ACO²: ALTERNATIVE CORPORATE OPTIONS FOR ACCOUNTABLE CARE ORGANIZATIONS

Steve Shaber and Kim Licata
Poyner Spruill LLP
Raleigh, North Carolina

August 7, 2010
North Carolina Medical Society ACO Summit

Epigram

And don't throw the past away
You might need it some other rainy day
Dreams can come true again
When everything old is new again

"Everything Old Is New Again"
Peter Allen

Alternate Epigram

With a bit of a mind flip
You're there in the time slip
Let's do the Time Warp again

"The Time Warp"
The Rocky Horror Picture Show
Richard O'Brien

Debate on What Providers Must Be in an ACO to Participate in Shared Savings

- At present, there is NO required composition of an ACO. There may be ACOs focused on particular aspects of care (physician services, acute care, full service)
- "All ACOs should have a strong base of primary care. Hospitals should be encouraged to participate . . . [b]ut in contrast to others' definitions, we believe that this need not be an absolute requirement for ACOs."
  - Elliott Fisher et al., *A National Strategy to Put Accountable Care Into Practice*, Health Affairs, May 2010, at 983.
- "[S]ome think that local hospitals must be included in an ACO. However, others think . . . we should allow separate outpatient and inpatient ACOs to develop. . . ."
  - Kelly Devers, *Can Accountable Care Organizations*

General Background on ACOs

Introduction to Accountable Care Organizations

- Accountable Care Organizations under health care reform are entities that will become accountable for the overall cost and quality of health care services delivered to patients.
- Inherent in the concept of an ACO is that greater accountability will be encouraged through incentive payments or new forms of payments to the ACOs.

p.s. Poyner Spruill LLP
ATTORNEYS AT LAW

Eight Required Elements

- Legal Organization
- 3 Year Commitment
- 5000 Beneficiaries
- Accountable for Quality & Cost of Care
  - Can collect and provide information
  - Can provide administration and clinical care
  - Offers evidence based medicine and coordinated care
  - Is patient centered
- The key is that CMS wants physicians (and other providers) to tell the Agency what works. We know what doesn't work!

Compensation – Options

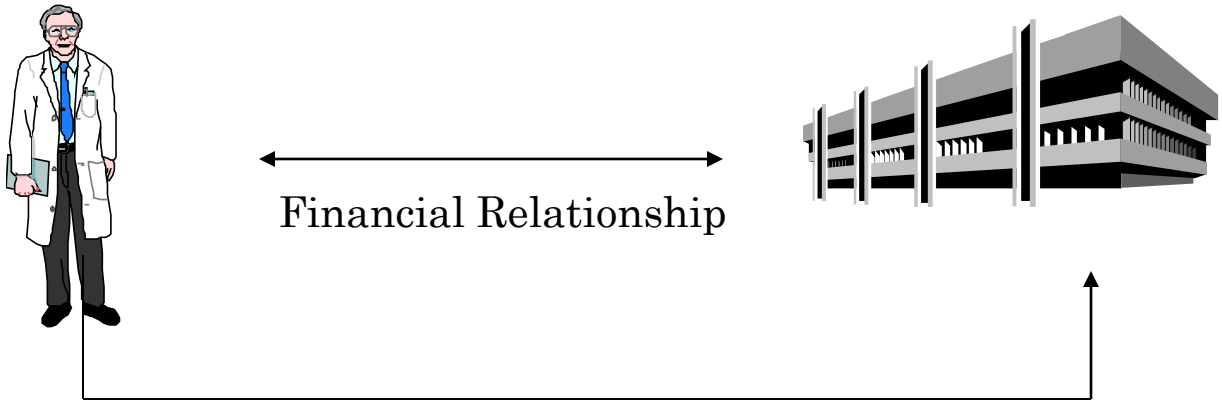
- Shared Savings.
  - ACO is eligible for "shared savings" payments (i.e. bonus payments) if:
    - it meets quality and performance standards and
    - the ACO's estimated Medicare costs are a certain percentage below a benchmark set by the Secretary.
- Capitation & Partial Capitation.
  - Secretary can choose to limit the capitation or partial capitation model to ACOs that are highly integrated systems of care and to ACOs capable of bearing risk.
- Other Payment Models Authorized by HHS.

