

103<sup>D</sup> CONGRESS  
2<sup>D</sup> SESSION

# H. R. 3486

To establish safe harbors from the application of the antitrust laws for certain activities of providers of health care services, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 10, 1993

Mr. ARCHER introduced the following bill; which was referred to the Committee on the Judiciary

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MAY 12, 1994

Additional sponsors: Mr. CALLAHAN, Mr. BARCIA of Michigan, Mr. GOSS, Mr. PARKER, Mr. PETRI, Mrs. FOWLER, Mr. CANADY, Mr. DUNCAN, Mr. DORNAN, Mr. DICKEY, Mr. SUNDQUIST, Mr. DERRICK, Mr. ALLARD, Mr. KLUG, Mr. GORDON, Mr. BONILLA, Mr. ZELIFF, Mr. INHOFE, Mr. DELAY, Mr. GOODLING, Mrs. LLOYD, Mr. HUTCHINSON, Mr. CRAPO, Mr. MANZULLO, Mr. TAYLOR of North Carolina, Mrs. UNSOELD, Mr. BREWSTER, Mr. FRANKS of Connecticut, Mr. FIELDS of Texas, Mr. SWETT, Mr. NUSSLE, Mr. THOMAS of Wyoming, Mr. UPTON, Mr. BOEHNER, Mr. SENSENBRENNER, Mr. RAVENEL, Mr. COMBEST, Mr. CRAMER, Mr. CLEMENT, Mr. LEVY, Mrs. VUCANOVICH, Mr. HALL of Ohio, Mr. MONTGOMERY, Ms. PRYCE of Ohio, Mr. KNOLLENBERG, Mr. PETE GEREN of Texas, Mr. YOUNG of Alaska, Mr. HOEKSTRA, Mr. SMITH of Oregon, Mr. RAMSTAD, Mr. INSLEE, Mr. STUMP, Mr. MCDADE, Mr. PAXON, Mr. PORTMAN, Mr. SMITH of New Jersey, Mr. MCHUGH, Mr. BUNNING, Mr. BACHUS of Alabama, Mr. HOBSON, Mr. COBLE, Mrs. BYRNE, Mr. ROGERS, Mrs. JOHNSON of Connecticut, Mr. MOORHEAD, Mr. EWING, Mr. HANCOCK, Mr. INGLIS of South Carolina, Mr. SANGMEISTER, Mr. SHAYS, Mr. MCCANDLESS, Mr. LIGHTFOOT, Mr. JEFFERSON, Mr. LAZIO, Mr. KYL, Mr. EHLERS, Mr. BLILEY, Mr. OXLEY, Mr. MACHTLEY, Mr. SOLOMON, Mr. ARMEY, Mr. GOODLATTE, Mr. PACKARD, Mr. ZIMMER, Mr. PETERSON of Minnesota, Mr. DEFazio, Ms. MCKINNEY, Mr. ROTH, Mr. HANSEN, Mr. BARCA of Wisconsin, Mr. DEUTSCH, Mr. MICA, Mr. CASTLE, Ms. DUNN, Mr. MCINNIS, Mr. JOHNSON of South Dakota, Mr. HUTTO, Mr. ROWLAND, Mr. STEARNS, Mr. PAYNE of Virginia, Mr. COLLINS of Georgia, and Mr. TAUZIN

# A BILL

To establish safe harbors from the application of the anti-trust laws for certain activities of providers of health care services, 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 Antitrust  
5 Improvements Act of 1993”.

6 **SEC. 2. EXEMPTION FROM ANTITRUST LAWS FOR CERTAIN**

7 **COMPETITIVE AND COLLABORATIVE ACTIVI-**

8 **TIES.**

9 (a) EXEMPTION DESCRIBED.—An activity relating to  
10 the provision of health care services shall be exempt from  
11 the antitrust laws if—

12 (1) the activity is within one of the categories  
13 of safe harbors described in section 3;

14 (2) the activity is within an additional safe har-  
15 bor designated by the Attorney General under sec-  
16 tion 4; or

17 (3) the activity is specified in and in compliance  
18 with the terms of a certificate of review issued by  
19 the Attorney General under section 5 and the activ-  
20 ity occurs—

21 (A) while the certificate is in effect, or

1 (B) in the case of a certificate issued dur-  
2 ing the 2-year period beginning on the date of  
3 the enactment of this Act, at any time on or  
4 after the first day of the 2-year period that  
5 ends on the date the certificate takes effect.

6 (b) AWARD OF ATTORNEY'S FEES AND COSTS OF  
7 SUIT.—

8 (1) IN GENERAL.—If any person brings an ac-  
9 tion alleging a claim under the antitrust laws and  
10 the activity on which the claim is based is found by  
11 the court to be exempt from such laws under sub-  
12 section (a), the court shall, at the conclusion of the  
13 action—

14 (A) award to a substantially prevailing  
15 claimant the cost of suit attributable to such  
16 claim, including a reasonable attorney's fee, or

17 (B) award to a substantially prevailing  
18 party defending against such claim the cost of  
19 such suit attributable to such claim, including  
20 reasonable attorney's fee, if the claim, or the  
21 claimant's conduct during litigation of the  
22 claim, was frivolous, unreasonable, without  
23 foundation, or in bad faith.

