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May 27, 2011

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

The Hon. Jon Leibowitz  
Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580

The Hon. Christine Varney  
Assistant Attorney General  
Antitrust Division  
U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington, DC 20530

Submitted at: <https://ftcpublic.commentworks.com/ftc/acoenforcementpolicy>

RE: Proposed Statement of Antitrust Enforcement Policy Regarding ACOs Participating in the Medicare Shared Savings Program, Mater V100017

Dear Mr. Secretary, Commissioner Leibowitz and Assistant Attorney General Varney:

Thank you for the opportunity to provide Fairview Health Service's perspective on the Proposed Statement of Antitrust Enforcement Policy (Proposed Policy) that applies to accountable care organizations (ACO) participating in the Medicare Shared Savings Program under section 3022.

Non-profit Fairview Health Services is based in Minneapolis, Minnesota. Fairview is an academic health system in partnership with the University of Minnesota. Fairview has more than 20,000 employees and 3,000 medical staff which includes employed physicians,

academic physicians and aligned independent physicians. Fairview is committed to becoming an ACO by 2012 because we feel strongly that integrated and accountable care is the way health care should be delivered. Fairview is on a path of transformation because, simply put, it is the right thing to do for our patients. We are committed to transforming our care delivery model to improve the experience of care, improve care delivery and reduce total cost of care. Thank you for the opportunity to provide comment to the Proposed Policy.

Fairview appreciates the Federal Trade Commission's (FTC) and Department of Justice's (DOJ) significant efforts in developing the Proposed Policy. We appreciate the efforts to obtain feedback from provider organizations in its development as well as the Proposed Policy's adoption of rule of reason treatment to an ACO organization's work in extending integrated care delivery to the commercial market. We also applaud the application of a safety zone to ACO organizations which will provide necessary certainty to organizations that undertake the significant transformational change to become an ACO. Fairview believes that in order to transform the method of health care delivery and payment that is intended by the Medicare Shared Savings Program (MSSP), the Proposed Policy, as well as the ACO Proposed Rule issued by CMS, should be flexible and allow providers such as Fairview the ability to structure an ACO model that creates value and meets the needs of the populations served. Fairview encourages the FTC and DOJ to reconsider aspects of the Proposed Policy, outlined below, which would encourage greater participation in the MSSP as well as the expansion of truly coordinated care.

Fairview encourages clarification in the Proposed Policy that organizations that have an integrated care delivery model that may participate in ACO projects with the Center for Medicare and Medicaid Innovation (CMMI), whose objective is to test and structure models that deliver value, as well as those in the commercial market are afforded the rule of reason analysis provided to an organization participating in the MSSP. We believe that the application of the rule of reason analysis as well as clinical integration standards applicable to ACO models should apply to the organization and its attributes in delivering integrated care that delivers value-increased quality, improved care experience and reduced costs-not only those who participate in the MSSP. Fairview also believes that ACO models in place after the MSSP agreement period should be eligible for continued protection, particularly in light of the significant investments made to participate in the MSSP and the likelihood that the integrated model will continue.

In addition, we urge the FTC and DOJ to consider restructuring the Proposed Policy to offer guidance rather than the proposed regulatory approach with its mandatory review process. By doing so, the FTC and DOJ could offer flexibility and ease of entry for organizations like Fairview who want to extend their model of integrated care to more patients, while still responding to actual anticompetitive behavior in the marketplace.

If the Proposed Policy continues in its current regulatory approach, we encourage the FTC and DOJ to consider an alternative mechanism than the proposed primary service area

analysis. The primary service area approach requires an ACO to expend significant resources to conduct the analysis for all providers and services, prior to it being considered to participate in the MSSP. This is even more burdensome for ACO organizations that bridge multiple providers and services beyond a single entity and very difficult under the time frame afforded. In addition, an analysis of primary service area utilizing only data on Medicare patients could misrepresent the true market power of an ACO Participant. We appreciate the Proposed Policy's acceptance of alternate sources of data; however, the challenges in obtaining this data would be extremely burdensome. This is particularly true for small providers without electronic health record systems (EHR's) or with more streamlined systems. For example, Fairview's potential model could include over twenty two different EHR's which would have widely varying capacities to produce the required information. Fairview would urge the FTC and DOJ to consider utilization of an alternate, less burdensome process to approximate market influence such as a physician count process which could encourage the development and expansion of ACO's.

We believe the safely zone should be higher and extended to protect ACO's that include more than one provider of a common service within the same primary service area with combined market share in excess of 30 percent, as long as the provider is non exclusive to the ACO. Non exclusive providers are able to participate in multiple ACO's and payor relationships, which is pro competitive and does not implicate competitive concerns. Further, we encourage the FTC and DOJ to consider the Proposed Policy's treatment of the exclusivity requirement. We also believe the FTC and DOJ should recognize exclusivity if the participant is able to contract with other ACO's or payors as the Proposed Policy's requirement on exclusivity does not recognize that an ACO Participant may not wish to participate in multiple ACO's.

In addition, Fairview is concerned about the Proposed Policy's requirement of a mandatory review process prior to acceptance in the MSSP. We are particularly concerned in light of the significant organizational and financial requirements required of a MSSP application and in the time frame that is implicated. Again, we urge the Proposed Policy adopt an approach to offer guidance relative to ACO models, not a mandatory review process. If the FTC and DOJ are going to apply a review process, we ask that the review be voluntary or more streamlined by focusing on exclusive providers and apply the agencies' traditional enforcement approach to actual anti competitive behavior identified in the marketplace. In addition, we also ask the FTC and DOJ consider clarification around the mechanism and process for its mandatory review. It is unclear whether the mandatory review completes the antitrust evaluation or it is a screening mechanism which could entail further review involving different standards such as market power assessment. We also encourage the FTC and DOJ to conduct the review process while the ACO application is considered and to provide feedback regarding the process, particularly in light of the time frame afforded.

Again, we appreciate the significant efforts by the FTC and DOJ, along with CMS and the other regulatory agencies involved in structuring the proposed rules relative to the MSSP. We believe accountable care at a lower cost can only be accomplished with more

integration within organizations like Fairview and closer alignment and integration with independent providers so that everyone in the continuum of care has the same incentives to perform and all relationships are triggered on quality. Ultimately, we believe that health care that has higher quality, improved patient experience and reduced spending is beneficial to the marketplace and competition as well as the patients served. We encourage the Proposed Policy embrace this view, and be structured to allow flexibility for ACO's to form and change delivery from a transactional health care delivery model to a people centered delivery model.

Again, thank you for the opportunity to provide this input.

Very truly yours,

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