LOCKE LORD® QUICK Study
Insurance Practice
April 4, 2017

CMS Reconsiders Its Position Prohibiting Quota Share Reinsurance For Medicare Advantage Organizations

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We previously reported on February 13, 2017 that the Centers for Medicare & Medicaid Services (CMS), on February 1, 2017, in connection with its 2018 Advance Notice (Notice), advised that quota share reinsurance arrangements are not a statutorily permitted form of reinsurance for Medicare Advantage Organizations (MAOs) with respect to Medicare Part C business (CMS advised that the limitations on reinsurance do not apply to Part D (Medicare prescription drug coverage) plans, including the Part D portion of a MA-PD plan).

On April 3, 2017, CMS announced that it has reconsidered its position on such prohibition. Specifically, CMS stated in its Announcement of Calendar Year (CY) 2018 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies and Final Call Letter and Request for Information (Final 2018 Call Letter), that it is not "finalizing the CY 2018 draft Call Letter position regarding quota share reinsurance," that "CMS has not thus far provided regulatory guidance interpreting or applying this provision to specific arrangements," and that "CMS may provide further clarifying guidance and/or potential future rulemaking to which MAOs would be held accountable at that time."

As we noted in our earlier Quick Study, CMS's position that MAOs could not enter into quota share reinsurance arrangements came as a surprise to many in the industry and would severely limit the ability of MAOs to manage their financial risk exposure.

CMS undoubtedly received many comments from industry representatives critical of CMS's new position prohibiting quota share reinsurance arrangements. On February 16, 2017, we submitted our own comment letter to CMS. In fact, CMS, in its Final 2018 Call Letter, confirmed as much by stating that "several organizations expressed concerns about CMS's interpretation of Section 1855(b). MA organizations were concerned they would not be able comply with a prohibition on quota share arrangements for contract year 2018 and about potential enforcement actions against those with existing arrangements. One commenter stated that Section 1855(b) does not specifically use the term "reinsurance" and that MA plans continue to be responsible to enrollees for full risk of the MA services when the organization has reinsurance arrangements. Organizations indicated that quota share reinsurance is a common market practice that reduces financial exposure to changes in health care costs, helps manage capital requirements, and allows organizations to grow enrollment responsibly. Comments indicated organizations that may benefit from using quota share reinsurance could be located in areas with fewer beneficiary choices and that preventing MA organizations from using this form of reinsurance may negatively impact competition and consumer choice, especially in small and mid-sized market areas. Several comments suggested CMS should address the permissibility of any and all reinsurance arrangements through formal rulemaking at the same time we establish the aggregate value in the first statutory exception and provide sufficient implementation time."

In addition, CMS stated that "[a]s the comments clarified for CMS that a quota share structure could be used in connection with the risks identified in section 1855(b)(1) through (4), CMS is not proceeding with the interpretation that quota share reinsurance itself is not permitted by the statute. CMS acknowledges that the details of an arrangement (whether reinsurance or otherwise)

for an MAO to share, transfer, or otherwise shift the risks identified in the exceptions listed in the statute are generally not limited by the statutory text. The statute permits MA organizations to share risk proportionally, so long as the risk (the type and amount) is in the exceptions [emphasis added]."

This is a refreshing development although CMS's position on quota share reinsurance will require continued monitoring and input from the industry as CMS further considers the permitted uses of quota share reinsurance, particularly in light of CMS's statement quoted above that "[t]he statute permits MA organizations to share risk proportionally, so long as the risk (the type and amount) is in the exceptions [emphasis added]." We presume that the reference to "exceptions" is to Section 1855(b)(1)-(4) [of the Social Security Act of 1935 as amended (the Act) (42 U.S.C. 139w-25(b))]. Given that the exceptions discussed in Section 1855(b)(1)-(4) do not address the traditional "types and amounts" of risk covered by quota share reinsurance, there is some ambiguity as to what CMS's future guidance may be on the permitted uses of quota share reinsurance arrangements by MAOs. However, as we noted in our comment letter to CMS, we are of the view that because quota share reinsurance does not extinguish or limit the MAO's obligation to assume "full financial risk" to provide health care benefits to its members, as required by Section 1855(b) of the Act, the four exceptions to such obligation are neither relevant nor applicable, and thus we do not believe that quota share reinsurance arrangements by MAOs should be limited as to the "type and amount" of risks covered by those exceptions. CMS advised that it may provide further clarifying guidance and/or potential future rulemaking with respect to the permitted uses of quota share reinsurance arrangements for MAOs, and to the extent any issues are identified by CMS, also advised CMS would work with MAOs to address any of their concerns.

Locke Lord LLP will continue to monitor developments with respect to this new guidance.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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