1251 *et seq.*, against Wayne County, Michigan, and 13 addition municipalities that send wastewater to the Wayne's Treatment Plant (the ''Plant''). The case was resolved in 1994 by a Consent Decree pursuant to which defendants agreed to attain and maintain compliance with the Plant's National Pollutant Discharge Elimination System permit limits and to comply with Decree-mandated interim limits during construction of Plant and collection-system improvements. On March 3, 1998, the Court entered a Amendment to the 1994 Consent decree providing for, among other things, the construction of an ultraviolet radiation (''UV'') disinfection system to replace the current chlorination/dechlorination facilities.

In the course of planning to build the UV system, the defendants determined that they cannot continue to dechlorinate the Plant's effluent while constructing the UV disinfection system, due to physical space limitations at the Plant. Without dechlorinating, the Plant will not meet its 0.5 mg/l total residual chlorine (''TRC'') limit. To resolve this issue, the proposed Second Amendment would allow the Plant to suspend compliance with its TRC limit during construction of the UV disinfection system, but would require the Plant to implement an Interim Chlorine Control Plan to minimize the use of chlorine while the TRC limit is suspended, to ensure that the federal and state regulators are kept informed regarding the plant's implementation of the Interim Plan, and to keep potentially affected downriver communities informed regarding the interim change in Wayne County's chlorine discharge limit. The Second Amendment also provides for stipulated penalties for failure to complete construction of the UV disinfection system on schedule, to submit the required Interim Chlorine Control Plan, or to submit required monthly reports regarding the Plan's implementation.

The court has directed the parties to seek entry of the proposed Second Amendment on or before October 15, 1998. Accordingly, pursuant to 28 CFR 50.7(c), the Department of Justice will receive for the period ending October 12, 1998, at 5:00 p.m., comments relating to the Second Amendment. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States and State of Michigan* v. *Wayne County et al.*, D.J. Ref. 90–5–1–1–2766.

The Second Amendment may be examined at the Office of the United States Attorney, Eastern District of Michigan, 211 W. Fort Street, Suit 2300, Detroit, MI 48226, at U.S. EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois, 60604, and at the Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the Second Amendment may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 3rd Floor, Washington, D.C. 20005. In requesting a copy, please enclose a check in the amount of $6.75 (25 cents per page reproduction cost) payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section/ Environment and Natural Resources Division.

[FR Doc. 98–26307 Filed 9–30–98; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Antitrust Division

United States of America v. Medical Mutual of Ohio; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. Section 16 (b) through (h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the Northern District of Ohio, in *United States of America* v. *Medical Mutual of Ohio*, Civil Action No. 1:98–CV–2172. On Sept. 23, 1998, the United states filed a Complaint against Medical Mutual of Ohio alleging that Medical Mutual had unreasonably restrained competition in the greater Cleveland area in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The proposed Final Judgment, filed the same time as the Complaint, restrains Medical Mutual from enforcing a Most Favored Rates requirement and from requiring its participating hospitals in the Cleveland area to disclose to Medical Mutual the rates such hospitals offer or charge any payers. Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice in Washington, DC in Room 400, 325 Seventh Street, NW., and at the Office of the Clerk of the United States District Court for the Northern District of Ohio, Ohio.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Gail Kursh, Chief, Healthcare Task Force, 325 Seventh Street, NW., Room 404, Antitrust Division, Department of Justice, Washington, DC 20530, (telephone (202) 307–5799).

Rebecca P. Dick,

Director of Civil Non-Merger Enforcement.

Stipulation for Entry of Final Judgment

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

1. This Court has jurisdiction over the subject matter of this action and over both of the parties, and venue of this action is proper in the Northern District of Ohio.

2. The parties consent that a Final Judgment in the form attached may be filed and entered by the Court, upon the motion of either party or upon the Court's own action, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. 16), and without further notice to any party or other proceedings, provided that Plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on Defendant and by filing that notice with the Court.

3. If Plaintiff withdraws its consent, or if the proposed Final Judgment is not entered pursuant to the terms of this Stipulation, this Stipulation shall be of no effect whatsoever, and the making of this Stipulation shall be without prejudice to either party in this or in any other proceeding.

4. Defendant agrees to be bound by the provisions of the proposed Final Judgment pending its approval by the Court.

Dated: _____.

For Plaintiff:
Joel I. Klein,
Assistant Attorney General.
Donna E. Patterson,
Deputy Assistant Attorney General.
Rebecca P. Dick,
Director of Civil Non-Merger Enforcement.
Gail Kursh,
Chief, Health Care Task Force.
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For Defendant:
Wayne C. Dabb, Jr.,
Gerald A. Connell,
Baker & Hostetler, LLP, 3200 National City Center, 1900 East Ninth Street, Cleveland, OH 44114–3485, (216) 621–0200.

Final Judgment

Plantiff, United States of America, filed its Complaint alleging violations of Section 1 of the Sherman Act, 15 U.S.C. 1, on September 23, 1998. Plaintiff and Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trail or final adjudication of any issue of fact or law. This Final Judgment shall not be evidence against any party or deemed an admission by any party of any issue of fact or law, nor shall it be deemed a determination that any violation of law has occurred. Therefore, before the taking of any trial testimony, without trial of any issue of fact or law, and upon consent of the parties, it is

Ordered, adjudged, and decreed, as follows:

I. Jurisdiction

This Court has jurisdiction over the subject matter of this action and over each of the consenting parties. The Complaint states a claim upon which relief may be granted under Section 1 of the Sherman Act, 15 U.S.c. 1.

