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May 3, 1994

VIA FEDERAL EXPRESS

Ms. Anne K. Bingaman
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530

Re: Chicagoland Radiological Network - Request for Business Review Letter

Dear Ms. Bingaman:

We are submitting this request for a business review letter pursuant to 28 C.F.R. § 50.6 on behalf of Chicagoland Radiological Network (CRN), a physician network joint venture that will offer prepaid radiological services on a capitated basis to third party payors and self-insured employers. As this letter details, CRN is being formed by Chicagoland radiologists as a pro-competitive response to marketplace pressures. CRN's goals are to reduce the cost of radiological services, while at the same time improving access, efficiency and quality.

I. Impetus for CRN

CRN's formation is driven by several marketplace pressures, including 1) demand for radiology provider panels that provide comprehensive radiological services through acceptance of capitated fees for the technical, as well as the professional, component of radiological services;[1/] 2) demand for regional radiological provider networks that provide

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1/ Both diagnostic and therapeutic radiology services generally require extremely expensive capital equipment, such as magnetic resonance imaging (MRI), computed tomography (CT) scanners, linear accelerators, and nuclear medicine scanners. This equipment generally is owned by hospitals or large health care enterprises backed by private investors. These entities generally contract with radiologists or a radiology group to provide the professional component. Although there is no uniform billing structure, most radiologists and facilities in the Chicago area still bill separately for

one-stop shopping for geographically diversified radiology coverage throughout the Chicagoland area; 3) demand for alternatives to the only regional radiology network currently operating in the Chicagoland area; and (4) the inability of small radiology groups to compete effectively for large payor contracts.

A. General Trends in Managed Care Contracting

Managed care penetration in the Chicago area continues to rise, as the pressure to contain health care costs continues to build. Major health maintenance organizations ("HMOs") doing business in the area include Humana Health Care, Chicago HMO and HMO Illinois.[2/] In addition, several large employers and employer coalitions have begun to contract directly with area IPAs and PHOs.

Although many third party payors have developed relatively sophisticated QA/UR procedures and have succeeded in winning discounts from health care providers in return for volume, most health care services continue to be provided on a discounted fee-for-service, rather than on a capitated, basis. Despite efforts to control health care costs, health care costs in the Chicago area rose approximately 6% last year.

Nearly everyone in the Chicago health care community recognizes that the primary way to further contain health care costs is to provide services on a capitated basis. Capitation, however, has been slow to come to the Chicago market, particularly in the market for hospital services. Only now are area IPAs and PHOs even developing the capacity to accept capitation on a wide-spread basis through withhold funds and subcapitation arrangements. Although several HMOs have capitated physicians for the past several years, these payors have not widely marketed the capacity to capitate the technical component of health care services.

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the professional (i.e., that part of radiology services provided by the radiologist) and technical (i.e., charges relating to provision of facility, non-physician staff, and equipment) components. However, in some cases, the parties have arranged for global billing (i.e. for both the professional and technical components) by either the facility or the radiologists, with resulting collections split between the radiologists and facility based on a pre-determined formula.

2/ See listing of major HMOs from Crain's Chicago Business, December 27, 1993, attached as Exhibit A.

B. Trends in Managed Care Contracting for Radiological Services

Although there is no uniform managed care contracting mechanism for radiological services, most area payors engage in a series of time-consuming negotiations with hospitals, IPAs and individual radiologists and primary care physicians[3/] in order to ensure adequate access to quality radiological coverage for enrollees throughout the Chicagoland area. Most third party payors doing business in the Chicago area still contact separately with both the facility and the radiologist to provide radiological services to enrollees. In many cases, the third party payor will contract with several hospital-specific IPAs, which in turn contract with the radiologists to provide professional services to the payors' enrollees on a discounted fee-for-service basis. Other third party payors contract with several area hospitals for both the professional and technical component -- the hospitals then subcontract with their hospital-based radiologists.

The current system is plagued by numerous inefficiencies. Each payor-IPA, payor-hospital and payor-radiologist negotiation can consume considerable transaction costs, making it difficult and expensive for Chicagoland payors to provide enrollees with adequate access to radiological services. In addition, each payor must individually credential its radiology providers. Furthermore, because QA/UR standards for radiology vary from hospital to hospital, payors must expend considerable resources on QA/UR programs and computer technology if they are to implement uniform QA/UR standards and monitor compliance.

A relatively recent development in the Chicago market is the emergence of a broker system for radiological services. At present, there is only one regional radiology network operating in the Chicagoland area: Medicon, Inc.[4/]-+ Medicon is a for-profit corporation which has established a network of radiologists throughout the Chicago area to facilitate

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3/ More than 50% of all medical imaging services in this country are performed (interpreted) by non-radiologists.

