

farsightedness, or any form of astigmatism; (6) the number of people whom such service has helped achieve normal vision; and (7) the ability of such service to provide pilots and other career professionals with stable visual acuity sufficient to meet occupational vision requirements, unless, at the time the representation is made, proposed respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

Paragraph III of the proposed order prohibits proposed respondents from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, survey, or report.

Paragraph IV of the proposed order prohibits proposed respondents from representing that the experience represented by any user testimonial or endorsement of any service, procedure, or product represents the typical or ordinary experience of members of the public who use the service, procedure, or product, unless the representation is true, and competent and reliable scientific evidence substantiates that claim, or respondents clearly and prominently disclose either: (1) What the generally expected results would be for program participants; 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 achieve similar results.

Paragraph V of the proposed order prohibits proposed respondents from making any representation about the relative or absolute efficacy, performance, or benefits of any ophthalmic service, procedure, or product purporting to treat, mitigate, or cure nearsightedness, farsightedness, or astigmatism, unless the representation is true and, at the time the representation is made, proposed respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

Paragraph VI of the proposed order requires that proposed respondents: (1) Not disseminate to any optometrist or eye care provider any material containing any representations prohibited by the order; (2) send a required notice to each optometrist or eye care provider who has attended one of proposed respondents' seminars since January 1, 1994 requesting that the optometrist cease using any materials previously received from proposed respondents that contain any claims violative of the order, informing the optometrist of this settlement, and attaching a copy of this proposed

complaint and order; (3) in the event that proposed respondents receive any information that subsequent to receipt of the required notice any optometrist or eye care provider with whom the proposed respondents have an agreement to market and/or perform CKR services is using or disseminating any advertisement or promotional material that contains any representation prohibited by the order, immediately notify the optometrist or eye care provider that proposed respondents will terminate the optometrist or eye care provider's right to market and/or perform CKR ortho-k if he or she continues to use such advertisements or promotional materials; (4) terminate any such optometrist or eye care provider about whom proposed respondents receive any information that such person has continued to use advertisements or promotional materials that contain any representation prohibited by the order after receipt of the required notice; and (5) for a period of three (3) years following service of the order, send the required notice to each optometrist or eye care provider who attends proposed respondents' seminars who has not previously received the notice; the notices shall be sent no later than the earliest of: (1) The execution of a sales or training agreement or contract between proposed respondents and the prospective optometrist or eye care provider; or (2) the receipt and deposit of payment from a prospective optometrist or eye care provider of any consideration in connection with the sale of any service or rights associated with CKR ortho-k. The mailing shall not include any other documents.

Paragraph VII of the proposed order contains record keeping requirements for materials that substantiate, qualify, or contradict covered claims and requires the proposed respondents to keep and maintain all advertisements and promotional materials containing any representation covered by the proposed order. In addition, Paragraph VIII requires distribution of a copy of the consent decree to current and future officers and agents. Further, Paragraph IX provides for Commission notification upon a change in the corporate respondents. Paragraph X requires proposed respondent Sami G. El Hage, O.D. to notify the Commission when he discontinues his current business or employment and of his affiliation with any new business or employment. The proposed order, in paragraph XI, also requires the filing of a compliance report.

Finally, Paragraph XII of the proposed order provides for the termination of the

order after twenty years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order, or to modify in any way their terms.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 98-4753 Filed 2-24-98; 8:45 am]

BILLING CODE 6750-01-M

## FEDERAL TRADE COMMISSION

[Dkt. 9284]

### Mesa County Physicians Independent Practice Association, Inc.; Analysis to Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed Consent Agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before April 27, 1998.

**ADDRESSES:** Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

**FOR FURTHER INFORMATION CONTACT:** William Baer or Robert Leibenluft, FTC/H-374, Washington, D.C. 20580. (202) 326-2932 or 326-3688.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 3.25(f) of the Commission's Rules of Practice (16 CFR 3.25(f)), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text to the consent agreement package can be obtained from the FTC Home Page (for February 19, 1998), on the World Wide Web, at "http://www.ftc.gov/os/actions/htm." A paper copy can be obtained

from the FTC Public Reference Room, Room H-130, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, either in person or by calling (202) 326-3627. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

#### **Analysis of Proposed Consent Order to Aid Public Comment**

The Federal Trade Commission (Commission) has accepted, subject to final approval, an agreement to a proposed consent order from Mesa County Physicians Independent Practice Association, Inc. (Mesa IPA), a physician organization in Mesa County, Colorado. The agreement would settle ongoing litigation concerning charges by the Commission that Mesa IPA has violated Section 5 of the Federal Trade Commission Act by: (1) Conspiring to obstruct the entry of third-party payers into Mesa County; (2) acting as the *de facto* exclusive bargaining agent for its physician members; (3) fixing the terms on which its members deal with payers; and (4) collectively refusing to deal with payers.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order to modify in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Mesa IPA that the law has been violated as alleged in the complaint.

