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Client Alert

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CMS Releases Proposed ACO Regulations

The Centers for Medicare & Medicaid Services (CMS) recently released the much-anticipated proposed rule to guide the development of accountable care organizations (ACOs) under the Medicare Shared Savings Program.[1] The proposed rule, which was published in the Federal Register on April 7, 2011, addresses the eligibility requirements for ACO provider participation and certain regulatory requirements related to performance and measurement of ACO providers. Providers and other interested parties have until June 6, 2011, to submit comments. Please click here[2] to view the Federal Register notice.

Section 3022 of the Patient Protection and Affordable Care Act (PPACA) gave broad authority to the Secretary of Health and Human Services to establish a Medicare Shared Savings Program that allows for the increased coordination of care for individual Medicare beneficiaries across care settings. As part of this Shared Savings Program, ACOs were developed to promote healthcare quality and decrease healthcare costs. ACO quality measure improvements are focused on five key areas:

1. The patient or caregiver's experience of care;
2. Care coordination;
3. Patient safety;
4. Preventive health; and
5. At-risk population health and frail elderly health.

CMS's proposed rule identifies 65 quality measures across these five domains to measure ACO performance and determine eligibility for shared savings payments in the first year of implementation. CMS also notes that it intends to expand and revise the measures for the ACO program in future rule-making, by potentially adding measures for hospital-based care and for care provided in post-acute settings, such as home health and nursing facilities.

In general, provider and beneficiary participation in the ACO program will be voluntary. In the proposed rule, CMS outlines the operational definition for an ACO, the potential eligibility requirements for ACO providers under the

1 CMS and the Department of Health and Human Services, Office of Inspector General (OIG), also released a notice with comment period regarding certain waivers that will prevent ACOs from violating the Physician Self-Referral Law and anti-kickback statutes, among others. This notice is available at: http://www.gpo.gov/fdsys/pkg/FR-2011-04-07/pdf/2011-7884.pdf

2 http://www.agg.com/media/interior/publications/ACOproposedruleMarch2011.pdf

Shared Savings Program, benchmarks for payments and a methodology for measuring ACO performance, and two different payment models available for those organizations interested in becoming ACOs.

Under PPACA, the following provider and supplier types are eligible to participate in the Shared Savings Program:

- ACO professionals in group practice arrangements;
- Networks of individual practices of ACO professionals;
- Partnerships or joint ventures between hospitals and ACO professionals; and
- Hospitals employing ACO professionals.

Pursuant to discretionary authority provided to CMS in PPACA, the proposed rule expands ACO eligibility to incorporate other groups of enrolled providers and suppliers that could not otherwise participate in the program independently, such as home health agencies, long-term care providers and physical therapy group practices. As ACO providers, these groups would have incentives to collaborate and coordinate care for an individual patient to access shared savings in the form of additional Medicare payments.

The proposed rule outlines several regulatory requirements for ACO providers to follow in interacting with beneficiaries. CMS proposes that providers must give notice to beneficiaries about the provider's participation as an ACO and its eligibility for additional Medicare payments under the Shared Savings Program. The beneficiary may then opt to receive services from the provider or obtain treatment from a non-ACO provider. In addition, CMS clarifies that beneficiaries would not be limited to participation in any single ACO and, in fact, CMS would be able to review retrospectively each beneficiary's service history to assess whether a particular ACO should be credited with improving care and reducing costs.

CMS proposes two separate tracks for ACO participation. The first track, a "one-sided risk model," allows for shared savings in only the first two years of participation with the sharing of savings and losses in the third year. The second track, a "two-sided risk model," requires providers to share in savings and losses with CMS for all three years. The proposed rule also contemplates that ACO providers will have a three-year contractual commitment for participation, with data-sharing responsibilities during this timeframe.

As noted above, providers have until June 6, 2011, to review the proposed rule and submit comments. CMS notes that it is particularly interested in comments on the following issues:

- The provider and supplier types that should be included as potential ACO participants and the potential benefits or concerns related to including or excluding certain provider types;
- The administrative measures required to implement and monitor particular partnerships effectively;
- Any operational issues associated with the proposed rule; and
- Other ways for CMS, using its discretionary authority under PPACA, to allow the independent participation of providers and suppliers not specifically mentioned in PPACA.

The ACO model is expected to have a significant impact on healthcare services and reimbursement, and the proposed rule offers considerable insight into the likely model that CMS will eventually implement. Providers have an opportunity to act now by reviewing the proposed rule, considering how its provisions will impact them, and submitting comments that may help shape the final rule.