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Health Care Transactions Spotlight: Key Considerations for Deals Involving Recipients of COVID-19 Provider Relief Funds and Other Assistance

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Now more than a year into the pandemic, the impact of COVID-19 continues to be felt and is an essential issue to address in all health care transactions.

In an effort to address the impact of COVID-19 on health care providers and suppliers, Congress appropriated (1) $178 billion to the Public Health and Social Services Emergency Fund (the Provider Relief Fund), which the U.S. Department of Health and Human Services (HHS) has been distributing in the form of grants to providers and suppliers, and (2) $8.5 billion to the Rural Relief Fund (the Rural Relief Fund) for grants to rural providers. In addition, HHS expanded the Accelerated and Advance Payments Program (AAP), which allows the Centers for Medicare & Medicaid Services (CMS) to

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make up-front payments to providers and suppliers in certain emergency situations. Over the past year, these programs (collectively, the Programs, and the funds received thereunder, the Funds) have been the subject of a number of material changes and evolving guidance, which has made it increasingly complex for providers and suppliers to comply with program requirements.

This article provides a general overview of the Programs and related considerations the Acquirer should consider in a transaction involving a health care provider or supplier that received COVID-19 Provider Relief Funds or other assistance (Target). Key takeaways include:

- The Acquirer will want to diligence the Funds applied for, and received by, the Target (and any affiliates), and the usage thereof.
- The structure of the transaction will impact the Acquirer's ability to utilize existing Provider Relief Funds received by the Target.
- Key provisions of the transaction agreement (e.g., representations and warranties, covenants, closing conditions, indemnity) should be adjusted to provide the Acquirer adequate protections in respect of the Funds.

Overview

While there are numerous local, state, and federal programs in place to provide aid specifically to health care providers and other general programs available to health care providers (e.g., Paycheck Protection Program (PPP) loans), this article focuses on (1) the Provider Relief Fund aid under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and subsequent COVID-19 relief legislation,[1] (2) Rural Relief Fund aid under the American Rescue Plan Act (ARP),[2] and (3) changes to the AAP.

Provider Relief Fund

Congress appropriated $178 billion to the Provider Relief Fund as part of the CARES Act, the Paycheck Protection Program and Health Care Enhancement Act,[3] and the Consolidated Appropriations Act, 2021.[4] The Provider Relief Fund is aimed at supporting health care-related expenses or lost revenue attributable to the pandemic and assuring access to COVID-19 testing and treatment. Of the $178 billion available, HHS has distributed more than $150 billion to health care providers and suppliers over the past year through multiple rounds of general distributions and targeted distributions directed to specific types of providers and suppliers.[5]

Recipients of Provider Relief Funds that wish to retain the funds are required to sign attestations confirming receipt of the funds and certifying compliance with certain Terms and Conditions. HHS has provided that noncompliance with any of the Terms and Conditions is grounds for HHS to recoup some or all of the payments made. In this regard, key Terms and Conditions include a requirement that the Funds be used only to

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prevent, prepare for, and respond to COVID-19, and to reimburse the recipient only for health care-related expenses or lost revenues attributed to COVID-19.[6]

The Terms and Conditions also include certain limitations. Recipients are prohibited from utilizing the Funds to reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse.[7] They are also prohibited from seeking more than in-network cost-sharing amounts from out-of-network COVID-19 patients for care for possible or actual cases of COVID-19.[8] Moreover, recipients are not permitted to utilize the Funds to pay the salary of an individual, through a grant or other mechanism, at a rate in excess of Executive Level II.[9]

The Terms and Conditions require recipients to maintain appropriate records and cost documentation. Recipients of payments exceeding $10,000 in the aggregate are also required to report their use of funds in accordance with guidance issued by HHS on January 15, 2021.[10] In addition to the reporting guidance, HHS has issued Frequently Asked Questions (FAQs), which constitute the most comprehensive guidance on program requirements to date. HHS has continued to amend, modify, and revise the FAQs since they were first issued in April 2020. The FAQs provide guidance on ownership structures and financial relationships, as well as applicable auditing and reporting requirements.[11]

With regard to reporting, HHS initially required recipients to report on expenses and losses attributable to COVID-19 from last year during a reporting window between January 15, 2021 and February 15, 2021.[12] HHS provided that, if recipients had not justified all funds in the original reporting, they would need to issue a second report with expenses and losses for January1 – June 30, 2021, starting on July 15, 2021.[13] However, on January 15, 2021, HHS opened the Provider Relief Fund Reporting Portal while announcing that it was delaying the reporting window.[14] At this point, it is possible that HHS may require a single report through June 30, 2021, starting on July 15, 2021.

