JUDICIAL CONFERENCE OF THE UNITED STATES

Meeting of the Judicial Conference Advisory Committee on Rules of Appellate Procedure

AGENCY: Judicial Conference of the United States, Advisory Committee on Rules of Appellate Procedure.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Appellate Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation and will start each day at 8:30 a.m.

DATES: April 15–16, 1996.

ADDRESSES: The Fairmont Hotel, 950 Mason Street, San Francisco, California.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, D.C. 20544, telephone (202) 273–1820.

Dated: March 1, 1996.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. 96–5305 Filed 3–7–96; 8:45 am]

BILLING CODE 221001–M

DEPARTMENT OF JUSTICE

Antitrust Division

[Case No. 1:94CV02693]

United States v. Vision Service Plan; Public Comments and United States' Response to Public Comments

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16 (b)–(h), the United States publishes below the comments received on the proposed Final Judgment in *United States* v. *Vision Service Plan*, Case No. 1:94CV026923, United States District Court for the District of Columbia, together with the response of the United States to the comments.

Copies of the response and the public comments are available on request for inspection and copying in room 215 of the Antitrust Division, U.S. Department of Justice, 325 7th Street, N.W., Washington, D.C. 20004, and for inspection at the Office of the Clerk of the United States District Court for the District of Columbia; 3rd Street and Constitution Ave., NW.; room 1825; Washington, DC 20001.

Rebecca P. Dick,

Deputy Director of Operations, Antitrust Division.

United States' Response to Public Comments

I. Introduction

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, (commonly referred to as the ''Tunney Act''), 15 U.S.C. 16 (b)–(h), the United States hereby responds to public comments regarding the Final Judgment initially proposed as the basis for settling this proceeding in the public interest. Since the comments regarding the first proposed Final Judgment were submitted, the parties have agreed to a superseding, proposed Revised Final Judgment, filed on November 1, 1995, which reflects changes to a few provisions. After careful consideration of the comments on the formerly proposed Final Judgment, viewed in light of the proposed Revised Final Judgment, the United States concludes that the Revised Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. Once the public comments and this response have been published in the Federal Register, pursuant to 15 U.S.C. 16(d), the United States will request that the Court enter the Revised Final Judgment.

II. Procedural History

On December 15, 194, the United States filed a Complaint alleging that Vision Service Plan (''VSP''), in all or parts of the many states in which it does business as a vision-care insurer, has entered into agreements with its panel doctors that unreasonably restrain competition by discouraging the doctors from discounting their fees for vision-care services, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and a Stipulation signed by both it and the defendant, agreeing to the entry of the Final Judgment following compliance with the Tunney Act.

Pursuant to the Tunney Act, on December 23, 1994, VSP filed the required description of certain written and oral communications made on its behalf; the United States filed a Competitive Impact Statement (''CIS'') on January 13, 1995. A summary of the terms of the proposed Final Judgment and the CIS and directions for the submission of written comments were published in the *Washington Post* for seven consecutive days, from January 22–28, 1995. The proposed Final Judgment and the CIS were published in the Federal Register on January 26, 1995. 60 FR 5210–17 (1995). The 60-day period for public comments on the then proposed Final Judgment began on January 27, 1995, and expired on March 27, 1995. Five comments were received.

The United States filed the five comments with the Court on May 12, 1995, and was preparing to file its response to them when VSP raised issues about the application of certain provisions of the then-proposed Final Judgment to its operations. On June 23, 1995, the United States advised the Court that the parties were considering whether those issues warranted any modification to the proposed Final Judgment. Reflecting the outcome of those negotiations are the parties' Superseding Stipulation, the proposed Revised Final Judgment, and the Revised CIS, filed on November 1, 1995. The latter two documents are styled as ''Revised'' because they reflect changes made to a few of the provisions of the proposed Final Judgment and to related portions of the CIS. The Government agreed to these revisions to remedy certain problems that VSP had experienced while operating under the terms of the originally proposed Final Judgment, which, pursuant to Stipulation, it had been doing since the proposed Final Judgment was filed.

In a letter accompanying the superseding filings, the United States informed the Court of its intent to provide public notice of the proposed Revised Final Judgment and the Revised CIS in accordance with the Tunney Act. Pursuant to the Act, under cover of a letter dated November 27, 1995, the defendant filed the required description of certain written and oral communications made on its behalf. A summary of the terms of the proposed Revised Final Judgment and the Revised CIS and directions for the submission of written comments were published in the *Washington Post* for seven consecutive days, from November 12–18, 1995. The proposed Revised Final Judgment and the Revised CIS were published in the Federal Register on November 13, 1995. 60 FR 57017–21 (1995). The 60-day period for public comments started on November 14, 1995, and expired on January 13, 1995. No comments on the proposed Revised Final Judgment were received.

III. Factual Background

VSP contracts with businesses, government agencies, health-care insurers, and other organizations to provide prepaid vision-care insurance to

employee groups and beneficiaries in 46 states and the District of Columbia. In 1994, VSP covered about 15 million persons, and its revenues totaled about $650 million. The United States sought injunctive relief to remedy the anticompetitive consequences of a fee non-discrimination clause in VSP's agreements with doctors in private practice who have agreed to become VSP ''panel doctors'' and, accordingly, provide vision care to patients covered by VSP.[1] VSP contracts with at least 17,000 such doctors—predominantly optometrists and a relatively small number of ophtalmologists—across the nation. The challenged clause is similar in substance to clauses commonly called ''most-favored-nation'' (''MFN'') clauses. VSP's MFN clause required each of its panel doctors to charge VSP no more than the lowest price the doctor charged any non-VSP patient or insurance plan.

As a result of the MFN clause, a VSP-panel doctor could not charge any non-VSP plan or patient less than VSP for equivalent services. If the doctor wished to charge a non-VSP plan or patient less than he or she had been charging VSP, the doctor would also have had to grant an equal discount to VSP for all VSP-insured patients the doctor served. In all or parts of many states in which VSP does business, it contracts with a high percentage of local optometrists,[2] and in these areas most optometrists earn a significant part of their professional income from VSP. For these doctors, the financial consequences of granting a greater discount for services provided to all of their VSP patients would be substantial, so they ceased or refrained from discounting below VSP-payment levels to anyone. In addition to discouraging the discounting of vision care services below VSP-payment levels, VSP's MFN clause made it impossible for some competing vision-care plans to obtain or retain sufficient panel doctors to serve their members at competitive prices, thus limiting the amount of competition faced by VSP from other plans.

IV. Response to Public Comments

All five of the comments address the originally proposed Final Judgment. Some of the comments contend that Section V of that Judgment, which expressly permits VSP to engage in certain activities, undermines the prohibitions of the Judgment. Other comments urge that additional relief be ordered for the conduct that was challenged. Finally, several of the comments concern practices that the United States did not challenge and that are not enjoined by the Judgment. The United States has concluded that the Revised Final Judgment reasonably and appropriately addresses the harm alleged in the Complaint. Therefore, following publication of the comments and this response, pursuant to the Tunney Act, and submission of the United States' certification of compliance with the Act, the United States intends to urge this Court to enter the proposed Revised Final Judgment based on the Court's determination that that Judgment is in the public interest.

A. Comments About the Permitted Activities

Two comments from Alaska, Arizona, Hawaii, Nevada, New Mexico, Oregon and Washington, (''the seven states'') and comments from Northwest Administrators and First American Health Concepts question Section V of the formerly proposed Final Judgment, which expressly permitted VSP to collect from its panel doctors sufficient information about the fees they charged non-VSP plans and patients to enable VSP to calculate each doctor's modal or median fees, which were then to be used by VSP in setting its own fees to panel doctors. The commenters raised various concerns about these provisions.

In their initial comment, the seven states reported that several of them have been examining the competitive effects of various VSP business practices in addition to the MFN clause. Although they recognized that the proposed Final Judgment was ''an agreement between the parties with no precedential effect,'' they nevertheless expressed concern about ''a potential problem with the inclusion of certain language in the [proposed Final Judgment] which could potentially inhibit future law enforcement efforts by the states'' against possible horizontal price-fixing by VSP. They feared that the provisions in Section V permitting certain activities may be ''taken out of context to support horizontal price-fixing activity, which is beyond the scope of [this] * * * lawsuit.''

It is well established, however, that ''a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties.'' *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 13 (1979). Therefore, nothing in the formerly proposed Final Judgment would have precluded any of the states, or any other party, from bringing future antitrust claims against VSP, whether based on a per se or rule of reason analysis. Nor would any provision in the formerly proposed Final Judgment have obstructed entry of full and appropriate relief in a subsequent suit. These conclusions apply equally to the proposed Revised Final Judgment.

In their later comment, the states asserted directly that the gathering by VSP of fee information and its setting of fees, in the manner permitted by Section V of the formerly proposed Final Judgment, would be per se violations of the Sherman Act when undertaken by a provider-controlled plan. Even if VSP were controlled by optometrists, as the states apparently believe they can prove, its setting of fees to its panel doctors, as an activity related to the offering of a separate and additional product—insurance—might in some circumstances be analyzed under the rule of reason rather than the per se rule.[3] *See generally id.* at 19–24. Insurance plans such as VSP commonly establish doctor panels to provide services to their insureds and set the fees that the plan will pay the panel doctors for these services. VSP's fee-setting policies may be reasonably ancillary to its operation of a vision-care insurance plan, and, if so, they would appear to be subject to rule of reason analysis.

The seven states also asserted that permitting VSP to base its fees on its panel doctors' modal or median prices to non-VSP plans for patients risks the same anticompetitive harm that has resulted from VSP's enforcement of its MFN clause. Two other commenters, Northwest Administrators and First American Health Concepts, raised similar arguments. Under the Revised Final Judgment, VSP will no longer maintain the option, contained in the formerly proposed Final Judgment, to calculate payments made to its panel doctors based on a doctor's modal or median fees. Rather, under Section V of the Revised Final Judgment, VSP will retain the option of calculating the fees that it pays panel doctors based merely on their usual and customary fees charged to private patients before any discounts are applied. The proposed

[1] Such service consist primarily of diagnostic services and the dispensing of optical goods, such as corrective lenses and frames.

