



**DEPARTMENT OF JUSTICE**  
Antitrust Division

**ANNE K. BINGAMAN**  
Assistant Attorney General

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Main Justice Building  
10th & Constitution Ave., N.W.  
Washington, D.C. 20530  
(202) 514-2401 / (202) 616-2645 (f)  
antitrust@justice.usdoj.gov (internet)  
<http://www.usdoj.gov> (World Wide Web)

October 4, 1996

Gregory G. Binford, Esquire  
Benesch, Friedlander, Coplan & Aronoff, P.L.L.  
2300 BP America Building  
200 Public Square  
Cleveland, Ohio 44114-2378

Dear Mr. Binford:

This letter responds to your request, on behalf of Cincinnati Regional Orthopaedic and Sports Medicine Associates, Inc. ("CROSMA"), for the issuance of a business review letter pursuant to the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6, regarding CROSMA's proposal to form an independent practice association ("IPA") in the greater Cincinnati, Ohio metropolitan area. For the reasons set forth below, the Department has no present intention of challenging CROSMA's proposed activities under the antitrust laws.

Based on the information provided, we understand that CROSMA will offer prepaid medical and surgical services on a capitated basis to third party payers and self-insured employers. These services will be offered primarily in the greater Cincinnati metropolitan area, which CROSMA states includes 28 counties in Ohio, Kentucky, and Indiana. The association will be organized as an Ohio professional corporation.

CROSMA proposes a membership consisting of 56 of the approximately 158 board eligible or board-certified orthopaedic surgeons who practice in the greater Cincinnati metropolitan area. These 56 physicians are presently organized into ten separate physician practice groups. CROSMA members hold medical staff privileges and clinical privileges at the major hospitals and ambulatory surgery centers in the area, and provide a full range of orthopaedic surgery services. Based on the number

of orthopaedic surgeons within CROSMA compared to the total number of orthopaedic surgeons in the greater Cincinnati metropolitan area, CROSMA physicians will have a combined market share of approximately 35%.

Surgeons participating in CROSMA will do so on a non-exclusive basis. CROSMA members will be free to contract individually with all other parties, including insurance companies, employers, and other physician network joint ventures.

CROSMA presently intends to contract with health benefit plans and other payers only through contracts providing for capitated payments. It is possible that in the future CROSMA will enter into a discounted fee-for-service schedule for its member physicians, with a "risk pool" withhold of at least 20% of the fees due each physician. The withhold will be distributed to the participating physicians only if the panel of doctors as a group meets pre-established efficiency and quality parameters. CROSMA plans to develop utilization review/quality assurance standards as well as practice parameters.

CROSMA proposes several safeguards designed to address concerns about sharing of price information. No CROSMA participating physician will have access to any other CROSMA physician's individual fee and charge information. CROSMA will utilize the services of a third party administrator or other consultant to negotiate with purchasers of its health care services. The administrator or consultant will be bound by a confidentiality agreement that prohibits the granting of access or sharing of individual fee and charge information among CROSMA members.

Based on the information set forth above, it appears that CROSMA will be a bona fide joint venture in which the participating physicians will assume significant financial risk by participating in capitated contracts or, possibly, in the fee withhold arrangements described above. See Statements of Antitrust Enforcement Policy in Health Care, issued by the Department of Justice and the Federal Trade Commission, August 1996, ("Health Care Antitrust Statements") at pp. 67-69, 72. Thus, we have analyzed CROSMA's proposed IPA pursuant to the rule of reason to determine if the proposed network is likely to be anticompetitive.

### Rule of Reason Analysis

The rule of reason analysis focuses on whether the proposed network will create, enhance or facilitate the exercise of market power (i.e., the ability to impose supracompetitive prices or to prevent the formation of competing networks).

CROSMA's network does not fall within the safety zone of Statement 8 of the Health Care Antitrust Statements since, in the proposed geographic market, CROSMA includes more than 30% of the providers in the orthopaedic surgical specialty. However, based on the information available to us at this time, it appears that the proposed network is not likely to be anticompetitive.

As outlined in the Health Care Antitrust Statements, the first step in a rule of reason analysis is to identify the relevant service market and the relevant geographic market in which the IPA's members compete. Ordinarily, the services provided by each physician specialty will be considered a separate relevant service market. For this business review, it appears to be appropriate to treat services provided by orthopaedic surgeons as the relevant service market.

As to the geographic bounds of this service market, for each relevant service market, the relevant geographic market will include all available physicians who are reasonably good substitutes for physicians participating in the joint venture. CROSMA proposes the 28 county region centered about the greater Cincinnati metropolitan area. The information submitted is not sufficient to allow us to determine that the geographic market would be that broad. There is, however, good evidence that indicates that CROSMA's market share would not be appreciably greater even if a smaller geographic market were defined.

### Competitive Effects

We next determine the share of the relevant market held by the members of the proposed IPA in order properly to evaluate the possible anticompetitive effects. In this case, the measure of market share may be obtained by calculating the number of individual physicians in the venture as a percentage of all physicians in the relevant geographic market who are orthopaedic surgeons. Calculated on this basis, CROSMA physicians will have a combined market share of about 35% in the geographic market proposed by CROSMA.

Moreover, even in more narrowly defined regions, CROSMA's market shares are sufficiently low that, when viewed in conjunction with other information we have learned, CROSMA is unlikely to create a competitive problem. In particular, while CROSMA's market share exceeds the 30% figure established by the Health Care Antitrust Statements as an antitrust safety zone for non-exclusive physician network joint ventures that share substantial financial risk, under both CROSMA's proposed geographic market and in the more narrowly defined markets considered by the

Division, CROSMA does not appear to raise substantial antitrust concerns. The ready availability of the services of orthopaedic surgeons who are not affiliated with CROSMA indicates that CROSMA is unlikely to be successful if it seeks to act anticompetitively. Furthermore, since CROSMA is a non-exclusive joint venture, members will be free to affiliate with other networks or to contract individually with managed care payers. In the course of our investigation, payers indicated that they saw little or no likelihood that CROSMA could create a competitive problem and indicated that they would enter into contracts with CROSMA only if they found it to be to their advantage in the form of lower costs or more efficient delivery of services. Several payers expressed support for the formation of CROSMA and indicated that they believed that CROSMA would allow them to obtain orthopaedic services at lower rates than presently.

Finally, it appears that the CROSMA network may have cost lowering procompetitive effects. CROSMA states that its intent is to improve the efficiency of the marketing and delivery of its services by availing itself of the professional services and expertise of a third-party administrator. The third-party administrator will seek to control costs by tracking clinical outcomes, managing resource utilization, and helping to reduce unnecessary medical services.

### Conclusion

For the reasons explained above, the Department has no present intention to challenge CROSMA's planned IPA. 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 CROSMA network proves to be anticompetitive in purpose or effect.

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This statement is made in accordance with the Department of Justice 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 publicly available immediately. In addition, any supporting data that you do not identify as confidential business information under paragraph 10(c) of the Business Review Procedure also will be made publicly available in 30 days.

Sincerely,

Anne K. Bingaman