The Medicare Shared Savings Program and the New Glide Path to Risk

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With the first class of 82 Accountable Care Organizations (ACO) in the Medicare Shared Savings Program (MSSP) awaiting word on what the future holds for their participation in the program after January 1, 2019, the Centers for Medicare and Medicaid Services (CMS) released a proposed rule on August 9, 2018, that gives those ACOs, as well as the other 479 ACOs in the program, a preview of CMS's current thinking regarding the program's direction.

The proposed rule was officially published on August 17, 2018, in the Federal Register and a 60-day public comment period will follow. The proposed rule does not have the force of law and will not be binding unless and until a final rule is published with whatever revisions to the proposed rule CMS might make.

Background

The proposed rule contains many technical modifications to the MSSP, which are not addressed here, but one major policy decision that is contained in the proposed rule concerns the level of risk ACOs in the program will be required to take going forward and when.

There are currently four "tracks" in the program, Tracks 1, 1+, 2, and 3, and all but one, Track 1, requires ACOs to take some level of "downside" risk. That is the responsibility to pay back the Medicare program some portion of the amount by which expenditures for the ACOs assigned population in a given year exceed expenditure targets for that year. Track 1 allows ACOs to share in a portion of the "upside" or savings (if expenditures for the ACOs assigned population fall below targets in any year) but does not hold the ACO financially responsible if expenditures exceed targets in a given year.

Track 1 has been by far the most popular track in the MSSP with 460 of the 561 ACOs (82 percent of all MSSP ACOs) in the MSSP enrolled in Track 1. Under the currently effective MSSP regulations, ACOs are limited to six years (two, three-year terms) in Track 1 before they must move to a track that involves downside risk. The details of the proposed rule have been eagerly awaited by Track 1 ACOs, which will have to make the critical decision as to whether to move to downside risk or abandon the program at some point in the future. Some ACO representatives have been actively urging CMS to extend the six-year limitation on participation in Track 1.

What's the Urgency?

CMS's position on the extension of the six-year limitation, kept under wraps until last week, has immediate consequences for the 82 ACOs that began in Track 1 in 2012 and 2013. Under current MSSP regulations, these ACOs will have to decide this fall whether to move to a track that includes downside risk on January 1, 2019, or abandon the program. A May 2018 survey by the National Association of Accountable Care Organizations indicated that 71 percent of these ACOs would likely leave the program if they were required to take downside risk starting in 2019.

The MSSP Redesign

The proposed rule addresses the six-year "upside" only limitation as one part of a major redesign of the program's structure.

ACOs in any of the four current MSSP tracks would have the option to finish out the current three-year term, pursuant to the rules of the track in which they currently participate, and, as discussed below, those Track 1 ACOs with terms ending on December 31, 2018, would be able to continue in Track 1 until June 30, 2019. Thereafter, ACOs would be subject to the redesigned MSSP if they want to remain in the program.

The first major aspect of the redesign would be that participation terms would be increased from three to five years.

Secondly, the MSSP would be broken down into two tracks, Basic and Enhanced, and the current numeric terminology for the tracks would be eliminated. The Basic Track would embody the substantive features of Track 1 and Track 1+. The Enhanced Track would embody the substantive features of Track 3, the highest level of risk and potential reward of all four current tracks, and the current Track 2 would be discontinued.

The Basic Track would have five levels, A-E, with increasing levels of risk and potential reward in each level. Only the first two, A and B, would, like the current Track 1, be upside only, and levels C-E, would involve increasing levels of downside risk and potential upside reward. The downside risk and potential upside reward in Level E would be equivalent to the current Track 1 +.

ACOs in the Basic Track would be required to move up a least one level each year until they reached Level E, where they would remain until their five-year terms ended, hence the Glide Path. These ACOs would have the option to skip to higher risk levels (e.g., more directly from Level C to E) at the end of each year of the term, but could not go back to lower risk levels.

How Long May an ACO Remain in an Upside Only Model?

