



Healthcare Alert: CMS issues guidance and ACO physician exclusivity

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The Centers for Medicare & Medicaid Services (CMS) recently updated its Medicare Shared Savings Program (MSSP) FAQs by adding 13 questions and answers that provide important guidance on the ability of physicians to participate in multiple accountable care organizations (ACOs).

Contrary to the common misconception that only primary care physicians are required to be exclusive to a single ACO, and that specialists are free to participate in multiple ACOs, the update clarifies that if a group practice (or other entity) bills Medicare for services under any of the billing codes that fall within the definition of "primary care services," the taxpayer identification number (TIN) of the group is not allowed to appear on the participant lists for multiple ACOs. It is important to keep in mind that the ACO regulations broadly define "primary care services" as all services that fall within certain billing codes, including CPT codes for evaluation and management (E&M) services in various office, outpatient, nursing facility and home settings, regardless of the specialty of the physician. Primary care physicians and specialists alike will therefore generally be precluded from participating in multiple ACOs if their services are billed under any of these E&M codes, or if the services of other physicians, nurse practitioners, physician assistants or clinical nurse specialists are billed by their practice entity under those codes.

CMS indicates, however, that physicians and their practice entities have substantial flexibility to avoid the exclusivity restrictions by affiliating with ACOs as "other entities," rather than as ACO participants. Rights and obligations of the "other entity" will be determined by its contract with the ACO. Those who affiliate with ACOs as "other entities" do not appear on lists of ACO participants, do not qualify for Physician Quality Reporting System (PQRS) incentives and are not included in determining beneficiary assignment to ACOs, but are required to agree to comply with MSSP rules and may (if agreed in the contract with the ACO) be entitled to share in savings relating the ACO's participation in the MSSP. In some cases, physicians may also be able to skirt the exclusivity restrictions by billing under separate TINs.

In light of this guidance, physicians who desire to participate in multiple ACOs may wish to evaluate whether any current or contemplated ACO arrangements are likely to trigger exclusivity and, if so, to look into structuring (or restructuring) their arrangements to avoid the exclusivity restriction.

The link to the updated FAQ is:

<https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/sharedsavingsprogram/FAQ.html>

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