

Repayment Mechanism Arrangements Guidance

Appendix A: Escrow Agreement Template

The escrow agreement template satisfies the repayment mechanism requirements for an Accountable Care Organization (ACO) participating in the Medicare Shared Savings Program. Use of the escrow agreement template may expedite CMS' review and should minimize the potential need for revision, but it does not guarantee CMS approval of the ACO's escrow agreement (particularly if it has been modified). If the ACO and/or banking institution chooses to modify the template, the ACO and/or banking institution should use Track Changes in a Word document when submitting the draft to CMS for review. Note that any changes made to the template will lengthen the CMS review time.


Instructions:

- Complete fields marked in bracketed and bolded text as instructed.
- According to the preferences of the banking institution issuing the escrow agreement, provide documentation on letterhead or security paper with the banking institution's logo.

For additional information, review the [Repayment Mechanism Arrangements Guidance](#).

Disclaimers: The contents of this document do not have the force and effect of law and are not meant to bind the public in any way, unless specifically incorporated into a contract. This document is intended only to provide clarity to the public regarding existing requirements under the law.

This communication material was prepared as a service to the public and is not intended to grant rights or impose obligations. It may contain references or links to statutes, regulations, or other policy materials. The information provided is only intended to be a general summary. It is not intended to take the place of either the written law or regulations. We encourage readers to review the specific statutes, regulations, and other interpretive materials for a full and accurate statement of its contents.

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ESCROW AGREEMENT

THIS ESCROW AGREEMENT (the “Agreement”), dated as of _____, is 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 (“Escrow Agent”), collectively, the “Parties” to this Agreement.

A. CMS is the agency that administers the Medicare program, including the Medicare Shared Savings Program (“Shared Savings Program”).

B. Depositor is an Accountable Care Organization (ACO) that agrees to be held accountable for the quality, cost, and experience of care of an assigned Medicare fee-for-service beneficiary population.

C. Escrow Agent is a legal entity authorized to provide financial services under the laws of the state in which it operates.

D. Depositor and Recipient have entered into a Medicare Shared Savings Program Accountable Care Organization Participation Agreement (“Participation Agreement”), effective _____ 1, _____, pursuant to which the Depositor elected to participate in the Shared Savings Program and to comply with the regulations at 42 CFR Part 425 (the “Shared Savings Program Regulations”). Escrow Agent is not a party to, and has no duties or obligations under, the Participation Agreement.

E. Pursuant to the Shared Savings Program Regulations, Depositor must pay CMS the amount of shared losses that CMS determines is owed by Depositor upon annual reconciliation of each performance year (“Shared Losses”). The amount of Shared Losses that Depositor owes to CMS comprises the debt (“Debt”).

F. Pursuant to the Shared Savings Program Regulations, Depositor must guarantee its ability to pay Shared Losses by providing a repayment mechanism in an amount determined by CMS. Accordingly, Depositor shall deposit funds in a segregated

escrow account (“Account”) to be held by Escrow Agent for the purpose of paying Shared Losses owed by Depositor under the Shared Savings Program Regulations at 42 CFR Part 425. The Assets (as defined below) shall be paid to Recipient according to the terms of this Agreement.

THEREFORE, the Parties, for themselves, their successors, and assigns, hereby agree as follows:

- 1) **Appointment of and Acceptance by Escrow Agent**. Depositor and Recipient hereby appoint Escrow Agent to serve as escrow agent hereunder. Escrow Agent hereby accepts such appointment.
- 2) **Deposit of Funds**.
 - a) Depositor shall transfer funds by wire transfer of immediately available funds, to the Account designated by Escrow Agent, in the manner and at the time(s) specified in Schedule I. The first transfer of funds from the Depositor that has occurred is referred to as the “Initial Deposit.”
 - b) Depositor shall provide Escrow Agent with at least _____ business days advance written notice of the expected amount of any deposit made after the Initial Deposit.
 - c) Escrow Agent shall provide written confirmation to Depositor and Recipient of the receipt and deposit of the Initial Deposit to the Account in the manner provided in Section 7 of this Agreement.
- 3) **Duties and Liability of Escrow Agent**.
 - a) Escrow Agent shall hold, invest, and disburse the funds, including interest thereon (the “Assets”), in accordance with the terms and conditions set forth in this Agreement, which in all events, shall govern and control over any contrary or inconsistent provisions contained in Schedules I, II, or III attached hereto.

