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Provider network risk arrangements

Norton Rose Fulbright US LLP
Thursday, September 29, 2016

Speaker

Denise Webb Glass

Partner, Norton Rose Fulbright US LLP

Denise Glass, a partner in the Health Care Transactional group of the Dallas location, joined in 1997. Her practice is devoted to operational, business and related regulatory issues affecting the health care services industry. Denise has broad experience in transactions involving physicians and hospitals, including compliance issues arising under the federal anti-kickback statute and the Stark law, formation, acquisition and disposition of health care entities, and joint venture arrangements.

She has significant experience in the development, organization and operation of various types of managed care and insurance-related entities, including accountable care organizations and clinically integrated networks. She provides advice on both commercial payor and government contracting and compliance matters, including issues related to participation in state managed Medicaid programs, the Medicare Advantage program and the Medicare Shared Savings Program.

Speaker

Bernard A. Duco

Of Counsel, Norton Rose Fulbright US LLP

Bernie Duco joined Norton Rose Fulbright in 2014 after serving as Chief Legal Officer with the Memorial Hermann Health System. Bernie led the development of Memorial Hermann's Medicare certified Accountable Care Organization and was the lead legal advisor for MHMD – Memorial Hermann's clinically integrated physician group. Prior to joining Memorial Hermann, Bernie served as Senior Vice President and General Counsel for Mercy Health System in St. Louis. Having served for over 20 years as general counsel for large non-profit health systems, Bernie has broad corporate governance, transaction, and litigation management experience. Bernie received his JD from the University of Houston Law Center and his BA from Rice University. He is licensed to practice in Texas and Missouri.

Continuing education information

- We have applied for 1.0 hour of California and Texas CLE credit and 1.0 hour of New York transitional CLE credit. For attendees outside of these states, we will supply a certificate of attendance which may be used to apply for CLE credit in the applicable bar or other accrediting agencies.
- Norton Rose Fulbright will supply a certificate of attendance to all participants who:
  - Participate in the web seminar by phone and via the web
  - Complete our online evaluation that we will send to you by email within a day after the event has taken place

Administrative information

- Today's program will be conducted in a listen-only mode. To ask an online question at any time throughout the program, click on the question mark icon located on the toolbar in the bottom right side of your screen. Time permitting, we will answer your question during the session.
- Everything we say today is opinion. We are not dispensing legal advice, and listening does not establish an attorney-client relationship. This discussion is off the record. You may not quote the speakers without our express written permission. If the press is listening, you may contact us, and we may be able to speak on the record.

Levels of Risk

- Payor to CIN/ACO: Arrangements under which the CINs or ACOs assume some degree of financial responsibility for the quality, efficiency, and/or outcome of the care received by assigned or attributed members
- CIN/ACO to Provider: Arrangements under which health care providers, usually through integrated networks like CINs or ACOs, assume some degree of financial responsibility for the quality, efficiency, and/or outcome of the care they individually and/or collectively provide

Why are Providers Moving to Provider Risk?

- HHS has set as a goal to have 50% of Medicare payments in alternative payment models (e.g., ACO's, bundled payments, and population-based payments) by the end of 2018. https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-01-26-3.html
- Private Payers are following suit
  - - In 2015 United Health Group expected about a 20% increase in the concentration of value-based reimbursement to providers – growing from $36 billion to $43 billion.
    "United Health's $43 Billion Exit From Fee-For-Service Medicine," Forbes, January 23, 2015

Risk sharing under MSSP Track 3 and Next Generation ACO models

- Background on programs
- How are Track 3 and NextGen different from other CMS models?
- How are Track 3 and NextGen different from commercial risk models between payers and CINs?

What does CMS require of the ACO?

- Repayment mechanism
  - Percentage of payment limit
  - Form of security
- Still responsible for compliance with state insurance laws
  - "To participate in the Next Generation ACO Model, an ACO must demonstrate compliance with all applicable state licensure requirements regarding risk-bearing entities unless it provides a written attestation to CMS that it is exempt from such state laws."
  - "…CMS understands that most states do not have laws that specifically address provider organizations bearing substantial financial risk, distributing savings, or, in the case of certain Next Generation payment mechanisms, paying claims. Therefore, depending on the particular state laws and the discretion of state authorities, Next Generation ACOs may be subject to insurer or third-party administrator (TPA) licensure requirements. It is a Next Generation ACO's responsibility to determine and meet all applicable licensure requirements."

