Published on *The National Law Review* https://natlawreview.com

CMS Proposes Massive Changes to ACO Program – Pushing Providers to Accept Downside Risk

Article By:

Christine M. Clements

Vinay Bhupathy

Patrick M. Callaghan

On Thursday, August 9, 2018, the Centers for Medicare & Medicaid Services ("CMS") published a Proposed Rule (the "Proposed Rule")[1] regarding the Medicare Shared Savings Program ("MSSP") for Accountable Care Organizations ("ACOs"). The Proposed Rule would require ACOs to accept downside risk or shared losses sooner than under the current MSSP and would promote entities that have shown the greatest cost savings since implementation of the MSSP in 2012. Although not discussed in this article, the Proposed Rule also contains refinements to the methodology concerning ACO benchmarks and a modification to the current approach to risk adjustments, as well as changes to the MSSP's claims-based assignment methodology and allowing beneficiaries to voluntarily align to ACOs in which their designated primary clinician is an ACO professional.

Current MSSP ACO Tracks

The current MSSP has four Tracks. Track 1 is a one-sided risk model which allows ACOs to share in up to 50% of savings while not being obligated to share in the costs should they spend above the CMS benchmarks.[2] More than 80% of ACOs in the MSSP are in Track 1 (460 of the 561 participating ACOs).[3]

Tracks 1+, 2, and 3 are two-sided risk models, providing an opportunity to share in a greater portion of program savings but requiring the ACO to accept the downside risk associated with spending more than the CMS benchmarks. In Track 3, ACOs may share up to 75% of savings, but are also liable for up to 75% of costs should spending exceed the benchmarks.[4]

Changes Under the Proposed Rule

Under the Proposed Rule, the four Tracks would be replaced with two "glide paths" – BASIC and ENHANCED. The BASIC glide path would replace Tracks 1, 1+ and 2, and would limit the amount of time ACOs could participate in a one-sided risk model. Those ACOs already participating in Track 1

could only avoid downside risk through 2020, and ACOs not already participating in the MSSP would not have downside risk through 2021.[5] ACOs participating in the one-sided risk model would have their savings share capped at 25%, down from 50% under the current structure.[6] As ACOs on the BASIC glide path assume downside risk, their savings sharing would increase, peaking at 50% in the fifth and final year of the term (down from 60% under the current Track 2).[7] At Level E, the highest of the five levels of risk on the BASIC glide path, ACOs would qualify as an Advanced Alternative Payment Model under the Quality Payment Program.[8]

The ENHANCED glide path mirrors the current Track 3 where ACOs are able to share in up to 75% of any savings from cost efficiencies, but share between 40% and 75% of any downside risk.[9]

Under the Proposed Rule, CMS would not offer new agreement periods with January 1, 2019 start dates, and instead would offer a one-time new agreement period start date of July 1, 2019.[10] Those ACOs already participating in the MSSP with an agreement expiring December 31, 2018 would have a one-time opportunity to extend their current agreements through June 30, 2019.[11] CMS hopes that these changes would provide ACOs with time to evaluate the impact of the Proposed Rule if finalized and determine the nature of their future participation in the MSSP, if any.[12] If implemented, the Proposed Rule would change all agreement terms following the renewal periods to five years (up from three years under the current MSSP).[13]

The Proposed Rule also differentiates between “low revenue” ACOs, which could participate on the BASIC glide path for two five-year terms, and “high revenue” ACOs, which would be limited to one five-year BASIC term. The Proposed Rule defines a low revenue ACO as “an ACO whose total Medicare Parts A and B fee-for-service revenue of its ACO participants based on revenue for the most recent calendar year for which 12 months of data are available, is less than 25 percent of the total Medicare Parts A and B fee-for-service expenditures for the ACO’s assigned beneficiaries based on expenditures for the most recent calendar year for which 12 months of data are available,” and they are often small physician practices, rural providers, and providers serving underserved populations.[14] High revenue ACOs are those entities whose participants’ total Medicare Parts A and B FFS revenue for assigned beneficiaries is greater than 25 percent, and they are often hospitals.[15]

