HALL RENDER
KILLIAN HEATH & LYMAN

HEALTH LAW NEWS

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LATEST STIMULUS BILL INCLUDES OVER $100 BILLION IN HEALTH CARE INDUSTRY RELIEF: PROVIDERS SHOULD START PREPARING NOW

On March 25, 2020, the Senate passed the Coronavirus Aid, Relief, and Economic Security Act (H.R. 748) ("CARES Act" or "Act"). The CARES Act contains numerous provisions aimed at the response to the Coronavirus or COVID-19 pandemic, including $100 billion in reimbursement to hospitals and other health care entities for COVID-19-related expenses and lost revenue ("Fund"). The CARES Act was passed by the House of Representatives on Friday March 27, 2020 and signed into law by President Trump on Friday afternoon.

PRACTICAL TAKEAWAYS AND RECOMMENDATIONS

- Health care entities should start immediately tracking and documenting expenses incurred as part of their COVID-19 response efforts.
- Health care entities should start immediately estimating and documenting lost revenues related to their COVID-19 response efforts. This includes, for example, developing mechanisms for estimating and documenting lost revenue as a result of delaying and cancelling non-emergency procedures, decreases in operating revenues and margins as a result of shifts in types of services and losses tied to providing free testing or screening as part of COVID-19 response efforts.
- "Eligible entities" is broadly defined to include hospitals, Critical Access Hospitals ("CAHs") and other types of Medicare enrolled providers and suppliers.
- At this point, it is unclear how the Secretary of Health and Human Services ("Secretary") will allocate the Fund among different health care entities. Be on the lookout for additional guidance from the Secretary in upcoming days and weeks.

UPCOMING HALL RENDER INFORMATION BRIEFING

Hall Render will be providing a 30-minute **Information Briefing** on April 8, 2020 at 1:00 PM EDT to discuss the CARES Act and what providers and suppliers can be doing now to ensure they have access to needed financial support. Please mark your calendars now. More information about this Information Briefing will be available soon!

THE CARES ACT: OVERVIEW

The $2.2 trillion CARES Act includes the creation of the $100 billion Fund for health care providers and suppliers to help with expenses and lost revenues attributable to efforts to respond to the COVID-19 public health emergency. The complexity and magnitude of the legislation, combined with the pressure Congress was under to get a deal finalized as soon as possible, means even at over 800 pages the CARES Act is light on concrete detail. As a result, the sections describing the Fund are only a few pages with minimal information on the method and timing for allocating and distributing the Fund to health care providers. The Secretary will have substantial discretion in determining how and when the Fund is allocated.

Based on the minimal legislative text, health care entities, however, can start preparing now. This includes immediately estimating and documenting both expenses incurred and lost revenues related to their COVID-19 response efforts. This also includes, for example, developing mechanisms for estimating and documenting lost revenue as a result of delaying and cancelling non-emergency procedures, decreases in operating revenues and margins and losses tied to providing free testing or screening as part of COVID-19 response efforts.

Hall Render is evaluating the legislative language, analyzing previous stimulus packages and talking to federal regulators to ensure organizations can access funds to help offset the unanticipated financial burden many providers and suppliers continue to experience as they serve their communities during this ongoing public health emergency.

THE CARES ACT: WHO IS ELIGIBLE?

The CARES Act states that "eligible health care providers" can qualify for reimbursement under the Fund and defines eligible health care providers as follows:

> [Pu]blic entities, Medicare or Medicaid enrolled suppliers and providers, and such for-profit entities and not-for-profit entities not otherwise described in this proviso as the Secretary may specify, within the United States (including territories), that provide

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> diagnoses, testing, or care for individuals with possible or actual cases of COVID–19[.]

Importantly, reimbursement is not only available for hospitals and CAHs, but also other Medicare enrolled providers (e.g., a Skilled Nursing Facility, Hospice, Home Health Agency, Comprehensive Outpatient Rehabilitation Facility) and suppliers (e.g., a Rural Health Clinic, Federally Qualified Health Clinic, Ambulatory Surgery Center, physician practices, etc.), as well as other types of entities designated by the Secretary.

THE CARES ACT: WHAT WILL BE REIMBURSED?

The CARES Act states the Fund will be made available to reimburse health care entities for both expenses and lost revenue to prevent, prepare for and respond to the COVID-19 pandemic. Importantly, the CARES Act includes not only expenses, but also lost revenue. In addition, the CARES Act gives the following examples of reimbursable expenses:

> [B]uilding or construction of temporary structures, leasing of properties, medical supplies and equipment including personal protective equipment and testing supplies, increased workforce and trainings, emergency operation centers, retrofitting facilities, and surge capacity[.]

The Act does not give examples of the types of lost revenues that would be reimbursable, but entities should be prepared to estimate such lost revenue, which could include downtime or lower volumes to prepare for COVID-19 patients, decreases in operating margin from cancelling elective procedures to clear the schedule for a surge and/or minimizing community spread and lost revenue from replacing higher margin service lines with lower margin services.

Another important aspect of the Fund is that the CARES Act states that it may not be used to reimburse expenses or lost revenues that are reimbursed from other sources or that other sources are obligated to reimburse, so health care entities will need to offset any other funds received for responding to the COVID-19 pandemic.

The CARES Act also instructs the Secretary to designate the types and forms of documentation required to be maintained and submitted by health care entities seeking reimbursement. The Secretary will likely need to issue regulatory or sub-regulatory guidance addressing the types of expenses and lost revenues that may be claimed.

THE CARES ACT: HOW WILL THE FUND BE DISTRIBUTED?

That is the biggest unknown. The CARES Act does not contain the method or formula for allocating the Fund or whether the Fund will be distributed on a prospective or retrospective basis. Those details will be determined by the Secretary. The Act simply states that eligible health care entities must submit an application that includes a "statement justifying the need of the provider for the payment." So entities will not automatically qualify for reimbursement.

Hopefully, the Fund will be distributed to entities as soon as possible to allow them ample time and resources to prepare. One method would be to allocate the Fund based on past Medicare payments (e.g., allocated based on Medicare payments for the past year), and the Secretary could reconcile these payments later. For example, the Fund could be allocated similar to the method for the Medicare Periodic Interim Payment set forth in 42 C.F.R. 413.64(h) and Provider Reimbursement Manual Section 2407 where payments are made on a prospective basis and reconciled later based on actual expenses and lost revenues experienced by the health care entity.

If you have questions or would like additional information about this topic, please contact:

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