

## What The New ACO Guidelines Tell Us About Antitrust

Law360, New York (November 04, 2011, 3:29 PM ET) -- The Federal Trade Commission and U.S. Department of Justice (the agencies) issued a joint policy statement on Oct. 20, 2011, providing antitrust guidance to those considering forming Accountable Care Organizations.[1]

Although the statement focuses on providing ACOs with a detailed antitrust framework, it also sheds light on the agencies' current thinking on antitrust enforcement for the health care sector overall and in other sectors.

So what does the ACO statement tell us about the current antitrust environment? There are four key lessons that companies in all industries, including health care, can take away from the ACO guidelines: (1) market share still matters; (2) quality initiatives carry weight; (3) exclusive contracting may carry risks; and (4) innovative procedures have gained favor with the agencies.

### Market Share Still Matters

Following the release of the 2010 Horizontal Merger Guidelines, the antitrust community began to wonder: Do market shares still matter?

Although the agencies sought aggressively to de-emphasize the importance of traditional market structure analysis in the 2010 Horizontal Merger Guidelines, market structure resurfaced at the heart of the agencies' ACO framework. Absent extraordinary circumstances, the ACO guidelines state that the agencies will not challenge non-exclusive ACOs with a share of 30 percent or less of any overlapping service in each participant's primary service area (PSA).

PSA shares, therefore, are used as an initial screen in ACO reviews, similar to the screening approach used in the 1992 Horizontal Merger Guidelines. Interestingly, the ACO screening mechanism is also reminiscent of the Elzinga-Hogarty test for geographic market definition. This test, which has been under some criticism at the FTC, still has value as a screening mechanism to assess market structure in geographic regions.

The 2010 Horizontal Merger Guidelines establish that the agencies “need not start with market definition” and that “the measurement of market shares and market concentration is not an end in itself ... [but] is useful to the extent it illuminates the merger’s likely competitive effects.”[2]

This statement was a sharp departure from the long-standing 1992 Horizontal Merger Guidelines and caused many to question whether market shares were still relevant in antitrust analysis. Lo and behold, just over a year after market share and structural analyses were de-emphasized in the 2010 Horizontal Merger Guidelines, these analyses were reintroduced as a screen in the ACO guidelines.

### **Quality Initiatives Carry Weight**

Companies looking to collaborate often view financial integration as the easiest path to rule-of-reason antitrust review instead of a more rigid per se analysis. For example, obtaining an equity interest or sharing in the profits or losses of the combined collaboration or venture would support a rule-of-reason analysis of a joint venture. Uncertainty arises, however, where the collaboration takes the form of qualitative integration only.

The agencies have been skeptical in the past of joint ventures among health care providers lacking financial integration. The new ACO guidelines, however, recognize that clinical integration resulting in quality improvements may be pro-competitive for consumers even in the absence of financial integration.

Whereas in the past the agencies have often used a truncated "quick look" analysis to analyze these situations — see *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447 (1986) — the ACO statement calls for a full-scale rule-of-reason analysis. Thus, under the ACO guidelines, clinical integration initiatives will be evaluated using a broad-based analysis that takes into account a full range of factors.

The agencies’ acknowledgement that a joint venture lacking financial integration is not subject to a per se rule does not come as a complete surprise. Outside the health care context, such as with high-technology standard-setting organizations, competitors have collaborated to provide quality-enhancing, pro-competitive benefits to consumers despite lacking financial integration.

Such arrangements are analyzed under the rule of reason even in the absence of any financial integration. The ACO guidelines therefore suggest that the agencies are further embracing the idea that quality-enhancing benefits alone may justify rule of reason treatment.

## **Exclusive Contracting May Carry Risks**

The ACO guidelines highlight dangers associated with exclusive contracting. Firms with large shares especially could have problems entering into exclusive agreements. The agencies indicate that these problems could arise through express contracting or de facto practices.

De facto practices that may equate to contractual exclusivity or have the same anti-competitive effect include tying, full-product forcing, retaliation for purchasing competitor products, and the use of most-favored nations.

