



Medicare Shared Savings Program &  
Medicare ACO Track 1+ Model

# REPAYMENT MECHANISM ARRANGEMENTS

**Guidance**

April 2019  
Version #8



MEDICARE  
SHARED SAVINGS  
PROGRAM

## Revision History (from version 7 to version 8)

VERSION	DATE	REVISION / CHANGE DESCRIPTION	SECTIONS AFFECTED IN CURRENT VERSION
8	April 2019	Revised for the application cycle(s) for a July 1, 2019 or January 1, 2020 start date	<a href="#">Section 2</a> <a href="#">Section 4</a> <a href="#">Section 5</a> <a href="#">Appendix B</a> <a href="#">Appendix C</a> <a href="#">Appendix D</a>

# Table of Contents

<b>1</b>	<b>Introduction.....</b>	<b>1</b>
	1.1 Background .....	1
	1.2 Repayment Mechanism Amount.....	1
	1.3 Establishing the Repayment Mechanism Arrangement .....	4
	1.4 Repayment Mechanism Arrangement Review.....	5
	1.5 Repayment Mechanism Arrangement Extension and Cancellation .....	5
<b>2</b>	<b>General Terms of the Repayment Mechanism .....</b>	<b>6</b>
	Beneficiary/Recipient/Obligee of Repayment Mechanism .....	6
	Liable Party.....	6
	Term .....	6
	Dollar Amount.....	7
	Condition for Calling Funds .....	10
	Demand Letter .....	11
	Account Fees.....	11
	Note on Applicability of State Laws .....	11
	Other Requirements .....	11
<b>3</b>	<b>Funds Placed in Escrow .....</b>	<b>11</b>
<b>4</b>	<b>Letter of Credit.....</b>	<b>13</b>
	Arrangement.....	13
	Auto Renewal Clauses .....	14
	Sanctioned Entity Clauses.....	14
<b>5</b>	<b>Surety Bond .....</b>	<b>15</b>
	Surety Companies .....	15
	Surety Bond Terms.....	15
	Auto Renewal Clauses .....	15
<b>6</b>	<b>How to Change an Existing Repayment Mechanism.....</b>	<b>16</b>
<b>7</b>	<b>Contact Us.....</b>	<b>16</b>
	<b>Appendix A: Standard Escrow Agreement Template.....</b>	<b>17</b>
	Schedule I .....	25
	Exhibit A .....	27
	Schedule II .....	29

Schedule III .....	30
<b>Appendix B: Escrow Agreement Amendment Sample .....</b>	<b>31</b>
<b>Appendix C: Letter of Credit Sample.....</b>	<b>34</b>
<b>Appendix D: Surety Bond Sample .....</b>	<b>36</b>

# 1 Introduction

## 1.1 BACKGROUND

This guidance on repayment mechanism arrangements is intended to aid Accountable Care Organizations (ACOs) in establishing and maintaining an adequate repayment mechanism and includes common mistakes to avoid to ensure the repayment mechanism satisfies CMS requirements, timely.

Medicare Shared Savings Program (Shared Savings Program) ACOs must establish a repayment mechanism to assure CMS that they can repay losses for which they may be liable upon reconciliation for each performance year under which they accept performance-based risk (42 CFR § 425.204(f)).

To be eligible to participate in a two-sided risk model (ACOs currently participating under Track 2, Track 3 (herein referred to as the ENHANCED track) or the Medicare ACO Track 1+ Model, or Levels C, D, or E of the BASIC track or the ENHANCED track) an ACO must demonstrate that it has established an adequate repayment mechanism. Additionally, ACOs that are participating in Levels A or B of the BASIC track must demonstrate the adequacy of its repayment mechanism prior to the start of any performance year in which it either elects to participate in or is automatically transitioned to a two-sided model. These ACOs must demonstrate that they are able to repay shared losses incurred at any time within the agreement period, and for a sufficient period of time following the end of each agreement period to permit CMS to calculate the amount of any shared losses that may be owed by the ACO and to collect this amount from the ACO. ACOs must *demonstrate* the adequacy of their repayment mechanism arrangements at such other times as requested by CMS.

## 1.2 REPAYMENT MECHANISM AMOUNT

### *Currently Participating ACOs and Applicants*

For an ACO in Track 2 or the ENHANCED track whose agreement period began on or before January 1, 2019, the repayment mechanism amount must be equal to at least 1 percent of the total per capita Medicare Parts A and B FFS expenditures for the ACO's assigned beneficiaries, based on expenditures used to establish the ACO's benchmark.

Under the Track 1+ Model, the ACO's composition will determine the ACO's eligibility for either a benchmark-based or revenue-based loss sharing limit.<sup>1</sup> For Track 1+ Model ACOs eligible for a benchmark-based loss sharing limit, CMS will apply a repayment mechanism estimation methodology based on 1 percent of estimated benchmark expenditures. For Track 1+ Model ACOs eligible for a revenue-based loss sharing limit, the repayment mechanism must be equal to at least 2 percent of ACO participants' Medicare fee-for-service revenue (total Parts A and B fee-for-service revenue). If this

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<sup>1</sup> For more information, refer to [Track 1+ Model Fact Sheet](#).

repayment mechanism amount based on ACO participant Medicare revenue exceeds the repayment mechanism amount for the ACO based on benchmark expenditures, then the amount will be capped at 1 percent of the ACO’s total per capita Medicare Parts A and B fee-for-service expenditures for its assigned beneficiaries.

For ACOs participating in Levels C, D, or E of the BASIC track, or the ENHANCED track, for agreement periods beginning on or after July 1, 2019, the repayment mechanism amount must be equal to the lesser of (i) 1 percent of the total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries, based on expenditures for the most recent calendar year for which 12 months of data are available; or (ii) 2 percent of the total Medicare Parts A and B FFS revenue of its ACO participants, based on revenue for the most recent calendar year for which 12 months of data are available.

TRACK	AGREEMENT PERIOD START DATE	REPAYMENT MECHANISM CALCULATION METHODOLOGY
Track 1+ Model	Model start date of 1/1/18	<p>ACOs eligible for benchmark-based loss sharing limit: repayment mechanism equal to 1% of the total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries.</p> <p>ACOs eligible for revenue-based loss sharing limit: The repayment mechanism must be equal to 2% of the total Medicare Parts A and B FFS revenue of its ACO participants. If this repayment mechanism amount exceeds the repayment mechanism amount for the ACO based on benchmark expenditures, then the amount will be capped at 1% of the total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries.</p>
Track 2	On or before 1/1/19	1% of the total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries
Track 3	On or before 1/1/19	1% of the total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries
Level C (BASIC track)	On or after 7/1/19	The lesser of either: 2% of the total Medicare Parts A and B FFS revenue of its ACO participants or 1% of the total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries
Level D (BASIC track)	On or after 7/1/19	The lesser of either: 2% of the total Medicare Parts A and B FFS revenue of its ACO participants or 1% of the total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries
Level E (BASIC track)	On or after 7/1/19	The lesser of either: 2% of the total Medicare Parts A and B FFS revenue of its ACO participants or 1% of the total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries

TRACK	AGREEMENT PERIOD START DATE	REPAYMENT MECHANISM CALCULATION METHODOLOGY
ENHANCED track	On or after 7/1/19	The lesser of either: 2% of the total Medicare Parts A and B FFS revenue of its ACO participants or 1% of the total per capita Medicare Parts A and B FFS expenditures for its assigned beneficiaries

*Renewing ACOs Applying to Continue Participation in the Shared Savings Program*

To confirm that an ACO will be able to repay losses it owes to CMS, the ACO must submit to CMS as part of the renewal request documentation (pursuant to § 425.204(f)(3)(iv)) that shows it has an adequate repayment mechanism.

In the case of an ACO that has applied to renew its participation agreement and wishes to use its existing repayment mechanism to establish its ability to repay any shared losses incurred for performance years in the new agreement period, the amount of the repayment mechanism must be equal to the greater of the following: (A) The amount calculated by CMS in accordance with § 425.204(f)(4)(ii). (B) The repayment mechanism amount that the ACO was required to maintain during the last performance year of the participation agreement it seeks to renew.

CMS cannot determine an ACO’s maximum liability amount until the completion of the results of the performance year financial reconciliation. It is possible that shared losses could either be more or less than the repayment mechanism amount. If the amount of the repayment mechanism is not sufficient to cover the total amount of the shared losses owed by an ACO, the ACO will be required to repay any remaining balance using alternative funding sources.

