

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

_____)
)
In the Matter of)
) Docket No. C-
PREFERRED HEALTH SERVICES, INC.,)
a corporation.)
_____)

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Preferred Health Services, Inc. (“Preferred Health”), hereinafter sometimes referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order to Cease and Desist (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent 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 Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Preferred Health is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of South Carolina, with its principal address at 301 Memorial Drive, Suite E, Seneca, SC 29672.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, 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” means Preferred Health Services, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by Preferred Health Services, Inc., and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Medical group practice” means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.
- C. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services, to a payor through such entity. This definition also applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- D. “Payor” means any person that pays, or arranges for the payment, for all or any part of any physician services for itself or for any other person. Payor includes any person that develops, leases, or sells access to networks of physicians.
- E. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- F. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).
- G. “Preexisting contract” means a contract that was in effect on the date of the receipt by a payor that is a party to such contract of notice sent by Respondent, pursuant to Paragraph V.B of this Order, of such payor’s right to terminate such contract.
- H. “Principal address” means either (1) primary business address, if there is a business

address, or (2) primary residential address, if there is no business address.

- I. “Qualified clinically-integrated joint arrangement” means an arrangement to provide physician services in which:
1. all physicians that participate 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 physicians who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.
- J. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which:
1. all physicians who participate in the arrangement share substantial financial risk through their participation in the arrangement and thereby create incentives for the physicians who participate jointly to control costs and improve quality by managing the provision of physician services, such as risk-sharing involving:
 - a. the provision of physician services for a capitated rate from payors;
 - b. the provision of physician services for a predetermined percentage of premium or revenue from payors;
 - c. the use of significant financial incentives (*e.g.*, substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals; or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, 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; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians:
 - 1. To negotiate on behalf of any physician with any payor,
 - 2. To deal, refuse to deal, or threaten to refuse to deal with any payor,
 - 3. Regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms, or
 - 4. Not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician’s willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal;
- C. Attempting to engage in any action prohibited by Paragraph II.A or II.B, above;
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C above; and
- E. For a period of three (3) years after the date this Order becomes final, acting as or using a messenger or agent on behalf of any physicians, in dealing with health plans regarding contracts under which physicians would be compensated for the provision of services.

PROVIDED, HOWEVER, that nothing in Paragraph II of this Order shall prohibit any agreement involving or conduct by Respondent that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, so long as the arrangement does not restrict the ability, or facilitate the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement.

III.

IT IS FURTHER ORDERED that:

- A. Respondent shall, pursuant to each purported qualified risk-sharing joint arrangement or purported qualified clinically-integrated joint arrangement (“Arrangement”), for three (3) years from the date this Order becomes final, notify the Secretary of the Commission in writing (“Qualified Arrangement Notification”) at least sixty (60) days prior to:
1. Participating in, organizing, or facilitating any discussion or understanding with or among any physicians in such Arrangement relating to price or other terms or conditions of dealing with any payor; or
 2. Contacting a payor, pursuant to an Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any payor, on behalf of any physician in such Arrangement.

PROVIDED, HOWEVER, that the Qualified Arrangement Notification required by this Paragraph III.A is not required for negotiations or agreements with subsequent payors pursuant to any Arrangement for which the Qualified Arrangement Notification was given.

- B. Respondent shall include the following information in the Qualified Arrangement Notification:
1. for each physician participant, his or her name, address, telephone number, medical specialty, medical practice group, if applicable, and the name of each hospital where he or she has privileges;
 2. a description of the Arrangement, its purpose, function, and area of operation;
 3. a description of the nature and extent of the integration and the efficiencies resulting from the Arrangement;
 4. an explanation of the relationship of any agreement on prices, or contract terms related to price, to furthering the integration and achieving the efficiencies of the Arrangement;
 5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Arrangement or its activities; and
 6. all studies, analyses, and reports, that were prepared for the purpose of evaluating or analyzing competition for physician services in the Seneca, South Carolina, area, including, but not limited to, the market share of physician services.
- C. If, within sixty (60) days from the Commission’s receipt of the Qualified Arrangement Notification, a representative of the Commission makes a written request for additional

information to the Respondent, then Respondent shall not engage in any conduct described in Paragraph III.A.1 or Paragraph III.A.2 of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition. The expiration of any waiting period described herein without a request for additional information or without the initiation of an enforcement proceeding shall not be construed as a determination by the Commission, or its staff, that a violation of the law, or of this Order, may not have occurred. Further, receipt by the Commission from Respondent of any Qualified Arrangement Notification, pursuant to Paragraph III of this Order, is not to be construed as a determination by the Commission that any such Arrangement does or does not violate this Order or any law enforced by the Commission.

