

12336 COMPETITIVE PROBLEMS IN THE DRUG INDUSTRY

exception in MAC cannot disguise the fact that the proposal would severely restrict a physician's freedom to treat his patients with the products he prefers. Such an exemption for the pharmacist is non-existent in the proposal.

MAC Proposal Violates Fundamental Principles of Administrative Law

A fundamental principle of administrative law is that agency action which is irrational or unsupported by relevant facts is arbitrary and capricious. Since the Medicare-Medicaid statutes preclude implementation of a program such as the MAC proposal unless findings of quality assurance and therapeutic equivalence can properly be made, HEW must consider the evidence dealing with these two highly relevant issues. HEW itself has recognized that a valid MAC-type proposal must rest upon findings of quality assurance and therapeutic equivalence, and yet, existing evidence on those issues does not support the required findings.

Until HEW comes forward with evidence which will support such findings, adoption of a MAC program will lack the required rational connection between the facts found and the choice made. The evidence does not provide a factual predicate which will support the assumptions underlying the MAC program. Thus, implementation would be arbitrary and capricious.

Mr. Chairman, this concludes our statement. We shall be pleased to respond to your questions.