

FTC news

Federal Trade Commission Washington, D.C. 20580 (202) 326-2180

FOR RELEASE: AUGUST 28, 1996

FEDERAL TRADE COMMISSION, JUSTICE DEPARTMENT REVISE POLICY STATEMENTS ON HEALTH CARE ANTITRUST ENFORCEMENT

As part of an ongoing effort to encourage efficient arrangements for delivering health care, the Federal Trade Commission and the Department of Justice today announced revisions to the agencies' enforcement policy statements regarding health care provider networks. These changes expand upon the guidance contained in the agencies' prior joint Statements of Antitrust Enforcement Policy in Health Care, last revised in 1994, in order to ensure that uncertainty about the antitrust laws does not deter the formation of new types of networks that could benefit competition and consumers. The most important changes make clear that a wider range of physician networks will receive more flexible antitrust treatment than was spelled out in previous policy statements. While the new guidelines represent an effort by the agencies to promote innovation in the industry, the agencies stressed that they will not be lessening their scrutiny of anticompetitive health care arrangements.

In recent speeches and Congressional testimony, FTC Chairman Robert Pitofsky has outlined how antitrust enforcement has been vital to maintaining competitive health care markets. The revisions announced today address how physician network joint ventures (Statement 8) as well as the broad range of multiprovider networks generally (Statement 9) will be reviewed under the antitrust laws.

"As health care markets undergo rapid change, federal antitrust officials must assure consumers they will receive the benefits of new innovative arrangements, while continuing to be protected from anticompetitive activity," Chairman Pitofsky said. "These revisions to our enforcement policy statements provide important new guidance to the health care industry,

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(Revised Health Care Antitrust Guides--08/28/96)

ensure that antitrust laws do not unnecessarily impede market developments, and continue to prevent anticompetitive conduct that would limit the range and quality of health care options available to consumers or lead to higher prices."

The revised statements provide additional guidance on how the agencies determine whether agreements among competing providers on the prices they will charge through a network should be condemned as "per se" illegal price fixing or analyzed instead under "rule of reason." Rule of reason analysis examines whether a particular activity may have anticompetitive effects that outweigh any procompetitive benefits. The "per se" rule of illegality is reserved for certain types of conduct that have been found so inherently detrimental to competition that they are presumed illegal without further examination. The 1994 Statements provided that such agreements were analyzed under the rule of reason if the physicians shared substantial financial risk or if the combining of the physicians into a joint venture enabled them to offer a new product producing substantial efficiencies.

Today's statements expand the discussion of agreements that receive rule of reason treatment. As the health care industry has evolved, there has been increasing interest in exploring new arrangements to meet the needs of purchasers of health care services. In particular, the agencies have given expanded treatment to their analysis of networks in which the participating providers do not share financial risk, but cooperate to contain costs and assure quality of care, and networks in which participants share financial risk in additional ways beyond those specifically set forth in the earlier statements.

Today's statements also provide more guidance on how the agencies apply the rule of reason to provider networks. In addition, the revisions give further attention to the particular issues raised by rural markets, explaining how market conditions in rural areas may justify certain health care arrangements that might raise antitrust concerns in other areas.

The previous statements established "antitrust safety zones" for certain physician networks. Because some in the industry have misinterpreted these as defining the only physician networks that the agencies would consider lawful, the revisions further emphasize that networks falling outside the safety zones may be lawful. The revisions provide additional examples of risk-sharing arrangements that can fall within the safety zones, but do not change the scope of the safety zones.

The statements issued today continue the agencies' commitment to expedited treatment for requests from the health care industry for antitrust guidance about specific proposed conduct concerning matters addressed by the policy statements.

The Commission vote to approve the revised policy statements was 5-0. Commissioner Christine A. Varney issued a statement in which she said she believed the revisions address her previous concerns that the guides should "reflect greater receptiveness to new and innovative forms of provider arrangements that do not necessarily involve financial risk sharing and suggesting factors that should be taken into account in reviewing provider arrangements that fall

(Revised Health Care Antitrust Guides--08/28/96)

outside the safety zones." Varney also said she invited continued input from interested parties so that the Agencies can continue to provide appropriate and relevant antitrust guidance."

