

Repayment Mechanism Arrangements Guidance

Certain Medicare Shared Savings Program (Shared Savings Program) Accountable Care Organizations (ACOs) must establish a repayment mechanism to assure CMS that they can repay losses for which they may be liable or any other monies determined to be owed upon first performance year reconciliation (42 CFR 425.204(f)).

Specifically, ACOs are required to establish repayment mechanisms if:

1. They were accepted into Track 1 (one-sided shared savings only model) with start dates of April 1 or July 1, 2012, and elected an interim payment calculation, or
2. They were accepted into Track 2 (two-sided shared savings / losses model).

For an ACO's first performance year, the repayment mechanism must be equal to at least 1 percent of its total per capita Medicare Parts A and B fee-for-service expenditures for its assigned beneficiaries, as determined based on expenditures used to establish the ACO's benchmark (§425.204(f)). We estimate the amount of the ACO's initial repayment mechanism based on available historical data, and will give this estimate to the ACO around the time we accept its application.

To continue to participate in the program, each Track 2 ACO must annually demonstrate the adequacy of its repayment mechanism before the start of each performance year in which they take risk (§425.204(f)(3)). The repayment mechanism for each performance year must be equal to at least 1 percent of the ACO's total per capita Medicare Parts A and B fee-for-service expenditures for its assigned beneficiaries, as determined based on expenditures for the ACO's most recent performance year. Before the start of the next performance year, we will give Track 2 ACOs an estimate of the amount of the repayment obligation for which they must establish a repayment mechanism for the upcoming performance year.

To confirm that an ACO will be able to repay any monies it owes to CMS, we request the ACO submit to CMS documentation (pursuant to §425.204(f)(3)) that shows it has an adequate repayment mechanism. In their application to the Shared Savings Program, applicants selected from the following 5 types of repayment arrangements:

1. Funds placed in escrow
2. A line of credit as evidenced by a letter of credit that the Medicare program could draw upon
3. Reinsurance
4. Surety bond
5. Alternative repayment mechanism

This Guidance on Repayment Mechanism Arrangements is designed to aid ACOs in establishing an adequate repayment mechanism.

General Terms

Beneficiary/ Obligee of repayment mechanism: Centers for Medicare & Medicaid Services. CMS' address is 7500 Security Boulevard, Baltimore, MD 21244. Designate CMS as the sole beneficiary or obligee.

Term: The repayment mechanism's funds must be available to CMS until the earliest of the following:

- The ACO has fully repaid CMS the shared losses or other monies owed;
- CMS has exhausted the amount reserved by the ACO's repayment mechanism; or
- CMS determines that the ACO does not owe any shared losses or other monies under the Shared Savings Program.

Dollar amount: The dollar amount funded by the repayment mechanism must be the amount specified in a repayment mechanism amount notice from CMS to the ACO.

Track 1: If the actual amount of the interim shared savings payment is less than the amount listed in the repayment mechanism amount notice the ACO received at the start of the agreement period, then the ACO may reduce the amount in the repayment mechanism to the amount of shared savings it received in the interim payment.

Track 2: To allow for continued participation in the program from year to year, before the end of a performance year, the ACO will need to demonstrate a repayment mechanism adequate to support potential losses in the upcoming performance year. The ACO may be required to increase the amount of its repayment mechanism or to establish a second repayment mechanism to make sure it maintains adequate coverage.

CMS must be provided with notice of any change in the amount funded by the repayment mechanism.

Condition for calling funds: Your repayment mechanism documentation should indicate that your ACO is obligated to repay money it owes to CMS as a result of participation in the Shared Savings Program, citing the regulations at 42 CFR Part 425. Example:

The ACO is obligated to repay money it owes to CMS under the Medicare Shared Savings Program, as required by 42 CFR Part 425. The amount of shared losses or other monies owed will be noted in a demand letter to the ACO from CMS.

Demand letter: Repayment mechanism documentation should allow for payment to CMS in response to a demand letter from CMS.

Account fees: Account fees associated with a repayment mechanism are the responsibility of the ACO and should not be paid out of the principal for the repayment mechanism.

Note on applicability of state laws: We did not preempt any state laws or state law requirements in the final rule establishing the Shared Savings Program. To the extent that state law affects an ACO's operations, we expect the ACO to comply with those requirements as an entity authorized to conduct business in the state (76 Fed. Reg. 67802, 67816 (Nov. 2, 2011)).

Other requirements: See below for further guidance applicable to specific repayment mechanisms.

Funds placed in Escrow

CMS and U.S. Bank National Association (“U.S. Bank”) have in place a standard escrow account agreement, for use between U.S. Bank and third parties, where CMS is the recipient of funds held in escrow if payment is due to CMS. The ACO should contact the Shared Savings Program (as specified below) to open a U.S. Bank escrow account.

If the ACO wants to establish an escrow account at a different institution, CMS must approve the escrow agreement and the instructions for disbursement of the assets. Generally, CMS will accept an escrow agreement with a different institution under the following conditions:

- (i) The funds are invested in Treasury-backed securities or a money market fund;
- (ii) The instructions for disbursement of the assets are consistent with CMS’ standard escrow instructions (see Appendix A);
- (iii) The costs, fees, and expenses associated with the escrow account, including any legal expenses incurred by the escrow agent or the ACO, are not borne by CMS and such costs are not charged to principal;
- (iv) The principal cannot be encumbered for any purpose other than repaying shared losses or other monies owed by the ACO to CMS;
- (v) CMS is not required to indemnify any person or entity against any loss, claim, damages, liabilities, or expenses, including the costs of litigation arising from the escrow agreement or the subject of the agreement;
- (vi) CMS will receive advance notice of early termination of the account and any change in the amount of funds held in escrow.

