**Network Antitrust Compliance: Sample Policy and Procedure[[1]](#footnote-1)**

**Policy.**

The purpose of this document is to establish policies and procedures to promote compliance with antitrust laws and, by so doing, protect [*PCA-HCCN name*] (“PCA-HCCN”) and its members from potential scrutiny or exposures.

1. All PCA-HCCN members, officers, managers, and employees must comply with federal and state antitrust laws. PCA-HCCN will not condone any conduct which violates federal or state antitrust laws. Furthermore, violation of this PCA-HCCN Network Antitrust Compliance Policy by any PCA-HCCN member, officer, manager, or employee may result in immediate termination from PCA-HCCN or loss of employment with PCA-HCCN.
2. Any PCA-HCCN member, officer, manager, or employee who has questions about the application of antitrust laws to past, present or future conduct of PCA-HCCN should contact PCA-HCCN’s Executive Director, who will, in turn, consult with PCA-HCCN’s antitrust counsel.
3. For payor agreements that do not involve the sharing of substantial financial risk, PCA-HCCN will adhere to the protocols of the messenger model or other appropriate procedures that avoid antitrust concerns. Specific procedures are set forth below.
4. PCA-HCCN shall distribute copies of this policy and procedure to each of its members, officers, managers, and employees. When this policy is updated, PCA-HCCN shall circulate a revised version to each of its members, officers, managers, and employees reminding them of the existence and substance of this policy and procedure.

This policy and procedure will be reviewed annually by PCA-HCCN with input from PCA-HCCN’s antitrust counsel. Any proposed deviations from this policy and procedure will be reported to PCA-HCCN’s Executive Director, who will, in turn, consult with PCA-HCCN’s antitrust counsel before any deviation is implemented.

**Procedure.[[2]](#footnote-2)**

1. **Payor contracting**

PCA-HCCN recognizes that otherwise independent health centers that are not substantially integrated generally may not collectively agree on rates or charges. Health centers that are not integrated must set their fees independently, and must make independent decisions whether or not to contract with a particular payor.

PCA-HCCN recognizes the need to set guidelines to ensure that decisions on pricing and contracting are made in an appropriate manner. Accordingly, PCA-HCCN will observe the following procedures when contracting.

1. Messenger model procedures

For payor contracts that do not involve the sharing of substantial financial risk among individual members, PCA-HCCN may serve as a messenger to act as a facilitator of contractual arrangements between individual health centers and payors.

In certain instances, PCA-HCCN may ask each member to unilaterally determine its floor prices or rates or a conversion factor for providing services under fee-for-service contracts. This information will be provided directly to PCA-HCCN on forms and in the manner prescribed by PCA-HCCN. Each member may also be asked to execute and agreement authorizing PCA-HCCN to enter into contracts on its behalf if the contract rate is at or above a “floor” rate unilaterally determined by the individual member. This process is called the “pre-authorization process.” The pre-authorization process is offered solely for the purpose of streamlining the contracting process within the legal boundaries of the messenger model.

Neither the members nor PCA-HCCN will share information concerning an individual member’s floor price or rate or conversion factor with any other members. PCA-HCCN will maintain the information related to each member’s floor prices or rates or conversion factor in such a way as to ensure its confidentiality from the other members of PCA-HCCN. PCA-HCCN may not negotiate on behalf of members or otherwise facilitate collective decision making by members.

1. Payors propose fee schedule. When a payor asks that PCA-HCCN facilitate contracting with its members under a fee-for-service arrangement and the payor proposes the fee schedule, PCA-HCCN may, at the written request of the payor, review forms of contracts proposed by such a payor and negotiate changes unrelated to price or other competitively-sensitive terms that PCA-HCCN believes will make the contracts more acceptable to its members. Thereafter, PCA-HCCN will follow the steps outlines in subsections (a) and (b) below:
2. PCA-HCCN may transmit the payor’s contract offer to all members or to a subset thereof that best meets the payor’s needs (the subset will be chosen by the payor) for individual acceptance or rejection with such neutral explanations of the offers as may be necessary to assist the members in understanding and evaluating them. Members will thereafter be given thirty (30) days to review the offer and to notify PCA-HCCN if they accept the offer and/or wish to make a counterproposal to the payor. If no acceptance or counterproposal is received from the member within the thirty (30) day period, the member will be deemed to have rejected the offer. All counterproposals (and any responses thereto) will be passed from payor to member in accordance with this provision; under no circumstances shall PCA-HCCN negotiate fees or other competitively-sensitive terms on behalf of members. All competition and other competitively-sensitive information which PCA-HCCN transmits to or from members in PCA-HCCN’s capacity as messenger is confidential and will not be disclosed by PCA-HCCN to any member.
3. At the written request of the payor, and as an alternative to option (a) above, PCA-HCCN may also review members’ unilaterally-determined floor rates to ascertain the number of members that are willing to contract at the rate offered by the payor and may advise the payor of the number of members that will contract at that rate. If the payor’s offer meets or exceeds the members’ unilaterally-determined floor rates, PCA-HCCN may enter into contracts on behalf of those members who have elected to participate in the pre-authorization process. Any offers that do not meet the members’ individual determined floor rates will be transmitted to the members for their individual consideration.
4. Payor does not propose fee schedule. When a payor asks PCA-HCCN to facilitate contracting with its members under a fee-for-service arrangement and the payor does not tender a fee schedule to PCA-HCCN, PCA-HCCN will follow the steps outlined below:

At the written request of the payor, PCA-HCCN may review the forms of contract or terms proposed by such payor, and negotiate changes unrelated to price or other competitively-sensitive terms that PCA-HCCN believes will make the contract more acceptable to its members. PCA-HCCN may provide the payor with information concerning members’ individually-determined floor rates. Such information shall be furnished to the payor for the sole purpose of enabling payor to develop contract offers. The payor is free to counter-propose compensation terms which will be conveyed to the members via the messenger model.

