FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF COMPETITION

March 22, 1984

Gilbert M. Frimet, Esquire
Frimet, Bellamy, Gilchrist & Lites, P.C.
333 West Fort Street
Suite 2000
Detroit, Michigan 48226

Dear Mr. Frimet:

This letter responds to your February 1, 1984, request for a staff advisory opinion concerning several issues regarding the operation of an HMO/IPA plan that you represent. Some of the conduct that you asked about appears to be on-going rather than prospective and, with regard to certain issues, we did not have all the information we needed to judge the impact of the conduct involved. Therefore, in accordance with the Commission's Rules of Practice, §1.1(a), we cannot give a formal advisory opinion. We can, however, supply some general guidance with regard to the questions you have raised.

According to the information that you have provided, your office represents a large HMO/IPA plan that has approximately 12% of the population of a three-county service area as enrollees. The HMO contracts with an IPA physician group composed of approximately 60% of the primary care physicians in the service area and 65% of the total number of physicians practicing in the same area. In addition, you have also informed us that the HMO reimburses the IPA on a capitation basis. The physicians in the IPA, however, are reimbursed on the basis of a fee schedule or on the basis of their actual charges, whichever amount is lower. In addition, a percentage of the fee due the physicians is withheld by the IPA and placed in an account to be used to cover expenses in the event that the capitation payments are not sufficient to cover the expenses of the IPA. Also, the HMO and the IPA have an agreement under which they share, on an equal basis, any deficit or surplus that results from the provision of health services, other than medical services, to the HMO's enrollees.

You have asked for advice on the following issues:

1(a) Given its capitation and risk sharing arrangement with the HMO, can the IPA independently establish a fee schedule for distribution of its capitation payment to its physician-shareholders without violating the antitrust laws?

(b) Would the answer to this question change if the membership grew to include more physicians or if a larger proportion of the population enrolled in the HMO?

(c) Is it necessary that the HMO undertake the task of updating and constructing the fee schedule and, if so, what other measures could be undertaken to alleviate any antitrust concerns?

2. Would any or all of the following proposals, if adopted by the IPA, be a violation of the antitrust laws?

(a) A proposal that any IPA shareholder who is or becomes affiliated with another HMO or similar entity be ineligible to be an IPA shareholder.

(b) A proposal that IPA shareholders that are affiliated with other HMOs or similar entities hold a separate class of stock with diminished voting or economic rights.

(c) A proposal that the IPA would have the exclusive use of the shareholder's name, specialty, and certification for advertising and promotional purposes.

This letter is limited to the facts set out above and in your letter of February 1, 1984.

With regard to the first set of issues raised in your letter concerning the use of a fee schedule by the IPA, this conduct itself does not appear to represent a violation of the antitrust laws, assuming that the physicians' joint participation in the HMO program, through the IPA, is lawful. The Commission has analyzed some of the competitive problems that may occur when physicians form or operate an IPA-type HMO or other similar prepayment plan, or deal with a prepayment plan in which the IPA's physicians do not have a financial interest. See FTC Enforcement Statement Regarding Physician Agreements to Control Medical Prepayment Plans, 46 Fed. Reg. 48982 (1981) ("Enforcement Statement") (copy enclosed). In that statement, the Commission indicated that where physicians had "partially integrated" their practices in a prepayment plan, either through a financial contribution to the plan or through an agreement to share the risk of any adverse financial consequences that might result from the plan's operation, then most antitrust issues related to the operation of such a plan would be judged under the rule of reason. Under such an analysis, the likely procompetitive and anticompetitive effects of the arrangement are balanced in order to assess its overall impact on competition. Enforcement Statement at 48989.

In this instance, the IPA physicians appear to have a clear financial involvement in the HMO's operation, first through what is presumably a substantial risk assumption via the IPA's acceptance of a capitation payment, and second, at least arguably, through the IPA's partial ownership of the HMO via the newly-formed nonprofit corporation. Under these circumstances, the agreements on price by the IPA physicians relative to their participation in the HMO--both in setting maximum allowable fees for services provided to HMO patients, and in collectively negotiating a capitation rate with the HMO that, at least in part, is derived from the physicians' agreed-upon fee levels--are evaluated under the rule of reason and are distinguishable from the types of agreements held to be per se illegal price fixing in Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) and Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980). Furthermore, in its Enforcement Statement, the Commission noted that usually the practices of a physician group participating in the programs of a medical prepayment plan in this manner "will not violate the antitrust laws unless they have, or are likely to have, a significant anticompetitive effect." Enforcement Statement at 48991.

