National Association of
Children's Hospitals

Champions for Children's Health

N • A • C • H

May 31, 2011

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

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

To whom it may concern:

On behalf of children's hospitals across the country, the National Association of Children's Hospitals (N.A.C.H.) appreciates the opportunity to provide comments on the "Proposed Statement of Antitrust Enforcement Policy Regarding ACOs Participating in the Medicare Shared Savings Program." Although the proposed policy focuses on the Medicare Shared Savings Program, we would like to provide comments that recognize the impact on children's hospitals that provide health care to the small number of children covered by Medicare and the large number covered by Medicaid. We also have questions about how this antitrust guidance would apply to the Pediatric Accountable Care Organization (ACO) demonstration, authorized under Section 2706 of the Patient Protection and Affordable Care Act (ACA).

Background on Children's Hospitals
Children's hospitals are partners in efforts at the federal and state levels to improve the quality of health care for our nation's children through better integrated service delivery. Children's hospitals are indispensable providers of children's health care. From school-based care to intensive care, children's hospitals are committed to serving all children. Through community clinics, partnerships and innovative care models, children's hospitals reach children who might not otherwise have access to care when they need it, where they need it.

Children's hospitals are safety net providers for all children and major providers of care for children insured by Medicaid. Although they account for only 5 percent of hospitals in the United States, children's hospitals care for 45 percent of all children admitted to a hospital, including 47 percent of pediatric Medicaid admissions. Children's hospitals are regional centers for children's health care and provide care across large geographic areas and often serve children across state lines.

401 Wythe Street, Alexandria VA 22314
p 703.684.1355 f 703.684.1589
www.childrenshospitals.net

An Affiliate of the National Association of
Children's Hospitals & Related Institutions

Overall Issues/Questions

Under the proposed Medicare ACO rule, released by the Centers for Medicare and Medicaid Services (CMS) on April 7, children's hospitals could not lead or be a convener of an ACO. N.A.C.H. is requesting clarification from CMS that children's hospitals would be eligible to share in savings as a Medicare ACO provider/supplier. The determination of whether children's hospitals can participate in the Medicare ACO program would have implications for the impact of the antitrust enforcement guidance.

Regardless of children's hospitals' eligibility for the Medicare ACO program, we request clarification from the U.S. Federal Trade Commission and Department of Justice (FTC/DOJ) on the applicability of this guidance to a pediatric or Medicaid ACO. We have reviewed the guidance to identify the potential impact on children's hospitals and believe that their unique characteristics as regional providers for children and high Medicaid payer mix warrant special attention by FTC/DOJ.

General Concerns with the FTC/DOJ Statement's Treatment of Proposed ACOs

Overall, the regulations propose too many barriers to ACO formation, which will result in low participation. Given the increased likelihood of mandatory review for pediatric specialty services (see below), mandatory review is daunting due to its likely expense and uncertain result.

While the FTC/DOJ policy provides clearer guidance with respect to clinical integration, the criteria set forth in the CMS regulation may limit flexibility to innovate and tailor to specific types of care. In the ACO guidance, the DOJ/FTC state that a proposed ACO that meets CMS criteria will be found to be sufficiently "integrated" to meet part of the test for avoiding antitrust enforcement actions. While this is a step forward, the CMS criteria are stringent and inflexible. Tying "integration" to these criteria may limit innovation in design and implementation of ACOs. These concerns apply to children's hospitals, which may find additional unique ways to structure ACOs to reduce costs or adapt the criteria to meet the needs of a pediatric population. We also would not want "clinical integration" for pediatric or Medicaid ACOs to be defined by the Medicare regulation criteria without an assessment of how it could work or be adapted for children.

The use of Primary Service Area (PSA) shares to determine market power is unproven as a matter of antitrust economics, and thus leads to greater uncertainty without necessarily achieving the FTC/DOJ's objectives of reducing anti-competitive effects. There have been no studies to determine whether this approach is a good proxy for market share or market power.

Potential Concerns with Treatment of Pediatric Hospitals and Service Providers under the Proposed Medicare ACO Guidance

If pediatric service providers are joined in a Medicare ACO, the proposed regulations require collection of new data (for example, counting the number of physicians in a certain

specialty area within an uncertain geographic range), which will likely be very burdensome and expensive. The up-front costs may discourage integration of care across service providers, which would otherwise benefit both providers and patients.

The use of Medicare data in the calculation of PSA shares does not work for pediatrics. Only a very small number of children are enrolled in Medicare and physician services rarely used by Medicare beneficiaries would not be represented in the data. If pediatric providers are to be part of a Medicare ACO, other data sources that actually reflect pediatrics need to be explored before the guidance is finalized.

Concerns with Application of the Medicare ACO Guidance to the Pediatric ACO
The determination of market shares on the basis of Medicaid-only data, which is the likely corollary to the Medicare-only data prescribed by the FTC/DOJ Statement, will lead to higher-than-actual market shares for pediatric services. There are fewer pediatric providers and many do not accept Medicaid. For example, only 42 percent of pediatric physicians accept all new Medicaid patients.

For specialty services, there are an even smaller number of providers available and they are often affiliated with children's hospitals. The fact that children's hospitals generally provide the majority of the specialty services for children could, in many cases, put them in the mandatory review category when they create an ACO with other pediatric specialty providers. This could cause children's hospitals to decide not to pursue an ACO because of the likelihood of a burdensome review process. This policy seems to disproportionately impact children's providers, and children's hospitals, in particular. A more complete mix of payer data should be considered if market share thresholds will be used to determine up-front burdens for achieving ACO status for the Pediatric ACO Pilot.

Furthermore, children's hospitals are regional providers of health care services for children and often treat children from multiple states. The need to combine data from multiple states may prove burdensome due to the use of different Medicaid specialty codes in each state, as compared to Medicare Specialty Codes, which are national. Beyond the additional burden, the combination of specialty codes of varying breadth may result in an over-statement of market shares. In addition, the use of Medicaid data solely within a state to determine market share may distort actual shares for many metropolitan areas.

We appreciate the opportunity to comment. If you have any questions on our comments, please contact Aimee Ossman, Director, Policy Analysis at 703/797-6023 or aossman@nachri.org.

Sincerely,

Lawrence A. McAndrews
President & CEO

401 Wythe Street, Alexandria VA 22314
p 703.684.1355 f 703.684.1589
www.childrenshospitals.net

401 Wythe Street, Alexandria VA 22314
p 703.684.1355 f 703.684.1589
www.childrenshospitals.net

An Affiliate of the National Association of
Children's Hospitals & Related Institutions