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LEGAL UPDATES

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Risks of Spending Public Health and Social Services Emergency Fund Payments

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On Monday, April 13, 2020, your Husch Blackwell Healthcare team published a Client Alert outlining the Best Practices Related to Public Health and Social Services Emergency (Relief) Fund Payments. Here we outline the risks of spending a Relief Fund payment without careful attention to the related Terms and Conditions, vague as some of them may be.

Relief Fund payments are likely a federal award. To fully appreciate the risks associated with spending a Relief Fund payment, it's important to consider the nature of the payment. The CARES Act gave the Secretary of the Department of Health and Human Services (HHS) the authority to reimburse providers through grants or other mechanisms. The mechanism here was simply a direct deposit into providers' accounts with "HHSPAYMENT" as the description. The Relief Fund Payment Terms and Conditions suggest the payments are a federal award. For instance, the Terms and Conditions require compliance with the uniform administrative requirements, cost principles and audit requirements for HHS awards, 45 C.F.R. §§ 75.302, 361 and 365. The Terms and Conditions also refer to providers as "recipients," which include entities that receive a federal award directly from afederal awarding agency to carry out an activity under a federal program, 45 C.F.R. §75.2. The fact that the payment is likely a federal award means non-compliance with the Terms and Conditions could result in disallowance, termination of the award and debarment, 45 C.F.R. §§75.371-75.375. But there are many more risks.

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HHS Office of Inspector General audits. Even though the CARES Act is not itself a federal health care program, the payments were distributed through HHS, and its Office of Inspector General (OIG) has been given the authority to conduct audits of the program's payments. HHS-OIG is also charged with submitting a final report on its audit findings to the House and Senate Committees on Appropriations within 3 years after final Relief Fund payments are issued. This means that, just as with a Medicare-related audit of a provider, a payment audit will carry the risk of steep civil money penalties and the risk of exclusion from federal and state health care programs, 42 U.S.C. § 1320a–7a (o).

Whistleblower complaints. HHS specifically wants the assistance of whistleblowers to help protect the Relief Fund payments. The last provision of the Terms and Conditions invites whistleblowers to tip them off to suspected misconduct: "The HHS Inspector General accepts tips and complaints from all sources about potential fraud, waste, abuse, and mismanagement in Department of Health and Human Services' programs." The OIG website and its TIPS hotline phone number are provided, too. HHS's message is bolstered by the recent announcements of the Attorney General and the Department of Justice (DOJ) that they will prioritize the investigation and prosecution of coronavirus-related misconduct.[1]

False Claims Act complaints. The False Claims Act (FCA), 31 U.S.C. §§ 3729 – 3733, is the key tool for fighting fraud in government programs, including fraud involving federal awards.[2] It imposes civil liability for knowingly submitting a false claim or causing another to submit a false claim to the government or knowingly making a false record or statement to get a false claim paid by the government, and civil liability for a reverse false claim by acting improperly to avoid having to pay money back to the government. The FCA defines "knowing" to include actual knowledge and deliberate ignorance or reckless disregard of the truth or falsity of the information. The FCA does *not* require proof of specific intent to defraud, so disregarding the Relief Fund Payment Terms and Conditions would be enough to impose civil liability. FCA civil liability carries steep penalties of between $5,500 and $11,000 per false claim and treble the amount of the government's damages. The FCA also allows private whistleblowers (relators) to file suit for violations of the FCA on behalf of the government (known as a *qui tam* action) and potentially recover as much as 30 percent of the recovery.

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Criminal prosecution. The criminal corollary to the FCA is 18 U.S.C. § 287, requiring that the government prove a specific intent to defraud. Criminal penalties for submitting false claims include imprisonment and criminal fines. If criminal enforcement were pursued for intentional violations of the Terms and Conditions of the Relief Fund payment, the government could potentially also rely on other criminal statutes focused on fraud against the government. For example, 18 U.S.C. § 1031 imposes criminal liability for major fraud against the federal government in connection with $1 million or more of federal assistance (a 10-year crime with a 7-year statute of limitations). Others include 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud); and 18 U.S.C. § 371 (conspiracy). Even the Travel Act (federalizing state law claims) could be used to pursue criminal liability, combined with state commercial bribery laws, as seen in the well-publicized *Forest Park* case.

Exclusion. In addition to the risks of civil liability and criminal prosecution, HHS-OIG has the authority to exclude providers from participation in federal health care programs under certain circumstances. Indeed, it is required to exclude providers when they misuse program funds or are convicted of certain criminal offenses, including financial misconduct, 42 U.S.C. § 1320a-7.

State enforcement. State Attorneys General – particularly those running for re-election and seeking to show the strength of their Medicaid Fraud Control Unit (MFCU) – could well be the first to take enforcement action for Relief Fund payment misconduct, even though the payments are not Medicaid dollars. In 2019, regulatory action was taken to incorporate statutory and policy changes that have occurred since the 1970s when the MFCU programs began, giving MFCUs "the option to investigate and prosecute patient abuse or neglect in board and care facilities, regardless of whether the facilities receive Medicaid payments." MFCUs could easily take the position that any recipient's misuse of Relief Fund payments –intended only for providers currently providing diagnoses, testing or care for individuals with possible or actual cases of COVID-19 – necessarily constitutes neglect of patients.

The audits, whistleblower complaints, investigations, and civil and/or criminal enforcement actions described here could arise from suspected non-compliance with any one of the Terms and Conditions, such as by:

Using the payment to reimburse losses that other sources are obligated to reimburse;

Submitting the required reports with false information;

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Failing to maintain required records and cost documentation;

Billing for services not directly tied to suspected or confirmed cases of COVID-19; or

Conceivably, enforcement action could even arise from the required (and seemingly simple) required certification that the recipient billed Medicare in 2019, if the government later concluded the provider's 2019 Medicare payments were the result of false claims.

Given what is at stake when spending the Relief Fund payment, recipients are advised to review the Terms and Conditions carefully and implement best practices for compliance.

Contact us for CARES Act and COVID-19 guidance

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.

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[1]In a March 16, 2020, memorandum, Attorney General William Barr announced that the DOJ will prioritize the investigation and prosecution of coronavirus-related fraud schemes, directing U.S. Attorneys to appoint a coronavirus fraud coordinator in each district (responsible for coordinating enforcement and conducting public outreach and awareness) and establishing a national system for whistleblowers to report suspected fraud. The Attorney General also urged the American public to report COVID-19 fraud. The whistleblower/relators' bar of plaintiffs' lawyers is actively engaged as well, as evidenced by the National Whistleblower Center's letter to the Attorney General requesting task force formation to monitor and investigate False Claims Act violations related to the coronavirus crisis.

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[2]The regulations that govern federal awards define fraud to include acts of fraud or corruption or attempts to defraud the federal government and acts that violate the FCA. 2 C.F.R. § 200.435.

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