

to Medicare fee-for-service beneficiaries under a billing number assigned to the TIN of an ACO participant. The notice must be submitted in the form and manner specified by CMS.

(ii) The deletion of an ACO provider/supplier from the ACO provider/supplier list is effective on the date the individual or entity ceased to be a Medicare-enrolled provider or supplier that bills for items and services it furnishes to Medicare fee-for-service beneficiaries under a billing number assigned to the TIN of an ACO participant.

(d) *Update of Medicare enrollment information.* The ACO must ensure that all changes to enrollment information for ACO participants and ACO providers/suppliers, including changes to reassignment of the right to receive Medicare payment, are reported to CMS consistent with § 424.516.

[80 FR 32836, June 9, 2015, as amended at 83 FR 68063, Dec. 31, 2018]

Subpart C—Application Procedures and Participation Agreement

§ 425.200 Participation agreement with CMS.

(a) *General.* In order to participate in the Shared Savings Program, an ACO must enter into a participation agreement with CMS for a period of not less than the number of years specified in this section.

(b) *Agreement period.* (1) *For 2012.* For applications that are approved to participate in the Shared Savings Program for 2012, the start date for the participation agreement will be one of the following:

(i) April 1, 2012 (term of the participation agreement is 3 years and 9 months).

(ii) July 1, 2012 (term of the participation agreement is 3 years and 6 months).

(2) *For 2013 and through 2016.*

(i) The start date is January 1 of that year; and

(ii) The term of the participation agreement is 3 years unless all of the following conditions are met to extend the participation agreement by 6 months:

(A) The ACO entered an agreement period starting on January 1, 2016.

(B) The ACO elects to extend its agreement period until June 30, 2019.

(1) The ACO's election to extend its agreement period is made in the form and manner and according to the time-frame established by CMS; and

(2) An ACO executive who has the authority to legally bind the ACO must certify the election described in paragraph (b)(2)(ii)(B) of this section.

(3) *For 2017 and 2018.*

(i) The start date is January 1 of that year; and

(ii) The term of the participation agreement is 3 years, except as follows:

(A) For an ACO whose first agreement period in Track 1 began in 2014 or 2015, in which case the term of the ACO's initial agreement period under Track 1 (as described under § 425.604) may be extended, at the ACO's option, for an additional year for a total of 4 performance years if the conditions specified in paragraph (e) of this section are met.

(B) For an ACO whose agreement period started on January 1, 2018, the term of the participation agreement is extended by 12 months if both of the following conditions are met:

(1) The ACO elects to extend the participation agreement for a fourth performance year until December 31, 2021.

(2) The ACO's election to extend its agreement period is made in the form and manner and by a deadline established by CMS.

(4) *For 2019.* (i) The start date is January 1, 2019, and the term of the participation agreement is 3 years for ACOs whose first agreement period began in 2015 and who deferred renewal of their participation agreement under paragraph (e) of this section; or

(ii) The start date is July 1, 2019, and the term of the participation agreement is 5 years and 6 months.

(5) *For 2020 and subsequent years.* (i) The start date is January 1 of that year; and

(ii) The term of the participation agreement is 5 years.

(c) *Performance year.* The ACO's performance year under the participation

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agreement is the 12 month period beginning on January 1 of each year during the term of the participation agreement unless otherwise noted in its participation agreement, and except as follows:

(1) For an ACO with a start date of April 1, 2012, or July 1, 2012, the ACO's first performance year is defined as 21 months or 18 months, respectively.

(2) For an ACO that entered a first or second agreement period with a start date of January 1, 2016, and that elects to extend its agreement period by a 6-month period under paragraph (b)(2)(ii)(B) of this section, the ACO's fourth performance year is the 6-month period between January 1, 2019, and June 30, 2019.

(3) For an ACO that entered an agreement period with a start date of July 1, 2019, the ACO's first performance year of the agreement period is defined as the 6-month period between July 1, 2019, and December 31, 2019.

(d) *Submission of measures.* For each performance year of the agreement period, ACOs must submit measures in the form and manner required by CMS according to § 425.500(c) or § 425.510, as applicable, and as applicable according to §§ 425.608 and 425.609.

(e) *Optional fourth year.* (1) To qualify for a fourth performance year as described in paragraph (b)(3)(ii) of this section, the ACO must meet all of the following conditions:

(i) The ACO's first agreement period in the Shared Savings Program under Track 1 began in 2014 or 2015.

(ii) Is currently participating in its first agreement period under Track 1.

(iii) Has requested renewal of its participation agreement in accordance with § 425.224.

(iv) Has selected a two-sided model (as described under § 425.606 or § 425.610 of this part) in its renewal request.

(v) Has requested an extension of its current agreement period and a 1-year deferral of the start of its second agreement period in a form and manner specified by CMS.

(vi) CMS approves the ACO's renewal, extension, and deferral requests.

(2) An ACO that is approved for renewal, extension, and deferral that terminates its participation agreement before the start of the first perform-

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ance year of the second agreement period is—

(i) Considered to have terminated its participation agreement for the second agreement period under § 425.220; and

(ii) Not eligible to participate in the Shared Savings Program again until after the date on which the term of that second agreement period would have expired if the ACO had not terminated its participation, consistent with § 425.222.

[76 FR 67973, Nov. 2, 2011, as amended at 80 FR 32837, June 9, 2015; 81 FR 38013, June 10, 2016; 83 FR 60092, Nov. 23, 2018; 83 FR 68063, Dec. 31, 2018; 85 FR 27625, May 8, 2020; 85 FR 85038, Dec. 28, 2020]

§ 425.202 Application procedures.

