INTRODUCTION

Several aspects of the proposed Health Transformation Alliance Limited Cooperative ("HTA") touch on antitrust issues. This memorandum identifies a number of those issues. The HTA Team would welcome input from prospective members on other antitrust concerns that should be addressed in order to ensure that the HTA is created and operated in a manner that fully complies with all antitrust laws.

I. Joint Purchasing Activities.

A. General Safety Zone

The Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) (the “Agencies”) are responsible for antitrust enforcement. The Agencies publish comprehensive guidelines for evaluating the possible antitrust implications of various business arrangements and transactions. See DOJ and FTC Antitrust Guidelines for Collaboration Among Competitors (“Competitor Collaboration Guidelines”)¹, and DOJ/FTC Statement of Enforcement Policy in Healthcare (“Health Care Statements”)² (collectively “Guidelines”).

The agencies’ Guidelines specify antitrust “safety zones,” which describe arrangements that will generally not raise antitrust concerns. The two broad rules for joint purchasing arrangements are that (1) they must be a legitimate, efficiency-enhancing joint purchasing activity, rather than an unlawful “buyers’ cartel” that exists just to fix the prices at which members will individually pay common suppliers; and (2) the purchasing group cannot become so large that it could exercise “monopsony power” over suppliers. “Monopsony power” would occur when a buying group amasses so much power that it is able to force prices below a competitive level.

In order to comply with the first broad rule, the arrangement must involve actual joint purchasing activity that achieves some economies of scale, or that avoids duplication of effort in purchasing activity. The arrangement must be more than an agreement among members to fix the price that each member will individually pay for the product or service. The arrangement must involve some efficiency-enhancing combination of purchasing activities to be permissible. Some of the potential efficiency-enhancing activities of the HTA include negotiation, contract drafting, and data collection and analysis.

In order to comply with the second broad rule, the aggregate combined group purchases must account for less than 35 percent of the total purchases of the product or service in the relevant market. The HTA members’ purchases would be compared to the total purchases of similar health care services or products in the geographic region in which the HTA members operate. Because virtually everyone in the population is a purchaser or potential purchaser of health care services, it seems unlikely that HTA

members’ purchases would account for 35 percent or more of the total purchases of health care services in the relevant market. However, it will be important for the HTA to monitor this data point.

**B. Competitive Members Safety Zone**

If there are two or more competitor members in the HTA, then additional guidelines apply. The antitrust concern in this situation is that a joint purchasing cooperative of competitors might result in standardized costs, which in turn could facilitate price fixing, output restrictions, or other anti-competitive practices among competitors.

The antitrust safety zone guideline in such circumstances provides that the aggregate input cost of the jointly purchased good or service cannot exceed 20 percent of the total sales value of the competing products sold by each participating competitor. The “20 percent” standard reflects the agencies’ arbitrary judgment as to the level at which the possibility of collusion becomes a potential antitrust concern. There is no antitrust concern if the jointly purchased products or services amount to less than 20 percent of the final price of the products or services sold by the competitors.

In addition to the 20 percent rule, the guidelines recommend additional safeguards when there are competitor members in a group purchasing arrangement. These safeguards include: (1) not requiring members to use the HTA for all their purchases of the relevant product or service; (2) using a third party, independent agent to conduct negotiations with providers; and (3) keeping communications between individual participants and HTA confidential and not sharing communications among members.

**C. Arrangements Outside the Safety Zone**

Joint buying arrangements that fall outside the safety zones may still be perfectly lawful but would require more in-depth analysis. Generally, a group buying arrangement would be analyzed under a “rule of reason” analysis. Such an analysis focuses on the state of competition in the market with, as compared to without, the relevant agreement. The HTA anticipates that it will fall within the applicable safety zones for joint purchasing arrangements and has therefore not engaged in this further analysis at this point.

