

# Consumer-Purchaser DISCLOSURE PROJECT

Better information. Better decisions. Better health.

October 13, 2011

The Honorable Jon Leibowitz  
Chairman  
Federal Trade Commission  
Office of the Chairman  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

The Honorable Sharis Pozen  
Acting Assistant Attorney General, Antitrust Division  
United States Department of Justice  
Office of the Assistant Attorney General  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

The Honorable Donald Berwick, MD, MPP  
Administrator  
Centers for Medicare & Medicaid Services  
Department of Health & Human Services  
200 Independence Avenue, SW  
Washington, D.C. 20201

RE: Antitrust Enforcement Policy for Accountable Care Organizations Participating in the Medicare Shared Savings Program

The undersigned consumer, labor, and employer organizations are writing to strongly urge you to maintain the Antitrust Enforcement Policy Regarding Accountable Care Organizations (ACOs) issued by the Federal Trade Commission (FTC) and Department of Justice (DOJ) on March 31, 2011 as an essential component in the selection of participants for the Medicare Shared Savings Program.

Competitive markets are critical to achieving affordable care for all Americans. Consequently, care must be taken to not exacerbate an already serious problem of providers having a disproportionate share of market power in many, if not most areas of the country. In particular, ACOs could garner market power that enables them to both increase prices for the private sector and cost-shift due to limits in Medicare payments. Purchasers absorb some of the price increases by paying more for health insurance, and some increases get passed on to consumers in the form of higher premiums and co-payments. In some instances, health plan benefits are scaled back to offset the higher costs.

[www.healthcaredisclosure.org](http://www.healthcaredisclosure.org)

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It is very important that we not reduce costs for one sector at the expense of another. We support the enforcement policy's proactive approach in detecting market concentration problems as an integral feature of determining appropriate participants in the Medicare Shared Savings program. It makes much more sense to identify potential problems in advance and prevent the formation of organizations that would create inappropriate market concentration as it is very difficult to unwind new organizational structures once they are in place.

Given the seriousness of the consequences, if anything, the enforcement policy should be strengthened. In the comments on the proposed statement of policy, dated May 31, 2011, submitted to the FTC and DOJ, we made several proposals to strengthen the policy. One of those proposals was for the FTC and DOJ to be cautious about which organizations fall into the safety zone and recommended reducing the applicable thresholds. Given the new and untested nature both of the Shared Savings Program and the Policy Statement, this will reduce the likelihood that the safety zone will generate significant harm by not submitting enough entities to any review.

On behalf of the millions of Americans represented by the undersigned organizations, thank you for your efforts to promote healthy competition and protect consumers and purchasers from inappropriately high prices. If you have any questions, please contact either of the Consumer-Purchaser Disclosure Project's co-chairs, Bill Kramer, Executive Director for National Health Policy at the Pacific Business Group on Health or Debra L. Ness, President of the National Partnership for Women & Families.

Sincerely,

American Benefits Council  
AFL-CIO  
Center for the Study of Services  
HR Policy Association  
Massachusetts Group Insurance Commission  
National Business Coalition on Health  
National Partnership for Women & Families  
Pacific Business Group on Health

Cc: Jonathan Blum, Director, Center for Medicare Management, CMS  
Chris Dawe, Director of Delivery System Reform, Department of Health and Human Services  
Liz Fowler, PhD, JD, Special Assistant to the President, National Economic Council  
Richard Gilfillan, MD, Acting Director, Center for Medicare & Medicaid Innovation, CMS