CCH Health Care Compliance LETTER

Volume 7, Issue 25 health.cch.com December 13, 2004

Nonprofit hospitals should get ready for Sarbanes-Oxley, experts recommend

by Catherine Hubbard, MA, Contributing Editor

Although not-for-profit hospitals aren't governed by the Sarbanes-Oxley Act (SOX), they should still prepare to comply, according to experts who spoke during a November 10 audio conference sponsored by the Healthcare Financial Management Association.

Hospitals and other health care organizations should start adopting aspects of SOX immediately, said John Bigalke, national managing partner of Life Sciences and Health Care at Deloitte & Touche. "Now is the time to start," he said. "There will be surprises in the future and if you wait until you ... have time to devote to it, or until it's legislated that you have to, then that'll be too late."

It's only a matter of time before the federal government, state governments or other associations set SOX–type standards for nonprofit hospitals, Bigalke said. "Someone is going to put this in front of you," he said. "This is not a question of if; it's a question of when."

Several organizations, including the American Health Lawyers Association, the National Association of Insurance Commissioners, and the National Association of College and University Business Owners, are supporting various SOX concepts for not-for-profit organizations, Bigalke noted said. In addition, various state legislatures, including California and several state attorneys general, "are taking a very active look at this," he said.

The good news is that unlike for-profit companies, Bigalke said, nonprofits aren't facing any mandates at the end of this year. "You have the luxury of time to think about it and to get in front of it," he said.

As for-profits focus on stockholders, nonprofits should focus on their stakeholders, which include people who hold bonds, those who depend on the financial viability of the organization for their pension and retirement funding, and those who depend on the community services provided, Bigalke noted.

"We have the same obligation to bond holders that for-profit companies have for shareholders," added Dan Roach, vice president for compliance and audit at Catholic Healthcare West.

Sheryl Vacca, director and West Coast practice leader for the National Life Sciences and Health Care Regulatory Practice at Deloitte & Touche, said the Committee of Sponsoring Organizations (COSO) model, which SOX was based on, can be applied to non-SOX required environments. "There are reasons why it should apply across the industry," she said. "With many tax-exempt organizations financed by public debt bonds, we want to make sure we strengthen our corporate governance standards."

Letters to the Editor

The CCH Health Care Compliance team welcomes comments or questions regarding articles published in the CCH Health Care Compliance Letter. Send comments to Sharon Sofinski, Coordinating Editor, at sofinsks@cch.com. For more information about the CCH Health Care Compliance Portfolio visit our online store at http://health.cch.com.

Unfortunately, the health care industry has not been immune to financial oversight failures, Bigalke said. The industry is the second largest source of all financial restatements, representing 9.3 percent of all earnings restatements from 1971 to 2000, he said. "It unfortunately has been a pattern," he added.

Common compliance mistakes. One reason for these failures is weak or misguided "tone at the top." Even with a well-thought-out plan, organizations need top executives to present a common stance on ethics and values and to focus on doing the right thing, regardless of what the financial reporting is or how it affects them personally, Bigalke emphasized. "That is the most fundamental aspect of this. You can have all the internal controls in the world, you can do everything right, but if you do not have a controlled environment, you have limited, if any, ability to be successful in compliance with Sarbanes-Oxley," he said.

It's also important to protect ethics while integrating or merging other health care systems, Bigalke said, noting that a merger or acquisition can take the executives into provider areas of which they are not very knowledgeable. Furthermore, the organization might have merged with a company that didn't share the same cultural values, he said. "The results of mergers and acquisitions can be very high risk," he said. "Many of the problems in the industry have been a failure to create a consistent program across the organization," he said.

Organizations should also update technology in a coordinated, comprehensive way over time, Bigalke advised. Rather than simply adding on to legacy systems, the organization should make sure the systems respond to its needs of key functions, such as operating processes and accounting processes, he said. In an ideal world, he said, those processes should be closely linked.

