IN THE MATTER OF

# WESTERN DIRECT MARKETING GROUP, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3821. Complaint, July 28, 1998--Decision, July 28, 1998*

This consent order prohibits, among other things, the two California-based advertising agencies, that created and produced infomercials for Cholestaway, from making efficacy, performance, or safety claims for any food, drug or dietary supplement, unless they possess competent and reliable scientific evidence that substantiates the claims. The consent order also prohibits the respondents from representing that any advertisement is something other than a paid advertisement and requires disclosures during the infomercials that they are advertisements. In addition, the consent order prohibits claims that the testimonials and endorsements are typical of the experiences of consumers who use the products, unless the claims are substantiated.

## *Participants*

For the Commission: *Lisa Kopchik* and *Jeff Bloom.*

For the respondents: *Charles Chernofsky, Chernofsky & deNoyelles*, New York, NY.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Western Direct Marketing Group, Inc. and Western International Media Corporation, corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. At relevant times herein, respondent Western Direct Marketing Group, Inc. was known as Television Marketing Group, Inc., a California corporation with its principal office or place of business at 8544 Sunset Boulevard, Los Angeles, California.

2. Respondent Western International Media Corporation is a California corporation with its principal office or place of business at 8544 Sunset Boulevard, Los Angeles, California.

3. Respondents, at all times relevant to this complaint, were advertising agencies of Bogdana Corporation, and prepared and

disseminated advertisements to promote the sale of Cholestaway wafers and capsules. Cholestaway is a product subject to the provisions of Sections 12 and 15 of the Federal Trade Commission Act.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have disseminated or have caused to be disseminated television advertisements for Cholestaway, including but not necessarily limited to the attached Exhibit A. This advertisement contains the following statements:

Consumer One: "My cholesterol level was 230 and now it's 179. That's great."
Consumer Two: "My cholesterol at this point is down more than a hundred points."
Consumer Three: "My cholesterol was 220. After three months, my cholesterol went down to 190."
Host One: "Just what is it that lowered these people's cholesterol levels so dramatically? This is it. (He puts two Cholestaway tablets in his hand) A new, completely safe scientifically proven method that is as simple as chewing two flavorful wafers with every meal. It is called Cholestaway. (Graphic: 'Guarantees to Lower Your Blood Cholesterol Level') It is not a prescription drug, not a chemical, but a simple all natural dietary supplement that guarantees to lower your blood cholesterol level or your money back. That is right. It guarantees to lower your cholesterol." (Exhibit A, Cholestaway Television Infomercial 2, p. 1).

. . . .

Host One: "This is a cross-section of an artery. When there is too much cholesterol present in the bloodstream, it begins building up fatty deposits on the artery wall narrowing the opening, sort of like rust builds up on an old water pipe. When this opening becomes clogged, the blood flow to the heart is interrupted, causing a heart attack." (Exhibit A, p. 3).

. . . .

Host One: "With all natural Cholestaway, you get proven results without drugs, and without side effects. Studies were done at several prestigious research institutes on the effects of adding dietary calcium and magnesium, the ingredients found in Cholestaway, to the diet. Although not every study was created to determine the effect on blood serum cholesterol, it was noted that cholesterol levels were reduced, and in one study, by as much as 25%. One study even measured a weight loss, while another reported no loss at all.
(Graphic: "PROVEN TO LOWER BLOOD CHOLESTEROL BY SCIENTIFIC RESEARCH STUDIES.")
It was concluded, however, that, taken in sufficient dosages, these dietary supplements will lower cholesterol levels. The results by users, while anecdotal, is [sic] proof positive." (Exhibit A, p. 4).

. . . .

(A bottle of Cholestaway is shown on a table next to the "Physician's Desk Reference." Host Two picks up the bottle and holds it.)

Host Two: "And that is the beauty of Cholestaway. It lets you eat like you normally would. Of course, when I say normal, I don't mean pizza every night, or ice cream and cake with every meal. What you normally eat." (Exhibit A, pp. 4, 5).

. . . .

Host Three: "Studies have proven Cholestaway's effectiveness in lowering cholesterol. Just two flavorful wafers with every meal can lower your cholesterol count almost immediately. It is that simple. And it is completely safe." (Exhibit A, p. 6).

. . . .

Consumer Four: "I went for an annual check-up and had a blood test done, and found that my cholesterol was at 274. And they suggested that I start medication, if I don't do something about changing it. And I refused that. So in hearing about Cholestaway, I started taking it, and found that I dropped down to 208, which I think is fantastic."

(Graphic: "The Results of Using Cholestaway may vary from individual to individual.") (Exhibit A, pp. 6,7).

. . . .

Host One: "Now, I would like to introduce you to the man who discovered Cholestaway, Dr. DeLamar Gibbons, former Director of Clinical Research for the Saturday Evening Post, and author of several books on cholesterol and diets."

. . . .

Gibbons: "This is what I did. I ate a pound, I weighed it out, I had little scales, and I weighed out a pound of Kentucky Fried Chicken. I didn't peel the skin off or anything -- as fat as I could. And I took the same amount of Cholestaway that this inmate was taking. And for 60 days in a row, I ate a pound of Kentucky Fried Chicken."

Host Two: "You ate a pound of Kentucky Fried Chicken for sixty days?"

Gibbons: "Every day."

Host Two: "Every day?"

Gibbons: "Every day. And at the end of the sixty days, I checked, and my cholesterol had dropped remarkably. And my blood fat had gone down. And to my surprise, I had lost 25 pounds." (Exhibit A, p. 8).

. . . .

Consumer Five: "I've been on Cholestaway for about two months now. And in the process of getting my cholesterol tested, my cholesterol has come down. At this point, my cholesterol is down over a hundred points. The pluses to this have been that I can eat almost whatever I want, within reason, eggs, corned beef sandwich for lunch occasionally, and I'm still showing improvement, plus I've lost weight."

(Graphic: "The results of using Cholestaway will vary from individual to individual.")

(Graphic: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur.") (Exhibit A, p. 10).

. . . .

Dr. Dalton: "Dr. Gibbons and I were working together in the state correctional system in Virginia. And I was under the care of some physicians who were taking care of my health. I had a diabetic condition, which seemed to get out of hand. And my triglycerides as well as my cholesterol went so high, that it was very threatening. As a matter of fact, the triglycerides should only be around 200 as the cholesterol should. And my triglycerides were over 1600, and the cholesterol was over 500.

. . . .

Dr. Dalton: So we started on Cholestaway. And within several weeks, my chemistry concerning the triglycerides and cholesterol had dropped to near normal. By one month, they were both within normal range. And it was one of the best things that had ever happened to me."
(Graphic: "The results of using Cholestaway will vary from individual to individual.") (Exhibit A, p. 13).

. . . .

Consumer Three: "Yes, I had a side effect, an unusual side effect and a happy one. I lost 30 pounds."
Host Two: "You lost 30 pounds."
Dr. Dalton: "That's interesting Barbara, because I had the same experience. I lost 50 pounds over the past five years."
(Graphic: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur.")
Host Two: "Fifty pounds?"
Consumer Three: "That's wonderful."
Dr. Dalton: "Exactly."
Host Two: "Just what in Cholestaway causes one to lose the weight?"
Dr. Dalton: "Again, as Dr. Gibbons explains, it's the calcium combining with the fat in food and it simply never goes into the system. It's a very simple, but very effective mechanism." (Exhibit A, pp. 14, 15).

. . . .

Gibbons: "Cholestaway is perfectly safe for high blood pressure. In fact, there have been studies in the last year or two employing the ingredients of Cholestaway to treat high blood pressure. Some people with high blood pressure are found to be low on their calcium. And Cholestaway is an excellent source of calcium. And it would probably be very favorable to people with high blood pressure." (Exhibit A, p. 18).

. . . .

Gibbons: "They put cholesterol in a machine that's like a cream separator. And it's the high density that stays in the milk part, and the low density that comes out of the cream part. The low density is thought to be the bad one and the high density is felt to be the good one. The ratio of one to the other is currently regarded as important. The Cholestaway seems to be getting rid of primarily the low density cholesterol and improving the ratio."

. . . .

Host Two: "Yes, there is one major side effect while on Cholestaway. You will probably lose weight." (Exhibit A, p. 19).

6. Through the use of the trade name "Cholestaway," and through the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. Cholestaway significantly lowers serum cholesterol levels.
B. Cholestaway significantly lowers serum cholesterol levels without changes in diet.
C. Cholestaway significantly lowers serum cholesterol levels and causes significant weight loss even if users eat foods high in fat, including fried chicken and pizza.
D. Cholestaway substantially reduces or eliminates the body's absorption of dietary fat.
E. Cholestaway lowers low density lipoprotein cholesterol and improves the high density lipoprotein cholesterol to low density lipoprotein cholesterol ratio.
F. Cholestaway is effective in the treatment of hardening of the arteries and heart disease.
G. Cholestaway causes significant weight loss.
H. Cholestaway causes significant weight loss without changes in diet.
I. Cholestaway significantly reduces blood triglyceride levels.
J. Cholestaway significantly reduces elevated blood pressure.
K. Testimonials from consumers appearing in the advertisements for Cholestaway reflect the typical or ordinary experience of members of the public who use the product.

7. Through the use of the trade name "Cholestaway," and through the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. Through the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. Scientific studies prove that Cholestaway significantly lowers serum cholesterol levels.
B. Scientific studies prove that Cholestaway significantly reduces elevated blood pressure.

10. In truth and in fact:

A. Scientific studies do not prove that Cholestaway significantly lowers serum cholesterol levels.
B. Scientific studies do not prove that Cholestaway significantly reduces elevated blood pressure.

Therefore, the representations set forth in paragraph nine were, and are, false or misleading.

11. Respondents knew or should have known that the representations set forth in paragraphs seven and nine were, and are, false or misleading.

12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

EXHIBIT A

**"Transcript of Cholestaway Television Infomercial #2"**

Graphic (with voiceover):

The following is a paid program brought to you by Television Marketing Group and contains testimonials from consumers relating their personal experiences using Cholestaway to reduce their cholesterol levels. These testimonials are personal accounts and have not been scientifically recorded. Although some users have also experienced a weight loss using Cholestaway, it is not intended as a weight loss product. Remember the results of taking Cholestaway will vary from individual to individual.

| | |
|---|---|
| UNIDENTIFIED WOMAN #1: | My cholesterol level was 230 and now its 179. That's great. |
| UNIDENTIFIED MAN: | My cholesterol at this point is down more than a hundred points. |
| UNIDENTIFIED WOMAN #2: | My cholesterol was 220. After three months, my cholesterol went down to 190. |
| MR. MACHADO: | *(Holding bottle of Cholestaway)* |
| | Just what is it that lowered these people's cholesterol levels so dramatically? This is it. |
| | *(Puts two Cholestaway tablets in his hand)* |
| | A new, completely safe scientifically proven method that is as simple as chewing two flavorful wafers with every meal. It is called Cholestaway. |
| | *(Graphics reading "NOT A DRUG," "NOT A CHEMICAL," "ALL NATURAL DIETARY SUPPLEMENT" and "GUARANTEES TO LOWER YOUR BLOOD CHOLESTEROL LEVEL" are shown to correspond with script.)* |
| | It is not a prescription drug, not a chemical, but a simple all natural dietary supplement that guarantees to lower your blood cholesterol level or your money back. That is right. It guarantees to lower your cholesterol. |

*("Mario Machado Television & Radio Commentator"*

EXHIBIT A

Hello. I am Mario Machado. And welcome to our show. Here to help me tell you more about this revolutionary new breakthrough in controlling your cholesterol is a good friend of mine, Roni Margolis-Liddy.

*(Roni Margolis-Liddy is shown and bottom of screen reads "Roni Margolis-Liddy.)*

Hi, Roni.

MS. LIDDY: Hi, Mario.

The three people you saw at the beginning of our program had, like more than 65 million Americans, a higher than normal blood cholesterol. In fact, there is a good chance that you have a high cholesterol level yourself.

Now I said that they had high cholesterol. But thanks to Cholestaway, their cholesterol levels have returned to an acceptable level. And just what is acceptable? Let's take a look.

*A chart labeled "Cholesterol Levels" across the top is shown with subheadings: "Acceptable under 200," "Borderline 200 to 259" and High Above 260." A graph line rises as she continues to speak.*

The National Cholesterol Education Program regards cholesterol levels under 200 as acceptable. Readings of 200 to 239 are considered borderline. And those of 240 and above are considered high.

*Mario Machado writes the words "CHOLESTEROL" on a green board.*

MR. MACHADO: Now, first of all, let me explain that cholesterol has been getting a bad rap. You see, cholesterol, a wax-like substance processed in the liver, is essential to life. The human body needs cholesterol to manufacture cells, membranes, nerve tissues, hormones, and bile acids to digest food.

It is when there is too much cholesterol in our system that the trouble begins.

EXHIBIT A

Mario Machado writes "240" on the board.

If you have a blood cholesterol level of over 240, you are probably a good candidate for a heart attack. Here is why:

*(Mario Machado draws a circle to represent an artery. He then colors in the circle to represent fatty deposits building-up.)*

This is a cross-section of an artery. When there is too much cholesterol present in the bloodstream, it begins building up fatty deposits on the artery wall narrowing the opening, sort of like rust builds up on an old water pipe. When this opening becomes clogged, the blood flow to the heart is interrupted, causing a heart attack.

MS. LIDDY: But heart disease isn't the only symptom linked to high cholesterol. It can cause visual problems, forgetfulness, leg cramps, and difficulty in hearing, just to name a few.

MR. MACHADO: Now the real trick is to get rid of all of this excess cholesterol. To do this, most doctors prescribe drugs. But these can cause a variety of side effects that sometimes can be just as dangerous as having high cholesterol.

MS. LIDDY: *(Opens up a copy of the Physician's Desk Reference as she speaks)*

Here is what the Physician's Desk Reference, a well-respected journal within the medical profession, says about the side effects of one of the more popular drugs prescribed for controlling high blood cholesterol:

> "Caution: Can cause liver dysfunction, hypertension, ulcers, skin diseases, insomnia, thyroid abnormalities, vomiting, anorexia, cataracts, seizures," and on and on and on and on.

*(Studies from the Laboratory of Biochemical Genetics and Metabolism, Rockefeller University, New York; the Arterioscleroses Research Group, St. Vincent's Hospital, Montclair, New Jersey; the Department of Internal Medicine, University of Texas; and the Digestive Disease*

EXHIBIT A

*Center, Veterans Administration Medical Center, Houston, Texas are shown as Mr. Machado speaks.)*

MR. MACHADO: With all natural Cholestaway, you get proven results without drugs, and without side effects. Studies were done at several prestigious research institutes on the effects of adding dietary calcium and magnesium, the ingredients found in Cholestaway, to the diet. Although not every study was created to determine the effect on blood serum cholesterol, it was noted that cholesterol levels were reduced, and in one study, by as much as 25%. One study even measured a weight loss, while another reported no loss at all.

