I. INTRODUCTION

The Joint Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations participating in the Medicare Shared Savings Program (the "Proposed Statement") was released by the Department of Justice, Antitrust Division, and the Federal Trade Commission on March 31, 2011. As its name suggests, the Proposed Statement applies to medical practices that collaborate and combine in order to qualify as Accountable Care Organizations ("ACOs"). Under the Patient Protection and Affordable Care Act of 2010 ("PPACA"), hospitals and free standing practices that combine to form qualified ACOs are entitled to increased Medicare reimbursement in the form of savings achieved through the more efficient rendering of medical services to Medicare patients.

To participate in the Share Savings Program under PPACA, however, certain ACOs will have to seek antitrust clearance from the FTC/DOJ. The Proposed Statement identifies those practices that must, may, and do not need to seek such antitrust clearance.

The Proposed Statement, utilizes a market share "screen" -- one which essentially relies on an ACO's share of particularized medical services to Medicare populations in the ACOs primary geographic region -- to identify those ACOs that must and need not seek antitrust clearance. Here, we suggest that the market share screen set forth in the Proposed Statement does not accurately identify those proposed ACOs that will most likely cause concerns under the antitrust laws. In other words, we argue that these screens do not presumptively identify which practices are most likely able to exercise market power over, and thus cause harm to, patient/subscribers of *commercial insurance plans*. Accordingly, as the purpose of the ACO antitrust reviews is to protect commercially-insured patients, we contend that the screen suggested by the DOJ/FTC in the Proposed Statement is imprecise. We thus suggest an

alternative screen for the agencies to consider as a proxy for identifying whether a proposed ACO should be required to file for antitrust clearance with the DOJ/FTC.

II. THE PURPOSE OF THE ACO ANTITRUST REVIEW

The purpose of subjecting a proposed ACO to an antitrust review is to ensure that it cannot exercise market power over commercial insurance plans to the detriment of physician competitors and consumers. The FTC/DOJ will undertake this review because, as stated in the Proposed Statement, "health care providers are more likely to integrate their care delivery for Medicare beneficiaries through ACOs for commercially insured patients." ACOs cannot, by definition, wield power over Medicare patients, as they are required to treat patients covered by Medicare by law, and as Medicare is an enormously powerful single payer sponsored by the federal government. No provider has the market clout to force Medicare to do anything.

ACOs that, via the combination of their medical practice members, become dominant in the rendering of particular medical services in given locales will have incentives to force commercial insurers to accede to their will or otherwise forego the medical services that they would render to the subscribers of the insurance plans. Specifically, such ACOs will have the incentive to use their market weight to demand higher reimbursement from commercial insurers. Such higher reimbursement would likely then be passed on to consumers in the form of higher insurance premiums.

Dominant ACOs will also likely seek to force commercial insurers to exclude competitors of the physicians/hospitals in the ACO from participcation in the insurance plan. This will ensure that commercially-insured patients are limited in their choice of providers, potentially reducing the quality of medical care offered to such subscribers, as well as patient access to innovative medical treatments. As stated in the Proposed Statement, "The Agencies

recognize that . . . under certain conditions, ACOs could reduce competition and harm consumers through higher prices or lower quality of care."

Thus, to reduce the likelihood that proposed ACOs will be able to exercise market power over commercial insurers, the FTC/DOJ are charged with clearing ACOs before they can participate in the Shared Savings Program.

III. THE MARKET SHARE SCREEN PRPOSED BY DOJ/FTC

As discussed, the Proposed Statement relies upon a market share screen to determine whether a proposed ACO should/should not file for antitrust clearance. The Proposed Statement utilizes such a screen because it is recognized under both antitrust law and well-established economic principles that market share can indirectly evidence the ability of given entities to exercise market power.

Specifically, the FTC/DOJ have suggested the following market share screens in the Proposed Statement to identify the proposed ACOs that must seek, may seek, and need not seek antitrust clearance. These screen attempt to place an antitrust filing requirement only on those ACOs that most likely could negatively impact competition. According to these screen:

- If a proposed ACO has *less than* a 30% share of "common service" in a given geographic area, it falls within a "safe harbor," and thus, need not apply for clearance to participate in the Shared Savings Program. A "common service" is defined as medical services (categorized by the Center for Medicare Services) that are supplied by individual medical practices in the ACO which are the "same" as services provided by others.

- If a proposed ACO has *more than* a 50% share of a "common service" in a given geographic area, it *must* file for antitrust clearance. The FTC/DOJ will then complete a 90-day expedited antitrust service of the filing ACO. If the FTC/DOJ concludes, upon completion of that service that it has "no present intent to challenge or recommend challenging the ACO," the ACO can then participate in the Shared Savings Program.

- If the ACO has less than a 50%, but more than a 30% share of a common service in a given geographic area, it may apply for antitrust clearance. If it does so, the given ACO will not be able to participate in the Shared Savings Program until antitrust clearance is achieved.

Market share, of course, can be measured in various ways. How one measures share is a function of the specific market that may be comprised by antitcompetitive conduct. For example, one will not look at market shares of brand produces of a given transaction of milk sellers would potentially raise price to purchasers of milk. The Proposed Statement calculates the market share thresholds referenced above by looking at the percentage of Medicare medical services rendered to patients (based on charges and payment data) that the individual participants in an ACO rendered in their geographic service areas. It does not measure share by reviewing the percentage of medical services to commercially-insurers that the ACO rendered in their geographic service areas.

IV. THE MORE APPROPRIATE MARKET SHARE SCREEN

Because the principle concern motivating the antitrust clearance process is to assure that proposed ACOs will not be able to cause harm to commercially-insured patients, any screen employed to identify ACOs that must necessarily _____ antitrust clearance should be based on the market are share of medical services to commercially-insured patients in the ACO's service area. This becomes particularly clear when we consider that the share of medical service that a given practice supplies to commercially-insured patients can be very different from the percentage of services that it provides to Medicare patients.

For example, in recent enforcement actions, the DOJ and FTC have each looked to the share of services supplied by medical providers to commercially-insured patients -- not to Medicare patients -- in assessing whether the providers wielded power over commercially-insured plans. In *United States v. United Regional* -- a Section 2 case brought by the DOJ earlier

this year -- the DOJ found that the defendant hospital wielded market power over insurers because its "share of inpatient hospital services sold to commercial insurers [was] approximately 90% "based on admissions." Cmplt. ¶ 39. It also found that this defendant hospital wielded power because "its share of outpatient surgical services sold to commercial health insurers is more than 65% (based on)." Cmplt. ¶ 41.

The FTC, on April 20, 2011, challenged a merger on Section 7 grounds, finding that the transaction would cause a likely substantial lessening of competition in Albany, Georgia. To measure the likely market power that the defendants would wield as a result of the merger, the FTC . . ."

In a case that we tried entitled *Stand Up MRI et al. v. CareCore National et al.*, we used information on the lives covered by commercial insurers to prove that the defendant radiology benefit manager impacted competition in the market for commercially-insured outpatient radiology services.

The jury in this matter found that the defendants, which facilitated the action of a cartel of radiologists in New York that excluded competition from large health plans, was liable under Section 1. It awarded roughly $35 million (post-trebling) to the plaintiffs in damages.

V. CONCLUSION