Reinforce good ethics. Organizations need to create an infrastructure that connects the tone at the top to the control activities in the organization, Vacca emphasized. "Controls really begin at the point of service," she noted. "That's where a mistake, if they do happen, could continue to compound through the system."

Adopting a code of ethics is just a first step, Bigalke said. "It has to be visible, reinforced and when people violate it, there should be a visible example of punishment," he said. "You must make it serious, because if people watch and if you don't live it and you don't enforce it, they'll know it doesn't have any meaning to you."

Bigalke advised organizations to tackle SOX incrementally, assessing which areas are high risk. "Narrow it down to the most important ones," he said. "Take some bite-sized pieces of control activities." For instance, the organization can find out whether revenues are recorded accurately on the ledger, whether the categorizations by payer are correct, and whether documentation is adequate.

"It is no coincidence that organizations that make ethics compliance a priority are the same organizations that are the leaders in profitability and outcomes and respect."

Benefits of SOX compliance. Complying with SOX will pay off in increased efficiency, health care quality, and cost effectiveness, said Bigalke. "It is no coincidence that organizations that make ethics compliance a priority are the same organizations that are the leaders in profitability and outcomes and respect," he said.

Roach added that while complying with SOX will take time and money up front, if properly executed, it will save money in the long run. "Our compliance program pays for itself in additional revenue, even though that's not our objective," he said of Catholic Healthcare West's successful program. "Because we have better controls over our processes, we have more efficient business processes, we avoid duplication, we've enhanced utilization of our resources and efficiency of our resources, and we've included greater accountability," he said. "All that has had a positive impact on the performance of the organization." ■

CCH Washington Bureau, November 22, 2004

CCH Health Care Compliance Letter

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CCH Health Care Compliance Letter is published 24 times a year by CCH INCORPORATED, 4025 W. Peterson Avenue, Chicago, IL, 60646. Subscription rate is $305 per year. First-class postage paid at Chicago, Illinois, and at additional mailing offices. POSTMASTER: SEND ADDRESS CHANGES TO *CCH Health Care Compliance Letter*, 4025 W. PETERSON AVENUE, CHICAGO, IL 60646. Printed in U.S.A.

Fraud & Abuse

Lab arrangement could violate Anti-Kickback Statute

by Gené Stephens Connolly, JD, Contributing Editor

The Office of Inspector General (OIG) determined that a proposed arrangement to provide laboratory employees and related equipment and supplies to dialysis facilities for the purpose of preparing specimens for delivery to a laboratory free of charge, could potentially generate prohibited remunerations under the Anti-Kickback Statute. The OIG further determined that it could potentially impose administrative sanctions on the laboratory under sections 1128(b)(7) and 1128A(a)(7) of the Social Security Act.

The laboratory, which provides testing services to dialysis patients pursuant to service contracts with various dialysis facilities, proposed to provide free services of laboratory assistants ("lab assistants") employed by the laboratory to certain dialysis facilities. The lab assistants would be based at the selected dialysis facilities and would prepare specimens for delivery to the laboratory.

While the lab assistants' duties would be limited to those laboratory test processing services necessary to perform any ordered tests, the proposed arrangement failed to qualify under the personal services safe harbor exception of the Anti-Kickback Statute. The provision of the free lab assistants, along with the necessary testing supplies, would constitute a tangible benefit to the dialysis facilities, thus producing a financial benefit. In such instances of free services to a select group of facilities, the OIG concluded that an inference arises that the free services and supplies would be intended to influence the dialysis facilities' selection of a laboratory. In addition, the proposed arrangement did not provide safeguards to rebut the inference that the free goods and services could be intended to induce referrals. The OIG explained that by capturing referral streams from the dialysis facilities, the laboratory would likely generate substantial revenue because dialysis patients typically need lifetime laboratory testing services associated with their receipt of dialysis services.

