

Mini Summit X:
Delivery System Reform

Antitrust and Accountable Care Organizations

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January 20, 2011
Washington, D.C.

Goal of Presentation

- ❑ Review antitrust analysis of ACOs
 - ❑ Highlight congruence between antitrust analysis and purpose of ACOs under Affordable Care Act
 - ❑ Report work coordinating with CMS
 - ❑ Note: The views I express are my own, and do not necessarily reflect those of the Federal Trade Commission or any Commissioner.
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Review of Basic Antitrust Analysis

□ Two main questions:

- 1) Is the ACO an arrangement to allow providers to fix prices – or is it an integrated joint venture that has the potential to improve quality and lower costs?
 - 2) Does the formation of the ACO create market power or allow it to be exercised in new ways?
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Question 1: Price Fixing or Integration with a Valid Purpose?

☐ Price fixing: Prohibited.

- Competing providers may NOT jointly negotiate reimbursement rates with commercial payers.
- Per se (automatically) **illegal price fixing**.

☐ Integration with a Valid Purpose: Permitted,

- If competing providers have **integrated their services to create a product or service that none of the participants alone could produce, or produce as efficiently.**
 - Joint negotiation must be reasonably necessary to achieve the improved care and lower costs that the ACO claims it will create.
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Integration with a Valid Purpose

- ❑ Valid Purpose: To improve the quality and lower the cost of health care.
 - ❑ Similarity with ACA, Section 3022 (“shared savings”):
 - ❑ “groups of providers . . . may work together to manage and coordinate care for Medicare . . . beneficiaries through an [ACO];” and
 - ❑ may receive payments for shared savings if the ACO meets certain quality performance standards.
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Market Power

- ❑ The ability to raise prices above the competitive level or exclude competitors from the market.
 - ❑ Market share can be an indicator of market power.
 - ❑ Market power of a provider organization will vary depending on competitors in the market and other factors.
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Exclusivity versus Non-Exclusivity

- **Exclusivity:** ACO member cannot contract individually with a commercial payer or with another ACO.
 - **Non-exclusivity:** ACO member can belong to more than one ACO and can contract individually with a commercial payer.
 - **Non-exclusivity** can lessen market power by, among other things, making providers available to form more ACOs.
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Coordination with CMS

- ❑ FTC and DOJ Antitrust Division staff working with CMS staff to coordinate the assessment of ACOs.
 - ❑ We understand that providers would like “one-stop shopping” on regulatory issues.
 - ❑ Stay tuned – more likely during the first quarter of 2011.
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