Legal Issues in Forming ACOs

The Stark law, Anti-Kickback Statute, and Anti-trust Considerations

p.s. Poyner Spruill LLP
ATTORNEYS AT LAW

The Stark Statute and Regulations



Referral of DHS for Medicare or Medicaid patient

➔Under Stark, a physician is prohibited from referring Medicare patients to an entity for designated health services for which Medicare would otherwise pay, if the physician (or an immediate family member of the physician) has a financial relationship with the entity.

➔Stark is violated when the financial relationship does not fit a statutory or regulatory exception. Stark is a technical, bright-line statute, intent is irrelevant!

p.s. Poyner Spruill LLP
ATTORNEYS AT LAW

The Anti-Kickback Statute

- The Anti-kickback statute prohibits the knowing and willful solicitation, offer, payment, or receipt of any remuneration, whether direct or indirect, overt or covert, in cash or in kind, in return for or to induce:
  - Referring or influencing the referral of an individual for the furnishing of any item or service;
  - Purchasing, leasing or arranging or recommending for the purchase, lease or ordering of any item or service.
- Paid in whole or in part under any federal health program.
- Basis for civil and criminal liability; also leads to liability under other federal statutes (False Claims Act, Civil Monetary Penalties).
- As Stark has exceptions, Anti-kickback has Safe Harbors

Anti-Trust Law & Safety Zones

- Financial Integration is allowed where there is Limited Market Power
  - *Arizona v. Maricopa County Medical Society*
  - *Statement 8*

- Clinical Integration is allowed where Clinical Benefits Justify Anticompetitive Bargaining
  - Revised FTC *Statement 8*

p.s. Poyner Spruill LLP
ATTORNEYS AT LAW

Gainsharing as a Predictor of ACO Treatment

- Gainsharing is profit sharing between hospitals and physicians where FFS remains but a percentage of the cost savings gets passed on to the physician
- The OIG has previously approved gainsharing arrangements on a case-by-case basis because of:
  - Substantial Structure
  - Accountability
  - Quality Controls and
  - Other Safeguards

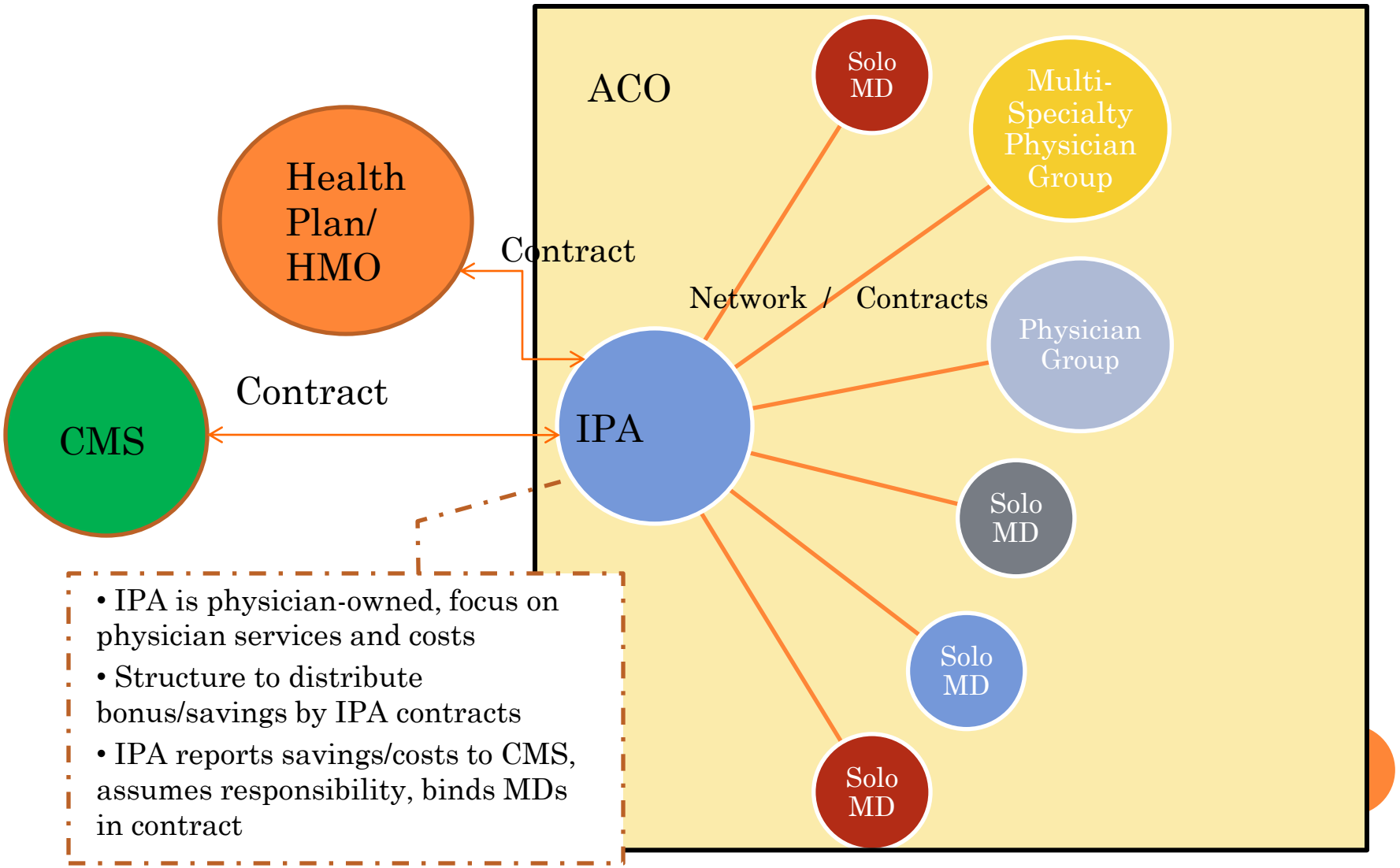
p.s. Poyner Spruill LLP
ATTORNEYS AT LAW

