



CMS Offers a New Accountable Care Organization Model

On March 10, 2015, the Centers for Medicare & Medicaid Services (CMS) unveiled a Request for Applications (RFA) for the Next Generation Accountable Care Organization (Next Generation ACO or Next Generation Model), to “test whether strong financial incentives for ACOs can improve health outcomes and reduce expenditures for Medicare fee-for-service beneficiaries.”

Similar to other Medicare ACO Models, the Next Generation Model will be evaluated on its ability to deliver better care for individual patients, improve population health, and lower expenditure growth. However, the Next Generation Model is different from existing ACO Models in many respects. Next Generation ACOs will take on greater performance risk than current models, and have the potential to share in a greater portion of savings. To support the increased risk sharing, Next Generation ACOs will have refined benchmarking methods that reward attainment of cost savings and a selection of payment mechanisms to facilitate a move from fee-for-service reimbursements to other value based payments options, a key difference between existing ACOs and the Next Generation Model.

Legal Requirements

A Next Generation ACO must be a legal entity operated for the purposes of meeting the objectives of the Next Generation ACO — receiving and distributing savings and repaying shared losses — formed by group practice arrangements; networks of practitioners; hospitals employing physicians; partnerships or joint venture arrangements between hospitals and practitioners; federally qualified health centers; rural health clinics; and critical access hospitals. Each applicant must meet the requirements for ACO activities in its state of operation, and should pay particular attention to state laws and regulations applicable to risk-bearing entities. ACOs that have participated in one of the other Medicare ACO programs are deemed to have met the Next Generation Model legal entity requirements, but an ACO and its group of providers and suppliers cannot concurrently participate in the Next Generation Model and another Medicare ACO model. That said, simultaneous participation in the Next Generation Model and Health Care Innovation Awards or Bundled Payments for Care Improvement or other demonstration or models is permissible.

An ACO's governing body must be separate and unique to the ACO and must not be the same as the governing body of any other entity participating in the ACO. At least 75 percent control of the governing body must be held by providers or their designated representatives and must include at least one Medicare beneficiary served by the ACO, as well as a consumer advocate (who may be the same person as the beneficiary). Clinical management must be overseen by a physician who is an ACO provider. CMS will review the leadership of each Next Generation Model applicant for integrity and compliance.

Payment Mechanisms and Benchmarks

The Next Generation Model offers the following two risk arrangements to choose from, which determines the portion of savings or losses from the difference between actual expenditures and the discounted benchmarks that accrue to the ACO: (1) increased shared risk of 80 percent in the first two years and 85 percent in the second two years or (2) full 100 percent performance risk. Under either option, aggregate savings or losses are capped at 15 percent of the benchmark. Saving payments or loss recoupment will occur annually after a year-end financial reconciliation. In the interim, payment options under each risk arrangement include:

- > Traditional fee-for-service;
- > Traditional fee-for-service and a monthly per-beneficiary per month (PBPM) payment of no more than \$6 PBPM to support ACO infrastructure and care coordination;
- > Reduced fee-for-service payments to downstream providers and suppliers and a monthly population-based payment to the ACO; or
- > Monthly PBPM capitation payment to ACO and the ACO pays the downstream providers and suppliers.

CMS aims to create a stable and predictable financial benchmark for savings using the same methodology regardless of the payment mechanism chosen. Unlike prior ACO models, which established the benchmark at the end of a performance year, the Next Generation Model benchmark will be established prior to the start of a performance year as follows: (1) determine the ACO's historic baseline expenditures; (2) apply the regional projected trend using similar assumptions as those for Medicare Advantage plans; (3) adjust risk separately for the baseline year and performance years using the CMS Hierarchical Condition Category Model; and (4) apply a discount, which is derived from one quality adjustment and two efficiency adjustments, but not based on a minimum savings rate. A detailed financial methodology will be made available to potential participants.

Quality and performance standards for the Next Generation Model will be similar to previous CMS measures. Such measures will be a strong determining factor in whether an individual ACO reaps financial benefits from the Next Generation Model, since the benchmark calculation will assume a 100 percent quality score for all ACOs when calculating the discount and setting the prospective benchmark. In the Next Generation Model, providers with lower costs will aim to achieve quality measures, but will also be measured against doctors and hospitals in their respective regions, based on the prices charged by rival providers and facilities, rather than measurement based on historical performance.

Benefit Enhancements and New Provider Relationships

In addition, CMS is offering Next Generation ACOs the ability to offer a variety of benefit enhancements to Medicare members, including the following:

- > A semi-annual CMS payment of approximately \$50 to beneficiaries who receive at least 50 percent of Medicare services from Next Generation Model providers;
- > A waiver of the three-day inpatient stay requirement prior to admission to a Skilled Nursing Facility (SNF);
- > Expanding the coverage of telehealth services beyond beneficiaries in rural areas; and
- > Allowing post-discharge home visits by clinicians under the “general supervision” (instead of “direct supervision”) of a Next Generation provider.