State Insurance Laws Concerns

- Insurance laws are state specific and vary widely
  - A provider risk arrangement that is allowed under the laws of one state may not be allowed under the laws of another
- Assumption of population management risk will very likely require establishing a certain level of financial viability through reserves, stop-loss, etc.
  - No easy route to full risk
- Caution: existing payers are whistleblowers-in-waiting for providers who engage in prohibited risk-based arrangements

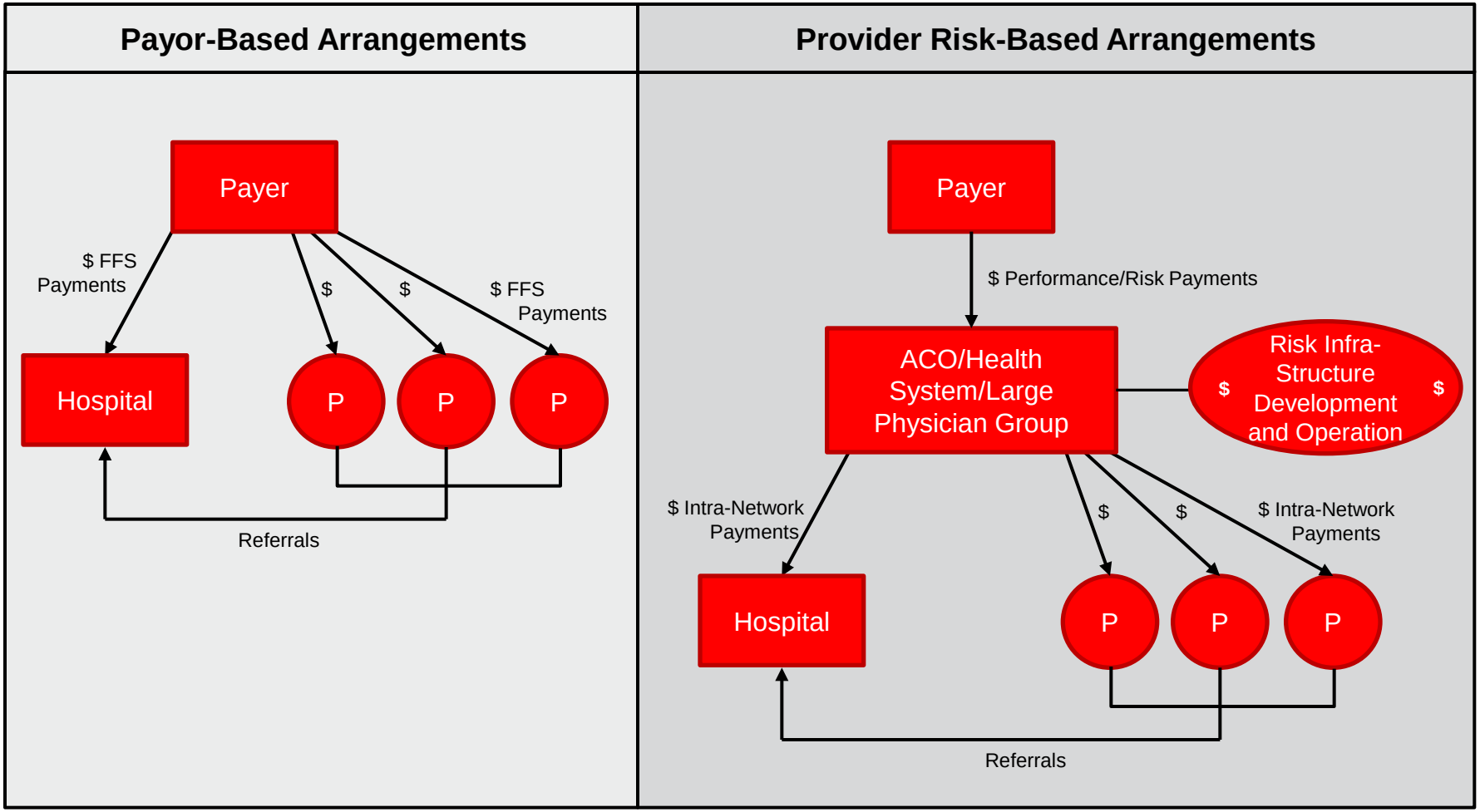
Risk bearing organizations under Texas law

