Form of Entity and Legal Structure

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CMS Proposed Rule

The Centers for Medicare and Medicaid Services (CMS) Proposed Rule[1] would require that the accountable care organization (ACO) have the following characteristics:

1. be a legal entity that is recognized and authorized under applicable State law to engage in the business of being an ACO;
2. have a taxpayer identification number;
3. be comprised of an eligible group of ACO participants that works together to manage and coordinate care for the Medicare fee-for-service beneficiaries who are assigned to the ACO; and
4. have a mechanism for shared governance that provides all ACO participants with appropriate proportionate control over the ACO's decision-making process.[2]

I. Legal Entity

The Act[3] requires that the ACO have a formal legal structure that allows the organization to receive and distribute payments for shared savings to participating providers and suppliers.[4] The Proposed Rule would add that the ACO be organized as a legal entity that has the power under the laws of the States in which it does business to:

A. receive and distribute shared savings under the MSSP;

B. repay shared losses;

C. establish, report and ensure provider compliance with health care quality criteria, including quality performance standards; and

D. perform the ACO's other functions.[5]

The Proposed Rule's Preamble notes that likely legal entity structures that will be available under State law will be corporations, partnerships, limited liability companies, foundations, as well as other types of entities permitted by applicable State. An ACO therefore could not be organized simply as a contractual joint venture among its participants.

Existing organizations may be able to constitute themselves as ACOs without forming new legal entities. If an existing legal entity meets the ACO eligibility requirements (such as a hospital that employs ACO Professionals), that existing entity would qualify to be an ACO if it satisfied the Proposed Rule's other requirements. As a practical matter, however, the Proposed Rule's shared governance requirements are likely to encourage most existing organizations to form new entities. Existing organizations will probably be reluctant to restructure their governance for all of their operations and lines of business simply to accommodate participation in the MSSP, as is discussed below.

II. Taxpayer Identification Number

The ACO will be required to have its own taxpayer identification number. Under the Proposed Rule, payments of shared savings will be made to that taxpayer identification number.

III. Eligible ACO Participants

The Proposed Rule would allow the following parties may participate:[6]

A. ACO professionals, i.e., physicians, osteopaths, physician assistants, nurse practitioners and clinical nurse specialists;

B. networks of individual practices of ACO professionals;

C. partnerships or joint venture arrangements between hospitals and ACO professionals;

D. hospitals employing ACO professionals;

E. other providers, such as Federally Qualified Health Centers ("FQHCs") and Rural Health Centers ("RHCs") that may not form ACOs themselves but that may participate in ACOs formed by others; and

F. critical access hospitals ("CAHs") that bill Medicare for both facility and professional services, i.e., billing under "Method II."

IV. Mechanism for Shared Governance

The Proposed Rule would require that the legal entity have a governing body, such as a board of directors, board of managers or the like, that has broad authority and responsibility for the ACO's administrative, fiduciary, and clinical operations.[7] This governing body must include proportional representation of ACO participants or their designated representatives (who must make up at least 75% of the governing body), and at least one Medicare beneficiary representative served by the ACO who has no conflict of interest (and no family member with a conflict of interest) with the ACO. As is noted above, existing organizations may wish to avoid restructuring the governance for their entire organization, and therefore may opt to form new entities to serve as ACOs.

IRS Guidance

The Internal Revenue Service's guidance[8] states that tax-exempt organizations must ensure that their participation in the MSSP through an ACO be structured so as not to result in their net earnings inuring to the benefit of insiders or in being operated for the benefit of private parties.

The IRS expects that it will not consider a tax-exempt organization's participation an ACO to result in impermissible private inurement or private benefit where:

A. the terms of the tax-exempt organization's participation in the ACO are set forth in advance in a written agreement negotiated at arm's length;

B. CMS has accepted the ACO into, and has not terminated the ACO from, the MSSP;

C. the tax-exempt organization's share of benefits and losses from the ACO (including its share of MSSP payments and losses) are proportional to the benefits or contributions it provides to the ACO;

D. if the tax-exempt organization receives an ownership interest in the ACO, the ownership interest is proportional and equal in value to its capital contributions, and all returns of capital, allocations and distributions are made in proportion to ownership interests; and

E. All contracts and transactions entered into by the tax-exempt organization with the ACO and its participants, and by the ACO with its participants and any other parties, are at fair market value.

The IRS further stated that, absent inurement or impermissible private benefit, any MSSP payments received by a tax-exempt organization from an ACO would be exempt from unrelated business income tax (UBIT). The IRS Notice did not address whether and under what circumstances a tax-exempt organization's participation in non-MSSP activities through an ACO will be consistent with an organization's tax-exemption under § 501(c)(3) or not result in UBIT.

Endnotes

1 Notice of Proposed Rule, CMS 1345-P.

2 42 CFR § 425.4

3 The Patient Protection and Affordable Care Act (Pub. L. 111-148).

4 Act § 1899(b)(2).

5 42 CFR § 425.5(d)(7).

6 42 CFR § 425.5(b).

7 42 CFR § 425.5(d)(8).

8 Notice 2011-20, March 31, 2011.

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