Regarding Comment on: Launching Accountable Care Organizations — the Proposed Rule for the Medicare Shared Savings Program

Donald M. Berwick, MD, MPP
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Centers for Medicare & Medicaid Services,
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April 21, 2011

Dear Dr Berwick,

We are writing you regarding concerns that adequate patient protections will be incorporated into the governance and staff responsibilities of Accountable Care Organizations (ACO). The dominant ACO structure which is emerging is a hospital organization with physician employment.(1) A major change is the loss of the independent medical staff. We feel that three safeguards should be incorporated into Accountable Care Organizations.

First, the physician or healthcare provider's primary fiduciary responsibility should be to the patient and not the ACO. Fiduciary responsibility encompasses quality, finances, and loyalty. In other words, the physician can counsel the patient and refer the patient out of the ACO without fear of retaliation. Every patient would want their physician to have the patient's interests as paramount importance. An example of such a regulation would be as follows:

> "A registered nurse, licensed practical nurse, advanced nurse practitioner, doctor of allopathic medicine, doctor of osteopathic medicine or other healthcare provider with substantially similar responsibilities shall have their primary fiduciary responsibility to the patient and not to an institution or corporation which employs them, or to an entity which reimburses them for their services."

Second, is requiring key personnel in auditing and quality assurance functions to be employed by and report directly to the ACO's Board. This is similar to the banking industry. This quality assurance structure is an important consideration with the rapid disappearance of the independent medical staff. It removes the CEO as the supervisor of those who measure and assure the facilities quality.

Finally, similar to non-profit hospitals, all ACO Boards should be comprised of at least 51% of individuals without a conflict of interest with the ACO. Moreover, a substantial number of the individuals comprising the 51% should have a history of citizen representation on civic, educational, benevolent or other types of non-profit boards, such as consumer and community advocacy organizations, the League of Women Voters, parent-teacher organizations, and the American Association of University Women.

Even with this percentage, the institutions of many non-profits are profit driven, which has prompted the IRS to generate new guidance on the responsibilities of non-profit hospitals.(2) According to Lois Lerner, Director of the IRS Exempt Organization Division, for hospitals (3):

> "To qualify for tax-exemption, they must show that they provide benefit to a class of people, broad enough to benefit the community, and they must be operated to serve a public rather than a private interest."

The Boards of Non-Profit Institutions have as their primary fiduciary responsibility charitable purposes of the community and not the facility. ACOs composed of at least one non-profit organization should have Boards with the same fiduciary responsibility as non-profit organizations. Boards of For-Profit hospitals have the facility as their primary fiduciary responsibility but this should be required to be the patient. Similarly, a For-Profit ACO Board's primary fiduciary responsibility should also be to the patient and not to the ACO.

Thank you for this consideration,

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