Copies of the DOJ/FTC "Statements of Antitrust Enforcement Policy in Health Care" will be available after 12 Noon today on the Internet at the FTC's World Wide Web site at: <http://www.ftc.gov> and from the FTC's Public Reference Branch, Room 130, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580; 202-326-2222; TTY for the hearing impaired 202-326-2502. To find out the latest news as it is announced, call the FTC NewsPhone recording at 202-326-2710. FTC news releases, FTC advisory opinions and other materials also are available on the Internet at the FTC's World Wide Web site.

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**U.S. Department of Justice
and the
Federal Trade Commission**

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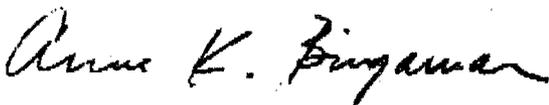
Dear Representative:

We are pleased to enclose a copy of the new 1996 Statements of Antitrust Enforcement Policy in Health Care issued by the Department of Justice and the Federal Trade Commission. These statements give health care providers guidance regarding antitrust issues that might arise in health care markets.

These statements revise and expand on similar statements issued in 1993 and 1994. Since issuing the 1994 statements, we have received many helpful comments and suggestions from a wide spectrum of participants in the health care marketplace. Before issuing the statements we met with a variety of groups interested in health care markets to seek their input on these antitrust issues.

The main focus of these revisions provide additional guidance with respect to health care provider networks, both physician networks and multiprovider networks. Importantly, they emphasize that many provider networks will be reviewed under the "rule of reason" antitrust analysis, rather than a "per se" analysis that applies to naked price fixing arrangements. They also include significantly expanded examples of real world health care situations, including networks that do not share financial risk and networks that share financial risk in ways beyond those described in earlier statements. They also provide further guidance on rural area health care networks.

These statements represent a continuing commitment to sound antitrust enforcement that will not impede efficient, procompetitive activities. We remain committed to continue to protect consumers against truly anticompetitive conduct that will lead to higher prices.



Anne K. Bingaman
Assistant Attorney General
Antitrust Division



Robert Pitofsky
Chairman
Federal Trade Commission

American Medical Association

Physicians dedicated to the health of America



News Release

AMA PERSISTENCE BRINGS NEW ANTITRUST RULES

August 28, 1996

The President of the American Medical Association declared the revisions of the antitrust guidelines released today by the Federal Trade Commission and the Department of Justice "a significant step forward in ending the discrimination of prior agency policies against physician joint ventures."

Said Daniel H. Johnson, Jr., MD, AMA president, "The revised guidelines should result in more choice for patients, more competition, and better health care. Our persistence has paid off. There is more to be done, but the agencies have done three things we asked for:

"First, they have acknowledged the fundamental changes in the health marketplace, in particular the power of insurance companies and employers, and the benefits to patients of physician designed and controlled ventures.

"Second, they have agreed not to hold physician joint ventures "per se" unlawful simply because they do not reimburse physicians under a capitation mechanism, whereby physicians were rewarded for providing fewer services. Fee for service ventures and other kinds of arrangements will now be given an opportunity to demonstrate their merits under a "rule of reason" test, if they are otherwise true joint ventures.

"Third, agencies will now permit physician joint ventures of the size necessary to be competitive. Patients want choice of physicians and plans. The agencies will not block plans with 50 percent of physicians in competitive marketplaces. Insurance companies have never had to limit the size of their plans. The narrow "safety zone" formulas are not to be taken in any way as maximum tests.

"We believe in an open marketplace and we believe in the value of the patient-physician relationship. Neither ideal was given adequate weight in prior agency interpretations of the antitrust laws."

The revised antitrust guidelines resulted from an intensive three-year campaign by the AMA aimed at removing barriers to physician joint venture networks. The campaign also resulted

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in the introduction of the "Hyde Bill" (HR 2925), sponsored by Rep. Henry Hyde, (R, Ill.), chairman of the House Judiciary Committee, with 153 bipartisan co-sponsors. The bill would require a "rule of reason" approach to physician networks.

