



# Department of Justice

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**DEPARTMENT OF JUSTICE, FEDERAL TRADE COMMISSION SEEK PUBLIC COMMENT ON PROPOSED STATEMENT OF ANTITRUST ENFORCEMENT REGARDING ACCOUNTABLE CARE ORGANIZATIONS**

*Provides for Antitrust “Safety Zone” and Expedited Antitrust Review*

WASHINGTON – The Department of Justice and the Federal Trade Commission (FTC) today issued a joint statement about how the agencies will enforce U.S. antitrust laws in regard to new Accountable Care Organizations (ACOs) – groups of health care providers that will collaborate under the new Affordable Care Act of 2010 to improve health care quality and reduce costs.

The joint proposed policy statement solicits public comment on the antitrust agencies’ proposed guidance to ensure that newly formed ACOs can innovate to serve Medicare beneficiaries and patients with private health insurance, without raising competitive concerns. The proposed policy statement would create an antitrust “safety zone” for certain ACOs and establish an expedited antitrust review process for others.

“Providing Americans with quality health care at affordable prices has been and will continue to be a priority for this administration, and the intergovernmental effort on providing guidance to ACOs enhances these goals,” said Christine Varney, Assistant Attorney General in charge of the Department of Justice’s Antitrust Division. “The Antitrust Division supports innovative, collaborative and cost saving efforts – that comply with the antitrust laws – to improve health care and reduce costs to all Americans.”

The department vigorously enforces the antitrust laws in the health care sector. Over the past 20 years, the department has conducted more than 60 substantial investigations into the conduct of health insurance plans, hospitals and physicians. These investigations have resulted in a number of enforcement actions, including successful challenges to health plan and hospital mergers and physician boycotts. These actions have protected consumers from anticompetitive conduct, resulting in lower prices for and higher quality of health care services. The department has also provided the industry with substantial guidance. In 1996, the department and the FTC issued joint Statements of Antitrust Enforcement Policy in Health Care. Also, over the past two decades, the department has issued more than 62 business review letters that responded to inquiries from industry participants about the antitrust issues involved in many different types of practices.

The Affordable Care Act of 2010 encourages health care providers to form integrated organizations to jointly offer services in order to reduce costs and improve the quality of patient care in the United States. The goal of these joint provider organizations – ACOs – is to better coordinate care, leading to efficiencies and cost savings for consumers. Under the act, ACOs will serve fee-for-service Medicare beneficiaries through Medicare’s Shared Savings Program and must sign up with the Department of Health and Human Services’ Centers for Medicare and Medicaid Services (CMS) to participate in the program for at least three years.

The department and the FTC recognize that ACOs may generate opportunities for health care providers to innovate in both the Medicare and commercial markets to achieve the cost savings Congress intended when establishing the Shared Savings Program. At the same time, however, the agencies also understand that collaborations among otherwise independent health care providers – as will occur through the formation of ACOs – may raise competitive concerns. The department and the FTC have developed jointly the proposed antitrust policy statement to coordinate competition analysis with CMS’s review of ACO applications, to ensure the newly formed organizations do not lead to reduced competition and higher prices for consumers.

The joint policy statement is intended to ensure that health care providers have the antitrust guidance they need to form procompetitive ACOs. It describes: the ACOs to which it will apply; when the department and the FTC will apply particular antitrust analysis to those ACOs; an antitrust safety zone for certain ACOs; an expedited CMS-mandated antitrust review process for other ACOs; and options for ACOs to gain additional antitrust clarity if they fall outside the safety zone but below the CMS-mandated antitrust review trigger, including expedited antitrust review.

The department and the FTC have committed to complete the expedited review within 90 days of receiving the required documents and information from the ACO. The department and the FTC will establish a joint ACO Working Group to collaborate and discuss issues arising out of ACO reviews. This process will allow ACOs to rely on the expertise of both agencies and will ensure efficient, cooperative and expeditious reviews.

In addition, the joint policy statement identifies five types of conduct that an ACO can avoid to reduce significantly the likelihood of antitrust concern.

The department and the FTC are accepting public comment on the proposed policy statement through May 31, 2011. The agencies are seeking comments from health care providers, payers, consumers, antitrust practitioners and other stakeholders on issues including:

- Whether and, if so, why the guidance in the proposed policy statement should be changed;
- Whether other data sources exist that ACO applicants could use to determine relevant primary service area (PSA) shares for: physician services rarely used by Medicare beneficiaries (e.g., pediatrics, obstetrics); and inpatient hospital services located in states where all-payer hospital discharge data are unavailable; and

– Whether providing the documents and information required to obtain an expedited antitrust review will present an undue burden on ACO applicants.

Comments can be submitted electronically at [www.ftc.gov/os/publiccomments.shtm](http://www.ftc.gov/os/publiccomments.shtm). The Federal Register notice announcing the proposed policy statement contains information on submitting comments via mail and can be found at [www.ftc.gov/opp/aco/](http://www.ftc.gov/opp/aco/). The proposed policy statement is available at [www.justice.gov/atr/public/guidelines/269155.pdf](http://www.justice.gov/atr/public/guidelines/269155.pdf).

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