

DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION

STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE

INTRODUCTION

In September 1993, the Department of Justice and the Federal Trade Commission (the “Agencies”) issued six statements of their antitrust enforcement policies regarding mergers and various joint activities in the health care area. The six policy statements addressed: (1) hospital mergers; (2) hospital joint ventures involving high-technology or other expensive medical equipment; (3) physicians’ provision of information to purchasers of health care services; (4) hospital participation in exchanges of price and cost information; (5) health care providers’ joint purchasing arrangements; and (6) physician network joint ventures. The Agencies also committed to issuing expedited Department of Justice business reviews and Federal Trade Commission advisory opinions in response to requests for antitrust guidance on specific proposed conduct involving the health care industry.

The 1993 policy statements and expedited specific Agency guidance were designed to advise the health care community in a time of tremendous change, and to address, as completely as possible, the problem of uncertainty concerning the Agencies’ enforcement policy that some had said might deter mergers, joint ventures, or other activities that could lower health care costs. Sound antitrust enforcement, of course, continued to protect consumers against anticompetitive activities.

When the Agencies issued the 1993 health care antitrust enforcement policy statements, they recognized that additional guidance might be desirable in the areas covered by those statements as well as in other health care areas, and committed to issuing revised and additional policy statements as warranted. In light of the comments the Agencies received on the 1993 statements and the Agencies’ own experience, the Agencies revised and expanded the health care antitrust enforcement policy statements in September 1994. The 1994 statements, which superseded the 1993 statements, added new statements addressing hospital joint ventures involving specialized clinical or other expensive health care services, providers’ collective provision of fee-related information to purchasers of health care services, and analytical principles relating to a broad range of health care provider networks (termed “multiprovider networks”), and expanded the antitrust “safety zones” for several other statements.

Since issuance of the 1994 statements, health care markets have continued to evolve in response to consumer demand and competition in the marketplace. New arrangements and variations on existing arrangements involving joint activity by health care providers continue to emerge to meet consumers’, purchasers’, and payers’ desire for more efficient delivery of high quality health care services. During this period, the Agencies have gained additional experience with arrangements involving joint provider activity. As a result of these developments, the Agencies have decided to amplify the enforcement policy statement on physician network joint ventures and the more general statement on multiprovider networks.

In these revised statements, the Agencies continue to analyze all types of health care provider networks under general antitrust principles. These principles are sufficiently flexible to take into account the particular characteristics of health care markets and the rapid changes that are occurring in those markets. The Agencies emphasize that it is not their intent to treat such networks either more strictly or more leniently than joint ventures in other industries, or to favor any particular procompetitive organization or structure of health care delivery over other forms that consumers may desire. Rather, their goal is to ensure a competitive marketplace in which consumers will have the benefit of high quality, cost-effective health care and a wide range of

choices, including new provider-controlled networks that expand consumer choice and increase competition.

The revisions to the statements on physician network joint ventures and multiprovider networks are summarized below. In addition to these revisions, various changes have been made to the language of both statements to improve their clarity. No revisions have been made to any of the other statements.

PHYSICIAN NETWORK JOINT VENTURES

The revised statement on physician network joint ventures provides an expanded discussion of the antitrust principles that apply to such ventures. The revisions focus on the analysis of networks that fall outside the safety zones contained in the existing statement, particularly those networks that do not involve the sharing of substantial financial risk by their physician participants. The revised statement explains that where physicians' integration through the network is likely to produce significant efficiencies, any agreements on price reasonably necessary to accomplish the venture's procompetitive benefits will be analyzed under the rule of reason.

The revised statement adds three hypothetical examples to further illustrate the application of these principles: (1) a physician network joint venture that does not involve the sharing of substantial financial risk, but receives rule of reason treatment due to the extensive integration among its physician participants; (2) a network that involves both risk-sharing and non-risk-sharing activities, and receives rule of reason treatment; and (3) a network that involves little or no integration among its physician participants, and is per se illegal.

The safety zones for physician network joint ventures remain unchanged, but the revised statement identifies additional types of financial risk-sharing arrangements that can qualify a network for the safety zones. It also further emphasizes two points previously made in the 1994 statements. First, the enumeration in the statements of particular examples of substantial financial risk sharing does not foreclose consideration of other arrangements through which physicians may share substantial financial risk. Second, a physician network that falls outside the safety zones is not necessarily anticompetitive.

MULTIPROVIDER NETWORKS

In 1994, the Agencies issued a new statement on multiprovider health care networks that described the general antitrust analysis of such networks. The revised statement on multiprovider networks emphasizes that it is intended to articulate general principles relating to a wide range of health care provider networks. Many of the revisions to this statement reflect changes made to the revised statement on physician network joint ventures. In addition, four hypothetical examples involving PHOs ("physician-hospital organizations"), including one involving "messenger model" arrangements, have been added.

SAFETY ZONES AND HYPOTHETICAL EXAMPLES

Most of the nine statements give health care providers guidance in the form of antitrust safety zones, which describe conduct that the Agencies will not challenge under the antitrust laws, absent extraordinary circumstances. The Agencies are aware that some parties have interpreted the safety zones as defining the limits of joint conduct that is permissible under the antitrust laws. This view is incorrect. The inclusion of certain conduct within the antitrust safety zones does not imply that conduct falling outside the safety zones is likely to be challenged by the Agencies. Antitrust analysis is inherently fact-intensive. The safety zones are designed to require consideration of only a few factors that are relatively easy to apply, and to provide the Agencies with a high degree of confidence that arrangements falling within them are unlikely to raise substantial competitive concerns. Thus, the safety zones encompass only a subset of provider arrangements that the Agencies are unlikely to challenge under the antitrust laws. The statements outline the analysis the Agencies will use to review conduct that falls outside the safety zones.

Likewise, the statements' hypothetical examples concluding that the Agencies would not challenge the particular arrangement do not mean that conduct varying from the examples is likely to be challenged by the Agencies. The hypothetical examples are designed to illustrate how the statements' general principles apply to specific situations. Interested parties should examine the business review letters issued by the Department of Justice and the advisory opinions issued by the Federal Trade Commission and its staff for additional guidance on the application and interpretation of these statements. Copies of those letters and opinions and summaries of the letters and opinions are available from the Agencies at the mailing and Internet addresses listed at the end of the statements.

The statements also set forth the Department of Justice's business review procedure and the Federal Trade Commission's advisory opinion procedure under which the health care community can obtain the Agencies' antitrust enforcement intentions regarding specific proposed conduct on an expedited basis. The statements continue the commitment of the Agencies to respond to requests for business reviews or advisory opinions from the health care community no later than 90 days after all necessary information is received regarding any matter addressed in the statements, except requests relating to hospital mergers outside the antitrust safety zone and multiprovider networks. The Agencies also will respond to business review or advisory opinion requests regarding multiprovider networks or other non-merger health care matters within 120 days after all necessary information is received. The Agencies intend to work closely with persons making requests to clarify what information is necessary and to provide guidance throughout the process. The Agencies continue this commitment to expedited review in an effort to reduce antitrust uncertainty for the health care industry in what the Agencies recognize is a time of fundamental change.

The Agencies recognize the importance of antitrust guidance in evolving health care contexts. Consequently, the Agencies continue their commitment to issue additional guidance as warranted.