

## **New York Certificate of Public Advantage (COPA) Program Alert: Revised Regulations Are Particularly Relevant to DSRIP Participants**

by **Arthur J. Fried**

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On August 27, 2014, the New York State Department of Health (“DOH”) issued [revisions](#) to its proposed regulations implementing the Certificate of Public Advantage (“COPA”) process, which will facilitate immunity for New York health care entities from state and federal antitrust liability through active state supervision of covered activities. Earlier [proposed regulations](#) were issued on September 18, 2013. The DOH’s revisions clarify the process of application, reporting requirements, periodic review, and scope of antitrust protections for entities listed in a COPA, as well as the state agencies involved in the COPA program. Public comment on the revised regulations will be accepted through September 26, 2014.

New York’s COPA law was enacted in 2011<sup>1</sup> in response to the Affordable Care Act and other shifts within the health care infrastructure toward value-based purchasing arrangements. Once the program’s regulations are finalized and its application forms released, health care entities seeking to enter into a cooperative agreement or collaborative planning process can apply for a COPA. The effect of a COPA will be to immunize the listed entities from state antitrust laws, and provide the foundation for immunity from federal antitrust laws, under the state action doctrine, so long as the actions of those entities are within the scope of conduct covered by the COPA and the entities abide by any additional conditions listed on the COPA. A COPA will be issued to entities where the reviewing agencies (while DOH is the ultimate decision-maker, the Public Health and Health Planning Council, Attorney General, and mental hygiene agencies will provide input, where applicable) find that the likely benefits to the public from the proposed cooperative agreement outweigh its potential disadvantages. The criteria for reaching this conclusion are detailed in the proposed regulations. Certified entities will then be responsible for periodic reporting, review, and renewal of their COPA to ensure that this balance remains in favor of the public’s benefit. The DOH’s revisions signify that the COPA program is moving toward finalization and should be available to New York health care entities within the near future.

<sup>1</sup> N.Y. PUB. HEALTH LAW Art. 29-F (Consol. 2011); 2011 N.Y. Laws 59.

Developments in the COPA certification process will be highly relevant to entities planning to participate in New York's Delivery System Reform Incentive Payment Program ("DSRIP"). DSRIP is the implementation of the federal and state governments' \$8 billion investment in redesigning delivery of health care to Medicaid recipients to facilitate performance-based payments, particularly with regard to reducing unnecessary utilization of hospital inpatient beds and emergency services. Under DSRIP, qualifying health care provider collaboratives, called Performing Provider Systems, within a specified geographic area can apply to receive incentive payments based on their performance against certain program-specified benchmarks. After completion of its five-year program period, the systems developed as part of DSRIP will potentially become the standard for all of New York's Medicaid provider payments.

As DSRIP participation will require various forms of information sharing, cooperation, and integration among Medicaid providers, many of whom are competitors, entities currently participating in New York Medicaid should strongly consider filing a COPA application when the process becomes available. As noted in a recent DSRIP [Q&A](#), providers within the same geographic area are required to work together to form a DSRIP-qualifying organization. Those providers will be required to share financial and performance data with one another as well as collaborate on quality-improvement initiatives. DSRIP providers will also be required to appoint a lead entity with responsibility for the organization's reporting and for distributing the DSRIP incentive payments. In the same Q&A, New York's COPA program is specifically mentioned as a means of protecting DSRIP providers collaborating in this way from antitrust concerns.

New York Medicaid providers, and particularly those that intend to participate in the DSRIP program, should follow further developments in the COPA program closely. While the COPA application process is not yet formally available, careful planning, specifically in view of the program considerations listed in the revised regulations and the rapidly approaching December 16th deadline for DSRIP applications, can ensure the timely submission of a COPA application once the requirements and process are finalized.

As previously noted, public comment on the revised regulations will be accepted through September 26, 2014. Epstein Becker Green is available to assist with the drafting and submission of comments to the DOH, as well as with strategy for and submission of a COPA application.

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