Department of Justice

ANTITRUST AND THE NEW COMPETITION IN HEALTH CARE

REMARKS BY

DOUGLAS H. GINSBURG
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

NATIONAL HEALTH LAWYERS ASSOCIATION
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I WOULD LIKE TO DESCRIBE SOME OF THE ANTITRUST DIVISION'S PERSPECTIVES ON THE HEALTH CARE INDUSTRY--BOTH IN TERMS OF THE POLICIES WE EXPECT TO FOLLOW CONCERNING NEW DEVELOPMENTS IN THE COMPETITIVE STRUCTURE OF THE HEALTH CARE INDUSTRY, AS WELL AS THE ANALYSES WE HOPE TO PROVIDE TO FEDERAL AND STATE REGULATORY AGENCIES AND LEGISLATURES TO SUPPORT NEW INITIATIVES THAT PROMOTE EFFICIENT, COMPETITIVE PERFORMANCE BY THIS INDUSTRY.

AS YOU KNOW, THE HEALTH CARE INDUSTRY IS A MAJOR PORTION OF OUR ECONOMY. IT ACCOUNTS FOR OVER TEN PERCENT OF THE NATION'S GROSS NATIONAL PRODUCT. ITS SIGNIFICANCE, BOTH IN DOLLAR FIGURES AND AS A FRACTION OF GNP, HAS RISEN GREATLY IN THE POST-WAR PERIOD.

DURING THE LAST SEVERAL YEARS, THERE HAS BEEN MUCH THOUGHT AND EXPERIMENTATION AT INTRODUCING ELEMENTS OF MARKETPLACE COMPETITION TO PROMOTE BOTH THE EFFICIENT PROVISION, AND THE EFFICIENT USE, OF HEALTH CARE SERVICES AND FACILITIES. THE ANTITRUST DIVISION SUPPORTS THIS MOVEMENT TOWARD GREATER RELIANCE ON MARKET MECHANISMS. WE BELIEVE THAT COMPETITION IS A MUCH MORE VIABLE AND EFFICIENT REGULATOR OF HEALTH CARE MARKETS THAN MANY PAST OBSERVERS HAVE BELIEVED.

OUR RECENT REORGANIZATION IN THE DIVISION HAS INCREASED OUR FLEXIBILITY IN INVESTIGATING HEALTH CARE MATTERS. THE PERSONNEL RESPONSIBLE FOR OUR HEALTH ACTIVITIES HAVE BEEN CONSOLIDATED IN THE PROFESSIONS AND INTELLECTUAL PROPERTY SECTION, HEADED BY JOHN CLARK, WHO REPORTS DIRECTLY TO THE DEPUTY FOR REGULATORY AFFAIRS, RICK RULE.

WE ALSO NOW EXPECT TO PRESENT OUR VIEWS, THROUGH OUR COMPETITION ADVOCACY PROGRAM, TO REGULATORY AND LEGISLATIVE AUTHORITIES AS TO WHY MARKET MECHANISMS ARE GENERALLY SUPERIOR TO DIRECT REGULATION IN CONTROLLING COSTS AND ALLOCATING SERVICES.

THERE ARE TWO MAJOR CHANGES IN THE NATION'S HEALTH CARE ORGANIZATION THAT THE ANTITRUST DIVISION MAY WISH TO ADDRESS: RELAXATION OF CERTIFICATE OF NEED ("CON") REGULATIONS AND THE INTRODUCTION OF PREFERRED PROVIDER ORGANIZATION ("PPO") REGULATIONS.

MANY STATES OR HEALTH PLANNING JURISDICTIONS CURRENTLY REGULATE THE NUMBER OF HOSPITALS, NURSING HOMES, HOME HEALTH CARE AGENCIES OR MAJOR PIECES OF CAPITAL EQUIPMENT THAT CAN BE INSTALLED IN THEIR DISTRICT THROUGH THE CON PROCESS. BRIEFLY STATED, ANYONE WHO WISHES TO PROVIDE SUCH A SERVICE MUST FIRST SECURE A CON. IN DECIDING WHETHER TO GRANT A CON, THE REGULATOR JUDGES WHETHER THE PROPOSED SERVICE IS "VALUABLE" AND/OR IN CURRENT SHORT SUPPLY.

