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# Frederick Health

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Owner:	Christian Gomes: Director FIHN Ops & Phys
Area:	FIHN

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References:

## Antitrust Compliance Policy, FIHN 100

### A. Scope and Applicability

This Antitrust Compliance Policy is designed to provide direction to Frederick Integrated Healthcare Network, LLC ("FIHN") and its participating physicians. FIHN's participating physicians may be actual or potential competitors of one another. FIHN may collectively negotiate with third party payors on behalf of FIHN participating providers who are integrated through participation in FIHN's clinical integration program ("CIP") and accountable care organization for the rates that third party payors will pay FIHN and its participating providers for services rendered to the payors' beneficiaries on the basis of clinical integration.

**Clinical integration** means an active and ongoing program (i) to evaluate and modify practice patterns of the participants and (ii) to create a high degree of interdependence and cooperation among the participants to control costs and ensure quality. However, FIHN and its participating physicians must ensure that their activities within FIHN's CIP do not "spill over" into areas beyond the scope of their collaborative arrangement.

The purpose of this Antitrust Compliance Policy is to minimize FIHN's and its participating physicians' liability for anticompetitive conduct. Failure to comply with federal and state antitrust laws could result in serious consequences for FIHN and its participating physicians. Violations of many antitrust laws are criminal violations, subjecting FIHN, its participating physicians and individuals to heavy fines (\$100 million or more per company; as much as \$1 million per individual) and individuals to possible imprisonment (up to 10 years). In addition, FIHN and its participating physicians may be required to pay treble damages and may be permanently enjoined from engaging in the offending activity in the future.

### B. Unlawful Agreements

FIHN participating physicians will risk antitrust liability for conduct that is not ancillary to and reasonably necessary to achieve the FIHN's legitimate procompetitive objectives. In other words, participating physicians must continue to compete with one another outside of the limited context of their CIP.

The antitrust laws prohibit agreements, conspiracies and understandings among competitors that unreasonably restrain competition. Unlawful agreements among competitors encompass a wide variety of understandings that may be formal or informal, explicit or implicit, and do not even require any verbal exchange. Below are some examples of anticompetitive agreements or conspiracies that FIHN and its participating physicians may not enter into.

#### 1. Agreements Regarding Price and Other Matters

Unlawful agreements include "naked" price fixing, which is an agreement on price that is not reasonably necessary to achieve the underlying business purposes of a pro-competitive arrangement between the parties, such as FIHN's CIP. Any price-fixing agreement among FIHN participating providers who are actual or potential competitors for services outside of the context of FIHN's CIP (or another legitimate collaborative arrangement between the parties pursuant to which an agreement on price would be ancillary) would be considered an unlawful price-fixing agreement. Price-fixing is any understanding whatsoever between competitors with respect to price or any element of price (e.g., discounts). For example, an agreement among competitors to adhere to a specific formula for determining price is just as unlawful as an agreement on the price itself.

#### ***Examples of Prohibited Price-Fixing Agreements***

- For services rendered by actual or potential competitors outside of the FIHN (or another legitimate joint venture):
  - Jointly negotiating managed care agreements
  - Agreeing on the prices that each FIHN participating provider will charge patients or payors, such as each participating provider's chargemaster or price list
  - Agreeing on the payment methodology (e.g., discount off of charges) that will be the basis for each FIHN participating provider's contracting with payors
  - Agreeing on the discount or other price offered to payors
  - Agreeing to use a common formula or methodology to set prices (or to refuse to accept a certain reimbursement methodology)
  - Adopting a common starting price level for negotiations
  - Establishing maximum or minimum reimbursement rates
  - Raising, lowering or holding prices or discounts
  - "Calling a truce" on price competition
- Coordinating wages and salaries for any employees of competing practices

## **2. Allocating Services or Service Areas**

Unlawful agreements also include dividing or allocating service areas or agreeing to the specific services each competing FIHN participating physician practice will provide.

#### ***Examples of Prohibited Allocation Agreements***

- Allocation accounts (e.g., agreements that one or more FIHN participating providers will market only to certain payors and that other FIHN participating providers will market only to other payors)
- Allocating territories (e.g., agreements that one or more FIHN participating providers will establish practice locations within a certain geographic region and market their services only in that area, and that other FIHN participating provider practices will be located in another geographic area and market their services only in that geographic area)
- Agreements to discontinue any services
- Allocating services between competing FIHN participating physician practices (e.g., agreements that one or more FIHN participating providers will provide one category of

### ***Examples of Prohibited Allocation Agreements***

ancillary services and that the other FIHN participating provider practices will provide another category of ancillary services only, so that there is no competition between the two groups for those ancillary services)

- Agree to contract exclusively with specified payors or types of payors

### **3. Refusals to Deal**

The antitrust laws also limit competitors' abilities to agree among each other to refuse to deal, or to deal only on specific terms, with particular payors.

### ***Examples of Unlawful Refusals to Deal***

- Refusing to do business with certain payors with the expectation or understanding that the other FIHN participating providers will do the same
- Refusing to deal with certain physicians or their organizations

## **C. Information Sharing**

An unlawful agreement may often be no more than an informal understanding based on the sharing of competitive information, which naturally tends to produce uniform action. For this reason, FIHN participating physicians may not exchange or discuss any competitively sensitive information about their respective practices. If an FIHN participating physician attempts to discuss such information, that discussion should be immediately terminated.

In order to remain above suspicion, below are categories of information that FIHN participating physician practices should never exchange and subjects they should never discuss.

