

# CORONAVIRUS INFORMATION & UPDATES

April 16, 2020

## Public Health & Social Services Emergency Fund Implementation Guidelines as of April 15, 2020

On April 10, 2020, the Department of Health & Human Services (HHS) [announced](#) the immediate distribution of the first \$30 billion of the \$100 billion appropriated in the CARES Act for Medicare Part A or Part B enrolled individuals and entities (Recipients) responding to the COVID-19 pandemic. Many Recipients received their share of the funding—approximately 6% of their 2019 Medicare fee-for-service revenue—by direct deposit that day.

Not all Recipients, however, may be entitled to retain the funding. HHS requires that all Recipients certify through an Attestation that they meet various [Terms and Conditions](#) to retain the money. If unable to meet those Terms and Conditions, Recipients must return the funds within 30 days of receipt.

Below are some implementation guidelines for Recipients to consider in determining eligibility, qualifying expenses and compliance with the Terms and Conditions, and for expense tracking and record-keeping.

### Initial Considerations

- *Determine Eligibility*
  - Determining whether to retain the funds is a fact-specific inquiry that will require input from finance, legal, and compliance teams. Consider establishing a cross-disciplinary team to review and respond to Terms and Conditions.
  - Key criteria that Recipients might consider in determining funding eligibility are set forth in section II below. Note that guidance is evolving on eligibility and use of funds.
- *Track Payments*
  - Consider establishing a process for closely tracking funds received or segregating funds if possible. Note that HHS made payments based on a Recipient's tax identification number (TIN), so payments may need to be tracked across individual providers. Funds can be identified through an "HHSPAYMENT" descriptor.
  - To the extent that payments might have been swept as part of a practice management sweep structure, it is helpful for both the Recipient and the management company to track funds and confirm sufficient reserves to repay funds if necessary.
- *Track Expenses*

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- Consider implementing processes to track COVID-19-related expenses and lost revenues. Some Recipients have established cost centers for this purpose.
- *Begin Recordkeeping and Documentation Practices*
  - HHS is expected to release future guidance on the records needed to support the appropriate use of funds under the grant. Current guidance requires quarterly detailed reporting on amounts and the nature of expenses, including a list of all projects and activities for which funds were expended or obligated, and the amount of funds received that were expended or obligated for each project or activity. Preparation of templates and/or documentation recording this information can be a helpful base for such reporting.
  - Consider creating a budget, memo or other internal document showing the use of funding.
  - Collect and save relevant documents, emails and other communications related to the use of funds.
- *Set the Deadline*
  - Calendar the 30th day after receipt of the payment. That is when the Attestation is due (for those who received payments on April 10, the due date is May 9). Although the portal for signing the Attestation opened on April 16, 2020, allow time to collect and analyze data as well as to review and evaluate compliance with Terms and Conditions.
- *Signing the Attestation*
  - The Attestation is a certification of compliance with the Terms and Conditions. All such certifications, particularly those involving federal health care programs, must be based on truthful and accurate determinations of compliance. The bases for the Attestation may involve input from relevant members of management with knowledge of the Recipient's operations and financial results.
  - HHS's advancement of these funds, and Recipients' use of them, may come under scrutiny, from federal authorities, the press, and whistleblowers. Maintaining a record of a Recipient's diligence in determining its eligibility to retain funds, and its appropriate deployment of them, could prove beneficial.
- *Monitor for Additional Guidance*
  - We expect HHS may issue additional guidance in the coming days. Ropes & Gray will continue to monitor this guidance and post it to our [COVID-19 resource site](#). We recommend that Recipients also closely monitor HHS guidance regarding the funding

## Steps to Analyze Eligibility and Qualifying Expenses

### 1. Confirm Eligibility

HHS' Terms and Conditions (which have been changed since their first release on April 10) state that eligible Recipients

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must certify that they “provide[ ] or provided after January 31, 2020, diagnoses, testing, or care for individuals with possible or actual cases of COVID-19.”