24 (2) OFFSET IN CASES OF BAD FAITH.—The  
25 court may reduce an award made pursuant to para-

1 graph (1) in whole or in part by an award in favor  
2 of another party for any part of the cost of suit (in-  
3 cluding a reasonable attorney's fee) attributable to  
4 conduct during the litigation by any prevailing party  
5 that the court finds to be frivolous, unreasonable,  
6 without foundation, or in bad faith.

7 **SEC. 3. SAFE HARBORS.**

8 The following activities are safe harbors for purposes  
9 of section 2(a)(1):

10 (1) COMBINATIONS WITH MARKET SHARE  
11 BELOW THRESHOLD.—Activities relating to health  
12 care services of any combination of health care pro-  
13 viders if the number of each type or specialty of pro-  
14 vider in question does not exceed 25 percent of the  
15 total number of such type or specialty of provider in  
16 the relevant market area.

17 (2) ACTIVITIES OF MEDICAL SELF-REGULATORY  
18 ENTITIES.—

19 (A) IN GENERAL.—Subject to subpara-  
20 graph (B), any activity of a medical self-regu-  
21 latory entity relating to standard setting or  
22 standard enforcement activities that are de-  
23 signed to promote the quality of health care  
24 provided to patients.

1           (B) EXCEPTION.—No activity of a medical  
2 self-regulatory entity may be deemed to fall  
3 under the safe harbor established under this  
4 paragraph if the activity is conducted for pur-  
5 poses of financial gain.

6           (3) PARTICIPATION IN SURVEYS.—The partici-  
7 pation of a provider of health care services in a writ-  
8 ten survey of the prices of services, reimbursement  
9 levels, or the compensation and benefits of employ-  
10 ees and personnel, but only if—

11           (A) the survey is conducted by a third  
12 party, such as a purchaser of health care serv-  
13 ices, governmental entity, institution of higher  
14 education, or trade association;

15           (B) the information provided by partici-  
16 pants in the survey is based on prices charged,  
17 reimbursements received, or compensation and  
18 benefits paid prior to the third month preceding  
19 the month in which the information is provided;  
20 and

21           (C) if the results of the survey are dissemi-  
22 nated, the results are aggregated in a manner  
23 that ensures that no recipient of the results  
24 may identify the prices charged, reimbursement

1 received, or compensation and benefits paid by  
2 any particular provider.

3 (4) JOINT VENTURES FOR HIGH TECHNOLOGY  
4 AND COSTLY EQUIPMENT AND SERVICES.—Any ac-  
5 tivity of a health care cooperative venture relating to  
6 the purchase, operation, or marketing of high tech-  
7 nology or other expensive medical equipment, or the  
8 provision of high cost or complex services, but only  
9 if the number of participants in the venture does not  
10 exceed the lowest number needed to support the ven-  
11 ture together with any other providers for whom the  
12 participation in the venture is the only means of ob-  
13 taining or operating such equipment or providing  
14 such services.

15 (5) HOSPITAL MERGERS.—Activities relating to  
16 a merger of 2 hospitals if, during the 3-year period  
17 preceding the merger, one of the hospitals had an  
18 average of 150 or fewer operational beds and an av-  
19 erage daily inpatient census of less than 50 percent  
20 of such beds.

21 (6) JOINT PURCHASING ARRANGEMENTS.—Any  
22 joint purchasing arrangement among health care  
23 providers if—

24 (A) the purchases under the arrangement  
25 represent less than 35 percent of the total sales

1 of the product purchased in the relevant market  
2 area; and

3 (B) the amounts paid under the arrange-  
4 ment represent less than 20 percent of the total  
5 revenues of the supplier of the product pur-  
6 chased.

7 (7) NEGOTIATIONS.—Activities consisting of  
8 good faith negotiations to carry out any activity—

9 (A) described in this section,

10 (B) within an additional safe harbor des-  
11 ignated by the Attorney General under section  
12 4,

13 (C) that is the subject of an application for  
14 a certificate of review under section 5, or

15 (D) that is deemed a submission of a noti-  
16 fication under section 6(a)(2)(B),

17 without regard to whether such an activity is carried  
18 out.

19 **SEC. 4. DESIGNATION OF ADDITIONAL SAFE HARBORS.**

20 (a) IN GENERAL.—

21 (1) SOLICITATION OF PROPOSALS.—Not later  
22 than 30 days after the date of the enactment of this  
23 Act, the Attorney General shall publish a notice in  
24 the Federal Register soliciting proposals for addi-  
25 tional safe harbors.

1           (2) REVIEW AND REPORT ON PROPOSED SAFE  
2 HARBORS.—Not later than 180 days after the date  
3 of the enactment of this Act, the Attorney General  
4 (in consultation with the Secretary of Health and  
5 Human Services and the Chair of the Federal Trade  
6 Commission) shall—

7           (A) review the proposed safe harbors sub-  
8 mitted under paragraph (1); and

9           (B) submit a report to Congress describing  
10 the proposals to be included in the publication  
11 of additional safe harbors described in para-  
12 graph (3) and the proposals that are not to be  
13 so included, together with explanations there-  
14 fore.

