NPAF National Patient Advocate Foundation

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May 31, 2011

Eric H. Holder, Jr.
Attorney General of the United States
Office of the Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: **Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program**

Dear Attorney General Holder:

National Patient Advocate Foundation (NPAF) would like to thank you for the opportunity to comment on the joint Department of Justice (DOJ) and Federal Trade Commission (FTC) proposed statement. The proposed statement outlines the application of antitrust laws to health care collaborations among independent providers and provider groups seeking to participate, or which will be invited to participate, as accountable care organizations (ACOs) under the Medicare Shared Savings Program. NPAF welcomes this opportunity as ACOs are designed to provide high-quality coordinated care to patients.

NPAF is a non-profit organization dedicated to improving patient access to healthcare services through both federal and state policy reform. Its mission is to be the voice for patients who have sought care after a diagnosis of a chronic, debilitating or life-threatening illness. While other commenters may find responding to a patient-centric rule to represent a new paradigm, NPAF has a fifteen year history of serving as the trusted patient voice. The advocacy activities of NPAF are informed and influenced by the experience of patients who receive direct, sustained case management services from our companion organization, Patient Advocate Foundation (PAF). In 2010, PAF resolved 82,963 cases nationally and provided information to almost 4 million online contacts.

NPAF applauds the broad scope of the proposed statement as it offers guidance to health care providers interested in using the ACOs for their commercially insured patients. As noted in the proposed statement, health care providers are more likely to integrate their care delivery for Medicare beneficiaries through ACOs if they can also use the ACOs for their commercially insured patients. The antitrust clarity and guidance offered by the proposed statement encourages integration of individual provider practices which benefits the provider by expending fewer resources on integration and benefits the patient population by allowing a both commercially insured as well as Medicare fee-for-service patients to benefit from integrated healthcare delivery.

While ACOs have great potential in so many areas, both DOJ and FTC must take care to not dilute the protective force that they both offer patients as health consumers from anticompetitive harm. As law professors John B. Kirkwood and Robert H. Lande stated in a law review article that explored the intent of antitrust law, "The fundamental goal of antitrust, in other words, is to protect consumers in the

relevant market from anticompetitive behavior that exploits them—that unfairly transfers their wealth to firms with market power—not to increase the total wealth of society."[1] NPAF's comments integrated this historical premise when considering the effect the proposed statement will have on patients as healthcare consumers.

The willingness of providers to form truly integrated ACOs is predicated upon their comfort that innovative ideas are not stifled by the law in general and antitrust law in particular. While NPAF holds antitrust law in high regard because of the protection it affords healthcare consumers, we applaud the decision that both agencies will apply the rule of reason analysis to ACOs that meet certain conditions. This decision strikes the correct balance between the need for patients to have access to the benefits of integrated delivery systems able to coordinate care and yet still protects them from anticompetitive harmful behavior. The added guidance the proposed statement provides for providers who want to participate in both private and public markets that the ACO must use the same governance and leadership structure and the same clinical and administrative processes it uses to qualify for and participate in the Shared Savings Program is likewise welcomed and appreciated by NPAF. It will prevent a two-tiered health system for public vs private insurance beneficiaries, and will assure the patient-centric requirements under the Medicare fee-for-service ACOs such as patient representation on the governing board will inure to the benefit of commercial insurance product beneficiaries.

The proposed statement's initial determination whether an ACO is likely to raise anticompetitive concerns gives NPAF concern for patients in rural areas. If ACOs that have a high share of services in their service areas are assumed to have a greater risk of being found to be anticompetitive, then this may tempt those forming ACOs to avoid rural areas. NPAF encourages the agencies to recognize and accommodate the inherent disparity that might result from the application of this analysis to rural areas. The safety zone criteria should include special consideration for rural areas. Please consider the expertise of the nonprofit community in general, and patient advocate groups in particular when considering how best to design the safety zone criteria so that rural patients are not unintentionally penalized.

NPAF thanks you for the opportunity to comment on this rule. As noted above, this rule is an important one as it has the potential to positively transform the delivery of quality healthcare services to Medicare fee-for-service patients if many of the issues defined herein are appropriately addressed. We would be pleased to respond to any questions about our recommendations that may arise in the future. We are also available to discuss, in greater detail, our suggestions regarding a role for the nonprofit community in the implementation of the rule.

Respectfully submitted,

Rene Cabral-Daniels
Chief of Staff, Regulatory Analyst

CC:
Nancy Davenport-Ennis
Chief Executive Officer and President

[1] John B. Kirkwood and Robert H. Lande, The Fundamental Goal of Antitrust, 84 Notre Dame Law 191,193 (2008).