



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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Bureau of Competition

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Dear Mr. Neiderman:

This letter responds to your request on behalf of Medical Group Management Association (MGMA) for an advisory opinion concerning MGMA's proposal to conduct and publish the results of a survey of physician practices. The survey will seek information regarding several aspects of physicians' contractual relationships with third-party payers, including information about amounts that health plans pay for physician services. MGMA will publish the information obtained through the survey only on an aggregated basis; it will not disclose information about individual payers. As discussed below, it does not appear likely that publication of the survey results, in the manner described in your letters, will prompt coordinated anticompetitive behavior by physicians. Accordingly, the Commission staff has no intention to recommend law enforcement action regarding the proposed conduct.

Description of the Proposed Conduct

MGMA is a professional association that represents medical practice administrators, including individual administrators and executives of medical groups and other providers of health care services. According to information on MGMA's website, it has 19,000 members who manage 11,000 physician practices, integrated health care systems, and hospital- and medical school-affiliated practices containing 220,000 doctors throughout the United States.¹

Your request letter states that one of MGMA's functions is to provide to its members data that allow them to benchmark the performance and status of their medical group compared to its

¹ See MGMA website at www.mgma.com.

peers. This information, according to MGMA, can be an important strategic tool in medical groups' competition in the market. MGMA already does annual surveys of its members relating to, among other things, physician compensation and production, and practice costs.²

MGMA's request for an advisory opinion focuses on its proposal to conduct a survey of insurer payments to medical groups and of "medical groups' overall satisfaction with certain aspects of contract performance of third-party payers in the marketplace." MGMA will send the initial survey to Colorado primary care physicians (family practitioners, general internists, pediatricians, and obstetrician-gynecologists). It will obtain information from members of the Colorado State Medical Association as well as members of MGMA. The survey results will be offered for commercial sale to interested parties (at a reduced price to survey participants). If the program is successful in Colorado, then MGMA may expand it to other states and specialties.

Only employees of MGMA responsible for the data collection, analysis, and reporting will have access to the underlying survey responses; this information will not be shared among the physician practices participating in the survey. The payment information, when published, will be at least 90 days old. Either MGMA will request information about prices that were in effect ninety days prior to the response, or it will ask about current prices but not publish them in any form until 90 days after the information is collected.

The proposed survey instrument asks each responding practice to report the amount received for each of ten evaluation and management services procedure codes from up to ten commercial fee-for-service payers. MGMA will publish for each procedure code only aggregated information relating to prices paid by all the insurers whose data are reflected in the survey. The information will not be weighted according to the size of the reporting practice group or the number of patients covered by a particular payer. MGMA intends to report, for each procedure code surveyed, the number of responses, the mean, the standard deviation, the 25th percentile, the median, the 75th percentile, and the 90th percentile of payments, both for Colorado as a whole and for metropolitan areas within the state. Separate reports would be generated for all primary care practices combined and for particular types of primary care practitioners. The data may also be reported by practice groups with certain characteristics (such as size). MGMA will neither collect nor report information on prices paid by individual, named insurers.

In addition, the survey will seek information regarding:

- What percentage of commercial fee-for-service payers maintain an adequate network of specialists, based on factors such as length of time required for a patient to get to an appointment with a specialist, travel time to specialists to whom patients are referred, and the adequacy of communications between the

² See MGMA website at www.mgma.com/surveys.

referring doctor and specialists;

- What percentage of commercial fee-for-service claims are denied, partially denied, or returned for correction or additional information;
- What percentage of commercial fee-for-service claims are paid within certain time periods (from 30 to 75 days) after submission; and
- The practices' satisfaction with payers' responsiveness to questions or concerns regarding claims.

MGMA will not collect and report the information about these subjects with reference to specific payers, but only on an aggregated basis.

MGMA contends that the information exchange will “promote the exchange of meaningful data and enhance the overall efficiency of the health care marketplace, not only among physician participants but also among insurers, employers and consumers.” In essence, MGMA contends that providing information about market conditions to providers and purchasers of health care services will permit those parties to become more efficient participants in the health care system. It also asserts that the proposed information exchange does not pose a significant risk of anticompetitive effects because of the nature of the information involved and the procedural safeguards relating to the survey process that MGMA intends to implement: namely, safeguarding against disclosure of the underlying data to persons other than selected MGMA personnel, the focus on prices at least 90 days old, and the aggregated nature of the data to be reported.

Legal Analysis

MGMA's publication of information obtained from physician practices through the proposed survey of insurer payments and other aspects of insurer business practices constitutes a type of information exchange among competitors. The information that MGMA proposes to collect and publish can be divided into two general categories: information about insurer payments to medical practices, and information about physician practices' satisfaction with other aspects of their business relationships with insurers. Each category of information raises somewhat different antitrust issues and thus warrants separate discussion.

Insurer Payments

MGMA's publication of information about insurer payments to survey respondents is similar to an exchange of price information among physicians, because the payment that any physician practice receives pursuant to a contract with a particular insurer reflects the price that the physicians have agreed to accept for services rendered to patients covered by that insurer's health plan. As is recognized in the DOJ/FTC *Statements of Antitrust Enforcement Policy in*

Health Care (1996) (*Statements*),³ competitors' exchanges of price, cost, and other types of information do not necessarily endanger competition. In many circumstances, indeed, providing information to market participants about prevailing market conditions, including information about market prices, can improve the functioning of the market and enhance competition. In some circumstances, however, an exchange of price information can be part of a price-fixing arrangement, or can facilitate sellers' tacit coordination of their competitive behavior. A price survey such as MGMA proposes to undertake could restrain competition by resulting in physicians' concertedly or interdependently modifying their pricing or contracting behavior relative to insurers. As your letter recognizes, safeguards relating to the manner in which the price information is gathered and published can significantly reduce the risk that an exchange of price information will result in anticompetitive effects.