(a) *General rules.* (1) In order to obtain a determination regarding whether it meets the requirements to participate in the Shared Savings Program, a prospective ACO must submit a complete application in the form and manner required by CMS by the deadline established by CMS.

(2) An ACO executive who has the authority to legally bind the ACO must certify to the best of his or her knowledge, information, and belief that the information contained in the application is accurate, complete, and truthful.

(3) An ACO that seeks to participate in the Shared Savings Program and was newly formed after March 23, 2010, as defined in the Antitrust Policy Statement, must agree that CMS can share a copy of their application with the Antitrust Agencies.

(b) *Condensed application form.* For determining eligibility for agreement periods beginning before July 1, 2019: (1) PGP demonstration sites applying to participate in the Shared Savings Program will have an opportunity to complete a condensed application form.

(2) A Pioneer ACO may use a condensed application form to apply for participation in the Shared Savings Program if it satisfies all of the following criteria:

(i) The applicant is the same legal entity as the Pioneer ACO.

(ii) The applicant's ACO participant list does not contain any ACO participant TINs that did not appear on the "Confirmed Annual TIN/NPI List" (as

defined in the Pioneer ACO Model Innovation Agreement with CMS) for the applicant ACO's last full performance year in the Pioneer ACO Model.

(iii) The applicant is not applying to participate in the one-sided model.

(c) *Application review.* CMS reviews applications in accordance with § 425.206.

[76 FR 67973, Nov. 2, 2011, as amended at 80 FR 32837, June 9, 2015; 83 FR 68063, Dec. 31, 2018]

§ 425.204 Content of the application.

(a) *Accountability for beneficiaries.* As part of its application and participation agreement, the ACO must certify that the ACO, its ACO participants, and its ACO providers/suppliers have agreed to become accountable for the quality, cost, and overall care of the Medicare fee-for-service beneficiaries assigned to the ACO.

(b) *Prior participation.* Upon request by CMS during the application cycle, the ACO must submit information regarding prior participation in the Medicare Shared Savings Program by the ACO, its ACO participants, or its ACO providers/suppliers, including such information as may be necessary for CMS to determine whether to approve an ACO's application in accordance with § 425.224(b).

(2) The ACO must specify whether the related participation agreement is currently active or has been terminated. If it has been terminated, the ACO must specify whether the termination was voluntary or involuntary.

(3) If the ACO, ACO participant, or ACO provider/supplier was previously terminated from the Shared Savings Program, the ACO must identify the cause of termination and what safeguards are now in place to enable the ACO, ACO participant, or ACO provider/supplier to participate in the program for the full term of the participation agreement.

(c) *Eligibility.* (1) As part of its application, an ACO must certify that the ACO satisfies the requirements set forth in this part. Upon request, the ACO must submit the following supporting materials to demonstrate that it satisfies the requirements set forth in this part:

(i) Documents (for example, ACO participant agreements, agreements with ACO providers/suppliers, employment contracts, and operating policies) sufficient to describe the ACO participants' and ACO providers/suppliers' rights and obligations in and representation by the ACO, and how the opportunity to receive shared savings or other financial arrangements will encourage ACO participants and ACO providers/suppliers to adhere to the quality assurance and improvement program and evidence-based clinical guidelines.

(ii) A description, or documents sufficient to describe, how the ACO will implement the required processes and patient-centeredness criteria under § 425.112, including descriptions of the remedial processes and penalties (including the potential for expulsion) that will apply if an ACO participant or an ACO provider/supplier fails to comply with and implement these processes.

(iii) Materials documenting the ACO's organization and management structure, including an organizational chart, a list of committees (including names of committee members) and their structures, and job descriptions for senior administrative and clinical leaders specifically noted in § 425.108 and § 425.112(a)(2).

(iv) Evidence that the governing body—

(A) Is an identifiable body;

(B) Represents a mechanism for shared governance for ACO participants;

(C) Is composed of representatives of its ACO participants; and

(D) Is at least 75 percent controlled by its ACO participants.

(v) Evidence that the governing body includes a Medicare beneficiary representative(s) served by the ACO who does not have a conflict of interest with the ACO, and who has no immediate family member with conflict of interest with the ACO.

(vi) A copy of the ACO's compliance plan or documentation describing the plan that will be put in place at the time the participation agreement with CMS becomes effective.

(2) Upon request, the ACO must provide copies of all documents effectuating the ACO's formation and operation, including, without limitation the following:

- (i) Charters.
- (ii) By-laws.
- (iii) Articles of incorporation.
- (iv) Partnership agreement.
- (v) Joint venture agreement.
- (vi) Management or asset purchase agreements.
- (vii) Financial statements and records.
- (viii) Resumes and other documentation required for leaders of the ACO.

(3) If an ACO requests an exception to the governing body requirement in § 425.106(c)(2) or (c)(3), the ACO must describe—

- (i) Why it seeks to differ from the requirement; and
- (ii) If seeking an exception to (c)(2), how the ACO will provide meaningful representation in ACO governance by Medicare beneficiaries.
- (iii) If seeking an exception to the requirement at (c)(3), why the ACO is unable to meet the requirement and how it will involve ACO participants in innovative ways in ACO governance.

(4)(i) An ACO must certify that it is recognized as a legal entity in the State, Federal or Tribal area in which it was established and that it is authorized to conduct business in each State or Tribal area in which it operates.

(ii) An ACO formed among two or more ACO participants must provide evidence in its application that it is a legal entity separate from any of the ACO participants.

(5) The ACO must provide CMS with such information regarding its ACO participants and its ACO providers/suppliers participating in the program as is necessary to implement the program.

(i) The ACO must submit a list of all ACO participants and ACO providers/suppliers in accordance with § 425.118.

(ii) ACOs must also submit any other specific identifying information as required by CMS in the application process.