Finally, the OIG commented that there was a risk that the laboratory essentially would be offering a functional "discount" to the dialysis facilities in exchange for the referral of noncomposite rate tests to the laboratory. The OIG concluded that there was a greater risk that the arrangement as a whole would involve a "nexus between the composite rate business and the noncomposite rate business" such that the presence of a discount would be particularly suspect under the Anti-Kickback provisions. Consequently, the OIG could not exclude the possibility that the laboratory's proposed arrangement could offer improper nonmonetary discounts to the dialysis facilities. ■

OIG Advisory Opinion 04-16, ¶500,119

Competition

Examining the role of competition in a changing health care landscape

by Gené Stephens Connolly, JD, Contributing Editor

In July 2004, the Antitrust Division of the Department of Justice (DOJ), in collaboration with the Federal Trade Commission (the Commission), issued an extensive report on the role of competition in health care markets and the ways competition has altered the institutional and structural arrangements through which health care is financed and delivered. In a climate of rising health care costs and health care quality and accessibility challenges, the joint Commission and DOJ report addresses long-standing skepticisms about the role of competition among health care markets and examines how antitrust enforcement has, and should, increase consumer welfare while working to protect both existing and potential health care competition.

Written in eight chapters with four appendices, the report is based on the work of over 250 health care specialists, insurers, attorneys, scholars, and government and public health officials from 27 days of joint hearings held from Febru-

continued on page 7

Understanding the new U.S. Department of Labor overtime regulations

by William P. Schurgin

On August 23, 2004, the U.S. Department of Labor's ("DOL") revised Fair Labor Standards Act ("FLSA") overtime regulations went into effect. The Regulations update, clarify, and in some cases, redefine those categories of white-collar employees whose job duties, minimum salaries and compensation basis exclude them from the FLSA's overtime pay requirements. Collectively, the five exemptions are known as the "white-collar" overtime exemptions to the FLSA.

Background

The FLSA requires employers to pay employees at least the federal minimum wage of $5.15 per hour (though it is higher under many states' laws), and overtime pay of one-and-one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek (and for health care employees the alternative 8 $80 overtime pay system). The FLSA, however, includes a number of exemptions from these requirements, most notably the white-collar exemptions, which the DOL is empowered by law to define.

The DOL first defined the white-collar exemptions in 1938. Those regulations set forth three requirements that generally must be met for an employee to fall under one of the exemptions:

- the employee is paid a certain weekly minimum (the "salary level test");
- the employee is paid on a salary, rather than hourly, basis (the "salary basis test"); and
- the employee performs certain exempt duties (the "duties test").

Despite a dramatically changing economy, the DOL has neither raised the salary level since 1975, modified the salary basis test for the private sector since 1958, nor substantially altered the duties tests since 1949.

In March of 2003, the DOL proposed significant revisions to its "white-collar" exemptions. The proposed regulations resulted in a political firestorm—led by Congressional Democrats—to block the regulations' implementation due to their belief that large numbers of employees would lose their eligibility to receive overtime. As a result, the final regulations are a compromise, focusing on clarification and modernization of antiquated definitions. While employers likely will find it easier to classify employees as exempt in some instances, employers now face additional hurdles in other instances, which will make it difficult to exempt employees from overtime pay. The following discussion summarizes the significant changes contained in the DOL's final overtime regulations.

The New Overtime Regulations: What Employers Need to Know

Minimum Salary Level

To be eligible for one of the white-collar exemptions, an employee must be paid a minimum weekly salary of $455 per week, or $23,660 per year (with the exception of outside sales employees for whom there is no minimum salary level). Employees making less than $455 per week, generally cannot be exempt even if they meet the duties test for establishing exempt status. Employees who make $455 per week or more can be exempt, but only if they also satisfy the duties and salary basis tests.

Under the old regulations, there were two salary levels, each with a corresponding duties test: for those who make more than $250 per week (or $13,000 per year), a "short" test; and for those who make between $155 and $250 per week, a more stringent "long" test. These $155/$250 levels had not been changed since 1975. Because so few exempt employees now make less than $13,000 per year, the long test has not been applied in quite some time. The DOL estimates that 1.3 million workers—primarily in the retail and fast-food sectors, and often in rural areas or the South—will need to be reclassified from exempt to non-exempt status because of this increase in the minimum salary level.

