

HEALTH LAW UPDATE

September 30, 2010

FTC, CMS AND OIG TO CONDUCT ACO WORKSHOP

The Federal Trade Commission (FTC), HHS Office of Inspector General (OIG) and the Centers for Medicare and Medicaid Services (CMS) will host an accountable care organization (ACO) workshop, October 5, 2010 (9:00 am to 4:30 pm Eastern Standard time), to discuss many of the legal issues and potential barriers raised by the healthcare industry in response to the emergence of ACOs under the Patient Protection and Affordable Care Act (PPACA). While registration for in-person attendance is fully subscribed, details for accessing a webcast of the workshop are expected to be posted to the CMS website Friday, October 1.

The Medicare shared savings program contemplates groups of providers coming together in some integrated fashion to manage and coordinate care for program beneficiaries. [See PPACA, Section 3022.] Under this concept, which has been tested via several Medicare demonstration programs in the recent past, an ACO may receive payments for shared savings if the ACO meets certain quality performance standards established by the Secretary. PPACA also contemplates a similar ACO demonstration project for pediatric providers. The financial structure and referral relationships between and among disparate providers in a given market can implicate several regulatory regimes, including the antitrust, anti-kickback and physician referral and civil money penalties laws.

The workshop has identified three areas of focus: (1) an assessment of the variety of possible ACO structures in different healthcare markets and their resulting impact on price and quality in healthcare delivery to all beneficiaries; (2) an assessment of whether the above-referenced laws should or could be addressed in the regulation currently under draft by the Secretary; and (3) an assessment of whether a specific exception or safe harbor should be created to accommodate the legal concerns raised in the formation of ACOs.

The morning of the workshop will be devoted to addressing various antitrust concerns raised by ACOs and will feature healthcare providers and experts in health policy. The first session will focus on the various indicia involved in clinical integration and explore various options for achieving ACO goals. The second morning session will explore ways to encourage formation of multiple ACOs among otherwise independent practitioners, including (1) analyses of exclusive provider arrangements; (2) the impact of risk-based contracting on market power assessments; (3) ways to assess the impact of any adverse pricing or quality; and (4) financial, utilization, outcome and patient experience data necessary to monitor and measure the impact of an ACO on price and quality in a market.

Afternoon sessions focus on the anti-kickback, self-referral and civil money penalties laws and the potential development of safe harbors or exceptions to accommodate the formation of ACOs.

In the notice of the workshop and their request for public comment, the agencies indicated a desire to understand how ACO-type arrangements might be constrained

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by these laws and have asked for specific examples and/or scenarios regarding potential impediments.

Baker Hostetler has submitted questions and comments to CMS in response to the agency's request for input, and are active participants in discussions relating to these specific issues. For further information about the workshop or ACOs, please contact Susan Feigin Harris, sharris@bakerlaw.com or 713.646.1307 or Steven A. Eisenberg, seisenberg@bakerlaw.com or 216.861.7903.

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