



Department of Justice

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ANTITRUST ENFORCEMENT POLICY STATEMENTS ISSUED FOR HEALTH CARE INDUSTRY

WASHINGTON, D.C. -- First Lady Hillary Rodham Clinton, Attorney General Janet Reno and Anne K. Bingaman, Assistant Attorney General for the Antitrust Division, were joined by Federal Trade Commission Chairman Janet D. Steiger and prominent members of Congress at the Department of Justice to announce steps to make health care more available and affordable to all Americans.

The Department of Justice and the Federal Trade Commission issued six antitrust enforcement policy statements to provide guidance to hospitals and health care providers to know whether they can enter into mergers and joint ventures without violating the antitrust laws. The policy statements will help alleviate uncertainty within the health care industry making it easier for mergers and joint ventures to take place, resulting in lower health care costs.

Assistant Attorney General Anne K. Bingaman said, "Many health care providers have delayed cooperative cost-cutting arrangements because of uncertainty about antitrust restrictions."

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I wholeheartedly believe that these new policies will bring down costs to health care consumers while providing effective quality health care services."

The policy statements provide antitrust safety zones which describe circumstances under which the Department of Justice and the Federal Trade Commission will not challenge:

- Hospital mergers;
- Hospital joint ventures involving high-technology or other expensive medical equipment;
- Physicians' provision of information to purchasers of health care services;
- Hospital participation in exchanges of price and cost information;
- Joint purchasing arrangements among health care providers;
- Physician network joint ventures.

The Department of Justice and Federal Trade Commission are also committing themselves to an expedited business review procedure under which the agencies would provide responses within 90 days, after all necessary information is received, to requestors seeking guidance on health care joint ventures and information exchanges.

Today's announcement is part of the Administration's efforts to reform the nation's health care system. The Justice Department is also currently evaluating measures which may increase federal power to combat fraud and abuse. For example,

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strengthening anti-kickback laws and making the heavy penalties against defrauding the government applicable to those who defraud the private health care system, as well.

Senator Howard Metzenbaum (D-OH) and Representative Jack Brooks (D-TX) took part in the announcement at the Department of Justice.

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**DEPARTMENT OF JUSTICE AND FTC
ANTITRUST ENFORCEMENT POLICY STATEMENTS
IN THE HEALTH CARE AREA**

The Department of Justice and the FTC today issued six statements of their antitrust enforcement policies regarding mergers and other joint activities among health care providers.

The six statements address: (1) hospital mergers; (2) hospital joint ventures involving high-technology or other expensive medical equipment; (3) physicians' provision of information to purchasers of health care services; (4) hospital participation in exchanges of price and cost information; (5) joint purchasing arrangements among health care providers; and (6) physician network joint ventures.

The statements are designed to provide information to the health care community in a time of tremendous change, and to resolve, as completely as possible, any antitrust uncertainty that might deter beneficial mergers or joint ventures that promise to reduce health care costs. Sound antitrust enforcement will not impede efficient transactions, but it will continue to protect consumers against truly anticompetitive activities that lead to higher prices.

Antitrust analysis is inherently fact-intensive. The six policy statements give health care providers guidance, in the form of "antitrust safety zones," which describe the circumstances under which the Agencies will not challenge conduct under the antitrust laws. The statements also summarize the analysis the Agencies will use to review conduct which falls outside the antitrust safety zones.

Providers who wish to have the Agencies' views on specific joint activities that they plan to undertake may obtain a timely response through the Department's expedited business review procedure or the FTC's advisory opinion procedure for the health care community. In the policy statements, the Agencies commit to respond to requests within 90 days after all necessary information is received regarding any matter addressed in the statements except hospital mergers outside the antitrust safety zone. The Agencies make this commitment to swift and certain expedited review in an effort to reduce antitrust uncertainty for the health care industry in a time of fundamental and far-reaching change. The Agencies also recognize that, in light of such change, additional antitrust guidance may be desirable in the areas covered by these policy statements, as well as in other evolving health care contexts. Consequently, the Agencies will issue additional policy statements as warranted.

HOSPITAL MERGERS

The Agencies have challenged only eight of well over 200 hospital mergers in the last five years. Many hospital mergers do not present antitrust concerns because the merging hospitals are not significant competitors of each other. In other cases, where a merger substantially reduced the number of competing hospitals in an area, the Agencies in the past have refrained from bringing an action because the merger produced significant cost savings that could not otherwise be realized.

The policy statement establishes an antitrust safety zone for mergers where one of the merging hospitals is small. Specifically, the Agencies commit not to challenge, absent extraordinary circumstances, a merger in which one of the merging hospitals has

less than 100 licensed beds and an average daily inpatient census of less than 40 patients. This antitrust safety zone will be especially helpful for small rural hospitals, who consider a merger necessary in order to continue providing services, but who fear the cost of an expensive investigation by federal antitrust authorities.

