

103^D CONGRESS
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H. R. 2640

To direct the Secretary of Health and Human Services and the Attorney General to provide exemptions of certain provisions of antitrust law for activities of providers of health care services conducted under joint ventures, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 14, 1993

Mr. McMILLAN (for himself, Mr. COBLE, Mr. TAYLOR of North Carolina, Mr. LANCASTER, Mr. KOLBE, and Mr. VALENTINE) introduced the following bill; which was referred jointly to the Committees on Energy and Commerce and the Judiciary

A BILL

To direct the Secretary of Health and Human Services and the Attorney General to provide exemptions of certain provisions of antitrust law for activities of providers of health care services conducted under joint ventures, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Health Care Coopera-
5 tive Antitrust Protection Act of 1993”.

1 **SEC. 2. PURPOSE.**

2 It is the purpose of this Act to substantively encour-
3 age the formation of efficiency producing, pro-competitive
4 joint ventures among providers of health care services by
5 minimizing unnecessary antitrust risk and clarifying regu-
6 latory ambiguity in order to reduce excess capacity and
7 duplication of services.

8 **SEC. 3. DEFINITIONS.**

9 For purposes of this Act:

10 (1) The term “Advisory Committee” means the
11 Interagency Advisory Committee on Competition,
12 Antitrust Policy, and Health Care established under
13 section 6.

14 (2) The term “antitrust laws” has the meaning
15 given it in subsection (a) of the first section of the
16 Clayton Act (15 U.S.C. 12(a)), except that such
17 term includes—

18 (A) section 5 of the Federal Trade Com-
19 mission Act (15 U.S.C. 45) to the extent such
20 section applies to unfair methods of competi-
21 tion; and

22 (B) any State law similar to the laws re-
23 ferred to in subparagraph (A).

24 (3) The term “health care joint venture” means
25 an agreement between 2 or more providers of health
26 care services that is entered into solely for the pur-

1 pose of sharing in the provision of health care serv-
2 ices and that involves substantial integration or fi-
3 nancial risk-sharing between the parties, but does
4 not include the exchanging of information, the enter-
5 ing into of any agreement, or the engagement in any
6 other conduct that is not reasonably required to
7 carry out such agreement.

8 (4) The term “health care services” includes
9 services related to the delivery or administration of
10 health care services.

11 (5) The term “provider of health care services”
12 means any individual or entity that is engaged in the
13 delivery of health care services in a State and that
14 is required by State law or regulation to be licensed
15 or certified by the State to engage in the delivery of
16 such services in the State.

17 (6) The term “Secretary” means the Secretary
18 of Health and Human Services.

19 **SEC. 4. ESTABLISHMENT OF EXEMPTION PROGRAM FOR**
20 **HEALTH CARE JOINT VENTURES.**

21 (a) ESTABLISHMENT.—

22 (1) IN GENERAL.—Not later than 6 months
23 after the date of the enactment of this Act, the Sec-
24 retary of Health and Human Services, in concur-
25 rence with the Attorney General, shall promulgate

1 specific guidelines under which a health care joint
2 venture may submit an application requesting that
3 the Secretary provide the entities participating in
4 the joint venture with either of the following exemp-
5 tions:

6 (A) With respect to any action brought
7 against the entity under the antitrust laws, an
8 exemption under which (notwithstanding any
9 other provision of law)—

10 (i) monetary recovery on a claim shall
11 be limited to actual damages if the claim
12 results from conduct within the scope of
13 the joint venture and the action is filed
14 after the exemption becomes effective; and

15 (ii) the conduct of the entity in mak-
16 ing or performing a contract to carry out
17 the joint venture shall not be deemed ille-
18 gal per se but shall be judged on the basis
19 of its reasonableness, taking into account
20 all relevant factors affecting competition,
21 including (but not limited to) effects on
22 competition in properly defined, relevant
23 research, development, product, process,
24 and service markets (taking into consider-
25 ation worldwide capacity to the extent that

1 it may be appropriate in the cir-
2 cumstances).

3 (B) An exemption under which (notwith-
4 standing any other provision of law) the anti-
5 trust laws shall not apply to conduct within the
6 scope of the joint venture for a 5-year period.

