

# Getting a Handle on CARES Act Relief Payments and Avoiding Compliance Pitfalls

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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, optometrists included, 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. Recipients should be aware that at some point in the future, they may be asked to prove that they complied with the applicable requirements. All recipients should ensure that they take steps now to avoid compliance pitfalls associated with CARES Act relief funds and avoid potential aggravation later.

## What Terms and Conditions Apply to Receipt of Provider 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 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 (which was the second distribution made from the Provider Relief Fund) 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;
- 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.

With respect to the condition requiring that funds be used only to prevent, prepare for, and respond to COVID-19 and to reimburse the recipient for health care related expenses or lost revenues attributable to COVID-19, HHS explained that this category of expenses may cover a range of items and services purchased to prevent,

prepare for, and respond to Coronavirus, including:

- Supplies used to provide health care services for possible or actual COVID-19 patients;
- Equipment used to provide health care services for possible or actual COVID-19 patients;
- Workforce training;
- Developing and staffing emergency operation centers;
- Reporting COVID-19 test results to federal, state, or local governments;
- Building or constructing temporary structures to expand capacity for COVID-19 patient care or to provide health care services to non-COVID-19 patients in a separate area from where COVID-19 patients are being treated; and
- Acquiring additional resources, including facilities, equipment, supplies, healthcare practices, staffing, and technology to expand or preserve care delivery.

In addition, funds may be used for eligible health care related expenses regardless of when the cost was incurred, so long as the cost was attributable to Coronavirus and was used to prevent, prepare for, and respond to the pandemic. However, HHS expects that it would be highly unusual for such a cost to have been incurred prior to January 1, 2020 - implying that a cost incurred prior to January 1, 2020 is likely ineligible.

HHS further advised that “lost revenues that are attributable to Coronavirus” encompasses any revenue that a health care provider lost due to Coronavirus. This may include revenue losses associated with fewer outpatient visits, canceled elective procedures or services, or increased uncompensated care. Re-

cipients may use funds to cover any cost that the lost revenue otherwise would have covered, so long as the cost prevents, prepares for, or responds to Coronavirus. As such, these costs do not need to be specific to providing care for possible or actual Coronavirus patients, but the lost revenue that the payment covers must have been lost due to Coronavirus. HHS encourages the use of funds to cover lost revenue so that providers can respond to the public health emergency by maintaining healthcare delivery capacity, such as by using funds to cover:

- Employee or contractor payroll
- Employee health insurance
- Rent or mortgage payments
- Equipment lease payments
- Electronic health record licensing fees

In addition to the aforementioned terms and conditions, 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 Optometrists 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. Optometrists receiving relief funds should carefully review the terms and conditions in order to determine, first of all, whether they should retain the funds. If an optometrist determines that he or she 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 Optometrist 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

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render diagnoses, testing or care for individuals with possible or actual cases of COVID-19. 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, optometrists 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

Optometrists 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 would like further information or have questions about the Provider Relief Fund, please contact Jody Erdfarb at [jerdfarb@wiggins.com](mailto:jerdfarb@wiggins.com) or Karen Rabinovici at [krabinovici@wiggins.com](mailto:krabinovici@wiggins.com).*

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## con’t from page 4: Legislative Update

as the important election cycle draws closer. bringing thousands of people to the State Capitol to express support or opposition. The bill was reported out of committee to the House floor.

In conclusion, the leaders of the General Assembly continue to discuss how they will move forward with the 2020 session. We will continue to keep you updated on administrative actions as the Governor and legislative leadership are governing through Executive Orders.

Above all, we stand ready to assist CAO members. Working together, our state and nation will overcome this very serious pandemic.