We do not have sufficient information to conclude definitively whether the nature of the IPA physicians' involvement in the HMO is anticompetitive under the rule of reason. However, absent evidence of anticompetitive effect, and applying the guidelines set out by the Commission in its Enforcement Statement, we do not see substantial antitrust concerns arising from such involvement. Consequently, we do not see any substantial antitrust problem arising from the IPA's adoption of a maximum fee schedule for its physicians in their treatment of HMO patients. The fee schedule is apparently a vehicle for determining how the revenues from the HMO are to be distributed within the IPA, just as any corporation or business organization must determine how its revenues will be distributed. Thus, the use of the fee schedule to determine how to divide up the capitation payment does not, in itself, appear to present an antitrust problem.[1]

---

[1] Care should be taken that the fee schedule used by the IPA does not become the basis upon which these physicians determine their fees to patients not enrolled in the HMO. Such conduct could be considered evidence of illegal price-fixing.

With regard to question 1(b), set out above, the analysis of the legality of the fee schedule for the purposes described above would not appear to change if the number of physicians or percentage of the population participating in the HMO grew. With regard to question 1(c), since the use of the

(Continued)

An antitrust problem, of course, could exist, with regard to the joint negotiation and agreement by the physicians in the IPA on the capitation rate that they will accept from the HMO if the IPA physicians did not have a financial or risk-sharing interest in the HMO. See Enforcement Statement at note 27 and accompanying text; Maricopa, supra at 356-57. Such activity is not violative of the antitrust laws so long as it is part of a true joint venture and so long as its anticompetitive aspects are outweighed by any procompetitive benefits. Enforcement Statement at 48989-991. In this instance, so long as the physicians have made a substantial contribution to the operation of the plan or have undertaken a substantial financial risk, then this aspect of the arrangement probably also would not represent an antitrust violation.

With respect to the second issue raised in your letter, relating to the possibility of imposing on the physicians in the IPA a requirement that they not affiliate with another HMO or similar entity, more serious antitrust issues are raised. As noted above, the Commission has indicated that in assessing the legality of such conduct, it will usually apply a rule of reason. Enforcement Statement at 48991. In its Enforcement Statement, the Commission noted that it would be likely to consider enforcement action against those plans that "prevent or make impracticable the formation of other plans that would otherwise be likely to enter the market" and thus result in the elimination of potential competition. Enforcement Statement at 48990-91. In assessing whether the operation of a plan raises such antitrust concerns, the Commission indicated that it would examine closely whether the plan in question had market power, since some degree of market power is usually required if an act or practice is to have a significant anticompetitive effect. Id. In this regard the Commission noted:

> Antitrust concern would also arise if a partially integrated plan required its participating physicians to sign contracts that effectively barred them from participating in any other prepayment plan, and so many physicians signed up that it was difficult for other plans to recruit a sufficient physician panel.

Enforcement Statement at 48991 (footnote omitted). See also Blue Cross of Wash. and Alaska v. Kitsap Physician Service, 1982-1 Tr. Cas. ¶ 64,588 (1981) (attempt by an insurer to prohibit contracting physicians from becoming affiliated with competing HMOs held sufficiently likely to violate the antitrust laws so as to warrant issuance of preliminary injunction); Medical Service Corp. of

---

fee schedule does not appear to be illegal, no further response to this question is required.

Spokane County, 88 F.T.C. 906 (1976) (consent order barring Blue Cross plan and a physician group from boycotting HMOs and physicians who practice in HMOs).

Based on the above guidelines, if the IPA adopted a proposal requiring all IPA members to deal exclusively with that organization, such action could present serious antitrust concerns and the Commission might decide that enforcement action was warranted. The IPA in question includes a substantial majority of the physicians in the area; therefore such an exclusivity provision could make it extremely difficult for a new or existing HMO or similar organization to attract or retain the physicians that it would need to operate effectively if enough physicians agreed to the exclusivity provision.[2] Thus, if the IPA enacted such a proposal it could have a significant anticompetitive effect and might well be unlawful, unless it could be shown to have an equal or greater procompetitive effect. From the information you provided, however, there appears to be little valid procompetitive justification for this restriction. Your letter states that the IPA has an interest in assuring that physician shareholders act in the best interest of the HMO/IPA plan. However, it is not clear why the legitimate interests of the IPA could not adequately be protected through some means that has less potential for injuring competition.

Finally, the alternative proposals in your letter, such as giving physicians who are affiliated with another HMO a separate class of stock with diminished voting or economic rights or requiring that physicians give the IPA the exclusive use of the their name for advertising and promotional purposes, also could raise the same antitrust problems noted above if a sufficient number of physicians in the IPA agreed to be bound by the terms of these proposals and a new firm attempting to enter would have difficulty attracting the necessary physicians or successfully marketing its program to consumers.

---

2 Of course, if there were evidence that doctors would forego their membership in the IPA in order to permit their participation in other ventures, then the possible anticompetitive effects of the exclusivity provision could be ameliorated.

The above legal advice is an informal staff opinion. Under the Commission's Rules of Practice §1.3(c), the Commission is not bound by this advice and reserves the right to rescind it at a later time.

Sincerely yours,

Arthur N. Lerner

Arthur N. Lerner
Assistant Director

Enclosure