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THE VALUE OF FAIR MARKET VALUE REVIEW IN A HOSPITAL'S PREPARATION AND RESPONSE TO CORONAVIRUS

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DISCLAIMER:

This FMVantage Point contains a general discussion of current issues and developments regarding Coronavirus disease 2019 ("COVID-19"). The information provided in this article does not, and is not intended to, constitute legal advice; instead, all information and content in this article are for general informational purposes only.

OVERVIEW:

COVID-19 has reached the United States, after causing thousands of deaths and disrupting trade in China and other countries globally. On March 13, 2020, the day President Trump declared a national emergency[i] under the Stafford Act[ii], the United States had between 1,600 and 1,700 confirmed cases of COVID-19[iii]. With this backdrop, hospitals are preparing for the heightened probability of a local outbreak affecting their community, and, with it, patients populating their emergency rooms and intensive care units and straining staff and resources, similar to what is occurring in Italy and elsewhere in the world where there have been outbreaks[iv].

The President's declaration of a national emergency will free much-needed additional funding to, as well as ease some regulatory restrictions on, the nation's hospitals[v]. However, significant resource planning challenges remain. In addition to the more obvious clinical response and containment questions, there are a substantial number of resource-allocation and financial questions that hospitals may need to address to optimize their COVID-19 readiness and effectiveness of response. We discuss some of these below.

1. **Ensuring an Adequate and Secure Supply Chain.** Hospitals have been advised to plan for shortages and disruptions in the local and global supply chains for essential items such as personal protective equipment, pharmaceutical drugs, surgical and respiratory supplies and

[i] Adam Edelman, Peter Alexander and Kristen Walker, Trump Declares National Emergency to Combat Coronavirus, Authorizes Waiving of Laws and Regulations, NBCNews, March 13, 2020
[ii] 42 U.S.C. 68, §5121 et seq.
[iii] Statistics from https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html, which is updated daily. The site was accessed March 13, 2020.
[iv] For example, see Yascha Mounk, The Extraordinary Decisions Facing Italian Doctors, The Atlantic, March 11, 2020. (accessed March 13, 2020 at https://www.theatlantic.com/ideas/archive/2020/03/who-gets-hospital-bed/607807/)
[v] Under the Stafford Act, the President's declaration of emergency makes available funding through the Federal Emergency Management Agency ("FEMA") and allows the Secretary of the Department of Health and Human Services ("HHS") to waive certain regulatory requirements under Section 1135 of the Social Security Act.

equipment, and infection control agents. Of note, providers are already facing a delay of several weeks for penicillin products with components produced in China, where the active ingredients of dozens of other major drugs also originate. As illustrated in the aftermath of other recent disasters, such as Hurricane Maria in Puerto Rico, the effects of supply chain disruptions may be exacerbated if and when there is a need to reallocate critical resources to an incident or outbreak-response rather than more typical or elective uses. In response, hospitals and health systems may find themselves needing to rapidly clear new vendors, rely on non-price-preferred or alternative vendors, or even turn to neighboring hospitals or other providers to secure critical items and resources. These measures may result in new or novel financial transactions and arrangements of varying duration, terms and risk.

2. **Preparing for Emergency Patients.** On March 9, the Centers for Medicare and Medicaid Services ("CMS") released specific guidance and requirements to hospitals for complying with the Emergency Medical Treatment and Labor Act ("EMTALA"). Among other things, the guidance provides that:

   - Medicare-participating hospitals with capacities and specialized capabilities needed for stabilizing COVID-19 are required to accept transfers from hospitals without the necessary capabilities.
   - Medicare-participating hospitals with specialized capabilities are required to accept appropriate transfers of individuals with emergency medical conditions ("EMCs") if the hospital has the specialized capabilities that an individual requires for stabilization, as well as the capacity to treat the individual. The requirements apply whether or not the facility has a dedicated emergency room.
   - Hospitals may set up alternative screening sites on the hospital campus to perform required medical screening examinations ("MSEs"), provided that: (i) the MSEs are performed by qualified personnel, which may include physicians, nurse practitioners, physician assistants or registered nurses trained to perform MSEs and acting within the parameters of the state's scope of practice act; and (ii) the hospital provides stabilizing treatment (or appropriate transfer) to individuals found to have an EMC, including moving them as needed from the alternative screening site to an on-campus hospital department.
   - Hospitals may set up screening at off-campus hospital-controlled sites, or communities may set up screening clinics in sites not controlled by a hospital. In either case, a hospital may not tell individuals who have already come to the hospital's emergency department to go to an offsite location for their MSE. Further, if an individual who has presented to the offsite location needs additional medical attention on an emergent basis, the hospital that controls the off-campus screening site is required to arrange referral/transfer through local emergency medical services.
   - If, during the MSE, a hospital concludes that an individual who has come to the emergency department may be a possible COVID-19 case, then, consistent with accepted standards of practice for COVID-19 screening, the hospital is expected to isolate the patient immediately and initiate stabilizing treatment while maintaining the isolation requirements for COVID-19 and coordinating with their state or local public health officials.

Although certain sanctions may be waived under Section 1135 of the Social Security Act, adherence to this guidance may require hospitals to make arrangements to secure additional or more intensive on-call medical specialty coverage by infectious disease specialists, intensivists and other physicians, as well as to rapidly add and onboard additional medical personnel who are appropriately qualified and trained to perform COVID-19 MSEs and treat related EMCs. It may also result in hospitals leasing or otherwise utilizing off-campus screening and/or isolation space that would not otherwise be

utilized for such purposes, and/or temporarily utilizing telemedicine or other telehealth services to increase capacity for medical screening and stabilization.

3. **Ensuring Staffing and Facilities Capacity for a Surge.** To prepare for and respond to the intensive resource use associated with admission of COVID-19 patients, including the possible infectious exposure of the hospital's clinical staff to COVID-19 patients, hospitals may need to consider how to address provider-to-patient ratios, ICU overflow and required or recommended isolation protocols for COVID-19 assessment and treatment. Hence, staffing and planning for COVID-19-related patient surges may mean: (i) engaging or employing alternative or additional specialist providers; (ii) increasing demands on physician medical directors and other physician leaders to assist with development and implementation of circumstance-specific policies and clinical protocols; and/or (iii) alternative and novel short-term use of facility space, equipment and staff, such as (for example) converting an empty or underutilized hospital wing into an additional ICU space, or utilizing telemedicine to create a "virtual ICU."

AVOIDING COMPENSATION PITFALLS:

The circumstances of the COVID-19 public health emergency may result in rapid emergence of contractual arrangements that are of a nature, scope and dollar amount that is not consistent with a hospital's or other provider's usual and customary contracting practices or other professional services arrangements. Due to the Presidential declaration of emergency, many of these arrangements may be assumed to be covered by regulatory waivers, and, therefore, of low regulatory enforcement risk. However, there are various reasons why parties may still want or need assistance understanding and evaluating the fair market value of the contracted items and services. An expert in healthcare valuation can be an invaluable resource for parties that are in need of rapid, independent review of compensation terms and fair market value guidance.