



May 31, 2011

VIA EMAIL

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

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
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 Assistant Attorney General Varney and Commissioner Leibowitz:

Jefferson Health System, Inc. ("JHS") is a non-profit healthcare system serving the greater Philadelphia, Pennsylvania area. We appreciate the opportunity to comment on the Proposed Statement of Antitrust Enforcement Policy ("Statement") regarding Accountable Care Organizations ("ACOs") participating in the Medicare Shared Savings Program ("MSSP").

JHS recognizes the value of establishing ACOs as a means to improve the coordination of care for patients across the healthcare continuum, enhance the quality of the services for consumers and achieve greater efficiencies for all patients not just Medicare beneficiaries. JHS, in anticipation of participating in the MSSP and other shared savings arrangements, has been considering forming an ACO with other providers in the region.

JHS is mindful of and appreciates the efforts of the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") in the development of a proposal for ACOs as it is critical that ACOs be granted antitrust protections with clear concise guidance and for ACOs to have the ability obtain specific guidance where appropriate from the FTC and DOJ on an expedited basis.

Nonetheless, just as we understand the American Hospital Association and The Hospital & Healthsystem Association of Pennsylvania have expressed to you, JHS has serious concerns that the Statement presents an unnecessary barrier to participation in the MSSP and does not

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provide the guidance necessary to spur adoption of and continued innovation in clinical integration beyond the Medicare program.

Our specific comments focus on two areas of the Statement:

- The proposed formula for calculating market share within individual Primary Service Areas should be replaced with a more workable formula more akin to traditional market share analyses.
- JHS believes that in order for a Medicare ACO to be most successful it is essential to allow for the exclusivity of hospitals in the model.

Abandon the Proposed Formulas

The Statement proposes a new, untested formula to determine the market shares of each prospective ACO participant in its “Primary Service Area” (“PSA”) which JHS finds problematic. This formula is critical as the Statement sets it as the basis for determining whether an ACO meets the “safety zone” or whether an ACO must obtain specific FTC or DOJ approval prior to participating in the MSSP. Under the Statement, market shares must be calculated for *each* common service to be provided by *each* participating hospital and doctor (or group of doctors) within *each* provider’s PSA. PSA is defined as the lowest number of contiguous zip codes from which the provider draws at least 75% of its patients. This untested method of analysis would be expensive, extremely complicated and burdensome. Specific concerns are as follows:

- Calculating PSA shares on the basis of Medicare fee-for-service data is likely to be unreliable and will be practically unavailable for any service or medical specialty that does not routinely provide services to Medicare patients, such as obstetrics, pediatrics, burn units and HIV services, for example. The data will also overstate the market shares of providers who care for large numbers of Medicare fee-for service patients and understate the shares of those who restrict their practices to commercially-insured or Medicare Advantage patients. Even where Medicare fee-for-service data might be available, it will be extremely difficult for physicians to match zip code data with billing records to obtain the services provided.
- The formula appears to be incongruous with traditional rule of reason analysis, which typically does not define a market in the manner described in the formula nor does it typically allow concerns over as one minor service dictate the result when there is no concern over the vast majority of services.

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- Calculating PSA shares on the basis of contiguous zip codes likely will be burdensome and costly, particularly for physicians, and require a substantial number of judgment calls.
- Given the limitations on physician compensation arrangements under the Stark and Anti-kickback statutes, it is unclear at best whether and to what extent other ACO participants could share the burden associated with the physicians' calculation of their respective market shares even though the calculation of these market shares ACO would be an integral part of any MSSP application. There is no indication in the notice issued by CMS and the Office of Inspector General on waivers in connection that a waiver for such activities and expenses is being considered.

In light of these concerns JHS strongly suggests that an alternative formula to determine whether an ACO qualifies for a "safety zone" or requires mandatory anti-trust review (to the extent such a review remains part of the MSSP application process in any form) be established. In the event that the agencies decide to implement this proposed method, JHS requests that the "safety zone" market share threshold be increased to at least 35%.

Hospital Exclusivity Should be Allowed

As mentioned above, JHS strongly believes that it is important for ACO hospital participants to be able to establish voluntary exclusive arrangements with an ACO in order to qualify for the safety zone. Exclusivity among hospitals, in particular, would assist the ACO in ensuring that all its major participants are aligned with the ACO's clinical protocols and quality and financial performance goals rather than having multiple and potentially conflicting sets of such protocols and goals. **The desire to partner with other hospital systems to form a regional ACO is seriously compromised if exclusivity precludes a hospital from qualifying for a safety zone.**

Thank you for the opportunity to comment on the Statement. If you have any questions about my comments or need further information, please contact me at 610-225-6217.

Sincerely,

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Christopher Raphaely
Deputy General Counsel