THE PRINCIPAL RATIONALE FOR THE USE OF CON REGULATION OF HEALTH CARE SERVICES IS THAT IT IS NECESSARY TO CORRECT MARKET DISTORTIONS CREATED BY OTHER GOVERNMENT REGULATIONS, PARTICULARLY REIMBURSEMENT REGULATIONS. FURTHER, SOME ARGUE THAT EVEN IF THERE WERE NO GUARANTEED REIMBURSEMENT FOR THESE SERVICES THROUGH GOVERNMENT PROGRAMS, AN INDUSTRY WITH FREE ENTRY WOULD RAPIDLY BECOME "SICK" AS TOO MANY FACILITIES WITH LONG-LIVED CAPITAL WOULD ENTER THE HEALTH CARE MARKET, AND

COMPETITION, WHILE FORCING PRICES DOWN, WOULD NOT QUICKLY FORCE THE EXIT OF THESE EXCESS FACILITIES.

CON REGULATIONS HAVE GREATLY INFLUENCED HOW WE ANALYZE MARKETS THAT ARE SUBJECT TO THEIR STRICTURES. IN EVALUATING A PROPOSED HEALTH CARE MERGER IN A JURISDICTION THAT REQUIRES A CON FOR A NEW PROVIDER TO ENTER THE MARKET, WE CONSIDER HOW LIKELY A CON IS TO BE ISSUED TO AN ERSTWHILE NEW ENTRANT. SOME JURISDICTIONS MAKE OUR EVALUATION OF ENTRY CONDITIONS STRAIGHTFORWARD BY FOLLOWING SET POLICIES OF ALWAYS DENYING OR ALWAYS GRANTING CERTAIN TYPES OF CONS. OTHERS ARE MORE VARIABLE. IF CON REQUESTS BY NEW ENTRANTS ARE LIKELY TO BE DENIED, HOWEVER, WE ARE MORE LIKELY TO CONTEST THE MERGER THAN IF CONS ARE FREELY AVAILABLE.

RECENTLY, HOWEVER, STATES HAVE BEEN RETHINKING THE WISDOM OF CON REGULATION. WE SUPPORT THE INITIATIVES UNDERWAY IN SOME STATES TO LOOSEN CON'S HOLD ON HEALTH CARE MARKETS. WE BELIEVE THAT CON REGULATION GENERALLY IS INFERIOR TO MARKET FORCES IN CONTROLLING COSTS AND EFFICIENTLY ALLOCATING SERVICES. FURTHERMORE, WE BELIEVE THAT MARKETS FREE OF CON CONTROL MAY REQUIRE LESS ANTITRUST SURVEILLANCE THAN OTHERS. WE RECOGNIZE THESE CHANGES, AND OUR ANTITRUST ANALYSIS WILL REFLECT THE FACT THAT EASE OF ENTRY IS A FAR BETTER GUARANTOR OF COMPETITIVE MARKET PERFORMANCE THAN IS ANTITRUST INTERVENTION.

THE NEXT TOPIC I WISH TO DISCUSS IS PPO'S. PPOS ARE GROUPS OF AFFILIATED HEALTH CARE PROVIDERS SUCH AS PHYSICIANS, HOSPITALS, ETC. WHO MAY AGREE TO CHARGE CERTAIN DISCOUNTED FEES TO MEMBERS, TAKE ON CERTAIN INSURANCE REIMBURSEMENT CLAIM PROCESSING FUNCTIONS, OR ACTUALLY BEAR SOME INSURING RISK FOR THEIR PATIENTS.

