

104 Inverness Center Place
Suite 110
Birmingham, AL 35242

September 15, 1993

Hon. Anne K. Bingaman
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, DC 20530

Re: Request for Business Review Letter

Dear Ms. Bingaman:

Pursuant to 28 C.F.R., Subsection 50.6, the parties (the "Participants") to the Cooperative Clinical Benchmarking Demonstration Project Agreement enclosed with this letter as Attachment A (the "Agreement") request that the Antitrust Division state its present enforcement intention under Section 1 of the Sherman Antitrust Act with respect to the Participants' proposed business conduct in connection with the proposed "Demonstration Project." The Participants include twenty-four (24) corporations doing business within the State of Alabama (the "Businesses") and ten (10) corporations engaged in providing hospital and healthcare services within the State of Alabama (the "Providers").¹

The purpose of the Demonstration Project is to: (1) evaluate the appropriateness, cost and clinical effectiveness of healthcare services delivered by the Providers by comparison with local and national benchmarks; (2) determine and demonstrate the appropriate resource mix and processes needed for Providers to produce desirable patient outcomes; and (3) determine the validity of the aggregate data reported to the parties concerning relative clinical effectiveness and historical cost of healthcare services delivered by the Providers under the Diagnosis Related Groups ("DRG") of Acute Myocardial Infarction (DRG Nos. 121, 122, 123);

¹ See Attachment B for a listing of the Participants.

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Obstetrical Delivery (DRG Nos. 370-375) and Pneumonia (DRG No. 89) and its ability to enable the Business and the beneficiaries of their employee health benefit plans to individually make informed decisions about the selection and purchase of healthcare services.

Although the Agreement has been executed by the parties requesting this Business Review Letter, the essence of the proposed business conduct for which advice is sought will not be initiated until the Department has issued an opinion concerning its current enforcement intentions regarding the Demonstration Project. (See §7.01 of the Agreement.)

1. Genesis of the Demonstration Project.

The idea of the Demonstration Project was initiated by the Alabama Healthcare Council ("AHC"), a non-profit corporation whose members consist of businesses employing and offering healthcare benefits to their employees and their dependents within the State of Alabama, and The Alabama Hospital Association ("AHA"), an association of healthcare providers within the State of Alabama.

The business members of AHC are interested in acquiring meaningful information concerning various healthcare providers from which they may individually make decisions concerning purchasing healthcare services. Historically, the publicly available information concerning healthcare providers has consisted primarily of only charge data, without information concerning utilization rates, quality indices and efficacy of services rendered by healthcare providers. In addition, this publicly available information has not afforded purchasers of healthcare services with data concerning the relative performance and cost of services among the local service providers, much less a comparison of service outcomes or cost with local, regional or national standards or "benchmarks."

Healthcare Providers understand that they must become more efficient and effective as resources available to purchase increasingly costly healthcare services diminish. From the perspective of Providers, the publicly available information from which purchasers may make decisions does not take into account factors such as age, sex and severity of illness of each of their own "patient mixes," in order to give would-be purchasers an "apples to apples" comparison from which to make purchasing decisions. For example, a hospital that appears to be high cost or high charge may be so not because it is inefficient or because its charge structure is relatively high, but because its patient mix legitimately demands that more resources be applied to care for their patients. Hospitals, therefore, would readily agree to have purchasers examine their cost, charges, efficiency and effectiveness if only their results were "standardized" to take

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into account their patients' severity of illness and other critical factors affecting outcomes.

MediQual Systems, Inc. is a corporation unaffiliated with any of the Participants which specializes in collecting, analyzing and reporting standardized data which allows purchasers to make comparative decisions based on meaningful information and gives hospitals information from which they will understand how their performance stands against their local, regional and national peers. More importantly, however, MediQual gives each hospital it studies substantial information and ideas concerning critical clinical success factors that will, if addressed, result in improvement in the quality, effectiveness and efficiency of care delivered.

When the AHC and AHA became aware of MediQual's services, they formed a joint task force to determine the feasibility of structuring a demonstration project in which their members could individually elect to participate to facilitate an information exchange such as that described herein. The task force's consensus was that a narrowly tailored project, in which only a few DRGs were studied would be appropriate. The task force believed that if the demonstration project were implemented and proved to be successful, then perhaps broader and more comprehensive studies and information exchanges could be conducted. The task force appointed me as the Project Coordinator, and I engaged legal counsel to draft the Agreement to facilitate the Demonstration Project.

The proposed Agreement was circulated among the members of AHC and AHA and those members who elected to execute it are the Participants who seek the Department's review of their proposed business conduct. Not all of the members of either AHC or AHA elected to execute the Agreement.

