March 30, 2020

Coronavirus Aid, Relief, and Economic Security (CARES) Act: Overview of Material Healthcare Provisions

In response to the 2019 Novel Coronavirus Disease or COVID-19 (hereinafter COVID-19) emergency, Congress passed a significant rescue package entitled the "Coronavirus Aid, Relief, and Economic Security Act," or the "CARES Act," on March 27, 2020.[1] The CARES Act is a $2 Trillion relief package designed to alleviate economic pressure caused by the COVID-19 emergency through a broad range of federal assistance to individuals, businesses, and states. The CARES Act includes direct monetary payments to individuals, the expansion of unemployment benefits, the creation of loan funds for small businesses and large corporations, and the provision of over $140 billion in appropriations to support the national health system. This Client Alert focuses on the funding provisions in the CARES Act that are intended specifically to assist healthcare providers and suppliers.

The CARES Act provides financial relief to hospitals and healthcare providers through several different funding methods, including the following:

- **PUBLIC HEALTH AND SOCIAL SERVICES EMERGENCY FUND**.
    - The CARES Act appropriates $100 Billion for "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[2] for health care related expenses or lost revenues that are attributable to coronavirus; provided that:
        - The funds may not be used to reimburse expenses or losses that have been reimbursed from other sources, or that other sources are obligated to reimburse.
        - Recipients of such payments shall submit reports and maintain documentation as the Secretary determines necessary to ensure compliance.
    - Funds appropriated under this section shall be available for construction of temporary structures, leasing of properties, medical supplies and equipment including personal protective equipment and testing supplies, increased workforce and trainings, emergency operation centers, retrofitting facilities, and surge capacity.
    - Exactly how and to whom this money will be distributed is not defined at this time, but to be eligible for payment,[3] an eligible health care provider shall submit to the Secretary an application that includes a statement justifying the need of the provider, and the eligible health care provider shall have a valid tax identification number. The Secretary shall review applications and make payments on a rolling basis.

[1] The CARES Act can be found here.
[2] "Eligible health care providers" shall mean public entities, Medicare or Medicaid enrolled suppliers and providers, and such for-profit entities and nonprofit entities not otherwise described as the Secretary may specify, within the United States, that provide diagnoses, testing or care for individuals with possible or actual cases of COVID-19. *See* page 753 of the CARES Act.
[3] The term "payment" is defined as a pre-payment, prospective payment, or retrospective payment, as determined appropriate by the Secretary. *See* page 754 of the CARES Act.

- **FUNDING FOR COMMUNITY HEALTH CENTERS.**

  - The CARES Act provides for $1.32 billion in supplemental awards to community health centers[4] to be distributed by the Secretary of Health and Human Services (the "Secretary") for the detection of SARS-CoV-2 or the prevention, diagnosis, or treatment of COVID-19. As of the publication of this Client Alert, details on how awards are to be distributed by the Secretary are not yet provided. We expect additional guidance from the Secretary to be forthcoming.

- **TELEHEALTH EXPANSION.**

  - The CARES Act expands telehealth services during the emergency period by allowing patients to see providers with whom they do not have a pre-existing relationship. The expanded telehealth services will allow beneficiaries to access telehealth from alternative sites, such as the patient's home, and from a broader range of providers. We have prepared a supplemental Client Alert that provides greater detail on the telehealth expansion provided by the CARES Act, here.

- **RESOURCE ALLOCATION.**

  In addition to encouraging the use of telehealth, the CARES Act implements the following to alleviate pressure on hospital resources and healthcare providers:

  - Nurse practitioners, physician assistants and other professionals are authorized to prescribe home health services for Medicare beneficiaries in an effort to reduce delays and increase beneficiary access to care in the patient's home.

  - Acute care hospitals are being given more flexibility to transfer patients out of their facilities and into alternative care settings in order to prioritize resources needed to treat COVID-19 cases. Specifically, during the emergency period, the Secretary is waiving the Inpatient Rehabilitation Facility 3-hour rule,[5] the Long Term Care Hospital ("LTCH") 50-percent rule,[6] and the LTCH site-neutral IPPS payment rate for a discharge if the admission occurs during the emergency period and is in response to the public health emergency.

  - State Medicaid programs are permitted to pay for direct support professionals and trained caregivers to help with activities of daily living to ensure smooth transitions between acute care settings and home and community-based settings, and to preserve the individual's functional abilities. This is an effort to help reduce the length of hospital stays and increase bed availability for patients with COVID-19.

- **MEDICARE REIMBURSEMENT.**

  The CARES Act made several changes to Medicare reimbursement to provide prompt assistance to healthcare providers on the front lines fighting the COVID-19 virus.

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[4] "Health center" means an entity that serves a population that is medically underserved, or a special medically underserved population comprised of migratory and seasonal agricultural workers, the homeless, and residents of public housing, by providing, either through the staff and supporting resources of the center or through contracts or cooperative arrangements: (A) required primary health services; and (B) as may be appropriate for particular centers, additional health services necessary for the adequate support of the primary health services required under subparagraph (A); for all residents of the area served by the center. *See* 42 U.S.C. § 254b(r).

[5] The Inpatient Rehabilitation Facility 3-hour rule requires a Medicare beneficiary to participate in at least three (3) hours of intensive rehabilitation at least five (5) days per week to be admitted to an Inpatient Rehabilitation Facility.

[6] The LTCH 50-percent rule relates to the payment adjustment for LTCHs that do not have a discharge payment percentage for that period that is at least fifty (50) percent.