[2] For example, in 1993 VSP reported that 98% of all optometrists licensed in Nevada were VSP-panel doctors, and today in California, VSP contracts with about 90% of optometrists in independent private practice.

[3] Statements 6 and 8 of the *Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust*, jointly issued by the Department of Justice and the Federal Trade Commission in 1994 and cited by the states, do not address the issuance of insurance, the activity at issue here.

Revised Final Judgment's narrowing of VSP's permitted fee-calculation options to a method based on a panel doctor's usual and customary fees, defined as such fees before any discounts are applied, eliminates any possibility that VSP's permitted fee-setting activity will inhibit discounting.[4]

The commenters also objected to some of the practices permitted under Section V of the formerly proposed Final Judgment on other grounds. First American Health Concepts contended that the collection of fee information would enable VSP to punish panel doctors if they discount to or even participate in non-VSP plans. This claim, however, ignores Sections IV (C) and (D) of the Final Judgment (and Revised Final Judgment), which clearly prohibit such conduct.[5] In any event, the proposed Revised Final Judgment no longer permits VSP to obtain fee information that reflects a panel doctor's discounting.

First American also contended that the information-collection provision (Section V(A) of the formerly proposed Final Judgment) would have enabled VSP to impose burdensome recordkeeping requirements on doctors. But most doctors already keep, in the ordinary course of their business, all of the information VSP would have been allowed to seek. At any rate, Section V(A) of the proposed Revised Final Judgment effectively reduces a panel doctor's potential fee-reporting obligations to an annual submission of the doctor's usual and customary fees for a retrospective period of up to 12 months. Such a requirement entails no more than submission of the doctor's fee schedule(s) in effect for the relevant period.

As the preceding discussion shows, the theme of many of the comments was that Section V of the formerly proposed Final Judgment went too far in granting VSP leeway to continue to operate its business despite the restrictions imposed by Section IV. Although the United States believes that Section V of the formerly proposed Final Judgment granted VSP nothing that compromised the remedy embodied in Section IV, the proposed Revised Final Judgment's narrowing of VSP's permitted activities substantially addresses most of the commenters' arguments. Moreover, the United States fully intends to monitor VSP's practices under the Revised Final Judgment and to seek enforcement or additional relief if warranted. Should competitive problems again restrain optometrists from discounting their fees for vision-care services to plans competing with VSP or to others, the United States stands ready to take all appropriate action.

B. Comments Seeking Additional Relief for the Challenged Conduct

Northwest Administrators urged that additional relief be obtained in the then-proposed Final Judgment. Its comment applies equally to be the Revised Final Judgment, which also does not provide for the additional relief sought. Northwest Administrators wanted the formerly proposed Final Judgment to require VSP to take affirmative steps to encourage doctors to rejoin competing plans and to repay doctors the difference between what VSP has paid them and what it would have paid them in the absence of its MFN clause. Pursuant to the Stipulation filed with the Complaint in this action, VSP has already provided all of its panel doctors with an addendum to its Panel Doctor's Agreement that expressly nullifies the MFN clause. In addition, the proposed Revised Final Judgment would require VSP to give each panel doctor a copy of the Judgment, which enjoins VSP from taking actions to deter panel doctors from participating in non VSP plans. As to payments, it is not the role of the United States to secure monetary damages for private parties.

C. Comments About Conduct Not Challenged in the Complaint

The Optical Laboratories Association and First American Health Concepts urged that the formerly proposed Final Judgment (and, by extension, the Revised Final Judgment) be expanded to cover a variety of conduct not challenged in the Complaint. Essentially, these commenters disagreed with the United States' prosecutorial decision about what conduct to challenge. As explained below, however, the Tunney Act does not authorize the Court to reject the proposed Revised Final Judgment on the ground that it does not enjoin conduct, allegedly in violation of the antitrust laws, that was not challenged in the Complaint. The scope of a governmental antitrust challenge is a matter solely within the discretion of the United States and is beyond the scope of the Court's Tunney Act review.

V. The Legal Standard Governing the Court's Public Interest Determination

The Tunney Act directs the court to determine whether entry of the proposed Judgment ''is in the public interest.'' 15 U.S.C. § 16(e). In making that determination, ''the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.'' *United States* v. *Wester Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993) (emphasis added, internal quotation and citation omitted).[6] Consequently, the Court should evaluate the relief set forth in the proposed Revised Final Judgment in light of the claims alleged in the Complaint and should enter the decree if it falls within the government's ''rather broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp*., 56 F.3d 1448, 1461 (D.C. Cir. 1995). The Tunney Act does not empower the Court to reject the remedies in the proposed Decree based on the belief that ''other remedies were preferable.'' *Id*. at 1460.

The Court is not ''to make *de novo* determination of facts and issues.'' *Western Elec.* 993 F.2d at 1577. Rather, ''[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General.'' *Id*. (internal quotation and citation omitted throughout). In particular, the Court must defer to the Department's assessment of like, competitive

[4] Similarly, VSP's permitted use (under the formerly proposed Final Judgment) of modal or median fee calculations as the basis for its own fees, unlike VSP's enforcement of its MFN clause, should not have discouraged doctors from discounting to non-VSP plans or patients. A substantial percentage of vision-care patients are uninsured, and for the most part, these are not the patients who are able to obtain discounts in any amount. Thus, a VSP-panel doctor's median or modal fee, even though calculated in part on fees charged to other plans to which the doctor does offer a discount, would likely have been well above the lowest fee charged by the doctor to a non-VSP plan or patient. Under the formerly proposed Final Judgment, discounting by a VSP-panel doctor to some non-VSP plans or patents was, therefore, not likely to have significantly depressed the doctor's income from VSP. Thus, this method of fee-setting by VSP, unlike the MFN clause, should not have operated to deter effective competition to VSP from other vision-care plans. Indeed, the modification of this provision of the decree (the substitution of a ''usual and customary'' for a ''median'' or ''modal'' basis from which VSP may set its panel doctors' fees) arose from VSP's practical difficulties in implementing a ''median'' or ''modal'' methodology, rather than from competitive concerns.

[5] Section IX of the Revised Final Judgment authorizes the United States to investigate VSP's compliance with the Judgment at any time upon reasonable notice. The United States may inspect and copy VSP documents, interview VSP employees, and require VSP to submit written reports under oath. Moreover, the Judgment, once entered, is an injunction, violations of which are punishable by the Court's contempt power.

[6] The *Western Electric* decision concerned a consensual modification of an existing antitrust decree. The Court of Appeals assumed that the Tunney Act was applicable.

consequences, which it may reject ''only if it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.''[7] *Id*. Thus, the Court may not reject a decree simply ''because a third party claims it could be better treated.'' *Microsoft*, 56 F.3d at 1461 n.9.

To a great extent it is the realities and uncertainties of litigation that constrain the role of courts in Tunney Act proceedings. *See United States* v. *Gillette Co.,* 406 F. Supp. 713, 715–16 (D. Mass. 1975). As Judge Greene has observed,

> If courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not contain the exact relief which the court would have imposed after a finding of liability, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an antritrust enforcement tool, despite Congress' directive that it be preserved.

United States v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd sub nom*. *Maryland* v. *United States*, 460 U.S. 1001 (1983) (Mem.). Indeed, where, as here, the proposed consent decree comes before the Court at the time the Complaint is filed, ''the district judge must be even more deferential to the government's predictions as to the effect of the proposed remedies * * *'' *Mircosoft*, 56 F.3d at 1461.

Moreover, the entry of a governmental antitrust decree forecloses no private party from seeking and obtaining appropriate antitrust remedies. Thus, VSP will remain liable for any illegal acts, and any private party may challenge such conduct if and when appropriate. If any of the commenting parties has a basis for suing VSP, they may do so. The legal precedent discussed above holds that the scope of a Tunney Act proceeding is limited to whether entry of *this* particular proposed Consent Decree, agreed to by the parties as settlement of *this* case, is in the public interest.

[7] The Tunney Act does not give a court authority to impose different terms on the parties. *See, e.q., United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 153 n. 95 (D.D.C. 1982), *aff'd sub nom*. *Maryland* v. *United States*, 460 U.S. 1001 (1983) Mem.); *accord* H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). A court, of course, can condition entry of a decree on the parties' agreement to a different bargain, *see, e.g., AT&T*, 552 F. Supp. at 225, but if the parties do not agree to such terms, the court's only choices are to enter the decree the parties proposed or to leave the parties to litigate.

Finally, the Tunney Act does not contemplate judicial reevaluation of the wisdom of the government's determination of which violations to allege in the Complaint. The government's decision not to bring a particular case on the facts and law before it at a particular time, like any other decision not to prosecute, ''involves a complicated balancing of a number of factors which are peculiarly within [the government's] expertise,'' such as ''whether [the government's] resources are best spent on this violation or another, whether the [government] is likely to succeed if it acts, whether the particular enforcement action requested best fits the [government's] overall policies, and, indeed, whether the [government] has enough resources to undertake the action at all.'' *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985); *See also Maryland* v. *United States*, 460 U.S. 1001, 1106 (1983) (Rehnquist, J., dissenting from summary affirmance). The Court may not ''reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made.'' *Microsoft*, 56 F.3d at 1459 (emphasis added). Entry of the proposed Revised Final Judgment will not prevent the government from investigating and challenging, if appropriate, conduct not addressed in the current action.

VI. Conclusion

The Tunney Act requires that public comments and this response be published in the Federal Register. When that publication has been accomplished, the United States will notify the Court and urge entry of the proposed Revised Final Judgment based on the Court's determination that the Judgment is in the public interest.

Dated: February 16, 1996.