The agencies identify a range of potential harms to customers and suppliers. For example, the agencies believe that exclusive contracting could harm rivals of the seller — competing providers, in the case of ACOs — or it could harm rivals of the customers — competing health insurers, in the case of ACOs.

The agencies' scrutiny of exclusive ACO contracting practices is consistent with the agencies' recent enforcement activities in other industries.

In August 2010, the FTC settled charges against Intel Corporation.[3] Intel allegedly engaged in de facto exclusivity practices by favoring customers that purchased 100 percent of their CPU requirements from Intel, and retaliating against customers that bought CPUs from other competitors by raising prices, terminating technology collaborations and reducing marketing support.

Similarly, the FTC in April 2010 settled charges stemming from exclusive contracting practices by Transitions Optical Inc., a leading manufacturer of treatments used to darken corrective eyeglass lenses.[4] Transitions Optical allegedly had either explicit or implicit understandings with its customers that they would not sell or promote competing products.

The FTC claims that Transitions Optical terminated or refused to deal with customers that did not comply with this all-or-nothing exclusivity policy. Just like Intel (75 to 85 percent share), Transitions Optical (80 percent share) held a very high share of its market and allegedly threatened or did in fact retaliate against customers that refused to deal exclusively with the company.

The ACO guidelines, combined with these recent investigations, send out a clear signal that the agencies are closely monitoring exclusive dealings by firms with high market shares. The specific scope of the prohibited exclusionary conduct remains somewhat unclear, unfortunately. Exclusive contracting can provide significant quality improvements and cost savings. But firms with high shares need to be cautious before entering into such exclusive contracts and must ensure they have a pro-competitive purpose and justification for doing so.

## **Innovative Procedures Have Gained Favor with the Agencies**

The ACO guidelines provide for a new, expedited voluntary review. The final guidelines do not require mandatory review for ACOs with a greater than 50 percent PSA share.

Instead, providers can voluntarily choose to seek review and obtain agency feedback under a 90-day review process. This procedure would be faster than the agencies' advisory-opinion process that applies generally in all industries. The ACO review process differs from the advisory opinion process in that the ACO process will be more fact-intensive.

The 90-day review process begins when the reviewing agency receives all documents and information set forth in the guidelines, including, among other things, formation documents, business and strategic plans, competitive intelligence, PSA share calculations or related data, a list of the ACO's five largest commercial payers, and a list of other known ACOs in the geographic area.

The reviewing agency will then review the information and advise the ACO that the ACO either: (1) "does not likely raise competitive concerns," or does not likely raise competitive concerns if conditioned on a specific remedy; (2) "potentially raises competitive concerns"; or (3) "likely raises competitive concerns."

In both the advisory opinion and voluntary review processes, the ultimate determinations are merely a kiss on the cheek by the agencies. They have no binding effect either as to further agency action, action by other federal or state agencies, such as state attorneys general, or in private litigation.

Thus, even ACOs that receive the tentative blessing of the agencies remain fully subject to later antitrust challenges. Nonetheless, approval from the agencies under this new process may have value to ACOs, particularly those with large shares. Going forward, it will be interesting to see how frequently ACOs rely on this process.

## **Conclusion**

The ACO guidelines delivered many key lessons on the agencies' current enforcement trends. When looking to collaborate, companies in health care and other sectors may be able to take advantage of these insights to achieve important cost-saving, quality-enhancing benefits that will pass muster with the antitrust agencies.

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[1] U.S. Dep't of Justice and Fed. Trade Comm'n, Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (Oct. 20, 2011), available at <http://www.ftc.gov/os/fedreg/2011/10/111020aco.pdf>.

[2] U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines, at 7 (Aug. 19, 2010), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

[3] Fed. Trade. Comm., FTC Settles Charges of Anticompetitive Conduct Against Intel (Aug. 4, 2011), available at <http://www.ftc.gov/opa/2010/08/intel.shtm>.

[4] Fed. Trade. Comm., FTC Bars Transitions Optical, Inc. from Using Anticompetitive Tactics to Maintain its Monopoly in Darkening Treatments for Eyeglass Lenses (Mar. 3, 2010), available at <http://www.ftc.gov/opa/2010/03/optical.shtm>.