- b) Escrow Agent's duties and responsibilities shall be limited to those expressly set forth in this Agreement, and Escrow 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. Escrow Agent shall have no implied duties beyond the express duties set forth in this Agreement.
- c) Escrow Agent's sole responsibility shall be for the safekeeping of the Assets in accordance with Escrow Agent's customary practices and for disbursement thereof in accordance with the terms of this Agreement.
- d) Escrow Agent shall maintain books and records regarding its administration of the Account and the deposit, investment, collections, and disbursement or transfer of Assets. Escrow Agent 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.
- e) Escrow 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 (Depositor's signature specimen) and Section 7 of this Agreement, as determined by Escrow Agent in good faith without additional confirmation or investigation.
- f) Escrow Agent may rely upon any notice, instruction, request, or other instrument, not only as to its due execution, validity, and effectiveness but also as to the truth and accuracy of any information contained therein, which Escrow Agent believes to be genuine and to have been signed or presented by the person or parties purporting to sign the same. In no event shall Escrow Agent be liable for (i) acting in accordance with or conclusively relying upon any instruction, notice, demand, certificate, or document reasonably believed by Escrow Agent to have been created

by or on behalf of Depositor or Recipient; (ii) incidental, indirect, special, consequential or punitive damages, or penalties of any kind, except for gross negligence or willful misconduct on the part of the Escrow Agent as finally determined by a court of competent jurisdiction, which determination is not subject to appeal; or (iii) any amount greater than the value of the Assets.

- g) In the event instructions, including funds transfer instructions, address change, or change in contact information are given to Escrow Agent (other than in writing at the time of execution of this Agreement), whether in writing, or otherwise, Escrow Agent is authorized, but shall not be required, to seek confirmation of such instructions by telephone call-back to any person identified on Schedule I, and Escrow Agent may rely upon the confirmation of anyone purporting to be a person so identified, except that Escrow Agent shall seek confirmation of any change in Recipient's contact information and banking information. The persons and telephone numbers for call-backs may be changed only in writing actually received and acknowledged by Escrow Agent and shall be effective only after Escrow Agent has a reasonable opportunity to act on such changes. Depositor and Recipient acknowledge that these optional security procedures are commercially reasonable.
- h) Escrow 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.

4) **Indemnification.**

- a) Depositor shall indemnify and hold harmless Escrow Agent and each director, officer, employee and affiliate of Escrow Agent (each, an "Indemnified Party") upon demand against any and all claims, actions, proceedings, losses, damages, liabilities, penalties, costs, and expenses of any kind or nature (including without limitation reasonable attorneys' fees, costs, and expenses) (collectively, "Losses") arising from this Agreement or Escrow Agent's actions hereunder, except to the

extent such Losses are finally determined by a court of competent jurisdiction, which determination is not subject to appeal, to have been directly caused solely by the gross negligence or willful misconduct of such Indemnified Party in connection with Escrow Agent's material breach of this Agreement. Depositor further agrees to indemnify each Indemnified Party for all costs, including without limitation reasonable attorneys' fees, incurred by such Indemnified Party relating to the enforcement of Depositor's and Recipient's obligations hereunder.

- b) Each Indemnified Party shall, in its sole discretion, have the right to select and employ separate counsel with respect to any action or claim brought or asserted against it, and the reasonable fees of such counsel shall be paid upon demand by Depositor.
 - c) The obligations of Depositor under this Section shall survive any termination of this Agreement and the resignation or removal of Escrow Agent.
 - d) 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 Agreement or the subject of the Agreement.
- 5) **Disputes and Suspension of Performance**. If, at any time, (a) Escrow 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 Escrow Agent's duties under this Agreement (other than a dispute or legal action taken by Depositor to contest the accuracy of any settlement report issued pursuant to the Shared Savings Program Regulations), (b) Escrow Agent is unable to determine, to Escrow Agent's sole satisfaction, Escrow Agent's proper actions with respect to its obligations hereunder, or (c) the Depositor has not, within 30 days of receipt of a notice of resignation, appointed a successor escrow agent to act hereunder, then Escrow 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 Escrow Agent's discretion, Escrow Agent may require, despite what may be set forth elsewhere in this Agreement. In such event, Escrow Agent will not be liable for interest or damage. Escrow 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 Escrow 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 Escrow 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 Escrow Agent complies with any such order, writ, judgment or decree, it shall not be liable to the Depositor or Recipient by reason of such compliance even though such order, writ, judgment, or decree may be subsequently reversed, modified, annulled, set aside, or vacated.

