



COVID-19 RESPONSE TEAM

HHS CARES ACT RELIEF FUNDS

APRIL 17, 2020

FOR MORE INFORMATION ABOUT HOW WE CAN ASSIST YOUR BUSINESS DURING THE COVID-19 PANDEMIC, PLEASE VISIT WWW.SHUTTS.COM/SHUTTS-BOWEN-COVID-19-RESPONSE/.

If you would like additional information about any of the topics below, please contact James Farrell at JFarrell@shutts.com or at 561-650-8539.

On Friday, April 10th, 2020, Department of Health and Human Services (“HHS”) began delivering the initial \$30 billion in relief funding under the recently passed Coronavirus Aid, Relief, and Economic Security (“CARES”) Act to Medicare providers and suppliers in support of the national response to COVID-19. The funding is a portion of the \$100 billion of funding that will be distributed under the CARES Act to support health care-related expenses or lost revenue attributable to the COVID-19 pandemic and to ensure uninsured Americans will be provided access to needed testing and treatment without surprise billing from a provider or supplier.

Providers must sign an attestation confirming receipt of the funds and agreeing to the Terms and Conditions within 30 days of receiving the payment, and that not returning the payment within 30 days of receipt will be viewed as acceptance of the Terms and Conditions. HHS has opened a portal for signing the attestation <https://covid19.linkhealth.com/#/step/1>. To the extent a provider receives payment and does not wish to comply with these Terms and Conditions, the provider must contact HHS within 30 days of receipt of payment and then remit the full payment to HHS, which instructions will also be posted on HHS.gov.

On April 13th, HHS updated the Terms and Conditions for use of the funds.

Relief Fund Payment Terms and Conditions

Although the funds are payments, not loans, to health care providers, and will not need to be repaid, the funds are subject to a significant number of Terms and Conditions, indicating that, at least presently, the federal government intends to treat these funds very much like federal grants for clinical services or research, including that provider recipients of the funds must certify that:

- The provider 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, and other federal health care programs; and does not currently have Medicare billing privileges revoked.

Although the certification could be of concern to providers in regard to medical practices which are currently closed, HHS has clarified that health care providers that have ceased operation as a result of the COVID-19 pandemic are eligible to receive funding as long as they provided diagnoses, testing, or care for individuals with possible or actual cases of COVID-19, noting that care does not have to be specific to treating COVID-19. Importantly, HHS notes in the updated guidance that it “broadly views every patient as a possible case of COVID-19.”

- The funds received will only be used to prevent, prepare for, and respond to COVID-19, and shall reimburse the provider recipient only for health care-related expenses or lost revenues attributed to COVID-19.

HHS will need to provide additional guidance as to the above requirements given many providers will have lost revenues as result of COVID-19, as it is not clear if these lost revenues must also be tied to preventing preparing for, or responding to COVID-19.

- The provider will not use the funds to reimburse other expenses or losses that have received or are expected to receive reimbursement from other sources.

In this regard, providers that are also participating in other federal response programs (e.g., Federal Emergency Management Agency emergency response funding) will have to carefully track that expenses or losses are not claimed twice. Providers anticipating potential receipt of SBA Paycheck Protection Program Funds will also want to try to apply the HHS funds to expenses or losses incurred prior to drawing down of the PPP loan.

- For all care for a possible or actual case of COVID-19, it will not seek to collect more than in-network cost-sharing amounts from out-of-network COVID-19 patients.

Providers need make sure their billing department knows to implement these rules; although in many instances insurers are otherwise requiring no cost-sharing amounts for all COVID-19 care.

- The provider is required to submit reports to the HHS Secretary to ensure compliance with the conditions imposed on the funds.

HHS indicates that it will clarify further instruction on this requirement in future program guidance, as there is no current reporting process.

Recipients receiving more than \$150,000 under any appropriations mechanism related to COVID-19 must submit a report within 10 days of the end of each quarter detailing certain information on use of the funds, including the following:

- The total amount of funds received from HHS;
- The amount of funds received that were expended or obligated for each project or activity;
- A detailed list of all projects or activities for which large covered funds were expended or obligated, including
 - the name and description of the project or activity, and
 - the estimated number of jobs created or retained by the project or activity, where applicable; and
- Detailed information on any subcontracts or subgrants awarded by the recipient or its subcontractors or subgrantees, including all information required to comply with the Federal Funding Accountability and Transparency Act of 2006 (such as the name and location of the entity receiving the award; the amount of the award; information on the award, including transaction type, funding agency, etc.; the location of the entity receiving the award; and the names and compensation of highly compensated officers).

Providers are required to maintain appropriate records and cost documentation as required by 45 C.F.R. § 75.302 and 45 C.F.R. §§ 75.361–.365.

These regulations are located within in the Uniform Administrative Requirements, Cost Principles, and Audit Requirement for HHS Awards and outline requirements applicable to federal award recipients and subrecipients. Under 45 C.F.R. § 75.302, federal award recipients must have in place accounting and internal control systems that provide for appropriate monitoring of grant accounts to ensure compliance with federal statutes, regulations, and the terms and conditions of the federal award and permit the preparation of reports required by general and program-specific terms and conditions and tracing of funds adequate to establish that funds have been used appropriately.

In addition to the above requirements, the Terms and Conditions also require compliance with a number of requirements outlined in the Consolidated Appropriations Act, 2020 and Further Consolidated Appropriations Act, 2020, or other requirements applicable to HHS funding. In particular, some of these requirements include:

- Executive Pay. No funds received may be used to pay the salary of any individual, whether through a grant or other payment mechanism, at a rate in excess of Executive Level II, currently set at \$197,300.00.
- Privacy Act. No funds received may be used in contravention of section 552a of title 5, U.S. Code (the “Privacy Act”) and its implementing regulations, which mandates how federal agencies maintain records about individuals and establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies, such as under the Freedom of Information Act. The Privacy Act also provides individuals with a means by which to seek access to and amendment of their records, and it sets forth various agency record-keeping requirements.
- Confidentiality Agreements. No funds received may be made available for a contract, grant, or cooperative agreement with an entity that requires employees or contractors to sign internal confidentiality agreements that would prohibit or restrict such employees or contractors from lawfully reporting fraud, abuse, or waste.
- Nondisclosure Agreements. No funds received may be used to implement or enforce any nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain a nondisclosure provision, unless a limited exception applies.

- Unpaid Federal Tax Liability. Entities receiving the funds may not have any unpaid federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being timely paid, unless a federal agency has considered and determined that suspension or debarment of the corporation is not necessary.
- Human Subjects Protections. If the funds will be used to support activities involving human subjects in any research activities, the recipient must provide satisfactory assurances of compliance with the participant protection requirement of the HHS Office of Human Research Protection (OHRP) prior to implementation of those research components.
- The Terms and Conditions also note that the HHS Inspector General will be accepting tips and complaints from all sources about potential fraud, abuse, waste, and mismanagement of CARES Act funding.