*(The words "PROVEN TO LOWER BLOOD CHOLESTEROL BY SCIENTIFIC RESEARCH STUDIES are shown on the screen.)*

It was concluded, however, that, taken in sufficient dosages, these dietary supplements will lower cholesterol levels. The results by users, while anecdotal, is proof positive.

MS. LIDDY: Let's be honest. There is a simple, easy way to help lower your cholesterol. And that is by eating a proper diet. But just how many of us have the will power to stay on a fat-free diet? I know I don't. We all have good intentions. But because of our job, lack of time, too much work, whatever, we just cannot always eat correctly.

And just what is considered a high-cholesterol diet? Well, fats, of course, like butter, oils, cheese, pork, rich gravies, shell fish, whole milk, cream – all of the good stuff.

*(The words 'BUTTER," "OILS," "CHEESE," "PORK," "GRAVY," "SHELLFISH," and "WHOLE MILK" are shown on the screen as she mentions them.)*

*(A bottle of Cholestaway is shown on a table next to the PDR. She picks up the bottle and holds it.)*

And that is the beauty of Cholestaway. It lets you eat like you normally would. Of course, when I say normal, I don't

EXHIBIT A

mean pizza every night, or ice cream and cake with every meal. What you normally eat. You simply take two Cholestaway wafers with each meal. They are vanilla flavored, and they actually taste good. And your blood cholesterol is lowered, guaranteed. It is that simple.

*("Calcium carbonate and magnesium are generally recommended as safe by the FDA" is shown in small letters at the bottom of the screen.)*

It is not only effective, it is all natural. That is what I especially like about it. It is not a drug. In fact, Cholestaway is actually good for you. It contains calcium and magnesium, both important to your health.

*("This is a paid commercial" is shown at the bottom of the screen when she says the word "magnesium.")*

JIM CHAPEL: (Testimonial)

I've had a problem with my cholesterol for the past 10 years. It was up to 278 two months ago. I tried everything. I tried niacin. I tried getting my diet down to five percent fat -- nothing seemed to work. I saw Cholestaway on television, and I tried it and in two months it went from 278 to 258. I was very happy about it.

*(As he speaks the words "The results of using Cholestaway will vary from individual to individual" appears at the bottom of the screen.)*

FEMALE ANNOUNCER:

If you are one of the over 65 million Americans who suffer from high blood cholesterol, you will be happy to know that there is a remarkable breakthrough discovery that can lower your cholesterol level without drugs. It is called Cholestaway.

*(Scene fades and the woman appears in a garden holding a bottle of Cholestaway.)*

Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back. That is right. It's guaranteed.

But don't just take our word for it.

EXHIBIT A

*(She holds up a study. At the bottom of the screen, in small letters, the words "All products have possible, but remote side effects. See product literature.")*

Studies have proven Cholestaway's effectiveness in lowering cholesterol.

*(She picks up the bottle, opens it and takes out two wafers.)*

Just two flavorful wafers with every meal can lower your cholesterol count almost immediately. It is that simple. And it is completely safe.

*(The words "Calcium carbonate and magnesium are generally recognized as safe by the FDA" appear at the bottom of screen in small letters.)*

So if you are concerned about cholesterol, call the number on the screen, and order Cholestaway now.

*(On the screen, as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [CA + tax]. Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway, P.O. Box 803377, Dallas, TX, 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")*

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Pick up the phone and call the number on the screen now.

ROSLYN GERNSTADT: (Testimonial)

I went for an annual check-up and had a blood test done, and found that my cholesterol was at 274. And they suggested that I start medication, if I don't do something about changing it. And I refused that. So in hearing about

EXHIBIT A

Cholestaway, I started taking it. and found that I dropped down to 208, which I think is fantastic.

*(At bottom of picture you can read: "The Results of Using Cholestaway may vary from individual to individual.")*

FEMALE ANNOUNCER: Now, if you don't know if you have a high cholesterol level or not, have a pencil and paper handy, because later in the program we will give you a little quiz to see if you are at risk.

MR. MACHADO: Now, I would like to introduce you to the man who discovered Cholestaway, Dr. DeLamar Gibbons, former Director of Clinical Research for the Saturday Evening Post, and author of several books on cholesterol and diets. Thank you for joining us, sir. Tell us about the genesis of the product. How did it come about? And I hear that it had something to do with prisons.

DR. GIBBONS: At the time that I discovered Cholestaway, I was the medical director for a state prison in Virginia. And I had under my care an individual that I thought, the vessels under his skin all stood out. And I could even trace some of the nerves in his skin. I had never seen an individual look like this. He had good muscles, and he was obviously quite healthy.

I thought maybe he is on one of those special diets that many of the prisoners put themselves on. I went to the mess hall to watch him eat. And gosh, he gobbled up his tray, and half of his neighbor's. It wasn't the diet.

So I said pull his medical record for me. And interestingly enough, he had had thyroid cancer. And in taking his thyroid out, they took his parathyroid glands out.

MR. MACHADO: And that causes what?

DR. GIBBONS: It upsets --

MR. MACHADO: A voracious appetite?

DR. GIBBONS: No. It has to do with calcium metabolism. And to correct

EXHIBIT A

this problem. he was taking a crude form of Cholestaway. And my first love was chemistry. I thought. ah. I know why he looks so peculiar. He isn't able to absorb any of the fat in his diet. He is fat starved. This is interesting. As I thought about it. I decided that I would try it on myself.

MR. MACHADO: You were going to be your own guinea pig?

DR. GIBBONS: This is what I did. I ate a pound. I weighed it out. I had little scales, and I weighed out a pound of Kentucky Fried Chicken. I didn't peel the skin off or anything -- as fat as I could. And I took the same amount of Cholestaway that this inmate was taking. And for sixty days in a row, I ate a pound of Kentucky Fried Chicken.

MS. LIDDY: You ate a pound of Kentucky Fried Chicken for sixty days?

DR. GIBBONS: Every day.

MS. LIDDY: Every day?

DR. GIBBONS: Every day. And at the end of the sixty days, I checked, and my cholesterol had dropped remarkably. And my blood fat had gone down. And to my surprise, I had lost 25 pounds.

MS. LIDDY: You lost weight?

DR. GIBBONS: I lost 25 pounds. The beautiful thing about Cholestaway is it's all natural and it's even good for you. It isn't a drug. It isn't a medicine. What it is is the natural minerals from hard water.

MR. MACHADO: And what does that do to the system?

DR. GIBBONS: *(A chart with the stomach. liver and intestines is shown. Cholic acid is labeled in the liver and little arrows show the process that Dr. Gibbons describes. When he mentioned Cholestaway by name. the word "Cholestaway" appears on the chart.)*

Our livers process cholesterol. which is then excreted in the bile in the form of cholic acid. As the bile enters the intestine. the soluble cholic acid looks like food to the

EXHIBIT A

| | |
|---|---|
| | intestines and it's absorbed into the bloodstream. The absorbed cholic acid is carried back to the liver and is excreted in the bile and then reabsorbed again from the intestine. Cholestaway interrupts this cycle by combining with the cholic acid to form an insoluble residue that can't be reabsorbed. |
| MR. MACHADO: | That's incredible. |
| DR. GIBBONS: | It robs you of fat calories and with it it takes excess cholesterol. |
| MR. MACHADO: | Two a day per meal? |
| DR. GIBBONS: | With each meal. And you know, I like pizza. And if I'm going to have pizza I maybe take two or three extras. |
| | *(A pizza is shown and someone with a bottle of Cholestaway putting three wafers in the palm of the hand.)* |
| MR. MACHADO: | But the general regimen that you are stating is that you take two tablets per meal for how long a period of time? |
| DR. GIBBONS: | Well, as long as you need it. It isn't going to hurt you. It's good for you. |
| MR. MACHADO: | I want to thank you for being with us Dr. Gibbons, and for sharing your knowledge and also sharing Cholestaway with us. Thank you. We'll see you again later in the program. Stay tuned. We'll be right back with some satisfied users who each have an incredible success story to tell us. |
| | *("This is a paid commercial" at bottom of screen.)* |
| MS. LIDDY: | Thank you. |
| DR. GIBBONS: | Thank you. |
| FEMALE ANNOUNCER: | O.K. Do you have a paper and pencil handy? Here are five questions, the answers to which will tell you if you're at risk of having a high cholesterol level. Number 1: Does anyone in your family have high cholesterol? Number 2: Do you smoke? Number 3: Do you have a stressful job or |

EXHIBIT A

do you often find yourself under a lot of pressure? Number 4: Do you eat a lot of foods high in fat? And Number 5: Do you seldom exercise?

*(A chart, with the same five questions is shown on the screen. As the announcer reads each question. a check is put in the box before each question.)*

*(Announcer is shown holding a bottle of Cholestaway)*

Now, if you answered 'yes' to any three of these questions. you're at risk of having a high cholesterol level and it would be a good idea to have it checked. Remember, high levels can lead to all kinds of health problems. But as you've seen, all natural Cholestaway is a safe and easy way to keep it under control.

STEVEN BRODY: (Testimonial)

I've been on Cholestaway for about two months now. And in the process of getting my cholesterol tested, my cholesterol has come down. At this point, my cholesterol is down over a hundred points. The pluses to this have been that I can eat almost whatever I want, within reason, eggs, corned beef sandwich for lunch occasionally, and I'm still showing improvement, plus I've lost weight.

*(As he talks "The results of using Cholestaway will vary from individual to individual" appears. As he says "I'm still showing improvement" the following statement appears at the bottom of the screen: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur.")*

FEMALE ANNOUNCER #1:

If you're one of the over 65 million Americans who suffer high blood cholesterol, you'll be happy to know there's a remarkable breakthrough discovery that can lower you cholesterol level without drugs. It's called Cholestaway.

*(A bottle of Cholestaway is shown. She picks up the bottle.)*

Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

EXHIBIT A

That's right. It's guaranteed. But don't just take our word for it.

*(She holds up a study. "All products have possible but remote side effects. See product literature." appears in small letters at the bottom of the screen.)*

Studies have proven Cholestaway's effectiveness in lowering cholesterol. And just how does Cholestaway work? Let's take a look.

*(A chart with the stomach, liver and intestines is shown. Cholic acid is labeled in the liver and little arrows show the process that announcer describes. When she mentions Cholestaway by name, the word "Cholestaway" appears on the chart.)*

Our liver processes cholesterol, which is excreted in the bile in the form of cholic acid. As the cholic acid enters the intestines, it looks like food to your body and it's absorbed into the bloodstream. The absorbed cholic acid is carried back to the liver and is excreted in the bile and reabsorbed through the intestines again and again. Cholestaway interrupts this cycle by combining with the cholic acid to form an insoluble residue that can't be reabsorbed.

*(Announcer is seated on a table in a room. She picks up the bottle and pours them into her hand.)*

Just two flavorful wafers with every meal can lower you cholesterol count almost immediately. It's that simple. And it's completely safe. So if you're concerned about cholesterol call the number on the screen and order Cholesterol now.

*("Calcium carbonate and magnesium are generally recognized as safe by the FDA" appears at the bottom of the screen when she says "completely safe.")*

*(On the screen, as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [C.A ÷*

EXHIBIT A

*tax.] Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway, P.O. 803377 Dallas. TX. 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")*

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Pick up the phone and call the number on the screen now.

CAMILLA ROSENDE-LOPEZ: (Testimonial)

My cholesterol, it was very, very high. I diet. Everything that they say that is bad, I do not eat it. I exercise every day and even then, my cholesterol does not went down. Now one day, I was changing channels when I saw [the advertisement] on Cholestaway and I decided to try it. I did and from 286 to 235, very slowly, very surely, it works on me.

*(As she speaks "The results of using Cholestaway will vary from individual to individual" appears at the bottom of the picture.)*

FEMALE ANNOUNCER #2:

If you order Cholestaway right now, you'll have the opportunity to purchase CholesTrak.

*(Holds up box of CholesTrak and removes device from box. At bottom of screen "Manufactured by ChemTrak, the leader in home test medical products.")*

CholesTrak is a unique home testing device that allows you to check your cholesterol level, quickly, easily and accurately right in the comfort of your own home. This same device is often used by doctors on their patients.

*("97% ACCURATE" appears on the screen when she says "97% accurate.")*

And it's 97% accurate when used as directed.

EXHIBIT A

*(Picture of the CholesTrak box appears. To the left "$19 Value Only $12.95. Under the box to the left "One time use only.")*

A $19.00 value -- we're offering it to you for only $12.95. Now with CholesTrak you can see exactly how much your cholesterol level has dropped using Cholestaway.

MS. LIDDY: This is Dr. Fred Dalton. Dr. Dalton is a recognized forensic psychiatrist, and has had several papers published on the subject. Welcome, Doctor.

DR. DALTON: Thank you.

MS. LIDDY: I understand that your story has something to do with Dr. Gibbons, something about him saving your life.

DR. DALTON: Dr. Gibbons and I were working together in the state correctional system in Virginia. And I was under the care of some physicians who were taking care of my health. I had a diabetic condition, which seemed to get out of hand. And my triglycerides as well as my cholesterol went so high, that it was very threatening. As a matter of fact, the triglycerides should only be around 200 as the cholesterol should. And my triglycerides were over 1600, and the cholesterol was over 500. My doctors had warned me, and they had put me on different types of medications. I had side effects to them, and it was a very unhappy situation.

And in talking with my friend, Dr. Gibbons, he suggested let's give it a try. So we started on Cholestaway. And within several weeks, my chemistry concerning the triglycerides and cholesterol had dropped to near normal. By one month, they were both within normal range. And it was one of the best things that had ever happened to me.

*(As he speaks the words "The results of using Cholestaway will vary from individual to individual" appear at the bottom of the screen in small letters.)*

MR. MACHADO: I am sure your doctor was just as surprised if not more than you.

