DRAFT 08-20-96

Background on Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy In Health Care August 1996 Revisions.

The Department of Justice and the Federal Trade Commission have jointly issued antitrust policy statements concerning the health care industry, which build upon the sets of similar statements the Agencies issued in 1993 and revised in 1994.

Two of the statements significantly expand the prior statements' discussion of the antitrust principles that apply to providers' collaboration, through networks they control, to deliver health care services. The two expanded statements:

- Outline the antitrust principles that the Agencies apply to provider-controlled networks;
- Discuss the application of these principles to evolving forms of provider-controlled networks; and,
- Provide substantial guidance to participants in the health care industry and should reduce uncertainty about the legality of such evolving networks under the antitrust laws, while preserving the Agencies' ability to challenge anticompetitive activity by providers that threatens the choices available to consumers in the marketplace.

In accomplishing these ends, the two expanded statements emphasize three basic points:

- Antitrust analysis and enforcement take into account the particular characteristics of health care markets and the rapid changes that are occurring in these markets.
- The antitrust laws are neutral as to the form that procompetitive provider-controlled networks take.
- The Agencies apply the antitrust laws to provider-controlled networks, primarily using a rule of reason analysis, based on the facts and circumstances of each situation.

The two expanded statements include practical guidance concerning the establishment of such networks:

- First, they outline "antitrust safety zones" for

certain physician networks that are unlikely to raise significant competitive concerns. The criteria for the safety zones are clear and straightforward.

- Second, they emphasize that networks outside the safety zones will be considered on their merits and will pass muster under the rule of reason analysis when they are predominately procompetitive.

- Finally, the statements add specific examples of provider networks whose features justify rule of reason analysis, including networks formed by physician-hospital organizations ("PHOs"):

  * One example outlines a physician network that is structured to deliver more cost-effective quality care to patients through the cooperative efforts of the network physicians.

  * Another example shows how a proposed physician-hospital organization (PHO) could offer residents of a rural area, for the first time, a wide network of physicians and a hospital with the potential to provide health care services more efficiently.

  * An additional example focuses on a joint venture among a hospital, physicians and other health care providers to improve the quality and efficiency of the bone marrow transplants and related cancer care they provide to patients.

  * There is also an example demonstrating how a network of providers can use a "messenger model" to reduce the cost of contracting with health plans.

  * The examples also include a provider-controlled network that is formed for the purpose of exercising market power and is per se unlawful.

Because the statements cannot address the specifics of every possible arrangement, the Agencies have continued their commitment to respond in writing, within 90 or 120 days, depending on the circumstances, to requests for their analysis of proposed provider networks and a variety of other health care arrangements.

- During the last three years that the expedited procedure for responding to parties' inquiries and the Policy Statements have been in effect, the Agencies issued 64 written opinions on health care arrangements.

- Many of the requests during the last three years have involved provider networks that received favorable review by the Agencies because they were structured to avoid competitive risks, promote competition in the health care marketplace, and expand consumer choice.

Possible Criticisms of Revised DOJ/FTC Policy Statements

I. Revisions Don't Go Far Enough

A. Should expand existing safety zones for physicians

Response: Safety zones properly play a limited and precisely-defined role, as they are for networks that can be presumed lawful without examination. While on the whole beneficial, they have proved to be problematic where people try to squeeze within them instead of responding to market demands. Current revisions emphasize the analysis of networks that fall outside the safety zones.

B. Should create new safety zones for other provider networks (PHOs, dentists)

Response: Same consideration as above, plus more problematic to create safety zone for multiprovider networks. In particular, the wide variety in arrangements would make it impossible to craft an appropriate safety zone.

C. Should state clearly that non-exclusive networks with more than 50% of the providers are unlikely to be anticompetitive

Response: Revisions emphesize principles over numbers, because numbers alone can be misleading. Networks that include over 50% of the providers in a market have the potential to be anticompetitive. Revisions emphasize in many places that networks outside safety zones may often be legal, and give examples of larger networks that have been approved in the past. Expedited agency review of specific proposals is availeble.

D. Should give any network that isn't just a "sham" rule of reason treatment (not just those that meet agencies' concept of clinical integration)

Response: The revisions make clear that any arrangement, regardless of form, that offers significant efficiencies for consumers will be evaluated under rule of reason. Discussion of clinical integration is there because that is what people are talking about in the marketplace, and it responds to requests that the agencies give examples of types of arrangements that don't involve financial risk sharing but get rule of reason treatment.

