

IN THE MATTER OF

COLUMBIA/HCA HEALTHCARE CORP.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3544. Consent Order, Dec. 6, 1994—Modifying Order, Aug. 14, 1998

This order reopens a 1994 consent order – that prohibited the respondent from acquiring an interest worth more than \$1 million in any outpatient surgical services facility in Anchorage, Alaska, and from selling an interest in such an entity, without prior Commission approval – and this order modifies paragraph IV of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), the respondent named in the consent order issued by the Commission on December 6, 1994 in Docket No. C-3544 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").¹ Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph IV, which currently requires Columbia/HCA, among other things, to seek the prior approval of the Commission to acquire or to permit to be acquired certain outpatient surgery facilities. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

discussed below, the Commission has determined to reopen and modify the order to set aside the prior approval requirement and substitute a prior notice provision for it.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission also announced, in its Prior Approval Policy Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the

Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The complaint in this matter ("complaint") alleged that Columbia/HCA's acquisition of some of Medical Care America, Inc. ("MCA"), 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 outpatient surgery services in the Municipality of Anchorage, Alaska.

The complaint alleged that the acquisition would eliminate actual competition between Columbia/HCA and MCA in the relevant market; increase the already high level of concentration in the market; eliminate MCA's surgery facility as a substantial independent competitive force in the relevant market; enhance the likelihood of collusion or interdependent coordination between or among the firms in the relevant market; and deny free and open competition based on price, quality and service in the provision of outpatient surgery services in the relevant market. The Order required Columbia/HCA to divest Alaska Surgery Center, which Columbia/HCA did.

The presumption is that setting aside the general prior approval requirement in this Order is in the public interest. There is no evidence in the record that rebuts that presumption, *i.e.*, Columbia/HCA acquired MCA, and there is nothing to suggest a credible risk that Columbia/HCA will seek to acquire the Alaska Surgery Center. Accordingly, the Commission has determined to reopen the proceedings and modify the Order to eliminate the prior approval requirement and substitute a prior notice provision for it.

Prior notification is appropriate for acquisitions in the relevant market because the record evidences a credible risk that the respondent could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. The relevant market is local, and the acquisition price of an outpatient surgery facility, or a portion thereof, could fall below the size-of-transaction threshold in the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement and the respondent's request, the Commission has determined to modify paragraph IV of the Order to substitute a prior notification requirement for the existing prior approval requirement.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

It is further ordered, That, paragraph IV of the Order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any person presently engaged in, or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

B. Acquire any assets used, or previously used, in the Municipality of Anchorage, Alaska (and still suitable for use) for operating an outpatient surgery facility from any person presently engaged in or within the two years preceding such acquisition engaged in, operating an outpatient surgery facility in the Municipality of Anchorage, Alaska;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management, or control of any outpatient surgery facility, or any part thereof, in the Municipality of Anchorage, Alaska, including, but not limited to, a lease of or management contract for any such outpatient surgery facility;

D. Acquire or otherwise obtain the right to designate directly or indirectly directors or trustees of any outpatient surgery facility in the Municipality of Anchorage, Alaska; or

E. Permit any outpatient surgery facility it operates in the Municipality of Anchorage, Alaska to be acquired by any person that operates, or will operate immediately following such acquisition, any other outpatient surgery facility in the Municipality of Anchorage, Alaska.

Provided, however, that such prior notification shall not be required for:

1. The establishment of a new outpatient surgery service or facility (other than as a replacement for an outpatient surgery service

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or facility, not operated by respondent, in the Municipality of Anchorage, Alaska, pursuant to an agreement or understanding between respondent and the person operating the replaced service or facility);

2. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in case of an asset acquisition, the consideration to be paid for) the outpatient surgery facility or part thereof to be acquired does not exceed one million dollars (\$1,000,000); or

3. The acquisition of products or services in the ordinary course of business.

The prior notifications required by this paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until thirty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Commissioner Swindle dissenting.