15           (3) PUBLICATION OF ADDITIONAL SAFE HAR-  
16 BORS.—Not later than 180 days after the date of  
17 the enactment of this Act, the Attorney General (in  
18 consultation with the Secretary of Health and  
19 Human Services and the Chair of the Federal Trade  
20 Commission) shall publish in the Federal Register  
21 proposed additional safe harbors for purposes of sec-  
22 tion 2(a)(2) for providers of health care services.  
23 Not later than 180 days after publishing such pro-  
24 posed safe harbors in the Federal Register, the At-



1       torney General shall issue final rules establishing  
2       such safe harbors.

3       (b) CRITERIA FOR SAFE HARBORS.—In establishing  
4       safe harbors under subsection (a), the Attorney General  
5       shall take into account the following:

6               (1) The extent to which a competitive or col-  
7       laborative activity will accomplish any of the follow-  
8       ing:

9                       (A) An increase in access to health care  
10       services.

11                      (B) The enhancement of the quality of  
12       health care services.

13                      (C) The establishment of cost efficiencies  
14       that will be passed on to consumers, including  
15       economies of scale and reduced transaction and  
16       administrative costs.

17                      (D) An increase in the ability of health  
18       care facilities to provide services in medically  
19       underserved areas or to medically underserved  
20       populations.

21                      (E) An improvement in the utilization of  
22       health care resources or the reduction in the in-  
23       efficient duplication of the use of such re-  
24       sources.

1           (2) Whether the designation of an activity as a  
2 safe harbor under subsection (a) will result in the  
3 following outcomes:

4           (A) Health plans and other health care in-  
5 surers, consumers of health care services, and  
6 health care providers will be better able to ne-  
7 gotiate payment and service arrangements  
8 which will reduce costs to consumers.

9           (B) Taking into consideration the charac-  
10 teristics of the particular purchasers and pro-  
11 viders involved, competition will not be unduly  
12 restricted.

13           (C) Equally efficient and less restrictive al-  
14 ternatives do not exist to meet the criteria de-  
15 scribed in paragraph (1).

16           (D) The activity will not unreasonably  
17 foreclose competition by denying competitors a  
18 necessary element of competition.

19 **SEC. 5. CERTIFICATES OF REVIEW.**

20           (a) ESTABLISHMENT OF PROGRAM.—In consultation  
21 with the Secretary and the Chair, the Attorney General  
22 shall (not later than 180 days after the date of the enact-  
23 ment of this Act) issue certificates of review in accordance  
24 with this section for providers of health care services and

1 advise and assist any person with respect to applying for  
2 such a certificate of review.

3 (b) PROCEDURES FOR APPLICATION FOR CERTIFI-  
4 CATE.—

5 (1) FORM; CONTENT.—To apply for a certifi-  
6 cate of review, a person shall submit to the Attorney  
7 General a written application which—

8 (A) specifies the activities relating to the  
9 provision of health care services which satisfy  
10 the criteria described in section 4(b) and which  
11 will be included in the certificate; and

12 (B) is in a form and contains any informa-  
13 tion, including information pertaining to the  
14 overall market in which the applicant operates,  
15 required by rule or regulation promulgated  
16 under section 8.

17 (2) PUBLICATION OF NOTICE IN FEDERAL REG-  
18 ISTER.—Within 10 days after an application submit-  
19 ted under paragraph (1) is received by the Attorney  
20 General, the Attorney General shall publish in the  
21 Federal Register a notice that announces that an  
22 application for a certificate of review has been sub-  
23 mitted, identifies each person submitting the appli-  
24 cation, and describes the conduct for which the ap-  
25 plication is submitted.

1           (3) ESTABLISHMENT OF PROCEDURES FOR IS-  
2 SUANCE OF CERTIFICATE.—In consultation with the  
3 Chair and the Secretary, the Attorney General shall  
4 establish procedures to be used in applying for and  
5 in determining whether to approve an application for  
6 a certificate of review under this title. Under such  
7 procedures the Attorney General shall approve an  
8 application if the Attorney General determines that  
9 the activities to be covered under the certificate will  
10 satisfy the criteria described in section 4(b) for addi-  
11 tional safe harbors designated under such section  
12 and that the benefits of the issuance of the certifi-  
13 cate will outweigh any disadvantages that may result  
14 from reduced competition.

15           (4) TIMING FOR DECISION ON APPLICATION.—

16           (A) IN GENERAL.—Within 90 days after  
17 the Attorney General receives an application for  
18 a certificate of review, the Attorney General  
19 shall determine whether the applicant’s health  
20 care market activities are in accordance with  
21 the procedures described in paragraph (3). If  
22 the Attorney General, with the concurrence of  
23 the Secretary, determines that such procedures  
24 are met, the Attorney General shall issue to the

1 applicant a certificate of review. The certificate  
2 of review shall specify—

3 (i) the health care market activities to  
4 which the certificate applies,

5 (ii) the person to whom the certificate  
6 of review is issued, and

7 (iii) any terms and conditions the At-  
8 torney General or the Secretary deems nec-  
9 essary to assure compliance with the appli-  
10 cable procedures described in paragraph  
11 (3).

12 (B) APPLICATIONS DEEMED APPROVED.—

13 If the Attorney General does not reject an ap-  
14 plication before the expiration of the 90-period  
15 beginning on the date the Attorney General re-  
16 ceives the application, the Attorney General  
17 shall be deemed to have approved the applica-  
18 tion and to have issued a certificate of review  
19 relating to the applicant's health care market  
20 activities covered under the application.

