AMERICAN HEALTH LAWYERS ASSOCIATION

PRACTICE GROUP *email alert*

CMS Announces Proposed Rule Implementing the ACA's MLR Requirements for MA and Prescription Drug Plans

This was the first in a series of four email alerts that will be published by the American Health Lawyers Association this week regarding the recent release of the Centers for Medicare & Medicaid Services' Proposed Rule implementing the Affordable Care Act's Medical Loss Ratio requirement for Medicare Advantage and Part D Plans and the 2014 Advance Notice and draft Call Letter.

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By Darryl Landahl and Ishra Solieman

On February 15, the Centers for Medicare & Medicaid Services (CMS) released its Proposed Rule, effective calendar year (CY) 2014, implementing the Medical Loss Ratio (MLR) requirements for Medicare Advantage (MA) organizations and Medicare Part D plan sponsors (collectively, Plan Sponsors). The rule is required by the Patient Protection and Affordable Care Act and the Health Care and Educational Reconciliation Act (collectively, ACA). The proposed MLR rule limits the amount Plan Sponsors can spend on marketing, overhead, and profit and, to a large extent, is modeled after MLR rules already applicable in the private health insurance market.

New MLR Requirement

The MLR requirement is reflected as a percentage of revenue a Plan Sponsor must use for patient care, rather than for other costs, such as administrative expenses or profit. The Proposed Rule will require that Plan Sponsors spend at least 85% of total revenue on patient care costs. Total revenue is defined as the payments a Plan Sponsor receives from CMS, all premiums paid by or on behalf of enrollees in a plan, and all unpaid premium amounts that a Plan Sponsor could have collected from all enrollees in a plan under the Plan Sponsor's contract with CMS. Patient care costs include clinical services, prescription

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drugs, quality improvement activities, and direct benefits to beneficiaries in the form of reduced Medicare Part B premiums (which is a unique benefit of some MA plans). Certain costs must be deducted from total revenue for MLR calculation purposes, including licensing and regulatory fees, state and federal taxes, and assessments and payments made toward reducing the Medicare Part B premium for MA plan enrollees. The Proposed Rule provides significant detail regarding the specific nuances in calculating the MLR.

The Proposed Rule requires Plan Sponsors to report an aggregated MLR at the contract level for each CY--an approach that somewhat aligns with the commercial MLR requirement, which generally aggregates the MLR to the state or market level, rather than to each specific health plan policy or benefit offering. CMS requests comment on the timing of MLR reporting, but recommends a July 31 reporting date to avoid disruption to beneficiaries who are choosing health plans for the coming year.

Scope and Applicability

In addition to applying to MA and Part D plans, the new MLR requirement will also apply to cost health maintenance organizations (HMOs), competitive medical plans (CMPs), and employers or unions offering health care prepayment plans (HCPP), to the extent they offer Part D coverage as an optional supplemental benefit. Liability under the MLR requirements for cost HMOs, CMPs, and HCPPs is limited to the Part D portion of their benefit offerings.

Program for All-Inclusive Care for the Elderly (PACE) organizations, however, are exempt from the new MLR requirements under the Proposed Rule even if they offer Part D benefits. CMS believes subjecting PACE plans to the ACA's MLR requirements would conflict with the intent and purpose of the PACE statute and regulations, and could thwart a PACE plan's ability to service its special needs enrollees.

Penalties for Noncompliance

Under the new requirements, Plan Sponsors must report their MLR to CMS, and are subject to progressive levels of financial and other penalties for failure to meet the new requirements. The first penalty requires the Plan Sponsor to pay to CMS the amount the applicable MLR requirement exceeds the contract's actual MLR, multiplied by the total revenue of the contract. CMS will subtract the penalty amount from the regular monthly payments made to Plan sponsors. MA plans that have fewer than 2,400 member months and Part D stand-alone contracts with fewer than 4,800 member months are exempt from the penalty.

If a Plan Sponsor remains noncompliant with the MLR requirements for more than three consecutive years, it will be subject to enrollment sanctions, which would halt new enrollments into all plans offered under the Plan Sponsor's noncompliant contract. The final penalty requires contract termination, which is applicable after the fifth consecutive year of noncompliance. The enrollment and termination penalties

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take effect the second succeeding year after the third or fifth year, respectively, of noncompliance. For example, if a contract fails to meet the MLR requirement for the 2014, 2015, and 2016 contract years, CMS would not permit new enrollment in plans under that contract in 2018 (i.e., the second succeeding contract year after the third consecutive year of failure (2016) to meet the MLR requirements). Similarly, for a contract that fails to meet the MLR requirement in 2014 through 2018, CMS could terminate the contract in 2020.

MLR Review and Noncompliance

Under the Proposed Rule, CMS would be authorized to review MLR reports submitted by Plan Sponsors. Plan Sponsors are required to retain documentation relating to the data reported, and to provide access to CMS, the U.S. Department of Health & Human Services, the Comptroller General, or their designees. Plan Sponsors that utilize third-party vendors are also required to obtain and validate all underlying data associated with vendor services before preparing and submitting its MLR report to CMS. The Proposed Rule's review provisions give teeth to CMS' ability to determine the accuracy and validity of a Plan Sponsor's MLR self-reporting.

CMS is accepting comments on the proposed MLR rule for 60 days beginning on February 15. The final rule governing MA and Part D MLR requirements is set to take effect for the contract year beginning January 1, 2014.

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