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AdvaMed
Advanced Medical Technology Association

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Submitted via mail and electronically

Federal Trade Commission
Office of the Secretary
Room H–113 (Annex W)
600 Pennsylvania Avenue, NW
Washington, DC 20580
https://ftcpublic.commentworks.com/ftc/acoenforcementpolicy/

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

To whom it may concern:

I am writing on behalf of the Advanced Medical Technology Association (AdvaMed) in response to the notice with comment period from the Federal Trade Commission and the Antitrust Division of the Department of Justice (collectively, the "Agencies) on the "Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program."[1] AdvaMed appreciates the opportunity to comment on this proposed statement.

AdvaMed member companies produce the medical devices, diagnostic products and health information systems that are transforming health care through earlier disease detection, less invasive procedures, and more effective treatments. These products and services improve patient care quality and many improve efficiency by reducing the lengths of stay, allowing procedures to be performed in less intensive and less costly settings, providing early detection of disease and infections, improving the ability of providers to monitor care, and other benefits. AdvaMed members range from the largest to the smallest medical technology innovators and companies.

AdvaMed appreciates the complexity of developing the new Medicare Shared Savings Program and supports the goals of increasing the quality of care and efficiency in health

[1] 76 Fed. Reg. 21894 (April 18, 2011).

care delivery. However, AdvaMed continues to be concerned about the overall market power that an ACO may wield, to the detriment of competitive forces in the health care marketplace. Excess market power often has a negative impact on patient care, resulting in patients having little or no choice in the health care services and items available. AdvaMed appreciates the overarching framework of guidance set forth in the proposed statement of antitrust enforcement policy as a very significant step toward addressing concerns about excess market power. We have comments, however, in the following three areas: (I) the scope of antitrust enforcement; (II) the threshold for the safety zone; and (III) process considerations.

I. Scope of Antitrust Enforcement

An "accountable care organization" is one type of organization that many providers and suppliers in health care are considering as a means to integrate health care delivery. The articulated goals of integration are better coordination of care, maintenance or improvement in quality of care, and lower health care costs. The significant interest in ACOs from many hospitals, physicians, and other providers and professionals is indicative not only of the pressure to achieve these goals but also reflects their interest in gaining market share and control over referral sources.

ACOs, however, are not the only structure or means of integrating care. Increasingly, hospitals are employing physicians and acquiring physician practices. According to data from a recent Medical Group Management Association survey, almost two thirds (65 percent) of established physician were placed in hospital-owned practices and almost half (49 percent) of physicians hired out of residency or fellowship were placed within hospital-owned practices.[2] Increasing hospital employment of physicians and hospital acquisition of physician practices pose great antitrust risk, raising concerns with the "potential for hospitals to convert greater market power into higher prices and less competition."[3] Although greater integration holds the promise of increased care coordination, reduced complications and lower health care costs, those savings may not translate into lower prices for patients, employers and payers.[4]

Despite the increases in provider market power resulting from the rush to employ physicians—and to acquire existing physician practices — to date the Agencies largely

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[2] *Physician Placement Starting Salary Survey: 2010 Report Based on 2009 Data.* (Medical Group Management Association.)
[3] R. Kocher and N. Sahni, "Perspective: Hospitals' Race to Employ Physicians—The Logic behind a Money-Losing Proposition," *New England Journal of Medicine* (March 30, 2011).
[4] *See id.*

have not enforced the antitrust laws in relation to these changes.[5] ACOs clearly have been a focal point for the Agencies, and AdvaMed applauds the effort to enforce the antitrust laws for ACOs under Medicare's shared savings program. However, ignoring the race to employ physicians will lead to a skewed marketplace with power shifting toward hospitals and negative consequences for consumers. AdvaMed believes that it is critical for the Agencies to scrutinize hospital employment of physicians and hospital acquisitions of physician practices because they may have serious, long-term, anti-competitive effects that disrupt markets. In particular, we are concerned about the limited choice that consumers/patients will have if there continues to be increasing hospital employment of physicians (or hospital acquisition of physician practices). Explicitly expanding the scope of the Agencies' review—both under the Medicare shared savings program reviews and under the Agencies' overall enforcement activities—to include a more comprehensive analysis of hospital employment and physician practice acquisitions would be an important step toward combating the anticompetitive effects of hospitals locking up market share.

II. Threshold for the Safety Zone

AdvaMed appreciates the Agencies' effort to provide guidance on how they will treat ACO applicants for the Medicare shared savings program. In that vein, the creation of an antitrust safety zone is an important guidepost for prospective ACOs to use in evaluating whether their organizations raise significant anti-competitive concerns. AdvaMed supports the use of a safety zone, but we recommend beginning with a more conservative threshold while this new program is started, with consideration of a higher threshold only after it is better established and the impact on the various markets has been understood.

The Agencies have proposed that "to fall within the safety zone, independent ACO participants (e.g., physician group practices) that provide the same service (a "common service") must have a combined share of *30 percent or less* of each common service in each participant's PSA, wherever two or more ACO participants provide that service to patients from that PSA."[6] AdvaMed recommends that the Agencies consider setting the safety zone threshold lower than thirty percent because it is not yet clear whether in certain markets the thirty percent threshold is sufficient to allay anti-competitive concerns. By setting the threshold at a lower level (such as 20 percent), the Agencies can evaluate and monitor slightly more arrangements initially for attendant risks. If the Agencies find anti-competitive concerns or issues above this lower level, then the lower

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[5] *See* C. Havinghurst and B. Richman, "The Provider Monopoly Problem in Health Care", 89 *Oregon Law Review* 847, 868-871 (March 2011). This article can also be found at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2905&context=faculty_scholarship

[6] Federal Trade Commission/Department of Justice Notice with comment period, "Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participation in the Medicare Shared Savings Program," 76 Fed. Reg. at 21897 (emphasis added).

level can be maintained going forward. If no anti-competitive concerns are found with a lower level, then after some period the threshold could be raised to thirty percent.

III. Process Considerations

Finally, AdvaMed understands that some stakeholders are concerned that efforts to comply with the antitrust laws will be burdensome and lengthy. AdvaMed supports the Agencies' missions to ensure a competitive marketplace and views the Agencies' review functions as critical. The impact of a mistake – that is, to inadvertently allow an ACO that is anti-competitive – could be longstanding and severe. Squelching competition as a result of inaccurate antitrust analysis would have devastating consequences for markets, and by consequence patients/consumers, employers and payers.

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Thank you again for the opportunity to comment on these important antitrust matters related to the Medicare shared savings program. Should you or your staff have any questions, please contact me at (202) 434-7203.

Sincerely,

Ann-Marie Lynch