This paper provides a broad overview of the antitrust issues implicated by networks or joint ventures among providers and explains the factors that are taken into consideration in determining whether a provider network or joint venture passes muster under the antitrust laws. The factors discussed below usually are described in the context of physician networks, but they also apply to other provider networks and joint ventures as well.

In 1996, the U.S. Department of Justice and the Federal Trade Commission (the “Agencies”) issued statements of their antitrust enforcement policies regarding mergers and various joint activities by providers in the health care area. Statements of Antitrust Enforcement Policy in Health Care (1996) available at http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm (“Policy Statements”). The purpose of the Policy Statements is to provide guidance to hospitals and physicians as to the types of joint activities they can engage in without violating the antitrust laws. This guidance is furnished in the form of “antitrust safety zones” which describe the circumstances under which the Agencies will not challenge provider conduct under the antitrust laws absent extraordinary circumstances. Joint ventures that fall outside the antitrust safety zones are not necessarily unlawful and may, in fact, be permissible under the antitrust laws. The statements also set forth the analysis used to evaluate these joint ventures. In addition, the Agencies have issued general guidelines on collaborations among
Policy Statement Number 8 in particular applies to the formation of physician network joint ventures that are controlled by physicians and jointly price and market the services of their member physicians. This policy statement sets forth two antitrust “safety zones” for such physician joint ventures.

I. Safety Zone for Exclusive Physician Networks

An “exclusive” physician network is one in which the network’s physician participants are restricted in their ability to individually contract or affiliate with other network joint ventures or health plans. For an exclusive physician network to fall within an antitrust safety zone, it must have the following characteristics:

- The joint venture must constitute 20 percent or less of the physicians in each specialty with active hospital staff privileges who practice in the relevant market.

- The participants in the physician joint venture must share substantial financial risk in providing all the services that are jointly priced through the network.

  ➢ While the Guidelines do not provide an exhaustive list of arrangements that constitute sharing of “substantial financial risk” examples of such arrangements are set forth herein in Section III(A)(1).

II. Safety Zone for Non-Exclusive Physician Networks

A “non-exclusive” physician network is one in which the network’s physician participants do, or are available to, affiliate with other networks or contract individually with health plans. The Agencies look at several factors to determine whether a network is non-exclusive, such as whether the physicians in the network actually individually participate in other networks or managed care plans and whether the physicians earn substantial revenue from other networks or through individual contracts with managed care plans.
The antitrust safety zone for non-exclusive physician networks is generally the same as that for exclusive physician networks. The only significant difference is that a non-exclusive physician network can qualify for an antitrust safety zone if it is comprised of 30 percent or less of the physicians in each specialty with active hospital staff privileges who practice in the relevant market.

III. Evaluation of Physician Joint Ventures That Do Not Qualify For a Safety Zone

If a physician joint venture does not fall within one of these two antitrust safety zones, it must be analyzed much like any other joint venture among competitors. Under the antitrust laws, unless a joint venture can be shown to be reasonably necessary to achieve cognizable efficiencies, it will not be considered a “legitimate” joint venture and will instead be considered illegal per se. Even if a joint venture is determined to be legitimate joint venture, it must still be evaluated under the rule of reason. Under the rule of reason, a legitimate joint venture will nevertheless be considered illegal under the antitrust laws if it is found to have a net anticompetitive effect in the relevant market.

A. Step 1: Is the Physician Joint Venture a Legitimate Joint Venture?

The Policy Statement sets forth three different ways that physician groups may integrate and be considered a legitimate joint venture. These three types of integration are: (1) integration through the sharing of substantial financial risk; (2) clinical integration; and (3) the messenger model. Each of these three approaches are outlined below.

1. Integration through sharing of substantial financial risk.

The clearest way for a physician network to demonstrate cognizable efficiencies and form a legitimate joint venture is for the physician members to share substantial financial risk in
providing all of the services that are jointly priced through the network. The federal government has provided the following five examples of what constitutes sharing of substantial financial risk:

(1) **Capitation** - The agreement to provide defined health care services to an enrollee in return for a fixed, predetermined amount (usually a “per member, per month” payment), regardless of the level of services actually required, shifts the financial risk of paying for those services from the enrollee to the provider.

(2) **Fee-For-Service With a Risk Withhold** - A network assumes risk if it contracts on a fee-for-service basis but withholds a “substantial amount” from distribution to physician members based on group performance in meeting the cost containment goals of the network as a whole.

(3) **Provisions of Services on a Percentage of Premium Basis** - A network that provides services of its participating physicians to a health plan on a percentage of premium basis also is assuming the financial risk of providing the services. Like capitation, providers are paid a fixed amount per patient to provide designated health services.

(4) **Establishment of Targets and Financial Penalties** - Some networks establish overall cost or utilization targets for the network as a whole. Participants are rewarded or penalized depending on group performance in meeting the targets.

(5) **Global Rates** - Global rates or “all-inclusive case rates” may involve substantial risk sharing if they cover “a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient’s condition, the choice, the complexity, or length of treatment, or other factors.”
As a general matter, the concept of risk sharing focuses on creating incentives for one physician to be concerned about the cost effectiveness of the care provided by his colleagues in the network. As an example, if two physician practices form a joint venture, and agree to take risks by contracting on a capitated basis, but each practice is subcapitated for its own patients and bears no risk for the cost of care provided to the patients of the other practice, this could be seen as *per se* unlawful price fixing.