HHS guidance has clarified eligibility:

- Recipients do not need to currently operate. A Recipient that ceased operations as a result of the COVID-19 pandemic is still eligible for funding, so long as it provided diagnoses, testing, or care for individuals with possible or actual cases of COVID-19 at some point after January 31, 2020.
- Care does not have to be specific to treating COVID-19.
- HHS broadly views every patient as a possible case of COVID-19.

Recipients thus may be eligible to retain funding, even if they provide care that is not specific to treating COVID-19, and is not provided to confirmed or suspected COVID-19 patients.

## 2. Determine Qualifying Expenses

Confirm appropriate qualifying expenses for which funds may be used. Use of funds is subject to all of the following key restrictions:

- Funds may be used only to prevent, prepare for, and respond to COVID-19, and may reimburse Recipients only for healthcare-related expenses and lost revenues that are attributable to COVID-19; and
- Funds cannot be used to reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse.

Determining qualifying expenses is a fact-specific exercise that may require coordination between legal and finance teams. Consider the following key inquiries:

- *Will the funds be used (i) to prevent, prepare for, and respond to COVID-19 and (ii) to cover healthcare-related expenses or lost revenues that are attributable to COVID-19? Consider, for example, the following:*
  - Actions taken to prepare to treat COVID-19 patients and to mitigate transmission of COVID-19;
  - Closures, restructuring of space, purchases/leases of equipment, items and supplies, and new space;
  - Training and additional services;
  - Investments in physical and technical infrastructure;
  - Acquisition of software and other technology to increase capacity to treat patients remotely or otherwise support patient care efforts;

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- Increased labor costs, such as overtime and emergency pay, paid leave, new hires to cope with a surge of patients, and housing costs for quarantined staff or staff working longer hours;
- Higher costs associated with items, supplies and equipment;
- Lost revenues due to changes to business operations attributable to COVID-19, such as lost revenues due to cancelled services or reduced capacity;
- Loss of revenues due to reduced schedules for in-person care, and to telehealth rather than in-person care, attributable to COVID-19; and
- In certain instances, expenses may need to be allocated to reflect those that are considered COVID-19-related expenses.

- *What other potential sources are available for reimbursement of the same expenses?*

Funds cannot be used to reimburse expenses or losses that are covered by other sources or that other sources are obligated to reimburse. Other sources could include other federal grants and loans. For example, while sick pay for employees infected with COVID-19 may be an eligible expense, if a Recipient has obtained funds through the Paycheck Protection Program to cover payroll expenses or is eligible for tax credits through the Families First Coronavirus Response Act, these new funds may not be used for the same expense. Consider whether some funding programs might be better suited to cover certain expenses or lost revenues

Potential sources of reimbursement may include:

- Federal and state health care programs;
- Third-party payors, including any third-party payor reimbursement for COVID-19 testing, or patient cost sharing;
- Business insurance programs; and
- Other CARES Act funding programs, such as SBA loans or the Paycheck Protection Program.

### ***3. Review Remaining Terms and Conditions***

HHS' Terms and Conditions contain additional restrictions on use of the funds. Careful review of these Terms and Conditions is important to ensure compliance. Key terms include:

- Recipients cannot collect patient cost sharing “for all care for a possible or actual case of COVID-19” in amounts greater than what the patient would otherwise have been required to pay if the care had been provided by an in-network provider.
- Funding cannot be used for individual salaries at a rate in excess of Executive Level II, or \$197,300.

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- Recipients cannot use the funding if they require employees or contractors to sign internal confidential agreements restricting those employees or contractors from lawfully reporting waste, fraud, or abuse.
- Funding cannot be used by any corporation that was convicted of a felony criminal violation under any Federal law within the preceding 24 months unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.
- Recipients cannot use funding if they have unpaid federal tax liability unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

#### ***4. Sign the Attestation within 30 Days or Return Funding***

If a Recipient determines that it can comply with the Terms and Conditions, it must sign an Attestation confirming receipt of payment and agreeing to HHS's Terms and Conditions within 30 days of receipt of payment. The Attestation has been posted to the [CARES Act Provider Relief Fund Website](#).

If a Recipient cannot agree to the Terms and Conditions, the Recipient must contact HHS within 30 days of receipt of the payment and return the payment as instructed by HHS.