



FTC/DOJ Seek Public Comment on ACO Antitrust Policy Statement

By: Bradley C. Weber

On March 31, 2011, the Federal Trade Commission and the Antitrust Division of the Justice Department (the Antitrust Agencies) jointly released a proposed [Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program](#) (the proposed Antitrust Policy Statement), which is designed to ensure that Accountable Care Organizations (ACOs) can implement provisions of the recent health reform act without raising competition concerns. ACOs are designed to provide voluntary incentives for health care providers to form collaborative arrangements to help treat individual patients across various health care settings. The Antitrust Agencies are seeking public comments related to the proposed Antitrust Policy Statement, which must be submitted on or before **May 31, 2011**. [Click here](#) to access the comment form.

The proposed Antitrust Policy Statement coincides with new proposed rules issued by the Centers for Medicare & Medicaid Services (CMS), which govern the framework for establishing ACOs. [Click here](#) to access the CMS proposed rules. In addition, Locke Lord's Health Care Practice published a *Locke Lord's QuickStudy*, entitled "[CMS Releases Proposed ACO Rules](#)" on April 1, 2011. The Antitrust Agencies developed the proposed Antitrust Policy Statement to coordinate their competition analysis with CMS's review of ACO applications to ensure that ACOs do not lead to reduced competition and higher prices for consumers.

The proposed Antitrust Policy Statement describes:

- The ACOs to which it will apply;
- When the Antitrust Agencies will apply particular antitrust analyses to evaluate ACO collaborations;
- The establishment of an antitrust "safety zone" to shield certain ACOs from enforcement activity;
- The CMS-mandated antitrust review process for certain other ACOs; and
- Options for ACOs to seek additional antitrust guidance if they fall outside the safety zone and below the CMS-mandated antitrust review threshold.

The Antitrust Agencies will evaluate applicants that meet CMS eligibility criteria based on the ACO's share of common services in the applicant's primary service area (PSA). An ACO with a relatively high market share in a PSA may pose a higher risk of being anticompetitive, could restrict competing ACOs in that PSA, and could allow the ACO to raise prices charged to commercial health plans above competitive levels, the Antitrust Agencies said.

An ACO that falls below a minimum market share threshold in its PSA would be within a prescribed "safety zone" and would not face antitrust review, barring extraordinary circumstances. Typically, the



safety zone would provide protection for ACOs with individual participants providing the same service if their combined market share of common services within the PSA is 30 percent or less. ACOs whose participants collectively provide 50 percent or more of the common services within the PSA would trigger a mandatory review, although such a market share would not be presumed unlawful. ACOs with market shares falling between 30 percent and 50 percent would be allowed to proceed without Antitrust Agency scrutiny, although regulators would be able to launch investigations and enforcement actions at any time against the ACOs if necessary.

Depending on an ACO's shares of common services in the relevant PSA, CMS may mandate, or an ACO may choose to seek, an expedited antitrust review. An ACO will submit its request for an expedited 90-day review to both of the Antitrust Agencies, and they will decide on a case-by-case basis which agency will investigate, much like they now determine merger reviews. In addition, the Antitrust Agencies will establish a Joint ACO Working Group to discuss issues arising out of ACO reviews.

The Antitrust Agencies are soliciting comments on the proposed Antitrust Policy Statement, including whether:

- The proposed Antitrust Policy Statement should be changed in any respect;
- Other data sources exist that ACO applicants could use to determine their relevant PSA shares for (1) physician services rarely used by Medicare beneficiaries (e.g., pediatrics, obstetrics) and (2) in-patient hospital services located in states where all-payer hospital discharge data are unavailable; and
- Providing the documents and information required for ACOs to secure expedited antitrust review would pose an undue burden on the applicants.

Locke Lord is closely reviewing the proposed Antitrust Policy Statement and corresponding agency notices and will be issuing subsequent Locke Lord's QuickStudy articles that are focused on a variety of ACO topics. Locke Lord also is available to consult with clients who are considering submission of comments regarding the proposed Antitrust Policy Statement or related agency notices.

In addition, Locke Lord plans to host an ACO conference during the month of April that will include web participation options.

For more information on the matters discussed in *Locke Lord's QuickStudy*, please contact the author:

Bradley C. Weber | T: 214-740-8497 | bweber@lockelord.com