

HOUSE JUDICIARY HEARING PROVIDES FEW ANSWERS FOR ACO PARTICIPANTS

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At the recent House Judiciary Committee's hearing on the effects of antitrust laws in the health care industry, testimony relating to accountable care organizations (ACOs) was plentiful, but unrevealing. Industry representatives and federal antitrust enforcers agreed that ACOs have the potential to successfully lower costs and improve quality of care, but government witnesses declined to provide a roadmap as to how ACOs may avoid running afoul of the antitrust laws.

Health care providers testified that clear guidance from federal agencies is urgently required to reduce the cost, complexity, and uncertainty that have stymied ACO formation to date and impede potential participants' willingness to join these organizations in the future. Along these lines, providers called for an update to the *Statements of Antitrust Enforcement Policy in Health Care* (Health Care Guidelines), last amended in 1996, to reflect current market realities. Industry witnesses also requested that the agencies develop safe harbors tailored to address antitrust concerns particular to the formation of ACOs. As to the possibility of obtaining a business review letter (BRL), industry experts and participants testified that the time and expense of obtaining a BRL significantly discourages many providers that might otherwise consider integration. Furthermore, providers testified that the fact-specific analysis provided in a BRL for one venture is not easily applied to other ventures, even when the collaborations are similar.

Representatives from the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice acknowledged the benefits of ACOs, but reiterated their focus on the potential of joint ventures and other collaborations to facilitate price-fixing. The FTC witness stated that there is no current plan to revise the Health Care Guidelines, explaining that he viewed the Health Care Guidelines as a "living document" that has been elucidated on an ongoing basis through the issuance of formal BRLs, speeches, and the agencies' responses to individual inquiries. With regard to the development of safe harbors for proposed ACOs, the DOJ witness stated that some guidance may be included in the Centers for Medicare & Medicaid Services (CMS) regulations, which are scheduled for release in early 2011. While CMS will have oversight over only ACOs seeking Medicare or Medicaid funding, the new regulations may nonetheless provide insight into antitrust analysis going forward. However, given that the FTC, DOJ, and CMS are presently engaged in weekly discussions on the safe harbor issue, further commentary was deemed premature.

In summary, prospective ACO participants learned little from this hearing. Those wishing to form or join an ACO must continue to thoroughly consider the risk of antitrust liability, and even then, have no assurance that they will not later be accused of violating antitrust laws. While greater clarity may be forthcoming with the release of CMS regulations in the coming year, there is no guarantee that these regulations will include safe harbors sufficient to encourage widespread ACO participation.