

CMS FINALIZES PROPOSED REDESIGN TO MEDICARE SHARED SAVINGS PROGRAM: FIVE BIG TAKEAWAYS

Date: 7 January 2019

Health Care Alert

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On December 31, 2018, the Centers for Medicare & Medicaid Services ("CMS") published a final rule that contains revisions to the Medicare Shared Savings Program ("Shared Savings Program"), dubbed the "Pathways to Success" model (the "Pathways to Success Final Rule"). [1] The Pathways to Success Final Rule includes a significant redesign to the Shared Savings Program for all new and renewing accountable care organizations ("ACOs"), as well as a number of programmatic revisions that will also affect existing ACOs.

As CMS also discussed in its August 17, 2018 Pathways to Success proposed rule ("Pathways to Success Proposed Rule"), [2] a major drive behind the changes is CMS's concern that the current "Track 1" ACOs — which are eligible to earn shared savings but are not required to take on downside performance-based risk — were generating a net revenue loss for the Medicare program. [3] However, Track 1 ACOs remain by far the most popular option for participating ACOs, with 460 of 561 ACOs in Performance Year 2018 electing Track 1. [4] As a result of the program redesign, ACOs will be required to transition to a performance risk-share model ("Risk Model") on an accelerated timeframe.

While the Pathways to Success Final Rule contains numerous major and minor changes to the Shared Savings Program, here are five key takeaways:

1. PROGRAM REDESIGN ACCELERATES NEW AND RENEWING ACOS INTO RISK-SHARING MODELS

As part of CMS's stated goal to increase savings for the Medicare Trust Funds, the redesigned Shared Savings Program will require ACOs to enter a Risk Model at a much faster pace than under prior program requirements. Under the prior rules, an ACO could join the Shared Savings Program as an upside-only/one-sided Track 1 ACO for two three-year agreement periods or six years in total. After two agreement periods, ACOs were required to transition to one of the Risk Model tracks, i.e., Track 1+, 2, or 3.

The Pathways to Success Final Rule eliminates the Track 1, 1+, and 2 options, replacing these with a "BASIC Track," and renames the Track 3 option to the "ENHANCED Track." The program agreement period for each of the new tracks is extended to five years (from three years).

The BASIC Track incorporates a five-level "Glide Path" that starts ACOs at a one-sided savings model in Levels A and B and then shifts the ACO into progressively higher risk-sharing model over time at Levels C–E. Thus, over the course of a single agreement period, an ACO will be required to transition into taking on performance-based

risk. Depending on the ACO's revenue and its experience with the Shared Savings Program and performance-based risk sharing, this transition will occur after one, two, or three years, or the ACO may be required to take on risk immediately.

2. AN ACO'S REVENUE AND EXPERIENCE WILL IMPACT ITS PATH TO RISK-SHARING

The speed at which new and renewing ACOs will be required to take on risk sharing will be based on two new subclassifications of ACOs based on high versus low revenue, as well as prior ACO experience with risk.

Low-revenue ACOs are defined as ACOs whose ACO participants' total fee-for-service revenue under Medicare Parts A and B is less than 35% of the total Medicare Parts A and B fee-for-service expenditures of its assigned beneficiaries. Accordingly, high-revenue ACOs are greater than 35%. [5]

To be considered inexperienced with risk, the ACO legal entity and at least 60% of the ACO's participants must never have previously participated in (or deferred participation in) any performance-based risk Medicare ACO initiative (including Shared Savings Program Tracks 1+, 2, 3, the Pioneer ACO model, the Next Generation ACO model, or the Comprehensive ESRD Care model). [6] The consideration of ACO participant experience is a major departure from prior CMS policy and was driven by a concern about ACOs gaming the system by modifying their ACO participant lists.

Low-revenue ACOs are permitted to stay in one-sided risk-sharing models for a longer period, as shown in the table below. Any ACO determined to be experienced with Risk Models however, is required to take on risk immediately. In addition, whether an ACO is new to the Shared Savings Program or is renewing participation in the program also impacts how long the ACO can stay in a one-sided BASIC Track level.