Some Potential Physician-Led Structures for an ACO

Based on statutory guidance

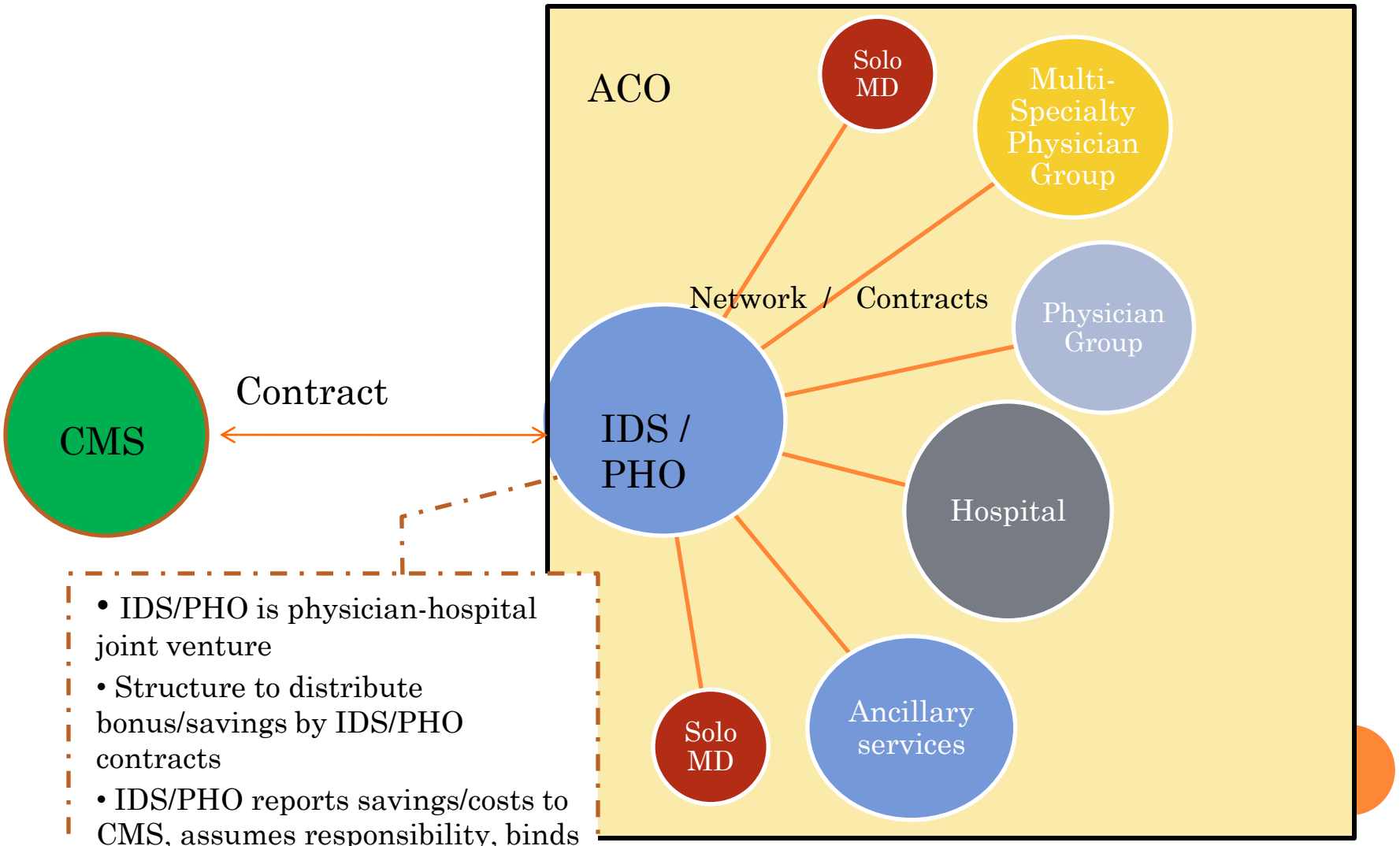
p.s. Poyner Spruill LLP
ATTORNEYS AT LAW

