HHS UPDATES ITS CARES ACT PROVIDER RELIEF FUND FAQS AGAIN

For the third time this week, twice on May 20 and again late on the 21, the Department of Health and Human Services (“HHS”) has amended its Frequently Asked Questions ("FAQs") related to the CARES Act Provider Relief Fund. These FAQs continue to build on its recent guidance related to common health care industry transactions. Additionally, HHS made a distribution today to certified Skilled Nursing Facilities and Medicaid-only nursing homes. That distribution is covered in a separate article.

More information on these deadlines, the latest Relief Fund Updates, and other related issues is included below. Our earlier update for this week's changes is available here. Before that the Relief Fund FAQs were last updated on May 6 and May 15.

HIGHLIGHTS AND KEY TAKEAWAYS FOR MAY 21 FAQS

- HHS updated its CARES Act Provider Relief Fund FAQ document to add a series of FAQs addressing common health care industry transactions and the impact on Relief Fund Payments
- The newest FAQs focus on revenue reporting in the portal, especially by parent organizations, and confirm that health care systems have the discretion to allocate funds among subsidiaries.

LATEST UPDATES TO RELIEF FUND FAQS

The first FAQ pertains to a situation where a provider that did not bill Medicare in 2019 acquires a practice that did bill Medicare in 2019. The FAQ answer states if the acquiring provider did not bill in 2019 and did not receive a General Distribution payment, it is not eligible for a payment for this newly acquired entity and should not enter any revenue information into the Provider Relief Fund Payment Portal. The FAQ states the provider may be eligible for future payments.

The next FAQ addresses a situation where an organization received a payment for an entity that has been subsequently sold, transferred, terminated or otherwise removed from the corporate structure. The HHS response permits the divesting organization to retain those funds so long as that divested provider was reflected in its most recent tax return gross receipts and sales and can continue to meet all of the Terms and Conditions, particularly the ability to show that the funds were used to offset lost revenue or COVID-related expenses.

Between these first two FAQs, HHS seems to conclude that the organization that received the payments may retain them, regardless of whether that provider has since been sold/divested. However, HHS again suggests that if the organization believes its lost revenue and COVID-19 related expenses will be materially less than what it received in General Distribution funding, then the provider should return the funding. There continues to be no definition of materiality in the FAQs, nor is there guidance as to how long the period will be for measuring lost revenue and expenses for purposes of this determination and its reporting obligation.

The next two FAQs pertain to parent organization questions. HHS confirms a parent may "accept and allocate funds at its discretion to its subsidiaries," as long as the reporting obligations are fulfilled. This is an important confirmation that commonly controlled organizations should be able to analyze the use of funds for COVID related lost revenue and expenses on an aggregate or system-level basis, rather than on a disaggregated basis – by legal entity/EIN – presumably whether the system files a consolidated tax return or not.

Next, HHS provides clarification on entering TINs into the portal, where a parent submits a tax return under a TIN that does not bill Medicare, and the subsidiaries of the parent received General Distribution payments under the Billing TIN. In that situation, HHS states the parent should complete a portal application by listing the Billing TINs of the respective subsidiaries without entering its own TIN used to file the tax return. Further, the parent entity should submit a statement on the first page of the uploaded tax return file stating (i) the parent entity’s Filing TIN and that it does not bill Medicare and (ii) a schedule of the billing subsidiaries, their Billing TINs, and gross sales or receipts."

The last of the newest FAQs asks about a parent organization that has both patient revenue and non-patient revenue, such as from insurance, retail or real estate operations. Again, HHS instructs that an application should be completed at the parent level, that HHS only wants revenue reported from subsidiaries providing care, testing, and/or diagnosis for possible or actual cases of COVID-19 – the definition of “eligible health care provider” in the CARES Act. Revenue from subsidiaries (legal entities/TINs) that do not have patient revenue should be excluded from reporting.

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Earlier this week, the FAQs were updated to state an entity can submit revised applications in the portal. In addition to the substantive changes, these latest revisions underscore the fact that HHS will continue to revise and add to these FAQs on an ongoing basis. Providers should be careful to review the most updated version of the FAQs prior to making any decisions based on guidance included in the FAQs. Some of the FAQs have been changed multiple times since the document was originally published, and there will be future revisions.

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

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