DEPARTMENT OF JUSTICE

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On Competition and Antitrust Issues in Health Care Reform

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I am delighted to have the opportunity to submit to the Subcommittee the views of the Department of Justice on the role of competition and the antitrust laws as significant reform of our health system is underway. This Subcommittee knows the vital role that competition plays in the American economy, and the importance of the antitrust laws in preserving that competition. Increasing competition in the health care system will help lead to lower prices, more innovation and increased quality. This will benefit all Americans and is an important goal of any health care reform.

The Vital Importance of Competition and the Antitrust Laws

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 health care markets, as in other markets, the antitrust laws have played an integral role in protecting consumers from higher prices resulting from efforts to reduce or eliminate price competition and to thwart cost containment. The antitrust laws have enabled innovative health care delivery systems to form and compete in the market by preventing providers from boycotting those systems. Indeed, the success of managed care plans today is directly related to the existence and

enforcement of the antitrust laws. The antitrust laws have prevented providers from jointly agreeing to increase their fees above competitive levels and pass those unjustified increases to consumers. The antitrust laws have prevented anticompetitive mergers that would result in diminished services, decreased quality and increased prices. While this is unambiguously good, at the same time, the antitrust laws have not prevented efficiency-enhancing joint conduct likely to lead to improved quality, increased services and lower prices.

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 joint activities that can lead to lower costs and improved quality occur every day in the health care industry without raising any antitrust issues. Many types of procompetitive activity are well recognized as highly unlikely to raise any significant antitrust 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. With hospital mergers numbering in the hundreds and hundreds, the Department and the FTC investigate and challenge only a very small percentage-those transactions which, instead of producing significant efficiencies that will lower prices to consumers,

will result in decreased competition and harm consumers by resulting in higher prices. The Department and the FTC's enforcement record makes clear that only those activities that would harm health care markets and consumers by raising prices, decreasing the availability or quality of services, or discouraging innovation face potential antitrust challenge.

As the debate on health care reform moves forward, it is important to realize, remember and preserve the vital role that the antitrust laws have in ensuring that health care markets will continue to function competitively.

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 the following 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.

These six areas were chosen after discussions with many members of the health care industry. We wanted to focus on those areas of greatest concern to the health care community. We recognized that industry participants could (and did) provide important input to the Department and the FTC on those areas that most concerned the health care community regarding the application of the antitrust laws. We responded to those concerns in these statements. In working on these statements, we paid particular attention to concerns regarding the application of the antitrust laws in rural health care markets.

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.

The Department has committed substantial resources to the health care business review process and I am proud of the results thus far. We have issued health care business reviews on a number of important topics in the health care industry, including group purchasing by employers of health care benefits (which can hold down health care costs), provider networks (an area of increasing importance to the provider community), and wage and salary surveys (conduct often engaged in by hospitals). We expect to continue promptly to address these and other topics important to the health care community. 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.

Competition and the Health Security Act

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.

Specific Antitrust Provisions in the Health Security Act

The Health Security Act contains two specific 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 Subcommittee'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 Subcommittee the views of the Department of Justice on these important issues.