

Washington, DC 20580. If a comment contains nonpublic information, it must be filed in paper form, and the first page of the document must be clearly labeled "confidential." Comments that do not contain any nonpublic information may instead be filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word) as part of or as an attachment to email messages directed to the following email box: consentagreement@ftc.gov. Such comments 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 Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Tenet Healthcare Corporation ("Tenet") and Frye Regional Medical Center, Inc. ("Frye"). The agreement settles charges that Tenet and Frye ("Respondents") violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by directly facilitating the orchestration and implementation of agreements among the physician members of Piedmont Health Alliance, Inc. ("PHA") to fix prices and other terms on which the physicians would deal with health plans, and to refuse to deal with such purchasers except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

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, or to modify its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Tenet or Frye that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint Allegations

Frye is a for-profit corporation that operates a 338-bed hospital in Hickory, North Carolina. Tenet is a for-profit corporation that owns or operates over 100 hospitals throughout the United

States, including Frye. Frye was instrumental in the foundation and operation of PHA, a for-profit physician-hospital organization ("PHO"), operating in the western North Carolina area of Catawba, Burke, Caldwell, and Alexander Counties that is known as the "Unifour" area. PHA has as members approximately 450 physicians, or roughly 75% of the physicians in the Unifour area, and three of the five Unifour area hospitals, including Frye. A separate complaint has been issued against PHA and 10 of its physician leaders relating to their activities.

In 1993, Frye's Chief Executive Officer ("CEO") developed a plan to create a PHO that would include Frye and the physicians practicing at Frye. He hired a consultant to survey the Frye physicians regarding what they would expect from a PHO. The consultant reported that the Frye practicing physicians "stated a need to form the group to negotiate with group clout and power" and "maintain their income" in anticipation of the arrival of managed care organizations in the Unifour area. Frye's CEO and Chief Operating Officer ("COO"), along with eight physicians practicing at Frye, formed a steering committee, which was responsible for establishing and organizing the PHO.

PHA was established in 1994 with the aim of facilitating collective bargaining by physicians with health plans in order to obtain more favorable fees and other terms than PHA's physician members could obtain through dealing individually with health plans. In early 1994, the PHA steering committee established the Contracts Committee to negotiate contracts with payors on behalf of PHA's physician members. Frye's Chief Financial Officer ("CFO") and COO actively participated on the Contracts Committee, and were the PHA physicians' principal contract negotiators between 1994 and 1996. In 1996, PHA expanded to include Caldwell Memorial Hospital ("Caldwell Memorial") and Grace Hospital ("Grace"), both nonprofit hospitals, and their respective medical staffs.

PHA is managed and controlled by a Board of Directors made up of 14 physician directors and six hospital directors, two representing each hospital member (but with only one vote per hospital member). Thus, Frye has two representatives on the PHA Board of Directors. Both a majority of PHA physician directors and two of the three voting hospital directors must approve each payor contract entered into on behalf of PHA's physician members. The PHA Board representatives voted on the approval of contracts containing physician fee

schedules that PHA collectively negotiated with payors. Since 1994, PHA has negotiated and executed over 50 contracts with payors.

The complaint alleges that with the assistance of Frye and Tenet, PHA has successfully coerced a number of health plans to pay artificially high prices to PHA physician members, and thereby raised the cost of medical care in the Unifour area. As a result of the challenged actions of Tenet and Frye, consumers in the Unifour area have been, and are, deprived of the benefits of competition among physicians. By facilitating agreements among PHA member physicians to deal only on collectively-determined terms, and through PHA's and its members' actual or threatened refusals to deal with health plans that would not meet those terms, Tenet and Frye have violated Section 5 of the FTC Act. The collective negotiation of fees and other competitively significant terms by PHA physician members with the assistance of Frye and Tenet has not been, and is not, reasonably necessary to achieving any efficiency-enhancing integration.

The Proposed Consent Order

The proposed consent order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence, while allowing Tenet and Frye to engage in legitimate conduct that does not impair competition. For example, other than the limitation in Paragraph IV regarding acting as an agent or messenger, the proposed order does not prohibit involvement in vertical arrangements between Frye or Tenet and physicians that do not involve illegal horizontal agreements among physicians. The proposed order is similar to recent orders that the Commission has issued to settle charges relating to unlawful agreements to raise physician prices.

The proposed order's specific provisions are as follows:

The order's core prohibitions are contained in Paragraphs II, III, and IV. Paragraph II.A prohibits Tenet and Frye from entering into or facilitating any agreement between or among any physicians practicing in the Unifour area: (1) To negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving PHA.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondents from facilitating exchanges of information