*Annual Review of Repayment Mechanism*

CMS estimates the amount of an ACO’s repayment mechanism based on available historical data and will give this estimate to the ACO at a time that coincides with the annual application/certification cycle. Additionally, CMS will annually re-evaluate the repayment mechanism amount estimates for ACOs in two-sided risk models whose agreement period begins on or after July 1, 2019.

ACOs may be required to adjust its repayment mechanism arrangement within its agreement period if the estimated value of the repayment mechanism amount increases by equal to or greater than either a 50 percent or \$1,000,000; whichever is the lesser value. If an ACO’s repayment mechanism amount exceeds the aforementioned threshold, CMS will issue the ACO a written notice, letting the ACO know the revised repayment mechanism amount. The ACO has 90 days from the date of receipt of the written notice. The ACO must submit for CMS approval documentation that the amount of its repayment mechanism has been increased to the amount specified by CMS.

For an ACO participating in the Track 1+ Model, with an agreement period that began on or before January 1, 2018, CMS will annually re-evaluate the repayment mechanism amount. These ACOs may be required to increase or decrease its repayment mechanism arrangement within its agreement period if the estimated value of the repayment mechanism amount increases by equal to or greater than either a 50 percent or \$1,000,000; whichever is the lesser value. If an ACO's repayment mechanism requires update via the aforementioned threshold, CMS will issue the ACO a written notice, letting the ACO know the revised repayment mechanism amount. The ACO has 90 days from the date of receipt of the written notice. The ACO must submit for CMS approval documentation that the amount of its repayment mechanism has been updated to the amount specified by CMS.

For an ACO participating within the program as Track 2 or the ENHANCED track, with agreement periods that began on or before January 1, 2019, the repayment mechanism amount will not be revised during the agreement period.

### **1.3 ESTABLISHING THE REPAYMENT MECHANISM ARRANGEMENT**

An ACO that will participate in a two-sided model must establish one or more of the following repayment mechanisms in an amount and by the deadline specified by CMS:

- Funds placed in escrow established with an insured institution;
- A line of credit as evidenced by a letter of credit that the Medicare program could draw upon established at an insured institution; or
- Surety bond issued by a company included on the U.S. Department of Treasury's list of certified (surety bond) companies (available at <https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html>).

An ACO may use a combination of the designated repayment mechanisms, if needed, such as placing certain funds in escrow, obtaining a surety bond for a portion of remaining funds, and providing a letter of credit for the remainder. Further details for each repayment mechanism are provided within this document. Within the appendices, we provide a template and samples that meet the Shared Savings Program repayment mechanism requirements.

The type of repayment mechanism selected will determine the signatory requirements of the ACO. An ACO is required to sign the final surety bond, escrow agreement, and/or amendment to a letter of credit documentation. An original letter of credit does not require an ACO signatory. The following authorized users in the ACO Management System (ACO-MS) meet the signatory requirements of the repayment mechanism: ACO Executive, Authorized to Sign (primary), Authorized to Sign (secondary), and Financial Contact.



## 1.4 REPAYMENT MECHANISM ARRANGEMENT REVIEW

CMS reviews an ACO’s repayment mechanism arrangement documentation when the ACO applies to participate in a Shared Savings Program two-sided risk model (Levels C, D, and E of the BASIC track or ENHANCED track). The draft documentation does not need to include an amount.

### IMPORTANT TIP

CMS strongly recommends that each ACO submit draft repayment mechanism documentation with the NOIA submission to allow for additional time for reviewers to provide feedback on documentation and for the ACO to resolve any issues.

Review Figure 1 for an overview of the review process. For deadlines, refer to the [Application Types & Timeline webpage](#).

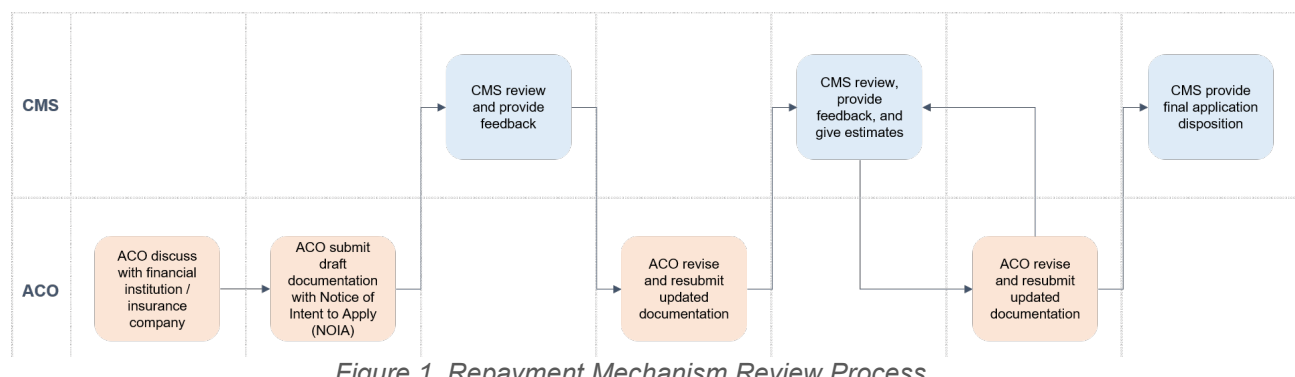


Figure 1. Repayment Mechanism Review Process

## 1.5 REPAYMENT MECHANISM ARRANGEMENT EXTENSION AND CANCELLATION

An ACO currently participating in a two-sided risk model that wishes to renew its participation in the Shared Savings Program and enter a new agreement period beginning on July 1, 2019 and in subsequent years, is permitted to use its existing repayment mechanism to establish its ability to repay shared losses, if applicable, incurred for performance years in its new agreement period. CMS would require the ACO to extend the term of the existing repayment mechanism by an amount of time specified by CMS and, if necessary, to increase the amount of the repayment mechanism to reflect the new repayment mechanism amount.

Your ACO is required to maintain its repayment mechanism after termination of its participation in the Shared Savings Program or the Track 1+ Model until CMS determines the amount of any shared losses owed and collects that amount from your ACO or the repayment mechanism expires. Your repayment mechanism can be cancelled prior to its expiration if your ACO does not owe CMS shared losses. Further

details regarding the conditions under which a repayment mechanism can be terminated are detailed within the next section.

## 2 General Terms of the Repayment Mechanism

**Beneficiary/Recipient/Obligee of Repayment Mechanism:** Centers for Medicare & Medicaid Services. CMS' address is 7500 Security Boulevard, Mail Stop C5-15-12 Baltimore, MD 21244. Designate CMS as the sole beneficiary within a letter of credit, recipient within an escrow agreement, or obligee within a surety bond.

**Liable Party:** The ACO that is applying to the Shared Savings Program must be the liable party for the repayment mechanism, because it would be the liable party for any shared losses.

**Term:** The repayment mechanism must be in effect for the duration of the ACO's participation under a two-sided model plus 12 months following the conclusion of the agreement period, except as noted below.

For an ACO that is establishing a new repayment mechanism to meet this requirement the repayment mechanism must satisfy one of the following criteria:

- (i) The repayment mechanism covers the entire duration of the ACO's participation under a two-sided model plus 12 months following the conclusion of the agreement period; or
- (ii) The repayment mechanism arrangement covers a term of at least the first two performance years in which the ACO is participating under a two-sided model and provides for automatic, annual 12-month extensions of the repayment mechanism such that the repayment mechanism will eventually remain in effect for the duration of the agreement period plus 12 months following the conclusion of the agreement period.

For a renewing ACO that wishes to use its existing repayment mechanism to establish its ability to repay any shared losses incurred for performance years in the new agreement period, the existing repayment mechanism must be amended to meet one of the following criteria:

- (i) The duration of the existing repayment mechanism is extended by an amount of time that covers the duration of the new agreement period plus 12 months following the conclusion of the new agreement period; or
- (ii) The duration of the existing repayment mechanism is extended, if necessary, to cover a term of at least the first two performance years of the new agreement period and provides for automatic, annual 12-month extensions of the repayment mechanism such that the repayment mechanism will eventually remain in effect for the duration of the new agreement period plus 12 months following the conclusion of the new agreement period.

See [Appendix B](#) for a sample escrow agreement amendment for renewing ACOs.

