COVID-19: UPDATED HHS ANNOUNCES REMAINING ALLOCATIONS OF CARES ACT PROVIDER RELIEF FUNDING AND UPDATES FUNDING TERMS AND CONDITIONS

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U.S. Health Care Alert

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On April 22, 2020, the U.S. Department of Health and Human Services ("HHS") announced the remaining allocations of the $100 billion provider relief funding appropriated as part of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. After distributing an initial $30 billion on April 10, HHS announced this week that the remaining allocations include general allocations based on provider net patient revenue as well as more targeted allocations focused on providers in COVID-19 high-impact areas, providers who provide COVID-19 related treatment to the uninsured, rural providers, and Indian Health Service facilities, among others. HHS made the announcement after updating the Provider Relief Fund Terms and Conditions earlier in the week, and proceeding to make additional changes later this week. This client alert provides an overview of the allocations as well as key updates to the Terms and Conditions.

FUNDING ALLOCATIONS

General Allocation

HHS announced that $50 billion out of the $100 billion appropriated for providers under the CARES Act has been allocated for general distribution to Medicare facilities based on providers' 2018 net patient revenue.[1] As reported in our previous client alert (here), HHS distributed an initial $30 billion in relief funding based on providers' percentage share of total Medicare Fee-For-Service ("FFS") reimbursements in 2019. HHS distributed $26 billion on April 10, 2020 and the remaining $4 billion of the initial funding on April 17, 2020.[2]

In recognition of the impact that such allocation had on health care providers that have a relatively small share of their revenue coming from Medicare FFS (e.g., children's hospitals), HHS announced that the remaining $20 billion of the general allocation would be distributed to these providers to ensure that the general $50 billion distribution is allocated proportional to providers' share of 2018 net patient revenue.[3]

HHS indicated that it would distribute payments on a weekly and rolling basis, with the first set of payments going out on Friday, April 24. HHS noted that providers will be sent an advance payment based on revenue data submitted in their cost reports. Providers that do not have adequate cost report data on file will need to submit revenue information to a portal that will be made available in the Provider Relief Fund site (here).

Providers will need to submit revenue data for verification, sign an attestation confirming receipt of the funds, agree to the Terms and Conditions, and confirm the cost report. HHS noted that recipients will be required to submit documentation to ensure that the funds were used for health-related expenses or lost revenue attributable to COVID-19, stressing that it will conduct "significant anti-fraud and auditing work."[4]

Targeted Allocations

COVID-19 High-Impact Areas

HHS also announced that $10 billion will be allocated for hospitals in COVID-19 high-impact areas. This funding will be distributed based on the following information that HHS has been requesting hospitals to submit through TeleTracking, a third-party vendor. Although hospitals were initially required to submit this information to HHS before midnight PT on Thursday, April 23 2020, HHS has extended the deadline to 3:00 PM ET on Saturday, April 25 2020.[5]

- Tax Identification Number
- National Provider Identifier
- Total number of Intensive Care Unit beds as of April 10, 2020
- Total number of admissions with a positive diagnosis for COVID-19 from January 1, 2020 to April 10, 2020

What remains unclear based on the HHS guidance and accompanying press release is the algorithm that will then be used to allocated these funds based on this data, but direct guidance from HHS to hospitals related to this allocation notes that timely providing this information to HHS by the midnight deadline is a "prerequisite" to receiving this funding. HHS guidance also indicates that the distribution will take into consideration "the challenges faced by facilities serving a significantly disproportionate number of low-income patients, as reflected by their Medicare Disproportionate Share Hospital (DSH) Adjustment."[6]

It has been reported that HHS Secretary Alex Azar indicated during a call with reporters yesterday that this targeted distribution will "largely be based on the total number of admitted patients who tested positive for COVID-19,"[7] emphasizing that "our goal in all of the decisions we're making is to get this money out the door as quickly as possible, while targeting it to those suffering the most from the pandemic."[8]

Rural Providers and Indian Health Service

HHS announced that $10 billion will be allocated for rural health clinics and hospitals. In recognition that these providers are "financially exposed to significant declines in revenue or increases in expenses related to COVID-10," HHS indicated that it would it would distribute payments as early as next week on the basis of operating expenses, noting that payments would be distributed proportionately to each facility and clinic.[9]

HHS also announced that $400 million will be allocated for Indian Health Service facilities. Like the funding for rural providers, this funding will be distributed as early as next week based on operating expenses.[10]

Treatment of the Uninsured and Other Providers

Finally, out of the $29.6 billion in remaining funds, HHS indicated that "a portion" will be used to reimburse providers for providing COVID-19-related treatment to the uninsured, noting that some providers will receive further, separate funding, including skilled nursing facilities, dentists, and those that solely take Medicaid.[11]

Hospitals that provided treatment on or after February 4, 2020, will be able to request claims-based reimbursement at Medicare rates, subject to available funding. This funding will be made available through a program run by the Health Resources and Services Administration ("HRSA"), which is managing the program to reimburse providers for COVID-19 testing and related visits for uninsured patients and COVID-19-related treatment to the uninsured.[12] Providers will be able to register on HRSA's site (here) beginning on April 27, 2020, and submit claims beginning on May 6 with reimbursement beginning in mid-May.

