Locke Lord LLP
Attorneys & Counselors

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

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VIA ELECTRONIC MAIL and FEDERAL EXPRESS
cynthia.tudor@cms.hhs.gov

Cynthia G. Tudor, Ph.D.
Acting Director
Center for Medicare
7500 Security Boulevard
Baltimore, MD 21244

RE: Advance Notice of Methodological Changes for Calendar Year (CY) 2018 for Medicare Advantage (MA) Capitation Rates, Part C and Part D Payment Policies and 2018 Call Letter (the "Notice")

Dear Director Tudor:

I am writing in reaction to the Notice published on February 1, 2017 by your office. My firm represents a significant number of Medicare Advantage Organizations ("MAOs") in connection with their regulatory and transactional matters, including reinsurance. Several of our clients asked me to write you to share their concerns about the Notice.

We were very surprised to read in the Notice that with respect to Medicare Part C business, the Centers for Medicare & Medicaid Services ("CMS") is of the view that MAOs are not permitted to cede risk on a quota share reinsurance basis. We understand that CMS came to its conclusion because quota share reinsurance is not expressly identified in any of the four categories of permissible exceptions to an MAO assuming full financial risk described in Section 1855(b) (42 U.S.C. 1395w-25(b)) of the Social Security Act of 1935, as amended (the "Act"). We believe this conclusion will have undesirable public policy ramifications and, moreover, is not supported by the language of the Act, as discussed below.

From a public policy perspective, denying MAOs the ability to engage in quota share reinsurance with respect to Medicare Part C business will significantly restrict the ability of MAOs to manage their financial risk exposure, grow their Medicare Advantage business and operations, and compete with the larger MAOs that may be able to rely less on quota share

reinsurance for purposes of managing their financial risk. The end result of such a denial may very well be fewer choices for consumers in the Medicare Advantage marketplace.

Reinsurance (including quota share reinsurance) is widely used by MAOs and is subject to comprehensive state insurance regulation and solvency oversight.[1] Reinsurance does not exculpate the MAO from its obligation to assume full financial risk, and, therefore, does not extinguish or limit the liability of the MAO to satisfy its contractual obligations to its policyholders or members, as applicable (collectively, hereafter, "members"). In fact, quota share reinsurance is "invisible" to the MAO's members as the reinsurer has no contractual privity with the members.

As required by Section 1855(b) of the Act, an MAO, under a quota share reinsurance agreement, remains at "full financial risk on a prospective basis for the provision of the health care services for which benefits are required to be provided," even where the reinsurance may be uncollectible, whether as a result of a dispute between the parties to the reinsurance or insolvency of a reinsurer.[2] Furthermore, quota share reinsurance does not effect a novation of the MAO's Medicare Part C business or of the MAO's contract with CMS. It is simply a financial tool to manage an MAO's risk exposure and does not diminish or impair CMS' ability to regulate the activities of the MAO or the applicable state insurance regulator's ability to regulate the licensure or financial solvency of the MAO.

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, it is our view that the four exceptions to such obligation are neither relevant nor applicable. So long as the reinsurance entered into by an MAO is a contract of indemnity reinsurance, such as quota share reinsurance, rather than a contract of assumption reinsurance which would effect a novation and release of the MAO's obligations to its members, the MAO and the quota share reinsurance is in compliance with Section 1855(b) of the Act.

Even assuming that CMS does not agree with our interpretation of Section 1855(b) above, we question whether the four exceptions to Section 1855(b) of the Act were intended to limit the type of reinsurance that an MAO may engage in. Nowhere in that sub-section does the Act expressly refer to reinsurance, nor did we find any legislative history with respect to that particular sub-section that refers to reinsurance (we note that the Act, in other sections, does expressly refer to "reinsurance"). The first and third permitted exceptions for risk shifting in Section 1855(b) appear to be of an excess of loss or stop loss nature, which can be written as reinsurance but are also viewed in certain states as direct insurance, even when issued to insurers. The second permitted exception appears to permit MAOs that are provider-sponsored organizations to obtain insurance coverage for services that the providers themselves cannot

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[1]We cite, as examples of the comprehensive state regulation of reinsurance including quota share reinsurance, the following NAIC model laws and regulations that have been adopted, or substantially adopted, in all states: NAIC Credit For Reinsurance Model Law (Model 785); NAIC Credit For Reinsurance Model Regulation (Model 786); and NAIC Life And Health Reinsurance Agreements Model Regulation (Model 791).

[2] In order to protect the solvency of insurers, state insurance laws and regulations are designed to ensure that the insurer reinsures its risks with a statutorily authorized reinsurer, including a reinsurer that fully collateralizes its reinsurance obligations to the insurer, and that the reinsurance agreements satisfy certain minimum protective requirements.

provide in emergency or out-of-service area circumstances or permit MAOs to obtain reinsurance for a similar risk, although, if the latter, such reinsurance is not limited to excess of loss or stop loss reinsurance and thus could include quota share reinsurance. The fourth permitted exception for risk shifting is not reinsurance and, in some states, may not even be insurance, but direct contractual risk shifting between MAOs and providers through, for example, capitation, withhold or pooling arrangements.

As such, it is unclear, at best, that Congress intended to limit the ability of MAOs to reinsure their risks only in accordance with the four exceptions to Section 1855(b) of the Act, when such exceptions do not exclusively or expressly pertain to reinsurance.

Based on the foregoing, we request that CMS reconsider its determination prohibiting MAOs from ceding risk on a quota share reinsurance basis. We would be happy to provide any other information you may find helpful as you consider our comments to the Notice.

Respectfully,

LOCKE LORD LLP

Jon Biasetti
Partner