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**MEMORANDUM**

**TO:** Joseph Habboushe, MD, MBA  
MDCalc, CEO & Co-Founder

**FROM:** Michelle F. Zaltsberg  
Baker Donelson, Shareholder

**DATE:** February 16, 2021

**RE:** Federal Funding Opportunities for the MDCalc Connect COVID-19 Toolkit

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This Memorandum provides information regarding opportunities that may be available to hospitals and healthcare providers to cover the cost of the MDCalc Connect (“MDCC”) COVID-19 Toolkit Plus Software as a Service (“SaaS”), which assists physicians and other healthcare workers in making more accurate clinical decisions around COVID-19 patients, including admission, discharge, and treatment decisions thereby increasing hospital capacity during this pandemic emergency. THIS IS NOT A LEGAL OPINION AND SHOULD NOT BE RELIED ON AS SUCH. There are multiple federal programs under which a hospital or healthcare provider may be eligible for federal funding to cover the cost of the Toolkit.

- **FEMA Public Assistance Program.** Actions taken by eligible applicants to save lives and protect the public health in response to a declared disaster like COVID-19 are eligible for FEMA reimbursement as “emergency protective measures.” FEMA awards grants to reimburse eligible disaster-related costs for eligible applicants through its Public Assistance program. A disaster-related cost is eligible when it is necessary, reasonable, and adequately documented. Public Assistance funding is reimbursed at a 75% federal cost share (leaving the remaining non-federal share to the state recipient or the applicant subrecipient). President Biden recently increased the federal share to 100% (retroactive to January 20, 2020) for government and tribal applicants (e.g., public hospitals), although it is not yet clear if the cost share will increase to 100% for private nonprofits.
- **HHS CARES Act Provider Relief Fund.** Congress has also made funding available to healthcare providers through the Provider Relief Fund (“PRF”) created under the CARES Act and administered by HHS. PRF dollars are paid directly to providers. Funds may be used to cover healthcare related expenses or revenue losses attributable to COVID-19 that have not been reimbursed or are obligated to be reimbursed by other sources.

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Outlined below are considerations for exploring these opportunities for federal funding for the purchase of MDCC's COVID-19 Toolkit Plus SaaS.

**1. "Emergency Protective Measures" under FEMA's Public Assistance program.**

Information technology systems, including software, are considered medical equipment eligible for FEMA's Public Assistance Program if the software is used for eligible emergency protective measures ("EPM"). Per FEMA guidance, EPMs "conducted before, during, and after an incident are eligible if the measures...eliminate or lessen immediate threats to lives, public health, or safety..."<sup>1</sup> FEMA identifies medical care as an EPM, including, among other things, "triage and medically necessary tests and diagnosis."<sup>2</sup> For the COVID-19 disaster, FEMA has developed a limited list of EPMs for which it may provide disaster assistance, which includes medical care.<sup>3</sup> Per its COVID-19-specific guidance, FEMA reimbursement may be available for the costs associated with the following medical care activities in primary medical care facilities:

- a. Emergency and inpatient clinical care for COVID-19 patients, including, but not limited to:
  - i. Emergency medical transport related to COVID-19;
  - ii. Triage and medically necessary tests and diagnosis related to COVID-19 patients;
  - iii. Necessary medical treatment of COVID-19 patients; and
  - iv. Prescription costs related to COVID-19 treatment."<sup>4</sup>

You have advised that use of the MDCC COVID-19 Toolkit Plus SaaS platform and its COVID-specific clinical decision support ("CDS") tools contributes to and enhances medical diagnoses, improves the delivery of emergency/critical care, and helps allocate scarce medical resources. In other words, the software's use during the COVID-19 Public Health Emergency helps to eliminate or lessen an immediate threat to lives, public health, or safety and thus may be considered an EPM.