EXHIBIT A

| | |
|---|---|
| DR. DALTON: | Interestingly enough, several of the physicians who were caring for me at that time, and I still have those physicians, are taking Cholestaway themselves. |
| MR. MACHADO: | How about side effects, did you experience any? |
| DR. DALTON: | None whatsoever. However, as I mentioned, from the medications which were prescription only and which doctors frequently prescribe for hypercholesterolemia, there were numerous side effects. And unfortunately, I was a victim of that. |
| MR. MACHADO: | Thank you for sharing your story with us, Doctor. |
| MS. LIDDY: | This is Barbara Egyude. Hello, Barbara. |
| MS. EGYUDE: | Hello. |
| MS. LIDDY: | I heard that you have an unusual story to tell us concerning Cholestaway. |
| MS. EGYUDE: | Yes, I had a side effect, an unusual side effect and a happy one. I lost 30 pounds. |
| MS. LIDDY: | You lost 30 pounds. |
| DR. DALTON: | That's interesting Barbara, because I had the same experience. I lost 50 pounds over the past five years.<br><br>*("If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur" appears at the bottom of the screen in small letters.)* |
| MS. LIDDY: | Fifty pounds? |
| MS. EGYUDE: | That's wonderful. |
| DR. DALTON: | Exactly. |
| MS. LIDDY: | Just what in Cholestaway causes one to lose the weight? |

EXHIBIT A

| | |
|---|---|
| DR. DALTON: | Again. as Dr. Gibbons explains. it's the calcium combining with the fat in food and it simply never goes into the system. It's a very simple. but very effective mechanism. |
| MS. LIDDY: | It sounds very effective. |
| DR. DALTON: | It is. |
| MS. LIDDY: | Remember, Cholestaway is not a weight-loss program. Any weight loss you experience is merely a side effect. |
| MS. EGYUDE: | And may I say a very nice side effect. |
| MS. LIDDY: | Yes, I agree. |
| | *("This is a paid commercial" appears at the bottom of the screen in small letters.)* |
| MS. LIDDY: | Thank you all for joining us, and sharing your experiences with our viewers. Thank you. |
| REGINE JOHNSON: (Testimonial) | I had a very high cholesterol count. And my physician had recommended -- she was going to put me on medication. And someone told me about Cholestaway. And I have been taking it, and my cholesterol level is down to its normal level, and I have lost quite a bit of weight as a bonus to that. |
| | *("The results of using Cholestaway will vary from individual to individual" appears at the bottom of the screen in small letters.)* |
| FEMALE ANNOUNCER #1: | If you're one of the over 65 million Americans who suffer from high blood cholesterol, you'll be happy to know there's a remarkable breakthrough discovery that can lower your cholesterol level without drugs. It's called Cholestaway. |
| | *(A bottle of Cholestaway is shown. She picks up the bottle.)* |
| | Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back. |

EXHIBIT A

That's right. It's guaranteed. But don't just take our word for it.

*(She holds up a study. "All products have possible but remote side effects. See product literature." appears at the bottom of the screen.)*

Studies have proven Cholestaway's effectiveness in lowering cholesterol.

*(Announcer is seated on a table in a room. She picks up the bottle and pours them into her hand.)*

Just two flavorful wafers with every meal can lower your cholesterol count almost immediately. It's that simply. And it's completely safe. So if you're concerned about cholesterol call the number on the screen and order Cholestaway now.

*("Calcium carbonate and magnesium are generally recognized as safe by the FDA" appears at the bottom of the screen when she says "completely safe.")*

*(On the screen, as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [CA + tax.] Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway, P.O. 803377 Dallas, TX, 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")*

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Pick up the phone and call the number on the screen now.

EARDIE ANDERSON: I was told that I had high cholesterol. And I was told about Cholestaway. And I started to take it. And after I guess

EXHIBIT A

about four months or so. I went to my doctor. and I was told that my cholesterol had gone really down. Because at first it was 286. and it went – she didn't tell me how much it went down. But she told me it was good, that it went all the way down: That is what I was told. And I was very glad.

FEMALE ANNOUNCER #2: If you order Cholestaway right now. you'll have the opportunity to purchase CholesTrak.

*(Holds up box of CholesTrak and removes device from box. At bottom of screen "Manufactured by ChemTrak, the leader in home test medical products.")*

CholesTrak is a unique home testing device that allows you to check your cholesterol level, quickly, easily and accurately right in the comfort of your own home. This same device is often used by doctors on their patients.

*("97% ACCURATE" appears on the screen when she says "97% accurate.")*

And it's 97% accurate when used as directed.

*(Picture of the CholesTrak box appears. To the left "$19 Value Only $12.95. Under the box to the left "One time use only.")*

A $19.00 value – we're offering it to you for only $12.95. Now with CholesTrak you can see exactly how much your cholesterol level has dropped using Cholestaway.

MR. MACHADO: Rejoining us is Dr. Gibbons to help with this question and answer segment of our show. We recently went out onto the streets to get some of the most often-asked questions pertaining to cholesterol and Cholestaway, and let's listen in.

QUESTION: How can I find out what my cholesterol level is?

DR. GIBBONS: The simplest way is to go to your doctor, and have a physical check-up. and have your blood tested. A very quick and accurate way is to use the CholesTrak kit. It

EXHIBIT A

| | |
|---|---|
| | allows you to check your cholesterol level right in the comfort of your own home. Simply and easily. |
| MR. MACHADO: | Let's go see who this person is. |
| QUESTION: | I have a teenage daughter that has high cholesterol. Can she take Cholestaway? |
| DR. GIBBONS: | Cholestaway is safe for all ages. It is a perfectly natural preparation. And there is no problem giving it to children, if they have high cholesterol. There has been a lot of interest lately on children I would say in families that have a history of high cholesterol. It is important to check the children. Because some teenagers and some in their early twenties are dying of heart attacks. |
| QUESTION: | My father has high blood pressure and high cholesterol. Can he take Cholestaway? |
| MR. MACHADO: | That is a good question. In fact, I do have high blood pressure. A lot of people do. A lot of my friends do. |
| DR. GIBBONS: | Cholestaway is perfectly safe for high blood pressure. In fact, there have been studies in the last year or two employing the ingredients of Cholestaway to treat high blood pressure. Some people with high blood pressure are found to be low on their calcium. And Cholestaway is an excellent source of calcium. And it would probably be very favorable to people with high blood pressure. |
| QUESTION: | How long can you stay on Cholestaway? |
| DR. GIBBONS: | Indefinitely. It isn't a medicine. It is a food supplement. It is natural. You don't get too much of it. As I mentioned, it has calcium in it. Women should be taking Cholestaway anyway to keep their bones hard. So you can take it indefinitely. |
| MS. LIDDY: | So it would help in osteoporosis, perhaps? |
| DR. GIBBONS: | Definitely. |
| MS. LIDDY: | I'm curious, Doctor. What are these margarine companies |

EXHIBIT A

talking about when they refer to. good cholesterol?

DR. GIBBONS: They put cholesterol in a machine that's like a cream separator. And it's the high density that stays in the milk part, and the low density that comes out of the cream part. The low density is thought to be the bad one and the high density is felt to be the good one. The ratio of the one to the other is currently regarded as important. The Cholestaway seems to be getting rid of primarily the low density cholesterol and improving the ratio.

QUESTION: What if you have an ulcer, or if you had an ulcer, could you still take Cholestaway?

DR. GIBBONS: It is actually a good idea to take Cholestaway. It is an excellent antacid among other things. And ulcer patients will get considerable relief when they take the Cholestaway. Some people have told me that they took it as an antacid. But it is definitely safe for people with ulcers.

MR. MACHADO: We have time for one more question. So let's listen here.

QUESTION: Are there any side effects from Cholestaway?

MS. LIDDY: I'll answer that one. Yes, there is one major side effect while on Cholestaway. You will probably lose weight.

*(The following statement appears at the bottom of the screen in small letters: "If you maintain your present level of food consumption while taking Cholestaway, our experience and knowledge of body chemistry indicates that there is a possibility that weight loss will occur."*

MR. MACHADO: Now, the results of using Cholestaway varies with every individual. Your experience with Cholestaway might differ from what we've heard here today. I'd like to thank our incredible guest Dr. DeLamar Gibbons, the discoverer of this extraordinary cholesterol-reducing product, Cholestaway, for being on our program today. Remember, you can order Cholestaway right now by calling the 800-number no the screen.

EXHIBIT A

*("This is a paid commercial" appears on the screen.)*

MADELINE WALSH: (Testimonial)

I originally had a cholesterol problem of 278 and now it has dropped down to 238.

*("The results of using Cholestaway will vary from individual to individual" appears at bottom of screen in small letters.)*

FEMALE ANNOUNCER #1:

If you are one of the over 65 million Americans who suffer from high blood cholesterol, you will be happy to know that there is a remarkable breakthrough discovery that can lower your cholesterol level without drugs. It is called Cholestaway.

*(Scene fades and the woman appears in a garden holding a bottle of Cholestaway.)*

Cholestaway is an all-natural dietary supplement that guarantees to lower your cholesterol or your money back. That is right. It's guaranteed.

But don't just take our word for it.

*(She holds up a study. At bottom of screen, the words "All products have remote side effects. See product literature.")*

Studies have proven Cholestaway's effectiveness in lowering cholesterol.

*(She picks up the bottle, opens it and takes out two wafers.)*

Just two flavorful wafers with every meal can lower your cholesterol count almost immediately. It is that simple. And it is completely safe.

*(The words "Calcium carbonate and magnesium are generally recognized as safe by the FDA.")*

So if you are concerned about cholesterol, call the number on the screen, and order Cholestaway now.

EXHIBIT A

*(On the screen, as the woman continues to talk, in the upper left-hand corner are two bottles of Cholestaway. In the upper right-hand corner there are three credit cards and under that it reads "Only $29.95 [plus S&H] [CA + tax]. Under this "Not Available in Stores." In the middle of the screen "Send Check to: "TMG/Cholestaway, P.O. Box 803377, Dallas, TX, 75380." Under this "30-Day Money Back Guarantee [less S&H]" At the bottom of the screen "TMG/8544 Sunset Blvd., L.A., CA 90069.")*

You will get a month's supply of all-natural Cholestaway for only $29.95. That is right, $29.95, enough for a full thirty days. And remember, Cholestaway is not a drug, but a completely safe, all-natural dietary supplement that guarantees to lower your cholesterol or your money back.

Start your way on the road to a longer, healthier life. Pick up the phone and call the number on the screen now.

TOM CAMP:
(Testimonial)

Cholestaway has made a big difference in my life. Nowadays, there's a tremendous consciousness about fat intake. All the doctors speak about it, all the commercials, your labels, and many people are concerned about fat intake. And I find it's a very practical and convenient way to keep your fat intake down by using the Cholestaway product.

*("The results of using Cholestaway will vary from individual to individual.")*

Graphic (with voiceover):

The preceding program contained testimonials from consumers relating their personal experiences using Cholestaway to reduce their cholesterol levels. These testimonials are personal accounts and have not been scientifically recorded. Although some users have also experienced a weight loss using Cholestaway, it is not intended as a weight loss product. Remember, the results of taking Cholestaway will vary from individual to individual.

*(TMG appears on the screen with music. Under TMG is a line and under the line the words "Television Marketing Group, Inc. A Division of Western International Media.")*

*(The preceding was a paid program brought to you by Television Marketing Group.)*

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated or that the facts, as alleged in the complaint, other than jurisdictional facts, are true; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. At relevant times herein, respondent Western Direct Marketing Group, Inc. was known as Television Marketing Group, Inc., a California corporation with its principal office or place of business at 8544 Sunset Boulevard, Los Angeles, California.

2. Respondent Western International Media Corporation is a California corporation with its principal office or place of business at 8544 Sunset Boulevard, Los Angeles, California.

## ORDER

### DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise

of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "*respondents*" shall mean Western Direct Marketing Group, Inc. and Western International Media Corporation, corporations, their successors and assigns and their officers, and each of the above's agents, representatives and employees.

3. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

*It is ordered,* That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Cholestaway or any other food, dietary supplement or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

A. That such product significantly lowers or has any other effect on serum cholesterol levels, with or without changes in diet;
B. That such product significantly lowers serum cholesterol levels or causes significant weight loss even if users eat foods high in fat, including fried chicken and pizza;
C. That such product substantially reduces or eliminates or has any other effect on the body's absorption of dietary fat;
D. That such product lowers low density lipoprotein cholesterol or improves the high density lipoprotein cholesterol to low density lipoprotein cholesterol ratio;
E. That such product is effective in the treatment of hardening of the arteries or heart disease;
F. That such product causes significant weight loss or has any other effect on weight, with or without changes in diet;
G. That such product significantly reduces or has any other effect on blood triglyceride levels; or
H. That such product significantly reduces or has any other effect on blood pressure levels,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

*It is further ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Cholestaway or any substantially similar product in or affecting commerce, shall not use the name "Cholestaway" or any other name that represents, expressly or by implication, that the product will lower serum cholesterol levels, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

*It is further ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study or research.

IV.

*It is further ordered*, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or
2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

V.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VI.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VII.

*It is further ordered*, That respondents Western Direct Marketing Group and Western International Media Corporation, and their successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;
B. All materials that were relied upon in disseminating the representation; and
C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other

communications with consumers or with governmental or consumer protection organizations.

VIII.

*It is further ordered*, That respondents Western Direct Marketing Group and Western International Media Corporation and their successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

IX.

*It is further ordered*, That respondents Western Direct Marketing Group and Western International Media Corporation and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporations that may affect compliance obligations arising under this order, including but not limited to a dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporations about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

*It is further ordered*, That respondents Western Direct Marketing Group and Western International Media Corporation and their

successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XI.

This order will terminate on July 28, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not effect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

# INSTITUTIONAL PHARMACY NETWORK, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3822. Complaint, Aug. 11, 1998–Decision, Aug. 11, 1998*

This consent order prohibits, among other things, the respondents, who are providers of institutional pharmacy services in Oregon, from entering into, maintaining, or enforcing any agreement with any pharmacy concerning fees or fixing, raising, stabilizing, maintaining, or tampering with any fees.

## *Participants*

For the Commission: *Randall Marks, Steven Levy, Michael McNeely, William Baer,* and *Jonathan Baker.*

For the respondents: *Douglas Ross* and *Pat Morris*, in-house counsel, Portland, OR.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the Institutional Pharmacy Network; Evergreen Pharmaceutical, Inc.; NCS Healthcare of Oregon, Inc.; NCS Healthcare of Washington, Inc.; United Professional Companies, Inc.; and White, Mack and Wart, Inc., hereinafter sometimes referred to as respondents, have violated and are violating the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

1. Respondent Institutional Pharmacy Network ("IPN") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 1300 SW 5th Avenue, Suite 2300, Portland, Oregon.

2. Respondent Evergreen Pharmaceutical, Inc. ("Evergreen"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington with its office and principal place of business located at 12220 113th Avenue, NE, Kirkland, Washington.

3. Respondent NCS Healthcare of Oregon, Inc. ("NCS of Oregon"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its office and principal place of business located at 2725 Columbia Blvd., Portland, Oregon.

4. Respondent NCS Healthcare of Washington, Inc. ("NCS of Washington"), is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio with its office and principal place of business located at 13035 Gateway Drive, Seattle, Washington.

5. Respondent United Professional Companies, Inc. ("UPC"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 3724 West Wisconsin Avenue, Milwaukee, Wisconsin.

6. Respondent White, Mack & Wart, Inc., doing business as ProPac Pharmacy ("ProPac"), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 11620 NE Ainsworth Circle, Portland, Oregon.

7. IPAC Pharmacy ("IPAC") was a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon. On or about July 31, 1996, after the occurrence of the events alleged in paragraphs 18-20, respondent NCS of Oregon purchased the pharmacy business of IPAC.

8. Clinical Health Systems ("Clinical") was a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington. On or about November 1, 1996, after the occurrence of the events alleged in paragraphs 18-20, respondent NCS of Washington purchased the pharmacy business of Clinical.

9. The respondents named in paragraphs two through six herein (sometimes referred to as "institutional pharmacy respondents") provide institutional pharmacy services in Oregon.

