COMMENTS OF MICHIGAN HOSPITAL ASSOCIATION TO PART 3 OF FTC RULES OF PRACTICE

On May 30, the Federal Trade Commission ("FTC") announced that FTC General Counsel Stephen Calkins would chair a special task force to evaluate current rules in Part 3 of the FTC Rules of Practice. The task force was to specifically consider changes to make the process of litigation in administrative cases more efficient and effective.

The Michigan Health and Hospital Association ("MHA") submits these comments in response to that announcement. MHA is an association of hospitals, health systems, and other health care providers throughout Michigan who work together with patients, communities, and providers to improve health care for all Michigan citizens by addressing current health care issues.

MHA is particularly concerned with the FTC rules of practice insofar as they govern administrative merger litigation. In order to reduce health care costs and remain competitive, many hospitals are considering mergers or joint ventures with other hospitals in order to remain competitive and financially viable. The prospect of lengthy and expensive antitrust enforcement proceedings has caused many of these providers significant concern. The greatest expense and longest proceedings result from FTC action, and Michigan hospitals have been specifically concerned about the expense and time involved in the FTC administrative litigation process.

MHA believes that the process can, and should, be streamlined, at least with respect to mergers. Indeed, the Commission's current rules provide that "[i]n the conduct of such proceedings the Administrative Law Judge and counsel for all parties shall make every effort at each state of a proceeding to avoid delay." Rules § 3.1.

Unfortunately, however, Rule 3.1's purpose and spirit has not been achieved. Commission administrative cases, especially in the merger context, have not been efficient, effective or

expeditious. As recently noted by the court in FTC v. Freeman, 1995 Trade Cas. (CCH) ¶ 71,037 at 74,893 n.8 (D. Mo. 1995), "[t]he average time from the issuance of a complaint by the FTC to an initial decision by an administrative law judge averaged nearly three years in 1988. Moreover, additional time will be required if that initial decision is appealed."

An administrative process which lasts three years (or much longer if, as is frequently the case, appeals are taken) certainly serves the interest of no one. This is particularly true in the case of mergers, which are often enjoined throughout this time period. Delaying a merger for three, four or five years will often have the effect of "killing" the transaction, since the parties will see little sense in retaining a commitment to a transaction whose benefits cannot be achieved for so many years.

Even if no injunction issues, the parties are often severely inhibited by such delays, particularly in their efforts to effectuate the cost-saving aims of the merger, through consolidation of operations. This is because the merging parties face the risk that the transaction could later be declared void, and their efforts undone by a divestiture order that may be especially costly if the parties have consolidated their operations in the interim. The parties will often decide that the risks of divestiture three to five years down the road make short term consolidations too risky. They therefore often conclude that the cost-saving benefits from the transaction are too problematic in the short run to justify the merger.

Moreover, the FTC's interests not served by a lengthy process. Three years or more after the issuance of a complaint may simply be too late for the FTC to "unscramble the eggs", even of a transaction which it believes may be anticompetitive.

MHA therefore requests that the FTC adopt changes to the current Part 3 rules to allow for a more expedient resolution of administrative actions, at least in the merger context.[1] There is no reason why the FTC cannot be as efficient as many trial courts, which are increasingly adopting rules requiring very rapid trials. Nor is there any reason why the FTC should require more time to decide a merger case than the federal courts which have reached final decisions in merger cases brought by the Department of Justice in well under one year. See e.g. U.S. v. Rockford Memorial Corp., 717 F. Supp. 1251(N.D. Ill 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990), *cert. denied*, 498 U.S. 920 (District court decision within eight months of filing of complaint), U.S. v. Carillion Health System, 707 F.Supp 840 (W.D. Va. 1989), *aff'd*, 1989-2 Trade Cases. (CCH) ¶68,859 (4th Cir. 1989) (decision within nine months).

MHA believes that such a result could be achieved by requiring a decision by the Administrative Law Judge in merger cases on a more accelerated basis, and by expediting many of the steps in the merger litigation process. MHA also urges the Commission to adopt rules which would allow for a more accelerated resolution of appeals.

