



## **Update on Antitrust Risks Facing ACOs**

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### **WHY DO ACCOUNTABLE CARE ORGANIZATIONS (“ACOs”) POSE POTENTIAL ANTITRUST RISK?**

As ACOs involve networks of competing providers, they will continued to be regulated by state and federal antitrust laws, which prohibit competitors from, among other things, agreeing on fees or prices.

The idea behind ACOs is to deliver care more efficiently by formulating and abiding by utilization standards, agreeing on clinical protocols and guidelines and, in some cases, assuming financial risk. These features may permit otherwise competing providers to agree on fees and prices, as the ACO would be considered an “integrated” joint venture.

### **HISTORICAL FTC ENFORCEMENT POSITION ON “INTEGRATED” JOINT VENTURES**

The Federal Trade Commission (FTC) and Antitrust Division of the Justice Department have each been enforcing the antitrust laws against provider joint ventures for decades, and have instituted dozens of cases where integration was either absent or insufficient to produce efficient delivery of care.

The regulators are also continuing to evaluate whether providers or provider networks possess *too much* market power, as evidenced by the recently filed *U.S. v. Blue Cross and Blue Shield of Michigan* case and actions against a Texas health care system and California laboratory. We expect these trends to continue.

Under existing laws, ACOs with all employed providers need not be concerned, because they are not considered “competitors.” Similarly, ACOs that deal exclusively in Medicare fee-for-service are unlikely to face substantial antitrust scrutiny.

However, ACOs that involved competing providers and deal with commercial payors must be either financially integrated (i.e., share risk through capitated contracts or risk withholds) or clinically integrated. Clinical integration requires a significant investment of time and infrastructure (such as electronic medical records) and must involve, other things:



- Use and development best practice protocols and clinical practice guidelines based on local and national standards covering a large percentage of likely diagnoses;
- Infrastructure sufficient to monitor quality of care and utilization;
- Provider participation to implement, educate and follow the protocols;
- A sufficient number of specialists for in-network referrals and adequate enforcement mechanisms to retrain or remove outliers.

*To reduce antitrust risk, it is important to carefully assess the adequacy of integration on a case-by-case basis, particularly those that deal with commercial payors.*

## **LIKELY APPROACHES TO ANTITRUST ENFORCEMENT FOR ACOs**

Although the Patient Protection and Affordable Care Act (“PPACA”) authorizes the FTC and Antitrust Division to institute safe harbor rules/waivers, this is unlikely to occur. The FTC has stated that it would not interpret existing statutes to impede ACOs and the Antitrust Division has promised to conduct expedited review of ACOs (again, under *existing* antitrust laws).

The FTC and the Antitrust Division are currently split over antitrust policy governing ACOs. The Antitrust Division is generally viewed as more deferential toward ACOs. FTC officials, however, have expressed fear that without “vigorous enforcement,” ACOs threaten consumer welfare. This is particularly true in communities with only one or two hospitals. An FTC official fears that ACOs may attempt to offset Medicare losses by overcharging commercial payors. The agencies are attempting to issue a joint statement on enforcement policy, but no timetable has been set. Furthermore, one FTC commissioner has stated that the FTC should take the lead or exclusive role in evaluating ACOs. A number of senators have urged the President to give the Antitrust Division the upper hand in enforcement.

Because the enforcement climate for ACOs is uncertain, providers should weigh carefully antitrust considerations when structuring a potential ACO – particularly in areas where providers may have considerable market power or plan to deal with commercial payors. A cautious approach to antitrust risk will likely be a prudent strategy in the near term and until federal agencies provide more solid guidance as to their enforcement initiatives for ACOs and related arrangements.

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If your organization is evaluating or seeking to establish an ACO, please contact Howard Iwrey to discuss antitrust risks. Howard is a member Dykema and chairs Dykema's Antitrust and Trade Regulation practice group.

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