

to: FTC/Office of the Secretary, Room 159-H, 600 Pennsylvania Avenue, NW., 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 e-mail 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 § 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 the Maine Health Alliance and its Executive Director, William R. Diggins. The Alliance is an organization consisting of over 325 physicians and 11 hospitals in northeastern Maine. The agreement settles charges that respondents violated section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by facilitating and implementing agreements among physician members and among hospital members of the Alliance to fix prices and other terms of dealing for physician and hospital services with health insurance firms and other third-party payors, and to refuse to deal with these payors except on collectively determined terms. These price-fixing agreements and concerted refusals to deal among otherwise competing physicians and among otherwise competing hospitals, in turn, have kept the price of health care in northeastern Maine above the level that would have prevailed absent the illegal conduct. 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 their terms in any way. Further, the proposed

consent order has been entered into for settlement purposes only and does not constitute an admission by the respondents that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

#### **The Complaint Allegations**

The Alliance was formed in 1995 by the vast majority of physicians and hospitals in five counties in northeastern Maine to negotiate payor contracts that contained "higher compensation" and more "advantageous" contract terms than the physicians and hospitals could obtain by dealing individually with payors. More than 85% of the physicians on staff at Alliance member hospitals are Alliance members, as are eleven of the sixteen hospitals in the five-county area. The physician and hospital members designated the Alliance as their negotiating agent to contract with payors, and authorized the Alliance to enter into, on their behalf, payor contracts.

Although the Alliance is a nonprofit corporation, and its member hospitals are tax-exempt organizations, a substantial majority of its physician members are for-profit entities. These for-profit physicians play a significant role in the governance of the Alliance and receive pecuniary benefits as a result of their participation. Participating physicians select 11 of the 22 members of the Alliance's Board of Directors and thus exercise substantial authority over the policies and actions of the Alliance. The participating physicians are therefore "members" of the Alliance within the meaning of Section 4 of the FTC Act, which grants the Commission jurisdiction over nonprofit organizations that carry on business for the profit of their members. Because the Alliance engages in substantial activities that confer pecuniary benefits on these for-profit members, its activities engaged in on behalf of the physician and hospital members fall within the Commission's jurisdiction.

Alliance physician and hospital members have refused to contract with payors on an individual basis. Instead, the Alliance's Board of Directors authorized Mr. Diggins to act as a principal negotiating agent with payors on behalf of the collective membership of the Alliance. Mr. Diggins was instrumental in forming the Alliance, coordinating the membership's collective bargaining activity, and negotiating payor contracts on behalf of the collective membership.

As guidance for Mr. Diggins, the Board, in conjunction with its Contracts

Committee, compiled written "Contracting Guidelines and Parameters," setting forth price-related and other competitively significant terms that the Alliance required in order to contract with payors. Mr. Diggins reported the details of negotiations with payors to the Board and the Contracts Committee. Based on the recommendations of Mr. Diggins, and the Contracts Committee, the Board decided whether to accept or reject contracts with payors on behalf of the Alliance's physician and hospital members.

The Alliance and Mr. Diggins negotiated higher reimbursement for Alliance physician and hospital members, and more advantageous contract language, than the physicians and hospitals could have achieved through individual contracts with payors. Despite a written Alliance policy allowing members to contract independently of the Alliance, in fact the Alliance and Mr. Diggins encouraged the physician and hospital members to contract only through the Alliance, in order to maintain the Alliance's leverage over payors. Mr. Diggins provided Alliance physician and hospital members with a model letter for them to use to notify payors that they refused to negotiate individually, and that the Alliance would negotiate on their behalf. In response to payors' requests to contract directly with Alliance physician and hospital members, the members directed payors to the Alliance for contracting.

The Alliance's and Mr. Diggins' joint negotiation of fees and other competitively significant terms has not been reasonably related to any efficiency-enhancing integration. Although the Alliance has developed some clinical programs limited primarily to hospital members, none of the Alliance's clinical activities create any significant degree of interdependence among the physician or hospital participants, nor do the activities create sufficiently substantial potential efficiencies.

By orchestrating agreements among Alliance physician members, and hospital members, to deal only on collectively-determined terms, together with refusals to deal with payors that would not meet those terms, respondents have violated section 5 of the FTC Act.

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

The proposed order is designed to prevent recurrence of the illegal conduct charged in the complaint, while allowing respondents to engage in