

# HEALTH REFORM IMPACT

## What you need to know NOW

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

### ACOs Part VI:

## A Needed Jump-Start? Three New Initiatives Promote ACO Development

June 10, 2011

Although the final rule for the Medicare Shared Savings Program (“MSSP”) is still pending, on May 17, the Centers for Medicare & Medicaid Services (“CMS”) announced three new initiatives to encourage development of Accountable Care Organizations (“ACOs”). As discussed in previous issues of *Health Reform IMPACT*,<sup>1</sup> the MSSP proposed rule (the “Proposed Rule”) is the subject of much debate in the healthcare industry, and, perhaps in response to provider wariness, CMS has launched these three new initiatives, which will operate from within CMS’ Center for Medicare and Medicaid Innovation (“CMMI”).<sup>2</sup> The initiatives, discussed separately below, are: (1) the Pioneer ACO Model, (2) the Advance Payment Initiative, and (3) the Accelerated Development Learning Sessions.

### **Pioneer ACO Model**

The first initiative announced by CMS is the “Pioneer ACO Model,” a program intended to complement the development of ACOs pursuant to the MSSP. The Pioneer ACO Model provides a way for teams that already have experience in coordinating patient care to move quickly ahead and to launch ACOs as early as the fall. CMS intends to select up to 30 participants in the Pioneer ACO Model. The Pioneer ACO Model shares some features of the MSSP as set forth in the Proposed Rule, but differs substantially from the Proposed Rule in other respects, some of which are highlighted below.<sup>3</sup>

*Number of aligned beneficiaries.* Under the Pioneer ACO Model, CMS will require ACOs to have a minimum of 15,000 Medicare beneficiaries aligned with the ACO (or 5,000 if in a rural area). By contrast, the MSSP Proposed Rule sets forth a requirement for just 5,000 aligned Medicare beneficiaries.

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<sup>1</sup> See [“ACOs Part I: Assembly Instructions,”](#) [“ACOs Part II: Oasis or Mirage? The FTC and DOJ Proposed Statement on ACOs,”](#) [“ACOs Part III: Three Key Ingredients for your ACO – Quality, Quality, and Quality,”](#) [“ACOs Part IV: Avoiding the Big ‘Gotcha,’”](#) and [“ACOs Part V: ‘Unplugged’ Versions Welcome.”](#)

<sup>2</sup> Under Section 1115A of the Social Security Act, the CMMI has authority to test new payment and services delivery models that could reduce Medicare expenses while improving quality of care for beneficiaries.

<sup>3</sup> A complete summary of these distinctions is in Appendix A of CMS’ Pioneer ACO Model Request for Application materials, available at <http://innovations.cms.gov/wp-content/uploads/2011/05/Pioneer-ACO-RFA.pdf>.

*Length of Agreement.* The Pioneer ACO Model anticipates three initial performance periods, with the first beginning at the outset of the program (sometime in the third or fourth quarter of 2011) and ending December 31, 2012. The second and third performance periods would be 12 months in duration. CMS may at its option extend the term for a Pioneer ACO for a total of five performance periods.

*Retrospective or prospective alignment of patients.* A Pioneer ACO may choose either retrospective or prospective alignment of Medicare beneficiaries for whom the ACO is accountable. Prospective alignment would be based on an analysis of the prior three years of claims data (with the most recent year weighted most heavily), whereas retrospective alignment would be based on the actual performance period. Notably, the MSSP Proposed Rule provides only for retrospective alignment.