Respectfully submitted,

Steven Kramer,

Richard S. Martin,

U.S. Department of Justice, Antitrust Division, Bicentennial Building—Room 9420, 600 E Street NW., Washington, DC 20530, (202) 307–0997.

January 19, 1995.

Gail Kursh

Chief Professional & Intellectual Property Section, Antitrust Division, U.S. Department of Justice, 600 E. Street NW., Room 9300, Washington, DC 20530.

Dear Ms. Kursh: These comments are submitted regarding United States of America vs. Vision Service Plan, case number 1:94CV02693.

Northwest Administrators, Inc. (NW) is a third party administrator which manages a vision care plan which competes with Vision Service Plan in the Northwestern United States. Our vision plan is known as the Northwest Benefit Network (NBN) vision care plan. During the past several years, NBN has experienced the anti-competitive actions by VSP as described in the U.S. Justice Department ''Complaint''. Eventually, we took our concerns to the Washington State Attorney General, which has conducted its own investigation.

We are concerned that the proposed settlement will enable VSP to continue to engage in anti-competitive activities, and we request that your settlement be modified to include the following:

1. VSP should be prohibited from asking participating panel doctors for any information regarding fees accepted from other plans or regarding participation in any other plan. By allowing this activity, you permit them to identify doctors who they may wish to punish for cooperating with competing plans. By allowing them to collect fee information about their competitors, they will be in a position to continue to use the information in restraint of trade even if they don't do so under the authority of a ''most favored nation'' contract clause.

To support my concern, I am enclosing a copy of a letter from VSP to its panel doctors in which VSP states, ''In the future, VSP's payments will be based on the range of fees the doctor accepts, rather than the lowest fee.'' The ''range'' of a doctor's fees, by definition, includes the lowest and highest fees which the doctor accepts. This is the type of information which VSP has misused in the past.

2. ''Permitted Activities'' described on page five of your Final Judgment neutralize several of the activities described in ''Prohibited Conduct'' on page four and five of your Final Judgment. For example, VSP is prohibited from ''monitoring or auditing the fees any VSP panel doctor charges any non-VSP patient or any non-VSP plan; and communicating in any fashion with any VSP panel doctor regarding the doctor's participation in any non-VSP plan or regarding the doctor's fees charged to any non-VSP patient or to any non-VSP plan.'' In the very next section, under ''Permitted Activities'', VSP is allowed to collect fee information and to audit fee information regarding doctors' charges to non-VSP patients. The only way to insure that such information is not used for anti-competitive activities is to prohibit them from collecting or possessing such information.

3. VSP should be required to notify all doctors who withdrew from competing plans that they will not in any way be penalized for re-enrolling in other non-VSP plans. As currently written, your ''Compliance Measures'' simply assist VSP in becoming more monopolistic. To enhance competition and provide equitable relief, competing plans which were damaged should be made whole. Due to VSP's dominant market position, when forced to choose between dropping their participation in VSP and dropping their participation in non-VSP plans, providers almost always choose to drop their participation in non-VSP plans. Your efforts should be to help non-VSP plans regain lost providers; not to help VSP to become bigger and stronger. Non-VSP plans should be

allowed to monitor the distribution of such notices to insure that all affected providers receive proper notification.

4. VSP should be required to repay all doctors who were penalized for participating in other non-VSP plans. VSP should be required to reimburse the difference in the amount they would have paid and the reduced amount paid because the doctor was on a competing plan which paid less than VSP.

Finally, I would like to request clarification of Section X of the Final Judgment which states that ''This Final Judgment shall expire within five years from the date of its entry.'' Does that mean that VSP can resurrect their ''Most Favored Nation'' activities after five years?

We would like to express our sincere gratitude to the Justice Department for helping to level the playing field and for attempting to restore a competitive market environment. We also appreciate your consideration of our suggestions regarding the proposed settlement with VSP.

Sincerely,

James H. Baker,

Vice President.

March 17, 1995.

Gail Kursh,

Chief, Professions & Intellectual Property Section, Department of Justice, Antitrust Division, 600 E. Street NW., Room 9300, Washington, DC 20530.

Re: U.S. v. Vision Service Plan, USDC for District of Columbia, Case No. 1:94CV02693

Dear Sir/Madam: This comment on the proposed Final Judgment in the above—entitled case is filed on behalf of the Optical Laboratories Association, ''(OLA''), a trade association who address is P.O. Box 2000, Merrifield, VA 22116–2000. Many of the members of the Association have agreements with VSP as ''VSP contract laboratories'' to ''perform opthalmic prescription work for VSP''.

The thrust of this comment is that the proposed consent order should be expanded to prohibit the MFN clause in VSP's contracts with its contract laboratories.

A vision service plan needs agreements with two sets of providers: a panel of optometrists to perform refractions for the plan members; and a panel of optical laboratories to perform prescription work and provide completed devices—lenses and frames—to be delivered to the plan members. A plan which cannot secure the services of adequate panels in each of these areas cannot be competitive in the market place.

The Department's Competitive Impact Statement adequately describes conditions in the optical industry, and provides justification for the proposed consent order. However, it does not go far enough. The word ''laboratory'' could be substituted for the word ''optometrist'' wherever the latter word appears in the Statement to describe the reluctance of contract laboratories to give discounts to plans that compete with VSP. This means that the market can be made competitive for other vision service plans only if the laboratories can be freed from enforcement of VSP's MFN clause.

Attached is a copy of VSP's ''Laboratory Agreement''. Paragraph ''J'' refers to prices and provides that—''these prices . . . reflect discounts which are greater than Laboratory gives to any non-VSP customer.'' Paragraph ''H'' provides that—''Laboratory agrees not to sell . . . any vision care group plan . . .'' There can be no doubt that the agreement is designed to lock the laboratory into a non-competitive position.

Also attached is a copy of a typical letter received by a contract laboratory after VSP had audited its prices. There is no question that VSP enforces its MFN clause.

In view of the above, it is submitted that in order to assure competitive conditions in the market for vision care plans, VSP must be enjoined from enforcing a MFN clause in any Laboratory Agreement.

Respectfully submitted,

Optical Laboratories Association, by:

Joseph S. Gill,

VSP Laboratory Agreement

The undersigned optical laboratory, hereinafter referred to as ''Laboratory,'' hereby agrees to perform ophthalmic prescription work for VISION SERVICE PLAN, hereinafter referred to as ''VSP,'' as a ''VSP contract laboratory.''

A. Term. This contract shall be effective upon the date of acceptance by VSP and shall remain in full force and effect until terminated by either party hereto giving the other fifteen (15) days prior written notice of intent to terminate. Laboratory agrees to complete and deliver any prescription orders already in process on the date of termination of this contract, and VSP agrees to pay for these prescriptions at the contract prices listed herein. Laboratory agrees that VSP will exercise its sole discretion in determining that laboratories with which it will contract and that VSP reserves the right to cancel this contract and remove Laboratory's name from its approved list, subject only to the fifteen (15) day notice provided for hereinabove.

B. Laboratory Representations. Laboratory agrees and represents that:

(1) It adheres to applicable ANSI Z–80 Standards.

(2) It conducts a complete wholesale optical service, serving all optometrists and ophthalmologists without discrimination as to race, color or creed.

(3) It has surfacing and finishing capabilities in-house or through the parent company (a lab by the same name) which is located within the same region.

(4) It is not owned, in whole or in part, by any person practicing as an optometrist, ophthalmologist or dispensing optician or by any person owning any part of a dispensary or retail outlet.

(5) It has listed below all persons having an ownership interest in Laboratory.

(6) It will notify VSP immediately of any change in ownership of laboratory.

(7) It understands and agrees that this contract is not assignable and becomes invalid if the Laboratory changes ownership, name, or address.

(8) It agrees to adhere to and be bound by all policies and procedures of VSP.

(9) It agrees to notify VSP of any price changes by sending its revised price lists to the VSP Contract Laboratory Department within thirty (30) days of the effective new prices.

C. Audits and Inspections. Laboratory agrees that representatives of VSP may visit Laboratory at any reasonable time during normal business hours for the purpose of inspecting Laboratory's facilities, stock, and fabrication operations, and to audit any records. Laboratory will allow VSP representatives to analyze pricing and discount information by reviewing wholesale invoices and statements selected from Laboratory's files. Laboratory will provide VSP all wholesale prescription price lists used for any and all Laboratory customers, including buying groups. Pricing information shall be held in strictest confidence by VSP, and shall be utilized solely for VSP's internal purposes. Pricing information will not be disseminated to any other laboratory or third party.

D. Name Use. Laboratory agrees not to sue the name ''Vision Service Plan, ''VSP,'' the VSP logo, or any variation of any of them without having first obtained the express written consent of VSP and agrees that using either the name of servicemarks of VSP for any purpose without the express written consent of VSP is a violation of state and federal law and will result in immediate termination of this contract.

E. Financial Incentives. Laboratory agrees not to offer or provide any discounts, gifts, premiums, or other financial inducements to VSP member doctors to attract VSP prescriptions. Laboratory agrees *not* to include the VSP volume when determining a VSP member doctor's volume discount on private prescriptions.

F. Insurance. Laboratory agrees to provide and maintain general and product liability insurance in a minimum amount of $1,000,000 per occurrence and to have VSP named as an additional insured on the general and product liability policies.

G. Cooperation. Laboratory agrees not to take any actions demonstrating any unwilliness or inability to work cooperatively for the best interest of VSP, its doctors, subscribers or subscriber groups.

H. Competition. Laboratory agrees not to sell or offer to sell, directly or indirectly (including through any partnership, association or corporation in which Laboratory owns more than 10% of outstanding shares), any vision care group plan except safety eyewear programs.

I. Redos. Laboratory shall honor lab and doctor redos for at least six (6) months from the date of completion of the original Rx. Lab redos shall be remade until correct at no charge, and the VSP member doctor will be the final judge of quality. A doctor redo shall be remade at no additional charge. Laboratory agrees that the contract prices paid for original Rxs cover the costs of doctor redos.