4/ We understand that there is at least one other emerging radiology network in the Chicagoland area. Like CRN, this network is in the planning stages and to the best of our knowledge is not formally incorporated as of the date of this letter. The individuals working with the establishment of this network are as follows:

1. Dr. Robert Briet
MR Institute of Lake County
Gurnee, Illinois
708/360-1674

2. Dr. James Chamblis
University of Chicago Hospitals/
Weiss Hospital
Chicago, Illinois
312/878-8700 x2356

one-stop shopping by payors for a geographically diversified network of radiologists. Medicon, which is controlled in part by non-radiologists, currently contracts with eight (8) to ten (10) radiology groups whose practices are located throughout the Chicagoland area. Medicon negotiates arrangements with payors, offering radiological services on a capitated basis. It has the capacity to offer the technical component, as well as the professional component, for a capitated fee. The entity also has an MIS system to track utilization data. The entity keeps a substantial "middle-man" profit -- approximately 20% of all capitated payments from third party payors are retained, ostensibly for administrative and broker services.

Currently, Medicon is the only network in the Chicagoland area to which third party payors and self-insured employers can turn for one-stop shopping for radiological services. CRN will offer third party payors and self-insured employers a choice for prepaid radiological services in the Chicagoland area and is responsive to market demand. Because CRN member radiologists will contribute to its operations on a volunteer basis and because CRN will be not-for-profit and will not need to make money for non-radiologist investors, it believes it will be able to administer the network for far less than the 20% administrative fee taken off the top by Medicon. In addition, as explained in Section III of this letter, CRN is in the process of developing a utilization review program that will provide more sophisticated analyses than is currently available. It is also significant that member radiologists will play an integral role in the day-to-day operation and governance of CRN. Because such radiologists clearly understand the nature of the practice of radiology, they will be better able to communicate and educate CRN's membership and address membership concerns regarding CRN's administration, thereby resulting in a more effective network for the delivery of radiological services.

II. Structural Overview

A. Legal Form and Purposes

CRN does not yet exist as a legal entity. Rather, in December of 1993, a group of six radiologists formed the CRN Steering Committee to study the feasibility of forming a radiologist service organization and to resolve the attendant legal and organizational issues, including the need for this business review letter. CRN's principal place of business will be in Chicago.

CRN will be organized as an Illinois not-for-profit corporation. The draft bylaws describe the Corporation's purposes as follows:

> The Corporation is organized to operate exclusively for charitable, educational and scientific purposes which include, among others, to arrange for, promote, facilitate and otherwise

> encourage the cost-effective delivery of radiological health care services, including delivery through managed care arrangements, and to serve as a forum for the identification and evaluation of various joint venture opportunities. In no instance, however, will the Corporation engage in the practice of medicine.

(A copy of the draft bylaws is enclosed as Exhibit B to this letter.) The CRN Steering Committee does not expect the purposes clause to materially change in the final bylaws. We have also asked that CRN members submit business plans and/or other documents discussing each member's (or his/her affiliated radiology group's) business strategies with respect to participation in various products and services to be offered by CRN.

B. Members

1. Composition

CRN's membership will consist of board certified and board eligible radiologists licensed to practice medicine in the State of Illinois who comply with CRN's membership and credentialing standards. Member radiologists will be culled from the following counties to ensure CRN's ability to provide radiological coverage throughout the Chicagoland area: Cook, Lake, DuPage, Will, Kane, Grundy, McHenry and Kankakee counties.[5/] All members will pay a membership fee and dues and will be subject to capital contribution requirements, if deemed necessary by the CRN Board. CRN periodically will recredential members to verify compliance with quality and efficiency based credentialing standards.

In order to ensure CRN's ability to contract for all modalities of radiological services, CRN's members will include radiologists specializing in both diagnostic radiology and therapeutic radiology. Diagnostic radiology encompasses services such as CT scans, MRIs, routine x-ray studies, mammography, barium studies, fluoroscopy and nuclear medicine. Therapeutic radiology includes radiation oncology, radiation implants and hyperthermia.

5/ Although radiologists on opposite ends of the Chicagoland area do not compete directly, the overlap in service areas makes it impossible to break the Chicagoland area into discreet geographic markets for radiology services. Moreover, because CRN's target customers, payors and large self-insured employers, must provide radiology coverage on a regional basis, these counties are the appropriate geographic market within which to assess CRN's competitive effects.