7 (2) DEADLINE FOR RESPONSE.—The Secretary,
8 with the concurrence of the Attorney General, shall
9 approve or disapprove the application of a health
10 care joint venture for an exemption under this sub-
11 section—

12 (A) in the case of an exemption described
13 in paragraph (1)(A), not later than 30 days
14 after the Secretary and the Attorney General
15 receive the joint venture’s application; and

16 (B) in the case of an exemption described
17 in paragraph (1)(B), not later than 90 days
18 after the Secretary and the Attorney General
19 receive the joint venture’s application.

20 (3) PROVIDING REASONS FOR DISAPPROVAL.—
21 If the Secretary disapproves the application of a
22 health care joint venture for an exemption under
23 this subsection, the Secretary shall provide the joint
24 venture with a statement explaining the reasons for
25 the Secretary’s disapproval.

1 (b) REQUIREMENTS FOR APPROVAL.—For purposes
2 of subsection (a), the Secretary and the Attorney General
3 shall approve the application of a health care joint venture
4 for an exemption under subsection (a) if—

5 (1) in the case of a joint venture seeking an ex-
6 emption described in subsection (a)(1)(B), the Sec-
7 retary (in concurrence with the Attorney General)
8 finds that the joint venture meets the criteria de-
9 scribed in subsection (c); and

10 (2) an entity participating in the joint venture
11 submits to the Secretary, the Attorney General, and
12 the Advisory Committee an application not later
13 than 30 days after the entity has entered into a
14 written agreement to participate in the joint venture
15 (or not later than 30 days after the date of the en-
16 actment of this Act in the case of an agreement in
17 effect as of such date) that contains the following in-
18 formation and assurances:

19 (A) The identities of the parties to the
20 joint venture.

21 (B) The nature, objectives, and planned
22 activities of the joint venture.

23 (C) Assurances that the entities participat-
24 ing in the joint venture shall notify the Sec-
25 retary and the Attorney General of any changes

1 in the information described in subparagraphs
2 (A) and (B) during the period for which the ex-
3 emption is in effect.

4 (D) In the case of a joint venture seeking
5 an exemption described in subsection
6 (a)(1)(B)—

7 (i) assurances that the entities partici-
8 pating in the joint venture shall submit an-
9 nual reports to the Secretary and the At-
10 torney General during the period for which
11 the exemption is in effect on the activities
12 of the joint venture; and

13 (ii) any other information and assur-
14 ances required by the Secretary and the
15 Attorney General to ensure that the joint
16 venture meets the criteria described in sub-
17 section (c).

18 (c) CRITERIA DESCRIBED.—A health care joint ven-
19 ture meets the criteria referred to in this subsection if the
20 Secretary (with the concurrence of the Attorney General)
21 finds that the approval of the joint venture will promote
22 each of the following goals:

23 (1) The enhancement of the quality of health
24 care services provided to individuals residing in the

1 geographic area served by the entities participating
2 in the joint venture.

3 (2) The preservation of meaningful competition
4 among providers of health care services in such area.

5 (3) The reduction of the costs of providing
6 health care services in such area, or an increase in
7 the efficiency of the provision of such services.

8 (4) The improvement of the utilization of health
9 care services in such area.

10 (5) The elimination of costly and unnecessary
11 duplication in the delivery of health care services in
12 such area.

13 (d) REVOCATION OF EXEMPTION.—

14 (1) IN GENERAL.—The Secretary, in concur-
15 rence with the Attorney General, may revoke an ex-
16 emption provided to a health care joint venture
17 under this section if, at any time during which the
18 exemption is in effect, the Secretary finds that the
19 joint venture no longer meets any of the applicable
20 requirements for approval under subsection (b), ex-
21 cept that the Secretary may not revoke such an ex-
22 emption if the failure of the health care joint ven-
23 ture to meet such requirements is merely technical
24 in nature.

1 (A) prepare a notice with respect to the
2 joint venture that identifies the parties to the
3 venture and that describes the planned activi-
4 ties of the venture;

5 (B) submit the notice to the entities par-
6 ticipating in the joint venture; and

7 (C) after submitting the notice to such en-
8 tities (but not later than 30 days after approv-
9 ing the application for the exemption for the
10 joint venture), publish the notice in the Federal
11 Register.

