CMS Final Rule Aims to Strengthen Incentives for MSSP ACOs

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On June 6, 2016, the Centers for Medicare & Medicaid Services ("**CMS**") issued a new final rule for accountable care organizations ("**ACOs**") participating in the Medicare Shared Savings Program ("**MSSP**"). This final rule (i) revises the benchmarking methodology by phasing in regional factors, (ii) creates a new option for Track 1 ACOs to extend participation agreement in Track 1 for an additional year prior to transitioning to a performance-based risk track, and (iii) defines time frames and other criteria for reopening payment determinations of shared savings and losses. According to CMS, the purpose of these modifications is to "strengthen incentives" for MSSP ACOs.

Revisions to Benchmark Methodology

The final rule makes changes for resetting or rebasing the ACO's benchmark determination for a second or subsequent agreement period beginning on or after January 1, 2017, so that it is incrementally less dependent on the ACO's historical spending and more reflective of spending in the ACO's region. The former rebasing methodology used historical expenditures from past agreement periods to reset the ACO's benchmark and applied an adjustment for savings generated, which raised concerns that the ACO had to continually beat its own performance and limited the opportunity to produce savings. The changes in the final rule aim to evaluate the ACO's performance in relation to other providers in the same regional market, instead of against its own prior performance.

Some of the changes to the methodology for resetting an ACO's benchmark for a second or subsequent agreement period beginning on or after January 1, 2017, include:

- Replace the national trend factor with regional trend factors for establishing the ACO's rebased historical benchmark and remove the adjustment to explicitly account for savings generated under the ACO's prior agreement period.
- Make an adjustment when establishing the ACO's rebased historical benchmark to reflect a percentage of the difference between the regional fee-for-service ("FFS") expenditures in the ACO's regional service area and the ACO's historical expenditures. A phased approach will be used to transition to a higher weight in calculating the regional adjustment. For those ACOs determined to have spending higher than their region, a lower weight will apply in calculating the regional adjustment the first and second time that their benchmark is rebased under the revised rebasing methodology using the following approach:
    - For higher spending ACOs, the weight placed on the regional adjustment will be reduced to 25 percent (compared to 35 percent for other ACOs) in the first agreement period in which the regional adjustment is applied, and 50 percent (compared to 70 percent for other ACOs) in the second agreement period in which the adjustment is applied.
    - Ultimately a weight of 70 percent will be applied in calculating the regional adjustment for all ACOs beginning no later than the third agreement period in which the ACO's

benchmark is rebased using the revised methodology.
- Annually update the rebased benchmark to account for changes in regional FFS spending, replacing the current update, which is based solely on the absolute amount of projected growth in national FFS spending.

For ACOs that started in the program in 2012 and 2013 and that have renewed their participation for a second agreement period beginning in 2016, the revised methodology will apply for the first time in calculating the rebased historical benchmark for their third agreement period (beginning in 2019). For these ACOs' second agreement period (2016 – 2018), the benchmark rebasing methodology established with the June 2015 final rule will continue to apply, including equally weighting the ACO's historical benchmark years and applying an adjustment for savings generated under the ACO's first agreement period.

Extension of Participation Agreement in Track 1

Under the MSSP, ACOs enter a three-year agreement period with CMS under a one-sided (Track 1) or two-sided (Track 2 or Track 3) risk model. ACOs participating in Track 1 have the option to renew for a second, three-year agreement period under Track 1 or under a two-sided risk model. Now, an ACO participating in Track 1 that renews its participation agreement under a two-sided risk model may request that its participation in Track 1 be extended for one additional year (giving the ACO effectively a four-year agreement period under Track 1). At the end of this additional year, the ACO will transition to Track 2 or Track 3 for a three-year agreement period.

Policies for Reopening Payment Determinations

In the final rule, CMS defined time frames and criteria for reopening a determination of ACO shared savings payments or shared losses owed by the ACO to correct financial calculations. Re-openings are limited to not later than four years after the date of notification to the ACO of the initial determination of shared savings or losses for the performance year for good cause. CMS reserves the right to reopen a payment determination at any time in the case of fraud or similar fault.

According to a CMS press release, "Medicare is moving away from paying for each service a physician provides towards a system that rewards physicians for coordinating with each other." Earlier this year, the U.S. Department of Health and Human Services ("HHS") announced it met its goal of tying 30% of Medicare payments to alternative payment models that reward quality of care over quantity of services, such as ACOs, by 2016. HHS' new goal is to tie 50% of Medicare payments to alternative payment models by 2018. ACOs play an important role in this transition, and the recent changes indicate CMS' commitment to making these organizations sustainable.