The following represent some possible areas of reform, which could help assure that merger litigation is resolved more quickly. One such area involves the time period for commencement of trials. Currently, § 3.21(c) states that the ALJ shall enter a schedule that provides for the "commencement of the evidentiary hearings within six months after entry of the order, unless the Administrative Law Judge determines that a later date is necessary because of

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[1] MHA believes that the most important reform in this area would be to eliminate administrative litigation when the merging parties prevail in a preliminary injunction proceeding. However, MHA understands that this issue has recently been addressed by the FTC, and is not the subject of this current request for comments.

the complexity of the case or circumstances beyond the control of the parties." This schedule is set after the filing of the Complaint, the Answer, the nonbinding statements of the parties, and a scheduling conference. Id. Under the FTC's rule, this scheduling occurs fully 10 weeks after the filing of the complaint. The parties should not have to wait 10 weeks simply for a hearing schedule.

MHA urges the Commission to change Rule § 3.21(c) to require the commencement of an evidentiary hearing in a merger case within six months after the earlier of (1) the filing of the administrative complaint or (2) the filing of the complaint in any preliminary injunction proceeding. A conference to set the schedule should be set immediately after the filing of the complaint. Such a schedule will be achievable in merger cases, since the parties and the FTC will have spent substantial time prior to the issuance of the complaint investigating the transaction, and in light of the discovery that will simultaneously be occurring in a preliminary injunction proceeding. The requirement that the hearing commence within six months after the earlier of the filing of the administrative or preliminary injunction complaint will eliminate any delay in the filing of the administrative complaint.

Other steps could be taken to help achieve this schedule. To permit rapid preparation for trial, the time periods for responding to interrogatories and requests for admissions should be shortened. Requirements for immediate exchanges of information similar to those contained in Federal Rule of Civil Procedure 26(a) should be considered.

While the ALJ should still be permitted to determine that some cases will require a lengthier schedule, the presumption ought to be strongly against such a result, and there ought to be limits on the Administrative Law Judge's discretion to change the schedule. A delay should

only be permitted on a finding that it is necessary to allow the parties to prepare for the hearing, and only after a finding that the parties have to date exercised due diligence in their efforts to meet the schedule.

The most important reform would involve a limitation on the length of the hearing itself. Even many complex merger cases have been tried in federal courts in two to three weeks; there is no reason why most ALJ hearings should not proceed as quickly. The rules should provide that merger hearings will be completed, and all evidence received, within 30 days of their commencement, unless the ALJ finds that, despite the diligent efforts of the parties and all reasonable scheduling efforts, the case cannot be reasonably completed within the time period allowed.

Speedy hearings can also be encouraged by procedures to limit the need for lengthy oral testimony. This could include permitting either party, at its discretion, to submit written direct examination (to be followed by live cross examination). The submission of deposition testimony in lieu of live testimony should also be permitted. Additionally, discovery in any preliminary injunction proceeding should be fully usable in all administrative proceedings, and trial exhibits and transcripts of testimony in preliminary injunction proceedings should be fully admissible in administrative merger litigation. This will eliminate the need for duplicative efforts.

MHA also urges that § 3.54 be changed to require the Commission to rule on appeals within a specified period of time. Currently, there is no time period set forth by which the Commission must rule on an appeal. MHA urges that § 3.54 be modified to require the Commission to issue a decision on appeal in a merger case within 60 days after oral argument. MHA would also urge that § 3.52 be modified to require that oral arguments be heard within 30

days after the filing of that last brief under § 3.52(d). The Commission should be able to meet this schedule in merger cases if they are given priority. Circuit courts of appeals frequently decide complex matters in preliminary injunction cases on a more accelerated basis.

There may well be other changes, and variations on these proposals, that are advisable. What is critical is that a process be established with deadlines that assure that administrative merger litigation at the FTC be completed in approximately one year. Such a change is necessary to assure that the merits, rather than the prospect of expense and delays, decide which mergers are completed by the parties.

Implementing these changes will make the conduct of administrative litigation more efficient and effective. In the health care context, it will benefit not only health care providers who are partners to a transaction, but ultimately the public, the purchasers and consumers of health care services.

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