- Medicare Sequester. The CARES Act lifts the Medicare sequester, which reduces Medicare payments to providers by two (2) percent, from May 1, 2020, through December 31, 2020, boosting payments for hospitals, physicians, nursing homes, home health care, and other care. The CARES Act also extends the Medicare sequestration payment reduction through fiscal year 2030, instead of fiscal year 2029.

- Increased Reimbursement for COVID-19 Treatment. The CARES Act also increases the payment to a hospital for treating a patient admitted with COVID-19 by twenty percent (20%). This add-on payment will be available through the duration of the COVID-19 emergency period.

- Accelerated Medicare Payments. The CARES Act expands an existing Medicare accelerated payment program for the duration of the COVID-19 emergency period. Qualified facilities may request up to six (6) months advanced lump sum or periodic payment, based on net reimbursement represented by unbilled discharges or unpaid bills. Most hospital types may elect to receive up to one hundred percent (100%) of the prior period payments, and Critical Access Hospitals may receive up to one hundred twenty-five percent (125%) of their prior period payments. Qualifying hospitals are not required to make repayments on the accelerated sum for four (4) months and will have at least twelve (12) months to complete repayment without a requirement to pay interest.[7] The Centers for Medicare and Medicaid Services ("CMS") has issued supplemental guidance on availability of the accelerated Medicare payments.[8]

- Medicare Payment Reductions. The CARES Act includes several provisions that prevent scheduled reductions in Medicare payments, including delaying the reduction in payments for durable medical equipment through the COVID-19 emergency period and clinical diagnostic laboratory tests furnished to Medicare beneficiaries in 2021.

- Physician Fees. In areas where labor costs are determined to be lower than the national average, the CARES Act increases Medicare payments for the work component of physician fees through December 1, 2020.

- Disproportionate Share Hospitals. The CARES Act delays the scheduled reductions in Medicaid disproportionate share hospital payments through November 30, 2020.

- **COVID-19 TESTING AND SERVICES.**

  - COVID-19 Vaccine. The CARES Act stipulates that Medicare Part B beneficiaries may receive a COVID-19 vaccine with no cost sharing and requires private insurance plans to cover all testing for COVID-19 without cost-sharing.

  - Testing Rates. For COVID-19 testing covered with no cost to patients, an insurer is required to pay either the rate specified in a contract between the provider and the insurer, or, if there is no contract, a cash price posted by the provider. During the emergency period, each provider must publicize the cash price for such test on the provider's public website.

  - Physician Volunteers. Health care professionals[9] who provide volunteer medical services during the public health emergency related to COVID-19 shall not be liable under Federal or

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[7] *See* section 3719 of the CARES Act.
[8] The CMS Accelerated Payments Fact Sheet can be found here.
[9] The term "health care professional" is defined as an individual who is licensed, registered or certified under Federal or state law to provide health care services. *See* section 3215 of the CARES Act.

State law for any harm caused by an act or omission of the professional in the provision of health care services[10] provided that:

- The professional is providing health care services in response to such public health emergency as a volunteer;[11] and
- The act or omission occurs (i) in the course of providing health care services; (ii) in the health care professional's capacity as a volunteer; (iii) in the course of providing health care services that (a) are within the scope of the license, registration or certification of the volunteer; (b) do not exceed the scope of the license, registration or certification of a substantially similar health professional in the State in which such act or omission occurs; and (iv) in a good faith belief that the individual being treated is in need of health care services.
- The liability protections do not apply if (i) the harm was caused by an act or omission constituting willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed by the health care professional; or (ii) the health care professional rendered the health care services under the influence of alcohol or an intoxicating drug.

- **ADDRESSING SUPPLY SHORTAGES.**

  In an attempt to address supply shortages, the CARES Act places certain reporting requirements on medical device and drug manufacturers in order to help mitigate future shortages and supply interruptions. It also provides certain liability protections for manufacturers of personal respiratory protective equipment, such as masks and respirators, in the event of a public health emergency, to incentivize production and distribution.

- **PHARMACEUTICALS.**

  Finally, to limit possible patient exposure, the CARES Act requires Medicare Part D plans to provide up to 90-day supply of a prescription medication if requested by a beneficiary during the COVID-19 emergency period.

While the CARES Act provides expanded access to resources to healthcare providers to fight COVID-19, it is important to note that some state rules and regulations may restrict the full implementation of the above measures – for example, state telehealth licensing rules. We anticipate that many state agencies will be evaluating the implementation of the CARES Act and may issue subsequent guidance to address such state limitations.

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We anticipate additional guidance related to the above provisions of the CARES Act and in response to COVID-19 will be issued in the coming days and weeks. Healthcare providers who are or may be affected by the consequences of the COVID-19 pandemic should monitor additional developments and announcements from the Secretary, CMS, and state agencies. If you have questions about the impact of COVID-19 on healthcare providers, the CARES Act, or related guidance, please contact a member of our national Healthcare practice group.

[10] The term "health care services" means any services provided by a health care professional, or by an individual working under the supervision of a health care professional, that relate to (i) the diagnosis, prevention or treatment of COVID-19, or (ii) the assessment or care of the health of a human being related to an actual or suspected case of COVID-19. *See* section 3215 of the CARES Act.

[11] "Volunteer" means a health care professional who, with respect to the health care services rendered, does not receive compensation or any other thing of value in lieu of compensation. "Compensation" includes a payment under any insurance policy or health plan, or under any Federal or State health benefits program. "Compensation" does not include (i) receipt of items to be used exclusively for rendering health care services in the health care professional's capacity as a volunteer; or (ii) any reimbursement for travel to the site where the volunteer services are rendered and any payments in cash or kind to cover room and board, if services are rendered more than 75 miles from the volunteer's principal place of residence. *See* section 3215 of the CARES Act.

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