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND COMMISSIONERS
SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA") filed a Petition pursuant to Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement") to Reopen and Modify the Orders in Docket Nos. C-3472, C-3505, C-3538, C-3544 and D.9256. By that Petition, Columbia/HCA requests that the prior approval requirements in the Orders be deleted and, as an alternative, that the Orders be modified to require prior notification of potentially anticompetitive transactions below the Hart-Scott-Rodino ("HSR") Act threshold. Upon consideration of this matter, the Commission decided to grant Columbia/HCA's Petition to delete the prior approval provisions in the Orders and replace them with prior notification provisions upon the terms set forth below.

The Commission's 1995 Prior Approval Policy Statement provides that, "as a general matter, [future] Commission orders . . . will not include prior approval or prior notification requirements." If "a Petition is filed to reopen and modify an order, pursuant to the [Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement." But the Statement also directs that the terms of any prior notification requirement be considered "on a case-by-case basis" in light of the characteristics of particular markets, market participants and other relevant factors. Significantly, the Commission "*reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances.*" See Prior Approval Policy Statement, 60 Fed. Reg. 29745, 39746 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241(emphasis added).

The Commission, exercising its equitable power, has substituted prior notification for prior approval provisions in the relevant Orders. In doing so the Commission will require Columbia to provide thirty (30) days advance notice of any proposed merger or acquisition transaction as defined in the Orders ("first waiting period"). If during this first waiting period the Commission requests further information concerning a proposed transaction, Columbia shall not take any

action, other than planning, in furtherance of such a transaction until thirty (30) days after substantially complying with such request for additional information ("second waiting period") or such shorter waiting period as may be granted by letter from the Bureau of Competition. This second waiting period is consistent with several cases where the Commission believed it was necessary to protect the public interest from a credible risk that the defendant would once again engage in anticompetitive transactions. *See* MD Physicians of SW Louisiana, FTC File No. 941 0095; Mesa County Physicians Independent Practice Association, Docket No. D.9284.

In this case, first and foremost, there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act, commonly referred to as the HSR Act. Indeed, the complaints in each of these matters involved transactions that if filed individually would have fallen below the reporting threshold of the HSR Act. Second, Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders. Indeed, on July 30, 1998 the Commission imposed a \$2.5 million civil penalty upon Columbia/HCA for its violation of Commission orders by: (1) failing to divest in a timely manner two Utah Hospitals and its joint venture interest in South Seminole Hospital in Florida; and (2) violating a related Hold Separate Agreement governing assets it acquired in Utah as a result of its merger with Healthtrust Inc. *See* FTC File No. 961 0013. Given this history, it is both prudent and consistent with our policy to require additional review time.

For these reasons, we voted to grant Columbia's Petition to Reopen the Orders in Docket Numbers C-3472, C-3505, C-3538, C-3544 and D.9256, and Modify the Orders to delete the prior approval provisions, but also asked that they be replaced with prior notice provisions that have a thirty (30) day second waiting period.

DISSENTING STATEMENT OF COMMISSIONER ORSON SWINDLE

Application of our Prior Approval Policy Statement has led the Commission to replace the prior approval provision in each of these five orders with a requirement that Columbia/HCA provide us with prior notification of certain acquisitions. Supplanting prior approval is the correct result: there is no credible risk in any of these cases that

Columbia/HCA will attempt the same or approximately the same transaction that triggered the Commission's original enforcement concern, and there is nothing to rebut the presumption in each case that setting aside the prior approval requirement is in the public interest. Moreover, replacing prior approval with prior notification is warranted, since each of these matters involves a credible risk that Columbia/HCA could make anticompetitive acquisitions that fall below Hart-Scott-Rodino thresholds.

Nevertheless, I have dissented because the Commission here has imposed the wrong prior notification requirement for the wrong reasons. In a long line of order modifications pursuant to the Prior Approval Policy Statement, the Commission has been consistent in either simply vacating the prior approval clause or replacing it with a prior notification mechanism that comprises a 30-day initial period and a 20-day second period. In the present matters, however, the Commission has chosen to lengthen the second period in each of these orders to 30 days. I disagree with the decision to impose on Columbia/HCA a greater burden than other respondents have borne, and to do so for reasons that appear to smack of retribution.