Salary Basis Test

Employees covered under the white-collar exemptions must generally be paid on a salary basis. The final regulations make two significant changes to the salary basis test. First, companies may now suspend exempt employees in full-day increments (as opposed to merely full-week increments) for violations of well communicated written rules pertaining to workplace conduct without losing an employee's exempt status. The DOL has expressly stated that workplace conduct does not refer to job performance or attendance matters. Rather, it refers to serious misconduct such as sexual harassment, drug or alcohol violations, or state or federal law violations.

The regulations also provide new rules with respect to the impact of improper deductions from an employee's salary. If an employer: (1) has a clearly communicated policy that prohibits improper pay deductions and includes a complaint mechanism; (2) reimburses employees for any improper deductions; and (3) makes a good-faith commitment to comply with the salary basis test in the future, the employer will not lose the exemption for any employee as the result of an inadvertent improper deduction unless the employer willfully violates the policy by continuing the improper deductions after receiving a complaint from the employee. This policy should be well communicated and set forth in the employer's employee handbook. The DOL has published a model policy on its website for employer use.

Duties Tests

In order to meet the requirements for exempt status, in addition to the above-referenced salary requirements, the employee must also perform the duties of a bona fide executive, administrative, professional, or outside sales employee.

Executive Exemption

Under the Final Rule, it will be more difficult for employers to classify employees as exempt executives because such employees now must "have the authority to hire or fire employees or the employee's suggestions and recommendations as to hiring, firing, advancement, promotions or other change in status of other employees must be given particular weight." While disciplinary authority always has been considered a hallmark of exempt status by DOL investigators, such authority has not regularly been required by courts. An employee's suggestions and recommendations may be deemed to have "particular weight" even if a higher-level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the subordinate's change in status. Authority to reprimand, suspend or create a performance review will not suffice—authority over a "change in status" is required.

While the addition of the hiring-firing requirement may mean that some currently exempt executives will no longer be exempt, the DOL in other ways has modernized the regulations in order to help employees apply the rules to today's work force. Specifically, the new regulations establish that:

- an employee's primary duty is not limited to performing the duty he or she spends the most time on, but rather is the "principal, main, major or most important duty that the employee performs;" and that
- "concurrent performance of exempt and non-exempt work does not disqualify an employee from the executive exemption" if the employee otherwise meets the executive exemption.

These two provisions mean, for example, that an assistant manager who spends more than half his or her working time performing non-exempt work may be exempt if he or she has a "primary duty" of management, directs the work of at least two other employees, and has the requisite authority in which to change the status of other employees. These provisions largely codify existing majority-view case law, but are important because of the recent court challenge to these principles.

Administrative Exemption

To be an exempt administrative employee under the new regulations, the employee's primary duty must be the performance of office or non-manual work directly related to the management or business operations of the employer or its customers, and include the exercise of discretion and independent judgment on matters of significance. This test is largely the same as the DOL's long-standing administrative exemption test.

Historically, the administrative exemption has created confusion in its application because of the lack of objective, bright-line tests associated with it. The final rule provides clearer definitions and modern examples of what are and are not administrative exempt job duties. This should make it easier for employers to determine which of their employees may be exempt.

Employers will still need to make two interdependent inquiries, to evaluate whether an employee is administratively exempt: (1) the type of work the employee performs, and (2) whether the employee's primary duty includes exercising discretion and independent judgment regarding matters of significance.

The DOL attempted to clarify the administrative exemption's "type of work" requirement in two substantive ways. First, the DOL modified the definition. The old regulation required the work to be directly related to management policies or general business operations of the employer or the employer's customers. The new rule substitutes the term "management" for the term "management policies." That change was intended to clarify that, while management policies are certainly one component of running a business, there are many other administrative functions that also may constitute the management of a business (or support the management of a business) that, when performed by an employee, may bring him or her within the administrative exemption.

