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With Its Vague Terms, Relief Fund Has Compliance Risks; 'Look from Several Angles'

By Nina Youngstrom

Because of the coronavirus, the talents of a business development executive at a hospital are wasted, and the chief financial officer (CFO) is wondering whether her salary can be allocated to the Provider Relief Fund^[1] even though the connection to COVID-19 is circuitous. The stakes for getting this right are high, because HHS will recoup the money from the hospital with interest unless it complies with the terms and conditions of the Provider Relief Fund, which was created by the Coronavirus Aid, Relief, and Economic Security (CARES) Act^[2] to help health care organizations prevent, prepare for and respond to the coronavirus. But some of the terms and conditions are ambiguous, attorneys said.

“The compliance risk is in how you spend the money and how you document how you spend the money—and eventually how you report that spending, but we don’t know the process yet,” said Martie Ross, a health care consultant with PYA in Overland Park, Kansas.

In this scenario, the answer to the CFO is probably “yes,” because HHS made it clear the funds may be used for diagnosing and treating patients and replacing revenue lost because of the pandemic, said attorney Gregory Etzel, with Morgan Lewis in Houston, Texas. “In the words of HHS, for determining the eligibility for the payments, the agency considers every patient to be a potential coronavirus patient.” But it would be helpful to have more definitive answers about the terms and conditions, which are written in broad strokes. “Hopefully, there will be more clarity coming out from HHS about these questions,” Etzel said. One catch: The Provider Relief Fund money can’t pay more than \$197,300 of the hospital executive’s salary.

At this extraordinary moment in time, HHS has used an unusual method to start funneling the \$100 billion from the CARES Act to hospitals and other health care organizations. The first “tranche”—\$30 billion—was deposited into the account of every provider that billed Medicare in 2019, Ross said. The amount is about 6.2% of the Medicare payments last year, and the relief fund payment is made to every provider with a taxpayer identification number (TIN). HHS contracted with UnitedHealthcare to process payments, Ross said.

Providers submit an attestation, which is hyperlinked to a portal, that they will comply with the terms and conditions within 30 days of receiving them. Without an attestation, providers that keep the funds for 30 days are bound by the terms and conditions anyway, Ross said. “It’s a belt and suspenders approach.” To reject the money, providers must click the appropriate button in the portal, and follow the instructions for returning the funds, she said.

Meanwhile, HHS announced April 22 that it’s spending the balance of the \$100 billion from the CARES Act—\$70 billion—although this time, the details differ.^[3] The money will be distributed based on 2018 net patient revenue and cost reports, and some of it will be devoted exclusively to hospitals in “COVID-19 high-impact areas,” rural clinics and hospitals, and Indian Health Services facilities.

These aren’t loans, and the money doesn’t have to be repaid, but there are strings attached—again, the terms

and conditions. “It’s a contractual relationship,” Ross said. But this isn’t CMS, and it’s not traditional regulatory compliance. Provider Relief Fund money is more akin to grants, with general terms and disqualifiers. Academic medical centers and other institutions that are accustomed to grant funding may be able to adapt more easily to the relief funds than facilities less well versed, Etzel said. “That’s where additional guidance from HHS will be helpful.”

Of all the terms and conditions, the one that Ross said people are worried most about is certifying that funds “will only be used to prevent, prepare for, and respond to coronavirus.” But Ross said “HHS broadly views every patient as a possible case, so that gives you pretty broad leeway with which to use these funds.” Also, relief funds can’t be used to reimburse expenses or losses that are already covered by other sources, such as insurance payments. Providers also can’t charge COVID-19 patients more if they are out of network. Because potentially every patient is a COVID-19 patient, it implies that providers who accepted relief funds can’t balance bill anyone during the public health emergency, but it’s a little unclear, Etzel said.

Don’t Spend Money on Chimpanzees

Providers that receive more than \$150,000 from the CARES Act and the other coronavirus legislation must submit reports to the Pandemic Response Accountability Committee (PRAC), the watchdog created by the CARES Act to oversee stimulus spending, and they will be audited eventually by PRAC and the HHS Office of Inspector General (OIG), Ross said. “Let’s say two years down the road, PRAC is doing audits, and you received \$60 million but didn’t adhere to the rules, because you paid bonuses with that money,” Ross said. “It’s subject to recoupment, and the interest rate on recoupment is significantly higher than market rates.”

The False Claims Act is always lurking because this is federal money, and hospitals sign attestations that they are complying with terms and conditions. “False Claims Act liability is a significant risk associated with the acceptance and use of the Relief Fund—and law firms are already raising awareness to this potential exposure,” Etzel said. “That is why the accounting and documentation efforts of providers in the early stages as well as throughout the expenditure of the funds are so important. There will be numerous potential avenues (disgruntled employees, consumer watchdog groups, and eventual government audits) for exposure to this liability, so adopting and maintaining adequate controls and spending justification is a critical consideration as providers begin to implement their plans for these funds.”

There’s also a list of things providers can’t spend the money on, and it includes the “capture or procurement of chimpanzees obtained from the wild” and pornography. On a more practical note, providers must be vigilant about ensuring no money from the Provider Relief Fund is spent on contracts with people who have unpaid tax liability or felonies in the previous 24 months, or lobbying. “If I’m looking at my payroll, and I have three people in the government affairs office, and they are registered lobbyists, I’d avoid using funds to pay their salaries,” Ross said.

Compliance and Finance Should Join Forces

There are documentation requirements, but they’re vague, which also raises concerns. HHS states that the recipients of the relief funds have to “maintain appropriate records and cost documentation” and “promptly submit copies of such records and cost documentation” at the request of the HHS Secretary, OIG or PRAC.

As they muddle through, compliance and finance will have to work together, Etzel and Ross said. “The significant worry here is you have violated the terms and conditions, but we are dealing with vague terms and conditions,” Ross said. “I don’t think you want to have one person interpreting the terms and conditions. You want to look from several angles. The CFO will know the proper accounting procedures for tracking the dollars, but will they know the restrictions on lobbying? The compliance officer will play that role.”

Most of the questions he has received from providers are about the documentation requirements, Etzel said. For example, hospitals want to know whether time spent by salaried employees who are assigned to coronavirus tasks can be paid out of relief funds in a manner similar to cost reporting requirements. Until CMS issues more guidance, he points people back to the magic words: preparation for, response to and prevention of coronavirus. As long as the money is used for those categories, they should be OK. “There are situations where providers want to carefully document the census reductions and other ways the coronavirus has impacted their health care business from a revenue standpoint,” Etzel said. Providers also can spend the money to repurpose buildings to test and treat patients for COVID-19, address surge capacity or remodel waiting rooms to separate the potentially infected from healthy people.

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1 Assistant Secretary for Public Affairs, “CARES Act Provider Relief Fund,” HHS, last reviewed April 23, 2020, <https://bit.ly/3eK8wPl>.

2 Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, March 27, 2020, <https://bit.ly/3bKvvIh>.

3 HHS, “HHS Announces Additional Allocations of CARES Act Provider Relief Fund,” news release, April 22, 2020, <https://bit.ly/35baynn>.

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