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HEALTH CARE PROVISIONS IN THE HEROES ACT

EXECUTIVE SUMMARY

House Democrats released their sweeping "CARES 2.0" coronavirus relief package (text; section-by-section) earlier this week, including $3 trillion in funding for COVID-19 relief efforts. The Health Economic Recovery Omnibus Emergency Solutions (HEROES) Act aims to provide support for a plethora of industries, and health care provisions remained at the forefront of lawmakers' focus. The legislation looks to codify the Health Care Provider Relief Fund and boost available funding by $100 billion; greatly expand testing, contact tracing, and surveillance capabilities; prohibit cost sharing for potential COVID-19 therapies and vaccines; secure the health supply chain; improve and assist the health care workforce; and more. A manager's amendment (text) introduced yesterday afternoon added a requirement that federal agencies uphold "scientific integrity" policies, addressed personal protective equipment (PPE) costs, and made technical corrections. Additionally, the manager's amendment would establish risk corridor programs for Medicare Advantage, Exchange plans, and self-insured, large group plans.

Republicans have already labeled the Democrats' bill a nonstarter, as Democrats did not pre-negotiate terms with the GOP-controlled Senate or White House before assembling the package. The bill contains several ambitious "poison pill" provisions that will not be accepted by Senate Republicans, House Democrats see the legislation as an opening salvo in bipartisan, bicameral negotiations on the next round of relief efforts. Progressive Democrats were also lukewarm to the legislation, calling for a delay on the vote until next week to allow for additional intraparty negotiations. Notably, several progressive Democrats have called for price controls on potential therapies or vaccines developed using federal assistance. At least one moderate Democrat, Kendra Horn (D-OK) will also vote against the bill over concerns that it was not written to become law. House Speaker Nancy Pelosi (D-CA) has urged Democrats to support the legislation, and the package is expected to pass the House later today. A concrete timeline on an agreement for the next round of relief legislation is still unclear, as GOP lawmakers and the Trump administration have stated repeatedly that they would prefer to continue assessing the implementation of the Coronavirus Aid, Relief, and Economic Security (CARES) Act before moving onto another legislative response package.

The balance of this memo details the most notable health-specific provisions included in the Democrats' relief package, with particular emphasis on: (1)_ provider relief; (2) the medical supply chain; (3) federal health programs; (4) testing; (5) access to forthcoming therapies; (6) health coverage; and (7) support for vulnerable populations.

PROVIDER RELIEF FUND

The legislation would codify a Health Care Provider Relief Fund under the Health Resources and Services Administration (HRSA). Funding for provider relief is currently handled through the Office of the Secretary as part of the Public Health and Social Services Emergency Fund (PHSSEF) with few statutory conditions. The HEROES Act modifications would define a formula for distribution of provider assistance funding and institute a quarterly application and distribution schedule. HRSA would be required to set up the fund shortly after enactment.

- **Formula.** Providers would be reimbursed for 100 percent of eligible expenses and 60 percent of lost revenues, less any other funds received under the Coronavirus Preparedness and Response Supplemental Appropriations Act (H.R. 6074), the Families First Coronavirus Response Act (H.R. 6201), the CARES Act (H.R. 748), or the Paycheck Protection Program and Health Care Enhancement Act (H.R. 266) that do not have to be repaid.
    - *Eligible Expenses* are expenditures such as building temporary structures, personal protective equipment, tests, increased workforce and trainings, constructing or retrofitting facilities, surge capacity, and workforce retention. Other eligible expenses may be decided by the Secretary.
    - *Lost Revenues* are the net patient revenue for the provider in the corresponding quarter of 2019 minus net patient revenue for the provider in the relevant quarter, minus any savings due to foregone wages, payroll taxes, and benefits for workers laid off during the quarter. When determining net patient revenue for the purpose of lost revenues, Medicaid dollars are counted double and Medicare dollars are counted at 125 percent.

