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September 12, 2007
Mr. Joseph Miller
Acting Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

Re: Comments of the Connecticut State Medical Society to the Proposed Final Judgment As To The Federation of Physicians and Dentists and Lynda Odenkirk, Case No. 1:05-cv-431

Dear Acting Chief Miller:

On June 19, 2007, the Department of Justice ("DOJ") entered its proposed Final Judgment (the "Final Judgment") as to the Federation of Physicians and Dentists (the "Federation") and Lynda Odenkirk (collectively, the "Federation defendants") in connection with the above-referenced matter. The DOJ thereafter filed its Competitive Impact Statement on July 2, 2007. Notification of the Final Judgment and Competitive Impact Statement was published in the Federal Register, Vol. 72, No. 137 on July 18, 2007. The Connecticut State Medical Society (CSMS) files these Comments in response to the terms of the Final Judgment.

I. INTRODUCTION

CSMS, chartered by the Connecticut State legislature in 1792 and believed to be one of the nation's oldest such groups in continuous operation, on behalf of its more than 7,000 physician and medical student members, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b), submits these Comments concerning the Final Judgment as to the Federation defendants that the parties have submitted to entry in the above-captioned matter.

CSMS, a federation of eight component county medical associations, is a constituent state entity of the American Medical Association (AMA). Founded by the physician-patriots of the American Revolution, CSMS operates from a heritage of democratic principles embodied in its Charter and Bylaws. CSMS has begun its third century as the voice of medicine in Connecticut with a mission to serve physicians and their patients. CSMS is therefore inherently positioned to provide its expert comment concerning the lawful representation of physicians for the betterment of patients.

As discussed more fully below, CSMS finds the Final Judgment's prohibitions unnecessarily restrictive and more onerous than final decrees typically proposed by both

the DOJ and the Federal Trade Commission (FTC) under similar circumstances in that it precludes the Federation from engaging in *lawful* conduct including, representing physicians in their dealings with payers as a messenger and from reviewing and analyzing physician contracts with any third-party payer. It is therefore CSMS' objective in submitting these Comments to request that the DOJ amend the Final Judgment to allow the Federation and its physician members to engage in generally accepted common and lawful practices.

II. ARGUMENT

(1) The Final Judgment Is Overly Stringent in that it Bars the Federation from Engaging in Lawful Conduct On Behalf of its Physician Members.

Recent orders issued by the DOJ and the FTC to settle charges that physician membership organizations acting on behalf of their members engaged in unlawful agreements to raise fees received from health plans, have consistently permitted these organizations to engage in lawful activity on behalf of their physician members. *See In the Matter of Memorial Hermann Health Network Providers*, Docket No. C-4104 (Decision and Order entered Jan. 8, 2004); *In the Matter of Health Care Alliance of Laredo, L.C.*, Docket No. C-4158 (Decision and Order issued Mar. 23, 2006); *In the Matter of Physician Network Consulting, L.L.C., et al.*, Docket No. C-4094 (Decision and Order issued Aug. 27, 2003); *In the Matter of Advocate Health Partners, et al.*, File No. 031 0021 (Dec. 19, 2006); *In the Matter of New Century Health Quality Alliance, Inc., et al.*, Docket No. C-4169 (Decision and Order issued Sept. 29, 2006); *United States v. Federation of Physicians and Dentists, Inc.*, CA 98-475 JFF (D. Del., judgment entered Nov. 6, 2002) (hereinafter "DOJ/FTC Decisions"). Specifically, these decrees have excluded the following lawful arrangements and activities from their prohibitions: (1) "qualified risk-sharing joint arrangements"; (2) "qualified clinically-integrated joint arrangements"; (3) messenger model arrangements and (4) lawful communication with and representation of physician members. *See* DOJ/FTC Decisions, *supra*. In this case, however, the Final Judgment bars the Federation defendants from engaging in lawful activity officially recognized in the 1996 Department of Justice/Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care ("1996 Statements") and ordinarily permitted under final decrees issued by the DOJ and FTC in comparable cases.

The nature of the Federation defendants' case is similar to that of the typical DOJ/FTC Decisions in that it concerns alleged agreements among competing physicians acting through a physician membership organization to fix fees they charge health plans and other third-party payors. *See* DOJ/FTC Decisions, *supra*. Therefore, consistent with recent orders, CSMS urges the DOJ to modify the Final Judgment to allow the Federation to continue engaging in lawful activity, on behalf of its physician members, ordinarily excluded from DOJ and FTC final decree prohibitions. CSMS' proposed modification would promote fairness while preserving the "essence of the Final Judgment" by restraining the Federation defendants from engaging in unlawful antitrust activity, and

specifically barring them “from participating in any unlawful conspiracy to increase fees for physician services.” See Final Judgment.

(a). Qualified Risk-Sharing and Qualified Clinically Integrated Joint Arrangements

The DOJ should amend the Final Judgment to allow the Federation an opportunity to participate in qualified risk-sharing and clinically-integrated joint arrangements. Typical DOJ and FTC final orders concerning providers’ alleged collective bargaining with health plans and other third-party payors have not precluded physician membership organizations from participating in “qualified risk-sharing” and “qualified clinically-integrated” joint arrangements. See DOJ/FTC Decisions, supra. The Final Judgment, however, is significantly more onerous and prohibitive than recent orders in that it bars the Federation from participating in these arrangements on behalf of its physician membership. CSMS therefore proposes that the DOJ modify the Final Judgment to allow the Federation the ability to participate in these same lawful arrangements on behalf of its physician members.

