



U.S. DEPARTMENT OF JUSTICE
Antitrust Division

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January 15, 2020

Victoria L. Smith, Esq.
Stinson Leonard Street, LLP.
1201 Walnut Street, Suite 2900
Kansas City, MO 64106

Re: The American Optometric Association and the AOAExcel
GPO, LLC Business Review Request

Dear Ms. Smith:

This letter responds to your request on behalf of the American Optometric Association (the “Association”) and the AOAExcel GPO, LLC (the “GPO”) for a business review letter from the Department of Justice pursuant to the Department’s Business Review Procedure, 28 C.F.R. § 50.6. Specifically, you have asked for a statement of the Department’s present enforcement intentions regarding the Association and the GPO’s proposal to expand the current scope of their group purchasing activities to include the purchase of optometric products, namely corrective eyeglass lenses, eyeglass frames, and contact lenses.¹ Based on the information and representations you provided, and after a thorough review, the Department presently does not intend to challenge the GPO’s expansion to include optometric products for the reasons explained below. In accordance with the Department’s usual practice, however, it reserves the right to challenge the GPO in the future if the GPO’s operations are determined to be anticompetitive in purpose or effect.

I. Background

All facts set forth in this section regarding the Association, the GPO, and the proposed GPO expansion are based on your representations to the Department.

¹ Letter from Victoria Smith, Esq., Stinson Leonard Street, to Office of the Assistant Attorney General, Antitrust Division, Department of Justice (December 17, 2019) (hereinafter, “Request Letter”).

The Association is a trade association that represents approximately 46,000 members across the United States, including approximately 27,000 independent and private practice doctors of optometry who pay member fees to be part of the Association. The remaining members of the Association are approximately 12,000 employees of optometric practices, such as staff or paraoptometric, and 7,000 students.

The Association's members compete with one another, non-member optometrists, and ophthalmologists to provide optometric services, including diagnosing eye disease and prescribing and selling optometric products. The Association member optometrists compete in the sale of optometric products with those other healthcare providers, and with retail and online stores, such as Walmart, Costco, 1-800-contacts, Warby Parker, and vertically integrated manufacturers such as EssilorLuxottica.

Like many professional associations, the Association—through its subsidiary, the GPO—operates a group purchasing organization. The GPO today only offers Association members the ability to purchase non-optometric products, such as professional liability insurance, credit card processing, life insurance, general office supplies, general medical supplies, and equipment. In addition, all items acquired through the GPO today are used by each member's practice and are not for re-sale. The GPO uses Intalere, a third-party healthcare group purchasing organization, as its agent to negotiate discounts on products and services. No optometric product manufacturer maintains any financial stake, makes any financial contributions, or holds any ownership or board positions in Intalere. As of February 2019, 1,011 Association member optometric practices had signed up to participate in the GPO, and 251 practices had made at least one purchase through the GPO. The Association members' participation in the GPO is optional.

II. The Proposed Expansion of the GPO to include Optometric Products

The Association proposes to expand the types of products available through the GPO to include optometric products. Intalere will negotiate discounts on optometric products from multiple manufacturers so that Association members can purchase these products for their patients' needs.

Optometric product manufacturers do not maintain any financial stake, make any financial contributions, or hold any ownership or board positions in the Association or the GPO. Furthermore, you represent that no product manufacturer would be permitted to maintain any financial stake, make any financial contributions, or hold any ownership or board positions in the Association or the GPO going forward.

You represent that the proposed GPO expansion likely will result in discounts, better pricing, and reduced transaction costs for the Association members who purchase optometric products through the GPO. These discounts and cost reductions will enable GPO participants to better compete against large retail stores, online channels, other healthcare providers, and vertically integrated manufacturers in the sale of optometric products. GPO members would not be required to buy any products through the GPO.

You represent that Association members today generally pay more for optometric products than many of their competitors, such as vertically-integrated manufacturers and retailers, internet-only retailers, and big-box stores. You anticipate that the GPO likely will lower prices for most Association members for optometric products. By obtaining lower prices on optometric products, the GPO members will be able to charge less for these goods when the members resell them to consumers.

You represent that GPO participants likely will purchase significantly less than 35 percent of the total sales of each type of optometric product sold in the United States. The GPO will use only Intalere, an independent third party, to negotiate prices with suppliers.

You also represent that no GPO participant will be involved in negotiations. The communications between the GPO and an individual participant regarding prices for optometric products will be kept confidential from other GPO participants. In addition, Intalere is contractually obligated to maintain the confidentiality of information about individual members of the GPO.

III. Analysis of the Proposed GPO Expansion

In Statement 7 of the *Statements of Antitrust Enforcement Policy in Health Care*, the Department and the Federal Trade Commission (collectively, “the Agencies”) provide guidance concerning the Agencies’ antitrust enforcement policy with respect to joint purchasing arrangements among healthcare providers.² Statement 7 notes that most joint purchasing arrangements among healthcare providers do not raise antitrust concerns because these arrangements can produce efficiencies that benefit consumers, including reducing transaction costs. Statement 7 also provides that joint purchasing arrangements between healthcare providers are unlikely to raise antitrust concerns unless at least one of the following factors is present:

- (1) the arrangement accounts for so large a portion of the purchases of a product or service that it can effectively exercise market power in the purchase of the product or service, or
- (2) the products or services being purchased jointly account for so large a proportion of the total cost of the services being sold by the participants that the joint purchasing arrangement may facilitate price fixing or otherwise reduce competition.³

Statement 7 provides an “antitrust safety zone” under which, absent extraordinary circumstances, the Agencies will not challenge a joint purchasing arrangement among healthcare providers. The safety zone has two requirements:

² U.S. Dep’t of Justice & Fed. Trade Comm’n, *Statements of Antitrust Enforcement Policy in Health Care*, Statement 7 (Aug. 1996), available at <https://www.justice.gov/atr/page/file/1197731/download>.