6) **Investments.**

- a) The Assets held in the Account shall be invested by Escrow Agent at the written direction of Depositor. Escrow Agent is directed to automatically invest and reinvest the Assets in the investment identified in Schedule II attached hereto and incorporated herein, until notified in writing of alternate instructions.
- b) Depositor warrants that no investment or reinvestment direction shall be given contrary to investment or reinvestment in the following: (a) direct obligations of the United States of America or obligations the principal of and the interest on which are unconditionally guaranteed by the United States of America; (b) U.S. dollar denominated deposit accounts and certificates of deposit issued by any bank, bank and trust company, or national banking association (including Escrow Agent and its

affiliates), which are either (i) insured by the Federal Deposit Insurance Corporation (“FDIC”) up to FDIC limits, (ii) insured by the National Credit Union Share Insurance Fund (“NCUSIF”) up to NCUSIF limits, or (iii) with domestic commercial banks which have a rating on their short-term certificates of deposit on the date of purchase of at least “A-1” by S&P or “P-1” by Moody’s (ratings on holding companies are not considered as the rating of the bank); or (c) money market funds comprised of securities described in (a), including funds managed by Escrow Agent or any of its affiliates. Provided further, however, that Escrow Agent will not be directed to invest in investments that Escrow Agent determines are not consistent with Escrow Agent’s policies or practices.

- c) Depositor and Recipient recognize and agree that Escrow Agent will not provide supervision, recommendations or advice relating to either the investment of Assets or the purchase or disposition of any investment and the Escrow Agent shall not have any liability for any loss in an investment made pursuant to the terms of this Agreement.
- d) To the extent applicable regulations grant rights to receive brokerage confirmations for certain security transactions, Depositor and Recipient waive the right to receive such confirmations. Receipt of Assets, after the Initial Deposit, and investment and reinvestment of the Assets shall be confirmed by Escrow Agent by an account statement according to Schedule I and at such other times as reasonably requested by Depositor or Recipient.
- e) All investments shall be made in the name of Escrow Agent. Escrow Agent may, without notice to Depositor and Recipient, sell or liquidate any of the foregoing investments at any time for any disbursement of Assets permitted or required hereunder and shall not be liable for any loss, cost, or penalty resulting from any sale or liquidation of any such investment.

- f) All investment earnings shall become part of the Assets, and investment losses shall be charged against the Assets.
- g) With respect to any Assets or investment instruction received by Escrow Agent after 11:00 a.m. U.S. Central Time, Escrow Agent shall not be required to invest applicable funds until the next business day on which Escrow Agent is open to the public for general banking purposes.

7) **Notices.**

- a) All notices shall be sent to the applicable party or parties at the address specified on Schedule I or to such other address as each party may designate for itself by like notice and unless otherwise provided herein shall be deemed to have been given on the date received.
- b) All notices, approvals, consents, requests, and any communications hereunder must be in writing (provided that any communication sent to Escrow Agent must be in the form of a document that is signed manually or by way of a digital signature provided by DocuSign or Adobe Sign), in English, and delivered (a) by personal delivery, or (b) by traceable carrier, or (c) by certified or registered mail, return receipt requested, or (d) via email by way of a portable document format (“PDF”) attachment thereto. Depositor and Recipient agree to assume all risks arising out of the use of using digital signatures and electronic methods to submit communications to Escrow Agent, including without limitation the risk of Escrow Agent acting on unauthorized instructions, and the risk of interception and misuse by third parties.
- c) Notice shall be effective upon receipt, except for notice via email, which shall be effective only when the recipient, by return email or notice delivered by other method provided for in this section, acknowledges having received that email (with an automatically generated receipt or similar notice not constituting an acknowledgment of an email receipt for purposes of this section).

