



Accountable Care and Governance Challenges Under the Affordable Care Act

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Corporate Governance Developments

- The past decade has seen a revolution in corporate governance and in the expectations set for corporate directors.
- Fiduciary duty has come to mean that directors must be active participants in oversight, not mere passive recipients of information.
- A good director must engage in active inquiry and be:
 - Demanding enough to rattle cages when necessary;
 - Knowledgeable enough to set direction;
 - Bold enough to add value through hard questions;
 - Vigorous enough to assure that the organization's plans yield results;
 - And yet, a good director should not lose sight of the difference between oversight and day-to-day management.

The Case for Payment and Delivery Reform

- The Problem:
 - Fragmented care
 - Uneven, unsafe practices
 - Unsustainable costs
- “Our fee-for-service system, doling out separate payments for everything and everyone involved in a patient’s care, has all the wrong incentives: it rewards doing more over doing right, it increases paperwork and the duplication of efforts, and it discourages clinicians from working together for the best possible results.”

— Atul Gawande, “Testing, Testing,” The New Yorker, 12/14/09
- Quality = Care that is safe, effective, efficient, patient-centered, timely and equitable

— Institute of Medicine, Crossing the Quality Chasm, 2001

The Case for Payment and Delivery Reform (cont.)

- The Solution:
 - Better coordinated care, more transparent to the consumer, using evidence-based measures to achieve better outcomes, greater patient satisfaction and improved cost efficiency;
 - Or, in other words, “accountable care”;
 - An “accountable care organization” (ACO) is a provider-based organization comprised of multiple providers with a level of clinical integration sufficient to deliver accountable care;
 - Both the payment system and delivery system (in both the public and private sectors) need to change together to achieve accountable care;
 - There is widespread agreement as to the current problems and the end goals – the challenge is the transition.

The ACA Timeline for Accountable Care

- 2010
 - Section 6301: Patient-Centered Outcomes Research
 - Section 4201: Community Transformation Grants
 - Section 3027: Extension of Gainsharing Demonstration
 - Section 2705: Medicaid Global Payment System Demonstration
- 2011
 - Section 3011: National Strategy for Improvement in Health Care
 - Section 3021: Establishment of Center for Medicare and Medicaid Innovation
 - Sections 3006: Plans for Value-Based Purchasing Programs for Skilled Nursing Facilities, Home Health Agencies and Ambulatory Surgical Centers
 - Section 10333: Community-Based Collaborative Care Networks

The ACA Timeline for Accountable Care

- 2012
 - Section 3022: Medicare Shared Savings Program
 - Section 3001: Hospital Value-Based Purchasing Program
 - Section 3025: Hospital Readmissions Reduction Program
 - Section 3024: Independence at Home Demonstration Program
 - Section 2706: Pediatric Accountable Care Organization Demonstration Project
 - Section 2704: Demonstration Project to Evaluate Integrated Care Around a Hospitalization

The ACA Timeline for Accountable Care

- 2013
 - Section 3023: National Pilot Program on Payment Bundling
- 2014
 - Section 3004: Quality Reporting for Long-Term Care Hospitals, Inpatient Rehabilitation Hospitals and Hospice Programs
- 2015
 - Section 3008: Payment Adjustment for Conditions Acquired in Hospitals
 - Section 3002: Improvements to the Physician Quality Reporting System

Activities in the Private Sector

- Providers are assessing Medicare ACO participation, both Pioneer and MSSP, and the new CMMI bundled payment initiative.
- Hospitals are purchasing physician practices and expanding their contracting networks.
- Providers are reassessing health plan ownership or acquiring medical management capability.
- Private payers are setting up ACO, bundled payment, medical home, P4P and other value-based payment programs.
- Payers are purchasing providers and provider organizations.
- Providers are looking at value-based payment demonstrations with their own employees and with other self-funded employers in the community.
- New acute/post-acute arrangements and joint ventures are being developed.
- Providers and payers are responding to state value-based payment and ACO programs.
- Many large employers are again becoming active in care management for their employees, creating additional opportunities for payers and providers.

Fiduciary Challenges and Opportunities in the Accountable Care Era

- Health care provider organizations face a variety of challenges and opportunities in the accountable care era; their board members, as fiduciaries, will need to address the following issues, among others:
 - Fee-for-service payments are likely to decline steadily in the years ahead, challenging financial performance;
 - Additional payment changes will further reduce reimbursement to providers with poor scores on quality measures or who evidence inefficiencies such as above-average readmissions;
 - The shift to various forms of pay-for-performance, bundled payments and global or population-based payments, or other value-based reimbursement methodologies, will require infrastructure investments by providers that may or may not be reimbursed, further threatening financial solvency;

Fiduciary Challenges and Opportunities in the Accountable Care Era (cont.)

