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CARES Act Provider Relief Funding: Think Before You Deposit

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Be careful. If you are a health care provider who recently received a massive check from the federal government — without asking for it — and are wondering whether to deposit the check in your bank account, you need to pause for a moment. The U.S. government pays out money, sometimes blindly, during times of crisis to boost the economy. But once the crisis is over, the government always opens up its books and takes a look at who received that money. If the government determines that money went where it was not supposed to go, it will make every effort to claw it back. This is known as "pay, then chase." That is what will likely happen with $50 billion of Coronavirus Aid, Relief, and Economic Security (CARES) Act Provider Relief Funding that just left the U.S. Treasury and might have found its way into your mailbox or bank account.

If you are a health care provider who received a CARES Act check in April or May and quickly deposited it into your company's bank account, reading this article may, initially, cause your heart to skip a couple of beats. That's not the point of the article, however. There may be nothing wrong with accepting and depositing these funds, but if you are a health care provider whom the Centers for Medicare & Medicaid Services (CMS) has placed on prepayment review or payment suspension, your company is already on the government's radar. Accepting a $250,000 check, for example, from the government and depositing it into your company's bank account may have increased the size of your blip on the radar. In which case, you should consult with counsel sooner rather than later.

Background

As part of the CARES Act and the Paycheck Protection Program and Health Care Enhancement Act, the U.S. Department of Health and Human Services (HHS) is providing $175 billion in relief funds to

hospitals and other health care providers in response to the coronavirus pandemic. Under the CARES Act, provider relief funding includes two rounds of distributions totaling $50 billion. Between April 10 and April 17, 2020, the government distributed the initial $30 billion in funding to certain health care providers. Beginning April 24, 2020, the government started distributing the remaining $20 billion in additional CARES Act provider relief funding.

Unlike other COVID-19 stimulus payments, these distributions are payments, not loans. But these dollars are far from government charity. Accepting provider relief funding involves certain terms and conditions, enrollment agreements, attestations, and certifications that carry potentially significant consequences for noncompliance. You need to read these terms and conditions very carefully and ask yourself whether, realistically, you can comply with them.

The attestation is worthy of emphasis. For instance, a health care provider who accepts CARES Act provider relief funds must certify: (1) they currently provide or provided after January 31, 2020, diagnoses, testing, or care for individuals with possible or actual cases of COVID-19; (2) they are not currently terminated from participation in Medicare; (3) the provider has not been excluded from participation in Medicare, Medicaid, and any other federal health care programs; (4) the provider's Medicare billing privileges have not been revoked; and (5) the CARES Act funds will only be used to prevent, prepare for, and respond to the coronavirus, or to reimburse the provider for health care-related expenses or lost revenues that are attributable to the coronavirus.

Risks Associated With Provider Relief Funding

Noncompliance can subject providers to a variety of penalties. Any deliberate omission, misrepresentation, or falsification of any information within the payment application or future reports can result in "criminal, civil, or administrative penalties, including but not limited to, revocation of Medicare billing privileges, exclusion from federal health care programs, and/or the imposition of fines, civil damages, and/or imprisonment." Criminal charges, for instance, may include making false statements to the government, in violation of 18 U.S.C. § 1001.

The federal False Claims Act (FCA), 31 U.S.C. §§ 3729–3733, is also implicated by any noncompliance with the program's terms and conditions. The FCA creates civil liability for knowingly defrauding a federal program. Generally, the FCA prohibits knowingly presenting a false claim for payment of government funds or knowingly making a false statement material to a false claim. A reverse false claim, however, is not premised on the improper submission of a claim for payment. Instead, the reverse claim is based on the theory that an entity retained money it should have otherwise paid (or returned) to the government. Violations carry significant liability, including a penalty for each claim submitted and treble damages.

Whom Will the Government Go After?

If you are a health care provider on Medicare payment suspension or prepayment review, your company will probably be one of the first on the government's list to track down to find out what you did with the funds they gave you. Your practices are already under scrutiny. If you fall into one of these two categories and you are contemplating depositing, cashing, or accepting a CARES Act provider relief funding check or direct deposit, you should consult with counsel before doing so. If not, you may need to consult with counsel after HHS' Office of Inspector General (HHS OIG) knocks on your door in six months.

The fact that your company received CARES Act provider relief funding from the government will not be kept a secret from the public either. HHS plans to make publicly available the names of all payment recipients and the amounts received by those recipients. By accepting funds, the recipient consents to HHS publicly disclosing the payments that the recipient has received from the relief fund; that means you, if you deposited one of these checks in your company's bank account. Public disclosure may result in a whistleblower contacting the government about your receipt of funds. If an investigation is not open already, this may trigger one.

Weighing the Implications of Receiving and Retaining Funds

Counsel can clarify and fully explain the requirements and obligations set forth in the applicable distribution terms and conditions. This is particularly true for providers actively engaged in disputes with CMS or under investigation by the Department of Justice (DOJ) or HHS OIG.

Recipients should understand that they will likely be subject to compliance, tracking, reporting, and potential audit requirements. As such, providers can take several proactive steps to mitigate the risks associated with accepting provider relief funds:

1. Carefully evaluate funding terms and conditions.
2. Ensure the accuracy and truthfulness of all certifications.
3. Monitor new and updated regulations.
4. Maintain accurate and detailed records of all conduct that could lead to or mitigate liability.
5. Review and update compliance plans, policies, and procedures.
6. Promptly investigate concerns raised regarding the acceptance or use of these funds, while following whistleblower best practices to avoid retaliation claims.

Conclusion

CARES Act funding should not be taken lightly. Government money rarely comes without strings attached. If you have questions regarding the receipt of provider relief funding, submission of an attestation statement, or the implications of accepting funds while being the subject of an ongoing government investigation, contact the authors of this article or your current Carlton Fields attorney.

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