- d) Whenever, under the terms hereof, the time for Escrow Agent's giving a notice or performing an act falls upon a Saturday, Sunday, or legal holiday, such time shall be extended to the next business day.
- 8) **Escrow Agent Compensation.** Depositor agrees to compensate Escrow Agent upon demand for its services hereunder in accordance with Schedule III attached hereto. If Escrow Agent's fees, or reasonable costs or expenses, provided for herein, are not promptly paid, Escrow Agent may be paid from interest earned on the Assets, but the principal shall not be charged, used as an offset, or otherwise encumbered by the Escrow Agent or the Depositor. The obligations of Depositor and Escrow Agent under this Section 8 shall survive the resignation or removal of the Escrow Agent and the termination of this Agreement.
- 9) **Escrow Agent Resignation.**
- a) It is understood that Escrow Agent reserves the right to resign and be discharged from the performance of its duties hereunder at any time by giving thirty (30) days' prior written notice to Depositor and Recipient specifying a date when such resignation shall take effect.
- b) After the date of such resignation notice, notwithstanding any other provision of the Agreement, Escrow Agent's sole obligation will be to hold the Assets pending appointment of a successor escrow agent. If Depositor, with the consent of Recipient (which consent shall not be unreasonably withheld), fails to appoint a successor escrow agent prior to the effective date of such resignation, Escrow 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 Escrow Agent incurs in connection with such a proceeding shall be paid by the Depositor.
- c) Escrow Agent shall transmit all records pertaining to the Assets and shall pay all Assets to the successor escrow agent, after making copies of such records as Escrow Agent deems advisable and after deduction and payment to the Escrow

Agent of all fees and expenses permitted under this Agreement (including court costs and attorneys' fees) payable to, incurred by, or expected to be incurred by Escrow Agent in connection with the performance of its duties and the exercise of its rights hereunder.

- d) After Escrow Agent's resignation, the provisions of this Agreement shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Escrow Agent under this Agreement.

10) **Disbursement, Escrow Termination, and Asset Replenishment.**

- a) The Account shall remain open, and this Agreement shall not terminate until Escrow Agent receives written direction from Recipient with instructions to close the account. Such written instructions may, but are not required to, be substantially in the form of Exhibit A hereto.
- b) Escrow Agent shall dispose of the Assets only upon written instruction from an authorized representative of Recipient delivered in the manner set forth in Section 7 of the Agreement and according to the conditions set forth in this section of the Agreement. Such written instructions may, but are not required to, be substantially in the form of Exhibit A hereto.
- c) Before Assets are disbursed for the payment of any amount of Shared Losses, Recipient shall provide further written instructions to Escrow Agent, in consultation with Depositor, for the replenishment of Assets or closure of the Account.

- 11) **Governing Law.** This Agreement shall be construed, enforced, and administered in accordance with the laws of **[State's name]**, to the extent not inconsistent with federal law.

- 12) **Amendment.** None of the terms or conditions of this Agreement may be changed, waived, modified, discharged, terminated, or varied in any manner whatsoever unless in writing duly signed by each party of this Agreement. No course of conduct shall

constitute a waiver of any of the terms and conditions of this Agreement unless such waiver is specified in writing and then only to the extent so specified.

13) **Tax Reporting.** The Escrow Agent shall have no responsibility for the tax consequences of this Agreement. The Escrow 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 Escrow Agent with an Internal Revenue Service Form W-8 or Form W-9 (if applicable), properly completed and signed, and/or such other forms that the Escrow Agent may reasonably request.

14) **Entire Agreement, No Third-Party Beneficiaries, and Assignment.**

- a) This Agreement constitutes the entire agreement between the signatory parties hereto relating to the holding, investment, and disbursement of the Assets and sets forth in their entirety the obligations and duties of Escrow Agent with respect to the Assets.
- b) This Agreement may be executed in two or more counterparts, which when so executed, shall constitute one and the same agreement or direction.
- c) To the extent any provision of this Agreement is prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.
- d) The Section headings appearing in this instrument have been inserted for convenience only and shall be given no substantive meaning or significance whatsoever in construing the terms and conditions of this Agreement.
- e) Nothing in this Agreement, express or implied, is intended to or shall confer upon any person other than the signatory parties hereto and each Indemnified Party any right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

f) No party may assign this Agreement or any of its rights or obligations hereunder without the written consent of the other parties, provided that if Escrow Agent consolidates, merges or converts into, or transfers all or substantially all of its corporate trust business (including the escrow contemplated by this Agreement) to another entity, the successor or transferee entity without any further act shall be the successor Escrow Agent.

15) **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, Escrow Agent will ask for documentation to verify its formation and existence as a legal entity. Escrow 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.

