

May 31, 2011

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”

Submitted electronically to <https://ftcpublic.commentworks.com/ftc/acoenforcementpolicy>

Dear Commissioners:

The undersigned organizations appreciate the opportunity to provide comments on the proposed Statement of Antitrust Enforcement Policy regarding Accountable Care Organizations (ACOs) participating in the Medicare Shared Savings Program created in the Affordable Care Act of 2010. We believe these organizations offer an important opportunity to reducing the growth in health care spending and achieving better patient outcomes by improving the coordination of care between providers, reducing duplication of services, and avoiding medical errors. However, we are also aware that the formation of these new structures will involve significant investments and challenge traditional models of health care delivery. In order for these organizations to achieve their potential, we believe it is essential to eliminate unnecessary barriers that prevent health care providers from practicing to the extent of their education and clinical preparation and to assure that providers and organizations that control significant market shares and access to capital are not able to unfairly restrict competition and collaboration.

We appreciate the general approach to antitrust enforcement outlined by the agencies in the proposed policy statement. We agree with recent comments that “health care providers are more likely to integrate their care delivery for Medicare beneficiaries through ACOs if they can also use the ACOs for commercially insured patients.” As you point out, the time and financial resources that must be devoted to integrate independent practices into collaborative interdisciplinary teams is daunting. We also agree that it is important to ensure that improvements in integrated care and innovative practice and payment structures can benefit patients beyond the Medicare program. These broader interests magnify the importance of ensuring that ACOs are developed as inclusively and competitively as possible.

Our primary concern is ensuring that nurse practitioners and other providers who are not part of a particular ACO and the patients they care for are not denied necessary health care services by participants in an ACO – particularly in circumstances where the ACO may be aligned with most of the providers of a particular service. It is critical that ACOs be prevented from engaging in anti-competitive behavior that would threaten the health of patients and the ability of nurse practitioners and other providers to provide the full range of care to meet their patients’ needs.

We generally agree that a “rule of reason” approach is appropriate for reviewing ACOs that meet the basic requirements for clinical integration proposed by the Centers for Medicare and Medicaid Services (CMS). We also appreciate the benefit of a streamlined analysis to evaluate an ACO’s share of services in the Primary Service Area (PSA) of each ACO participant even though, as the agencies acknowledge, a PSA may not constitute a relevant antitrust market.

However, because an ACO’s PSA is integral to the determination of whether it qualifies for an antitrust “safety zone” or requires mandatory antitrust review, we believe it is imperative to the accuracy of this review process that Primary Services Areas are truly reflective of the common services provided by ACO participants in a primary service area. In particular, we are concerned that the methodology proposed by the agencies appears to only account for services provided by physicians in the physician’s primary specialty, as designated on the physician’s Medicare Enrollment Application, major diagnostic categories for inpatient facilities, and outpatient categories determined by CMS for outpatient facilities.

We believe that there two problems with this methodology: first, and of primary concern to us, it does not include the services of nurse practitioners and other non-physician providers; second, it includes only providers who are enrolled in the Medicare database.

Services of Non-Physician Providers:

Nurse practitioners and other non-physician providers are integral parts of coordinated patient care. Nurse practitioners are fully recognized by Medicare as qualified providers and are recognized as ACO professionals in Section 3022 of the Affordable Care Act.

We often practice autonomously and provide the majority of primary care services for Medicare beneficiaries in many markets, including those experiencing shortages of physicians.

Failure to account for the services provided by nurse practitioners and other non-physician providers who are ACO participants in a primary service area will result in an inaccurate and potentially erroneous view of an ACO’s PSA share of common services. This distortion could impact the agencies’ determination of whether an ACO qualifies for the safety zone, requires mandatory antitrust review, or receives approval from the agencies.

Inclusion of Only Medicare Providers:

Recognizing that providers are unlikely to structure practices differently for Medicare beneficiaries and will seek to use ACOs for their commercially insured patients, we believe that relying solely on Medicare data will provide an inaccurate and potentially misleading perception of an ACO’s PSA share of common services. Commercially insured patients will reflect a significantly different mix of ages, medical conditions, and health care needs than a population comprised only of Medicare beneficiaries. To provide an accurate evaluation of an ACO’s PSA share of common services and evaluation of an ACO’s status, non-Medicare services provided by all the participating providers in the ACO should be included in the assessment.

We urge you to adopt an enforcement policy that truly ensures the protection of patients and health care providers from the potentially anti-competitive incentives that could influence the operation of Accountable Care Organizations by accurately assessing Primary Service Areas and by assuring that ACOs are not able to dominate markets in a way that puts patients or providers at risk.

Sincerely,

American College of Nurse Practitioners
National Association of Pediatric Nurse Practitioners
National Organization of Nurse Practitioner Faculties