National Business Group on Health

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Creative Health Benefits Solutions for Today, Strong Policy for Tomorrow

May 31, 2011

The Honorable Christine Varney
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

The Honorable Jonathan D. Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room 338
Washington, DC 20580

Re: Comments on Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program

Dear Assistant Attorney General Varney and Chairman Leibowitz:

I am writing on behalf of the National Business Group on Health to applaud the efforts of the Federal Trade Commission (FTC), the Department of Justice (DoJ), and the Centers for Medicare and Medicaid Services (CMS) to assure that Accountable Care Organizations (ACOs) abide by the same antitrust rules that help guard against unwarranted higher prices and lower quality for Medicare and people with private coverage. ACOs hold promise to truly reorganize health care delivery and reorient care to focus on prevention, primary care and wellness. However, they must not serve as vehicles to exert market leverage over Medicare or private payers, including self-funded employer plans and commercial insurers and to the detriment of patients.

Because of the newness and untested nature of Medicare's ACO program in an environment of widespread provider consolidation accompanied by unrelenting price increases, NBGH believes that the Agencies' guidelines setting up a screening mechanism for antitrust review of potential ACOs should err on the side of caution to prevent harm to consumers, the Medicare program, and private payers. Therefore, **NBGH recommends that the Agencies lower the 30% safety zone and the 50% mandatory review thresholds to 20% and 40%, respectively.**

Furthermore, because ACOs should improve the efficiency and effectiveness of care for all, including non-Medicare patients, and because private payers—self funded employer plans, commercial insurers, and people who buy their own insurance or pay part of the cost of their coverage through employers—are likely to feel the brunt of anti-competitive effects because they cannot set prices administratively like Medicare, which can mitigate

the harmful effects of market power, **NBGH strongly believes that CMS should not provide shared savings payments to ACOs that demonstrate evidence of increased "cost-" shifting to private payers and non-Medicare beneficiaries**.

The National Business Group on Health is a membership association of America's largest employers devoted to best practices in employee health benefits and improving health care delivery. Our organization represents approximately 330, primarily large, employers (including 66 of the Fortune 100) who voluntarily provide health benefits and other health programs to over 50 million American employees, retirees, and their families.

Lower Thresholds for Review to Protect Consumers and Payers from Anti-Competitive Harm

While not all market consolidation is anticompetitive, given the recent wave of hospital consolidation and hospital purchase of physician practices, consumers and payers have legitimate reason to be concerned if this program leads to additional consolidation that proves anti-competitive.

While NBGH appreciates that the Agencies have sought to give clarity to providers interested in forming ACOs regarding when they may be subject to antitrust review, NBGH believes that the Agencies should assure sufficient review of entities to prevent harm to consumers for several reasons. First, because of the newness of the ACO and Shared Savings Program, the Agencies should review more rather than fewer entities. Not only is the program new, but also its approach to analyzing entities based on primary service areas (PSAs) is new. Second, the potential harm and cost to consumers of false negatives—insufficient review of entities that could exercise market power—warrant the additional caution. Finally, proactive prevention of antitrust problems at the outset rather than enforcement after the fact, always a much harder task, calls for lower thresholds.

To assure that the program generates higher quality and more efficient care and does not lead to higher prices due to undue market power for Medicare beneficiaries and/or for people in employer plans or with insurance coverage, the thresholds the Agencies should use lower thresholds for the safety zone and for mandatory review. Specifically, NBGH supports lowering the threshold of the safe harbor from 30% to 20%, which is the threshold the Agencies use for exclusive physician network joint ventures in your *1996 Statements of Antitrust Enforcement in Health Care*.

Similarly, because antitrust agencies and courts have found anti-competitive harm to consumers at levels below 50%, and because of the newness of the program and the proposed screening process for review, lowering the threshold for mandatory review from 50% to 40% will reduce the possibility that ACOs will harm consumers.

Entities that Increase "Cost" Shifting Should Not Be Eligible for Shared Savings Payments

"Cost" shifting definitely is not the intention of the ACO program and can also be evidence of market power. For both of these reasons, NBGH strongly believes that CMS should not reward ACOs with shared savings payments if data show that the ACOs have shifted costs to private payers and private patients.

At a minimum, CMS should reduce bonuses by the amount of "cost-" shifting. Furthermore, CMS should consider removing ACOs found to be "cost-" shifting from the

program. The final rules should specify that CMS and the Agencies should share relevant data and analyses of “cost-” shifting.

One of the major goals of the Affordable Care Act (ACA) is to lower the overall costs of care for all Americans. Proponents have touted the Medicare ACO program as one of the ACA’s principal means to achieve this goal. Producing “savings” for the Medicare program and then making up for lost revenues by charging non-Medicare payers and patients more should not be mistaken as evidence for more efficient provision of care and CMS should not reward it. A recent analysis commissioned by the National Business Group on Health and conducted by the actuarial consulting firm Milliman, identified health care markets that produce high value care for Medicare but not for other payers while other markets produce high value care at low cost for both Medicare and patients in the private sector. NBGH believes that markets characterized by the former should not be rewarded since they are likely to be “cost-” shifting to the private sector as they produce “savings” for Medicare.

Classic economics identifies the ability of a seller to differentially price the same goods or services to different buyers as a potential sign of market power. If a seller can make up lower prices to one buyer by charging more to other buyers, it certainly suggests the absence of competitively determined prices in a marketplace. While the underlying level of “cost-” shifting is unfortunately routine in the health care “market” in the US, **what concerns NBGH and other private payers is that the ACO program not exacerbate the “cost-” shifting problem.**

As part of the program, CMS will collect cost, quality, and utilization data to determine whether the program is meeting its goals. NBGH believes that as part of its data gathering, CMS should determine baseline levels of “cost-” shifting by calculating the ratio of public to private payments to ACOs for the same services and recalculate these ratios annually. CMS should share these data with the Agencies to alert them to potential antitrust problems. The proposed rule should clarify that CMS will share any relevant information with the Agencies. The Agencies, in turn, should share any relevant information and analysis with CMS to supplement CMS’ own analyses of whether program participants are engaging in “cost” shifting.

Thank you for the opportunity to express the concerns of the business community and employer-sponsored health plans regarding antitrust policy toward ACOs. Please contact me or Steven Wojcik, the National Business Group on Health’s Vice President of Public Policy, at (202) 558-3012, if you would like to discuss this issue in more detail.

Sincerely,

Helen Darling
President

cc: The Honorable Kathleen Sebelius, Secretary, U.S. Department of Health and Human Services