I have searched these five orders in vain for any basis for treating Columbia/HCA differently from the many previous respondents that have asked the Commission to set aside or modify a prior approval requirement. The orders summarily announce the length of the notification periods but do not themselves venture any explanation for the disparate treatment accorded Columbia/HCA. Such an obvious departure from consistent agency practice without any explanation could be judged arbitrary and capricious. Perhaps in an effort to save these orders from just such a condemnation, my fellow Commissioners have offered a statement to rationalize what they have done.¹ With all due respect, I find their statement unpersuasive.

My colleagues quote the Prior Approval Policy Statement to the effect that the Commission "reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances."² The quoted passage plainly announces that the Commission has not forsworn its power to prescribe prior approval

¹ Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson in the Matter of Columbia/HCA Healthcare Corp., Docket Nos. C-3472, C-3505, C-3538, C-3544 and 9256.

² *Id.* at 1.

or prior notification requirements in appropriate circumstances. It is not a declaration that the Commission is liberated from every agency's obligation to treat parties before it fairly and evenhandedly. With the clearly disparate treatment of Columbia/HCA, however, the latter message is what observers are likely to take from the Commission's action.³

The penultimate paragraph of the majority's statement may disclose what motivated the Commission to impose a 30-day second period on Columbia/HCA. I agree with my colleagues that "there is a credible risk that Columbia/HCA would engage in future anticompetitive acquisitions covered by the Orders that would not be subject to the reporting requirements of Section 7A of the Clayton Act . . ." ⁴ But this observation establishes merely that the Commission should retain a prior notification requirement. It by no means furnishes a basis for treating Columbia/HCA more harshly than other respondents.

This paragraph then arrives at the nub of my colleagues' argument: ". . . Columbia/HCA's earlier conduct suggests a reckless disregard with respect to satisfying obligations in Commission orders." ⁵ After referencing the civil penalty that Columbia/HCA paid for violating certain divestiture obligations under two of these orders, they conclude: "Given this history, it is both prudent and consistent

³ My colleagues' attempted analogy to collusion cases in the health care industry also fails to supply the missing justification for lengthening the second period in the present cases to 30 days. The Commission's recent consent agreements in *M.D. Physicians of Southwest Louisiana, Inc.* (File No. 941 0095) and *Mesa County Physicians Independent Practice Association, Inc.* (Docket No. 9284) contained 30-day second notification periods. In those cases, however, the Commission found it necessary to reserve enough time to satisfy itself that newly-constituted horizontal arrangements among physicians would not lead to a return to the collusion that those cases targeted. I do not know how those two cases, arising from substantial evidence of collusive behavior, supply the Commission with a reason to increase the time it will spend scrutinizing some hospital merger that Columbia/HCA might undertake in, say, Augusta, Charlotte County, or Salt Lake City -- hospital markets with which the Commission is already thoroughly familiar and thus should need less time for review. In addition, although the skeletal nature of the initial notification in *M.D. Physicians* and *Mesa County Physicians* might counsel in favor of lengthening the second period to 30 days, no such consideration is present here: any initial notification provided by Columbia/HCA should contain the level of detail that one normally encounters in an acquiring firm's Hart-Scott-Rodino filing.

In a case that involves not only collusion but also merger issues -- and thus is more analogous than *M.D. Physicians* or *Mesa County Physicians* to the present matter -- the Commission has just announced acceptance of a proposed order that requires only a 20-day second notification period. *Commonwealth Land Title Insurance Company* (File No. 981 0127). I do not understand how my colleagues can square the relief in *Commonwealth* with what they have done to Columbia/HCA.

⁴ Statement of Chairman Pitofsky and Commissioners Anthony and Thompson at 2.

⁵ *Id.*

with our policy to require additional review time."⁶ This conclusion is a *non sequitur*.

