

**Legal Waivers under the Medicare
Shared Savings Program:
An Overview of the Options**

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Shared Savings Program: ACOs

- Medicare Shared Savings Program (ACA, Sec. 3022)
 - Accountable Care Organizations
- ACOs will accept responsibility for the overall care of at least 5000 Medicare beneficiaries
- ACO providers will be paid on Medicare fee-for-service rates
- If the ACO meets quality benchmarks and reduces the cost of providing care to the Medicare enrollees attributed to it, the ACO will receive a percentage of the savings
- ACOs may also contract on a “partial capitation” or other basis approved by HHS

ACOs

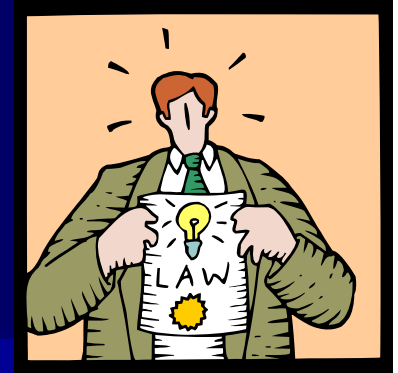
- Concept has attracted significant industry attention
- CMS drafting regulations –
 - Latest prediction— “in December”
- Regulations will provide detail of how an ACO must be structured, what safeguards must be in place, etc.

Waiver Authority

- Accountable Care Act, Section 3022(f), grants the Secretary of HHS the authority to waive fraud & abuse laws to facilitate development of ACOs



Which Fraud & Abuse Laws?



- Civil Money Penalty Law (CMP) Prohibition on Hospital Payments to Physicians to Reduce or Limit Care
- CMP Beneficiary Inducement Prohibition
- The Stark law
- The Anti-kickback statute
- Prohibitions on Payments in excess of Medicare Allowable

Options Outline

- Provides an overview of some of the ways in which the Secretary could structure ACO waivers
- The Outline is not exhaustive
- Not an advocacy piece
- Rather, the Outline provides overview and attempts to describe the pros and cons of some of the options



Do we need ACO waivers?

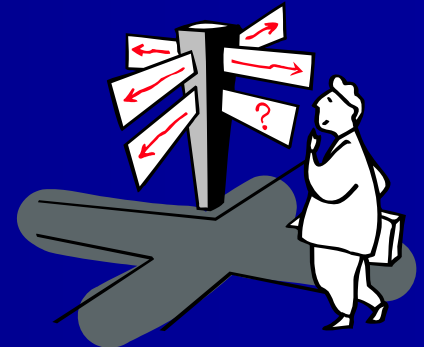
- Waivers would facilitate shared savings programs
- Waivers could clarify law –giving the industry better guidance
- Waivers could give ACOs flexibility in both their design and operation
- Waivers could enable ACOs to use incentives or compensation to encourage appropriate behaviors, such as patient management fees to primary care providers responsible for coordinating care

Do we need ACO waivers?

- Waivers could lead to program and patient abuse
- Waivers could allow ACOs to incent behaviors that undermine quality or increase costs
- Waivers could distort decision making by both providers and patients
- Waivers could chill innovation if drawn too narrowly

Waiver Options

- Individualized Waivers
 - Each ACO submits application describing its specific structure and operational plans
 - Secretary grants waivers tailored to individual applicants



Waiver Options

- Managed Care lite
 - Treat ACOs like Managed Care Organizations
 - Expand existing Risk Exceptions to Stark law & Anti-kickback statute
 - Amend Health Plan CMP relating to incentives to reduce care to apply to ACOs (as opposed to the hospital CMP)
 - Clarify applicability of Medicare allowable charge limits

Waiver Options

- The Safeguards Approach
 - Craft waivers for each law implicated
 - Include safeguards in both the ACO definition and in the requirements to qualify for the waivers

Waiver Options

- Minimalist Approach
 - Waiver focuses solely on legal impediments to ACO shared savings payments
 - Create new exceptions to CMP, Stark and Kickback that permit a qualifying ACO to distribute any shared shavings payments it may receive among its members

Hypothetical # 1: Eager Beaver Hospital

- Eager Beaver Hospital decides it must have an ACO
 - Hospital pays for all of the legal and consulting fees associated with forming the entity and setting up the infrastructure
- Can Hospital allow physicians to become full members of the ACO with governance rights and the right to share in financial rewards (shared savings) while ensuring that the physicians have no downside risks?

Eager Beaver Targets PCPs

- Eager Beaver wants to attract a sufficient number of PCPs to the ACO so that it will have a large enough “attributed” Medicare patient base to justify its infrastructure investment and enable the organization to effectively manage the risks
- Eager Beaver agrees that each PCP member of the ACO will receive \$25 for each Medicare patient per month for coordinating services and ensuring that a high percentage of the necessary care is provided by ACO members
 - Hospital will advance funding required for PMPM payments, with reimbursement potentially from shared savings funds

Eager Beaver controls patient flow

- To assure that care can be coordinated in pursuit of quality, cost savings and health outcome objectives, the Eager Beaver ACO requires that each of its contracted physicians refer all services for attributed ACO patients to other members of the ACO, including Eager Beaver as the sole hospital,
 - exceptions for medical necessity or patient request

Eager Beaver gets wired

- Eager Beaver Hospital recognizes that its ACO cannot effectively manage the full range of services needed by its attributed Medicare patients if the ACO members do not have a means of effectively communicating
- Eager Beaver offers to pay the full cost of new software licenses for all ACO members
- The new software will enable all ACO participants to track the care being provided to the ACO attributed Medicare enrollees



Hypothetical #2: The Sisters of Perpetual Inducement

- The Sisters operate a full service hospital that employs 50 physicians
- The Sisters form an ACO
 - In addition to the Sisters Hospital and its employed physicians, PCPs Unlimited and Specialists R Us join
- During the first year of operation, the Sisters Hospital agrees to forego its share of the shared savings
 - As a result the physician members receive much higher distributions

The Sisters keep it in the family

- The ACO determines that its ability to control costs was greatly undercut during its first year of operation by the cost and volume of care provided by non affiliated physicians
- To address this leakage problem, the ACO institutes a new policy giving member PCPs the right to a higher percentage of total cost savings if at least 95% of the PCP's referrals are made to specialists affiliated with the ACO

The Sisters give more

- The Sisters ACO also offers its attributed Medicare enrollees free door to door transportation to all appointments as long as the patient is being treated by an ACO affiliated provider
- Patients also receive free on line access to their medical record and test results as long as their care is provided within the ACO provider network

The Sisters promote wellness

- Sister Hospital agrees to pay for non covered screening tests for diabetes for all of the ACO's attributed Medicare patients
- After a few months the Hospital imposes a requirement that the screening test will be paid for only if it is performed by the Specialist Group affiliated with the ACO
 - Hospital pays the Specialists less than half of the cost of the screening exam; Specialist write off the remaining charges