IV.

IT IS FURTHER ORDERED that, for three (3) years from the date Respondent is permitted to enter into an arrangement with any physician to act as or use a messenger or agent in dealing with health plans regarding contracts or terms of dealing with payors, Respondent shall notify the Secretary of the Commission in writing (“Messenger Notification”) at least sixty (60) days prior to entering into any arrangement with any physicians under which Respondent would act as a messenger, or an agent on behalf of those physicians, with payors regarding contracts or terms of dealing. The Messenger Notification shall include the identity of each proposed physician participant, the proposed geographic area of operation, a copy of any proposed physician participation agreement (including a copy of each form intended to be used to communicate with physician participants regarding contracts or terms of dealing with payors), a description of the proposed arrangement’s purpose and function, a description of any resulting efficiencies expected to be obtained through the arrangement, and a description of procedures to be implemented to limit possible anticompetitive effects, such as those prohibited by this Order. Messenger Notification is not required for Respondent’s subsequent acts as a messenger pursuant to an arrangement for which the Messenger Notification has been given. Receipt by the Commission from Respondent of any Messenger Notification, pursuant to Paragraph IV of this Order, is not to be construed as a determination by the Commission that any action described in such Messenger Notification does or does not violate this Order or any law enforced by the Commission.

V.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Order becomes final, send by electronic mail with electronic return receipt, a copy of this Order and the Complaint to:
 1. each physician who participates, or has participated, since January 1, 2003, in Respondent; and

2. each officer, director, manager, and employee of Respondent;
- B. Within thirty (30) days after the date on which this Order becomes final, send by first-class mail, return receipt requested, a copy of this Order and the Complaint to the chief executive officer of each payor with which Respondent has a record of having been in contact since January 1, 2003, regarding contracting for the provision of physician services, and include in such mailing the notice specified in Appendix A to this Order;
 - C. Terminate, without penalty or charge, and in compliance with any applicable laws, any preexisting contract with any payor for the provision of physician services, at the earlier of: (1) receipt by Respondent of a written request from a payor to terminate such contract, or (2) the earliest termination or renewal date (including any automatic renewal date) of such contract; *provided, however*, a preexisting contract may extend beyond any such termination or renewal date no later than one (1) year after the date on which the Order becomes final if, prior to such termination or renewal date, (a) the payor submits to Respondent a written request to extend such contract to a specific date no later than one (1) year after the date this Order becomes final, and (b) Respondent has determined not to exercise any right to terminate; *provided further*, that any payor making such request to extend a contract retains the right, pursuant to part (1) of Paragraph V.C of this Order, to terminate the contract at any time;
 - D. Within ten (10) days after receiving a written request from a payor, pursuant to Paragraph V.C(1) of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each physician participating in Respondent as of the date Respondent receives such request;
 - E. For a period of three (3) years after the date this Order becomes final:
 1. distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - a. each physician who begins participating in Respondent, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such participation begins;
 - b. each payor that contracts with Respondent for the provision of physician services, and that did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such payor enters into such contract; and
 - c. each person who becomes an officer, director, manager, or employee of Respondent, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that he

or she assumes such responsibility with Respondent; and

2. annually publish a copy of this Order and the Complaint in an official annual report or newsletter sent to all physicians who participate in Respondent, with such prominence as is given to regularly featured articles;
- F. File a verified written report within sixty (60) days after the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each such report shall include:
1. a detailed description of the manner and form in which Respondent has complied and is complying with this Order; and
 2. copies of the return receipts required by Paragraphs V.A, V.B, V.D, and V.E.1 of this Order; and
- G. Notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of Respondent, (2) acquisition, merger or consolidation of Respondent, or (3) any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission of any change in its principal address within twenty (20) days of such change in address.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

- A. 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 its possession, or under its control, relating to any matter contained in this Order; and

- B. Upon five (5) days' notice to Respondent, and in the presence of counsel, and without restraint or interference from it, to interview Respondent or employees of Respondent.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it is issued.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: