



A Passionate Voice for Compassionate Care

May 31, 2011

The Honorable Christine Varney
Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

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

Submitted electronically to <http://ftcpublic.commentworks.com/ftc/acoenforcementpolicy>

Dear Assistant Attorney General Varney and Chairman Leibowitz:

On behalf of the Catholic Health Association of the United States (CHA), the national leadership organization of more than 2,000 Catholic health care sponsors, systems, hospitals, long-term care facilities, and related organizations, I welcome the opportunity to submit comments regarding the Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program published on March 31, 2011 applicable to collaborations among otherwise independent providers and provider groups seeking to participate in the Medicare Shared Savings Program (MSSP) established under section 3022 of the Affordable Care Act.

CHA and its members are committed to transforming the U.S. health care system so that it will serve patients better and more efficiently. In this regard, we view the ACO concept as promising and one that could be fully compatible with our members' mission orientation.

The Honorable Christine Varney
The Honorable Jon Leibowitz
May 31, 2011
Page 2

Rule of Reason Analysis

CHA appreciates that the agencies have attempted to bring a degree of clarity to the antitrust analysis required of collaborations seeking to participate as ACOs under the MSSP and agree with the proposal to review these collaborations under a rule of reason analysis given the structure of the MSSP and close monitoring of participating ACOs by CMS. However, what is absent from the proposed statement is specific guidance on how the rule of reason analysis would be applied to ACOs, especially in the context of formation and clinical integration. Additional guidance is critical to the business and legal analysis prospective collaborations undertake to minimize Federal antitrust risk.

Primary Service Area Analysis

CHA is concerned about the use of the proposed Primary Service Area (PSA) analysis of common services to determine the relative market share of ACO applicants. The requirement for the calculation of each common service provided by ACO participants (institutional providers, group practices, or individual practitioners) within the respective participant's PSA will be overly burdensome, especially for individual physicians or small group physician practices, and will be a costly undertaking for applicants which may deter the very types of collaborations sought under the MSSP. The requirement for the lowest number of contiguous zip codes among various ACO providers and suppliers in determining PSAs is unnecessarily complex. CHA encourages the agencies to adopt a less restrictive area analysis, such as an MSA analysis or, if the agencies retain the PSA model, the requirement for contiguous postal codes should be eliminated. CHA also requests clarification on the treatment of non-Medicare services included in the ACO under the analysis.

The analysis as applied to rural areas is also problematic. While the exception provided for under the safety zone treatment for rural physicians and sole community and critical access hospitals indicates some understanding of the nature of the rural health care market, it does not sufficiently address concerns of ACOs seeking to furnish services to Medicare beneficiaries in these areas. For example, the requirement that only one physician per specialty may qualify under the exception will not likely afford an ACO the pool of knowledge it requires to successfully furnish health care services to those beneficiaries in the area involved. The proposed statement should permit greater numbers of providers under the exception if the providers are nonexclusive.

Expedited Review

CHA appreciates that the agencies have committed to providing an expedited review process for applications that exceed certain market share thresholds; however both the short period for review and the low trigger for mandatory review are problematic. Of chief concern is that it only requires one PSA common service to exceed the 50 percent threshold for mandatory review among all of a prospective ACO's PSA common services, the rest of which could all be

The Honorable Christine Varney
The Honorable Jon Leibowitz
May 31, 2011
Page 3

substantially lower, and that one PSA common service exceeding the threshold could be for a non-Medicare specialty. The proposed statement requires an enormous amount of documentation to be submitted to the agencies—a good portion of which appears supplementary to that submitted to CMS in the MSSP ACO application.

CHA is also concerned that the proposed 90-day review period is insufficient to afford staff of the Federal Trade Commission or the Department of Justice conducting the review adequate time to perform the careful analysis to determine whether any potential anticompetitive effects exists and whether the procompetitive features outweigh those effects. It may force staff to come to a decision too rapidly which could result in an inappropriately stringent or lenient analysis of the impact of the proposed collaboration. The agencies could consider permitting an ACO applicant to request additional time as part of the review process.

CHA believes that safety zone treatment of 30 percent or less should be increased to not less than 35 percent which is consistent with guidelines addressing network exclusivity for providers in the private market. Further, safety zone treatment under the proposed statement should not preclude exclusive arrangements as exclusivity may well make an ACO more efficient in meeting various requirements under the MSSP, including quality reporting and health information technology.

CHA notes that there is currently uncertainty and inconsistency with respect to the various thresholds of market share that apply to collaborations of providers and practitioners under different antitrust analyses applied in the private sector and as proposed to be applied to ACOs and ACO participants, providers and suppliers under the MSSP. CHA encourages the agencies to develop and apply the same thresholds for antitrust review for similar collaborations under the same rule of reason across the public and private health care sectors.

We hope the preceding comments are helpful. If you have any questions about these comments or need more information, please do not hesitate to contact me or Kathy Curran, Senior Director Public Policy, at 202-721-6300.

Sincerely,

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Lisa J. Gilden
Vice President, General Counsel