The *Statements* provide an antitrust "safety zone" for exchanges of price information that met the following criteria:

- the survey is managed by a third-party;
- the information provided by survey participants is based on data more than three months old; and
- there are at least five providers reporting data upon which each disseminated statistic is based, no individual's data represents more than 25 percent on a weighted basis of any statistic, and the information disseminated is sufficiently aggregated that the prices charged by any particular health care provider cannot be identified.

These conditions are intended to assure that competing sellers do not use the information exchange to discuss or determine mutually acceptable price levels.

The safety zone does not by its terms apply to MGMA's survey of insurer payment information. Dissemination of that information may, in some circumstances, have different competitive effects from dissemination of physician price information. Thus, MGMA's decision to adopt with respect to the proposed survey the types of safeguards found in the safety zone – preventing disclosure of the underlying payment data to physicians, focusing on past or current rather than future payments, publishing only statistics that combine data from at least 5 respondents, and publishing the information in an aggregated form that prevents disclosure of the prices paid by individual insurers or received by individual physician practices – are not by themselves dispositive with respect to the antitrust analysis. Nonetheless, these safeguards provides significant protection against use of the information to restrict competition among physicians.

In addition, the circumstances of the proposed activity provide no indication that the

³ The *Statements* are available at www.ftc.gov/reports/hlth3s.htm#8.

proposed conduct is likely to encourage restraints on the competitive process, or is intended to do so. MGMA will not be acting in a representative capacity with health plans on behalf of any physician group, and it will not provide advice or suggestions to practices about proper pricing. The way that the information will be presented does not appear likely to facilitate tacit agreement on any particular price level, because the information will not be weighted, prices of individual payers will not be identified, and several price levels for each procedure will be reported. Physicians could, of course, use the information disclosed through MGMA's survey to enter into agreements on the prices they will accept from insurers. Such conduct would be patently illegal. The survey itself, however, is not likely to increase appreciably the risk of such conduct.

On balance, the potential procompetitive effects of providing market participants with information on insurer payments are likely to outweigh any risk that particular groups of doctors in some locations might use the information to facilitate anticompetitive conduct. Should such illegal conduct take place, we would, of course, recommend that the Commission take appropriate enforcement action.⁴

Other Aspects of Insurer Performance

The other aspect of MGMA's proposed conduct, involving collecting and disseminating aggregated information about insurers' referral networks, their rates of claim rejections and payments times, and physicians' satisfaction with payers' responsiveness to questions or concerns about claims or payments, does not appear likely to promote anticompetitive conduct by physicians. Because MGMA will not identify individual payers' performance on any of the measures, there does not appear to be ground for concern that the information would facilitate physicians' collective refusal to deal with any particular payer.

In addition, the information to be reported does not lend itself to providing clear benchmarks for physician agreements on terms of dealing with purchasers. Two of the measures -- physicians' perception of the adequacy of specialist networks and their satisfaction with payers claims and payment practices -- deal with subjective and qualitative judgements on those two issues. This information neither establishes clear benchmarks for what might be deemed acceptable performance, nor evaluates particular payers based on any benchmarks. The two additional survey items -- relating to the percentage of commercial fee-for-service claims denied, partially denied, or returned for correction or additional information, and the percentage of commercial fee-for-service claims paid within certain time periods (from 30 to 75 days) after submission -- provide more specific and quantitative data. These data are not reported in ways that appear likely to encourage agreement on any particular level of purchaser performance in evaluating or paying claims for use as a minimum level that physicians could accept from a

⁴ Collusion may be easier the fewer the competitors that exist in a market. Accordingly, MGMA would reduce the antitrust risk by refraining from publishing information relating to geographic markets containing a small number of physician practices in a particular specialty.

payer.

The information may, however, permit physician practice groups to compare the performance of the payers with which they contract with the overall performance of payers in the same market, as well as permit individual payers to compare their performance to that of the market generally. This appears more likely to encourage payers to compete with respect to their performance on these measure than to prompt physicians' concerted refusal to deal with particular payers.

Conclusion

Groups of physicians could, in some situations, use some of the information that MGMA intends to collect and publish to fix prices or to reach agreements not to deal with certain payers. Such agreements would violate the antitrust laws. MGMA's proposal to publish the information, however, does not appear to be intended, or inherently likely, to promote express anticompetitive agreements or tacit coordinated behavior among physicians in their contracting practices. Accordingly, the Commission staff has no present intention to recommend enforcement action regarding MGMA's proposed information exchange.

This letter sets out the views of the staff of the Bureau of Competition, as authorized by the Commission's Rules of Practice. Under Commission Rule § 1.3(c), 16 C.F.R. § 1.3(c), the Commission is not bound by this staff opinion and reserves the right to rescind it at a later time. In addition, this office retains the right to reconsider the questions involved and, with notice to the requesting party, to rescind or revoke the opinion if implementation of the proposed program results in substantial anticompetitive effects, if the program is used for improper purposes, if facts change significantly, or if it otherwise would be in the public interest to do so.

Sincerely yours,

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