II. Definitions

As used herein, the term:

(A) *Cleveland Region* means Ashtabula, Cuyahoga, Geauga, Lake, Lorain, Medina, and Wayne Counties of the State of Ohio;

(B) *Defendant* of *Medical Mutual* means Medical Mutual of Ohio, is subsidiaries, divisions, successors, assigns, and each other entity directly or indirectly owned or controlled by it;

(C) *Hospital* means any entity in the Cleveland Region licensed to provide acute care in-patient services;

(D) *Hospital Agreement* means any agreement between Medical Mutual and a Hospital in the Cleveland Region for the provision of in-patient or out-patient hospital services to Medical Mutual's subscribers, and all amendments and additions to any such agreements;

(E) *Most Favorable Rates Requirement* means any policy, practice, rule, or contractual provision which (1) requires a Participating Hospital to charge any Third Party Payer as much as or more than the rate charged to Medical Mutual by such Participating Hospital, or (2) requires a Participating Hospital to charge Medical Mutual rates equal to or lower than the lowest rate it charges any Third Party Payer;

(F) *Participating Hospital* means any Hospital in the Cleveland Region that has entered into a Hospital Agreement with Medical Mutual;

(G) *Third Party Payer* means any non-governmental entity, other than Medical Mutual, that pays for all or part of any expense for health care services provided by a Hospital to another person or group of persons.

III. Applicability

This Final Judgment applies to Medical Mutual and all other persons (including all Participating Hospitals) in active concert or participation with it who have received actual notice of the Final Judgment by personal service or otherwise.

IV. Prohibited Conduct

Medical Mutual is enjoined and restrained from:

(A) Adopting, maintaining, or enforcing in the Cleveland Region a Most Favorable Rates Requirement or any policy, practice, rule, or contractual provision having the same purpose or effect;

(B) Adopting, maintaining, or enforcing any policy, practice, or agreement that requires a Participating Hospital to disclose to Medical Mutual, directly or indirectly, through audit or any other means, the rates such Hospital offers or charges any Third Party Payer(s), except as necessary for coordination of benefits in connection with specific claims.

V. Permitted Activities

Provided that such activities do not violate any provision of Section IV, nothing herein shall be construed to prohibit Medical Mutual from:

(A) Negotiating for or obtaining rate arrangements, reimbursement levels, or payment methodologies with any Participating Hospital, whether on an overall or product line basis, including negotiating for or obtaining the lowest rate(s) or largest discount(s) from any Participating Hospital;

(B) Receiving or accepting information regarding the rates a Hospital offers or charges any Third Party Payer so long as the Hospital provides such information without any request from Medical Mutual and without any offer or promise of consideration for such information from Medical Mutual;

(C) Establishing preferred provider networks, other forms of provider panels, or alternative delivery systems;

(D) Recruiting hospitals who have contracts with or are participating in hospital networks or panels of Third Party Payers;

(E) Having different rate arrangements, reimbursement levels, or payment methodologies for different product lines, for different hospitals, or for different networks or panels of hospitals;

(F) Declining or refusing to contract or do business with any hospital, or terminating any hospital agreement.

VI. Nullification

All Most Favorable Rates Requirements in the Cleveland Region are hereby declared null and void and shall impose no obligation on any Participating Hospital.

VII. Compliance Measures

Medical Mutual shall:

(A) Distribute, within 60 days of the entry of this Final Judgment, a copy of this Final Judgment to: (1) all of Medical Mutual's officers and trustees; and (2) all of Medical Mutual's employees and agents who are responsible for negotiating, approving, disapproving, or enforcing any Hospital Agreement, except employees and agents primarily involved in the administration of payments to and collections from Hospitals;

(B) Distribute in a timely manner a copy of this Final Judgment to any officer, trustee employee, or agent who succeeds to a position described in Section VII(A);

(C) Obtain from each present of future officer, trustee, employee, or agent designated in Section VII(A), within 60 days of entry of this Final Judgment or of the person's succession to a designated position, a written certification that he or she: (1) has read, understands, and agrees to abide by the terms of this Final Judgment; and (2) has

been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

(D) Maintain a record of persons to whom the Final judgment has been distributed and from whom, pursuant to Section VII(C), the Certification has been obtained;

(E) Distribute, within 60 days of the entry of this Final Judgment, a copy of this Judgment, by first-class mail, to all currently Participating Hospitals;

(F) Provide a copy of this Final Judgment to any Hospital in the Cleveland Region not covered by Section VII(E) with which Medical Mutual enters into negotiations for a Hospital Agreement after the effective date of this Judgment;

(G) Promptly report to the Plaintiff any violation of the Final Judgment.

VIII. Certification

(A) Within 75 days of the entry of this Final Judgment, Medical Mutual shall certify to the Plaintiff that it has: (1) distributed the Final Judgment in accordance with Section VII(A) and (E); and (2) obtained certifications in accordance with Section VII(C).

(B) For ten years after the entry of this Final Judgment, on or before its anniversary date, Medical Mutual shall file with the Plaintiff an annual Declaration as to the fact and manner of its compliance with the provisions of Sections IV, VI, and VII.