J. Prices. Laboratory agrees to perform VSP prescription work for the prices listed below. These prices include all materials and labor involved in supplying finished and mounted prescription lenses to VSP member doctors and reflect discounts which are greater than Laboratory gives to any non-VSP customer.

All single Vision Lenses ..... $_____

All bifocal Lenses ..... $_____
All Other Prescriptions Including Trifocal, Lenticular, Double Seg., Etc. ..... $_____
Laboratory will supply frames for VSP prescriptions at the catalog price on the date the prescription is completed less: 15%
$_____

Laboratory agrees there will be no service charge to VSP or the doctor for supplying any frame normally available to Laboratory's customers. The price for each category of prescription lenses includes all types of lenses within that category, and is the total price, except for times on the VSP Lab Options List. Laboratory agrees not to charge the VSP member doctor directly unless authorized by VSP. Laboratory agrees not to refuse any VSP prescription because of its cost. Laboratory agree to at all times give VSP prescriptions the same priority as non-VSP prescriptions. Laboratory understands and agrees that some prescriptions within each of these categories are more expensive than others, and these prices cover all prescriptions. Laboratory agrees not to divulge any of these prices to any other party.

K. Laboratory Ownership. The following are the only persons who have an ownership interest in the Laboratory:

Name of owner(s)	Percentage of ownership
[None Listed]	

Vision Service Plan, Contract Laboratory Program, 333 Quality Drive, Rancho Cordova, CA 95670–7989, (910) 851–5000 (800) 852–7609, Telefax (916) 851–4866

Enclosed is a new laboratory contract for your completion. Please carefully review this new contract. Among other changes, note the following.

* The minimum general and product liability insurance coverage has increased to $1,000,000 per occurrence. In addition, VSP is to be named as an additional insured on the policies.

* When we last surveyed all contract laboratories on their current liability limits, it was evident that most labs already realized the necessity of higher liability coverage. We found that 85% of our contract labs carried at least $1,000,000 coverage.

Please forward a Certificate of Insurance reflecting the minimum of $1,000,000 general and product liability, as well as showing VSP as an additional insured.

* The laboratory agrees not to sell any competing vision care group plan. Safety eyewear programs may continue to be sold by contract laboratories.

* As a result of increased communications between VSP and contract labs, a paragraph titled ''Confidential Information'' has been added. This will help ensure confidentiality of any information exchanged.

* The laboratory's bid prices must reflect competitive pricing for VSP.

A recent price audit was conducted on your laboratory prices. The audit utilizes the frequency of options, different lens prescriptions and styles, and miscellaneous add-on items, and then compares the amount VSP pays against your laboratory's private pricing.

VSP has found through this audit process that VSP is not receiving a discount off maximum discounted private prices. As a remedy to this situation, we ask that you submit a new bid to continue as a VSP Contract Laboratory.

Your cooperation on returning the completed contract with new bid prices and Certificate of Insurance by (_____) is appreciated. If you have any questions, please call me.

Sincerely,

Teri M. Lew,

Contract Laboratory Program Administrator.

TML/td

Enclosures

March 28, 1995.

Gail Kursh,

Chief, Professional and Intellectual Property Section, Antitrust Division, United States Department of Justice, 600 W. Street NW., Room 9300, Washington, D.C. 20530

Re: *United States v. Vision Service Plan*, Case Number 1:94CV02693

Dear Ms. Kursh: The undersigned states offer the following comments in the matter of *United States v. Vision Service Plan*. We are pleased that you have attempted to address some of the problems raised by VSP's practices and applaud your enforcement efforts. However, on behalf of the chief antitrust enforcement officers of our respective states we would like to point out a potential problem with the inclusion of language in the Consent Decree which could potentially inhibit any future enforcement efforts by the states. Although we recognize that the proposed Consent Decree is merely an agreement between the parties with no precedential effect, we nevertheless feel that the Decree could be improved to more adequately address the public interest in this matter.

As you are aware, Vision Service Plan (VSP) is based in California and does business throughout the western United States. As your investigation revealed, many states have been impacted by VSP's activities. Consequently, for some time now several states have been examining VSP's practices and their effects on consumers in our region. The scope of our review is somewhat broader than the DOJ investigation, focusing on other issues in addition to the most favored nation clause.

Our purpose in submitting comments is to raise our concern that the Consent Decree as proposed might be interpreted as a court-sanctioned seal of approval for the activities which have been specifically identified in Section V of the Decree. That section permits, *inter alia*, the defendant to continue to gather fee information from participating doctors. The fees gathered are then permitted to be used as part of a determination of median or modal fees, which are in turn used to set reimbursement rates. Although this activity has been permitted in the context of responding to your concerns about misuse of most favored national clauses, we are concerned that it will be taken out of context to support horizontal price-fixing activity, which is beyond the scope of activity addressed in your lawsuit. It would be disturbing to see such a result.

We suggest that our concern would be eliminated if Section V is simply moved to the Stipulation between the parties, rather than made a part of the court's order. Alternative by, language should be inserted which makes it clear that the permitted activities are permitted only insofar as they are not part of action which would be otherwise illegal, such as horizontal price-fixing. Either solution would address our concern by clarifying the scope of the Consent Decree, yet would not affect the substance of your settlement with VSP.

Thank you for your consideration. Please feel free to contact us if you have any questions.

Very truly yours,

Tina E. Kondo,

Brian Dew,

Assistant Attorneys General, State of Washington.

Daveed Schwartz,

Assistant Attorney General, State of Alaska.

Kenneth S. Countryman,

Assistant Attorney General, State of Arizona.

Michael T. Lee,

Deputy Attorney General, State of Hawaii.

Marty Howard,

Deputy Attorney General, State of Nevada.

Susan G. White,

Assistant Attorney General, State of New Mexico.

Andy Aubertine,

Assistant Attorney General, State of Oregon.

April 21, 1995.

Ms. Anne Bingaman,

Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 600 E. Street N.W., Washington, D.C. 20530

Re: *United States* v. *Vision Service Plan*, Case No. 1:94CV026993 TPJ

Dear Ms. Bingaman: Pursuant to conversations with the Department of Justice (the Department), the undersigned states submit this Additional Comment in the matter of *United States* v. *Vision Service Plan*. We are concerned that entry of the proposed Final Judgment, as drafted, would not be in the public interest. Entry of the decree would give VSP a court order which arguably allows it to engage in activity which the Ninth Circuit, the Department and the Federal Trade Commission (FTC) consider to be per se illegal. Although the decree contains prohibitions against certain activities associated with most favored nation clauses, Section V can be interpreted as overruling them and allows VSP to engage in many of these activities. Although we applaud the Department's recognition that VSP's business practices have severe and significant anticompetitive effects and support the Department's efforts to address the problem, we fear that the proposed Final Judgment will create more problems than it

will solve. Accordingly, we object to entry of the proposed Final Judgment.

I

Section V May Allow VSP to Engage in Activities That Would Otherwise be per se Illegal

In *Hahn* v. *Oregon Physicians' Service,* 868 F.2d 1022 (9th Cir. 1988), the Ninth Circuit held that a provider-controlled plan which collected fee information and set reimbursement rates and maximum fee caps for other providers could be construed as a horizontal price fixing conspiracy, and thus per se illegal. Moreover, the Department and the FTC, in jointly prepared guidelines declare that activities such as information gathering and fee setting by provider-controlled plans is per se illegal.

A. Provider Control

VSP is a provider-controlled plan. Historically, all of its directors have been doctors. Its mission ''is to put . . . dollars into optometric bank accounts.'' [1] Currently, twelve of its thirteen directors are doctors. Each of these twelve director-doctors is also a VSP panel doctor. Under these panel doctors' direction, VSP collects information about the fees charged by all panel doctors. The director-doctors are ultimately responsible for using this information to set fee reimbursement rates and maximum fee caps for their fellow doctors. Each of these activities: information gathering and fee setting, is per se illegal when engaged in by a provider-controlled plan.[2]

B. Information Gathering

A number of provisions in Section V arguably would allow VSP to engage in illegal information gathering. Section V(A) of the proposed Final Judgment would allow VSP to collect fee information from panel doctors in order to determine doctors' median or modal fees. The median fee is defined as ''the fee below and above which there are an equal number of fees,'' and the modal fee is defined as the fee charged most frequently to non-VSP patients. Either measurement requires knowledge of every fee charged by a doctor during the preceding year. Accordingly, this section would allow VSP's doctor-controlled board to collect information about all fees charged by fellow member doctors during the preceding year and use this information to set fee reimbursement rates and maximum fee caps.

The Department and the FTC explicitly condemn this activity. ''If an exchange among competing providers of price or cost information results in an agreement among competitors as to the prices for health care services . . . that agreement will be considered unlawful per se.'' Statement of Department of Justice and Federal Trade Commission Enforcement Policy on Provider Participation in Exchanges of Price and Cost Information, BNA Antitrust Trade and Regulation Reporter, Sep. 29, 1994, p. S–14.

C. Fee Setting

A number of provisions in Section V arguably would allow VSP to engage in illegal fee setting. Section V(B) would allow VSP to calculate the fees it pays to panel doctors on the basis of median or modal fees. Section V(D) would allow VSP to devise a fee system for new panel members based on average fees. Section V(E) would allow VSP to maintain the current fee reimbursements and maximum fee caps it has already set. Taken together, these sections seem to allow VSP's doctor-controlled board to continue to set fee reimbursement rates and maximum fee caps as long as they do not base them on the lowest fees charged by panel doctors. The fact that providers are setting fees for fellow providers, however, should be more of a concern than the statistic used to set the fee.[3]

The Department notes that Section V would allow VSP to use a fee schedule, which is ''an approach used by other vision care insurance plans.'' Competitive Impact Statement, p. 12. VSP is not like other vision care insurance plans. It is controlled by doctors. ''Even if a fee schedule is therefore desirable, it is not necessary that the doctors do the price fixing.'' *Arizona* v. *Maricopa County Medical Society,* 457 U.S. 332, 352 (1982).

