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Donald S. Clark, Secretary
Federal Trade Commission
Office of the Secretary
Room H-113 (Annex W)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Proposed Statement of Antitrust Enforcement Policy Regarding ACOs Participating in the Medicare Shared Savings Program, Matter V1000017

Dear Secretary Clark:

The American Association of Orthopaedic Surgeons (AAOS) appreciates the opportunity to comment on the Federal Trade Commission (FTC)/Department of Justice (DOJ) Antitrust Division (hereafter referred to as "the agencies") "Proposed Statement of Antitrust Enforcement Policy Regarding ACOs Participating in the Medicare Shared Savings Program, Matter V1000017" which contains provisions relating to the formation of Accountable Care Organizations (ACOs). We commend the FTC and the DOJ for collaborating to provide guidance on how ACOs will and will not be subject to FTC/DOJ scrutiny for antitrust violations. The AAOS believes that ACOs should be shielded from antitrust enforcement to the greatest extent possible in order to encourage better coordination and integration of health care services that can improve quality of care and patient satisfaction. We represent over 18,000 board-certified, orthopaedic surgeons and anticipate many of our members will be interested in participating in ACOs.

Rule of Reason

The AAOS agrees with the agencies' interpretation of CMS approved ACOs as reasonably likely to be bona fide arrangements intended to improve the quality and reduce the costs of providing health care through their collaborative efforts. Absent this basic policy statement agreement, all ACO participants would be subject to FTC/DOJ review and we believe this would prove to be a severe deterrent to creating ACOs. Furthermore, we support the agencies' intention to allow CMS approved ACOs to also form agreements with private-sector payers and still be assumed to fall under the stated rule of reason.

Expedited Analysis of ACOs

The AAOS applauds the agencies for proposing an expedited antitrust analysis as it is essential that ACOs be fully aware of any potential antitrust issues in the formative stages. The AAOS also appreciates the agencies' delineation of safety zones versus mandatory antitrust review. In general, the AAOS is concerned the agencies have committed themselves to a single definition of possible antitrust violations-share of services provided by the ACOs relative to the total services provided in the ACO's Primary Service Area (PSA). While this is one measurement of market dominance, the PSA test does not delineate the antitrust relevant geographic market and may not capture all single ACOs that achieve a disproportionate ability to set standards. Moreover, potential ACOs' PSA analysis will likely depend on Medicare data, which may not provide an accurate picture of the provider's actual market power. Finally, there are other manners in which a single ACO could come to obtain disproportionate ability to set standards. Accordingly, we would encourage the agencies to consider additional measurements of antitrust.

Antitrust Safety Zone

The AAOS supports the agencies intention to exempt ACOs that contain less than 30% of each common service. However, we would encourage the agencies to consider higher thresholds for the safety zone or delineate exemptions not just for rural areas but for rare but critical specialties like pediatrics, which are provided in very low frequencies for Medicare patients. The agencies should provide exemptions for all surgical services where the 30% threshold (or the 50% threshold for automatic review) can easily be exceeded by a handful of specialty surgeons. Absent this action, many low Medicare volume specialists will likely not ever be invited into ACOs because they would raise potential review by the agencies.

Mandatory Antitrust Agency Review Threshold

Similar to the 30% threshold for safety zone eligibility, the AAOS would encourage the agencies to provide exemptions for specialties that provide few Medicare services.

Lastly, the AAOS would encourage the agencies to consider the possibility that under the CMS proposed structures of ACOs that Primary Care Physicians have exceptionally large importance in the governance and operations of ACOs. Our concern, and one we believe the agencies should consider as well, is that because primary care physicians are given so much importance by CMS that they could obtain disproportionate control over the management of ACOs and the distribution of shared savings at the expense of non primary care physicians and because Primary Care Physicians have the ability to provide or withhold referrals to specialists they could force participation and terms upon other

types of providers. In our estimate this type of activity would constitute possible violations of antitrust laws and the agencies should consider providing guidance limiting the ability of primary care physicians to control ACO formation and management.

Again, we thank you for the opportunity to comment. Should you require any additional feedback from our surgical and specialty perspective, please do not hesitate to contact our Medical Director, William R. Martin, III, MD at (202) 546-4430 or martin@aaos.org.

Sincerely,

Daniel J. Berry, MD
President
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