10. Clinical, Evergreen, IPAC, ProPac, and UPC formed IPN and have been its only members.

11. The institutional pharmacy respondents are engaged in the business of providing pharmacy services to institutional care facilities, such as nursing homes. Institutional pharmacies provide

specialized services, including providing medications in single dose packages, maintaining an "emergency box" at the client facility with drugs for use in emergency situations, and providing consulting and quality assurance services to institutional care facilities.

12. IPN engages in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, IPN is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

13. The general business practices of IPN and its members, including those practices herein alleged, are in or affect "commerce" within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

14. Except to the extent that IPN and its members have restrained competition as alleged herein, IPN's members have been, and are now, in competition among themselves and with other providers of institutional pharmacy services in Oregon. Absent agreements among competing pharmacies on the price and other terms on which they will provide services to third-party payers, competing pharmacies decide individually whether, and at what price, to enter into contracts with such payers.

15. The State of Oregon created the Oregon Health Plan ("OHP") in 1994 to provide health care to Medicaid recipients and other needy Oregonians. Under OHP, the state contracts with Fully Capitated Health Plans ("Plans"), which are managed care organizations that receive a fixed payment to care for OHP patients. The Plans in turn contract with providers, including hospitals, physicians, retail pharmacies, and institutional pharmacies. OHP covers about half of all institutional care patients in Oregon.

16. IPN neither provides new or efficient services, nor enables its members to provide new or efficient services. Moreover, IPN members do not share risk. Instead, IPN provides a vehicle for its members to reach collective decisions on the prices that the institutional pharmacies will seek from the Plans.

17. The institutional pharmacy members of IPN have agreed among themselves, and IPN has acted as a combination of those institutional pharmacies, and has combined with them, to engage in collective negotiations over price and other terms with the Plans and thereby to fix the fees they charge the Plans. In so doing, IPN and its institutional pharmacy members have fixed, stabilized, or increased

the price of institutional pharmacy services and otherwise restrained competition among institutional pharmacies in Oregon.

18. The institutional pharmacy members of IPN together provide pharmacy services for approximately 80 percent of the patients that receive institutional pharmacy services in Oregon. Their purpose in agreeing to negotiate collectively has been to maximize their resulting leverage in bargaining over reimbursement rates with the Plans. Indeed, even before forming IPN, they saw "an advantage to negotiate from strength for reimbursement" because they recognized that competition among themselves would drive down reimbursement rates.

19. IPN has contracted with three Plans. Pursuant to each of those contracts, each Plan pays IPN members a higher rate than it pays institutional pharmacies that are not IPN members and that did not negotiate collectively with that Plan.

20. IPN also attempted to contract with at least four other Plans. Clinical, Evergreen, IPAC, ProPac, and UPC agreed that, before conducting individual negotiations, each member would give IPN time to attempt to negotiate a contract. Pursuant to this agreement, the pharmacies negotiated separately with three of the Plans only after IPN failed to reach an agreement on behalf of the group. IPN also negotiated with a fourth Plan that is by far the largest purchaser of institutional pharmacy services for OHP patients. Although this Plan sought to deal with Clinical, Evergreen, IPAC, ProPac, and UPC individually, the pharmacies largely refused to respond and instead approached the Plan as a group. After months of attempting to negotiate individually with the institutional pharmacy members of IPN, and under pressure to implement pharmacy arrangements for institutional care patients under OHP, the Plan began negotiating with IPN. As a result of these negotiations, the Plan agreed to pay higher rates to IPN members than it had agreed to pay other institutional pharmacies.

21. Respondents' actions as alleged herein have had and have the purpose, tendency, and capacity, among other effects:

a. To restrain competition among pharmacies providing institutional pharmacy services in Oregon;

b. To fix or increase the prices that the Plans pay for institutional pharmacy services to OHP patients in Oregon; and

c. To deprive the State of Oregon, the Plans, nursing homes and other long-term care facilities, and OHP beneficiaries of the benefits of competition among providers of institutional pharmacy services in Oregon.

22. The combinations or agreements and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

## DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Institutional Pharmacy Network; Evergreen Pharmaceutical, Inc.; NCS Healthcare of Oregon, Inc.; NCS Healthcare of Washington, Inc.; United Professional Companies, Inc.; and White, Mack and Wart, Inc., hereinafter sometimes referred to as the respondents, and the respondents having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with

the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Institutional Pharmacy Network is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 1300 SW 5th Avenue, Suite 2300, Portland, Oregon.

2. Respondent Evergreen Pharmaceutical, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington with its office and principal place of business located at 12220 113th Avenue, NE, Kirkland, Washington.

3. Respondent NCS Healthcare of Oregon, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio with its office and principal place of business located at 2725 Columbia Blvd., Portland Oregon.

4. Respondent NCS Healthcare of Washington, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Ohio with its office and principal place of business located at 13035 Gateway Drive, Seattle, Washington.

5. Respondent United Professional Companies, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 3724 West Wisconsin Avenue, Milwaukee, Wisconsin.

6. Respondent White, Mack and Wart, Inc. (doing business as Propac Pharmacy), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 11620 NE Ainsworth Circle, Portland, Oregon.

7. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

*It is ordered*, That, as used in this order, the following definitions shall apply:

A. Respondent *Institutional Pharmacy Network ("IPN")* means Institutional Pharmacy Network; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by IPN; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

B. Respondent *Evergreen Pharmaceutical, Inc.*, means Evergreen Pharmaceutical, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by Evergreen Pharmaceutical, Inc.; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. Respondent *NCS Healthcare of Oregon, Inc.*, means NCS Healthcare of Oregon, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by NCS Healthcare of Oregon; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

D. Respondent *NCS Healthcare of Washington, Inc.*, means NCS Healthcare of Washington, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by NCS Healthcare of Washington; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

E. Respondent *United Professional Companies, Inc.*, means United Professional Companies, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by United Professional Companies, Inc.; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

F. Respondent *White, Mack and Wart, Inc.*, means White, Mack and Wart, Inc.; its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by White, Mack and Wart, Inc.; and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

G. "*Third-party payer*" means any person or entity that reimburses for, purchases, or pays for all or any part of the health care services provided to any other person, and includes, but is not limited to: health insurance companies; managed care organizations; Fully Capitated Health Care Plans under the Oregon Health Program; pharmacy benefit managers; prepaid hospital, medical, or other health service plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs.

H. "*Oregon Health Plan*" means the plan created by the State of Oregon in 1994 to provide health care to Medicaid recipients and other needy Oregonians.

I. "*Qualified risk-sharing joint arrangement*" means an arrangement to provide services in which (1) the arrangement does not restrict the ability, or facilitate the refusal, of pharmacy providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all pharmacy providers participating in the arrangement share substantial financial risk from their participation in the arrangement through: (a) the provision of services to payers at a capitated rate; (b) the provision of services for a predetermined percentage of premium or revenue from payers; (c) the use of significant financial incentives (*e.g.*, substantial withholds) for its participating providers, as a group, to achieve specified cost-containment goals; or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by different types of providers offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors.

J. "*Qualified clinically-integrated joint arrangement*" means an arrangement to provide services in which (1) the arrangement does

not restrict the ability, or facilitate the refusal, of pharmacy providers participating in the arrangement to deal with payers individually or through any other arrangement, and (2) all pharmacy providers participating in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the providers participating in the arrangement, in order to control costs and ensure quality of the services provided through the arrangement.

K. "*Subcontract*" means an agreement between two pharmacies that one will fulfill the contractual obligations of the other to provide pharmacy goods and services to the patients of an institutional care facility or third-party payer at a particular facility, when (1) the contracting pharmacy cannot reasonably fulfill its contract obligations at that facility or (2) a respondent is operating in its capacity as a network including that facility if, at the time of the agreement, that facility had a pre-existing contract with another pharmacy.

II.

*It is further ordered*, That each respondent, in connection with the provision of institutional pharmacy goods and services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist, directly or indirectly, or through any corporate or other device, from entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, facilitating, attempting to facilitate, ratifying, or attempting to ratify any agreement with any pharmacy either (1) concerning fees or (2) setting, fixing, raising, stabilizing, establishing, maintaining, adjusting, or tampering with any fees.

Provided that nothing in this order shall be construed to prohibit any respondent from:

(1) Entering into any agreement or engaging in conduct that is reasonably necessary to form, facilitate, manage, operate, or participate in:

(a) A qualified risk-sharing joint arrangement; or

(b) A qualified clinically integrated joint arrangement, if the respondent has provided the prior notification(s) as required by this

paragraph (b). Such prior notification must be filed with the Secretary of the Commission at least thirty (30) days prior to forming, facilitating, managing, operating, participating in, or taking any action, other than planning, in furtherance of any joint arrangement requiring such notice ("first waiting period"), and shall include for such arrangement the identity of each participant; the location or area of operation; a copy of the agreement and any supporting organizational documents; a description of its purpose or function; a description of the nature and extent of the integration expected to be achieved, and the anticipated resulting efficiencies; an explanation of the relationship of any agreement on reimbursement to furthering the integration and achieving the expected efficiencies; and a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from such agreement(s). If, within the first waiting period, a representative of the Commission makes a written request for additional information, respondent shall not form, facilitate, manage, operate, participate in, or take any action, other than planning, in furtherance of such joint arrangement until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition.

(2) Agreeing on the terms by which that respondent will provide pharmacy goods or services:

(a) With a prescription benefit manager or other third-party payer that is acting on behalf of an employer or other purchaser of pharmacy goods and services and (i) that is neither owned by nor operates any pharmacies providing institutional pharmacy services, or (ii) that owns or operates a pharmacy providing institutional pharmacy services as long as respondent notifies the Commission in writing at least forty-five (45) days prior to such agreement.

(b) To an institutional care facility that is acting as a purchaser of pharmacy goods or services, even if the facility also owns a pharmacy.

(c) With another pharmacy pursuant to a subcontract.

(3) Agreeing on the terms by which respondent will purchase pharmacy goods or services in its capacity as an institutional care facility.

(4) Contracting to operate or manage a pharmacy.

III.

*It is further ordered*, That each respondent shall:

A. Within thirty (30) days after the date on which this order becomes final, cause the distribution by first-class mail of this order and the complaint to (1) each of its corporate officers, directors, and managers, and the officers, directors, and managers with responsibility for operating pharmacies in the states of Oregon and Washington, and (2) each Fully Capitated Health Plan under the Oregon Health Plan;

B. For a period of two (2) years after the date this order becomes final, distribute by first-class mail a copy of this order and the complaint to each new member of IPN and each of respondent's corporate officers, directors, and managers, and officers, directors, and managers with responsibility for operating pharmacies in the states of Oregon and Washington, within (30) days of the member's admission or the election, appointment, or employment of the officer, director, or manager;

C. File a verified written report within sixty (60) days after the date this order becomes final setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, setting forth in detail the manner and form in which it has complied and is complying with paragraphs II and III of this order;

D. Notify the Commission at least thirty (30) days prior to (1) the respondent's dissolution, assignment, or sale resulting in the emergence of a successor corporation, or (2) the creation or dissolution of subsidiaries that may affect compliance obligations arising out of the order or any other change that may affect compliance obligations arising out of the order; and

E. For the purpose of determining or securing compliance with this order, permit any duly authorized representative of the Commission: (1) access, during office hours and in the presence of

counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of a respondent relating to any matters contained in this order; and (2) upon five days' notice to the respondent, and without restraint or interference from it, to interview its officers, directors, or employees.

IV.

*It is further ordered*, That this order will terminate on August 11, 2018.

IN THE MATTER OF

# COLUMBIA/HCA HEALTHCARE, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3472. Consent Order, Nov. 19, 1993–Modifying Order, Aug. 14, 1998*

This order reopens a 1993 consent order – that prohibited the respondents from acquiring any acute care hospital in Osceola County, Florida, without prior Commission approval – and this order modifies paragraph IV of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

## ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), the respondent named in the consent order issued by the Commission on November 19, 1993, in Docket No. C-3472 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph IV, which currently requires Columbia/HCA to seek the prior approval of the Commission to acquire or to permit to be acquired certain acute care hospitals. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons discussed below, the

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

Commission has determined to set aside the prior approval requirement in paragraph IV, and substitute a prior notice provision for it.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a

rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in Docket No. C-3472 ("complaint") alleged that Columbia/HCA's acquisition of Galen Health Care, Inc. ("Galen"), would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the market for the sale and production of acute care hospitals in Osceola County, Florida.

The complaint alleged that the acquisition would eliminate actual competition between Columbia/HCA and Galen in the relevant markets; significantly increase the already high level of concentration in the relevant markets; enhance the likelihood of collusion or interdependent coordination between or among the firms in the relevant markets; and deny free and open competition based on price, quality and service in the provision of acute care inpatient hospital services in the relevant markets. The Order required Columbia/HCA to divest Kissimmee Memorial Hospital, which Columbia/HCA did.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. There is no evidence in the record that rebuts that presumption, *i.e.*, Columbia/HCA acquired Galen, and there is nothing to suggest a credible risk that Columbia/HCA will seek to acquire Kissimmee Memorial Hospital. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to eliminate the prior approval requirement and substitute a prior notice provision for it.

Prior notification is appropriate for acquisitions in the relevant market because the record evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The relevant market is local, and the acquisition price of an acute care hospital, or a portion thereof, could fall below the size-of-transaction threshold in the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement and the respondent's request, the Commission has determined to modify paragraph IV of the Order to substitute a prior notification requirement for the existing prior approval requirement.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

*It is further ordered*, That paragraph IV of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IV.

*It is further ordered*, That, for a period of ten (10) years from the date this order becomes final, no respondent shall, without prior notification to the Federal Trade Commission:

A. Acquire any acute care hospital in Osceola County, Florida; or

B. Permit any acute care hospital it operates in Osceola County, Florida to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in Osceola County, Florida.

Provided, however, that no acquisition shall be subject to this paragraph IV of this order if the fair market value of (or, for) the acute care hospital or part thereof to be acquired does not exceed one million dollars ($1,000,000).

The prior notifications required by this paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until thirty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a

transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA") filed a Petition pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement") to Reopen and Modify the Orders in Docket Nos. C-3472, C-3505, C-3538, C-3544 and D.9256. By that Petition, Columbia/HCA requests that the prior approval requirements in the Orders be deleted and, as an alternative, that the Orders be modified to require prior notification of potentially anticompetitive transactions below the Hart-Scott-Rodino ("HSR") Act threshold. Upon consideration of this matter, the Commission decided to grant Columbia/HCA's Petition to delete the prior approval provisions in the Orders and replace them with prior notification provisions upon the terms set forth below.

The Commission's 1995 Prior Approval Policy Statement provides that, "as a general matter, [future] Commission orders . . . will not include prior approval or prior notification requirements." If "a Petition is filed to reopen and modify an order, pursuant to the [Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement." But the Statement also directs that the terms of any prior notification requirement be considered "on a case-by-case basis" in light of the characteristics of particular markets, market participants and other relevant factors. Significantly, the Commission "*reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances.*" *See* Prior Approval Policy Statement, 60 Fed. Reg. 29745, 39746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241(emphasis added).