If, after reviewing the fee information provided pursuant to this Section 2, a payor offers compensation terms which meet or exceed the members’ individually-determined floor rates, the payor, at its option, may utilize the pre-authorization process described above, or it may request PCA-HCCN to transmit the fee information to the members for their individual consideration. If the pre-authorization process is utilized, any offers that do not meet the members’ individually-determined floor rates will be transmitted to the members for their individual consideration.

1. Prohibited actions. Except as specifically provided above, PCA-HCCN shall not:

a. Agree or disagree on behalf of members, individually or collectively, to enter into contracts;

b. State the terms (price or other) on which members, individually or collectively, will enter in to contracts with payors, or negotiate price or other competitively-sensitive terms;

c. Advise members whether they should or should not enter into contracts with payors;

d. Share information among members as to the terms (price or other) on which they contract to do business individually, or as to whether or not they are prepared individually to do business with any given payor; nor

e. Prohibit individual members who wish to negotiate the offer with the payor from doing so directly.

1. Information regarding member’s fees. As messenger, PCA-HCCN may provide payers with information concerning its members’ fees, which may include their usual and customary fees, and the fees at which they have stated their willingness to contract. PCA-HCCN may assist payors in developing contract offers by taking the fee authorizations of the members and developing a schedule that can be presented to a payor showing the percentages of participants in PCA-HCCN who have authorized contracts at various price levels. In doing so, PCA-HCCN will observe the following guidelines:

a. Only PCA-HCCN will gather and disseminate the information;

b. Under no circumstance will PCA-HCCN negotiate or agree to fees or other competitively-sensitive terms on behalf of members;

c. PCA-HCCN will collect fee information from the members, and will maintain it in such a way as to ensure its confidentiality from other members;

d. In its capacity as messenger, PCA-HCCN will be free to consult PCA-HCCN’s legal counsel as it deems necessary, and to act on legal counsel’s advice for protection of PCA-HCCN and its members;

e. For purposes of furnishing fee information to payors, PCA-HCCN will provide actual information for all of a sample of members, rather than typical or average fees; and,

f. PCA-HCCN may discuss with its members any market considerations affecting prices, but will not discuss specific prices, price levels, or price proposals.

1. Non-messenger model procedures

PCA-HCCN may negotiate and contract with a payor as a single entity on behalf of its members and engage in other activities typically considered anti-competitive if the members are sufficiently integrated. Under these circumstances, PCA-HCCN will remain protected from antitrust concerns. Because integration can be expensive to establish and can be very difficult to set up for political, logistical and operational reasons, PCA-HCCN and its members should consult legal counsel when and if deciding to integrate.

1. Financial integration. To meet the “sufficient integration” requirement, PCA-HCCN and its members must share “substantial financial risk,” typically through capitation payments, global fee arrangements, fee withholds, cost or utilization-based bonuses or penalties, shared savings arrangements or other indicia of financial integration. Such indicia may include making substantial capital investments in the arrangement and/or executing a participating provider contract with payors that provides for capitation.

Despite financial integration, antitrust safe harbors require a network arrangement to be restricted to a certain market share. For a non-exclusive network arrangement, no more than thirty percent (30%) of the primary care or specialty physicians who practice in the relevant geographic market may participate in the network. For exclusive network arrangements, only twenty percent (20%) of primary care or specialty physicians for the relevant geographic market may participate in the network.

1. Clinical integration. A collaboration that is unable to demonstrate sufficient financial integration is still possible if it can demonstrate sufficient clinical integration. Clinical integration is demonstrated by the implementation of an active and ongoing program to evaluate and, as necessary, modify the practice patterns of the participating members, thereby creating a high degree of interdependence and cooperation to control costs and ensure quality. Note that the standards by which sufficient clinical integration is defined are imprecise, thereby increasing the legal risk of this approach.

**This policy and procedure shall be periodically reviewed and updated consistent with the requirements and standards established by the Board of Directors and PCA-HCCN management, federal and state laws and regulations, and applicable accrediting and review organizations.**

**Responsible parties:**

### Signature Date

### Executive Director

Signature Date

1. The Authors of these materials include attorneys at the law firm of Feldesman Tucker Leifer Fidell LLP. The sample documents offer general guidance based on federal law and regulations and do not necessarily apply to all PCAs-HCCNs under all facts and circumstances. Further, these materials do not replace, and are not a substitute for, legal advice from qualified legal counsel. [↑](#footnote-ref-1)
2. Authors’ note: Using the following sample as a guide, PCAs-HCCNs should tailor the procedure to reflect their own structures and operations. [↑](#footnote-ref-2)