The Federal Trade Commission (FTC) provided its first guidance for clinically integrated networks since passage of the Affordable Care Act and the joint FTC/Department of Justice Accountable Care Organization (ACO) Antitrust Policy Statement in a February 13 advisory opinion. The FTC’s favorable letter was issued in response to a proposal by the Norman Physician Hospital Organization (PHO) to form a clinically integrated health-care network. While the advisory opinion provides new guidance regarding the details of a clinical integration program sufficient to pass antitrust muster in the post-ACO world, it reaffirms the FTC’s overall antitrust analysis of clinically integrated provider networks.

The Norman PHO, which was originally founded in 1994 and includes 280 physicians of the Norman Physician Association and the hospitals and clinics of the Norman Regional Health System, proposed to form a network to offer clinically integrated services as a vehicle for improving quality of care, reducing costs, and increasing patient satisfaction, and in order to implement those services, to jointly negotiate the payer contracts for its physicians’ services. Previously, the PHO utilized a “messenger model” to contract with payers.

Specifically, under the proposed clinical integration program, the PHO’s participating physicians are required to actively participate in a variety of collaborative clinical activities, develop and follow clinical practice guidelines, utilize physician performance measures, conduct peer review and corrective actions, design and implement quality improvement initiatives, and significantly adopt and use an electronic medical information and records system (including e-prescribing and an electronic clinical decision support system). The clinical integration program would rely on a new organizational structure including several new committees and a new Participating Practitioner Agreement that places substantial emphasis on physician participation, commitment, and investment in the program. Similarly, the program requires time and financial commitment by participating physicians, including “holds” from payer contracts to finance the clinical integration program.

As a result of this clinical integration program, the FTC concluded that, although joint contracting by physicians generally constitutes price-fixing, which is a per se violation of the antitrust laws, the Norman PHO qualified for rule-of-reason analysis. Importantly, the advisory opinion stated that “Norman PHO’s proposed joint contracting appears to be subordinate to the network’s effort to improve efficiency and quality through the clinical integration of its participating physicians,” that is, the joint contracting is an “ancillary” (i.e., reasonably necessary) component of the clinical integration initiative. The FTC further stated that the PHO’s proposed activities appeared “unlikely to unreasonably restrain trade” based on a number of factors (although the advisory opinion noted that staff did not conduct a formal market analysis). First, and most significant, the PHO will be non-exclusive, allowing payers to contract with individual member physicians independently from the PHO. Thus, there will be a sufficient number of contracting alternatives left for payers who do not want to contract through the PHO. In addition, the joint contracting would involve only physician services, and inpatient and outpatient hospital services would be excluded (because the Norman Regional Health System is the only provider of such services in the network). Finally, the PHO’s proposal contains affirmative safeguards against anticompetitive conduct such as refusals to deal or sharing competitors’ competitively sensitive information.

As a result, the FTC concluded that, while the PHO could exercise market power, the proposal appeared “likely, on balance, to be procompetitive or competitively neutral,” because it “offers the potential to create a high degree of interdependence and cooperation among its participating physicians and to generate significant efficiencies in the provision of physician services.”

In sum, the advisory opinion provides details regarding the elements of a clinical integration program, including those implemented by an ACO, that the FTC will find sufficient to allow joint contracting by otherwise competing providers who are not fully merged into a single entity under the antitrust laws. The FTC also reiterated the factors it will consider important in the antitrust analysis of such networks. In some circumstances, providers may find that fully merging allows more flexibility and certainty in payor contracting and other operational activities; in others, fully integrating will not be feasible and forming a clinically integrated network is the best option. Providers must weigh the benefits and costs of clinically integrated networks and similar joint ventures against those presented by fully merging, including hospital acquisition and employment of physicians.