21 (5) EXPEDITED ACTION.—If the applicant indi-  
22 cates a special need for prompt disposition, the At-  
23 torney General and the Secretary may expedite ac-  
24 tion on the application, except that no certificate of  
25 review may be issued within 30 days of publication

1 of notice in the Federal Register under subsection  
2 (b)(2).

3 (6) ACTIONS UPON DENIAL.—

4 (A) NOTIFICATION.—If the Attorney Gen-  
5 eral denies in whole or in part an application  
6 for a certificate, the Attorney General shall no-  
7 tify the applicant of the Attorney General's de-  
8 termination and the reasons for it.

9 (B) REQUEST FOR RECONSIDERATION.—

10 An applicant may, within 30 days of receipt of  
11 notification that the application has been denied  
12 in whole or in part, request the Attorney Gen-  
13 eral to reconsider the determination. The Attor-  
14 ney General, with the concurrence of the Sec-  
15 retary, shall notify the applicant of the deter-  
16 mination upon reconsideration within 30 days  
17 of receipt of the request.

18 (C) RETURN OF DOCUMENTS.—If the At-

19 torney General denies an application for the is-  
20 suance of a certificate of review and thereafter  
21 receives from the applicant a request for the re-  
22 turn of documents submitted by the applicant  
23 in connection with the application for the cer-  
24 tificate, the Attorney General and the Secretary  
25 shall return to the applicant, not later than 30

1 days after receipt of the request, the documents  
2 and all copies of the documents available to the  
3 Attorney General and the Secretary, except to  
4 the extent that the information has been made  
5 public under an exception to the rule against  
6 public disclosure described in subsection  
7 (g)(2)(B).

8 (7) FRAUDULENT PROCUREMENT.—A certifi-  
9 cate of review shall be void ab initio with respect to  
10 any health care market activities for which the cer-  
11 tificate was procured by fraud.

12 (c) AMENDMENT AND REVOCATION OF CERTIFI-  
13 CATES.—

14 (1) NOTIFICATION OF CHANGES.—Any appli-  
15 cant who receives a certificate of review—

16 (A) shall promptly report to the Attorney  
17 General any change relevant to the matters  
18 specified in the certificate; and

19 (B) may submit to the Attorney General  
20 an application to amend the certificate to re-  
21 flect the effect of the change on the conduct  
22 specified in the certificate.

23 (2) AMENDMENT TO CERTIFICATE.—An appli-  
24 cation for an amendment to a certificate of review  
25 shall be treated as an application for the issuance of

1 a certificate. The effective date of an amendment  
2 shall be the date on which the application for the  
3 amendment is submitted to the Attorney General.

4 (3) REVOCATION.—

5 (A) GROUNDS FOR REVOCATION.—In ac-  
6 cordance with this paragraph, the Attorney  
7 General may revoke in whole or in part a cer-  
8 tificate of review issued under this section. The  
9 following shall be considered grounds for the  
10 revocation of a certificate:

11 (i) After the expiration of the 2-year  
12 period beginning on the date a person's  
13 certificate is issued, the activities of the  
14 person have not substantially accomplished  
15 the purposes for the issuance of the certifi-  
16 cate.

17 (ii) The person has failed to comply  
18 with any of the terms or conditions im-  
19 posed under the certificate by the Attorney  
20 General or the Secretary under subsection  
21 (b)(4).

22 (iii) The activities covered under the  
23 certificate no longer satisfy the criteria set  
24 forth in section 4(b).



1           (B) REQUEST FOR COMPLIANCE INFORMA-  
2           TION.—If the Attorney General or Secretary  
3           has reason to believe that any of the grounds  
4           for revocation of a certificate of review de-  
5           scribed in subparagraph (A) may apply to a  
6           person holding the certificate, the Attorney  
7           General shall request such information from  
8           such person as the Attorney General or the Sec-  
9           retary deems necessary to resolve the matter of  
10          compliance. Failure to comply with such request  
11          shall be grounds for revocation of the certificate  
12          under this paragraph.

13          (C) PROCEDURES FOR REVOCATION.—If  
14          the Attorney General or the Secretary deter-  
15          mines that any of the grounds for revocation of  
16          a certificate of review described in subpara-  
17          graph (A) apply to a person holding the certifi-  
18          cate, or that such person has failed to comply  
19          with a request made under subparagraph (B),  
20          the Attorney General shall give written notice of  
21          the determination to such person. The notice  
22          shall include a statement of the circumstances  
23          underlying, and the reasons in support of, the  
24          determination. In the 60-day period beginning  
25          30 days after the notice is given, the Attorney

1           General shall revoke the certificate or modify it  
2           as the Attorney General or the Secretary deems  
3           necessary to cause the certificate to apply only  
4           to activities that meet the procedures for the is-  
5           suanance of certificates described in subsection  
6           (b)(2).

7           (D) INVESTIGATION AUTHORITY.—For  
8           purposes of carrying out this paragraph, the  
9           Attorney General may conduct investigations in  
10          the same manner as the Attorney General con-  
11          ducts investigations under section 3 of the Anti-  
12          trust Civil Process Act, except that no civil in-  
13          vestigative demand may be issued to a person  
14          to whom a certificate of review is issued if such  
15          person is the target of such investigation.