2. Interest to Date

To date, 208 radiologists have expressed interest in CRN and each have agreed to provide $1,500 to fund the organization's development and implementation. One hundred seventy-nine of these radiologists specialize in diagnostic radiology; the remaining twenty-nine radiologists specialize in therapeutic radiology. Contributing radiologists have been informed that their funding is not a stock investment, nor does it guarantee their participation as network providers. Rather, once CRN establishes credentialing criteria, it will credential each applicant and will reject those applicants who do not satisfy CRN's uniform credentialing standards.

CRN recently imposed a moratorium on contributions and has returned subsequent contributions from area radiologists. These radiologists were notified that the return of their contributions will not preclude them from being considered for future participation. However, CRN intends to process membership applications from all contributors before accepting additional membership applications. Cognizant that the percentage of participating specialists in a given geographic area can be a factor in determining the legality of physician network joint ventures, CRN did not want to commit to credentialing an unduly large percentage of area radiologists. Accordingly, CRN placed the moratorium on contributions pending the outcome of this business review process.

3. Number of Members

The CRN Steering Committee contemplates its initial provider panel will approximate the number of radiologists who have provided contributions, namely 179 specializing in diagnostic radiology and 29 specializing in therapeutic radiology. There are approximately 782 radiologists in the Chicagoland area. Of these, 711 specialize in diagnostic radiological services and 71 specialize in therapeutic radiological services.[6/] Thus, CRN projects that approximately 25% of area radiologists will participate in the venture. If deemed necessary in order to secure a favorable business review letter, CRN will consider limiting the number of radiologists in the network.

C. Governance

1. Board of Directors

The property, business and affairs of CRN will be controlled by the Board of Directors, consisting of between twelve (12) and seventeen (17) directors elected by the

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6/ Information received from Membership Services, American College of Radiology, 1891 Preston White Drive, Reston, Virginia 22091, 703/648-8900.

members. All directors will be members of CRN. Representation of directors on the Board will generally reflect the composition of CRN's membership at large in terms of geographic location and subspecialty.

2. Officers

CRN's officers will include a President, at least one Vice-President, a Secretary and a Treasurer. In addition, CRN will employ an Executive Director and Medical Director. Officers will be elected annually by the Board. Only directors will be eligible to serve as officers.

3. Committees

CRN will have several standing committees, including an Executive Committee, Contracting Committee, Credentialing Committee and UR/QA Committee. Other committees may be created by the Board on an as-needed basis. The duties of the Contracting, Credentialing and UR/QA Committees are described in additional detail below.

III. Products and Services To Be Developed

CRN intends to offer prepaid radiological services on a capitated basis to third party payors and self-insured employers through a geographically diversified network of radiologists providing all modalities of radiological services. Initially, CRN plans to market only to large HMOs doing business on a regional basis. In order to maximize responsiveness to payor demand, CRN will develop the capacity to provide comprehensive radiological services by accepting both the technical and professional component through arrangements between participating radiologists and the facilities where they practice. Payors also will be provided the option of contracting for the professional component only and for payment on a discounted fee for service basis.

CRN will develop extensive UR/QA standards and processes to ensure that radiological services are rendered in the most efficient, cost-effective manner possible. CRN also will develop practice parameters to enhance the quality of services rendered by participating radiologists. At present, two members of the CRN Steering Committee are developing initial UR/QA standards and processes and practice parameters. Upon CRN's formation, the UR/QA Committee will assume ongoing responsibility for developing and recommending UR/QA programs and standards, as well as practice parameters, to the Board for adoption.

While CRN is utilizing American College of Radiology ("ACR") standards and guidelines in the development of its UR/QA program, CRN is also developing its own

standards. CRN's UR/QA program will be more sophisticated than UR/QA programs presently available in the marketplace. Current UR/QA programs simply analyze appropriateness of clinicians ordering of examinations on the basis of positive or negative readings as determined by nonradiologist personnel. CRN plans to have the participating radiologist perform appropriateness analyses and resource outcome studies, thereby improving the UR program's clinical effectiveness. CRN's UR/QA program will provide multiple criteria on which to evaluate the provision of radiological services, including whether the proper modality (i.e., method of diagnosis or treatment) has been chosen, given a patient's symptoms.

The UR/QA Committee will have ongoing responsibility for monitoring utilization/quality data, providing feedback to member physicians and ensuring UR/QA and practice parameter compliance through education and retraining. The UR/QA Committee will work with the CRN Medial Director to enforce CRN's UR/QA policies in accordance with an enforcement policy to be approved by the Board. CRN also plans to interact directly with the Medical Director of each payor customer to help analyze problem cases.

CRN also will develop a sophisticated medical management information system (MIS) to track utilization data and monitor compliance with CRN's UR standards and practice parameters. The CRN MIS system will produce periodic physician profiles, which will enable participating radiologists to identify patterns over-utilization and those specific physicians who over-order radiological services. This information will enable third party payors under contract with CRN to identify in-plan physicians who inappropriately utilize radiological services and to use this information to modify practice patterns. This technology has an obvious cost-savings potential. It also promises to promote the quality of care by reducing patient exposure to unnecessary radiation treatment and diagnostic tests.

