

DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION

STATEMENTS OF ANTITRUST
ENFORCEMENT POLICY IN HEALTH CARE

STATEMENT 4: ENFORCEMENT POLICY ON PROVIDERS' COLLECTIVE PROVISION OF
NON-FEE-RELATED INFORMATION TO PURCHASERS OF HEALTH CARE SERVICES

INTRODUCTION

The collective provision of non-fee-related information by competing health care providers to a purchaser in an effort to influence the terms upon which the purchaser deals with the providers does not necessarily raise antitrust concerns. Generally, providers' collective provision of certain types of information to a purchaser is likely either to raise little risk of anticompetitive effects or to provide procompetitive benefits.

This statement sets forth an antitrust safety zone that describes providers' collective provision of non-fee-related information that will not be challenged by the Agencies under the antitrust laws, absent extraordinary circumstances.¹² It also describes conduct that is expressly excluded from the antitrust safety zone.

A. ANTITRUST SAFETY ZONE: PROVIDERS' COLLECTIVE PROVISION OF NON-FEE-RELATED INFORMATION THAT WILL NOT BE CHALLENGED, ABSENT EXTRAORDINARY CIRCUMSTANCES, BY THE AGENCIES

Providers' collective provision of underlying medical data that may improve purchasers' resolution of issues relating to the mode, quality, or efficiency of treatment is unlikely to raise any significant antitrust concern and will not be challenged by the Agencies, absent extraordinary circumstances. Thus, the Agencies will not challenge, absent extraordinary circumstances, a medical society's collection of outcome data from its members about a particular procedure that they believe should be covered by a purchaser and the provision of such information to the purchaser. The Agencies also will not challenge, absent extraordinary circumstances, providers' development of suggested practice parameters--standards for patient management developed to assist providers in clinical decisionmaking--that also may provide useful information to patients, providers, and purchasers. Because providers' collective provision of such information poses little risk of restraining competition and may help in the development of protocols that increase quality and efficiency, the Agencies will not challenge such activity, absent extraordinary circumstances.

In the course of providing underlying medical data, providers may collectively engage in discussions with purchasers about the scientific merit of that data. However, the antitrust safety zone excludes any attempt by providers to coerce a purchaser's decisionmaking by implying or threatening a boycott of any plan that does not follow the providers' joint recommendation. Providers who collectively threaten to or actually refuse to deal with a purchaser because they object to the purchaser's administrative, clinical, or other terms governing the provision of services run a substantial antitrust risk. For example, providers' collective refusal to provide X-rays to a purchaser that seeks them before covering a particular treatment regimen would constitute an antitrust violation. Similarly, providers' collective attempt to force purchasers to adopt recommended practice parameters by threatening to or actually boycotting purchasers that refuse to accept their joint recommendation also would risk antitrust challenge.

Competing providers who are considering jointly providing non-fee-related information to a purchaser and are unsure of the legality of their conduct under the antitrust laws can take advantage of the Department of Justice's expedited business review procedure announced on December 1, 1992 (58 Fed. Reg. 6132 (1993)) or the Federal Trade Commission's advisory opinion procedure contained at 16 C.F.R. §§ 1.1-1.4 (1993). The Agencies will respond to a business review or advisory

ry opinion request on behalf of providers who are considering jointly providing such information within 90 days after all necessary information is submitted. The Department's December 1, 1992 announcement contains specific guidance as to the information that should be submitted.

FOOTNOTES:

12. This statement addresses only providers' collective activities. As a general proposition, providers acting individually may provide any information to any purchaser without incurring liability under federal antitrust law. This statement also does not address the collective provision of information through an integrated joint venture or the exchange of information that necessarily occurs among providers involved in legitimate joint venture activities. Those activities generally do not raise antitrust concerns.