³ *Id.* at 53-54.

- (1) the purchases [of any product or service covered by the arrangement] account for less than 35 percent of the total sales of the purchased product or service in the relevant market; and
- (2) the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement.⁴

The purpose of the first requirement is to determine whether the joint purchasing arrangement might be able to drive down the price of the product or service being purchased below competitive levels.⁵ You represent that the expanded GPO will meet the first requirement because GPO participants likely will purchase significantly less than 35 percent of the total sales of each type of optometric product in the United States. Consequently, the GPO likely will not drive down the price of any type of optometric product below competitive levels. If, however, the GPO grows and it begins to purchase 35 percent or more of any product, then the GPO's conduct may result in prices below competitive levels and violate the antitrust laws.

The purpose of the second requirement is to determine whether the arrangement might result in standardized costs, thus facilitating price fixing or otherwise having anticompetitive effects.⁶ You have not represented that the expanded GPO will meet the second requirement of the safety zone. Rather, the cost of many of the products that the Association members purchase through the GPO appears likely to account for more than 20 percent of the total revenue from the sale of those products by competing participants in the GPO. For example, the cost of contact lenses that the participants purchase through the GPO likely will account for more than 20 percent of the revenues that the participants will receive from reselling those contact lenses. For this reason, the expanded GPO does not meet the second requirement of Statement 7's antitrust safety zone.

Statement 7 notes, however, that joint purchasing arrangements that fall outside the antitrust safety zone do not necessarily raise antitrust concerns.⁷ Statement 7 describes three safeguards that joint purchasing arrangements can adopt to mitigate concerns that might otherwise arise.⁸ The first mitigating factor is present if "members are not required to use the arrangement for all their purchases of a particular product or service."⁹ The second mitigating factor occurs where "an independent employee or agent who is not also an employee of a participant" negotiates on behalf of the joint purchasing

⁴ *Id.* at 54-55.

⁵ *Id.* at 55.

⁶ U.S. Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care*, Statement 7 (Aug. 1996), available at <https://www.justice.gov/atr/page/file/1197731/download>, at 55.

⁷ *Id.* at 56.

⁸ *Id.* at 56-57.

⁹ *Id.*

arrangement.¹⁰ The third mitigating factor exists where “communications between the purchasing group and each individual participant are kept confidential, and not discussed with, or disseminated to, other participants.”¹¹ Statement 7 explains that these safeguards will reduce substantially, if not completely eliminate, use of the purchasing arrangement as a vehicle for discussing and coordinating the prices of healthcare products and services offered by the participants—and that the adoption of these safeguards will help demonstrate that the joint purchasing arrangement is intended to achieve economic efficiencies rather than to serve an anticompetitive purpose.¹²

The expanded GPO will incorporate all three of these safeguards to mitigate concerns that might otherwise arise in connection with joint purchasing arrangements. Namely, (1) GPO participants will not be required to make any of their optometric-product purchases through the GPO, (2) a third party, Intalere, will negotiate prices with the GPO’s suppliers, and (3) communications between the GPO and each individual participant regarding prices will be kept confidential from other GPO participants. As described in Statement 7, these safeguards will reduce substantially, if not completely eliminate, the risk that the GPO might be used as a vehicle for discussing and coordinating the prices of optometric products sold by the participants. The adoption of these safeguards helps demonstrate that the proposed GPO expansion is intended to lower costs and promote competition rather than to serve an anticompetitive purpose.

The expanded GPO also appears unlikely to produce anticompetitive effects through the standardization of its members’ costs for two additional reasons. First, other GPOs already exist for the purchase of optometric products, and optometric products are also sold through distributors. Because these purchasing options already exist, and likely will continue to exist, the proposed GPO likely will not significantly increase the standardization of costs that exists today for optometric products. Second, the existence of other GPOs and the need to compete with large retail stores, online channels, other healthcare providers, and vertically-integrated manufacturers in the sale of optometric products may help defeat any attempt by GPO members to collectively raise prices. GPO participants likely will purchase significantly less than 35 percent of each type of optometric product sold in the United States, indicating that consumers likely have many competitive alternatives from which to purchase each type of optometric product.¹³

IV. Conclusion

Based on our investigation and your representations described above regarding the GPO and its proposed expansion to include optometric products, the GPO expansion is unlikely to produce anticompetitive effects. Accordingly, the Department has no

¹⁰ *Id.* at 57.

¹¹ *Id.*

¹² *Id.*

¹³ See Request Letter at 6. While this factor alone would not give us confidence that anticompetitive effects are unlikely, here the limited share of purchase of each type of product stands alongside each of the three identified safeguards, and the existence of other GPOs and other distribution channels.

present intention to take antitrust enforcement action concerning the proposed GPO expansion.

This letter expresses the Department's current enforcement intention and is predicated on the accuracy of the information and assertions that you have presented to us, as well as the additional qualifications set forth in this letter. In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct 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, and any supporting data you submitted will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with paragraph 10(c) of the Business Review Procedure.

Sincerely,


Makan Delrahim