ANTITRUST

ANTITRUST: STATEMENT OF THE PROBLEM

I. Need to promote competition

The Health Security Act depended on flourishing competition to achieve its coverage and cost containment goals. Therefore, legal barriers that could hinder regulators from performing their functions as the protectors of competition posed a potential problem.

II. Need to decrease uncertainty in a changing health care industry environment

In recent years, new types of health care delivery systems, affiliations, and intermediaries have grown in popularity. It was feared that uncertainty within the health care industry about how antitrust laws would be applied to these new arrangements would deter the formation of mergers and joint ventures that would result in lower health care costs without producing anticompetitve effects.

ANTITRUST: APPROACHES

ADMINISTRATION INITIATIVES

I. Health Security Act: repeal McCarran-Ferguson Act for health insurers.

II. DOJ/FTC Policy Statements

A. background

In 1994, DOJ and FTC issued nine policy statements relating to the health care industry. The 1994 statements superseded six policy statements on the same subject issued in 1993.

The theme of the policy statements is that they create safety zones that describe activities that will not be challenged by the agencies, barring extraordinary circumstances. (This does not mean that activities falling outside the zone definitely will be challenged.)

Most activity that falls outside of a safety zone, if challenged, will be evaluated under rule of reason analysis. This means that the agencies will analyze the relevant characteristics of the market, the activity, and the parties involved in the activity to determine whether the overall effect of the activity will be anti-competitive.

The agencies are committed to responding to most requests from the business community for advisory opinions (e.g., whether a proposed activity falls within the safety zone) within 90 days.

B. The policy statements delineated safety zones in the following areas:

1. hospital mergers

2. hospital joint ventures to purchase or to share the costs of operating or marketing high-tech or other expensive equipment (e.g., MRI; a helicopter)

3. providers' collective provision of non-fee related information to purchasers of health care services (e.g., outcomes data for a particular procedure)

4. providers' collective provision of fee related information to purchasers of health care services

5. provider participation in surveys of price and cost information (e.g., prices for health care services; wages of health care personnel)

6. joint purchasing arrangements among health care providers (e.g., laundry services; prescription drugs; computer services)

7. physician network joint ventures (e.g., individual practices associations; preferred provider organizations)

C. The policy statements also discussed two arrangements about which the agencies did not create safety zones because they do not believe they have enough experience to know what a safety zone would look like in these areas. However, the agencies gave examples of how they would analyze these arrangements.

1. hospital joint ventures to provide specialized clinical or other expensive health care services (e.g., open heart surgery unit)

2. multiprovider networks

REPUBLICAN INITIATIVES

I. Hatch/Archer (introduced in House and Senate)

A. Contains three types of broad immunities from antitrust law.

1. The bill creates statutory "safe harbors" that tend to be broader than DOJ/FTC safety zones. In addition, three of the safe harbors are in areas for which the agencies did not create safety zones.

2. The Attorney General is to establish additional "safe harbors" after she has sought and received the public's suggestions.

3. The bill creates a "certificate of review" to be issued by the AG with the agreement of the HHS Sec'y. Generally, standards for evaluating certificate of review applications are whether the activity increases access, quality of utilization of health care services or will lead to cost savings and whether the activity will restrict competition unduly. If the AG and HHS Sec'y do not deny an application for a certificate within 90 days, it is deemed approved. Denial of a certificate of review is reviewable in federal court.

B. The bill provides notification procedures that confer antitrust protections on cooperative ventures that file with the AG. These protections include guaranteed rule of reason analysis and detrebling of antitrust damages.

II. Senate: revised S. 1658 (Dole bill incorporates these provisions

Revised S. 1658 differs from Hatch/Archer in that it:

1. creates three additional safety zones

2. provides that safe harbors must be established through administrative rule-making rather than by statute

3. provides that in exceptional circumstances, federal authorities can enjoin activities that fall within safe harbors

4. makes some changes to certificate of review and notification procedures.

III. House: Canady amendment to H.R. 3600 (reported out of House Judiciary Committee)

A. The bill contains statutory safe harbors, some of which are not addressed in DOJ/FTC policy statements. The remaining safe harbors are addressed in the policy statements; however, some of them are broader or potentially broader than the safety zones described by the agencies.

B. In addition, the AG may designate additional safe harbors. The criteria for additional safe harbors are the same as the certificate of review criteria in the Hatch/Archer bill.

ANTITRUST: ISSUES IN THE NEW ENVIRONMENT

I. McCarran-Ferguson reform

The Administration was interested in this issue because it wanted to promote competition in order for the Health Security Act's scheme to succeed. At the same time, the House Judiciary Committee was also working on McCarran-Ferguson reform (but not repeal) for the entire insurance industry, outside the context of health care reform. (The House Judiciary's reform provisions were incorporated into the Gephardt health care bill). This demonstrates that the viability of McCarran-Ferguson reform as an issue does not depend on whether Congress passes comprehensive health care reform. (Note that McCarran-Ferguson may be superseded, at least in part, if insurance reform legislation is enacted in the next Congress.)

There is no consensus whether McCarran-Ferguson reform is necessary or important. Although this is not a strictly partisan issue, Republicans have traditionally been less likely to favor reform.

The issue of McCarran-Ferguson reform has federalism/states' rights implications as well. This is because under McCarran-Ferguson, oversight of the insurance industry is a matter left to the states. State insurance commissioners have opposed McCarran-Ferguson reform or repeal in the past, although some state attorney generals have supported it.

II. Agency antitrust authority

The new types of arrangements in the health care industry are, if anything, even more important in the absence of comprehensive federal reform. Although there is no indication whether the Republicans are intending to introduce legislation on this subject, there is no reason to believe that they will change their general approach to it. In addition, there may be interest group pressure for activity in this area. For example, the AMA has stated that it "will continue to press for modification of the [DOJ/FTC policy statement] guidelines or legislative relief."

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Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust

Issued by the
U.S. Department of Justice
and the
Federal Trade Commission

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