

PUBLICATION

CMS Issues Additional Guidance for ACOs

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On March 16, 2012, the Centers for Medicare and Medicaid Services (CMS) issued Additional Guidance for Medicare Shared Savings Program Accountable Care Organization (ACO) Applicants. In this Additional Guidance, CMS first reiterates the distinction between an ACO participant and an ACO provider/supplier, stating that "the key point is that an ACO participant is identified by its Medicare-enrolled TIN [Taxpayer Identification Number]".

Second, CMS makes clear that all "ACO providers/suppliers billing through an ACO participant TIN are included in the ACO by virtue of their relationship to the ACO participant and the ACO participant's relationship with the ACO." Thus, CMS reminds entities interested in applying to participate in the Shared Savings Program of their duty to "ensure that all ACO providers/suppliers associated with each ACO participant TIN have agreed and will comply with the program regulations." Unless all providers and suppliers billing under the ACO participant's TIN have agreed to participate in the Shared Savings Program and abide by the regulations, the ACO may not include that entity as an ACO participant.

Third, CMS specifies that contracts and agreements between the ACO, ACO participants and ACO providers/suppliers must be executed prior to the submission of the ACO's application to participate in the Shared Savings Program. With respect to the content of the agreement between the ACO and the ACO participant, the agreement must require the ACO participant to "participate in and comply with the requirements of the Medicare Shared Savings Program under 42 C.F.R. 425." A general statement requiring compliance with either federal law or Medicare regulations will not suffice. Further, the ACO participant's agreement must describe the participant's "rights and obligations in, and representation by, the ACO, *including how the opportunity to share in savings or other financial arrangements will encourage ACO participants and ACO providers/suppliers to adhere to the quality assurance and improvement program and evidence-based clinical guidelines and should include language giving the ACO the authority to terminate an ACO participant for its non-compliance with the ACO's participation agreement with [CMS] or any of the requirements of 42 C.F.R. part 425.*" (emphasis added.) CMS then reiterates that ACOs cannot, except as explicitly permitted by regulation, require that ACO participants or ACO providers/suppliers refer ACO beneficiaries to ACO participating entities, or any other provider or supplier.

Finally, CMS provides guidance on the requirement that the ACO governing body have a specific fiduciary duty to the ACO, stating that governing body members must "have a fiduciary duty to the ACO and must act consistent with that fiduciary duty." A governing body that is "also responsible for governing the activities of individuals or entities" outside the ACO will not satisfy the ACO governing body requirement. Thus, where the ACO has multiple independent participants, the ACO governing body must be a separate and distinct entity as the governing body's sole fiduciary duty must be to the ACO. Where an existing legal entity and ACO participant is comprised of both ACO provider/supplier entities and non-ACO provider/supplier entities, the existing legal structure of the participant entity cannot be used. CMS is clear that "the ACO's governing body must be independent from influence of interests that may conflict with the ACO's interests."

Practically speaking, CMS advises that if based on this guidance, an application to participate in the Medicare Shared Savings Program needs to be amended, the applicant should submit a written request including the

organization's legal entity name and ACO ID, along with the request to change the program start date or a request to modify an existing application.

If you have questions or need any additional information about how these regulations may affect you or your company, please contact your Baker Donelson attorney.