Rural Relief Fund

Congress appropriated $8.5 billion to the Rural Relief Fund as part of the ARP.[15] Like the Provider Relief Fund, the Rural Relief Fund is aimed at supporting health care-related expenses or lost revenue attributable to COVID-19.[16] Although HHS has not issued official guidance, it is presumed that the Rural Relief Fund will be administered following similar guidelines as the Provider Relief Fund. The legislation appropriating this funding incorporates Provider Relief Fund guidance into the implementation of the Rural Relief Fund, particularly with regard to health care-related expenses or lost revenue attributable to COVID-19.[17]

Accelerated and Advance Payment Program

In response to the COVID-19 pandemic, HHS expanded the existing AAP, a program that allows CMS to make up-front payments to health care providers and suppliers in

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certain circumstances. Under Medicare Part A and Part B, CMS pays a provider or supplier after it has furnished a service and submitted a claim for payment to Medicare. Under the AAP, however, CMS makes up-front payments for expected future claims. AAP payments are then recovered by CMS through repayment and, in some cases, by recoupment as an overpayment with interest charges.

When the AAP was created, it was intended to be used in emergency situations involving financial or cash flow difficulties.[18] Indeed, prior to the COVID-19 public health emergency, CMS had only approved 100 AAP requests since the inception of the program.[19] As of December 9, 2020, CMS has paid $107.3 billion under the AAP during the COVID-19 public health emergency (approximately $99 billion to Medicare Part A providers and $8.5 billion to Part B suppliers).[20]

In an effort to provide further relief to providers, CMS expanded the AAP to a broader group of Medicare Part A providers and Part B suppliers. The CARES Act provided additional benefits and flexibilities, including extended repayment timeframes, to a subset of providers, including inpatient hospitals, children's hospitals, certain cancer hospitals, and critical access hospitals.[21] Most recently, the Continuing Appropriations Act, 2021 and Other Extensions Act amended the AAP repayment terms for all providers and suppliers that received AAP payments from CMS.[22]

Under the new terms, beginning at one year from the date the AAP payment was issued and continuing for 11 months, Medicare payments owed to providers and suppliers will be recouped at a rate of 25%.[23] After the 11-month period ends, Medicare payments owed to providers and suppliers will be recouped at a rate of 50% for another six months.[24] After the six month period ends, a letter requesting any remaining balance of the AAP payment(s) to be paid will be issued. Providers and suppliers will have 30 days from the date of the letter to repay the balance in full.[25] If payment is not received, interest will accrue at the rate of 4% from the date of the letter and will be assessed for each full 30-day period that the balance remains unpaid.[26]

On October 8, 2020, CMS announced that it would no longer accept COVID-19 applications for AAP payments while noting that it would continue to monitor the impact of the pandemic.[27] Most recently, CMS noted that recovery of COVID-19 AAP payments began as early as March 30, 2021, depending on when providers and suppliers requested and received the AAP payments.[28]

Deal Considerations

Due Diligence

The unprecedented speed with which certain Funds under the Programs were distributed combined with attendant shifting regulatory guidance under the Programs has generated a substantial potential for liability, primarily through the False Claims Act.

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Accordingly, it is essential that an Acquirer conduct a comprehensive diligence review of a Target's participation in the Programs.

In addition to generally assessing the effects of COVID-19 on the Target's business, the Acquirer's diligence of the Target should focus on (1) identifying the Programs the Target has applied to participate in and has been participating in, (2) obtaining the details of the Funds received under each Program (e.g., amount received, date received, general/targeted distribution), and (3) obtaining the information and documentation necessary to verify the Target's compliance with the terms and conditions of the Programs, including understanding how the Funds were used. Additionally, if the acquisition of the Target is structured as a purchase of equity, the Acquirer will need to confirm it has the information necessary to ensure it will be able to comply with the reporting requirements of the Programs post-closing.

For example, the Acquirer should diligence the following in respect of the Programs:

- What types of governmental assistance did the Target apply for and receive?
- Identification of the specific legal entities within the Target's organizational structure that received Funds (or expect to receive Funds)—has the Target transferred Funds to any affiliated entities?
- The types and amounts of Funds received by each legal entity. Has the Target or any affiliated entity returned any Funds?
- How is the Target tracking utilization of the Funds?
- What portion of the Funds received by the Target have been utilized?
- Review of agreements, attestations, budgets, reports, and other documentation evidencing compliance with the Programs' requirements (including evidence that the funds were (1) used for their permitted purposes and (2) not used for expenses already reimbursed from another source).
- What is the repayment/recoupment status of any AAP payments received by the Target?

Transaction Structure Impact

The transaction structure impacts how the Funds will be treated in connection with the closing of the transaction as well as the applicable reporting obligations, particularly General Distributions of Provider Relief Funds. Note that there is not yet adequate guidance to confirm whether Rural Relief Funds will be treated in the same manner as Provider Relief Funds in this context.

