

ORIGINAL

FEDERAL TRADE COMMISSION
RECEIVED DOCUMENTS

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;

We propose that Paragraph II A 2 be revised to read:

2. to deal with any payor, or not to deal with any payor through any arrangement other than Respondent;

overly broad. The court agreed with the administrative law judge that the provision could be interpreted to require NTSP “to messenger contracts with payors and to contract with all payors.”

payors, regardless of potential risks to Respondent, its member physicians, and its patients.” *Id.* (quoting Initial Decision of ALJ at 89). Although the Commission explained in its Decision (and in its brief to the court of appeals) that the Order does not impose a general obligation to “messenger” all offers or to contract with all payors,¹ the court nonetheless believed it could be interpreted to impose such an absolute and unqualified duty to deal.

The proposed addition to Paragraph II.A.2 would address the court’s concern by expressly linking the ban on refusals to deal to the conduct prohibited by the other provisions of Paragraph II. The court of appeals expressed no concerns about anything in Paragraph II (or any other aspects of the Order) except II.A.2, rejecting all of NTSP’s other objections.

Incorporating language prohibiting refusal to contract with payors and to contract with all payors.

include language in the Order that specifically addresses refusals to deal and threats to refuse to deal with payers, when undertaken in furtherance of otherwise prohibited agreements or conduct.

Concerted refusals to deal and threats of refusals are a common and long-standing feature in

price-fixing and collective negotiation cases² and NITSD used such threats and refusals to

prohibited agreement or conduct among NTSP physicians with regard to the provision of the members' physician services.

We do not believe the Commission should seek in the Order to delineate safe harbors for

future referrals deal by NTSP. As of 1/1/11, the Commission has

pavor offer, may or may not violate the Order depending on the surrounding circumstances. As

In sum, we believe the proposed modification to Paragraph II.A.2, set forth on page two, articulates the straightforward principle that would be applied in evaluating whether the facts concerning a refusal or threatened refusal by NTSP to deal with a payor would amount to a violation of the Order. This modification fully addresses the concerns expressed by the court of appeals and is consistent with the intended scope of the current provision.

Respectfully Submitted,


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Bureau of Competition

August 13, 2008

Certificate of Service

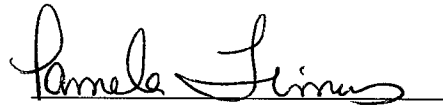
I, Pamela Timus, hereby certify that on August 13, 2008, I caused a copy of Complaint Counsel's Proposal for Order Modification on Remand to be filed with:

Office of the Secretary
Federal Trade Commission
Room H-135
600 Pennsylvania Ave., NW
Washington, DC 20580

and served by first-class mail and e-mail upon:

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Pamela Timus