The level at which an ACO enters the Basic Track will determine how long it would remain eligible for an upside-only level. The level at which an ACO enters the Basic Track would be determined by its previous history in the MSSP and the Medicare Part A and Part B revenue of its ACO participants. Only newly enrolled ACOs (i.e., ACOs with no previous experience in the MSSP) and low revenue ACOs (these include ACOs where the Medicare Part A and Part B revenue of its participants is less than 25 percent of the Medicare Part A and Part B expenditures of its assigned beneficiaries) with no prior experience in Track 1+, 2 or 3 would be permitted to enter the Basic Track at Level A and participate for two years in an "upside" only level. An ACO that had previous experience in Track 1 may enter the Basic Track at Level B. A low revenue ACO with experience in Track 1+, 2 or 3 may enter the Basic Track at Level E. All other MSSP ACOs with previous Track 1+, 2 or 3 experience may only enter the Enhanced Program.

Those Track 1 ACOs that are completing their current three year MSSP terms on December 31, 2018 (including but not limited to the 82 ACOs in the first class of MSSP ACOs in 2012 and 2013) have special rules that recognize that their current terms will be expiring either before or shortly after the final rules are put in place. They would have the option to extend their terms in Track 1 until June 30, 2019.

Other current Track 1 ACOs would remain in Track 1 until their current terms expire. High revenue Track 1 ACOs then would have the option to enter into the Basic Track at Level B after their terms expire. Therefore, high revenue ACOs could remain in an upside only model until their current Track 1 term expires plus one additional year. Low Revenue Track 1 ACOs would have the option of entering the Basic Track at Level A and could remain in an upside only model until their current Track 1 term expires plus two additional years.

ACOs with no prior experience in the MSSP could start in Level A of the Basic Track on January 1, 2020 or after January 1 of any year thereafter (no ACOs may start in the MSSP in 2019) and could stay in an upside only Level (A&B) for two years of their five year term in the Basic Track. The chart below sets forth the level at which current Track 1 ACOs may enter the Basic Track at the end date of their Track 1 terms and the amount of time they may remain in an upside only track/level after December 31, 2018.

Track 1 ACOs: A Move to Risk

High Revenue

Track 1 Term Ends	Extend Track 1 Term Six Months	Time Remaining in Track 1(after 2018)	Enter Basic Track at Level	Time in Upside Only Basic Track (After 2018)	Total Time Remaining in Upside Only Models (After 2018)
12/31/18	Yes	.5 years	B	1.5 years*	2 years
12/31/19	No	1 year	B	1 year	2 years
12/31/20	No	2 years	B	1 year	3 years

Low Revenue

Track 1 Term Ends	Extend Track 1 Term Six Months	Time Remaining in Track 1(after 2018)	Enter Basic Track at Level	Time in Upside Only Basic Track (After 2018)	Total Time Remaining in Upside Only Models (After 2018)
12/31/18	Yes	.5 years	A	2.5 years*	3 years
12/31/19	No	1 year	A	2 years	3 years
12/31/20	No	2 years	A	2 years	4 years

* The first “year” in the Basic Track would be 18 months for these ACOs

Proposed Rules to Prevent “Gaming” to Delay Taking Downside Risk of the 50 Percent Rule

The 50 Percent Rule

Current MSSP regulations are silent as to whether ACO participants with previous MSSP experience can simply form a new entity to enter the MSSP as an ACO and participate as a “new” ACO to gain additional time in an upside-only level. CMS has proposed closing this potential loophole by stating that any new ACO where 50 percent or more of its participants participated in the Track 1 model in the last five years will be required to begin in Level B of the Basic Track just as if the ACO itself had previously been a Track 1 ACO.

The 40 Percent Rule

Similarly CMS has proposed to eliminate the possibility that ACO participants with previous downside risk experience in Tracks 1+, 2 or 3 could attempt to form and enter the MSSP with a new ACO entity to avoid the requirement that high revenue ACOs with such experience move directly to the Enhanced Track (and the requirement that low revenue ACOs with such experience move directly to Level E of the Basic Track) as opposed to Level A of the Basic Track. The proposed rule would treat new ACOs with more than 40 percent of their participants having participated in Track 1+, Track 2 or Track 3 in the past five years as if the new ACO itself had participated in such tracks.

While various industry groups and ACO participants have expressed varying levels of support (or lack thereof) for the proposed rule, virtually all agree that the requirement for all MSSP ACOs to establish downside risk arrangements in the relatively near future has major consequences for the Medicare Program, ACO participants, and the ACO themselves. The next several months should see numerous comments on this critical issue.