THE ANTITRUST DIVISION BELIEVES THAT ALTERNATIVE HEALTH CARE DELIVERY SYSTEMS SUCH AS PPOS (AND HMOS) OFFER SIGNIFICANT PROCOMPETITIVE POTENTIAL, AND WE SUPPORT AND ENCOURAGE THE DEVELOPMENT OF SUCH SYSTEMS AS ALTERNATIVES TO THE TRADITIONAL FEE-FOR-SERVICE REIMBURSEMENT SYSTEMS. WE REGARD THE RAPID GROWTH OF THESE SYSTEMS AS EVIDENCE OF THE COST EFFICENCY AND CONSUMER BENEFITS THAT THEY BRING TO HEALTH CARE MARKETS. HOWEVER, SINCE PPOS PERFORM BOTH HEALTH CARE AND INSURANCE FUNCTIONS, STATE LEGISLATION OFTEN MUST BE ALTERED TO ENABLE THESE ORGANIZATIONS TO FORM.

CURRENTLY, THIS STATE LEGISLATION IS NOT UNIFORM. IN SOME STATES THERE ARE FEW RESTRICTIONS ON THE TYPE OF CONTRACTS PPOS CAN PROVIDE AND THE FORMS THEY CAN TAKE. IN OTHERS, THERE ARE VERY SEVERE RESTRICTIONS. WE WILL TRY TO CONVINCE STATE LEGISLATURES THAT PPOS SHOULD BE AS FREE AS POSSIBLE TO PROMOTE NEW SERVICES AND METHODS. BUT WE ALSO RECOGNIZE THAT PPOS MAY PRESENT CERTAIN NEW COMPETITIVE PROBLEMS: THE DIVISION IS CURRENTLY CONSIDERING SEVERAL POSSIBLE ENFORCEMENT ACTIONS AND BUSINESS REVIEW REQUESTS. OUR PRINCIPAL CONCERNS IN EVALUATING

THE COMPETITIVE EFFECTS OF PPOS ARE THAT: (1) THEY MUST NOT BE SO CONSTRUCTED THAT THEY UNREASONABLY FORECLOSE COMPETITION FROM OTHER PROVIDERS, AND (2) HORIZONTAL AGREEMENTS AMONG THEIR MEMBERS CONCERNING PRICES OR UTILIZATION STANDARDS MUST BE REASONABLY RELATED TO THE PROCOMPETITIVE PURPOSES OF THE VENTURE. AS WITH CON DEREGULATION, WE BELIEVE THAT LOOSENING PPO REGULATION MAY MAKE THE HEALTH CARE MARKET MORE COMPETITIVE ON ITS OWN. WE STILL EXPECT, THOUGH, TO MONITOR THESE MARKETS SO THAT THE BENEFITS OF COMPETITION ARE ENJOYED BY CONSUMERS, INSURERS, AND EFFICIENT PROVIDERS.

WHILE WE EXPECT TO DEVOTE TIME AND EFFORT TO SUPPORTING PROCOMPETITIVE DEVELOPMENTS IN THIS INDUSTRY, THE DIVISION IS ALSO INVOLVED IN AN EFFORT TO ENSURE THAT THE ANTITRUST LAWS ARE NOT USED TO HINDER COMPETITIVE EFFORTS IN ALL INDUSTRIES. I AM REFERRING TO OUR WORK ON THE LEGISLATIVE PROPOSALS TO REFORM THE ANTITRUST LAWS, WHICH WILL BE INTRODUCED IN CONGRESS EARLY THIS YEAR. THESE PROPOSALS ARE DESIGNED TO MODERNIZE THE NATION'S ANTITRUST AND RELATED INTERNATIONAL TRADE LAWS IN FOUR IMPORTANT AREAS: REMEDIES, MERGER ANALYSIS, INTERLOCKING DIRECTORATES, AND IMPORT RELIEF.

THE TIME HAS COME TO REFORM PRIVATE ANTITRUST REMEDIES. OUR REMEDIES PROPOSAL WILL ADDRESS SEVERAL RELATED PROBLEMS THAT WE BELIEVE EXIST IN THE SET OF INCENTIVES AND DISINCENTIVES NOW FACING ANTITRUST LITIGANTS. AT THE OUTSET OF