IV. Contracting

A. Participating Radiologist Contracts

CRN will enter into contracts with individual radiologists or with groups of radiologists, the employees, partners, or shareholders of which include members of CRN, for the provision of radiological services. CRN may also enter into agreements with non-members in the event that patients require services that CRN members are unable to provide, although it is contemplated that this will be a relatively rare occurrence. Although the CRN Steering Committee has yet to develop a participating radiologist agreement, the Committee contemplates that certain substantive terms will be included:

1) Participating radiologists (i.e., individual radiologists or those CRN members affiliated with a group and on whose behalf the group has contracted) will be required to abide by CRN's QA/UR procedures.

2) Participating radiologists will agree to accept capitated and other fees negotiated by CRN as payment in full for services rendered to enrollees.

3) Participating radiologists will be required to accept patients covered under contracts negotiated by CRN, unless they provide notice that they are closing their practice to all patients.

4) The CRN participating provider agreement will preclude participating radiologists from contracting with other radiology networks headquartered and/or principally administered in the Chicago area. However, participating radiologists will remain free to contract through other managed care provider entities, such as IPAs and PHOs, to contract directly with third party payors and to provide services to private pay, Medicare and Medicaid patients.

5) Participating radiologists will acknowledge that their contracts can be terminated based on utilization and economic factors.

6) The contract will have a defined term and will be terminable by member radiologists without cause upon prior notice.

7) Participating radiologists will acknowledge their obligation to return all QA/UR, MIS, practice parameter, physician profiling and credentialing materials issued to them by CRN upon termination of their membership in CRN and to keep all such materials confidential during the term of their membership.

8) Participating radiologists will covenant not to share information regarding usual and customary charges with any other CRN member.

B. Payor Contracts

CRN intends to contract with third party payors and self-insured employees only on a regional basis. Initially, CRN will market only to large HMOs. It does not intend to enter into contracts on behalf of any individual radiologist or radiology group. Because payor contracts will not be exclusive, payors will remain free to contract with non-CRN radiologists and with competing radiological networks.

The CRN Board of Directors will develop contract parameters based on Contracting Committee recommendations. The contract parameters will set forth minimum standards which payor contracts must meet and include, among other items, pricing methodologies, payment methodologies, grievance procedures, termination procedures and utilization review procedures. The Contracting Committee will be responsible for reviewing each managed

care contract to determine whether it falls within the contract parameters. CRN members will be obligated to participate in all contracts executed by the CRN Board that fall within pre-approved contract parameters. If the contract does not fall within pre-approved contract parameters, then CRN members will have the option to "opt in" or "opt out" of the arrangement on a case-by-case basis.

C. Payment Mechanisms

1. Capitation

From its inception, CRN plans to actively solicit and accept capitated contracts. The CRN Steering Committee has hired the Medical Business Development Group consulting firm to provide overall coordination of the establishment of CRN and is in the process of interviewing for a second consultant to develop the capacity to accept capitated arrangements as soon as CRN becomes operational. Indeed, the ability to accept capitation will be a major selling point for CRN and is one of the driving forces behind CRN's development.

2. Discounted Fee Schedule

CRN is developing the dual capacity to accept discounted fee schedule contracts so that it does not foreclose itself from contracting with third party payors and self-insured employers who are not seeking capitation arrangements for such services. Fee schedule parameters will be developed by an independent consulting firm, recommended by the Contracting Committee and approved by the CRN board. Non-board and non-Contracting Committee members will not review the fee schedule parameters. The CRN Board will be authorized to accept contracts that meet or exceed the fee schedule parameters.

Each participating radiologist will send his usual and customary charges to CRN administration and will be paid the lesser of a given payor's fee schedule or the radiologist's usual and customary charges. CRN will establish a withhold fund into which a defined percentage of the discounted fee for service receipts will be deposited. The fund will be distributed to CRN participating radiologists only if cost containment goals are met.

In order to ensure that price information is not shared among actual and potential competitors, each CRN participating physician will be expressly prohibited from disclosing any information regarding usual and customary charges or the charges he has agreed to accept under any managed care arrangement to any other CRN physician. Participating physicians also will be unable to disclose the fees they receive under a given CRN contract, given that they will not know whether they are receiving the fee schedule or their usual and customary charge. Finally, those radiologists who serve on the Board and Contracting Committee will sign written confidentiality agreements pledging to maintain the

confidentiality of information garnered during the fee schedule approval process or the fee schedule itself.