2. Description of the Demonstration Project.

The Participants propose to utilize MediQual to collect, analyze and report aggregate data concerning the relative clinical effectiveness and historical cost of the Providers in rendering care to hospitalized patients under the DRGs for Acute Myocardial Infarction; Obstetrical Delivery and Pneumonia. The product resulting from the study will include reports such as those in Appendix A to the Agreement (the "Product") which is included herewith as Attachment A. The Product will initially be distributed to the Participants without identifying any particular Provider, although each Provider will be able to determine the results of their own clinical performance and cost. Approximately twelve (12) months after the initial distribution, the Product will again be released to the Participants and will identify each Provider. Providers will be given an opportunity to explain the

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results of the study with respect to their services to the Businesses concurrent with the second distribution of the Product.

In addition to the foregoing, the Businesses will engage a consultant(s) to collect, analyze and report to themselves individually, information concerning the clinical effectiveness and inpatient services utilized by their health plan beneficiaries at each of the Provider's hospitals during 1991-1992.

The Providers have individually engaged MediQual Systems, Inc. to collect, analyze and report the data pertinent to their own hospital and have agreed to furnish this to the Project Coordinator for compilation into the Product and distribution as described above.² In the event the Antitrust Division is not generally approving of the Demonstration Project, then MediQual will be instructed not to compile aggregate information concerning the Providers for distribution to the Participants; instead, each Provider will be furnished information concerning their own hospital pursuant to their agreement with MediQual.

The distribution of the Product of the Demonstration Project is confined to the Participants who may, in turn, disclose the Product to their agents, employees and the beneficiaries of their employee health benefit plans (see §§ 3.02 and 4.02 of the Agreement). The Agreement specifically prohibits the Participants from engaging in any unlawful joint or concerted action as a result of their participation in the Demonstration Project (see §§ 3.03 and 4.03 of the Agreement).

3. Safeguards to Prevent Unlawful Concerted Action.

While the Demonstration Project and the Agreement facilitate the exchange between the Participants of historical cost, charge and other information concerning the Providers, safeguards exist to prevent the use of the Product to engage in unlawful concerted action. Each Provider Participant affirmatively promises, by executing the Agreement, that it will not:

". . . engage in any unlawful joint or concerted action with other Providers, any healthcare provider who is not a party to this Agreement, or others, to fix prices, divide service offerings or markets, restrict output or otherwise engage in the unlawful restraint of trade as a result of their participation in the Project or by using

² The specimen agreement attached as Attachment C is representative of the agreements between each of the Providers and MediQual.

the Product of the Project. Each Provider agrees that any decision or action it makes, takes or recommends concerning its prices, services, markets, or output during the Term hereof, or afterwards, if basing any such decision or action on the Product of the Project, shall be made individually and consistent with its own economic interest." (§ 3.03, Agreement; Attachment A.)

Similarly, each Business Participant affirmatively promises to:

". . . [refrain from] engag[ing] in any unlawful joint or concerted action with another Business or any other purchaser of healthcare services or otherwise, to restrain trade as a result of their participation in the Project or by using the Product of the Project. Each Business agrees that any decision it makes or recommends concerning the services of Providers during the Term hereof, or afterwards, if basing any such decision on the Product of the Project, shall be made individually and consistent with its own economic interest."

Additionally, the Participants have agreed not to exchange any information unless and until the Antitrust Division has indicated that it has no present intention of challenging the business conduct contemplated in the Agreement.

4. Cost of Conducting the Demonstration Project.

The cost of the Demonstration Project is to be borne as follows: (1) Each Provider will bear the cost of its agreement with MediQual; (2) each Business will bear the cost of any consultant retained by it to collect and analyze data concerning its own utilization of healthcare services from the Providers; (3) the cost of administering the Agreement will be paid by the Businesses through an annual assessment of \$2.00 per employee employed by each Business within the State of Alabama.

5. Conclusion.

The Participants believe that the Demonstration Project will, if implemented, enable meaningful individual decision-making concerning the purchase and delivery of healthcare services based on pertinent and standardized comparative information. To this end, the Project fosters competition and competitive markets. Without the information exchange proposed through the Project, purchasers are without any tools necessary to make informed buying decisions. In addition, the Participants believe that the Agreement contains sufficient safeguards to prevent the use of the Product of the Project for unlawful concerted action or the

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formation or maintenance of a cartel among its Participants or others.

Should you require any additional information, please feel free to contact me or William B. Stewart, Esq. Mr. Stewart may be reached at Lange, Simpson, Robinson & Somerville, 417 - 20th Street, North, Suite 1700, Birmingham, AL 35203, phone 205-250-5000.

Very truly yours,



David H. Johnson, as Project
Coordinator on Behalf of the
Participants in the Demonstration
Project

cc: Participants
William B. Stewart, Esq.