

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:

On behalf of Oregon's 58 hospitals, the Oregon Association of Hospitals and Health Systems would like to thank you for the opportunity to comment to your respective agencies on the Proposed Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program.

WHY THIS GUIDANCE SHOULD BE CHANGED

ACOs are a new concept in the integration of providers for the provision of coordinated care. An ACO's performance will be evaluated by its ability to reduce cost and meet quality benchmarks. ACOs also have to operate under unprecedented levels of transparency.

Therefore, we urge your agencies to substantially revise the proposed statement. Guidance should not be a prerequisite for participation in the Medicare ACO program. Instead the agencies should provide guidelines for integrated organizations like Medicare ACOs on how they can avoid infringing antitrust rules in their operations. It would be helpful if the FTC and DOJ:

- Define a process by which the agencies will respond to grievances as they arise in the marketplace.
- Give guidance on what would constitute an abuse of market power by integrated health care organizations.

The chief concern of the FTC and DOJ should be in governing the market consequences affected by an ACO's operation, but not its formation. Integrated entities that end up abusing market power, fixing prices, and unfairly competing should be reprimanded accordingly. However, the wanton will of some organizations should not cast suspicion on all entities that choose to participate in the program with the intention of lowering the cost of health care and upholding quality standards.

OTHER CONCERNS THAT SHOULD BE ADDRESSED

We have two specific concerns about the proposed statement that should be addressed in the case that your agencies disregard our recommendation and insist on following through with the current proposed antitrust guidance framework:

- The safety zone of 30 percent or less is too low and should be increased to at least 35 percent.
- The rural exception is too narrow. Having a larger share of providers where necessary should be allowed under the exception if the providers are nonexclusive (available to work with others).

We appreciate the work and collaboration among the agencies that went into the proposed statement. However, in its current form the proposed rules will be an unnecessary and unfortunate barrier to Medicare ACO formation and operation. We hope the antitrust agencies will abandon the proposed statement and instead issue meaningful guidance and a streamlined and voluntary process to obtain advice from the agencies. We look forward to working with the agencies to make the Medicare ACO program a success and to lay a stronger foundation for other clinically integrated arrangements to flourish.

Thank you again for the opportunity to comment about this important issue.

Sincerely,

OAHHHS Director of Public Policy