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May 31, 2011  
Attention:

Donald S. Clark,  
Secretary  
Federal Trade Commission

And

Sharis A. Pozen,  
Chief of Staff and Deputy Assistant Attorney General.  
Department of Justice

The Marshfield Clinic respectfully submits these comments in connection with the "Proposed Statement of Antitrust Enforcement Policy Regarding ACOs Participating in the Medicare Shared Savings Program, Matter V100017."

Marshfield Clinic (the "Clinic") is a large private group medical practice in Wisconsin. It is one of only a few large independent not-for-profit, tax-exempt medical clinics in the United States. The Clinic is engaged in providing quality health care, health care education, and medical research. The Clinic owns a small critical access hospital and a small rural hospital and operates outpatient clinical, educational, and research facilities with its main clinical facilities and administrative offices located in Marshfield, Wisconsin. The Clinic currently employs more than 779 physicians and 6500 additional staff. The Clinic has 55 regional centers in addition to the Marshfield location and operates in 37 Wisconsin communities throughout Central, Western, and Northern Wisconsin, which is a predominantly rural area. Marshfield Clinic has developed and acquired sophisticated tools, technology, and other resources that complement and support the population health management mission and strategy of the Clinic. These include an electronic medical record, a data warehouse, an immunization registry, and an epidemiological database that enable enhanced definitions of disease states, diagnoses or conditions, and cost analysis of CPT level interventions. Marshfield Clinic's 56 regional centers are linked by common information systems. With this infrastructure, the Clinic is presently publicly reporting clinical outcomes, and providing physicians and staff quality improvement tools to analyze their clinical and business processes, eliminate waste and unnecessary redundancies, and improve consistency while simultaneously reducing unnecessary costs. Marshfield Clinic is unique in that it has developed its own electronic health records and ancillary reporting systems over the last thirty years. The system, called CattailsMD, was the first internally-developed system to gain CCHIT certification.

### **Anti-Trust Policy Statement**

The FTC/DOJ guidance for ACO entities with a 30% to 50% market share for a service raises a number of questions for such entities, as well as those ACO's that may possess market share for a particular service(s) in excess of 50%. Marshfield Clinic is aware that a number of anti-trust experts

intend to share their insights on the FTC/DOJ Policy Statement and therefore will limit its comments to the following.

- If an ACO with a service market share of 30 to 50% elects not to apply for anti-trust review, the FTC/DOJ guidance indicated a potential concern with an ACO restricting a payor's ability to share cost, quality, efficiency, and performance information with enrollees. We believe the guidance should clearly state that the FTC/DOJ do not desire to restrict the existing rights of providers to prior review, appeal and, if necessary, legal recourse regarding objective accuracy of a payor's information. The ability to ensure accuracy and objectivity of cost, quality, and performance data is critical not only for providers, but also Medicare and commercial insurance subscribers, who would be placed at risk if subjected to inaccurate information.
- Even with CMS providing some data, the data analysis required to determine the "Primary Service Area" for every common service, as specified by the FTC/DOJ, will require a significant investment of time, resources, and finances.
- The Shared Savings Program relates to Medicare, while the FTC/DOJ Policy Statement is concerned with provider activity that would potentially impact the commercial healthcare market. In many instances, an ACO's Medicare market share may vary significantly from that of its commercial market share. For example, an ACO may possess a Medicare market share of 50% for a common service while its commercial market share for the same service could be less than 30%. Therefore, given the FTC/DOJ anti-trust concerns relate to an ACO's potential impact on the commercial marketplace, is the emphasis on Medicare market share misplaced?

We look forward to working with you and other federal policymakers on this matter for improving the current proposed rules and guidelines regarding the Shared Savings Program. I can be reached at (715) 387-5763; please do not hesitate to contact me, if there is any way that we can assist you.

Sincerely,

DOUGLAS J. REDING, MD, MPH, FACP  
Vice President  
Chairman, Government Relations