DEPARTMENT OF JUSTICE
Antitrust Division

ANNE K. BINGAMAN
Assistant Attorney General

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

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George Miron, Esquire
Feith & Zell, P.C.
2300 M Street, N.W.
Suite 600
Washington, D. C. 20037

Dear Mr. Miron:

This letter responds to your request on behalf of the California Chiropractic Association ("CCA") for the issuance of a business review letter under the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6, regarding CCA's plans to form a statewide chiropractic managed care organization ("the MCO").

Based on information provided by you and Michael J. Schroeder, General Counsel to CCA, we understand that the MCO will offer a statewide network of chiropractors, and that it will contract at a capitated (or per subscriber) rate with third-party payers and, possibly, with physician groups that serve third-party payers.

The planned MCO will include licensed chiropractors, regardless of affiliation with CCA, who desire to participate in the MCO and who meet the MCO's utilization standards.

CCA explains that its decision to form the proposed statewide MCO arose in part from market research which suggests that some payers would favor capitated contracting with chiropractors, but because chiropractor expenses make up a very small portion of their overall provider expenses, they are not willing to incur the cost of negotiating such contracts with separate local chiropractor organizations in numerous local markets. However, some of those payers may be receptive to entering into a single statewide contract with an organization like the MCO for chiropractors' services, on a capitated basis, in all of the local markets where those payers need those services.

CCA also notes that local groups of chiropractors would in many cases be unwilling to bear the cost of the state licensing fees and legal expenses they would have to incur under California regulatory requirements in order to offer their services on a capitated basis. By establishing a statewide MCO, CCA will be able to spread those same costs among the MCO's entire statewide membership, which will make participation in capitated contracting less costly, and, therefore, more attractive for chiropractors.

CCA asserts that for the great majority of geographic areas for which third-party payers or physician groups are likely to want chiropractic services provided by local chiropractors, the MCO is unlikely to include more than 50 percent of the local chiropractors and it is prepared to take appropriate action to meet a 50 percent limitation if it learns that the MCO has more than 50 percent of the local chiropractors in a relevant market.

CCA furthermore states that the MCO will be "nonexclusive." That is, the MCO's member-chiropractors will be free to contract individually with third-party payers or physician groups outside the framework of the MCO, or to participate in other chiropractic contracting organizations that compete with the MCO for third-party payers' or physician groups' accounts. (Conversely, third-party payers and physician groups that contract with the MCO will be free to obtain chiropractic services from the MCO and from other sources as well.)

Based on the information set forth above, it appears that the MCO will be a bona fide joint venture in which the participating chiropractors will assume significant financial risk by participating in capitated contracting arrangements. The Antitrust Division's competitive analysis of such a joint venture, therefore, focuses on whether the proposed venture 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 chiropractic joint ventures).

A joint venture among health care providers may facilitate the exercise of market power if it includes a large proportion of the providers in a relevant market whom a would-be competitor would need in order to offer a competing product. In this instance, CCA does not intend to include in the MCO more than 50 percent of the active chiropractors in any relevant geographic market, and CCA's member-chiropractors will be able to contract freely with competing chiropractor contracting organizations, or individually with payers or physician groups. Although combining up to 50 percent of particular providers can raise substantial antitrust concerns in many markets, the Department believes that in this specific case, such an aggregation of active chiropractors is unlikely to be anticompetitive for a variety of reasons sets forth below.

First, interviews of representative payers and physician groups that might contract with the MCO indicated that in any given geographic area for which they would need local chiropractors, they could fulfill their need for chiropractic services with a very small number of local chiropractors. (In this regard payers' requirements for chiropractic services may differ substantially from their requirements for physician services.) Thus, if the MCO attempted to demand noncompetitive terms, it appears likely based on these interviews that a relatively small number of local chiropractors who do not belong to the MCO would supplant the MCO by offering their services on competitive terms.

Second, if the MCO demanded noncompetitive terms, some MCO members likely will exercise their option to contract with payers outside the MCO, or to join a competing provider contracting organization. The MCO is unlikely to have any effective means of discouraging member-chiropractors from seeking to exploit that opportunity, because, unlike physicians, chiropractors do not depend on other chiropractors to provide or accept referrals, or for access to hospital staff privileges or other hospital perquisites.

Third, if the MCO demands noncompetitive terms, and few of its members in a particular local market are willing to contract outside the framework of the MCO, it will not be difficult for a competing chiropractor contracting organization to attract recent graduates, and chiropractors who do not yet have an established practice elsewhere, to locate in that local market. It appears that the proposed MCO would have no effective means of discouraging such entry by outside chiropractors because, unlike a physician organization, new-entrant chiropractors would not depend on

established local chiropractors (including the MCO's members) to provide or accept referrals, for admission to a hospital's medical staff, or for other important hospital staff perquisites.

Finally, customers have told us that if the MCO were to demand noncompetitive terms, they would consider relying, at least in the short run, on physical therapists or orthopedic physicians for substitute services.

For these reasons, the Department has no present intention to challenge CCA's planned MCO. 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 MCO proves to be anticompetitive in purpose or effect.

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 have not identified as confidential business information under paragraph 10(c) of the Business Review Procedure also will be made publicly available.

Sincerely,

Anne K. Bingaman,
Assistant Attorney General

Enclosure

cc: Michael J. Schroeder, P.C.
General Counsel, CCA
Hart, King & Coldren
200 E. Sandpointe
Fourth Floor
Santa Ana, CA. 97707-0507