V. Legal Analysis

A. CRN Should be Treated as a Legitimate Joint Venture

CRN should be treated as a physician network joint venture whose policies and practices are subject to analysis under the Rule of Reason. Legitimate joint ventures often are procompetitive because they increase efficiency, facilitate entry into new markets or create productive capacity that would otherwise be unavailable. For these reasons, the courts generally apply the Rule of Reason to the practices of legitimate joint ventures, including practices that would typically be deemed per se illegal if perpetrated by a group of unaffiliated competitors due to their impact on price or exclusion of competitors. E.g. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). Ancillary restraints that are reasonably necessary to the accomplishment of the legitimate joint venture's procompetitive objectives generally withstand scrutiny under the Rule of Reason. United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1365 (5th Cir. 1980); Broadcast Music, Inc. v. Columbia Broadcasting Co., 441 U.S. 1 (1979) ("BMI"). Further, joint ventures that lack market power lack the ability to impose any restraint detrimental to competition. E.g. National Bancard Corp. v. VISA U.S.A., Inc., 596 F. Supp. 1231, 1258, aff'd, 779 F.2d 592 (11th Cir.), cert. denied, 479 U.S. 923 (1986) ("Na Banco").

In the Statements of Antitrust Enforcement Policy in the Health Care Area released last September by the DOJ and FTC, the enforcement agencies expressly recognized that "[b]ecause of their potential for providing quality services at reduced costs . . . . physician network joint ventures promise significant procompetitive benefits for consumers of health care services." U.S. Department of Justice and Federal Trade Commission, Statement of Antitrust Enforcement Policy in the Health Care Area (September 15, 1993) at 33 (hereinafter "Joint Statement at __"). Accordingly, even those physician network joint ventures that do not qualify for protection under the Antitrust Safety Zones are reviewed under the Rule of Reason, if the physicians in the joint venture share substantial financial risk or if the combining of physicians in the joint venture enables them to offer a new product producing substantial efficiencies. Id. at 36.

CRN clearly qualifies for Rule of Reason treatment on both fronts. First, the CRN member radiologists will be sharing substantial financial risk through the acceptance of capitated payments and through withholds and bonus arrangements that do not result in distributions to members unless utilization/cost containment goals are met. Second, CRN will enable member radiologists to offer a new product: pre-paid, geographically diversified

radiological services on a capitated basis, backed-up by sophisticated QA/UR and MIS capabilities. This product will produce the following substantial efficiencies:

1) health care cost-containment through capitation;

2) the elimination of the transaction costs currently faced by payors who contract with large numbers of radiologists, hospitals and hospital-based IPAs to provide adequate coverage and choice for enrollees;

3) the creation of an integrated radiology network that allows radiologists to compete for large payor contracts;

4) a system-wide credentialing process that eliminates the need for payors to separately review each radiologist's qualifications to screen out incompetent or inefficient providers;

5) QA/UR and MIS capabilities that should reduce over-utilization of radiological procedures;

6) system-wide practice parameters; and

7) reduced administrative costs as compared to more hospital-specific physician networks.

No radiologist is capable of providing this product or recognizing these efficiencies on his or her own.

Even under more traditional, judicial antitrust standards, CRN would qualify for legitimate joint venture treatment because:

1) the network will be under the joint control of otherwise unaffiliated radiologists;

2) each radiologist will make a substantial contribution to the joint enterprise, both in terms of funding and the provision of highly skilled services;

3) the network will exist as a distinct legal entity, namely a not-for-profit corporation;

4) the network will create significant new enterprise capability by offering pre-paid, geographically diversified radiological services, backed up by

sophisticated QA/UR and MIS capabilities that no radiologist or radiologist group could individually provide;

5) the radiologists will share significant risk through CRN's active solicitation and acceptance of capitated arrangements and withhold and bonus arrangements.

See Hassan v. Independent Practice Associates, 698 F. Supp. 679 (E.D. Mich. 1988). In short, by any valid legal standard, CRN constitutes a legitimate joint venture whose ancillary policies and practices should be evaluated under the Rule of Reason.

