May 31, 2011

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

RE: Matter V100017 – Proposed Statement of Antitrust Enforcement Policy Regarding ACOs Participating in the Medicare Shared Savings Program (76 Fed.Reg. 21894, April 19, 2011)

To Whom It May Concern:

The American Association of Nurse Anesthetists (AANA) welcomes the opportunity to comment on this Proposed Statement of Antitrust Enforcement Policy Regarding ACOs Participating in the Medicare Shared Savings Program (76 Fed. Reg. 21894, April 19, 2011) issued by the Federal Trade Commission (FTC) and the Department of Justice (DOJ).

As the FTC and the DOJ found through extensive hearings nearly a decade ago[1], and the Institute of Medicine documented in a landmark report issued within the past few months[2], patient access to high-quality, cost-effective healthcare is often put directly at risk by collusive, anticompetitive initiatives that constrain the practice of Certified Registered Nurse Anesthetists (CRNAs) and other advanced practice registered nurses (APRNs). While we support the development and deployment of coordinated care models that advance healthcare quality and reduce costs, we also must keep the agencies mindful that prohibited collusion and anticompetitive behavior constrains patient choice and increases healthcare costs. In light of this risk, the AANA requests that the FTC/DOJ policy statement be periodically reevaluated after a set time frame to ensure that it is meeting goals consistent with promotion of a robust, competitive and fair marketplace where innovations may expand patient access to cost-effective care and improve its quality.

[1] Department of Justice and Federal Trade Commission. Improving Health Care: A Dose of Competition (Washington, DC: July 2004), available at: http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[2] Institute of Medicine. The Further of Nursing: Leading Change, Advancing Health (Washington, DC: The National Academies Press, 2011).

Background of the AANA and CRNAs

The AANA is the professional association for more than 42,000 CRNAs and student nurse anesthetists representing over 90 percent of the nurse anesthetists in the United States. CRNAs are advanced practice nurses who personally administer about 32 million anesthetics given to patients each year in the United States, according to the 2009 AANA Practice Profile Survey. Nurse anesthetists have provided anesthesia in the U.S. for nearly 150 years, and high quality, cost effective CRNA services continue to be in high demand. CRNAs are Medicare Part B providers and since 1989, have billed Medicare directly for 100 percent of the physician fee schedule amount for services.

CRNA services include administering the anesthetic, monitoring and interpreting the patient's vital signs, and managing the patient throughout the surgery. CRNAs also provide acute and chronic pain management services. CRNAs provide anesthesia for a wide variety of surgical cases and in some states are the sole anesthesia providers in nearly 100 percent of rural hospitals, affording these medical facilities obstetrical, surgical, trauma stabilization, and pain management capabilities. According to a May/June 2010 study published in the journal of *Nursing Economic$*, CRNAs acting as the sole anesthesia provider are the most cost-effective model for anesthesia delivery, and there is no measurable difference in the quality of care between CRNAs and other anesthesia providers or by anesthesia delivery model.[3] Furthermore, an August 2010 study published in *Health Affairs* shows no differences in patient outcomes when anesthesia services are offered by CRNAs, physicians, or CRNAs supervised by physicians.[4]

According to a 2007 Government Accountability Office (GAO) study, CRNAs are the predominant anesthesia provider where there are more Medicare beneficiaries and where the gap

[3] Paul F. Hogan et. al, "Cost Effectiveness Analysis of Anesthesia Providers." *Nursing Economic$.* 2010; 28:159-169.

[4] B. Dulisse and J. Cromwell, "No Harm Found When Nurse Anesthetists Work Without Physician Supervision." *Health Affairs*. 2010; 29: 1469-1475.

between Medicare and private pay is less.[5] Nurse anesthesia predominates in Veterans Hospitals and in the U.S. Armed Forces. CRNAs work in every setting in which anesthesia is delivered including hospital surgical suites and obstetrical delivery rooms, ambulatory surgical centers (ASCs), pain management facilities and the offices of dentists, podiatrists, and all varieties of specialty surgeons.

