

American Psychiatric Association

1000 Wilson Boulevard
Suite 1825
Arlington, VA 22209
Telephone 703.907.7300
Fax 703.907.1085
E-mail apa@psych.org
Internet www.psych.org

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May 27, 2011

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

To whom it may concern:

The American Psychiatric Association (APA), the national medical society representing more than 37,000 psychiatric physicians, appreciates the opportunity to submit comments to the Federal Trade Commission and Anti-Trust Division of the Department of Justice on the Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations (ACOs) participating in the Medicare Shared Savings Program. Commentary suggests physicians are more likely to integrate their patients' care by participating in ACOs, if they can also use the ACOs to serve commercially insured patients. In this Proposed Statement of antitrust enforcement for ACOs, the FTC and DOJ state they have created ACO specific antitrust rules to better protect ACO Medicare beneficiaries and commercially insured patients from potential anticompetitive harm. The APA wishes to submit comments on the following facets of the rule.

Rule of Reason Analysis

The APA commends the FTC and DOJ's intention to use "rule of reason" antitrust analysis in evaluating whether the collaborations characterizing specific ACOs are likely to have substantial anticompetitive effects, and if so, whether the benefits of these collaborations outweigh the anticompetitive effects. Under rule of reason analysis, the fact finder must weigh all facts of the case before deciding whether the practice complained of unreasonably restrains competition, thus violating antitrust law. The "per se rule," the alternative legal analysis applied to antitrust legal cases, is generally only appropriate after the fact finder has had enough experience with a particular practice to be able to conclude the practice is characterized by mostly pernicious results and few benefits. Application of the "per se rule"



means a court will condemn a practice as violating antitrust law without taking any arguments into account. The novelty of ACOs combined with the unique facts coloring each individual ACO collaboration merit the FTC and DOJ's use of the more fact specific rule of reason analysis when evaluating specific ACOs' compliance with antitrust law.

Primary Service Area

The APA endorses the American Medical Association's (AMA) comments about the Primary Service Area (PSA) model. The APA believes the FTC and DOJ should replace the PSA model with a more traditional market model that is easier to apply and less costly to the physicians.

Constructing current PSAs requires an ACO to determine which geographically contiguous zip codes represent 75 percent of the ACO participant's Medicare allowed charges. Once the PSAs are constructed, each ACO must determine each of its participant's market shares within each PSA. Compliance with the thresholds in the FTC/DOJ proposed antitrust rule requires an ACO to determine for each Medicare specialty code the number of its physician participants drawing patients from the ACO's PSAs. This does not require actual overlap of the PSAs of two or more ACO participants practicing under the same Medicare specialty code.

The cost of constructing PSAs will be prohibitive, especially for ACOs characterized by lesser physician and/or hospital participation. Larger physician groups may already have the large billing databases conducive to constructing PSAs; smaller physician practices are less likely to have yet invested in this expensive infrastructure. The elevated costs smaller physician groups are likely to incur as they attempt to construct PSAs diminish the luster of ACO participation. The likely effects of the PSA requirement as currently written will likely undermine Congress's intent to encourage the formation of ACOs.

The APA embraces the solutions put forth by the AMA for revising the way PSAs are constructed, so the end result is they are not too laborious or costly to construct.

Safety Zone

The APA supports the FTC and DOJ's creation of a "safety zone" for ACOs that satisfy the criteria of having physician group practices that provide the same service, while having a combined market share of 30 percent or less of each same service in each participant's PSA wherever two or more ACO participants provide that service to patients from that same PSA. The creation of this safety zone reflects the view that ACOs having 30 percent or less of market share are unlikely to raise anticompetitive concerns, thus not warranting the need for an antitrust review. The APA agrees with the FTC and DOJ that ACOs falling outside the safety zone, thus comprising more than 30 percent market share in a

PSA, are not presumptively unlawful. Additionally, the APA supports the FTC and DOJ's decision to have the "safety zone" remain in effect for the duration of an ACO's agreement with CMS, so long as there is not a substantial change in the ACO's provider composition during the three-year ACO contractual period.