THIS DISCUSSION, I SHOULD EMPHASIZE THAT THE ADMINISTRATION CLEARLY RECOGNIZES THE POSITIVE ROLE THAT PRIVATE ANTITRUST LITIGATION CAN PLAY IN PUNISHING WRONGDOERS AND IN DETERRING ANTITRUST VIOLATIONS. THE PRIVATE SUIT AGAINST PRICE FIXERS IS AN OBVIOUS INSTANCE OF SUCH PROCOMPETITIVE LITIGATION. HOWEVER, PRIVATE ACTIONS UNDER THE ANTITRUST LAWS ALSO CARRY THE POTENTIAL FOR ABUSE, PARTICULARLY IN SUITS BY FIRMS AGAINST THEIR RIVALS OR THEIR POTENTIAL COMPETITORS. THE CURRENT SYSTEM OF INCENTIVES TO SUE AND SETTLE ANTITRUST CASES DOES NOT DISTINGUISH BETWEEN THOSE PRIVATE SUITS THAT ARE LIKELY TO PROMOTE COMPETITION, AND THOSE SUITS DESIGNED ONLY TO ADVANCE THE INTEREST OF ONE OR MORE COMPETITORS, AT THE EXPENSE OF COMPETITION. THIS IS THE IDEA AT THE HEART OF OUR REMEDIES REFORM LEGISLATION.

FIRST IS TREBLE DAMAGE REFORM. UNDER THE CURRENT STATUTORY SCHEME, PLAINTIFFS' RECOVERIES IN ALL PRIVATE ANTITRUST ACTIONS ARE TREBLED, AUTOMATICALLY. TREBLING OBVIOUSLY PROVIDES POTENTIAL PLAINTIFFS WITH ADDITIONAL INCENTIVE TO BRING PRIVATE ACTIONS. WHERE CLEARLY HARMFUL CONDUCT SUCH AS BID RIGGING OR PRICE FIXING IS INVOLVED, TREBLING IS ENTIRELY APPROPRIATE. SUITS CHALLENGING SUCH BEHAVIOR ARE TYPICALLY BROUGHT BY THE VICTIMS OF OVERCHARGES OR UNDERPAYMENTS CAUSED BY THESE PRACTICES.

HOWEVER, WHERE POTENTIALLY PROCOMPETITIVE PRACTICES SUCH AS AGGRESSIVE DISCOUNTING OR INNOVATIVE DISTRIBUTIONAL ARRANGEMENTS ARE INVOLVED, TREBLING CAN HAVE SERIOUS ANTICOMPETITIVE SIDE EFFECTS. OVERDETERRENCE IS A MAJOR CONCERN HERE--TREBLING CAN CAUSE FIRMS TO SHY AWAY FROM SUCH POTENTIALLY BENEFICIAL CONDUCT. FURTHER, PROCOMPETITIVE PRACTICES THAT ARE ADOPTED BY FIRMS ARE OFTEN CHALLENGED BY THEIR RIVALS OR THEIR POTENTIAL COMPETITORS WITH PERVERSE MOTIVATIONS TO SUE. THUS, THE THREAT OF A TREBLE DAMAGES AWARD MAY BE USED TO COERCE A COMPETITIVELY SUCCESSFUL FIRM INTO ABANDONING OR RESTRICTING CONDUCT OR ARRANGEMENTS THAT ENHANCE EFFICIENCY AND LOWER PRICES TO CONSUMERS.

AN OPTIMAL ANTITRUST PENALTY WOULD TAKE INTO ACCOUNT THE LIKELY HARM TO SOCIETY FROM THE CONDUCT AND THE PROBABILITY THAT THE CONDUCT WILL BE DETECTED, PROSECUTED, AND PUNISHED. WHERE SUCH HARM IS OBVIOUS, AND THE CHANCE OF ITS DISCOVERY RELATIVELY LOW, THE PENALTY MUST BE HIGH IN ORDER TO DETER VIOLATIONS EFFECTIVELY. CONVERSELY, WHERE THE HARM TO COMPETITION IS UNCERTAIN, AND THE CONDUCT IS OPEN AND NOTORIOUS, THE PENALTY SHOULD NOT BE MORE THAN COMPENSATORY TO ANYONE INJURED BY THE CONDUCT. THE RISKS OF MISTAKENLY CLASSIFYING BENEFICIAL CONDUCT AS ANTICOMPETITIVE MUST ALSO BE RECOGNIZED IN CONSTRUCTING AN OPTIMAL PENALTY SYSTEM. UNFORTUNATELY, THE CURRENT UNIVERSAL TREBLE-DAMAGE RULE IN ANTITRUST CASES BEARS LITTLE RESEMBLANCE TO SUCH A SYSTEM.