If further review and analysis is required, the HTA might want to consider submitting a business review request to the DOJ pursuant to 28 C.F.R. §50.6. The DOJ’s business review procedure is intended to provide a mechanism for a business to determine how the Division may respond to proposed business conduct. The DOJ may decline the request for review under certain circumstances, such as when the business is ongoing rather than prospective, or where the proposed conduct requires regulatory approval from another agency.³

II. Health Data

Antitrust laws generally promote competition by prohibiting anti-competitive conduct that impedes the operation of an open and fair market. The healthcare industry is subject to antitrust law, but the law is frequently ambiguous. The DOJ has issued opinions that seemingly encourage information sharing. However, antitrust experts question whether some broad-scale contractual and information sharing arrangements involving health data now coming into operation will be considered lawful.4

This section details the relevant antitrust statutes and guidance as they apply to the health data the HTA is likely to collect and use. While it does not appear that antitrust laws would prohibit the HTA from using health data in the manner anticipated, once the scope of HTA’s use of provider health data to control costs and negotiate provider contracts becomes more defined, another detailed review of the antitrust ramifications of such activities will be necessary.

A. The Sherman Act

The Sherman Antitrust Act of 1890 provides that agreements “in restraint of trade” and activities that “monopolize, or attempt to monopolize . . . any part of the trade or commerce” are per se illegal. American Column & Lumber Co. v. United States5 was the first Supreme Court case to hold that the Sherman Act prohibits anticompetitive data dissemination. In the past few years, both the FTC and DOJ have dedicated significant resources to the area of healthcare data sharing. Although most agency cases have focused on competitor collaboration, monopolization of a given healthcare market, and healthcare mergers that would impede local competition, it is not clear whether HTA attempts to use (and share) health data in order to control broad-scale market costs could implicate the Sherman Act.

B. The McCarran–Ferguson Act

Pricing networks and information sharing established by insurance companies, and perhaps certain health plans, is protected from federal antitrust law by the McCarran–Ferguson Act. Passed by Congress in 1945, the McCarran–Ferguson Act6 established the states as the primary regulators of insurance and exempted certain insurance practices from federal antitrust laws, including the Sherman Act. Under McCarran–Ferguson, certain activities are outside of the purview of federal antitrust law, to the extent that such activities 1) constitute the “business of insurance,” 2) are “regulated by State law,” and 3) do not constitute an agreement or act “to boycott, coerce, or intimidate.”7 While many health insurers use the protection of McCarran–Ferguson to share pricing and quality data without violating federal antitrust law, the activities of HTA are not likely to be covered by this law because it will not be in the business of insurance nor will it be regulated by State law.

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4 See attached Healthcare Statements 5, 6, and 7. Health Care Statement No. 5 sets out the antitrust agencies’ enforcement policy with respect to collective dissemination of healthcare providers’ fee information to purchasers, and Statement No. 6 outlines their policy with respect to exchanges of price and cost information among competing healthcare service providers. Statement No. 6 is discussed in this section. If the Health Transformation Alliance proceeds with the collection of health data in order to manage industry-wide costs for employers, further legal analysis of these statements may be required.

5 257 U.S. 377 (1921).


7 Id.
C. Health Information Exchange Safe Antitrust Safety Zone, Statement No. 6

The Agencies’ Health Care Statements addressed several issues including provider participation in exchanges of price and cost information. The 1993 policy statements, which were updated in 1996, were designed to address the problem of uncertainty concerning the Agencies’ enforcement policy that were thought to deter activities that could lower health care costs. Although the policies do not appear to apply directly to employers seeking health data information in order to lower costs, they are informative as to potentially anti-competitive activity. It is also informative of counter-arguments that may be available when TPAs and health care providers cite antitrust concerns as the basis of their reluctance to share health data.

Statement No. 6, titled “Provider Participation in Exchanges of Price and Cost Information”, specifically states that participation by competing providers in surveys of prices for health care services does not necessarily raise antitrust concerns. In fact, the statement allows providers to use information derived from price surveys to price their services more competitively. It also states that purchasers (which, presumably, include patients as well as employers) can use price survey information to make more informed decisions when buying health care services. The statement goes on to note, however, that without appropriate safeguards, information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices or compensation, resulting in increased prices, or reduced quality and availability of health care services.

