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Industry Pressure Points May Shape Final ACO Rule

Law360, New York (June 2, 2011) -- The Obama administration's proposed rule for Accountable Care Organizations has taken a beating from critics in recent weeks, but as the June 6 comment deadline passes and regulators react, we will see if one of the centerpieces of health care reform can be retooled to attract key players.

As embattled CMS Administrator Donald Berwick, M.D., stated in an optimistic May 17 editorial titled "We Can Have It All," the Affordable Care Act (ACA) provides a variety of tools for improvement of the health care system:

"One of those important new tools is the so-called Accountable Care Organization. The idea of the ACO is to encourage and support physicians, hospitals and other providers to lower costs by providing better quality care, and to reward them for success by allowing them to share in the resulting savings. ACOs are part of an important agenda of change: to shift American health care from a system based on the volume of care (the more you do, the more you get paid) to one based on the results of care (the better you do for patients, the more you get paid)."

Much of the pushback has focused on the perceived disconnect between the cost and complexity of setting up an ACO compared to the amount and timing of the potential rewards. In May, CMS responded to some of the concerns by establishing an Advance Payment Initiative along with offering other options and resources.[1]

Additionally, health care organizations and interest groups have expressed reservations about the absence of an upside-only shared savings model, the number and complexity of the 65 proposed quality measures, the uncertainty arising out of CMS' chosen retrospective patient attribution method and the antitrust obstacles remaining under the Justice Department/Federal Trade Commission proposal.

Among the high-profile players who have raised qualms about the program in its proposed form are the Mayo Clinic, the Cleveland Clinic, Sutter Health, Marshfield Clinic and the 10 members of the CMS Physician Group Practice demonstration project. It is entirely possible these players are holding out as a strategy to obtain more favorable terms from the administration in the final rules.

Political opposition is solidifying as well, particularly as the constitutional challenges to the ACA are not expected to prevail according to many experts. A group of seven Republican senators, led by Tom Coburn of Oklahoma, wrote[2] to urge HHS Secretary Kathleen Sebelius and Dr. Berwick to scrap the proposed rule and start over, although they did not offer any specifics for a revamped rule.

Costs of Implementation

The American Hospital Association (AHA) released a report claiming CMS had significantly underestimated ACO startup costs.[3] The AHA's study found the necessary elements to successfully manage the care of a defined population from launch through the first year of operation would range from $11.6 million for a 200-bed, single hospital system, to $26.1 million for a 1,200-bed, five-hospital system, as opposed to CMS' estimate of $1.8 million.

The AHA engaged the McManis Consulting firm, which evaluated a number of existing health systems that performed functions similar to those required of ACOs. The McManis study identified 23 separate capabilities in four categories: network development and management; care coordination, quality improvement and utilization management; clinical information systems; and data analytics.

In a May 13 letter[4] to CMS, AHA urged the agency to adjust the shared savings rate in recognition of the higher costs in order to encourage and enable participation. The funding gap and its related timing issues have not escaped notice at CMS.

The Center for Medicare and Medicaid Innovation announced[5] on May 17 it is considering an Advance Payment Initiative for those ACOs entering the Medicare Shared Savings Program to test whether and how pre-paying a portion of future shared savings could increase participation in the Medicare Shared Savings Program. The plan would allow eligible ACOs to receive an advance on their anticipated shared savings, to be applied to build care coordination capabilities and meet other organizational criteria. CMS is accepting comments through June 17 on this initiative.

Antitrust Obstacles

Michael D. Maves, M.D., MBA, CEO of the American Medical Association (AMA), has raised a number of concerns about the proposed antitrust policy in a May 26 letter[6] to the Federal Trade Commission.

The AMA contends the joint FTC-Department of Justice policy favors hospital-dominated ACOs over physician-led ACOs and will lead to even more practice acquisitions and consolidation in the market. Additionally, the AMA argues the proposed policy will result in "false positives" for market power and would discourage many potential arrangements that would otherwise be pro-competitive and be able to deliver the desired quality and savings.

The proposed enforcement policy divided ACOs into three tiers for antitrust purposes. For an ACO to fall within a "safety zone," independent ACO participants (e.g., physician group practices) that provide the same service must have a combined share of 30 percent or less of each such common service in each participant's Primary Service Area (PSA), wherever two or more ACO participants provide that service to patients from that PSA.

The PSA for each service is defined as the lowest number of contiguous postal zip codes from which the ACO participant draws at least 75 percent of its patients for that service. Those ACOs between 30 and 50 percent may request an optional review by the agencies, and those who exceed 50 percent will be required to obtain a review. The AMA contends the agencies' methodology will distort the results and assign most applicants into the highest-risk antitrust category.

Pioneer ACO Model

Recognizing that some well-integrated entities may be ready to accept more risk and responsibility from the start, CMS announced a Pioneer ACO model[7] as an alternative to the shared savings program on March 17. This program resembles an RFP-style solicitation.

Each ACO must manage a minimum of 15,000 beneficiaries (5,000 in rural areas), who would be identified prospectively. A retrospective alignment may be selected by negotiation with CMS, if desired. Pioneer status is limited to 30 ACOs. Letters of intent are required by June 10 and completed applications by June 18.

The core payment arrangement will be similar to the shared savings program with greater levels of upside gain and downside risk, but a second-tier payment system is also anticipated. A 35-page Request for Application[8] has been published, and it may provide some indication of what

the Shared Services ACO application may look like after the final rule is published.

Armchair Predictions

From my perspective, I anticipate the White House will exert pressure on the various regulatory agencies to tweak the rules in a manner that entices enough entities to participate so that the administration can describe the program as a successful step toward bending the cost curve and ensuring quality care.

Various stakeholders may seize the opportunity to shape the shared savings program to their own advantage. I can see the percentage of cost savings being increased, the antitrust barriers being streamlined and a possible no-downside option being added, among other changes. The final rules will determine whether the ACO concept will fly in the short run and spread to the private insurance market in the mid to long term.

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[1] http://www.healthcare.gov/news/factsheets/accountablecare05172011a.html

[2] http://coburn.senate.gov/public//index.cfm?a=Files.Serve&File_id=3dc75d6b-0099-4c21-b2d9-dbd83aa3cc91

[3] http://www.aha.org/aha/press-release/2011/110513-pr-aco.html

[4] http://www.aha.org/aha/letter/2011/110513-let-fishman-berwick-aco-case-studies.pdf

[5] http://innovations.cms.gov/areas-of-focus/seamless-and-coordinated-care-models/advance-payment/

[6] http://www.ama-assn.org/resources/doc/washington/aco-antitrust-reform-proposal-comment-letter.pdf

[7] http://innovations.cms.gov/areas-of-focus/seamless-and-coordinated-care-models/pioneer-aco/

[8] http://innovations.cms.gov/wp-content/uploads/2011/05/Pioneer-ACO-RFA.pdf