Proskauer

Supplementing the CARES Act: The PPPHCEA and HHS Clarifications to the Provider Relief Fund

April 28, 2020

Less than a month after passing the $2.0 trillion Coronavirus Aid, Relief, and Economic Security Act of 2020 (the "CARES Act"), Congress has passed and the President has signed a second round of aid (the Paycheck Protection Program and Health Care Enhancement Act, the "PPPHCEA") that stakeholders in the health care industry can use to continue the fight against COVID-19 and stay in business until social distancing orders are loosened. Importantly, the PPPHCEA includes an infusion of an additional $75 billion to the Public Health and Social Services Emergency Fund (the "Provider Relief Fund"). Below we provide a summary of the latest updates issued by the U.S. Department of Health and Human Services ("HHS") as to how money from the Provider Relief Fund will be distributed to health care providers and suppliers. For a summary to date of relief offered to the health care industry through the CARES Act and the PPPHCEA, please refer to our up-to-date summary here.

Public Health and Social Services Emergency Fund

The CARES Act authorized HHS to directly cover costs of hospitals, health systems and other providers related to COVID-19; the bill earmarked $100 billion for this purpose. $30 billion was initially allocated for payment through the Provider Relief Fund with an additional $20 billion set to be released starting on April 24, 2020 as part of the general allocation; HHS has also announced targeted allocations of $20.4 billion, which include supporting hospitals in areas hardest hit by the pandemic, ensuring treatment for uninsured individuals, and protecting rural providers and the Indian Health Service. HHS has yet to clarify exactly how the remainder of the $100 billion included in the CARES Act and the additional $75 billion included in the PPPHCEA will be allocated.

General Allocation

The initial $30 billion of generally allocated funds was delivered via direct deposit to eligible providers between April 10, 2020 and April 17, 2020, with an additional $20 billion being delivered on a rolling basis starting on April 24, 2020. Within 30 days of receiving such payments, which were issued as grants with no repayment obligations, providers were required to log onto the CARES Act Provider Relief Fund Payment Attestation Portal and execute an attestation confirming receipt of the funds and agreeing to the terms and conditions provided by HHS (the "Terms and Conditions") found here.

Providers should be cautious in agreeing to the Terms and Conditions, as HHS Secretary Alex Azar stressed that HHS, including the Office of Inspector General will audit and pursue significant fraud to ensure that funds are appropriately distributed. "Congress has entrusted us with an immense amount of money to send to providers and we will be clear and careful about how we're doing it," Azar said during a press call on the afternoon of April 22, 2020.

To be eligible to receive the initial payment under the Provider Relief Fund, providers must have received Medicare fee-for-service ("FFS") reimbursements in 2019, have treated "individuals with possible or actual cases of COVID-19" after January 31, 2020, and agree not to seek collection of out-of-pocket payments from a "presumptive or actual" COVID-19 patient that are greater than what the patient would have otherwise been required to pay if the care had been provided by an in-network provider. HHS has interpreted "possible or actual" COVID-19 patients, which eligible providers must have treated after January 31, 2020, to include any patient seen after January 31, 2020. It is not clear if that interpretation will apply to "presumptive or actual" COVID-19 patients, the language used in the patient charge limitation provision. It is noteworthy that, in setting the requirements for the above-noted limitation on patient charges, HHS first said that it applied, again, to "possible or actual" COVID-19 patients (which, as noted, meant all patients). When providers noted that this charge limitation was too broad, HHS revised the application of the limitation to "presumptive or actual" from "possible or actual" COVID-19 patients. As of this writing, it is not clear how HHS will apply the "presumptive or actual" COVID-19 patient language in the limitation.

HHS calculated the amount paid to each eligible provider by determining the portion of the total $484 billion of 2019 FFS that the provider billed, and multiplying that percentage against the initial $30 billion distribution; the calculated amount was then paid to billing organizations based on their Taxpayer Identification Number. In updated guidance, HHS clarified that the total share of the $50 billion disbursed from the Provider Relief Fund was to be based on each eligible provider's share of 2018 net patient revenue, and the additional $20 billion that will begin to be distributed April 24, 2020 should augment each provider's allocation to align with 2018 net patient revenue. This shift from FFS payments to net patient revenue across all sources was flagged by HHS as a better indicator of the size of provider entities and should ensure that money is more equitably shared among providers. Entities with adequate cost report information on file with CMS will automatically receive payment starting on April 24, 2020, while providers with inadequate cost report information will need to submit revenue numbers through a portal provided by HHS.

Other Terms and Conditions provided by HHS include a number of certifications that the eligible provider must attest to in order to retain the payment, including the following:

1. Provider billed Medicare in 2019;
2. Provider is not currently terminated from Medicare;
3. Provider is not currently excluded from Medicare, Medicaid or any other Federal health care program;
4. Provider does not have its Medicare billing privileges revoked;
5. Provider will only use the payment to prevent, prepare for, and respond to COVID-19;
6. Provider will use the payment to reimburse provider for health care related expenses or lost revenues attributable to COVID-19; and
7. Provider will not use the payment to reimburse expenses or losses for which the provider has received reimbursement from another source.

In addition, HHS has specified that the grants issued under the Provider Relief Fund cannot be used to pay salary in excess of $197,300 for any individual.

As the payments were sent directly to providers without any affirmative action, providers who are ineligible for the Provider Relief Fund grants must contact HHS and return the money within 30 days of receipt; a failure to promptly return the money will be deemed an agreement to the Terms and Conditions.

Targeted Allocations

In addition to generally allocating funds, HHS announced targeted allocations to help both COVID-19 patients and certain types of hospitals providing care for infected individuals. Starting on April 27, 2020, providers who have treated uninsured COVID-19 patients on or after February 4, 2020 can register for reimbursement at Medicare rates. Providers can start submitting claims in early May 2020 and should begin to receive reimbursement in mid-May. Additional details regarding this program can be found here.

As for hospitals treating COVID-19 patients, $10 billion has been earmarked by HHS to be distributed to hospitals in locales that have been disproportionately impacted by the COVID-19 pandemic; hospitals in such areas were contacted directly by HHS and required to provide the hospital's tax identification number, national provider identifier, total number of ICU beds as of April 10, 2020, and total number of admissions with positive diagnosis for COVID-19 between January 1, 2020 and April 10, 2020. An additional $10 billion will be allocated to rural health clinics and hospitals, while $400 million will be allocated for Indian Health Service facilities, each on the basis of operating expenses of such facilities. HHS also stated that additional allocations may be made to non-hospital providers, including skilled nursing facilities, dentists and providers that solely take Medicaid.

Conclusion

Congress continues to act to financially support health care providers, but given the extent of the COVID-19 pandemic, additional Federal action may be required to ensure that the health care industry can continue to address this historic outbreak. Look for additional alerts as laws and guidance become available here.

* * * *

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, related regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

Related Professionals

- **Edward S. Kornreich**
- **David Manko**
  Partner
- **Jason S. Madden**
  Partner