AANA Request: FTC and DOJ Should Reevaluate the Proposed Policy Statement for Appropriateness After A Set Time Frame to Ensure that Policy is Meeting Goals

The AANA applauds both the FTC and the DOJ for this proposed statement of antitrust enforcement policy regarding ACOs participating in the Medicare Shared Savings Program. The dangers of anticompetitive practices and collusion, which include increasing health care costs and diminishing quality of care and patient choice, are well established. In the early 2000s, the FTC and DOJ conducted two years of hearings on healthcare and antitrust, yielding a landmark joint report entitled *Improving Health Care: A Dose of Competition.*[6] More recently, the Institute of Medicine (IOM) report entitled *The Future of Nursing: Leading Change, Advancing Health*[7] specifically recommended that the FTC examine how anticompetitive acts, such as limiting APRNs like CRNAs from providing care to the fullest extent of their education and skill, reduce patient choice and increase healthcare costs without improving quality.

For example:

- According to the FTC and DOJ, "…anticompetitive conduct that raises prices, even if it is done in the name of improving 'quality,' is likely to have a systemic adverse effect on the quality of care actually provided to the population as a whole. In a competitive market, consumers consider various dimensions of quality and price. Competition law exists to promote and enhance consumer choice along all of these dimensions."[8]

---

[5] U.S. Government Accountability Office (GAO). Medicare Physician Payments: Medicare and Private Payment Differences for Anesthesia Services. Report to Subcommittee on Health, Committee on Ways and Means, U.S. House of Representatives. GAO-07-463. July 2007;15. http://www.gao.gov/new.items/d07463.pdf

[6] Department of Justice and Federal Trade Commission op. cit..

[7] Institute of Medicine op. cit.

[8] Department of Justice and Federal Trade Commission, op. cit., Chapter 1, p. 30.

- According to one of the supplementary papers in the IOM report, "The Federal Trade Commission should be charged with actively monitoring proposed state laws and regulations specifically applicable to retail or convenient care clinics (or other innovative delivery mechanisms utilizing APNs) to assure that impermissible anti-competitive measures are not enacted. The need for such monitoring is confirmed by the recent FTC evaluations of proposals in Massachusetts and Illinois and Kentucky, which revealed that several such provisions (including limitations on advertising, differential cost-sharing, more stringent physician supervision requirements, restrictions on clinic locations and physical configurations or proximity to other commercial ventures, and limitations on the scope of professional services that can be provided which do not apply to the same credentialed professionals in comparable limited care settings) could be considered anti-competitive."[9]

AANA supports the FTC and DOJ ensuring that ACOs have an opportunity to achieve substantial efficiencies while at the same time ensuring that patients are protected against harm from prohibited anticompetitive collusion. While we appreciate the efforts of both agencies, are the safety zones and other safeguards introduced in the agencies' policy sufficient? More to the point for the nurse anesthesia profession, without either a final rule circumscribing the ACO innovation and its shared savings incentives, or a basis of market experience implementing such ACOs, the effects of the agencies' proposal upon patient access to safe, high-quality and cost-efficient CRNA care are impossible to reliably anticipate. Therefore, the AANA recommends that the FTC/DOJ policy statement be reevaluated each six months after the policy is in force to examine if it has guarded against illegal and anticompetitive collusion while promoting coordinated, cost-effective healthcare delivery through ACOs. The evaluations should consider whether consumers and providers have lodged complaints regarding potential antitrust violations in the healthcare marketplace as a result of the establishment of an ACO.

[9] Barbara J. Safriet, "Federal Options for Maximizing the Value of Advanced Practice Nurses in Providing Quality, Cost Effective Health Care," in Institute of Medicine. The Further of Nursing: Leading Change, Advancing Health (Washington, DC: The National Academies Press, 2011) p. H-24.

We thank you for the opportunity to comment on the proposed statement. Should you have any questions regarding these matters, please feel free to contact the AANA Senior Director of Federal Government Affairs, Frank Purcell, at 202.484.8400, fpurcell@aanadc.com.

Sincerely,

Paul Santoro, CRNA, MS
AANA President

cc: Wanda O. Wilson, CRNA, PhD, AANA Executive Director
Frank J. Purcell, AANA Senior Director of Federal Government Affairs
Romy Gelb-Zimmer, MPP, AANA Associate Director Federal Regulatory and Payment Policy