

CLIENT ALERT: July 12, 2010

**Medicare Shared Savings Program for Accountable Care Organizations (“ACOs”):
CMS Questions And Answers; Special Open Forum**

Recent CMS Communications on ACOs

The Centers for Medicare & Medicaid Services (“CMS”) recently issued preliminary questions and answers (“Q&A”) clarifying the requirements for becoming an ACO for purposes of participating in the Medicare Shared Savings program (“Shared Savings Program”) under Section 3022 of the Patient Protection and Affordable Care Act (“PPACA”).

<https://www.cms.gov/OfficeofLegislation/Downloads/AccountableCareOrganization.pdf>.

ACOs are defined as organizations comprised of providers responsible for both the cost and care of a defined patient population and are the newest model of health care payment and delivery systems.

CMS also held a Special Open Door Forum on June 24, 2010 (“Forum”) to obtain stakeholder input on ACOs. Krokidas & Bluestein (the “Firm”) participated in the Forum, during which numerous comments and questions were posed by a large, diverse group of stakeholders. The large number of fundamental issues raised demonstrates that CMS has considerably more work to do in order to implement this program. However, there is still much providers can do to prepare themselves to form an ACO to participate in the Shared Savings Program, and to prepare themselves for other similar federal and state initiatives in the future.

1. ACO Formation

Providers should consider joining together to become an ACO by **January 1, 2012** to participate in the Shared Savings Program. In order to do so, a provider will need to demonstrate that it has the clinical, management, financial, contractual, primary care, and quality competence to be able to operate as/participate in an ACO. Toward that end, hospitals should strengthen their alliances and consider consolidating with primary care providers in their area; and community health and primary care providers should similarly strengthen their relationships with local hospitals.

Providers also should strengthen their payer relationships, and transition to new, more sophisticated managed care contracts with performance measures. In addition, providers should seek other opportunities to participate in new payment experiments through pilots and demonstration projects under PPACA. Providers that take these measures will more likely be viewed by CMS to satisfy the requirements for qualifying as an ACO and be selected to participate in the Shared Savings Program. Where CMS will be choosing from many applicants and may restrict the number of ACOs in any given region, providers are well advised to move forward now to form the relationships and acquire the capacities needed to become an ACO.

2. CMS Questions and Answers

The Q&A reiterate a number of items in PPACA, including the following ACO requirements:

1. Formal legal structure to receive and distribute shared savings
2. Sufficient number of primary care professionals for the number of assigned beneficiaries (5,000 minimum)
3. Participate for not less than a 3-year period
4. Have sufficient information regarding participating ACO health care professionals as the Secretary determines necessary to support beneficiary assignment and for the determination of payments for shared savings
5. Leadership and management structure that includes clinical and administrative systems
6. Defined processes to (a) promote evidence-based medicine, (b) report the necessary data to evaluate quality and cost measures (this could incorporate requirements of other programs, (e.g. Physician Quality Reporting Initiative (PQRI), Electronic Prescribing (eRx), and Electronic Health Records (EHR)), and (c) coordinate care
7. Demonstrate it meets patient-centeredness criteria

CMS clarified that beneficiaries will continue to be able to receive services from providers that are not part of their ACO. Also, participating ACOs will not be subject to payment penalties if their savings targets are not achieved. CMS expects to provide additional details in the fall through a rulemaking process.

3. CMS Special Open Door Forum

Stakeholders raised the following issues:

- Will CMS exercise its waiver authority under PPACA and/or coordinate with the Office of the Inspector General (“OIG”) to waive certain federal Stark law and anti-kickback provisions in order to permit and encourage the types of referral relationships contemplated in forming ACOs?
- Which entity will be responsible for paying for out-of-ACO services? What incentives will be permitted to encourage people to receive services from ACO providers?
- What is the time frame in which CMS will determine whether an ACO has achieved the savings benchmarks, and when will payments be made?
- How will the success of an ACO be determined? How will any savings be measured, shared, and distributed?
- Will CMS provide opportunities for more risk sharing than simple shared savings for more sophisticated ACOs (e.g. next levels of risk sharing from shared savings: traditional upside/downside; partial capitation)?
- How will the Shared Savings program relate to the other CMS pilots and demonstrations under PPACA?
- How will individuals be assigned to an ACO?

- How will issues of market consolidation and anti-competitive impact be addressed?
- How and when will more accurate and diverse (and outcome-based) quality measures be established?
- What level of risk will an ACO be asked to assume in this and other programs that may involve ACOs? What risk will insurers continue to bear (performance vs. insurance risk)?
- How will “meaningful use” and other electronic health information technology (“HIT”) requirements relate to the HIT needed to establish an ACO?
- What will the consequences be for ACOs and their constituent providers that do not succeed in achieving performance benchmarks and savings?

While CMS did not provide answers during the Forum, it took the questions under consideration, and indicated it plans to establish an email box for obtaining additional comments, and will provide notification of further special open forum sessions. The audio recording and transcript of the Forum has been posted on the CMS website at http://www.cms.gov/OpenDoorForums/05_ODF_SpecialODF.asp

Interested providers may receive automatic emails of Open Door Forum schedule updates and see FAQs by signing up on the CMS website at <http://www.cms.hhs.gov/opendoorforums/>. Providers are encouraged to participate to provide input on these key issues.

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