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DOJ, FTC Propose Joint ACO Antitrust Enforcement, Create Safety Zone For Certain Collaborations

The Department of Justice and Federal Trade Commission are proposing to jointly enforce antitrust laws when examining accountable care organizations as created by health reform, with the two agencies releasing a proposed policy statement Thursday (March 31) calling for an antitrust "safety zone" for certain ACOs that would shield them from challenges. The agencies take significant steps to encourage higher ACO participation by providing more certainty and confidence to potential participants who might otherwise be deterred by fear that their collaborations would be at risk for future antitrust challenges, one antitrust lawyer said.

DOJ and FTC propose to provide a "rule of reason" treatment to an ACO if, in the commercial market, the ACO uses the same governance and leadership structure and the same clinical and administrative processes it uses to participate in CMS' Medicare Shared Savings Program. By using rule of reason, the agencies would analyze whether the ACOs could have substantial anti-competitive effects, and whether the collaboration's potential competition-friendly aspects are likely to outweigh those effects.

DOJ and FTC also propose using a "primary service area" (PSA) metric as an initial step in determining whether an ACO is likely to raise competition concerns, and the guidance sets forth an antitrust safety zone for ACOs that meet CMS' shared savings program eligibility criteria. The PSA for each service is defined as the lowest number of contiguous postal ZIP codes from which the ACO participant draws at least 75 percent of its patients for that service.

ACOs that fall into the safety zone, the agencies' guidance states, are "highly unlikely to raise significant competitive concerns" and therefore would not be challenged, absent extraordinary circumstances.

The agencies state they have determined that ACOs meeting CMS criteria for approval are "reasonably likely to be bona fide arrangements intended to improve the quality, and reduce the costs, of providing medical and other health care services through their participants' joint efforts." Additionally, if a CMS-approved ACO provides "the same or essentially the same services in the commercial market," the integration criteria are "sufficiently rigorous" that joint negotiations with private payers will be treated as subordinate.

Antitrust attorney Mark Botti, a former DOJ antitrust attorney who is now with the law firm Akin Gump Strauss Hauer & Feld LLP, said the guidance provides some certainty to providers who have approved ACOs that if they use that ACO as a vehicle for contracting with private health plans, their private contracting will not be summarily condemned. It was always possible that the agencies would apply a more lenient standard in the private market for ACOs approved by CMS because it gives providers new confidence instead of chilling participation, he said.

The ACO's share of services in each ACO participant's PSA will be evaluated, and the higher the PSA share, the greater the risk an ACO will be anti-competitive, the agencies wrote. Barring a few exceptions, for an ACO to fall within the antitrust safety zone, independent ACO participants — such as physician group practices — that provide the same service must have a combined share of 30 percent or less of each common service in each participant's PSA wherever two or more ACO participants provide that service to patients from that PSA. The guidance lists a 50 percent share threshold for mandatory ACO antitrust review that will be completed within 90 days.

In a statement, Premier Healthcare Alliance's Blair Childs said Premier strongly agrees that ACOs meeting CMS' clinical integration criteria are in compliance with the country's antitrust laws. FTC Chairman Jon Leibowitz said Thursday that the agencies will vigorously enforce antitrust laws, "But we are also committed to making the ACO system, which really is a brave new experiment, we're committed to making it work."

The PSA concept is a test that moves in a direction that the agencies have explicitly strayed from in recent years, Botti added. The PSA concept demonstrates the agencies' "very regulatory approach" to antitrust, Botti said, which is a historic departure from how the agencies usually operate. Normally antitrust tries to examine underlying market realities and applies principles to the market realities, but the DOJ and FTC proposal uses regulatory proxies in place of the usual market investigations, Botti said.

"The primary service area sounds like market shares but it's not market shares," Botti said. "It uses an approach that is very rigid and stylized and derived from HHS regulations."

Assistant Attorney General Christine Varney, head of DOJ's antitrust division, said Thursday that the agencies believe there is no area of the economy that could benefit more from collaboration than health care. Others still expressed fear that ACOs could accelerate the trend of provider consolidation, with America's Health Insurance Plans' President and