



1080 Montreal Avenue
St. Paul, Minnesota 55116

Tel: (651) 695-1940
Fax: (651) 695-2791

www.aan.com

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May 31, 2011

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

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

Dear Secretary Clark:

The American Academy of Neurology (AAN) is the premier national medical specialty society for neurology, representing 24,000 neurologists and neuroscience professionals, and is dedicated to promoting the highest quality patient-centered neurologic care. A neurologist is a doctor with specialized training in diagnosing, treating, and managing disorders of the brain and nervous system such as Alzheimer's disease, stroke, migraine, multiple sclerosis, brain injury, Parkinson's disease, and epilepsy.

The Academy appreciates the opportunity to provide comments to the Federal Trade Commission (FTC) and the Department of Justice (DOJ) on the proposed joint statement on antitrust enforcement policy regarding accountable care organizations (ACO). Our comments here are provided in tandem with comments we will provide on the Centers for Medicare and Medicaid Services' (CMS) proposed rule on the Medicare Shared Savings Program. The Academy is hopeful that policies are adopted that provide the antitrust clarity and guidance needed for neurologists to participate in forming ACOs and that result in the quality improvement and reduction in health care costs as envisioned by Congress.

The AAN supports the FTC and DOJ proposed policy in applying the rule of reason to ACOs, establishing the concept of an antitrust safety zone with respect to market power, and providing an expedited review process for ACOs seeking FTC/DOJ approval.

The Academy has concerns regarding several aspects of the proposed policy. A substantial percentage of all neurologists care for patients in solo or small practices, creating significant disadvantages for many neurologists in the formation stage of an ACO due to their limited market power in considering clinical integration alternatives. The Academy is also concerned that the proposed policy will result in significant cost burdens being placed on neurologists that will have a chilling effect on their decision to participate in an ACO.

In summary, the AAN is concerned with 1) cost issues associated with the Primary Service Area (PSA) methodology which will deter neurologists, especially those in solo or small practices, from participating in an ACO; and 2) the possibility that neurologists may not be able to exert an equal amount of influence in the control and management of ACO arrangements as compared to other physicians.

PSA Methodology

In order to fall into one of the antitrust safety zones to determine if an ACO would be required to seek antitrust review, every ACO would have to identify PSAs for its participating physicians and calculate market share that each participant has in its PSA. An ACO whose participants have a market share of 30% or less in each of the ACO's PSAs is deemed not to raise any antitrust concerns. A 50% threshold will trigger a mandatory antitrust agency review. The Academy is concerned that the zip code analysis required for the PSA model will impose significant costs on participants forming ACOs, particularly for those participants in solo or small physician practices. Commentary from an FTC ACO workshop noted that it may cost between \$15,000 and \$20,000 per ACO to determine its PSA. An ACO would have to determine the percentage of its patients that came from each zip code, determine the smallest number of those zip codes that would add up to 75% of the ACO's patients, and determine which zip codes would be contiguous to that 75% block.

While the AAN appreciates that using the PSA as a surrogate for market power is more expedient than traditional antitrust analysis, the AAN recommends that CMS, which holds all the relevant data, calculate the PSA scores for ACO participants. In order to incent all forms of physician practices to join and/or form an ACO, the costs associated with the PSA process should be minimized to the extent possible.

Potential Dominance of ACO Governance

All physicians contribute to the cost of healthcare and are responsible for safe and quality care and as such all physicians and specialties are equally important to achieving these goals. Consequently, the FTC and DOJ should be aware of the possibility that neurologists may find themselves on the outside when negotiating for a fair share of the savings. As envisioned in the CMS proposed rule on the Medicare Shared Savings Program, the quality measures would be disproportionately satisfied by only four types of physicians. However as previously noted, all physicians acting in tandem are necessary to achieve the care coordination that will likely lead to higher quality care delivered at a lower cost.

The Academy agrees with the premise of the joint statement that ACOs are likely to be bona fide arrangements intended to improve the quality and reduce the costs of providing health care through their collaborative efforts. Nevertheless, the Academy is concerned that neurologists, as participants in the formation of any ACO, may not garner a significantly large importance in the governance and operations of the ACO and that other providers could obtain disproportionate control over the management of the ACO and the subsequent distribution of shared savings. In addition to further assurances by CMS of an equitable distribution of shared savings not based solely on compliance and reporting of quality measures, the Academy encourages the FTC and DOJ to consider guidance that would limit the ability of any group of physicians to join together to control ACO formation and operations in a manner inconsistent with the primary purpose of ACOs to improve health care services.

Thank you for your attention to the comments listed above. Should you have questions or require

further information, please contact Mark Pascu, AAN Manager Regulatory Affairs at mpascu@aan.com or at 202-525-2018.

Sincerely,

Bruce Sigsbee, MD, FAAN
President
American Academy of Neurology