B. CRN Will Not Have Market Power

CRN will not have market power in any market in which it proposes to operate[7/] and thus is incapable of causing any significant anticompetitive effects. General Leaseways v. National Truck Leasing Ass'n, 744 F.2d 588, 596 (7th Cir. 1984). CRN will compete in the Chicagoland market for radiological services. Arguably, CRN will compete in two product sub-markets: diagnostic radiological services and therapeutic radiological services. There are approximately 7,389,768 residents of the Chicagoland market area (defined as Cook, Lake, DuPage, Will, Kane, Grundy, McHenry and Kankakee counties). The vast majority of these persons receive radiological services pursuant to payor or employer contracts with individual radiologists, hospitals, IPAs and PHOs. A market share of 12% for CRN would be extremely optimistic, particularly because its target customers -- large HMOs with enrollees residing throughout the Chicagoland area[8/] -- cover less than 23%

7/ As noted above, participating radiologists' service areas overlap, making it impossible to divide the Chicagoland area into discrete geographic markets. This problem is compounded by a lack of reliable patient origin and destination data regarding radiology services. However, because CRN intends to contract with payors and self-insured employers only on a regional basis and fees will be standardized on a lesser of fee schedule or usual and customary charges basis, CRN will not allow individual radiology practices to attain, increase or exercise market power in their local markets.

8/ Although CRN may eventually market to self-insured employers directly, its initial marketing efforts will focus on large HMOs, including the following:

1. HMO Illinois/Blue Cross Blue Shield of Illinois
2. Chicago HMO/Share
3. Humana Health Care Plans
4. Rush Prudential HMO

of the lives in the Chicagoland area.[9/] See U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589 (1st Cir. 1993) (no distinct product market for HMOs exists). And several of these target customers are expected to continue contracting on an individual provider or hospital-based IPA or PHO basis.

Even when market share is assessed by examining the number of participating radiologists, CRN clearly will not have market power. As noted above, CRN projects that it will contract with approximately 25% of the providers in the two major radiology sub-specialties in the Chicagoland area, just over the 20% threshold embodied in the Physician Network Joint Venture Antitrust Safety Zone promulgated last year. In all other respects, CRN would qualify for Antitrust Safety Zone protection because participating radiologists will share substantial financial risks. Although it does not believe that it will be able to exercise market power, even if it includes a majority of the radiologists in the Chicagoland area, CRN would consider imposing an outer limit on membership if necessary to obtain a favorable business review letter.

Of course market share is only a proxy for market power. The real issue is whether CRN will have sufficient power to effectuate a non-transitory price increase (i.e. more than 5%) as a result of the joint venture. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, § 1.11 (April 2, 1992). Expressed differently, will CRN be able to raise the prices for physician services charged to health insurance plans above competitive levels? Joint Statement at 37. The answer to this question is a resounding "no" for the following reasons:

1) CRN's target customers -- large third party payors doing business throughout the Chicago area -- represent a small share of the total radiological services market;

2) CRN will face vigorous competition from Medicon and emerging radiology networks;

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5. CIGNA Health Plan of Illinois, Inc.
6. Take Care Health Plan
7. Heritage National Health Plan
8. Union Health Service, Inc.
9. Metlife Network of Illinois, Inc.
10. Aetna Health Plans of Illinois, Inc.

9/ Data is available only for Cook, DuPage, Will and Kane counties. We would expect HMO penetration in the Chicagoland area as a whole to be even lower than the 23% figure that applies to these four counties.

3) there are virtually no barriers to the entry of competing radiology networks (no licenses or approvals are required from the state);

4) referring primary care physicians will be free to refer patients to other providers of radiological services; and

5) participating radiologists will remain free to contract directly with third party payors, self-insured employers, multi-specialty IPAs, PHOs and other managed care organizations.

Indeed, under the current system, third party payors and self-insured employers have developed a demonstrated ability to contract with radiologists individually or through the hospital where they are based. CRN's formation will in no way hamper operation of this system. See CBS v. ASCAP, 620 F.2d 930, 936-39 (2d Cir. 1980) (blanket license did not restrain trade because purchasers retained ability to purchase licenses from individual composers). Thus, payors will not contract with CRN unless the payor concludes that there is a cost and/or quality advantage to doing so. In short, CRN will not possess sufficient market power to restrain competition, making its formation and operation lawful under the Rule of Reason. General Leaseways, 744 F.2d at 596.

C. Efficiency and Quality Enhancing Aspects Outweigh Any Anticompetitive Potential

CRN's formation and operation will result in substantial efficiencies and quality enhancements that will far outweigh any anticompetitive potential. As discussed in Section V(A) of this letter, CRN will generate substantial efficiencies. In addition, CRN will improve the quality of radiological services available to payors through its credentialing, QA/UR, physician profiling and MIS systems. Unnecessary non-invasive radiological services can harm patients through exposure to unnecessary radiation. And like all invasive procedures, invasive radiological procedures carry certain medical risks. By reducing overutilization of radiological services and screening out incompetent providers, CRN will improve the quality of radiological services and reduce patient risk. Thus, even if CRN were to garner market power (which for the reasons discussed above is a highly unlikely proposition), its operation would not violate the antitrust laws because it would be, on balance, procompetitive.

