ADJUSTING GLOBAL PAYMENTS FOR SOCIAL DETERMINANTS OF HEALTH

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BENEFITS

Adjusting global payments for social determinants of health (SDOH) may:

- Reduce provider risk, facilitating adoption
- Prevent SDOH-based "cherry picking"/"lemon dropping"
  - *Cf.* Incomplete history of risk adjustment for mental health/substance use disorders.
- Encourage "lemon picking," e.g., housing assistance programs?
  - *Cf.* Dan Diamond, *How the Cleveland Clinic grows healthier while its neighbors stay sick*, POLITICO (July 17, 2017).

EXAMPLE

Arlene S. Ash, *et al.*, *Social Determinants of Health in Managed Care Payment Formulas*, 2017 JAMA Intern. Med. 1424 (Oct. 2017).

- Massachusetts' first-of-kind effort to incorporate SDOH into risk adjustment, for MassHealth (Medicaid) MCO payments.
- Beginning 2016, "modest[]" improvement in overall explanatory power; "dramatic[]" improvement in explanatory power for "several categories of vulnerable members."
- Variables include: "economic distress" of census block, substance use disorder, mental illness, disability, housing.
  - "Economic distress" based on FPL, unemployment rate, car ownership, education.

Legal challenge: Authority?

- "Woodwork" and legal authority for global payment. Increased access may = increased cost.
  - CMMI model TESTS need not be budget neutral, but EXPANSIONS must be "expected to—[]reduce spending[,]" including certification by CMS Actuary. 42 U.S.C. § 1315a(c).

Legal challenge: Fraud, waste, and abuse laws

- Anti-kickback statute
- Stark Act
- Civil Monetary Penalties

PennState Dickinson Law
PRACTICE GREATNESS

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Timothy Stoltzfus Jost & Ezekial J. Emanuel, *Legal Reforms Necessary to Promote Delivery System Innovation*, 2008 JAMA 2561, 2562 (2008).

Table. Laws Inhibiting Delivery System Innovation and Proposed Reforms

	Governmental Level							
	State			Federal				
Law or Regulation	Corporate Practice of Medicine	Scope of Practice	Certificate of Need	Antitrust	Tax Exempt Organization Law	Incentives to Limit Services Prohibition	Medicare "Silo" Payment Policy	Antikickback Laws—Stark II
Intended purpose	Protects physicians from lay dominance	Limits professionals to practice within their competence	Blocks "unneeded" facilities	Prohibits combinations to limit competition	Prohibits inappropriate payments from charitable organizations	Prohibits payments to limit services to beneficiaries	Historical reasons	Prohibits payment for referrals
Problem for delivery system innovation	Blocks corporate organization of health care	Keeps some professionals from fully using skills and training	Blocks innovative new facilities	Limits nonfinancial integration	Limits coordination between exempt organizations and professionals	Limits "gain sharing"	Blocks system coordination	Limits attempts to coordinate activities of professionals and health care facilities
Proposed reform	Repeal	Define in functional rather than occupational terms	Repeal or redefine	CIDS to permit exceptions and to develop evidence to change law				CIDS and eliminate compensation prohibition in Stark II

Abbreviation: CIDS, Commission for Innovation in Delivery Systems.

Legal challenge: Fraud, waste, and abuse laws

- CMS granted waivers to facilitate compliance for APMs. *See, e.g.*, *Medicare Program; Final Waivers in Connection With the Shared Savings Program*, 80 Fed. Reg. 66726 (Oct. 29, 2015).
- Legislative concern that waivers are incomplete. *See e.g.* "Why Stark, Why Now? Suggestions to Improve the Stark Law to Encourage Innovative Payment Models," Senate Finance Committee Majority Staff Report (June 2016).

Legal Challenge: Fragmentation/Coordination

- Have an idea? Just check: HHS OIG, CMS, CMMI, DOJ Antitrust, DOJ Civil & Criminal, FTC, IRS, State law, state common law.
  - Welcome to healthcare!

- Jost & Emanuel (2008): Statutory commission with power to approve models, preempt state law?
  - Interim alternative: Payment reform czar to coordinate Executive Branch agencies? *Cf.* Executive Order 13410 (Aug. 22, 2006).

- CMMI RFI—Comments due November 20, 2017.

THANK YOU

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