(b). Messenger Model

The DOJ should modify the Final Judgment to permit the Federation to engage in messenger model arrangements on behalf of its members. As outlined in the 1996 Statements, both the DOJ and the FTC have officially recognized that “[a]rrangements that are designed simply to minimize the costs associated with the contracting process, and that do not result in a collective determination by the competing network providers on prices or price-related terms, are not per se illegal price fixing.” Statement 9(C), 1996 Statements. Indeed, both agencies acknowledged that legitimate messenger model arrangements “facilitate contracting between providers and payers and avoid price-fixing agreements among competing network providers”. Id.

The DOJ and FTC, in its 1996 Statements, identified four ways by which physician membership organizations can lawfully operate messenger model arrangements: (1) “network providers may use an agent or third party to convey to purchasers information obtained individually from the providers about the prices or price-related terms that the providers are willing to accept”; (2) “the agent may convey to the providers all contract offers made by purchasers, and each provider then makes an independent, unilateral decision to accept or reject the contract offers”; (3) “the agent may have received from individual providers some authority to accept contract offers on their behalf”; and (4) “[t]he agent may also help providers understand the contracts offered, for example by providing objective or empirical information about the terms of an offer (such as a comparison of the offered terms to other contracts agreed to by network participants).” Statement 9(C), 1996 Statements.

DOJ and FTC orders have generally permitted physician membership organizations to enter into arrangements under which they will act as messengers or agents on behalf of their members with payors regarding contracts, subject to notification requirements. See

DOJ/FTC Decisions, *supra*. These organizations typically must provide sixty (60) days written notice to the agency prior to entering into any arrangement with any physicians under which the organization proposes to act as a messenger, or as an agent on behalf of any physicians, with payors regarding contracts. *See* DOJ/FTC Decisions. Most notably, the Delaware district court in *United States v. Federation of Defendants, Inc.* ("Delaware Decree"), *supra*, which the DOJ, in the present case, explicitly recognized as "similar" in nature to the present case, did not bar the Federation from *lawfully* representing physicians in their dealings with payors as a messenger. In the present matter, the Final Judgment, which lacks any explanation for this considerable inequity, stands in stark contrast to the Delaware Decree in addition to decisions rendered in other comparable cases. *See* DOJ/FTC Decisions, *supra*. CSMS therefore recommends that the DOJ modify the Final Judgment to allow the Federation to participate in all lawful messenger model arrangements on behalf of its physician membership.

(c) Lawful Communication With and Representation of Physician Members

The Final Judgment unnecessarily precludes the Federation defendants from other lawful conduct typically excluded from final decree prohibitions issued by the DOJ and FTC. *See* DOJ/FTC Decisions, *supra*. The Delaware Decree, for example, permitted the Federation to communicate to a physician member, at that physician's request, "accurate, factual, and objective information about a proposed payer contract offer or contract terms," and to "objectively review and analyze terms and conditions of any proposed or actual payer contract" subject to certain restrictions. *See* Delaware Decree, Section 5, *supra*. The Final Judgment, however, precludes the Federation defendants from "providing *any* services to *any* physician in private practice regarding such physician's negotiation, contracting, or other dealings with *any* payors" and explicitly prohibits them from "training or educating, or attempting to train or educate, any independent physician in any aspect of contracting or negotiation with any payor." *See* Final Judgment, pp. 4-5 (emphasis added). The prohibitions are so far-reaching and restrictive that they are excessively punitive in nature. CSMS therefore suggests that the DOJ modify the Final Judgment to authorize the Federation defendants to engage in such lawful practices.

(2) The Purpose of § 4 of the Sherman Act Is To Prevent Recurrence of Unlawful Conduct

Amending the Final Judgment to allow Federation defendants to engage in the type of lawful activity discussed above would be consistent with the Sherman Act's enforcement provisions. Section 4 of the Sherman Act (the "Act"), provides in relevant part: "it shall be the duty of the several district attorneys of the United States...to institute proceedings in equity to prevent and restrain such violations [of the Act]." 15 U.S.C. § 4. Absent from this provision, however, is language indicating that the purpose of such proceedings is to prohibit *lawful* activity. Moreover, the 1996 Statements explicitly recognize that multiprovider networks engaging in legitimate arrangements, including the messenger model, can offer procompetitive benefits to consumers. Accordingly, CSMS proposes that the DOJ amend the Final Judgment to remedy the alleged illegal concerted conduct, while permitting the Federation to engage in lawful

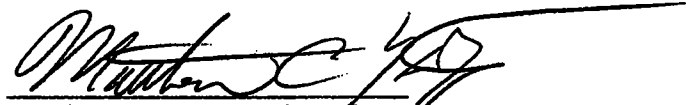
activities on behalf of its physician members consistent with past DOJ/FTC orders, rulings and final judgments.

III. CONCLUSION

The Final Judgment is so restrictive that it effectively precludes the Federation and potentially its physician members from engaging in legal activities associated with past rulings, as well as from communicating within the network regarding patient care in general. Not only does the all-encompassing nature of the prohibitions unreasonably interfere with the physician members' livelihood, but it also threatens the quality of patient care. Furthermore, the Final Judgment's impact could potentially impede the Federation's communication and activities not only on behalf of members within this particular organization, but also on behalf of the organization itself and its individual physician members.

For all the foregoing reasons, CSMS urges the DOJ to reconsider the terms of the Final Judgment to permit the Federation to engage in the type of lawful conduct, discussed in detail above, on behalf of its physician members.

Sincerely,



Matthew Katz, Executive Director