DEPARTMENT OF JUSTICE
Antitrust Division

JOEL I. KLEIN
Assistant Attorney General

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401 / (202) 616-2645 (f)
antitrust@justice.usdoj.gov (internet)
http://www.usdoj.gov (World Wide Web)

July 30, 1997

Robert M. Langer, Esquire
Wiggin & Dana
One City Place
185 Asylum Street
Hartford, Connecticut 06103-3402

Dear Mr. Langer:

This letter responds to your request on behalf of Vermont Physicians Clinic ("VPC"), as contained in submissions of March 11, 1997, March 21, 1997, March 31, 1997, May 13, 1997, and May 29, 1997, for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. §50.6. For the reasons set forth below, the Department has no present intention of challenging the proposed operations of VPC. Our understanding of the facts is based largely on the representations made in your request and the information you submitted in support of it, in addition to information we obtained during our independent investigation.

VPC is a not for profit corporation comprising approximately 40 physicians from various medical specialties in the Rutland, Vermont, area. VPC will provide utilization review, quality improvement services, and some administrative services. You have stated that VPC will be non-exclusive, both de jure and de facto and, thus, that VPC's participating physicians will be free to contract with other managed care entities independently or through other provider networks.

VPC will negotiate risk contracts with third-party payers. You have stated that such risk contracts will take the form of either capitation, or substantial withhold of compensation whereby the participating physicians will recoup the 20 percent or more of the compensation due them only if VPC's participating physicians, as a group, meet pre-established cost containment goals. Based on this description, we assume for purposes of this business review that in all VPC's contracts with payers, VPC's participating physicians will share "substantial financial risk" as that term is described in the Statements of Antitrust Enforcement Policy in Health Care, issued jointly by the Department and the Federal Trade Commission in August 1996.

As proposed, VPC appears to be an economically integrated joint venture, designed with the stated purpose of producing significant efficiencies that should benefit third-party payers and their subscribers. VPC's physicians will be participating in price or price-related agreements that appear reasonably necessary to achieve anticipated efficiencies. Consequently, we have analyzed VPC's proposal under the rule of reason.

We have not attempted to define precisely the scope of the services or the geographic boundaries of the relevant markets for each different type of VPC participating physician. Under the circumstances presented here, we have determined that our conclusions would not differ significantly under any reasonable market assumptions.

With three different types of exceptions, VPC's participating physicians will not exceed 30 percent of the physicians in any physician specialty in the Rutland area. The exceptions, which are discussed below are: 1) physician specialties in which all the VPC participating physicians in the specialty are in a pre-existing integrated group practice that has not been formed or expanded to avoid the 30 percent limitation; 2) internal medicine practitioners, who, you have asserted, should be considered part of a larger market that includes family practitioners; and 3) three physician specialties in which VPC proposes to include more than 30 percent of the physicians in the Rutland area, each of which represents a small percentage of the total number of physicians in VPC.

The first type of exception is for pre-existing integrated physician groups not formed or expanded to avoid the 30 percent limitation. Where all VPC participating physicians in a specialty belong to such a pre-existing group, the group's inclusion in VPC would not increase market concentration or market power in the physician specialty.

The second type of exception is for internal medicine practitioners. VPC proposes to include 10 internal medicine practitioners as participating physicians. These practitioners would comprise approximately 43 percent of the total of 23 internal medicine practitioners in the Rutland area. You have asserted, however, that in the Rutland area, family practice physicians are good substitutes for internal medicine practitioners, an assertion that appears to be reasonable in this instance.[1] VPC proposes to include 11 of the total of 44 family practice and internal medicine physicians in the Rutland area. Consequently, VPC would include only 25 percent of the physicians in these two specialties combined.

---

[1]Our experience has been that this is often the case, especially in more sparsely populated communities. Based on our interviews with third-party payers and others, this seems to be the situation in the Rutland area.

The third type of exception is for three small physician specialties in which VPC proposes to include more than 30 percent of the physicians in the Rutland area as participating physicians.[2] For all three of these specialties, you have asserted plausible business reasons for including the physicians.