With respect to Provider Relief Funds, if the transaction is structured as a purchase of equity or merger, then the Target (or the resulting entity in the event of a merger) may continue to use Provider Relief Funds post-closing and report on the same, regardless of the Target's new owner, or the Acquirer (if an eligible health care provider) may direct the use of the Funds and report on the same.[29] In an equity transaction or merger, during the due diligence phase, the Acquirer should place particular emphasis on

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confirming that it has the information regarding the Target's participation in the Programs necessary to comply with the reporting requirements of the Programs and respond to audits that may be initiated, in each case post-closing. Note that with respect to Targeted Distributions of Provider Relief Funds, only the Target can use such Funds and the Target must report on the use.

If the transaction is structured as an asset acquisition, then the Target is required to use the Provider Relief Funds for its eligible expenses and lost revenues and return any unused funds to HHS.[30] The Target's Provider Relief Funds do not transfer to the Acquirer in an asset acquisition; however, the Acquirer will be eligible to apply for future Provider Relief Funds.[31] In this regard, the Acquirer cannot use the Target's Provider Relief Funds or report on the use.[32] Since Provider Relief Funds cannot be transferred to the Acquirer in an asset acquisition, the Acquirer should consider listing these Funds in the purchase agreement as specifically excluded assets and excluded liabilities. This approach not only makes clear that the parties are abiding by the Program requirements with respect to treatment of such Funds in an asset acquisition, but also has the added benefit to the Acquirer of ensuring liabilities with respect to the excluded Funds are subject to indemnification.

HHS has provided that reporting entities that acquired or divested of related subsidiaries during calendar year 2020 will be required, as part of the post-payment reporting process, to indicate (1) the change in ownership, including the date of the acquisition/divestiture; (2) the entities included in the acquisition/divestiture; (3) the percent of ownership for acquisition/divestiture; and (4) whether the reporting entity has held or holds a controlling interest in the entity.[33] HHS has directed reporting entities that have been themselves acquired or divested to self-report the change in ownership.[34]

With respect to AAP payments, such Funds may be transferred regardless of transaction structure; however, liability for repayment/recoupment of the AAP Funds follows the Medicare provider number. Accordingly, as discussed further in the Covenants section of this article below, the Acquirer should ensure AAP Funds are appropriately accounted for in the purchase price adjustment or fully repaid/recouped prior to closing.

Representations and Warranties

The Acquirer should consider including representations in the purchase agreement specifically addressing the Target's participation in the Programs. There are two primary goals for including these representations. First, in order to ensure the Acquirer understands the full range of Programs the Target has participated in, the representations should require the Target to disclose in a schedule to the purchase agreement each of the Programs in which the Target has participated. This representation typically includes a broad requirement for the Target to disclose all COVID-19-related governmental or nongovernmental programs that it has participated

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in, applied for, or received funds or supplies under. Second, the representations should cover the key areas of diligence related to the Programs, including Target's eligibility for participation in, and compliance with the terms and conditions of, the Programs. The Acquirer should consider applying extended survival periods to these representations and excluding these representations from any applicable baskets and limits in the purchase agreement. If the transaction includes a representation and warranty insurance (RWI) policy, the parties should consider whether it will be beneficial to minimize specific representations around COVID-19-related programs that may be subject to exclusions under the RWI policy and instead rely on existing representations (such as compliance with laws) and discreet definitional modifications to cover COVID-19 program compliance in a manner less likely to lead to exclusions under the RWI policy.

Covenants

- Pre-Closing Covenants—If the transaction has a delayed closing, the Acquirer should consider including specific pre-closing covenants requiring the Target to (1) comply with all laws, terms, and conditions applicable to the Funds and Programs; (2) keep thorough records of the use of the Funds; and (3) ensure that it takes action to timely submit any required attestations, certifications, reports, and financial records, and timely respond to any governmental audits or other requests for information. With respect to the AAP, the payments should be treated as debt or a current liability in the net working capital adjustment (to the extent such payments have not been recouped at the time of closing of the transaction). As an alternative to settling the AAP payments in the net working capital adjustment, some acquirers have chosen to require the Target to return the AAP payments to CMS or the applicable Medicare administrative contractor prior to closing in order to avoid recoupment of such payment amounts against the Acquirer's post-closing Medicare payments.
- Post-Closing Covenants—Post-closing covenants largely mirror the pre-closing covenants; however, if the transaction is structured as an equity transaction, the Acquirer should be prepared for the owners of the Target to negotiate to shift the obligations outlined in the pre-closing section above to the Acquirer as the owner of the Target post-closing. Additionally, the Acquirer in an equity transaction should ensure there is an adequate post-closing cooperation covenant with respect to the Programs.

