

## **New York State Publishes Draft Certificate of Public Advantage Regulations**

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The New York Department of Health recently published a proposed regulation that lays out the rules governing the issuance of certificates of public advantage for health care collaborations within the state.

On Sept. 18, 2013, the New York State Department of Health published proposed certificate of public advantage (COPA) regulations. The regulations are intended to establish a mechanism for active state supervision of collaborative arrangements between health care competitors, with the purpose of securing state action immunity under federal antitrust laws. Health care providers in New York who are contemplating collaborative activities will want to monitor the progress of these proposed regulations closely.

In U.S. antitrust law, the state action immunity doctrine provides immunity for certain transactions that may otherwise have a potential anticompetitive effect. In order for transactions involving private actors to qualify for state action immunity, however, two conditions must be satisfied. First, there must be a clearly articulated state policy to displace competition with regulation. In addition, the state must also actively supervise the private conduct in question.

In 2011, Section 2999-aa of New York's Public Health Law was enacted. Section 2999-aa provides that it is the policy of the state to encourage appropriate collaborative arrangements among health care providers "who might otherwise be competitors." The section further provides that to the extent such arrangements may be anticompetitive within the meaning of state and federal antitrust laws, "the intent of the state is to supplant competition with such arrangements under the active supervision and related administrative actions of the commissioner as necessary to accomplish [the state's policy goals] and to provide state action immunity under the state and federal antitrust laws ..."

The proposed regulations would permit health care providers to apply for a COPA to immunize a broad range of potential collaborative activities, ranging from the sharing or allocation of patients, personnel or other resources to the implementation of clinical integration programs or mergers and joint ventures.

Upon receipt of a COPA application, the New York Department of Health, in consultation with the

Attorney General and the Public Health and Health Planning Council, must weigh the potential benefits of the proposed collaboration against any potential disadvantages caused by the displacement of competition. The proposed regulations also provide for a public comment period. If the Department of Health determines that the potential benefits of the arrangement outweigh its potential disadvantages, then it may issue a COPA, valid for at least two years, which may include any conditions the Department of Health deems necessary to ensure the state's policy goals are met.

Under the proposed regulations, recipients of a COPA would be subject to annual reporting obligations for at least four years after issuance of the COPA. If the Department of Health determines, based upon the annual reports or otherwise, that the benefits of the collaboration no longer outweigh the disadvantage, it may, subject to the recipient's right to a hearing, revoke the COPA.

The proposed regulations are now subject to a 45-day period of public comment.

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