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FTC Issues a Favorable Advisory Opinion to a Clinically Integrated Physician Hospital Organization

The Federal Trade Commission (FTC) issued a favorable advisory opinion to the Norman Physician Hospital Organization (Norman PHO) on February 13, 2013, permitting a proposed Clinical Integration Program to move forward (the Advisory Opinion). The following is a summary of the Advisory Opinion.

OVERVIEW

Norman PHO was founded in 1994 by the Norman Regional Health System (Health System) and physicians who were on the medical staff at the Health System's hospitals. Norman PHO initially used a messenger model to contract with third-party payers; however, it represented to the FTC that it intends to move to a clinically integrated provider network and constructed a program (Clinical Integration Program) that has strong provider support and is also attractive to health plans, employers, and other third-party payers. Norman PHO expects that this Clinical Integration Program will benefit patients, payers, and the participating providers. The FTC analyzed Norman PHO's proposed Clinical Integration Program and concluded that, with the information provided, the FTC would not recommend an enforcement action against Norman PHO or its providers.

COMPONENTS OF NORMAN PHO'S CLINICAL INTEGRATION PROGRAM

Some components of Norman PHO's Clinical Integration Program plan are summarized below:

- **Infrastructure and Clinical Practice Guidelines:** The new organizational infrastructure includes the formation of Specialty Advisory Groups, a Mentor's Committee, a Quality Assurance Committee, and a new Participating Practitioner Agreement. All physicians participating in Norman PHO are required to participate in a Specialty Group, which are responsible for developing and periodically updating clinical practice guidelines.
- **Electronic Platforms and Interface:** In promoting an overall electronic platform,

Norman PHO developed systems for: clinical decisions support; e-prescribing, electronic medical records, and an electronic health interface. Participating physicians are required to both (1) acquire and maintain the necessary computer equipment, software, rights or licenses, and (2) make available to the network practice data and medical records for use in developing, reviewing, and enforcing clinical practice guidelines.

- **Physician Involvement:** Participating physicians are expected to commit, invest, and stay involved in Norman PHO's Clinical Integration Program. This includes each physician: (1) satisfying credentialing and medical staff appointment requirements; (2) paying an initial membership fee and annual dues; (3) entering into and complying with the Participating Practitioner Agreement; and (4) generally committing to the network's Clinical Integration Program. In addition, physicians are expected to serve on one of the aforementioned committees. Norman PHO expects to implement a review process to impose penalties or exclude physicians who are not compliant with these provisions.
- **Payer Contracting and Non-Exclusivity:** A contracting committee will evaluate Norman PHO's payer contract proposals. Pursuant to the Participating Practitioner Agreement, all participating physicians are required to participate in any contract entered into between Norman PHO and a payer. Norman PHO specifically represented that it will clearly inform payers and participating providers that it is a non-exclusive network; and thereby, its participating providers will remain free to contract with payers independent of Norman PHO.
- **Preventing "Spillover Effects":** To comply with all relevant antitrust laws, Norman PHO plans to implement mechanisms to limit opportunities for anticompetitive "spillover effects" or other unlawful coordination among its competing providers. Specifically, Norman PHO will take steps to ensure that competitively sensitive information (for example, prices, pricing, or negotiating strategies or intentions) is not improperly shared among participants.

FTC ANALYSIS OF NORMAN PHO

The FTC used a rule-of-reason analysis to determine whether the formation and operation of the Norman PHO's Clinical Integration Program have any substantial anticompetitive effect and, if such effect was found, whether it is outweighed by any procompetitive efficiencies stemming from its program. In applying this analysis, the FTC determined that the proposed Clinical Integration Program is not likely to have a substantial net anticompetitive effect. Instead, the FTC found that Norman PHO's proposed Clinical Integration Program is likely to be "procompetitive or competitively neutral."

The FTC highlighted certain aspects of the Clinical Integration Program's potential to create significant efficiencies benefiting patients and payers including: (1) the network's collaborative, physician-centered processes for developing, implementing, and enforcing evidence-based clinical practice guidelines; (2) the use of a network-wide electronic platform; (3) the use of the newly revised Participating Practitioner Agreements; (4) the requirement that each physician member make meaningful contributions, including investments of human capital, time, and money, to the network's clinical integration activities; and (5) the selective nature of the proposed network wherein the PHO includes only those providers dedicated to the network's collective attainment of its cost, utilization, and quality goals.

In making its determination, the FTC repeatedly emphasized the nonexclusive nature of the network, noting that payers would remain free to contract separately with individual participating providers. This mitigated the concern of Norman PHO's overall potential market power; however, the FTC cautioned that, if Norman PHO were to operate as a de facto

exclusive network, it would raise serious concerns, and the FTC would have to reevaluate whether to recommend antitrust enforcement action.

Next, the FTC determined that Norman PHO's proposed joint contracting appears to be subordinate to the network's effort to improve efficiency and quality through its clinical integration activities. The FTC appeared to accept Norman PHO's arguments that the participating physicians will have a greater incentive to contribute their time and effort to the network's clinical integrative efforts once they are contractually bound to participate in all Norman PHO contracts.

Finally, the FTC noted that the proposed Clinical Integration Program has the potential to facilitate collusion among the participating providers if such providers could improperly coordinate the terms on which they are willing to contract outside the network. Noting approval of the antitrust counseling and training that Norman PHO plans to provide, the FTC indicated that, ultimately, Norman PHO is accountable for creating and executing effective mechanisms to prevent possible "spillover effects," including such mechanisms as confidentiality agreements, internal firewalls, and the above mentioned counseling. Failure to do so could result in serious antitrust violations.

If you have any questions regarding this Advisory Opinion, please contact a member of [Robinson & Cole's Health Law Group](#).

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