With this in mind, Statement No. 6 sets forth an antitrust safety zone that describes exchanges of price and cost information among providers that will not be challenged by the DOJ and FTC under antitrust laws, absent extraordinary circumstances. The safety zone specifically allows health care providers to engage in written surveys requesting information on their pricing data for health care services provided that:

- The providers collectively account for no more than 20% of each relevant health care market;
- The survey is managed by a third party;
- The survey is based on data that is at least 3 months old;
- The data is aggregated from at least 5 providers;
- No single provider’s data represents more than 25% of the collected data; and
- The aggregation process prevents identification of prices charged by any individual provider.

For HTA purposes, it is important to note that the safety zone rules apply when competitors are collecting data for their own purposes; it does not, necessarily, apply directly to the collection of data by the HTA on behalf of purchasers, to the extent that such information is not provided directly to providers. Note also that exchanges of price and cost information that fall outside the antitrust safety zone generally

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8 Id. at pg. 61.
9 For this purpose, the statement defines pricing data health care services as the "prices" at which providers offer their services to purchasers, including billed charges for individual services, discounts off billed charges, or per diem, capitated, or diagnosis related group rates.
will be evaluated by the DOJ and FTC to determine whether the information exchange may have an anticompetitive effect that outweighs any procompetitive justification for the exchange. The statement explicitly provides that, depending on the circumstances, public, non-provider initiated surveys may not raise competitive concerns if they allow purchasers to have useful information that they can use for procompetitive purposes.\(^\text{10}\)

Finally, the statement provides that exchanges of future prices for provider services will be considered anticompetitive if an exchange among competing providers of price or cost information results in an agreement among competitors as to the prices for health care services. Under the expedited advice provisions of Statement No. 6, competing providers that are considering participating in a survey of price or cost information and are unsure of the legality of their conduct under antitrust laws can take advantage of the review procedure, under which the agencies will provide an advisory opinion on any antitrust concerns regarding the sharing of health data within 90 days after all necessary information is submitted. To the extent that the HTA believes that its collection and use of provider pricing data may raise antitrust concerns, it may consider availing itself of this process and seek an advisory opinion, although it is unclear whether the agencies would be willing to provide such to an employer entity.

### III. Contracts with Providers

HTA will be entering into contracts, or developing templates to be used, with health care providers as part of its core mission. HTA therefore needs to be aware of certain antitrust concerns that might arise in such agreements. In a recent enforcement action, \textit{U.S. and State of Texas v. United Regional Healthcare System}, Case No. 7:11cv00030-O (W.D. Tex. 2011), the parties entered into a Final Judgment barring United Regional Health Care, which has market power in the region, from including certain anticompetitive provisions in its agreements with commercial health insurers. “Commercial health insurers” was broadly defined to include anyone who provides access to health care provider networks, regardless of whether they bear any risk or make any payment. The specific prohibited provisions were:

- conditional volume discounts whereby a discount was conditioned upon the insurer’s purchases meeting or exceeding a certain threshold\(^\text{11}\);
- exclusivity arrangements whereby the provider’s price or discount was conditioned on the insurer not entering into an agreement with a competitive provider; and
- restrictions on the insurer offering products that encouraged members to use other providers.

As the specifics of the HTA’s contracting responsibilities and practices evolve, the HTA will need to be fully aware of the antitrust parameters for contracts with health care providers.

\(^\text{10}\) \textit{Id.} at 64-65. Note that the DOJ and FTC have provided specific guidance to ACOs that allows these entities to use pricing data while avoiding the potentially anti-competitive nature of such arrangements.

\(^\text{11}\) Notably, incremental volume discounts, whereby a discount applies only to purchases above a specified threshold, are permissible.