



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  
Accountable Care Organizations Participating in the Medicare  
Shared Savings Program, Matter V100017**

Dear Mr. Clark:

The Medical Group Management Association (MGMA) appreciates the opportunity to submit comments in response to the Federal Trade Commission's (FTC's) and the Department of Justice's (DOJ's) "Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program" (the Proposed Statement).

MGMA, founded in 1926, is the nation's principal voice for medical group practice. MGMA's nearly 22,500 members manage and lead 13,600 organizations, in which 280,000 physicians provide more than 40 percent of the nation's healthcare services. MGMA's diverse membership comprises administrators, CEOs, physicians in management, board members, office managers and many other management professionals. They work in medical practices and ambulatory care organizations of all sizes and types, including integrated systems and hospital- and medical school-affiliated practices. Whatever the precise role of medical group practices in a particular accountable care organization (ACO), it is difficult if not impossible to imagine a successful ACO without substantial medical group participation. Thus, MGMA is pleased to submit our comments and concerns surrounding the Proposed Statement.

MGMA appreciates several aspects of the Proposed Statement aimed at giving healthcare providers confidence that their collaboration in an ACO model will not be challenged on the basis of antitrust concerns. Overall, however, we believe significant changes need to be made to make the Proposed Statement useful to medical groups and others interested in participating in an ACO.

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MGMA appreciates the establishment of a safety zone that allows certain ACO applicants to proceed without challenge from the agencies, absent extraordinary circumstances. For those applicants that fall outside of the safety zone, the Proposed Statement provides an expedited 90-day review process to allow potential ACOs entering the Medicare Shared Savings Program to learn in advance whether their operations would be challenged by the government.

We are supportive of the FTC's and the DOJ's decision to apply a "rule of reason" analysis to applicants outside of the safety zone. As currently proposed, the statement relies on the clinical integration required by the Centers for Medicare and Medicaid Service's (CMS') proposed rule on the Medicare Shared Savings Program. MGMA has identified a number of concerns with aspects of the proposed rule, and we believe the Medicare Shared Savings Program should undergo a number of changes for it to become a viable option for group practices. Our specific concerns are addressed in separate letters to CMS and the HHS Office of Inspector General. We believe the better approach for purposes of the FTC's and DOJ's Proposed Statement would be to recognize that the participants in an ACO share sufficient financial risk by virtue of entering into an ACO agreement to qualify for rule of reason treatment on that factor alone, both for purposes of the Medicare Shared Savings Program and for ACOs' negotiations in the private sector.

With respect to calculating whether an ACO falls within the safety zone, MGMA has significant concerns with the approach set forth in the Proposed Statement, which relies on ACO participants' combined share of services in each participant's Primary Service Area (PSA). As proposed, when the combined share is below 30 percent, an ACO will not need to seek agency review. Agency review is optional between 30 and 50 percent and mandatory for ACOs where two or more of its participants have a share of more than 50 percent for any common service provided to patients in the same PSA. As currently defined, we are concerned that a large percentage of applicants will fall outside of the safety zone and will need to seek formal agency approval. We urge the FTC and DOJ to reevaluate these ranges and consider increasing the safety zone to 40 percent. The low threshold is of particular concern in small to midsized markets, where that percentage can be achieved with a very low number of ACO participants. We further urge the FTC and DOJ to revise the exceptions for dominant providers and rural areas so that ACOs with medical group participants will have a realistic opportunity to fall within the safety zone.

Additionally, MGMA is concerned that the cost associated with performing this initial analysis of the ACO's share of services

in each ACO participant's PSA will be prohibitive. The calculation relies on data that are difficult to obtain, and any cost for making this calculation - which will likely require the assistance of an outside consultant - will only add to the initial start-up costs of an ACO. Based on feedback MGMA has received from our members, including those who participated in the physician group practice demonstration, one of the primary concerns expressed is the significant start-up costs associated with even applying to participate in the Medicare Shared Savings Program. As MGMA has commented in a separate letter to CMS and the Office of Inspector General with respect to the Medicare Shared Savings Program, the question of paying for start-up costs is even more onerous given that there are currently no waivers available (or proposed) to the federal Stark and anti-kickback statutes for start-up costs. As a result, ACO participants with greater resources are not allowed to fund this analysis beyond their percentage of ACO ownership and governance without violating these federal laws. We urge the FTC and DOJ to work to find a more streamlined method to screen proposed collaborations so that the very process of seeking approval does not deter applicants. Without significant changes to the process, participation in the Medicare Shared Savings Program may not be an option for small and mid-sized medical groups.

In addition, we urge the FTC and DOJ to clarify in its final Statement how entities participating in the Medicare Shared Savings Program that were formed before March 23, 2010 will be analyzed for antitrust purposes. To the extent that the Proposed Statement seeks to provide Medicare Shared Savings Program participants with clarity and confidence that the government will not challenge its existence, we believe the same benefit should be available to previously existing entities.

Finally, MGMA appreciates the Proposed Statement's application of the rule of reason analysis to joint negotiations with private-sector payers for ACOs participating in the Medicare Shared Savings Program. As proposed, this favorable treatment would only last for the duration of the ACOs participation in the Medicare Shared Savings Program. Given the uncertainty surrounding participation in the Medicare Shared Savings Program and the massive investment of resources required, healthcare providers will need confidence that their investments will be worthwhile and useful beyond the limited scope of that Program. As long as an ACO that qualified for the Medicare Shared Savings Program maintains the same fundamental structure, its operations should continue to be analyzed under the rule of reason.

MGMA appreciates your consideration of these comments. If you have any questions, please contact Amy Nordeng in the Government Affairs Department at (202) 293-3450.

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Sincerely,

William F. Jesse<sup>e</sup>, MD, FACMPE  
President and Chief Executive Officer