Revenue Classification	Experience with Performance-Based Risk	New or Renewing ACO?	Years Permitted to Remain in a One-Sided Risk Model
Low Revenue	Inexperienced with Risk	New	3
Low Revenue	Inexperienced with Risk	Renewing	1
Low Revenue	Experienced with Risk	New or Renewing	0 – must enter at highest level of BASIC Track or in ENHANCED Track
High Revenue	Inexperienced with Risk	New	2

High Revenue	Inexperienced with Risk	Renewing	1
High Revenue	Experienced with Risk	New or Renewing	0 – must enter in ENHANCED Track, unless only experience with performance risk is current MSSP Track 1+, in which case can enter at highest level of BASIC Track.

3. SHARED SAVINGS RATE CUT FOR NEW/RENEWING ACOS UNTIL THEY TAKE ON RISK

In addition to shortening the period of time that an ACO will be eligible for a one-sided model, CMS is also cutting the shared savings rate that will be available for ACOs until they enter a Risk Model. Current Track 1 ACOs are eligible for shared savings at a rate of up to 50% of the total calculated savings to CMS. However, under the Pathways to Success Final Rule, ACOs participating within the one-sided Levels A and B of the BASIC Track will be eligible for a lower maximum sharing rate of 40%. [7] While this is a decline from what Track 1 ACOs currently experience, it is significantly higher than the 25% sharing rate that CMS initially proposed in the Pathways to Success Proposed Rule. In the Pathways to Success Final Rule, CMS acknowledged that numerous commentators opposed the 25% sharing rate, claiming that a 25% rate would deter ACOs from joining the Shared Savings Program in the future. CMS stated that it was persuaded by the argument that a 25% rate might deter participation in the program, and thus, CMS increased the rate to 40% in the Pathways to Success Final Rule. [8]

4. CHANGES TO HOW AN ACO'S POTENTIAL FOR SHARED SAVINGS IS AFFECTED BY REGIONAL IMPACTS TO ITS PERFORMANCE BENCHMARK

CMS finalized modifications to its calculation of the regional adjustment to an ACO's performance benchmark, i.e., the mark an ACO must surpass in order to earn shared savings or the threshold at which the ACO is responsible for risk. CMS finalizes three such changes in the Pathways to Success Final Rule:

- For ACOs entering the Shared Savings Program for an agreement period beginning July 1, 2019, or in subsequent years, CMS will incorporate the regional fee-for-service expenditures, in addition to an ACO's own expenditures, into the ACO's initial benchmark for the ACO's first agreement period. [9]
- CMS also finalized a schedule of weights used to phase in regional adjustments for ACOs entering the Shared Savings Program for an agreement period beginning July 1, 2019, and for subsequent years. [10] These weights will phase in over an ACO's first four agreement periods. [11] CMS will impose a cap on the regional adjustment equal to +/- 5% of the national per capita expenditures. [12]
- For all agreement periods starting July 1, 2019, and for subsequent years, CMS finalized the blend of national and regional factors to set benchmarks, as proposed in the Pathways to Success Proposed Rule. [13] The blend is designed to improve incentives for ACOs that serve high proportions of fee-for-service beneficiaries in their regional service areas. [14]

CMS believes these changes will create stronger financial incentives for ACOs, greater sustainability for the Shared Savings Program, and will result in more accurate benchmarks that better reflect the average fee-for-services spending in an ACO's regional market. [15]

5. ACOS LOOKING TO APPLY OR RENEW PARTICIPATION FOR 2019 MUST ACT NOW

For ACOs not currently participating in the Shared Savings Program (both initial and reentering applicants), CMS is offering a special start date of July 1, 2019, for the first agreement period under the new participation options. [16] The first performance year will last six months, ending December 31, 2019, with five subsequent performance years running from January 1 through December 31 of the following calendar years. [17]

ACOs interested in participating in the Shared Savings Program on the July 1, 2019 start date must complete a Notice of Intent to Apply ("NOIA") by **January 18, 2019**. CMS has not yet released Shared Savings Program applications, including Initial and Renewal Applications or its Application Toolkit, but further information is available on CMS's website. [18]

In addition, CMS will also have a separate application cycle that returns to the standard January 1 start date for participation starting January 1, 2020. The NOIA and application submission time frame for the January 1st, 2020 cycle has not yet been announced.