16          (d) REVIEW OF DETERMINATIONS.—

17               (1) AVAILABILITY OF REVIEW FOR CERTAIN AC-  
18               TIONS.—If the Attorney General denies, in whole or  
19               in part, an application for a certificate of review or  
20               for an amendment to a certificate, or revokes or  
21               modifies a certificate pursuant to paragraph (3), the  
22               applicant or certificate holder (as the case may be)  
23               may, within 30 days of the denial or revocation,  
24               bring an action in any appropriate district court of  
25               the United States to set aside the determination on

1 the ground that such determination is erroneous  
2 based on the preponderance of the evidence.

3 (2) NO OTHER REVIEW PERMITTED.—Except  
4 as provided in paragraph (1), no action by the At-  
5 torney General or the Secretary pursuant to this  
6 title shall be subject to judicial review.

7 (3) EFFECT OF REJECTED APPLICATION.—If  
8 the Attorney General denies, in whole or in part, an  
9 application for a certificate of review or for an  
10 amendment to a certificate, or revokes or amends a  
11 certificate, neither the negative determination nor  
12 the statement of reasons therefore shall be admissi-  
13 ble in evidence, in any administrative or judicial pro-  
14 ceeding, concerning any claim under the antitrust  
15 laws.

16 (e) PUBLICATION OF DECISIONS.—The Attorney  
17 General shall publish a notice in the Federal Register on  
18 a timely basis of each decision made with respect to an  
19 application for a certificate of review under this section  
20 or the amendment or revocation of such a certificate, in  
21 a manner that protects the confidentiality of any propri-  
22 etary information relating to the application.

23 (f) ANNUAL REPORTS.—Every person to whom a cer-  
24 tificate of review is issued shall submit to the Attorney  
25 General an annual report, in such form and at such time

1 as the Attorney General may require, that contains any  
2 necessary updates to the information required under sub-  
3 section (b) and a description of the activities of the holder  
4 under the certificate during the preceding year.

5 (g) RESTRICTIONS ON DISCLOSURE OF INFORMA-  
6 TION.—

7 (1) WAIVER OF DISCLOSURE REQUIREMENTS  
8 UNDER ADMINISTRATIVE PROCEDURE ACT.—Infor-  
9 mation submitted by any person in connection with  
10 the issuance, amendment, or revocation of a certifi-  
11 cate of review shall be exempt from disclosure under  
12 section 552 of title 5, United States Code.

13 (2) RESTRICTIONS ON DISCLOSURE OF COM-  
14 MERCIAL OR FINANCIAL INFORMATION.—

15 (A) IN GENERAL.—Except as provided in  
16 subparagraph (B), no officer or employee of the  
17 United States shall disclose commercial or fi-  
18 nancial information submitted in connection  
19 with the issuance, amendment, or revocation of  
20 a certificate of review if the information is priv-  
21 ileged or confidential and if disclosure of the in-  
22 formation would cause harm to the person who  
23 submitted the information.

1 (B) EXCEPTIONS.—Subparagraph (A)  
2 shall not apply with respect to information dis-  
3 closed—

4 (i) upon a request made by the Con-  
5 gress or any committee of the Congress,

6 (ii) in a judicial or administrative pro-  
7 ceeding, subject to appropriate protective  
8 orders,

9 (iii) with the consent of the person  
10 who submitted the information,

11 (iv) in the course of making a deter-  
12 mination with respect to the issuance,  
13 amendment, or revocation of a certificate  
14 of review, if the Attorney General deems  
15 disclosure of the information to be nec-  
16 essary in connection with making the  
17 determination,

18 (v) in accordance with any require-  
19 ment imposed by a statute of the United  
20 States, or

21 (vi) in accordance with any rule or  
22 regulation promulgated under subsection  
23 (i) permitting the disclosure of the infor-  
24 mation to an agency of the United States  
25 or of a State on the condition that the

1           agency will disclose the information only  
2           under the circumstances specified in  
3           clauses (i) through (v).

4           (3) PROHIBITION AGAINST USE OF INFORMA-  
5           TION TO SUPPORT OR ANSWER CLAIMS UNDER ANTI-  
6           TRUST LAWS.—Any information disclosed in an ap-  
7           plication for a certificate of review under this section  
8           shall only be admissible into evidence in a judicial or  
9           administrative proceeding for the sole purpose of  
10          establishing that a person is entitled to the protec-  
11          tions provided by such a certificate.

12 **SEC. 6. NOTIFICATIONS PROVIDING REDUCTION IN CER-**  
13                   **TAIN PENALTIES UNDER ANTITRUST LAW**  
14                   **FOR HEALTH CARE COOPERATIVE VEN-**  
15                   **TURES.**

16          (a) NOTIFICATIONS DESCRIBED.—

17           (1) SUBMISSION OF NOTIFICATION BY VEN-  
18           TURE.—Any party to a health care cooperative ven-  
19           ture, acting on such venture’s behalf, may, not later  
20           than 90 days after entering into a written agreement  
21           to form such venture or not later than 90 days after  
22           the date of the enactment of this Act, whichever is  
23           later, file with the Attorney General a written notifi-  
24           cation disclosing—

1 (A) the identities of the parties to such  
2 venture,

3 (B) the nature and objectives of such ven-  
4 ture, and

5 (C) such additional information as the At-  
6 torney General may require by regulation.

