



**DEPARTMENT OF JUSTICE**  
*Antitrust Division*

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March 5, 1996

Scott Withrow, Esquire  
Withrow, McQuade & Olsen  
3379 Peachtree Road, N.E.  
Suite 970  
Atlanta, Georgia 30326

Dear Mr. Withrow:

This letter responds to your request on behalf of Southern Health Corporation ("SHC") for a statement, pursuant to the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6, of the Department's present enforcement intentions regarding SHC's proposal to establish a physician-hospital organization ("PHO") among SHC's owned and/or operated hospitals and nursing homes in northern Georgia and those facilities' affiliated physicians. The newly-formed entity would be called the Southeastern HealthCare Alliance, Inc. Based on the information you have provided, as most recently supplemented by your revised request of December 19, 1995, and our own investigation, the Department has no present intention to challenge the proposed PHO if it is implemented as described.

As we understand your proposal, SHC currently owns North Georgia Medical Center and Gilmer Nursing Home in Ellijay (Gilmer County), Georgia; Chestatee Regional Hospital in Dahlonega (Lumpkin County), Georgia; and Chatuge Regional Hospital and Nursing Home in Hiawassee (Townsend County), Georgia; and manages Mountainside Medical Center and Nursing Home in Jasper (Pickens County), Georgia. SHC proposes to unite all of these facilities and their respective affiliated medical staffs into a PHO to jointly provide medical services to the enrollees of health care plans and other third party payers in the north Georgia area, including self-insured employers. The area encompassed by these facilities is a mountainous, rural area that has relatively few medical facilities and providers in comparison to the nearest big cities, Atlanta and Chattanooga. Thus, the PHO would comprise

fairly high percentages of the primary care doctors and specialists available to provide medical services in the areas served by the facilities with which they are affiliated. Since the hospital members of the PHO are already under common management and therefore financially integrated, the formation of the PHO will have no effect on existing competition in the hospital services market. However, competition still currently exists among the physicians who are affiliated with each hospital but are not employed by SHC. In order to avoid joint price setting by these unintegrated members, the PHO would contract using a "messenger" model. Under this arrangement, an agent of the PHO would receive contract offers from payers and convey these offers individually to members of the PHO. Each provider will then independently decide, without discussion with or influence by other providers, whether to accept or reject the contract. The PHO will also be non-exclusive; that is, members of the PHO would be free to enter into new contracts or to continue existing contracts with other provider groups, third party payers or managed care plans, including payers or plans with which the PHO may contract.

Under SHC's proposal, at the specific written request of a payer, the agent may discuss with the payer certain potentially competitively significant non-price issues, such as utilization review, credentialing, quality assurance standards, criteria for admissions to hospitals, and standard and emergency procedures provided by hospitals and physicians. In doing so, however, the agent may not negotiate or agree to any such terms or conditions on behalf of the providers (*i.e.*, either hospitals or physicians) or in any way attempt to require or coerce a payer to adopt any particular terms or conditions. Rather, the agent will transmit all information and offers from the payer to each provider, and each provider will decide unilaterally whether to accept or reject the terms or conditions.

SHC also proposes that, at the specific written request of a payer, the agent may discuss and/or negotiate with the payer certain administrative terms and conditions that are not competitively sensitive, such as methods of billing and collection, events causing termination of the relationship between Southeastern HealthCare Alliance and a payer, and general provisions regarding the interpretation and governance of the contract. The agent may agree to such non-competitive, administrative aspects of the payer's contract offer on behalf of all participating providers.

The PHO will develop quality assurance and utilization review ("QA/UR") standards and monitor the care provided by providers on an on-going basis. This process will be overseen by the QA/UR Committee, made up of one or more members appointed by the Board of Directors. Providers who routinely deviate from established parameters will be counseled by this committee, which will have no fee-setting authority or access to any fee arrangements between a provider and third-party payers. The QA/UR Committee shall have no authority to require any third party payers to adopt any particular quality assurance and/or utilization review standards. Payers are free to establish their own QA/UR programs in their contracts with providers, and these terms would supersede any PHO QA/UR terms if there were a conflict.

The PHO would specifically recognize and affirm the right of each provider to participate in similar organizations, joint ventures, services or activities of any other organization, and to independently negotiate and enter into contracts with third party payers. Those providers who currently contract with third party payers or managed care plans would be given the option of continuing to contract as individuals or contracting through the PHO.

#### Analysis of the Competitive Effects of the PHO

Statement 9 of the Department's and FTC's September 1994, Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust describes the analytical principles that the agencies apply in evaluating the competitive effects of multiprovider networks. As that statement explains, the joint fee-setting activities of multiprovider groups who are financially integrated will be evaluated under the rule of reason rather than being held per se unlawful. However, a network that does not engage in joint pricing, or joint agreements on other significant terms of competition, need not be economically integrated. The PHO has proposed to avoid joint agreement on price and other significant competitive contract terms through the use of a messenger model as described in Statement 9. As the statement explains, "[s]uch arrangements, when properly designed and administered, rarely present substantial antitrust concerns."

By adopting a properly structured messenger model (see pp. 94-96 of the Statements), the PHO has established procedures designed to ensure that its members, who may compete with each other for the business of third party payers by offering lower prices, will not confer or collude in setting the prices they

will charge. Rather, the agent will convey contract offers to each doctor individually and without comment about the actions or views of other doctors in the group, and doctors will accept or reject contract offers without discussion among or between themselves.

Likewise, the PHO has carefully avoided possible anticompetitive effects by not allowing its agent, or messenger, to negotiate with payers any potentially competitively significant terms or conditions that could indirectly lead to agreements among PHO members regarding the prices they charge for their services. On matters that have only limited competitive significance, such as administration, billing procedures and claims disputes, however, the agent would be permitted to negotiate on behalf of all members of the group. In either case, discussions and/or negotiations will only occur at the specific, written request of a payer, thus ensuring that when they occur, the payers will have determined that such talks may produce efficiency or cost containment benefits; we have concluded that the possibility of such benefits outweighs the potential anticompetitive consequences of such talks.

Because the PHO has carefully followed the messenger model described in Statement 9 to establish contracts with third party payers, there is little danger of anticompetitive harm. We would be concerned, however, if the actual operation of the PHO resulted in collusive behavior among unintegrated physician members of the group and thus threatened anticompetitive effects in any properly defined relevant market. Consequently, our conclusions are based on the assumption that the PHO will indeed be structured and operate as you have described.

A further step in the Statement 9 analysis of a multiprovider network involves looking at the possible vertical effects of such a network. By establishing membership in the PHO on a non-exclusive basis, the PHO maintains the ability of member physicians to participate in similar networks, or to contract individually with payers. Under the structure proposed, member physicians will independently accept or reject contract offers received either through the PHO or outside the PHO. These factors lead us to conclude that anticompetitive effects are not likely to result from the vertical integration involved here.

We also note that payers in the area did not express concern about the PHO as proposed. In fact, some payers were impressed that a provider group in this area, where managed care has thus far made few inroads, would take affirmative steps to foster the

development of managed care contracting. Further, the PHO seems likely to face some competition by providers outside of the PHO, including at least one strong and competitively aggressive multiprovider network, in the area encompassed by SHC facilities.

In light of the foregoing, the Department has no present intention of challenging the proposed PHO. As noted above, however, we would be concerned if the operation of the PHO should result in anticompetitive effects in the areas it serves. This might occur, for example, if a significant number of the PHO's members refused to deal with payers except through the PHO. Thus, in accordance with our normal practice, the Department remains free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest, if the proposed PHO proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department of Justice's 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 placed in a file that will be available to the public 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