The Commission, exercising its equitable power, has substituted prior notification for prior approval provisions in the relevant Orders.

In doing so the Commission will require Columbia to provide thirty (30) days advance notice of any proposed merger or acquisition transaction as defined in the Orders ("first waiting period"). If during this first waiting period the Commission requests further information concerning a proposed transaction, Columbia shall not take any action, other than planning, in furtherance of such a transaction until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. This second waiting period is consistent with several cases where the Commission believed it was necessary to protect the public interest from a credible risk that the defendant would once again engage in anticompetitive transactions. *See* MD Physicians of SW Louisiana, FTC File No. 941 0095; Mesa County Physicians Independent Practice Association, Docket No. D.9284.

In this case, first and foremost, there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act, commonly referred to as the HSR Act. Indeed, the complaints in each of these matters involved transactions that if filed individually would have fallen below the reporting threshold of the HSR Act. Second, Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders. Indeed, on July 30, 1998 the Commission imposed a $2.5 million civil penalty upon Columbia/HCA for its violation of Commission orders by: (1) failing to divest in a timely manner two Utah Hospitals and its joint venture interest in South Seminole Hospital in Florida; and (2) violating a related Hold Separate Agreement governing assets it acquired in Utah as a result of its merger with Healthtrust Inc. *See* FTC File No. 961 0013. Given this history, it is both prudent and consistent with our policy to require additional review time.

For these reasons, we voted to grant Columbia's Petition to Reopen the Orders in Docket Numbers C-3472, C-3505, C-3538, C-3544 and D.9256, and Modify the Orders to delete the prior approval provisions, but also asked that they be replaced with prior notice provisions that have a thirty (30) day second waiting period.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

Application of our Prior Approval Policy Statement has led the Commission to replace the prior approval provision in each of these five orders with a requirement that Columbia/HCA provide us with prior notification of certain acquisitions. Supplanting prior approval is the correct result: there is no credible risk in any of these cases that Columbia/HCA will attempt the same or approximately the same transaction that triggered the Commission's original enforcement concern, and there is nothing to rebut the presumption in each case that setting aside the prior approval requirement is in the public interest. Moreover, replacing prior approval with prior notification is warranted, since each of these matters involves a credible risk that Columbia/HCA could make anticompetitive acquisitions that fall below Hart-Scott-Rodino thresholds.

Nevertheless, I have dissented because the Commission here has imposed the wrong prior notification requirement for the wrong reasons. In a long line of order modifications pursuant to the Prior Approval Policy Statement, the Commission has been consistent in either simply vacating the prior approval clause or replacing it with a prior notification mechanism that comprises a 30-day initial period and a 20-day second period. In the present matters, however, the Commission has chosen to lengthen the second period in each of these orders to 30 days. I disagree with the decision to impose on Columbia/HCA a greater burden than other respondents have borne, and to do so for reasons that appear to smack of retribution.

I have searched these five orders in vain for any basis for treating Columbia/HCA differently from the many previous respondents that have asked the Commission to set aside or modify a prior approval requirement. The orders summarily announce the length of the notification periods but do not themselves venture any explanation for the disparate treatment accorded Columbia/HCA. Such an obvious departure from consistent agency practice without any explanation could be judged arbitrary and capricious. Perhaps in an effort to save these orders from just such a condemnation, my fellow Commissioners have offered a statement to rationalize what they have done.[1] With all due respect, I find their statement unpersuasive.

---

[1] Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson in the Matter of Columbia/HCA Healthcare Corp., Docket Nos. C-3472, C-3505, C-3538, C-3544 and 9256.

My colleagues quote the Prior Approval Policy Statement to the effect that the Commission "reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances."[2] The quoted passage plainly announces that the Commission has not forsworn its power to prescribe prior approval or prior notification requirements in appropriate circumstances. It is not a declaration that the Commission is liberated from every agency's obligation to treat parties before it fairly and evenhandedly. With the clearly disparate treatment of Columbia/HCA, however, the latter message is what observers are likely to take from the Commission's action.[3]

The penultimate paragraph of the majority's statement may disclose what motivated the Commission to impose a 30-day second period on Columbia/HCA. I agree with my colleagues that "there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act..."[4] But this observation establishes merely that the Commission should retain a prior notification requirement. It by no means furnishes a basis for treating Columbia/HCA more harshly than other respondents.

---

[2] *Id.* at 1.

[3] My colleagues' attempted analogy to collusion cases in the health care industry also fails to supply the missing justification for lengthening the second period in the present cases to 30 days. The Commission's recent consent agreements in M.D. Physicians of Southwest Louisiana, Inc. (File No. 941 0095) and Mesa County Physicians Independent Practice Association, Inc. (Docket No. 9284) contained 30-day second notification periods. In those cases, however, the Commission found it necessary to reserve enough time to satisfy itself that newly-constituted horizontal arrangements among physicians would not lead to a return to the collusion that those cases targeted. I do not know how those two cases, arising from substantial evidence of collusive behavior, supply the Commission with a reason to increase the time it will spend scrutinizing some hospital merger that Columbia/HCA might undertake in, say, Augusta, Charlotte County, or Salt Lake City -- hospital markets with which the Commission is already thoroughly familiar and thus should need less time for review. In addition, although the skeletal nature of the initial notification in M.D. Physicians and Mesa County Physicians might counsel in favor of lengthening the second period to 30 days, no such consideration is present here: any initial notification provided by Columbia/HCA should contain the level of detail that one normally encounters in an acquiring firm's Hart-Scott-Rodino filing.

In a case that involves not only collusion but also merger issues -- and thus is more analogous than M.D. Physicians or Mesa County Physicians to the present matter -- the Commission has just announced acceptance of a proposed order that requires only a 20-day second notification period. Commonwealth Land Title Insurance Company (File No. 981 0127). I do not understand how my colleagues can square the relief in Commonwealth with what they have done to Columbia/HCA.

[4] Statement of Chairman Pitofsky and Commissioners Anthony and Thompson at 2.

This paragraph then arrives at the nub of my colleagues' argument: ". . . Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders."[5] After referencing the civil penalty that Columbia/HCA paid for violating certain divestiture obligations under two of these orders, they conclude: "Given this history, it is both prudent and consistent with our policy to require additional review time."[6] This conclusion is a *non sequitur*.

There is no question that Columbia/HCA recently paid a $2.5 million civil penalty for alleged order violations. Although my colleagues evidently found that penalty acceptable, I questioned whether it was sufficient in light of Columbia/HCA's "prolonged and pronounced disregard for the requirements of two Commission divestiture orders and the Utah Hold Separate Agreement."[7] I continue to believe that Columbia/HCA committed serious infractions and deserved a civil penalty even larger than what we obtained. But the civil penalty case was our opportunity to levy sanctions for Columbia/HCA's order violations, and that opportunity is gone. I do not see what bearing that misconduct has on the entirely unrelated question of how much time we need to review future acquisitions. If the Commission has based its decision to lengthen the second waiting period on its reaction to respondent's previous behavior, then I would suggest that such a decision is not only arbitrary but punitive. The public may find this perception inescapable.

I am also troubled by another aspect of the majority's decision to extend the second period to 30 days. Each of our newly-modified orders ends with a proviso exempting transactions subject to Hart-Scott-Rodino from the order's prior notification requirement. In other words, an acquisition large enough to be reportable under Hart-Scott-Rodino will be subject to the 20-day second waiting period prescribed by that statute,[8] but a covered acquisition too small to meet Hart-Scott-Rodino thresholds will be subject to the 30-day

---

[5] *Id.*

[6] *Id.*

[7] Statement of Commissioner Orson Swindle in Columbia/HCA Healthcare Corporation, File No. 961 0013 (available at http://www.ftc.gov/os/9807/9610013.os.htm).

[8] Moreover, for a cash tender offer, the Hart-Scott-Rodino second waiting period is reduced to 10 days. 15 U.S.C. 18a(e)(2).

second period mandated by the Commission's orders. The practical effect of this action is to place an entire class of smaller acquisitions under a greater burden than is borne by larger acquisitions. Although smaller acquisitions, of course, sometimes may be more problematic than large acquisitions from an antitrust point of view, I do not believe this justifies imposing a greater burden on smaller transactions.

I return to whether punishment of Columbia/HCA underlies (or will be perceived to underlie) the Commission's decision. If it does not, then the Commission should explain either why Columbia/HCA alone has earned a 30-day second period -- a result that on its face looks arbitrary and capricious -- or whether it is moving toward imposing a 30-day second period in all future cases. No one has sought to announce a new 30-day period of general applicability, and so it boils down to how the Commission treats this particular respondent. Because Columbia/HCA's prior order violations have no demonstrable bearing on the appropriate length of the second waiting period, I dissent from the Commission's unjustified handling of this respondent.

IN THE MATTER OF

# COLUMBIA/HCA HEALTHCARE CORP., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3505. Consent Order, July 5, 1994–Modifying Order, Aug. 14, 1998*

This order reopens a 1994 consent order – that prohibited the respondents from acquiring any acute care hospital in the Augusta-Aiken area, without prior Commission approval – and this order modifies paragraph IV of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

## ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), the respondent named in the consent order issued by the Commission on July 5, 1994, in Docket No. C-3505 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph IV, which currently requires Columbia/HCA to seek the prior approval of the Commission to acquire or to permit to be acquired certain acute care hospitals. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons discussed below, the Commission has determined to set aside the prior approval requirement in paragraph IV, and substitute a prior notice provision for it.

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of

the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that Columbia's acquisition of 100% of the voting stock of Hospital Corporation of America ("HCA") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the market for the sale and production of acute care hospital services and any narrower group therein in the Augusta-Aiken market.

The complaint alleged that the acquisition would eliminate actual competition between Columbia and HCA in the relevant markets; significantly increase the already high level of concentration in the relevant market; eliminate HCA hospitals as substantial independent competitive forces in the relevant market; enhance the likelihood of collusion or interdependent coordination between or among the firms in the relevant markets; and deny free and open competition based on price, quality and service in the provision of acute care hospital services in the relevant market. The Order required Columbia/HCA to divest Aiken Regional Medical Center, which Columbia/HCA did.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. There is no evidence in the record that rebuts that presumption, *i.e.*, Columbia acquired HCA, and there is nothing to suggest a credible risk that Columbia/HCA will seek to acquire Aiken Regional Medical Center. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to eliminate the prior approval requirement and substitute a prior notice provision for it.

Prior notification is appropriate for acquisitions in the relevant market because the record evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The relevant market is local, and the acquisition price of an acute care hospital, or a portion thereof, could fall below the size-of-transaction threshold in the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement and the respondent's request, the Commission has determined to modify paragraph IV of the Order to substitute a prior notification requirement for the existing prior approval requirement.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

*It is further ordered*, That paragraph IV of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IV.

*It is further ordered*, That, for a period of ten (10) years from the date this order becomes final, no respondent shall, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any acute care hospital in Augusta-Aiken; or

B. Permit any acute care hospital it operates in Augusta-Aiken to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in Augusta-Aiken.

Provided, however, that no acquisition shall be subject to this paragraph IV of this order if the fair market value of (or, in case of a purchase acquisition, the consideration to be paid for) the acute care hospitals or part thereof to be acquired does not exceed one million dollars ($1,000,000).

The prior notifications required by this paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until thirty days after substantially complying with such request for additional information. Early termination of the waiting periods in

this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA") filed a Petition pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement") to Reopen and Modify the Orders in Docket Nos. C-3472, C-3505, C-3538, C-3544 and D.9256. By that Petition, Columbia/HCA requests that the prior approval requirements in the Orders be deleted and, as an alternative, that the Orders be modified to require prior notification of potentially anticompetitive transactions below the Hart-Scott-Rodino ("HSR") Act threshold. Upon consideration of this matter, the Commission decided to grant Columbia/HCA's Petition to delete the prior approval provisions in the Orders and replace them with prior notification provisions upon the terms set forth below.

The Commission's 1995 Prior Approval Policy Statement provides that, "as a general matter, [future] Commission orders . . . will not include prior approval or prior notification requirements." If "a Petition is filed to reopen and modify an order, pursuant to the [Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement." But the Statement also directs that the terms of any prior notification requirement be considered "on a case-by-case basis" in light of the characteristics of particular markets, market participants and other relevant factors. Significantly, the Commission "*reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances.*" *See* Prior Approval Policy Statement,

60 Fed. Reg. 29745, 39746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241(emphasis added).

The Commission, exercising its equitable power, has substituted prior notification for prior approval provisions in the relevant Orders. In doing so the Commission will require Columbia to provide thirty (30) days advance notice of any proposed merger or acquisition transaction as defined in the Orders ("first waiting period"). If during this first waiting period the Commission requests further information concerning a proposed transaction, Columbia shall not take any action, other than planning, in furtherance of such a transaction until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. This second waiting period is consistent with several cases where the Commission believed it was necessary to protect the public interest from a credible risk that the defendant would once again engage in anticompetitive transactions. *See* MD Physicians of SW Louisiana, FTC File No. 941 0095; Mesa County Physicians Independent Practice Association, Docket No. D.9284.

In this case, first and foremost, there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act, commonly referred to as the HSR Act. Indeed, the complaints in each of these matters involved transactions that if filed individually would have fallen below the reporting threshold of the HSR Act. Second, Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders. Indeed, on July 30, 1998 the Commission imposed a $2.5 million civil penalty upon Columbia/HCA for its violation of Commission orders by: (1) failing to divest in a timely manner two Utah Hospitals and its joint venture interest in South Seminole Hospital in Florida; and (2) violating a related Hold Separate Agreement governing assets it acquired in Utah as a result of its merger with Healthtrust Inc. *See* FTC File No. 961 0013. Given this history, it is both prudent and consistent with our policy to require additional review time.

For these reasons, we voted to grant Columbia's Petition to Reopen the Orders in Docket Numbers C-3472, C-3505, C-3538, C-3544 and D.9256, and Modify the Orders to delete the prior

approval provisions, but also asked that they be replaced with prior notice provisions that have a thirty (30) day second waiting period.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

Application of our Prior Approval Policy Statement has led the Commission to replace the prior approval provision in each of these five orders with a requirement that Columbia/HCA provide us with prior notification of certain acquisitions. Supplanting prior approval is the correct result: there is no credible risk in any of these cases that Columbia/HCA will attempt the same or approximately the same transaction that triggered the Commission's original enforcement concern, and there is nothing to rebut the presumption in each case that setting aside the prior approval requirement is in the public interest. Moreover, replacing prior approval with prior notification is warranted, since each of these matters involves a credible risk that Columbia/HCA could make anticompetitive acquisitions that fall below Hart-Scott-Rodino thresholds.