Second, the new rule gives explicit examples of the type of work that fits within this definition. Some of the examples are streamlined versions of examples from the old regulations; others are new and reflect the realities of the 21st-century workforce.

The new rule also attempts to clarify the concept of discretion and independent judgment. Under the final rule, the employer must determine whether the employee's primary duty includes "the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered" and whether the

work is significant, substantial, important or of consequence. This does not require, in all cases, that employees have authority to make an unreviewable independent decision; rather, employees still may be exercising discretion and independent judgment, even if they only recommend action, rather than actually take action. The final rule provides a detailed list of specific inquiries (some of which were contained in the prior rule and its interpretations) that will assist employers in making this determination on a case-by-case basis.

The new regulations contain a detailed list of examples of exempt and non-exempt administrative work in the modern workforce, some of which have been the subject of significant litigation in recent years. The final rule thus now codifies some of the issues that have been heavily litigated in the courts and provides additional clarity. These examples include a discussion of what factors are important in determining exempt status and are likely to provide helpful guidance to employers in evaluating their own workforces.

Professional Exemption

There are three types of professional exemptions: learned, creative and computer. To be exempt under the learned professional category, the employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning which is customarily acquired by a prolonged course of specialized intellectual instruction. Under the final regulations, the DOL restated the existing duties tests for the learned professional exemption and provided an expanded view as to the path an employee could take to obtain "advanced knowledge" within the meaning of this exemption. Specifically, the DOL recognized that knowledge customarily acquired through a prolonged course of specialized intellectual instruction also could be acquired through alternative means involving a combination of intellectual instruction and work experience. The DOL cautioned, however, that the regulation is not intended to change the long-standing educational requirements for the learned professional exemption or to expand the exemption beyond fields of science or learning. In addition, the regulations define key terms and provide examples of occupations that generally meet the duties test of a learned professional.

For an employee to qualify as a learned professional, all of the following criteria must be met:

- the employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment; and
- the advanced knowledge must be in a field of science or learning; and
- the knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Work requiring advanced knowledge generally involves using advanced knowledge—such as cannot be attained at the high school level—to analyze, interpret or make deductions from various facts. It does not include work involving routine mental, manual, mechanical or physical work.

Exempt professional work also means work requiring the consistent exercise of discretion and judgment. This standard is different than the "includes work requiring the exercise of discretion and independent judgment" standard of the administrative exemption. Under the professional exemption, judgment must be regularly exercised as distinguished from the administrative exemption which requires engaging in work involving independent judgment. The DOL noted that a prime characteristic of professional work is the application of special knowledge or talents with discretion and judgment and acknowledged that a physicist's or engineer's reliance on a manual outlining emergency procedures should not transform the employee into a non-exempt technician.

Fields of science or learning are distinguished from the mechanical arts and skilled trades (where the knowledge may be advanced, but is not in a field of science or learning) and include the traditional fields of science or learning such as law, medicine, theology and teaching.

The exemptions for creative and computer professionals have largely remained unchanged, though each contains small changes that may be important in close cases and in certain job classifications.

Health Care Positions in Relation to the Professional Exemption

The Regulations make specific reference to a number of health care positions. In doing so, the DOL cautioned that the regulations are not intended to change the long-standing educational requirements for the learned professional exemption. Fields of science are distinguished from skilled trades where the knowledge may be advanced, but where the skill was acquired from experience.

The following are examples of specific health care jobs that, under the new regulations, are explicitly included as eligible for the learned professional exemption: doctors, registered nurses, and accredited physician assistants. The best evidence of a learned profession is the attainment of the appropriate academic degree.

The DOL has clarified that the exemption will not normally apply if an employee has acquired the skill through experience rather than through an advanced specialized intellectual instruction in an advanced degree program. For this reason, licensed practical nurses and licensed vocational nurses do not fall within the learned professional exemption.

