111 South Wacker Drive
Chicago, IL 60606
Telephone: 312-443-0700
Fax: 312-443-0336
www.lockelord.com

Jon Biasetti
Direct Telephone: 312-443-1866
Direct Fax: 312-896-6566
jbiasetti@lockelord.com

March 27, 2020

Submitted via the Federal Regulations Web Portal at http://www.regulations.gov and Federal Express

The Honorable Seema Verma, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-4190-P, Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

RE: CMS-4190-P

Dear Administrator Verma:

Many thanks for the opportunity to provide comments in response to the Notice of Proposed Rulemaking ("NPRM") from the Centers for Medicare & Medicaid Services ("CMS") on Medicare and Medicaid Programs; Contract Year 2021 and 2022 Policy and Technical Changes to the Medicare Advantage Program, Medicare Prescription Drug Benefit Program, Medicaid Program, Medicare Cost Plan Program, and Programs of All-Inclusive Care for the Elderly published on February 18, 2020.

Comments

This comment letter is limited to the proposed reinsurance rule at 42 CFR § 422.3 (the "Proposed Reinsurance Rule") described in the NPRM and specifically the Proposed Reinsurance Rule's regulation of the use of first dollar proportional reinsurance. At the outset, we wish to note that our assumption is that the use of the language "pro rata insurance coverage that would provide first dollar coverage" and "sharing [such] costs proportionally on a first dollar basis" by CMS in the NPRM and in the Proposed Reinsurance Rule refers to quota share reinsurance, where a percentage of all premiums and claims are shared with the reinsurer from the first dollar on up.

The Proposed Reinsurance Rule is a welcome development in light of the legal uncertainty MAOs have operated under during the past several years regarding the use of quota share reinsurance. However, we believe that, as currently written, there remains a considerable amount of uncertainty on how MAOs can comply with the Proposed Reinsurance Rule. Specifically, several MAOs and reinsurers have expressed significant doubts to us that MAOs can purchase reinsurance with terms that comply with the Proposed Reinsurance Rule.

Specifically, the Proposed Reinsurance Rule, as written, and based on comments by CMS in the NPRM, would require that the aggregate value of the insured risk under a quota share reinsurance arrangement must not exceed a value that is actuarially equivalent to the costs of providing basic benefits to an individual enrollee that exceeds an aggregate level that is greater than or equal to $10,000 during a contract year under an excess of loss reinsurance arrangement (the "Actuarially Equivalent Condition"). In addition, CMS would require that such quota share reinsurance coverage be priced at an actuarial value not to exceed the cost of purchasing excess of loss reinsurance for medical expenses exceeding $10,000 per member per year (the "Pricing Condition" and, together with the Actuarially Equivalent Condition, the "Quota Share Reinsurance Conditions").

As noted above, based on our discussions with several actuaries of MAOs and their reinsurers, there is general confusion regarding the meaning of the Actuarially Equivalent Condition and how to comply with it considering that quota share (proportional) and excess of loss (non-proportional) reinsurance are very different forms of reinsurance. Furthermore, with respect to the Pricing Condition, excess of loss reinsurance and quota share reinsurance are priced very differently in the reinsurance marketplace. Generally, pricing for excess of loss reinsurance is based on a percentage of premium which the reinsurer's actuaries believe is necessary to cover the anticipated loss to the reinsured layer under the specific reinsurance agreement. Pricing for quota share reinsurance, on the other hand, is the agreed upon quota share percentage of premiums being ceded to the reinsurer from the first dollar on up in exchange for the reinsurer sharing in all claims at the same quota share percentage, and includes an expense allowance payable to the MAO to cover the MAO's operational and administrative costs associated with the quota share of the Medicare Advantage business being reinsured. For these reasons, we are concerned that the Proposed Reinsurance Rule, as written, will not remove the legal uncertainty in the use of quota share reinsurance by MAOs and may actually deter MAOs from making use of it.

Recommendations

In order to be helpful and promote the many benefits of quota share reinsurance acknowledged by CMS in the NPRM, any regulation of the use of quota share reinsurance by MAOs must be clear and unambiguous and establish conditions that can actually be complied with in the reinsurance marketplace. Unfortunately, we, and the MAO and reinsurer representatives that we have spoken to, do not believe that MAOs can ever know with any certainty if they fully comply with the Quota Share Reinsurance Conditions as written. The ambiguity in the Quota Share Reinsurance Conditions presents a CMS bid filing dilemma for the MAOs that use quota share reinsurance. The standard language in the bid certification module states that "the entire bid(s) identified in this certification are in compliance with the applicable laws, rules, CY 20[XX] bid instructions, and current CMS guidance." Without further clarity, we have been told that certifying actuaries of MAOs will, out of prudence, likely qualify their bid certifications by explicitly excluding compliance with the Quota Share Reinsurance Conditions.

However, we recommend the following approach for CMS' consideration. Based on CMS's statement in the NPRM "of the need to ensure that MA organizations are not transferring all the risk of providing services to enrollees to a third party that is not under contract with CMS", we assume that CMS is concerned with "fronting", which is a concept that is familiar to the insurance and reinsurance industry. Fronting is commonly understood as a quota share reinsurance arrangement whereby a ceding company (i.e., an MAO in this case) cedes one hundred percent (100%) of the risks of its insurance business (i.e., the MAO's Medicare Part C business) to a reinsurer that is not licensed, accredited or otherwise authorized in the ceding company's state of domicile (i.e., a reinsurer that is not under contract with CMS in this case). A handful of states have published authority prohibiting fronting arrangements, which arguably allow an unauthorized reinsurer to transact business in their state without obtaining a certificate of authority. However, such states do not prohibit all quota share reinsurance transactions but instead may require that the ceding company retain a minimum percentage of the risks being reinsured with an unauthorized reinsurer (e.g., at least a ten percent (10%) quota share retention). See Cal. Ins. Reg. 2302.15(b) ("Except for cessions to affiliates, the failure of a domestic insurer to retain at least 10% of direct premium written per line of business may be grounds for a finding that the insurer's reinsurance arrangements are materially deficient…The Commissioner may consent to a lesser percentage of retained risk upon demonstrated business necessity…"). CMS appears to share a similar concern based on its aforementioned statement.

