

September 18, 2020

The Honorable Alex M. Azar
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Azar:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, our clinical partners – including more than 270,000 affiliated physicians, 2 million nurses and other caregivers – and the 43,000 health care leaders who belong to our professional membership groups, the American Hospital Association (AHA) requests that the Department of Health and Human Services (HHS) revise certain Frequently Asked Questions (FAQs) that place problematic restrictions on the use of some CARES Act Provider Health and Social Services Emergency Fund (Provider Relief Fund) dollars, effectively preventing hard-hit hospital systems nationwide from recovering health care-related expenses and lost revenues attributable to the declared COVID-19 public health emergency.

These FAQs impose restrictions that, in turn, yield unintended results because they do not allow updated and revised attestations to the use of Provider Relief Fund distributions, as well as account for different hospital systems' corporate structures and billing Tax Identification Numbers (TINs). We urge HHS to issue new, clarifying FAQs, so that the Provider Relief Fund's purpose of ensuring that all of the country's hospital systems can continue to care for their communities can be fulfilled.

The Coronavirus Aid, Relief, and Economic Stimulus Act (CARES Act) appropriated \$100 billion for the Public Health and Social Services Emergency Fund "to remain available until expended, to prevent, prepare for, and respond to coronavirus domestically or internationally, for necessary expenses to reimburse, through grants or other mechanisms, eligible health care providers for health care related expenses or lost revenues that are attributable to coronavirus." The Paycheck Protection Program and Health Care Enhancement Act appropriated an additional \$75 billion to the same



fund to advance the same purpose. Since early April, HHS has been disbursing these Provider Relief Funds by means of General and Targeted¹ Distributions.

Yet, in conflict with this broad remedial purpose, FAQs posted in recent months to the HHS website have placed restrictions on the ability of a hospital system to allocate the funds throughout its system where COVID-19 related expenses and lost revenues are occurring.² Specifically, the FAQs do not account for the fact that hospital systems function as an integrated coordinated whole in managing care and resources.

Many hospitals are part of multi-hospital health systems that operate in a coordinated fashion under the control of a common parent. These systems organize themselves through a variety of different corporate structures. In some instances, a single corporation owns and operates multiple hospitals. In others, each hospital or facility is owned by a separate corporation or limited liability company. In some, the parent is itself a licensed health care provider while for others the parent is purely an administrator of the system. Likewise, some systems operate under a single TIN while others operate multiple TINs. Regardless of how they are legally structured or their TIN configuration, hospital systems coordinate operations so that they can use their combined resources as efficiently and effectively as possible to benefit their patients and communities.

The Department's FAQs are creating at least two related difficulties for hospital systems. First, the current FAQs allow a parent hospital system that exercises corporate control over multiple hospitals to attest to and reallocate Provider Relief Fund General Distributions among hospitals within the system where the expenses and lost revenues are occurring. However, prior to the publication of the FAQs and the direction they provided, if an individual hospital rather than the system made the attestation, the hospital system is *not* able to allocate funds across the system. Second, hospital systems with a more diversified corporate structure and multiple billing TINs cannot move Targeted Distributions to follow their patients treated for COVID-19 to hospitals within the system that are incurring the expenses and lost revenues directly attributable to the virus.

Attachment A provides a graphic illustration of how the foregoing two issues adversely affect hospital systems and the communities they serve.

Lack of Flexibility to Revise Attestations for General Distributions

The FAQs that govern General Distributions permit hospital systems organized under the control of a common parent to have the parent attest to the Terms and Conditions

¹ Targeted Distributions have gone to rural areas, high-impact areas, skilled nursing facilities, the Indian Health Service, safety net hospitals and for nursing home infection control.

² Health systems often include skilled nursing facilities, home health agencies, outpatient clinics and other providers in addition to hospitals. For purposes of this letter, we will refer only to hospitals within a hospital system.

attached to the funds and allocate these funds as appropriate among the system's hospitals.³ See attached current FAQs. This policy is important as it gives hospital systems the crucial flexibility to direct funds to the hospitals where they are needed most; this flexibility in turn, aligns with Congress's intent in appropriating the funds.