*Payment Arrangements.* CMS plans to allow Pioneer ACOs the option to be paid under either (1) a “Core Payment Arrangement” (with certain variations) or (2) an alternative payment model that CMS will synthesize from suggestions made by program applicants. Under the Core Payment Arrangement, CMS anticipates that in the first two performance periods, the Pioneer ACO will be eligible for a percentage of shared savings and shared losses based on fee-for-service (“FFS”) payments, but that by the third performance period, the Pioneer ACO will shift to a “population-based payment” (a per-beneficiary, per-month payment), which appears to be substantively the same as a capitation payment. According to CMS, the goal of this population-based payment is to “allow Pioneer ACOs the revenue flexibility to provide services not currently paid for under FFS, and to invest in infrastructure to support care coordination.”<sup>4</sup>

*Participation of Other Payers.* CMS has designed the Pioneer ACO Model to work in coordination with private payers. Pioneer ACOs are required to enter into outcomes-based contracts<sup>5</sup> with other payers such that the majority of their total revenues stem from such arrangements by the end of the second performance period.

*Quality Performance Measures.* The performance measures for Pioneer ACOs will be the same as those in the final regulations for the MSSP. Notably, Pioneer ACOs may withdraw from the Pioneer ACO Model (by January 2012) if they do not find the terms of the MSSP final rule to be acceptable. CMS will publicly report on its website the performance of Pioneer ACOs on quality metrics.

*Representation of Consumers.* Pioneer ACOs are required to have meaningful representation from consumer advocates on the governing body of the ACO. By contrast, ACOs under the Proposed Rule do not require “community stakeholders” to be included on the governing body, but if such stakeholders are not included, an ACO must still “partner with” at least one community stakeholder (as further discussed in a previous issue of *Health Reform IMPACT*).<sup>6</sup> Note that both Pioneer ACOs and ACOs under the Proposed Rule must have patients on the governing body.

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<sup>4</sup> CMS, *Pioneer ACO Model Request for Application* at 9.

<sup>5</sup> CMS defines “outcomes-based contracts” as those that “include financial accountability (shared savings and/or financial risk), evaluate patient experiences of care, and include substantial quality performance incentives.” CMS, *Pioneer ACO Model Request for Application* at 13.

<sup>6</sup> See “[ACOs Part I: Assembly Instructions](#).”

*Legal and Regulatory Guidance.* Importantly, CMS indicates that it will apply rules consistent with the guidance issued by the Federal Trade Commission, the Department of Justice and the Internal Revenue Service regarding the antitrust and tax implications of the ACOs. CMS further indicates that on fraud and abuse issues, the Office of Inspector General of the Department of Health and Human Services and CMS plan to “apply consistent principles to the consideration of fraud and abuse waiver designs for all ACO programs and models in the Medicare program.”<sup>7</sup>

Organizations interested in participating in the Pioneer ACO Model must submit a letter of intent to apply by June 30, 2011. Full applications are due by August 19, 2011.<sup>8</sup>

### **Advance Payment Initiative**

The second initiative announced by CMS to foster the development of ACOs is consideration of an Advance Payment Initiative. This initiative responds to the criticism leveled at the MSSP that the startup costs for ACOs (such as for staff and infrastructure for coordinating care) are prohibitively burdensome. CMS is requesting comments from the public on how participants in the MSSP may be able to get part of their anticipated savings up front to invest in coordination of care efforts. ACOs would have to provide a plan for using the funds, and advance payments would be recouped through the ACO’s earned shared savings. CMS requests comments on this idea by June 17, 2011.

### **Accelerated Development Learning Sessions**

The third initiative announced by CMS is the availability of free Accelerated Development Learning Sessions to provide learning opportunities for interested parties about how to take action to improve care delivery and coordination and ultimately coordinate care through an ACO. Curriculum for these sessions will focus on core competencies for ACOs, including how to improve quality and reduce costs, how to effectively use health information technology and data, and how to assume and manage financial risk. Four sessions will be offered in 2011; attendance is not mandatory for potential ACO applicants.

If you have questions, please contact any of the attorneys in our Healthcare Practice Group listed below.

Also, please [click here](#) to visit our special webpage on Health Reform IMPACT.

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<sup>7</sup> CMS, *Pioneer ACO Model Request for Application* at Appendix A.

<sup>8</sup> Links to the form letter of intent and application are available at <http://innovations.cms.gov/areas-of-focus/seamless-and-coordinated-care-models/pioneer-aco>.

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