(iii) The ACO must certify the accuracy of this information.

(6) Upon request by CMS during the application cycle or at any point during an agreement period, the ACO must submit documents demonstrating that its ACO participants, ACO providers/suppliers, and other individuals or entities performing functions or services related to ACO activities are required to comply with the requirements of the Shared Savings Program. Upon such a request, the evidence to be submitted must include, without limitation, sample or form agreements and, in the case of ACO participant agreements, the first and signature page(s) of each executed ACO participant agreement. CMS may request all pages of an executed ACO participant agreement to confirm that it conforms to the sample form agreement submitted by the ACO. The ACO must certify that all of its ACO participant agreements comply with the requirements of this part.

(d) *Distribution of savings.* As part of its application to participate in the Shared Savings Program, an ACO must certify it has a mechanism and plan to receive and use payments for shared savings, including criteria for distributing shared savings among its ACO participants and ACO providers/suppliers.

(e) *Selection of track and option for interim payment calculation.* (1) As part of its application, an ACO must specify the Track for which it is applying (as described in § 425.600).

(2)(i) An ACO applying to participate in the program with a start date of April 1, 2012 or July 1, 2012, has the option of requesting an interim payment calculation based on the financial performance for its first 12 months of program participation and quality performance for CY 2012.

(ii) An ACO must request interim payment calculation as part of its application to participate in the Shared Savings Program.

(f) *Assurance of ability to repay.* (1) An ACO must have the ability to repay all shared losses for which it may be liable under a two-sided model.

(2) An ACO that will participate in a two-sided model must establish one or more of the following repayment mechanisms in an amount and by a deadline specified by CMS in accordance with this section:

(i) An escrow account with an insured institution.

(ii) A surety bond from a company included on the U.S. Department of Treasury's List of Certified Companies.

(iii) A line of credit at an insured institution (as evidenced by a letter of credit that the Medicare program can draw upon).

(3) An ACO that will participate under a two-sided model of the Shared Savings Program must submit for CMS approval documentation that it is capable of repaying shared losses that it may incur during its agreement period, including details supporting the adequacy of the repayment mechanism.

(i) An ACO participating in Track 2 must demonstrate the adequacy of its repayment mechanism prior to any change in the terms and type of the repayment mechanism, and at such other times as requested by CMS.

(ii) An ACO entering an agreement period in Levels C, D, or E of the BASIC track or the ENHANCED track must demonstrate the adequacy of its repayment mechanism prior to the start of its agreement period, prior to any change in the terms and type of the repayment mechanism, and at such other times as requested by CMS.

(iii) An ACO entering an agreement period in Level A or Level B of the BASIC track must demonstrate the adequacy of its repayment mechanism prior to the start of any performance year in which it either elects to participate in, or is automatically transitioned to, a two-sided model, Level C, Level D, or Level E of the BASIC track, prior to any change in the terms and type of the repayment mechanism, and at such other times as requested by CMS.

(iv) An ACO that has submitted a request to renew its participation agreement must submit as part of the renewal request documentation demonstrating the adequacy of the repayment mechanism that could be used to repay any shared losses incurred for performance years in the next agreement period. The repayment mechanism applicable to the new agreement period may be the same repayment mechanism currently used by the ACO, provided that the ACO submits documentation establishing that the dura-

tion of the existing repayment mechanism has been revised to comply with paragraph (f)(6)(ii) of this section, and the amount of the repayment mechanism complies with paragraph (f)(4) of this section.

(v) As part of its application, a re-entering ACO must submit documentation demonstrating the adequacy of the repayment mechanism that could be used to repay any shared losses incurred for performance years in the next agreement period. The repayment mechanism applicable to the new agreement period may be the same repayment mechanism currently used by the re-entering ACO, provided that the ACO is the same legal entity as an ACO that previously participated in the program, and the ACO submits documentation establishing that the duration of the existing repayment mechanism has been revised to comply with paragraph (f)(6)(ii) of this section and the amount of the repayment mechanism complies with paragraph (f)(4) of this section.

(4) CMS calculates the amount of the repayment mechanism as follows:

(i) For a Track 2 ACO, the repayment mechanism amount must be equal to at least 1 percent of the total per capita Medicare Parts A and B fee-for-service expenditures for the ACO's assigned beneficiaries, based on expenditures used to calculate the benchmark for the applicable agreement period, as estimated by CMS at the time of application.

(ii) For a BASIC track or ENHANCED track ACO, the repayment mechanism amount must be equal to the lesser of the following:

(A) One-half percent of the total per capita Medicare Parts A and B fee-for-service expenditures for the ACO's assigned beneficiaries, based on expenditures and the number of assigned beneficiaries for the most recent calendar year for which 12 months of data are available.

(B) One percent of the total Medicare Parts A and B fee-for-service revenue of its ACO participants, based on revenue for the most recent calendar year for which 12 months of data are available, and based on the ACO's number of

assigned beneficiaries for the most recent calendar year for which 12 months of data are available.

(iii) CMS recalculates the ACO's repayment mechanism amount for the second and each subsequent performance year in the agreement period in accordance with paragraph (f)(4)(ii) of this section based on the certified ACO participant list for the relevant performance year, except that the number of assigned beneficiaries used in the calculations is the number of beneficiaries assigned to the ACO at the beginning of the relevant performance year under § 425.400(a)(2)(i) (for ACOs under preliminary prospective assignment with retrospective reconciliation) or § 425.400(a)(3)(i) (for ACOs under prospective assignment).

(A) If the recalculated repayment mechanism amount exceeds the existing repayment mechanism amount by at least \$1,000,000, CMS notifies the ACO in writing that the amount of its repayment mechanism must be increased to the recalculated repayment mechanism amount.