However, the FAQs explicitly authorizing a parent hospital system to attest and thereby reallocate funds from the General Distribution to hospitals within the system were not published until June 2, which was after the date many recipient hospital systems were obligated to attest to these funds. As a result, many individual hospitals submitted the required attestation instead of their parent organization. Conversely, hospital systems where the attestation was delayed past June 2 had the benefit of the FAQ and thus had the parent organization make the attestation thereby giving it the flexibility to allocate General Distributions where needed.⁴ The Department's response, thus far to the problems created by this timing gap has been "[i]t is the Department's policy to allow only one attestation and prohibit subsidiaries from transferring funds."⁵

The AHA fully supports the requirement that every payment be subject to a binding attestation that makes a single, identifiable entity legally accountable for the proper use of these distributions. However, without the flexibility to alter the original attestation to allow a hospital system to be added to or substituted for an attestation by an individual hospital, it will not be possible for many systems to direct these funds to where they are needed, consistent with the intent of Congress and HHS policy.

To address this problem, we propose an addition to the existing FAQ, please see Attachment B.

Lack of Flexibility Based on Corporate Structure for Targeted Distributions

HHS has distributed each payment from the Provider Relief Fund to hospital systems or individual hospitals on the basis of a unique TIN. For hospital systems whose corporate structure is composed of multiple hospitals under the control of a common parent and a single TIN, payments from both the General and the Targeted Distributions can be moved among those hospitals in proportion to their allowable expenses or lost revenues.⁶ By contrast, for hospital systems that operate under multiple TINs because of their corporate structure, Targeted Distribution payments cannot currently be moved among hospitals within the system to follow the patient or in proportion to the allowable COVID-19-related expenses or lost revenues. See attached current FAQs.

³ <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/for-providers/index.html#how-to-attest>.

⁴ This timing gap creates an obvious inequity among hospital systems that is not ameliorated by the subsequent FAQ that allows the affected hospital system to withdraw the attestation and return the funds.

⁵ July 21, 2020 email to the law firm of Ropes & Gray LLP.

⁶ This assumes the parent made the original attestation.

This is only one example of how this lack of flexibility is adversely impacting hospital systems operating under multiple TINs. To better care for patients and more effectively manage scarce resources, many hospital systems will move a COVID-19 patient who needs intensive care from a smaller rural hospital to a larger hospital within the system where resources and experience caring for these patients are concentrated. Whether the funds from the Provider Relief Fund can be shared among the hospitals that incurred the expenses relating to care for the patient and the lost revenue that resulted from concentrating services in another location depends entirely on whether the rural and larger hospitals operate under the same TIN. That is certainly not the result that Congress intended. To address this problem, we propose the revised FAQ as discussed in Attachment C.

We urge you to address the problems created by the current FAQs. Hospital systems throughout the nation are relying on Provider Relief Fund distributions as Congress intended so that they can better withstand the staggering losses caused by this unprecedented public health crisis and continue to serve the patients and communities who depend on them.

The AHA stands ready to work with HHS to resolve these issues. Please feel free to contact me or have a member of your team contact Ashley Thompson, senior vice president of policy analysis and development, at athompson@aha.org or Melinda Hatton, senior vice president and general counsel, at mhatton@aha.org.

