



ADVENTIST HEALTH
POLICY ASSOCIATION

2400 Bedford Road | Orlando, FL 32803
407-303-1607 | 407-303-7935 (fax)

May 31, 2011

Honorable 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 V100017

Dear Mr. Clark,

I am writing on behalf of the Adventist Health Policy Association (AHPA). We represent 72 hospitals and several hundred affiliated health care facilities (nursing homes, outpatient centers, urgent care centers, and others) across 17 states. One of our AHPA members (Florida Hospital) is the nation's largest Medicare provider.

We have read the Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations (ACOs) Participating in the Medicare Shared Savings Program issued by both the Federal Trade Commission (FTC) and Department of Justice (DOJ). We have some concerns that we would like to share with you.

Rule of Reason

The FTC/DOJ in their *Statements of Antitrust Enforcement Policy in Health Care (1996)* indicates that there must be an agreement between participants in physician or multiprovider joint ventures to share substantial financial risk. The risk-sharing agreement would help establish both an overall efficiency goal and incentives for the participants to meet that goal.

The question arises of whether a pure shared savings model (as originally envisioned in the Patient Protection and Affordable Care Act) and an ACO based upon strictly on a shared savings model (and not a risk-sharing model) would meet this test.

One test for not running afoul of antitrust issues is achieving cost utilization and quality standards. Therefore, the question is: **If an ACO fails to reduce costs, lower utilization, improve quality, or fails in any of the CMS quality metrics in the ACO rule, would ACOs be subject to post facto review by the FTC or the DOJ?**

Review of Antitrust Safety Zones for Participants Exceeding the 50% Market Share

For ACO participants, the DOJ/FTC statement proposes three levels of antitrust review related to market share in the Primary Service Area (PSA). This proposal puts certain hospitals at higher risk for antitrust issues.

- For an institutional provider, such as a hospital, the basis of analysis will be the major diagnostic categories (MDC). Some hospital ACOs would automatically be subject to extensive antitrust review because they will exceed 50% market share in a particular MDC. This could include an ACO that has only one participating non-exclusive hospital that is a tertiary center that has the only organ transplant program in the area.
- Another example is the only hospital providing certain service in an area because of Certificate of Need (CON) requirements.
- We believe this will be a problem even in the area where there is not high tertiary care development when you have a community with a large hospital and a small hospital. The large hospital will inevitably have 50% market share in most MDC's.

We recommend that the FTC and the DOJ look at the particular facts and circumstances in a given community to determine whether there is in fact an anti-competitive practice arising from participation in the ACO.

We thank you for the opportunity to comment.

Sincerely,

Richard E. Morrison
President

CC: APHA Board and management committee