(B) Within 90 days after receipt of such written notice from CMS, the ACO must submit for CMS approval documentation that the amount of its repayment mechanism has been increased to the amount specified by CMS.

(iv)(A) In the case of an ACO that has submitted a request to enter a new participation agreement for an agreement period starting on or after January 1, 2022 and is a renewing ACO or a re-entering ACO that is the same legal entity as an ACO that previously participated in the program: If the ACO wishes to use its existing repayment mechanism to establish its ability to repay any shared losses incurred for performance years in the new agreement period, the amount of the repayment mechanism must be equal to at least the amount calculated by CMS in accordance with paragraph (f)(4)(ii) of this section.

(B) Under the following circumstances, an ACO that renewed its participation agreement for an agreement period beginning on July 1, 2019, or January 1, 2020, may elect to decrease the amount of its repayment mechanism.

(1) The ACO elected to continue to use its existing repayment mechanism for the agreement period beginning on July 1, 2019, or January 1, 2020, and the amount of that repayment mechanism was greater than the repayment mechanism amount estimated at the time of renewal application according to paragraph (f)(4)(ii) of this section.

(2) The repayment mechanism amount for performance year 2021, as recalculated pursuant to paragraph (f)(4)(iii) of this section, is less than the existing repayment mechanism amount.

(3) CMS will notify the ACO in writing if the ACO may elect to decrease the amount of its repayment mechanism pursuant to this paragraph (f)(4)(iv)(B). The ACO must submit such election, together with revised repayment mechanism documentation, in a form and manner and by a deadline specified by CMS. CMS will review the revised repayment mechanism documentation and may reject the election if the repayment mechanism documentation does not comply with the requirements of this paragraph (f).

(v)(A) An ACO that established a repayment mechanism to support its participation in a two-sided model beginning on July 1, 2019, January 1, 2020, or January 1, 2021, may elect to decrease the amount of its repayment mechanism if the repayment mechanism amount for performance year 2022, as recalculated pursuant to paragraph (f)(4)(iii) of this section, is less than the existing repayment mechanism amount.

(B) CMS will notify the ACO in writing if the ACO may elect to decrease the amount of its repayment mechanism pursuant to this paragraph (f)(4)(v). The ACO must submit such election, and revised repayment mechanism documentation, in a form and manner and by a deadline specified by CMS. CMS will review the repayment mechanism documentation and may reject the election if the repayment mechanism documentation does not comply with the requirements of this paragraph (f).

(5) After the repayment mechanism has been used to repay any portion of shared losses owed to CMS, the ACO must replenish the amount of funds

available through the repayment mechanism within 90 days. The resulting amount available through the repayment mechanism must be at least the amount specified by CMS in accordance with paragraph (f)(4) of this section.

(6) The repayment mechanism must be in effect for the duration of the ACO's participation under a two-sided model plus 12 months following the conclusion of the agreement period, except as otherwise specified in this section.

(i) For an ACO that is establishing a new repayment mechanism to meet this requirement, the repayment mechanism must satisfy one of the following criteria:

(A) The repayment mechanism covers the entire duration of the ACO's participation under a two-sided risk model plus 12 months following the conclusion of the agreement period.

(B) The repayment mechanism covers a term of at least the first two performance years in which the ACO is participating under a two-sided model and provides for automatic, annual 12-month extensions of the repayment mechanism such that the repayment mechanism will eventually remain in effect for the duration of the agreement period plus 12 months following the conclusion of the agreement period.

(ii) For a renewing ACO, or a re-entering ACO that is the same legal entity as an ACO that previously participated in the program, that wishes to use its existing repayment mechanism to establish its ability to repay any shared losses incurred for performance years in the new agreement period, the existing repayment mechanism must be amended to meet one of the following criteria.

(A) The duration of the existing repayment mechanism is extended by an amount of time that covers the duration of the new agreement period plus 12 months following the conclusion of the new agreement period.

(B) The duration of the existing repayment mechanism is extended, if necessary, to cover a term of at least the first two performance years of the new agreement period and provides for automatic, annual 12-month extensions of the repayment mechanism such that

the repayment mechanism will eventually remain in effect for the duration of the new agreement period plus 12 months following the conclusion of the new agreement period.

(iii) CMS may require the ACO to extend the duration of the repayment mechanism if necessary to ensure that the ACO fully repays CMS any shared losses for each of the performance years of the agreement period.

(iv) The repayment mechanism may be terminated at the earliest of the following conditions:

(A) The ACO has fully repaid CMS any shared losses owed for each of the performance years of the agreement period under a two-sided model.

(B) CMS has exhausted the amount reserved by the ACO's repayment mechanism and the arrangement does not need to be maintained to support the ACO's participation under the Shared Savings Program.

(C) CMS determines that the ACO does not owe any shared losses under the Shared Savings Program for any of the performance years of the agreement period.

(g) *Consideration of claims billed under merged and acquired entities' TINs.* An ACO may request that CMS consider, for purposes of beneficiary assignment and establishing the ACO's benchmark under §§ 425.601, 425.602, 425.603, or 425.652, claims billed under the TINs of entities that have been acquired through sale or merger by an ACO participant.

(1) The ACO may include an acquired entity's TIN on its ACO participant list under the following circumstances:

(i) The ACO participant has subsumed the acquired entity's TIN in its entirety, including all of the providers and suppliers that reassigned their right to receive Medicare payment to the acquired entity's TIN.

(ii) Each provider or supplier that previously reassigned his or her right to receive Medicare payment to the acquired entity's TIN has reassigned his or her right to receive Medicare payment to the TIN of the acquiring ACO participant and has been added to the ACO provider/supplier list under paragraph (c)(5) of the section.

