



FOLEY
HOAG LLP

The Public Health and Social Services Emergency Fund

Avoiding Liability and Compliance Best Practices

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Provider Relief Fund: Overview

- As part of the CARES Act and other recent legislative efforts, Congress has appropriated more than \$175 billion for healthcare providers to “prevent, prepare for, and respond to” COVID-19.
- While these funds come at a time of great need and are not generally subject to repayment, healthcare providers receiving and accepting such funds face a number of immediate and long-term compliance obligations.
- Given the May 10 deadline for most healthcare providers to accept or reject the first tranche of funding, this webinar is designed to answer your key questions and concerns related to compliance best practices for the **provider relief fund**.



Key Actions/Dates

Legislation	Date	Impact
Families First Coronavirus Response Act or FFCRA (P.L. 116-127)	March 18, 2020	\$1 billion for the COVID-19 Uninsured Program
CARES Act (P.L. 116-136)	March 27, 2020	\$100 billion for the Public Health and Social Services Emergency Fund**
Paycheck Protection Program and Health Care Enhancement Act (P.L. 116-139)	April 24, 2020	\$75 billion for the Public Health and Social Services Emergency Fund**

** Funds from the Public Health and Social Services Emergency Fund (AKA the **Provider Relief Fund**) are currently being allocated by HHS into the following major buckets:

- **General Distribution Fund**
- **COVID-19 Uninsured Fund**
- **High Impact Fund**
- **Rural Provider Fund**



- The first tranche of Provider Relief funding was direct deposited to certain healthcare providers on April 10 and April 17 (\$30 billion from the General Fund).
 - On April 24, HHS began distribution of the second tranche of funding (\$20 billion from the General Fund)
 - Other allocations are ongoing. Providers can currently begin filing claims for reimbursement for testing and treatment through the COVID-10 Uninsured Program Portal

- **Within 30 days** of receipt of funds from the General Fund, providers must visit an Attestation Portal and **agree** to the **Terms & Conditions** of the fund, or else **reject** the funds. Failure to reject the funds within 30 days of receipt will be viewed as an acceptance of the Terms & Conditions.

Key Terms & Conditions

- ✓ To be eligible for payments from the Fund, a provider must certify that it **“provides or provided after January 31, 2020 diagnoses, testing, or care for individuals with possible or actual cases of COVID-19.”**
 - In Guidance, HHS clarifies: “[c]are does not have to be specific to treating COVID-19. HHS broadly views every patient as a possible case of COVID-19.”
- ✓ Providers must also certify **“that the Payment will only be used to prevent, prepare for, and respond to coronavirus, and that the Payment shall reimburse the Recipient only for health care related expenses or lost revenues** that are attributable to coronavirus.”
 - HHS has yet to provide guidance on how the language “prevent, prepare for and respond” to coronavirus will be determined, or what a provider would need to do to document compliance with this requirement.

Key Terms & Conditions (cont.)

- ✓ Requires providers to certify that “for all care for a **presumptive or actual case of COVID-19...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.”
 - HHS has not provided guidance on how to determine whether a patient is a presumptive case of COVID-19

Other Key T&Cs:

- Obligation to still pursue third-party payment
- Quarterly reporting for providers receiving more than \$150K
- Requirement to “maintain appropriate records and cost documentation”
- Agreement to cooperate with any applicable audits
- Broad compliance attestation (“[t]he Recipient certifies that all information... are true, accurate and complete, to the best of its knowledge...”)

DOJ Prioritizing COVID-19 Frauds

- Healthcare frauds will be a top priority of DOJ (as always)

“The Department of Justice is committed to pursuing all manner of fraud in federal health care programs, including violations disclosed by whistleblowers under the False Claims Act, especially during this critical time as our nation responds to the outbreak of COVID-19.”

Attorney General William Barr (March 3, 2020)



Office of the Attorney General
Washington, D. C. 20530

March 16, 2020

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM:

THE ATTORNEY GENERAL



SUBJECT:

COVID-19 – Department of Justice Priorities

“Every U.S. Attorney's Office is thus hereby directed to prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic.”

TARP-like Super Structures and Additional Overlay

Current Oversight



Office of the Special
Inspector General for
Pandemic Response

Congressional
Oversight
Committee



Office of Inspector General
Pension Benefit Guaranty Corporation

Pandemic Response
Accountability Committee

TARP Takeaways

In total:

- 300 criminal convictions
- \$11 billion in recovery

In 2019 alone:

- \$900 million in recovery

Expected Enforcement Mechanisms

- Traditional enforcement tools

42 U.S.C. 1320a-7b

Criminal penalties for acts involving Federal health care programs

False Claims Act

31 U.S.C. § 3729(a)(1) (A-G)

Chapter 63.—MAIL FRAUD

Sec.

