



Justice Department and Federal Trade Commission Withdrawal of Health Care Antitrust Statements, including 2011 Guidance Related to ACOs

Department of Justice Withdrawal

On Friday, February 6, the Department of Justice (DOJ) unexpectedly [announced](#) its withdrawal from three health care antitrust policy statements, including the 2011 [Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program](#). The FTC, which had jointly authored these statements with DOJ, has not announced whether it also was withdrawing from them, but it is anticipated that it will take similar action.

Federal Trade Commission Withdrawal

On July 14, the Federal Trade Commission (FTC) [announced](#) its withdrawal from two health care antitrust policy statements, including the 2011 [Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program](#). The announcement followed the Department of Justice's withdrawal from the same statements in February.

Administration Focus on Antitrust Enforcement

The now-withdrawn statements, which date back to 1993, were issued to furnish guidance to health care providers across a range of antitrust issues, including mergers, joint ventures, purchasing arrangements, information exchanges, and the formation of clinically integrated networks. Both DOJ and the FTC provided little information regarding its reason for withdrawing the statements, other than commenting that since their promulgation the healthcare landscape has changed significantly, and that as a result, the statements are overly permissive on certain subjects.

The withdrawal is part of a much broader and more aggressive antitrust enforcement posture of the Biden Administration. While the impact of the changes remains to be seen, the decision signals the potential for increased antitrust scrutiny of ACOs and other health care collaborations.

Implications for ACOs

Withdrawal of the statements could have several implications for ACOs:

- The announcements withdraw specific guidance that relates to ACOs that qualify for MSSP. Most importantly, the ACO-specific guidance created a presumption that joint negotiations with private payers by ACOs satisfying CMS eligibility criteria would not be considered *per se* violations of Section 1 of the Sherman Antitrust Act.
- The withdrawn statements provided clarity about how the DOJ and FTC would analyze the antitrust implications of provider networks. The guidance reflected long-established antitrust principles that clinically or financially integrated networks would avoid *per se* condemnation.

The guidelines also created certain “safety zones” for networks that were below certain market shares.

- The DOJ’s and FTC’s actions do not appear targeted specifically at ACOs or physician collaborations; indeed, the only specific example it referenced as overly permissive in its announcement involved information-sharing (and specifically, sharing of wage and benefit information). Nevertheless, the withdrawal is consistent with the administration’s more aggressive enforcement approach which includes the health care sector as one of its priority targets.
- Antitrust investigations of ACOs and other health providers are typically triggered by complaints from health plans alleging that such entities are using their market power to leverage higher contracted rates that are not justified by higher value services. While such conduct has always been subject to antitrust challenge, the announcements from the DOJ and FTC suggest an even greater likelihood of antitrust scrutiny.

NAACOS will continue to monitor the impact of the withdrawal of these statements. After the DOJ announcement, numerous ACOS reported that the withdrawal would not have a major impact. Please reach out to advocacy@naacos.com if you determine that the withdrawal of these statements will impact your ACO.