Providers would have seven days after the close of each calendar quarter to submit applications for the reimbursement of qualified expenses and lost revenues. Payments would be made no later than 14 days after the close of each quarter. Provider applications must include an accounting of expenses and lost revenues, including expenses incurred from providing uncompensated care. Reimbursement for expenses linked to uncompensated care would be required to be considered payment in full, and any payment on the part of an uninsured individual receiving treatment must be returned to that individual. The bill would codify a prohibition on certain surprise bills as a condition of taking the funding, and it would require a public listing of awards under the fund. Additionally, funds from reimbursements could not be used for executive compensation or benefits.

Eligible providers include Medicare providers, Medicaid providers, public entities, and any other entity that the Secretary may specify that provides diagnostic services or treatment to individuals with a confirmed or presumptive COVID-19 diagnosis.

- **Funding**. The legislation would appropriate $100 billion for the Provider Relief Fund. The funding falls under the umbrella of the PHSSEF but is designated for the Provider Relief Fund. Additionally, it would consider any unobligated funds from the provider relief appropriations in the CARES Act and the Paycheck Protection Program and Health Care Enhancement Act as

appropriated to the Provider Relief Fund. The former appropriated $100 billion and the latter appropriated $75 billion.

TRP Insights. Senate Republicans have begun to sound alarms about spending during the crisis, pointing to skyrocketing deficits. The last round of $75 billion for provider relief was inserted into the bill against the stated wishes of the Senate GOP. That money has not yet been distributed, and without demonstrated need, it is questionable whether the Senate would approve additional provider relief funding.

SUPPLY CHAIN

The HEROES Act includes several measures on the pharmaceutical and medical device supply chain, including the text of Energy & Commerce Health Subcommittee Chairwoman Anna Eshoo's Prescription for American Drug Independence Act (H.R. 6670) — modified to cover devices as well as drugs. That legislation would convene a National Academies panel to recommend strategies to end the U.S. medical supply chain's reliance on foreign countries.

The HEROES Act would require pharmaceutical manufacturers to report on their manufacturing sites abroad and to report on the quarterly volume manufactured at each site. It would also provide an enforcement mechanism for requirements to notify the Food and Drug Administration (FDA) in a timely manner regarding discontinuances or interruptions of certain drugs and to maintain a supply chain risk management plan. FDA would also be given the ability to destroy counterfeit medical devices.

The president would be mandated to appoint a Medical Supplies Response Coordinator as a central point of contact for coordinating supply chain-related emergency response, mirroring a proposal by Energy & Commerce Chairman Frank Pallone (D-NJ). The Coordinator would be required to have experience with the medical supply chain.

The bill would give the Strategic National Stockpile the ability to create incentives for medical supply manufacturers to geographically diversify their production, using the language of the Medical Supplies for Pandemics Act (H.R. 6531).

TRP Insights. Supply chain issues have gained traction in both chambers and in both parties. Some Senate Republicans have expressed caution in measures that would disrupt the global supply chain, particularly those that are punitive towards China. Others, in both the House and Senate, joined by some Democrats, have pushed for measures to require domestic manufacturing of drugs purchased by the federal government and to punish China. The proposals in this bill have support on both sides of the aisle and represent some of the more measured proposals on the supply chain. While supply chain measures are likely to be included in the next COVID-19 legislation, it remains to be seen where the policy will end up as the Senate begins to consider the issues in a more formal capacity.

MEDICAID

The HEROES Act includes a wide range of policies designed to bolster state Medicaid programs, assist Medicaid providers, and give states flexibility through the crisis. These policies include increases to the federal medical assistance percentage (FMAP), increases to disproportionate share hospital (DSH) funding, and a delay of a pending rule — issued before the public health emergency (PHE) — that includes stringent new restrictions on state Medicaid funding. It also includes a policy change to preempt a proposal floated by the administration prior to the PHE to make non-emergency medical transportation (NEMT) an optional benefit.

- **FMAP.** The bill would increase the general medical FMAP to state Medicaid programs by 14 percentage points from July 1, 2020 through June 30, 2021. The original 6.2 percent increase established in the previous relief legislation would be in effect through the end of June 2020 and from July 2021 through the end of the emergency declaration. Additionally, the bill would provide a ten-percentage point increase to FMAP for Home and Community-Based Services (HCBS). Under the legislation, no FMAP could rise above 95 percent.

