cc: Melanne
Steve
Chris

Congress of the United States

Washington, DC

November 3, 1993

Mrs. Hillary Rodham Clinton
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mrs. Clinton:

We are writing to ask your assistance in deleting those sections of the Health Security Act that provide an antitrust exemption for physicians and other providers, before it is introduced in the Congress. Specifically, Title I Subtitle D of that Act now includes an explicit antitrust exemption for collective provider negotiations with Health Alliances over fee schedules for fee-for-service health plans. Such negotiations would already be accorded antitrust immunity under the state action and Noerr-Pennington doctrines -- provided that the conditions of the doctrines are met.

States meet these conditions every day in insulating from antitrust challenge a wide host of various state-run or state-supervised entities or franchisees, which provide everything from electrical power and water service to trash collection. No pro-consumer purpose is served, however, by the Federal government simply declaring the conditions to be automatically met even before health alliances are in operation.

As you may be aware, yesterday our staffs met with representatives from the White House and the Department of Justice's Antitrust Division to discuss in detail our serious concerns about the proposed exemption. Therefore, we will not reiterate all of those concerns in this letter.

However, it is clear to us that this antitrust exemption will benefit primarily physicians represented by the American Medical Association. The AMA has stated in its own publication and in other news accounts, which are attached, that it has been seeking an antitrust exemption for group negotiations to protect its members' fees. It has even gone so far as to suggest that the AMA should act as the bargaining agent for such collective negotiations for all physicians groups.

No response
per Greg
Lawler

The fact is that the proposed antitrust exemption for physicians could undermine the cost containment goals of health care reform and force consumers to pay higher prices or receive less care. Moreover, we believe that higher prices and less care would almost certainly result from enacting this exemption if the Administration's current plan is altered in any substantial manner during the legislative process.

We are also seriously concerned that the proposed antitrust exemption will incite an outpouring of demands by physicians and other provider groups for broader exemptions. Resisting those demands would be made more difficult by the fact that the AMA would be perceived as having won an exemption for itself in the Health Security Act. As you know, we were both delighted with the Administration's decision, announced publicly on September 15, 1993, that a series of antitrust guidelines would be promulgated by the Antitrust Division to help promote pro-competitive collective behavior by healthcare providers rather than resorting to unjustified exemptions from the antitrust laws.

We continue to believe that it would be in the best interest of consumers for the Administration to delete the sections of the Health Security Act that would provide antitrust exemptions for physicians and other providers.

Sincerely,

JACK BROOKS
Chairman
House Judiciary Committee

HOWARD M. METZENBAUM
Chairman
Senate Subcommittee on Antitrust,
Monopolies and Business Rights

cc: The Honorable Anne Bingaman
Mr. Ira Magaziner

Enclosures

to cap annual increases in health insurance premiums. Stark — citing new data that shows [illegible] tails for President Clinton's health

AMA turns up the heat to get break on antitrust

By Brian McCormick
AMNEWS STAFF

CHICAGO — In a detailed and sometimes stinging analysis, the AMA is trying a new tack in seeking antitrust relief for physicians under a reformed health system.

The review of federal antitrust enforcement in health care says such relief is mandatory to maintain market competition — a watchword of the White House reform plan.

The 21-page critique was sent to the Justice Dept. and Federal Trade Commission and presented separately to White House health reformers. It proposes several enforcement policy changes to help physicians feel more comfortable about collaborative activity in the current market.

Most of the changes would broaden the "safety zones" the two agencies announced last month to protect physicians or hospitals engaging in certain joint ventures.

But the letter, signed by AMA general counsel Kirk Johnson, also includes a proposal to deal with market conditions anticipated under health reform. If large, highly regulated regional purchasing alliances are set up as the de facto single payers for health services in a market, then providers should be allowed to band together under a single entity to negotiate clinical and payment issues, Johnson argues. And that, he says, should be organized medicine.

It's not the AMA's first pitch for medicine to have leave to negotiate collectively. The Association made

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New antitrust reform plea

The AMA has revised its pitch for antitrust relief for physicians. It is proposing changes in the White House reform plan as well as a broadening of recently released health care antitrust 'safety zones.'

Clinton plan should allow:

- Negotiated rule-making to let medicine bargain directly with government on payment and clinical issues.

'Safety zones' should:

- Protect physician ventures including more than 20% of market's doctors.
- Liberalize classification of specialists considered competitors in ventures.
- Expand definition of 'risk-sharing' to include doctors who hold equity in fee-for-service IPAs or PPOs.
- Protect 'price-related information' provided by doctors to purchasers.

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such a proposal last year as part of a multipart bid for antitrust relief. Justice and FTC officials never formally answered, but they have been quoted as rejecting any special treatment for medicine.

Agency officials declined comment on the latest proposal until they could prepare a formal response.

There also was no immediate White House response. But AMA leaders who have met with White House officials several times since the release of President Clinton's draft reform plan have repeatedly described them as "sympathetic" to medicine's antitrust concerns and willing to listen to AMA proposals.