"FTC Chairman Robert Pitofsky, Assistant Attorney General Anne Bingaman, and their respective staffs have responded with a more reasonable set of enforcement policies," Dr. Johnson said.

"While today's action represents a milepost, we still have a way to go before we reach a level playing field," he added. "The health care market is undergoing rapid changes. Antitrust and other regulatory policies will require even deeper adjustments. We will continue to work with Mr. Hyde and other Congressional supporters on reasonable antitrust policy.

"Finally, it should be noted that the new antitrust guidelines represent a defeat of an intense insurance industry campaign to block changes in policy. Physician networks now have a great chance to compete effectively with commercial companies, and expand the range of choices available to our patients."

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NEW RULES ISSUED TO HELP DOCTORS FORM NETWORKS

THE NEW YORK TIMES, THURSDAY, AUGUST 29, 1996

Groups of Physicians Will Face Less Risk of Running Afoul Of U.S. Antitrust Laws

By ROBERT PEAR

WASHINGTON, Aug. 28 — The Federal Trade Commission and the Justice Department issued new guidelines today making it easier for doctors to band together and form their own networks and other joint ventures to compete with insurance companies and health maintenance organizations.

Such collaborations now often run afoul of Federal antitrust law because doctors in the same network frequently want to agree on prices. For decades, the Supreme Court has held that price-fixing agreements in general are so harmful to competition that they should be automatically condemned as illegal, regardless of their purpose.

Robert Pitofsky, chairman of the Federal Trade Commission, and Anne K. Bingaman, Assistant Attorney General in charge of the antitrust division of the Justice Department, said the new guidelines would give a green light, or at least a yellow light, to many arrangements in which doctors agree on prices if the doctors can show that the agreement benefits consumers.

Increasingly, doctors want to band together and sell their services to employers without using an insurance company or an H.M.O. as an intermediary. By forming their own health plans, doctors say, they can regain control of medical decision-making and keep more of the income they generate. Doctors have been financially squeezed as more and more patients join H.M.O.'s and other managed-care plans, which rein in costs by tightly controlling payments to health care providers.

Doctors contend that physician networks, rather than restraining competition, may encourage it by providing alternatives to H.M.O.'s, which offer comprehensive medical care in return for fixed monthly premiums. Enrollment in H.M.O.'s and other forms of managed care is soaring, in part because employers see them as a way to control costs.

Mrs. Bingaman predicted that the new rules would "encourage the formation of pro-competitive physician networks." Doctors say policy statements issued by the trade commission and the Justice Department in 1993 and 1994 discouraged the forma-

tion of such networks because doctors feared they would be accused of illegal price-fixing.

Under the original rules, a group of doctors could legally agree on prices if they shared financial risk, as in a clinic or a group practice. One way to share financial risk is for doctors to accept a per capita payment, or premium, for each subscriber.

The guidelines make clear that other physician networks may be legal if, for example, the doctors cooperate in controlling costs and improving the quality of care, but do not share financial risk. Thus, doctors who agree on prices but are paid a separate fee for each service may be allowed to show how consumers benefit from their network.

Mr. Pitofsky said a group of doctors might qualify for such treatment if "the network makes an investment in technology, exchanges information" and regularly reviews the performance of doctors in an effort to improve the quality of care and hold down costs.

With rare bureaucratic finesse, the Justice Department and the commission appeared to please two groups directly affected by the new policy: doctors and H.M.O.'s.

Doctors did not get all they wanted, but they welcomed the changes. "The guidelines are wonderful," said M. Kathleen Kenyon, director of legal affairs at the American Medical Group Association, which represents doctors in group practices. "The agencies have done a good job in addressing the realities of the market."

Dr. Daniel H. Johnson Jr., president of the American Medical Association, said the new standards were more reasonable than the old rules and "should result in more choice for patients, more competition and better health care."

Karen M. Ignagni, president of the American Association of Health Plans, a trade association for H.M.O.'s, praised the two Federal agencies for resisting "pressure to weaken the antitrust laws."

