MSSP VS ACO REACH: FIVE CONSIDERATIONS FOR LEGAL COUNSEL

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Health care providers looking to explore or expand their involvement in value-based care through affiliation with an accountable care organization (ACO) have a large number of options available to them. In the Medicare space, many providers find themselves being courted by ACOs participating either in the Medicare Shared Savings Program (MSSP), or the recently implemented ACO Realizing Equity, Access, and Community Health (REACH) Model. Programmatic rules and statutory requirements dictate that providers can only ultimately participate in one of these two models. Providers, then, when faced with a choice of competing ACO proposals, must evaluate which model and partnership bests fits their clinical, operational, and financial goals.

There are a host of considerations that providers will be faced with when making this choice. For example, providers will need to assess their ability to take on risk, evaluate their anticipated attributed patient population and likely benchmarks, review cultural and clinical alignment with other participating and preferred providers within the prospective ACOs, and assess compatibility with quality and performance metrics used within the ACO, among a host of other matters.

While many of these considerations will be assessed within business, financial, and leadership teams and may not involve active participation of legal counsel, there are a number considerations when making this choice that touch on regulatory and other legal issues. This alert briefly touches on five such considerations, and a companion white paper, available here, dives into these five considerations in greater detail.

CONSIDERATION 1 – OPPORTUNITIES TO PARTICIPATE IN MULTIPLE MODELS

In order to prevent potential 'double-dipping' in shared savings opportunities, providers are limited to participation in a single shared savings model. However, due to operational differences in how MSSP and ACO REACH classify 'participants,' ACO REACH offers some additional flexibilities. As discussed in the white paper, provider practices and health systems, as defined by tax identification number (TIN), are required to be 'all-in' when it comes to MSSP. In contrast, participation in ACO REACH is defined more narrowly, allowing a provider to split participation among its practitioners into different shared savings models. For example, while a specialty group practice might include its primary care providers in ACO REACH, other specialists billing under the group's TIN could opt-out, and instead participate in a different, specialty-specific shared savings model.

CONSIDERATION 2 – REGULATORY FLEXIBILITIES TO INCENTIVIZE PATIENT PARTICIPATION

Both MSSP and ACO REACH contain regulatory guardrails on the ability of ACOs and providers to market to patients and incentivize patients to align with a particular ACO. That said, ACO REACH generally offers more expansive opportunities to engage with patients in a regulatory compliant manner, through a variety of cost-sharing support and beneficiary incentive options.

CONSIDERATION 3 – ABILITY TO TAKE ADVANTAGE OF MEDICARE PROGRAM FLEXIBILITIES

In light of the different incentives present in value-based rather than volume-based care, and to encourage providers and patients to join value-based models, both MSSP and ACO REACH contain a variety of optional flexibilities with respect to Medicare program requirements. For ACO REACH, however, the variety of flexibilities available is significantly more expansive, reflecting the enhanced role providers play in that model in taking on risk when participating in value-based compensation.

CONSIDERATION 4 – ALIGNMENT ON HEALTH EQUITY

While the Centers for Medicare and Medicaid Services has a particular focus on health equity across all value-based models, ACO REACH is currently at the forefront of these efforts. Accordingly, participation in ACO REACH should include an enhanced commitment to focusing on health equity efforts, including understanding and collaborating with an ACO's health equity plan.

CONSIDERATION 5 – READINESS FOR COMPLIANCE AND ENFORCEMENT SCRUTINY

The introduction of ACO REACH has been controversial, particularly given the enhanced role of ACOs in managing significant government funds. Accordingly, the level of scrutiny over this model—and the compliance expectations of ACOs and providers participating in this model—go beyond what providers participating in MSSP may be used to. As such, providers looking to participate in ACO REACH should ensure they understand and are prepared to coordinate regarding these compliance activities.

As noted, in addition to these five considerations, there are a variety of important financial, quality, and operational differences and challenges associated with each at-risk, capitated model that will require careful consideration when evaluating participation options. K&L Gates' Health Care and FDA practice regularly advises stakeholders on shifting to value-based care, including both government payor and commercial models.

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