Hospitals which are unsure if they are within the safety zone may obtain timely advice from the Agencies through the expedited 90-day review procedure set forth in the policy statement.

HOSPITAL JOINT VENTURES INVOLVING HIGH-TECHNOLOGY OR OTHER EQUIPMENT

The Agencies have never challenged a joint venture among hospitals to purchase or operate high-technology or other expensive medical equipment. In most cases, these collaborative activities create procompetitive efficiencies that benefit consumers, which outweigh any potential anticompetitive harm. Although numerous hospitals presently participate in joint ventures, it has been suggested that fear of antitrust enforcement currently chills such ventures and forces hospitals to purchase expensive equipment individually, even though joint ventures clearly would be more efficient and less expensive.

The policy statement sets out an antitrust safety zone for joint ventures involving high-technology or other expensive equipment that must be shared in order to allow the hospitals to recover the cost of acquiring, operating and marketing the services provided by the equipment. As long as the joint venture is reasonably necessary to recover these costs and does not include a hospital or a group of hospitals that could have offered a

competing service to the planned joint venture, the Agencies will not challenge, absent extraordinary circumstances, the formation or operation of the venture. For example, joint ventures among rural hospitals to share MRIs or other expensive equipment and agreements among community hospitals to operate helicopter or other expensive services jointly normally will fall within the antitrust safety zone.

Joint ventures that fall outside the antitrust safety zone do not necessarily raise significant antitrust concerns. The policy statement, therefore, includes a brief description and examples of how these ventures will be analyzed. Hospitals considering joint ventures may obtain timely advice from the Agencies through the expedited 90-day review procedure set forth in the policy statement.

PHYSICIANS' PROVISION OF INFORMATION TO PURCHASERS OF HEALTH CARE SERVICES

This policy statement defines an antitrust safety zone that covers the collective provision of non-price information by physicians to purchasers of health care services. The collective provision of this type of information will have procompetitive benefits and allow physicians to work with health care purchasers to improve the quality of care that patients receive. The policy statements provide that the Agencies will not challenge, absent extraordinary circumstances, the collective provision of underlying medical data, including the development of suggested practice parameters.

The safety zone would not cover physicians who collectively threaten to or actually refuse to deal with a purchaser because they object to the purchaser's administrative, clinical or other terms governing the provision of services. In addition, it does not cover

the collective provision of fee-related information. The collective provision of price information is not, however, necessarily illegal. Physicians who wish collectively to provide such information may receive timely advice from the Agencies under the expedited 90-day review procedure.

HOSPITAL PARTICIPATION IN EXCHANGES OF PRICE AND COST INFORMATION

This policy statement defines an antitrust safety zone that covers hospital participation in written surveys of prices for hospital services or wages, salaries or benefits of hospital personnel. The safety zone applies where (1) the survey is managed by a third party, (2) the information collected for the survey is more than three months old, and (3) the price or cost data reported are based on data from at least five hospitals and aggregated so that the prices charged or compensation paid by particular hospitals cannot be identified.

The policy statement also includes a description of how the Agencies will evaluate information exchanges that fall outside the antitrust safety zone. Hospitals that are unsure of the legality of a proposed survey can obtain timely advice from the Agencies through the expedited 90-day review procedure set forth in the policy statement.

JOINT PURCHASING ARRANGEMENTS AMONG HEALTH CARE PROVIDERS

Most joint purchasing arrangements among hospitals or other health care providers do not raise antitrust concerns; indeed the Agencies have never challenged such a joint purchasing arrangement. Such collaborative activities typically allow the participants to

achieve efficiencies that will benefit consumers. This policy statement covers arrangements among providers to purchase such goods and services as laundry or food services, computer or data processing services, and prescription drug and other pharmaceutical products.

Under the policy statement, the Agencies will not challenge, absent extraordinary circumstances, a joint purchasing arrangement if the group's purchases account for less than 35 percent of the total purchases of the relevant product or service, and the cost of the product or service being jointly purchased accounts for less than 20 percent of the total revenues from all products or services sold by each participant in the joint purchasing arrangement.

PHYSICIAN NETWORK JOINT VENTURES

This policy statement sets forth the Agencies' analysis of the formation of physician network joint ventures that are controlled by physicians and that jointly market the services of their member physicians. These joint arrangements have the potential to provide quality services at reduced costs, and can offer significant procompetitive benefits for consumers. Physicians who participate in legitimate network joint ventures can collectively provide information to health care purchasers, and jointly negotiate with them.

The policy statement sets forth an antitrust safety zone that covers physician network joint ventures comprised of 20 percent or less of the physicians in each physician specialty in the relevant geographic market, when the members share substantial financial

risk. The statement includes examples of physician network joint ventures that would meet the requirement of sharing substantial financial risk.

The statement also includes a brief description and examples to illustrate how the Agencies will analyze a physician network joint venture that does not fall within the antitrust safety zone. Physicians forming network joint ventures can obtain timely antitrust advice from the Agencies under the expedited 90-day review procedure.