

Provider Relief Fund Dilemma: Keep the Money or Send it Back?

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The Coronavirus Aid, Relief, and Economic Security (“CARES”) Act provides \$100 billion in relief funds to hospitals and health care providers to aid in their coronavirus response. From that monies, the Department of Health and Human Services (“HHS”) carved out \$30 billion for immediate distribution via direct deposit payments, not loans. Facilities and providers that received Medicare fee-for-service (“FFS”) reimbursement in 2019 are eligible for the payment, and their payments are calculated using their total Medicare FFS reimbursement from 2019, not including Medicare Advantage, divided by \$484 billion and then multiplying that ratio by \$30 billion. The first of these payments was made on Friday, April 10, 2020, with very limited guidance from HHS. At the time, only a [PDF copy of the Terms and Conditions](#) were available, along with an [HHS webpage](#). Since then, the Terms and Conditions have been modified slightly, without announcement, and an [Attestation Portal](#) has gone live as of Thursday, April 16, 2020.

Some key provisions of the Terms and Conditions include:

- The recipient of the monies must certify that it billed Medicare in 2019; **provides or provided, after January 31, 2020, diagnoses, testing or care for individuals with possible or actual cases of COVID-19**; is not currently terminated from participation in Medicare; is not currently excluded from participation in Medicare, Medicaid or other Federal health care programs; and does not currently have Medicare billing privileges revoked.
- The payment received must only be used to **prevent, prepare for, and respond to coronavirus**, and shall reimburse the recipient only for **health care related expenses or lost revenues that are attributable to coronavirus**.
- The payment **cannot be used to reimburse expenses or losses already reimbursed from another source, or under obligation** from another source.
- The recipient **must submit reports as the Secretary** determines are needed to ensure compliance with conditions that are imposed on this payment, and such reports shall be in such form, with such content, as specified by the Secretary in future program instructions directed to all recipients.
- Any recipient that is an **entity receiving more than \$150,000 total in funds** under the CARES Act, the Coronavirus Preparedness and Response Supplemental Appropriations, the Families First Coronavirus Response Act or any other Act primarily making appropriations for the coronavirus response and related activities, **shall submit to the Secretary and the Pandemic Response Accountability Committee a report no later than 10 days after the end of each calendar quarter**. There are specific requirements within the Terms and Conditions for this report.
- The recipient must **maintain records and cost documentation** in compliance with certain federal requirements, more specifics of which are within the Terms and Conditions. Recipients must be prepared to **submit copies of such records and cost documentation upon request of the Secretary**, and must

cooperate with audits from the Secretary, the Inspector General, or Pandemic Response Accountability Committee.

- The recipient must certify that it will **not seek to collect from the patient out-of-pocket expenses in an amount greater than what the patient would have otherwise been required to pay if the care had been provided by an in-network Recipient.**

Additional restrictions on the expenditures apply, including:

- No funds can be used to pay the salary of an individual at a rate in excess of Executive Level II, which is \$197,300 according to the [OPM 2020 Salary Table](#).
- No funds can be made to advocate or promote gun control
- No funds can be used for lobbying
- No funds can be used for abortions (qualifying language applies – please see the Terms and Conditions page itself)
- No funds can be used for embryo research
- No funds can be used for activities that promote the legalization of controlled substances
- No funds can be used for pornography
- No funds for Association for Community Organizations for Reform Now
- No funds for needle exchange except in limited circumstance

There are other general restrictions on the government monies (like no use for criminal activity prohibition). **Whistleblower protections apply to the award.**

Within 30 days of payment, recipients of these monies must access the portal and sign an attestation confirming receipt of the funds and agreeing to the Terms and Conditions of payment. Not returning the payment within 30 days of receipt will be viewed as acceptance of the Terms and Conditions. The [HHS webpage](#), as of April 16, goes on to say that providers must contact HHS within 30 days of payment and then remit the full payment to HHS as instructed. The Attestation Portal guides providers through accepting or rejecting the funds.

It appears that the Attestation Portal requires 2 key attestations:

- “I acknowledge receipt of [\$] from the Public Health and Social Services Emergency Fund (“Relief Fund”), and accept the [Terms and Conditions](#). If you received a payment from funds appropriated in the Relief Fund under Division B of Public Law 116-127 and retain that payment for at least 30 days without contacting HHS regarding remittance of those funds, you are deemed to have accepted the following [Terms and Conditions](#). **This is not an exhaustive list and you must comply with any other relevant statutes and regulations, as applicable.** Your commitment to **full compliance** with all Terms and Conditions is **material** to the Secretary’s decision to disburse these funds to you. Non-compliance with any Term or Conditions is grounds for the Secretary **to recoup some or all of the payment made from the Relief Fund**. These Terms and Conditions apply directly to the recipient of payment from the Relief Fund. In general, the requirements that apply to the recipient, also apply to sub-recipients and contractors under grants, unless an exception is specified.”
- **“By receiving and accepting Relief Fund payment, you attest** that in accordance with the “Coronavirus Aid, Relief, and Economic Security Act” or the “CARES Act”, **you are eligible for this payment.** You