Highly Compensated Employees Performing Executive, Administrative or Professional Duties

In an effort to create a "bright line" test for workers who do not perform manual labor, but do perform duties of an ex-

ecutive, administrative or professional employee, and whose salary level is so high that Congress did not originally intend to provide them with overtime pay protections contained in the FLSA, the DOL formulated a streamlined exempt status test for highly compensated employees. To qualify for the highly compensated employee exemption, an employee must meet all of the following criteria:

- the employee's primary duty must include performing office or non-manual work;
- the employee must "customarily and regularly" perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee; and
- the employee's annual total compensation must equal $100,000 or more, which includes at least $455 per week paid on a salary basis.

Under the highly compensated employee exemption, the employee's total annual compensation must include at least $455 per week paid on a salary basis. Commissions, nondiscretionary bonuses, and other nondiscretionary compensation may be included in determining whether the employee meets the $100,000 annual threshold, but is not subject to the salary basis requirement.

Effect of State Laws

A complicating factor for many employers in complying with the new federal regulations is the impact of state overtime laws. Many states have their own overtime laws. While most states provide that employees who are exempt under the FLSA's white-collar exemptions are also exempt from overtime under state law, 18 states either have their own unique standards or do not automatically adopt the changes in the new federal regulations. Health care employers in these states will need to apply both the new federal and the applicable state standards in order to ensure overtime compliance.[1]

Conclusion

State and federal wage and hour collective action lawsuits are one of the fastest growing areas of employment litigation. As such, it is imperative that all health care employers carefully review how they categorize employees as exempt from overtime compensation. The new federal regulations provide a modern set of guidelines for employers to follow in making decisions as to whether or not individuals are entitled to overtime compensation. While Democrats in Congress have attempted to block these regulations, the fact remains that the new regulations are currently in full force and effect. The DOL has also indicated that it intends to vigorously enforce the new regulations, and plaintiff's lawyers will likely look at the new regulations as another opportunity to sue employers who fail to make changes in accordance with new requirements. In light of the significant penalties (double damages and an extended statute of limitations) for willful violations of federal wage and hour laws, health care employers are advised to take appropriate actions to assure that they have properly evaluated their work force from the standpoint of overtime eligibility. ■

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Mr. Schurgin is a part-time faculty member at DePaul University College of Law and Loyola University College of Law. He is a member of the CCH Health Care Compliance Editorial Advisory Board and has recently been selected as a fellow of the College of Labor and Employment Lawyers.

[1] The 18 states are: Alaska, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Kentucky, Maryland, Minnesota, Montana, New Jersey, North Dakota, Oregon, Pennsylvania, Washington, West Virginia and Wisconsin.

Competition (cont.)

Continued from page 3

ary through October 2003, as well as a Commission sponsored workshop that was held in September 2002. The report's in-depth discussion and analysis reminds health care policy makers and consumers alike of the importance of market competition to promote the delivery of cost-effective and high quality health care.

While the report does not claim that mere competition alone can eliminate the inherent uncertainties, challenges and problems of the American health care system nor, as the report states, the "asymmetries among consumers, providers and payors," the report suggests that vigorous antitrust enforcement may help to inspire health care providers to "do a better job" for consumers. The report points out that in 2002, approximately 14 percent of the gross domestic product (GDP) was spent on health care services in the United States, which amounts to approximately $1.6 trillion. Of the $1.6 trillion spent on health care, nearly 31 percent was spent on hospital care; 22 percent was spent on physician and clinical services; and prescription drug expenses amounted to 11 percent of the total costs. The remaining 36 percent of health care services was split among long-term care, administrative and other expenditures.

The report points to several features that can limit health care competition, including: (1) the extensive health care regulatory framework; (2) third-party payments (that the report suggests can distort consumer, provider and payor incentives and have unintended consequences); (3) the lack of reliable and accurate information about health care prices and quality; (4) cost, quality and access trade-offs (referred to

as the "iron triangle" of health care; when the performance of the health care system is increased along any one of these dimensions, the other dimensions can be compromised, regardless of the amount spent on health care); (5) societal attitudes regarding medical care; and (6) multiple health care agency relationships. Interestingly, the report boldly states that with regard to information problems, "the public has access to better information about the price and quality of automobiles than it does about most health care services." The report explains that without good information, consumers have more difficulty identifying and obtaining the goods and services they desire. Improved information technology and access to electronic medical records, as well as computerized physician order entry, would help to employ information technology more effectively within the health care system. The report further reiterates the need for more providers to use E-mail to communicate with consumers rather than continue the existing patterns of handwritten prescriptions and scattered medical records in multiple locations.