- **1115 Waivers.** The HEROES Act would require the Health and Human Services (HHS) Secretary to extend Section 1115 waiver demonstrations set to end on or before February 28, 2021 upon the request of the state. The extensions may be through 2021. The original terms and conditions would apply to the extension period, unless the State requests and the Secretary approves modifications to the demonstration designed to address the emergency. Such modifications may be retroactive to the first quarter of 2020.

- **DSH.** The bill would increase DSH allotments by 2.5 percent during the emergency. It would express the sense of Congress that DSH payments should be prioritized for hospitals with a relatively high share of patients with COVID-19.

- **MFAR.** The bill would delay implementation of the Medicaid Fiscal Accountability Regulation (MFAR) until the end of the public health emergency. State Medicaid agencies had registered their concerns that the rule would place significant strain on their fiscal situations, and the

National Association of Medicaid Directors (NAMD) called for the rule to be delayed for two years. The rule was designed to improve transparency and oversight in the federal government's share of Medicaid funding. It places clearer limits on permissible sources of states' share of Medicaid funding to minimize the chances of states "recycling" federal Medicaid dollars.

- **NEMT.** The bill would codify the requirement for state Medicaid programs to cover NEMT, preempting discussions about making NEMT an optional benefit.

TRP Insights. The initial FMAP increase of 6.2 percent was already negotiated down from the original Democratic proposal of 8.0 percent, raising questions as to whether Senate Republicans would agree to such a substantial FMAP boost — particularly as they rail against "bailing out" states. States of all political persuasions have called on CMS to delay or withdraw MFAR and the agency has not indicated that it intends to advance the rule during the PHE. Finally, DSH allotments often benefit rural hospitals, a favorite of legislators on both sides of the aisle. Legislators have delayed scheduled reductions to DSH allotments overwhelmingly, repeatedly, and on a bipartisan basis.

COST SHARING FOR COVID-19 TREATMENT

The bill would require coverage of COVID-19 treatment, including drugs, with zero cost sharing in Medicare, Medicaid, group health plans, Exchange plans, and other government payers. Medicare beneficiaries would not be responsible for COVID-19 hospital and outpatient treatments in Part A and Part B during the public health emergency, and Medicare Prescription Drug Plans (PDP) and Medicare Advantage PDPs will be required to cover drug intended to treat COVID-19 without cost-sharing or Utilization Management Requirements. Medicaid, TRICARE, Veterans Affairs health plans, and the Federal Employee Health Benefit Program will be held to the same cost-sharing requirements. Group and Individual market health plans will also be required to cover items and services related to the treatment of COVID-19 without cost sharing. The Coronavirus Preparedness and Response Supplemental Appropriations Act and the CARES Act required coverage of testing and vaccines with zero cost sharing. Furthermore, states would be given the option to cover COVID-19 treatment and vaccines at no cost sharing for uninsured individuals under their Medicaid programs.

TRP Insight. Lawmakers previously found compromise on cost-sharing requirements for testing in earlier relief legislation, and Sen. Bernie Sanders (I-VT) asked public health officials to commit to distribute any potential vaccine free-of-charge to ensure broad access during a hearing earlier this week. Despite the lack of controversy over cost-sharing, progressive Democrats have called for the legislation to include price controls on potential therapies.

COVID-19 TESTING

The legislation contains a plethora of policies aimed at increasing testing nationwide as well as developing an understanding around disparities in access to testing. The Health Resources and Services Administration (HRSA) would receive $7.6 billion for Health Centers to expand the capacity to provide testing, triage, and care for COVID-19 and other health care services at approximately 1,000 existing health centers across the country. The legislation also included a provision making the requirement for free coverage of COVID-19 testing under private insurance retroactive to the beginning of the COVID-19 public health emergency.

The bill would provide $75 billion for a nationwide COVID-19 test and trace effort. The funding for the COVID-19 National Testing and Contact Tracing Initiative would be appropriated under the Public Health and Social Services Emergency Fund (PHSSEF). The funding would be used in part to award grants to local health departments for testing, contact tracing, surveillance, containment, and mitigation of COVID-19. The Centers for Disease Control and Prevention (CDC) would be required to lead the effort, including through guidance, technical assistance, and central coordination.