15 U.S.C.A. § 16(e) (1995) requires that the proposed Final Judgment be in the public interest. If the proposed Final Judgment is entered, it will give to VSP, a collection of doctors the government contends have already acted anticompetitively, a court order which arguably allows further behavior the Ninth Circuit, the Department and the FTC all consider per se illegal. This behavior will most likely result in even higher vision care costs in areas where VSP is dominant. Because of Section V, the proposed Final Judgment not only fails to remedy the anticompetitive effects of VSP's actions, it arguably makes them worse. Entry of such a consent judgment can not be in the public interest.

II

Section V Compromises the Decree's Ability to Terminate Alleged Violations

The proposed Final Judgment, as drafted, also fails the public interest test because it does not terminate the alleged violations. The complaint alleges that one of the ''agreements'' between VSP and panel doctors that has raised prices for vision care services is the most favored nation (MFN) clause. The complaint also alleges that the MFN clause creates disincentives to discounting. Although Section IV of the proposed Final Judgment purports to prohibit various activities associated with the MFN clause, section V overrules these restrictions and explicitly permits VSP to engage in many of these activities. Because of section V, the decree also fails to remove the disincentives to discounting.

A. MFN Activities

Section IV of the proposed Final Judgment attempts to prevent illegal conduct regarding most favored nation clauses. Although Sections IV(E) and IV(F) would prohibit VSP from monitoring, auditing or communicating with any panel doctor about the fees the doctor charges any non-VSP patient or plan, Section V(C) allows VSP to audit any of its doctors and Section V(A), as discussed above, allows VSP to collect (monitor and communicate) information on each fee charged by a doctor to a non-VSP patient or plan. Section IV(B) would prohibit VSP from linking panel doctor payments to fees charged by the doctor to non-VSP patients or plans. Section V(B), however, allows VSP to calculate payments to doctors on median or modal fees which are, by definition, calculated exclusively on fees paid to non-VSP patients or plans. Finally, whereas Section IV(C) would prohibit VSP from differentiating payments to doctors who charge lower fees to non-VSP patients or plans, Section V(E) allows VSP to maintain current fees which, because of most favored nation enforcement, already differentiate.

B. Discounting Disincentives

Use of modal or median fees in place of the lowest fee fails to remove disincentives to discounting. For example, the median fee, ''the fee below and above which there are an equal number of fees,'' is potentially lowered anytime a provider discounts his fee to a non-VSP patient or plan. Providers are still unlikely to risk reducing the amounts they receive from VSP, which constitutes a significant portion of many practices, by accepting anything less than their VSP fees.[4]

Section V thus not only facilitates price fixing, it also compromises the proposed Final Judgment's attempts to prohibit MFN activities and remove disincentives to discounting. Moreover, by allowing VSP to maintain the current fees which are the result of years of VSP's misuse of most favored

[1] ''The mission of our corporation as stated by the founders, reaffirmed by the present board, and by all of the leaders in between, is to put patients into our panel doctors' offices and dollars into optometric bank accounts.'' February 12, 1987 Speech by VSP's President, John O'Donnell, p. 8. Exhibit 62 to Declaration of Jeffrey M. Shohet in Support of Plaintiffs' Motion for Partial Summary Judgment in *Allstate Optical Services, Inc.* v. *California Vision Service,* Docket No. C87–20572WAI, U.S. District Court, Southern District of California.

[2] A ''safe harbor'' exists where a provider-controlled plan shares substantial financial risk through capitation or withholding of at least 20%. Statement 8 of The Department of Justice and Federal Trade Commission Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust. VSP, however, does not use capitation and only withholds a maximum of 2%. Accordingly, VSP does not qualify for the safe harbor.

[3] As the Department points out at p. 7 of the Competitive Impact Statement, one of the effects of VSP's practices is that fees for vision care services are 30% higher in areas where VSP is dominant. The Department implies that VSP currently bases its fees on the lowest fees accepted by its doctors. By encouraging VSP to set fees based on any amount other than the lowest fees, however, costs for vision care services are likely to rise even higher.

[4] Perhaps most significantly, the proposed Final judgment fails to address what is arguably the strongest disincentive to discounting. Many optometrists feel that VSP is ''optometry's plan.'' They see discounting or membership on a competitor's panel as forms of disloyalty. The decree thus would leave intact the most significant disincentive to discounting.

nation clauses, the proposed Final Judgment fails to remedy a specific practice alleged in the Complaint. It would not be in the public interest to simply tell VSP to ''sin no more'' without also addressing the unfair advantage it has already gained.[5]

III. Conclusion

Nothing is alleged in the VSP complaint which would necessitate the inclusion of Section V. This section arguably would allow VSP to engage in conduct that would otherwise be illegal. Section V also reduces the safeguards of Section IV to nothing more than an illusion. For these reasons we object to entry of the proposed Final Judgment in this matter.

Respectfully Submitted this 21st day of April, 1995.

Very truly yours,

Tina E. Kondo,

Brian L. Dew,

Assistant Attorneys General, State of Washington.

Bruce M. Botelho,

Attorney General.

Daveed A. Schwartz,

Assistant Attorney General, State of Alaska.

Kenneth S. Countryman,

Assistant Attorney General, State of Arizona.

Michael T. Lee,

Deputy Attorney General, State of Hawaii.

Marty Howard,

Deputy Attorney General, State of Nevada.

Susan G. White,

Assistant Attorney General, State of New Mexico.

Andrew E. Aubertine,

Assistant Attorney General, State of Oregon.

United States of America, Plaintiff, vs. *Vision Service Plan,* Defendant.

[No. CV 94–2693 TPJ]

Comment of First American Health Concepts, Inc.

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), First American Health Concepts, Inc., (''FAHC''), an interested person, submits to the Department of Justice for filing with the United States District Court for the District of Columbia and publication in the Federal Register its written Comment on the Final Judgment proposed by the parties to this action. This Comment is supported by the attached Memorandum of Points and Authorities and all Exhibits hereto.[1]

Respectfully Submitted this 29th day of March, 1995.

Shimmel Hill, Bishop & Gruender, P.C.

Daniel F. Gruender,

Michael V. Perry,

Glenn B. Hotchkiss,

3700 North 24th Street, Phoenix, Arizona 85016, Attorneys for First American Health, Concepts, Inc.

Memorandum of Points and Authorities

I. Introduction

FAHC is an Arizona corporation formed in 1981 and a competitor of the Defendant, Vision Service Plan (''VSP''), in the market for pre-paid vision care services. Both FAHC and VSP offer their enrolled members eye examinations and eyeware (eyeglasses and contact lenses) through a network of affiliated service providers, primarily optometrists and opticians.

FAHC incorporates the factual recitations contained in the Competitive Impact Statement Sections I and II filed in this action.

FAHC opposes the proposed Final Judgment for the following reasons. As explained in § II(B) below, mere elimination of the Most Favored Nations (''MFN'') provision by name from the VSP Panel Doctor Agreement does not remedy VSP's anti-competitive practice of penalizing panel doctors for accepting lower fees from competing plans because § V(B) of the proposed Final Judgment permits VSP to continue calculating the fees it will pay its panel doctors in relation to what those doctors accept from non-VSP patients. As explained in § II(C) below, the proposed Final Judgment is deficient because it does not even address, let along prohibit, VSP's illegal tying/exclusive dealing arrangement between a VSP panel doctor's membership on a VSP panel and then purchase of eyeglasses from a VSP-controlled sources.

For all these reasons, and as further explained in § II(D), FAHC respectfully suggests that the proposed Final Judgment be modified in the following respects:

(1) VSP should be prohibited from calculating the fees it will pay its panel doctors based *directly or indirectly* on the fees those doctors charge to non-VSP patients;

(2) VSP should be prohibited from requiring VSP panel doctors to maintain or produce any information relating to the fees those doctors charge to non-VSP patients, and also should be prohibited from auditing VSP panel doctors' records to discover such information; and

(3) VSP should be prohibited from tying the VSP membership of its panel doctors to the purchase of vision products manufactured by VSP-owned or controlled sources or requiring that VSP panel doctors obtain vision products only from VSP-controlled sources.

II. Analysis

A. Introduction

The Tunney Act requires that before entering the proposed Final Judgment, this Court must first determine that entry of the Final Judgment is in the public interest. 15 U.S.C. § 16(e). As stated in *United States* v. *Airline Tariff Pub. Co.,* 836 F.Supp. 9, 11 (D.D.C. 1993):

Courts have developed a two-pronged public interest inquiry. First, courts inquire as to whether the proposed relief effectively will foreclose the possibility that antitrust violations will occur or recur * * *. Second, courts consider whether the relief impinges upon other public policies. (citations omitted)

In making the public interest determination, the Court must evaluate whether the proposed Final Judgment provides a valid antitrust remedy by ''pry[ing] open to competition a market that has been closed by [VSP's] illegal restraints.'' *International Salt Co.* v. *United States,* 332 U.S. 392, 401 (1947). *See also United States* v. *Microsoft,* 159 F.R.D. 318, 331 (D.D.C. 1995). Stated another way, in assessing whether a proposed consent judgment passes muster, the Court must determine that it (a) rectifies the behavior the government perceives to be a current antitrust violation, and (b) does not allow the settling defendant to engage in similar anti-competitive behavior. *Airline Tariff, supra,* at 12–13. The Court must independently review the proposed Final Judgment using the above analysis, and may not merely rubber stamp it. *Microsoft, supra,* at 329. Finally, in making the public interest determination, this Court is not restricted to the allegations of DOJ's Complaint, and instead, may look beyond the four corners of the Complaint to all relevant conduct and circumstances. *Microsoft, supra,* at 331. For the reasons set forth below, the proposed Final Judgment does not serve the public interest and should be rejected.

