Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

FTC Opinion Draws New Roadmap For Health Care Tie-Ups

By **Rachel Slajda**

Law360, New York (February 14, 2013, 9:30 PM ET) -- The Federal Trade Commission gave its blessing Wednesday to a proposed physician-hospital network in Oklahoma, laying out the first post-Affordable Care Act blueprint for how providers can structure new ways to coordinate care without running afoul of antitrust laws, experts say.

The Norman Physician Hospital Organization, or Norman PHO, got a favorable staff advisory opinion Wednesday on its plan to provide integrated care among 280 physicians and Norman Regional Health System hospitals.

In recent years, and especially since the ACA was passed, health care providers and payers have been looking for ways to collaborate on patient care, with the idea that better communication among providers and closer case management will improve the quality of care and reduce costs. But a lingering question is how antitrust authorities like the FTC will view such arrangements.

The commission staff has only released a few opinions on clinical integration programs like Norman's in recent years, and this is the first since the ACA was passed, said Ashley Fischer, a partner in McDermott Will & Emery LLP's health industry advisory group. The new opinion, which said FTC staff wouldn't recommend that the commission challenge Norman PHO, will be helpful to the industry at a time when many organizations are considering new arrangements, she said.

“It's a very important opinion for the industry to be aware of. It's the first detailed road map of how the FTC will analyze joint activities post-ACA,” said Stephen Mahinka, chair of Morgan Lewis & Bockius LLP's Life Sciences and Healthcare Interdisciplinary Group and an antitrust attorney. “It goes into great detail about what constitutes an integrated network.”

Experts said the opinion was a positive sign, going into further detail about some aspects of care integration than staff has before. It also shows that, post-ACA, the FTC staff is staying consistent in what it's looking for and how it's analyzing the information it's given, attorneys said.

“It's more notable for what it didn't do,” Fischer said. “This is the first clinical integration program opinion since the passage of Affordable Care Act and their policy statement on accountable care organizations. … I was wondering if they would change things. They didn't.”

One way in which the FTC has stayed consistent is by looking for assurances that the proposed pricing agreements, which could be construed as anti-competitive price-fixing, are secondary to and necessary for the program's goals for reduced cost and better care.

So organizations must show, as Norman PHO did, that they would have in place elements such as clear program goals, clinical guidelines that are created and enforced by the network, and the health information technology to easily share electronic health records and capture and analyze data on a large scale, among other things.

The opinion does go into some new detail about what the FTC might find acceptable when it comes to how exclusive these agreements are, or, in other words, whether physicians will be allowed to contract with other payers outside of the network.

The FTC had said previously that exclusive networks, where payers could not contract with participants without contracting with the network, wouldn't work. But there were still questions about what, exactly, would constitute exclusivity, Fischer said.

“The question I often get is, 'Could we have this type of restriction that's short of an outright ban on providers' ability to contract outside?'” Fischer said. “Where do you draw the line in the sand? Where does the restriction tip you over the edge into being de facto exclusive?”

Norman PHO does come with restrictions. If an insurance company contracts with the network, every physician is bound to that contract. They can contract individually with payers, but only if that payer does not already contract with the network.

The FTC said that flexibility, which will not force payers to contract with the network if they want to contract with any physicians individually or as part of another group, mitigated concerns about the high market share Norman PHO would have.

Another factor the FTC is looking for is significant investment of time and money from physicians, experts said, as a crucial element to making the program successful. In the Norman proposal, participating physicians will be required to pay an upfront and annual fee, sit on committees that will write and enforce guidelines, get their IT and electronic health records up to date, and the like. It's a high level of investment, experts say.

“That's a pretty significant investment on the part of physicians. They've invested their time and money in something, so they'll want to see a return,” Fischer said.

The FTC's analysis comes down to this balance: Do the potential benefits of a successful program outweigh the possibility of anti-competitive outcomes?

“The framework that was laid out here certainly seems to be somewhat of a winning recipe, if the physicians and hospitals will commit the resources to making it happen and they can prove that, at the end of the day, with all this commitment and infrastructure, they will create more pro-competitive benefits than anti-competitive effects,” said Jay Levine, an antitrust partner at Bradley Arant Boult Cummings LLP.

There are still, of course, lingering questions about how the FTC will look at other arrangements. One major question is whether these sorts of joint ventures can exist with multiple hospitals or other institutional providers involved.

“What happens if you had multiple hospitals involved?" Mahinka asked. "That is a question that is reserved for the future. ... But I think the logic of the way in which the FTC reviewed the proposal would enable a broader group to get clearance, if they were able to set it up like this … and show there were significant efficiencies."

--Editing by Elizabeth Bowen and Chris Yates.