**ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS
TO AID PUBLIC COMMENT**

In the Matter of Fresenius AG, File No. 051 0154

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Fresenius AG and entities it controls, including Fresenius Medical Care AG & Co. KGaA, Fresenius Medical Care Holdings, Inc., and Florence Acquisition, Inc. ("Fresenius"). The purpose of the Consent Agreement is to prevent the anticompetitive effects that would result from Fresenius's purchase of Renal Care Group, Inc. ("RCG"). Under the terms of the Consent Agreement, Fresenius is required to divest 91 dialysis clinics, and RCG's joint venture equity interests in an additional 12 clinics, in 66 markets across the United States.

The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement or make it final.

Pursuant to an Agreement dated May 3, 2005, Fresenius proposed to acquire RCG for approximately $3.5 billion. The Commission's complaint alleges, as summarized in sections II and III below, that the proposed acquisition, if consummated, 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 provision of outpatient dialysis services in local geographic markets across the United States.

II. The Parties

Fresenius, based in Germany, has its United States headquarters in Lexington, Massachusetts. After acquiring RCG, Fresenius will be the largest provider of outpatient dialysis services in the United States. In 2005, Fresenius had approximately $4.1 billion in revenues from the provision of outpatient dialysis services to approximately 89,000 end stage renal disease ("ESRD") patients at approximately 1,155 outpatient dialysis clinics nationwide.

Headquartered in Nashville, Tennessee, RCG is the third-largest provider of outpatient dialysis services in the United States, with approximately 450 outpatient dialysis clinics nationwide, at which over 32,000 ESRD patients receive treatment. In 2005, RCG had approximately $1.5 billion in revenues from the provision of outpatient dialysis services at approximately 450 clinics.

III. Outpatient Dialysis Services

Outpatient dialysis services is the relevant product market in which to assess the effects of the proposed transaction. Most ESRD patients receive dialysis treatments in an outpatient dialysis clinic three times per week, in sessions lasting between three and five hours. The only alternative to outpatient dialysis treatments for ESRD patients is a kidney transplant. However, the wait-time for donor kidneys – during which ESRD patients must receive dialysis treatments – can exceed five years. Additionally, many ESRD patients are not viable transplant candidates. As a result, many ESRD patients have no alternative to ongoing dialysis treatments.

The Commission's complaint alleges that the relevant geographic markets for the provision of dialysis services are local in nature. They are circumscribed by the distance ESRD patients are able to travel to receive dialysis treatments. Most ESRD patients are quite ill and suffer from multiple health problems. As such, ESRD patients are unwilling and/or unable to travel long distances for dialysis treatment. The time and distance a patient will travel in a particular location are significantly affected by traffic patterns; whether an area is urban, suburban, or rural; local geography; and a patient's proximity to the nearest center. The size and dimensions of relevant geographic markets are also influenced by a variety of other factors including population density, roads, geographic features, and political boundaries.

The Commission alleges that each of the 66 outpatient dialysis markets defined in the complaint is highly concentrated. With few exceptions, these markets have no more than one significant dialysis provider other than Fresenius and RCG. In each of these 66 markets, evidence that Fresenius and RCG are actual and substantial competitors in these markets, along with the high post-acquisition concentration levels, suggest that the combined firm likely would be able to exercise unilateral market power. The evidence shows that health plans and other private payors who pay dialysis providers for dialysis services used by their members benefit from direct competition between Fresenius and RCG when negotiating the rates of the dialysis provider. As a result, the proposed combination likely would result in higher prices and reduced incentives to improve service or quality for outpatient dialysis services in the 66 outpatient dialysis markets defined in the complaint.

In the outpatient dialysis services markets defined by the complaint, entry on a level sufficient to deter or counteract the likely anticompetitive effects of the proposed transaction is not likely to occur in a timely manner. The primary barrier to entry is the difficulty associated with locating nephrologists with established patient pools who are willing and able to serve as medical directors. Federal law requires each dialysis clinic to have a physician medical director. As a practical matter, having a nephrologist serve as medical director is essential to the success of a clinic because they are the primary source of referrals. Entry is also inhibited where certain attributes (such as a rapidly growing ESRD population, a favorable regulatory environment, average or below average nursing and labor costs, and a low penetration of managed care) are not present, as the Commission alleges is the case in particular geographic markets defined in the Commission's complaint.

IV. The Consent Agreement

The Consent Agreement effectively prevents the anticompetitive effects that the proposed acquisition would otherwise be likely to have in the 66 markets where both Fresenius and RCG operate dialysis clinics, by requiring Fresenius to divest 91 outpatient dialysis clinics, and RCG's joint venture equity interests in 12 additional clinics, to National Renal Institutes, Inc. ("NRI"), a wholly-owned subsidiary of DSI Holding Company, Inc.

As part of these divestitures, Fresenius is required to obtain the agreement of the medical directors affiliated with the divested clinics to continue providing physician services after the transfer of ownership to NRI. Similarly, the Consent Agreement requires Fresenius to obtain the consent of all lessors necessary to assign the leases for the real property associated with the divested clinics to NRI. These provisions ensure that NRI will have the assets necessary to operate the divested clinics in a competitive manner.

The Consent Agreement contains several additional provisions designed to ensure that the divestitures will be successful. First, the Consent Agreement provides NRI with the opportunity to interview and hire employees affiliated with the divested clinics, and prevents Fresenius from offering these employees incentives to decline NRI's offer of employment. This will ensure that NRI has access to patient care and supervisory staff who are familiar with the clinic's patients and the local physicians. Second, the Consent Agreement prevents Fresenius from contracting with the medical directors (or their practice groups) affiliated with the divested clinics for three years. This provides NRI with sufficient time to build goodwill and a working relationship with its medical directors before Fresenius can attempt to capitalize on its prior relationships in soliciting their services. Third, the Consent Agreement requires Fresenius to provide NRI with a license to Fresenius's policies and procedures, as well as the option to obtain Fresenius's medical protocols, which will further enhance NRI's ability to provide continuity of care to patients.

Finally, the Consent Agreement requires Fresenius to provide prior notice to the Commission of its planned acquisitions of dialysis clinics located in the 66 markets addressed by the Consent Agreement. This provision ensures that subsequent acquisitions do not adversely impact competition in the markets at issue and undermine the remedial goals of the proposed order.

The Commission is satisfied that NRI is a qualified acquirer of the divested assets. NRI's management team has extensive experience in all facets of operating and developing outpatient dialysis clinics. In addition, Fresenius will provide transition services to NRI for a period of 12 months to ensure continuity of patient care and records as NRI implements its quality care, billing, and supply systems. Firewalls and confidentiality agreements will ensure that competitively sensitive information is not exchanged. NRI has received substantial financial backing from Centre Partners, a private equity firm focused on making investments in middle market companies.

The Commission has appointed Richard Shermer as Monitor to oversee the transition service agreements, and the implementation of, and compliance with, the Consent Agreement. Mr. Shermer is the President of R. Shermer & Company, a professional services firm that specializes in providing services for companies undergoing transitions in ownership through divestitures, mergers, or acquisitions. R. Shermer & Company has served as a monitor in connection with other Commission actions.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or the Order to Maintain Assets, or to modify their terms in any way.