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The CARES Act has dozens of strings attached for Medicare providers, including multiple certifications for the providers to attest to. Squire Patton Boggs attorneys, all former prosecutors, examine how law enforcement may scrutinize these certifications and give tips on how providers who receive CARES Act funds can insulate themselves from such scrutiny.

A Medicare provider who accepts money from the Provider Relief Fund of the Coronavirus Aid, Relief, and Economic Security (CARES) Act accepts dozens of terms and conditions along with that money.

These terms and conditions apply even if your entity receives unsolicited money that was automatically distributed based on your record of prior Medicare billing. Among these terms and conditions are multiple certifications to which the recipient must attest and which can have great ramifications.

From the perspective of former prosecutors, highlighted below are key considerations regarding these certifications and how law enforcement may rely on them in scrutinizing a provider's use of CARES Act funds, together with strategies that providers may employ to best insulate their businesses from such scrutiny.

A Minor Violation Can Taint All of the Funds

The Department of Health and Human Services (HHS) has made clear that, by accepting money from the fund and signing the attestation (or implicitly signing by not returning the funds), a provider is agreeing to all of the terms and conditions attached to the CARES Act money. Thus, a violation of any of the terms and conditions may taint all of the funds.

For example, if the intent element is met, misuse of \$1,000 could render a \$2 million allocation subject to scrutiny and/or provider repayment. From a False Claims Act standpoint, if an entity's conduct was knowing or intentional, the Department of Justice could contend that the false claim affected the entire amount of the grant, and not just the amount misused. In the example above, this could result in a false claim of \$2 million, which, subjected to the treble damages permitted by

the FCA, could result in a penalty of \$6 million (not to mention potential criminal exposure for knowing or willful violations).

Eligibility Status

The first certification requires a provider to confirm that it billed Medicare in 2019, that it has not been excluded from federal health-care programs, and that it has provided testing or care related to Covid-19.

Due to the straightforward nature of several of the sub-parts of this certification, it will likely be a starting point for scrutiny of providers. The government will easily be able to compare recipients of CARES Act funds to provider data to determine if providers billed Medicare in 2019, as well as if they have been excluded from federal health-care programs.

As to the certification regarding treatment of Covid-19 patients, the HHS has indicated that it "broadly views every patient as a possible case of Covid-19." Under this broad interpretation, most providers will not have an issue with this representation. However, if a provider cannot substantiate that it rendered services relating to testing for, or treatment of, Covid-19 under the broad interpretation, it should return the funds, even if the 30-day window has expired.

Limitation on Use of CARES Act Funds

In the next critical certification, the provider certifies that it will only use the funds "to prevent, prepare for, or respond to coronavirus" or to reimburse the provider for "expenses or lost revenues that are attributable to coronavirus."

In permitting the funds to be used for reimbursement of lost revenues, the Fund tacitly permits their use for any justifiable purpose, without having to tie it to coronavirus treatment. But, before applying funds to purposes or expenditures unrelated to the coronavirus, a provider must first ensure that it can demonstrate lost revenues or additional expenses that have resulted from the pandemic. In this regard, the provider should retain financial statements reflecting that it has suffered financial losses due to the pandemic at least as great as the amount of funds received.

Alternatively, the provider can abide by the first portion of the certification and ensure that the funds are used for specific purposes related to the coronavirus. Either way, the provider should keep detailed records showing how the funds are used.

Provision of Truthful Information and Acknowledgment of Potential Penalties

The next certification makes explicit that the provider must abide by the affirmative obligations in the terms and

conditions and provide truthful information when doing so. It also provides notice of potential penalties (including “imposition of fines, civil damages, and/or imprisonment”). This clause has been crafted carefully and undoubtedly will be highlighted in any trial or administrative proceeding to demonstrate that a provider breached the terms and conditions – and did so knowingly and/or willfully, with full knowledge of the potential penalties.

No ‘Balance Billing’

A final certification in the terms and conditions relates to the provision of services to patients who are “out-of-network.” It requires certification that the provider will not engage in so-called “balance billing.” Specifically, by accepting these funds, a provider can no longer charge an out-of-network patient a greater out-of-pocket fee for coronavirus treatment than it could charge an in-network patient.

This condition is likely to draw significant scrutiny from the government, as it is specifically highlighted on the HHS coronavirus website, noting that “President Trump is committed to ending surprise bills for patients.” This is also an area for which a government investigator would easily be able to prove a violation, as the bills submitted to patients would provide ample evidence of the improper billing. Moreover, patients have an interest in enforcing this provision, and are likely to complain when providers are billing them directly for out-of-pocket costs.

Before accepting (or retaining) CARES money, consider what your organization is being forced to accept in the terms and conditions of the money and certifications that you are making. Make plans for the bright light that government investigators will shine on your entity. Please consider reaching out for assistance if your team requires guidance on any of the highlighted considerations.

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