7 (2) ACTIVITIES DEEMED SUBMISSION OF NOTI-  
8 FICATION.—The following health care cooperative  
9 ventures shall be deemed to have filed a written noti-  
10 fication with respect to the venture under paragraph  
11 (1):

12 (A) SUBMISSION OF APPLICATION FOR  
13 CERTIFICATE OF REVIEW.—Any health care co-  
14 operative venture for which an application for a  
15 certificate of review is filed with the Attorney  
16 General under section 4.

17 (B) ENGAGING IN RISK-SHARING ACTIVI-  
18 TIES UNDER VENTURE.—Any health care coop-  
19 erative venture whose members engage in risk-  
20 sharing arrangements, including (but not lim-  
21 ited to)—

22 (i) the acceptance of capitation con-  
23 tracts;

24 (ii) the acceptance of contracts with  
25 fee withholding mechanisms relating to the

1 ability to meet established goals for utiliza-  
2 tion review and management; and

3 (iii) the holding by members of signifi-  
4 cant ownership or equity interests in the  
5 venture, where the capital contributed by  
6 the members is used to fund the oper-  
7 ational costs of the venture such as admin-  
8 istration, marketing, and computer-oper-  
9 ated medical information, if the venture  
10 develops and operates comprehensive pro-  
11 grams for utilization management and  
12 quality assurance that include controls  
13 over the use of institutional, specialized,  
14 and ancillary medical services.

15 (C) VENTURES BELOW CERTAIN SIZE.—

16 Any health care cooperative venture consisting  
17 of a network of providers not greater than—

18 (i) in the case of a nonexclusive net-  
19 work in which the participating members  
20 are permitted to create or join other com-  
21 peting networks, 50 percent of the provid-  
22 ers of health care services in the relevant  
23 geographic area and 50 percent of the  
24 members of the provider specialty group in  
25 the relevant market area; or



1 (ii) in the case of an exclusive network  
2 in which the participating members are not  
3 permitted to create or join other competing  
4 networks, 35 percent of the providers of  
5 health care services in the relevant geo-  
6 graphic area and 35 percent of the mem-  
7 bers of the provider specialty group in the  
8 relevant market area.

9 (3) SUBMISSION OF ADDITIONAL INFORMA-  
10 TION.—

11 (A) REQUEST OF ATTORNEY GENERAL.—  
12 At any time after receiving a notification filed  
13 under paragraph (1), the Attorney General may  
14 require the submission of additional information  
15 or documentary material relevant to the pro-  
16 posed health care cooperative venture.

17 (B) PARTIES TO VENTURE.—Any party to  
18 a health care cooperative venture may submit  
19 such additional information on the venture's be-  
20 half as may be appropriate to ensure that the  
21 venture will receive the protections provided  
22 under subsection (b).

23 (C) REQUIRED SUBMISSION OF INFORMA-  
24 TION ON CHANGES TO VENTURE.—A health  
25 care cooperative venture for which a notification

1 is in effect under this section shall submit infor-  
2 mation on any change in the membership of the  
3 venture not later than 90 days after such  
4 change occurs.

5 (4) PUBLICATION OF NOTIFICATION.—

6 (A) INFORMATION MADE PUBLICLY AVAIL-  
7 ABLE.—Not later than 30 days after receiving  
8 a notification with respect to a venture under  
9 paragraph (1), the Attorney General shall pub-  
10 lish in the Federal Register a notice with re-  
11 spect to the venture that identifies the parties  
12 to the venture and generally describes the pur-  
13 pose and planned activity of the venture. Prior  
14 to its publication, the contents of the notice  
15 shall be made available to the parties to the  
16 venture.

17 (B) RESTRICTION ON DISCLOSURE OF  
18 OTHER INFORMATION.—All information and  
19 documentary material submitted pursuant to  
20 this section and all information obtained by the  
21 Attorney General in the course of any investiga-  
22 tion or case with respect to a potential violation  
23 of the antitrust laws by the health care coopera-  
24 tive venture (other than information and mate-  
25 rial described in subparagraph (A)) shall be ex-

1           empt from disclosure under section 552 of title  
2           5, United States Code, and shall not be made  
3           publicly available by any agency of the United  
4           States to which such section applies except in  
5           a judicial proceeding in which such information  
6           and material is subject to any protective order.

7           (5) WITHDRAWAL OF NOTIFICATION.—Any per-  
8           son who files a notification pursuant to this section  
9           may withdraw such notification before a publication  
10          by the Attorney General pursuant to paragraph (4).  
11          Any person who is deemed to have filed a notifica-  
12          tion under paragraph (2)(A) shall be deemed to have  
13          withdrawn the notification if the certificate of review  
14          in question is revoked or withdrawn under section 5.

15          (6) NO JUDICIAL REVIEW PERMITTED.—Any  
16          action taken or not taken by the Attorney General  
17          with respect to notifications filed pursuant to this  
18          subsection shall not be subject to judicial review.

19          (b) PROTECTIONS FOR VENTURES SUBJECT TO NO-  
20          TIFICATION.—

21                  (1) IN GENERAL.—

22                          (A) PROTECTIONS DESCRIBED.—The pro-  
23                          visions of paragraphs (2), (3), (4), and (5) shall  
24                          apply with respect to any action under the anti-  
25                          trust laws challenging conduct within the scope

1 of a notification which is in effect pursuant to  
2 subsection (a)(1).