E. Not enough specific guidance (compare Hyde bill, which has checklist of criteria that if met guarantee the network rule of reason treatment)

Response: The statements provide meaningful guidance and they emphasize the agencies' openness to new types of arrangements, to encourage

innovation that may lead to more cost-effective, higher quality health care. Specific criteria of the sort contained in the Hyde bill risks channeling the market in one direction that may not be best for consumers. Important to maintain maximum flexibility consistent with protecting consumers from anticompetitive conduct. Also, we give more guidance in this industry than in any other, through policy statements and expedited advice letters.

F. Revisions don't level the playing for doctors vis a vis insurance companies

Response: The antitrust laws are designed to protect consumers. Allowing physicians to form groups to give them greater bargaining power when negotiating fees with insurers won't enhance the public's interest in cost effective, quality health care.

II. Revisions Go Too Far

A. Networks that don't involve financial risk sharing don't offer any consumer benefit

Response: There is strong interest in experimenting with alternatives to risk sharing. Antitrust should not discourage such innovation, but instead evaluate on its merits.

B. Encouraging physician-controlled networks increases risk that doctors will engage in anticompetitive conduct to block competition from allied health care providers, such as nurse anesthetists and nurse midwives

Response: The revisions warn that collateral agreements designed to prevent competition from allied providers raise serious antitrust risks. Networks that injure consumers and comptition will be challenged.

C. The revisions send a signal that virtually anything goes as far as doctor networks are concerned

Response: The statements are balanced and emphasize the agencies continued commitment to preventing anticompetitive conduct.

III. PROCESS -- Revisions should have been published for public comment

Response: The guidelines describe the agencies' current law enforcement policy and are not regulations subject to administrative notice and comment procedures. Before issuing the statements, however, the agencies consulted

with a broad spectrum of health care providers, purchasers, consumer groups and state antitrust enforcers. A formal notice and comment period would have significantly delayed issuance of this important guidance.

FURTHER GUIDANCE UNDER EXISTING LAW, NOT LEGISLATIVE DIRECTIVES, IS THE BEST WAY TO PROMOTE PROCOMPETITIVE PROVIDER-DIRECTED HEALTH PLANS

- Health care markets are changing rapidly. Vigorous antitrust law enforcement has been, and continues to be, instrumental in allowing health care markets to develop without obstruction by private restraints that raise prices or limit the range of choices available to consumers.

- As part of ongoing efforts to ensure that antitrust analysis reflects current market realities, the Federal Trade Commission and the Department of Justice, after consultation with a broad cross-section of industry representatives and state antitrust law enforcers, have issued additional guidance for the health care industry to make clear that the antitrust laws do not impede the development of new types of potentially procompetitive provider-sponsored network arrangements.

- Addressing legitimate concerns that uncertainty or misperceptions about the antitrust laws could deter some beneficial new arrangements is best done by issuing guidance under existing law.

  - Such an approach permits continued flexible adjustment over time as markets continue to evolve. Experience demonstrates that health care markets are changing too rapidly to assess the potential efficiencies of provider networks on the basis of any single set of fixed criteria like that contained in H.R. 2925.

  - The antitrust laws are sufficiently flexible to permit this type of reevaluation and any necessary adjustments, without the need for statutory changes.

- Adopting legislative criteria would:

  - risk immediate consumer harm by making it more difficult to challenge certain forms of highly anticompetitive conduct -- such as price fixing -- which sometimes have been undertaken by provider-sponsored networks. Employers in particular have expressed concern that such legislation could threaten the gains they have made to contain the rising costs of employee benefits plans.

  - distort the development of physician networks by encouraging organizers to establish networks that meet the technical requirements of the law, rather than developing networks that ensure maximum patient benefit.

- Mandating that rule of reason analysis be applied to price fixing agreements -- as H.R. 2925 does -- would be unprecedented. Creating special rules for health care providers would invite other industries to seek favored status as well.

Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, AUGUST 28, 1996

AT
(202) 616-2771
TDD (202) 514-1888

JUSTICE DEPARTMENT AND FEDERAL TRADE COMMISSION ISSUE REVISED ANTITRUST GUIDELINES FOR THE HEALTH CARE INDUSTRY

Guidelines Promote Innovative Health Care Arrangements to Provide Consumers with Better Health Care Services

WASHINGTON, D.C. -- The Justice Department and the Federal Trade Commission today released revised antitrust guidelines for the health care industry to let health care providers and hospitals know how they can enter into joint ventures and other collaborative activities without violating the antitrust laws. The newly-revised guidelines provide significantly expanded discussions of the antitrust principles that the Department and FTC apply when analyzing physician network joint ventures and multiprovider networks.

