ACO Contracting Guide for SNFs

Part 2: Preparing for and Contracting with ACOs

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PART II: PREPARING FOR AND CONTRACTING WITH ACOs

Preparing to Negotiate a Contract with an ACO

A contract with an Accountable Care Organization (ACO) will, at the least, change the way that the SNF interacts with the ACO participants and providers and, at the most, could subject the SNF to the risk of sharing losses with the ACO. If the skilled nursing facility (SNF) is considering taking on a more significant role with the ACO as a “participant” then it should conduct a due diligence process that is based in part on the degree of risk that it might bear in the arrangement. SNFs may not form Medicare Shared Savings Program (MSSP) ACOs on their own, but they can be “owners” in a MSSP, Pioneer ACO, or Next Generation ACO or private payer ACO-type entity (depending on how the ACO is structured). If that is the situation, then due diligence in the “buy-in” would be subject to an even higher degree of due diligence.

These considerations are particularly important when an ACO participates in the Medicare program, though the same inquiries should be made if a SNF is considering a contract with an ACO that is not planning on applying for the MSSP program but intends to contract with private payers.

Prior to conducting negotiations and providing confidential information, the parties should seriously consider entering into a “Non-Disclosure Agreement” which obligates them both to maintain the confidentiality of business information shared prior to contracting. These binding agreements also specify what information is expected from the non-disclosure obligations and how long the obligation endures.

As of 2017, SNF leadership should be aware that all contracts with ACOs will include obligations on the SNF to adhere to MSSP program regulations and the terms of the ACO’s program agreement. SNFs will also have to remain in ACOs for at least one performance year with consequences for early termination, and will have to adhere to a closeout process to transfer

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all relevant data necessary for the ACO’s annual assessment after contract termination. These new binding terms should be considered as they affect the ability to participate for just a trial period.

**Due Diligence**

The due diligence process that the SNF should undertake before commencing negotiations is described below by organizational and operational/financial categories. The list below would constitute a basic first round request for SNFs that may be considering contracting as an ACO Participant or a Preferred Provider under the Next Generation ACO Model. Some of these items would not be necessary if the SNF is planning to contract as an “Other Entity” and will not be subjected to financial risk.

**Organizational Matters:**

A SNF should understand how the ACO is organized and how it is treated for tax purposes. This phase of the due diligence process will provide an understanding of how decisions are made at the highest level and who bears the economic risk. If the SNF is a non-profit then it should be advised by its counsel about how to be involved with a for-profit ACO without jeopardizing its own tax-exempt status. Finally, it is important to know if the ACO is an MSSP, Pioneer ACO, or Next Generation ACO as different regulations apply to these models.

**ACO Organization—Request the Following Documents:**

- Articles of Incorporation, bylaws, and/or similar document filed with the applicable Secretary of State to bring the ACO into legal existence. These filings will verify whether it is a general business corporation, limited liability company (LLC), or a non-profit corporation.

- Subscription agreements, shareholder agreements, or similar documents if the SNF is considering ACO participation;

- Tax returns or applications filed with the Internal Revenue Service. This will help establish whether an entity is exempt from federal taxes or is treated as a “pass-through” for tax purposes (i.e., gains and losses are simply passed through to the owners with no entity-level tax).

**ACO Operations/Finances—Request the Following Documents:**

- The agreement between the Centers for Medicare and Medicaid Services (CMS) or Center for Medicare and Medicaid Innovation (CMMI) and the ACOs; other documents filed with CMS or CMMI as a result of the application process (this would include organizational and governance documents and agreements with participants and the agreement with CMS, list of participants and ACO Providers/Suppliers, Data Use Agreement).
The ACO is obligated to provide ACO Participants with the CMS ACO Agreement;

- Audited financial statements for the ACO for each year of existence and, if not well known, for other major participants, details on past distribution of savings or losses;
- Detail on reserves established to protect against losses or any other arrangements designed to reduce financial risk of loss;
- Budgets and strategic plans for the ACO;
- List and terms of private payer outcome-based contracts if applicable for SNF reimbursement as ACO Participant;
- Policies and procedures for: clinical care including coordination of patient care among different types of providers; gathering and reporting data; expectations on clinical performance and measures that can be taken by the ACO if the provider fails to meet expectations;
- Marketing material for the ACO. “Marketing materials” (as defined in 42 C.F.R. § 425.20) used by an MSSP ACO must be submitted to CMS and not be disapproved by CMS before they may be used);
- Correspondence with CMS regarding the ACO;
- Data connectivity and IT infrastructure requirements; and
- Available performance data.

Preparation of Strategic Material

ACOs present the opportunity to deliver better care more efficiently but are only likely to achieve these goals if they develop a good post-acute care strategy. Often, post-acute care is not the focus of acute care or physician group leadership and it will fall to the SNF to help them understand how critical post-acute care providers, such as SNFs, will be in ensuring successful operation of an ACO. In preparing to negotiate with an ACO, it is important to think of the other side of the equation: what would the ACO want to know about the SNF and what should they know about the SNF (whether they know to ask or not).

ACOs may request data and other organizational information from a SNF that they identify as a potential participant. This may include documents such as organizational documents (articles of incorporation, corporate bylaws, etc.). In addition, the ACO may request recent state survey results and patient satisfaction scores.
SNF leadership may wish to produce data that is important to the ACO in meeting its goals, including information about per diem costs, and key policies and procedures that relate to patient care and transitions—e.g., what are the processes for deciding whether to transfer a patient to a hospital and what resources are available on-site to avoid unnecessary trips to the hospital. Another important issue in patient management and accountability is data—both patient specific (medical records) and other kinds of population data. Good descriptions of the SNF’s existing and planned capability in health information technology will be important.

SNF leadership should also consider requesting the portion of the ACO’s application to CMS that describes (1) how the ACO intends to partner with long-term and post-acute care providers to improve care coordination, and (2) how the ACO intends to use technology to provide real time data sharing and medical records access to improve care coordination.