Report Recommendations. The Commission and DOJ provide several recommendations to improve competition in the health care market to benefit consumers and as a strategy to lower costs while enhancing health care quality. Specifically, the list of report recommendations focuses on how to encourage the development of prerequisites to competition, such as good information about price and quality. The report suggests that a renewed focus on perquisites for effective competition may assist policy-makers in identifying and prioritizing tasks for the near future. Following are some of the recommendations from the report:

- **Recommendation 1:** The report suggests that private payors, governments and providers should continue experiments to improve incentives for providers to lower costs and enhance quality for consumers that would enable them to seek lower prices and better quality. Specifically, the report suggests that increased transparency in pricing is needed to implement strategies that encourage providers to lower costs and consumers to evaluate prices. While work already has been done to measure quality, the report suggests that agencies must continue work in this area. Furthermore, information must be reliable and understandable if consumers are to effectively select health plans and providers. The report reveals that research to date indicates that many consumers have not used the price and quality information they received to make decisions about health plans and providers. Finally, Recommendation 1 suggests a heightened focus on the degree to which providers' incentives are compatible with consumers' interests in order to yield better results (i.e., more closely aligning providers' incentives with consumers' interests).
- **Recommendation 2:** The report suggests that states should decrease barriers to entry into provider markets. Specifically, states with Certificate of Need (CON) programs should consider whether these programs best serve their citizens' health care needs. According to the findings of the report, agencies have noted that, on balance, CON programs are not successful in containing health care costs and pose serious anti-competitive risks that usually outweigh their purported economic benefits. The report also found that market incumbents can too easily use CON procedures to forestall competitors from entering an incumbent's market. Secondly, the report recommends that states should consider adopting the recommendation of the Institute of Medicine to broaden membership of state licensing boards. At the present time, state licensure boards are disproportionately composed of licensed providers. Many states, according to the report, also have taken steps to restrict allied health professionals (AHPs) from independent practice and direct access to consumers, which significantly reduces certain forms of competition. The report's authors believe that state licensure boards with broader membership that would include representatives of the general public and individuals with expertise in health administration, economics, consumer affairs, education, and health services research would be less likely to limit competition or engage in conduct that could unreasonably increase health care prices or lower access to care.
- **Recommendation 3:** The report suggests that governments should re-examine the role of subsidies in health care markets in light of their inefficiencies and potential to distort competition, as well as whether the current subsidies best serve their citizens' health care needs. As the report suggests, competition cannot provide resources to those who lack them and does not work well when certain facilities are expected to use higher profits in certain areas to cross-subsidize uncompensated care. The report's authors believe that it would be more efficient to provide subsidies directly to those who should receive them, rather than to obscure cross subsidies and indirect subsidies in transactions that are not transparent.
- **Recommendation 4:** The report suggests that governments should not enact legislation to permit independent physicians to bargain collectively. The report explains that physician collective bargaining would harm consumers financially and would not likely result in quality improvements. The authors suggest that there are other ways in which physicians can work together to improve health care quality without violating the antitrust laws.
- **Recommendation 6:** Finally, the report suggests that governments should reconsider whether current mandates best serve their citizens' health care needs, and whether such mandates are likely to reduce competition, restrict consumer choice, raise the cost of health insurance, and/or increase the number of uninsured Americans. This report recommendation urges governments to insure that proponents of vigorous legislation and mandated benefits look to consumer protections rather than mere provider protections. ■

Improving Health Care: A Dose of Competition, A Report by the Federal Trade Commission and the Department of Justice, July 2004,¶680,001