

Frequently Asked Questions for DSRIP Performing Provider Systems Completing Certificate of Public Advantage Applications

These Frequently Asked Questions (FAQs) will provide guidance to Performing Provider Systems (PPSs) that intend to submit an application for a Certificate of Public Advantage (COPA) pursuant to Article 29-F of the Public Health Law (PHL) and associated regulations, 10 NYCRR Subpart 83-1, in conjunction with a Delivery System Reform Incentive Payment (DSRIP) Program Project Plan application. The regulations, effective December 17, 2014, are available at http://www.health.ny.gov/regulations/recently_adopted/docs/2014-12-17_certificate_of_public_advantage.pdf. These FAQs, which are available at http://www.health.ny.gov/health_care/medicaid/redesign/copa, will be further updated as additional questions arise.

1. Q: What is a Certificate of Public Advantage, referred to as a “COPA”?

A: A COPA is a document issued by the Department of Health (Department) signifying the approval of a Cooperative Agreement or planning process, subject to certain conditions being satisfied. Parties that have received a COPA are provided state action immunity under federal antitrust laws and immunity from private claims under state antitrust laws and may negotiate, enter into, and conduct business pursuant to, a Cooperative Agreement or a planning process covered by a duly issued Certificate of Public Advantage. See PHL Article 29-F and 10 NYCRR Subpart 83-1.2.

2. Q: What is a Cooperative Agreement in the DSRIP context?

A: For purposes of COPA applications submitted by PPSs in conjunction with their DSRIP Project Plan applications, the DSRIP Project Plan application shall serve as the Cooperative Agreement, as supplemented by additional information included in response to other sections of the application or otherwise requested by the Department, such that the Department is able to identify the projects and activities for which a COPA is sought and the PPS partners involved therewith.

3. Q: For what activities may a PPS seek a COPA?

A: A COPA may be requested by a PPS only with respect to DSRIP projects as set forth in the DSRIP Project Plan application and the activities necessary to carry out an approved Project Plan application. A COPA may not be necessary for all DSRIP projects and related activities. Potential applicants should consult with their attorneys to determine whether their DSRIP activities warrant submission of a COPA application.

4. Q: What activities may not be covered by a COPA issued to a PPS?

A: A COPA will not be issued to a PPS for activities that are not necessary to carry out an approved DSRIP Project Plan application. Further, a COPA will not apply to any Medicare or non-governmental commercial transactions or activities that are carried out by any PPS or any PPS partner. A PPS seeking antitrust immunity for non-DSRIP projects and activities will need to submit a separate COPA application to the Department, as set forth on the Department's website at http://www.health.ny.gov/health_care/medicaid/redesign/copa.

5. Q: Who may submit a COPA application?

A: Only the PPS Lead Applicant may submit a COPA application in conjunction with a DSRIP Project Plan application. Any other COPA applications must be separately submitted to the Department at copa@health.ny.gov, as set forth on the Department's website at http://www.health.ny.gov/health_care/medicaid/redesign/copa, and those applications may be submitted and will be reviewed on a rolling basis.

6. Q: Do multiple COPA applications need to be filed for each DSRIP project or by each provider within a PPS that have been identified for each project activity?

A: No, a PPS Lead Applicant should file no more than one COPA application for all the projects and activities for which it seeks COPA protection, and will need to identify such projects and activities in the response to the application.

7. Q: Where are COPA application forms found?

A: A COPA application form is available on the Department's website at http://www.health.ny.gov/health_care/medicaid/redesign/copa.

8. Q: How would the PPS Lead Applicant complete Section I (General Information) of the COPA Application?

A: Under Section I (General Information), Part A, of the COPA application, a PPS Lead Applicant should mark the box indicating that the application is submitted in conjunction with a DSRIP Project Plan application. The PPS Lead Applicant should enter "PPS" in response to the question under Section C (COPA Applicant Information) and "PPS Lead Applicant" in response to the question under Part D (Application Lead Contact).