1341. Frauds and swindles.

93 STAT. 240

PUBLIC LAW 96-39—JULY 26, 1979

18 USC 1001.

(2) PENALTIES FOR FRAUDULENT CONDUCT.—In addition to any other provisions of law which may be applicable, section 1001 of title 18, United States Code, shall apply to fraudulent conduct with respect to the origin of products for purposes of qualifying for a waiver under section 301 or avoiding a prohibition under section 302.

- Targeting direct violations of CARES Act – and other frauds
 - Potential for old issues to surface
 - Financial distress creates its own risk

- Primary civil enforcement tool for false representations made to the government
- Primary theory of liability = Knowingly submitting, or causing another to submit, a false claim to the government
- Very large recoveries from the healthcare industry = \$2.6 billion of \$3.0 billion total recovery in 2019
- Elements of claim: (1) false statement; (2) made knowingly; (3) material to government's decision to pay a claim; (4) caused the government to pay out money or forfeit money owed
- Cases are often brought by internal whistleblowers
 - Whistleblower/relator bar gearing up for COVID-related cases
- Significant damages and penalties

- ☐ I acknowledge receipt of **\$XXXX** from the Public Health and Social Services Emergency Fund ("Relief Fund"), and accept the [Terms & 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 & 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 Condition 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.

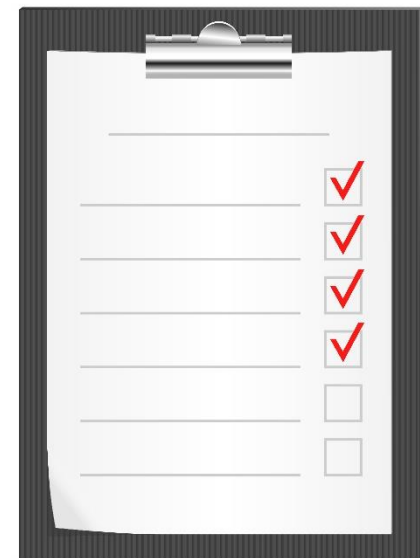
- Primary theories:
 - Falsely certifying compliance with terms and conditions of the Relief Fund
 - Falsely certifying eligibility for the funds
 - False statements in periodic reports
- An investigation can lead to discovery of other violations
- Other common theories related to healthcare providers include:
 - Fraudulently billing for tests and procedures
 - Upcoding
 - Medically unnecessary tests and procedures

Steps to Avoiding Liability

- Compliance is key
- Careful attention to terms and conditions applicable to monitoring use of funds and documenting compliance with requirements
- Training personnel
- Monitor agency guidance and enforcement alerts
- Availability of internal procedures/hotlines to report concerns
 - No retaliation against whistleblowers
- Consulting with counsel and investigating any potential concerns
- Avoiding inartfully drafted emails

Compliance Program: What?

- What should a compliance program for this law seek to accomplish?
 - Veracity of representations
 - Ongoing adherence to terms and conditions
- What does that look like?
 - OIG's guidance on provider compliance programs is still good authority
 - Seven key elements
 - Written policies, procedures [and standards of conduct
 - Individual and committee with designated responsibility
 - Training and education
 - Effective lines of communication
 - Internal monitoring and auditing
 - Enforcing standards through well-publicized disciplinary guidelines
 - Responding promptly to detected offenses and taking corrective action



Compliance Program: Why?

- Systemic and programmatic approach is important because:
 - (Obvious) Best way to ensure compliance
 - Perhaps less obvious:
 - Existence of adequate processes and procedures could insulate you from scrutiny in the first instance
 - Investors and acquirers already taking notice of the law's requirements – future due diligence WILL cover this.
 - Prevents footfaults and missteps that give an appearance of non-compliance (even if you are in fact compliant)

Compliance Program: How?

- How is this different from existing compliance programs?
 - It doesn't have to be!
 - Examples for supplementation to existing program:
 - Create new policies regarding the use of the funds
 - Designate a point person for this compliance responsibility
 - Train relevant personnel on purpose and acceptable use for funds
 - Engage your internal and/or external accounting function to ensure appropriate use
 - Use or tweak existing documentation procedures to monitor compliance
 - Existing program is lacking or out of date? Might be time to revisit.
 - In particular, look carefully at your monitoring/reporting tools once further guidance comes out

- Reasonable standards vs. complete compliance
- Sparing no expense vs. pinching pennies
 - Establish reasonable policies and protocols AND
 - Investigate every possible violation?
- Compliance education
 - Empower relevant personnel but avoid overkill
 - Consider different educational resources
 - Outside experts vs. “train the trainer”

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