Antitrust experts outside the AMA gave varied responses to the proposal. Some saw merit in the concerns expressed in the letter. Others believed that granting the AMA's requests would give doctors license to engage in anticompetitive activity.

Seller beware

"The president's plan does not call for a true competitive market," Johnson wrote. "It calls for competition on the seller side of the market, but would have virtually no competition on the buyer side. Instead, it would create a highly regulated health care system in which entities called 'health alliances' exercise monopsony power."

Under such a system, Johnson argued, doctors should be free to collaboratively negotiate with the alliance as a single entity, rather than through an array of competing health plans. As a model, the AMA suggests using the Negotiated Rulemaking Act of 1990, a law that outlines a preregulation negotiations process between federal agencies and the subjects of regulation.

Negotiations with doctors would would bring the United States more in line with other industrialized countries in which government exercises a high degree of control over health care, Johnson said. "These countries have a better record of cost control than does our market-based system."

But Johnson was quick to add that the AMA would still prefer a pure market solution to one built on regulation and negotiation.

"The Clinton plan would more closely approximate the operation of a competitive market if it required more than one alliance to operate in a given market, and if its provisions for employer opt outs were expanded," he said. If competition among buyers was assured, he said there would be no need for collective negotiation among providers.

Quality, access could suffer

Robert Bloch, a Washington, D.C., antitrust lawyer and former Justice Dept. official, agrees in part with Johnson.

"I agree that we should have multiple alliances and more opportunities for corporate alliances to form," he said. "If there is only one alliance in a market, there is a risk of monopsony [a buyer's monopoly] power that can have an anticompetitive effect."

Bloch warned of the risk in a special health reform issue of the *National Law Journal* published this month. He cautioned that an alliance with market power could drive prices down to such an extent that quality, innovation and access could suffer.

Conversely, he added, the monopsony power could backfire by forcing most providers out of the market and leaving the alliance at the mercy of a remaining health plan or network.

But Bloch stopped short of support-

rights. "There is a problem, but the solution is competing alliances, not going to the other extreme and concentrating the power of providers."

Johnson said that regardless of how the alliances issue is settled, negotiated rulemaking should be applied to the federal government's existing single-payer program — Medicare.

"I can think of a dozen regulations that have created havoc for physicians in the last decade, and in each case it could have been mitigated or avoided entirely if physicians had had a negotiating role," he said.

He added that past AMA ambivalence about seeking a formal negotiating role has been rooted in fears that union-like advocacy will tarnish physicians' professional status. "But we are talking about a consensus process; enhancing physician involvement in regulatory systems that exist whether they like them or not."

Safety zones criticized

The negotiated rulemaking proposal is the most controversial aspect of the AMA letter. But the analysis also criticizes the federal safety zones created to encourage collaboration in health care and address the uncertainty that breeds antitrust fears among physicians contemplating such activity.

One of the six safety zones announced last month dealt with physician joint ventures such as PPOs and IPAs. The guideline said such ventures posed no antitrust risk if they included fewer than 20% of a market's physicians in a given specialty and if the venture featured adequate financial risk sharing — such as capitated payment or substantial fee withholds.

The AMA noted several concerns with this safety zone. First, the 20% threshold is more conservative than the government itself was using only a few years ago. It also fails to distinguish between exclusive arrangements and nonexclusive ventures, where doctors can deal independently or through other networks with purchasers.

The AMA letter proposes a two-tiered alternative to the 20% limit. For nonexclusive ventures, it says, up to half a market's doctors should be allowed to collaborate without fear of antitrust scrutiny. Ventures that tie physicians into full-time, exclusive contracts should have a 35% threshold — which, the letter contends, was fed-

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eral enforcement policy in the Reagan years.

Former Justice Dept. antitrust official Charles Rule is not sure a two-tiered safety zone could work. "A 50% threshold for nonexclusive ventures makes sense, but when you get into the issue of whether a venture is a *de facto* exclusive, the lines become blurred."

But he agreed on raising the threshold to 35%. "The concern is whether the physicians in a venture are in a position to exercise market power," said Rule, now a lawyer in private practice in Washington, D.C.

"If 65% or more of the market's physicians are not in the venture, there is very little likelihood that the 35% can inflict harm," he said.

Concerns about defining risk

The letter also reiterates AMA concerns about the government's narrow definition of risk-sharing within physician joint ventures.

In civil actions in recent years, the FTC and Justice have labeled PPOs or IPAs as anticompetitive "shams" if they did not incorporate capitation or fee withholds. But the AMA has repeatedly argued that holding a substantial equity stake in the venture should be viewed as risk sharing.

"Since the savings achieved by physician joint venture networks are ultimately derived from improvements in the clinical management of patients — not from the mode of compensation — we recommend that the statement place greater emphasis on creating efficiencies and less on the manner of compensation," the AMA letter says.

AMA associate general counsel Edward Hirshfeld added that the restrictive safety zone flies in the face of free market doctrine. "The stock market — and corporate America, for that matter — operates on the idea of pooling capital and risking loss. To exclude that activity and to say that the only way to pool risk is via a reimbursement mode is overly narrow."

