# DEPARTMENT OF JUSTICE

STATEMENT

OF

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United States Senate

On Competition and Antitrust Issues in Health Care Reform
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I am pleased to have the opportunity to submit to the Committee the views of the Department of Justice on the role of competition and the antitrust laws as significant reform of our health care system is underway. My statement will also address the antitrust-related provisions of the President's proposed Health Security Act.

**The Vital Importance of Competition and the Antitrust Laws**

The President's proposed Health Security Act and most of the other major proposals for health care reform rely heavily on the forces of competition to increase the availability and improve the quality of health care services, foster efficiency in the delivery of those services, and control their spiralling costs. For too long, the salutary effects of competition in health care marketplaces have been inhibited. Third party payment mechanisms that do not stimulate cost-effective consumer and provider decisions, limitations on the ability of consumers to choose health care plans on the basis of quality and price, and consumer unawareness of the merits and costs of the choices they do have are examples of inhibitions on competition that need to be addressed.

The Health Security Act promotes competition in many ways. The health care delivery system it will create will stimulate increased competition between and among various types of health plans and between and among institutional and individual health care providers. Plans will compete to be selected by consumers by seeking ways to lower premiums and increase the quality of care through networks of qualified providers. Providers will compete to develop or participate in plans by demonstrating that they can provide high quality care at affordable prices, and by seeking innovative ways to offer that care. Consumers will have information that will make them better able to evaluate and select their health care coverage on the basis of cost and quality, and thus play their important role in stimulating effective competition among plans and providers. In short, the Health Security Act will promote competition to its rightful status as a major determinant in health care reform.

As we reform our health care system to rely heavily on increased competition, it is vital that we remember that promoting and protecting that competition requires effective prohibitions against private conduct that would undercut it. Fortunately, we do not have to invent such prohibitions: They have existed for a century in the form of our antitrust laws. Given the proposals for sweeping immunities from the antitrust laws or serious constraints on their effectiveness in some of the bills before the Congress, however, I fear that this simple connection between increasing competition and preserving the laws that protect it may be overlooked as health care reform is pursued. That is a mistake we must not make.

The antitrust laws of the United States and their enforcement by the Department and the Federal Trade Commission are sound, including as applied in the health care industry. The antitrust laws have existed for over a century as the principal guarantor of effective competition in free marketplaces. They have proved, time and again, far superior to pervasive government review, regulation, and oversight of individual or collective activities that may have competitive consequences. Indeed, they have been termed the "Magna Carta" of our fundamental national economic system.

In the health care area, as is the case generally, the antitrust laws are enforced so as to take into account not only indications of possible competitive harm, but also the potential for procompetitive increases in efficiency, lowered administrative and other costs, improvements in quality, enhanced innovation, and other factors that are important to the cost-effective delivery of quality health care services. Many types of procompetitive industry activity are well recognized as highly unlikely to raise any significant competitive concern. For example, neither the Department nor the FTC has ever challenged a joint venture among hospitals to purchase, operate and market high-technology or other expensive medical equipment. Only those activities that would harm health care markets and consumers by raising prices, decreasing availability or quality of services, or discouraging innovation face potential antitrust challenge.

**Antitrust Guidance to the Health Care Community**

Although antitrust principles in the health care area are basically sound, the Department and the FTC have recognized that antitrust uncertainty in the health care community, particularly in these changing times, should be addressed. To that end, we have been working since last summer to provide antitrust guidance to the industry. In September 1993, we issued six Statements of Antitrust Enforcement Policy in the Health Care Area, covering matters that we knew to be of concern to health care providers and others. Our statements cover six areas:

- Hospital mergers
- Hospital equipment joint ventures
- Physicians' provision of information to purchasers
- Hospitals' exchange of price and cost data
- Joint purchasing arrangements among providers, and
- Physician network joint ventures.

Our statements contain "safety zones" describing mergers, joint ventures, and other activities that the agencies have concluded are very unlikely to raise competitive concerns. The statements also make clear, however, that conduct that does not fall within the safety zones is not by implication likely to be challenged by the Department or the FTC. Indeed, much conduct not amenable to coverage by a safety zone because of the significance of the particular circumstances will be recognizably and demonstrably procompetitive in those circumstances. The statements set out the analysis the agencies use in evaluating conduct outside the safety zones so that health care providers may more confidently assess antitrust issues raised by proposed conduct even if the safety zones themselves are not applicable.

Both the safety zones and the agencies' analysis of other conduct are set out in our policy statements in simple, straightforward terms. Our goal is to provide antitrust guidance to health care providers themselves, and not only to the antitrust bar that advises the industry.

While our 1993 policy statements cover a lot of ground and, I believe, have contributed greatly to health care providers' understanding of antitrust issues, I also believe that we can and

should do more. When we issued our policy statements last September, we recognized that additional antitrust guidance in the areas they cover as well as in other health care areas may be desirable. We are hard at work on such additional guidance right now, and have pledged to continue this effort. In this regard, I want to express my sincere appreciation for the advice and counsel we have received from representatives of the health care community in our ongoing efforts to develop useful antitrust enforcement policy statements. The legal and practical insights that have been shared with us by the American Hospital Association, the American Medical Association, and a variety of other interested and knowledgeable parties have been invaluable.

We have also instituted an expedited procedure to supplement the general antitrust guidance set forth in the Statements of Antitrust Enforcement Policy in the Health Care Area with more specific guidance on specific proposed conduct. We have committed to respond to requests for Department business reviews of specific health care activities within 90 or 120 days, depending on the nature of the conduct. The Federal Trade Commission has made the same commitment with respect to its advisory opinion procedure. Health care providers are taking advantage of these procedures, and we anticipate that they will result in significant further clarification of antitrust rules and guideposts to the advantage of all.

**Antitrust Provisions in the Health Security Act**

The Health Security Act contains two antitrust-related provisions. First, section 5501 of the Act repeals the broad antitrust immunity in the McCarran-Ferguson Act for the business of insurance to the extent that such business relates to the provision of health benefits. The current, broad immunity could allow health insurers to act anticompetitively and thereby interfere with the Health Security Act's goal of relying on competition between insurers to control health care costs.

The Health Security Act also provides that, in connection with the establishment by a regional alliance of a fee schedule for use in regional alliance fee-for-service health plans, health

care providers may collectively negotiate the fee schedule with the regional alliance (section 1322(c)). This section recognizes that the establishment of such fee schedules by the alliances is basically a governmental function under the Act, and provides that the actions of the alliances in this regard and their negotiations with providers collectively shall be accorded the antitrust treatment due to government actions and efforts by private parties to influence those actions (section 1322(c)(5)). Such actions and efforts generally are not subject to the antitrust laws, but under section 1322, as is the case generally, there are important limits on what actions providers may take to influence an alliance's fee-for-service schedule decisions. The principal limitation is that providers may not threaten or engage in any boycott to force an alliance to adopt their suggestions or recommendations (section 1322(c)(6)). As used in section 1322, the term "boycott" is intended to include any threat or action through which providers collectively would decline initially to participate, or departicipate, in fee-for-service health care delivery unless fees were set at certain levels.

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Before concluding, I would like to underscore the one point I think is vital to keep in mind as antitrust issues are considered during health care reform. Among the primary goals of such reform is to bring the forces of competition effectively to bear in health care markets as never before. To accomplish this goal the efficacy of the antitrust laws must be preserved, and we seek the Committee's support in this effort. The Department of Justice must also continue to work with the FTC and the health care community to reduce unwarranted antitrust uncertainty in the health care area, which we have pledged to do.

Thank you again for the opportunity to submit to the Committee the views of the Department of Justice on these important issues.