- HMOs arrange for or provide to enrollees health care plans, on a prepaid basis
- In an HMO delivery network, physicians and providers can, using a risk-sharing or capitation arrangement, enter into various contracts
- Assumption of risk as a “delegated entity” or “delegated network”
  - Delegated entity status carries with it additional contract, reporting and monitoring requirements
  - Texas Department of Insurance examination authority
  - Reserve requirements

Including Network Risk in Network Member Arrangements

- No Legal or Regulatory Requirement To Do So
- Should Network Risk Be Included?
- If so, how?
  - Direct Allocation?
  - Performance-based Incentives?
- Conclusions:
  - Important to include Network Risk in Network Member arrangements
  - Probably best through performance-based incentive arrangements

Including Network Risk in Member Arrangements: The Stark, Federal Anti-Kickback Statute (AKS), and Tax-Exempt (TE) Issues



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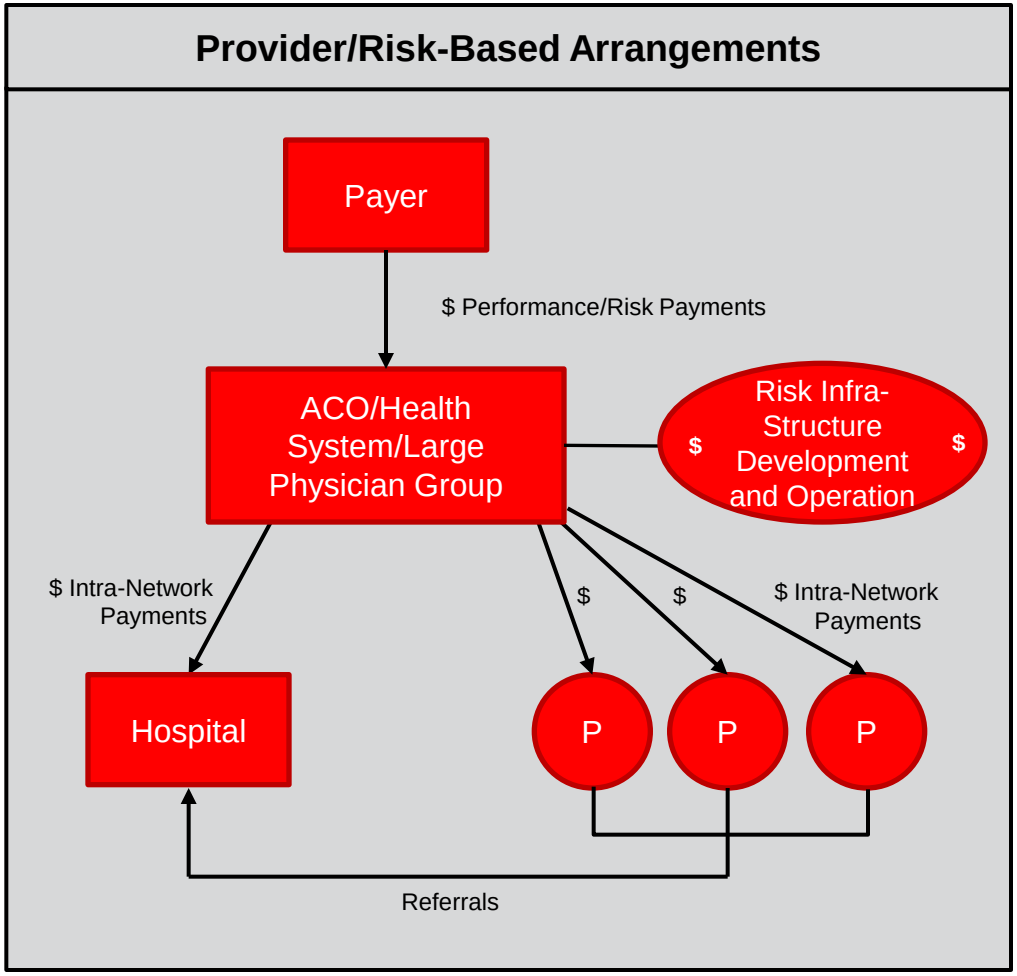

What is the relationship, if any, between the Network entity making the Intra-Network Payments and providing the Risk Related Infra-Structure and the Hospital?

