

## Antitrust Advisory

JANUARY 29, 2013

### DOJ Approves Greater New York Hospital Association's Proposed Gainsharing Program

BY [BRUCE D. SOKLER](#), [CHRISTI J. BRAUN](#), [ROBERT G. KIDWELL](#), [FARRAH SHORT](#), AND [SHOSHANA S. SPEISER](#)

On January 16, the Department of Justice's Antitrust Division ("DOJ") announced that it does not presently intend to challenge the Greater New York Hospital Association's ("GNYHA") proposed gainsharing program. The program was designed to provide a framework for participating hospitals to measure physician performance against certain benchmarks and award bonuses to physicians for quality and efficiency improvements. The DOJ concluded that the program neither constitutes a horizontal agreement on compensation levels nor an exchange of information that would facilitate anticompetitive coordinated limits on physician compensation.

GNYHA is a trade association with 250 hospital and continuing care facility members in New York and several nearby states. GNYHA wrote to the DOJ seeking a business review of its proposed voluntary gainsharing program for its 100 New York hospital members. Gainsharing programs incentivize physicians to consider their use of hospital resources in decision-making by rewarding them with a "share" of the "gain" that results from increased efficiency. GNYHA explained that its program is based upon Medicare's gainsharing programs and differs primarily in that its application is broader than just Medicare products.

As such, no information provided by GNYHA to any individual hospital may be shared with any other hospital. GNYHA's members are not required to participate in the program and the program will be implemented by participants with individually-determined variations to address their own specific needs. The participants will give GNYHA publicly-available data about their costs. This data will be: at least three months old, supplied by at least five entities, with no individual representing more than 25% on a weighted basis, and aggregated so that the hospitals who receive the combined data cannot identify prices charged by others. Using this data, GNYHA will develop a Best Practice Norm for each All Patient Refined Diagnosis Related Group ("APR-DRG") (a code designated by Medicare for each specific treatment or procedure) as the 25th percentile of the cost among all hospitals in New York State for the particular APR-DRG. GNYHA will then measure each physician's performance relative to this Best Practice Norm and will share this information only with the hospital employing the physician. Each hospital will then independently determine whether it will make any incentive payment and its own incentive payment cap in the event that it does make payments. The cap imposed is required to be a specific percentage of Medicare Part B fees and supported by a legal opinion. Finally, GNYHA will contract a health care consultant to conduct a fair market value analysis to ensure that the hospitals' and physicians' actions justify the award of incentive payments. These last two measures will ensure that the incentive payments do not cause participating hospitals to run afoul of the Stark Law or the Anti-Kickback Statute.

In determining that it has no present intention to challenge GNYHA's program as described, the DOJ primarily focused on the lack of data sharing and the necessity to include the incentive payment cap and conduct a fair market value analysis. First, the fact that the program would not allow for or facilitate participants' sharing of competitively-sensitive information was crucial to DOJ's approval because otherwise the hospitals could set prices for their services or physician salaries which would violate the antitrust laws. Second, the DOJ allowed for the program provisions related to physician payment caps and fair market value analysis because they were reasonably necessary to further the procompetitive purposes of the gainsharing program. But if these provisions

are used as a pretense to standardize the participating hospitals' incentive payments to physicians, the DOJ clearly stated that the hospitals and GNYHA would be subject to prosecution.

Antitrust enforcement in the health care area continues to be vigorous. Antitrust agencies, however, understand the need for quality and efficiency improvements. Thus, innovative and well-structured initiatives and innovations will likely pass antitrust scrutiny.

\* \* \*



---

View Mintz Levin's Antitrust attorneys.

---

Boston · London · Los Angeles · New York · San Diego · San Francisco · Stamford · Washington

[www.mintz.com](http://www.mintz.com)

Follow Us    

Copyright © 2013 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

This communication may be considered attorney advertising under the rules of some states. The information and materials contained herein have been provided as a service by the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; however, the information and materials do not, and are not intended to, constitute legal advice. Neither transmission nor receipt of such information and materials will create an attorney-client relationship between the sender and receiver. The hiring of an attorney is an important decision that should not be based solely upon advertisements or solicitations. Users are advised not to take, or refrain from taking, any action based upon the information and materials contained herein without consulting legal counsel engaged for a particular matter. Furthermore, prior results do not guarantee a similar outcome.

2604-0113-NAT-AFR