### ***Subjects Never to Discuss and Information Never to Exchange***

- Information relating to current or future price lists or prices, discounts or other competitive terms or conditions of contracting for services contracted outside of FIHN
- Information relating to costs, profits or other financial information, including financial projections, for FIHN participating physician practices
- Information relating to service areas, markets or shares of the FIHN participating physician practices
- Information with respect to wages or salaries of professional or nonprofessional staff of the FIHN participating physician practices
- Information relating to marketing or strategic planning information for the FIHN participating physician practices
- Any plans to discontinue services or to offer new patient services
- Any other information that would *not* be shared with a competitor

## **D. Non-Exclusivity**

For all FIHN participating physicians other than ("FIHN specialists") those who have a primary specialty designation of internal medicine, general practice, family practice, or geriatric medicine or if Physician bills for any of the following HCPCS codes: 99201 through 99215, 99304 through 99340, 99341 through 99350, G0402 (the code for the Welcome to Medicare visit), G0438 and G0439 (codes for the annual wellness visits),

FIHN is a non-exclusive contracting network. This means that payors, if they choose to contract only with one or more – but not all – of the FIHN specialists, may contract individually (or through another network) with one or more of the FIHN specialists and not with FIHN on behalf of those FIHN specialists. FIHN specialists are permitted to contract independently of FIHN (either individually or through another network) with payors that do not hold contracts with FIHN.

If a payor attempts to contract independently with only a portion of FIHN's specialists, FIHN should not deny that opportunity to payors. Instead, FIHN should attempt to persuade the payor that the entire FIHN network will provide more advantages than a subset of FIHN's membership – in terms of geographic coverage, cost control, or higher quality, for example. Further, FIHN should communicate in writing to those FIHN specialists that they are free to contract independently with the payor, and should remind those FIHN specialists that they must make such participation decisions independently and without consulting with other competing physicians. FIHN may also provide talking points to the FIHN specialists for discussions with payors regarding the advantages of FIHN and data to demonstrate the quality and cost-effectiveness of FIHN's entire network and CIP.

## E. Minimizing Overinclusion Risk

The formation of FIHN's network would raise antitrust issues if too large a percentage of area physicians were permitted to participate. If such overinclusiveness allows FIHN to exercise "market power" by raising prices above competitive levels, or prevents competing networks from forming, FIHN could face antitrust liability. FIHN is monitoring its network composition with respect to compliance on an ongoing basis.

## F. Communications

Since an agreement may be inferred from circumstantial evidence, conversations and memoranda, FIHN employees, officers, directors and participating physicians should draft all documents (e.g., e-mails, letters, reports and memoranda) to convey a precise meaning. FIHN employees, officers, directors and participating physicians should articulate the pro-competitive purposes of FIHN's activities such as improving the quality of care and reducing the cost of care in all oral and written communications. Numerous executives have brought scrutiny to their organizations by mischaracterizing the intent or purpose of a given strategic endeavor, as follows:

### *Examples of Executive Quotes in Select FTC Proceedings*

- "By buying [Wild Oats] we will . . . avoid nasty price wars in [several] cities which will harm [Whole Foods'] gross margins and profitability. By buying [Wild Oats] . . . we eliminate forever the possibility of Kroger, Super Value, or Safeway using their brand equity to launch a competing national natural/organic food chain to rival us. . . . [Wild Oats] may not be able to defeat us but they can still hurt us . . . . [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever." - Whole Foods' executive
- "Through our growth initiatives, we will expand our presence in our marketplace in order to provide leverage to our market position as we negotiate relationships with purchasers of care. Our goal will be to receive superior pricing for our services and to become indispensable to the purchaser of care as they sell their product in our marketplace." - Evanston Northwestern Healthcare executive

The following chart sets forth examples of words and phrases that could lead to mischaracterization of the purpose and effect of FIHN's activities and, therefore, should be avoided.

Category	Words, Phrases and Conduct to Avoid	Reason to Avoid
<b>GUILTY WORDS</b>	"Destroy after reading," "no copies," "for your eyes only"	Casts suspicion on the activity
<b>POWER WORDS</b>	"Control," "dominate," "dominance," "dominant position"	Suggests abuse of power
<b>NEGOTIATING POWER</b>	"Increased bargaining power," "dominant position", "leverage", "clout"	Suggests power to increase profits
<b>PHRASES SUGGESTING NO REALISTIC COMPETITORS</b>	"Only seller," "essential seller"	Suggests no choice and power to raise prices
<b>WORDS OF DESTRUCTION</b>	"Eliminate," "destroy," "obliterate," "annihilate"	Suggests an intent to destroy or injure
<b>WORDS DEFINING MARKETS OR MARKET SHARE</b>	"75% of the [Service X] market"	Probably too narrow a market from an antitrust perspective
<b>WORDS SUGGESTING AGREEMENT RATHER THAN COMPETITION</b>	"Collaborate," "collaboration," "gentlemen's agreement," "partnering"	May imply an unlawful conspiracy
<b>WORDS SUGGESTING ELIMINATION OR END OF COMPETITION OR CHOICE</b>	"Eliminate the competition," "no choice but to use ..."	Implies an unreasonable restraint or anticompetitive effect
<b>WORDS OF EXCLUSION OR BOYCOTT</b>	"Exclude," "avoid," "boycott," "united front"	Suggests anticompetitive intent or effect
<b>WORDS SUGGESTING POWER TO RAISE PRICES</b>	"Enhance the bottom line," "increase profits," "leverage"	Suggests intent to raise prices

## Attachments

No Attachments

## Approval Signatures

Step Description	Approver	Date
Senior Leader Approval	Jennifer Teeter: VP Clin Integration & Con	03/2021
	Christian Gomes: Director FIHN Ops & Phys	03/2021
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