



**DEPARTMENT OF JUSTICE**  
Antitrust Division

**ANNE K. BINGAMAN**  
Assistant Attorney General

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Barbara S. Accetta, Esquire  
Roberts & Newman  
One Gateway Center  
Newton, Massachusetts 02158-2802

Dear Ms. Accetta:

This letter responds to your request on behalf of Allergy & Asthma Consultants, Inc. ("AAC") for the issuance of a business review letter under the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. AAC proposes forming a physician network joint venture consisting solely of allergists serving primarily Massachusetts and secondarily its neighboring states of Rhode Island, Connecticut, New York, Vermont, New Hampshire, and Maine.

This letter is based exclusively on the representations made in your submissions to the Department. For the reasons set forth below, the Department has no present intention to challenge AAC's proposed activities under the antitrust laws or as violations of the Final Judgment in United States v. Massachusetts Allergy Society, Inc. et al., 1992-1 Trade Cas. ¶ 69,846 (D.Mass. 1992) ("MAS").<sup>1/</sup>

As we understand the facts, AAC intends to form and operate as a for-profit corporation under the laws of the Commonwealth of Massachusetts. The corporation will issue stock only to AAC's participating physician members, all of whom will be medical doctors specializing in allergy, asthma, and related medical problems. The corporation will be governed by a managing board of directors and will have standing committees for such matters as credentialing, finance, and quality assurance/utilization review.

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<sup>1</sup> One of the initial participants in AAC's proposed physician network joint venture is a party defendant to MAS. The consent decree in MAS prohibits MAS from entering into, negotiating, or attempting to enter into any agreement or understanding concerning any fee regarding any allergy or allergy-related service, either on its own behalf or as a representative of any physician, with any third-party payer; and also enjoins MAS from advocating or recommending that any physician withdraw from or refuse to enter into an agreement with any third-party payer. The consenting individual physician defendants are similarly enjoined from discussing with or submitting to any third-party payer any fee regarding any allergy or allergy-related service on behalf of MAS or, except in very limited circumstances, as an agent for any other physician.

Initially, nine physicians will participate as owners of the AAC corporation. Three of those physicians practice together as an integrated group; the others have individual practices. These physician members have primary and satellite medical offices located throughout Massachusetts and comprise approximately 10 percent of the approximately 92 practicing allergists in the Commonwealth of Massachusetts. While AAC intends to recruit additional physician members after AAC is formed, the number of physician providers in any relevant geographic market will be limited and will never exceed the number permitted in the safety zone for non-exclusive physician network joint ventures set forth in Statement 8 of the Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust issued by the Department of Justice and Federal Trade Commission on September 27, 1994.<sup>2/</sup>

AAC will negotiate and contract with health benefit plans (HMOs, other health insurance carriers, self-insured employers and multi-physician primary care organizations) to provide their beneficiaries with physician medical services for the treatment of allergies, asthma and related conditions. AAC will negotiate and enter into contracts with these plans/organizations on a regional and/or state-wide basis, under which AAC members will provide medical services to the beneficiaries of the health benefit plan. Each contract will provide for physician services compensation either in the form of a capitated payment or under 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 retained by AAC or distributed to the participating physicians only if the panel of doctors as a group meets established efficiency and quality parameters. If the group meets those requirements, the amount of the withhold will be distributed according to each doctor's compliance with established protocols and procedures.

In order to establish the payment terms under which AAC will contract with payers, AAC will hire independent health care consultants to gather and prepare an aggregate of information relating to utilization, quality standards, cost of purchased services, fees, charges, and clinical outcomes. The consultants will use this information to create a database, prepare a statistical analysis and develop a proposed fee schedule and minimum acceptable contract terms. If the AAC Board of Directors votes to approve the proposed fee schedule and minimum contract terms, the AAC will be authorized to enter into contracts that meet those minimum requirements and bind its member physicians to those terms. No physician participating in AAC, including board members, will have access to any other member physician's fees, pricing or volume information, or any other individual physician's information collected by the consultants. In addition, each AAC participating physician will be expressly prohibited from disclosing to any other AAC physician any information regarding usual and customary charges or the charges the physician has agreed to accept under any other managed care arrangement.

AAC physician providers will participate in the network on a non-exclusive basis. Individual member providers will be able to affiliate and contract directly with competing multi-specialty

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<sup>2</sup> You have assured us that AAC requirements directed to physicians concerning permissible location of main or satellite offices will be for the limited purpose of keeping market shares within a "safety zone." Such requirements, including By-Laws Section 2(c), will not be for the purpose of allocating territories or otherwise engaging in non-price marketing constraints that restrict competition, within the meaning of the Agency Statements.

networks, primary care groups, independent practice organizations, physician hospital organizations, managed care plans, and other third party payers.

The proposal you have submitted falls within the safety zone of Health Care Policy Statement 8, and we are aware of no extraordinary circumstances that would lead us to conclude that the proposal would create anticompetitive effects. Consequently, the Department has no present intention of challenging the proposed network.

Furthermore, AAC's proposal meets the requirements of the Final Judgment in MAS. Since AAC's proposal involves the significant sharing of substantial financial risk, it meets the definition of an "integrated joint venture" in Section II(D) of the Final Judgment in MAS.<sup>3/</sup> That, coupled with the nonexclusivity provisions of the proposal noted above, means that AAC's network satisfies the requisites for an acceptable integrated joint venture set forth in Section VI of the Final Judgment. Section VI permits defendants to belong to an integrated joint venture if the joint venture does not discourage or prohibit any participating physician from negotiating or contracting independently with any third party payer.<sup>4/</sup>

Given these facts, the Department of Justice has no present intention of challenging the proposed network. 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 network, once formed, proves to be anticompetitive in purpose or effect. This could include judgment enforcement proceedings against those party defendants to the MAS decree who are participating in AAC if the network in operation fails to entail both the sharing of substantial risk of adverse financial results and nonexclusivity requirements of Sections II(D) and VI of the MAS Final Judgment.

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 and this letter will be made publicly available immediately. In addition, any supporting data that you do not timely identify as confidential business information under Paragraph 10(c) of the Business Review Procedure will also be made publicly available.

Sincerely yours,

Anne K. Bingaman  
Assistant Attorney General

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<sup>3</sup> "Integrated joint venture" is defined in II(D) to mean a "joint arrangement to provide prepaid health care services in which physicians who would otherwise be competitors pool their capital to finance the venture, by themselves or together with others, and share substantial risk of adverse financial results caused by unexpectedly high utilization or costs of health care services."

<sup>4</sup> Section VI provides, in part: "Nor shall anything in this Final Judgment prohibit an individual defendant from continuing to be or becoming a member of an integrated joint venture . . . so long as the integrated joint venture in no way discourages or prohibits any participating physician from negotiating or contracting independently with any third party payer."