12 (2) EFFECT OF PUBLICATION.—An exemption
13 provided by the Secretary and the Attorney General
14 under section 4(a) shall take effect as of the date of
15 the publication in the Federal Register of the notice
16 with respect to the exemption pursuant to paragraph
17 (1).

18 (b) WAIVER OF DISCLOSURE REQUIREMENTS FOR
19 INFORMATION RELATING TO APPLICATIONS FOR EXEMP-
20 TIONS.—

21 (1) IN GENERAL.—All information and docu-
22 mentary material submitted as part of an applica-
23 tion of a health care joint venture for an exemption
24 under section 4(a), together with any other informa-
25 tion obtained by the Attorney General, the Sec-

1 retary, or the Advisory Committee in the course of
2 any investigation, administrative proceeding, or case
3 with respect to a potential violation of the antitrust
4 laws by the joint venture with respect to which the
5 exemption applies, shall be exempt from disclosure
6 under section 552 of title 5, United States Code,
7 and shall not be made publicly available by any
8 agency of the United States to which such section
9 applies, except as relevant to a law enforcement in-
10 vestigation or in a judicial or administrative proceed-
11 ing in which such information and material is sub-
12 ject to any protective order.

13 (2) EXCEPTION FOR INFORMATION INCLUDED
14 IN FEDERAL REGISTER NOTICE.—Paragraph (1)
15 shall not apply with respect to information contained
16 in a notice published in the Federal Register pursu-
17 ant to subsection (a).

18 (c) USE OF INFORMATION TO SUPPORT OR ANSWER
19 CLAIMS UNDER ANTITRUST LAWS.—

20 (1) IN GENERAL.—Except as provided in para-
21 graph (2), the fact of disclosure of conduct under an
22 application for an exemption under section 4(a) and
23 the fact of publication of a notice in the Federal
24 Register under subsection (a) shall be admissible
25 into evidence in any judicial or administrative pro-

1 ceeding for the sole purpose of establishing that a
2 person is entitled to the protections provided by an
3 exemption granted under section 4(a).

4 (2) EFFECT OF REJECTED APPLICATION.—If
5 the Secretary and the Attorney General deny, in
6 whole or in part, an application for an exemption
7 under section 4(a), or revoke an exemption under
8 such section, neither the negative determination nor
9 the statement of reasons therefore shall be admissi-
10 ble into evidence in any administrative or judicial
11 proceeding for the purpose of supporting or answer-
12 ing any claim under the antitrust laws.

13 **SEC. 6. INTERAGENCY ADVISORY COMMITTEE ON COM-**
14 **PETITION, ANTITRUST POLICY, AND HEALTH**
15 **CARE.**

16 (a) ESTABLISHMENT.—There is hereby established
17 the Interagency Advisory Committee on Competition,
18 Antitrust Policy, and Health Care. The Advisory Commit-
19 tee shall be composed of—

20 (1) the Secretary of Health and Human Serv-
21 ices (or the designee of the Secretary);

22 (2) the Attorney General (or the designee of the
23 Attorney General);

24 (3) the Director of the Office of Management
25 and Budget (or the designee of the Director); and

1 (4) a representative of the Federal Trade Com-
2 mission.

3 (b) DUTIES.—The duties of the Advisory Committee
4 are—

5 (1) to discuss and evaluate competition and
6 antitrust policy, and their implications with respect
7 to the performance of health care markets;

8 (2) to analyze the effectiveness of health care
9 joint ventures receiving exemptions under the pro-
10 gram established under section 4(a) in reducing the
11 costs of and expanding access to the health care
12 services that are the subject of such ventures; and

13 (3) to make such recommendations to Congress
14 not later than 2 years after the date of the enact-
15 ment of this Act (and at such subsequent periods as
16 the Advisory Committee considers appropriate) re-
17 garding modifications to the program established
18 under section 4(a) as the Advisory Committee con-
19 siders appropriate, including modifications relating
20 to the costs to health care providers of obtaining an
21 exemption for a joint venture under such program.

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