

LEGAL UPDATES

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FTC, OIG, and CMS to Hold Workshop on Accountable Care Organizations

On October 5, 2010, the Federal Trade Commission (FTC), Centers for Medicare & Medicaid Services (CMS), and Office of Inspector General of the U.S. Department of Health and Human Services (OIG) will hold a workshop that will discuss various issues concerning Accountable Care Organizations (ACOs). The workshop will take place from 9:00 am-4:30 pm EDT at CMS Headquarters in Baltimore, MD. Only 350 seats to the workshop were made available and registration was required. Seats are no longer available, but web conference and teleconference capabilities will be made available. Details about web conference and teleconference capabilities will be posted on the CMS website prior to the session. You may also cross-reference the Federal Register notice that described the workshop.

The Patient Protection and Affordable Care Act (PPACA) encourages the creation of ACOs and requires the HHS Secretary to implement a Medicare Shared Savings Program pursuant to section 3022 of PPACA. The antitrust laws, Stark Law, Anti-Kickback Law, and Civil Money Penalty (CMP) Law will all apply to ACOs. Moreover, an ACO may wish to contract with payors in the private health insurance market as well as federal healthcare programs, and this fact has prompted the enforcement agencies to explore the application of the laws referenced above for which the FTC, CMS, and OIG have enforcement responsibility.

The morning sessions of the workshop will address antitrust issues through moderated panel discussions, with representatives of providers, payors, and experts in health policy. The panel will first address the indicia of clinical integration sufficient to indicate that an ACO is improving the quality of its services and whether joint price negotiation is necessary to achieve these

efficiencies. At the second morning session, the panelists will explore: (1) arrangements where providers or facilities are exclusive or non-exclusive to an ACO; (2) the impact of risk-based contracting on market power assessments; (3) ways to assess whether formation of an ACO may allow the ACO to increase price and reduce quality; and (4) the data necessary to monitor the impact of an ACO on prices and quality in relevant markets.

The afternoon will consist of two sessions regarding how ACOs will interact with the Stark Law, Anti-Kickback Law, and CMP Law. The first afternoon session will be a moderated panel discussion of industry stakeholders, including representatives of providers and suppliers and healthcare policy experts. During the second session, there will be an opportunity for attendees to submit comments in person or by teleconference. An agenda for these afternoon sessions will be released at a later time.

The enforcement agencies are interested in comments addressing the intersection of these laws and the various business models and vision for ACOs. They are interested in explanations about the extent to which the laws currently accommodate integration and ways in which existing exceptions and safe harbors might be tailored to further address integration issues.

The Secretary has the authority to waive such requirements of Title XVIII as well as §§ 1128A and 1128B of the Social Security Act as may be necessary to carry out the provisions of section 3022 of PPACA. An alternative to the use of the Secretary's waiver authority is the creation of a new shared savings/incentive payment exception to the physician's self-referral prohibition.

It is hoped that the workshop can provide valuable information to policymakers and enforcement agencies concerning changes to statutes, regulations, and agency guidance that can be useful to the successful development of ACOs. Interested parties should closely monitor the CMS website for updates concerning the workshop.

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