### **Antitrust Compliance for**

### **Managed Care Network Arrangements: Checklist[[1]](#footnote-1)**

**General Questions**

* Does the arrangement involve price fixing, group boycotts, or a market allocation agreement?
  + Stop, these have been deemed inherently, or per se, anti-competitive.
* Does the arrangement involve a merger, consolidation, joint venture, or other collaborative agreement?
  + If so, these are analyzed under a fact-based “rule of reason” test and generally fall within a gray area. They could possibly constitute an antitrust violation, but require further analysis.
    - What are the underlying business purposes?
    - What, if any, anti-competitive harm and pro-competitive benefits could result?

**Integrated Provider Safety Zone**

* Does the arrangement involve a joint venture by providers to form an integrated provider network?
* Are participants in the network sufficiently financially integrated?
  + Do participants (meaning the network and its provider members) share “substantial financial risk”? (E.g., capitation payments, global fee arrangements, fee withholds, cost or utilization-based bonuses or penalties, or other indicia of financial integration?)
  + If the network is non-exclusive does no more than thirty percent (30%) of the primary care or specialty physicians who practice in the relevant geographic market participate in the network?
  + If the network is exclusive, do no more than twenty percent (20%) of primary care or specialty physicians for the relevant geographic market participate in the network?
* Can the network demonstrate sufficient clinical integration?
* Has the network implemented an active and ongoing program to evaluate and, as necessary, modify the practice patterns of the participating providers, thereby creating a high degree of interdependence and cooperation to control costs and ensure quality?
* Does the network have common information technology (including medical records), employ centralized staff, and share practice standards, protocols, and care management protocols?
* Does the network have cost and quality control mechanisms, shared information-gathering systems for performance review, and shared monitoring of patient satisfaction with the participating providers?

**Accountable Care Organization Safety Zone**

* Do independent ACO participants (for example physician group practices) that provide the same service (“common service”) have a combined share of 30% or less of each common service in each participant's primary service area (“PSA”) wherever two or more ACO participants provide that service to patients from that PSA?
* If any participant in the ACO has more than 50% market share in any PSA that no other ACO participant provides services to patients, does that participant contract with the ACO on a non-exclusive basis?
* If the ACO exceeds the 30% PSA does the ACO include one physician or physician group per specialty, on a non-exclusive basis, and is the physician or physician group’s primary office classified as “isolated rural” or “other small rural”?

**Non-Integrated Provider Networks/Messenger Model**

* Do individual health centers make independent, unilateral decisions regarding acceptance or rejection of contractual terms (including, but not limited to, fee schedules) offered by a third party?
* Do individual health centers remain free to conduct negotiations independent of the messenger (non-exclusivity)?

**Exchanging Price and Cost Information**

* Is the survey managed by a third-party (*e.g.*, a purchaser, government agency, health care consultant, academic institution, or trade association)?
* Is the information provided by the survey participants based on data more than three months old?
* Are there are at least five providers reporting data upon which each disseminated statistic is based, such that no individual provider’s data represents more than 25 percent on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider?

1. The Authors of these materials include attorneys at the law firm of Feldesman Tucker Leifer Fidell LLP. The sample documents offer general guidance based on federal law and regulations and do not necessarily apply to all PCAs-HCCNs under all facts and circumstances. Further, these materials do not replace, and are not a substitute for, legal advice from qualified legal counsel. [↑](#footnote-ref-1)