

Bond Case Briefs

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ABA Members Request Additional Guidance on Accountable Care Organizations.

Rudolph Ramelli of the American Bar Association Section of Taxation and David Douglass of the ABA Health Law Section have responded to a request for comments (Notice 2011-20) on tax-exempt hospitals or other tax-exempt healthcare organizations participating in the Medicare Shared Savings Program (MSSP) through an accountable care organization (ACO).

The tax section and health law section are grateful for the guidance in Notice 2011-20 explaining that a tax-exempt organization that participates in the MSSP through an ACO will not jeopardize its tax-exempt status, will not violate the private inurement or private benefit doctrines, and will not be subject to the unrelated business income tax. However, section members ask that the guidance be formalized in a revenue ruling and have provided an example on which that ruling can be based.

Section members note that Notice 2011-20 focuses primarily on the exempt purpose of lessening the burdens of government, while leaving open the question of whether the promotion of health would qualify as an exempt purpose to support an ACO's tax-exempt status. Members recommend that in general, the promotion of health should be recognized as an exempt purpose for MSSP ACOs as well as non-MSSP ACOs.

Section members also address whether non-MSSP activities will result in private inurement or impermissible private benefit and provide examples of guidelines that can be used to make the determination. Another example is used to illustrate that a tax-exempt organization should not be subject to UBIT when it participates in non-MSSP activities through an ACO joint venture.

Members request guidance confirming that an ACO would qualify for section 501(c)(3) status if it is organized as a nonprofit subsidiary of a tax-exempt organization and is subject to the same safeguards that the IRS has approved for integrated healthcare systems and in other contexts in which ultimate control of an entity resides in the parent's community-controlled board of directors. Lastly, members recommend that a tax-exempt organization that provides services to an ACO in which it participates or which it controls, including project management, actuarial, population management, and clinical care design services, should not be subject to UBIT on payments it receives from the ACO for those services.