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May 31, 2011

Mr. Donald S. Clark
Secretary
Federal Trade Commission
Room H-113 (Annex W)
600 Pennsylvania Avenue, N.W.
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 Medical Society of New Jersey (MSNJ), a non-profit membership association representing approximately 8,000 physicians in the state of New Jersey, appreciates the opportunity to provide comments to the Federal Trade Commission (FTC) and the Department of Justice (DOJ) on the proposed Statement of Antitrust Enforcement Policy regarding Accountable Care Organizations participating in the Medicare Shared Savings Program. We believe that the FTC/DOJ proposal is inextricably linked to the Centers for Medicare & Medicaid Services' (CMS) proposed rule on the Medicare Shared Savings Program. We agree with the American Medical Association (AMA) that significant modifications are required for both proposals in order for our physician members, the majority of whom practice solo or in small practices, to be able to successfully form and participate in ACO models.

MSNJ agrees with the AMA position that physician-led ACOs are a necessary option because "the savings generated by ACOs in many cases, are expected to result from reduced inpatient admissions,"¹ and this requires physician leadership outside of a hospital. Accordingly, it is important that the antitrust rules create a level playing field that does not favor hospitals over physician led ACOs. We are concerned that the proposed clinical integration rules unnecessarily require resources available to hospitals, but that many physicians may not have. Therefore, we ask that the FTC/DOJ set forth clear and common sense antitrust rules concerning the formation of ACOs so that physicians can pursue integration options that are not hospital driven.

¹ CMS Proposed Rule on Medicare Shared Savings Program, p.19537.

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Mr. Donald S. Clark, Secretary FTC

MSNJ Comment RE: Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program; FTC Matter No: V100017

We join the AMA comments and support the following FTC/DOJ proposals: (a) the FTC/DOJ ACO policy to apply the rule of reason to ACOs; (b) the establishment, in principle, of a safety zone with respect to the issue of market power; and (c) a 90-day expedited review process for ACOs that seek and/or are required to obtain FTC/DOJ approval.

MSNJ strongly supports the application of the rule of reason to ACOs. We agree with the AMA that ACOs should continue to receive rule of reason treatment even if they no longer participate in the Shared Savings Program. Monetary start-up costs, clinical integration, and staff development will be significant. In addition, many ACO participants will want to be able to participate in commercial ACOs as well as the Medicare Shared Savings Program. Physicians would be discouraged from developing or participating in an ACO, if that ACO were only subject to the rule of reason for three years and then became potentially subject to *per se* analysis. If the economic substance of an ACO merits rule of reason treatment in year one, it should continue to receive rule of reason treatment in year four.

MSNJ shares the AMA concerns about the Primary Service Area (PSA) methodology in the proposed FTC/DOJ ACO policy for determining whether an ACO falls within an antitrust safety zone. MSNJ agrees with the AMA's analysis that building PSAs will be cost prohibitive to solo and small medical practices. Most small practices do not have the financial resources to conduct the zip code analysis nor do they have this data automated for easy analysis. If the FTC and DOJ have conducted surveys addressing the cost issue, we would ask that they share the results. If not, we strongly recommend that the FTC and DOJ conduct such surveys. **We respectfully request that the FTC/DOJ work with CMS to determine if CMS could develop a program that would assist prospective ACOs with the PSA calculations.** If building PSAs is a lengthy and expensive process, imposing such an obligation on newly formed ACOs will undermine the FTC and DOJ's stated policy of having a streamlined review process. It will also undermine Congress' intention of encouraging the formation of ACOs.

For the above reasons, and those stated in the AMA's comment letter dated May 26, 2011, we urge the FTC/DOJ to carefully consider the barriers to participation by solo and small practices and to modify the proposed enforcement policy to accommodate the stated concerns.

Respectfully submitted,

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General Counsel
Medical Society of New Jersey