The legislation would mandate that HHS update the national strategic testing plan to include specific benchmarks and timelines, as well as information around allocation of testing materials, with an emphasis on testing for vulnerable and underserved populations. The administration would be required to establish a centralized testing website, and states and manufacturers would be required to report on testing results, capacity, distribution, and availability. The legislation also directs the Government Accountability Office (GAO) to produce a report on the testing response efforts of laboratories, test manufacturers, states, local, tribal, and territorial governments under the legislation. HHS, by Aug. 1, would also be mandated to expand on the previously required report to Congress describing the testing, positive diagnoses, hospitalization, intensive care admissions, and mortality rates associated with COVID–19, disaggregated by race, ethnicity, age, sex, and gender. The legislation directs the Secretary of HHS to propose evidence-based response strategies to reduce disparities related to COVID-19 and a final report in 2024. Additionally, the bill requires modernizations to public health data systems and laboratory infrastructure.

The HEROES Act would direct $600 million to respond to crisis in correctional facilities through Pandemic Justice Response Grants, including $500 million to states and local governments that operate correctional facilities to provide testing and treatment of COVID-19 for incarcerated individuals. The funding would be distributed by creating two grant programs—one focused on the release of low-risk individuals who are currently incarcerated, and another aimed at reducing COVID-19 exposure for those individuals who are arrested. The legislation also includes $25 million to establish a grant program for state and local governments that operate correctional facilities for rapid testing of inmates who are leaving correctional custody. Additionally, the Bureau of Prisons would receive $200 million to carry out coronavirus prevention and response activities, including testing.

TRP Insights. Calls for increased testing have come from both sides of the aisle, as most see this as the only path forward to decreasing COVID-19 cases and reopening the economy. Earlier this week, Senators were united in criticism that the administration had not done enough to increase contact tracing and surveillance efforts. Additionally, lawmakers have repeatedly voiced concerns that a lack of oversight of the testing supply chain could delay efforts to increase testing. The Senate is likely to address testing provisions in their negotiations around COVID-19 legislation, although the scope of those provisions is still unclear.

SPECIAL ENROLLMENT

The legislation would create a special enrollment period (SEP) for Medicare Parts A and B, as well as for the Exchanges, during the public health emergency. Specifically, the bill would open a two-month open enrollment period to allow uninsured individuals to gain coverage under private insurance. The policy applies to all exchanges, but exempts any state-exchange that has already established its own SEP. The bill further requires that HHS conduct an outreach and education campaign to inform Americans about the opportunity and authorizes $25 million for that effort — while also barring the administration from using the funding to promote non-ACA compliant products, including short-term plans or association health plans. The package also includes policies that would fully subsidize COBRA coverage from March 1 through Jan. 1, 2021 and make the coverage available to still-employed furloughed workers. People who lose their employer-sponsored insurance can continue that coverage through COBRA, although it is typically quite expensive since unemployed workers generally have to pay the employee plus employer portions of the premium plus an additional 2%. Additionally, the legislation would allow veterans without disabilities, but suffering from financial hardship, to qualify for enrollment in VA's health care system and be exempt from hospital or medical care copays.

TRP Insights. Lawmakers from both parties have encouraged Americans without health insurance to sign up on the Exchanges, as many states operating their own marketplaces are holding SEPs. Insurers, hospitals, unions, employers and even some GOP governors have called for the federal government to hold its own SEP amid reports that as many as 27 million Americans may have lost employment-based insurance. Additionally, there are bipartisan disagreements over how much of the COBRA policy should be covered, particularly as the Democratic proposal is estimated to cost hundreds of billions of dollars. The Trump administration has remained steadfastly opposed to a SEP, though congressional Republicans have been notably silent on the issue, with *The Hill* reporting some openness to a SEP in the GOP caucus. Furthermore, Senate Majority Whip John Cornyn (R-TX) encouraged his constituents to sign up for an ACA plan if they are able.

NURSING AND LONG-TERM CARE

The House Democrats' legislation includes several provisions on prevention and response efforts in nursing and long-term care facilities to protect some of the most vulnerable populations from the pandemic. The bill would create incentive payments for nursing facilities to establish COVID-19-specific facilities. It would also direct HHS to provide assistance to nursing facilities with infection control issues through the Quality Improvement Organizations program and allocates $150 million to help states create "strike teams" to help nursing homes manage outbreaks within 72 hours of three residents being diagnosed with or suspected of having COVID-19.

