FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

May 21, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for requesting the views of the Federal Trade Commission concerning S. 379, the "Health Care Cost Containment Act of 1985." The comments presented here are essentially the same as those presented on behalf of the Commission by Bureau of Competition Director Timothy J. Muris at hearings before the Committee on the Judiciary on S. 2051, held on June 26, 1984. S. 2051, as you know, is identical to S. 379, which would exempt from the antitrust laws and the Federal Trade Commission Act joint action undertaken among insurers and third-party payers of health care services relating to the collection and sharing of information and claims about such services. The bill also would exempt from these laws activities relating to third-party payers' joint negotiation of agreements with providers of health care services on charge levels and utilization of services. 1/

Containing the cost of health care services is one of the most urgent and important tasks facing our nation. We fully agree with the supporters of S. 379 that health care insurers have an important role to play in health care cost containment. But, as we explain below, we believe that role can best be fulfilled through a healthy, vigorous, competitive rivalry among health care insurers, and not by reliance on an exemption from the antitrust laws. Therefore, because S. 379 appears likely to reduce the very competition among insurers that helps assure their continuing efforts to contain costs, the Commission must respectfully oppose passage of the bill.

1/ S. 379 would do more than merely exempt certain conduct from the antitrust laws. By including the Federal Trade Commission Act in its entirety within the scope of the statutory exemption provided in Section 4 of the bill, S. 379, if enacted, also apparently would eliminate the Federal Trade Commission's consumer protection authority over unfair or deceptive acts or practices injurious to consumers, if those acts or practices arise in the course of information collection activities by any third-party payer or other conduct immunized by the bill.

in the value of competition," 5/ and that the opportunity for consumers to freely select among alternative offers generated by such competition will assure that the highest quality product is available at the best price in the marketplace. 6/ Special antitrust status should only be granted when there is compelling evidence that competition is unworkable or is incapable of achieving a paramount social purpose. 7/ The Commission submits that competition has an important role to play in the provision and financing of health care services, and is playing it with increasing effectiveness. Both the Congress and the Executive Branch have encouraged this trend toward increased competition and have adopted several programs in the health care area that use competitive forces to improve efficiency and help control costs.

For many years competition was believed to be an inappropriate or insignificant force in the provision of health care services. Competition was discouraged among health care providers in a variety of ways, and the prevalence of third-party payment for medical expenses seemed to make the normal competitive market incentives somewhat irrelevant as the individual patient sought out medical services from the individual physician on a fee-for-service basis.

As it became clear that the continuing escalation of health care costs must be checked, Congress and the Executive Branch, along with the private sector, have become increasingly interested in permitting competitive forces to help provide a more efficient health care system. The Commission has shared and helped nurture this interest over the past decade. These efforts have focused largely on a recognition that individual third-party payers have the incentive to contain costs when competing for subscribers, and that the large and increasing number of physicians and other providers and hospitals with unused capacity also have the incentive to attract patients by providing cost-conscious care. Market forces can only be successful in helping to achieve cost control

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5/ National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978), quoting from Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951).

6/ See National Soc'y of Professional Eng'rs v. United States, 435 U.S. at 695.

7/ See National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General 177 (1979).

enforcement policy statement concerning the relationship of physician groups to medical prepayment plans and other health care insurers. 10/ In addition, the Commission has closely monitored mergers of competing hospital chains, challenging mergers that it has reason to believe are likely either to give a competitor undue market power in a market for hospital services or to increase substantially the likelihood of collusion. 11/ Finally, the Commission has sought to remedy several attempts by groups of fee-for-service physicians to obstruct competition from HMOs or other alternative-care institutions that employ, or contract with, physicians. 12/

The Commission's enforcement activity, along with similar private and government antitrust actions, and the pro-competition policies of the Congress and Executive Branch, have helped create a marketplace far more receptive to cost-containment efforts by health insurers -- indeed it is a marketplace that now places a premium on cost-effective insurance. Those who finance and provide health care services have responded with a refreshing array of competitive and innovative plans and institutions. One promising example of innovation by both insurance carriers and providers is the creation of preferred provider organizations (PPOs), which can offer many of the cost-control features of an HMO, while giving consumers a broader choice of providers.

10/ Enforcement Policy With Respect to Physician Control of Medical Prepayment Plans, 46 Fed. Reg. 48982 (1981).

11/ See, e.g., American Medical Int'l, Inc., Docket No. 9158, ____ F.T.C. ____ (Initial Decision issued July 27, 1983), aff'd, ____ F.T.C. ____, 3 Trade Reg. Rep. (CCH) ¶ 22,170 (FTC Opinion July 2, 1984), order modified, ____ F.T.C. ____, 3 Trade Reg. Rep. (CCH) ¶ 22,208 (FTC Opinion Nov. 9, 1984); Hospital Corp. of America, Docket No. 9161, ____ F.T.C. ____ (Initial Decision issued Nov. 5, 1984), FTC argued April 4, 1985.

