



AMERICAN ACADEMY OF
FAMILY PHYSICIANS
STRONG MEDICINE FOR AMERICA

May 25, 2011

Jon Leibowitz
Chairman
Federal Trade Commission
Room H-113 (Annex W)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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

Dear Chairman Leibowitz and Attorney General Holder:

On behalf of the American Academy of Family Physicians (AAFP), which represents more than 100,300 family physicians and medical students nationwide, I am responding to the notice with comment period for the *Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations (ACO) Participating in the Medicare Shared Savings Program* as published in the April 19 Federal Register. The AAFP appreciates the Federal Trade Commission (FTC) and Department of Justice (DOJ) for proactively working together to ease antitrust challenges that medical practices currently face as they contemplate forming an ACO.

The AAFP is a longstanding supporter of legislative and regulatory efforts that allow physicians to engage in collective bargaining to improve the ability of physicians to negotiate with insurance and managed care companies so that they can become stronger patient advocates. We also support efforts that improve the quality and efficiency of care and the AAFP believes properly structured ACOs have the potential to help make the delivery system more accountable and more focused on value instead of volume. Our recently sent comment [letter](#) to the Centers for Medicare & Medicaid Services specifies our reservations with the proposed Medicare ACO program. Despite our concerns with the Medicare ACO program as proposed, it is the AAFP's position that antitrust laws should not create barriers that inhibit clinical integration.

Physicians are presently at a critical disadvantage when negotiating for better pricing and payments without risking sanctions under current federal antitrust enforcement policies. Current regulatory barriers to physician collaboration combined with "take it or leave it" contracts from payers often hamper the delivery of quality primary care by limiting the number of in-network primary care physicians. The AAFP believes that holding the insurance industry to the same standard as other industries may promote genuine competition and improve the nation's healthcare system. We encourage efforts that enable primary care physicians' to contract with all insurers on level playing fields. Further, the unique circumstances of smaller or rural

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practices must be taken into consideration when formulating policies that may ultimately prevent them from participating in healthcare delivery reform.

The AAFP concurs with the implicit assumption within the proposed statement that healthcare providers are more likely to integrate their care delivery systems for Medicare beneficiaries through ACOs if they can also use the ACOs for commercially insured patients. Furthermore, we recognize the need to waive certain antitrust enforcement in order to properly test innovative payment models eventually offered through the Center for Medicare and Medicaid Innovation.

ACOs remain subject to a "rule of reason" analysis that relies on calculations of the ACO participants' share of their Primary Service Areas (PSA), defined as "the lowest number of contiguous postal zip codes from which the [ACO participant] draws at least 75 percent of its [patients]" for that service. The ACO will be assessed for potential anticompetitive impact based on the entity's share of services in each ACO participant's PSA. If an entity has a high PSA share, the greater the anticompetitive concerns become. The AAFP agrees with the FTC and DOJ proposal to examine potential ACOs utilizing the more flexible "rule of reason" analysis instead of the currently used and outmoded "per se" clause. The "rule of reason" analysis is more appropriate and will allow reviewing agencies to evaluate on a case by case basis whether collaboration is likely to have substantial anti-competitive effects and, if so, whether the collaboration's potential pro-competitive efficiencies are likely to outweigh those effects.

The AAFP also generally concurs with the proposal to create "safety zones" so that detailed and specific analyses are not required for all areas. As proposed, these "safety zones" are for ACO participants, such as physician group practices, that provide the same "common service" and have a combined share of 30% or less of each common service in each participant's PSA. Though appreciated, we urge the FTC and the DOJ to offer greater details and more expansive definitions surrounding the safety zone policies. All medical practices interested in the ACO program will likely pursue a formal antitrust review and wait for an approved FTC or DOJ letter stating the reviewing agency has no intent to challenge the ACO under the antitrust laws unless the final antitrust enforcement policy contains greater specifics on safety zones. Doing so will provide physicians with greater confidence as they pursue innovative arrangements.

Prompt guidance from the FTC is always important to promote proper business integration, but for ACOs to be functional within 2012, prompt guidance is not only important, but essential. The AAFP therefore appreciates that the FTC included an expedited 90-day review process. The AAFP believes prospective ACOs will likely wait for the FTC to render a formal decision before the entity takes further steps toward completing the Medicare ACO application process.

However, the AAFP has concerns with the proposed antitrust policy. We are worried that the policy only applies to groups newly integrating after March 23, 2010, which is the date the *Affordable Care Act* was signed into law. This limitation will not assist physician groups that were already collaborating and that now wish to apply to become a Medicare ACO. We are also concerned that the "rule of reason" analysis only applies to the three year Medicare ACO program period. Groups that form a successful ACO will likely wish to permanently operate in this clinically integrated manner. We urge the FTC and the DOJ to think outside of the Medicare ACO timeframe and apply these revised antitrust enforcement policies on a broader scale.

We appreciate the opportunity to provide these comments and make ourselves available for any questions you might have or clarifications you might need. Please contact Robert Bennett, Federal Regulatory Manager, at 202-232-9033 or rbennett@aaafp.org.

Sincerely,

Lori J. Heim, MD, FAAFP
Board Chair