B. The Proposed Final Judgment Is Deficient Because It Allows VSP To Demand From Its Panel Doctors Information Regarding Fees Charged Non-VSP Patients And To Continue Calculating The Fees It Pays Its Panel Doctors In Relation To What Those Doctors Charge Non-VSP Patients.

On the simplest level, DOJ Claims that the proposed Final Judgment will eliminate VSP's anti-competitive practices and open the vision services industry to an unparalleled degree of competition. The proposed Final Judgment will bring about this result, DOJ says, because it renders the MFN provision in the VSP Panel Doctor's Agreement null and void. The vice in that MFN provision (and what presumably led DOJ to sue VSP in the first place) is that it allows VSP to calculate the fees it will pay its panel doctors in relation to the fees those same doctors charge non-VSP patients and non-VSP plans. DOJ knows that VSP has a history of cutting providers' rates under the guise of the MFN alleging the provider is accepting lower fees from another competitor even when that allegation is incorrect or the fees involved are not comparable. Based on this evidence, there is no reason to expect VSP will not do the same with any other formula permitted. Based on what DOJ knows, it should, as it did in the case of Delta Dental, prohibit VSP access to any fee information of providers for others than its own patients and not put its imprimatur on any fee setting mechanism.

[5] It is unclear why the proposed Final Judgment in this case differs so significantly from the proposed Final Judgment in the Department's recent Arizona Delta Dental case. The complaint in the Delta Dental case, like the VSP case, included allegations of misuse of most favored nations clauses. The decree in Delta Dental does not contain a section of permitted activities. There is no apparent difference in the Complaints that would explain the presence of Section V in this case.

[1] FAHC incorporates at Exhibits A and B the letters dated October 10, 1994 and October 17, 1994, and all exhibits thereto, submitted to the Department of Justice by Daniel F. Gruender.

An additional problem with the proposed Final Judgment is that while it prohibits VSP from enforcing the MFN provision, it expressly allows VSP to continue its anti-competitive practice of setting its fees in relation to the fees charged by its competitors.

Part of the problem with the permitted Section V is it is based on the erroneous assumption that non-VSP fees will be for the identical or comparable level of service and product as VSP's. In fact, some providers use composite rates, one price for any exam, whether limited, intermediate or comprehensive, and the same type of lens and glasses while this is not in fact the case with VSP. Accordingly, efforts to construct ''median'' or ''modal'' fees are meaningless because it involves a comparison of dissimilar services or products.

There is no doubt but that the proposed Final Judgment allows VSP to disguise and continue its anti-competitive comparative fee-setting policy. Section IV of the proposed Final Judgment prohibits VSP from maintaining or enforcing the MFN and from linking payments made by VSP to its panel doctors to the fees charged by those doctors to any non-VSP patient or plan. However, the entirety of § IV is qualified by the clause ''[e]xcept as permitted in Section V.'' Section V *permits* VSP to ''calculate the fees that it pays to a VSP panel doctor for services rendered to VSP patients based on either the panel doctor's modal or median fee. * * *.'' § V(B). In turn, ''modal fee' and ''median fee'' are both defined in terms of ''the fee(s) charged * * * for each service rendered to *non-VSP patients* * * *.'' § II(F) & (G) (emphasis added). In short, Section V expressly authorizes VSP to continue some vaguely defined comparative fee-setting policy which resulted in this lawsuit and which Section IV purports to prohibit.

DOJ tacitly concedes that the proposed Final Judgment will not prohibit VSP from basing its payments on the fees paid by its competitors:

> Though Section V does not allow VSP *routinely* to base its payments on the lowest fee charged by its panel doctors to any non-VSP plan or patient—as VSP has done through its MFN clause—Section V does permit VSP to base its payments to panel doctors on their median or modal fees charged to non-VSP plans and patients, two measures of usual and customary fees that are not linked *directly* to the lowest fee charged.

Impact Statement at 13 (emphasis added). Apparently, DOJ's position is that VSP may base its payments to its panel doctors on the fees those doctors receive from non-VSP patients or plans so long as VSP does not do so routinely or directly.

The fallacy in DOJ's reasoning is obvious. If the fee-setting mechanism embodied in the MFN provision is the competitive evil DOJ says it is,[2] then the policy must be prohibited whether it is implemented routinely or sporadically, directly or indirectly. Otherwise, VSP is free to do indirectly what it is prohibited from doing directly, in which case the very idea that competition will increase and consumers will benefit is laughable.

DOJ's only response is to suggest that in light of the fact that many patients have no vision coverage at all, the VSP panel doctor's median or modal (i.e., non-VSP) fee is not likely to be the doctor's lowest fee. Impact Statement at 13. This argument also misses the mark. The point is not that the median or modal fee will be a given doctor's *lowest* fee, but rather, that it will be a *lower* fee than the previously determined VSP fee. In that event, VSP can (and undoubtedly will) lower its fee to the lower level, the VSP panel doctor will suffer financially due to his membership in a competing plan, and the doctor's financial incentive will be to drop his membership in the competing plan to the detriment of that plan which reduces the competitor's ability to be an effective competitor which results in higher costs to the consumer. This is exactly the anti-competitive chain of events of which DOJ complains in its Complaint. *See* Complaint at ¶¶9–11.

DOJ's inadequate remedy also presents a significant obstacle to a doctor's decision to join another panel in addition to VSP. Under § V(A) of the proposed Final Judgment, VSP can compel a panel doctor to provide on an annual basis information sufficient to determine that doctor's modal and median fee. The modal fee is defined as the doctor's most frequently charged fee to non-VSP patients or for non-VSP covered services, while the median fee is defined as the doctor's fee below and above which there are an equal number of fees charged to non-VSP patients or for non-VSP covered services. Proposed Final Judgment at § II(F) & (G).

DOJ's modal/median fee scheme will require doctors to carry an enormous record-keeping burden in order to comply with VSP's requirements. Each doctor who participates in both a VSP panel and a competing panel will have to maintain (and produce at least annually), and probably compile and compute from, extensive records regarding each non-VSP patient and the fees charged to each non-VSP patient. The cost of this type of record-keeping could well be prohibitive. The failure to comply with the record-keeping requirement could be even worse because the proposed Final Judgment also permits VSP to impose unspecified penalties on doctors who misrepresent their fees or the frequency with which they charge those fees.[3] Proposed Final Judgment at § V(F). Rather than go through all that red tape and risk unspecified reductions and potential penalties and costs, providers will stay off of other panels just as they have under the MFN by whatever name it has been called.

When faced with this Hobson's choice (between the cost of compliance and penalties for non-compliance), the only way for a doctor to escape the record-keeping burden and potential risks, expenses and uncertainties of ''modals'' and ''medians'' as well as penalties, is to drop his membership in a competing panel or simply not join if the fees are not the same as VSP. That is what most plans that have resisted VSP's MFN enforcement tactics have been forced to do, namely raise their rates to those provided by VSP. In other words, if a doctor chooses to join a VSP panel, and *only* a VSP panel, the onerous record-keeping requirements of § V(A) do not apply to him because he is not providing services to any non-VSP patients.[4] Again, the clear incentive is for the doctor to drop his membership in a competing plan and provide services only through VSP, and the end result is a corresponding diminution in the number of doctors available to competing plans such as FAHC or other non-VSP plans and programs, and, of course, less competition for VSP who is growing by leaps and bounds.[6]

If DOJ is serious about increasing competition in the vision services industry by providing incentives for providers to join more than one vision services plan (or at least by removing the disincentives to doing so), that goal can be accomplished only by prohibiting VSP, as the Justice Department required of a similar plan using a MFN clause and fee setting mechanism in the dental industry, from setting the fees it will pay its panel doctors in comparison to the lower fees those doctors accept from competing plans.[6] DOJ does not explain why it prohibited Delta Dental from doing what it permits VSP to do. Any lesser remedy leaves VSP's litigation-inducing, anti-competitive practice intact.

C. The Proposed Final Judgment Is Deficient Because It Fails to Even Address the Tying/Exclusive Dealing Arrangement Between Membership on a VSP Panel and the Lenses VSP Panel Doctors Must Dispense.

1. Introduction

In addition to the defects discussed above, the proposed Final Judgment fails to serve the public interest because it does not even address a VSP-imposed requirement which is either a tying arrangement or an exclusive dealing arrangement. Specifically, the VSP Member Doctor's Procedure Manual (the ''Manual'') requires that VSP panel doctors must obtain lenses to be dispensed to patients only from VSP-approved

[2] In its Complaint, DOJ states that the MFN provision/comparative fee policy: 1) unreasonably restrains competition among vision service care insurance plans; 2) results in higher prices for vision care services for non-VSP patients; and 3) deprives consumers of vision care services of the benefits of free and open competition. *See* Complaint at § 18(a)-(c). FAHC agrees, which is why it files this Comment to see that this anti-competitive practice is stopped rather than reformulated.

[3] The proposed Final Judgment does not define the term ''misrepresent'' as that term is utilized in § V(F). Therefore, a doctor who inadvertently fails to keep accurate records of all non-VSP patient charges might be accused of misrepresenting his non-VSP fees.

[4] Of course, to the extent that a doctor provides services to a non-VSP patient who is not affiliated with a competing plan, the record-keeping requirements would, in theory, still apply. However, it is doubtful that VSP would enforce the requirements where a competing plan is not involved.

[5] See Exhibit C and Exhibit D.

[6] See Delta Dental Consent Judgment and Competitive Impact Statement in case of *Delta Dental.* Exhibits E and F.

laboratories.[7] This requirement should be (but is not) prohibited by the proposed Final Judgment.

2. Tying Arrangement

A tying arrangement is ''an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'' *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5-6 (1958) Not all tying arrangements violate the antitrust laws. A tying arrangement will violate § 1 of the Sherman Act if the seller has ''appreciable economic power'' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Eastman Kodak Co.* v. *Image Technical Services, Inc.,* 119 L.Ed.2d 265, 280 (1992). According to the Supreme Court, ''the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.'' *Jefferson Parish Hospital District No. 2* v. *Hyde,* 466 U.S. 2, 12 (1984).