Ms. Ignagni said that vigorous enforcement of these laws was as important today as in 1941, when the Supreme Court upheld a criminal conviction of the A.M.A. for conspiring to obstruct the operation of an H.M.O.-style health plan here in Washington. Doctors and hospitals still try to block managed care by dictating prices and other conditions

to H.M.O.'s, she said.

Gene Kimmelman, co-director of the Washington office of Consumers Union, said: "In principle, the new guidelines continue to promote competition in the health care industry. But I am concerned that Federal antitrust officials are bending over backward in response to lobbying pressure from doctors. The ultimate result may be price increases for consumers and businesses."

As part of their plan to redesign Medicare, the Federal health insurance program for the elderly, House Republicans last year proposed to relax antitrust laws to make it easier for doctors to form networks serving Medicare beneficiaries. Many House members from both parties have agreed to co-sponsor a separate bill that would let doctors exchange information about their prices and profits "for the purpose of establishing a health care provider network."

After issuing the new guidelines today, Mr. Pitofsky said, "I don't think there is any need for the legislation now."

FPI

cc: Chris Jennings

- NAM

- Anti-Trust Ask

EXECUTIVE OFFICE OF THE PRESIDENT

17-Jul-1996 09:21am

TO: Mark E. Miller

FROM: Farooq A. Khan
Office of Mgmt and Budget, HD

CC: John M. Richardson
Anne W. Mutti
Timothy B. Hill

SUBJECT: DRAFT HEALTH CARE GUIDELINES EXPAND RULE OF REASON, ATTORNEY

DRAFT HEALTH CARE GUIDELINES EXPAND RULE OF REASON, ATTORNEYS TELL BNA
The Federal Trade Commission and Department of Justice's summer blockbuster -- draft revisions of the antitrust health care guidelines due out in August -- are making a generally favorable impression among antitrust health care attorneys who have viewed the document.

The revisions lean toward a wider application of "rule of reason" when regulators conduct antitrust analysis. The guidelines would also create a more flexible messenger model, permitting easier negotiations among providers who are not financially integrated. At the same time, the revisions add no new safety zones where providers are relieved from concern over antitrust challenges, according to health attorneys conversant with the document. The draft revisions will update revised and expanded guidelines issued Sept. 27, 1994, according to BNA interviews.

Robert F. Leibenluft, assistant director of the FTC Bureau of Competition told BNA the agency has "talked to a broad range of people since December," when FTC Deputy Director Mark D. Whitener announced the agency's interest in seeking comments on what type of new health care arrangements should trigger rule of reason analysis.

Under rule of reason analysis, regulators consider the competitive nature of certain conduct, such as information exchanges, by non-integrated provider groups; such information exchanges now are considered automatically, or "per se," illegal.

The agencies also conferred with the health care industry when writing the original and amended guidelines in 1993 and 1994. Leibenluft warned that the final revised Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust may be altered from their present state.

Safety Zones

The agencies have added no safety zones to earlier versions of the guidelines, several sources told BNA. This disappointed some reviewers, while others said that the safety zones have probably hindered market innovation. Safety zones describe circumstances under which the agencies will not challenge conduct under the antitrust law.

"While I'm encouraged by what I saw, I still wish they had increased the

safety zones. I'm a little disappointed that they didn't consider expanding the safety zones for multi-provider networks," Kevin Grady, Alston & Bird, Atlanta, told BNA.

But Mark J. Horoschak, Womble Carlyle Sandridge & Rice, Charlotte, N.C., told BNA, "The [guidance] is as good as a safety zone. Once you're within the rule of reason, the only real concern is market power and monopoly-related problems."

Horoschak, who until late 1995 was assistant director for health care in the FTC's Bureau of Competition, said, "People have the [mistaken] notion that if you're not in a safety zone, you're unsafe."

David Marx, McDermott, Will & Emery, Chicago, told BNA that a shift in the size of the safety zones is unlikely. Being outside of a safety zone doesn't mean that the network is going to be anticompetitive, he added, citing a July 1 DOJ business review letter to a proposed physician network of colon and rectal surgical specialists that will not face a DOJ challenge.