(iii) The acquired entity's TIN is no longer used to bill Medicare.

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(2) The ACO must submit the following supporting documentation in the form and manner specified by CMS.

(i) An attestation that—

(A) Identifies by TIN both the acquired entity and the ACO participant that acquired it;

(B) Specifies that all the providers and suppliers that previously reassigned their right to receive Medicare payment to the acquired entity's TIN have reassigned such right to the TIN of the identified ACO participant and have been added to the ACO provider/supplier list under paragraph (c)(5) of this section; and

(C) Specifies that the acquired entity's TIN is no longer used to bill Medicare.

(ii) Documentation sufficient to demonstrate that the acquired entity's TIN was merged with or purchased by the ACO participant.

[76 FR 67973, Nov. 2, 2011, as amended at 80 FR 32837, June 9, 2015; 81 FR 80559, Nov. 15, 2016; 82 FR 53369, Nov. 15, 2017; 83 FR 68063, Dec. 31, 2018; 85 FR 85038, Dec. 28, 2020; 86 FR 65683, Nov. 19, 2021; 87 FR 70232, Nov. 18, 2022]

§ 425.206 Evaluation procedures for applications.

(a) *Basis for evaluation and determination.* (1) CMS evaluates an ACO's application to determine whether an applicant satisfies the requirements of this part and is qualified to participate in the Shared Savings Program, and approves or denies applications accordingly. Applications are approved or denied on the basis of the following:

(i) Information contained in and submitted with the application by an application deadline specified by CMS.

(ii) Supplemental information that was submitted in response to a CMS request and by a deadline specified by CMS.

(iii) Other information available to CMS.

(2) CMS notifies an ACO applicant when supplemental information is required for CMS to make a determination on the ACO's application and provides an opportunity for the ACO to submit the information.

(3) CMS may deny an application if an ACO applicant fails to submit requested information by the deadlines established by CMS.

(b) *Notice of determination.* (1) CMS notifies in writing each applicant ACO of its determination to approve or deny the ACO's application to participate in the Shared Savings Program.

(2) If CMS denies the application, the notice will indicate that the ACO is not qualified to participate in the Shared Savings Program, specify the reasons why the ACO is not so qualified, and inform the ACO of its right to request reconsideration review in accordance with the procedures specified in subpart I of this part.

[76 FR 67973, Nov. 2, 2011, as amended at 80 FR 32838, June 9, 2015]

§ 425.208 Provisions of participation agreement.

(a) *General rules.* (1) Upon being notified by CMS of its approval to participate in the Shared Savings Program, an executive of that ACO who has the ability to legally bind the ACO must sign and submit to CMS a participation agreement.

(2) Under the participation agreement the ACO must agree to comply with the provisions of this part in order to participate in the Shared Savings Program.

(b) *Compliance with laws.* The ACO must agree, and must require its ACO participants, ACO providers/suppliers, and other individuals or entities performing functions or services related to the ACO's activities to agree, or to comply with all applicable laws including, but not limited to, the following:

(1) Federal criminal law.

(2) The False Claims Act (31 U.S.C. 3729 *et seq.*).

(3) The anti-kickback statute (42 U.S.C. 1320a–7b(b)).

(4) The civil monetary penalties law (42 U.S.C. 1320a–7a).

(5) The physician self-referral law (42 U.S.C. 1395nn).

(c) *Certifications.* (1) The ACO must agree, as a condition of participating in the program and receiving any shared savings payment, that an individual with the authority to legally bind the ACO will certify the accuracy, completeness, and truthfulness of any data or information requested by or submitted to CMS, including, but not limited to, the application form, participation agreement, and any quality data

or other information on which CMS bases its calculation of shared savings payments and shared losses.

(2) Certifications must meet the requirements at § 425.302.

§ 425.210 Application of agreement to ACO participants, ACO providers/suppliers, and others.

(a) The ACO must provide a copy of its participation agreement with CMS to all ACO participants, ACO providers/suppliers, and other individuals or entities involved in ACO governance.

(b) All contracts or arrangements between or among the ACO, ACO participants, ACO providers/suppliers, and other individuals or entities performing functions or services related to ACO activities must require compliance with the requirements and conditions of this part, including, but not limited to, those specified in the participation agreement with CMS.

§ 425.212 Changes to program requirements during the agreement period.

(a) An ACO is subject to all regulatory changes that become effective during the agreement period, with the exception of the following program areas, unless otherwise required by statute:

(1) Eligibility requirements concerning the structure and governance of ACOs.

(2) Calculation of sharing rate.

(b) In those instances where there are changes in law or regulations, the ACO will be required to submit to CMS for review and approval, as a supplement to its original application, an explanation detailing how it will modify its processes to address these changes in law or regulations.

(c) If an ACO does not modify its processes to address a change in law or regulations, it will be placed on a CAP. If the ACO fails to effectuate the necessary modifications while under the CAP, the ACO will be terminated from the Shared Savings Program using the procedures in § 425.218.

(d) An ACO will be permitted to terminate its agreement, in those instances where Shared Savings Program statutory and regulatory standards are established during the agreement period which the ACO believes will im-

pact its ability to continue to participate in the Shared Savings Program.

[76 FR 67973, Nov. 2, 2011, as amended at 80 FR 32838, June 9, 2015]

§ 425.214 Managing changes to the ACO during the agreement period.

(a)(1) An ACO must notify CMS within 30 days of any significant change.

(2) An ACO's failure to notify CMS of a significant change does not preclude CMS from determining that the ACO has experienced a significant change.

(3) A "significant change" occurs when an ACO is no longer able to meet the eligibility or program requirements of this part.

