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CMS Finalizes Rules Allowing Medicare Advantage Plans To Expand and Target Supplemental Benefits

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Health Care

Under Sections 1852(d) and 1854(c) of the Social Security Act (SSA), a Medicare Advantage (MA) plan must offer uniform benefits, premiums, and cost-sharing within each "segment" in the MA plan's service area. *See* 42 C.F.R. § 422.100(d). "Segments" are county-level portions of a plan's overall service area.

Section 1852(a)(3) of the SSA allows MA plans to offer "supplemental health care benefits," which CMS has defined as an item or service (1) not covered by original Medicare, (2) that is "primarily health related," (3) for which the MA plan must incur a direct medical cost. *See* CMS, 2019 MA Call Letter, at 207. In addition, supplemental health care benefits, like all MA benefits, are generally subject to the uniformity requirement.

Last month, the Centers for Medicare & Medicaid Services (CMS) released its 2019 MA Call Letter, in which it, among other changes, reinterpreted the term "primarily health related" to expand the definition of supplemental benefits that MA plans have the discretion to provide. On the same day, CMS finalized rules that will allow Medicare Advantage Organizations (MAOs) to target supplemental benefits, without running afoul of the uniformity requirement. The final rules also implement statutory changes giving MAOs more flexibility to target supplemental benefits to the chronically ill. 83 Fed. Reg. 16,440, 16,482 (April 16, 2018).[1]

Expanding the Definition of Supplemental Benefits

In the past, CMS interpreted an item or service as "primarily health related", and thus potentially allowable as a supplemental benefit, if the primary purpose of the item or service was to prevent, cure, or diminish an illness or injury. CMS acknowledged in the 2019 Call Letter that research has demonstrated that a broader range of items and services can diminish the impact of injuries or health conditions and reduce avoidable health care utilization. CMS, 2019 MA Call Letter at 207. "For example, fall prevention devices can be an effective means to assist enrollees at high risk of fall and protect against the likelihood of additional injury resulting from a fall." *Id*.

[1] The final rule and 2019 Call Letter adopted a number of other policies and changes applicable to Medicare Advantage and Part D plans. This advisory addresses only those relating to uniformity and supplemental benefits.

Under CMS's new interpretation, a service or item will be considered "primarily health related" if it can diagnose, prevent, or treat an illness or injury; compensate for physical impairments; act to ameliorate the functional/psychological impact of injuries or health conditions; *or* reduce avoidable emergency and healthcare utilization. *Id*. at 208. MAOs may only propose supplemental health benefits that meet this standard and do not have a primary purpose that is outside of this standard. *Id*. CMS will determine the primary purpose of an item or service by national typical usages of most people using the item or service and by community patterns of care. *Id*.

Targeting Supplemental Benefits Based on Medical Criteria

Previously, CMS interpreted the uniformity provision to require that MA plans offer all enrollees within the same segment access to the same benefits at the same level of cost sharing, regardless of medical condition, status, or diagnosis. *See* 83 Fed. Reg. at 16,480.

Under the final rules, MA plans will be permitted to vary supplemental benefits, premiums, and cost sharing within a segment, as long as the variation is based on medical criteria. *Id.* at 16,485. For example, MAOs may reduce cost sharing for certain covered benefits, offer specific tailored supplemental benefits, and offer lower deductibles for enrollees within a segment that meet specific medical criteria, provided that similarly situated enrollees (that is, all enrollees who meet the medical criteria identified by the MA plan for the benefits) are treated the same. *See id.* at 16,480. The final rules do not permit MA plans to vary benefits covered by original Medicare within a segment.

CMS determined that targeting access to supplemental services and cost sharing is consistent with the statutory uniformity requirement because targeted supplemental benefits and cost sharing reductions must be offered uniformly to all enrollees with a specified health status or disease state. *Id.* "By tying specific supplemental benefits to specific medical conditions, MA plans would be building upon the concept of medical necessity and developing targeted benefits designed to treat the illnesses of enrollees who meet specific medical criteria." *Id.* "[T]reating similarly situated enrollees equally preserves the uniformity of the benefits package." *Id.*

In addition to being offered "uniformly", supplemental benefits must be "medically appropriate" and there must be some nexus between the health status or disease state of the enrollee and the specific benefit(s) designed for enrollees meeting that health status or disease state. *See* 83. Fed. Reg. at 16,480, 16,483. CMS explains that a specific health status or disease state—or meeting a specific group of medical criteria—is a means of "grouping" similarly situated enrollees for equal access to and treatment for benefits coverage. *Id*. at 16,481. For example, the new rules will allow an MA plan to offer an enrollee with diabetes any or all of the following: reduced cost sharing for endocrinologist visits; more frequent foot exams as a tailored, supplemental benefit; and a lower deductible. *Id*. at 16,480.

