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MEMORANDUM

To: **Radiology Clients and Friends**

Date: **April 1, 2020**

Subject: **COVID-19: Federal Law and Policy Changes Impacting Radiology Groups**

The Coronavirus Aid, Relief, and Economic Security Act ("the CARES Act" or "the Act") authorizes more than $2 trillion in government spending in response to COVID-19 and its economic effects, including immediate cash relief for individual citizens, loan programs for small business, support for hospitals and other medical providers, and various types of economic relief for impacted businesses and industries.

An overview of certain portions of the Act follows with an emphasis on provisions important to radiology groups. Forthcoming regulatory guidance will impact the scope and applicability of the Act and, in particular, those provisions supporting small businesses. It is also important to note that CMS and the OIG have recently issued regulations and guidance on the application of the federal fraud and abuse laws, including the federal anti-kickback statute and physician self-referral law (or Stark law), which will impact financial relationships between and among health care providers.

Please visit our CARES Act Resource Center for additional information and resources, and if you have a particular question beyond the scope of this client alert, please contact any Reed Smith attorney with whom you work.

A. Small Business Provisions (Title I—Keeping American Workers Paid and Employed Act)

Paycheck Protection Program: The Paycheck Protection Program enacted under the CARES Act provides increased loan amounts for eligible small businesses for payroll obligations, emergency grants to cover immediate operating costs, and a mechanism for loan forgiveness where the small business can demonstrate that the loan proceeds were used for payroll and related costs. Title I provides $349 billion for relief during the covered period from February 15, 2020 to June 30, 2020 through a number of changes to the loan programs that currently exist and are administered by the Small Business Administration (SBA).

Small Businesses: So-called Section 7(a) loans are the primary SBA vehicle for providing capital to small businesses. The Act defines "small businesses" to include a wide range of business concerns; *provided that* such entities employ not more than the greater of (i) 500 employees (which includes full time and part time employees) or, if applicable, (ii) the number of employees established as the size standard by the SBA for the industry in which such entity operates.

For a businesses reported in the compilation of U.S. Census Bureau's NAICS classification codes as within the health care sector, SBA historically applied a $12 million annual receipts limit, rather than number of employees, to determine whether the business qualified as a "small

business." This has excluded many radiology groups from qualification for SBA loans. However, because the CARES Act explicitly uses the 500-employee limit, it is unclear whether the SBA could continue to apply the NAICS classifications, which, if applied, would severely limit access by radiology groups to 7(a) loans. We expect the SBA to clarify this point in forthcoming regulations.

Affiliation Rules: For purposes of meeting the 500 or fewer employees test, the CARES Act generally appears to leave the SBA affiliation rules intact. As a result, the employees of the borrower and its affiliates (domestic and foreign) are aggregated for purposes of the calculation. The application of the affiliation rules is complex and fact-specific and will be of particular concern to borrowers sponsored by private equity, venture capital and similar financial sponsors. The question for such financial sponsors is whether such a borrower is deemed "affiliated" for SBA purposes with its financial sponsor and with the sponsor's other portfolio companies.

For example, those radiology groups affiliated with large management service organizations (MSOs), Section 7(a) loan eligibility will depend on whether the MSO is deemed an affiliate of the radiology practice. If the MSO is deemed an affiliate, then the radiology practice will be required to count all employees of the practice, the affiliated MSO, and any party that controls an affiliated MSO, which may result in exceeding the 500-employee limit. Historically, the SBA has based an MSO's affiliate status upon whether the MSO is in a position to "control" a medical practice. As noted above, the analysis of this issue is fact-specific and may be influenced by future SBA guidance.

Section 7(a) Borrowers: An eligible recipient applying for a covered loan under the CARES Act must make a good faith certification that, among other things: (i) the current economic conditions and uncertainty make the loan request necessary to support the recipient's business operations; (ii) the funds from such covered loan will be used to retain workers, maintain payroll, or make mortgage, lease or utility payments; (iii) the recipient does not have another loan application pending under the CARES Act; and (iv) the recipient has not received amounts under the CARES Act for the same purpose before December 31, 2020 and was in operation as of February 15, 2020.

Loan Forgiveness: Any portion of the Section 7(a) loan used to maintain payroll, provided workers stay employed through to the end of June 2020, will be forgiven in an amount equal to the sum of the following costs incurred and payments made during the eight-week period beginning on the date of the origination of a covered loan: (i) payroll costs; (ii) interest payments on mortgages; (iii) covered rent obligations; and (iv) covered utility payments. The amount of forgiveness may not exceed the principal amount made available under the covered loan. Small businesses and other eligible entities will be able to apply if they experienced impacts related to the COVID-19 pandemic between February 15, 2020 and June 30, 2020. Loan forgiveness applies only to Section 7(a) loans and does not apply to Economic Injury Disaster Loans.

Regulatory Guidance: The SBA is required to issue regulations implementing the statutory requirements of Title I of the CARES Act by April 13, 2020. Such regulations may provide additional clarity on the issues discussed above, including the application of the affiliation rules. These regulations will not be subject to any notice and comment requirements.

