# PAYMENT REFORM POLICY BRIEF:
# Health Care Payment Reform Models Can Satisfy the Antitrust Laws

Some tension exists between long-standing antitrust policy favoring vigorous competition, and the perceived need under health care payment reform for providers to collaborate or affiliate in order to deliver care in a coordinated manner.

- These concerns have been well summarized in a speech by Deborah L. Feinstein, Director, Bureau of Competition, Federal Trade Commission, at the Fifth National Accountable Care Organization Summit, Washington, DC, June 19, 2014, entitled "Antitrust Enforcement in Health Care: Proscription, not Prescription" (available online at http://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf.)

The federal agencies responsible for antitrust enforcement, the U.S. Department of Justice and the Federal Trade Commission, have provided helpful guidance.

- The DOJ/FTC *Statements of Antitrust Enforcement Policy in Health Care* (1996) (available online at www.ftc.gov/bc/healthcare/industryguide/policy/index.htm) outline acceptable conditions for hospital mergers; hospital joint ventures involving high technology or other major medical equipment; hospital joint ventures involving specialized clinical services; providers' collective provision of non-fee-related information to purchasers of health care services; providers' collective provision of fee-related information to purchasers of health care services; provider participation in exchanges of wage, price and cost information; joint purchasing arrangements; physician network joint ventures; and multi-provider networks.
- The DOJ/FTC *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (2011) (available online at: http://www.ftc.gov/bc/healthcare/aco/) establishes that any ACO meeting MSSP participation requirements will be presumed to have sufficient clinical integration for antitrust compliance. MSSP clinical integration criteria include:
    - clinical oversight by a physician medical director;
    - meaningful commitment by network participants to following clinical performance standards (including reporting and peer review processes);
    - processes to promote evidence-based medicine;
    - processes to promote patient engagement, including patient surveys and beneficiary representatives;
    - patient access to medical records;
    - processes to evaluate patient health needs;
    - internal reporting on quality and cost metrics for performance improvement;
    - care coordination across the entire spectrum of providers, including individualized care programs for high-risk or chronic patients; and
    - robust EHR infrastructure.

Cases brought by the FTC against health care providers and networks show limits on providers' ability to collaborate or affiliate.

- *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008): independent physician association could not negotiate non-risk contracts with payors jointly on behalf of its members, where the network's clinical integration activities did not extend to those contracts. (*See* http://www.ftc.gov/enforcement/cases-proceedings/0210075/north-texas-specialty-physicians-matter.)
- *FTC v. St. Luke's Health System, Ltd.*, Case No. 1:12-CV-00560-BLW (D. Ida., Jan. 24, 2014) (*appeal pending*): FTC and competitors opposed hospital system's acquisition of physician group that would have given the system dominant market power in one local market, despite arguments the acquisition was in preparation for value-based reimbursement. (*See* http://www.ftc.gov/enforcement/cases-proceedings/121-0069/st-lukes-health-system-ltd-saltzer-medical-group-pa.)

**Further resources include:**

FTC Anticompetitive Practices website: http://www.ftc.gov/enforcement/anticompetitive-practices.

American Health Lawyers Association website: http://www.healthlawyers.org/.



This Issue Brief was prepared by Benjamin P. Townsend, Esq., an attorney at Kozak & Gayer, P.A., under a grant from the Maine Health Access Foundation. Additional resources are available through the "Payment Reform" pages of MMA's website at: www.mainemed.com/cme-education-info/payment-reform-resources.