IX. Plaintiff's Access to Information

(A) To determine or secure compliance with this Final Judgment, duly authorized representatives of the Plaintiff, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Medical Mutual made to its principal office, shall be permitted, subject to any legally recognized privilege:

(1) Access during Medical Mutual's office hours to inspect and copy all documents in the possession or under the control of Medical Mutual, which may have counsel present, relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of Medical Mutual and without restraint or interference from it, to interview officers, trustees, employees, or agents of Medical Mutual, who may have Medical Mutual's counsel and/or their own counsel present, regarding such matters.

(B) Upon the written request of the Assistant Attorney General in charge of the Antitrust Division made to Medical Mutual's principal office, Medical Mutual shall submit such written reports, under oath if requested, relating to any matters contained in this Final Judgment as may be reasonably requested, subject to any legally recognized privilege.

(C) Medical Mutual shall have the right to be represented by counsel in any process under this Section.

(D) No information or documents obtained by the means provided in Section IX shall be divulged by the Plaintiff to any person other than duly authorized representatives of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(E) If at the time information or documents are furnished by Medical Mutual to Plaintiff, Medical Mutual represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Medical Mutual marks each pertinent page of such material, ''subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then 10 days notice shall be given by Plaintiff to Medical Mutual prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Medical Mutual is not a party.

(F) Nothing in this Final Judgment prohibits the Plaintiff from using any other investigatory method authorized by law.

X. Further Elements of the Final Judgment

(A) This Final Judgment shall expire ten years from the date of its entry.

(B) Jurisdiction is retained by this Court for the purpose of enabling either of the parties to this Final Judgment, but no other person, to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment; to modify or terminate any of its provisions, based on changed circumstances of fact or law warranting such action; to enforce compliance; or to punish violations of its provisions.

(C) The Court finds that this Final Judgment is in the public interest.

United States District Judge

Dated: _____.

Competitive Impact Statement

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States submits this Competitive Impact Statement to provide the information necessary to enable the Court and the public to evaluate the proposed Final Judgment that the parties have jointly filed.

I. Nature and Purpose of This Proceeding

Simultaneous with the filing of this Statement, the United States filed a civil antitrust complaint against Medical Mutual of Ohio (''Medical Mutual''), the largest health care insurer in Ohio, for unreasonably restraining competition in the hospital services and commercial health plan markets in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The Complaint alleges that for over ten years Medical Mutual required that any hospital wishing to do business with it in the ''Cleveland Region,'' a seven-county area consisting of Cuyahoga, Ashtabula, Geauga, Lake, Lorain, Medina, and Wayne Counties, agree to a ''Most Favorable Rates'' (''MFR'') clause; that this MFR clause had the effect of requiring those hospitals to charge Medical Mutual's competitors significantly more than they charged Medical Mutual or pay substantial penalties; that the MFR clause stifled the development of innovative and less costly health plans; and that, as a result, businesses and consumers in the Cleveland Region paid higher than competitive prices and were deprived of innovative and less costly alternatives for health care services.

The parties have stipulated that the proposed Final Judgment may be entered after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. 16), and that Medical Mutual shall be bound by the provisions of the proposed Final Judgment pending the Court's approval. The parties also agreed that the United States may withdraw its consent at any time prior to the entry of the Final Judgment by serving notice of that withdrawal on Medical Mutual and by filing that notice with the Court. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction over the matter for any further proceedings that may be required to interpret, enforce, or modify the Judgment or to punish violations of any of its provisions. This Court is required by 15 U.S.C. 16(e) to determine whether the proposed Final Judgment is in the public interest.

II. Practices Giving Rise to the Alleged Violation

Medical Mutual, a non-for-profit mutual insurance company organized

under Ohio law, is by far the largest commercial health care insurer in the Cleveland Region. With more than 730,000 enrollees there, it covers approximately 36% of the commercially insured population and is roughly twice the size of its closest competitor. Medical Mutual also accounts for approximately 25 to 30% of commercial payments to local hospitals, and nearly all of these hospitals depend on Medical Mutual for the largest share of their commercial business.

A. Medical Mutual's MFR Clause

Starting in 1986, Medical Mutual required a MFR clause as a precondition for entering into an agreement with any hospital in the Cleveland Region. Those provisions, in effect, compelled the hospitals to charge non-governmental health plans with a lower total dollar volume of business than Medical Mutual rates equal to or greater than the rates the hospital charged Medical Mutual. Not content with ensuring that it had the best rate, Medical Mutual—through its MFR clause—also required that the hospitals maintain certain percentage differentials between the rates charged Medical Mutual and all other smaller commercial payers. Those differentials provided Medical Mutual with a cost advantage of 15–30% over its competitors in the purchase of hospital services.

Medical Mutual's MFR clause created such rate differentials in several ways. First, it required that the hospitals charge all other payers with less volume at the hospital at least as much as they charged Medical Mutual for services to Medical Mutual's indemnity subscribers. Since Medical Mutual typically paid hospitals 15–20% less for services provided to its managed care subscribers, pegging the MFR clause to its indemnity prices automatically gave Medical Mutual a substantial cost advantage over its managed care competitors. In effect, the MFR created a buffer of at least 15–20% between Medical Mutual's managed care costs and the managed care costs of its rivals.