The following exceptions to the duration requirement may apply:

- (i) CMS may require the ACO to extend the duration of the repayment mechanism if necessary to ensure that the ACO fully repays CMS any shared losses for each of the performance years of the agreement period.
- (ii) The repayment mechanism may be terminated at the earliest of the following conditions:
  - The ACO has fully repaid CMS any shared losses owed for each performance year of the agreement period under a two-sided model.
  - CMS has exhausted the amount reserved by the ACO's repayment mechanism and the arrangement does not need to be maintained to support the ACO's participation under the Shared Savings Program.
  - CMS determines that the ACO does not owe any shared losses under the Shared Savings Program for any of the performance years of the agreement period.<sup>2, 3, 4</sup>

**Dollar Amount:** CMS will provide an estimated repayment mechanism amount within its Repayment Mechanism Request for Information (RM RFI) communication. CMS will provide a final repayment mechanism estimate amount during the completion of the RM RFI cycle. The dollar amount funded by the repayment mechanism must at least be the amount specified in the final RFI communication.

#### *Calculation of the Repayment Mechanism Amount Estimate*

In determining the repayment mechanism estimated dollar amount, CMS multiplies an estimated number of assigned beneficiaries for the ACO by a projected per beneficiary dollar amount. The dollar amount is calculated using either projected total per capita Medicare Parts A and B FFS expenditures for the ACO's assigned beneficiaries

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<sup>2</sup> Except as otherwise noted, for ACOs entering an agreement period beginning on January 1, 2016, 2017, or 2018, the ACO's repayment mechanism was required to be in effect for a 5-year term, consisting of the 3-year agreement period, plus the 24-month tail period.

<sup>3</sup> In accordance with § 425.200(e), as amended by the June 2016 Final Rule, a Track 1 ACO that deferred the start of its second agreement period under a performance-based risk track for 1 year, submitted documentation (pursuant to § 425.204(f)) that showed it had an adequate repayment mechanism. This scenario required the renewing ACO's repayment mechanism to be in effect for a 6-year term, consisting of the 1 year deferral period, followed by the 3-year agreement period in a risk track, plus the 24-month tail period. In the December 2018 Final Rule we amended § 425.200(b)(3) to specify that the deferred renewal option was available for ACOs that began a first agreement period in 2014 or 2015 and therefore deferred renewal in 2017 or 2018 (respectively).

<sup>4</sup> For ACOs that entered the Track 1+ Model starting in Performance Year 2 of their current agreement period, the repayment mechanism term must be 4 years (2 years of the remaining agreement period, plus the 24-month tail period). For ACOs that entered the Track 1+ Model starting in Performance Year 3 of their current agreement period, the term must be 3 years (1 year of the remaining agreement period, plus the 24-month tail period).

(benchmark-based estimate) or projected ACO participants' total Medicare Parts A & B FFS revenue (revenue-based estimate). CMS calculates a required percent of this product. For ACOs that are eligible or the lower of the benchmark-based or revenue-based loss sharing limit, CMS will calculate both estimates and use the lower value.

**Benchmark-based loss sharing limit:** The repayment mechanism amount must be equal to at least 1 percent of the total per capita Medicare Parts A and B FFS expenditures for the ACO's assigned beneficiaries, based on expenditures for the most recent calendar year for which 12 months of data are available.

*Table 1. Benchmark-Based Table (Example)*

CALCULATION COMPONENT	VARIABLE DESCRIPTION & ENUMERATION	CALCULATION NOTES	ESTIMATED VALUES
<b>Assigned Beneficiaries</b>	2016 <sup>2</sup> (A)		10,000
	Assignment Growth (B)		1.01665
	Projected 2018 Assignment <sup>3</sup> (C)	=AxB	10,167
<b>Estimated Dollar Amount</b>	CY 2016 Dollars Per Beneficiary <sup>4</sup> (D)		\$10,000
	Trend to 2018 (E)		1.04506
	2018 Projected Dollars Per Beneficiary <sup>4</sup> (F)	=DxE	\$10,450.60
<b>Forecast Repayment Requirement</b>	Projected Amount (G)	=Fx C	\$106,251,250.20
	Required Percentage (H)		1%
	Repayment Mechanism Amount Required (I)	=GxH	\$1,062,513

To illustrate, the following benchmark-based estimation methodology was used to determine the repayment mechanism amount estimates during the 2018 application cycle.

- i. To estimate assigned beneficiaries, CMS determined beneficiaries who would have been assigned to the ACO. (For the 2018 application cycle, Benchmark Year 2016 data was used). This estimate was based on the applicant's ACO Participant List and determined in relation to estimated assignment for all other applicants and existing ACOs. A trend factor was applied to estimate the growth in number of assigned beneficiaries over a 2-year period. (For the 2018 application cycle, a trend factor of approximately 1.01665 was applied. This trend factor may vary each year).
- ii. To estimate expenditures, CMS summed the total Parts A and B claims payments for the beneficiaries who would have been assigned to the ACO. Expenditures were based on the most recent calendar year for which 12 months of data are available. (For the 2018 application cycle, 2016 expenditure data was used for the

2016 estimated assigned population). Expenditures were truncated at the 99th percentile and excluded indirect medical education and Disproportionate Share Hospital payments. The effect of sequestration was removed in calculating this amount. A trend factor was applied to estimate growth in expenditures over a 2-year period. (For the 2018 application cycle, a trend factor of approximately 1.04506 was applied. This trend factor may vary each year).

iii. For the 2018 application cycle, the following formula illustrates the calculation.

$$\text{Estimated Repayment Mechanism Amount for Benchmark-Based Loss Sharing Limit} = ([\text{estimated 2016 Parts A and B per capita amount } \$] \times \sim 1.04506) \times ([\text{estimated 2016 number of assigned beneficiaries}] \times \sim 1.01665) \times 0.01$$

Note that calculations included additional precision (including all decimal places), and trend factors for estimated assigned beneficiaries and expenditures are subject to change annually.

Revenue-based loss sharing limit: The repayment mechanism amount is equal to the lesser of: (1) 2 percent of the ACO participants' total Medicare Parts A & B FFS revenue for the most recent calendar year for which 12 months of data are available, or (2) 1 percent of the total per capita Medicare Parts A & B FFS expenditures for the ACO's assigned beneficiaries, based on expenditures for the most recent calendar year for which 12 months of data are available.

*Table 2. Revenue-Based Table (Example)*

CALCULATION COMPONENT	VARIABLE DESCRIPTION & ENUMERATION	CALCULATION NOTES	ESTIMATED VALUES
<b>Assigned Beneficiaries</b>	2016 <sup>2</sup> (A)		10,000
	Assignment Growth (B)		1.01665
	Projected 2018 Assignment <sup>3</sup> (C)	=AxB	10,167
<b>Estimated Dollar Amount</b>	CY 2016 Dollars Per Beneficiary <sup>4</sup> (D)		\$1,000
	Trend to 2018 (E)		1.04506
	2018 Projected Dollars Per Beneficiary <sup>4</sup> (F)	=DxE	\$1,045.06
<b>Forecast Repayment Requirement</b>	Projected Amount (G)	=Fx C	\$10,625,125.02
	Required Percentage (H)		2%
	Repayment Mechanism Amount Required (I)	=GxH	\$212,502.50

To illustrate, the following revenue-based estimation methodology was used to determine the repayment mechanism amount estimates during the 2018 application cycle.

- i. We estimated the number of assigned beneficiaries to the ACO for 2016 and multiplied it by ~1.01665 to project the total number of beneficiaries for Performance Year (PY) 2018.
- ii. We calculated total Parts A and B FFS revenue (paid amounts) for ACO providers/suppliers associated with TINs/CCNs on the ACO's certified ACO Participant List for all FFS claims incurred in Calendar Year (CY) 2016. All FFS claim payments to ACO participant (TINs/CCNs) were included even for claims not associated with ACO-assigned beneficiaries. Total Medicare FFS revenue was then divided by the number of beneficiaries that happened to be assigned to the ACO for 2016 to express the historical revenue on a per-assigned-beneficiary basis. Expenditures were not truncated and, if applicable, include indirect medical education and Disproportionate Share Hospital payments. We applied a trend factor of ~1.04506 to project 2018 FFS revenue.
- iii. We calculated 2 percent of the product of the projected number of assigned beneficiaries for PY 2018 and projected per capita revenue for PY 2018.
- iv. For the 2018 application cycle, the following formula illustrates the calculation:

Estimated repayment mechanism amount for revenue-based loss sharing limit =  
 ([estimated 2016 number of assigned Beneficiaries] x ~1.01665) x ([CY 2016  
 Dollars per Beneficiary] x ~1.04506) x 0.02

Note that calculations included additional precision (including all decimal places), and trend factors for estimated assigned beneficiaries and expenditures are subject to change annually.