There is no question that Columbia/HCA recently paid a \$2.5 million civil penalty for alleged order violations. Although my colleagues evidently found that penalty acceptable, I questioned whether it was sufficient in light of Columbia/HCA's "prolonged and pronounced disregard for the requirements of two Commission divestiture orders and the Utah Hold Separate Agreement."⁷ I continue to believe that Columbia/HCA committed serious infractions and deserved a civil penalty even larger than what we obtained. But the civil penalty case was our opportunity to levy sanctions for Columbia/HCA's order violations, and that opportunity is gone. I do not see what bearing that misconduct has on the entirely unrelated question of how much time we need to review future acquisitions. If the Commission has based its decision to lengthen the second waiting period on its reaction to respondent's previous behavior, then I would suggest that such a decision is not only arbitrary but punitive. The public may find this perception inescapable.

I am also troubled by another aspect of the majority's decision to extend the second period to 30 days. Each of our newly-modified orders ends with a proviso exempting transactions subject to Hart-Scott-Rodino from the order's prior notification requirement. In other words, an acquisition large enough to be reportable under Hart-Scott-Rodino will be subject to the 20-day second waiting period prescribed by that statute,⁸ but a covered acquisition too small to meet Hart-Scott-Rodino thresholds will be subject to the 30-day second period mandated by the Commission's orders. The practical effect of this action is to place an entire class of smaller acquisitions under a greater burden than is borne by larger acquisitions. Although smaller acquisitions, of course, sometimes may be more problematic than large acquisitions from an antitrust point of view, I do not believe this justifies imposing a greater burden on smaller transactions.

⁶ *Id.*

⁷ Statement of Commissioner Orson Swindle in Columbia/HCA Healthcare Corporation, File No. 961 0013 (available at <http://www.ftc.gov/os/9807/9610013.os.htm>).

⁸ Moreover, for a cash tender offer, the Hart-Scott-Rodino second waiting period is reduced to 10 days. 15 U.S.C. 18a(e)(2).

I return to whether punishment of Columbia/HCA underlies (or will be perceived to underlie) the Commission's decision. If it does not, then the Commission should explain either why Columbia/HCA alone has earned a 30-day second period -- a result that on its face looks arbitrary and capricious -- or whether it is moving toward imposing a 30-day second period in all future cases. No one has sought to announce a new 30-day period of general applicability, and so it boils down to how the Commission treats this particular respondent. Because Columbia/HCA's prior order violations have no demonstrable bearing on the appropriate length of the second waiting period, I dissent from the Commission's unjustified handling of this respondent.

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IN THE MATTER OF

COLUMBIA/HCA HEALTHCARE CORP.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9256. Consent Order, May 5, 1994—Modifying Order, Aug. 14, 1998*

This order reopens a 1994 consent order – that prohibited the respondent from consummating any partial or total merger of a Columbia hospital in the Charlotte County, Florida area with any other acute care hospital in the area, without prior Commission approval – and this order modifies paragraph II of the consent order by eliminating the prior approval requirement and substituting a prior notice provision for it.

ORDER REOPENING AND MODIFYING ORDER

On April 9, 1998, Columbia/HCA Healthcare Corporation ("Columbia/HCA" or "respondent"), the respondent named in the consent order issued by the Commission on May 5, 1994, in Docket No. 9256 ("Order"), filed its Petition To Reopen and Modify Consent Order ("Petition") in this matter. Columbia/HCA asks that the Commission reopen and modify the Order, along with four other orders, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").¹ Columbia/HCA's Petition requests that the Commission reopen and modify the Order to eliminate the prior approval requirement. In the alternative, Columbia/HCA requests that the Commission reopen and modify the Order by substituting a prior notification provision for paragraph II, which currently requires Columbia/HCA to seek the prior approval of the Commission to acquire or to permit to be acquired certain acute care hospitals. The thirty-day public comment period on Columbia/HCA's Petition ended on May 19, 1998. No comments were received. For the reasons discussed below, the Commission has

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.