3 (B) TIMING OF PROTECTIONS.—The pro-  
4 tections described in this subsection shall apply  
5 to the venture that is the subject of a notifica-  
6 tion under subsection (a)(1) as of the earlier  
7 of—

8 (i) the date of the publication in the  
9 Federal Register of the notice published  
10 with respect to the notification; or

11 (ii) if such notice is not published dur-  
12 ing the period required under subsection  
13 (a)(4), the expiration of the 30-day period  
14 that begins on the date the Attorney Gen-  
15 eral receives any necessary information re-  
16 quired to be submitted under subsection  
17 (a)(1) or any additional information re-  
18 quired by the Attorney General under sub-  
19 section (a)(3)(A).

20 (2) APPLICABILITY OF RULE OF REASON  
21 STANDARD.—In any action under the antitrust laws,  
22 the conduct of any person which is within the scope  
23 of a notification filed under subsection (a) shall not  
24 be deemed illegal per se, but shall be judged on the  
25 basis of its reasonableness, taking into account all

1 relevant factors affecting competition, including, but  
2 not limited to, effects on competition in relevant  
3 markets.

4 (3) LIMITATION ON RECOVERY TO ACTUAL  
5 DAMAGES AND INTEREST.—Notwithstanding section  
6 4 of the Clayton Act, any person who is entitled to  
7 recovery under the antitrust laws for conduct that is  
8 within the scope of a notification filed under sub-  
9 section (a) shall recover the actual damages sus-  
10 tained by such person and interest calculated at the  
11 rate specified in section 1961 of title 28, United  
12 States Code, for the period beginning on the earliest  
13 date for which injury can be established and ending  
14 on the date of judgment, unless the court finds that  
15 the award of all or part of such interest is unjust  
16 under the circumstances.

17 (4) AWARD OF ATTORNEY'S FEES AND COSTS  
18 OF SUIT.—

19 (A) IN GENERAL.—In any action under the  
20 antitrust laws brought against a health care co-  
21 operative venture for conduct that is within the  
22 scope of a notification filed under subsection  
23 (a), the court shall, at the conclusion of the ac-  
24 tion—

1 (i) award to a substantially prevailing  
2 claimant the cost of suit attributable to  
3 such claim, including a reasonable attor-  
4 ney's fee, or

5 (ii) award to a substantially prevailing  
6 party defending against such claim the  
7 cost of such suit attributable to such claim,  
8 including reasonable attorney's fee, if the  
9 claim, or the claimant's conduct during  
10 litigation of the claim, was frivolous, un-  
11 reasonable, without foundation, or in bad  
12 faith.

13 (B) OFFSET IN CASES OF BAD FAITH.—  
14 The court may reduce an award made pursuant  
15 to subparagraph (A) in whole or in part by an  
16 award in favor of another party for any part of  
17 the cost of suit (including a reasonable attor-  
18 ney's fee) attributable to conduct during the  
19 litigation by any prevailing party that the court  
20 finds to be frivolous, unreasonable, without  
21 foundation, or in bad faith.

22 (5) RESTRICTIONS ON ADMISSIBILITY OF IN-  
23 FORMATION.—

24 (A) IN GENERAL.—Any information dis-  
25 closed in a notification submitted under sub-

1 section (a)(1) and the fact of the publication of  
2 a notification by the Attorney General under  
3 subsection (a)(4) shall only be admissible into  
4 evidence in a judicial or administrative proceed-  
5 ing for the sole purpose of establishing that a  
6 party to a health care cooperative venture is en-  
7 titled to the protections described in this sub-  
8 section.

9 (B) ACTIONS OF ATTORNEY GENERAL.—

10 No action taken by the Attorney General pursu-  
11 ant to this section shall be admissible into evi-  
12 dence in any judicial or administrative proceed-  
13 ing for the purpose of supporting or answering  
14 any claim under the antitrust laws.

15 **SEC. 7. REVIEW AND REPORTS ON SAFE HARBORS AND**  
16 **CERTIFICATES OF REVIEW.**

17 (a) IN GENERAL.—The Attorney General (in con-  
18 sultation with the Secretary and the Chair) shall periodi-  
19 cally review the safe harbors described in section 3, the  
20 additional safe harbors designated under section 4, and  
21 the certificates of review issued under section 5, and—

22 (1) with respect to the safe harbors described in  
23 section 3, submit such recommendations to Congress  
24 as the Attorney General considers appropriate for  
25 modifications of such safe harbors;

1           (2) with respect to the additional safe harbors  
2           under designated under section 4, issue proposed re-  
3           visions to such activities and publish the revisions in  
4           the Federal Register; and

5           (3) with respect to the certificates of review,  
6           submit a report to Congress on the issuance of such  
7           certificates, and shall include in the report a descrip-  
8           tion of the effect of such certificates on increasing  
9           access to high quality health care services at reduced  
10          costs.

11          (b) RECOMMENDATIONS FOR LEGISLATION.—The  
12          Attorney General shall include in the reports submitted  
13          under subsection (a)(3) any recommendations of the At-  
14          torney General for legislation to improve the program for  
15          the issuance of certificates of review established under this  
16          title.