#### *Replenishment of the Repayment Mechanism*

If any portion of the repayment mechanism is used to repay shared losses owed to CMS, the ACO is required to replenish the amount of its repayment mechanism within 90 days after the repayment mechanism has been used to repay any portion of shared losses owed to CMS. If it is not possible to replenish the existing arrangement, the ACO is required to establish another repayment mechanism to make sure it maintains coverage equal to the amount specified in the repayment mechanism amount notice pursuant to § 425.204(f)(5).

#### *Notification of Changes in Amount*

CMS must be provided with notice of any change in the amount funded by the repayment mechanism or terms of 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 for Track 1+ Model ACO: The ACO is obligated to repay money it owes to CMS under the Shared Savings Program, as required by 42 CFR Part 425, and, if



applicable, the Track 1+ Model. The amount of shared losses owed will be noted in a demand letter to the ACO from CMS.

Example for Levels C, D, and E of the BASIC track or ENHANCED track: The ACO is obligated to repay money it owes to CMS under the Shared Savings Program, as required by 42 CFR Part 425. The amount of shared losses 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 or other fees associated with establishing, maintaining, or cancelling 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:** CMS 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, CMS expects 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.

### 3 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 Stephanie Haysley at 804-343-1567 or [stephanie.haysley@usbank.com](mailto:stephanie.haysley@usbank.com) to open a U.S. Bank escrow account.

For ACOs that plan to use a banking institution other than U.S. Bank to establish an escrow account, CMS strongly encourages adoption of the CMS approved escrow agreement template provided in this guidance at [Appendix A](#). The escrow agreement template has been drafted to satisfy the repayment mechanism requirements. Although use of the escrow agreement template does not guarantee CMS approval of the ACO's escrow agreement (particularly if it has been edited), it will expedite CMS' review of this component of your Shared Savings Program application and should minimize the potential need for revision. If the ACO and/or financial institution choose to modify the template, we ask that the ACO and/or financial institution do so using track changes when submitting the draft to CMS for review. Note that any changes made to the template will lengthen the CMS review time.

If the ACO wants to establish an escrow account at a different banking institution, CMS must approve the escrow agreement and the instructions for disbursement of the assets. CMS will sign only the escrow agreement; ancillary documents will not be

signed. Generally, CMS will accept an escrow agreement with a different institution under the following conditions:

- (i) The institution is insured;
- (ii) Funds are invested in Treasury-backed securities or a money market fund;
- (iii) The instructions for disbursement of the assets are consistent with CMS' standard escrow instructions (refer to [Appendix A, Schedule I](#));
- (iv) 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;
- (v) The principal cannot be encumbered for any purpose other than repaying shared losses owed by the ACO to CMS;
- (vi) 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;
- (vii) CMS will receive advance notice of early termination of the escrow account and any change in the amount of funds held in escrow.
- (viii) The escrow account is fully-funded up to the final repayment mechanism amount by the required final documentation submission date.

We recommend that ACOs review [Appendix A](#).

### COMMON ERRORS

Escrow agreement common errors:

1. A request to modify the indemnification article within the escrow agreement. CMS will not allow a modification to the indemnification article.
2. The financial institution did not sign the escrow agreement.
3. The financial institution did not include the account number on Schedule II or Schedule III.
4. The ACO's legal business name does not match the CMS system of record.
5. The ACO did not sign the escrow agreement.
6. For ACOs that elected to use the CMS escrow agreement template, their financial institution did not provide CMS with a letter detailing that the funds are on deposit in the amount of the repayment mechanism requirement by the final documentation required submission date.



## 4 Letter of Credit

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

- (i) The institution establishing the letter of credit is insured;
- (ii) The letter of credit is irrevocable;
- (iii) CMS is designated as the sole beneficiary;
- (iv) The appropriate credit amount is specified and should align with the required final repayment mechanism amount;
- (v) Example for ACO participating as a Track 1+ Model: 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 Legal Entity Name] under the Medicare Shared Savings Program regulations at 42 CFR Part 425 or, if applicable, the terms and conditions of the Medicare Accountable Care Organization (ACO) Track 1+ Model 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.”
- (vi) Example for Track 2, Track 3, Levels C, D, and E of the BASIC track or ENHANCED track: 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 Legal Entity 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.”

In addition, CMS requires assurance that it will receive 90 days advance notice if the letter of credit is revoked or if there is 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.

ACOs selecting a Letter of Credit as their repayment mechanism must submit a **draft** letter of credit to CMS for review. CMS will not provide a signature to cancel a non-approved repayment mechanism if the ACO or financial institution submits a final letter of credit that requires revision. Please note that if your ACO submits a final letter of credit for review and CMS requires any changes to the submitted documentation, it may delay the establishment of your repayment mechanism.

CMS suggests that ACOs review the sample letter of credit provided in [Appendix C](#) of this guidance. This letter of credit is an example of a letter of credit that CMS approved in the past. Use of provisions from the redacted letter of credit should expedite CMS' review and minimize the potential need for revisions, but it does not guarantee CMS' approval.

**Auto Renewal Clauses:** You may use clauses providing for the automatic renewal of an irrevocable standby letter of credit to establish the required term. The term of the letter of credit must cover at least the first two performance years in which the ACO is participating under a two-sided model and provides for automatic, annual 12-month extensions of the repayment mechanism such that the repayment mechanism will eventually remain in effect for the duration of the agreement period plus 12 months following the conclusion of the agreement period. If an automatic renewal clause is utilized, it should state that the lender will notify CMS and the ACO at least 90 days in advance if electing not to renew.

The option to auto-renew does not apply to ACOs with agreement start dates on or before January 1, 2019. For these ACOs, the auto-renewal clause may not be used for any part of the agreement period.

**Sanctioned Entity Clauses:** CMS has found language specified in sanctioned entity clauses problematic because such clauses could prevent payment to CMS if the ACO becomes a sanctioned entity. Ideally, the bank issuing the letter of credit should omit the clause entirely. Another option is for the bank to include the clause but modify it to exclude from the definition of "sanctioned entity" any entity sanctioned by or debarred from a federal health care program.

### **COMMON ERRORS**

Letter of credit common errors:

1. The ACO relied upon the sample within [Appendix C](#) and did not verify information with [Section 4](#). The sample is an example of a letter of credit that has met prior review cycle requirements; it is not a template.
2. The financial institution has provided a fully executed letter of credit prior to the submission of a draft letter of credit. If language errors are present within a fully executed letter of credit, extra review delays may occur due to financial institution requirements. A submission of a draft letter of credit is the best option for an ACO to work towards meeting the repayment mechanism requirement for the ACO's application.
3. The letter of credit does not explicitly match the language detailed in [Section 4](#) (v) or (vi).
4. The financial institution has used the word "purportedly" within the letter of credit.
5. The written or numerical amount on the letter of credit is incorrectly stated.
6. The termination date of the letter of credit is incorrectly stated.

## 5 Surety Bond

**Surety Companies:** The surety bond should be issued from a company included on the U.S. Department of the Treasury's List of Certified (Surety Bond) Companies.

**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) A statement that the surety will remain liable for any and all indebtedness of the Principal to the Obligee which accrued prior to the effective date of a cancellation or termination of the bond.
- (iii) The surety's name, street address or post office box number, city, state, and ZIP code on the surety bond should be identical to the surety's legal entity name and address; as listed on the U.S. Department of the Treasury's List of Certified (Surety Bond) Companies.
- (iv) 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.
- (v) Assurance that the surety will notify CMS promptly in writing if there is a lapse in the surety bond coverage or a change in the amount of the bond.
- (vi) A statement that the surety will notify CMS 90 days in advance of cancellation or termination of the bond.
- (vii) The appropriate surety bond amount is specified and should align with the required final repayment mechanism amount.
- (viii) A statement that the surety agrees to pay a claim within 30 days of receiving from CMS written notice of a claim.
- (ix) A statement that the surety shall remain liable under this Bond for twelve (12) months after the expiration of each Performance Year covered by the Agreement for any Repayment Amount determined by CMS to be owed by the Principal for the Performance Year(s) covered by the Agreement.

**Auto Renewal Clauses:** You may use clauses providing for the automatic renewal of a surety bond to establish the required term. The term of the surety bond must cover at least the first two performance years in which the ACO is participating under a two-sided model and provides for automatic, annual 12-month extensions of the repayment mechanism such that the repayment mechanism will eventually remain in effect for the duration of the agreement period plus 12 months following the conclusion of the agreement period.