The guidelines reflect and promote the continued emergence of innovative health care arrangements to meet consumer demand for cost-effective, high-quality health care services. The statements make clear that physician network joint ventures may be procompetitive and expand consumer choice. Such arrangements that offer consumers significant efficiencies and are reasonably

(MORE)

necessary to achieve them will be reviewed under a flexible analysis rather than viewed as naked price fixing agreements, the Department said.

The new statements were announced today at a press conference held by Anne K. Bingaman, Assistant Attorney General for the Department's Antitrust Division, and Robert Pitofsky, Chairman of the Federal Trade Commission.

"The health care industry is rapidly changing and evolving in response to consumer demand for new and better methods of delivering high quality health care efficiently," said Bingaman. "The current revisions to the policy statements demonstrate that antitrust analysis and enforcement are flexible and resilient to accommodate these changing markets."

The nine statements issued today build upon the set of similar statements the Department and the FTC issued in 1993 and revised in 1994. All of the statements outline the antitrust principles that the Department and FTC apply in analyzing a variety of joint ventures and other activities by health care providers that may be procompetitive and cost-saving, and thus alleviate antitrust uncertainty in these areas.

Today's revisions expand the statements on physician network joint ventures and multiprovider networks. They provide an expanded analytical framework that physicians and other providers can rely upon in creating new health care networks tailored to consumer demand for cost-effective, high-quality health care

services.

The statements provide seven new hypothetical examples of how the antitrust laws apply to specific situations. There are several examples of physician hospital organizations, including one in a rural market involving a large percentage of physicians, that would receive favorable treatment under the antitrust laws. There is also an example of a "messenger model" arrangement that explains how unintegrated networks can facilitate physician contracting with payers while avoiding unlawful price agreements.

The revised statement on physician joint ventures continues to provide safety zones for networks of a particular size--20 percent where exclusive and 30 percent where non-exclusive--that share substantial financial risk. Exclusive joint ventures, explicitly or in practice, restrict doctors from participating in other networks or from contracting individually with health benefits plans. The statement provides additional examples of substantial financial risk sharing, and further emphasizes that a physician network joint venture can be procompetitive even if it does not come within a safety zone.

Most of the statements also describe safety zones that define circumstances in which the Department and FTC will not challenge such conduct. The revisions emphasize that conduct falling outside the safety zones may be lawful.

Under the statements the Department and the FTC also continue their commitment to an expedited procedure to respond,

generally within 90 days, to parties seeking additional guidance on proposed health care joint ventures and other activities.

The Department has issued 40 business review letters in the health care area since the policy statements were first issued in September 1993. Many of these involved physician or other provider networks that were approved by the Department because they were structured to prevent anticompetitive harm and to promote competition in the marketplace.

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96-412

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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Separate Statement of Commissioner Christine A. Varney
On the Revised Health Care Guidelines

The Federal Trade Commission and the Department of Justice today issued revisions to Statements 8 and 9 of the *Statements of Antitrust Enforcement Policy in Health Care* ("health care guidelines"). I am writing separately for two basic reasons. First, I have been somewhat critical of the health care guidelines in the past, suggesting that they 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 outside of the safety zones. I believe that the revised health care guidelines address these previous concerns. I commend the Agencies' staffs for the tremendous progress that is reflected in these guidelines. Second, the issuance of the guidelines is an iterative process, and I invite continued input from interested parties. The health care marketplace is undergoing rapid change, and it is primarily through an open dialogue with all involved in the health care industry that the Agencies can continue to provide appropriate and relevant antitrust guidance.

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,

- more -

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

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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(FTC File No. P96503)
(hlth-3)

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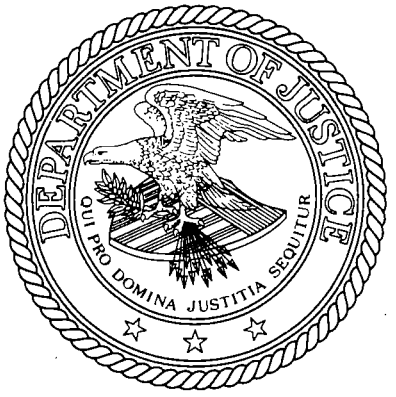
Statements of Antitrust Enforcement Policy in Health Care



Issued by the
U.S. Department of Justice
and the
Federal Trade Commission

August 1996