Second, starting in 1990, Medical Mutual began insisting that the hospitals charge all other health plans 1–10% more than they charged Medical Mutual for its indemnity plan. This requirement not only protected Medical Mutual's indemnity plan against competition, but also further widened the cost differential between Medical Mutual's managed care plans and those of its rivals. Hospitals were required to charge rival payers up to 30% more than they charged Medical Mutual for the same services.

Finally, while Medical Mutual reluctantly agreed in certain instances to a ''like-product'' MFR clause in which rates were compared on a product-line basis (indemnity to indemnity, managed care to managed care), it still sought to retain the cost advantage that the traditional MFR clause had given it. It did so by explicitly requiring hospitals with such agreements to charge all other plans with less total volume 10–15% more than they charged Medical Mutual.

B. Medical Mutual's Enforcement of the MFR Clause

Medical Mutual vigorously enforced its MFR clause—and the rate differentials—with the express purpose of protecting Medical Mutual against competition and significantly raising its competitor's hospital costs. Typically, if a rival player received discounts greater than those given to Medical Mutual, the auditor would multiply the percentage difference by Medical Mutual's total payments to that hospital. Thus, a rate 10% lower than Medical Mutual's would yield a $200,000 penalty if Medical Mutual's total business for the relevant contract year at that hospital was as little as $2 million. As Medical Mutual accounted for the largest share of nearly every hospital's commercial business—dwarfing the volume of most other payers in the market—the MFR penalties could be quite large and were often grossly disproportionate to the benefit received by the rival plan, *i.e.*, the amount that would have allowed the hospital to avoid violating the MFR provision.[1]

Even more significant was Medical Mutual's requirement that MFR compliance audits be conducted retrospectively—*i.e.*, after the other payers had reimbursed the hospital for its enrollees' claims. Concerned about the ability of competitors to lower their hospital costs through better management of hospital services, Medical Mutual decided—despite protests of unfairness by both hospitals and its own consultants—that the auditor was to determine the rates charged other payers, and thus violations of the MFR clause, retrospectively, *i.e.*, it was to look at actual reimbursement levels and not the contractual rate. By doing so it was able to impose penalties in those situations where the contractual discounts did not violate the MFR clause but where the effective discount, after factoring case mix and utilization management, was below the MFR rate. As one hospital complained to Medical Mutual: ''[under] this clause we could find ourselves in violation of the Favored Nations provision if a *per diem* payer through strong utilization review efforts reduced their length of stay and also their aggregate payments.'' In effect, the hospital would be penalized for a rival payer's greater efficiency.

C. Anticompetitive Effects of Medical Mutual's MFR Clause

As alleged in detail in the Complaint, Medical Mutual's MFR provision harmed competition and reduced consumer welfare in the hospital services and hospital insurance markets in the Cleveland Region by increasing the costs of hospital services for other plans, businesses, and consumers, and by discouraging innovation in the design of health insurance plans and the delivery of hospital services.

1. Medical Mutual's MFR Provision Substantially Increased the Cost of Hospital Services for Rival Plans

Because the MFR provisions required that hospitals charge Medical Mutual's competitors substantially more than they charged Medical Mutual or suffer significant penalties, various hospitals and hospitals systems, including MetroHealth, the Cleveland Clinic, University, Meridia, Lake, Marymount, Southwest General, Mt Sinai, and Fairview, were deterred from offering significant additional discounts—discounts up to 20% or more—to competing health plans. The result has been to increase the cost of hospital services to Medical Mutual's rivals and, ultimately to consumers.[2]

In addition, Medical Mutual's aggressive enforcement of the MFR clause discouraged hospitals from offering rates to rival plans even approaching the MFR rate. Since the differences between payment methods,

[1] For example, in 1991, Medical Mutual assessed a penalty of $342,916 against St. John West Shore Hospital for giving a rival payer a discount below Medical Mutual totaling $13,831; and in 1992, it assessed a penalty of $417,373 against Fairview Hospital System (then known as HealthCleveland) for giving a different rival payer a discount below Medical Mutual's rates totaling $30,781.

[2] Indeed, where the MFR clause has been inapplicable—whether due to an exemption or for some other reason—hospitals have demonstrated a willingness to give lower rates to Medical Mutual's rivals. Thus, when Kaiser Permanente became the largest payer at the Cleveland Clinic in 1994, and therefore exempt from the MFR provision, its per case rate for cardiac services alone declined by $2,000. Similarly, when Total Health Care and other payers handling Medicare and Medicaid enrollees obtained an exemption from the MFR clause, University Hospital and MetroHealth gave those plans rates below the MFR rate. Starting in 1996, when it entered the Medicaid and Medicare market, Medical Mutual stopped granting such exemptions and, as a result, those plans have been required to pay higher rates for hospital services.

patient mix, and case management, combined with Medical Mutual's retrospective review of actual reimbursement levels, made it difficult, if not impossible, for a hospital to accurately predict whether a contract would violate the MFR clause, hospitals simply refused to price anywhere near the MFR rate, routinely demanding rates from rival plans significantly above the MFR rate in order to protect against what could be a financially devastating penalty.

