

(iv) *Marketing prohibition.* Except for the beneficiary notifications required under this section, the beneficiary incentive program is not the subject of marketing materials and activities, including but not limited to, an advertisement or solicitation to a beneficiary or any potential patient whose care is paid for in whole or in part by a Federal health care program (as defined at 42 U.S.C. 1320a-7b(f)).

(5) *Effect on program calculations.* CMS disregards incentive payments made by an ACO under paragraph (c) of this section in calculating an ACO's benchmarks, estimated average per capita Medicare expenditures, and shared savings and losses.

(6) *Income exemptions.* Incentive payments made under a beneficiary incentive program are not considered income or resources or otherwise taken into account for purposes of either of the following:

(i) Determining eligibility for benefits or assistance (or the amount or extent of benefits or assistance) under any Federal program or under any State or local program financed in whole or in part with Federal funds.

(ii) Any Federal or State laws relating to taxation.

(7) *Termination.* CMS may require an ACO to terminate its beneficiary incentive program at any time for either of the following:

(i) Failure to comply with the requirements of this section.

(ii) Any of the grounds for ACO termination set forth in § 425.218(b).

[83 FR 68066, Dec. 31, 2018]

§ 425.305 Other program safeguards.

(a) *Screening of ACO applicants.* (1) ACOs, ACO participants, and ACO providers/suppliers are reviewed during the Shared Savings Program application process and periodically thereafter with regard to their program integrity history, including any history of Medicare program exclusions or other sanctions and affiliations with individuals or entities that have a history of program integrity issues.

(2) ACOs, ACO participants, or ACO providers/suppliers whose screening reveals a history of program integrity issues or affiliations with individuals or entities that have a history of pro-

gram integrity issues may be subject to denial of their Shared Savings Program applications or the imposition of additional safeguards or assurances against program integrity risks.

(b) *Prohibition on certain required referrals and cost shifting.* ACOs, ACO participants, and ACO providers/suppliers are prohibited from doing the following:

(1) Conditioning the participation of ACO participants, ACO providers/suppliers, other individuals or entities performing functions or services related to ACO activities in the ACO on referrals of Federal health care program business that the ACO, its ACO participants, or ACO providers/suppliers or other individuals or entities performing functions or services related to ACO activities know or should know is being (or would be) provided to beneficiaries who are not assigned to the ACO.

(2) Requiring that beneficiaries be referred only to ACO participants or ACO providers/suppliers within the ACO or to any other provider or supplier, except that the prohibition does not apply to referrals made by employees or contractors who are operating within the scope of their employment or contractual arrangement to the employer or contracting entity, provided that the employees and contractors remain free to make referrals without restriction or limitation if the beneficiary expresses a preference for a different provider, practitioner, or supplier; the beneficiary's insurer determines the provider, practitioner, or supplier; or the referral is not in the beneficiary's best medical interests in the judgment of the referring party.

[83 FR 68067, Dec. 31, 2018]

§ 425.306 Participant agreement and exclusivity of ACO participants.

(a) Each ACO participant must commit to the term of the participation agreement and sign an ACO participant agreement that complies with the requirements of this part.

(b)(1) Except as specified in paragraph (b)(2) of this section, ACO participants are not required to be exclusive to one Shared Savings Program ACO.