9. Q: How would the PPS Lead Applicant complete Section II (Applicant Information) of the COPA Application?

A: Section II need not be completed by the PPS Lead Applicant or its partners, provided that the Department is able to identify the PPS partners involved in the projects and activities for which a COPA is sought. To the extent that this cannot be readily ascertained by the Department from the DSRIP Project Plan application, the responses provided to Section III of the COPA application should set forth this information.

10.Q: How should the PPS Lead Applicant complete Section VI of the COPA Application?

A: While the PPS Lead Applicant must execute the certification form, it is unnecessary for the PPS Lead Applicant to obtain certifications and acknowledgments from all of the PPS partners involved in the projects and activities for which a COPA is sought, provided that the Department should be able to identify the PPS partners involved in the projects and activities for which a COPA is sought. To the extent that this cannot be readily ascertained by the Department from the DSRIP Project Plan application, the responses provided to Section III of the COPA application should set forth this information.

11.Q: Where should a PPS Lead Applicant submit a completed COPA application?

A: A completed COPA application can be submitted to DSRIPapp@health.ny.gov with “COPA Application” in the subject line.

12.Q: What are the fees for submitting a COPA?

A: For COPA applications submitted by PPSs in conjunction with their DSRIP Project Plan applications, the Department will waive fees otherwise payable in connection with a COPA application.

13.Q: Are all PPS partners required to post a description of the COPA application on each of their public websites?

A: The PPS Lead Applicant must conspicuously post on its public website a description of its COPA application, which should describe the projects and activities for which a COPA is sought. In addition, PPS partners need not also post such information, as long as the website of the PPS Lead Applicant either lists or links to a list of PPS partners, and further links to the Department’s

website, http://www.health.ny.gov/health_care/medicaid/redesign/copa, where COPA applications will be summarized.

14.Q: Is a completed COPA application a public document available pursuant to the Freedom of Information Law, referred to as “FOIL”?

A: New York’s Freedom of Information Law generally requires the Department of Health to make records available in response to a request unless an exception applies. The COPA application affords applicants the opportunity to identify any such records that may fall within an exception submitted as part of the application, and the Department will evaluate whether the exception applies.

14.1. Q: May the Department ask for additional information in its review process which is not included in the COPA application?

A: Yes, the Department may request additional documentation or information to assist in its review of a COPA application, and the request should be responded to within the time frame identified by the Department in its request. See 10 NYCRR § 83-1.10(c). Any delay in responding to such requests could delay the determination.

15.Q: When can the PPS Lead Applicant expect to hear if a COPA application is approved?

A: A COPA application submitted by a PPS Lead Applicant on or before December 22, 2014, should expect to be notified of the Department’s determination by April 1, 2015. A COPA application submitted by a PPS Lead Applicant on or before February 1, 2015, should expect to be notified of the Department’s determination by June 30, 2015. Applications may be submitted after February 1, 2015, and will be reviewed expeditiously on a rolling basis, but notification of the Department’s determination may not be made until after June 30, 2015. However, if the application does not sufficiently describe the projects and activities for which a COPA is sought or otherwise does not sufficiently respond to the questions in Section III of the application, leading the Department to request a substantial amount of additional documentation or information, or if any of the Department’s requests for additional documentation or information are not responded to in a timely fashion, notification of the Department’s determination of the COPA application may not be made by the referenced dates.

16.Q: What kinds of conditions may be attached to the approval of a COPA?

A: The Department may impose conditions to the COPA to ensure that the activities conducted under it are consistent with PHL Article 29-F and its purpose

to improve health care quality, access, efficiency and clinical outcomes (see 10 NYCRR § 83-1.6) and are consistent with the approved DSRIP Project Plan.

17.Q: What is the duration of a COPA?

