THE FAQ CAROUSEL: HHS CONTINUES WITH MORE UPDATES TO CARES ACT RELIEF FUND FAQS

The Department of Health and Human Services ("HHS") continues to update its Provider Relief Fund Frequently Asked Questions ("FAQs"). The latest revisions are dated May 26 and 29, 2020 and include new FAQs and modifications to existing FAQs. HHS also modified two of the FAQs by deleting potentially significant language without marking those FAQs as changed.

The new FAQs address a variety of issues including the recent Skilled Nursing Facility ("SNF") and Indian Health Service ("IHS") targeted distributions as well as updates on the High Impact Targeted Distribution. More information on these changes to the FAQs and other Relief Fund updates is included below.

HHS has indicated that it will continue to update the FAQs in response to questions from Providers.

HIGHLIGHTS AND KEY TAKEAWAYS

- The FAQs were updated to reflect the recent extension for attesting to relevant Terms and Conditions documents. The deadline is now 90 days from receipt of the relevant distribution. While other places on the HHS website still state that the deadline is 45 days, and the deadline is 90 days.
- HHS has NOT extended the June 3, 2020 deadline for recipients to upload tax return revenue and lost revenue for March and April via the Provider Relief Fund General Distribution Payment Portal ("General Distribution Payment Portal").
- HHS made multiple revisions to the FAQs addressing when and how Providers may need to reject or repay Relief Fund Payments.
- New FAQs also address the following:
  - Keep uploading COVID-19 admissions information, there may be further High Impact distributions.
  - The SNF Tranche distributed and addressed in our Alert found here.
  - The IHS Tranche for tribal hospitals and health programs.
  - Confirmation of application of the compensation limit included in the Terms and Conditions.

NEW AND MODIFIED FAQS

The most recent changes to the FAQs were made on May 26 and 29, 2020. Ten FAQs were revisions to already existing FAQs, although only eight of the ten were marked as modified. The other two changes were only visible by running a comparison between the most recent version of the FAQ document and a prior version. HHS also added seventeen new FAQs addressing a variety of issues.

Rejecting Payments and Overpayments

An FAQ added May 29, 2020 states that if a recipient rejects a specific Relief Fund distribution through the Attestation Portal and returns the applicable funds, the recipient cannot later get that payment back. The recipient may still be considered for future distributions if the criteria for such distribution are satisfied. A modified FAQ, however, still states that if a recipient believes it was overpaid, it should reject the entire distribution and submit the required revenue information and documents in the General Distribution Payment Portal to determine the correct payment. The FAQs do not clarify how a recipient can reject a payment it believes was in error while still preserving its right to a corrected payment after uploading the required revenue and tax information.

Without identifying them as "modified," HHS also deleted text from two FAQs addressing transactions that stated that recipients should return funds if they anticipate that COVID-19 related lost revenue and expenses would be materially less than distributions received. A retained FAQ still states that HHS does not generally intend to recoup funds as long as lost revenue and expenses exceed the amounts received.

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Because of the inconsistent and evolving guidance from HHS on this issue, Providers should work with legal counsel and financial advisors prior to making any decisions about rejecting or repaying Relief Fund payments.

Executive Compensation Restriction and Other Clarifications

HHS reiterated that Relief Funds may not be used to pay the salary of an individual, through a grant or other mechanism, at a rate in excess of Executive Level II ($197,300). HHS clarified, however, that the limitation only applies to the use of Relief Funds, the $197,300 limitation is only for "direct" salary, not fringe benefits, and that an organization receiving Provider Relief Funds may pay an individual's salary amount in excess of the salary cap with non-federal funds. This is consistent with how Hall Render had already been interpreting this particular restriction.

HHS also confirmed that receiving Relief Fund payments does not prohibit a Provider from also securing COVID-19 relief funding from other sources, such as the Small Business Administration's Paycheck Protection Program.

HIGH IMPACT DISTRIBUTION FAQS

HHS added multiple FAQs on May 29, 2020 about the Relief Fund High Impact payments that were distributed in early May to 395 providers. Those payments were only made to hospitals that provided inpatient care for 100 or more COVID-19 patients through April 10, 2020.

The new FAQs state that HHS may make additional High Impact distributions at a later date and that it would announce any additional distributions in advance and provide a deadline and method for providing updated data.

An earlier FAQ (that is still included in the document) stated Providers should continue to update their capacity and COVID-19 admissions data information through the "same method they used previously" to ensure that HHS can make timely payments in the event that the provider "becomes a high-impact provider." Implicit in this FAQ is that a Provider could qualify as a high-impact provider on a rolling basis and potentially qualify for a high impact payment. These new FAQs clarify that HHS will issue more formal guidance in the event it decides to make additional high impact payments.

SNF DISTRIBUTION AND IHS DISTRIBUTION FAQS

Eight new FAQs were added related to the recent Relief Fund payment distributions to Skilled Nursing Facilities and Tribes, Tribal organizations, urban Indian health organizations, and other health services providers. These FAQs primarily supplement website guidance on what organizations were eligible and how the distributions were determined. Watch for subsequent alerts on these areas.

UNINSURED PROGRAM PUBLIC DATA SET

HHS also created a new publicly available data set listing Providers who have received payments from the Uninsured Reimbursement Program and the specific amounts each has received. The data set is hosted on the CDC website (available here) and is updated weekly. There are now three separate data sets showing the amounts Providers have received from the Relief Fund: the new uninsured program data set, the General Distribution data set and the High Impact data set.

UPDATED RELIEF FUND LEGAL BRIEFINGS

Hall Render is preparing updates to its April 30, 2020 Legal Briefings, i.e., related to the CARES Act Relief fund Terms and Conditions and CARES Act Relief Fund Allocations, to include changes through the end of May, which will be available shortly. Organizations that purchased the April 30 Legal Briefings may purchase the updated briefings for $250 each. For others the updated Legal Briefings will be available for $1,000 each. If you are interested in purchasing your copy of the Hall Render Legal Briefing Documents, click **here** and complete the simple information request. A Hall Render representative will follow up with you shortly.

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

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