WYATT UPDATE

HHS Makes Second Disbursement of CARES Act Relief Funds to Providers
New Terms and Conditions Necessitate Keen Attention to Compliance

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As we previously reported, on April 10, 2020, HHS issued an initial disbursement from the Public Health and Social Services Emergency Fund (Relief Fund) that was created in the CARES Act. This initial disbursement of $30 billion was based on eligible recipients' proportionate share of the total Medicare fee-for-service reimbursements from 2019. While recipients did not have to apply in order to receive these funds, this disbursement was accompanied by Terms and Conditions that imposed strict eligibility and usage requirements. We previously summarized significant aspects of the Terms and Conditions, which implicate compliance risks for recipients of the Relief Funds, in our April 17, 2020 article.

On April 24, 2020, HHS announced a second disbursement of $20 billion from the Relief Fund. Per recent HHS guidance, these first two disbursements, which collectively total $50 billion, are allocated "for general distribution to Medicare facilities and providers impacted by COVID-19, based on eligible providers' 2018 net patient revenue." HHS is using this second disbursement to "augment [recipients'] allocation so that *the whole $50 billion general distribution is allocated proportional to providers' share of 2018 net patient revenue*." (Emphasis added.) Thus, the goal with these funds seems to be that—when a provider adds the amounts received under the first and second disbursements—the total amount received is proportionate to such provider's 2018 net patient revenue.

Eligibility for additional disbursements. Some providers received automatic payments starting on April 24 that were based on revenue data they had previously submitted in CMS cost reports. If a provider who received an initial disbursement from the Relief Fund did *not* receive a second payment, this could be because there was not adequate cost report data on file for such provider. A provider in this situation may apply to receive an additional disbursement from this $20 billion allocation by submitting their revenue information to the General Distribution Portal provided by the HHS. Providers who received automatic payments should take note that they are also required to submit their revenue information through the General Distribution Portal, so that it may be verified. Providers can use the following formula to estimate the total distribution for which they may be eligible:

(Individual Provider 2018 Revenue/$2.5 Trillion) X $50 Billion = Expected General Distribution

If a provider did not receive funds pursuant to the initial disbursement of the Relief Fund, then the provider is *not* eligible to receive any funding through this second disbursement. However, the HHS explained in the General Distribution Portal FAQs that these providers may still be eligible to receive payments from the Relief Fund through other mechanisms.

New Terms and Conditions. Similar to the first disbursement, this second tranche of funding comes with significant strings attached—the Terms and Conditions. The HHS has not changed its prior instruction that failure to return the funds within thirty days following receipt of the funds amounts to acceptance of the Terms and Conditions. Importantly, the HHS has now explained in the General Distribution Portal FAQs that, "[i]n order to *keep* the funds already received, and . . . to be *eligible to receive additional funds*, you must attest that you meet these terms and conditions . . . ." (Emphases added.)

The Terms and Conditions appear to be largely similar to the version that existed as of the date of our earlier article (linked above), but there are at least a few noteworthy changes. HHS uses separate Terms and Conditions for the first and second Relief Fund distributions but *updated* the first Terms and Conditions document to match several of the requirements as they are set forth in the second Terms and Conditions document—*however*, the Terms and Conditions for these two disbursements are not entirely identical and the minor differences are explained in the paragraph below this bulleted list. Both sets of Terms and Conditions now require providers receiving a distribution from the Relief Fund distributions to certify that:

- The Recipient is not precluded from receiving payment through Medicare Advantage or Part D, in addition to the original certification that they are not currently terminated from participating in Medicare.
- "[A]ll information it provides as part of its application for the Payment, as well as all information and reports relating to the Payment that it provides in the future . . . are true, accurate and complete, to the best of its knowledge" and
- "[A]ny deliberate omission, misrepresentation, or falsification of any information . . . may be punishable by criminal, civil, or administrative penalties, including but not limited to revocation of Medicare billing privileges, exclusion from federal health care programs, and/or the imposition of fines, civil damages, and/or imprisonment."

The Terms and Conditions for the second tranche of funds include the *additional* requirement described above that they submit "general revenue data for calendar year 2018 to the Secretary when applying to receive a Payment, or within 30 days of having received a Payment." The General Distribution Portal states that "providers who have already received payments will need to upload their most recent IRS tax filings as well as estimates of lost revenues for March and April 2020."

These second-wave recipients must also consent to the HHS publicly disclosing the payment received by the recipient. Accordingly, carefully consider any revenue data before uploading such data to the Relief Fund portal. The revenue data associated with Relief Fund distributions not returned to HHS also could be made public through the compliance audits that HHS is already planning to conduct and any ensuing investigation, which also could become public.

Separate attestations may be required for subsidiaries. Note that "[i]f a recipient organization has subsidiaries that file separate tax returns, each filing subsidiary must complete a separate portal application." Within the General Distribution Portal, HHS has provided a User

Guide for help with the process of attesting to each payment associated with the distribution recipient's billing Taxpayer Identification Number(s).

Confusion reigns with the CARES Acts distributions. It is our view, the CMS instructions on the CARES Act Relief Fund webpages are a bit confusing due to the separate Terms and Conditions and the two portals, one for attesting and one for making an "application" to receive additional Relief Funds. Again, the "application" portal is only available to those providers who received a distribution under the 1st and/or 2nd wave of distributions and believe they should have received more. Although providers who did not receive a distribution from the 1st or 2nd wave of Relief Fund distributions may be eligible for a distribution in some other way, such providers apparently must await further guidance from CMS on how relief monies will come their way.

Compliance with the Terms and Conditions is critical to avoiding liability. Due to the constantly-evolving nature of the issuance of these funds and modifications to the Terms and Conditions, providers are encouraged to pay close attention to the entirety of the requirements and prohibitions when deciding whether to retain these funds. Providers would be wise to review these Terms and Conditions often prior to agreeing to such, while always being aware of the thirty-day window the provider has to return these funds. While these funds could provide needed assistance, providers are opening themselves up to extensive liability should they not be able to comply with these stringent Terms and Conditions.

Finally, the compliance risks associated with accepting the Relief Funds without implementing appropriate monitoring and tracking for use of the funds is real. As we noted above, HHS has plans in place to audit the appropriate use of the Relief Funds by providers. A Relief Fund recipient's failure to maintain records and cost documentation showing that the recipient used the funds in accordance with the Terms and Conditions could trigger enforcement action by the Department of Justice or a *qui tam* lawsuit under the False Claims Act.

For compliance tips on how to operationally use the funds and protect yourself or your organization from liability for a false claim, ***register for this webinar,*** **Avoiding the Pandemic of FALSE CLAIMS for COVID 19 Payments/Awards,** jointly sponsored by MCM CPAs & Advisors and Wyatt, Tarrant & Combs, LLP. The webinar features, as one of the speakers, one of our partners, Christopher Melton, who frequently presents and defends clients concerning liability under the False Claims Act.

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