2. Hospitals and Rival Plans Entered Into Costly Contractual Arrangements Designed to Avoid Medical Mutual's MFR Provision

In addition to discouraging hospitals from offering favorable prices to rival payers. Medical Mutual's MFR clause forced hospitals to manipulate their contractual arrangements with other payers to avoid incurring a MFR penalty. The effect was to increase the cost of hospital services to Medical Mutual's competitors and ultimately to consumers.

For example, some hospitals insisted on using ''stop-loss'' provisions in their contracts with other payers to avoid MFR penalties. These clauses typically required their party payers to reimburse the hospital at a specified percentage of charges for claims that lay outside predetermined thresholds. MetroHealth Hospital, for example, insisted on such MFR-related ''stop-loss'' provisions in 90% of its contracts. University Hospital and Fairview Health System have similar provisions in a number of their contracts as well.[3] The additional costs due to these stop-loss provisions were borne by Medical Mutual's competitors and, ultimately, by the consumer.

Similary, some hospitals required payers to make payments over and above contracted rates to avoid a MFR penalty or to reimburse the hospital for any penalty incurred due to the MFR clause. Both mechanisms had the effect of raising the costs of Medical Mutual's rivals and, ultimately, to consumers. For example, Mt. Sinai Medial Center and CIGNA entered into ''reconciliation agreements'' beginning in 1992 which required CIGNA to reimburse Mt. Sinai any amounts necessary to avoid a MFR violation. CIGNA made retrospective payments to Mt. Sinai of over $600,000 for the years 1990–1992 alone so that Mt. Sinai could avoid over $4 million in MFR penalties that it would otherwise have owed to Medical Mutual.

Nor was Mt. Sinai the only hospital to do so. The Cleveland Clinic has a reconciliation agreement with Kaiser in the event its volume ever falls below Medical Mutual's volume. MetroHealth demanded that various payers, including Prudential, Aetna, QualChoice, and Personal Physician Care, make additional payments if MetroHealth's own MFR audit suggested a violation. Meridia Health System required some payers to reimburse if for any amount paid for a MFR violation University Hospital's contracts with Prudential required Prudential to make additional payments of $409,232.82 in 1996 alone.

Hospitals also demanded to re-negotiate existing agreements when faced with potential MFR violations. MetroHealth Hospital, for instance, requested HealthStar to re-negotiate rates in the midst of its 1993–94 contract because the patient mix was not as anticipated and would have caused a MFR violation, and required that Aetna agree to re-negotiate its rates if a MFR violation appeared likely. Southwest General increased Emerald's inpatient reimbursement in the middle of its contact period in 1993 and in 1995 demanded to re-negotiate several contracts, including the contract with HMO Aetna, to avoid a MFR violation. In 1995, the Cleveland Clinic re-negotiated Aetna's contract because the Clinic's new contract with Medical Mutual generated a higher MFR benchmark, one requiring a 20% increase in Aetna's inpatient rates. Still other examples include Lake Hospital demanding that CIGNA re-negotiate its contract after lake paid a $225,000 MFR pentaly; Meridia Health System terminating a contract with Affordable Health and re-negotiating a new contract of substantially higher rates after having been found in violation of the MFR provisions; and Meridia entering into an agreement with United HealthCare requiring the latter to re-negotiate its rates if the MFR clause was violated.

Finally, some hospitals simply terminated contacts with other payers when they were unable to re-negotiate terms: thus, Southwest General terminated its 1994 contract with CIGNA for behavioral services after it learned from Medical Mutual's auditor that CIGNA's 1992 contract violated the MFR clause and CIGNA refused to re-negotiate' Lake Hospital terminated its contract with Prudential because of the MFR and lost is contract with CostLogics after a 1992 MFR audit prompted lake to request a substantial rate increase; Lakewood lost its HMO Agreement with Metlife in 1992 because of the MFR; and University Hospital and Mutual of Omaha agreed to higher rates when Mutual of Omaha declined University's proposal to incorporate a reconciliation provision in their contract.

Medial Mutual has been well aware of the significant effect the MFR had on its rivals's costs, the demands by hospitals for retroactive payments from its rivals, the re-negotiation of contracts to increase existing rates, and even the termination of such contracts. Indeed, its recent contracts expressly provide that the hospital may elect, in order to avoid a violation of the MFR provision, to terminate, modify, or amend its contract with the other payer. The MFR's purpose and clear effect has been to increase the costs paid by other plans and, ultimately, by the consumer.

3. Medical Mutual's MFR Provision Hindered Innovation in the Delivery of Health Care Insurance

Medical Mutual's MFR provision also discouraged the development of innovative approaches to the efficient delivery of health insurance, particularly new contracting methodologies and novel health plan designs. Confronted by the threat posed by rival payers willing to invest in additional tools and resources to provide more efficient and better quality health care plans, Medical Mutual, through its MFR clause, required that all payers, regardless of utilization management, case mix, or other factors, pay a hospital at least as much or more than Medical Mutual for similar services. It a hospital's actual price to another payer was below the MFR benchmark for any reason, including more efficient management, Medical Mutual would assess a penalty against the hospital. The result was to force hospitals to raise all rates to Medical Mutual's level (or above), removing the principal incentive for other payers to invest in more efficient case management. Unable to obtain the benefits of more efficient case management, rival payers declined to invest in less costly methods and consumers were deprived of the choice of alternative plans.