CMS suggests that ACOs review the sample surety bond provided in [Appendix D](#) of this guidance. This surety bond is an example of a surety bond CMS approved in the past. Use of provisions from this surety bond should expedite CMS' review and minimize the potential need for revisions, but it does not guarantee CMS' approval.

### **COMMON ERRORS**

Surety bond common errors:

1. The ACO relied upon the sample within [Appendix D](#) and did not verify information with [Section 5](#). The sample is an example of a surety bond that has met prior review cycle requirements; it is not a template.
2. The replenishment language was stated less than the 90-day requirement.
3. The surety bond was missing indebtedness language.
4. The inclusion of the phrase: "and upon giving such notice, the surety shall be discharged from all liability under this bond for any act or omission of the principal occurring after the expiration of the ninety days (90) from the date of the receipt of such notice."
5. The surety bond was missing or had incorrect information for the surety's name, street address or post office box number, city, state, and ZIP.
6. The surety bond included an incorrect date that the ACO entered into the Medicare Shared Savings Program Accountable Care Organization Participation Agreement or as a participant in a Center for Medicare and Medicaid Innovation model (Innovation Center model), the Medicare ACO Track 1+ Model.

## **6 How to Change an Existing Repayment Mechanism**

If the ACO has an established repayment mechanism for an agreement period and would like to replace this arrangement with a new repayment mechanism during the agreement period, the ACO must submit a written request to the Shared Savings Program mailbox (contact specified below). CMS will provide further instructions to the ACO once the request is received.

## **7 Contact Us**

If you have any questions, please email [SharedSavingsProgram@cms.hhs.gov](mailto:SharedSavingsProgram@cms.hhs.gov). Include your ACO ID and the phrase "Repayment Mechanism" in the subject line of the email.

## Appendix A: Standard Escrow Agreement Template

### *Medicare Shared Savings Program*

**THIS ESCROW AGREEMENT** (the “Agreement”) dated as of \_\_\_\_\_, is by and between \_\_\_\_\_, (“Depositor”); the United States Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) (“Recipient”); and \_\_\_\_\_ [Bank name], as Escrow Agent hereunder (“Agent”), collectively, the “Parties” to this Agreement.

Depositor and Recipient have entered into a Medicare Shared Savings Program Accountable Care Organization Participation Agreement (“Participation Agreement”), effective \_\_\_\_\_ 1, 20\_\_\_\_, pursuant to which the Depositor elected to participate in the Medicare Shared Savings Program (“Shared Savings Program”) and to comply with the regulations at 42 CFR Part 425, as amended (the “Shared Savings Program Regulations”).

Pursuant to the Shared Savings Program Regulations, Depositor must guarantee its ability to repay a portion of the Depositor’s total Medicare Parts A and B fee-for-service expenditures for its assigned beneficiaries (as specified in a written notice to the Depositor), in the event Recipient determines that the Depositor owes shared losses for a performance year (“Shared Losses”). Accordingly, Depositor shall deposit funds in a segregated escrow account (“Account”) to be held by Agent for the purpose of paying Shared Losses by Depositor. Should the Depositor fail to pay CMS the total amount of Shared Losses by the applicable deadline, the Assets (as defined below) shall be paid to CMS in an amount not to exceed the Shared Losses.

The funds described above, including interest thereon, (the “Assets”) will be deposited in the Account upon delivery thereof to the Agent.

The Agent is hereby authorized and directed by the Depositor and Recipient, as their escrow agent, to hold, deal with and dispose of the Assets as provided in the Instructions set forth in Schedule I attached hereto and incorporated herein; subject, however, to the terms and conditions set forth below, which in all events, shall govern and control over any contrary or inconsistent provisions contained in Schedule I attached hereto.

**Agent’s Duties.** Agent’s duties and responsibilities shall be limited to those expressly set forth in this Agreement, and Agent shall not be subject to, or obliged to recognize, any other agreement between or among the Depositor, the Recipient, or any other persons even though reference thereto may be made herein; provided, however, this Agreement may be amended at any time or times by an instrument in writing signed by the Parties hereto. Agent shall not be subject to or obligated to recognize any notice, direction or instruction of the Depositor, the Recipient, or any other person, except as expressly provided for and authorized in Schedule I. In performing any duties under this

Agreement, Agent shall not be liable to the Depositor or other party for consequential damages, (including, without limitation lost profits) losses, or expenses, except for gross negligence or willful misconduct on the part of the Agent.

**Court Orders or Process.** If any controversy arises between or among the Parties to this Agreement, or with any other person, concerning the subject matter of this Agreement, its terms or conditions, Agent will not be required to determine the controversy or to take any action regarding it. Agent may hold all documents and funds and may wait for settlement of any such controversy by final appropriate legal proceedings or other means as, in Agent's discretion, Agent may require, despite what may be set forth elsewhere in this Agreement. In such event, Agent will not be liable for interest or damage. Agent is authorized, in its sole discretion, to comply with orders issued or process entered by any court with respect to the Account, the Assets or this Agreement, without determination by the Agent of such court's jurisdiction in the matter. If any Assets are at any time attached, garnished, or levied upon under any court order, or in case the payment, assignment, transfer, conveyance or delivery of any such property shall be stayed or enjoined by any court order, or in case any order, judgment or decree shall be made or entered by any court affecting such property or any part thereof, then in any such events Agent is authorized, in its sole discretion, to rely upon and comply with any such order, writ, judgment or decree which it is advised by legal counsel of its own choosing is binding upon it; and if Agent complies with any such order, writ, judgment or decree, it shall not be liable to the Depositor or to any other person, firm or corporation by reason of such compliance even though such order, writ, judgment or decree may be subsequently reversed, modified, annulled, set aside or vacated.

1. **Agent's Actions and Reliance.** Agent shall not be personally liable for any act taken or omitted by it hereunder if taken or omitted by it in good faith and in the exercise of its own best judgment. Agent shall also be fully protected in relying upon any written notice, instruction, direction, certificate or document which in good faith it believes to be genuine.
2. **Indemnification.** Recipient is not required to indemnify any person or entity against any loss, claim, damages, liabilities, or expenses, including the cost of litigation arising from the Escrow Agreement or the subject of the agreement.
3. **Assets.** Unless otherwise approved in advance by Recipient, all Assets shall be deposited in cash as often as required by § 425.204(f) of the Shared Savings Program Regulations. Upon deposit, the Assets shall be promptly invested by Agent as set forth on Schedule I. Depositor shall provide Agent with at least two business days advance written notice of the expected amount of any deposit made after the initial deposit. The costs, fees and expenses associated with the Account, including any legal expenses incurred by the Agent or the Depositor, are not borne by the Recipient and such costs are not charged to principal.



4. **Collections.** Unless otherwise specifically indicated in Schedule I, Agent shall proceed as soon as practicable to collect any checks, interest due, matured principal or other collection items with respect to Assets at any time deposited in the Account. All such collections shall be subject to the usual collection procedures regarding items received by Agent for deposit or collection. Agent shall not be responsible for any collections with respect to Assets if Agent is not registered as record owner thereof or otherwise is not entitled to request or receive payment thereof as a matter of legal or contractual right. All collection payments shall be deposited to the Account, except as otherwise provided in Schedule I. Agent shall not be required or have a duty to notify anyone of any payment or maturity under the terms of any instrument, security or obligation deposited in the Account, nor to take any legal action to enforce payment of any check, instrument or other security deposited in the Account. The Account is a safekeeping escrow account, and no interest shall be paid by Agent on any money deposited or held therein, except as provided in Section 6 hereof.
5. **Agent Responsibility.** Agent shall not be responsible or liable for the sufficiency or accuracy of the form, execution, validity or genuineness of documents, instruments or securities now or hereafter deposited in the Account, or of any endorsement thereon, or for any lack of endorsement thereon, or for any description therein. Agent shall not be responsible or liable in any respect on account of the identity, authority or rights of the persons executing or delivering or purporting to execute or deliver any such document, security or endorsement or this Agreement.
6. **Investments.** All monies held in the Account shall be invested by Agent in its name or its nominee's name, in such instruments or securities and at the written direction of Recipient, as expressly authorized in Schedule I. The Recipient shall furnish the Agent with written instructions to sell securities (including shares or units in any money market mutual funds) to make any payments from the Account as provided hereunder. If no such instructions are received, Agent is authorized to sell any such securities held in the Account as necessary for that purpose. Agent shall not be responsible for the selection, quality or maturity of such investments or for the timely reinvestment of interest or maturity proceeds thereof except as provided in the immediately following paragraph.