Ten Year Outlook

CMS estimates the Proposed Rule will result in $2.24 billion in federal savings over the next ten years.[16] CMS concedes that the proposed increased risk requirements would impact MSSP participation, estimating a decrease of 109 participating ACOs in ten years.[17] A survey conducted by the National Association of ACOs (“NAACOS”) suggests that the impact could be more severe. The NAACOS survey found 70% of ACOs were likely to leave the MSSP due to requirements to assume downside risk.[18] CMS expressed a lack of concern about ACOs in one-sided risk models exiting the program because those ACOs have led to program losses overall, but the findings of the NAACOS survey suggest CMS may be underestimating the magnitude of the exodus that will occur should the Proposed Rule be finalized.

Next Steps and the Impact on ACOs

Comments on the Proposed Rule are due to CMS by October 8, 2018. NAACOS advises ACOs to consider whether they want to provide reactions or suggestions.[19] As detailed above, the Proposed Rule could have a significant impact on ACOs, depending on their current Track and revenue category.

The Proposed Rule's changes could have a large impact on the bottom line of both MSSP-participating ACOs and the businesses that rely on these entities. Under the Proposed Rule, ACOs face a smaller possible reward while being exposed to downside risk sooner than they originally planned. The NAACOS survey showed that providers were hesitant to accept downside risk under the current, higher savings share formulas. The simultaneous lowering of shared savings while requiring downside risk could lead to more ACOs leaving the program than estimated by CMS or even the NAACOS. The effects of these exits would be felt in the technology and infrastructure businesses that emerged to support ACOs, but may not face decreased demand for their services. Additionally, commercial and Medicaid ACO arrangements, which traditionally follow Medicare's lead, could implement similar changes that could cause decreased participation in those arrangements as well.

Given these potential impacts, ACOs should prepare for the short-term and long-term implications of the Proposed Rule. Those ACOs with agreements expiring in December should prepare to file for the six-month extension if they wish to continue their MSSP participation.[20] Additionally, all ACOs need to critically assess whether continued participation makes sense given the proposed regulatory framework.

---

[1] Medicare Program; Medicare Shared Savings Program; Accountable Care Organizations—Pathways to Success, available at https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-17101.pdf (proposed Aug. 9, 2018).

[2] ACO Comparison Chart, National Association of ACOs, available at https://www.naacos.com/assets/docs/news/revisedsummaryaco-comparisonchart.pdf.

[3] Proposed Rule at p. 43.

[4] ACO Comparison Chart.

[5] Proposed Rule at p. 51.

[6] Proposed Rule at p. 76.

[7] Id.

[8] Proposed Rule at p. 84; *see* "MACRA Quality Payment Program Final Rule: Implications for 2018 and Beyond," Erica Kraus, Nov. 29, 2017, available at https://www.sheppardhealthlaw.com/2017/11/articles/healthcare/qpp-2018/.

[9] Id.

[10] Proposed Pathways to Success for the Medicare Shared Savings Program, CMS.gov, Aug. 9, 2018, available at https://www.cms.gov/newsroom/fact-sheets/proposed-pathways-success-medicare-shared-savings-program.

[11] Id.

[12] Id.

[13] Id.

[14] Proposed Rule at p. 514

[15] Proposed Rule at p. 513.

[16] Proposed Rule at p. 25.

[17] Proposed Rule at p. 492.

[18] Press Release, National Association of ACOs, May 2, 2018, available at https://www.naacos.com/press-release-may-2-2018.

[19] Proposed Rule at p. 2.

[20] CMS notes in the Proposed Rule that the extension election process would begin following publication of a final rule, however it has not yet set a due date for election. Proposed Rule at p. 224.

National Law Review, Volume VIII, Number 228