(b) Upon becoming aware of a significant change or receiving an ACO's notice of a significant change described in paragraph (b) of this section, CMS reevaluates the ACO's eligibility to continue to participate in the Shared Savings Program and may request additional documentation. CMS may make a determination that includes one of the following:

(1) The ACO may continue to operate under the new structure.

(2) The ACO structure is so different from the initially approved ACO that it must terminate its participation agreement and submit a new application for participation.

(3) The ACO no longer meets the eligibility criteria for the program and its participation agreement must be terminated.

(4) CMS and the ACO may mutually decide to terminate the participation agreement.

[76 FR 67973, Nov. 2, 2011, as amended at 80 FR 32838, June 9, 2015]

§ 425.216 Actions prior to termination.

(a) *Pre-termination actions.* (1) If CMS concludes that termination of an ACO from the Shared Savings Program is warranted, CMS may take one or more of the following actions prior to termination of the ACO from the Shared Savings Program.

(i) Provide a warning notice to the ACO regarding noncompliance with one or more program requirements.

(ii) Request a CAP from the ACO.

(iii) Place the ACO on a special monitoring plan.

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(2) Nothing in this part, including the actions set forth in paragraph (a)(1) of this section, negates, diminishes, or otherwise alters the applicability of other laws, rules, or regulations, including, but not limited to, the Sherman Act (15 U.S.C. 1 *et seq.*), the Clayton Act (15 U.S.C. 12), and the Federal Trade Commission Act (15 U.S.C. 45 *et seq.*).

(b) *Corrective action plans.* (1) The ACO must submit a CAP for CMS approval by the deadline indicated on the notice of violation.

(i) The CAP must address what actions the ACO will take to ensure that the ACO, ACO participants, ACO providers/suppliers or other individuals or entities performing functions or services related to the ACO's activities or both correct any deficiencies and comply with all applicable Shared Savings Program requirements.

(ii) The ACO's performance will be monitored and evaluated during and after the CAP process.

(2) CMS may terminate the participation agreement if the ACO fails to submit, obtain approval for, or implement a CAP, or fails to demonstrate improved performance upon completion of the CAP.

[76 FR 67973, Nov. 2, 2011, as amended at 80 FR 32839, June 9, 2015]

§ 425.218 Termination of the participation agreement by CMS.

(a) *General.* CMS may terminate the participation agreement with an ACO when an ACO, the ACO participants, ACO providers/suppliers or other individuals or entities performing functions or services related to ACO activities fail to comply with any of the requirements of the Shared Savings Program under this part.

(b) *Grounds for termination by CMS.* CMS may terminate the participation agreement for reasons including, but not limited to the following:

(1) Non-compliance with eligibility and other requirements described in this part.

(2) The imposition of sanctions or other actions taken against the ACO by an accrediting organization, State, Federal or local government agency leading to inability of the ACO to com-

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ply with the requirements under this part.

(3) Violations of the physician self-referral prohibition, civil monetary penalties (CMP) law, Federal anti-kickback statute, antitrust laws, or any other applicable Medicare laws, rules, or regulations that are relevant to ACO operations.

(4) Failure to comply with CMS requests for documentation or other information by the deadline specified by CMS.

(5) Submitting false or fraudulent data or information.

(c) CMS may immediately terminate a participation agreement without taking any of the pre-termination actions set forth in § 425.216.

(d) *Notice of termination by CMS.* CMS notifies an ACO in writing of its decision to terminate the participation agreement.

[76 FR 67973, Nov. 2, 2011, as amended at 80 FR 32839, June 9, 2015]

§ 425.220 Termination of the participation agreement by the ACO.

(a) *Notice of termination.* An ACO must provide at least 30 days advance written notice to CMS and its ACO participants of its decision to terminate the participation agreement and the effective date of its termination.

(b) [Reserved]

[76 FR 67973, Nov. 2, 2011, as amended at 80 FR 32839, June 9, 2015; 83 FR 68064, Dec. 31, 2018]

§ 425.221 Close-out procedures and payment consequences of early termination.

(a) *Close-out procedures.* (1) An ACO whose participation agreement has expired or is terminated by CMS under § 425.218 or by the ACO under § 425.220 must implement close-out procedures including but not limited to the following issues in a form and manner and by a deadline specified by CMS:

(i) Notice to ACO participants of termination.

(ii) Record retention.

(iii) Data sharing.

(iv) Quality reporting.

(v) Beneficiary continuity of care.

(2) ACOs that fail to complete close-out procedures in the form and manner

and by the deadline specified by CMS will not be eligible to share in savings.

(b) *Payment consequences of early termination.* (1) *Receipt of shared savings.*

(i) Except as set forth in paragraph (b)(3)(i) of this section, an ACO that terminates its participation agreement under § 425.220 is eligible to receive shared savings for the performance year during which the termination becomes effective only if all of the following conditions are met:

(A) CMS designates or approves an effective date of termination of the last calendar day of the performance year.

(B) The ACO has completed all close-out procedures by the deadline specified by CMS.

(C) The ACO has satisfied the criteria for sharing in savings for the performance year.

(ii) If the participation agreement is terminated at any time by CMS under § 425.218, the ACO is not eligible to receive shared savings for the performance year during which the termination becomes effective.

(2) *Payment of shared losses.* (i) Except as set forth in paragraph (b)(3)(i) of this section, for performance years beginning before July 1, 2019, an ACO under a two-sided model is not liable for any shared losses if its participation agreement is terminated effective before the last calendar day of a performance year.

(ii) Except as set forth in paragraph (b)(3)(ii) of this section, for performance years beginning on July 1, 2019 and subsequent performance years, an ACO under a two-sided model is liable for a pro-rated share of any shared losses, as calculated in paragraph (b)(2)(iii) of this section, if its participation agreement is terminated effective before the last calendar day of a performance year.