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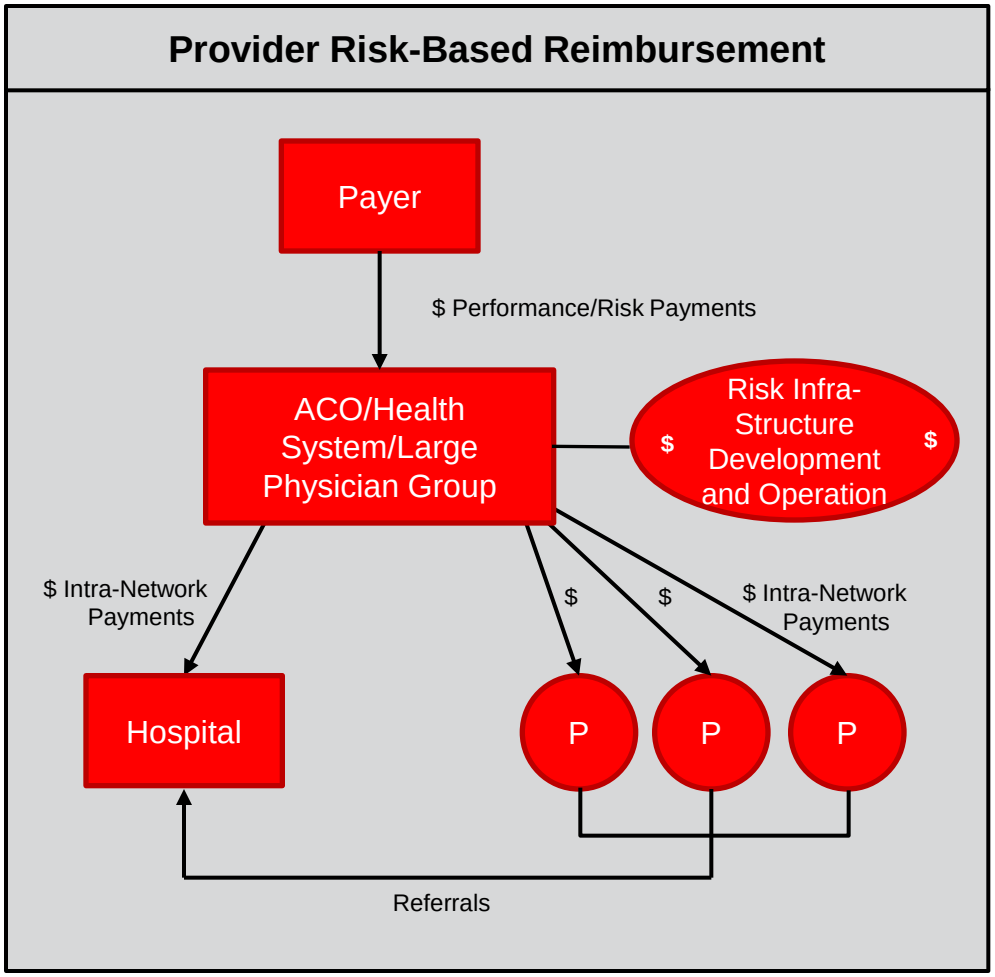
Including Network Risk in Member Arrangements: The Stark, Federal Anti-Kickback Statute (AKS) and Tax-Exempt (TE) Issues



Areas of Focus

1. Network Risk Infra-structure Development and Operation
   - Clinical Information Resources
   - Population Management Resources
   - Risk Assumption Resources
   - Analytical Capabilities
   - Stop-Loss Arrangements
2. Intra-Network Payments
   - Create aligned incentives to provide high quality, efficient, in-network care
   - Elements
     - In-Network utilization requirement
     - Use of bonuses/withholds and other mechanisms to reward appropriate care

