eligible and

sorely in need of the funds, but do not realize that years from now they may be asked to prove that they complied with the applicable requirements. All providers should ensure that they take steps now to avoid compliance pitfalls associated with CARES Act relief funds and avoid a lot of potential aggravation later.

### HOW ARE THE PROVIDER RELIEF FUNDS DISTRIBUTED?

HHS is disbursing the Provider Relief Funds through both "general" and "targeted" distributions, with \$50 billion allocated to each distribution type. The general distributions are intended to replace a percentage of a provider's annual gross receipts, sales or program service revenue. Meanwhile, the targeted distributions are aimed at providers that are disproportionately impacted by COVID-19 or that have not received payments from the general distribution. Each eligible health care provider accepting Provider Relief Fund payments must attest to HHS' **terms and conditions**. Retention and use of funds are subject to the terms and conditions, and non-compliance with any term or condition is grounds for HHS to recoup some or all of the payment.

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On April 24, 2020, President Trump signed **H.R. 266, the Paycheck Protection Program and Health Care Enhancement Act** into law which, amongst other things, provides an additional \$100 billion to HHS for the Public Health and Social Services Emergency Fund to distribute relief funds to health care providers, including hospitals battling COVID-19. Of the \$100 billion supplemental appropriation, \$75 billion will be added to the funds available in the Provider Relief Fund for the reimbursement of health care providers for expenses or lost revenues that are attributable to COVID-19 and the remaining \$25 billion is reserved for testing efforts to develop, purchase, administer, process and analyze tests for COVID-19. Consistent with the CARES Act, the bill specifies that providers may, but are not required to, use the funds for expenses related to building or construction of temporary structures, leasing of properties, purchasing medical supplies and equipment (including personal protective equipment and testing supplies), increased workforce utilization and training, establishing emergency operation centers, retrofitting facilities and managing the surge in capacity, among other activities. Additional guidance on the distribution of these funds and accompanying terms and conditions is anticipated.

### 1. GENERAL DISTRIBUTION

Beginning on April 10, 2020, \$30 billion of the \$50 billion in funds earmarked for general distribution was quickly and automatically released to eligible providers, proportionate to each provider's share of Medicare fee-for-

service reimbursements in 2019. HHS began distributing the remaining \$20 billion of the general distribution funds on April 24, 2020, in accordance with each provider's share of 2018 net patient revenue. HHS reports that a portion of providers have automatically been sent an advance payment based off the revenue data they submitted in Centers for Medicare & Medicaid Services ("CMS") cost reports. Providers for whom HHS does not have sufficient cost report data will not receive the automatic payments; these providers will need to apply by submitting their revenue information through the **General Distribution Portal (the "Portal")** in order to receive the additional funds.

It is important to note that only health care providers that have received a payment from the Provider Relief Fund by the close of business on Friday, April 24, 2020, and that have attested to having received such payment and have agreed to the terms and conditions for this first tranche of payments are eligible to augment the initial payment by applying to obtain a portion of the remaining \$20 billion general distribution through the Portal. Applicants who have been approved to receive additional funds from the general distribution should expect those funds to be disbursed within ten business days of completing their application. Applicants should be aware that although they will receive a notification email when their application is completed, HHS stated in its **General Distribution Portal FAQs** that HHS will not provide status updates on the application once it is submitted.

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According to HHS guidance, HHS will determine the amount that each provider will receive by apportioning relief funds to providers with the “intention of optimizing the beneficial impact of the funds.” At this time, there is no appeals or dispute process for the decision made on an application.

### 2. TARGETED DISTRIBUTION

In addition to the general distribution, \$50 billion has been designated for targeted distributions to COVID-19 hot spots, rural hospitals, Indian Health Service facilities, providers that solely take Medicaid and to reimburse health care providers, at Medicare rates, who provided treatment for uninsured COVID-19 patients on or after February 4, 2020.

Providers that have not yet received any funding from the Provider Relief Fund are still eligible to receive aid from the targeted distributions being made from the fund but should not use the Portal. A description of eligibility for the targeted distributions can be found here.

#### What Terms and Conditions Apply for Receipt of Relief Fund Payments?

HHS requires that all recipients of Relief Fund payments attest that they accept various terms and conditions. Providers that refuse to submit the attestation form must return the funds within thirty days of receipt. It is imperative for providers to ensure that they carefully read and fully understand the terms and conditions.

