Accountable Care Organizations – Panacea or Placebo?

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Since the passage of the Patient Protection and Affordable Care Act of 2010 (PPACA) brought about the introduction of a previously heretofore unheard of concept known as a "accountable care organizations" (ACOs), there has been a growing conversation in the medical community centered around two primary questions - what are ACO's and what do the foretell as to the future of medicine? ACOs were introduced as a Medicare savings program, intended to enhance quality, improve beneficiary outcomes and increase the value of care through incentives to healthcare providers. Although PPACA mandates that the federal government establish an ACO-based Medicare shared savings program by January 1, 2012, at this juncture there has been little guidance issued by the federal government with respect to these ACOs and how they will be structured.

In fact, until the demonstration project is completed (which will be a minimum of 3 years) and regulations are issued offering more guidance, it is unlikely that ACOs will truly impact healthcare systems in the near future. Parsing through the rhetoric and alarmism, it is important for physicians to understand that although many new ideas have been proposed with respect to Medicare (ACO's only being one of them), at this time, physicians are in no way precluded from continuing to care for Medicare patients even if they are not currently associated with an ACO. As such, physicians should be cautious and take this period of flux to truly understand and evaluate the risks and costs associated with ACOs prior to joining one or providing capitalization to an entity (i.e., an IPA) that will never even qualify to serve as an ACO.

What is an ACO?

An ACO is a group of providers or a network of groups, often affiliated with a hospital, which agrees to be "accountable" for the quality, cost, and overall care of Medicare beneficiaries who are enrolled in the traditional fee-for-service program (as opposed to an HMO in which the "accountability" rests with the insurer instead of the providers). In the event that the ACO provides exceptional or low cost care, it will be rewarded with a share of the savings as the result of efficiency the entity gains. Once again, physicians should take note - the specific quality performance standards which an ACO will have to meet have yet to be determined.

What requirements must be met to be an ACO?

As per PPACA, in order to participate as an ACO, the ACO must meet the following requirements: (1) Have a formal legal structure to receive and distribute shared savings; (2) Have a sufficient number of primary care professionals for the number of assigned beneficiaries (to be 5,000 at a minimum); (3) Agree to participate in the program for not less than a 3 year period; (4) Have sufficient information regarding participating ACO health care professionals as the Secretary of the Department of Health and Human Services (HHS) determines necessary to support beneficiary assignment and for the determination of payments for shared savings; (5) Have a leadership and management structure that includes clinical and administrative systems; (6) Have defined processes to (a) promote evidenced-based medicine, (b) report the necessary data to evaluate quality and cost measures (this could incorporate requirements of other programs, such as the

Physician Quality Reporting Initiative (PQRI), Electronic Prescribing (eRx), and Electronic Health Records (EHR), and (c) coordinate care; and (7) Demonstrate it meets patient-centeredness criteria, as determined by the Secretary of HHS.

Furthermore, the statute lists the forms of organizations that may become eligible to participate as an ACO which are as follows: (1) Physicians and other professionals in group practices; (2) Physicians and other professionals in networks of practices; (3) Partnerships or joint venture arrangements between hospitals and physicians/professionals; (4) Hospitals employing physicians/professionals; (5) Other forms that the Secretary of HHS may determine appropriate. Therefore, before any physician joins forces with an ACO, it is imperative that he or she evaluates and understands the implications associated with the different models. For instance, in the event a physician joins an ACO in which a hospital employs the involved physicians, the joining physician needs to understand that he/she will be giving up his/her autonomy and will serve the ACO strictly as an employee of the hospital. As a result, physicians contemplating retirement and/or physicians who are no longer interested in the stress of running a practice may see this as a viable option., however, physicians with a more entrepreneurial perspective may well find the ACO too limiting – both financially and professionally.

What are the legal Implications associated with ACOs?

As noted above, the Department of Health and Human Services (HHS) has yet to issue any regulations governing ACO's, which has left medicine with minimal guidance as to the specifics to govern the creation, formation and maintenance of ACOs. Further, it is not expected that any such regulations will be published in the near or even proximate future, as the federal government has only recently held its first public workshop to obtain comments and ideas from the legal and medical community. Amongst the commenters were the American Medical Association (AMA), Federal Trade Commission (FTC), and American Health Lawyers Associations (AHLA), in addition to several other leading organizations from the medical and cross-related communities.

Regardless of the eventual specifics, the current statute foretells that any design of ACO organizations will certainly implicate several critical state and federal rules and regulations, including, but not limited to, federal antitrust laws, fraud and abuse statutes (stark and anti-kickback), etc. Interestingly, to facilitate the establishment of ACOs, PPACA grants the Secretary of HHS the right to waive certain provisions of the fraud and abuse laws. However, since HHS has yet to promulgate these regulations, it is unclear whether the provisions of the fraud and abuse laws will indeed be waived or to what degree. As such, physicians should be extremely cautious with respect to joining an ACO as an improperly created entity could well expose the physician to potential anti-trust and/or fraud and abuse scrutiny.

What are the practical implications involved with joining an ACO?

Although many physicians are rushing to join quasi-ACOs as the result of scare tactics and starkly bad advice, the medical community needs to act with great caution as there are not only significant legal risks but also unprecedented anticipated costs associated with the formation of an ACO. Specifically, even the barest of structures will carry enormous capitalization costs, requiring new technologies, sophisticated consulting expertise and advance funding for staff and overhead.

Furthermore, in order to meet the statutory requirements for a "compliant" ACO, physicians will have to truly integrate their practices, both clinically and financially. For many physicians this is a daunting task and not an attractive option. However, any degree of non-compliance will quickly be revealed in either financial failure or investigative prosecution.

Conclusions:

In conclusion, while ACOs are the current "practice model of the day", their future (much like the PHO's of the past) are yet to be defined, realized or proven true. Therefore, physicians need to take a step back before leaping into this new foray. There is no urgency with respect to joining an ACO at this time especially since not even the regulations have been developed nonetheless published. With that being said, it is in every physician's best interest to hold off before joining an ACO until this additional guidance is issued so that they can ensure that the ACO under consideration is actually in compliance with all applicable healthcare rules and regulations. Certainly, physicians should take this time to explore and weigh the different ACO options as they present themselves but do so in order to be ready to act under the additional guidance yet to be provided by the federal government – not expend large amounts of precious capital with little guarantee of any return.

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