Expedited Antitrust Review

Historically, agency reviews of programs proposed by law have been lengthy and laborious. The FTC and DOJ promise a 90 day expedited antitrust review for ASOs deemed to exceed the 50 percent PSA share threshold. The APA encourages the FTC and DOJ to carry out expedited antitrust reviews of ACOs exceeding the 50 percent PSA share threshold. The APA appreciates that when conducting the mandatory review the FTC and DOJ will consider any information or alternative data suggesting the PSA shares may not reflect the ACO's likely market power, as well as also consider any substantial precompetitive justification for why the ACO needs the higher market share to provide high quality, cost-effective care to Medicare beneficiaries and patients in the commercial insurance market. The APA does wonder if there is a way to streamline the document review process. Given all the documents required by the FTC and DOJ for the mandatory review, it will be hard to have a review completed in 90 days or less.

Rural Exception

The APA supports the rural exception to the safety zone rule. Rural areas are often underserved by all types of specialist physicians as well as non-physician health and mental health providers. To encourage specialist physician participation in ACOs, and to foster patients seeking out mental health care from ACOs, it is imperative that there be a rural exception to the FTC/DOJ antitrust ACO rule. As currently written, the rural exception permits an ACO to include one physician per specialty from each rural county on a non-exclusive basis, even if the inclusion of these physicians boosts the ACO's share of any common service above 30 percent within any ACO participant's PSA for that common service. The APA endorses the rural exception as a necessary step to spurring specialist physician participation in ACOs.

Dominant Provider Limitation

The uneven distribution of specialist physicians, particularly in rural areas, means it is likely a physician in a rural area may qualify as a "dominant provider" under the ACO proposed rule. A dominant provider is an ACO participant with a greater than 50 percent share in its PSA of any service that no other ACO participant provides to patients within that PSA. The APA knows of geographic areas in which one psychiatrist provides more than 50 percent of a service within his/her provider service area that would not be provided by any other ACO participants. These specialist physicians should not be penalized for uniquely

providing patients within their PSA access to mental health services not provided by other ACO participants. The APA agrees that “dominant providers” must be non-exclusive to the ACO they serve to fall within the antitrust safety zone.

Review of ACOs Below the 50 Percent Mandatory Review Threshold and Outside the Safety Zone

The APA acknowledges an ACO with market share falling outside the safety zone and below the 50 percent threshold is not presumptively anticompetitive. An ACO in this category does not necessarily impede the functioning of a competitive market. The APA asks that there not be a presumption of anticompetitive market behavior for ACOs falling within this category. Where the FTC and DOJ suspect anticompetitive practices, the APA asks that these agencies be thorough in their review of these ACOs’ practices and employ rule of reason legal analysis. The APA also asks that these agencies provide notice to ACOs suspected of engaging in anticompetitive behavior that details the practices raising concern.

Types of Conduct ACOs Should Avoid

In its proposed antitrust ACO rule, the FTC and DOJ identify five types of conduct an ACO should avoid to significantly reduce the likelihood of undergoing an antitrust investigation. These agencies identify conduct that will facilitate payers’ ability to offer insurance products that distinguish among providers based on cost and quality and ensure an ACO does not facilitate collusion among its participants in their contracts with payers outside the ACO. The APA agrees ACO avoidance of the five types of conduct cited will go a long way in protecting an ACO from engaging in behaviors with the appearance or reality of anticompetitive behavior, thus giving rise to an inquiry by the administering agencies.

Anticompetitive Behavior among ACOs

The APA would like to bring to the FTC and DOJ’s attention the possibility of two ACOs acting in a coordinated and anticompetitive manner. Provisions of the antitrust rule work to ensure ACO participants do not acquire too much market share. In doing so, the proposed FTC/DOJ antitrust ACO rule hopefully will protect individual ACOs from having too much market share and colluding to function as an oligopoly in a given geographic area.

Conclusion

The APA is grateful for the opportunity to have commented on the many provisions of the proposed ACO antitrust rule. The APA asks that the agencies entrusted with implementing

the proposed ACO rules heed the APA's comments as they roll out ACOs beginning January 1, 2012.

Psychiatrists have expressed much concern with the ambiguity of the currently proposed ACO rules, including the general ACO rule and the ACO antitrust rule. Many psychiatrists find the existing ACO proposed rules to be overly ambiguous. The APA asks CMS to rework the existing ACO rules, so they may offer comprehensible guidance to non-lawyers.

Sincerely,

James H. Scully, Jr., M.D.
Medical Director and C.E.O., American Psychiatric Association