

## Accountable Care Organizations Series: Who Are ACOs?

The Patient Protection and Affordable Care Act (ACA), passed on March 23, 2010, will lead to drastic changes throughout the healthcare industry. Section 3022, the Medicare Shared Savings Program (MSSP) introduces a new approach to the delivery of healthcare, intended to encourage the development of Accountable Care Organizations (ACOs).<sup>1</sup> ACOs are integrated care networks designed to lower costs and increase quality through patient care coordination.<sup>2</sup> While the ACA and the Centers for Medicare and Medicaid Services (CMS) proposed rule, issued on March 31, 2011, set federal guidelines for ACO formation, private development of these emerging organizations outside of the proposed rules may lead to a diverse set of stakeholders, including: providers, payors, patients, and regulators. This third installment of the Accountable Care Organizations Series considers the question: *Who Are ACOs?*

### WHO ARE THE PROVIDERS?

The proposed rule defines an ACO participant as any provider with a Medicare Identification Number, who provides services to Medicare patients within an ACO identified by an individual Tax Identification Number.<sup>3</sup> An ACO participant may include eligible healthcare organizations or various types of medical providers, such as: physicians, physician assistants, nurse practitioners, and clinical nurse specialists. Individual providers are referred to as “*ACO professionals*.”<sup>4</sup>

While many providers may hesitate to participate in currently proposed version of the MSSP, some suggest that the commercial market demands better value and quality from the healthcare industry, prompting mergers between unlikely partners (such as hospitals and health plans).<sup>5</sup> Such ventures allow for increased market share, as well as coordinated care, similar to an ACO. Some of the largest and well-known health systems in the U.S. have been on the path to creating functional ACOs for many years, primarily independent of CMS. These enterprises include Kaiser, Geisinger, Mayo, Cleveland Clinic, certain medical groups in California, and several HMOs.<sup>6</sup>

Whether private or CMS oriented, hospitals and health systems appear to be in the best position to create the collaborative environment necessary for the development of ACOs in partnership with physician

providers. Although individual physicians may believe that such arrangements threaten their traditional role in patient care and management, governance provisions within the proposed rule emphasize the proven importance of physician leadership in integrated health organizations long term success. Commentators have urged commercially created ACOs to implement similar physician governance models.<sup>7</sup>

### WHO ARE THE PAYORS?

As insurance plans continue to explore provider acquisition, they may be on the path to operating their own ACOs. While some are weary of the expanding scope of the insurance market and the decreasing distinction between healthcare payors and providers, insurers fear that providers offering and managing their own plans may bypass them completely. Additionally, insurers not aiming to enter the service market have expressed concern that the size of ACO may force plans to increase reimbursement rates.<sup>8</sup> Despite these concerns, several insurers are jumping on the ACO bandwagon. Blue Cross Blue Shield Massachusetts, Aetna, Humana, and Wellpoint, have established ACO-like structures with providers. These shared risk arrangements between healthcare entities and insurers may have the potential to be the most successful ACO model, as they have more impetus to align incentives leading to “*cooperative, innovative relationships*.”<sup>9</sup> As CMS manages benefit distributions for federal ACOs, these pioneer insurance models may represent the system implemented in the private ACO market.

### WHO ARE THE PATIENTS?

The March 31 proposed rules includes an explanation of Medicare beneficiary assignment to ACOs. CMS will retroactively assign beneficiaries at the end of a performance year based on patient utilization of primary care services from a physician participating in a specific ACO.<sup>10</sup> Medicare beneficiaries receiving the majority of their primary care from an ACO’s participating primary care physicians will be assigned to that ACO, but will not be required to receive all of their services from an ACO participating provider.<sup>11</sup> Medicare Parts A and B prohibit CMS from “*forcing*” Medicare beneficiaries to maintain services at an assigned ACO. This limitation in CMS authority has caused some prospective ACO professionals to voice concerns about their responsibility

for the health outcomes of patients treated at facilities outside their ACO.<sup>12</sup> Critics of the proposed Medicare beneficiaries assignment methodology suggest that alternatively individuals should become more directly tied through membership.<sup>13</sup> CMS has stated that patients will likely choose to participate in the coordination of care process, especially if practitioners take time to educate them about ACO practices.<sup>14</sup>