(A) An ACO under a two-sided model that terminates its participation agreement under § 425.220 with an effective date of termination after June 30th of a 12-month performance year is liable for a pro-rated share of any shared losses determined for the performance year during which the termination becomes effective.

(B) An ACO under a two-sided model whose participation agreement is terminated by CMS under § 425.218 is liable

for a pro-rated share of any shared losses determined for the performance year during which the termination becomes effective.

(iii) The pro-rated share of losses described in paragraph (b)(2)(ii) of this section is calculated as follows:

(A) In the case of a 12-month performance year, the shared losses incurred during the 12 months of the performance year are multiplied by the quotient equal to the number of months of participation in the program during the performance year, including the month in which the termination was effective, divided by 12.

(B) In the case of a 6-month performance year beginning July 1, 2019, the shared losses incurred during CY 2019 are multiplied by the quotient equal to the number of months of participation in the program during the performance year, including the month in which the termination was effective, divided by 12.

(3) *Exceptions.* (i) An ACO starting a 12-month performance year on January 1, 2019, that terminates its participation agreement with an effective date of termination of June 30, 2019, and that enters a new agreement period beginning on July 1, 2019, is eligible for pro-rated shared savings or liable for pro-rated shared losses for the 6-month period from January 1, 2019, through June 30, 2019, as determined in accordance with § 425.609.

(ii) An ACO under a two-sided model that terminates its participation agreement under § 425.220 during the 6-month performance year beginning July 1, 2019, with an effective date of termination prior to the last calendar day of the performance year is not liable for shared losses incurred during the performance year.

[80 FR 32839, June 9, 2015, as amended at 83 FR 60092, Nov. 23, 2018; 83 FR 68064, Dec. 31, 2018]

§ 425.222 Eligibility to re-enter the program for agreement periods beginning before July 1, 2019.

(a) For purposes of determining the eligibility of a re-entering ACO to enter an agreement period beginning before July 1, 2019, the ACO may participate in the Shared Savings Program again only after the date on

which the term of its original participation agreement would have expired if the ACO had not been terminated.

(b) For purposes of determining the eligibility of a re-entering ACO to enter an agreement period beginning before July 1, 2019, an ACO whose participation agreement was previously terminated must demonstrate in its application that it has corrected the deficiencies that caused it to be terminated from the Shared Savings Program and has processes in place to ensure that it remains in compliance with the terms of the new participation agreement.

(c) For purposes of determining the eligibility of a re-entering ACO to enter an agreement period beginning before July 1, 2019, an ACO whose participation agreement was previously terminated or expired without having been renewed may re-enter the program for a subsequent agreement period.

(1) If the termination occurred less than half way through the agreement period, an ACO that was previously under a one-sided model may reenter the program under the one-sided model or a two-sided model. If the ACO reenters the program under the one-sided model, the ACO will be considered to be in the same agreement period under the one-sided model as it was at the time of termination.

(2) If the termination occurred more than half way through the agreement period, an ACO that was previously in its first agreement period under the one-sided model may reenter the program under the one-sided model or a two-sided model. If the ACO reenters the program under the one-sided model, the ACO will be considered to be in its second agreement period under the one-sided model. An ACO that was previously in its second agreement period under the one-sided model must reenter the program under a two-sided model.

(3) Regardless of the date of termination, an ACO that was previously under a two-sided model may only reapply for participation in a two-sided model.

[76 FR 67973, Nov. 2, 2011, as amended at 80 FR 32839, June 9, 2015; 83 FR 68065, Dec. 31, 2018]

§ 425.224 Application procedures for renewing ACOs and re-entering ACOs.

(a) *General rules.* A renewing ACO or a re-entering ACO may apply to enter a new participation agreement with CMS for participation in the Shared Savings Program.

(1) In order to obtain a determination regarding whether it meets the requirements to participate in the Shared Savings Program, the ACO must submit a complete application in the form and manner and by the deadline specified by CMS.

(2) An ACO executive who has the authority to legally bind the ACO must certify to the best of his or her knowledge, information, and belief that the information contained in the application is accurate, complete, and truthful.

(3) An ACO that seeks to enter a new participation agreement under the Shared Savings Program and was newly formed after March 23, 2010, as defined in the Antitrust Policy Statement, must agree that CMS can share a copy of its application with the Antitrust Agencies.

(4) The ACO must select a participation option in accordance with the requirements specified in § 425.600. Regardless of the date of termination or expiration of the participation agreement, a renewing ACO or re-entering ACO that was previously under a two-sided model may only reapply for participation in a two-sided model.

(b) *Review of application.* (1) CMS determines whether to approve a renewing ACO's or re-entering ACO's application based on an evaluation of all of the following factors:

(i) Whether the ACO satisfies the criteria for operating under the selected risk track.

(ii) The ACO's history of noncompliance with the requirements of the Shared Savings Program, including, but not limited to, the following factors:

(A) Whether the ACO demonstrated a pattern of failure to meet the quality performance standards or met any of the criteria for termination under § 425.316(c)(1)(ii) or (c)(2)(ii).

(B) For 2 performance years of the ACO's previous agreement period, regardless of whether the years are in consecutive order, whether the average per capita Medicare Parts A and B fee-for-service expenditures for the ACO's assigned beneficiary population exceeded its updated benchmark by an amount equal to or exceeding either of the following:

(1) The ACO's negative MSR, under a one-sided model.

(2) The ACO's MLR, under a two-sided model.

(C) Whether the ACO failed to repay shared losses in full within 90 days as required under subpart G of this part for any performance year of the ACO's previous agreement period in a two-sided model.