Closing Conditions

In a non-simultaneous sign and close transaction, the Acquirer should look to solidify its walk rights in respect of closing conditions. Given the rarity of material adverse effect closing conditions being enforced, the Acquirer should instead consider incorporating (1) more stringent bringdown or compliance thresholds for Program-related representations and covenants and (2) specific conditions tied to the Target's ongoing compliance with Program requirements.

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Indemnity

Indemnification for issues related to the Target's participation in the Programs may take different forms depending on the transaction structure, specific issues identified during due diligence, and the relative bargaining power of the parties. For equity deals, the Acquirer may wish to maintain a traditional indemnification structure, with the Acquirer picking up indemnification coverage related to the Programs through the Program-specific representations and covenants outlined above. In asset deals, the traditionally more expansive indemnification construct covering not only breaches of representations and covenants, but also excluded liabilities and pre-closing operations of the Target's business, provides additional opportunities for the Acquirer to seek indemnification for issues related to the Programs. In particular, the Acquirer may specifically exclude the Program Funds as an asset and exclude liabilities related to the Target's participation in the Programs, resulting in additional indemnification rights for these excluded assets and liabilities. Additionally, in both the equity deal and asset deal context, to the extent specific issues with the Target's participation in the Programs are identified during due diligence, the Acquirer may include specific indemnification covering the liabilities related to those identified issues/risks. The Acquirer should consider applying extended survival periods to Program specific representations and carving these representations out from any applicable baskets and limits in the purchase agreement.

Conclusion

Health care mergers and acquisitions transactions during and following the COVID-19 pandemic will require enhanced diligence and special attention in drafting purchase agreements to address new and unique concerns introduced by the COVID-19 pandemic and Programs. It is worth reiterating that federal guidance on the Provider Relief Fund continues to evolve and that HHS has yet to issue guidance on the Rural Provider Fund. Given the recent change in administration, it is possible that President Biden's administration may make material changes to these Programs as it assesses Program requirements issued to date, particularly with the Provider Relief Fund reporting deadline approaching. We expect additional material guidance to be issued in the coming months.

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[1] Pub. L. No. 116-136 (2020).

[2] Pub. L. No. 117-2 (2021).

[3] Pub. L. No. 116-139 (2020).

[4] Pub. L. No. 116-260 (2020).

[5] *See* U.S. Dep't of Health & Hum. Servs., CARES Act Provider Relief Fund: General Information (last accessed Apr. 16, 2021).

[6] *See* U.S. Dep't of Health & Hum. Servs., CARES Act Provider Relief Fund: Terms and Conditions (last accessed Apr. 16, 2021).

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] *See* U.S. Dep't of Health & Hum. Servs., General and Targeted Distribution Post-Payment Notice of Reporting Requirements (Jan. 15, 2021).

[11] *See* U.S. Dep't of Health & Hum. Servs., Provider Relief Fund Frequently Asked Questions (last accessed Apr. 21, 2021).

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[12] *See* U.S. Dep't of Health & Hum. Servs., HHS Announces Provider Relief Fund Reporting Update (Jan. 15, 2021).

[13] *Id*.

[14] *Id*.

[15] Pub. L. No. 117-2 (2021).

[16] *Id*.

[17] *Id*.

[18] *See* 42 C.F.R. § 413.64(g); 42 C.F.R. § 421.214.

[19] *See* Ctrs. for Medicare & Medicaid Servs., Press Release, CMS Approves Approximately $34 Billion for Providers with the Accelerated/Advance Payment Program for Medicare Providers in One Week (Apr. 7, 2020).

[20] *See* Ctrs. for Medicare & Medicaid Servs., Medicare Accelerated and Advance Payments Program COVID-19 Public Health Emergency Payment Data (Dec. 2020).

[21] Pub. L. No. 116-136 (2020).

[22] Pub. L. No. 116-159 (2020).

[23] *See* Ctrs. for Medicare & Medicaid Servs., Fact Sheet: Repayment Terms for Accelerated and Advance Payments Issued to Providers and Suppliers During COVID-19 Emergency (Oct. 8, 2020).

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *See* Ctrs. for Medicare & Medicaid Servs., Repayment of COVID-19 Accelerated and Advance Payments Began on March 30, 2021, MLN Matters, No. SE21004 (Apr. 1, 2021).

[29] *See* U.S. Dep't of Health & Hum. Servs., Provider Relief Fund Frequently Asked Questions (last accessed Apr. 21, 2021).

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[30] *Id.*

[31] *Id*.

[32] *Id*.

[33] *See* U.S. Dep't of Health & Hum. Servs., Post-Payment Notice of Reporting Requirements (Jan. 15, 2021).

[34] *Id.*

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