#### **The Complaint**

The complaint, issued by the Commission on May 13, 1997, charges that Mesa IPA has restrained competition in the provision of physician services in the Mesa County area by fixing the prices and other terms on which its members deal with third-party payers. The allegations in the Commission's complaint are summarized below.

Mesa IPA, an organization of more than 180 physicians, includes at least 85% of all the physicians, and at least 90% of the primary care physicians (family practitioners, general practitioners, internists, and pediatricians), in private practice in Mesa County, Colorado, an area of over 100,000 people. The IPA was formed in 1987 to protect the economic interests of Mesa County physicians in their dealings with third-party payers. Mesa IPA contracted with Rocky Mountain Health Maintenance Organization, a third-party payer based in Mesa County, whose enrollees comprise at least 50% of the total patient volume of Mesa IPA's members. In 1993, Mesa IPA began negotiating on behalf of its members with several third-party payers seeking to enter Mesa County.

Mesa IPA operated as the *de facto* exclusive bargaining agent for its physician members in dealing with third-party payers. Mesa IPA encouraged its physician members not to deal individually with third-party payers, or to do so only on terms that were approved by the IPA's Contract Review Committee. Mesa IPA's Board of Directors approved a set of guidelines and a schedule of fee conversion factors to be used by the IPA's Contract Review Committee in reviewing contract offers from payers. Mesa IPA's fee conversion factors resulted in significantly higher prices for physician services being charged to several payers than would have been charged absent the agreement among the IPA's members.

Mesa IPA's members have not integrated their medical practices so as to create efficiencies sufficient to justify their collective contract negotiations and other conduct alleged in the complaint.

As a result of Mesa IPA's activities, a wide range of third-party payers of physician services, including preferred provider organizations, health maintenance organizations, and employer health care purchasing cooperatives, were excluded from doing business in Mesa County. Although most payers sought alternatives to Mesa IPA, they were forced either to contract with the IPA to obtain the physician services they needed to market viable plans to employers and consumers, or else to abandon their efforts to enter Mesa County. Mesa IPA's actions have harmed consumers in Mesa County by, among other things, increasing the prices paid by consumers for physician services, depriving consumers of the benefits of competition in the purchase of physician services, and hindering the development of alternative health care

financing and delivery systems in Mesa County.

#### **The Proposed Consent Order**

The proposed consent order is designed to prevent the illegal concerted action alleged in the complaint, while allowing Mesa IPA to engage in legitimate joint conduct. Paragraph II of the proposed order contains the core operative provisions. It prohibits Mesa IPA from: (1) Engaging in collective negotiations on behalf of its members; (2) orchestrating concerted refusals to deal; (3) acting as an exclusive bargaining agent for its members; (4) restricting the ability of its members to deal with third-party payers and others individually or through arrangements other than Mesa IPA; (5) coordinating the terms of contracts with third-party payers with other physician groups in Mesa County or in any county contiguous to Mesa County; (6) exchanging or facilitating the exchange of information among physicians concerning the terms upon which physicians are willing to deal with third-party payers; and (7) encouraging or pressuring others to engage in any activities prohibited by the order.

Paragraph II also sets forth terms that Mesa IPA must observe, for a period of five years, if it seeks to act as an agent for individual physicians in dealings with third-party payers. Arrangements that do not involve agreements among competing providers on price or price-related terms, sometimes referred to as a "messenger model," can facilitate contracting between physicians and third-party payers. Although messenger models can take various forms, the key in any such arrangement is that it does not create or facilitate any agreement among competitors on price or price-related terms. The order permits Mesa IPA to use a messenger model, but prescribes the manner in which Mesa IPA may structure and operate such an arrangement (should it choose to employ one). This provision is necessary to guard against collusion, especially because the IPA has incorrectly claimed that some of its prior dealings with third-party payers were based on a messenger model. Thus, the messenger model specified in the order is tailored to the particular facts and circumstances of this case.

