U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

OCT 26 1992

William R. Creasey, Esquire
Looper, Reed, Mark & McGraw
2001 Bryan Street
Dallas, Texas 75201-3005

Dear Mr. Creasey:

This letter responds to your request on behalf of Transplant Associates ("TA") for a statement pursuant to the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6, of the Department's present enforcement intentions regarding TA's proposal to contract with a third-party accounting firm which, with the help of a subcontracted research services firm, will compile information and create a data base on individual TA physicians' charges for kidney and liver transplants. This data base will be used to prepare a statistical analysis of the average price of a given transplant procedure over a specified period of time, e.g., twelve months. That analysis will be given to TA for use in its negotiation for capitated (i.e., fixed-fee) contract proposals submitted by third-party payers.

We understand that TA, located in Dallas, Texas, is a provider-based preferred provider organization whose approximately 85 member physicians from numerous medical specialties work in teams to perform kidney and liver transplant procedures at Baylor University Medical Center ("Baylor") in Dallas, Texas. TA was formed by its members for the express purpose of negotiating contracts with third-party payers which include various health insurance companies and other intermediaries. The statistical analysis which TA's proposal contemplates is meant to assist TA in negotiating capitated contracts.

We understand further that the accounting and research services firms involved in TA's proposal will be independent from TA and its members. All information obtained by them will be considered to be proprietary and confidential. As a

safeguard to ensure the confidentiality of the data obtained, each of TA's member physicians will agree that, except for the final statistical analysis described above, none of the members shall have access to any of the disaggregated information held by the accounting and research services firms.

After careful consideration of the information you have provided, the Department has concluded that it has no present intention of challenging TA's proposal, as set out in this letter, on antitrust grounds. While the Department would be concerned if the effect of the proposed conduct were to increase the likelihood that TA or its members could successfully coordinate their interactions outside the scope of TA, such as by express or tacit collusion on pricing, the Department has concluded that TA's proposal, in essence a limited data exchange, is unlikely to facilitate TA or any of its members in reaching terms of agreement, or in detecting or punishing deviation from any agreement. Moreover, because the average charge data will not be provided to non-TA providers, any concern about coordinated interaction between TA and non-TA physicians is eliminated.

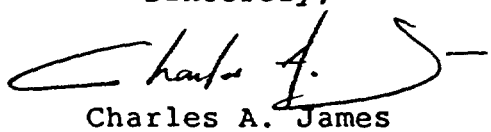
In support of this conclusion, the Department has relied on the following. First, the information to which TA and its members will have access will be aggregated, historical prices of kidney and liver operations. The price of any single operation includes the separate prices of each of the physicians who comprise the team performing the operation. For any given operation, both the number and types of these physicians needed may vary, making disaggregation of the price charged by any one physician or group of specialists difficult, if not impossible. Each operation is unique, depending on patient characteristics and the nature of the surgery required. Then, too, a number of operations are performed each year, each of which will be included in calculating the average price. Second, existing competition between TA and other physicians performing kidney and liver transplants in Dallas, regionally and nationwide constrains TA and its members from using the information to harm competition. In sum, due to the complexity and number of these variables used in determining the average cost of these operations and in light of the existence of competitive constraints, it is unlikely that TA could use the statistical analysis to facilitate collusion. Moreover, the safeguards described above ensure that the confidentially of the underlying data will be maintained.

There also appears to be a procompetitive justification for this project. The availability of the information should enable TA to make more informed decisions about whether to enter into fixed-fee agreements, possibly increasing the number of such agreements entered. Since fixed-fee agreements give physicians greater incentives to provide care in a cost-effective manner, the proposal should be efficiency enhancing.

For the foregoing reasons, the Department has no present intention to challenge TA's proposed information exchange. In accordance with our normal practice, however, the Department remains free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest if the actual operation of the data exchange proves anticompetitive in purpose or effect.

This statement of the Department's enforcement intentions is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made available to the public immediately. Your supporting documents will be publicly available within 30 days of the date of this letter unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,



Charles A. James
Acting Assistant Attorney General

Enclosure