[Signature page follows]

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

DEPOSITOR

By:

(Signature)

Name:

Title:

RECIPIENT

By:

(Signature)

Name:

Title:

_____ **as Escrow Agent**

By:

(Signature)

Name:

Title:

Attachments:

Schedule I

Exhibit A

Schedule II

Schedule III

SCHEDULE I

Notice and Deposit Information

Account Assets

Assets shall be deposited in cash as often as required by the Shared Savings Program Regulations by wire transfer of immediately available funds. Escrow Agent will furnish to Recipient and Depositor periodic cash transaction statements in the form of an account statement that will include detail for all Account transactions for so long as the Account is maintained under this Agreement. Account statements will be delivered in the manner provided in Section 7 of this Agreement or by electronic means at the request of Recipient or Depositor.

Upon deposit, the Assets shall be promptly invested by Escrow Agent in accordance with Section 6 of this Agreement.

Escrow Agent Wiring Instructions:

Bank:	
ABA #:	
Account #:	
Account Name:	
Account Address:	
Ref:	

Notice Addresses and Contact Information

If to Depositor:

Name:	
Attn:	
Address:	
Telephone:	
E-Mail:	

If to Recipient:

Name:	Centers for Medicare & Medicaid Services
Attn:	Karen McVeary, CM/Performance-Based Payment Policy Group
Address:	
	7500 Security Boulevard
	Mailstop: C5-15-12
	Desk Location: C5-16-03
	Baltimore, MD 21244
Telephone:	410-786-5604
E-Mail:	sharesavingsprogram@cms.hhs.gov

If to Escrow Agent:

Name:	
Attn:	
Address:	
Telephone:	
E-Mail:	

The following person(s) are authorized to provide instructions from Depositor to Escrow Agent, consistent with the terms of this Agreement:

Name:

_____ Specimen Signature

Title:

Phone Number:

Name:

_____ Specimen Signature

Title:

Phone Number:

Exhibit A

Certification of Shared Losses or Distribution of Assets

CMS hereby demands payment of funds held in escrow pursuant to that certain Escrow Agreement (the "Agreement"), dated _____, by and among _____ ("Escrow Agent"), _____ ("Depositor"), and the United States Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS) ("Recipient").

Recipient hereby certifies to the Escrow 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 dated _____ and issued pursuant to the Shared Savings Program regulations (the "Written Notification").
2. Depositor has failed to pay, or the Depositor requested that Recipient be paid \$ _____ of such Shared Losses (the "Debt") by the deadline specified on the Written Notification as required by 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 (if the cash value of the Assets exceeds the amount of the Debt) or
 the full cash value of the Assets on deposit in the Account (if the cash value of the Assets is less than or equal to the amount of the Debt).
4. Escrow Agent is hereby instructed to convert the Assets to cash and remit [field to specify dollar amount or "full cash value of the Assets on deposit in the Account"] to Recipient by wire transfer as follows:

Receiving Bank: _____
ABA # _____
Account Name: _____
Account Number: _____
Account Address: _____

Ref: _____
Contact Name and Phone Number: _____

5. Escrow Agent is instructed to:

- Await the replenishment of Assets by the Depositor.
- To the extent that no funds remain in the Account after payment to Recipient and the subsequent deduction of any unpaid fees, costs or expenses, close the Account.
- To the extent that any funds remain in the Account after payment to Recipient (if applicable) and the subsequent deduction of any unpaid fees, costs or expenses, return the remaining funds to Depositor by check delivered to the address in accordance with Schedule I of the Agreement, or by wire transfer as follows, and close the Account.
- Decrease the amount of the Account to \$ _____ as specified by Recipient, and return any excess funds above that amount to Depositor by check delivered to the address in accordance with Schedule I of the Agreement, or by wire transfer as follows.

Receiving Bank: _____

ABA # _____

Account Name: _____

Account Number: _____

Account Address: _____

Ref: _____

Contact Name and Phone Number: _____

6. Recipient has received separate written instructions from Depositor regarding the disposition of the Account as specified in sections 2, or 5 or both of Exhibit A.

Yes or No.

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

RECIPIENT

By: _____

Date: _____

Name: _____

Title: _____

SCHEDULE II

Account and Description Terms

Investment

Account Number

Account Number: _____

SCHEDULE III

Escrow Agent's Fees and Disclosures

Account fees, costs, or other expenses associated with establishing, maintaining, or canceling the account are the responsibility of the Depositor; these fees, costs, and expenses shall not be borne by CMS (Recipient) and shall not be charged to the principal.

Escrow Agent has or has not appended a schedule of fees and disclosures to this Agreement. Indicate all of the following documents that are appended:

- Schedule of Escrow Agent's fees
- Disclosures
- None of the above