

## Client Alert

### Medicare Accountable Care Organizations: The Time is Now

April 15, 2014

CMS created the permanent Accountable Care Organization (ACO) program, known as the Medicare Shared Savings Program (MSSP) at the end of 2011. Pursuant to authority under the Affordable Care Act, CMS began accepting applications from groups of healthcare providers, hospitals and physician group practices in 2012, to become MSSP ACOs.

If you are a health system, a group or groups of providers or physicians, or an individual provider that has been considering applying to be a Medicare ACO, the time to apply for the 2015 Program Year is now. CMS requires that ACOs file a notice of intent to apply between May 1st and May 30th, 2014. This notice of intent is a prerequisite to filing an application. CMS will post the application on the CMS website on May 30, 2014. An ACO has until July 31, 2014 to file a complete application. The application process is complex and thorough. CMS requires submission of data and detailed responses explaining how the ACO will meet many regulatory requirements.

Your preparation will make the difference in forming an ACO that will ultimately be successful in the ACO application process. You need to be able to demonstrate that you are ready to coordinate care, and that you have a detailed and well developed plan to improve care for your population of Medicare beneficiaries. Below, we provide five key areas that you should consider in developing your ACO application plan:

- a) Management Team: Developing an ACO takes significant effort, including the application process, contracting, financing, and communication among the various ACO participants. It is important to choose a strong manager or management team who is the point of contact for CMS throughout the application process, and can coordinate the efforts of many providers and physicians who may never have collaborated in the past.
- b) Governance Board: CMS regulations place heavy emphasis on a competent and engaged governance board that is responsible for achieving the care coordination and cost reduction goals of the ACO program. CMS requires that the governing board have a fiduciary duty to the ACO and that the board members represent all interests of the ACO participants. While some integrated systems may be able to use their existing governance board structure, CMS regulations often require new governance boards specifically focused on the ACO.
- c) Corporate Structure: ACOs that are bringing together groups of providers and physicians may not have existing corporate structures to accomplish the goals of the ACO program. CMS will want to understand how your ACO is organized, so corporations and affiliation agreements will need to be developed before the ACO applies to the MSSP. Further, some CMS regulations require

corporate structures that may conflict with state law. ACOs must give themselves adequate time to resolve these issues.

d) Capitalization: Starting an ACO is a resource intensive exercise, but with careful thought and planning the necessary resources can be secured. In addition to significant time requirements, ACOs need capital for new care coordination and leadership staff, electronic health records and data analytics systems, and new communication tools. ACOs should evaluate where long term capital will come from, and how it will be sustained. These new financing arrangements are achievable but must be structured to be compliant with law and to maintain flexibility as the ACO grows and evolves.

e) Creating a Qualified Network of Providers and Physicians: Many providers and physicians may expect that entering into an ACO will be similar to their participation in other payer arrangements. They may be part of an IPA, and have delegated the responsibility of contracting with payers to the IPA or other contracting entity. Yet CMS imposes new and significant requirements on providers and physicians who participate in the MSSP. Existing payer contracts will not be sufficient, and ACOs need to plan to enter into direct arrangements with ACO participants in order to meet the MSSP requirements. For large ACO networks, entering into new arrangements will be resource intensive and will require time to explain these requirements to providers and physicians.

If you are planning to apply for the ACO program this year, and have not considered these issues, it is not too late to address them. With careful planning and effort, ACOs can resolve these issues, which will lead to a successful launch into the Medicare Shared Savings Program.

#### **Crowell & Moring ACO Team:**

We have assembled a team of Crowell & Moring attorneys to advise and counsel in all aspects of ACO development and the ACO application process:

- Troy Barsky – ACO Regulatory
- John Brennan – Fraud & Abuse
- Katie Funk – Antitrust
- Kevin Kroeker – Commercial ACOs
- Kathleen Stratton – State Law Issues
- Todd Rosenberg – Corporate

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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