NATIONAL ASSOCIATION OF LONG TERM HOSPITALS
NALTH

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May 27, 2011

Ms. Christine Varney
Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Mr. Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

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

Dear Assistant Attorney General Varney and Commissioner Leibowitz:

The National Association of Long Term Hospitals ("NALTH") welcomes the opportunity to submit these comments on the "Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program" published on April 19, 2011 in 76 *Fed. Reg.* 21894 *et seq.* (hereafter referred to as the "Statement"). NALTH is committed to research, education and public policy development, which further the interests of the very ill (and often, debilitated) patient populations that receive services in long-term care hospitals ("LTCHs") throughout the nation.

NALTH's membership is composed of the nation's leading LTCHs, which serve approximately one-third of the Medicare beneficiaries who are admitted to LTCHs in the United States. The membership of NALTH is diverse. It represents not-for-profit and for-profit urban LTCHs with Medicare-approved teaching programs, LTCHs located in underserved rural areas, LTCHs which are owned and operated by large integrated health care systems throughout the United States, and publicly-owned LTCHs. As such NALTH is concerned with promoting access to quality cost effective care throughout the spectrum of acute and post-acute care medical providers.

NALTH's comments are directed at post-acute care providers that provide inpatient and outpatient services, including LTCHs, Inpatient Rehabilitation Facilities (IRFs), and Skilled Nursing Facilities (SNFs). NALTH is concerned about the potential for ACOs to cause a reduction of competition among post-acute care providers, such as providers of LTCH services, and the potential harm to Medicare beneficiaries, if there is reduced competition which could lead to lower quality of care. NALTH reads the term "ACO participant" as identifying a subsection (d) acute care hospital under Section 1886(d) of the Social Security Act and the primary care physician groups which are eligible to establish Accountable Care Organizations (ACOs). The term does not appear to encompass the broad range of post-acute care provider types and other suppliers which are envisioned to contract with ACOs. It is important for the Department of Justice and the Federal Trade Commission to conduct an antitrust analysis to implement safeguards for post-acute care providers, including LTCHs, IRFs, and SNFs, which are eligible to contract with ACOs.

The Statement proposes a new formula to determine the shares of each prospective ACO participant in its "Primary Service Area" (PSA), where shares must be calculated for each "common service" to be provided by each participating hospital and physician (or physician group) within each participant's PSA. "PSA" is 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.'" *See* 76 *Fed. Reg.* 21897, and footnote 27. The "common service" list in the Appendix is applicable to the types of services provided by subsection (d) acute care hospitals and physicians, but is not applicable to post-acute care hospitals such as LTCHs, which have a lower number of DRGs for which they provide services than acute care hospitals. Accordingly, as noted above, NALTH is concerned that the Statement contains no provision for an antitrust analysis or safeguards to address competitive concerns related to post-acute care service providers, such as LTCHs, IRFs, and SNFs. If a post-acute care provider contracts to provide services to an ACO, the ACO has an incentive to send the post-acute care provider all of its cases. Contracting with the ACO, in and of itself, has a high potential to increase a particular post-acute care provider's market share. Post-acute care services, such as LTCH services, may represent a small percentage of the ACO's total common services. However, a particular post-acute care provider, such as an LTCH, which contracts with an ACO may dominate the market for inpatient and outpatient LTCH services.

NALTH recommends that the agencies perform a market share assessment for post-acute care services, such as LTCH services, to determine whether any prospective ACO or prospective ACO provider/supplier entering into a contract with an ACO has 50% or more of the market share of post-acute care services. Instead of examining MDCs, the test should examine the volume of patients the ACO post-acute care provider receives. Any Medicare ACO applicant which receives 50% or more of the volume for post-acute care services, such as LTCH services, should be subject to mandatory antitrust review by the Department of Justice or the Federal Trade Commission. Furthermore, the market share assessment and mandatory antitrust review should not be limited to prospective Medicare ACO applicants but should be conducted on an annual basis for existing Medicare ACOs and their providers/suppliers.

NALTH agrees with the creation of an antitrust safety zone for ACOs in the Shared Savings Program, including the proposed rural exception and the proposed dominant provider limitation. These exceptions to the 50 percent PSA threshold test are important for rural provider participants and provider participants located in small urban areas.

NALTH thanks you and the professional staff of the Department of Justice and the Federal Trade Commission for your attention to these comments. Should you have any questions concerning these comments please contact the undersigned.

Sincerely,

Edward D. Kalman
General Counsel