A: A COPA may be issued for a period to be determined by the Department, which shall be no less than two years in duration. See 10 NYCRR § 83-1.6. The two year period referenced in the regulation is the minimum period, but a COPA can be issued for a longer period of time, depending on the circumstances. PPS Lead Applicants may note the length of time for which COPA protection is sought and why such time period is appropriate as part of its responses to Section III of the COPA application. The Department will take the request into consideration as part of its review of the application.

18.Q: Once a COPA is issued, will the PPS need to provide additional information?

A: In providing immunity as set forth in PHL Article 29-F and its implementing regulations, the State must actively supervise the activities of the PPS. To this end, the Department will require each PPS to submit an annual report and certification (Annual Report) in such form as determined by the Department. The Annual Report will be reviewed by the Department to ensure that the PPS is continuing to operate within the scope of the COPA, including any conditions or terms of such COPA. The Department may request additional reports, information or documentation at such other times as the Department may require. See 10 NYCRR § 83-1.9.

19.Q: Can a COPA be renewed upon expiration?

A: Yes; however, an application to renew a COPA will need to be filed no later than 120 days prior to the expiration of the COPA. See 10 NYCRR § 83-1.11. Renewals will undergo the same process as an initial COPA request and will be evaluated utilizing the same considerations. See 10 NYCRR § 1-10(a).

20.Q: Under what circumstances may a COPA be revoked?

A: The Department may revoke a COPA for the reasons set forth in 10 NYCRR § 83-1.12. The Department must notify the parties to a COPA of the Department's determination to revoke the COPA and the parties will have 90 days to respond and raise any objections or concerns. No COPA will be revoked without affording the parties an opportunity to request a hearing pursuant to 10 NYCRR Part 51. See 10 NYCRR § 83-1.13.

21.Q: Is there an opportunity for public comment in the COPA process?

A: Yes, a description of the COPA application, including any renewal application, will be available on the Department's website. The public may submit written comments to the Department or comment on a COPA application in person at a meeting of a designated Committee of the Public Health and Health Planning Council. See 10 NYCRR § 83-1.3(b). More information will be available on the Department's website at http://www.health.ny.gov/health_care/medicaid/redesign/copa.

22.Q: Where can questions concerning a COPA application be directed?

A: Questions should be submitted by email to DSRIPapp@health.ny.gov with "COPA" in the subject line.

23.Q. The application uses the term "COPA Applicants" and "COPA Applicant" throughout the application. Do the questions refer to the PPS only or to the PPS and all partner organizations?

A: For purposes of COPA applications submitted by PPS Lead Applicants in conjunction with their DSRIP Project Plan applications, the PPS Lead Applicant must provide information that sufficiently supplements the DSRIP Project Plan application and responses to other sections of the COPA application, such that the Department is able to identify the projects and activities for which a COPA is sought and the PPS partners involved therewith. The PPS Lead Applicant must provide the information on behalf of those involved PPS partners. If sufficient information is not so provided, the Department will request additional information and such information should be provided in timely fashion.

24.Q. How is the market share analysis required in Section II, Part Two, and Questions 4B (ix), (x) and (xi) calculated?

A: The market share analysis required in the COPA Application Section 4B(ix)-(xi) is based upon the analysis set forth in the *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* which was jointly issued by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) (the "Policy Statement"). For additional information pertaining to how to calculate primary service area (PSA) shares, please see the FTC/DOJ ACO Working Group's *Index of Questions and Answers Received in the PSA Share Calculation Electronic Mailbox Established Under the ACO Policy Statement* (the "FTC/DOJ PSA Q&A"). Potential applicants should consult with their attorneys when deciding how to best calculate their market shares. Please note that the Department may request additional information during the application review process.

25.Q: What are the categories of services that are required and how should those services be grouped for purposes of long-term care, behavioral health and other providers not addressed in the Policy Statement?

A: The categories of services correspond to those described in the DSRIP projects for which the Applicant is seeking a COPA. Applicants should use their best judgment and consult with their attorneys on how best to describe such services utilizing the resources provided in the Policy Statement and the FTC/DOJ Q&A. Please note that the Department may request additional information during the application review process.