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CARES Act Oversight: False Claims Act Risk under the CARES Act for Health Care Providers

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") provides significant financial assistance and support to hospitals and other health care providers. We expect that the Department of Justice ("DOJ") and whistleblowers will scrutinize payments under the CARES Act's programs and that the False Claims Act ("FCA") will be used aggressively in the years to come.

FCA risk under CARES Act programs is particularly acute for health care providers for a few reasons:

- **No need to develop novel legal theories.** Much of the support and assistance provided by the CARES Act ultimately flows through to health care providers billing and seeking reimbursement for care. For example, the CARES Act provides additional funding for federally qualified health centers ("FQHCs"), rural health networks, community health centers, and teaching hospitals, and creates a Public Health and Social Services Emergency Fund to reimburse health care providers for expenses or lost revenues attributable to the coronavirus. To the extent that the CARES Act's programs boil down to payment for medical services not previously covered by federal health care programs, DOJ and *qui tam* relators can seek to enforce the limits of the CARES Act's expansion of coverage by pursuing FCA billing fraud theories that have been investigated and litigated in a range of cases and contexts for many years.

- **Continued debate over the scope of the Supreme Court's *Escobar* decision means certification-based risk remains hard to cabin.** In *Universal Health Services, Inc. v. United States ex rel. Escobar*, the Supreme Court recognized an implied false representation theory of FCA liability under certain circumstances. *Escobar*, 136 S. Ct. 1989 (2016). The Court cabined the scope of the theory using the FCA's "demanding" materiality standard, but in the years since *Escobar*, a high volume of litigation over how to interpret and apply this standard has yet to result in consensus among the circuits. As relevant here, providers that submit claims or applications for federal funding under the Paycheck Protection Program ("PPP") or the Economic Injury Disaster Loan ("EIDL") program, for example, must certify their eligibility for those funds to the government, and it is their responsibility to ensure eligibility *before* certifying compliance to the government. The PPP offers loans for small businesses to maintain payroll and related benefits, and to make payments on leases, utilities, and mortgages and other debts. The EIDL program similarly provides small businesses with working capital loans that can provide vital economic support to help overcome the temporary loss of revenue they may be experiencing. Applications for funding under these programs, among others under the CARES Act, will likely receive scrutiny.

- **New documentation requirements mean new opportunities for honest errors to turn into lengthy litigation.** With certain of the CARES Act's programs, such as the Public Health and Social Services Emergency Fund, come reporting requirements that can lead to FCA liability. For instance, recipients of payments from the Public Health and Social Services Emergency Fund are required to submit reports and to maintain documentation to ensure compliance with requirements for the payments. When organizations are under stress—financially or operationally—sometimes recordkeeping falters. Given the unprecedented strain placed on providers during the current crisis, comprehensive new recordkeeping requirements may not get the attention they normally would receive.

A few specific examples of where risk may lie include:

Example 1 – Reimbursements to Eligible Health Care Providers. The $100 billion allocated in the Public Health and Social Services Emergency Fund to reimburse eligible health care providers for health care-related expenses or lost revenues attributable to coronavirus comes with important guardrails. Providers may not use the funds to reimburse expenses or losses that are reimbursable from other sources, and the CARES Act provides that providers must submit reports and maintain certain documentation.

Example 2 – Medicare Accelerated Payment Program. The CARES Act provides for the expansion of the Medicare accelerated payment program (as further supplemented by the Centers for Medicare and Medicaid Services ("CMS")) to provide the opportunity to receive an advance on Medicare payments to a broader group of Medicare providers and suppliers during the coronavirus public health emergency. This program also outlines specific eligibility requirements. For instance, a provider or supplier (such as a hospital, home health agency, or clinical diagnostic laboratory) must not be in bankruptcy and must not be under any active medical review or program-integrity investigation. Entities seeking accelerated payment should be careful to comply with eligibility requirements established by CMS.

Example 3 – Telehealth Reimbursement Expansion. The CARES Act establishes certain waivers, which CMS expanded further through the issuance of multiple blanket waivers, that waive or modify certain telehealth requirements to permit providers to receive Medicare reimbursement for a wider range of telehealth services than would have otherwise been permitted. For example, Medicare waivers now cover telehealth services furnished by physicians, FQHCs, and rural health clinics. Providers not previously eligible for telehealth reimbursement may now be seeking Medicare coverage of telehealth services for the first time, and navigating the detailed CMS requirements and enforcement risks.

The CARES Act provides necessary emergency financial support and assistance to health care providers and other businesses throughout the economy. But that assistance will come with unprecedented scrutiny from whistleblowers and a coordinated effort by federal and state law enforcement to police disbursement of the funds. Pressure on workers navigating the coronavirus crisis, coupled with the possibility of layoffs due to the economic downturn, may lead to a rise in whistleblower filings under the FCA. Accordingly, companies in the health care space seeking relief under the CARES Act must pay careful attention to billing practices, eligibility and other requirements for CARES Act programs, and enhanced documentation and recordkeeping requirements to protect against FCA enforcement down the road.

For our analysis of expected scrutiny surrounding the loan and other business assistance programs under the CARES Act, click here.