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<sup>1</sup> FEMA Public Assistance Program and Policy Guide ("PAPPG") v.3.1, FP 104-009-2, at 57 (Apr. 2018), available at [https://www.fema.gov/sites/default/files/2020-03/public-assistance-program-and-policy-guide\\_v3.1\\_4-26-2018.pdf](https://www.fema.gov/sites/default/files/2020-03/public-assistance-program-and-policy-guide_v3.1_4-26-2018.pdf) (version 3.1 of the PAPPG is applicable to COVID-19 federal disaster declarations).

<sup>2</sup> *Id.* at 64.

<sup>3</sup> FEMA Coronavirus (COVID-19) Pandemic: Work Eligible for Public Assistance (Interim), FP 104-009-19, at 3 (Sept. 1, 2020), available at [https://www.fema.gov/sites/default/files/2020-09/fema\\_public-assistance-eligibility-for-covid\\_policy\\_9-1-2020.pdf](https://www.fema.gov/sites/default/files/2020-09/fema_public-assistance-eligibility-for-covid_policy_9-1-2020.pdf).

<sup>4</sup> FEMA, Coronavirus (COVID-19) Pandemic: Medical Care Costs Eligible for Public Assistance, FP 104-010-04, at 3, available at [https://www.fema.gov/sites/default/files/2020-06/PA\\_Medical\\_Care\\_Policy\\_for\\_COVID-19\\_508.pdf](https://www.fema.gov/sites/default/files/2020-06/PA_Medical_Care_Policy_for_COVID-19_508.pdf).

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When asked for a preliminary assessment of the eligibility of the MDCC COVID-19 Toolkit as an EPM, two FEMA representatives at the Regional level (Regions 1 and 4) confirmed this view, advising that as long as the software is used during the performance of otherwise eligible EPM (e.g., COVID-19 medical care that lessens immediate threats to lives, public health, or safety), the cost of the software is likely eligible for FEMA reimbursement.

**2. Use of PRF funds.**

The terms and conditions of a PRF payment require a recipient to certify that funds will be used only “to prevent, prepare for, and respond to coronavirus” and to “reimburse the Recipient only for health care related expenses or lost revenues that are attributable to coronavirus.” HHS guidance outlining the types of expenses that could be eligible to be reimbursed using PRF payments include certain expenses paid for information technology systems, provided that the expense is attributable to coronavirus. Expenses incurred by PRF recipients to cover the cost of the Toolkit appear to fit into the information technology category, as long as the recipient can show that the cost was incurred in response to coronavirus.

**3. Qualification for FEMA or PRF assistance.**

Eligible applicants for FEMA Public Assistance under the COVID-19 disaster include state, local, tribal government entities (including, e.g., public hospitals) and private non-profit organizations that own and/or operate medical facilities.<sup>5</sup> Costs must be associated with work for which the applicant is legally responsible and which is necessary to respond to the COVID-19 pandemic.

HHS has issued PRF payments to many different types of health care providers through several payment distributions, each of which has different eligibility criteria. Hospitals are one type of provider entity that have qualified for several payment distributions and may be able to qualify for future PRF payment distributions, depending the eligibility criteria for a given distribution. Information about the eligibility criteria under prior PRF payment distributions can be found on HHS’s website:

<https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/general-information/index.html>. HHS is expected to include further information about future payment distributions on its website for providers: <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/for-providers/index.html>.

**4. Must a purchase be made through a competitive procurement?**

Federal procurement regulations apply to purchases for good or services funded with FEMA Public Assistance dollars. However, on March 17, 2020, FEMA announced that “For the duration of the Public Health Emergency, which began January 27, 2020 as determined by HHS, local government, tribal governments, nonprofits, and other non-state entities may proceed with new and existing noncompetitively procured contracts in order to protect property and public health and safety, or to lessen or avert the threats created by emergency situations for...Emergency protective measures under

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<sup>5</sup> *Id.* at 2.