In light of our concerns regarding the ambiguity of the Proposed Reinsurance Rule, in lieu of the proposed Quota Share Reinsurance Conditions, CMS could instead require that, except for cessions to affiliates of the MAO, a minimum quota share percentage of risk be retained by the MAO as a condition for the permissible use by MAOs of first dollar proportional reinsurance. Like the approach taken by California in its fronting restriction referenced above, reinsurance within an MAO's affiliated group should not be subject to the Quota Share Reinsurance Conditions because the risk is fully retained within the MAO enterprise. This would align with CMS's stated intention to allow reinsurance on risks that exceed a specified threshold.

Another benefit of taking this approach is that ceding risk in excess of a quota share retention (e.g., ten percent (10%)) to be held by the ceding company is customarily done in quota share reinsurance to ensure that the ceding company, through its retention of risk, continues to focus on appropriate risk management and compliance with applicable laws, the terms of its Medicare Advantage products and the proper administration thereof. It also removes all ambiguity in the Proposed Reinsurance Rule as the quota share percentage being ceded under a quota share reinsurance contract is readily ascertained in the contract. This will allow MAOs, and their representatives, and CMS to quickly confirm compliance with the Proposed Reinsurance Rule. It is the certainty of being able to comply with the Proposed Reinsurance Rule that will allow MAOs to benefit from the flexibility that CMS proposes to afford them under the rule.

We respectfully submit the following proposed language for CMS's consideration:

"§422.3 MA Organizations' use of reinsurance.

> (a) An MA organization may obtain insurance, reinsurance or make other arrangements for the cost of providing basic benefits to an individual enrollee:
>
> (1) through stop loss insurance or excess of loss reinsurance, the aggregate value of which exceeds an aggregate level that is greater than or equal to $10,000 during a contract year; or
>
> (2) through quota share reinsurance on a first dollar proportional basis, where the MA organization and/or an affiliate of the MA organization retains a minimum ten percent (10%) quota share percentage of the risks being transferred.
>
> (b) An MA organization may enter into such a stop loss insurance, excess of loss reinsurance or quota share reinsurance arrangement with an affiliate of the MA organization without being subject to the dollar and percentage limitations stated in §422.3(a)."

Request For Confirmation of Related Issues

In addition to the concerns described above, we respectfully request that CMS, in the preamble to the final Proposed Reinsurance Rule within the Federal Register, confirm the following:

(i) We are aware that CMS has been allowing MAOs to enter into quota share reinsurance transactions with "reinsurance entities" (i.e., captive or other insurance companies and risk bearing entities) that are subsidiaries or affiliates of physicians or other health care professionals and health care institutions under the authority of Section 1855(b)(4) of the Social Security Act (the "Act"). This allows such providers to assume all or part of the financial risk on a prospective basis for the provision of basic health services, with the provider's contract for health care services with the MAO being contingent upon the execution of a reinsurance contract with the provider's affiliated reinsurance entity. Please confirm that CMS allows, and will continue to allow, quota share reinsurance arrangements between MAOs and provider-affiliated captives, insurance companies and other risk bearing entities as described above. Please also confirm whether the foregoing provider affiliated entity must be a wholly-owned subsidiary of the provider or whether a lower ownership threshold would be allowed (e.g., a twenty-five to fifty percent (25% - 50%) ownership);

(ii) Once finalized, please confirm whether the Proposed Reinsurance Rule will only apply to quota share reinsurance arrangements under Section 1855(b)(1) of the Act or also apply to quota share reinsurance arrangements under Section 1855(b)(2), 1855(b)(3), and/or 1855(b)(4), or will quota share reinsurance arrangements only be allowed under Section 1855(b)(1); and

(iii) CMS advised in the NPRM that the Proposed Reinsurance Rule and its limits would only apply to reinsurance of costs of providing basic benefits and not supplemental benefits offered by MAOs. Because Section 1855(b) of the Act only requires MAOs to assume full financial risk

on a prospective basis for the provision of basic benefits, the exceptions listed in Section 1855(b)(1)-(4) (and the limitations set forth therein) should not apply. Please confirm that MAOs can also reinsure supplemental benefits on an excess of loss and quota share reinsurance basis. By way of background, we have spoken to several MAOs and they are concerned that it would be a significant operational challenge to separate the revenues and expenses associated with supplemental benefits from the revenues and expenses associated with basic benefits offered under their Medicare Advantage products if CMS were to prohibit MAOs from reinsuring supplemental benefits on a quota share reinsurance basis. The MAOs we spoke to further advised that allocating claims expenses between basic and supplemental benefits would be an even bigger challenge. This is relevant because in quota share reinsurance, a quota share percentage of the underlying Medicare Advantage product revenue is ceded to the reinsurer in exchange for the reinsurer assuming the same quota share percentage of claims expenses.

Many thanks for giving us this opportunity to provide our comments. Should you require any further information, please do not hesitate to contact us.

Very truly yours,

LOCKE LORD LLP

Jon Biasetti