Assistant Attorney General Anne Bingaman applied a broad product market definition, which included non-board certified colon and rectal specialists. She concluded that the colon and rectal specialists network fell within the requisite safety zone and would not be subjected to antitrust scrutiny. It's that kind of flexibility and dynamism around the concept of safety zones and product market definition that will probably keep the safety zone levels where they are, Jim Cherney, Latham & Watkins, Chicago, told BNA.

Proxies To Risk Sharing

The bulk of changes are expected to be made to Statements 8 and 9 of the guidelines, attorneys told BNA. The 1994 guidelines are comprised of nine statements of antitrust policy, ranging from mergers among hospitals to joint purchasing arrangements among health care providers.

Statement 8 dictates the maximum percentage of physicians in a particular specialty in a relevant geographic market who may participate in a network joint venture on either an exclusive or non-exclusive basis and not be at risk for antitrust prosecution

Statement 9 permits multiprovider networks to engage in joint pricing if they share substantial financial risk through capitation or fee withholds or through the use of a messenger model.

Marx told BNA that some elucidation on non-economic integration or risk sharing beyond capitation and fee withholds is likely, and that global fees might be the clearest answer. Global fees have emerged recently as a mechanism for shifting the risk to physicians for certain categories of patients. For example, an obstetrician would be financially responsible for all obstetric services associated with pregnancy and would receive no additional payment if the costs exceeded the global fee payment.

Marx pointed out that global fees have withstood antitrust scrutiny in the past in DOJ business review letters. "We'll probably learn what other forms of integration are appropriate. From what I've seen, I do believe we'll see some modification of today's requirements in this area," he said.

In addition, the agencies will look to capitation as another way for networks to obtain rule of reason treatment, said Grady. Through a global capitation arrangement, a payer pays an integrated provider organization a set rate per patient per month for all of the provider services.

Besides global fee and capitation arrangements, Grady said, "I didn't see anything other than pure economic risk in the way of substantial integration that would get rule of reason."

An attorney requesting anonymity told BNA, "The biggest change is the agency's willingness to allow functional and administrative integration as a

proxy for financial integration. You'll probably need a very significant infrastructure to monitor such things as utilization review, best management practices, and investment in systems that will lead to efficiencies and cost savings. This will require you to make significant financial investments so you will have most of the benchmarks required under financial integration but not that formal requirement. You just get there a different way."

Modified Messenger Model

One notable change in the new guidelines may come in the form of a modified, more dynamic, messenger model, Grady said.

Under the 1993 and 1994 statements, messengers, the third party negotiations who set up fees between payers and doctors, are not permitted to negotiate on behalf of physicians. But in hypothetical situations set out in the current draft, Grady said he saw examples of a "more flexible" messenger model. Grady told BNA that in the examples he saw, the messenger might be able to find out from the provider what the minimum aggregate amounts for fees will be and then take that information directly to the payer to negotiate.

"It looks like they're making the messenger model more practical," he said. Many attorneys agree that the current messenger model is cumbersome. "They're trying to make the whole thing clearer, bringing it more in line with market realities," Grady said. Nevertheless, he said the development was "not exactly earthshaking."

Recent DOJ business review letters indicate that if requested to do so by a payer, a messenger can have more meaningful discussions on behalf of members of the network than would otherwise be allowed, Marx told BNA. However, the messenger will have to continue to be "very sensitive to fee and fee-related information," Marx added. "We won't see much change there."

Affect On Physicians Unclear

How the new guidelines will affect physicians remains a question, attorneys told BNA, with some saying physicians will not be pleased, and others saying the guidelines offer physicians a "far greater degree of latitude within which to operate." The American Medical Association declined to comment on the draft guidelines but characterized the 1994 antitrust guidelines as "anti-physician"

The new guidelines correspond, but are not identical, to a bill (HR 2925) by Rep. Henry Hyde (R-Ill), that would require use of the rule of reason standard in the antitrust review of certain information exchanges by provider-sponsored networks relating to price, costs, profitability, marketing, and fees, Horoschak said, adding that he doubts the Hyde bill will pass this year.

Also weighing against passage of the Hyde bill is the Congressional Budget Office's conclusion that the bill would cost state governments \$5 million to \$15 million annually -- an average of \$250,000 per case, he said. CBO argued that easing antitrust review would increase the state and federal government's burden of proof required for the enforcement and prosecution of cases involving provider-sponsored networks.