The elements of an invalid tying arrangement are: (1) Two separate products or services, (2) the tying of the sale of one product or service to the purchase of another product or service, (3) sufficient market power in the tying product to restrain trade in the market for the tied product, and (4) a not insubstantial amount of interstate commerce in the tied product. *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.,* 11 F.3d 660, 664 n.6 (6th Cir. 1993). Tying arrangements which satisfy all four elements violate § 1 of the Sherman Act and § 3 of the Clayton Act.[8]

a. Separate Tying and Tied Products Or Services

By definition, the tying product must be separate from the tied product. Otherwise, there is really only one product, and there can be no tying arrangement. In determining whether one or two products are involved, courts focus on the character of the demand for the two products. *Jefferson Parish, supra,* at 19. Thus, there must be a demand for the tied product separate from the tying product sufficient to identify a distinct market for the tied product. *Id.* at 21-22. Although the products must be separate, a tying arrangement may exist between two functionally related but separate products. *See, e.g., Jefferson Parish, supra* at 22-24 (hospital services and anesthesiological services held to be two distinguishable services for tying arrangement purposes).

There is no doubt that a doctor's membership on a VSP panel[9] and the lenses that doctor dispenses to patients are sufficiently distinct so as to constitute two separate products for tying arrangement purposes. But for the tying arrangement, VSP panel doctors would be free to acquire lenses for their VSP patients from sources not affiliated with VSP, or even to make the lenses themselves. These alternative sources for eyeglass lenses conclusively demonstrate that VSP panel membership and the lenses to be dispensed to patients are two separate ''products'' for tying arrangement purposes.

b. Tying of Sale of One Product To Purchase of Another Product

The fact of a tie may be established either by reliance on a contract term, or by showing that defendant coerced the purchaser into accepting the tied product. *Waldo, supra,* at 727. In this case, the tie is beyond dispute because the Manual expressly requires VSP panel doctors to acquire lenses only from VSP-approved sources. *See* footnote 5, *supra.* In turn, the requirements of the Manual are incorporated by reference in the Panel Doctor's Agreement.[10]

c. Market Power To Restrain Trade in the Market for the Tied Product

The requisite market power may in inferred from a dominant market share without a showing of actual restraint on competition in the relevant market. *Eastman Kodak, supra,* at 282; *Jefferson Parish, supra,* at 17–18. In the event of dominant market share, the tie is per se illegal, and is not subject to a rule of reason analysis of actual market conditions. *Jefferson Parish, supra,* at 13–15.

VSP enjoys a dominant market share in California, other Western states, and quite probably, in most of the states in which it does business. FAHC is not able to more specifically identify VSP's share of the relevant market(s) because DOJ has avoided raising this issue in either its Complaint or Impact Statement. The proposed Final Judgment also is silent on VSP's market share. This lack of crucial information is reason enough to reject the proposed Final Judgment. *See Microsoft, supra,* at 332–33 (rejecting proposed decree in part because parties had failed to provide court with sufficient information to make the public interest determination).

With respect to the market share component of an illegal tying arrangement, FAHC asks this Court to take judicial notice of VSP's dominant market share in California. FAHC also respectfully suggests that DOJ and VSP should be required to come forward with evidence of VSP's market share in the relevant market(s) so as to provide this Court with adequate information to analyze VSP's anti-competitive practices, including the tying arrangement.

d. Substantial Interstate Commerce

The last element of a tying arrangement is that more than an insubstantial amount of interest commerce must be affected by the tie. As the Supreme Court noted in *Jefferson Parish,* ''if only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law.'' *Id.* at 16. However, from a dollar volume perspective, the requirement is easily reached. *See, e.g., United States* v. *Loew's,* 371 U.S. 38 (1962) ($60,800 sufficient).

VSP operates on a nationwide basis. Impact Statement at 2. VSP plans cover more than 15 million people. *Id.* VSP revenues in 1994 alone exceeded $650 million. *Id.* These facts clearly establish that VSP's anti-competitive practices affect a substantial amount of interstate commerce.

VSP's requirement that its panel doctors dispense only lenses obtained from VSP-approved sources as a condition of VSP panel membership is a classic tying arrangement which the proposed Final Judgment completely ignores. The proposed Final Judgment should be modified to prohibit this blatant anti-competitive practice. At the very least, this Court should require DOJ and VSP to explain why this practice does not violate the antitrust laws or should not be prohibited.[11]

3. Exclusive Dealing Arrangement

VSP's lens requirement also constitutes an exclusive dealing arrangement[12] in that it requires VSP panel doctors to obtain lenses only from VSP-controlled sources. Unlike tying arrangements, exclusive dealing arrangements are subject to review under a rule of reason analysis. *Jefferson Parish, supra,* at 44–45 (O'Connor, J., concurring) (citing *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 333–35 (1961)). The relevant inquiry is whether the restraint in question promotes or suppresses competition. *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 691 (1978). *Tampa Electric* sets forth a three-part test for determining the reasonableness of the restraint: (1) A determination of the line of commerce involved, (2) a determination of the area of effective competition, and (3) a determination of whether competition has been foreclosed in a substantial share of the

[7] Under the heading ''Ophthalmic Laboratories,'' the Manual states ''VSP doctors must use one of the VSP contract laboratories listed in the Laboratory Section of this Manual.'' Manual at G-1. The Manual also states ''VSP POLICY DOES NOT ALLOW THE PANEL DOCTOR TO FABRICATE AND/OR SUPPLY LENSES OUT OF HIS OWN OFFICE STOCK. ALL TINTING MUST BE DONE BY THE VSP CONTRACT LAB THAT SUPPLIED THE LENSES.'' Manual at G-1 (capitalization in original).

[8] Clayton Act § 3 is implicated only if both the tying product and the tied product are ''commodities,'' i.e., durable goods. *Waldo* v. *North American Van Lines, Inc.,* 669 F.Supp. 722, 727 (W.D. Pa. 1987). If either product is a service, only Sherman Act § 1 is implicated. *Id.*

[9] The tying ''product'' is really the patient referrals which flow from membership on a VSP panel. It is this source of referrals which optometrists wish to purchase, and which induces them to join the VSP panel. For purposes of convenience, however, this Comment will refer to the tying product simply as VSP panel membership.

[10] The VSP Panel Doctor's Agreement states ''THE DOCTOR AGREES to adhere to [VSP] policies and procedures as set forth in the panel doctors' manual * * * .'' Panel Doctor's Agreement at ¶4.

[11] Specifically, Sherman Act § 1 and Clayton Act § 3.

[12] In her concurrence in *Jefferson Parish,* Justice O'Connor noted that tying arrangements and exclusive dealing arrangements are similar in nature. *Id.* at 33, 44–45. Therefore, she separately analyzed the contract for anesthesiological services at issue in that case as both a tying arrangement and an exclusive dealing arrangement. *Id.* FAHC takes the same approach here with respect the VSP lens requirement.

relevant market. *Tampa Electric, supra,* at 327–29.

The line of commerce determination simply involves identifying the type of goods or services involved in the particular restraint. *Tampa Electric, supra,* at 327. In this case, VSP's exclusive dealing arrangement with its panel doctors relates specifically to eyeglass lenses.

The area of effective competition determination is a function of the market in which the seller operates, and the market to which the purchaser can turn to obtain alternate supplies. *Id.* at 327. Here, the ''seller'' is VSP (through the labs it approves and controls) and the ''purchasers'' are the panel doctors. Because VSP operates on a national basis, and its panel doctors are located nationwide, the area of effective competition is the entire country.[13]

Finally, the Court must determine whether the restraint forecloses a *substantial* share of competition in the relevant market. *Id.* at 328–29. By any standard, the amount of competition foreclosed is substantial. VSP typically controls as much as 98% of the total number of optometrists in a given market,[14] and more than 17,000 doctors in all. Impact Statement at 3. VSP's share of the pre-paid vision care services market is as high as 75% in some states such as California.[15] Finally, the VSP-controlled portion of its panel doctors' income is ''substantial.'' Complaint at ¶9.

Thus, VSP, through its control over the vast majority of doctors and pre-paid vision care patients, is able to dictate the source of a substantial percentage of eyeglass lenses purchased in this country. Every pair of lenses purchased from a VSP-controlled source pursuant to the lens requirement forecloses all other lens suppliers from the market. The foreclosure of a substantial percentage of the lens market is obvious.

VSP's lens requirement is an illegal exclusive dealing requirement which violates both § 1 of the Sherman Act and § 3 of the Clayton Act. The proposed Final Judgment must be modified to prohibit this anti-competitive practice.

D. The Proposed Final Judgment Should Be Modified To Remedy All of VSP's a Anti-Competitive Practices

Where a proposed consent decree provides an ineffective remedy—one which does not pry open the relevant market to competition—a court can and should modify or reject the decree. *See, e.g., Microsoft, supra,* at 333–34. Where the proposed decree does not address anti-competitive practices, particularly those it prohibited in the similar circumstances in the dental industry, the reviewing court cannot shut its eyes to the obvious. *Id.* at 334.

The proposed Final Judgment provides an ineffective remedy because: (1) It expressly allows VSP to continue setting its fees in comparison to its competitors, thereby allowing VSP the benefit of the MFN provision even while purporting to prohibit enforcement of that provision, and (2) it fails to even address the VSP lens requirement which is an illegal tying arrangement and/or exclusive dealing arrangement which has the anti-competitive effect of extending VSP's dominance in the pre-paid vision care market to the market for vision products.