IPA as Basis for an ACO



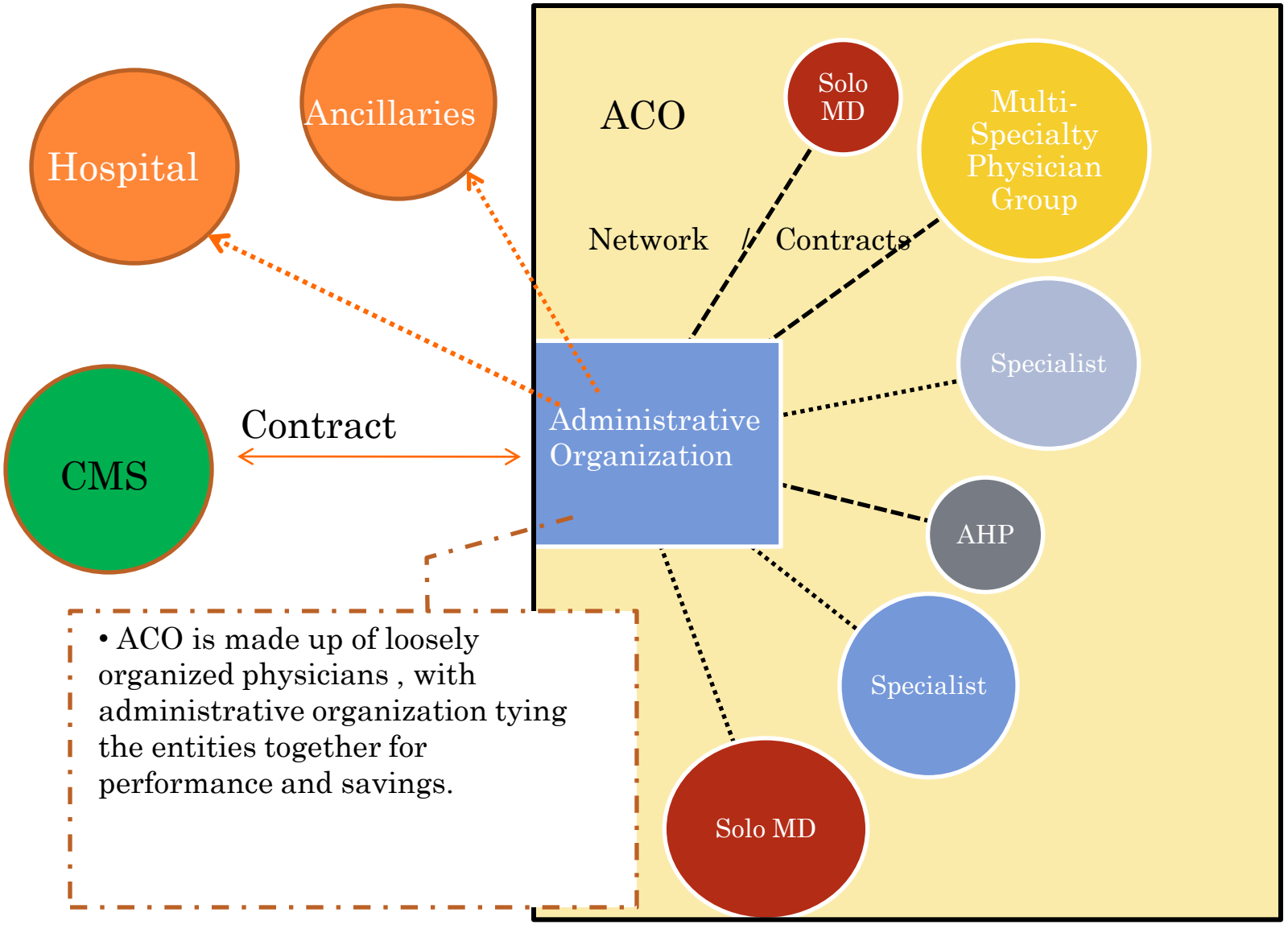
- IPA is physician-owned, focus on physician services and costs
- Structure to distribute bonus/savings by IPA contracts
- IPA reports savings/costs to CMS, assumes responsibility, binds MDs in contract

