

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

*In the Matter of Cooperativa de Médicos Oftalmólogos de Puerto Rico (OftaCoop)
File No. 141-0194*

I. Overview

The Federal Trade Commission (Commission), has accepted, subject to final approval, an agreement containing a proposed consent order with the Cooperativa de Médicos Oftalmólogos de Puerto Rico (Respondent or OftaCoop). The agreement settles charges that OftaCoop violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by orchestrating a concerted refusal to deal by ophthalmologists in Puerto Rico to preclude a third-party payor and its network administrator from implementing a cost-savings program to manage ophthalmology services and reduce reimbursement rates.

The proposed consent order 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 proposed consent order along with the comments received, and decide whether it should withdraw from the consent agreement, modify it, or make final the proposed consent order.

The purpose of this analysis is to facilitate public comment on the proposed consent order. The analysis is not intended to constitute an official interpretation of the proposed consent 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 Respondent that it violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

II. The Complaint

OftaCoop is a healthcare cooperative with about 100 ophthalmologists organized under the laws of the Commonwealth of Puerto Rico. The proposed complaint charges that OftaCoop facilitated an agreement among competing ophthalmologists to refuse to deal with MCS Advantage, Inc. (MCS), a payor, and Eye Management of Puerto Rico (Eye Management), MCS's network administrator. The allegations of the proposed complaint are summarized below.

MCS provides healthcare coverage to enrollees of its Medicare Advantage plans pursuant to a contract with Medicare. Medicare pays MCS a premium; in exchange, MCS arranges and pays for healthcare services for its enrollees. To participate in the Medicare Advantage program, MCS must offer a provider network with a sufficient number of physicians to comply with the program's network adequacy requirement designed to ensure enrollees have adequate access to healthcare services. MCS sought to lower its costs after Medicare reduced the premiums it was paying to MCS.

In April 2014, MCS asked Eye Management to create and manage a network of ophthalmologists in Puerto Rico to help lower costs and better manage ophthalmology services provided to its Medicare Advantage enrollees. Eye Management would administer ophthalmology services and benefits provided to MCS enrollees, including credentialing, utilization review, claims processing, and other management services. Under the arrangement, Eye Management would enter into contracts directly with each ophthalmologist to replace MCS's existing contracts with each ophthalmologist. In early June 2014, Eye Management sent a proposed contract to every ophthalmologist contracted with MCS at the time. These contracts offered payments at rates that were about 10% lower, on average, than the rates under the existing contracts between MCS and each ophthalmologist.

OftaCoop convened a meeting on June 14, 2014 with OftaCoop members and non-member ophthalmologists to discuss their dissatisfaction with Eye Management. The attendees agreed not to sign a new contract with Eye Management in order to prevent Eye Management from creating a network on behalf of MCS. After the meeting, OftaCoop's former Secretary of the Board of Directors, with help from OftaCoop's president, sent an email to OftaCoop member and non-member ophthalmologists with the subject line "DO NOT SIGN THE MCS/EYE MANAGEMENT AGREEMENT." The email was signed "Board of Directors OFTACOOP" and sent from OftaCoop's official email account. The email urged the ophthalmologists not to sign the contract with Eye Management so they could collectively negotiate with payors through OftaCoop.

Eye Management's medical director was one of the recipients of the email. In response to the email, Eye Management's counsel sent OftaCoop a cease-and-desist letter on June 19, 2014, asking OftaCoop to stop interfering with negotiations between Eye Management and individual ophthalmologists. The letter also notified OftaCoop that any agreement among competing ophthalmologists to jointly refuse to contract with Eye Management was illegal under the antitrust laws.

OftaCoop next met on June 22, 2014. The stated purpose of that meeting, according to the June 14, 2014 email, was "to turn this around and for us to trample over MCS." At the meeting, OftaCoop's president told the attendees they should make their own decision about payor contracting. Notwithstanding Eye Management's cease-and-desist letter, the former Secretary of the Board told the meeting attendees that they had to be united against Eye Management.

The collective refusal to deal among the ophthalmologists prevented Eye Management from creating a lower-cost network. Few ophthalmologists joined the Eye Management network. In early August 2014, Eye Management informed MCS of its inability to form a viable network of ophthalmologists. MCS directed Eye Management to suspend further efforts to develop a network.

MCS next tried to lower costs through its direct contracts with the ophthalmologists. In early August 2014, MCS offered to continue contracting directly with the ophthalmologists at rates about 10% below rates under its existing contracts with the ophthalmologists. Just as they had rejected Eye Management's proposed contracts, many ophthalmologists refused to accept

MCS's offer and cancelled, or threatened to cancel, their existing contracts with MCS. The contract cancellations jeopardized MCS's ability to meet network adequacy requirements for its Medicare Advantage enrollees. It also threatened to imperil patient care: MCS received hundreds of phone calls from its enrollees complaining that ophthalmologists were not offering appointments or cancelling previously scheduled surgeries. MCS had no choice but to abandon its plan to lower rates and instead continued paying ophthalmologists the higher rates to retain its network.