2. **Clinical Integration.**

A physician joint venture may be considered as generating significant efficiencies even without the sharing of substantial financial risk if it otherwise generates efficiencies through clinical integration. Sufficient clinical integration can be shown by the network implementing a program to evaluate and modify practice patterns by its physician participants and create a high degree of interdependence and cooperation among the physicians to control costs and ensure quality. Such a clinical integration program could include:

1. utilization review;
2. evaluation of individual and aggregate performance;
3. efforts to modify behavior where necessary;
4. case management;
5. review of hospital stays;
6. development of practice standards and protocols;
7. selective recruitment of efficient providers and termination of inefficient providers;
8. significant investment of capital, both monetary and human, in establishing the systems to manage the network.
As a general proposition, to satisfy the clinical integration test, the physician network must be able to demonstrate its ability to control health care costs through its clinical quality of care and utilization programs. The network must be willing to commit the time and money to develop and adopt quality and efficiency standards, and establish the infrastructure necessary to implement these standards. In addition, the network’s leadership must be prepared and willing to counsel and, if necessary, exclude from managed care contracting or the network itself, physicians who do not meet the quality and efficiency standards that are adopted by the network.

Physician networks that intend to integrate clinically without sharing substantial financial risk in setting fees jointly should consider two important issues. First, it may be difficult to explain why the group would integrate clinically, yet not take the final step and integrate financially as well. In other words, without the glue of financial risk sharing, the incentive to truly concern oneself with the performance and efficiency of other physicians may be weak. Second, if a group of physicians has integrated clinically, it may be difficult to show that an agreement on price is reasonably necessary to realize the efficiencies produced by the clinical integration.


To the extent that the purpose of the proposed joint venture or network is primarily to facilitate negotiations with third-party payers, the messenger model offers another possible means of integration that would qualify as a legitimate joint venture. Under the messenger model, a messenger shuttles between the individual providers and a payer carrying price offers back and forth until providers and the payer have entered into a series of individual agreements on prices. No joint fee schedule is developed. Rather, the individual providers make separate and independent decisions on whether to participate and at what fees.
There are a number of ways in which a messenger model can be utilized in compliance with the antitrust laws:

(1) It is acceptable for each provider to give the messenger, in advance, a fee schedule or conversion factor that represents the provider’s minimum acceptable amount, and to authorize the messenger to bind the provider to contracts in which a payer offers this amount or more.

(2) It is acceptable for the messenger, with the provider’s advance authorization, to bind a provider if a payer offers terms that are equal to or better than those the provider has accepted in the past from payers.

(3) The messenger also can prepare a schedule that shows payers the percentage of participants in a network (without identify any particular providers) who have authorized contracts at various price levels.

(4) It is permissible for the messenger to summarize the terms of contract proposals it has received and to point out the important provisions for the network participants, provided that the summary is objective and does not contain the opinions or impressions of the messenger.

On the other hand, the line the messenger cannot cross is to begin negotiating with payers on behalf of the providers collectively. A lawful messenger model must ensure that each provider makes a unilateral decision on fees and whether to participate and does so without reference to what other providers are seeking or doing. As a result, the messenger cannot coordinate provider responses to a particular proposal, disseminate to providers the views or intentions of other providers with respect to a proposal, express an opinion on the terms offered, or decide whether or not to convey an offer to providers. Also, if a payer offers a fee which is less than the minimum level acceptable to a provider, the messenger must convey the offer to the
individual provider for its consideration. Furthermore, the messenger cannot share any fee or price information among the participating providers.

**B. Step 2: Is the Physician Joint Venture Legal Under the Rule of Reason?**

As noted above, unless the joint venture incorporates one of the types of integration outlined above, the joint venture will likely be considered illegal *per se*. If, however, the joint venture has adopted one of these three integration models, the venture will be evaluated under the rule of reason.

Under the “rule of reason,” the efficiencies of the joint venture will be balanced against the potential anticompetitive effects and will pass muster under the antitrust laws if the joint venture is, on balance, not anticompetitive. In most cases, the potential anticompetitive effects are that the network will raise the prices for physician services charged to health insurance plans above competitive levels or that it will prevent the formation of other physician networks that would compete with it. A physician network is, however, unlikely to raise competitive concerns if there are many other physician networks in the relevant market or if there are many physicians available to form competing networks.

**IV. Antitrust Risk Associated with Physician Joint Ventures**

The risk of an enforcement action stemming from the formation of a physician joint venture can be significant. Each year, the Agencies bring antitrust enforcement actions against physician joint ventures that do not fall within a safety zone or are not sufficiently integrated, either financially or clinically, or are not valid messenger models.

If a provider joint venture wishes to eliminate any risk of antitrust liability, it is possible to seek, in advance of formation, an advisory opinion from the FTC or a business review letter from the Department of Justice. Under the advisory opinion or business review letter process,
the applicable Agency provides guidance with respect to the scope, interpretation, and application of the antitrust laws to particular proposed conduct. If the Agency determines that a proposed joint venture does not raise serious concerns under the antitrust laws, it will provide a statement that it has no present intention of challenging the proposed operations of the joint venture. On the other hand, a business review investigation potentially could alert the Agencies to other possible misconduct that would not otherwise have been brought to their attention.