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FEMA's Public Assistance Program..."<sup>6</sup> The Public Health Emergency remain in effect, having been renewed most recently effective January 21, 2021.

While FEMA's March 17, 2020 memorandum permits noncompetitive procurement, FEMA still expects applicants to document support for use of the exigency or emergency exception to competition. FEMA has published a Fact Sheet to assist applicants with this effort, available at [https://www.fema.gov/sites/default/files/2020-06/procurement\\_during\\_ee\\_circumstances\\_factsheet\\_ea\\_031820.pdf](https://www.fema.gov/sites/default/files/2020-06/procurement_during_ee_circumstances_factsheet_ea_031820.pdf). FEMA advises, an applicant utilizing the exigency/emergency exception to "explain the nature of the public exigency or emergency, including specific conditions and circumstances that clearly illustrate why procurement other than through noncompetitive proposals would cause unacceptable delay in addressing the public exigency or emergency." For COVID-19, this may include, e.g., the rate of spread of the disease, the strain on hospital capacity, healthcare workers, and other resources, and the emergence of new, more transmissible virus strains, among other things.

PRF recipients may use payments to reimburse health care related expenses or revenue losses attributable to coronavirus that have not been reimbursed by other sources and are not obligated to be reimbursed through other sources. HHS outlines allowed and prohibited uses of PRF payments in terms and conditions documents that are specific to each PRF payment distribution. HHS includes all terms and conditions documents on its website for providers: <https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/for-providers/index.html>. HHS has also provided guidance on the types of expenses for which recipients may use PRF payments in its guidance outlining the reporting requirements applicable to PRF recipients (<https://www.hhs.gov/sites/default/files/provider-post-payment-notice-of-reporting-requirements-january-2021.pdf>) and its FAQs (<https://www.hhs.gov/sites/default/files/provider-relief-fund-general-distribution-faqs.pdf>).

### 5. When must a purchase be made for a cost to be reimbursed?

On August 24, 2020, FEMA issued a memorandum announcing that the deadline to complete emergency work "is extended until further notice".<sup>7</sup> Accordingly, as of this writing there is no set deadline by which an applicant for Public Assistance must incur costs in order to submit those costs for FEMA reimbursement.

Based on current guidance, PRF recipients must use PRF payments by June 30, 2021. Current HHS guidance indicates that payment amounts not used for an allowed purpose by this date must be returned to HHS. It is possible HHS could revise this deadline.

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<sup>6</sup> FEMA Memorandum, *Procurement Under Grants Conducted Under Emergency or Exigent Circumstances for COVID-19* (March 17, 2020), available at [https://www.fema.gov/sites/default/files/2020-07/fema\\_procurement-under-ee-circumstances\\_memo\\_508ab.pdf](https://www.fema.gov/sites/default/files/2020-07/fema_procurement-under-ee-circumstances_memo_508ab.pdf).

<sup>7</sup> FEMA Memorandum, *COVID-19 Emergency Work Completion Deadline* (Aug. 24, 2020).

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**6. Is the cost of the product appropriate?**

An applicant for FEMA reimbursement must demonstrate that its costs are reasonable. For purchases over \$250,000, an applicant must perform and document a cost or price analysis, e.g., by comparing prices for similar goods or services. While a cost-benefit analysis is not specifically required as part of a price analysis, it may help to justify the purchase and demonstrate cost reasonableness, especially if an applicant can demonstrate that the Toolkit is likely to avoid the costs associated with longer hospital stays, unnecessary admissions, or improper discharges.

**7. Are FEMA and the PRF the only source of government funding?**

No. There are other state and federal grant programs that may be available for reimbursement to you for funding. For example, CARES Act funding through the U.S. Department of Treasury may also be available to reimburse your cost in full for the product, or available to pay any non-federal cost share required for FEMA reimbursement. This funding has been allocated to State, Tribal, and certain local governments and may be used by them for expenses necessary due to the COVID-19 pandemic.

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