In the absence of duly authorized and complete directions regarding investment of cash held in the Account, Agent shall automatically invest and reinvest the same in units of the interest-bearing money market account identified on Schedule II, attached hereto and incorporated herein.

Monies credited to any account or fund maintained hereunder which are uninvested pending disbursement or receipt of proper investment directions or as directed herein, may be deposited to and held in a non-interest bearing demand deposit account with the Agent, without the pledge of securities to or other collateralization of such deposit accounts.

7. **Notices/Directions to Agent.** Notices and directions to Agent from Depositor, or from other persons authorized to give such notices or directions as expressly set forth in Schedule I, shall be in writing and signed by an authorized representative as identified pursuant to Schedule I, and shall not be deemed to be given until actually received by Agent's employee or officer who administers the Account. Agent shall not be responsible or liable for the authenticity or accuracy of notices or directions properly given hereunder if the written form and execution thereof on its face purports to satisfy the requirements applicable thereto as set forth in Schedule I, as determined by Agent in good faith without additional confirmation or investigation.
8. **Books and Records.** Agent shall maintain books and records regarding its administration of the Account, and the deposit, investment, collections and disbursement or transfer of Assets, shall retain copies of all written notices and directions sent or received by it in the performance of its duties hereunder, and shall afford Depositor and Recipient reasonable access, during regular business hours, to review and make photocopies (at Depositor's cost) of the same. The Agent shall send statements to each of the Parties on a monthly basis reflecting activity in the Escrow Account for the preceding month.
9. **Depositor Disputes.** In the event Agent is notified of any dispute, disagreement or legal action between or among the Depositor, the Recipient, and/or any third parties, relating to or arising in connection with the Account, the Assets, or the performance of the Agent's duties under this Agreement, the Agent shall be authorized and entitled, subject to Court Orders or Process hereof, to suspend further performance hereunder, to retain and hold the Assets then in the Account and take no further action with respect thereto until the matter has been fully resolved, as evidenced by written notification signed by the Depositor and any other parties to such dispute, disagreement or legal action. This paragraph shall not apply in the case of a dispute, disagreement, or legal action taken by Depositor to contest the accuracy of any settlement report that is issued pursuant to the Shared Savings Program Regulations, and that is deemed final. For purposes of this Agreement, any such dispute, disagreement, or legal action shall be resolved as described in Schedule I.
10. **Notice by Agent.** Any notices which Agent is required or desires to give hereunder to the Depositor or Recipient shall be in writing and shall be delivered by hand or overnight courier service, mailed by United States certified or registered mail, postage prepaid, or sent by facsimile or email (attached as a portable document format (.pdf) only) to the applicable address, facsimile number or email address indicated below (or to such other address as said Depositor or Recipient may have theretofore substituted therefor by written notification to Agent. For all purposes hereof any notice so mailed shall be as effectual as though served upon the person of the Depositor or Recipient to whom it was mailed at the time it is deposited in the United States mail by Agent whether or not such undersigned thereafter actually receives such notice. Whenever, under the terms hereof the time for Agent's giving a



notice or performing an act falls upon a Saturday, Sunday, or holiday, such time shall be extended to the next business day.

**Depositor:**

**Recipient:**

Centers for Medicare & Medicaid Services  
 Attn: Karen McVeary,  
 CM/Performance-Based Payment Policy Group  
 7500 Security Boulevard  
 Desk Location: C5-16-06  
 Mail Stop: C5-15-12  
 Baltimore, MD 21244  
 Phone: 410-786-5604  
 Email: sharedsavingsprogram@cms.hhs.gov

Phone: \_\_\_\_\_  
 Email: \_\_\_\_\_

**Agent:**

Name:  
 Address:  
 City, State, ZIP  
 Attn: Name  
 Phone:  
 Email:

11. **Legal Counsel.** If Agent believes it to be reasonably necessary to consult with counsel concerning any of its duties in connection with the Account or this Agreement, or in case Agent becomes involved in litigation on account of being escrow agent hereunder or on account of having received property subject hereto, then in either case, its costs, expenses, and reasonable attorney’s fees shall be paid by the Depositor.
12. **Agent Compensation.** Agent shall be paid a fee for its services as set forth on Schedule III attached hereto and incorporated herein, which shall be subject to increase upon notice sent to Depositor and Recipient, and reimbursed for its reasonable costs and expenses incurred (including legal fees and expenses of its counsel). If Agent’s fees, or reasonable costs or expenses, provided for herein, are not promptly paid, Agent may be paid from interest earned on funds held in or earned on the Account, but the principal shall not be charged, used as an offset, or otherwise encumbered by the Agent or the Depositor. In the event that the conditions of this Agreement are not promptly fulfilled, or if Agent renders any service not provided for in this Agreement, or if the Parties request a substantial modification of its terms, or if any controversy arises, or if Agent is made a Party to, or intervenes in, any litigation pertaining to this escrow or its subject matter, Agent shall be reasonably compensated for such extraordinary services and reimbursed for all costs, attorney’s fees, including allocated costs of in-house counsel, and expenses occasioned by such default, delay, controversy or litigation. The Depositor

promises to pay these sums upon demand. The Depositor and its respective successors and assigns agree jointly and severally to indemnify and hold Agent harmless against any and all losses, claims, damages, liabilities, and expenses, including reasonable costs of investigation, counsel fees, including allocated costs of in-house counsel and disbursements that may be imposed on Agent or incurred by Agent in connection with the performance of his/her duties under this Agreement, including but not limited to any litigation arising from this Agreement or involving its subject matter. The obligations of the Parties under this Section 12 shall survive the resignation or removal of the Agent and the termination of this Agreement.

13. **Agent Resignation.** It is understood that Agent reserves the right to resign at any time by giving written notice of its resignation, specifying the effective date thereof, to the Depositor and Recipient. Within 30 days after receiving the aforesaid notice, the Recipient agrees to appoint a successor escrow agent to which Agent may transfer the Assets then held in the Account, less any deduction permitted under this Agreement for its unpaid fees, costs and expenses. If a successor escrow agent has not been appointed and has not accepted such appointment by the end of the 30-day period, Agent may apply to a court of competent jurisdiction for the appointment of a successor escrow agent, and the costs, expenses and reasonable attorney's fees which Agent incurs in connection with such a proceeding shall be paid by the Depositor.
14. **Escrow Termination.** This Agreement shall be terminated as provided in Schedule I, at which time the Assets then held in the Account, less Agent's unpaid fees, costs and expenses shall be returned to the Depositor. Recipient will receive ninety days advance written notice of early termination of the escrow account and two days advance written notice of any change in the amount of funds held in escrow.
15. **Governing Law.** This Agreement shall be construed, enforced, and administered in accordance with the laws of the State of \_\_\_\_\_ [ENTER YOUR STATE], to the extent not inconsistent with federal law. The undersigned Agent hereby agrees to hold, deal with, and dispose of the Assets at any time deposited to the Account in accordance with the foregoing Agreement.
16. **Automatic Succession.** Any company into which the Agent may be merged or with which it may be consolidated, or any company to whom Agent may transfer a substantial amount of its Escrow business, shall be the Successor to the Agent without the execution or filing of any paper or any further act on the part of any of the Parties, anything herein to the contrary notwithstanding.
17. **Tax Reporting.** The Agent shall have no responsibility for the tax consequences of this Agreement. The Agent hereby advises each party to this escrow to consult with independent legal counsel concerning the tax ramifications of this transaction. Depositor shall furnish the Agent with an Internal Revenue Service Form W-8 or

Form W-9 (if applicable), properly completed and signed, and/or such other forms and documents that the Agent may reasonably request.

18. **E-Mail/Photostatic Teletransmission/Execution in Counterpart.** If the parties sign this Agreement and any amendments to it in counterparts, each counterpart will be deemed to be an original, but all counterparts taken together will constitute one instrument. If any signature is delivered by e-mail of a “.pdf” data file, such signature will create a valid and binding obligation of the party executing (or on whose behalf such signature is executed) with the same force and effect as if such “.pdf” signature page were an original. The transmission of the instructions by electronic transmission (e-mail) as attributed to an authorized person or photostatic teletransmission with duplicate or facsimile signatures shall be an authorized method of communication and shall be considered in writing until the Parties notify the Agent to the contrary.
19. **Identifying Information.** To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify and record information that identifies each person who opens an account. For a non-individual person such as a business entity, a charity, a Trust or other legal entity Agent will ask for documentation to verify its formation and existence as a legal entity. Agent may also ask to see financial statements, licenses, identification, and authorization documents from individuals claiming authority to represent the entity or other relevant documentation.
20. **Security Advice Waiver Language.** The Depositor acknowledges that regulations of the Comptroller of the Currency grant the Depositor the right to receive brokerage confirmations of security transactions as they occur. The Depositor specifically waives such notification to the extent permitted by law and acknowledges that the Depositor will receive periodic cash transaction statements, which will detail all investment transactions.