First, you asserted that VPC would be virtually unmarketable unless all five general surgeons and both gastroenterologists were included in VPC. In support of this assertion, you noted that all five general surgeons and both gastroenterologists are participating physicians in most, if not all, of the existing managed care plans in the Rutland area. In our discussions with various third-party payers in the Rutland area, we confirmed that most, if not all, existing managed care plans currently contract with all five general surgeons and both gastroenterologists. Furthermore, all third-party payers with whom we spoke agreed that VPC might be unmarketable unless all five general surgeons and both gastroenterologists were included in VPC's provider panel.[3]

Second, you noted that all five of the general surgeons, both gastroenterologists, and four of the five ophthalmologists currently participate in equitable rotating call schedules and routinely engage in cross-coverage for both inpatients and outpatients. You asserted that such cross-coverage is necessary in the Rutland area. Although cross-coverage between physicians who are not participating physicians in a given managed care plan is feasible, a managed care plan frequently can achieve cost reductions when all the physicians who provide cross-coverage for each other are participating providers in that managed care plan.

---

[2]Of the physicians currently practicing in the Rutland area, VPC proposes to include: 100% of the general surgeons -- two integrated group practices, one with two general surgeons and one with three general surgeons; 100% of the gastroenterologists -- two solo practitioner gastroenterologists; and approximately 63% of the ophthalmologists -- three solo practitioners and one integrated practice group with two ophthalmologists, out of a total of eight ophthalmologists.

[3]Although some third-party payers did not believe VPC needed to include five of the eight ophthalmologists to be marketable, none of the payers believed that this was likely to cause substantial anticompetitive effects for two reasons: 1) since VPC will include only five of the eight ophthalmologists, payers will have three non-VPC ophthalmologists to whom they can turn, if the VPC ophthalmologists refuse to contract with them or raise their prices to supracompetitive levels; and 2) many procedures performed by ophthalmologists are also performed by optometrists, who to some extent serve as acceptable substitutes for those overlapping procedures.

You also noted that each of these three physician specialties comprises a small minority of the total number of VPC's participating physicians.[4] You asserted that, since the compensation of all of VPC's participating physicians will be paid out of a single fixed revenue pool, paying any of these physician specialties supracompetitive prices for their services would reduce the revenue available to compensate the other physicians. Consequently, the other physicians will have strong incentives to maintain the prices charged by the physicians in those three specialties at competitive levels.

Furthermore, you stated that VPC intends to establish safeguards to ensure that competing physicians do not learn of their competitors' fees and prices through the operations of VPC. Specifically, VPC does not currently plan to conduct a survey of its participating physicians, but will use commercially available data to construct internal fee schedules and prices for its services. If a fee survey proves necessary in the future, it will be conducted by an independent consultant, and the underlying data will not be made generally available to VPC's participating physicians. Furthermore, to provide additional protection to ensure the physicians in VPC's three highly concentrated physician specialties do not learn of their competitors' fees and prices, you have stated that physicians in those three specialties will neither serve on any VPC committee established to develop fees, nor have access to fee data available to any such committee.

A combination of physicians from multiple specialties, such as VPC, could raise competitive concerns, especially in those three specialties for which VPC proposes to include more than 30 percent of the physicians in the Rutland area. However, in this instance, the managed care plans and other third-party payers with whom we spoke expressed no concern that the operations of VPC, as proposed, would likely cause substantial anticompetitive effects. We would be concerned, however, if a substantial number of VPC's participating physicians terminated their existing contracts with third-party payers or refused to negotiate individually with them in the future. You have stated that VPC's participating physicians have no current intention of doing this.

Moreover, many of the third-party payers with whom we spoke were enthusiastic at the prospect of VPC's formation because they believe that VPC would provide much-needed competition to the managed care panel of physicians formed by the only hospital in the Rutland area, Rutland Regional Medical Center. Given these considerations, and based on the information presently available to us, it does not appear that the operations of VPC, as proposed, would likely lessen competition substantially in physician services in the Rutland area.

The Department therefore has no present intention to challenge the proposed operations of VPC. In accordance with our normal practice, however, we remain free to bring whatever action

[4]For general surgeons, approximately eleven percent; for gastroenterologists, approximately five percent; and for ophthalmologists, approximately eleven percent.

or proceeding we subsequently come to believe is required by the public interest, if the joint venture proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. §50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately. In addition, any supporting data that you do not timely identify to be confidential business information under Paragraph 10(c) of the Business Review Procedure will also be made publicly available.

Sincerely,

Joel I. Klein