Accountable Care Organizations: What About Antitrust Risks?

For more information, please contact your Vorys attorney or:

Laura G. Kuykendall
lgkuykendall@vorys.com
614.464.6445

The policy objectives of health care reform and the policy objectives of the antitrust laws are both intended to increase consumer options and improve consumer welfare. They should not be in conflict. The Patient Protection and Affordable Care Act ("PPACA") is an attempt to encourage formation of provider organizations capable of taking responsibility for quality and cost of care for patients and to extend health care coverage throughout the population.

Section 3022 of PPACA requires development of programs where groups of providers work together to manage and coordinate care for Medicare beneficiaries and "receive payments for shared savings."

But do these Accountable Care Organizations ("ACOs") result in antitrust risks? Is there an inherent conflict between ACOs and the antitrust law's commitment to unilateral decision-making? The notion of cooperation between health care providers to control costs and ensure quality is not new to antitrust enforcement in health care. "Clinical integration" was first described in 1996 by the FTC and DOJ and has been the byword ever since.

The required features of ACOs are not much different than the well recognized requirements for clinical integration that pass antitrust scrutiny for any health care combination. Indeed, it is not necessarily the case that new entities must be formed to meet the requirements for an ACO. Existing entities may already qualify.

Factors considered for clinical integration under existing standards and for ACOs include:

- Accountability for quality, cost and effective patient care
- Formal legal structure for purposes of payments
- Reporting on quality, utilization and clinical outcomes
- Defined, evidence-based guidelines and protocols promoting reporting, coordinated care, patient monitoring, and other methods of demonstrating efficiencies

- Enforcement mechanisms to ensure compliance
- Contribution by health care providers of time, expertise, and money in some form
- Medical management program to develop best practices

The need for ACOs to have sufficient scale to achieve enhanced patient care coordination and coverage objectives raises the specter of market power. However, once again, the antitrust issues and analysis remain the same as before health care reform was passed. Market power, so long as it is not exercised unreasonably to increase prices is not illegal under the antitrust laws.

At present, there are no specific "safe harbors" or guidelines specific to an ACO. Health care entities should look to the traditional clinic integration model for guidance and document the steps taken to meet the recognized requirements. In this evolving area, it is particularly important to consult with experienced antitrust counsel to analyze and advise on the most effective way to structure health care entities.
