Wylie Butler
(202) 318-0661
wbutler@capstonedc.com

CMS Finalization of Medicaid 80/20 Rule to Include Provider Friendly Changes, Deescalating Threat to Addus, Potential for Lawsuits Lingers

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EXECUTIVE SUMMARY

- **Capstone believes the final version of the Centers for Medicare & Medicaid Services (CMS) proposed the Ensuring Access to Medicaid Services Rule, which would establish a national threshold for pass-through of reimbursement for Medicaid direct care workers, will likely be more provider-friendly than the initial proposed rule released in April. A more relaxed rule would deescalate pressure on Addus HomeCare Corp. (ADUS).**

- **Potential changes to the rule, also known as the 80/20 Rule, that would benefit providers compared to the proposed rule include 1) extending the timeline for implementation from four to at least five years; 2) lowering the pass-through requirement from 80% to 75%; and 3) allowing a broader definition of compensation to include costs such as travel (ranked by relative likelihood). Intense opposition in comments on the proposed rule signals the possibility of legal challenges, which would further delay the implementation timeline.**

- **Since the rule's release, Addus shares have slumped, underperforming the S&P 500 by 28%. However, we believe provider-friendly changes in the rule would align federal requirements more closely with those in Illinois, Addus' top state by revenue. Capstone continues to believe key states for Addus will continue to support personal care rates, and CMS's implementation of this rule could strengthen lobbying power for personal care providers.**

- **CMS solicited comments on whether the proposed rule's requirement should apply to residential habilitation services, such as those provided by Sevita Health. Capstone believes such providers will likely be excluded from the final rule.**

- **After publication on May 3, 2023, CMS opened a two-month comment period for the rule. CMS typically takes 3-4 months between a proposed and final rule to accept and review comments, but this rule could take longer due to its novel proposals. The rule has not yet been submitted to the Office of Management and Budget (OMB) for review, suggesting that the final rule is at least a month away from release – likely in mid-August or later. Capstone will continue to monitor the forthcoming final rule, the potential for litigation, and any rule changes' subsequent impact on Addus.**

CMS to Finalize First Margin Capping Rule for Providers, States Remain Supportive of Program

If finalized, this would be the first rule of its kind since the 2016 medical loss ratio (MLR) requirement for Medicaid Managed Care Organizations (MCOs), and the first to target providers. In its 2016 rule, CMS argued the MLR standards for Medicaid MCOs were to promote alignment with standards in other insurer markets, including the commercial market as required under the Affordable Care Act (ACA) and in Medicare Advantage (another CMS rulemaking requirement). In this rule, CMS points to requirements from the Social Security Act and the ACA that mandates

states have a sufficient direct care workforce to meet demands for care, suggesting the rule will push states to raise rates for providers.

Capstone continues to believe states will remain supportive of the personal care program with Medicaid home and community-based services (HCBS), and this rule will strengthen provider lobbying efforts at the state level (see "Healthcare Weekly: Addus to Benefit from Favorable Rate Environment in States for 1-2 Years; Wind Down of PHE Funding Will Present Headwinds," April 1, 2023). We believe justification for the rule and CMS's authority to cap margins for providers will invite attention from provider advocacy organizations and any legal challenges could further slow or halt the implementation of the rule. While legal challenges were not explicitly noted in comments, Capstone will continue to follow provider pushback and the potential for litigation.

Providers to Notch Wins in Pass-Through Threshold, Compensation Definition, and Timeline

Pass-Through Threshold

Providers and their advocacy groups were pitted against labor unions such as the Service Employees International Union (SEIU) in the comment period for CMS's payment pass-through requirement. Provider responses ranged from requesting complete withdrawal of the rule to lowering the threshold (CMS noted it would consider 75% or lower) or proposing alternative solutions. The National Association for Home Care & Hospice (NAHC), which recently filed a lawsuit against the US Department of Health and Human Services (HHS) for the 2024 home health proposed rule, focused particularly on the lack of statutory authority for CMS to promulgate such a rule, suggesting a second lawsuit could follow the final rule.

Labor unions have pushed for technical clarification on the pass-through requirement application (per worker v. aggregate by provider) and the SEIU Healthcare Minnesota & Iowa noted that Minnesota historically has struggled with its own requirement due to the number of provider agencies, creating a market with "nonexistent" enforcement. States would be responsible for both auditing providers within their state and reporting compliance to CMS, though the penalty for noncompliance is unclear in the rule.

Capstone believes CMS's openness to a lower pass-through rate and submitted comments will guide the agency below its initial 80% threshold to no higher than 75%. The National Association of Medicaid Directors (NAMD), which represents state Medicaid agencies in federal policymaking, pushed back against the proposal noting the challenges small and rural providers would face relative to scaled providers. Arguments from states themselves citing the rule's potential to drive health inequity should prove particularly potent for the Biden administration.

Defining Compensation

CMS proposed a strict definition of compensation in the proposed rule: salary and wages, limited benefits (health, sick leave, and tuition reimbursement), and the employer's share of payroll taxes. While Minnesota's statute provided less clarity on types of benefits included in its 72.5% requirement, Illinois listed several additional line items for its 77% threshold that commenters request CMS consider:

- Travel time and travel reimbursement;

- Holiday, personal leave, and worker's compensation; and
- Retirement coverage, uniforms, and unemployment insurance.

Capstone believes if CMS pursues a 75% or higher threshold, it will yield on including several of these line items in its final compensation definition, most notably travel time and reimbursement, which would be a key factor for rural providers. Training costs remain a significant burden for the industry due to high turnover, and the NAMD has suggested a standard training cost per full-time equivalent be included in the compensation definition. CMS is likely unwilling to yield on the training cost inclusion but may consider other flexibilities for small or rural providers.

Timeline

CMS proposed that pass-through requirements to take effect four years following the final rule's effective date. Capstone and CMS expect that states and providers will need significant time to prepare data collection and reporting systems to comply with these requirements. State Medicaid departments are struggling with redetermination, a process that will continue through H1 2024. Noting current department workforce strains, NAMD, and other commenters pushed for a longer timeline of six years or more. Capstone believes CMS will yield to at least a five-year timeline that the agency opened a door to in the rule, which could provide a wide enough window for any legal challenges to be resolved.

Pass-Through Regulations Limited to Personal Care Providers, Excluding I/DD Industry

Capstone continues to believe CMS will limit the final rule's pass-through requirement to agency-based personal care services such as Addus, excluding community-based habilitation services for the intellectual/developmental disabilities (I/DD) community provided by Sevita Health. As the agency notes in the rule, reimbursement for this industry is significantly more complicated and involves multiple staff members and beneficiaries per community group home and residential costs. Due to a lack of sense for direct workforce costs in this program, we believe CMS is unlikely to pursue folding the I/DD industry into this rule.

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PFS and OPPS Quick Take: Congressional Relief for Physicians Remains Unlikely Despite New Proposed Cuts, Outpatient Hospital Rates Stable, July 14, 2023

Healthcare Heat Map: Investors Disappointed by Home Health Proposed Rule, Redetermination Data Continues, Air Ambulances Remain Top of Mind, July 12, 2023

Medicaid Redetermination Data Tracker: Arkansas Disenrollment of 99% of Pandemic Medicaid Growth Notably Aggressive, as 13 States Release Data, July 11, 2023

Healthcare Weekly Roundup: CA and GA Make Coverage Changes, Cassidy Calls for 340B Reform, ASTRO Compromises with CMS as NAHC Sues, July 8, 2023