

# Legal Structure and Governance Issues for Accountable Care Organizations

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# ACO Structural Requirements

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- Each ACO must
  - Be a **legal entity** recognized and authorized under applicable state law to engage in its business
  - Have a **taxpayer identification number**
  - Be comprised of an **eligible** group of **ACO Participants**
  - Have a mechanism for **shared governance**
- Organizations coming together to form an ACO will almost always need to form a new entity
- An existing organization may become an ACO without forming a new entity, but satisfying governance requirements will probably discourage it from doing so

# Legal Entity

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- ACO must have a formal legal structure that is authorized under state law to
  - Receive and distribute shared savings under the Medicare Shared Savings Program (“MSSP”)
  - Repay shared losses under MSSP
  - Establish, report and ensure provider compliance with health care quality criteria, including quality performance and reporting standards
  - Perform the ACO’s other functions
- Corporation, partnership, limited liability company, etc.
- May not be a contractual joint venture alone
- Existing entity may qualify if it satisfies requirements, including shared governance

# Taxpayer Identification Number

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- ACO must have a taxpayer identification number
- MSSP payments will be made to that TIN

# Eligible ACO Participants

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- Who may form an ACO
  - ACO Professionals, *i.e.*, physicians, osteopaths, physician assistants, nurse practitioners and clinical nurses
  - Networks of ACO Professionals
  - Partnerships and joint venture arrangements between hospitals and ACO Professionals
  - Hospitals employing ACO Professionals
- Who may also participate in an ACO
  - Certain other providers, such as Federally Qualified Health Centers (“FQHCs”) and Rural Health Centers (“RHCs”)
  - Critical Access Hospitals that bill Medicare for both facility and professional services, *i.e.*, Method II billing
- Others may provide services to an ACO, but may have a smaller or no role in governance

# Mechanism for Shared Governance

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- ACO must have a governing body, *e.g.*, Board of Directors, Board of Managers, etc. with broad authority and responsibility for the ACO's administrative, fiduciary and clinical operations
- Governing Body's responsibility includes definition of processes to promote evidence-based medicine and patient engagement, report on quality and cost measures, and coordinate care
- Governing Body must be separate and unique to the ACO where the ACO comprises multiple entities, *e.g.*, independent group practices

# Proportional Representation

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- Governing Body must provide proportional representation for ACO Participants
- At least 75% of Governing Body must be ACO Participants or their designated representatives
  - *“Each ACO participant must choose an appropriate representative from within its (sic) organization to represent them (sic) on the governing body and each ACO participant must have appropriate proportionate control over governing body decision making.”*
  - How does this work with 1 hospital and 200 independent physicians?
- Governing Body must include at least 1 ACO beneficiary with no “conflict of interest,” includes family members

# Leadership and Management

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- ACO operations must be managed by an executive, officer, manager or general partner accountable to the Governing Body
- Full-time senior-level medical director who is physically present on a regular basis
  - Medical license in the state(s) in which ACO operates
  - Board certified
- ACO Participants and providers/suppliers must have a meaningful financial or other commitment to the ACO's clinical integration program likely to motivate them to make clinical integration program succeed



# Tax-Exemption Considerations

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- Tax-exempt organizations (“TEOs”) must avoid private inurement and private benefit, and wish to avoid UBIT
- Must have all of the following:
  - Terms of TEO’s participation set forth in advance in writing, negotiated at arms length
  - ACO’s current participation in MSSP
  - TEO’s share of benefits & losses proportional to benefits or contribution TEO provides
  - Any ownership interest of TEO must be in proportion to value of capital contributions; allocations & distributions in proportion to ownership
  - All contracts and transactions are at fair market value

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