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Retroactive Change in Distribution Methodology for Provider Relief Funds May Trigger Refunds

As I am sure you know, the U.S. Department of Health and Human Services (HHS) began distributing approximately $50 billion in Provider Relief Funds provided under the CARES Act between April 10 and April 17. The initial distribution of Provider Relief Funds (consisting of approximately $30 billion) was distributed among healthcare providers based on their "proportionate share of Medicare fee-for-service reimbursement for 2019". For example, a provider with $15 million of Medicare FFS revenue in 2019 and $22 million in net patient revenue for 2018 would have received approximately $930,000 of Provider Relief Funds in the initial distribution: ($15,000,000/$484,000,000,000 (Total Medicare FFS Revenue for 2019) x $30,000,000,000).

In the second distribution of Provider Relief Funds (consisting of approximately $20 Billion) which began on April 24, HHS changed the methodology used to calculate the amount distributed to each healthcare provider. Instead of utilizing the "proportionate share of Medicare fee-for-service reimbursement for 2019" methodology used in the initial distribution, HHS opted to distribute the funds based on a healthcare provider's "proportionate share of net patient revenue for 2018." Using the hypothetical provider listed above, this same provider would receive $176,000 of Provider Relief Funds in the second distribution ($22,000,000/$2,500,000,000,000 (Total Net Patient Revenue for 2018) x $20,000,000,000) based on the new methodology.

In selecting this new distribution methodology for the second distribution, however, HHS also stated that it had reconsidered how it was distributing the Provider Relief Funds overall and was going to apply the new "net patient revenue" methodology to the entire $50 billion distribution, including the $30 billion already distributed under

the "Medicare fee-for-service" methodology. This would seem to mean that the total distribution of Provider Relief Funds to our hypothetical provider would be approximately $440,000 (($22,000,000/2,500,000,000,000) x $50,000,000,000). Given that our hypothetical provider has already received approximately $930,000 of Provider Relief Funds in the first distribution, it would not be entitled to any Provider Relief Funds in the second distribution and would potentially be on the hook to refund to HHS approximately $490,000 of the funds it received in the first distribution.

At this point, the information provided by HHS about the Provider Relief Funds makes no specific mention of an obligation to refund money if a provider received excess Provider Relief Funds due to the change in distribution methodology mid-stream. In its recently updated "CARES Act Provider Relief Fund General Distribution FAQs" (the "FAQs"), HHS states that "[i]f a provider believes it was overpaid or may have received a payment in error, it should reject the entire General Distribution payment and submit the appropriate revenue documents through the General Distribution portal to facilitate HHS determining their correct payment." Based on this statement, it would appear that providers will be expected to self-identify "overpayments" and affirmatively rectify such "overpayments" by rejecting the distribution creating the "overpayment" and submitting the necessary documentation to allow HHS to properly determine the amount of the distribution. Unfortunately, this statement appears in a section of the FAQs clarifying that in order to be eligible to receive a distribution from the Provider Relief Funds a provider must have COVID-19 related expenses and losses equal to or greater than the amount of Provider Relief Funds it receives. As a result it is not clear that this statement applies to an overpayment of Provider Relief Funds caused by a change in the distribution methodology for the Provider Relief Funds.

Similarly, in another section of the FAQs, HHS states that "[g]enerally, HHS does not intend to recoup funds as long as a provider's lost revenue and increased expenses exceed the amount of Provider Relief funding a provider has received." This statement, in and of itself, seems to indicate that HHS will not seek a refund if a provider receives excess Provider Relief Funds due to the change in the methodology for distributing the Provider Relief Funds, as long as the provider's COVID-19-related expenses and losses exceed the amount of Provider Relief Funds it received. Again, however, this statement is made in an FAQ dealing with the fact that providers are

not supposed to receive Provider Relief Funds to cover expenses or losses covered by another governmental funding source or program. As a result, it is not clear that this statement applies to an overpayment of Provider Relief Funds caused by the change in the distribution methodology for the Provider Relief Funds.

In the end, logic would seem to dictate that the only way the entire $50,000,000,000 could be distributed using the percentage of "net patient revenue" distribution methodology is for those who received excess funding in the initial distribution of Provider Relief Funds to return such excess. Further, during the last several weeks we have seen multiple instances in which the federal government has developed a new process on the fly to fill gaps left in a process just created. Thus, there is no reason to assume that the same will not happen in this situation.

What should a provider do to prepare for this eventuality?

1. Determine the likelihood that it received excess funding in the first distribution of Provider Relief Funds that might be subject to refund or return to HHS.

A simple way to make this determination is find out whether the provider received from HHS any funds in the second distribution of Provider Relief Funds. As stated above, the second distribution appears to have been made on the theory that the full $50,000,000,000 was distributed using the percentage "net patient revenue" methodology. As a result, if a provider received funds in the second distribution, it is unlikely that the provider received an excess of Provider Relief Funds in the first distribution.

One caveat, however, is that the provider needs to confirm that any recent funds received from HHS are actually part of the second distribution of Provider Relief Funds. As you know, HHS has created many new programs that are providing new sources of funding to healthcare providers. For example, we had a number of rural hospital clients recently receive funds from HHS under a special program for rural providers. These funds are part of the Provider Relief Funds, but distributed separate from the $50 billion general distribution of Provider Relief Funds. As a result, a provider needs to confirm the actual program under which funds have been recently received from HHS.

Even if a provider did receive funds in the second distribution of Provider Relief Funds, we still recommend that the provider apply the new "net patient revenue" distribution methodology discussed above to its actual 2018 "net patient revenues" to confirm whether it has received any excess Provider Relief Funds.

2. If the Provider determines that it received excess Provider Relief Funds, set the excess funds aside in the event HHS creates an obligation to and a process for refunding excess funds received. Quite honestly, we believe the creation of such obligation and process is inevitable. As a result, it is best to have those funds available when that happens.

In closing, we hope this information is helpful. We simply wanted to make sure you were aware of the potential impact of what might otherwise seem like a fairly insignificant decision by HHS.

For more information on HHS' methodology for distributing Provider Relief Funds, please check out the HHS Provider Relief Fund website: https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/index.html.

If you have any questions, please feel free to contact the Spencer Fane Health Care Group.

This blog post was drafted by Donn Herring, an attorney in the Spencer Fane LLP St. Louis office. For more information, visit www.spencerfane.com.