To participate in this program, recipients will need to enroll as a provider participant, check patient eligibility, and submit patient information and claims.[13] Providers will be reimbursed generally at Medicare rates, subject to available funding, via direct deposit. HRSA notes that reimbursement will be made for qualifying testing for COVID-19 and treatment services with a primary COVID-19 diagnosis, including the following:[14]

- Specimen collection, diagnostic and antibody testing.
- Testing-related visits including in the following settings: office, urgent care or emergency room, or via telehealth.
- Treatment: office visit (including via telehealth), emergency room, inpatient, outpatient/observation, skilled nursing facility, long-term acute care, acute inpatient rehab, home health, DME (e.g., oxygen, ventilator), emergency ground ambulance transportation, nonemergent patient transfers via ground ambulance, and FDA-approved drugs as they become available for COVID-19 treatment and administered as part of an inpatient stay.
- When an FDA-approved vaccine becomes available, it will also be covered.
- For inpatient claims, date of admittance must be on or after February 4, 2020.

HRSA notes that services that are not covered by traditional Medicare will also not be covered under this program.[15] Services that are also excluded from this program include air and water ambulance; any treatment without a COVID-19 primary diagnosis, except for pregnancy when the COVID-19 code may be listed as secondary; hospice services; and outpatient prescription drugs covered under Medicare Part D.[16]

Providers will need to attest they have "checked for health care coverage eligibility and confirmed that the patient is uninsured" and "verified that the patient does not have individual, employer-sponsored, Medicare or Medicaid coverage, and no other payer will reimburse you for COVID-19 testing and/or care for that patient."[17] Providers will need to accept program reimbursement as payment in full, agree not to balance bill the patient, agree to terms and conditions, and may be subject to post-reimbursement audit review.[18]

UPDATES TO FUNDING TERMS AND CONDITIONS

HHS' announcement of the remaining allocations of the $100 billion CARES Act funding came only a few days after it updated the Terms and Conditions providers are required to accept as a condition on payment of the initial $30 billion.[19] After announcing the allocations, HHS made additional updates. These conditions, and the material changes outlined below, are likely to apply not only to the initial $30 billion, but also to the additional $20 billion HHS allocated for general distribution and potentially all of the funding outlined above.

Use of Funds

HHS updated the use of funds certification in the Terms and Conditions to note that "the Payment will only be used to prevent, prepare for, and respond to coronavirus, and that the Payment shall reimburse the Recipient only for health care related expenses or lost revenues that are attributable to coronavirus."[20] The change appears to be responsive to the concerns that payment can be used solely for lost revenues and must not also tie to "preventing, preparing for, and responding" to COVID-19. In this regard, as part of the guidance relating to new allocations, HHS noted that recipients will be required to "submit documents sufficient to ensure that these funds were used for healthcare-related expenses or lost revenue attributable to coronavirus."[21]

Balance Billing Requirements

HHS updated the Terms and Conditions this week to note that, for all care for a "presumptive" or actual case of COVID-19, the funding recipient must not seek to collect more than in-network cost-sharing amounts from out-of-network COVID-19 patients.[22] Because this requirement applied previously to "possible" or actual cases of COVID-19, it was unclear whether HHS had unintentionally indicated that cost-sharing amounts should be waived for all out-of-network patients, even if COVID-19 was not suspected.

This concern was generated as a result of HHS amending the Provider Relief Fund website to indicate that, for purposes of qualifying for the payments in the first place, "[i]f you ceased operation as a result of the COVID-19 pandemic, you are still eligible to receive funds so long as you provided diagnoses, testing, or care for individuals with possible or actual cases of COVID-19. Care does not have to be specific to treating COVID-19. *HHS broadly views every patient as a possible case of COVID-19."*[23]

Although the change to "presumptive" cases clarifies that the requirement does not apply to all patients, building criteria for finding and applying the discount on copays for even "presumptive" COVID-19 patients remains a key practical concern for health care providers, particularly given that out-of-network providers typically are not aware of what a patient's in-network benefit and copay levels would otherwise be.

Fraud and Abuse

HHS updated the Terms and Conditions to provide that noncompliance with any Term or Condition is grounds for the Secretary to recoup some or all of the payment made from the Provider Relief Fund, signaling its intent to seek recoupments in the event of noncompliance with Terms and Conditions.[24]

The Terms and Conditions were also updated to include a new certification that all information relating to the payment (including future reports referenced in the Terms & Conditions) is true, accurate and complete, to the best of recipients' knowledge, noting that any deliberate omission, misrepresentation, or falsification may be punishable by criminal, civil, or administrative penalties, including revocation of Medicare billing privileges, exclusion from federal health care programs, and/or the imposition of fines, civil damages, and/or imprisonment.

