

April 2011

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Antitrust Agencies Release Proposed Statement of Antitrust Enforcement Regarding Accountable Care Organizations

On March 31, 2011, the Federal Trade Commission and Department of Justice released, for public comment, a joint proposed policy statement about how the agencies will apply the U.S. antitrust laws to new Accountable Care Organizations (“ACOs”). ACOs are groups of health care providers that will be collaborating under the Affordable Care Act of 2010 to improve health care quality and reduce costs. The policy statement sets forth the agencies’ plan to coordinate competition analysis with the Department of Health and Human Services’ Centers for Medicare & Medicaid Services’ (“CMS”) review of ACO applications.

The policy statement expresses the agencies’ general view of how health care providers can successfully form ACOs that meet improved health care quality and reduced cost goals without raising significant competitive concerns. Because these organizations will increase coordination among doctors and hospitals, their growing prominence raises the question of how they will be treated under the antitrust laws. The agencies have indicated that they will seek to promote collaborations able to demonstrate consumer benefits, so long as the ACOs meet Medicare’s standards for clinical coordination.

However, the agencies warn that “under certain conditions, accountable care organizations could reduce competition and harm consumers through higher prices or lower quality of care.”

To this end, the proposed policy statement establishes a framework for how the agencies will analyze and review ACOs. First, finding that CMS’s proposed eligibility criteria are broadly consistent with criteria the Agencies previously set forth in their 1996 Statements of Antitrust Enforcement Policy in Healthcare, the agencies explain that they will apply a rule of reason analysis to ACOs with the same structure and processes required for CMS Shared Savings Program participation. The agencies will evaluate applicants that meet CMS eligibility criteria based on the ACO’s share of services in each participant’s Primary Service Area, or PSA.

Based on PSAs, the agencies plan to create an antitrust “safety zone” for certain ACOs and establish expedited antitrust review (with an aim to complete the review within a 90-day period) for others. While the agencies will not normally challenge CMS-approved ACOs in which independent ACO participants have a combined share of 30 percent or less of each common service in each

participant's PSA, they plan to closely review (within 90 days if participants submit specified documents and information) any proposed ACO that would have more than 50 percent of the local market for any service. For ACOs that are outside the safety zone and below the 50 percent mandatory review threshold, the key issue is whether the ACO, on balance, will provide consumers with high-quality, cost-effective health care or, instead, increase price and reduce consumer choice and value.

The statement provides examples applying the above criteria and describes the information that an ACO will have to show to earn antitrust agency approval. Beyond this policy statement, the agencies plan to provide options for ACOs to gain additional antitrust clarity if they fall outside the safety zone but below the 50 percent threshold. Additionally, the agencies will establish a Joint ACO Working Group to collaborate and discuss issues arising out of ACO reviews, to enable

them to hopefully provide greater clarity for future ACO formations.

The FTC and DOJ are accepting public comment on the proposed policy statement through May 31, 2011. If your company may be impacted by these proposed changes, Hunton & Williams LLP can assist you in filing comments or concerns to the agencies and in requesting modification of the proposed policy statement.

Hunton & Williams LLP has significant experience representing hospitals and insurance companies in a wide range of matters, with specific experience in health care, labor and employment, and competition law. The firm's antitrust and competition practice combines high-level government and private litigation experience. Lawyers in the group come from both of the U.S. antitrust enforcement agencies and include a former deputy director of the U.S. Federal Trade Commission's Bureau of Competition, two former FTC senior litigators, and other officials from the FTC. Working from offices in the

United States and abroad, the group serves domestic and international companies in competition litigation, merger review, intellectual property matters, consumer protection and privacy, and criminal antitrust defense and related price-fixing litigation.

Further Information

FTC Press Release: <http://www.ftc.gov/opa/2011/03/aco.shtm>

DOJ Press Release: http://www.justice.gov/atr/public/press_releases/2011/269187.htm

Proposed rule governing Shared Savings Programs (issued by the Department of Health and Human Services, Center for Medicare & Medicaid Services): <http://www.ofr.gov/inspection.aspx>

Press Release about the proposed rule: <http://www.hhs.gov/news/press/2011pres/03/20110331a.html>

FTC's Accountable Care Organizations Page: <http://www.ftc.gov/opp/aco/index.shtml>

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