

Federal Trade Commission/Department of Justice ACO Working Group

Summary of Activities Following Issuance of the Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program

The Federal Trade Commission and Department of Justice (the Antitrust Agencies) issued the Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations (ACOs) Participating in the Medicare Shared Savings Program (the Policy Statement) in October 2011.¹ The Policy Statement is intended to ensure that health care providers have the antitrust clarity and guidance needed to form procompetitive ACOs that participate in both Medicare and commercial markets.

The Policy Statement established the Federal Trade Commission/Department of Justice ACO Working Group (the ACO Working Group) to collaborate and discuss issues arising out of the Policy Statement.² To further the Policy Statement's goals of antitrust clarity and guidance, the ACO Working Group issues this summary of its activities related to the Medicare Shared Savings Program (the MSSP) through March 31, 2013. During this period, the ACO Working Group has fielded 33 questions related principally to primary service area (PSA) share calculations and two requests for voluntary expedited review.

I. PSA Share Questions

Under the Policy Statement, an ACO may calculate its PSA shares to determine whether it falls within an antitrust safety zone for certain ACOs that are highly unlikely to raise significant competitive concerns.³ The Policy Statement also describes certain conduct an ACO may want to avoid if it has high PSA shares or other indicia of market power.

In response to requests for assistance in calculating PSA shares, the Antitrust Agencies established an electronic mailbox to allow ACOs to submit questions regarding PSA share calculations to the Antitrust Agencies.⁴ As of March 31, 2013, the Antitrust Agencies have received 33 questions relating to PSA share calculations and other issues concerning ACOs participating in the MSSP.⁵ The Antitrust Agencies provided responses to the majority of questions within five business days. In connection with this summary, the ACO Working Group

¹ The Policy Statement is available at <http://www.ftc.gov/os/fedreg/2011/10/111020aco.pdf> and http://www.justice.gov/atr/public/health_care/276458.pdf.

² See Policy Statement, § IV.B.2.

³ The Appendix to the Policy Statement explains how to calculate PSA shares.

⁴ See Policy Statement, footnote 26 (specifying electronic mailbox at aco_psa_questions@ftc.gov).

⁵ The ACO Working Group also responded to an additional 21 questions related to the proposed ACO Policy Statement that are no longer applicable following the issuance of the final Policy Statement.

has made all 33 questions and responses publicly available at <http://www.ftc.gov/bc/healthcare/aco/aco.htm> and http://www.justice.gov/atr/public/health_care/295587.pdf.

The largest category of questions related to obtaining and using Medicare and other data to calculate PSA shares (14 questions). The next largest category of questions related to the steps involved in calculating PSA shares (11 questions). The remaining questions related to the procedures for obtaining voluntary review (3 questions) and miscellaneous issues related to ACOs and the Policy Statement (5 questions).

II. Requests for Voluntary Review

The ACO Working Group also has conferred on the two requests for voluntary expedited 90-day review submitted as of March 31, 2013. A newly formed⁶ ACO seeking guidance beyond that in the Policy Statement may request voluntary expedited review of its program from the Antitrust Agencies. Within 90 days of receiving the information described in the Policy Statement, the reviewing Antitrust Agency will advise the ACO in a letter whether its formation or operation raise competitive concerns.⁷

Both applicants requested voluntary review in March 2012 and sought to participate in the Medicare Shared Savings Program (MSSP) starting in July 2012. One applicant withdrew its request after the reviewing Antitrust Agency informed the applicant that it was not eligible for review under the Policy Statement because the applicant did not intend to operate in any commercial market.⁸ The reviewing Antitrust Agency nonetheless offered to provide informal guidance to the applicant to address any competitive concerns. The applicant was accepted to participate in the MSSP. The other applicant withdrew its request without explanation before the reviewing Antitrust Agency commenced its review. To date, the applicant has not participated in the MSSP.

* * * * *

The ACO Working Group will continue to respond to PSA share questions and requests for voluntary expedited review as specified in the Policy Statement.

⁶ See Policy Statement, footnote 23 (defining “newly formed”).

⁷ See Policy Statement, § IV.B.2.

⁸ See Policy Statement, § I (“The Policy Statement is intended to ensure that health care providers have the antitrust clarity and guidance needed to form procompetitive ACOs that participate in both the Medicare and commercial markets.”); § IV.B.2.2 (applicants for voluntary review must submit to the reviewing Antitrust Agency materials including the ACO’s “plans to compete in the Medicare and commercial markets,” as well as the identity of “the five largest commercial health plans or other private payers” for the ACO’s services).