**IN WITNESS WHEREOF**, the Parties hereto have caused this Agreement to be executed under seal as of the date first above written.

**DEPOSITOR**

By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_

**RECIPIENT**

By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_

**[BANK NAME] as Escrow Agent**

By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_

Attachments:

Schedule I

Exhibit A

Schedule II

Schedule III

## SCHEDULE I

### *Instructions of Depositor*

1. Immediately upon deposit, all monies held in the Account shall be invested by Agent in Treasury-backed securities or a money market fund. 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 may be in the form of Exhibit A and shall --
  - a. Identify the amount, if any, of Shared Losses 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 CFR § 425.605 (Level C, D, E of the BASIC track), or 42 CFR § 425.610(h) (ENHANCED track) of the Shared Savings Program Regulations (the “Written Notification”).
  - b. Identify the amount of such Shared Losses that Depositor has failed to pay (the “Debt”) within 90 days of the delivery 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 CFR Part 425, Subpart I.
  - c. Instruct Agent to convert the Assets to cash and pay the amount of the Debt to Recipient. If Assets will be zero after delivering the amount of the Debt to Recipient, Agent shall notify Recipient, and Recipient shall provide further instructions, in consultation with Depositor, for the replenishment of assets or closure of the Account.
  - d. If applicable, notify the Agent of the expiration or termination of the Depositor’s Medicare Shared Savings Program Participation Agreement or other circumstances requiring closure of the Account and instruct Agent to convert the Assets to cash and dispose of them as follows:
    - i. 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.
    - ii. 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.
    - iii. 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. The Account shall remain open, and this Agreement shall not terminate, until five days after the date of a letter sent in accordance with paragraph 2(d) from Recipient to Agent instructing Agent to close the Account. It is anticipated that such a letter would be issued no later than \_\_\_\_\_ [insert date 12 months after the last day of the applicable performance year of the ACO's agreement period].
4. Upon termination of this Agreement, the Agent shall return the remaining full cash value of the Assets, if any, to Depositor, less Agent's unpaid fees, costs and expenses, by check, or wire transfer as follows:

Recipient Receiving Bank: \_\_\_\_\_  
 ABA # \_\_\_\_\_  
 Beneficiary Account Name: \_\_\_\_\_  
 Beneficiary Account Number: \_\_\_\_\_  
 Beneficiary Account Address: \_\_\_\_\_  
 OBI: \_\_\_\_\_  
 Ref: \_\_\_\_\_  
 Contact Name and Phone Number: \_\_\_\_\_

5. 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: \_\_\_\_\_

**EXHIBIT A**

*Certification of Shared Losses*

RE: \_\_\_\_\_ [YOUR BANK NAME], as Escrow Agent (“Agent”) under that certain Escrow Agreement (the “Escrow Agreement”), dated \_\_\_\_\_, 20\_\_\_\_, by and among Agent, \_\_\_\_\_ (“Depositor”), and the United States Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS), (“Recipient”)

Pursuant to the Shared Savings Program Regulations at 42 CFR Part 425, as amended and Schedule I of the Escrow Agreement, the undersigned hereby certifies to the Agent as follows:

1. Depositor has incurred \$ \_\_\_\_\_ of Shared Losses for the relevant performance year, as determined by CMS and set forth in the written notification issued under § 425.605 (Level C, D, E of the BASIC track), or § 425.610(h)(2) (ENHANCED track) of the Shared Savings Program Regulations and dated \_\_\_\_\_ (the “Written Notification”);
2. Depositor has failed to pay \$ \_\_\_\_\_ of such Shared Losses (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 Shared Savings Program Regulations;
3. Recipient is entitled to payment from the escrow account (“Account”) in an amount equal to the lesser of the Debt or the full cash value of the Assets on deposit in the Account; and
4. Agent is hereby instructed to convert the Assets to cash and remit the amount specified in paragraph 3 above to Recipient by check, or wire transfer as follows:

Receiving Bank: \_\_\_\_\_  
 ABA # \_\_\_\_\_  
 Beneficiary Account Name: \_\_\_\_\_  
 Beneficiary Account Number: \_\_\_\_\_  
 Beneficiary Account Address: \_\_\_\_\_

OBI: \_\_\_\_\_  
 Ref: \_\_\_\_\_  
 Contact Name and Phone Number: \_\_\_\_\_

5. To the extent that any funds remain in the Account after payment to Recipient and the subsequent deduction of any unpaid fees, costs or expenses, Agent is herein instructed to await the replenishment of Assets by the Depositor if the Agent has

not been notified that all outstanding obligations for the Agreement Period have been settled.

6. To the extent that any funds remain in the Account after the final payment to Recipient for all outstanding obligations for the Agreement Period and the subsequent deduction of any unpaid fees, costs or expenses, Agent is herein instructed to send the remaining funds to Depositor by check, or wire transfer as follows:]

Receiving Bank: \_\_\_\_\_  
 ABA # \_\_\_\_\_  
 Beneficiary Account Name: \_\_\_\_\_  
 Beneficiary Account Number: \_\_\_\_\_  
 Beneficiary Account Address: \_\_\_\_\_  
 OBI: \_\_\_\_\_  
 Ref: \_\_\_\_\_  
 Contact Name and Phone Number: \_\_\_\_\_

7. Recipient has received separate written instructions from Depositor to close the Account. Yes or No.

All terms used herein but not defined shall have such meaning as is ascribed to them by the Escrow Agreement or the Shared Savings Program Regulations at 42 CFR Part 425, as amended, as the case may be.

Date: \_\_\_\_\_

United States Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS),  
 ("Recipient")

By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_



## SCHEDULE II

### *Account and Description Terms*

Account Number: \_\_\_\_\_

#### RECIPIENT

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

### SCHEDULE III

**Escrow Agent's Fees: Account fees, costs, or other fees associated with establishing, maintaining, or cancelling the account are the responsibility of the ACO (Depositor); they are not borne by CMS (Recipient) and not be charged to the principal.**

## Appendix B: Escrow Agreement Amendment Sample

**THIS AMENDMENT** (“Amendment”) is made to the Escrow Agreement (“Agreement”) dated as of \_\_\_\_\_ by and among \_\_\_\_\_, (“**Depositor**”); the United States Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) (“**Recipient**”); and \_\_\_\_\_, as Escrow Agent hereunder (“**Agent**”), collectively, the “Parties.”

The Parties wish to amend the Agreement to reflect the term of the Medicare Shared Savings Program Accountable Care Organization Participation Agreement (“Participation Agreement”) entered into by the Depositor and Recipient, effective [Month] 1, 20XX.

**THEREFORE**, in consideration of the foregoing and the mutual covenants set forth below, the Parties hereby agree as follows:

1. Paragraph 3 of Schedule I (Instructions of Depositor) is amended to specify:  
[USE ONE OF THE FOLLOWING STATEMENTS REGARDING THE EXPIRATION DATE]

“It is anticipated that such a letter would be issued no later than \_\_\_\_\_, which is 12 months after the last day of the applicable performance year of the Depositor’s agreement period.”

[OR]

“It is anticipated that such a letter would be issued no later than \_\_\_\_\_, which is the last day of the ACO’s second performance year under a two-sided model, provided that the Agreement will auto-renew for 12 month extensions to

cover all remaining performance year(s) of the Agreement under a two-sided model and 12 months following the conclusion of the last performance year.”

2. Any conflict between the Agreement and this Amendment will be resolved in favor of this Amendment.

3. Except as set forth above, all other terms and conditions of the Agreement are not further amended and remain in full force and effect.

[FOR INFORMATIONAL PURPOSES ONLY (this note is not part of the sample Amendment text): To support the ACO’s renewal application, the ACO may be required to increase the amount of funds held in escrow, estimated by CMS during the application review period. The Escrow Agent may demonstrate this increase in documentation separate from an amendment to the escrow agreement.]

[Signature page follows]

**IN WITNESS WHEREOF**, the parties have caused this Amendment to be executed by their duly authorized representatives as of the date first above written.

