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LEGAL ALERT

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Provisions of the CARES Act Impacting Hospitals and Health Systems

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On Friday, March 27, 2020, the United States Congress passed and President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (H.R. 748) (the "CARES Act"). The CARES Act provides economic stimulus and relief to individuals, businesses, and hospitals in response to the negative economic impact caused by the coronavirus ("COVID-19") pandemic. This Legal Alert highlights some of the provisions impacting hospitals and health systems.

Public Health and Social Services Emergency Fund

The CARES Act includes the following increases in funding for the Public Health and Social Services Emergency Fund:

- $100 billion for eligible healthcare providers for healthcare-related expenses or lost revenues associated with COVID-19. Eligible healthcare providers for this fund include public entities, Medicare or Medicaid enrolled suppliers and providers, for-profit entities and nonprofit entities in the United States that provide diagnoses, testing or care for individuals with possible or actual cases of COVID-19. These funds will be available for building or 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. The Department of Health and Human Services ("HHS") will review applications and determine who will receive funds and for what purpose on a rolling basis. Providers must submit applications with justifications for the funds. We will continue to monitor the HHS's actions for guidance on the criteria for receiving these funds.

- $27 billion, available until September 30, 2024, to fund activities such as developing and manufacturing of diagnostic, preventive and therapeutic COVID-19 related services, including the development of countermeasures and vaccines, and the purchase of vaccines, therapeutics, diagnostics, necessary medical supplies, as well as medical surge capacity, addressing blood supply chain, workforce modernization, telehealth access and infrastructure, and other preparedness and response needs. At least $250 million of these funds must be made available to entities that are part of the Hospital Preparedness Program.

- $275 million, available until Sept. 30, 2022, to prevent and respond to the coronavirus, of which $180 million will be administered by the Health Resources and Services Administration – Rural Health to carry out telehealth and rural health activities.

Expanding Access to CMS's Accelerated and Advance Payment Program

In order to increase cash flow to eligible providers and suppliers during the COVID-19 pandemic, the Centers for Medicare & Medicaid Services ("CMS") pursuant to the CARES Act has expanded the Accelerated and Advance Payment Program to a broader group of Medicare providers and suppliers. CMS has advised that "[m]ost providers and suppliers will be able to request up to 100% of the Medicare payment

amount for a three-month period. Inpatient acute care hospitals, children's hospitals, and certain cancer hospitals are able to request up to 100% of the Medicare payment amount for a six-month period. Critical access hospitals (CAH) can request up to 125% of their payment amount for a six-month period." Further details on eligibility requirements and the request process are outlined in the following fact sheet available on CMS's website: https://www.cms.gov/files/document/Accelerated-and-Advanced-Payments-Fact-Sheet.pdf.

Medicaid Disproportionate Share Hospital (DSH) Payments

Congress previously delayed reductions to DSH payments through May 22, 2020. The CARES Act further delays DSH payment reductions until December 1, 2020.

Medicaid Sequestration

The CARES Act temporarily suspends Medicaid sequestration and the 2% payment reductions from May through December 2020.

DRG 20% Add-On

In the case of a discharge of an individual diagnosed with COVID–19 occurring during the emergency period, the CARES Act increases the weighting factor that would otherwise apply to the diagnosis-related group (DRG) to which the discharge is assigned by 20%. Such patients are identified through the use of diagnosis codes, condition codes or other such means as may be necessary.

Waivers to Provide Flexibility for Post-Acute Care

The CARES Act seeks to provide flexibility to post-acute care providers, like inpatient rehabilitation facilities ("IRFs") and long-term care hospitals ("LTCHs"), in determining how to provide care during the emergency period. Such providers are now able to increase access to post-acute care, without penalty, during this time. The CARES Act waives the following restrictions:

- IRF 3-hour rule, which required IRFs provide therapy for at least fifteen (15) hours a week (or three (3) hours per day five (5) times per week). This waivers allows therapy to be provided to more patients for fewer hours.
- LTCH 50 percent rule, which requires that greater than 50% of fee-for-service (FFS) cases be paid a standard LTCH rate (rather than being paid at the site-neutral rate) for the hospital to maintain an LTCH designation and continue to receive payment as an LTCH.
- LTCH site-neutral inpatient prospective payment system (IPPS) payment rate policy.

Private Care Services

During the COVID-19 emergency period, the CARES Act will reduce requirements applicable to face-to-face evaluations for home dialysis patients and expand the ability of physician assistants, nurse practitioners and certified nurse specialists with regard to the certification of home health services and document-related requirements.

Providing Home and Community-Based Support Services in Acute Care Hospitals

The CARES Act allows state Medicaid programs to pay for home and community-based services, self-directed personal assistance services under a plan for home-and-community care, as well as in an acute care hospital setting.

Telehealth

The CARES Act alters requirements for the provision of telehealth services in an effort to increase access to healthcare services during the COVID-19 emergency period. For example, providers are not required to have treated the patient in the past three years in order to be able to provide them with a telehealth service during the COVID-19 emergency. The HHS will have the authority to waive, among other requirements, the geographic and originating site requirements for telehealth services. Federally Qualified Health Centers ("FQHCs") and Rural Health Clinics ("RHCs") are able to serve as distant sites to provide telehealth services to patients. Furthermore, recertifications for eligibility for hospice care may be completed via telehealth, rather than a face-to-face visit, during the COVID-19 emergency period.

Other Health Care Related Funding

- **Food and Drug Administration -** $80 million for development of necessary countermeasures and vaccines, advanced manufacturing for medical products, monitoring of medical product supply chains and related administrative activities.
- **Defense Production Act -** $1 billion is available to make purchases until expended in order to prevent, prepare for, and respond to COVID-19, domestically or internationally.
- **Centers for Disease Control and Prevention** - $4.3 billion to remain available until September 30, 2024 for ''CDC-Wide Activities and Program Support'' to respond to COVID-19, including $500 million for public health data surveillance and analytics infrastructure modernization.
- **Child Care Development Block Grant** - $3.5 billion for the Child Care Development Block Grant to supplement State funds providing child care assistance to health care sector employees, emergency responders, sanitation workers, and other workers deemed essential during the COVID-19 emergency response and to provide funds to ensure child care providers are able to remain open or reopen.

While this Legal Alert focuses on certain provisions impacting hospitals and health systems, Schenck Price has published additional Legal Alerts (available on our website) addressing provisions of the CARES Act applicable to employers and nonprofit organizations that may be of interest to hospitals.

We will continue to evaluate the potential financial impact of the CARES Act's new rules and opportunities affecting hospitals and healthcare systems. Guidance on the process and procedures for implementing the CARES Act is anticipated to be issued in the near future. For more information, contact Daniel O. Carroll, Esq. at doc@spsk.com or any other member of the Health Care Law Practice Group.

DISCLAIMER: This Alert is designed to keep you aware of recent developments in the law. It is not intended to be legal advice, which can only be given after the attorney understands the facts of a particular matter and the goals of the client.