Sincerely,

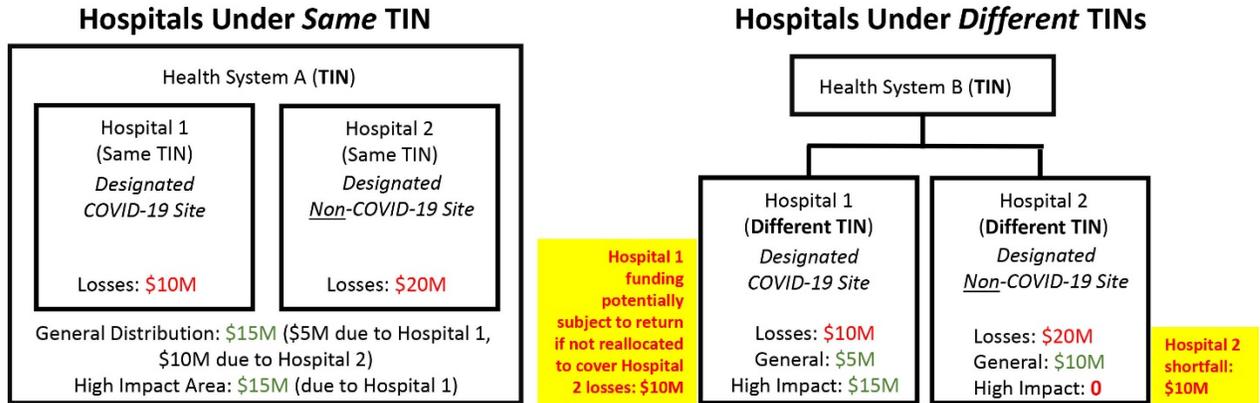
/s/

Richard J. Pollack
President and CEO

ATTACHMENT A

Graphical Illustration of TIN Dilemma

Alternative Integrated Delivery System Structures:
 Happenstance That Separately Incorporated Subsidiaries Bill Under Separate TINs
 Should Not Inhibit Reallocation of CARES Act Funds Where Needed Most



- Health System A used its integrated network of hospitals organized under a single TIN to establish a designated COVID-19 facility; whereas that facility experienced high inpatient volume due to a surge in COVID-19 admissions (yielding both third-party payments and “High-Impact” Targeted Distributions of \$50,000 per admission), the designated Non-COVID-19 site suffered a dramatic decline in elective and ambulatory cases without offsetting CARES Act relief.
- Health System A may reallocate its \$30 million in Provider Relief Fund payments as appropriate from Hospital 1 to Hospital 2.
- Health System B likewise determined to isolate COVID-19 admissions to a single, dedicated facility (Hospital 1), staffed to accommodate the surge.
- Provider Relief Fund payments to Hospital 1 (including General Distributions based on 2019 Medicare revenue and Targeted Distributions tied to COVID-19 admissions) exceed its COVID-19 attributed losses by \$10 million; Hospital 2, set aside for non-COVID-19 care, experienced twice the losses due to the pandemic (\$20 million), but received only General Distributions to offset those losses, resulting in a shortfall of \$10 million.
- Unless Health System B is permitted to make a parent attestation and allocate Provider Relief Payments between subsidiaries that bill under separate TINs—including Targeted Distributions, and even after Hospital 1 has already attested timely, in accordance with HHS FAQ guidance—Hospital 2 will suffer a \$10 million unreimbursed loss solely by virtue of how it is organized—an arbitrary, unintended consequence in conflict with HHS’s policy objectives.

ATTACHMENT B

Current FAQs that Restrict General Distributions Based on Original Attestation and Proposed Revisions

Current FAQs

Can a parent organization transfer General Distribution Provider Relief Fund payments to its subsidiaries? *(Modified 7/23/2020)*

Yes, a parent organization can accept and allocate General Distribution funds at its discretion to its subsidiaries. The Terms and Conditions place restrictions on how the funds can be used. In particular, the parent organization will be required to substantiate that these funds were used for increased health care-related expenses or lost revenue attributable to COVID-19, and that those expenses or losses were not reimbursed from other sources and other sources were not obligated to reimburse them.

In the case of a parent organization with multiple billing TINs that may have each received a General Distribution payment, may the parent organization attest to the Terms and Conditions and keep the payments? *(Modified 7/23/2020)*

Yes, the parent organization with subsidiary billing TINs that received General Distribution payments may attest and keep the payments as long as providers associated with the parent organization were providing diagnoses, testing, or care for individuals with possible or actual cases of COVID-19 on or after January 31, 2020 and can otherwise attest to the Terms and Conditions. The parent organization can allocate funds at its discretion to its subsidiaries. If the parent organization would like to control and allocate Provider Relief Fund payments to its subsidiaries, the parent organization must attest to accepting its subsidiaries' payments and agreeing to the Terms and Conditions.

Proposed Revisions to the FAQs

Add to the second FAQ above as follows:

Can a subsidiary organization transfer General Distribution Provider Relief Fund payments to its parent or to other health care providers controlled by its parent?

Yes, a subsidiary organization can accept and allocate General Distribution funds at its discretion to its parent or to other health care providers controlled by its parent. The Terms and Conditions place restrictions on how the funds can be used. In particular, the subsidiary organization that received and attested to the funds will be required to substantiate that these funds were used for increased health care-related expenses or lost revenue attributable to COVID-19, and that those expenses or losses were not reimbursed from other sources and other sources were not obligated to reimburse them.