Hirshfeld also called the safety zone on provision of information from physicians to buyers overly narrow. The guideline specifically excludes price-related information sharing.

The AMA argues that some courts have recognized the provision of such information, as long as it does not cross the line to become price-fixing or a boycott threat.

And Hirshfeld argues that the agencies added insult to injury in another safety zone by allowing hospitals to participate in the very activity that was proscribed for physicians.

But Bloch, who during his Justice Dept. tenure prosecuted four Arizona dentists for providing price-related information to buyers, sees a clear distinction between the hospital and physician safety zones.

"The hospital guideline deals with historical price information that is aggregated by an objective third party," he says. "What is contemplated for physicians is the ability to communicate on future prices they will accept, which is far more dangerous."

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Boston Globe 10/30/93

Late change offers antitrust exemption

By Richard A. Knox
GLOBE STAFF

WASHINGTON – After months of internal debate, the Clinton administration decided this week, apparently at the 11th hour, to modify its health reform proposal to give doctors broad immunity from antitrust laws.

The changes allow physicians to exchange information on fees and to bargain collectively with regional health insurance purchasing groups on how much they would be paid for each service.

As news of the proposed antitrust exemption spread yesterday, officials at the American Medical Association and other leading physician groups were guardedly pleased, while consumer advocates and antitrust specialists expressed dismay about what they called the provision's anticonsumer implications.

"This is movement in the right direction," said Dr. Robert McAfee, a Maine surgeon who is president-elect of the 294,000-member AMA. "It might make us feel a bit warmer toward the proposal. I'm not sure whether it will translate to support."

"It sounds like it may have been a major concession to AMA," said Dr. Denman Scott of the American College of Physicians. A spokesman for the American Society of Internal Medicine called the provision "a significant loosening of the antitrust law" and "a surprising and positive development."

But Mark Silbergeld of Consumers Union, which publishes Consumer Reports magazine, warned that the change, if allowed to stand by Congress, would result in higher doctors' fees:

"If all of the doctors get together and discuss what fees they're going to ask for and present a united front, they're obviously going to aim as high as possible and not set prices at a competitive level," he said. "Letting doctors collude and bargain a single fee schedule is not consistent with cost control."

"This is essentially creating a loophole in the antitrust laws that physicians can drive a truck through," said a congressional aide, who asked not to be identified.

Under federal antitrust law, doctors are prohibited from colluding to fix prices. New guidelines issued in September loosened those restrictions to permit doctors to bargain

more than 20 percent of physicians in any market area take part.

The AMA, which is angling for the right for itself or its state and county affiliates to be bargaining agents for doctors, has argued for months that the law puts them at an unfair disadvantage confronting the anticipated clout of the health plans or "health alliances," the regional purchasing groups that the Clinton plan would set up.

The language of the 1,846-page Clinton health reform proposal permits national, state or county medical societies or specialty associations to negotiate on behalf of all their members in setting fee schedules.

If physicians are not happy with the outcome of negotiations, however, the Clinton proposal bars them from boycotting – withholding their services – or threatening to boycott.

To the AMA's disappointment, however, the Clinton proposal stops short of allowing doctors to bargain over other types of payment. For instance, there is no antitrust exemption allowing them to negotiate contracts with managed-care plans, such as health maintenance organizations or HMOs, that would pay them per subscriber rather than per service.

The AMA's general counsel, Kirk Johnson, last night called the provision "a quarter of a loaf" and said the physician group would lobby hard in Congress for broader antitrust exemptions. He pointed out that other nations, such as Germany and Canada, permit doctors to bargain collectively over payments within the framework of national health insurance.

Johnson, in a telephone interview, said the AMA has had White House assurances that President and Hillary Rodham Clinton support even broader immunity so physicians can bargain with health plans over all forms of payment, not just over fee schedules.

However, the AMA lawyer said, administration officials said they did not want to put more sweeping antitrust language in the proposal because of fierce opposition from House and Senate judiciary committees as well as strong internal resis-

The White House referred inquiries to the Justice Department, where an official, who asked not to be named, emphasized that the proposal limits doctors' antitrust exemption to bargaining on fee schedules, not other forms of payment. In answer to critics' concerns that this might "spill over" to other forms of collusion, the official said: "We believe we would be able to uncover and challenge spillover effects where they happen to exist."

The AMA also wants some remedy short of boycott in case doctors and health alliances or health plans reach an impasse.

Dr. Robert Graham, executive director of the American Academy of Family Physicians, said it is important for the Clinton proposal to permit collective bargaining for fee-for-service plans.

Much of the nation is too thinly populated to support competing managed care plans, Graham noted, so fee-for-service plans will dominate. In addition, the Clinton plan opens the door more widely than anticipated to multiple fee-for-service plans in each region; and it requires all HMOs to offer plans that allow subscribers to seek fee-for-service care.

But Graham said family practitioners have strong reservations about allowing the AMA to be their bargaining agent because its affiliates are often dominated by surgeons and other procedure-oriented specialists. "If you get in with a medical society group, you spend all the time negotiating fees for CAT scans and other procedures, and nobody wants to talk about the fee for an office visit," he said.