Paragraph II includes a proviso allowing Mesa IPA to engage in conduct (including collectively determining reimbursement and other terms of contracts with payers) that is reasonably necessary to operate (a) any "qualified risk-sharing joint arrangement," or (b) provided the IPA complies with the order's prior notification requirements,

any "qualified clinically integrated joint arrangement." The proviso addresses the arrangements that the IPA may enter into, rather than the overall nature of the group, because of physician group may enter into legitimate arrangements with some third-party payers but engage in illegal conduct with respect to others. For the purposes of the order, a "qualified risk-sharing joint arrangement" must satisfy two conditions. First, it must be one in which participating physicians share substantial financial risk. The order lists ways in which physicians might share financial risk. These track the four types of financial risk sharing set forth in the *Statements of Antitrust Enforcement Policy in Health Care*, issued jointly by the FTC and the Department of Justice.<sup>1</sup>

Second, to be a "qualified" risk-sharing arrangement, the arrangement must also be non-exclusive, both in name and in fact. An arrangement that either restricts the ability of participating physicians to contract outside the arrangement (individually or through other networks) with third-party payers, or facilitates refusals to deal outside the arrangement by participating physicians, does not fall within the proviso. Although exclusive physician joint arrangements are not necessarily anticompetitive, they can impair competition, particularly when they include a large portion of the physicians in a market. In light of Mesa IPA's large share of the physician market, this definition does not permit the IPA to form exclusive arrangements.

A "qualified clinically integrated joint arrangement" includes arrangements in which the physicians undertake cooperative activities to achieve efficiencies in the delivery of clinical services, without necessarily sharing substantial financial risk. For purposes of the order, such arrangements are ones in which the participating physicians have a high degree of interdependence and cooperation through their use of programs to evaluate and modify their clinical practice patterns, in order to control costs and assure the quality of physician services provided through the arrangement. As with risk-sharing arrangements, the definition of clinically integrated arrangements reflects the analysis contained in the 1996 FTC/DOJ *Statements of Antitrust Enforcement Policy in Health Care*. In addition, as with risk-sharing arrangements, the clinically integrated arrangements must be non-exclusive.

The definition of a clinically integrated arrangement is by necessity less premise than that of a risk-sharing arrangement. Therefore, in order for a qualified clinically integrated joint arrangement to fall within the proviso, Mesa IPA must comply with the order's requirements for prior notification. The prior notification mechanism will allow the Commission to evaluate a specific proposed arrangement and assess its likely competitive impact, in order to help guard against the recurrence of acts and practices that have restrained competition and consumer choice.

Paragraph III requires that Mesa IPA (1) notify its members and certain third parties about the order; (2) amend its "Physician Manual" to bring the manual in compliance with the order; and (3) abolish its Contract Review Committee, which the complaint charges was one of the instruments through which the IPA orchestrated its anticompetitive activities. This paragraph also will require termination of any existing contracts with third-party payers that do not comply with Paragraph II of the order, at the earlier of the termination or renewal date of the contract, or receipt of a written request from the payer to terminate the contract. Automatic termination of such contracts is not required, to order to avoid disruption that might result from applying the order's prohibitions to existing contractual arrangements between Mesa IPA and third-party payers. In addition, Mesa IPA must, for the next five years, distribute copies of the complaint and order to new members; annually publish to members a copy of the complaint and order; and annually brief members on the meaning and requirements of the order and the antitrust laws. These provisions are aimed at monitoring, and hence preventing, possible anticompetitive conduct.

Paragraphs IV, V, and VI consist of various reporting procedures, consistent with those found in other Commission consent orders, that are designed to assist the Commission in monitoring compliance with the order. Finally, Paragraph VII terminates the order twenty years after the date it is issued, in accordance with Commission policy.

The consent order does not require Mesa IPA to reduce its share of primary care physicians in Mesa County. Although the "Notice of Contemplated Relief" issued along with the complaint in this case included such a structural change as a possible form of relief, the Commission has determined that structural relief is not necessary given changes in the market since the Commission issued its complaint. In particular, evidence suggests that

significant numbers of IPA members are now contracting with third-party payers outside Mesa IPA on competitive terms, alternatives to Mesa IPA are developing, and a number of third-party payers have been able to enter the market or expand their presence in the market.

Accordingly, the Commission has concluded that a consent order governing Mesa IPA's conduct will provide the necessary relief.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 98-4754 Filed 2-24-98; 8:45 am]

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## FEDERAL TRADE COMMISSION

[File No. 971-0091]

### **PacifiCorp, et al.; Analysis to Aid Public Comment**

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before April 27, 1998.

**ADDRESSES:** Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

**FOR FURTHER INFORMATION CONTACT:** Joseph Krauss, FTC/S-3627, Washington, D.C. 20580. (202) 326-2713.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for February 18, 1998), on the World Wide Web, at "http://

<sup>1</sup> *Statements of Antitrust Enforcement Policy in Health Care*, issued August 28, 1996, 4 Trade Reg. Rep. (CCH) ¶ 13,153 (also available at <http://www.ftc.gov>).