THE CHANGES THAT WE WILL PROPOSE IN THE TREBLE DAMAGE RULE WILL MOVE US IN THE RIGHT DIRECTION. SPECIFICALLY, WE WOULD AMEND THE CLAYTON ACT TO LIMIT THE AVAILABILITY OF TREBLE DAMAGE TO CASES IN WHICH THE PLAINTIFF'S CASE IS BASED ON OVERCHARGING (OR UNDERPAYMENT).

AMENDED IN THIS FASHION, THE CLAYTON ACT WOULD CONTINUE TO AWARD TREBLE DAMAGES TO PERSONS WHO HAVE BEEN INJURED BY REASON OF OVERCHARGES (OR UNDERPAYMENTS), AND THUS PROPERLY FOCUS THE FULL DETERRENT FORCE OF PRIVATE TREBLE-DAMAGE ENFORCEMENT ON UNAMBIGUOUSLY ANTICOMPETITIVE PRACTICES. VICTIMS OF THESE PRACTICES, WHETHER CONSUMERS OR BUSINESSES, WOULD RETAIN THE NEEDED INCENTIVE TO DISCOVER AND CHALLENGE CLEARLY HARMFUL BEHAVIOR.

IN CASES ALLEGING OTHER TYPES OF HARM, LIMITING RECOVERY TO FULL COMPENSATION ADDRESSES THE OVERDETERRENCE PROBLEM, BUT DOES NOT DEPRIVE A PLAINTIFF WITH A JUST CAUSE OF A COMPLETE RECOVERY. THUS, THE CLAYTON ACT WOULD CONTINUE STRONGLY TO DETER COVERT CARTEL BEHAVIOR, WHILE AVOIDING DETERRENCE, I.E., INHIBITION, OF BUSINESS CONDUCT THAT BENEFITS CONSUMERS AND THE ECONOMY GENERALLY. SIGNIFICANTLY, THE LEGISLATION WOULD NOT ALTER THE CURRENT RULES FOR DETERMINING STANDING, INJURY, OR LIABILITY IN PRIVATE ACTIONS UNDER THE CLAYTON ACT.

THERE IS NO REASON WHY THE UNITED STATES GOVERNMENT SHOULD ALWAYS BE LIMITED, AS IT NOW IS, TO SINGLE DAMAGE RECOVERY EVEN WHEN IT IS INJURED BY REASON OF HAVING BEEN OVERCHARGED OR

UNDERPAID BY AN ANTITRUST VIOLATOR. THIS MEANS THERE IS LESS RISK IN CHEATING THE FEDERAL GOVERNMENT THAN ANY OTHER POTENTIAL VICTIM. THE RESULT IS, PREDICTABLY, A MAJOR FRAUD ON THE TAXPAPERS, AND WE MUST ACT TO STOP IT.

NEXT, OUR REMEDIES PROPOSAL ADDRESSES THE CURRENT IMBALANCE IN ANTITRUST LAW REGARDING THE AWARD OF ATTORNEYS' FEES. CURRENTLY, PREVAILING PLAINTIFFS ARE ENTITLED TO REASONABLE ATTORNEYS' FEES. THE GENERAL RULE IS, OF COURSE, TO DENY ATTORNEYS' FEES TO PREVAILING DEFENDANTS. AS YOU KNOW, HOWEVER, THE CONGRESS HAS TWICE RECENTLY CORRECTED THIS IMBALANCE--IN THE NATIONAL COOPERATIVE RESEARCH ACT OF 1984, AND IN THE EXPORT TRADING COMPANY ACT OF 1982.