Medical Mutual's MFR provisions also created a significance disincentive to the development of low-cost, narrow-panel health care plans in the Cleveland Region, thus depriving consumers of the choice of such plans. By limiting its

[3] Even those hospitals that would have insisted on ''stop-loss'' provisions were there no MFR clause (to avoid the financial risk associated with catastrophic or high acuity cases) demanded lower ''stop-loss'' thresholds because of the MFR clause. By lowering the ''stop-loss'' threshold, the hospital ensured that more services were priced above the competitive rate—increasing the total cost of hospital care. For example, the Columbia/HCA hospitals (St. Vincent Charity Hospital, St. Luke's Medical Center, and St. John Westshore Hospital) would have agreed to higher ''stop-loss'' thresholds but for the MFR provisions.

enrollees to fewer hospitals, a small-panel plan provides higher volume to each of the participating hospitals in exchange for more aggressive discounts from the hospitals. In the Cleveland Region, however, Medical Mutual's MFR clause discouraged hospitals from offering a discount large enough to make such plans marketable.

Medical Mutual's MFR provisions also discouraged the use of ''carve-out'' contracts—contracts of such speciality services as obstetrics, organ transplants, or invasive cardiology. These specialty contracts can reduce hospital costs for payers and consumers by allowing a payer to contracts for those services in which the hospital has developed a particular expertise and by allowing the hospital to more efficiently use its resources. Medical Mutual's MFR provisions, however, discouraged hospitals in the Cleveland Region from entering into such specialty contracts by requiring that those payers be charged at least as much as Medical Mutual for such services. For examples, both University Hospital and the Cleveland Clinic requested exemptions from the MFR clause in order to enter into such carve-out contracts. University for both soft tissue transplant and obstetrics services; the Clinic for certain cardiology services. Medical Mutual refused them both, and neither participated in the program because of the significant penalties they would have incurred.

III. Explanation of the Proposed Final Judgment

The parties have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h).

A. Scope of the Proposed Final Judgment

Section III of the proposed Final Judgment provides that the Final Judgment shall apply to Medical Mutual and all other persons (including Medical Mutual's Participating Hospitals [4]) in active concert or participating with it who shall have received actual notice of the Final Judgment by personal service or otherwise.

B. Prohibitions and Obligations

Section IV sets forth the conduct prohibited by the Final Judgment.[5] Section IV(A) enjoins and restrains Medical Mutual from adopting, maintaining, or enforcing for the next ten years a Most Favorable Rates Requirement, defined as any policy, practice, rule, or contractual provision which (1) requires a Participating Hospital to charge any third party payer as much as or more than the rate charged to Medical Mutual by such Participating Hospital, or (2) requires a Participating Hospital to charge Medical Mutual rates equal to or lower than the lowest rate it charges any third party payer. Section IV(A) further enjoins and restrains Medical Mutual for a similar period from adopting, maintaining, or enforcing any policy, practice, rule, or contractual provision having the same purpose or effect.

Section IV(B) enjoins Medical Mutual from adopting, maintaining, or enforcing any policy, practice or agreement that requires a hospital to disclose to Medical Mutual directly or indirectly the rates such hospital offers or charges any other commercial payer. This section is intended to prevent Medical Mutual from achieving an effect comparable to that of the MFR clause by compelling hospitals to disclose information to it or its agents regarding the rates the hospitals charge other payers.

Section V lists various activities Medical Mutual may engage in so long as they do not violate the prohibitions of Section IV in doing so. These activities include negotiating rate arrangements and payment methodologies with hospitals, receiving information about rates charged others under certain conditions, establishing provider networks, recruiting hospitals participating in other plans, having different reimbursement levels for different participating hospitals or panels, and terminating or refusing to contract with hospitals. All such activities are specifically made subject to the prohibitions of Section IV so that they not become surrogates for the MFR clause.

More specifically, Section V(A) permits Medical Mutual to negotiate for or obtain the lowest rate(s) or largest discount(s) from any participating hospital whether on an overall or product line basis. Consistent with Section IV(A)'s prohibition against Medical Mutual's requiring or compelling a hospital to give it the lowest rates, this section allows Medical Mutual to use it bargaining skills to obtain the lowest rates, this section allows Medical Mutual to use its bargaining skills to obtain the lowest rate. In addition, Section V(B) permits Medical Mutual to receive rate information from a Participating Hospital when the provision of such confidential information is purely voluntary and not the result of a bargain. Since the disclosure of any rate information, if coerced or purchased, may affect a hospital's willingness to discount, Section V(B) together with Section IV(B) make clear that Medical Mutual cannot request that a hospital disclose the rates it charges other payers, cannot compel a hospital to disclose such rates, and cannot offer consideration for such information. Sections IV(C) and (D) specifically allow Medical Mutual to establish preferred provider networks or alternative delivery systems, to recruit hospitals who have contracts with other payers, and to have different rate arrangements or payment methods for different product lines, hospitals or networks. These activities are least likely to violate the prohibitions of Section IV. Finally, in Section V(F), Medical Mutual is permitted to decline or to refuse to contract or do business with any hospital or terminate any hospital agreement. As with the rest of Section V, however, Section V(F) is permitted only to the extent it does not violate the prohibitions of Section IV. Thus, for example, while Medical Mutual may be permitted to terminate a hospital agreement, the grounds for doing so cannot violate Section IV.