HHS will be required to collect and publicly report data on COVID-19 cases in nursing homes through *Nursing Home Compare.* The bill also ensures skilled nursing facilities in Medicare provide a means for residents to conduct "televisitation" with loved ones while in-person visits are not possible during the COVID-19 public health emergency.

TRP Insights. As outbreaks continue to plague nursing home facilities around the country, many have called for response efforts with emphasis on these vulnerable populations. CMS continues to issue new guidance and resources addressing issues specific to long-term care facilities. House Democrats previously called on the administration to publicly report coronavirus infections in nursing homes, and President Trump has mulled requiring nursing homes to test all patients. He criticized state governors' nursing home oversight, calling it "lax." The Nursing Home Association has asked Congress for $10 billion to appropriately respond to the pandemic. Bipartisan support is likely for at least some of the nursing home provisions in the House bill.

BEHAVIORAL HEALTH FUNDING

The HEROES Act would allocate $3 billion to Substance Abuse and Mental Health Services Administration (SAMHSA) to increase mental health support during the pandemic, increase outreach, and support substance abuse treatment. This includes:

- $1 billion for the Community Mental Health Services Block Grant;
- $1.2 billion for the Substance Abuse Prevention and Treatment Block Grant;
- $265 million through emergency grants to address immediate behavioral health needs as a result of COVID-19;
- $100 million for Project AWARE to identify students and connect them with mental services;
- $25 million for the Suicide Lifeline and Disaster Distress Helpline, and
- $150 million for Tribes and Indian health organizations to address mental health needs across a variety of programs.

Additionally, the legislation establishes a technical assistance center at SAMHSA to support public or nonprofit entities and public health professionals seeking to establish or expand access to mental health and substance use services associated with the COVID-19 public health emergency. National Guard and Reserve members would be permitted to receive mental health care at Vet Centers if deployed more than 14 days in support of the pandemic response efforts. The National Institutes of Health's (NIH) National Institute of Mental Health (NIMH) would also be required to support research on looking into the mental health consequences of COVID-19, including the impact on health care providers.

TRP Insights. The CARES Act included several provisions aimed at increasing behavioral health care in response efforts, including funding for suicide prevention programs and mental health and substance use disorder emergency grants. While the HEROES Act includes several provisions asked for by mental health stakeholders, including increased funding for hotlines, mental health impact research, and SAMHSA grants, the total support is seen as inadequate to meet the significant impact the pandemic has had on behavioral health providers and patients. Behavioral health advocates have urged the administration to collect data on the pandemic's impact on vulnerable populations, warning that the rates of suicide and overdose are likely to increase during the public health emergency.

ACCELERATED AND ADVANCE PAYMENTS

The bill would lower interest rates required to be paid on loans to hospitals under the accelerated and advance payments program, extend the repayment period, and restrict the offsets HHS may impose on claim payments for repayment of the loans. The CARES Act included an expansion of the Accelerated and Advance Payment Programs, under which hospitals could elect to receive up to 100 percent of prior period payments for six months in an advance lump sum or periodic payment. Critical Access Hospitals were eligible to receive up to 125 percent of prior period payments. CMS curtailed the loans after the passage of the Paycheck Protection Program and Health Care Enhancement Act.

The HEROES Act would make the terms of these loans more favorable to hospitals that took them. The loans carry interest rates of around 10 percent, and the HEROES Act would reduce that to one percent. It would also give providers at least one year to begin paying back the loans. Under the current program, CMS will begin to recoup the loans by offsetting claims after 120 days, and hospitals have one year to pay back the balance in full. The HEROES Act would allow providers one year before claims begin to be offset to reimburse CMS, and each claim could be offset by a maximum of 25 percent. Providers could also have at least two years from the date of the first repayment amount before being required to repay the balance of the loan. Finally, the loans would be treated as coming from the general treasury, not the Medicare Trust Fund.

TRP Insights. These changes were eagerly sought by hospitals. The Federation of American Hospitals called for similar changes in an April 29 letter to congressional leaders.