ATTACHMENT C

Current FAQs that Restrict Targeted Distributions Based on Corporate Structure and Proposed Revisions

Current FAQs

Can a parent organization with a direct ownership relationship with a subsidiary that received a Provider Relief Fund Targeted Distribution payment control and allocate that Targeted Distribution payment among other subsidiaries that were not themselves eligible and did not receive a Targeted Distribution (i.e., Skilled Nursing Facility, Safety Net Hospital, Rural, Tribal, High-Impact Area) payment? (Added 7/22/2020)

No. The parent entity may not transfer a Provider Relief Fund Targeted Distribution payment from the recipient subsidiary to a subsidiary that did not receive the payment. Control and use of the funds must remain with the entity that received the Targeted Distribution payment. The purpose of Targeted Distribution payments is to support the specific financial needs of the payment recipient.

Must a parent organization that received a Provider Relief Fund Targeted Distribution on behalf of a subsidiary in which it has a direct ownership relationship remit the payment to the subsidiary? (Modified 9/3/2020)

Yes. The parent entity must transfer a Provider Relief Fund Targeted Distribution payment to any or all subsidiaries that qualified for a Targeted Distribution payment. Control and use of the funds must be delegated to the entity that was eligible for the Targeted Distribution payment if a parent entity received the Targeted Distribution payment on the behalf of an eligible subsidiary, unless the funds were received as part of the Skilled Nursing Facility Targeted Distribution or Nursing Home Infection Control Distribution, in which case parent entities may distribute funds among those subsidiaries that were eligible for payment at its discretion. The purpose of Targeted Distribution payments is to support the specific financial needs of the eligible healthcare provider.

If a parent organization received a Provider Relief Fund Targeted Distribution on behalf of a subsidiary, which organization should attest to the Terms and Conditions for the payment? (Added 8/27/2020)

The parent entity should attest to the Terms and Conditions for the Targeted Distribution payment if it is the entity that received the payment. It may attest on behalf of any or all subsidiaries that qualified for a Targeted Distribution (i.e., Skilled Nursing Facility, Safety Net Hospital, Rural, Tribal, High-Impact Area) payment. The parent entity must transfer a Provider Relief Fund Targeted Distribution payment to any or all subsidiaries that qualified for a Targeted Distribution (i.e., Skilled Nursing Facility, Safety Net Hospital, Rural, Tribal, High-Impact Area) payment. Control and use of the funds must be delegated to the entity that was eligible for the Targeted Distribution payment if a parent entity received the Targeted Distribution payment on the behalf of an eligible subsidiary.

Proposed Revisions to the FAQs

Can a parent organization with a direct ownership relationship with a subsidiary that received a Provider Relief Fund Targeted Distribution payment control and allocate that Targeted Distribution payment among other subsidiaries that were not themselves eligible and did not receive a Targeted Distribution (i.e., Skilled Nursing Facility, Safety Net Hospital, Rural, Tribal, High Impact Area) payment?

Yes. The parent entity may transfer funds from a Provider Relief Fund Targeted Distribution payment from the recipient subsidiary to a subsidiary that did not receive the payment. If the parent makes such a transfer, the parent entity will be treated as having made an additional attestation to the Targeted Distribution payment and will join the subsidiary in taking responsibility for satisfying the Terms and Conditions with respect to the payment.

Must a parent organization that received a Provider Relief Fund Targeted Distribution on behalf of a subsidiary in which it has a direct ownership relationship remit the payment to the subsidiary?

No, the parent may retain control over the payment and allocate it among subsidiaries provided that it ensures the subsidiary eligible for the Targeted Distribution receives the funds maintains its ability to serve.

If a parent organization received a Provider Relief Fund Targeted Distribution on behalf of a subsidiary, which organization should attest to the Terms and Conditions for the payment?

The parent entity should attest to the Terms and Conditions for the Targeted Distribution payment if it is the entity that received the payment. It may attest on behalf of any or all subsidiaries that qualified for a Targeted Distribution (i.e., Skilled Nursing Facility, Safety Net Hospital, Rural, Tribal, High-Impact Area) payment.