IN ENACTING THESE TWO STATUTES, THE CONGRESS RECOGNIZED THAT ALTHOUGH PRIVATE ENFORCEMENT OF THE ANTITURST LAWS IS AN IMPORTANT SUPPLEMENT TO GOVERNMENT PROSECUTION, SOME PLAINTIFFS MAY ABUSE THE PROCESS. THIS ABUSE MAY TAKE THE FORM OF "STRIKE SUITS" FILED PRIMARILY TO EXTRACT A SETTLEMENT FROM A DEFENDANT FOR SOMETHING LESS THAN THE DEFENDANT'S ANTICIPATED LITIGATION COSTS. IT MAY ALSO ARISE WHERE A COMPETITOR, FEARING INNOVATIVE PROCOMPETITIVE CONDUCT BY A RIVAL, FILES A POTENTIALLY LENGTHY INJUNCTIVE ACTION TO INDUCE THE DEFENDANT TO ABANDON ITS PLANS RATHER THAN BEAR HIGH LITIGATION COSTS. THIS TYPE OF CONDUCT UNDERMINES THE PURPOSES OF PRIVATE ENFORCEMENT AND INCREASES THE COSTS THAT LITIGATION IMPOSES ON SOCIETY GENERALLY.

OUR LEGISLATION WILL ADDRESS THESE PROBLEMS BY AMENDING SECTIONS 4 AND 16 OF THE CLAYTON ACT TO PROVIDE FOR THE AWARD OF COSTS, INCLUDING A REASONABLE ATTORNEY'S FEE, TO A SUBSTANTIALLY PREVAILING ANTITRUST DEFENDANT UPON A FINDING THAT THE PLAINTIFF'S CONDUCT WAS "FRIVOLOUS, UNREASONABLE, WITHOUT FOUNDATION, OR IN BAD FAITH." BASELESS LITIGATION CAN BE SUBSTANTIALLY DETERRED BY THESE CHANGES REGARDING DEFENDANT'S ATTORNEY FEES.

THE FINAL PIECE OF OUR REMEDIES REFORM PROPOSAL IS CLAIMS REDUCTION. THUS, THE BILL WILL AMEND THE CLAYTON ACT SO AS TO PROVIDE THAT WHEN A PLAINTIFF SETTLES WITH ONE OR MORE DEFENDANTS IN AN ACTION UNDER THE CLAYTON ACT, OR RELEASES A POTENTIAL DEFENDANT FROM LIABILITY WITHOUT FILING A SUIT, THE PLAINTIFF'S CLAIM AGAINST THE REMAINING DEFENDANTS WILL BE REDUCED PROPORTIONATELY.

UNDER CURRENT LAW, ALL DEFENDANTS FOUND LIABLE FOR DAMAGES IN ANTITRUST CASES ARE JOINTLY AND SEVERALLY RESPONSIBLE FOR THE PLAINTIFF'S ENTIRE, TREBLED, RECOVERY. UNDER THE JOINT AND SEVERAL LIABILITY SYSTEM, SHOULD THE PLAINTIFF SETTLE WITH ANY LIABLE OR POTENTIALLY LIABLE PARTY, THE PLAINTIFF'S REMAINING CLAIM IS REDUCED ONLY BY THE AMOUNT THE PLAINTIFF RECEIVES FOR THE SETTLEMENT. THUS, A NONSETTLING DEFENDANT, FACING WHAT IS ALREADY VERY SUBSTANTIAL REAL LIABILITY, CAN SEE THAT LIABILITY MAGNIFIED IF THE PLAINTIFF SETTLES WITH OTHER DEFENDANTS FOR NOMINAL OR RELATIVELY SMALL AMOUNTS, PARTICULARLY IF SUCH

SETTLEMENTS ARE WITH THOSE RESPONSIBLE FOR A MAJOR PORTION OF THE PLAINTIFF'S DAMAGES. THIS "WHIPSAW" EFFECT MAY FORCE A DEFENDANT TO ABANDON ITS FACTUAL CLAIMS AND LEGAL DEFENSES, REGARDLESS OF THEIR MERITS.

