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FTC Promises Antitrust Safe Harbors For Accountable Care Organizations

On October 5, 2010, the FTC, CMS, and OIG co-hosted the Accountable Care Organization ("ACO") Workshop and Listening Session.[1] Guidance has been eagerly awaited by the medical community, anxious to see if the federal government can reconcile its promotion of collaboration and shared savings payments among providers through ACOs with the plethora of laws and regulations designed in the fee-for-service era to prohibit similar conduct.

The basic concept of an ACO is to have providers work cooperatively across the continuum of care to reduce costs while improving quality. They would continue to be paid fee-for-service, but have incentives aligned by having them all be "accountable" to each other through sharing of system-wide savings. The goal is that investment in health information technology and interdependent cooperation will be rewarded and encouraged. Under current laws, however, certain shared savings payments by a hospital or provider to another would be prohibited by the federal antitrust, anti-kickback, Stark, and civil monetary penalty laws. Although all of these federal programs were discussed at the Workshop, this Client Alert focuses on the antitrust dialogue.

Even before the Workshop, regulators raised expectations. Jon Leibowitz, Chair of the main antitrust watchdog, the FTC, stated at the Annual Meeting of the AMA that, "If you join together to improve patient care and lower costs, not only will we leave you alone, we'll applaud you, and we'll do everything we can to help you put together a plan that avoids antitrust pitfalls." At the Workshop, Leibowitz echoed the promise of ACOs and that the FTC sought to encourage their development while protecting consumers. To that end, he announced that the FTC was exploring development of safe harbors to provide guidance to providers. He also announced an ACO expedited review process. He solicited provider input in order to fashion safe harbors that effectively strike this balance.

[1] "FTC" is the U.S. Federal Trade Commission; "CMS" is Centers for Medicare and Medicaid Services; and "OIG" is the Office of the Inspector General, U.S. Department of Health and Human Services.
[2] "DOJ" is the U.S. Department of Justice.

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Antitrust guidance regarding provider collaboration is not new. Since the DOJ[1] and FTC issued the Statements of Antitrust Enforcement Policy in Health Care in 1996 (wherein the phrase "clinical integration" was coined), there have been numerous Policy Statements, advisory opinions, case law, and other guidance on application of these laws to provider collaboration.

Although the regulators are notoriously tight-lipped about what to expect, and they received suggestions ranging from the need to allow flexibility and widespread data sharing to concerns about exclusivity and market power concentration, some predictions may be made:

- The fundamental antitrust principles will continue to apply. Generally, ACOs organized to promote quality and lower costs will be allowed. Those formed to raise fees by formerly competing providers collectively organizing will not.

- Chair Leibowitz will make good on his promise to provide the health care community enough guidance to allow it to create an antitrust compliant ACO plan. The legal principles will not change, but there will likely be examples and ACO-specific guidelines.

Regardless of outcome, these efforts to reconcile impeding federal restrictions, including the anti-kickback, Stark, and civil monetary penalty laws, signal a clear intent of the federal government to pave the way for legitimate ACOs. It is hoped that proposed regulations will be released starting this fall.

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