The following three sections demonstrate why CRN's planned pricing mechanism, credentialing process and limited exclusivity requirements should withstand rule of reason scrutiny. We understand that these aspects of provider networks can generate antitrust concerns. However, in CRN's case their design and structure makes them procompetitive on balance.

1. **CRN Will Not Serve as a Price Fixing or Group Boycott Vehicle**

The development of a feasible pricing mechanism is essential to the marketing of the CRN product and, therefore, must be assessed under the Rule of Reason. E.g. BMI, 441 U.S. at 23. See also Hassan, 698 F.Supp. at 688 (price fixing agreements can be lawful if a necessary part of a joint venture's integration of resources). Indeed, the elimination of the need for payors to engage in a multitude of individual price negotiations to secure radiological services for enrollees is one of the key efficiencies produced by the joint venture. But because payors will continue to be able to secure radiology coverage through direct negotiations with individual radiologists, radiology groups, hospitals, IPAs and PHOs, CRN cannot be abused as a price fixing or group boycott vehicle.

CRN intends to institute several safeguards to ensure that it does not facilitate price fixing among individual radiologists, particularly direct competitors. All CRN participating physicians will covenant not to share information regarding usual and customary charges with any other CRN member. No CRN member, including board members and members of the Contracting Committee will have access to information regarding individual radiologist or radiology group charges. A third party consultant will be gathering the information necessary to develop fee schedule parameters and capitated arrangements. Although Board and Contracting Committee members may have access to aggregated radiologist fee information during the fee schedule approval process, CRN will require them to sign confidentiality agreements under which they will covenant not to disclose such information to other CRN members. No non-Board or Contracting Committee member will be given a copy of the fee schedule parameters or the fee schedule applicable under specific CRN contracts. Rather, each participating radiologist will be paid the lesser of his usual and customary charges or the fee schedule adopted under a given network-wide contract. Given these safeguards, CRN's pricing mechanism should be found lawful under the Rule of Reason because its otherwise unattainable efficiencies far outweigh its anticompetitive potential. See Na Banco, 779 F.2d at 601.

2. **Any Provider Exclusions Will Be Based on Legitimate Criteria Designed to Enhance CRN's Efficiency and Competitiveness**

CRN will screen out potential participating providers based solely on credentialing and membership criteria that are narrowly tailored to CRN's procompetitive purposes. In particular, the criteria will serve two primary purposes: the efficiency and quality of the CRN panel. CRN will establish uniform credentialing criteria that screen out practitioners who do not meet minimum quality and efficiency criteria, further reducing the cost incurred by payors to secure high-quality radiological services for their enrollees throughout the Chicagoland area. All participating radiologists will be subject to a recredentialing process and will be required to satisfy credentialing criteria on an ongoing basis. The criteria will be uniformly applied, including to those persons who have contributed to CRN's

development and implementation. Exclusions will be substantially related to CRN's efficiency and quality goals.

CRN will take additional precautions to ensure that the credentialing process cannot be abused for anticompetitive purposes. Direct competitors of a radiologist whose membership application is under consideration will be barred from participating in the credentialing process, via the conflict of interest provision set forth in the CRN Bylaws both at the Board and Credentialing Committee levels. Accordingly, under the standards enumerated in Northwest Wholesale Stationers, the CRN credentialing process should survive Rule of Reason scrutiny as a joint venture's reasonable rules of participation. 472 U.S. at 296-97.

3. The Limited Exclusivity to be Required of Participating Radiologists is an Ancillary Restraint Necessary to prevent Free-Riding and Protect CRN's Legitimate Business Interests

The limited exclusivity that will be required of participating radiologists -- the covenant not to contract with a competing radiology network headquartered and/or principally administered in the Chicagoland area while participating in CRN -- is a narrowly tailored ancillary restraint that is necessary to prevent free-riding and will protect CRN's legitimate business interests. Its procompetitive benefits far outweigh its anticompetitive potential.

As noted above, CRN plans to expend considerable resources on the development of a sophisticated MIS/physician profiling system, practice parameters and a QA/UR process. These features promise to enhance the efficiency and quality of participating radiologists and customers' in-plan referring physicians. CRN believes that these capabilities are critical to the success of CRN in capitated arrangements and that they will be an important selling point to potential customers. Indeed, CRN believes that its MIS/physician profiling, practice parameter and QA/UR capabilities will distinguish it from other radiological networks competing for contracts with major Chicagoland HMOs.

