

Healthcare Law Alert: \$30 Billion of the Public Health and Social Services Emergency Fund Paid to Healthcare Providers

April 13, 2020 – On Friday, April 10, 2020, the Centers for Medicare & Medicaid Services (CMS) began to release to eligible healthcare providers \$30 billion of the \$100 billion available from the Public Health and Social Services Emergency Fund (PHSSEF) through direct deposit into business bank accounts. Participating Medicare Providers (Providers), if they have not already done so, should monitor their practice's bank accounts, as CMS did not alert Providers that payments were forthcoming. Practices that do not have direct deposit and receive their payments by check, should receive a payment in the coming weeks.

Under the program, there is no application for the PHSSEF Payment (Payment). Rather, each medical practice automatically receives a Payment in an amount based upon the receipt of Medicare fee-for-service (FFS) reimbursements in 2019. However, as described below, the practice may need to return the amount of Payment to CMS, so it is critical that Providers become aware of any such Payment that is received. The Payment is supposed to have a payment description of "HHS PAYMENT," however some Providers have reported receiving deposits with the payment description "HHS STIMULUS." It is important that the source of the Payment be identified and distinguished from any payment that is received pursuant to other federal programs, because as described below, a practice may be required to return the Payment to CMS.

Estimating How Much the Payment Will Be

HHS has provided a formula for Providers to estimate how much their Payment will be: The practice's 2019 Medicare FFS payments received (not including Medicare Advantage) divided by \$484 billion and then multiplied by \$30 billion.

Next Steps After Receiving the Payment

The Payment is not a loan and will not need to be repaid, so long as certain terms and conditions are met.

First, within **30 days** of receiving a PHSSEF Payment, a representative of the practice will need to sign an attestation confirming receipt of the Payment and accepting the Terms and Conditions, as listed below. The portal for this attestation is not currently open, but HHS has advised that it will be available during the week of April 13. However, the Terms and Conditions are currently available and should be carefully reviewed. If the practice does not meet the Terms and Conditions, the money must be returned.

Overview of the Terms and Conditions as Announced by HHS

- The practice will need to certify that it: 1) billed Medicare in 2019; 2) **currently provides diagnoses, testing, or care for individuals with possible or actual cases of COVID-19**; 3) its physicians are not currently terminated from participation in Medicare; 4) is not currently excluded from participation in Medicare, Medicaid, and other Federal health care programs; and 5) does not currently have Medicare billing privileges revoked.
- The practice will be required to certify that the Payment will **only be used to prevent, prepare for, and respond to coronavirus, and shall reimburse the Recipient only for healthcare-related expenses or lost revenues that are attributable to coronavirus.**
- The practice will be required to certify that the Payment will not be used to reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse. For example, if a practice receives an SBA loan under a federal relief program related to the coronavirus pandemic and uses those funds to pay employee salaries and related expenses, the practice cannot certify that it utilized funds received under the Payment for the same physician salaries.

- The practice will be required to report as the Secretary of the Department of Health & Human Services (HHS) determines is needed to ensure compliance with conditions that are imposed on the Payment, and such report shall be in such form, with such content, as specified by the Secretary in future program instructions directed to all Payment recipients.
- If the practice receives more than \$150,000 total in funds under the various relief programs related to the coronavirus pandemic, the practice will be required to provide to HHS quarterly reports which contain information related to the total funds received from HHS under one of the relief programs and how the funds were utilized.
- The practice will be required to maintain appropriate records and cost documentation as required by federal regulation to substantiate the reimbursement of costs, which records will be subject to audit and inspection.
- The practice will be required to certify that it will not seek to collect from a patient out-of-pocket expenses an amount greater than what a patient would have otherwise been required to pay if the care had been provided by an in-network Provider.
- A practice which accepts the Payment to cover costs for treating the uninsured will be required to accept Medicare rates.

The Terms and Conditions also require Providers to comply with requirements that are imposed on federal appropriations and other federal awards, including but not limited to, not using such funds to advocate or promote gun control.

What to Do if the Terms and Conditions Cannot Be Met

It is imperative that Providers who receive a PHSSEF Payment, carefully review the Terms and Conditions and decide within **30 days** of receiving the Payment whether to accept or remit the Payment. If a practice ***does not wish to or cannot comply with the Terms and Conditions***, the full amount received must be remitted to HHS within 30 days of receipt as instructed by HHS. The contact information for remittance has not yet been posted on the HHS website, but is expected to be posted soon.

Further Guidance

In our view, there is a lack of clarity on one critical point in the HHS announcement of the Terms and Conditions for not remitting the Payment. As announced, in order to meet the Terms and Conditions, a representative of the practice will be required to certify that the practice “currently provides diagnoses, testing or care for patients with possible or actual cases of COVID-19.” While that appears on its face to suggest that in order to retain the Payment the practice must be treating patients either to determine if a patient has COVID-19 or has been diagnosed with the disease, that would seem antithetical to what we believe is the purpose of the program: to support Providers whose practices are adversely affected by the outbreak of COVID-19, not simply those Providers who are treating actual or potential COVID-19 patients. As with previous announcements by HHS since the outbreak of the pandemic, we expect further guidance on this point in the near future.

We will be monitoring this situation carefully in the coming days and we will be providing additional information as it is received. If Providers have any questions about a Payment they have received or anticipate receiving or the certifications that may be required, please contact:

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