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*VIA ONLINE SUBMISSION at  
<https://ftcpublic.commentworks.com/ftc/acoenforcementpolicy/>*

Federal Trade Commission  
Office of the Secretary  
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**

Pursuant to the Federal Trade Commission's (FTC) and Antitrust Division of the Department of Justice's (DOJ) (collectively the "Antitrust Agencies") request, 76 *Fed. Reg.* 21894 (Apr. 19, 2011), SCAN Health Plan ("SCAN") is pleased to submit comments in response to the Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program ("Proposed ACO Antitrust Statement").

SCAN is a not-for-profit public benefit health plan that covers more than 130,000 Medicare beneficiaries through the Medicare Advantage (MA) program. SCAN currently operates in 11 counties in California and two counties in Arizona and focuses on delivering high quality, coordinated care to a disproportionately frail and elderly population. As SCAN and its enrollees will be impacted by the Medicare Shared Savings Program and the operation of ACOs in the commercial market, we are concerned that the Proposed ACO Antitrust Statement may allow for excessive market power for some ACOs, which could result in reduced competition and higher overall health care costs.

SCAN agrees that some level of an antitrust safe harbor should exist in order to ensure participation by prospective ACOs. However, we believe the Proposed ACO Antitrust Statement, which provides that ACOs will not be subject to scrutiny by the Antitrust Agencies if they hold 30 percent or less of the market share for common services in a primary service area ("PSA"), is problematic for several reasons. First, such a high threshold is likely to substantially and negatively reduce healthy competition and lead to increased health care costs. ACOs with a 30 percent market share in a PSA would be able to wield a significant amount of power, and would be able to negotiate charges and rates with health plans that would make it unattractive and possibly prohibitive for MA and private plans to expand into that area.


In addition, SCAN is concerned that the Proposed ACO Antitrust Statement would have a disproportionate impact on the frail and elderly population that SCAN serves. SCAN depends on provider networks with sufficient primary and geriatric specialists, of which there is already a

shortage. If an ACO in a particular county provided 30 percent of geriatric medicine services, for example, the likelihood that SCAN and other plans focused on this population could establish a viable provider network in that county would be low. Plans serving the frail elderly could be effectively forced to opt out of expanding into such a county based upon the likelihood that the ACO's excessive market share would make it impossible to develop a sufficient provider network. More generally, SCAN is concerned that physicians participating in an ACO with such a high PSA market share will not desire or need to be part of a health plan's provider network, which would also be detrimental to plans' ability to serve their members and to expand into additional service areas.

While we agree that an antitrust safe harbor must exist in order to give comfort to would-be ACOs, SCAN would propose that the Antitrust Agencies adopt a safety zone threshold of a 20 percent or lower PSA market share and a mandatory review threshold of a 40 percent PSA market share. We believe these threshold levels are more likely to ensure that ACOs do not obtain excessive market power that can actually increase health care costs and reduce healthy competition by effective providers and health plans such as SCAN. These lower thresholds are more likely to encourage collaboration among providers, which will result in patients receiving higher quality and better coordinated health care.

SCAN appreciates the opportunity to submit comments in response to the Proposed ACO Antitrust Statement. Please contact us if we may provide any additional information.

Sincerely,

  
Douglas A. Jaques  
Senior Vice President, General Counsel