B. <u>Medicare Provisions</u> (Title III—Supporting America's Health Care System in the Fight Against the Coronavirus)

Medicare Sequestration Relief: Under the Budget Control Act of 2011, as subsequently amended, Medicare provider and plan payments are subject to a 2 percent across-the-board "sequestration" reduction through FY 2029. The Act pauses the sequestration requirement during the period of May 1, 2020 through December 31, 2020, which has the effect of providing an immediate payment boost to providers and plans. To avoid "worsening Medicare's long-term financial outlook," the Act extends the current Medicare sequester requirement through FY 2030.

Accelerated and Advance Payments from Medicare: The Act expands the current Accelerated and Advance Payment Program to include all Medicare providers throughout the country during the public health emergency. This includes hospitals, physician practices, and other Medicare Part A and Part B providers and suppliers. To qualify, the provider or supplier must: (1) have billed Medicare for claims within the 180 days immediately prior to the date of signature on the provider's or supplier's request form; (2) not be in bankruptcy; (3) not be under active medical review or program integrity investigation; and (4) not have any outstanding delinquent Medicare overpayments.

Most qualified providers, including hospital-based radiology practices, may request up to 100% of the Medicare payment amount for a three-month period. Each MAC will review and issue payments within seven calendar days upon receiving the request. Additionally, CMS has extended the repayment of these accelerated payments to begin 120 days after the date of payment. Most Part A providers and Part B suppliers will have 210 days from the date of payment to repay the balance.[1]

A provider seeking advanced payments may continue to submit claims after the advanced payment is issued; *however*, recoupment will not begin for 120 days. At the end of the 120-day period, every claim submitted by the provider will be offset from the new claims to repay the accelerated payment. Instead of receiving payment for newly submitted claims, the provider's outstanding advanced payment amount would be automatically reduced by the claim payment amount.

Participation in this program may prove administratively challenging for radiology groups. As noted above, once the 120-day period ends, Medicare will stop paying claims until the advanced payment is recouped. Given the challenge of predicting prospective claims volume, it will be difficult for radiology practices to determine the period of time they will experience diminished Medicare payments. Additionally, various Medicare Administrative Contractors reportedly require physicians to apply for this program individually, even if they are part of a group that has received reassignment from those physicians. Overcoming accounting and logistical issues involved in this program may impact its ultimate success or failure.

[1] This excludes inpatient acute care hospitals, children's hospitals, certain cancer hospitals, and Critical Access Hospitals, which have up to one year from the date of payment to repay the balance.

Advanced Refunding of Tax Credits: This provision amends the refundable employer tax credit for paid sick and family leave included in the Families First Coronavirus Response Act (FFCRA) to permit an advance of such tax credit (including the refundable portion) in lieu of employers having to rely upon a tax refund. The amount of such credit advance is calculated in the same manner and subject to the same limitations as otherwise determined under the FFCRA, according to forms and instructions to be provided by the Secretary of the Treasury. The Act also provides for the waiver of penalties for a failure to make deposits of related employer payroll taxes to the extent the Secretary of the Treasury determines such failure was due to the anticipation of this employer tax credit. A summary of the FFCRA is available here.

C. Funding for Health Care Provider (Title V—Coronavirus Relief Funds)

Opportunity for Financial Support from Hospitals

The Act includes a $100 billion appropriation for "eligible health care providers" to be appropriated to the Secretary of Health and Human Services "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." Health systems and hospitals are likely to be primary recipients of these funds and other support under the CARES Act.

Although radiology groups are not explicitly included under the foregoing hospital-targeted relief measures, hospital-based radiologists, as essential hospital partners, likely need to take part in CARES Act hospital benefits to endure the impending financial challenges associated with the COVID-19 emergency period. Ordinarily, Stark self-referral prohibitions impede financial arrangements between a hospital and a group whose physicians, such as interventional radiologists, make Medicare patient referrals of "designated health services," including diagnostic testing services, to the hospital.

CMS implicitly acknowledged these concerns by waiving several portions of the Stark law applying to hospitals and physicians under the agency's Social Security Act Sec. 1135 public health emergency waiver authority. Specifically, effective April 1, 2020, CMS has issued certain blanket Stark waivers for various arrangements, including remuneration from hospitals to physicians above the fair market value for services personally performed by such physicians. The existence of such waivers may provide hospitals comfort when considering providing a stipend or coverage agreement to support radiologist availability at the hospitals.

Therefore, especially given the justification to support the availability of hospital-based radiologists during the emergency period, the foregoing measures may present an opportunity for radiology groups to seek support from hospitals in the form of coverage agreements, stipends, or other financial support during the COVID-19 public health emergency.

Radiology groups should consider opening discussions with affiliated hospitals regarding supplemental compensation opportunities to help the radiologists maintain their capacity to provide essential services during the COVID-19 emergency. CMS's Stark sanction waivers announcement presents a game changing opportunity in making such additional compensation

possible. The specifics of any financial support offered by a health system or hospital should be analyzed carefully against the recent waivers and guidance issued by CMS and the OIG.

Our team is closely monitoring the situation to ensure we are able to provide the most up-to-date advice. Please call or email with any questions.

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