To complement the benefit enhancements, CMS is allowing two new ACO/provider arrangements. The first is the opportunity for an ACO to partner with two types of “Affiliates”: (1) “Capitation Affiliates,” which are Medicare providers who are not part of the ACO, but agree to provide services to ACO beneficiaries through capitation payments; and (2) “SNF Affiliates,” which are skilled nursing facilities permitted to admit beneficiaries who have not completed a three-day inpatient hospital stay. An ACO also may enter into written agreements with providers/suppliers who are not part of the ACO structure, but are “Preferred Providers” that contribute to the ACO’s goals by providing the benefit enhancements listed above.

Other Considerations

Before submitting a Letter of Intent (LOI), applicants will want to consider whether there are state rules regarding the business of insurance and transfer of risk to providers. All Next Generation ACOs will be required to comply with applicable state rules regarding provider-based risk bearing entities and may be required to have financial guarantees to cover potential losses. For example, New York applicants will need to be familiar with the requirements and obligations associated with risk sharing arrangements under 11 N.Y.C.R.R. § 101 *et seq.* (Regulation 164), including but not limited to, review of annual certified financial statements by the New York State Department of Financial Services, financial security deposit or parental guarantee and potentially an out-of-network bank account for referral services to providers outside of the ACO’s network. In addition, New York ACOs should consider any requirements under New York’s newly enacted ACO regulation (See 10 N.Y.C.R.R. § 1003 *et seq.*).

Application Process

Slated for an initial January 2016 launch, CMS expects between 15-20 ACOs to participate in the Next Generation Model over two application rounds. The Model will consist of three initial performance years and two optional one-year extensions. Interested organizations must submit a LOI no later than May 1, 2015 for consideration in round one, or May 1, 2016 for consideration in round two. Submission of an LOI is not binding on the applicant.

If you are interested in the Next Generation ACO, you can complete the [Request for Applications, Letter of Intent, and Application](#).

This *GT Alert* was prepared by **Whitney Magee Phelps, Nancy E. Taylor, Caroline B. Brancatella and Amanda R. Ledford**[~]. Questions about the Next Generation Model or any other value-based payment arrangement can be directed to:

- > [Whitney Magee Phelps](mailto:phelpsw@gtlaw.com) | +1 518.689.1427 | phelpsw@gtlaw.com
- > [Nancy E. Taylor](mailto:taylor@gtlaw.com) | +1 202.331.3133 | taylor@gtlaw.com
- > [Caroline Brancatella](mailto:brancatellac@gtlaw.com) | +1 518.689.1448 | brancatellac@gtlaw.com
- > Amanda R. Ledford[~] | +1 202.331.3140 | ledforda@gtlaw.com
- > Or your [Greenberg Traurig](#) attorney

[~]Admitted to the practice of law in Virginia.

Albany +1 518.689.1400	Denver +1 303.572.6500	New York +1 212.801.9200	Shanghai +86 (0) 21 6391 6633
Amsterdam + 31 (0) 20 301 7300	Fort Lauderdale +1 954.765.0500	Northern Virginia +1 703.749.1300	Silicon Valley +1 650.328.8500
Atlanta +1 678.553.2100	Houston +1 713.374.3500	Orange County +1 949.732.6500	Tallahassee +1 850.222.6891
Austin +1 512.320.7200	Las Vegas +1 702.792.3773	Orlando +1 407.420.1000	Tampa +1 813.318.5700
Boca Raton +1 561.955.7600	London* +44 (0) 203 349 8700	Philadelphia +1 215.988.7800	Tel Aviv[^] +972 (0) 3 636 6000
Boston +1 617.310.6000	Los Angeles +1 310.586.7700	Phoenix +1 602.445.8000	Tokyo[^] +81 (0)3 3216 7211
Chicago +1 312.456.8400	Mexico City⁺ +52 (1) 55 5029.0000	Sacramento +1 916.442.1111	Warsaw[~] +48 22 690 6100
Dallas +1 214.665.3600	Miami +1 305.579.0500	San Francisco +1 415.655.1300	Washington, D.C. +1 202.331.3100
Delaware +1 302.661.7000	New Jersey +1 973.360.7900	Seoul[∞] +82 (0) 2 369 1000	Westchester County +1 914.286.2900
			West Palm Beach +1 561.650.7900

*This Greenberg Traurig Newsletter is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. *Operates as Greenberg Traurig Maher LLP. **Greenberg Traurig is not responsible for any legal or other services rendered by attorneys employed by the strategic alliance firms. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. [^]Greenberg Traurig Tokyo Law Offices are operated by Greenberg Traurig Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [~]Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2015 Greenberg Traurig, LLP. All rights reserved.*