Nevertheless, I have dissented because the Commission here has imposed the wrong prior notification requirement for the wrong reasons. In a long line of order modifications pursuant to the Prior Approval Policy Statement, the Commission has been consistent in either simply vacating the prior approval clause or replacing it with a prior notification mechanism that comprises a 30-day initial period and a 20-day second period. In the present matters, however, the Commission has chosen to lengthen the second period in each of these orders to 30 days. I disagree with the decision to impose on Columbia/HCA a greater burden than other respondents have borne, and to do so for reasons that appear to smack of retribution.

I have searched these five orders in vain for any basis for treating Columbia/HCA differently from the many previous respondents that have asked the Commission to set aside or modify a prior approval requirement. The orders summarily announce the length of the notification periods but do not themselves venture any explanation for the disparate treatment accorded Columbia/HCA. Such an obvious departure from consistent agency practice without any explanation could be judged arbitrary and capricious. Perhaps in an effort to save these orders from just such a condemnation, my fellow Commission-

ers have offered a statement to rationalize what they have done.[1] With all due respect, I find their statement unpersuasive.

My colleagues quote the Prior Approval Policy Statement to the effect that the Commission "reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances."[2] The quoted passage plainly announces that the Commission has not forsworn its power to prescribe prior approval or prior notification requirements in appropriate circumstances. It is not a declaration that the Commission is liberated from every agency's obligation to treat parties before it fairly and evenhandedly. With the clearly disparate treatment of Columbia/HCA, however, the latter message is what observers are likely to take from the Commission's action.[3]

The penultimate paragraph of the majority's statement may disclose what motivated the Commission to impose a 30-day second period on Columbia/HCA. I agree with my colleagues that "there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton

---

[1] Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson in the Matter of Columbia/HCA Healthcare Corp., Docket Nos. C-3472, C-3505, C-3538, C-3544 and 9256.

[2] *Id.* at 1.

[3] My colleagues' attempted analogy to collusion cases in the health care industry also fails to supply the missing justification for lengthening the second period in the present cases to 30 days. The Commission's recent consent agreements in M.D. Physicians of Southwest Louisiana, Inc. (File No. 941 0095) and Mesa County Physicians Independent Practice Association, Inc. (Docket No. 9284) contained 30-day second notification periods. In those cases, however, the Commission found it necessary to reserve enough time to satisfy itself that newly-constituted horizontal arrangements among physicians would not lead to a return to the collusion that those cases targeted. I do not know how those two cases, arising from substantial evidence of collusive behavior, supply the Commission with a reason to increase the time it will spend scrutinizing some hospital merger that Columbia/HCA might undertake in, say, Augusta, Charlotte County, or Salt Lake City -- hospital markets with which the Commission is already thoroughly familiar and thus should need less time for review. In addition, although the skeletal nature of the initial notification in M.D. Physicians and Mesa County Physicians might counsel in favor of lengthening the second period to 30 days, no such consideration is present here: any initial notification provided by Columbia/HCA should contain the level of detail that one normally encounters in an acquiring firm's Hart-Scott-Rodino filing.

In a case that involves not only collusion but also merger issues -- and thus is more analogous than M.D. Physicians or Mesa County Physicians to the present matter -- the Commission has just announced acceptance of a proposed order that requires only a 20-day second notification period. Commonwealth Land Title Insurance Company (File No. 981 0127). I do not understand how my colleagues can square the relief in Commonwealth with what they have done to Columbia/HCA.

Act . . ."[4] But this observation establishes merely that the Commission should retain a prior notification requirement. It by no means furnishes a basis for treating Columbia/HCA more harshly than other respondents.

This paragraph then arrives at the nub of my colleagues' argument: ". . . Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders."[5] After referencing the civil penalty that Columbia/HCA paid for violating certain divestiture obligations under two of these orders, they conclude: "Given this history, it is both prudent and consistent with our policy to require additional review time."[6] This conclusion is a *non sequitur*.

There is no question that Columbia/HCA recently paid a $2.5 million civil penalty for alleged order violations. Although my colleagues evidently found that penalty acceptable, I questioned whether it was sufficient in light of Columbia/HCA's "prolonged and pronounced disregard for the requirements of two Commission divestiture orders and the Utah Hold Separate Agreement."[7] I continue to believe that Columbia/HCA committed serious infractions and deserved a civil penalty even larger than what we obtained. But the civil penalty case was our opportunity to levy sanctions for Columbia/HCA's order violations, and that opportunity is gone. I do not see what bearing that misconduct has on the entirely unrelated question of how much time we need to review future acquisitions. If the Commission has based its decision to lengthen the second waiting period on its reaction to respondent's previous behavior, then I would suggest that such a decision is not only arbitrary but punitive. The public may find this perception inescapable.

I am also troubled by another aspect of the majority's decision to extend the second period to 30 days. Each of our newly-modified orders ends with a proviso exempting transactions subject to Hart-Scott-Rodino from the order's prior notification requirement. In other words, an acquisition large enough to be reportable under

---

[4] Statement of Chairman Pitofsky and Commissioners Anthony and Thompson at 2.

[5] *Id.*

[6] *Id.*

[7] Statement of Commissioner Orson Swindle in Columbia/HCA Healthcare Corporation, File No. 961 0013 (available at http://www.ftc.gov/os/9807/9610013.os.htm).

Hart-Scott-Rodino will be subject to the 20-day second waiting period prescribed by that statute,[8] but a covered acquisition too small to meet Hart-Scott-Rodino thresholds will be subject to the 30-day second period mandated by the Commission's orders. The practical effect of this action is to place an entire class of smaller acquisitions under a greater burden than is borne by larger acquisitions. Although smaller acquisitions, of course, sometimes may be more problematic than large acquisitions from an antitrust point of view, I do not believe this justifies imposing a greater burden on smaller transactions.

I return to whether punishment of Columbia/HCA underlies (or will be perceived to underlie) the Commission's decision. If it does not, then the Commission should explain either why Columbia/HCA alone has earned a 30-day second period -- a result that on its face looks arbitrary and capricious -- or whether it is moving toward imposing a 30-day second period in all future cases. No one has sought to announce a new 30-day period of general applicability, and so it boils down to how the Commission treats this particular respondent. Because Columbia/HCA's prior order violations have no demonstrable bearing on the appropriate length of the second waiting period, I dissent from the Commission's unjustified handling of this respondent.

[8] Moreover, for a cash tender offer, the Hart-Scott-Rodino second waiting period is reduced to 10 days. 15 U.S.C. 18a(e)(2).

IN THE MATTER OF

# HEALTHTRUST, INC. - THE HOSPITAL COMPANY

## MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3538. Consent Order, Oct. 20, 1994–Modifying Order, Aug. 14, 1998*

This order reopens a 1994 consent order – that prohibited the respondent from acquiring any acute care hospital, medical or surgical diagnostic or treatment service or facility in the Utah counties of Weber, Davis, and Salt Lake, without prior Commission approval – and this order modifies paragraph IV of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

## ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), as successor to Healthtrust, Inc. - The Hospital Company ("Healthtrust"), the successor respondent in the consent order issued by the Commission on October 20, 1994, in Docket No. C-3538 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph IV, which currently requires Healthtrust, Columbia/HCA's predecessor, to seek the prior approval of the Commission to acquire or to permit to be acquired certain acute care hospitals. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons discussed

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

below, the Commission has determined to set aside the prior approval provision and substitute a prior notice provision for it.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a

rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that Healthtrust's acquisition of Holy Cross Health System Corporation ("Holy Cross") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the provision of acute care hospital services in the relevant market.

The complaint alleged that the acquisition would eliminate actual competition between Healthtrust and Holy Cross in the relevant market; increase the already high level of concentration in the relevant market; eliminate Holy Cross hospitals as substantial independent competitive forces in the relevant markets; enhance the likelihood of collusion or interdependent coordination between or among the firms in the relevant market; and deny free and open competition based on price, quality and service in the provision of acute care hospital services in the relevant markets. The Order required Healthtrust to divest Holy Cross Hospital, which Healthtrust did.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. There is no evidence in the record that rebuts that presumption, *i.e.*, Healthtrust acquired Holy Cross Hospital, and there is nothing to suggest a credible risk that Columbia/HCA, the successor respondent, will seek to acquire Holy Cross Hospital. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to eliminate the prior approval requirement and substitute a prior notice provision for it.

Prior notification is appropriate for acquisitions in the relevant market because the record evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The relevant market is local, and the acquisition price of an acute care hospital, or a portion thereof, could fall below the size-of-transaction threshold in the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement and the respondent's request, the Commission has determined to modify

paragraph IV of the Order to substitute a prior notification requirement for the existing prior approval requirement.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

*It is further ordered*, That paragraph IV of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IV.

*It is further ordered*, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital in the Three-County Area;

B. Acquire any assets used, or previously used, in the Three-County Area (and still suitable for use) for operating an acute care hospital from any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an acute care hospital in the Three-County Area;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any acute care hospital, or any part thereof, in the Three-County Area including, but not limited to, a lease of or management contract for any such acute care hospital;

D. Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of any acute care hospital in the Three-County Area; or

E. Permit any acute care hospital it operates in the Three-County Area to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in the Three-County Area.

Provided, however, that such prior notification shall not be required for:

1. The establishment of a new hospital service or facility (other than as a replacement for a hospital service or facility, not operated by respondent, in the Three-County Area, pursuant to an agreement or understanding between respondent and the person operating the replaced service or facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the acute care hospital or part thereof to be acquired does not exceed one million dollars ($1,000,000); or

3. The acquisition of products or services in the ordinary course of business.

The prior notifications required by this paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until thirty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA") filed a Petition pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement") to Reopen and Modify the Orders in Docket Nos. C-3472, C-3505, C-3538, C-3544 and D.9256. By that Petition, Columbia/HCA requests that the prior approval requirements in the Orders be deleted and, as an alternative, that the Orders be modified to require prior notification of potentially anticompetitive transactions below the Hart-Scott-Rodino ("HSR") Act threshold. Upon consideration of this matter, the Commission decided to grant Columbia/HCA's Petition to delete the prior approval provisions in the Orders and replace them with prior notification provisions upon the terms set forth below.

The Commission's 1995 Prior Approval Policy Statement provides that, "as a general matter, [future] Commission orders . . . will not include prior approval or prior notification requirements." If "a Petition is filed to reopen and modify an order, pursuant to the [Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement." But the Statement also directs that the terms of any prior notification requirement be considered "on a case-by-case basis" in light of the characteristics of particular markets, market participants and other relevant factors. Significantly, the Commission "*reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances.*" *See* Prior Approval Policy Statement, 60 Fed. Reg. 29745, 39746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241 (emphasis added).

The Commission, exercising its equitable power, has substituted prior notification for prior approval provisions in the relevant Orders. In doing so the Commission will require Columbia to provide thirty (30) days advance notice of any proposed merger or acquisition transaction as defined in the Orders ("first waiting period"). If during this first waiting period the Commission requests further information concerning a proposed transaction, Columbia shall not take any

action, other than planning, in furtherance of such a transaction until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. This second waiting period is consistent with several cases where the Commission believed it was necessary to protect the public interest from a credible risk that the defendant would once again engage in anticompetitive transactions. *See* MD Physicians of SW Louisiana, FTC File No. 941 0095; Mesa County Physicians Independent Practice Association, Docket No. D.9284.

In this case, first and foremost, there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act, commonly referred to as the HSR Act. Indeed, the complaints in each of these matters involved transactions that if filed individually would have fallen below the reporting threshold of the HSR Act. Second, Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders. Indeed, on July 30, 1998 the Commission imposed a $2.5 million civil penalty upon Columbia/HCA for its violation of Commission orders by: (1) failing to divest in a timely manner two Utah Hospitals and its joint venture interest in South Seminole Hospital in Florida; and (2) violating a related Hold Separate Agreement governing assets it acquired in Utah as a result of its merger with Healthtrust Inc. *See* FTC File No. 961 0013. Given this history, it is both prudent and consistent with our policy to require additional review time.

For these reasons, we voted to grant Columbia's Petition to Reopen the Orders in Docket Numbers C-3472, C-3505, C-3538, C-3544 and D.9256, and Modify the Orders to delete the prior approval provisions, but also asked that they be replaced with prior notice provisions that have a thirty (30) day second waiting period.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

Application of our Prior Approval Policy Statement has led the Commission to replace the prior approval provision in each of these five orders with a requirement that Columbia/HCA provide us with prior notification of certain acquisitions. Supplanting prior approval is the correct result: there is no credible risk in any of these cases that

Columbia/HCA will attempt the same or approximately the same transaction that triggered the Commission's original enforcement concern, and there is nothing to rebut the presumption in each case that setting aside the prior approval requirement is in the public interest. Moreover, replacing prior approval with prior notification is warranted, since each of these matters involves a credible risk that Columbia/HCA could make anticompetitive acquisitions that fall below Hart-Scott-Rodino thresholds.

Nevertheless, I have dissented because the Commission here has imposed the wrong prior notification requirement for the wrong reasons. In a long line of order modifications pursuant to the Prior Approval Policy Statement, the Commission has been consistent in either simply vacating the prior approval clause or replacing it with a prior notification mechanism that comprises a 30-day initial period and a 20-day second period. In the present matters, however, the Commission has chosen to lengthen the second period in each of these orders to 30 days. I disagree with the decision to impose on Columbia/HCA a greater burden than other respondents have borne, and to do so for reasons that appear to smack of retribution.

I have searched these five orders in vain for any basis for treating Columbia/HCA differently from the many previous respondents that have asked the Commission to set aside or modify a prior approval requirement. The orders summarily announce the length of the notification periods but do not themselves venture any explanation for the disparate treatment accorded Columbia/HCA. Such an obvious departure from consistent agency practice without any explanation could be judged arbitrary and capricious. Perhaps in an effort to save these orders from just such a condemnation, my fellow Commissioners have offered a statement to rationalize what they have done.[1] With all due respect, I find their statement unpersuasive.

My colleagues quote the Prior Approval Policy Statement to the effect that the Commission "reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited

---

[1] Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson in the Matter of Columbia/HCA Healthcare Corp., Docket Nos. C-3472, C-3505, C-3538, C-3544 and 9256.

circumstances."[2] The quoted passage plainly announces that the Commission has not forsworn its power to prescribe prior approval or prior notification requirements in appropriate circumstances. It is not a declaration that the Commission is liberated from every agency's obligation to treat parties before it fairly and evenhandedly. With the clearly disparate treatment of Columbia/HCA, however, the latter message is what observers are likely to take from the Commission's action.[3]

The penultimate paragraph of the majority's statement may disclose what motivated the Commission to impose a 30-day second period on Columbia/HCA. I agree with my colleagues that "there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act . . ."[4] But this observation establishes merely that the Commission should retain a prior notification requirement. It by no means furnishes a basis for treating Columbia/HCA more harshly than other respondents.

This paragraph then arrives at the nub of my colleagues' argument: ". . . Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission

---

[2] *Id.* at 1.