IDS or PHO as Basis for an ACO



- IDS/PHO is physician-hospital joint venture
- Structure to distribute bonus/savings by IDS/PHO contracts
- IDS/PHO reports savings/costs to CMS, assumes responsibility, binds providers in contract

ACO of Loosely Organized Physicians and Physician Organizations



- ACO is made up of loosely organized physicians , with administrative organization tying the entities together for performance and savings.

The Beauty of Waivers

- The PPACA allows the government to grant waivers
- Waivers could eliminate possible Stark, AKS, Anti-Trust, and organization problems
- The regulations will (we hope) clarify this

Special CMS Open Door Forum

Held on June 24, 2010

p.s. Poyner Spruill LLP
ATTORNEYS AT LAW

Highlights from the Open Door Forum

- Focus of Open Door Forum was to solicit opinions and experience from industry representatives, particularly physicians, to educate CMS on potential options for ACOs.
- CMS is asking physicians to tell the Agency how ACOs can work to be successful where past entities (i.e., HMOs) have failed to contain costs and promote quality care.
  - Physicians are in the driver's seat if they organize and provide comments to CMS.
  - If physicians do not take on this role, someone else (with potentially different interests) will.
  - Participants speaking at forum ranged from solo practitioners to large industry groups.
  - Additional opportunities for input are planned.

Highlights from the Open Door Forum

- CMS agrees that various organizational models meet the requirements of an ACO (IPAs, Multispecialty Groups, Hospital Medical Staff Organizations, PHOs, Organized/Integrated Delivery Systems, among others).
  - Statutory provisions identify several potential models and allow CMS to specify more details in regulation.
  - Models used can be loosely organized or more structured so long as the goal of cost containment and savings are achieved with accountability for care.
- Physician-led organizations (Mayo Clinic, Cleveland Clinic, Gunderson) have gained respect and notice for clinical and operational excellence.

Final Thoughts, Questions, & Contact

- **Steve Shaber, JD**
- **Poyner Spruill LLP**
- 301 Fayetteville St., Ste. 1900
- Raleigh, NC 27601

- Office: (919) 783-2906
- Fax: (919) 783-1075
- Email: sshaber@poynerspruill.com

- **Kim Licata, JD**
- **Poyner Spruill LLP**
- 301 Fayetteville St., Ste. 1900
- Raleigh, NC 27601

- Office: (919) 783-2949
- Fax: (919) 783-1075
- Email: klicata@poynerspruill.com

p.s. Poyner Spruill LLP
ATTORNEYS AT LAW