

STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE

STATEMENT 5: ENFORCEMENT POLICY ON PROVIDERS' COLLECTIVE PROVISION OF FEE-RELATED INFORMATION TO PURCHASERS OF HEALTH CARE SERVICES

INTRODUCTION

The collective provision by competing health care providers to purchasers of health care services of factual information concerning the fees charged currently or in the past for the providers' services, and other factual information concerning the amounts, levels, or methods of fees or reimbursement, does not necessarily raise antitrust concerns. With reasonable safeguards, providers' collective provision of this type of factual information to a purchaser of health care services may provide procompetitive benefits and raise little risk of anticompetitive effects.

This statement sets forth an antitrust safety zone that describes collective provision of fee-related information that will not be challenged by the Agencies under the antitrust laws, absent extraordinary circumstances.¹³ It also describes types of conduct that are expressly excluded from the antitrust safety zone, some clearly unlawful, and others that may be lawful depending on the circumstances.

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

Providers' collective provision to purchasers of health care services of factual information concerning the providers' current or historical fees or other aspects of reimbursement, such as discounts or alternative reimbursement methods accepted (including capitation arrangements, risk-withhold fee arrangements, or use of all-inclusive fees), is unlikely to raise significant antitrust concern and will not be challenged by the Agencies, absent extraordinary circumstances. Such factual information can help purchasers efficiently develop reimbursement terms to be offered to providers and may be useful to a purchaser when provided in response to a request from the purchaser or at the initiative of providers.

In assembling information to be collectively provided to purchasers, providers need to be aware of the potential antitrust consequences of information exchanges among competitors. The principles expressed in the Agencies' statement on provider participation in exchanges of price and cost information are applicable in this context. Accordingly, in order to qualify for this safety zone, the collection of information to be provided to purchasers must satisfy the following conditions:

- (1) the collection is managed by a third party (*e.g.*, a purchaser, government agency, health care consultant, academic institution, or trade association);
- (2) although current fee-related information may be provided to purchasers, any information that is shared among or is available to the competing providers furnishing the data must be more than three months old; and
- (3) for any information that is available to the providers furnishing data, there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data may represent more than 25 percent on a weighted basis of that statistic, and any information disseminated must be sufficiently aggregated such that it would not allow recipients to identify the prices charged by any individual provider.

The conditions that must be met for an information exchange among providers to fall within the antitrust safety zone are intended to ensure that an exchange of price or cost data is not used by

competing providers for discussion or coordination of provider prices or costs. They represent a careful balancing of a provider's individual interest in obtaining information useful in adjusting the prices it charges or the wages it pays in response to changing market conditions against the risk that the exchange of such information may permit competing providers to communicate with each other regarding a mutually acceptable level of prices for health care services or compensation for employees.

B. THE AGENCIES' ANALYSIS OF PROVIDERS' COLLECTIVE PROVISION OF FEE-RELATED INFORMATION THAT FALLS OUTSIDE THE ANTITRUST SAFETY ZONE

The safety zone set forth in this policy statement does not apply to collective negotiations between unintegrated providers and purchasers in contemplation or in furtherance of any agreement among the providers on fees or other terms or aspects of reimbursement,¹⁴ or to any agreement among unintegrated providers to deal with purchasers only on agreed terms. Providers also may not collectively threaten, implicitly or explicitly, to engage in a boycott or similar conduct, or actually undertake such a boycott or conduct, to coerce any purchaser to accept collectively-determined fees or other terms or aspects of reimbursement. These types of conduct likely would violate the antitrust laws and, in many instances, might be per se illegal.

Also excluded from the safety zone is providers' collective provision of information or views concerning prospective fee-related matters. In some circumstances, the collective provision of this type of fee-related information also may be helpful to a purchaser and, as long as independent decisions on whether to accept a purchaser's offer are truly preserved, may not raise antitrust concerns. However, in other circumstances, the collective provision of prospective fee-related information or views may evidence or facilitate an agreement on prices or other competitively significant terms by the competing providers. It also may exert a coercive effect on the purchaser by implying or threatening a collective refusal to deal on terms other than those proposed, or amount to an implied threat to boycott any plan that does not follow the providers' collective proposal.

The Agencies recognize the need carefully to distinguish possibly procompetitive collective provision of prospective fee-related information or views from anticompetitive situations that involve unlawful price agreements, boycott threats, refusals to deal except on collectively determined terms, collective negotiations, or conduct that signals or facilitates collective price terms. Therefore, the collective provision of such prospective fee-related information or views will be assessed on a case-by-case basis. In their case-by-case analysis, the Agencies will look at all the facts and circumstances surrounding the provision of the information, including, but not limited to, the nature of the information provided, the nature and extent of the communications among the providers and between the providers and the purchaser, the rationale for providing the information, and the nature of the market in which the information is provided.

In addition, because the collective provision of prospective fee-related information and views can easily lead to or accompany unlawful collective negotiations, price agreements, or the other types of collective conduct noted above, providers need to be aware of the potential antitrust consequences of information exchanges among competitors in assembling information or views concerning prospective fee-related matters. Consequently, such protections as the use of a third party to manage the collection of information and views, and the adoption of mechanisms to assure that the information is not disseminated or used in a manner that facilitates unlawful agreements or coordinated conduct by the providers, likely would reduce antitrust concerns.

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Competing providers who are considering collectively providing fee-related information to purchasers, 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 opinion request on behalf of providers who are considering collectively providing fee-

related 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:

13. 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.
14. Whether communications between providers and purchasers will amount to negotiations depends on the nature and context of the communications, not solely the number of such communications.