Clinical Integration: Some suggestions on additional Guidance

Presented at FTC Workshop on Clinical Integration
May 29, 2008

Robert F. Leibenluft
Hogan & Hartson LLP
Washington, D.C.

HOGAN & HARTSON

© Hogan & Hartson LLP. All rights reserved.

A few things are clear

- Clinical integration is important for quality of care
- Progress has been slow for a number of reasons
- Further progress depends on private and public initiatives
  - Leadership in the provider community
  - Affirmative signals from government agencies

© Hogan & Hartson LLP. All rights reserved.

What can the antitrust agencies do?

HOGAN & HARTSON

- Provide more guidance
  - There are challenges – need to avoid overly prescriptive formula
  - But more can be done
  - AHA Working Paper provides examples
- Send a more affirmative signal that Agencies are receptive to genuine clinical integration initiatives

© Hogan & Hartson LLP. All rights reserved.

Ten specific suggestions

HOGAN & HARTSON

1. **Focus on matters with real risk of anticompetitive effects**
   - Without such potential, no harm from conduct
   - Lack of market power suggests providers invested in program with hope of achieving efficiencies
2. **Recognize that there may be missteps and the path to efficiencies may be circuitous**
   - Goals of CI programs are hard to accomplish, and typically require a change in culture
   - Fully-integrated entities, such as merged companies, often fail to realize planned efficiencies
   - Look at how the program evolves over time
3. **Be realistic regarding what a program must be doing at the outset – the "chicken and egg" problem**
   - Clearly the program cannot simply start joint negotiations before developing the rest of the program
   - But to expect to put an entire program in place before joint negotiations creates a tension with showing that joint negotiations are really ancillary
   - Agencies can always return and see how much the program has evolved

© Hogan & Hartson LLP. All rights reserved.

Ten suggestions, *cont'd*

HOGAN & HARTSON

4. Avoid temptation to second guess programs on clinical issues and specific implementation steps
   - Specific clinic initiatives and practice guidelines
   - What to measure – structure, process, outcomes
   - What benchmarks – historic, regional, national
5. Focus on whether there is an ongoing process aimed at improvement
   - Are there ongoing efforts to measure, evaluate and improve care?
   - Concrete achievements are important
     - But quality measurement is difficult and imprecise
     - Unreasonable to expect too much at the outset
   - Equally probative is what the program does when it fails to achieve stated goals

© Hogan & Hartson LLP. All rights reserved.

Ten suggestions, *cont'd*

HOGAN & HARTSON

6. Recognize that PHOs may rely substantially on hospital infrastructure
   - Might be the most efficient way to leverage resources
   - Reflects further collaboration across types of providers
7. Be reasonable in applying ancillarity test
   - *Competitor Collaboration Guidelines:* "Agencies do not search for a theoretically less restrictive alternative that is not realistic given business realities"
   - Consider whether arrangement is similar to others for which ancillarity has been found
8. Recognize that exclusivity may be defensible, particularly where the network clearly has a low market share
   - Best guards against free-riding
   - Consistent with ancillarity rationale

© Hogan & Hartson LLP. All rights reserved.

Suggestions, *cont'd*

HOGAN & HARTSON

9. Extent of involvement across various groups of physicians may vary
   - Will likely vary across specialties
   - May need to start more modestly in some areas and build up
10. Recognize that higher rates are not necessarily evidence of "bad intent' or market power
   - Much of what CI programs do is aimed at higher quality and require substantial effort and costs, and therefore higher rates are not unexpected
   - Recognized in GRIPA
   - Evidence must be considered in light of likely market power

© Hogan & Hartson LLP. All rights reserved.

Agencies should send more affirmative signal about CI

HOGAN & HARTSON

- Need to overcome widely-held view that pursuing clinical integration is too risky
- Does not mean giving a “free pass” to whatever providers do
- Message should come from the Agency as a whole, not just staff

© Hogan & Hartson LLP. All rights reserved.

HOGAN & HARTSON

For more information on
Hogan & Hartson, please visit us at

www.hhlaw.com

Baltimore
Beijing
Berlin
Boulder
Brussels
Caracas
Colorado Springs
Denver
Geneva
Hong Kong
London
Los Angeles
Miami
Moscow
Munich
New York
Northern Virginia
Paris
Shanghai
Tokyo
Warsaw
Washington, DC

© Hogan & Hartson LLP. All rights reserved.