As noted above, HHS indicated that it intends to conduct antifraud and auditing work around the funds.[25]

General Revenue Data

Consistent with the announcement that general distributions will be allocated proportional to providers' share of 2018 net patient revenue, the updated Terms and Conditions provide that recipients must submit "general

revenue data for calendar year 2018 to the Secretary when applying to receive a Payment from the $20 billion general distribution tranche, or within 30 days of having received a Payment from the $20 billion general distribution tranche."[26]

Application to Subrecipients

HHS also notes that the Terms and Conditions apply to the funding recipients, as well as to "subrecipients and contractors under grants, unless an exception is specified."[27] This provision is a material new additional to the Terms and Conditions and could have an impact on contracting requirements providers may want to implement and potential risks associated with contractor noncompliance.

Other Applicable Requirements

Finally, HHS notes in the updated Terms and Conditions that "this is not an exhaustive list," noting that recipients of funding must comply with "any other relevant statutes and regulations, as applicable."[28]

Additional Guidance is Needed

As outlined in our prior alert (here), several conditions and requirements in the Terms and Conditions around the use of the funds remain open ended pending further guidance from HHS, including:

- As noted above, the Terms and Conditions include a certification that "the Payment will only be used to prevent, prepare for, and respond to coronavirus, and that the Payment shall reimburse the Recipient only for health care related expenses or lost revenues that are attributable to coronavirus."[29] The methodology recipients should utilize in accounting for lost revenue is unclear, particularly given recipients' financial documentation, tracking and reporting obligations.
- The Terms and Conditions provide that recipients of funds over $150,000 are required to report certain information on a quarterly basis. However, the form, content and process for reporting the use of the funds on a quarterly basis is not clear, particularly in light of the CARES Act requirement that reported information be published on a public-facing government website.
- The Terms and Conditions require providers to charge in-network copay levels to out-of-network patients with presumptive or actual cases of COVID-19. This requirement is a key practical concern, particularly given that out-of-network providers typically do not bill third-party payors directly and in any case, are generally have no insight into such patients' in-network benefit and cost-sharing obligations.
- The Terms and Conditions prohibit funds to be used to pay "to pay the salary of an individual, through a grant or other extramural mechanism, at a rate in excess of Executive Level II," which is currently $197,300.[30] This requirement, which is a common restriction in HHS funding programs, typically does not restrict the salary that a recipient may pay an individual, but rather only limits the portion of that salary that may be paid with federal funds. However, HHS has not to date clarified its intent to apply the same approach to use of Provider Relief funds.

In this regard, many providers are continuing to defer completing the attestation associated with the Terms and Conditions pending further guidance. We understand from several clients that multiple provider groups and healthcare trade organizations are seeking clarification or a delay in attestation process.

ADDITIONAL PROVIDER FUNDING

President Trump has signed into law the Paycheck Protection Program and Health Care Enhancement Act (H.R. 266), a $484 billion measure to provide additional relief to health care providers and small businesses.[31] Among other things, this bill provides $75 billion in additional funding for health care providers in addition to the $100 billion provided under the CARES Act, as well as $25 billion for COVID-19 testing.[32] At this point, it is unclear how HHS will distribute the $75 billion on additional provider relief funding.

CONCLUSION

K&L Gates LLP has created a HUB webpage to address the legal implications of the COVID-19 pandemic on businesses generally and health care providers, in particular. K&L Gates' health care and FDA practice can provide guidance to providers and suppliers on this funding, including compliance with the Terms and Conditions, as well as other funding programs available as a result of the COVID-19 pandemic.

FOOTNOTES

[1] Dep't of Health and Human Srvs., *CARES Act Provider Relief Fund* (Apr. 22, 2020), [hereinafter, "CARES Act Provider Relief Fund"].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See* Nathaniel Weixel, *Trump administration offers plan for hospital funds to coronavirus hot spots, uninsured patients,* THE HILL (April 22, 2020).

[8] *See* Rachel Roubein, *Trump sending hospital bailout funds for virus hot spots, uninsured patients,* POLITICO (April 22, 2020).

[9] *See* CARES Act Provider Relief Fund.

[10] *Id.*

[11] *Id.*

[12] *See* Health Resources and Services Administration, *COVID-19 Claims Reimbursement for Testing and Treatment to Health Care Providers and Facilities Serving the Uninsured* (April 22, 20202).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See* Dep't of Health and Human Srvs., *Relief Fund Payment Terms and Conditions* (April 22, 2020). (hereinafter "Terms and Conditions").

[20] *Id.*

[21] *See* CARES Act Provider Relief Fund.

[22] *See* Terms and Conditions.

[23] *See* CARES Act Provider Relief Fund.

[24] *See* Terms and Conditions.

[25] *See* CARES Act Provider Relief Fund.

[26] *Id.*

[27] *See* Terms and Conditions.

[28] *Id.*

[29] *Id.*

[30] *See* Terms and Conditions; U.S. Office of Personnel Management, Salary Table No 2020-EX: Rates of Basic Pay for the Executive Schedule (EX), (effective Jan. 2020).

[31] *See* Paycheck Protection Program and Health Care Enhancement Act, H.R. 266, 116th Cong. (2019–2020).

[32] *Id.*

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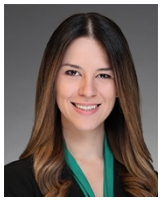

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