Section VI of the Final Judgment declares all Medical Mutual's MFR provisions null and void, making it clear that no Most Favorable Rates Requirement imposes any obligation on any of Medical Mutual's Participating Hospitals in the Cleveland Region.

Section VII of the Final Judgment sets forth various compliance measures. Section VII(A) requires Medical Mutual to distribute, within 60 days of the entry of the Final Judgment, a copy of the Final Judgment to: (1) all Medical Mutual officers and trustees; and (2) all Medical Mutual employees and agents who are responsible for negotiating, approving, disapproving, or enforcing any of Medical Mutual's hospital agreements with Participating Hospitals, excepting only those employees and agents primarily involved in the administration of payments to and collections from hospitals. Sections VII(B)–(D) require Medical Mutual to provide a copy of the Final Judgment to persons who succeed to the positions of those covered by VII(A), and to obtain and maintain records of present and future officers', trustees', agents', and

[4] Participating Hospitals are all hospitals in the Cleveland Region that have hospital agreements with Medical Mutual.

[5] While the relief here is limited to the Cleveland Region, the proposed Final Judgment does not foreclose the United States from investigating and subsequently seeking relief for comparably anticompetitive conduct by Medical Mutual in other geographic areas.

employees' written certifications that they have read, will abide by, and understand the consequences of their failure to comply with the terms of the Final Judgment. Sections VII(E) and (F) require Medical Mutual to distribute a copy of the Final Judgment to all currently Participating Hospitals and all other hospitals who enter into negotiations with Medical Mutual for a hospital agreement after the entry of the Final Judgment. Finally, Section VII(G) obligates Medical Mutual to report to the United States any violation of the Final Judgment.

Section VIII obligates Medical Mutual to certify its compliance with the requirements of Section IV, VI, and VII of the Final Judgment. In addition, Section IX sets forth a series of measures by which the Plaintiff may have access to information needed to determine or secure Medical Mutual's compliance with the Final Judgment. Section X limits the term of the Final Judgment to ten years.

C. Entry of the Proposed Final Judgment Is in the Public Interest

Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C 16(e), requires that the Court's entry of the proposed Final Judgment be in the public interest. The Act permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement and compliance mechanisms are adequate, whether the decree may harm third parties. *See United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1461–62 (D.C. Cir. 1995). Consistent with Congress' intent to use consent decrees as an effective tool of antitrust enforcement, the Court's function is ''not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest.'' *Id* at 1460 (internal quotations omitted); *see also United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981). The United States submits that entry of this proposed Final Judgment is in the public interest because it addresses the anticompetitive effects alleged in the Complaint and forecloses Medical Mutual from achieving the MFG clause's anticompetitive effects in other ways.

More specifically, by nullifying Medical Mutual's MFR clause and enjoining any policy, practice or rule having the same purpose or effect under Section IV(A), the proposed Final Judgment will ensure unrestrained price competition between Medical Mutual and other health insurance plans and among hospitals in the Cleveland area. Without a price floor set by MFR clauses or other similar provisions, hospitals will have a greater incentive to discount, thereby lowering health care costs for consumers as well as encouraging more innovation in the delivery of health care services. In addition, Section IV(B) restricts Medical Mutual's ability to compel from its Participating Hospitals, or bargain for, information on the rates the hospitals charge other payers, ensuring that Medical Mutual does not indirectly impose a MFR provision.

Finally, Section V of the proposed Final Judgment allows Medical Mutual to continue to compete on largely the same terms as other health insurance plans. Medical Mutual will not be restricted from negotiating different rate arrangements for different hospitals, establishing preferred provider networks or other forms of provider panels, recruiting hospitals who are participating in other provider panels, or even receiving rate information from its participating hospitals when the disclosure of such information is purely voluntary.

D. Medical Mutual's Voluntary Termination of the MFR Clause Does Not Eliminate the Need for Injunctive Relief

Despite Medical Mutual's recent promise to cease enforcing its MFR provisions and terminate the MFR audits, there is substantial likelihood of future violations of the antitrust laws and recurring harm to consumers in the absence of an harm injunction. In the absence of an injunction, Medical Mutual's promise is not enforceable, and nothing prevents Medical Mutual from reneging at any time, a possibility made more probable by its apparently strongly held belief that its conduct was lawful.[6] *See United States* v. *Cleveland Trust Co.*, 393 F. Supp. 699, 710 (N.D. Ohio, 1974)

In addition, Medical Mutual has clearly not precluded itself from instituting schemes short of reinstituting the MFR provision, schemes which could include auditing participating hospitals to determine other payers' rates or simply requiring the hospitals to disclose the rates they charged other payers, and then demanding comparable or lower rates. Given Medical Mutual's high market share in the Cleveland area relative to other payers and thus its correspondingly significant bargaining power, all of those arrangements, contractual or otherwise, are real options for Medical Mutual, and if implemented, could have the similar anticompetitive effects of deterring hospitals from discounting to other payers or participating in more innovative and efficient health care delivery systems.

Moreover, injunctive relief is particularly appropriate in this instance because Medical Mutual's voluntary abandonment was clearly occasioned by the government's then-imminent enforcement action. If an antitrust defendant is allowed to simply abandon its challenged conduct on the eve of a government action, then the enforcement of antitrust laws by the United States would be significantly hampered. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953). A trial court's wide discretion ''is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit.'' *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48 (1960).