ALL ARRANGEMENTS MUST BE STARK AND AKS COMPLIANT AND NOT CREATE PRIVATE INUREMENT OR IMPERMISSIBLE PRIVATE BENEFIT

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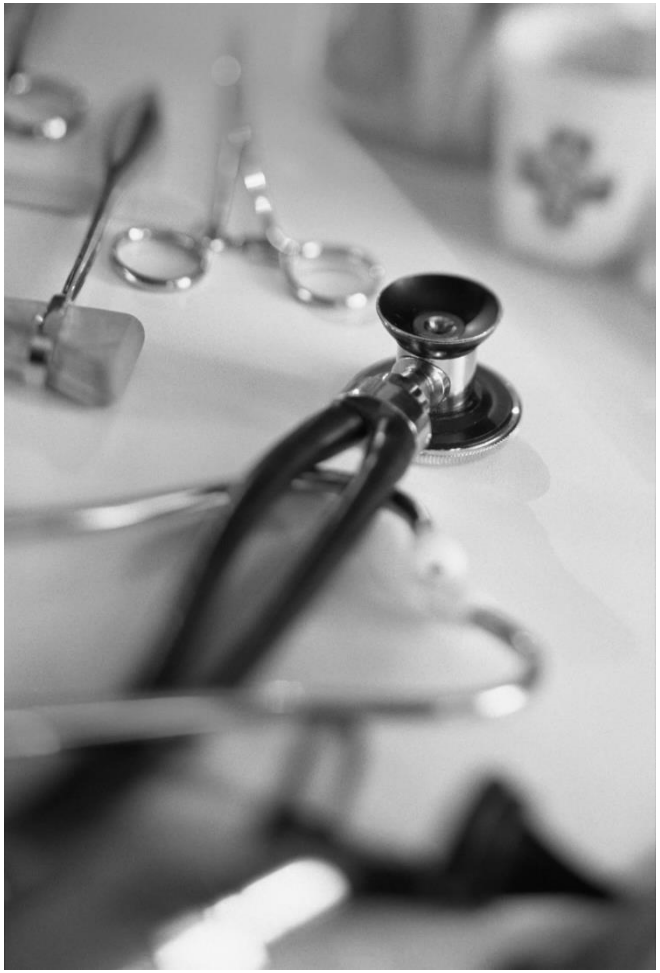
Stark and AKS Issues

- Potentially Applicable Stark Exceptions
  - Personal Services Arrangement (General)
  - Personal Services Arrangement (Physician Incentive Plan Exception)
  - Bona Fide Employment
  - Risk Sharing Arrangement
  - Indirect Compensation Arrangement



Stark and AKS Issues

Conclusions

- Available Stark Law exceptions allow providers to establish legally compliant arrangements containing provisions that will encourage high-quality, efficient care within the risk-bearing network
- Developing effective, straightforward incentive arrangements within the Stark law framework can be challenging
  - Arrangement Objectives
    - Changes in Practice Behaviors
    - Often Outcome rather than process focused
    - Disease, Service, or Network outcomes
  - Fair Market Value Determination Requirement
- While provider risk arrangements may not fall within an AKS safe harbor, those arrangements that meet a Stark exception should also not violate the AKS

Use of MSSP ACO Waivers for Network Arrangements

- Final MSSP ACO Waiver Rule Issued in October 2015; substantially similar to Interim Final Rule

- MSSP ACO Waiver Rule waives the application of the Stark Law, AKS, and Beneficiary Inducement Civil Monetary Penalty Law to ACO-related arrangements

Use of MSSP ACO Waivers for Network Arrangements

- Illustrative MSSP ACO “Start-Up Arrangements” include:
  - Creation of incentives for performance-based systems and the transition from a fee-for-service payment system to one of shared risk of losses
  - Information Technology
    - Data reporting systems
    - Data analytics
  - Capital investments including loans, capital contributions, grants and withholds
- Commercial payer risk arrangements may be considered in developing Network member arrangements that are eligible for MSSP waivers, but member arrangements that are tied exclusively to commercially insured patients are ineligible for MSSP waivers