As earlier noted, the inadequate remedy set forth in the proposed final Judgment is especially disappointing given that just this past December, DOJ tackled the health care industry's use of most favored nations clauses in *United States* v. *Delta Dental Plan of Arizona, Inc.*[16] That case arose out of a nearly identical most favored nations clause contained in the standard agreement defendant forced on its participating dentists. There, as here, the effect of the clause was to lower participating dentists' ''usual and customary fee'' to the lowest fee charged to any other person or plan.

While the violations in the *Delta Dental* case and this one are nearly identical, the final judgments are not. The *Delta Dental* judgment, which is attached hereto as Exhibit E, completely prohibits the defendant from maintaining or enforcing an MFN provision, demanding information about competing plans or those plans' customers, auditing plan providers with respect to fees charged to competing plans or other persons, communicating with plan providers about such fees, or taking any action directly or indirectly to force plan providers to refrain from participating in other plans or offering discount fees to competing plans or those plans customers. *See* Exhibit E at § IV. Unlike the proposed Final Judgment, the *Delta Dental* judgment does *not* allow the defendant to continue the same anti-competitive practices previously carried out through the MFN. In other words, there is no subsequent section, like the proposed Final Judgment's § V, which guts the injunctive provisions of the judgment. FAHC respectfully submits that the proposed Final Judgment should be modified to tailor its injunctive provisions to the injunctive provisions of the *Delta Dental* judgment, and to delete § V in its entirety.

In addition, the proposed Final Judgment should be modified to prohibit VSP's other anti-competitive practices. Specifically, VSP should be prohibited from tying membership on its panels to the use of vision products under the control of VSP, or from requiring its panel doctors to purchase or obtain any vision products exclusively from sources controlled by VSP.

The compliance measure requirement on page 7 of the Judgment which only requires VSP to send copies of the Final Judgment to ''former'' VSP providers whom VSP ''should reasonably know have resigned because of the MFN clause'' is too vague and ambiguous to be enforced. VSP knows which providers it sent letters to in seeking to enforce the terms of the MFN. Those are the people who need to know VSP's anti-competitive activities are prohibited. A copy of the Judgment should be sent to each of those providers who are still licensed by the states in which they practice. VSP can probably say they do not know why a provider resigned unless he specifically provided them with a reason. Besides, it only refers to providers who resigned from VSP, not former VSP providers who resigned from other panels because of VSP's illegal conduct. Few, if any, providers resigned from VSP as a result of VSP's efforts to enforce the MFN or VSP would not have been so enthusiastic in enforcing it.

III. Conclusion

VSP is the Microsoft of the pre-paid vision care industry. It enjoys the dominant position in the industry. It regularly employs anti-competitive practices to erect barriers to entry by its competitors. It continues to take all means necessary to deter licensed vision care providers from participating in competing plans. In these ways, VSP maintains its dominant market position at the expense of its competitors and vision care consumers, and in violation of this country's antitrust laws.

The proposed Final Judgment does virtually nothing to curb VSP's anti-competitive behavior. In fact, the proposed Final Judgment sanctions VSP's conduct by expressing permitting it. Any person with even a passing familiarity with antitrust law would be hard pressed to conceive of a less effective mechanism to stop VSP's anti-competitive practices.

Therefore, VSP opposes entry of the proposed Final Judgment for all the reasons set forth in this Comment, and requests that the proposed Final Judgment be modified as requested in § II(D). Anything less is not in the public interest.

Respectfully Submitted this 29th day of March, 1995.

Shimmel, Hill, Bishop & Gruender, P.C.

Daniel F. Gruender,

Michael V. Perry,

Glenn B. Hotchkiss,

3700 North 24th Street, Phoenix, Arizona 85016, Attorneys for First American Health Concepts, Inc.

Notice of Errata

In its Comment on the proposed Final Judgment in this matter, First American Health Concepts, Inc. (''FAHC'') concluded by stating ''VSP opposes entry of the proposed Final Judgment for all the reasons set forth in this Comment, and requests that the proposed Final Judgment be modified as requested in § II(D).'' Comment at 21. The above-quoted language should read *''FAHC* opposes entry of the proposed Final Judgment for all the reasons set forth in this Comment, and requests that the proposed Final Judgment be modified as requested in § II(D).''

[13] For purposes of examining the reasonableness of the VSP-imposed restraint on lenses, this broad definition of the relevant geographic market actually favors VSP. Despite this broad market definition, however, the restraint is still unreasonable.

[14] The figure provided is for the state of Nevada in 1993. Again, DOJ has not provided relevant data for the relevant market(s). This information is critical to the Court's public interest determination. *See Microsoft, supra.*

[15] Again, FAHC provides information to the best of its ability, given its status as a competitor of VSP. DOJ has the authority to compel VSP to disclose this information, and may have done so, but the Complaint, Impact Statement, and proposed Final Judgment contain no information concerning VSP's share of the relevant market(s).

[16] Case No. CIV 94–1793 PHX PGR.

Respectfully Submitted this 6th day of April, 1995.

Shimmel, Hill, Bishop & Gruender, P.C.

Daniel F. Gruender,

Michael V. Perry,

Glenn B. Hotchkiss,

3700 North 24th Street, Phoenix, Arizona 85016, Attorneys for First American Health Concepts, Inc.

[FR Doc. 96–5472 Filed 3–7–96; 8:45 am]

BILLING CODE 4410–01–M

Immigration and Naturalization Service

[INS No. 1741–95]

Immigration and Naturalization Service P–1 Nonimmigrant Advisory Committee

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Notice of establishment of P–1 Nonimmigrant Advisory Committee.

SUMMARY: In accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C., Appendix II (1972), the Commissioner, Immigration and Naturalization Service (INS), with the approval of the Attorney General, is establishing a P–1 Nonimmigrant Advisory Committee for the purpose of examining the question of whether United States-based entertainment groups seeking to employ alien entertainers may file P1 nonimmigrant petitions. In addition, the Advisory Committee will provide input regarding the appropriate use of the P–1 nonimmigrant classification as it relates to the employment of non-United States-based circus personnel. The object of the Committee is to provide an organized public forum for discussion of the above issues which have arisen between officials of the Service and members of the public in general, and management and labor groups in the entertainment industry in particular.

The INS also intends to use the Advisory Committee in the future in order to discuss additional issues relating to the P–1 classification as well as other issues that may arise with respect to the entertainment industry.

It is anticipated that the members of the Committee will assist the Service in being more responsive to the needs and concerns of the entities affected by the P–1 nonimmigrant classification.

MEMBERSHIP: The Committee will be composed of approximately 10-15 representatives from the entertainment industry, immigration practitioners, and labor organizations. The INS has been contacted by a number of representatives from these groups who have expressed interest in joining the Committee and volunteered their services. In addition, the INS invites other individuals interested in becoming members of this committee on contact, by interested in becoming members of this committee to contact, by letter or fax, the INS officer designated as the contact person listed below within 60 days of publication of this notice with a statement of their qualifications for membership and reasons why they believe they should participate. The INS will then publish a second notice after it has selected all the committee members.

The Committee will function solely as an advisory body in compliance with the provisions of the Federal Advisory Committee Act. Its charter will be filed in accordance with the provisions of the Act.

FOR FURTHER INFORMATION CONTACT: John W. Brown, Adjudications Officer, Immigration and Naturalization Service, 425 I Street NW., room 3214, Washington, DC 20536, Telephone (202) 514–3240, Fax (202 514–0198).

Dated: February 16, 1996.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 96–5503 Filed 3–7–96; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF LABOR

Office of the Secretary

The National Skill Standards Board (NSSB); Notice of Availability of Funds and Solicitation for Grant Applications

AGENCY: Office of the Assistant Secretary for Administration and Management, Labor.

ACTION: Notice of availability of funds and solicitation for grant application can be obtained by writing to: Lisa Harvey, U.S. Department of Labor, Office of Procurement, 200 Constitution Avenue, NW., Room N 5416, Washington, DC 20210. The National Skill Standards Board (NSSB) is soliciting proposals to be funded through Public Law 103–227. It is anticipated that five to 15 cooperative agreements will be awarded for a total not to exceed $1.5 million. Awards will range from $100,000 to $300,000. Eligibility to respond is limited, as described herein.

ELIGIBILE APPLICANTS: Applicants must be one of or a combination of two or more of the original 22 pilot projects funded as part of the national skill standards demonstration projects coordinated jointly by the U.S. Departments of Labor and Education.

CLOSING DATE: The closing date for receipt of proposals will be March 25, 1996, at 2:00 p.m. at the following address: Office of Procurement, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N5416, Washington, DC 20210.

It is anticipated that awards will be announced on or prior to May 1, 1996.

PERIOD OF PERFORMANCE: The period of performance will cover 12 months from the date of execution of the cooperative agreement.

Legislative Authority

In 1994 the Goals 200: Educate America legislation was signed, establishing in Title V the National Skill Standards Board. The Board is charged with stimulating the development and adoption of a voluntary, national system of skill standards and of assessment and certification of skill attainment.

Specifically the Board will Develop occupational clusters to provide the framework for standard setting efforts; be the catalyst for industry-led groups to set the standards; and endorse the qualifying standards presented to it for approval. The NSSB also serves as a clearinghouse of information relating to the development of skill standards and skills formation systems. The work of the Board is intended to ''serve as a cornerstone of the national strategy to enhance workforce skills''. Within the workforce development policy framework, national skill standards will link school-to-work initiatives, emerging reemployment strategies for displaced workers and state workforce development efforts to a common understanding. This shared understanding of skills needed for success will be imperative if the U.S. is to build a system that improves the skills, training and preparedness of the workforce, a system needed to insure economic competitiveness.

The Board is comprised of leaders from business, organized labor, education, training, state and federal government as well as other key stakeholder groups. The NSSB is mandated by the authorizing legislation to conduct workforce research relating to skill standards in support of its system development activities. The Board is interested in continuing the cooperative relationship with select pilot projects (or combinations thereof) drawing from the group of 22 funded previously through the cooperative efforts of the U.S. Departments of Labor and Education. The NSSB would like to build on what was required in the