OUR LEGISLATION ADDRESSES THIS PROBLEM DIRECTLY BY MANDATING THE REDUCTION OF THE PLAINTIFF'S CLAIM NOT BY THE SETTLEMENT AMOUNT BUT BY THE PROPORTIONATE SHARE OF THE PLAINTIFF'S DAMAGES FAIRLY ALLOCABLE TO THE SETTLING DEFENDANT. WHERE UNLAWFUL CONCERTED CONDUCT HAS RESULTED IN OVERCHARGES OR UNDERPAYMENTS, I.E., BASICALLY IN HORIZONTAL CASES, THE AMOUNT OF DAMAGES ALLOCABLE TO A SETTLING DEFENDANT IS THAT DEFENDANT'S PROPORTIONATE SHARE OF ALL THE PARTICIPANTS' OVERCHARGES OR UNDERPAYMENTS IN THE MARKET AFFECTED. FOR ALL OTHER CLAIMS, THE DAMAGES ALLOCABLE TO THE SETTLING DEFENDANT WOULD BE DETERMINED BY ITS RELATIVE RESPONSIBILITY FOR THE VIOLATION AND BY THE BENEFITS IT DERIVED FROM THE VIOLATION.

WITHOUT DOUBT, THE ADMINISTRATION'S SUGGESTED REVISIONS TO SECTION 7 OF THE CLAYTON ACT HAS BEEN THE MOST WIDELY DISCUSSED ASPECT OF THE WORKING GROUP'S MANDATE. THE LEGISLATION TO BE PROPOSED IS DESIGNED TO CODIFY ADVANCES IN MERGER CASE LAW AND IN ECONOMIC ANALYSIS, AND TO ELIMINATE THE POSSIBILITY THAT THE INCONSISTENT AND OVERLY RESTRICTIVE READING GIVEN SECTION 7 BY SOME COURTS IN THE PAST WILL RETURN TO PLAGUE OUR ECONOMY. WE PROPOSE TO MAKE SEVERAL CHANGES IN THE STATUTORY LANGUAGE.

THE SUBSTANTIVE STANDARD NOW APPLIED TO MERGERS IS WHETHER "THE EFFECT OF SUCH ACQUISITION MAY BE SUBSTANTIALLY TO LESSEN COMPETITION, OR TO TEND TO CREATE A MONOPOLY." THE REVISED SECTION 7 WOULD MAKE SURE THAT THE LAWFULNESS OR UNLAWFULNESS OF A MERGER IS BASED ON A REAL PROBABILITY RATHER THAN A MERE POSSIBILITY, OF ITS HAVING ANTICOMPETITIVE EFFECTS. FIRST, IT WOULD BRING SECTION 7 INTO LINE WITH CURRENT CASE LAW--WHICH REQUIRES A "REASONABLE PROBABILITY" OF SUBSTANTIAL HARM--AND WITH CURRENT ENFORCEMENT POLICIES. SECOND, THE CHANGE WOULD MAKE IT CLEAR THAT THE STATUTE IS CONCERNED WITH THE AVOIDANCE OF COMPETITIVE HARM--RATHER THAN WITH THE PRESERVATION OF CERTAIN CLASSES OF COMPETITORS. WHILE THIS CONCEPT HAS LONG BEEN ACCEPTED, IN PRINCIPLE, BY COURTS INTERPRETING SECTION 7, THE NEW LANGUAGE IS A CLEARER EXPRESSION OF THE CONCEPT AND LESS LIKELY TO BE MISAPPLIED.

OUR PROPOSAL ALSO PROVIDES A NONEXCLUSIVE LIST OF FACTORS TO BE CONSIDERED BY THE COURTS IN DETERMINING WHETHER A MERGER THREATENS TO INCREASE THE PROBABILITY THAT MARKET POWER WILL BE EXERCISED. THESE FACTORS WILL BE INSTANTLY RECOGNIZED AS THE PRINCIPLES UNDERLYING THIS ADMINISTRATION'S MERGER GUIDELINES. THUS, THE COURTS WOULD BE DIRECTED TO CONSIDER SUCH IMPORTANT CRITERIA AS THE NUMBER AND SIZE DISTRIBUTION OF FIRMS IN THE RELEVANT MARKET, BEFORE AND AFTER THE PROPOSED ACQUISITION; BARRIERS TO ENTRY; AND THE HISTORY OF THE MARKET, INCLUDING THE INDUSTRY'S COMPETITIVE CONDITIONS OR, CONVERSELY, THE PRESENCE OF PAST ANTITRUST VIOLATIONS.