12/ See, e.g., American Medical Ass'n, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982); American Soc'y of Anesthesiologists, Inc., 93 F.T.C. 101 (1979) (consent order); Forbes Health Sys. Medical Staff, 94 F.T.C. 1042 (1979) (consent order); Medical Serv. Corp. of Spokane County, 88 F.T.C. 906 (1976) (consent order).

such joint information-sharing activity by insurers is more imagined than real.

We strongly question the wisdom of granting an antitrust exemption when it is not needed on the merits, merely on the theory that it will save insurers the expense of defending against groundless lawsuits. In fact, some members of the health insurance industry have been seeking this exemption for years. Yet to our knowledge, no insurer has ever identified a single information-sharing program that could not be implemented because of antitrust risk. Moreover, the statutory exemption provided by S. 379 would appear to insulate certain joint activities that might take the form of information sharing, but which, in reality, might be undertaken for anticompetitive purposes or with anticompetitive effects. Thus, the exemption proposed by S. 379 is not only unnecessary, but it also unintentionally could shield from the antitrust laws a variety of undesirable activities that undermine cost-containment efforts.

An Exemption for Joint Negotiation by Third-Party Payers Would Harm Competition and Cost Containment

S. 379 would exempt from the antitrust laws joint activity by insurers or other health care payers involving "negotiating, entry into or acting upon agreements with health care providers" with respect to the use of, and payment for, health care services. Although we understand that the bill seeks to facilitate cost containment by giving insurers more leverage in their negotiations with health care providers, the Commission submits that the more likely effect of the exemption will be to retard the economic incentives for each insurer to engage in vigorous cost containment by offering the public diverse, cost-effective financing in competition with other third-party payers. Economic incentives and competitive pressures are a far surer method for reducing costs than cartels or monopolies. An exemption that weakens those economic incentives is therefore more likely to frustrate than to facilitate cost containment.

As discussed above, individual third-party payers already have the clear economic incentive to encourage providers to reduce the costs of their services. Many large and small insurers and other payers have accepted this challenge and already are offering innovative, efficient packages with premiums that attract cost-conscious buyers. Individual third-party payers are finding efficient providers and together they are cutting costs, thereby putting competitive pressure on other insurers and providers to do the same.

remedy to restore their losses, even if the Justice Department eventually halts a particular practice.

In addition, the authority left to the Department of Justice is unclear. The bill may create a new legal standard -- "unduly restricting competition" -- for enforcement by the Attorney General. By contrast, the Sherman Act has been interpreted to prevent "unreasonable restraints of trade," a term that has been judicially defined through many years of antitrust law enforcement. Section 5 also gives the Attorney General responsibility to determine whether certain activities "have had the effect or will have the effect of increasing the cost of health care services . . . ." Again, this standard differs from that employed under the antitrust laws. If the intention is for the Attorney General to determine whether health care costs are "reasonable," the result could be costly and protracted proceedings similar to those of utility regulation.

Section 5 also appears to undermine one of the apparent purposes of the entire bill, i.e., eliminating or minimizing insurers' concern that certain joint activities designed to contain costs could expose the participants to antitrust challenge and liability. Because the standards for triggering the Section 5 exception to the bill's exemption are undefined and novel, this bill will still leave insurers with some uncertainty about antitrust exposure.

What the Commission and Congress Can Do

The insurance industry undoubtedly desires to become more active and aggressive in health care cost containment. Moreover, some individual insurers may be frustrated with the apparently united front presented in many instances by health care providers. Although the perception of a monolithic and recalcitrant body of health care providers may, perhaps, have once had some validity, experience in the past several years shows that, in general, this simply is no longer the case.

The increased supply of health care providers -- empty hospital beds, new physicians with unfilled appointment slots, and emerging alternative forms and classes of health care providers (e.g., free-standing immediate care centers, ambulatory surgery centers, etc.) -- is forcing providers to be more responsive to those who are paying for their services in order to attract patients. Purchasers, third-party payers, and providers of health care services have developed a variety of innovative programs to help control costs. Health care providers are becoming more cost conscious, and are organizing more efficient and

legislative obstacles that prevented the formation and development of HMOs, and to foster their development. Continued oversight and judicious congressional intervention to remove unwarranted obstacles to competition also should facilitate insurers' cost-containment efforts and help obviate the need to resort to exemptions from the antitrust laws.

By direction of the Commission.

James C. Miller, III
Chairman