

Green Mountain Care Board
Guidance re: Referrals of Potential Violations of State or Federal
Antitrust Laws to the Vermont Attorney General

Introduction

The Green Mountain Care Board (GMCB) is responsible for supervising the participation of health care providers, health care facilities, and other persons operating or participating in an accountable care organization (ACO), to the extent required to avoid federal antitrust violations. 18 V.S.A. § 9382(e). The GMCB is also responsible for referring to the Vermont Attorney General for appropriate action the activities of any individual or entity that the GMCB determines, after notice and an opportunity to be heard, may be in violation of State or federal antitrust laws without a countervailing benefit of improving patient care, improving access to health care, increasing efficiency, or reducing costs by modifying payment methods. *Id.* The referral process is addressed in GMCB Rule 5.000, § 5.503(d).

This guidance document is intended to provide examples of conduct that the GMCB may, after having provided notice and an opportunity to be heard and having not found a countervailing benefit as described above, refer to the Vermont Attorney General under 18 V.S.A. § 9382(e) and GMCB Rule 5.000, § 5.503(d). It is based on guidance issued by the Federal Trade Commission and the U.S. Department of Justice, the agencies with primary responsibility for enforcing federal antitrust laws. Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (“Policy Statement”), 76 Fed. Reg. 67,026 (Oct. 28, 2011).

This document is not intended to describe all the types activities the GMCB may refer to the Vermont Attorney General. Furthermore, this document does not in any way limit the authority or discretion of the Vermont Attorney General or the federal antitrust agencies with respect to their enforcement of state and federal laws.

Conduct

Conduct that the GMCB may, after providing notice and an opportunity to be heard, refer to the Vermont Attorney General includes, but is not limited to the following:

1. Improper sharing of competitively sensitive information. Significant competitive concerns can arise when an ACO’s operations lead to price-fixing or other collusion among ACO participants in their sale of competing services outside the ACO. For example, improper exchanges of prices or other competitively sensitive information among competing participants could facilitate collusion and reduce competition in the provision of services outside the ACO, leading to increased prices or reduced quality or availability of health care services. *Id.* at 67,029; *see also*, U.S. Dep’t of Justice & Fed. Trade Comm’n, Statements of Antitrust Enforcement Policy in Health Care, Statements 4, 5, and 6 (1996).

2. Preventing or discouraging private payers from directing or incentivizing patients to choose certain providers, including ones that do not participate in the ACO, through “anti-steering,” “anti-tiering,” “guaranteed inclusion,” “most-favored-nation,” or similar contractual clauses or provisions. Policy Statement at 67,030.
3. Tying sales (either explicitly or implicitly through pricing policies) of the ACO’s services to a private payer’s purchase of other services from providers outside the ACO (and vice versa), including providers affiliated with an ACO participant (e.g., requiring a purchaser to contract with all of the hospitals under common ownership with a hospital that participates in the ACO). *Id.*
4. Contracting on an exclusive basis with ACO physicians, hospitals, ambulatory surgical centers, or other providers, thereby preventing or discouraging those providers from contracting with private payers outside the ACO, either individually or through other ACOs or analogous collaborations. *Id.* (noting that while the Centers for Medicare & Medicaid Services requires certain physician practices to contract exclusively with one ACO for purposes of beneficiary assignment, it did not require individual physicians or physician practices to contract exclusively through the same ACO for purposes of providing services to private health plans’ enrollees). Exclusivity may be present explicitly or implicitly, formally or informally, through a written or de facto agreement. *Id.* at 67,028.
5. Restricting a private payer’s ability to make available to its health plan enrollees cost, quality, efficiency, and performance information to aid enrollees in evaluating and selecting providers in the health plan. *Id.* at 67,030.

Whether conduct warrants a referral requires consideration of the specific circumstances involved, including the extent to which the conduct creates a countervailing benefit of improving patient care, improving access to healthcare, increasing efficiency or reducing costs. GMCB Rule 5, §5.503(d). A referral should not be construed as a legal finding or conclusion that any violation of law has occurred.