



Health Policy Snapshot

Health Care Quality

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ISSUE BRIEF

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Do ACOs Raise Anti-Trust Concerns?

Takeaways:

- ACOs are promising vehicles for delivering health care more efficiently, but some insurers and regulators worry they could reduce competition and drive up prices.
- Regulators outlined final criteria for judging whether a Medicare-qualified ACO is anti-competitive in the private market. They also cautioned ACOs against certain practices that could be anti-competitive.

Overview

Encouraging physicians and hospitals to come together to form Accountable Care Organizations (ACOs) to serve fee-for-service Medicare patients is a key cost control and quality improvement feature of the Affordable Care Act (ACA). In an ACO, independent providers form integrated delivery systems to offer more efficient care for a defined population of patients. Many policymakers hope Medicare ACOs will increase care coordination and spur the expansion of these collaborations in the private market.

While collaboration is good for patient care, it's feared that consolidation into ACOs could drive up costs. Some ACOs could gain so much market power that they would be able to demand higher payment rates from private payers. That's particularly a concern because independent providers in a Medicare ACO don't immediately have to share financial risk, a protection against anti-competitive

conduct. It's not a concern for Medicare itself because the program sets prices.

LONGSTANDING CONCERNS

Regulators, the courts, and health insurers long have watched for independent providers joining together to fix prices or restrain competition in violation of federal antitrust law.¹ The FTC and courts have accepted some and rejected other efforts by independent providers to collectively bargain in ways that are similar to ACOs. For example, in 2008 the FTC rejected an attempt by specialty physicians in north Texas to band together. The FTC said the move constituted illegal price fixing.²

Nevertheless, researchers have found regulators' antitrust guidelines and enforcement over the past two decades failed to prevent consolidation among providers and that consolidation has contributed to higher prices in many markets. For instance, researchers have attributed the near-doubling of California hospital prices from 1999-2005, in part, to widespread hospital mergers and acquisitions. The same consolidation and price trend occurred with California physician groups.³

REGULATORS' STANCE ON MEDICARE ACOS

Last October, the Centers for Medicare & Medicaid Services published its final rule on Medicare Shared Savings Program ACOs, requiring them to have a formal governance structure, promote coordination of care, report quality measures, and eventually have to repay Medicare for any excess costs or else share in savings.⁴ Simultaneously, the Federal Trade Commission and the Justice Department Antitrust

Division (“the Agencies”) issued a joint policy statement outlining the review criteria and process for participating ACOs. They said they would accept those ACOs negotiating with private health plans as long as the ACOs were not too big or powerful to limit competition.⁵

The Agencies will apply “rule-of-reason” treatment to ACOs that meet the Shared Savings Program requirements, participate in the program, and use the same governance structures and clinical and administrative processes for commercially insured patients. A rule-of-reason analysis evaluates whether a provider collaboration on balance is likely to have pro- or anti-competitive effects.

The Agencies also said they would use CMS data on costs, utilization, and quality to evaluate the clinical integration of an ACO. The Agencies require collaborating providers to show evidence of collective efforts to produce better and lower-cost care beyond what the individual providers could have achieved on their own.

The Agencies established a safety zone for Medicare-qualified ACOs deemed “highly unlikely” to raise significant anti-competitive concerns. To qualify, the combination of individual providers in the ACO cannot provide more than 30 percent of a service in that market. Hospitals, ambulatory surgery centers, and “dominant participants” in the ACO must be free to contract independently outside the ACO.

The Agencies initially had proposed mandatory anti-trust review for ACOs with high market share but later dropped this because providers objected.⁶ In place of mandatory review, ACOs can voluntarily request an expedited 90-day antitrust review by the Agencies, which pledged to vigilantly monitor antitrust complaints about ACOs.

CONDUCT TO AVOID

The Agencies cautioned ACO participants against sharing competitively sensitive information that could allow them to fix prices outside the ACO. For ACOs with higher market share, the Agencies warned them not to 1) block private insurers from steering patients to preferred providers; 2) tie ACO contracts with insurers to the purchase of other services outside the ACO; 3) discourage ACO participants from contracting independently; and 4) restrict insurers’ ability to give enrollees cost and quality data to help them select providers.

IMPACT BEYOND MEDICARE

While the Agencies’ final statement doesn’t significantly change antitrust policy, it does provide greater clarity for providers in forming new ACO partnerships. Some experts say rule of reason treatment will encourage more providers to establish ACOs, thus spreading a more efficient, coordinated-care model. Critics warn that some ACOs could be formed in order to exercise anti-competitive market power in the private market, which could lead to higher costs and lower quality for privately insured patients.⁷

WANT TO KNOW MORE?

- [*Accountable Care Organizations: Implications for Antitrust Policy \(RWJF\)*](#)
- [*Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program \(FTC/DOJ\)*](#)

¹ <http://www.hoganlovells.com/files/Publication/f6599f51-7d6b-4896-8b21-aa5a3270511e/Presentation/PublicationAttachment/76171d07-5384-44c9-bac1-ab926d2f5c26/Leibenluft%20ACO%20article%20in%20Antitrust%20Source.pdf>

² www.rwjf.org/files/research/57509.pdf

³ <http://content.healthaffairs.org/content/29/4/699.abstract>

⁴ <http://www.gpo.gov/fdsys/pkg/FR-2011-11-02/pdf/2011-27461.pdf>

⁵ http://www.justice.gov/atr/public/health_care/276458.pdf

⁶ http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec11_g_lazer_12_21f.authcheckdam.pdf

⁷ <http://www.ftc.gov/speeches/rosch/111117fallforumspeech.pdf>