17          **SEC. 8. RULES, REGULATIONS, AND GUIDELINES.**

18          (a) SAFE HARBORS, CERTIFICATES, AND NOTIFICA-  
19          TIONS.—The Attorney General, with the concurrence of  
20          the Secretary, shall promulgate such rules, regulations,  
21          and guidelines as are necessary to carry out sections 3,  
22          4, 5, and 6, including guidelines relating to appropriate  
23          geographic and product areas for health care services and  
24          providers of health care services.

25          (b) GUIDANCE FOR PROVIDERS.—



1           (1) IN GENERAL.—To promote greater cer-  
2           tainty regarding the application of the antitrust laws  
3           to activities in the health care market, the Attorney  
4           General, in consultation with the Secretary and the  
5           Chair, shall (not later than 1 year after the date of  
6           the enactment of this Act), taking into account the  
7           criteria used to designate additional safe harbors  
8           under section 4 and grant certificates of review  
9           under section 5, publish guidelines—

10                   (A) to assist providers of health care serv-  
11                   ices in analyzing whether the activities of such  
12                   providers may be subject to a safe harbor under  
13                   sections 3 or 4; and

14                   (B) describing specific types of activities  
15                   which would meet the requirements for a cer-  
16                   tificate of review under section 5, and summa-  
17                   rizing the factual and legal bases on which the  
18                   activities would meet the requirements.

19           (2) PERIODIC UPDATE.—The Attorney General  
20           shall periodically update the guidelines published  
21           under paragraph (1) as the Attorney General consid-  
22           ers appropriate.

23           (3) WAIVER OF ADMINISTRATIVE PROCEDURE  
24           ACT.—Section 553 of title 5, United States Code,

1 shall not apply to the issuance of guidelines under  
2 paragraph (1).

3 **SEC. 9. ESTABLISHMENT OF HHS OFFICE OF HEALTH CARE**  
4 **COMPETITION POLICY.**

5 (a) IN GENERAL.—There is established within the  
6 Department of Health and Human Services an Office to  
7 be known as the Office of Health Care Competition Policy  
8 (hereafter in this section referred to as the “Office”). The  
9 Office shall be headed by a director, who shall be ap-  
10 pointed by the Secretary.

11 (b) DUTIES.—The Office shall coordinate the respon-  
12 sibilities of the Secretary under this Act and otherwise as-  
13 sist the Secretary in developing policies relating to the  
14 competitive and collaborative activities of providers of  
15 health care services.

16 **SEC. 10. DEFINITIONS.**

17 In this Act, the following definitions shall apply:

18 (1) The term “antitrust laws”—

19 (A) has the meaning given it in subsection  
20 (a) of the first section of the Clayton Act (15  
21 U.S.C. 12(a)), except that such term includes  
22 section 5 of the Federal Trade Commission Act  
23 (15 U.S.C. 45) to the extent such section ap-  
24 plies to unfair methods of competition; and

1 (B) includes any State law similar to the  
2 laws referred to in subparagraph (A).

3 (2) The term “Chair” means the Chair of the  
4 Federal Trade Commission.

5 (3) The term “health benefit plan” means any  
6 hospital or medical expense incurred policy or certifi-  
7 cate, hospital or medical service plan contract, or  
8 health maintenance subscriber contract, or a mul-  
9 tiple employer welfare arrangement or employee ben-  
10 efit plan (as defined under the Employee Retirement  
11 Income Security Act of 1974) which provides bene-  
12 fits with respect to health care services.

13 (4) The term “health care cooperative venture”  
14 means any activities, including attempts to enter  
15 into or perform a contract or agreement, carried out  
16 by 2 or more persons for the purpose of providing  
17 health care services.

18 (5) The term “health care services” means any  
19 services for which payment may be made under a  
20 health benefit plan, including services related to the  
21 delivery or administration of such services.

22 (6) The term “medical self-regulatory entity”  
23 means a medical society or association, a specialty  
24 board, a recognized accrediting agency, or a hospital  
25 medical staff, and includes the members, officers,

1 employees, consultants, and volunteers or commit-  
2 tees of such an entity.

3 (7) The term “person” includes a State or unit  
4 of local government.

5 (8) The term “provider of health care services”  
6 means any individual or entity that is engaged in the  
7 delivery of health care services in a State and that  
8 is required by State law or regulation to be licensed  
9 or certified by the State to engage in the delivery of  
10 such services in the State.

11 (9) The term “Secretary” means the Secretary  
12 of Health and Human Services.

13 (10) The term “specialty group” means a medi-  
14 cal specialty or subspecialty in which a provider of  
15 health care services may be licensed to practice by  
16 a State (as determined by the Secretary in consulta-  
17 tion with the certification boards for such specialties  
18 and subspecialties).

19 (11) The term “standard setting and enforce-  
20 ment activities” means—

21 (A) accreditation of health care practition-  
22 ers, health care providers, medical education in-  
23 stitutions, or medical education programs,

24 (B) technology assessment and risk man-  
25 agement activities,

1 (C) the development and implementation of  
2 practice guidelines or practice parameters, or

3 (D) official peer review proceedings under-  
4 taken by a hospital medical staff (or committee  
5 thereof) or a medical society or association for  
6 purposes of evaluating the professional conduct  
7 or quality of health care provided by a medical  
8 professional.

○

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