



DEPARTMENT OF JUSTICE
Antitrust Division

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Ms. Diana West, IBCLC, RLC
P.O. Box 8123
Gaithersburg, MD 20898

Re: Request for Business Review Advice - Proposed Lactation Consultant Fee Survey

Dear Ms. West:

This letter responds to your request, on behalf of competing health providers in the field of internationally board-certified lactation consultation, for the issuance of a business review letter pursuant to the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6. You requested a statement of the Department's present enforcement intentions regarding a proposed survey of fees charged by private-practice or self-employed Internationally Board-Certified Lactation Consultants ("IBCLCs"). You stated that IBCLCs may be self-employed in private practice (usually sole proprietorships) or may work for organized health care providers such as hospitals or physicians' offices. The IBCLCs who wish to conduct this fee survey are self-employed in private practice and set their fees independently. They are not allied in any fashion, but do communicate regularly by e-mail through a number of organized e-mail distribution list serves.

Based on the information provided, we understand that the International Lactation Consultants Association ("ILCA") has thus far declined to conduct such a survey, citing antitrust concerns, but the private-practice IBCLCs, acting independently of the professional organization, wish to proceed with a fee survey in order to determine the range of prices customarily charged by self-employed IBCLCs. It is your belief that these fees can range anywhere from \$20 to \$200, and that most lactation consultants in private practice in the U.S. earn less than \$40,000 per year, with many earning significantly less. It is also your belief that such a survey would enhance competition, rather than reduce it, by encouraging practitioners to set fees that are lower than competitors' fees in their area in order to attract more business. Only by having some knowledge of average fees in her region, you believe, can an individual private-practice IBCLC set competitive rates.

The information from the survey would be collected following principles outlined in Section 6.A. of the *Statements of Antitrust Enforcement Policy in Health Care*, jointly issued by the U.S. Department of Justice and the Federal Trade Commission in August 1996 (“*Statements*”), and surveys will be sent only to those independent IBCLCs who have access to the internet (believed to be a majority of IBCLCs). Specifically: (1) the survey will be carried out and managed by a no-cost independent third-party online survey service using survey collection and analysis software; (2) the data will be collected anonymously, sorted by region and other criteria, such as rural vs. urban, and presented as a range of fees; (3) the data provided by survey participants will be more than three months old; (4) the data will be made available at no cost to any interested parties, accessible both online and in printed format; (5) at least 20 and potentially several thousand participants will provide data, no individual participant’s data will represent more than 25 percent on a weighted basis of any given statistic, and if fewer than five participants provide data for any given criteria, their data will be combined with those of others to assure that at least five participants make up each category; and (6) the information that will be disseminated will be sufficiently aggregated that it will not allow recipients to identify the fees charged by any particular provider.

The only limitation on the survey is that participation will be restricted to those IBCLCs who have internet access, which is believed to be a majority of IBCLCs.

Given the above-stated conditions, the Department of Justice has no present intention to take enforcement action against the proposed survey. The survey meets the requirements set forth as a safety zone in Statement 6 of the *Statements*. The safety zone described on page 50 of the *Statements* creates a framework 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. This formulation represents a careful balancing of a provider’s individual interest in obtaining information useful in adjusting the prices it charges 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. Statement 6 acknowledges that provision of collective price information to purchasers of health care services may provide procompetitive benefits and raise little risk of anticompetitive effects, and it provides safeguards, which are met here, for such information that is also made available to the providers themselves.

In stating these enforcement intentions the Department notes that the survey you propose is not being conducted to aid in collective contracting for services with insurers or other payers, but only to be shared among IBCLCs to assist in setting fees on an individual and uncoordinated basis. Additionally, you have brought to our attention internet list serves where lactation consultants have episodically mentioned prices or sensitive fee information. Those list serves are independent of the ILCA. While the Department does not believe that the current, ongoing general communications among lactation consultants on list serves disqualifies the proposed survey from the safety zone in Statement 6, we share the concerns apparently held by the ILCA that such list serves could serve as fora for problematic discussions. The Department cautions you that IBCLCs must guard against participation in the use of the data disseminated to coordinate pricing activity in any region or to artificially maintain higher than competitive pricing. This letter expresses only the Department’s current enforcement intention and is issued

in reliance on the information and representations contained in your original request and your subsequent submission of February 14, 2004. In accordance with our normal practices, the Department remains free to bring an enforcement action in the future should the actual operations of the survey prove to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to this procedure, your business review request and this letter will be made publicly available immediately, and any supporting documentation will be made publicly available within 30 days of the date of this letter, except for any part of the materials for which you have requested and justified confidential treatment in accordance with Paragraph 10(c) of the Business Review Procedure.

Yours sincerely,

R. Hewitt Pate
Assistant Attorney General