

Provider Relief Fund Overpayments: "Reverse" False Claims Considerations

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On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act. On April 24, 2020, the President signed into law the Paycheck Protection Program and Health Care Enhancement (PPP-HCE) Act. Those laws provided \$175 billion in relief funds to certain health care providers.

Over the past few months, the U.S. Department of Health & Human Services, through one of its agencies or partners (collectively, HHS), has been and will continue to distribute those funds to eligible health care providers. Occasionally, eligible health care providers receive a larger amount than they are expecting. In some instances, those health care providers do not need to reject or return the "overpayments" distributed by HHS from the Provider Relief Fund. For example, a health care provider that believes it has received an overpayment from a targeted distribution may keep the overpayment if the health care provider expects it will have cumulative lost revenues and increased costs that are attributable to coronavirus during the COVID-19 public health emergency that exceed the intended calculated payment. See CARES Act Provider Relief Fund: FAQs (last visited July 6, 2020).

If, however, a health care provider receives a Provider Relief Fund payment to which it knows it is not at all entitled and chooses not to reject or return the payment, that health care provider may incur "reverse" false claims liability. For example, a health care provider that receives a payment from the Provider Relief Fund but that has ceased providing services prior to January 31, 2020, must reject the payment. Since retention of such payment would be improper according to the CARES Act Provider Relief Fund Terms and Conditions, the government may construe retention of such payment as a knowing and improper retention of an overpayment.

Any health care provider that knowingly conceals or knowingly and improperly avoids returning such an overpayment to the government risks violating the “reverse” false claims provision of the False Claims Act, 31 U.S. C. §§ 3729–3733 (FCA), and incurring civil penalties ranging from \$11,665 to \$23,331 per instance plus three times the government’s damages. The FCA permits the government and private citizens (i.e. whistleblowers) to pursue violators of the FCA.

The FCA allows whistleblowers to file qui tam lawsuits by which the whistleblowers (called relators) can get a portion of the government’s recovery from the case. Last fiscal year, the government recovered more than \$3 billion from FCA enforcement cases, \$2.6 billion of which related specifically to the health care industry. Now that the Centers for Disease Control and Prevention (CDC) has listed on its website the recipients and amounts of HHS Provider Relief Fund payments, an increase in relators are inevitable, especially in these uncertain economic times.

If you have received or anticipate receiving payment(s) from the Provider Relief Fund and are uncertain whether you should return such payment(s), you should first review the CARES Act Provider Relief Fund: FAQs to see whether HHS has already addressed your particular situation.

If you are in need of additional assistance or guidance, please reach out to Hamilton Barber or your primary Nexsen Pruet healthcare attorney.