MA plans must use medical criteria that are objective and measureable in offering supplemental benefits to enrollees. *Id.* at 16,483. MA plans must have objective criteria in written policies that are clearly and adequately communicated to enrollees to ensure that these benefits are provided uniformly among similarly situated individuals. *Id*. at 16,481. A provider must diagnose the enrollee, or certify or affirm an enrollee's existing diagnosis to ensure equal application of the criteria. *Id*. And a licensed health care provider must recommend the supplemental benefits to beneficiaries. *Id.* at 16,481, 16,483.

Supplemental Benefits for the Chronically Ill

After the publication of the proposed rule loosening the uniformity requirements, 82 Fed. Reg. 51,052 (Nov. 2, 2017), Congress passed the Bipartisan Budget Act of 2018, Pub. L. No. 115–123 ("Bipartisan Budget Act" or "the Act"). Section 50322 of the Act expands supplemental benefits available under Section 1852(a)(3) for the "chronically ill" to include benefits that "have a reasonable expectation of improving or maintaining the health or overall function of the chronically ill enrollee and may *not* be limited to being *primarily health related benefits*." (emphasis added). These benefits will be "qualitatively different" than the supplemental health care benefits that MA plans may currently offer and may continue to offer to enrollees who are not chronically ill. 83 Fed. Reg. at 16,481. The Act identifies the chronically ill as individuals with (1) one or more morbidities that is life threatening and limits overall function, (2) has a high risk of hospitalization and adverse outcomes, and (3) requires intensive care coordination. *Id.*

Section 50322 of the Act also authorizes the Secretary to waive the uniformity requirement as applied to supplemental benefits provided to chronically ill enrollees, effective in plan year 2020. *Id.* This waiver allows the Secretary to permit MAOs to account for the fact that the needs of one chronically ill enrollee may be very different from those of another with a similar health status. *Id.* at 16,482.

To implement the statutory provisions in Section 50322, the final rules divide supplemental benefits into three categories: ''standard'' supplemental benefits offered to all enrollees; ''targeted'' supplemental benefits offered to qualifying enrollees by health status or disease state; and ''chronic'' supplemental benefits offered to the chronically ill. *Id*. at 16,482. Standard and targeted supplemental benefits will be allowable in 2019, subject to the regulatory changes described in the previous section. *Id.*

Effective January 1, 2020, MA plans will be able to offer chronic supplemental benefits pursuant to the changes in the Bipartisan Budget Act (i.e., not limited to the primarily health related standard), and MA plans will be eligible for a waiver of the uniformity requirements for their chronic supplemental benefits. 83 Fed. Reg. at 16,482-83. As result, starting in plan year 2020, health plans may offer certain benefits to address issues beyond a specific medical condition, such as social supports that meet individualized needs. *Id*. at 16,483. However, MA plans may only offer these benefits to chronically ill enrollees, and the provision of the benefits may not be based on conditions unrelated to medical conditions, such as living situation and income. *Id*.

Non-Discrimination Requirements

MA plans offering targeted or chronic supplemental benefits must still abide by non-discrimination requirements, which prohibit an MA plan from denying, limiting, or conditioning the coverage or provision of a service or benefit based on health-status related factors. 83 Fed. Reg. at 16,481 (citing SSA § 1852(b)(1)(A); 42 C.F.R. §§ 422.100(f)(2), 422.110(a)). "CMS will be concerned about potential discrimination if an MA plan is targeting cost sharing reductions and additional supplemental benefits for a large number of disease conditions, while excluding other, potentially higher-cost conditions," and it "will review benefit designs to make sure that the overall impact is non-discriminatory and that higher acuity, higher cost enrollees are not being excluded in favor of healthier populations." 83 Fed. Reg. at 16,481.

Further Guidance

In the final rulemaking, CMS states that it will provide additional guidance on this policy before June 4, 2018, when contract year 2019 bids are due. 83. Fed. Reg. at 16,482.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Health Care practice:

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