IV. Alternatives to the Proposed Final Judgment

An alternative to the proposed Final Judgment would be a full trial on the merits of the case, which would involve substantial time and expense to the United States and Medical Mutual and create uncertainty in the ultimate relief to be obtained by the United States. A trial is also undesirable because the United States believes that the proposed Final Judgment fully remedies the violations of the Sherman Act alleged in the Complaint.

The United States considered a claim for treble damages arising from overcharges the United States paid for the health insurance of federal employees in the Cleveland Region. Because Medical Mutual's use of a MFR clause had artificially inflated the cost of health insurance of the Cleveland Region, it similarly increased the amount of contribution the United States paid on behalf of its employees through the Federal Employees Health Benefit Program (''FEHBP'') to rival health plans in Cleveland.

However, in light of the costs and delay associated with litigation necessary to secure damages, and the fact that payments by the United States

[6] In its challenge to the Civil Investigative Demand issued to it in 1995, Medical Mutual, then known as Blue Cross and Blue Shield of Ohio, vigorously contended that its conduct could not be investigated as it was procompetitive as a matter of law. The Court (Aldrich, J) soundly rejected that position in *Blue Cross and Blue Shield of Ohio* v. *Bingaman*, 1996 WL 677094 (N.D. Ohio), 1996–2 Trade Cas. 71600, *aff'd*, 113 F.3d 1420 (Table, text at 1997 WL 400095) (6th Cir. 1997).

for its employees' health insurance constitute only a modest percentage of the total health insurance cost in the Cleveland area, it was determined that the time and resources required to pursue damages were unwarranted. Moreover, private litigants, such as competing health plans, may be in position to pursue damages claims against Medical Mutual. Should health plans whose enrollees include federal employees succeed in recovering damages from Medical Mutual, such recovery would also likely be passed on to the United States in the form either of rebates under the cost-plus provisions of such contracts or through lower premiums. The United States concluded, therefore, that the public interest is better served by securing the immediate, certain, and substantial relief set forth in the proposed Final Judgment without pursuing a damages claim.

V. Remedies Available to Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist in the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Final Judgment has no *prima facie* effect in any subsequent lawsuits that may be against Medical Mutual in this matter.

VI. Procedures Available for Modification of the Proposed Final Judgment

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to Gail Kursh, Chief, Health Care Task Force; Department of Justice; Antitrust Division; 325 7th Street, N.W.; Room 404; Washington, D.C. 20530, within the 60-day period provided by the Act. Comments received, and the Government's responses to them, will be filed with the Court and published in the **Federal Register**. All comments will be given due consideration by the Department of Justice, which remains free, pursuant to Paragraph 2 of the Stipulation, to withdraw its consent to the proposed Final Judgment at any time before its entry if the Department should determine that some modification of the Judgment is necessary to protect the public interest. The proposed Final Judgment itself provides that the Court will retain jurisdiction over this action, and that the Parties may apply to the Court for such orders as may be necessary or appropriate for the modification, interpretation, or enforcement of the Judgment.

VII. Determinative Documents

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b), were considered in formulating the proposed Final Judgment. Consequently, none are filed herewith.

Dated: _____.

Respectfully submitted,

Paul J. O'Donnell

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[FR Doc. 98–26034 Filed 9–30–98; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

National Institute of Corrections

Advisory Board Meeting

TIME AND DATE: 11 a.m. to 4:30 p.m. on Monday, November 2, 1998 & 8 a.m. to 12 noon on Tuesday, November 3, 1998.

PLACE: Westin Hotel—Long Beach, 333 East Ocean Boulevard, Long Beach, California 90802.

STATUS: Open.

MATTERS TO BE CONSIDERED: Election of New Officers; Updates on Strategic Planning and Interstate Compact Activities; Presentations on Regionalization Project and Mental Health Issues; and Program Division Reports.

CONTACT PERSON FOR MORE INFORMATION: Larry Solomon, Deputy Director, (202) 307–3106, ext. 155.

Morris L. Thigpen,

Director.

[FR Doc. 98–26339 Filed 9–30–98; 8:45 am]

BILLING CODE 4410–36–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (98–135)]

NASA Advisory Council (NAC), Space Science Advisory Committee (SScAC), Structure and Evolution of the Universe Advisory Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NASA Advisory Council, Space Science Advisory Committee, Structure and Evolution of the Universe Subcommittee.

DATES: Thursday, October 29, 1998, 8:30 a.m. to 5:00 p.m.; and Friday, October 30, 1998, 8:30 a.m. to 5:00 p.m.

ADDRESSES: NASA Headquarters, Conference Room MIC 7, 300 E Street, SW, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Dr. Alan N. Bunner, Code SA, National Aeronautics and Space Administration, Washington, DC 20546, 202/358–0364.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—State of Space Science
—Theme Updates
—Current Programs and Mission Updates
—Technology Programs and Reviews
—Strategic Planning
—Public Outreach
—Other Issues Facing the Subcommittee

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

Dated: September 24, 1998.

Matthew M. Crouch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 98–26337 Filed 9–30–98; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL SCIENCE FOUNDATION

Special Emphasis Panel in Advanced Networking Infrastructure Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–