Remarks of FTC Chairman Jon Leibowitz
As Prepared for Delivery
FTC/CMS Workshop on Accountable Care Organizations
Tuesday, October 5, 2010

Thank you very much, Don. I'd like to join Dr. Berwick and HHS Inspector General Levinson and welcome all of you to this workshop. The promise of ACOs – that creative health care practitioners can collaborate legally to deliver higher-quality health care at a lower cost – offers a real opportunity for health care reform.

Our job at the FTC, CMS, and the Office of the Inspector General at HHS is to ensure that regulation encourages that innovation and, likewise, benefits health care consumers. Today's workshop reflects an unprecedented effort among our agencies to come together and coordinate our requirements for ACOs based on the Stark Law, anti-kickback law, civil monetary penalties, and the antitrust laws.

From an antitrust perspective, we want to explore whether we can develop safe harbors so doctors, hospitals, and other medical professionals know when they can collaborate and when they cannot. We are also considering whether we can put in place an expedited review process for those ACOs that fall outside of the safe harbors.

Your job in the private sector is to tell us what you think is the best way to proceed. We need to learn more about your ideas for, and concerns about, ACOs. We received a number of excellent written comments last week, and we have been reading them carefully. We are also keeping the comment period open so that, if today's discussion sparks additional thoughts, you can bring them to our attention – we hope within the next two weeks.

We need your input because we need to get this right. If ACOs end up stifling rather than unleashing competition, we will have let one of the great opportunities for real health care reform slip away. We can't afford to let that happen.

But before any of us can do our jobs today, we have to let go of the stereotypes that define – and sometimes divide – those of us in this room: the stereotypes that suggest government agencies cannot work together no matter how high the stakes – the stereotypes that led so many of our private sector audience members to wince, or chuckle, when I began my remarks saying, in essence, "we're here from the government, and we're here to help."

Our challenge today reminds me of a story of a doctor and a lawyer who were driving toward each other on a remote country road and collided head on. They both got out of their cars and stood by the side of the road to wait for the police. The lawyer, seeing that the doctor was shaken up, offered him a drink out of a hip flask. The doctor accepted and handed the flask back to the lawyer, who capped it up and put it back in his pocket. "Aren't you going to have a drink yourself?" asked the doctor. "Sure," replied the lawyer, "after the police leave."

I am here today to tell you – I am not that lawyer.

I am here today to tell you – no one at the Federal Trade Commission is that lawyer.

Unfortunately, but not surprisingly, in the past too many health care providers saw antitrust regulators as just that. We know this from comments we receive when we resolve cases involving health care providers. For example, we recently settled a case against a group of doctors in Garfield County, Colorado.[1] One doctor accused the FTC of causing a shortage of physicians.[2] Another complained that our actions "defy logic."[3] Still another told us that our decision "goes beyond socialism, it is a return to serfdom."[4]

The picture painted by these comments is not pretty. By a few health care providers – and I am glad it is only a few – we are seen as surreptitious socialists bent on keeping doctors from charging a fair price for their services, as heartless regulators holding doctors to outdated antitrust rules that no other health care player has to follow, or as fastidious bureaucrats rejecting any change that would allow doctors to care for patients more efficiently.

Step back from those stereotypes, though, and you see that the FTC is, more often than not, on the side of health care providers – as professionals who care about their patients and as consumers themselves.

When competitors get together to fix prices, create market power, or prevent competition, that's illegal because it almost always leads to higher prices, lower quality, less innovation, and fewer choices for consumers. The antitrust agencies enforce these antitrust laws whether it is doctors, hospitals, health care insurers, pharmaceutical companies, real estate agents, or computer companies.

Too often, I believe, the health care community sees our antitrust enforcement actions as impeding improved care. If there is any stereotype I would like to disabuse you of today, that's the one.

Take the case of Grand Junction, Colorado. Back in the mid-1990s, the FTC found that physicians in Grand Junction were charging prices significantly higher than elsewhere

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[1] Public Comments in response to *In the matter of Roaring Fork Valley Physicians I.P.A., Inc.* (2010), *available at* http://www.ftc.gov/os/comments/roaringfork/index.shtm.

[2] Comment of Karen Snell in response to *In the matter of Roaring Fork Valley Physicians I.P.A., Inc*. (Feb. 4, 2010), *available at* http://www.ftc.gov/os/comments/roaringfork/546725-00004.htm.

[3] Comment of Robert Oliver, Plastic Surgery Specialists MD-PC in response to *In the matter of Roaring Fork Valley Physicians I.P.A., Inc*. (Feb. 4, 2010), *available at* http://www.ftc.gov/os/comments/roaringfork/546725-00005.htm.

[4] Comment of Robert Oliver, Plastic Surgery Specialists MD-PC in response to *In the matter of Roaring Fork Valley Physicians I.P.A., Inc*. (Feb. 4, 2010), *available at* http://www.ftc.gov/os/comments/roaringfork/546725-00005.htm.

in the state.[5] Almost all of the doctors in Grand Junction had agreed that a single organization would bargain with health insurance plans on behalf of the entire group.[6] That meant that the plans had to pay the doctors whatever fees the organization demanded because the health plans had almost nowhere else to turn for physician services.[7] And, the doctors' agreements kept new, innovative health plans from entering the Grand Junction area.[8]

The FTC challenged the conduct, and the case settled before it went to trial. The Commission and the doctors agreed to an order that did two things: stopped the anticompetitive pricing practices and allowed doctors to collaborate when doing so could lead to cost savings and better health care for patients.[9]

And the doctors in Grand Junction did exactly that. They worked together, not to fix prices, but to share financial risk. They worked with a health plan, Rocky Mountain Health Care, to develop ways to improve collaboration among providers, for example, instituting a community-wide electronic record system that allows them to share office notes, test results, and hospital data for patients.[10]

Today, Grand Junction is cited as one of the places in the United States with the lowest cost and highest quality health care – a terrific result for consumers.[11]

But we know that not all ACOs will follow the model used in Grand Junction. So, the question before us today is: How can we design rules for ACOs that are flexible enough to allow the health care community to collaborate to improve quality and decrease costs – but not to fix prices or create market concentration?

It is not easy to craft safe harbors that can replace an antitrust review that analyzes the specific facts of each case and market. To do so, we need your input. We need your real-world expertise to help us understand better what kind of ACOs you are considering, and how you see them operating in the health care marketplace.

And we all need to cast our stereotypes aside and to approach each other – not as regulators and regulated, not as doctors and lawyers and patients – but as Americans who all want to realize the potential of ACOs to spark true health care reform. Thank you.

Now I have the pleasure of introducing the Inspector General for the Department of Health and Human Services, Inspector General Daniel Levinson.

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[5] *See In the Matter of Mesa County Physicians Independent Practice Association, Inc.*, 127 F.T.C. 564 (1999) (consent order, etc.) *available at* http://www.ftc.gov/os/decisions/docs/Volume127.pdf#page=564.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Atul Gawande, *The Cost Conundrum, What a Texas town can teach us about health care*, THE NEW YORKER, June 1, 2009, *available at* http://www.newyorker.com/reporting/2009/06/01/090601fa_fact_gawande?currentPage=all#ixzz0qGnj0fe2.
[11] *Id.*