(D) For an ACO that has participated in a two-sided model authorized under section 1115A of the Act, whether the ACO failed to repay shared losses for any performance year as required under the terms of the ACO's participation agreement for such model.

(iii) Whether the ACO has demonstrated in its application that it has corrected the deficiencies that caused any noncompliance identified in paragraph (b)(1)(ii) of this section to occur, and any other factors that may have caused the ACO to be terminated from the Shared Savings Program, and has processes in place to ensure that it remains in compliance with the terms of the new participation agreement.

(iv) Whether the ACO has established that it is in compliance with the eligibility and other requirements of the Shared Savings Program to enter a new participation agreement, including the ability to repay losses by establishing an adequate repayment mechanism under § 425.204(f), if applicable.

(v) The results of a program integrity screening of the ACO, its ACO participants, and its ACO providers/suppliers (conducted in accordance with § 425.305(a)).

(2) Applications are approved or denied on the basis of the following information:

(i) Information contained in and submitted with the application by a deadline specified by CMS.

(ii) Supplemental information that was submitted by a deadline specified

by CMS in response to a CMS request for information.

(iii) Other information available to CMS.

(3) CMS notifies the ACO when supplemental information is required for CMS to make such a determination and provides an opportunity for the ACO to submit the information.

(c) *Notice of determination.* (1) CMS notifies the ACO in writing of its determination to approve or deny the ACO's application.

(2) If CMS denies the application, the notice of determination—

(i) Specifies the reasons for the denial; and

(ii) Informs the ACO of its right to request reconsideration review in accordance with the procedures specified in subpart I of this part.

[80 FR 32839, June 9, 2015, as amended at 83 FR 68065, Dec. 31, 2018; 85 FR 85039, Dec. 28, 2020; 87 FR 70232, Nov. 18, 2022]

§ 425.226 Annual participation elections.

(a) *General.* This section applies to ACOs in agreement periods beginning on July 1, 2019, and in subsequent years. Before the start of a performance year, an ACO may make elections related to its participation in the Shared Savings Program, as specified in this section, effective at the start of the applicable performance year and for the remaining years of the agreement period, unless superseded by a later election in accordance with this section.

(1) *Selection of beneficiary assignment methodology.* An ACO may select the assignment methodology that CMS employs for assignment of beneficiaries under subpart E of this part. An ACO may select either of the following:

(i) Preliminary prospective assignment with retrospective reconciliation, as described in § 425.400(a)(2).

(ii) Prospective assignment, as described in § 425.400(a)(3).

(2) *Selection of BASIC track level.* An ACO participating under the BASIC track in the glide path may select a higher level of risk and potential reward, as provided in this section.

(i) An ACO participating under the BASIC track's glide path may elect to transition to a higher level of risk and

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potential reward within the glide path than the level of risk and potential reward that the ACO would be automatically transitioned to in the applicable year as specified in § 425.605(d)(1). The automatic transition to higher levels of risk and potential reward within the BASIC track's glide path continues to apply to all subsequent years of the agreement period in the BASIC track.

(ii) An ACO transitioning to a higher level of risk and potential reward under paragraph (a)(2)(i) of this section must meet all requirements to participate under the selected level of performance-based risk, including both of the following:

(A) Establishing an adequate repayment mechanism as specified under § 425.204(f).

(B) Selecting a MSR/MLR from the options specified under § 425.605(b).

(b) *Election procedures.* (1) All annual elections must be made in a form and manner and according to the time-frame established by CMS.

(2) ACO executive who has the authority to legally bind the ACO must certify the elections described in this section.

[83 FR 68066, Dec. 31, 2018]

Subpart D—Program Requirements and Beneficiary Protections

§ 425.300 Compliance plan.

(a) The ACO must have a compliance plan that includes at least the following elements:

(1) A designated compliance official or individual who is not legal counsel to the ACO and reports directly to the ACO's governing body.

(2) Mechanisms for identifying and addressing compliance problems related to the ACO's operations and performance.

(3) A method for employees or contractors of the ACO, ACO participants, ACO providers/suppliers, and other individuals or entities performing functions or services related to ACO activities to anonymously report suspected problems related to the ACO to the compliance officer.

(4) Compliance training for the ACO, the ACO participants, and the ACO providers/suppliers.

(5) A requirement for the ACO to report probable violations of law to an appropriate law enforcement agency.

(b)(1) ACOs that are existing entities may use the current compliance officer if the compliance officer meets the requirements set forth in paragraph (a)(1) of this section.

(2) An ACO's compliance plan must be in compliance with and be updated periodically to reflect changes in law and regulations.

§ 425.302 Program requirements for data submission and certifications.

(a) *Requirements for data submission and certification.* (1) The ACO, its ACO participants, its ACO providers/suppliers or individuals or other entities performing functions or services related to ACO activities must submit all data and information, including data on measures designated by CMS under § 425.500 or § 425.510, as applicable, in a form and manner specified by CMS.

(2) *Certification of data upon submission.* With respect to data and information that are generated or submitted by the ACO, ACO participants, ACO providers/suppliers, or other individuals or entities performing functions or services related to ACO activities, an individual with the authority to legally bind the individual or entity submitting such data or information must certify the accuracy, completeness, and truthfulness of the data and information to the best of his or her knowledge information and belief.

(3) *Annual certification.* At the end of each performance year, an individual with the legal authority to bind the ACO must certify to the best of his or her knowledge, information, and belief—

(i) That the ACO, its ACO participants, its ACO providers/suppliers, and other individuals or entities performing functions or services related to ACO activities are in compliance with program requirements;

(ii) The accuracy, completeness, and truthfulness of all data and information that are generated or submitted by the ACO, ACO participants, ACO providers/suppliers, or other individuals or entities performing functions or