

ALERTS AND UPDATES

Final Antitrust Policy Statement Regarding ACOs in Medicare Shared Savings Program

October 21, 2011

The 2010 healthcare reform laws—the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010—established accountable care organizations (ACOs) as the mechanism through which healthcare providers may participate in the federal government's Shared Savings Program (SSP). Because ACOs bring together otherwise independent physicians and hospitals, providers had clamored for the government to issue a position statement about the antitrust implications of such a structure.

On October 20, 2011, the U.S. Federal Trade Commission and the Department of Justice, which coordinate enforcement of the antitrust laws, issued their final [Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program](#) (the "Enforcement Policy"). The fundamental principle of the Enforcement Policy is that the agencies will apply the rule-of-reason analysis to all ACOs applying for or participating in the SSP and, if the same services are involved, to commercial insurance products modeled on the SSP.

The Enforcement Policy is based initially on an analysis of market share for each common service provided by at least two independent participants in an ACO in their primary service area (PSA). For example, the agencies will look separately at the market share of all neurosurgeons in the ACO or all oncologists in the ACO, as well as any other specialists, inpatient facilities and outpatient categories comprising the ACO. Specific rules govern how market share is determined and how services are defined.

ACOs in which no independent providers perform common services with market shares exceeding 30 percent in their PSAs will fall within a safety zone, meaning that the agencies will not challenge the ACO under the antitrust laws, absent extraordinary

circumstances. Hospitals and ambulatory surgery centers (ASCs) in an ACO must be non-exclusive to the ACO in order for the ACO to fall within the safety zone.

If an ACO includes independent providers performing the same service and comprising more than 30 percent of the market share in their PSA, the ACO may still be found to be procompetitive and lawful. The Enforcement Policy recommends that to avoid raising the agencies' concerns, an ACO should not prevent private payers from directing their beneficiaries to certain providers, even if they are outside the ACO; tie sales of the ACO's services to a private payer's purchase of other services from outside the ACO (like affiliates of a hospital); or contract on an exclusive basis with physicians, hospitals, ASCs or other providers. If an ACO is challenged, the agencies will look at all circumstances to determine the ACO's impact on the relevant market in which it is a participant.

The final statement is very similar to the proposed statement issued on April 19, 2011, with two notable exceptions. First, the Enforcement Policy applies to all provider collaborations seeking to participate in the SSP, not only those formed after March 23, 2010, as originally drafted. Second, the final statement has deleted the mandatory antitrust review requirement for ACOs having a 50-percent or higher share of any common service before being permitted to participate in the SSP. The agencies will now provide an expedited voluntary review of any ACO with market shares in excess of 30 percent.

About Duane Morris

Duane Morris has an online [Healthcare Reform Center](#) to help guide employers, hospitals, physicians, nursing homes, and providers of home care services and new nursing home alternatives in their efforts to comply with the Patient Protection and Affordable Care Act of 2010. To access links to the relevant legislation and other online resources, a timeline of what to do and when to do it, and changes and provisions affecting healthcare providers, visit www.duanemorris.com/HealthcareReform.

For Further Information

If you have any questions about this *Alert* or would like more information, please contact [Philip H. Lebowitz](#), any of the [attorneys](#) in our [Health Law Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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