- On top of those issues, boards are faced with the fact that the increasing focus on quality measurement and reporting may trigger fraud and abuse enforcement against providers making claims to public and private payers for care that is ultimately deemed substandard;
- Greater quality data reporting and transparency will require board oversight to assure that reporting is accurate; compliance plans will need to be enhanced to address these expanded concerns;
- Provider entity boards will need to review their committee structures related to quality in order to ensure that the board or board committee's charter requires attention to effectiveness, efficiency and patient-centeredness in addition to patient safety;

Fiduciary Challenges and Opportunities in the Accountable Care Era (cont.)

- ACO boards and ACO sponsoring organization boards will need to ensure that appropriate and effective management and clinical personal and protocols are in place to meet CMS, NCQA and other requirements and to achieve the ACO's quality and financial goals;
- Health systems will need to consider which entity – one that currently exists or one to be formed – will serve as the ACO (including how many ACOs it may want to form or work with); and how to coordinate the ACO board or boards with other boards within the system.

MSSP Proposed Rule – Structure and Governance

- Formation of a new entity to serve as the ACO is not required if existing entities can meet all of the applicable requirements set forth in the rule.
- The ACO governing body must include participating ACO providers and suppliers (or representatives) and Medicare beneficiaries (or representatives); at least 75% control of the governing body must be held by ACO participants (providers and suppliers).
- Each ACO participant must have “appropriate proportionate control” over governing body decisionmaking.
- The Pioneer Model includes an additional requirement that the ACO board include a “consumer advocate.”
- These governance representation requirements raise questions of fiduciary duty as to ACO governing boards, since governing board members’ duty generally will be to the ACO, not any particular provider or group that they represent.

NCQA Guidelines for ACO Governance

- With regard to the governing body, NCQA proposes to score ACOs on the effectiveness of the role, structure and functions of the governing body, including how well the governing body provides leadership, establishes accountability and “provides the structure to align the functions of an ACO.”
- The NCQA criteria state that the physician or clinician leader of the ACO “must participate on or advise the board.”
- An ACO also, according to NCQA, will need a documented process for annually reviewing the ACO’s performance, including its social and structural elements critical to achieving high performance, with the governing body.

NCQA Guidelines for ACO Governance (cont.)

- ACO governing bodies also will need to assure that the following stakeholder groups are involved in its oversight functions:
 - Primary care practitioners and specialists who provide care for ACO's patients;
 - Hospitals or other providers that are part of the legal or contracting structure of the ACO; and
 - Consumers or community representatives.
- ACOs and their governing bodies are tasked and will be scored by the NCQA on how well they work with providers, community resources, consumers and payers.

Balancing Representational Requirements

- ACO boards will need to balance stakeholder representation required by CMS or NCQA with IRS requirements related to community representation as well as with both IRS and good governance recommendations related to the need for a reasonable number of “independent” directors on boards.
- Ultimately, directors should not view their job as to “represent” factions or constituencies in exercising their oversight in accord with the duty of care – they must act in the overall best interest of the organization for which they are a fiduciary.
- This must be understood as different from duty on an advisory board and different from how a provider representative would view a contract negotiation with a payer or another provider.
- ACO sponsoring organization board members and ACO board members will need clarity in their respective mission, vision, and goals as well as an understanding of the differences between the two.

Governance in the Accountable Care Era

- Governance in the accountable care era will need to be very focused and intentional, and it will be essential for board members to be both educated and proactive.
- This will require:
 - Robust recruiting and educating of directors with the right skill sets;
 - Providing the right kind of ongoing information that that does not drown them in unnecessary detail, but is incisive and detailed enough to allow for effective oversight;
 - Having in place board evaluation mechanisms that allow the board to continuously improve in doing its job.

Governance in the Accountable Care Era (cont.)

- Key Areas of Oversight:
 - Measuring and managing value;
 - Maximizing patient and physician stakeholder engagement;
 - Enhancing outcomes reporting transparency;
 - Strengthening internal pay-for-performance while remaining legally compliant;
 - Making board work more intentional.

Making Board Work More Intentional

- It will not be easy to attract, engage, and retain superior board members in this new era of high-performance governance. For board members to believe their time and talents are being maximized, new cultures and systems will be needed to govern tomorrow's integrated and accountable care delivery systems. High-performance boards must continuously explore and practice intentional governance that embraces these attributes:
 - Competency-based governance—recruiting and educating diverse and talented board members to achieve a balanced set of skills, attitudes, and experience within the board and its committees, advisory councils, and task forces.
 - Information for governance decision making that is driven by data from electronic health records; episodes of care cost profiles; and satisfaction scores of patients, physicians, employees, and purchasers.

Making Board Work More Intentional (cont.)

- Meeting calendars that have fewer but smarter meetings with agendas that encourage meaningful conversations with periodic expert speakers, clinicians, middle managers, and industry analysts about strategic challenges and future opportunities, rather than mere reviews of past statistics.
- Patient stories that ground and inform the board's deliberations about the reality of clinical frontline challenges and the continuous call for value from care that is convenient, comfortable, customized, and cost effective.
- Governance processes and structures that are evaluated each year to develop “governance enhancement plans.”
- Accountable care demands accountable governance. Great boards must design critical conversations about governance best practices into their journey toward continuous governance improvement in the accountable care era.

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