Medicare Shared Savings Program: CMS Announces Proposed Changes Affecting All ACOs

On December 1, 2014, the Centers for Medicare & Medicaid Services ("CMS") issued a proposed rule that would implement changes to the Medicare Shared Savings Program ("MSSP"). We summarized the original rules, finalized on November 2, 2011, in a prior alert.

The changes proposed by CMS attempt to balance policymakers' desire to accelerate progress in health care reform with organizations' need to build the infrastructure necessary for them to succeed—and to do so without bearing downside risk. Among its most significant changes, the proposed rule would permit lower-performing Accountable Care Organizations ("ACOs") already participating in the MSSP to extend the period that they can participate without assuming any financial risk. At the same time, but on the other end of the spectrum, the proposed rule would offer higher-performing ACOs willing to assume more risk a larger share of savings. CMS also proposes several minor changes that would streamline the MSSP for all ACOs, including placing greater emphasis on primary care services when calculating beneficiary assignment, adjusting financial benchmarks to better reflect market variation, and reducing the administrative barriers associated with data sharing.

Comments on the proposed rule are due by February 6, 2015.

Retain Lower-Performing ACOs by Extending Risk-Free Period

ACOs currently have the option to enter the MSSP under a one-sided risk model ("Track 1"), which allows the ACO to participate in shared savings without any financial risk for a three-year period. To avoid penalty, however, ACOs in Track 1 are required to transition to a two-sided risk model ("Track 2") after the first three years, at which time they will share financial losses with CMS as well as savings.

Lower-performing ACOs have expressed concern that this three-year period does not allow adequate time to develop the infrastructure necessary to be successful. The prospect of downside risk has caused some organizations to rethink their continued participation in the MSSP, despite having already made significant investments to become an ACO. According to a survey conducted by the National Association of ACOs in October of this year, two-thirds of ACOs in the MSSP were somewhat or highly unlikely to continue to participate if they were required to accept penalties. Approximately 20% of the ACOs surveyed said that there was too much risk involved for the amount of reward offered under the MSSP if they were forced to accept penalties.

The proposed rule addresses these concerns by allowing ACOs to continue in the MSSP for one additional three-year period before they are required to assume financial risk for losses. ACOs that elect to do so would be limited to a lower rate for shared savings (a maximum of 40%). In order to deter consistently poor-performing ACOs from continuing in the MSSP, the proposed rule would require that an ACO wishing to enter into a second risk-free agreement (i) must have met quality performance standards in at least one of the first two years of participation, and (ii) must not have generated losses that exceed certain rates set by CMS.

These changes allow ACOs that are still ramping up the flexibility to improve cost-containment efforts and continue expanding their provider networks without being deterred by the prospect of financial risk. On the other hand, by decreasing the shared savings in Track 1, and therefore its financial attractiveness to ACOs, the proposed rule seeks to motivate ACOs to transition to the two-sided model.

Incentivize Highest-Performing ACOs to Assume More Risk in Exchange for More Reward

Of the over 330 ACOs currently participating in the MSSP, 98% have chosen Track 1, with only five ACOs opting for the risk-based Track 2. CMS believes that accepting financial responsibility for patient care is integral to the success of the MSSP, and therefore is seeking ways to induce participants voluntarily to assume additional risk.

To meet this goal, CMS is considering changes that would incentivize stronger ACOs to assume more risk in exchange for a greater share of the savings. The most prominent proposal is the creation of a third track ("Track 3") that would increase the sharing rate to a maximum of 75% and cap loss sharing at 15%. According to CMS, this option offers a balance of encouraging continued participation while pushing ACOs to accept more performance-based risk.

CMS also proposes other benefits to ACOs that opt for Track 3. Among these is a proposal to provide Track 3 ACOs with a definitive list of assigned beneficiaries at the beginning of the performance year (rather than providing an interim list, to be finalized at the end of the performance year), in order to enable the ACO to plan focused improvement efforts.

CMS is specifically seeking comment as to what other changes would incentivize organizations to take on greater risk.

Emphasize Primary Care When Assigning Beneficiaries

The proposed rule seeks to ensure that beneficiaries are assigned to the appropriate ACO. Currently, beneficiary assignment is determined by identifying providers who furnish a plurality of patients' primary care. Under the current rule, CMS uses a two-step calculation for attributing patients to an ACO. In Step 1, patients are assigned to an ACO based on where they received services from a primary care physician. If the beneficiary did not receive any services from a primary care physician, the beneficiary is assigned under Step 2 based on primary care delivered by specialists, nurse practitioners, physician assistants and clinical nurse specialists.

The proposed rule would expand the scope of primary care services considered in Step 1 by recognizing those services rendered by nurse practitioners, physician's assistants and clinical nurse specialists. CMS also proposes to eliminate from consideration certain specialties that are not closely associated with primary care. By moving nurse practitioners, physician's assistants and clinical nurse specialists to Step 1, and not "displacing" such providers' services with specialty services, this change would align with movements toward increased use of lower-cost primary care providers.

Adjust Financial Benchmarks to Account for Market Variations

Some ACOs have struggled to contain costs due to environmental factors specific to their markets. The current benchmarks used to measure ACO performance are based on national standards that do not reflect variations among different markets.

While CMS is not proposing any changes to the benchmarking methodology at this time, it is seeking comments on alternatives. The most prominent proposal is to shift from the use of national fee-for-service benchmarks to regional fee-for-service benchmarks. CMS is also considering changing the benchmarks to make them more independent of an ACO's past performance and more dependent on an ACO's success in being cost-effective relative to its local market.

Reduce Barriers to Data Sharing

Many ACOs have requested greater and easier access to information about their patients. The current rule imposes an administrative notice and opt-out opportunity requirement in order for ACOs to access data, which is essential for achieving a seamless continuum of care across an ACO's provider network. Under the current rule, an ACO must formally notify a beneficiary of his or her ability to opt out of data sharing before it can access claims data, which ACOs have observed is a process that can take months.

The proposed rule shifts the administrative burden of notification by allowing an ACO to meet its requirement by posting signs at the point of care that direct the patient to contact CMS directly if he or she wishes to opt out of data sharing. The change would streamline ACOs' access to claims data while preserving the beneficiary's ability to opt out.

Conclusion

In sum, the proposed rule includes several initiatives designed to strengthen the MSSP and encourage greater and continued ACO participation. The proposed rule assists developing ACOs by extending the period in which they can participate in the MSSP without penalties, incentivizes continued participation by higher-performing ACOs with the option of greater shared savings, and proposes operational streamlining.

If you have questions about the Proposed Rule or other questions related to ACOs, please contact the Ropes & Gray attorney who normally advises you.