AMA's Particular Concerns

AMA, in a white paper and letter sent to the FTC and DOJ June 21, urged expansion of Statement 8 and 9 safety zones.

In the white paper, AMA proposed that, in non-exclusive physician networks, the maximum percentage of physicians in a particular specialty in a relevant geographic market who may participate in a network joint venture be increased from 30 percent to 50 percent and that the percentage for exclusive physician networks be increased from 20 percent to 30 percent.

Networks that fall in the 30 percent and 50 percent zones should be subject

to a "quick look" analysis to determine if they have an impermissible amount of market power, AMA said.

"Networks for which there is a plausible foundation for efficiencies would qualify for the rule of reason analysis," according to the AMA.

AMA also proposed a modified messenger model, in which each network physician would give the messenger a fee schedule or a conversion factor the physician would accept from the payers. The messenger would be authorized to contract on the physician's behalf with payers offering the fee level or better. The messenger would not share the fee information or negotiate with the payer.

In addition, AMA proposed changes to Statement 9, in which networks that do not assume capitation, fee withhold arrangements, or global fees would be included in the Statement 9 safety zone.

The networks could operate on a fee-for-service basis but would have to have a written review program for quality, efficiency, and appropriateness of treatment methods and service settings. Networks also would have a program to monitor utilization of services, coordination of delivery of care, and a grievance and appeal process, according to the AMA white paper.

'Positive Step'

"Overall, I think this is generally a positive step forward," said Grady. Others invited to view the drafts and offer comments said the agencies were taking ideas "very seriously." "It seems like they're really listening to a broad audience here," said one special interest representative.

"We feel pretty good about the process so far," said one attorney who had viewed the drafts several times and requested anonymity. "All in all, we're not as worried, but we're still cautious."--By Jeannine Mjoseth and Colin

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Additional DOJ/FTC Antitrust Guidance on Health Care Provider Networks

The Department of Justice and the Federal Trade Commission plan to issue additional guidance on the agencies' antitrust law enforcement policy with respect to health care provider networks. This action is designed to clarify and expand upon the agencies' earlier guidance regarding health care provider networks contained in the joint DOJ/FTC Statements of Enforcement Policy Relating to Health Care and Antitrust, issued in 1993 and revised in 1994. In developing revisions to the Statements, the agencies consulted with a broad spectrum of the health care industry (including self-insured employers, purchaser coalitions, physicians, hospitals and other providers, attorneys who advise providers seeking to form networks, insurers, and managed care plans) and with state antitrust officials. The agencies intend to issue the revised Statements by August 1996.

The revisions, which cover both physician networks and the broad range of "multiprovider" networks, address the following areas:

Rule of Reason/Per Se Treatment: The revisions clarify that a wide range of arrangements that offer efficiencies will justify analyzing price agreements among network participants under the more expansive "rule of reason" antitrust analysis, rather than the "per se" rule of illegality that applies to naked price fixing agreements. The revisions also include several additional examples of networks that would receive rule of reason treatment, including (a) networks in which the participants do not share financial

risk, and (b) networks in which participants share financial risk in ways not described in the earlier Statements.

Applying the Rule of Reason: The revisions elaborate on factors for evaluating networks that are subject to rule of reason analysis, particularly through the use of additional hypothetical examples that include both physician networks and one common type of multiprovider network, the physician-hospital organization (PHO).

Analysis of Networks in Rural Areas: The 1994 Statements discussed how market conditions in rural areas may justify certain health care arrangements that might raise antitrust concerns in other areas. The revisions provide further guidance on this issue through an analysis of a PHO in a rural area.

Safety Zones: The 1993 and 1994 Statements established “antitrust safety zones” for certain physician networks. Because some in the industry have misinterpreted these as defining the only physician networks that the Agencies would consider lawful, the revisions emphasize that networks falling outside the safety zones may be lawful.

Network Arrangements that Avoid Price Agreements: The revisions provide additional guidance on ways that unintegrated networks can employ a “messenger” to facilitate contracting while avoiding any agreements among competing providers on price terms.