

## **Application of the Proposed Antitrust Guidance for Healthcare Providers**

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While the FTC and the Department of Justice (“the agencies”) have never challenged the merger of physician practices or a hospital’s acquisition of a practice,<sup>1</sup> the potential for antitrust action by regulators is an increasing source of concern among healthcare providers.

To address these concerns, the agencies have proposed a “Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program” (“proposed statement”). The proposed statement creates an antitrust “safety zone” with a relatively simple definition: the agencies will not challenge ACOs participating in the Medicare Shared Savings Program with a combined market share of 30% or less for any common service (“product market”) within a geographic region (“geographic market”). The relevant geographic market is to be defined as the lowest number of contiguous zip codes from which the organization draws at least 75% of its patients.

While practices that fall within the safety zone are deemed legal, practices that fall outside the zone are not automatically assumed to be in violation. However, practices with market share greater than 50% for any common service must first obtain agency review, with the exception of certain rural practices. For practices that are outside the safety zone but below the 50% mandatory review threshold, the agencies have identified certain conduct that the practice should avoid to reduce the likelihood of a challenge.

The proposed guidance hinges on defining the product market(s) and the geographical market; then measuring market share. While the method chosen for defining the market and measuring market share is relatively simple, there is ambiguity in how market share will be computed in practice.

The following is a hypothetical example that describes the methodology we use to estimate market share as defined by the proposed statement.

#### **Defining Product Market**

Defining the product market is a matter of determining what is meant by “any common service.” For physician services, this is determined by the primary specialty of the practice as designated for Medicare enrollment purposes.

*“For example, Specialty Codes 01 (general practice), 08 (family practice), 11 (internal medicine), and 38 (geriatric medicine) are all considered primary care specialties and are treated as a common service.”<sup>2</sup>*

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<sup>1</sup> Christi J. Braun, Esq. *Physician-Practice Mergers: Watch Out for the Enforcer*.

<sup>2</sup> McGuireWoods LLP. *Legal Updates: FTC and DOJ Propose Antitrust Guidance for ACOs*. April 7, 2011.

In our example, we have chosen a merger of two single-specialty cardiology practices. This is a relatively simple example, as the merger of multi-specialty practices can lead to more complicated computations.

### Defining Geographic Market

The geographic market is defined as the lowest number of contiguous zip codes from which the practice draws at least 75% of its patients. This is determined by acquiring patient zip code data from the practice. Data from the merged practice is displayed below:

Zip	Visits	Percent	Cumulative
30309	1,285	16.70%	16.70%
30308	988	12.84%	29.54%
30318	827	10.75%	40.29%
30305	811	10.54%	50.83%
30313	635	8.25%	59.08%
30324	552	7.17%	66.25%
30307	541	7.03%	73.28%
30314	402	5.22%	78.51%
30312	395	5.13%	83.64%
30303	264	3.43%	87.07%
Other	995	12.93%	100.00%
Total	7,695	100.00%	100.00%

In our example, 30314 is the last zip code included in the geographic market, since it is the zip code that brings the cumulative percentage of visits over 75%.

### Computing Market Share

Market share is computed by dividing the number of visits to each of the practices from patients living within the defined geographic market by the number of specialty visits by the total population within the defined geographic market (market size). Since patient zip code data makes it relatively simple to measure the number of visits to the practice by patients within the defined geographic market, the most difficult component of computing market share is calculating market size.

Since the geographic market is a list of zip codes, the first step in our proposed methodology is to obtain total population data by zip code. This data can be found using the U.S. Census Bureau's American FactFinder, which uses data compiled from the 2000 Census.

In our example, our estimate of the market population is 223,420. From the market population, we then estimate market size using statistics from the National Health Statistics Reports (NHSR) to estimate the number of visits by specialty in a given year. According to the NHSR, the number of visits to

cardiovascular disease practices per 100 people per year is 10.9.<sup>3</sup> Dividing our market population estimate by 100 people and multiplying by 10.9 visits per 100 people results in an estimated market size of 24,353. This is our estimate of the number of visits to a cardiovascular disease practice by patients living within the defined geographic market.

### **Conclusion**

In our example, the merged practice had 6,041 visits from patients within its defined geographic market (sum of visits for zip codes included in the defined geographic market). Dividing 6,041 by our market size estimate of 24,353 results in a market share estimate of 24.8%. Our practice falls within the safety zone as defined by the proposed statement. We would not anticipate a challenge by the antitrust agencies in this case.

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<sup>3</sup> Chun-Ju Hsiao, et al. *National Ambulatory Medical Care Survey: 2007 Summary*. National Health Statistics Reports, November 3, 2010.