[3] My colleagues' attempted analogy to collusion cases in the health care industry also fails to supply the missing justification for lengthening the second period in the present cases to 30 days. The Commission's recent consent agreements in M.D. Physicians of Southwest Louisiana, Inc. (File No. 941 0095) and Mesa County Physicians Independent Practice Association, Inc. (Docket No. 9284) contained 30-day second notification periods. In those cases, however, the Commission found it necessary to reserve enough time to satisfy itself that newly-constituted horizontal arrangements among physicians would not lead to a return to the collusion that those cases targeted. I do not know how those two cases, arising from substantial evidence of collusive behavior, supply the Commission with a reason to increase the time it will spend scrutinizing some hospital merger that Columbia/HCA might undertake in, say, Augusta, Charlotte County, or Salt Lake City -- hospital markets with which the Commission is already thoroughly familiar and thus should need less time for review. In addition, although the skeletal nature of the initial notification in M.D. Physicians and Mesa County Physicians might counsel in favor of lengthening the second period to 30 days, no such consideration is present here: any initial notification provided by Columbia/HCA should contain the level of detail that one normally encounters in an acquiring firm's Hart-Scott-Rodino filing.

In a case that involves not only collusion but also merger issues -- and thus is more analogous than M.D. Physicians or Mesa County Physicians to the present matter -- the Commission has just announced acceptance of a proposed order that requires only a 20-day second notification period. Commonwealth Land Title Insurance Company (File No. 981 0127). I do not understand how my colleagues can square the relief in Commonwealth with what they have done to Columbia/HCA.

[4] Statement of Chairman Pitofsky and Commissioners Anthony and Thompson at 2.

orders."[5] After referencing the civil penalty that Columbia/HCA paid for violating certain divestiture obligations under two of these orders, they conclude: "Given this history, it is both prudent and consistent with our policy to require additional review time."[6] This conclusion is a *non sequitur*.

There is no question that Columbia/HCA recently paid a $2.5 million civil penalty for alleged order violations. Although my colleagues evidently found that penalty acceptable, I questioned whether it was sufficient in light of Columbia/HCA's "prolonged and pronounced disregard for the requirements of two Commission divestiture orders and the Utah Hold Separate Agreement."[7] I continue to believe that Columbia/HCA committed serious infractions and deserved a civil penalty even larger than what we obtained. But the civil penalty case was our opportunity to levy sanctions for Columbia/HCA's order violations, and that opportunity is gone. I do not see what bearing that misconduct has on the entirely unrelated question of how much time we need to review future acquisitions. If the Commission has based its decision to lengthen the second waiting period on its reaction to respondent's previous behavior, then I would suggest that such a decision is not only arbitrary but punitive. The public may find this perception inescapable.

I am also troubled by another aspect of the majority's decision to extend the second period to 30 days. Each of our newly-modified orders ends with a proviso exempting transactions subject to Hart-Scott-Rodino from the order's prior notification requirement. In other words, an acquisition large enough to be reportable under Hart-Scott-Rodino will be subject to the 20-day second waiting period prescribed by that statute,[8] but a covered acquisition too small to meet Hart-Scott-Rodino thresholds will be subject to the 30-day second period mandated by the Commission's orders. The practical effect of this action is to place an entire class of smaller acquisitions under a greater burden than is borne by larger acquisitions. Although

---

[5] *Id.*

[6] *Id.*

[7] Statement of Commissioner Orson Swindle in Columbia/HCA Healthcare Corporation, File No. 961 0013 (available at http://www.ftc.gov/os/9807/9610013.os.htm).

[8] Moreover, for a cash tender offer, the Hart-Scott- Rodino second waiting period is reduced to 10 days. 15 U.S.C. 18a(e)(2).

smaller acquisitions, of course, sometimes may be more problematic than large acquisitions from an antitrust point of view, I do not believe this justifies imposing a greater burden on smaller transactions.

I return to whether punishment of Columbia/HCA underlies (or will be perceived to underlie) the Commission's decision. If it does not, then the Commission should explain either why Columbia/HCA alone has earned a 30-day second period -- a result that on its face looks arbitrary and capricious -- or whether it is moving toward imposing a 30-day second period in all future cases. No one has sought to announce a new 30-day period of general applicability, and so it boils down to how the Commission treats this particular respondent. Because Columbia/HCA's prior order violations have no demonstrable bearing on the appropriate length of the second waiting period, I dissent from the Commission's unjustified handling of this respondent.

IN THE MATTER OF

# COLUMBIA/HCA HEALTHCARE CORP.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3544. Consent Order, Dec. 6, 1994--Modifying Order, Aug. 14, 1998*

This order reopens a 1994 consent order – that prohibited the respondent from acquiring an interest worth more than $1 million in any outpatient surgical services facility in Anchorage, Alaska, and from selling an interest in such an entity, without prior Commission approval – and this order modifies paragraph IV of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

## ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), the respondent named in the consent order issued by the Commission on December 6, 1994 in Docket No. C-3544 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph IV, which currently requires Columbia/HCA, among other things, to seek the prior approval of the Commission to acquire or to permit to be acquired certain outpatient surgery facilities. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

discussed below, the Commission has determined to reopen and modify the order to set aside the prior approval requirement and substitute a prior notice provision for it.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the

Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that Columbia/HCA's acquisition of some of Medical Care America, Inc. ("MCA"), would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the market for outpatient surgery services in the Municipality of Anchorage, Alaska.

The complaint alleged that the acquisition would eliminate actual competition between Columbia/HCA and MCA in the relevant market; increase the already high level of concentration in the market; eliminate MCA's surgery facility as a substantial independent competitive force in the relevant market; enhance the likelihood of collusion or interdependent coordination between or among the firms in the relevant market; and deny free and open competition based on price, quality and service in the provision of outpatient surgery services in the relevant market. The Order required Columbia/HCA to divest Alaska Surgery Center, which Columbia/HCA did.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. There is no evidence in the record that rebuts that presumption, *i.e.*, Columbia/HCA acquired MCA, and there is nothing to suggest a credible risk that Columbia/HCA will seek to acquire the Alaska Surgery Center. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to eliminate the prior approval requirement and substitute a prior notice provision for it.

Prior notification is appropriate for acquisitions in the relevant market because the record evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The relevant market is local, and the acquisition price of an outpatient surgery facility, or a portion thereof, could fall below the size-of-transaction threshold in the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement and the respondent's request, the Commission has determined to modify paragraph IV of the Order to substitute a prior notification requirement for the existing prior approval requirement.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

*It is further ordered*, That, paragraph IV of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IV.

*It is further ordered*, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

B. Acquire any assets used, or previously used, in the Municipality of Anchorage, Alaska (and still suitable for use) for operating an outpatient surgery facility from any person presently engaged in or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any outpatient surgery facility, or any part thereof, in the Municipality of Anchorage, Alaska, including, but not limited to, a lease of or management contract for any such outpatient surgery facility;

D. Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of any outpatient surgery facility in the Municipality of Anchorage, Alaska; or

E. Permit any outpatient surgery facility it operates in the Municipality of Anchorage, Alaska to be acquired by any person that operates, or will operate immediately following such acquisition, any other outpatient surgery facility in the Municipality of Anchorage, Alaska.

Provided, however, that such prior notification shall not be required for:

1. The establishment of a new outpatient surgery service or facility (other than as a replacement for an outpatient surgery service

or facility, not operated by respondent, in the Municipality of Anchorage, Alaska, pursuant to an agreement or understanding between respondent and the person operating the replaced service or facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the outpatient surgery facility or part thereof to be acquired does not exceed one million dollars ($1,000,000); or

3. The acquisition of products or services in the ordinary course of business.

The prior notifications required by this paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until thirty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA") filed a Petition pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement") to Reopen and Modify the Orders in Docket Nos. C-3472, C-3505, C-3538, C-3544 and D.9256. By that Petition, Columbia/HCA requests that the prior approval requirements in the Orders be deleted and, as an alternative, that the Orders be modified to require prior notification of potentially anticompetitive transactions below the Hart-Scott-Rodino ("HSR") Act threshold. Upon consideration of this matter, the Commission decided to grant Columbia/HCA's Petition to delete the prior approval provisions in the Orders and replace them with prior notification provisions upon the terms set forth below.

The Commission's 1995 Prior Approval Policy Statement provides that, "as a general matter, [future] Commission orders . . . will not include prior approval or prior notification requirements." If "a Petition is filed to reopen and modify an order, pursuant to the [Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement." But the Statement also directs that the terms of any prior notification requirement be considered "on a case-by-case basis" in light of the characteristics of particular markets, market participants and other relevant factors. Significantly, the Commission "*reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances.*" *See* Prior Approval Policy Statement, 60 Fed. Reg. 29745, 39746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241(emphasis added).

The Commission, exercising its equitable power, has substituted prior notification for prior approval provisions in the relevant Orders. In doing so the Commission will require Columbia to provide thirty (30) days advance notice of any proposed merger or acquisition transaction as defined in the Orders ("first waiting period"). If during this first waiting period the Commission requests further information concerning a proposed transaction, Columbia shall not take any

action, other than planning, in furtherance of such a transaction until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. This second waiting period is consistent with several cases where the Commission believed it was necessary to protect the public interest from a credible risk that the defendant would once again engage in anticompetitive transactions. *See* MD Physicians of SW Louisiana, FTC File No. 941 0095; Mesa County Physicians Independent Practice Association, Docket No. D.9284.

In this case, first and foremost, there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act, commonly referred to as the HSR Act. Indeed, the complaints in each of these matters involved transactions that if filed individually would have fallen below the reporting threshold of the HSR Act. Second, Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders. Indeed, on July 30, 1998 the Commission imposed a $2.5 million civil penalty upon Columbia/HCA for its violation of Commission orders by: (1) failing to divest in a timely manner two Utah Hospitals and its joint venture interest in South Seminole Hospital in Florida; and (2) violating a related Hold Separate Agreement governing assets it acquired in Utah as a result of its merger with Healthtrust Inc. *See* FTC File No. 961 0013. Given this history, it is both prudent and consistent with our policy to require additional review time.

For these reasons, we voted to grant Columbia's Petition to Reopen the Orders in Docket Numbers C-3472, C-3505, C-3538, C-3544 and D.9256, and Modify the Orders to delete the prior approval provisions, but also asked that they be replaced with prior notice provisions that have a thirty (30) day second waiting period.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

Application of our Prior Approval Policy Statement has led the Commission to replace the prior approval provision in each of these five orders with a requirement that Columbia/HCA provide us with prior notification of certain acquisitions. Supplanting prior approval is the correct result: there is no credible risk in any of these cases that

Columbia/HCA will attempt the same or approximately the same transaction that triggered the Commission's original enforcement concern, and there is nothing to rebut the presumption in each case that setting aside the prior approval requirement is in the public interest. Moreover, replacing prior approval with prior notification is warranted, since each of these matters involves a credible risk that Columbia/HCA could make anticompetitive acquisitions that fall below Hart-Scott-Rodino thresholds.

Nevertheless, I have dissented because the Commission here has imposed the wrong prior notification requirement for the wrong reasons. In a long line of order modifications pursuant to the Prior Approval Policy Statement, the Commission has been consistent in either simply vacating the prior approval clause or replacing it with a prior notification mechanism that comprises a 30-day initial period and a 20-day second period. In the present matters, however, the Commission has chosen to lengthen the second period in each of these orders to 30 days. I disagree with the decision to impose on Columbia/HCA a greater burden than other respondents have borne, and to do so for reasons that appear to smack of retribution.

I have searched these five orders in vain for any basis for treating Columbia/HCA differently from the many previous respondents that have asked the Commission to set aside or modify a prior approval requirement. The orders summarily announce the length of the notification periods but do not themselves venture any explanation for the disparate treatment accorded Columbia/HCA. Such an obvious departure from consistent agency practice without any explanation could be judged arbitrary and capricious. Perhaps in an effort to save these orders from just such a condemnation, my fellow Commissioners have offered a statement to rationalize what they have done.[1] With all due respect, I find their statement unpersuasive.

My colleagues quote the Prior Approval Policy Statement to the effect that the Commission "reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances."[2] The quoted passage plainly announces that the Commission has not forsworn its power to prescribe prior approval

[1] Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson in the Matter of Columbia/HCA Healthcare Corp., Docket Nos. C-3472, C-3505, C-3538, C-3544 and 9256.

[2] *Id.* at 1.

or prior notification requirements in appropriate circumstances. It is not a declaration that the Commission is liberated from every agency's obligation to treat parties before it fairly and evenhandedly. With the clearly disparate treatment of Columbia/HCA, however, the latter message is what observers are likely to take from the Commission's action.[3]

The penultimate paragraph of the majority's statement may disclose what motivated the Commission to impose a 30-day second period on Columbia/HCA. I agree with my colleagues that "there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act . . ."[4] But this observation establishes merely that the Commission should retain a prior notification requirement. It by no means furnishes a basis for treating Columbia/HCA more harshly than other respondents.

This paragraph then arrives at the nub of my colleagues' argument: ". . . Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders."[5] After referencing the civil penalty that Columbia/HCA paid for violating certain divestiture obligations under two of these orders, they conclude: "Given this history, it is both prudent and consistent

---

[3] My colleagues' attempted analogy to collusion cases in the health care industry also fails to supply the missing justification for lengthening the second period in the present cases to 30 days. The Commission's recent consent agreements in M.D. Physicians of Southwest Louisiana, Inc. (File No. 941 0095) and Mesa County Physicians Independent Practice Association, Inc. (Docket No. 9284) contained 30-day second notification periods. In those cases, however, the Commission found it necessary to reserve enough time to satisfy itself that newly-constituted horizontal arrangements among physicians would not lead to a return to the collusion that those cases targeted. I do not know how those two cases, arising from substantial evidence of collusive behavior, supply the Commission with a reason to increase the time it will spend scrutinizing some hospital merger that Columbia/HCA might undertake in, say, Augusta, Charlotte County, or Salt Lake City -- hospital markets with which the Commission is already thoroughly familiar and thus should need less time for review. In addition, although the skeletal nature of the initial notification in M.D. Physicians and Mesa County Physicians might counsel in favor of lengthening the second period to 30 days, no such consideration is present here: any initial notification provided by Columbia/HCA should contain the level of detail that one normally encounters in an acquiring firm's Hart-Scott-Rodino filing.

In a case that involves not only collusion but also merger issues -- and thus is more analogous than M.D. Physicians or Mesa County Physicians to the present matter -- the Commission has just announced acceptance of a proposed order that requires only a 20-day second notification period. Commonwealth Land Title Insurance Company (File No. 981 0127). I do not understand how my colleagues can square the relief in Commonwealth with what they have done to Columbia/HCA.

[4] Statement of Chairman Pitofsky and Commissioners Anthony and Thompson at 2.

[5] *Id.*

with our policy to require additional review time."[6] This conclusion is a *non sequitur*.

