

THREE KEY THINGS IN HEALTH CARE

HUNTON
ANDREWS KURTH

June 1, 2020

Three Key Things in Health Care offers snapshots of three significant issues in health care that we believe merit your attention. Published weekly by the Hunton Andrews Kurth Health Care Practice Group, the goal of *Three Key Things* is not to repeat what is already in the trade press, but to provide actionable ideas that will benefit your organization. We welcome your feedback!

- **COVID-19 could drive renewed interest in provider-payor affiliations.**

- Last week we discussed COVID-19's disparate impact across provider types as a potential driver of affiliation transactions.
- The impact disparity is even more pronounced when payors are considered. While providers have suffered financially, payors generally seem to be faring well because COVID-19 costs have been significantly outweighed by savings realized from postponement of non-urgent care.
- Provider interest over the past decade in developing and owning health plans (driven by a desire to capture and manage premium revenues) appears to have waned following significant losses incurred by many provider-owned plans.
- Studies reflect that provider-owned plans established after 2010 generally struggled more than plans established earlier, and that plans joint-ventured by provider and payors generally were more successful than those owned solely by providers.
 - These findings highlight the importance of having an established infrastructure and management expertise—whether by acquiring an existing platform or partnering with a payor having the necessary expertise and experience.
- The COVID-19 crisis illustrates that provider-owned health plans could serve an important role in diversifying risk for health systems in connection with pandemics or more general changes in health care payment and delivery systems. This realization likely will cause health systems to reconsider potential health plan investments.
- **Key takeaway:** Health systems will want to reconsider investments in provider-owned health plans to help diversify risk, but they should consider the successes and failures of other provider-owned plans and evaluate strategies around joint venturing with partners that can provide access to existing platforms and management expertise.

- **Paycheck Protection Program (PPP) enforcement: cautionary tale #2.**

- Last week we described the PPP loan forgiveness application as a cautionary tale for providers. Cautionary tale #2 is the Small Business Administration's (SBA) action against various Planned Parenthood entities across the country. The SBA instructed these entities to return PPP loans (their applications totaled over \$80 million in the aggregate), claiming they improperly certified eligibility for a loan.
- SBA indicated a Planned Parenthood entity wishing to contest SBA's "preliminary conclusion" as to eligibility should "demonstrate the basis for its certification that it is eligible for a [PPP] loan" and respond to a 14-point document request *within 10 calendar days of receipt of SBA's letter*. Among the items requested are all documents relating to
 - the basis for the entity's eligibility certification,
 - the application of the PPP affiliation rules to the entity and its related entities and

THREE KEY THINGS IN HEALTH CARE

HUNTON
ANDREWS KURTH

- the entity's economic uncertainty certification,
as well as all documents referenced or relied upon by the entity when applying the affiliation rules and all communications concerning the entity's PPP loan application.
- Politics aside, the SBA's letter underscores the speed with which COVID-19 enforcement actions will move and the scope of demands placed by regulators on relief fund recipients suspected of wrongdoing.
- **Key takeaway:** Providers should review the SBA letter and document request (available [here](#)) and consider them in light of the certifications they have made (or have been deemed to have made). Is there solid documentation of eligibility? What about "all communications" concerning the funds received? As we said last week, providers are well advised to track everything.
- **Securities and Exchange Commission (SEC) enforcement: cautionary tale #3.**
 - Cautionary tale #3 comes to us by way of the SEC, which can suspend trading in the securities of companies believed to have provided inaccurate or unreliable information to the market.
 - According to [information](#) released by the SEC, its Enforcement Division "is actively monitoring claims made in connection with COVID-19 and related trading activity. The trading suspensions brought in this area to date question the accuracy and adequacy of a variety of different public statements made about COVID-19, including statements about the manufacture and sale of COVID-19 test kits, the development of COVID-19 treatments and vaccines, and the production and sale of personal protective equipment."
 - **Key takeaway:** Providers should assume regulators of every stripe will not hesitate to bring enforcement actions against those who harm the public directly (through actions affecting patients, the markets, etc.) or indirectly (by taking improper advantage of relief programs). Some cases may be difficult to bring directly (such as those centering on dubious claims about the efficacy of COVID-19 treatment), but federal enforcement agencies have a huge tool chest with which to work.

Contacts

Mark S. Hedberg
mhedberg@HuntonAK.com

Matthew D. Jenkins
mjenkins@HuntonAK.com

James M. Pinna
jpinna@HuntonAK.com

Elizabeth A. Breen
ebreen@HuntonAK.com

Holly E. Cerasano
hcerasano@HuntonAK.com

© 2020 Hunton Andrews Kurth LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.