Finally, the complaint alleges that OftaCoop has not undertaken any activities to create any integration among OftaCoop members in their delivery of ophthalmology services and thus cannot justify the alleged conduct.

III. The Proposed Consent Order

The proposed consent order is designed to prevent recurrence of the illegal conduct alleged in the complaint. The key provisions are aimed at preventing OftaCoop from using concerted refusals to deal or other coercive tactics to extract favorable contract terms from payors. The proposed consent order also takes into account a change in Puerto Rico law that authorizes healthcare cooperatives to jointly negotiate with payors. Therefore, the proposed consent order does not prohibit OftaCoop from jointly contracting with payors.

A. Proposed consent order provisions

Paragraph II.A bars OftaCoop from organizing or implementing agreements to refuse to deal, or to threaten to refuse to deal, with a payor over contract terms, as well as agreements not to deal individually with payors, or to deal only through OftaCoop. Paragraph II.B prohibits OftaCoop from submitting for state approval any payor contract that it negotiated using acts of coercion, intimidation, boycott, or concerted refusal to deal.

The remaining portions of Paragraph II prohibit conduct that would facilitate a violation of Paragraph II.A. Paragraph II.C bars information exchanges to further conduct that violates the core prohibitions of Paragraph II. Paragraphs II.D and II.E. ban attempts and encouragement of such violations.

Paragraph III.A requires OftaCoop to send a copy of the complaint and consent order to its members, officers, directors, managers, and employees. Paragraph III.B contains notification provisions relating to future contact with its members, officers, directors, managers and employees. For five years after the date on which the consent order is issued, OftaCoop is required to distribute a copy of the consent order and complaint to each member who begins participating in OftaCoop and each person who becomes an officer director, manager, or employee. Paragraph III.B also requires OftaCoop to publish a copy of the consent order and complaint, annually for five years, on its web site, if any, or any official publication it sends to its members.

Paragraphs IV, V, and VI impose various obligations on OftaCoop to report or provide access to information to the Commission to facilitate monitoring of compliance with the consent order.

Finally, paragraph VII provides that the consent order will expire in 20 years.

B. Impact of new Puerto Rico law on the proposed consent order and inclusion of a proviso

During the investigation, Puerto Rico passed a new law (Act 228 of December 15, 2015) permitting healthcare cooperatives such as OftaCoop to jointly negotiate contracts with payors. Under this new law, healthcare cooperatives must file their payor agreements with the Puerto Rico Public Corporation for the Supervision and Insurance of Cooperatives (COSSEC). A committee whose members are not competitors in the market will oversee the negotiations, and must approve or disapprove each agreement.

Puerto Rico has neither issued any regulations nor do we have any record to evaluate how Puerto Rico will supervise negotiations. Therefore, the Commission is unable to assess to whether Act 228 complies with state action requirements.¹ Although it is too early to assess Puerto Rico's implementation of the new law, the Commission believes the circumstances here make it appropriate to defer to Puerto Rico's expressed intention to actively supervise joint negotiations between healthcare cooperatives and payors. Puerto Rico officials have only been recently granted that authority, and it is appropriate to allow them an opportunity to utilize that authority. As a result, the proposed consent order does not bar collective price negotiations. This is consistent with the consent order in another matter involving healthcare providers where state officials had authority to actively supervise private conduct but had not exercised it.²

In light of Act 228, the order also includes a proviso designed to clarify the scope of the prohibitions in Paragraph II. First, it provides that the provisions of Paragraph II do not prohibit OftaCoop, in exercising its business judgment, from rejecting a contract on behalf of its members, so long as there is no agreement between OftaCoop and any of its members that the member will refuse to deal individually (or will deal only through OftaCoop). Second, the proposed consent order does not prevent OftaCoop from exchanging information when necessary to conduct joint payor contract negotiations on behalf of its members. Such information would not, however, ordinarily include whether an individual member is participating in a particular contract or the terms on which it is negotiating with a payor independently of OftaCoop.

¹ The state action doctrine shields certain anticompetitive conduct by the states from federal antitrust scrutiny. *See Parker v. Brown*, 317 U.S. 341 (1943).

² *See Minnesota Rural Health Cooperative*, C-4311 (Jan. 4, 2011) (consent order, in settling charges that a group of doctors and hospitals used coercive tactics in negotiations with payors, prohibited using coercion in negotiations, but did not bar joint negotiations), available at <https://www.ftc.gov/news-events/press-releases/2010/06/minnesota-health-care-provider-group-settles-ftc-price-fixing>.