ADDITIONAL PATHWAYS TO SUCCESS FINAL RULE CHANGES

In addition to these main takeaways, there are a number of additional programmatic changes to the Shared Savings Program within the Pathways to Success Final Rule to be aware of, some of which go into effect starting in the next performance year. These further changes include:

- Modifications to repayment guarantee requirements for new and existing ACOs participating in risk-sharing tracks. [19]
- Providing CMS will the ability to terminate ACOs with multiple years of poor financial performance. [20]
- Incorporating several changes required by the Bipartisan Budget Act of 2018, including allowing ACOs to annually elect their choice of assignment methodology, [21] expanding the availability of payment for telehealth services for ACOs in performance-based risk tracks even when geographic limitations are not met, [22] and allowing ACOs in performance-based risk tracks to elect to operate a beneficiary incentive program and to provide incentive payments of up to \$20 for beneficiaries to receive qualifying primary care services when all requirements are met. [23]
- Extending notice requirements, requiring an ACO to provide notice (using CMS-developed templates) to Medicare beneficiaries of: (1) who are the participating ACO providers/suppliers, (2) the option to decline claims data sharing, (3) the ability to voluntarily align with clinicians, and (4) the availability of any beneficiary incentive program, if applicable. [24]

- Finally, CMS noted that it received feedback on its request for information on how Part D prescription drug plans could coordinate with ACOs to improve care and reduce costs associated with pharmacy care, but it did not finalize any initiatives in the Pathways to Success Final Rule. However, CMS noted that this feedback would be taken into account in possible future Shared Savings Program rulemaking.

NEXT STEPS

Again, as already noted, for new ACOs looking to join the Shared Savings Program and for existing ACOs looking to renew their participation, there is a short timeline to become familiar with the new program requirements and submit a NOIA to participate in the Shared Savings Program beginning in July 2019: NOIAs will be due by **January 18, 2019**. In addition, existing ACOs in Risk Models that wish to establish a beneficiary incentive program or obtain approval for a skilled nursing facility three-day rule waiver for a July 2019 start must likewise submit an NOIA by that date.

K&L Gates' health care practice regularly assists health systems in responding to regulatory changes and can assist in assessing how these changes to the Shared Savings Program rules will affect current or planned participation in the Program. We will continue to closely monitor developments related to these program changes and other changes affecting Medicare value-based payment reimbursement models.

NOTES:

[1] CMS, Medicare Program; Medicare Shared Savings Program; Accountable Care Organization — Pathways to Success and Extreme and Uncontrollable Circumstances Policies for Performance Year 2017 ("Pathways to Success Final Rule"), 83 Fed. Reg. 67,816 (Dec. 31, 2018).

[2] For a summary of the Pathways to Success Proposed Rule, please see our two-part triage series, located at [here](#).

[3] See Pathways to Success Final Rule at 68,043.

[4] *Id.* at 67,830.

[5] *Id.* at 68,062.

[6] *Id.*

[7] The savings rate is based on quality performance, applies to first-dollar savings after a minimum savings rate is exceeded, and is capped at 10% of an ACO's updated cost benchmark; see *id.* at 67,852.

[8] Pathways to Success Final Rule at 67,848.

[9] *Id.* at 68,017. Prior to this change, regional expenditures were not used when calculating an ACO's benchmark until the ACO's second or subsequent agreement period. *Id.* at 68,015.

[10] *Id.* at 68,024. For renewing or reentering ACOs, CMS will determine the weight to apply in the ACO's new agreement period by considering the ACO's agreement period upon renewal or reentry in combination with the weight previously applied to calculate the regional adjustment to the ACO's benchmark. *Id.*

[11] *Id.* The Pathways to Success Final Rule modifies the rates at which the weights phase in from the rates set forth in the Pathways to Success Proposed Rule, in an effort to improve participation incentives for ACOs that are higher cost relative to their regions. *Id.* at 68,021.

[12] *Id.*

[13] *Id.* at 68,029.

[14] *Id.* at 68,024.

[15] *Id.* at 68,014.

[16] *Id.* at 67,822–23.

[17] *Id.* at 67,823.

[18] See <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/for-acos/application-types-and-timeline.html>.

[19] Pathways to Success Final Rule at 67,928.

[20] *Id.* at 67,939.

[21] *Id.* at 67,857.

[22] *Id.* at 67,973.

[23] *Id.* at 67,981.

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