We recommend that the ACO review Appendix A, CMS’ standard escrow instructions.

Letter of Credit

Arrangement: CMS will generally accept a Letter of Credit under the following conditions:

- (i) The letter of credit is irrevocable;
- (ii) CMS is designated as the sole beneficiary;
- (iii) The appropriate credit amount is specified;
- (iv) The terms allow an authorized official of CMS to draw on the letter of credit upon submission to the issuing bank of the following items: (a) a certification that “The amount of the drawing under this credit represents funds due to CMS from [ACO Name] under the Medicare Shared Savings Program regulations at 42 CFR Part 425 and which have remained unpaid for at least 90 days”; and (b) a copy of the appropriate written notice to the ACO of the amount owed.
- (v) The terms provide that CMS will receive advance notification of revocation of the letter of credit, or any change in the amount of credit.

Documentation only of the availability of a line of credit is not acceptable because the funds would not be encumbered for purposes of the ACO repaying money it owes to CMS based on the ACO’s participation in the Shared Savings Program.

Auto renewal clauses: You should not use clauses providing for the automatic renewal of an irrevocable standby letter of credit to establish the required term. You may, however, use these clauses to automatically renew the letter of credit for a period of time beyond the required term. If you use an

auto renewal clause, it should state that the lender will notify CMS and the ACO at least 90 days in advance if electing not to renew.

Reinsurance

Participating in the Shared Savings Program does not involve insurance risk. ACO participants will continue to get Medicare fee-for-service payments for all Parts A and B services they provide to assigned beneficiaries. It is only shared savings payments (and shared losses in the two-sided model) that depend upon ACO performance (76 Fed. Reg. at 67815 - 67816).

Policy Terms: The reinsurance policy must require the insurer to notify CMS promptly in writing of any lapse in coverage and to provide advance written notice to CMS of a change in the reinsurance amount and policy termination.

Surety Bond

Surety Companies: The surety bond should be issued from a company included on the U.S. Department of Treasury's "Listing of Certified (Surety Bond) Companies," http://www.fms.treas.gov/c570/c570_a-z.html. If you use a bond from a company not included on the Department of Treasury listing, it may be subject to additional scrutiny to make sure appropriate safeguards are in place.

Surety Bond Terms: The bond must contain:

- (i) A statement that the surety is liable for assessments that occur during the term of the bond;
- (ii) The surety's name, street address or post office box number, city, state, and zip code;
- (iii) A statement naming the ACO as the Principal, CMS as the Obligee, and the surety (and its heirs, executors, administrators, successors and assignees, jointly and severally) as surety;
- (iv) A statement obligating the surety to notify CMS promptly in writing if there is a lapse in the surety bond coverage and to provide advance written notice of a change in the amount of the bond or termination of the bond.

Alternative Repayment Mechanism

CMS may consider your use of an alternative repayment mechanism adequate if it finds that the alternative repayment mechanism can ensure the ability of the ACO to repay the Medicare program.

Contact Us

If you have any questions please email SharedSavingsProgram@cms.hhs.gov. Include your ACO ID and the phrase "Repayment Mechanism" in the subject line.

Appendix A

Escrow Instructions of Depositor

1. Immediately upon deposit, all monies held in the Account shall be invested by Agent in Treasury-backed securities. Upon deposit and at such other times as may be requested by Recipient, Agent shall notify Recipient of the date and amount of each deposit and other Account transaction.
2. Agent shall dispose of the Assets only upon written instruction from an authorized representative of Recipient. Such written instructions shall
 - (i) Identify the amount, if any, of Shared Losses or Other Monies Owed incurred by the Depositor for the relevant performance year, as determined by CMS and set forth in a written notification (as revised, if applicable) issued by CMS pursuant to 42 C.F.R. §425.606(h) or 42 C.F.R. §425.608(d)-(e) of the Medicare Shared Savings Program Regulations (the "Written Notification").
 - (ii) Identify the amount of such Shared Losses or Other Monies Owed that Depositor has failed to pay (the "Debt") within 90 days of the date of the Written Notification or, in the event of a Request for Reconsideration Review and/or a Request for On-the-record Review of the reconsideration official's recommendation by an independent CMS official, within 90 days of the date of a final and binding agency decision issued pursuant to the regulations at 42 C.F.R. Part 425, Subpart I.
 - (iii) Instruct Agent to convert the Assets to cash and dispose of them as follows:
 - a. If the Debt is zero, Agent shall return the full cash value of the Assets to Depositor, less Agent's unpaid fees, costs and expenses.
 - b. If the cash value of the Assets is less than or equal to the amount of the Debt, Agent shall deliver to Recipient payment by check or wire transfer in the amount of the full cash value of the Assets.
 - c. If the cash value of the Assets exceeds the amount of the Debt, Agent shall deliver to Recipient payment by check or wire transfer in the amount of the Debt and shall return the remaining Assets to Depositor, less Agent's unpaid fees, costs and expenses.
3. Upon disposition of the Assets as specified in paragraph 2(c), Agent shall close the Account and the Agreement shall terminate.
4. Unless otherwise specified by written notice of the Parties, the following persons are authorized to provide instructions from Depositor or Recipient, as the case may be, to Agent, consistent with the terms of this Agreement:

Depositor

Name: _____

Specimen Signature

Title: _____

Recipient

Name: _____

Specimen Signature

Title: _____