The restriction against participation in competing radiology networks which are headquartered and/or principally administered in the Chicagoland area is necessary to guard against free-riding on CRN's investments by competing radiological networks. If other radiological networks competing for contracts with major Chicagoland HMOs could gain access to CRN's MIS/physician profiling and QA/UR processes or recognize the resulting provider efficiencies simply by signing up CRN participants, CRN would have little incentive to make this investment. See Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 221 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987); American Floral Serv. v. Florists' Transworld Delivery Ass'n, 633 F. Supp. 201 (N.D. Ill. 1986). Thus, the limited exclusivity required of CRN members will deter free-riding and should be treated as a

legitimate ancillary restraint. Rothery, 792 F.2d at 221-22; Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185 (7th Cir. 1985); The Treasurer, Inc. v Philadelphia National Bank, 682 F. Supp. 269, 280 (D.N.I.), aff'd mem., 853 F.2d 921 (3d Cir. 1988).[10/]

The exclusivity provision will not have an anticompetitive effect because CRN member radiologists will remain free to contract directly with third party payors and through hospitals, PHOs and multi-specialty IPAs. The exclusivity provision will not operate to increase the price paid by payors for radiological services. If CRN tried to raise prices above competitive levels, payors would simply negotiate lower prices directly with CRN radiologists and the multi-specialty IPAs and PHOs in which they participate.

Finally, nothing will prevent CRN radiologists from contracting with other radiology networks following the termination of their membership in CRN. The CRN participating radiologist agreement will be terminable without cause by participating radiologists upon notice as specified in the participating radiologist agreement. Therefore, if a competing radiology network becomes more attractive to any radiologist, that radiologist may terminate his membership in CRN and join the participating network.[11/] In short, the limited exclusivity required by CRN serves procompetitive goals without locking in any radiologist or impeding the development of competing radiological networks.

10/ Depending upon the overall managed care market, the exclusivity provision may also help to ensure the availability of the CRN network to the enrollees and employers of CRN's customers. CRN's payor contracts will obligate CRN to ensure round-the-clock radiological coverage for each payor's enrollees. CRN therefore needs to secure a threshold level of dedicated radiologists to ensure adequate geographic coverage throughout the Chicagoland area. CRN will be operating with a streamlined provider panel, consisting of just enough radiologists to ensure round-the-clock coverage throughout the region. If these same physicians were to contract with other radiological networks with large payor contracts, CRN might not be able to live up to its covenants to provide round-the-clock radiology coverage to payor enrollees.

11/ At that point, CRN will require the radiologist to turn in all QA/UR manuals, MIS manuals, practice parameters, QA/UR reports and physician profiles received by virtue of his or her membership in CRN and destroy all copies thereof. In addition, radiologists will be required to keep such materials confidential during the term of their membership.

CONCLUSION

CRN constitutes a procompetitive response to the market forces at play in the Chicagoland health care and health care financing markets. CRN is designed to increase economic efficiency and render markets more, rather than less, competitive. BMI, 441 U.S. at 19-20. It will integrate area radiologists into an efficient, high-quality, geographically diversified network of radiology providers. In so doing, CRN will present a low-cost alternative to the existing broker network and to the inefficient mode of individual contracting currently engaged in by most third party payors. CRN's credentialing, QA/UR and MIS capabilities go beyond what is currently offered in the marketplace and will enable payors to recognize efficiencies and improve the quality of care provided to enrollees. CRN will screen out inefficient and incompetent radiology providers and reduce unnecessary radiological procedures.

CRN will implement several structural safeguards to ensure that it is not abused as a group boycott or price fixing vehicle. Because it will not have market power, foreclose out-of-network contracting by its members or lock in radiologists, CRN will not have the ability to increase prices paid by payors for radiology services. In any event, increasing the price of radiological services would be antithetical to CRN's pro-competitive goals of efficiency, cost-containment and patient access to high quality radiology care. In short, CRN's procompetitive benefits far outweigh the potential for anticompetitive effects.

For the foregoing reasons, CRN respectfully requests that the Department of Justice issue a favorable business review letter stating that the development and implementation of the radiological network described in this letter will not violate the applicable antitrust laws and, therefore, that the Department does not intend to challenge CRN's formation.

The CRN Task Force has undertaken a good faith search for the documents and information specified in the Department's Business Review Procedures. Where applicable, we have provided all responsive materials in our possession. We recently asked all radiologists who have expressed interest in CRN to provide us with copies of their strategic planning documents, if any exist, and will forward any such documents upon receipt.

If you require any additional information to evaluate the legality of CRN or if you have any questions, please do not hesitate to call Steven F. Banghart ((312) 902-5647), Laura Keidan Martin ((312) 902-5487) or Laurel Fleming ((312) 902-5672). Indeed, once this letter is assigned to a particular member of your staff, we would appreciate a call so that we can initiate a dialogue and promptly provide the information necessary to address any antitrust concerns.

Very truly yours,

Steven F. Banghart

Steven F. Banghart

LKM/mm/73810

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