**DEPOSITOR**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**RECIPIENT**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**[FINANCIAL INSTITUTION'S NAME] as ESCROW AGENT**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## Appendix C: Letter of Credit Sample

[Financial Institution Name] - CONFIDENTIAL

DATE: [Execution Date of LOC]

IRREVOCABLE STANDBY LETTER OF CREDIT NUMBER: [LOC #]

ISSUING BANK

[Financial Institution Name]

[Financial Institution Address]

BENEFICIARY

APPLICANT

CENTERS FOR MEDICARE & MEDICAID  
SERVICES (CMS)  
7500 SECURITY BLVD  
MAIL STOP: C5-15-12  
BALTIMORE, MD 21244  
ATTN: KAREN MCVEARRY DESK  
LOCATION: C5-16-06

[ACO's Legal Entity Name & Address]

AMOUNT

Not exceeding USD [numerical dollar amount of Repayment Mechanism]

Not exceeding [written dollar amount of Repayment Mechanism] USD

EXPIRATION

[Term date per 42 CFR Part 425] at our counters

We hereby issue this irrevocable standby Letter of Credit Number [Letter of Credit #] in your favor, for the Account of the Applicant, for up to an aggregate amount of USD [numerical dollar amount of RM] available by your Draft(s) drawn on us at sight, accompanied by the following:

1. The original letter of credit and all amendments thereto, if any.
2. A dated statement signed by an authorized signatory of the beneficiary on beneficiary's letterhead reading as follows:
  - a. "The amount of the drawing under this credit represents funds due to CMS from [ACO Legal Entity Name] under the Medicare Shared Savings Program Regulations 42 CFR Part 425, 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.”

This is an integral part of Letter of Credit Number: [Letter of Credit #]

It is a condition of this letter of credit that it is deemed to be automatically extended without amendment for period(s) of one year each from the current expiry date hereof, or any future expiration date, unless at least ninety (90) days prior to any expiration date, we notify you by registered mail or overnight courier at the above listed address that we elect not to consider this letter of credit extended for any such additional period.

Any such notice shall be effective when sent by us and upon such notice to you, you may draw at any time prior to the then current expiration date, up to the full amount then available hereunder, against your draft(s) drawn on us at sight and the original of this letter of credit and all amendments thereto, accompanied by your statement, signed by an authorized signatory, on your letterhead stating that you are in receipt of [state financial institution name]’s notice of non-extension under Letter of Credit Number [state LOC number] and the applicant’s obligation to your remains.

**FOR INFORMATIONAL PURPOSES ONLY:** If any portion of the repayment mechanism is used to repay shared losses owed to CMS, the ACO is required to replenish the amount of its repayment mechanism within 90 days.

All banking charges are for the Account of the Applicant. Partial drawings are allowed.

Draft(s) must state: "Drawn under [Financial Institution Name] standby Letter of Credit Number [Letter of Credit #] Dated [Execution Date of LOC]."

Draft(s) and documents may be presented at our offices at [Financial Institution Name and Address].

This credit is issued subject to the International Standby Practices (ISP98), International Chamber of Commerce Publication NO. 590.

If you require any assistance or have any questions regarding this transaction, please call [Financial Institution Contact Information].

[Financial Institution Signatory signs on this line]

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[Printed Name and Title of Financial Institution Signatory]

## Appendix D: Surety Bond Sample

BOND NUMBER: [Surety Bond #]

Surety Bond  
MEDICARE SHARED SAVINGS PROGRAM  
ACCOUNTABLE CARE ORGANIZATION

KNOW ALL PERSONS BY THESE PRESENTS, that subject to the terms, conditions and limitations of this Bond, [ACO legal business Name], as Principal, and [Insurance Company Legal Business Name] of [Insurance Company's Address], a corporation organized and existing under the laws of [State Insurance Company is licensed], as Surety, are held and firmly bound unto the Centers for Medicare & Medicaid Services ("CMS"), an agency of the United States Department of Health and Human Services, of 7500 Security Boulevard, Mail Stop C5-15-12, Baltimore, MD 21244-1850, as Obligee, in the Penal Sum of [Written dollar amount of RM] dollars (\$[Numerical dollar amount of RM]) for the payment of which Principal and Surety bind themselves, their heirs, executors, administrators, successors and assignees, jointly and severally, by these presents.

WHEREAS, the Principal has entered into the Medicare Shared Savings Program Accountable Care Organization Participation Agreement ("Agreement") with the United States Department of Health and Human Services ("HHS"), Centers for Medicare & Medicaid Services, dated [Date of first day of the ACO's agreement period] pursuant to Section 1899 of the Social Security Act and the regulations at Title 42 CFR Part 425 governing the Medicare Shared Savings Program ("Regulations").

WHEREAS, pursuant to the Agreement, the Principal agrees to comply with the Regulations, which require the Principal to repay CMS for any monies that are owed ("Repayment Amount") by the Principal, as determined by CMS upon final reconciliation for each of the Performance Years (as defined in the Agreement) under a two-sided model covered by the Agreement.

WHEREAS, the Principal is required to provide an acceptable repayment mechanism (as described in 42 CFR § 425.204(f)(2)) as a condition of participating in the Medicare Shared Savings Program, this Bond is provided in compliance with the Principal's obligations as set forth in 42 CFR § 425.204(f).

NOW THEREFORE, the condition of this Bond is that if the Obligee determines that Principal owes a Repayment Amount under the Agreement and Regulations, and the Principal pays the Repayment Amount in full to Obligee, then this Bond shall be null and void, but if Principal fails to pay the Repayment Amount in full to Obligee, this Bond shall remain in full force and effect, subject, however, to the following:

1. Principal and Surety are liable under this Bond for only the Repayment Amount incurred for the Performance Year(s) under a two-sided model covered by the Agreement.
2. Surety agrees to pay the Repayment Amount within 30 days of receiving from CMS written notice of the Repayment Amount and sufficient evidence (as to any unpaid repayment due from the Principal under the referenced Agreement) to establish Surety's liability under this Bond.
3. The Surety is liable for any Repayment Amount determined by CMS to be owed by the



Principal for the Performance Year(s) under a two-sided model covered by the Agreement and the Obligee may collect on this Bond up to the Penal Sum.

4. CMS is the sole Obligee of this Bond, and no action may be brought on it by, or for the use or benefit of, any person or entity other than CMS or its contractors.
5. Regardless of the number of years this Bond is in effect, the number of premiums paid, or the number of claims made, the Surety's aggregate liability shall not be more than the Penal Sum of this Bond. After the repayment mechanism has been used to repay any portion of shared losses owed to CMS, the Principal must replenish the amount of funds available through the repayment mechanism within 90 days. Furthermore, the failure or inability of the Principal to replenish the repayment mechanism required by CMS shall not itself constitute a loss to the Obligee recoverable under this Bond.
6. For the purposes of clarity, the Surety shall remain liable under this Bond for twelve (12) months after the expiration of each Performance Year under a two-sided model covered by the Agreement for any Repayment Amount determined by CMS to be owed by the Principal for the Performance Year(s) under a two-sided model covered by the Agreement.
7. The Surety may cancel this Bond and terminate its liability by giving written notice to the Obligee; provided, however, that such notice must be received by the Obligee at least ninety (90) days prior to the date of termination of a Performance Year. Cancellation shall not itself constitute a loss to the Obligee recoverable under this Bond. Acceptance of a replacement repayment mechanism by CMS shall relieve the Surety of all liability under this Bond.

The term of this Bond shall commence on [Date of first day of the ACO's first Performance Year under a two-sided model].

[USE ONE OF THE FOLLOWING STATEMENTS REGARDING THE EXPIRATION DATE]

The term of this Bond shall end on [Date that is 12 months following the conclusion of the ACO's Agreement].

[OR]

The term of this Bond shall end on [Date that is the last day of the ACO's second Performance Year under a two-sided model], provided that the Bond will auto-renew annually for 12-month extensions to cover all remaining Performance Year(s) of the Agreement under a two-sided model.

In witness whereof, the undersigned Principal and Surety have set their hands and seals on this [# of day of Month, Year].

[ACO Legal Entity Name]

By: \_\_\_\_\_ (Name of ACO Executive, Authorized to Sign Primary or Secondary, Financial Contact)

By: \_\_\_\_\_ (Signature of one of 4 Authorized to Sign)

[Insurance Company Name]

By: \_\_\_\_\_ (Name of Signatory)

By: \_\_\_\_\_ (SIGN HERE)