Use of MSSP ACO Waivers for Network Arrangements

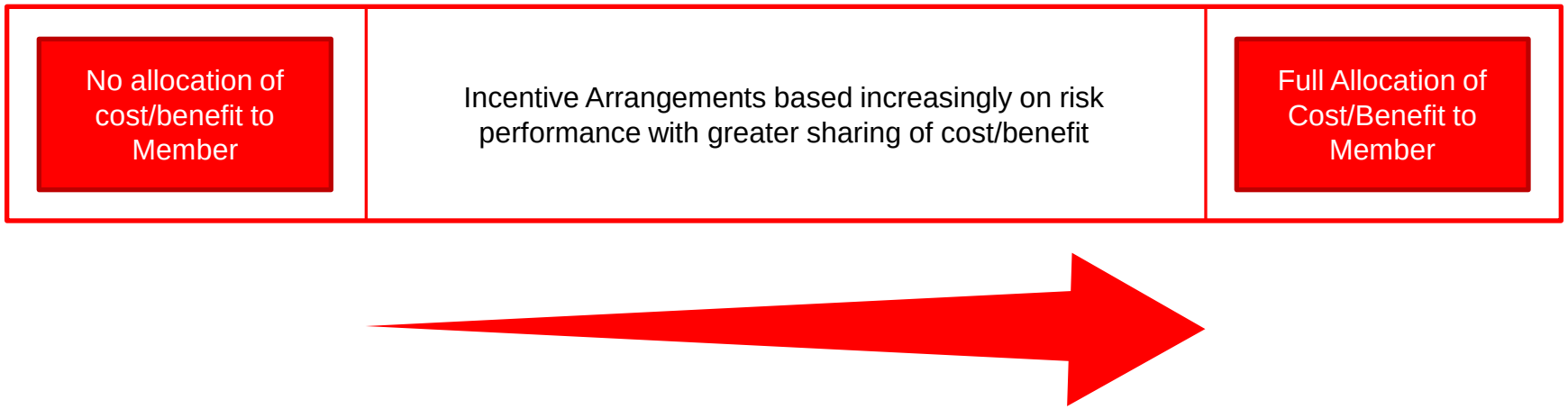
- Recommend placing Network arrangements under a waiver
  - clearly contemplated by CMS
  - provides greater flexibility in establishing incentive-based arrangements that reward performance, which can be challenging under the Stark Law
- Caution: MSSP Waivers do not waive applicable IRS rules
  - The Network provider arrangements must be reasonable as regards the sharing of potential costs and benefits of the Network risk arrangement to avoid creating private inurement or impermissible private benefit

TE Issues

- If the Health System affiliated with the Network is tax-exempt
  - does the risk arrangement further the System's exempt purpose?
  - Is the financial arrangement between the Network and its members reasonable in light of the potential costs and benefits presented by the risk arrangement and the TE resources used in establishing the arrangement?
  - That is, does the arrangement create private inurement or impermissible private benefit for the non-TE Network Members?

Allocation of the Cost/Benefit of Network Risk Arrangements to Network Members

- Spectrum of Network Member Financial Arrangements



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Allocation of the Cost/Benefit of Network Risk Arrangements to Network Members

- Under what terms should risk cost/benefit be shared?
- Can Network Members receive all of the benefit with none of the cost?
- What are the risk-related costs?
  - Credit Costs
    - LOC, Surety Bond or Escrow Account
    - Fee for Guarantee provided by ACO parent or Health System
  - Stop-Loss Premium
  - Network Reserve Fund Contributions
  - Repayment of unpaid losses accrued from prior performance periods
  - Exposure of Network assets to uninsured losses

Including Risk in Network Member Arrangements: A Proposed Model

- Network Members are not directly responsible for risk-based losses
- Risk is included in Network Member arrangements through performance-based incentives
- No distribution of risk proceeds until risk-related costs are covered

Including Risk in Network Member Arrangements: A Proposed Model

- Any windfall gains from risk arrangements should be retained by the Network for future development or distributed to the Health System to the extent the System capitalized and supports the Network. This counter-balances the retention of uninsured risk loss by the Network
- Must be Stark and AKS compliant, or under MSSP Waiver
- Must not create private inurement or impermissible private benefit if a TE organization is involved in the Network

Including Risk in Network Member Arrangements: Steps to Developing a Model

- Determine
  - Network exposure under payer risk arrangement
  - exposure to be retained by the Network
  - availability of stop-loss coverage
  - risk credit needs
    - Amount
    - Form-LOC, Surety, Escrow account, Parental guarantee
  - Overall risk cost in order to determine net risk proceeds, if any, available for distribution to Network members
  - “Windfall level” above which net risk proceeds will be retained by the Network or distributed to the Health System or other Network capital source

Including Risk in Network Member Arrangements: Steps to Developing a Model

- Develop Network member incentive arrangements that will support Network performance under the payer risk arrangement
- Confirm that the arrangement
  - is Stark and AKS compliant or falls under a MSSP waiver
  - does not create private inurement or impermissible private benefit concerns
  - complies with State Insurance laws


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