The terms and conditions, which apply to both the first \$30 billion allocation and

the second \$20 billion allocation of the general distribution, unless otherwise indicated, require the following:

- The recipient must have provided, after January 31, 2020, diagnoses, testing or care for individuals with possible or actual cases of COVID-19;
- The recipient is not excluded from participating in a federal health care program and is not terminated from participating in Medicare and has not had its Medicare billing privileges revoked;
- Funds may be used only to prevent, prepare for, and respond to COVID-19, and payment shall be used only to reimburse the recipient for health care related expenses or lost revenues attributable to COVID-19;
- Payment will not be used to reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse;
- The recipient shall submit reports as HHS determines are needed to ensure compliance with the terms and conditions, in the form and content specified by HHS in future program instructions (recipients of \$150,000 or more have additional reporting requirements);
- Recipients of payments from the \$20 billion allocation must submit general revenue data for calendar year 2018 to HHS when applying to receive a payment, or within thirty days of having received a payment;

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- Recipients of payments from the \$20 billion allocation must consent to HHS publicly disclosing payments received by recipients;
- Recipients must maintain appropriate records and cost documentation to substantiate the reimbursement of costs under payments. Upon HHS' request, recipients shall submit copies of such records and documentation and shall fully comply with all audits conducted to ensure compliance with the terms and conditions; and
- Recipients must certify that they will not seek to collect out-of-pocket expenses from presumptive or actual COVID-19 patients greater than what an in-network patient would have paid.

In addition, there are specific statutory provisions further restricting the use of the funds. For example, funds may not be used to advocate or promote gun control, for lobbying purposes or for the promotion of legalization of controlled substances.

### WHAT SHOULD PROVIDERS DO NOW TO AVOID COMPLIANCE PITFALLS?

HHS made clear that it will engage in significant anti-fraud and auditing efforts to ensure that the allocated funds are used appropriately. Under the CARES Act, the HHS Office of Inspector General ("OIG") is required to audit the use of the funds and provide quarterly reports to Congress summarizing the activities of the OIG and include detailed statements of transactions made under the CARES Act during the preceding quarter. Providers receiving relief funds

should carefully review the terms and conditions in order to determine whether they should retain the funds. If a provider determines that it can retain the funds, procedures should be put into place now to document use of these funds and to ensure that all terms and conditions are met.

### 1. DETERMINING WHETHER THE PROVIDER SHOULD RETAIN THE FUNDS

Many providers were surprised to see relief funds deposited in their bank accounts in April. The fact that a provider received these funds does not mean that the government determined the provider actually needs them. These funds were distributed widely under emergency circumstances to get relief funds into the hands of providers quickly. Providers will be held accountable for determining themselves whether they should keep these funds. Retention of funds without justification could expose a provider to liability under the False Claims Act, which typically involves expensive and time-consuming investigations and the risk of having to pay up to three times the amount determined to be illegally received. Making the determination about whether to retain the funds may require in-depth analysis with the advice of financial consultants and legal counsel.

The primary condition for retention of the funds is the requirement that after January 31, 2020, eligible health providers render diagnoses, testing or care for individuals with possible or actual cases of COVID-19.

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*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*

HHS clarified that recipients that have ceased operations as a result of COVID-19 remain eligible for funding, if they provided diagnoses, testing or care for individuals with possible or actual cases of COVID-19 at some point after January 31, 2020. HHS further explained that the “care” provided does not have to be specific to treating COVID-19 and that every patient is broadly viewed as a possible case of COVID-19. Therefore, recipients may remain eligible even if the care provided was not specific to COVID-19 and was provided to non-COVID-19 patients or non-suspected COVID-19 patients.

### 2. STEPS TO ENSURE COMPLIANCE

Recipients that have determined they are eligible to retain relief payments should take the following steps now to ensure compliance and to be prepared for future audits:

- Make sure that the attestation form is submitted in a timely manner;
- Consider maintaining payments in a separate account;
- Carefully track and document expenditures in order to comply with the reporting requirements set forth in the terms and conditions;
- Put procedures in place to retain documentation for at least three years to be prepared for potential audits;
- Stay tuned for future HHS guidance on reporting parameters and, for now, err on the side of over-documentation;
- Ensure proper internal approvals are in

place for expenditure of relief funds with written justification for how they will be applied; and

- Incorporate compliance with Provider Relief Fund terms and conditions into the organization’s compliance program with appropriate auditing and monitoring to verify compliance

If you have any questions regarding this piece, please contact its authors: **Jody Erdfarb, Maureen Weaver, Jermaine A. Brookshire, Jr., or Karen Rabinovici.**

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Visit Wiggin and Dana’s COVID-19 Resource Center [here](#) for additional publications and helpful links on multi-disciplinary topics that are relevant during the current COVID-19 global pandemic.