#### WHO ARE THE REGULATORS?

If a healthcare enterprise decides to become a federally registered ACO, they will be subject to the standards put forth in the ensuing final ACO rule monitored by CMS. While stricter formation guidelines and quality controls may put more strain on providers, federally sanctioned ACOs may benefit from potential savings through the MSSP. Additionally, the proposed rule includes a possible waiver process only available through the MSSP for possible Stark and Anti-Kickback violations.<sup>15</sup> Healthcare entities looking for the advantages of an integrated delivery system without a formal agreement with CMS may choose to form a private ACO. Although private ACOs will not be subject to CMS final rule mandates, they will have to comply with the language in their individual insurer-provider agreements, which may mirror some of the provisions seen in the final rules. Additionally, both private and federally sanctioned ACOs will be regulated by the same laws as any healthcare entity (e.g., Stark Law, antitrust, IRS Codes, etc.).<sup>16</sup>

Healthcare integration leads to increased concerns regarding market power, particularly among hospital and health systems. Historically, corporations with excessive market power have used their influence to raise prices for consumers, a situation contrary to ACOs and healthcare reform's overall goals. CMS's proposed rule and a Policy Statement jointly issued by the Federal Trade Commission and Department of Justice on March 31, 2011 address concerns regarding ACOs abuse of negotiating influence to gain profits.<sup>17</sup> Some critics believe that more precaution is necessary to control possible ACO monopolies from forming, and suggest implementing an all-payor rate regulation in addition to antitrust regulation. Most regulators have rejected this option, focusing instead on market-based solutions.<sup>18</sup> No existing evidence supports excessive regulatory legislation beyond the quality reporting standards set offered in CMS's proposed rule, suppressing concerns that ACOs will lead to a multitude of new regulation. Instead, through self-management, internal goal setting, and public transparency efforts, ACOs are expected to need less external regulation to achieve quality of care processes and outcomes.<sup>19</sup>

#### CONCLUSION

The various stakeholders involved in ACOs must define

their role in the accountable care environment. Whether private or federal, accountable care has already arrived and will change individual and organizational behavior in the healthcare industry. In the next article Health Capital Consultants will take a closer look at which healthcare entities are in the best position to transition to an ACO and examine, *Where are ACOs?*

<sup>1</sup> "Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations and Medicare Program: Waiver Designs in Connection With the Medicare Shared Savings Program and the Innovation Center; Proposed Rule and Notice," Fed. Reg. Vol. 76 No. 67 (April 7, 2011).

<sup>2</sup> "Accountable Care Organizations: Your Guide to Strategy, Design, and Implementation" By Marc Bard and Mike Nugent, Chicago, IL: Health Administration Press, 2011, p. 30.

<sup>3</sup> "Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations and Medicare Program: Waiver Designs in Connection With the Medicare Shared Savings Program and the Innovation Center; Proposed Rule and Notice" Federal Register, Vol. 76, No. 67 (April 7, 2011), p. 19537

<sup>4</sup> "Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations and Medicare Program: Waiver Designs in Connection With the Medicare Shared Savings Program and the Innovation Center; Proposed Rule and Notice" Federal Register, Vol. 76, No. 67 (April 7, 2011), p. 19537

<sup>5</sup> "Rising Healthcare Costs May be Impervious to Courts, Regulators" By Philip Betze, HealthLeaders Media, July 1, 2011, <http://www.healthleadersmedia.com/print/LED-268129/Rising-Healthcare-Costs-May-be-Impervious-to-Courts-Regulators> (Accessed 7/1/2011).

<sup>6</sup> "Leading Change in Health Care: Building a Viable System for Today and Tomorrow" By Ian Morrison, Chicago, IL: Health Forum, Inc., 2011, p. 184.