THIS ARRAY OF FACTORS TO BE CONSIDERED IN REVIEWING A CHALLENGED MERGER WILL ENSURE THAT NO ONE FACTOR WILL BE DETERMINATIVE OF A MERGER'S LEGALITY, TO THE EXCLUSION OF OTHER PROBATIVE ECONOMIC EVIDENCE.

IN ADDITION TO THESE CHANGES IN SECTION 7, OUR LEGISLATION WILL ALSO SEEK TO AMEND THE TRADE ACT OF 1974 IN ORDER TO PROVIDE A NEW FORM OF RELIEF FOR DOMESTIC INDUSTRIES INJURED BY IMPORT COMPETITION. WE PROPOSE TO GIVE THE PRESIDENT AUTHORITY TO GRANT A LIMITED SECTION 7 EXEMPTION TO MERGERS AND ACQUISITIONS AMONG FIRMS IN THE INJURED INDUSTRY, AS AN ALTERNATIVE TO PROTECTIONIST RELIEF UNDER THE TRADE ACT.

THE ADMINISTRATION HAS ALSO GIVEN CLOSE ATTENTION TO QUESTIONS RAISED BY THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAWS. WE EXPECT TO SUPPORT LEGISLATION TO CLARIFY THE APPLICATION OF OUR ANTITRUST LAWS IN CASES INVOLVING FOREIGN COMMERCE.

FINALLY, WE WILL ALSO SEEK TO AMEND SECTION 8 OF THE CLAYTON ACT, WHICH NOW GENERALLY PROHIBITS SERVICE BY ANY PERSON AS A DIRECTOR OF TWO OR MORE COMPETING CORPORATIONS IF ANY ONE OF THOSE CORPORATIONS HAS CAPITAL, SURPLUS, AND UNDIVIDED PROFITS OF MORE THAN $1 MILLION. OUR PROPOSAL WOULD RAISE THE JURISDICTIONAL AMOUNT FOR STATUTORY COVERAGE, NOW SET AT $1 MILLION, AND PERHAPS MORE IMPORTANTLY, WOULD CREATE EXPLICIT DE MINIMIS STANDARDS FOR ANALYZING COMPETITIVE OVERLAPS BETWEEN COMPANIES.

THESE CHANGES WILL ELIMINATE THE BAN ON INTERLOCKS IN SITUATIONS WHERE THE DANGER OF ANTICOMPETITIVE RESULTS FROM SUCH INTERLOCKS IS, IN FACT, VANISHINGLY SMALL BECAUSE OF THE INCONSEQUENTIAL NATURE OF THE COMPETITION BETWEEN THE FIRMS INVOLVED. THIS WILL ALLOW FIRMS IN MANY INSTANCES TO RETAIN BETTER QUALIFIED DIRECTORS, WITH NO REAL POSSIBILITY OF COMPETITIVE HARM TO THE PUBLIC AND NO UNCERTAINTY REGARDING THE LEGALITY OF THEIR CHOICE OF DIRECTORS.

TO SUM UP, I STRONGLY BELIEVE THAT THESE LEGISLATIVE PROPOSALS TO BE PRESENTED TO CONGRESS CONTAIN IMPORTANT, NEEDED REFORMS TO OUR ANTITRUST STATUTES THAT WILL SIGNIFICANTLY BENEFIT COMPETITION AND CONSUMERS. WE LOOK FORWARD TO CONGRESS' CONSIDERATION OF THESE PROPOSALS, AND TO THE DAY WHEN THE PRESIDENT SIGNS THEM INTO LAW.

IN CLOSING, I THANK YOU AGAIN FOR THE INVITATION TO SPEAK TO YOU. I AM PLEASED TO PRESENT MY MESSAGE THAT THE PROMOTION OF COMPETITION IN HEALTH CARE IS ONE THE THE ANTITRUST DIVISION'S MOST IMPORTANT GOALS. I LOOK FORWARD TO WORKING WITH YOU TO ACHIEVE INCREASED COMPETITION IN THIS VITAL INDUSTRY.