acknowledge that **you may be asked to submit to the review process** established by the US Department of Health and Human Services, including its contractor (collectively, “HHS”), **to determine your eligibility for this payment**. Additionally, upon request by HHS, **you will provide any and all information related to the disposition or use of funds** received under the Relief Fund for auditing and/or reporting purposes. I attest that I have the **legal authority to act on behalf of the [recipient]** that has received payment under the Relief Fund. For Electronic Funds Transfer/ACH Payments, HHS or its contractor **may make adjustments to the payment whenever a correction or change is required**. For example, if there is an error, you agree that **HHS may correct the error immediately and without notice**. Such errors may include, but are not limited to, reversing an improper credit, and correcting calculation and input errors. **The right to make adjustments are not subject to any limitations or time constraints, except as required by law.”**

The quick dissemination of these government monies presents unique questions for providers, especially physician groups. We’ve compiled some common Q&As based on what has been published to date.

1. Can a physician practice still accept the payment if they do not directly treat patients with COVID-19?

Yes, it appears the monies are available to providers even if they do not directly diagnose and treat COVID-19 patients. The monies are available to providers who, after January 31, 2020, provides or provided, diagnoses, testing or **care for individuals with possible** or actual **cases of COVID-19**. This is an incredibly broad statement, and the [HHS Provider Relief website](#) was updated to specify that **“care does not have to be specific to treating COVID-19.”** It goes on to say, **“HHS broadly views every patient as a possible case of COVID-19.”**

2. What if a provider practice doesn’t see many uninsured patients?

There is no requirement that a recipient use the funds to finance care for uninsured patients. These monies are meant as relief for providers. The monies can be used, in response to the coronavirus, to reimburse recipients for health care related expenses **or** lost revenues attributable to the coronavirus. Related to patient costs, it is true that out-of-network providers accepting the payment must not seek to collect from the patient out-of-pocket expenses in an amount greater than what the patient would have otherwise been required to pay if the care had been provided by an in-network Recipient.

3. Can a recipient accept a *portion* of the payment, and return what they do not need?

At this point, it appears the answer is no and that the money is an “all or nothing” acceptance. However, HHS reserves the right to recoup “some or all” payment made due to non-compliance (see the 1st attestation above). It is possible that, since we are still in the first week of payments, it might make sense to hold on to payments until closer to the 30 day point in case HHS announces a policy allowing providers to return “some or all” payment.

4. If a recipient already received other emergency funds related to the coronavirus, can they accept and keep the payment they received from the Provider Relief Fund?

It depends. Assuming the recipient meets the Terms and Conditions, it should review how it would plan to spend the payment. The Terms and Conditions prohibit a recipient from using the payment to

reimburse an expense already reimbursed from another source or under obligation from another source. A careful analysis needs to be done for each expense item to ensure compliance.

5. Can a physician practice use the monies to pay a physicians' salaries that have taken a hit due to decreased production from mandatory cancellation of nonessential and elective procedures?

Yes, however the practice should be mindful of the limit regarding individual compensation. No funds can be used to pay the salary of an individual at a rate in excess of Executive Level II, which is \$197,300 according to the [OPM 2020 Salary Table](#).

6. Are these funds subject to the False Claims Act?

Yes. As noted above the Terms and Conditions specify that whistleblower protection applies. Although provider did not submit a claim to obtain these funds, by signing the attestation to retain the funds providers are certifying their compliance with the Terms and Conditions. Failure to do so could create liability under the False Claims Act. Consequently, maintaining documentation to support the use of the funds is critical. In the rare instance in which a provider may not qualify for the funds, they should be returned.

Payments made from the Provider Relief fund are intended as relief for providers, broadly across the country. It is clear that HHS has prioritized quick relief for providers, and many questions remain. Providers should be on the lookout for further guidance, updates to the [HHS Provider Relief website](#) and any changes to the Attestation Portal.

Nelson Mullins is continuing to monitor developments related to COVID-19, including guidance from the Centers for Disease Control ("CDC"); World Health Organization; various health officials; and federal, state, and local government authorities. The firm is taking appropriate precautionary actions and has implemented plans to ensure the continuation of all firm services to clients from both in office and remote work arrangements across our 25 geographically dispersed offices. [Click here to visit the Nelson Mullins Coronavirus Resources page](#). Mr. Perling practices at the Ft. Lauderdale office of Nelson Mullins and can be contacted at Lester.Perling@NelsonMullins.com. Ms. Cross practices out of the Washington, D.C. office and can be reached at Hannah.Cross@NelsonMullins.com.