There is no question that Columbia/HCA recently paid a $2.5 million civil penalty for alleged order violations. Although my colleagues evidently found that penalty acceptable, I questioned whether it was sufficient in light of Columbia/HCA's "prolonged and pronounced disregard for the requirements of two Commission divestiture orders and the Utah Hold Separate Agreement."[7] I continue to believe that Columbia/HCA committed serious infractions and deserved a civil penalty even larger than what we obtained. But the civil penalty case was our opportunity to levy sanctions for Columbia/HCA's order violations, and that opportunity is gone. I do not see what bearing that misconduct has on the entirely unrelated question of how much time we need to review future acquisitions. If the Commission has based its decision to lengthen the second waiting period on its reaction to respondent's previous behavior, then I would suggest that such a decision is not only arbitrary but punitive. The public may find this perception inescapable.

I am also troubled by another aspect of the majority's decision to extend the second period to 30 days. Each of our newly-modified orders ends with a proviso exempting transactions subject to Hart-Scott-Rodino from the order's prior notification requirement. In other words, an acquisition large enough to be reportable under Hart-Scott-Rodino will be subject to the 20-day second waiting period prescribed by that statute,[8] but a covered acquisition too small to meet Hart-Scott-Rodino thresholds will be subject to the 30-day second period mandated by the Commission's orders. The practical effect of this action is to place an entire class of smaller acquisitions under a greater burden than is borne by larger acquisitions. Although smaller acquisitions, of course, sometimes may be more problematic than large acquisitions from an antitrust point of view, I do not believe this justifies imposing a greater burden on smaller transactions.

---

[6] *Id.*

[7] Statement of Commissioner Orson Swindle in Columbia/HCA Healthcare Corporation, File No. 961 0013 (available at http://www.ftc.gov/os/9807/9610013.os.htm).

[8] Moreover, for a cash tender offer, the Hart-Scott- Rodino second waiting period is reduced to 10 days. 15 U.S.C. 18a(e)(2).

I return to whether punishment of Columbia/HCA underlies (or will be perceived to underlie) the Commission's decision. If it does not, then the Commission should explain either why Columbia/HCA alone has earned a 30-day second period -- a result that on its face looks arbitrary and capricious -- or whether it is moving toward imposing a 30-day second period in all future cases. No one has sought to announce a new 30-day period of general applicability, and so it boils down to how the Commission treats this particular respondent. Because Columbia/HCA's prior order violations have no demonstrable bearing on the appropriate length of the second waiting period, I dissent from the Commission's unjustified handling of this respondent.

IN THE MATTER OF

# COLUMBIA/HCA HEALTHCARE CORP.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9256. Consent Order, May 5, 1994–Modifying Order, Aug. 14, 1998*

This order reopens a 1994 consent order – that prohibited the respondent from consummating any partial or total merger of a Columbia hospital in the Charlotte County, Florida area with any other acute care hospital in the area, without prior Commission approval – and this order modifies paragraph II of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

## ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), the respondent named in the consent order issued by the Commission on May 5, 1994, in Docket No. 9256 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").[1] Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph II, which currently requires Columbia/HCA to seek the prior approval of the Commission to acquire or to permit to be acquired certain acute care hospitals. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons discussed below, the Commission has

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

determined to reopen and modify the Order to set aside the prior approval provision and to substitute a prior notice provision for it.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the

Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that Columbia's acquisition of Medical Center Hospital ("MCH") in Punta Gorda, Florida, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the provision of acute-care inpatient hospital services in eastern Charlotte County, Florida, and certain adjacent areas of Sarasota and DeSoto Counties in Florida.

The complaint alleged that the acquisition would eliminate actual competition between Columbia and MCH in the relevant market; increase the already high level of concentration in the relevant market eliminate MCH hospital as a substantial independent competitive force in the relevant market; enhance the likelihood of collusion or interdependent coordination between or among the firms in the relevant market; and deny free and open competition based on price, quality and service in the provision of acute-care inpatient hospital services in the relevant market.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. There is no evidence in the record to rebut that presumption, *i.e.,* Columbia acquired MCH. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to eliminate the prior approval requirement and substitute a prior notice provision for it.

Prior notification is appropriate for acquisitions in the relevant market because the record evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The relevant market is local, and the acquisition price of an acute care hospital, or a portion thereof, could fall below the size-of-transaction threshold in the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement and the respondent's request, the Commission has determined to modify paragraph II of the Order to substitute a prior notification requirement for the existing prior approval requirement.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

*It is further ordered*, That paragraph II of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

II.

*It is further ordered*, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without prior notification of the Commission:

A. Acquire any acute care hospital in the Charlotte County area; or

B. Permit any acute care hospital it operates in the Charlotte County area to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in the Charlotte County area.

Provided, however, that such prior notification shall not be required for:

(1) The establishment of a new hospital service or facility (other than as a replacement for a hospital service or facility, not operated by Columbia, in the Charlotte County area, pursuant to an agreement or understanding between Columbia and the person operating the replaced service or facility); or

(2) Any transaction subject to this paragraph II of this order if the fair market value of (or, in case of a purchase acquisition, the consideration to be paid for) the hospital, part thereof or interest therein to be acquired does not exceed one million dollars ($1,000,000).

The prior notifications required by this paragraph II shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission,

notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until thirty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA") filed a Petition pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement") to Reopen and Modify the Orders in Docket Nos. C-3472, C-3505, C-3538, C-3544 and D.9256. By that Petition, Columbia/HCA requests that the prior approval requirements in the Orders be deleted and, as an alternative, that the Orders be modified to require prior notification of potentially anticompetitive transactions below the Hart-Scott-Rodino ("HSR") Act threshold. Upon consideration of this matter, the Commission decided to grant Columbia/HCA's Petition to delete the prior approval provisions in the Orders and replace them with prior notification provisions upon the terms set forth below.

The Commission's 1995 Prior Approval Policy Statement provides that, "as a general matter, [future] Commission orders . . . will not include prior approval or prior notification requirements." If "a Petition is filed to reopen and modify an order, pursuant to the [Policy Statement], the Commission will apply a rebuttable

presumption that the public interest requires reopening of the order and modification of the prior approval requirement." But the Statement also directs that the terms of any prior notification requirement be considered "on a case-by-case basis" in light of the characteristics of particular markets, market participants and other relevant factors. Significantly, the Commission "*reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances.*" *See* Prior Approval Policy Statement, 60 Fed. Reg. 29745, 39746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241(emphasis added).

The Commission, exercising its equitable power, has substituted prior notification for prior approval provisions in the relevant Orders. In doing so the Commission will require Columbia to provide thirty (30) days advance notice of any proposed merger or acquisition transaction as defined in the Orders ("first waiting period"). If during this first waiting period the Commission requests further information concerning a proposed transaction, Columbia shall not take any action, other than planning, in furtherance of such a transaction until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. This second waiting period is consistent with several cases where the Commission believed it was necessary to protect the public interest from a credible risk that the defendant would once again engage in anticompetitive transactions. *See* MD Physicians of SW Louisiana, FTC File No. 941 0095; Mesa County Physicians Independent Practice Association, Docket No. D.9284.

In this case, first and foremost, there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act, commonly referred to as the HSR Act. Indeed, the complaints in each of these matters involved transactions that if filed individually would have fallen below the reporting threshold of the HSR Act. Second, Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders. Indeed, on July 30, 1998 the Commission imposed a $2.5 million civil penalty upon Columbia/HCA for its violation of Commission orders by: (1) failing

to divest in a timely manner two Utah Hospitals and its joint venture interest in South Seminole Hospital in Florida; and (2) violating a related Hold Separate Agreement governing assets it acquired in Utah as a result of its merger with Healthtrust Inc. *See* FTC File No. 961 0013. Given this history, it is both prudent and consistent with our policy to require additional review time.

For these reasons, we voted to grant Columbia's Petition to Reopen the Orders in Docket Numbers C-3472, C-3505, C-3538, C-3544 and D.9256, and Modify the Orders to delete the prior approval provisions, but also asked that they be replaced with prior notice provisions that have a thirty (30) day second waiting period.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

Application of our Prior Approval Policy Statement has led the Commission to replace the prior approval provision in each of these five orders with a requirement that Columbia/HCA provide us with prior notification of certain acquisitions. Supplanting prior approval is the correct result: there is no credible risk in any of these cases that Columbia/HCA will attempt the same or approximately the same transaction that triggered the Commission's original enforcement concern, and there is nothing to rebut the presumption in each case that setting aside the prior approval requirement is in the public interest. Moreover, replacing prior approval with prior notification is warranted, since each of these matters involves a credible risk that Columbia/HCA could make anticompetitive acquisitions that fall below Hart-Scott-Rodino thresholds.

Nevertheless, I have dissented because the Commission here has imposed the wrong prior notification requirement for the wrong reasons. In a long line of order modifications pursuant to the Prior Approval Policy Statement, the Commission has been consistent in either simply vacating the prior approval clause or replacing it with a prior notification mechanism that comprises a 30-day initial period and a 20-day second period. In the present matters, however, the Commission has chosen to lengthen the second period in each of these orders to 30 days. I disagree with the decision to impose on Columbia/HCA a greater burden than other respondents have borne, and to do so for reasons that appear to smack of retribution.

I have searched these five orders in vain for any basis for treating Columbia/HCA differently from the many previous respondents that

have asked the Commission to set aside or modify a prior approval requirement. The orders summarily announce the length of the notification periods but do not themselves venture any explanation for the disparate treatment accorded Columbia/HCA. Such an obvious departure from consistent agency practice without any explanation could be judged arbitrary and capricious. Perhaps in an effort to save these orders from just such a condemnation, my fellow Commissioners have offered a statement to rationalize what they have done.[1] With all due respect, I find their statement unpersuasive.

My colleagues quote the Prior Approval Policy Statement to the effect that the Commission "reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances."[2] The quoted passage plainly announces that the Commission has not forsworn its power to prescribe prior approval or prior notification requirements in appropriate circumstances. It is not a declaration that the Commission is liberated from every agency's obligation to treat parties before it fairly and evenhandedly. With the clearly disparate treatment of Columbia/HCA, however, the latter message is what observers are likely to take from the Commission's action.[3]

---

[1] Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson in the Matter of Columbia/HCA Healthcare Corp., Docket Nos. C-3472, C-3505, C-3538, C-3544 and 9256.

[2] *Id.* at 1.

[3] My colleagues' attempted analogy to collusion cases in the health care industry also fails to supply the missing justification for lengthening the second period in the present cases to 30 days. The Commission's recent consent agreements in M.D. Physicians of Southwest Louisiana, Inc. (File No. 941 0095) and Mesa County Physicians Independent Practice Association, Inc. (Docket No. 9284) contained 30-day second notification periods. In those cases, however, the Commission found it necessary to reserve enough time to satisfy itself that newly-constituted horizontal arrangements among physicians would not lead to a return to the collusion that those cases targeted. I do not know how those two cases, arising from substantial evidence of collusive behavior, supply the Commission with a reason to increase the time it will spend scrutinizing some hospital merger that Columbia/HCA might undertake in, say, Augusta, Charlotte County, or Salt Lake City -- hospital markets with which the Commission is already thoroughly familiar and thus should need less time for review. In addition, although the skeletal nature of the initial notification in M.D. Physicians and Mesa County Physicians might counsel in favor of lengthening the second period to 30 days, no such consideration is present here: any initial notification provided by Columbia/HCA should contain the level of detail that one normally encounters in an acquiring firm's Hart-Scott-Rodino filing.

In a case that involves not only collusion but also merger issues -- and thus is more analogous than M.D. Physicians or Mesa County Physicians to the present matter -- the Commission has just announced acceptance of a proposed order that requires only a 20-day second notification period. Commonwealth Land Title Insurance Company (File No. 981 0127). I do not understand how my colleagues can square the relief in Commonwealth with what they have done to Columbia/HCA.

The penultimate paragraph of the majority's statement may disclose what motivated the Commission to impose a 30-day second period on Columbia/HCA. I agree with my colleagues that "there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act...."[4] But this observation establishes merely that the Commission should retain a prior notification requirement. It by no means furnishes a basis for treating Columbia/HCA more harshly than other respondents.

This paragraph then arrives at the nub of my colleagues' argument: ". . . Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders."[5] After referencing the civil penalty that Columbia/HCA paid for violating certain divestiture obligations under two of these orders, they conclude: "Given this history, it is both prudent and consistent with our policy to require additional review time."[6] This conclusion is a *non sequitur*.

There is no question that Columbia/HCA recently paid a $2.5 million civil penalty for alleged order violations. Although my colleagues evidently found that penalty acceptable, I questioned whether it was sufficient in light of Columbia/HCA's "prolonged and pronounced disregard for the requirements of two Commission divestiture orders and the Utah Hold Separate Agreement."[7] I continue to believe that Columbia/HCA committed serious infractions and deserved a civil penalty even larger than what we obtained. But the civil penalty case was our opportunity to levy sanctions for Columbia/HCA's order violations, and that opportunity is gone. I do not see what bearing that misconduct has on the entirely unrelated question of how much time we need to review future acquisitions. If the Commission has based its decision to lengthen the second waiting period on its reaction to respondent's previous behavior, then I would suggest that such a decision is not only

---

[4] Statement of Chairman Pitofsky and Commissioners Anthony and Thompson at 2.

[5] *Id.*

[6] *Id.*

[7] Statement of Commissioner Orson Swindle in Columbia/HCA Healthcare Corporation, File No. 961 0013 (available at http://www.ftc.gov/os/9807/9610013.os.htm).

arbitrary but punitive. The public may find this perception inescapable.

I am also troubled by another aspect of the majority's decision to extend the second period to 30 days. Each of our newly-modified orders ends with a proviso exempting transactions subject to Hart-Scott-Rodino from the order's prior notification requirement. In other words, an acquisition large enough to be reportable under Hart-Scott-Rodino will be subject to the 20-day second waiting period prescribed by that statute,[8] but a covered acquisition too small to meet Hart-Scott-Rodino thresholds will be subject to the 30-day second period mandated by the Commission's orders. The practical effect of this action is to place an entire class of smaller acquisitions under a greater burden than is borne by larger acquisitions. Although smaller acquisitions, of course, sometimes may be more problematic than large acquisitions from an antitrust point of view, I do not believe this justifies imposing a greater burden on smaller transactions.

I return to whether punishment of Columbia/HCA underlies (or will be perceived to underlie) the Commission's decision. If it does not, then the Commission should explain either why Columbia/HCA alone has earned a 30-day second period -- a result that on its face looks arbitrary and capricious -- or whether it is moving toward imposing a 30-day second period in all future cases. No one has sought to announce a new 30-day period of general applicability, and so it boils down to how the Commission treats this particular respondent. Because Columbia/HCA's prior order violations have no demonstrable bearing on the appropriate length of the second waiting period, I dissent from the Commission's unjustified handling of this respondent.

---

[8] Moreover, for a cash tender offer, the Hart-Scott- Rodino second waiting period is reduced to 10 days. 15 U.S.C. 18a(e)(2).