UNIVERSITY OF ILLINOIS
AT URBANA-CHAMPAIGN

David A. Hyman
Professor of Law and Medicine
(217) 333-0061
dhyman@law.uiuc.edu

College of Law
504 E. Pennsylvania Ave.
Champaign, IL
61820

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The Honorable Arlen Specter
Chairman of the Judiciary Committee
United States Senate
Washington, DC 20510

Dear Chairman Specter:

Thank you for giving me the opportunity to testify before the Committee earlier this month. Enclosed are my responses to the follow-up written questions I received after testifying on September 6, 2006 at a hearing titled "Examining Competition in Group Health."

Please feel free to contact me if you have additional questions.

Sincerely,

David A. Hyman

DAH:mp

Questions from Senator Specter:

Question 1: The AMA has urged Congress to require health insurers to publicly report additional enrollment and financial data. In your testimony, you advocate greater transparency. Do you believe such a reporting requirement would be helpful in this market?

Answer 1: I believe greater transparency with regard to the cost and quality of health care services has the potential to improve the performance of the health care marketplace. The FTC/DOJ report, *Improving Health Care: A Dose of Competition*, similarly calls for greater transparency with regard to this type of information. Good, reliable information about the cost and quality of health care services provides patients with the information they need to make their own decisions.

I am not convinced that compelled disclosure of the information sought by the American Medical Association (AMA) has the potential to improve the health care marketplace – particularly given the amount of such information that is already available. Information on enrollment and financial data on insurers is unlikely to be of interest to the relevant consumers (i.e., the purchasers of health care coverage and the recipients of health care services).

Question 2: You suggest that the AMA concentration study is flawed because its conclusions are based on the use of metropolitan statistical areas ("MSAs") as the appropriate geographic markets. However, in reviewing mergers between health insurers, the Department of Justice has relied upon MSAs to assess the effect of a merger on particular geographic markets. Why do you say that the use of MSAs is a weakness in the study?

Answer 2: The AMA study treats each MSA as a geographic market for purposes of calculating the Herfindahl-Hirshman Index (HHI). One simply can not assume that an MSA is equivalent to a geographic market without extensive analysis. It is always possible to disagree about the definition of a specific geographic market, but it is not correct to simply assume that an MSA is co-extensive with a geographic market.

Furthermore, when the DOJ uses MSAs, it does so as a starting point for analysis – not the end-point.

Question 3: You suggest that the antitrust enforcement agencies must show not only the ability to exercise market power, but also that such power was obtained or maintained through improper means, but that is not true for merger analysis is it? Merger analysis is designed to prevent an exercise of market power that would be legal if such market power was acquired other than through a merger, correct?

Answer 3: The statements in this question correctly describe antitrust law with regard to merger analysis. However, the AMA study was not about how to use HHIs to perform

merger analysis. Instead, the AMA used the HHI in each MSA as the basis for its analysis, without regard to the fact that it was not dealing with a prospective challenge to a merger. My point (against the backdrop of the AMA study) was that in a retrospective analysis, you cannot just look at market power – you also need to look at how that power was acquired.

Question 4: Do you believe that additional mergers among health insurers would enable the merged firm to exercise market power in at least some markets? As more mergers occur, would you oppose having the Justice Department take a closer look at health insurer mergers?

Answer 4: As I mentioned in my testimony, the question is whether the mergers are within geographic and product markets or across such markets. As long as the mergers are across markets, they are unlikely to raise issues of market power. Within-market mergers, on the other hand, require analysis to determine whether they raise issues of market power or not. I assume that in evaluating all such mergers, the Department of Justice will properly follow the enforcement policy set forth in the Horizontal Merger Guidelines that were jointly issued by the Department of Justice and the Federal Trade Commission.

Question from Senator Schumer:

Question 5: At the hearing, we examined the impact of consolidated health insurance companies on physicians. We did not, however, carefully examine the effect on hospitals. In New York, the consolidation of health insurers has been dramatic. We have recently seen the acquisition of Empire Blue Cross/Blue Shield by WellPoint, the acquisition of Oxford by United Health Group, and the proposed merger of the HIP Health Plans with Group Health Incorporated.

This activity exacerbates a disequilibrium, at least in my State, between the bottom lines of the health insurers and the bottom lines of our not-for-profit and public hospitals. For instance, last year the health insurance plans in New York State enjoyed a profit of $1.3 billion, while the hospitals have been in the red for seven consecutive years. Hospitals are held captive by huge national health plans, which need to sign contracts with plans like WellPoint, which has 34 million customers. And yet, our anti-trust laws prohibit hospitals from banding together to negotiate prices.

How can we expect a hospital to negotiate a fair deal with a behemoth like WellPoint?

Should we amend our antitrust laws to allow struggling hospitals that serve our inner city, suburban, and rural communities to band together and negotiate fair payment terms with these huge national companies?

Answer 5: As noted above, the issue is not how many customers any given insurer has across the country, but whether its market share in a specific geographic and product market is likely to result in the exercise of market power. So, the fact that Wellpoint represents 34 million customers nationwide does not indicate it has market power in any given geographic and product market.

More generally, consumers do not benefit when health care providers seek to "band together and negotiate fair payment terms" – and consumer welfare is the touchstone for our antitrust laws. Indeed, allowing physicians or hospitals to collectively fix prices will harm consumers – not help them. I do not believe it is necessary to amend the antitrust laws to address these concerns. If Congress wants to aid struggling hospitals in the inner city, suburban and rural communities, it should provide direct subsidies to the particular institutions that need assistance.