<sup>7</sup> "Accountable Care Organizations: Whatever Its Growing Pains, The Concept is Too Vitrally Important to Fail" By Francis J. Crosson, Health Affairs, Vol. 30, No. 7, July 2011, p. 1252-53.

<sup>8</sup> "Accountable Care Organizations: Whatever Its Growing Pains, The Concept is Too Vitrally Important to Fail" By Francis J. Crosson, Health Affairs, Vol. 30, No. 7, July 2011, p. 1252.

<sup>9</sup> "Accountable Care Organizations: Whatever Its Growing Pains, The Concept is Too Vitrally Important to Fail" By Francis J. Crosson, Health Affairs, Vol. 30, No. 7, July 2011, p. 1252.

<sup>10</sup> "If You Build It, Who Will Come? How Medicare Beneficiaries Will Be 'Assigned' To Your ACO" By Adam D. Romney and Liza Rediger Hayward, Davis Wright Tremaine LLP, May 2, 2011; "Additional Information About Accountable Care Organizations" Waller Landsen Dortch and Davis LLP, April 6, 2011.

<sup>11</sup> "Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations and Medicare Program: Waiver Designs in Connection With the Medicare Shared Savings Program and the Innovation Center; Proposed Rule and Notice," Fed. Reg. Vol. 76 No. 67 (April 7, 2011), p. 19562; "Accountable Care Organizations II: Questions and More Questions" By Mark S. Hedberg, American Bar Association, July 2010.

<sup>12</sup> "Accountable Care Organizations: Whatever Its Growing Pains, The Concept is Too Vitrally Important to Fail" By Francis J. Crosson, Health Affairs, Vol. 30, No. 7, July 2011, p. 1251.

<sup>13</sup> "Accountable Care Organizations: Whatever Its Growing Pains, The Concept is Too Vitrally Important to Fail" By Francis J. Crosson, Health Affairs, Vol. 30, No. 7, July 2011, p. 1251.

<sup>14</sup> "Patients May Present ACO Concerns of Their Own, Official Says" By Rick Daly, Modern Healthcare, May 2, 2011, <http://www.modernhealthcare.com/article/20110502/NEWS/305029918> (Accessed 7/19/2011).

<sup>15</sup> "Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations and Medicare Program: Waiver Designs in Connection With the Medicare Shared Savings

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- Program and the Innovation Center; Proposed Rule and Notice,” Fed. Reg. Vol. 76 No. 67 (April 7, 2011), p. 19628.
- <sup>16</sup> “Accountable Care Organizations: Whatever Its Growing Pains, The Concept is Too Vitally Important to Fail” By Francis J. Crosson, Health Affairs, Vol. 30, No. 7, July 2011, p. 1253.
- <sup>17</sup> “FTC, DOJ Open ACO Antitrust Guidelines to Public Comment” By John Commins, HealthLeaders Media, April 1, 2011, <http://www.healthleadersmedia.com/content/MAR-264430/FTC-DOJ-Open-ACO-Antitrust-Guidelines-to-Public-Comment> (Accessed 7/20/2011).
- <sup>18</sup> “Accountable Care Organizations: Whatever Its Growing Pains, The Concept is Too Vitally Important to Fail” By Francis J. Crosson, Health Affairs, Vol. 30, No. 7, July 2011, p. 1253.
- <sup>19</sup> “Accountable Care Organizations: Whatever Its Growing Pains, The Concept is Too Vitally Important to Fail” By Francis J. Crosson, Health Affairs, Vol. 30, No. 7, July 2011, p. 1251.

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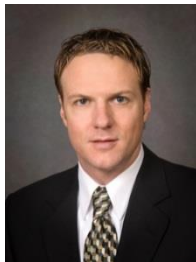
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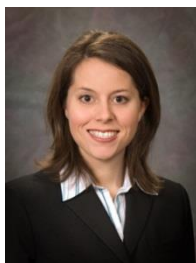
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