practice affected the firm's costs, prices, risks, sales, shares, and profits. Participants in markets where other firms use such practices are invited to respond with real-world examples of the practice's effect on competition in the market as a whole, including what market conditions changed when the practice was instituted or ended and whether buyers perceive specific benefits or disadvantages from the use of the practice and, if so, what they are.

The following lists particular types of conduct that commenters may wish to address, followed by sample questions that commenters may wish to consider with respect to each or all of the types of conduct they discuss.

**Particular Types of Conduct for Possible Discussion**

*Bundled Loyalty Discounts and Market Share Discounts.* Sellers sometimes offer discounts contingent upon a buyer's purchase of two or more different products—for example, restaurants may offer a choice between a la carte items and complete meals (priced at a discount). Sellers also may offer a discount on all units sold to the buyer, if the buyer meets a target (*e.g.*, volume or market share) for purchases of a single item.

*Product Tying and Bundling.* Tying occurs when a firm conditions the sale of one product on the customer's agreement to buy or to take a second product. Tying often involves separate prices for components that purchasers can use in different proportions, and a contractual or technological requirement that if users purchase the tying product, they must also purchase the tied product from the same seller. When a firm charges a single price for a specified bundle of tied goods, the practice has been called ''bundling.'' If the components are also sold separately, with a discount for purchasing the bundle, the practice is called ''mixed bundling.''

*Exclusive Dealing.* Exclusive dealing includes arrangements in which a seller agrees to sell its product to only a single distributor, a seller precludes its customer from purchasing some product from another supplier, or a buyer requires its supplier to sell some product only to the buyer.

*Predatory Pricing.* Predatory pricing involves pricing below ''an appropriate measure'' of a firm's costs, combined with a dangerous probability that the firm can later raise its prices to recoup its prior investment in below-cost prices.

*Refusals to Deal.* Refusals to deal occur when a firm chooses not to make a product or service available to another firm.

*Most-Favored-Nation Clauses.* A most-favored-nation clause is a contractual agreement between a buyer and a seller that requires the seller to sell to the buyer on pricing terms that are at least as favorable as, and sometimes more favorable than, the pricing terms on which the seller sells to any other buyer.

*Product Design.* Claims may arise under section 2 that a firm has modified its product design to exclude a competitor in a product-related market (*e.g.*, a market for an attachment that must fit with the product design), rather than to improve product design.

*Misleading or Deceptive Statements or Conduct.* Misleading or deceptive statements or conduct by a firm may potentially implicate section 2.

*Sample Questions for Consideration With Respect to Each or All of the Types of Conduct That the Commenter Discusses*

1. How should the structure of the market and the market shares of participants be taken into account in analyzing such conduct?

2. What are the likely procompetitive and antitcompetitive effects of the conduct in the short run? In the long run?

3. What specific types of cost savings, risk reduction, or other efficiencies (*e.g.*, elimination of free riding or otherwise protecting investments in services and reputation, product improvement or innovation) could be generated by such conduct? Would these efficiencies depend to any extent on the seller maintaining a certain scale or scope of operation?

4. Would a business typically analyze or estimate the likely cost savings from this type of conduct before engaging in it? After engaging in it? Why or why not? What other business practices, if any, could be used to achieve similar or greater efficiencies? What factors would influence the practical or economic feasibility of such alternative conduct?

5. How might competitors respond to counteract a loss of sales to the firm engaging in such conduct? If implemented by a firm with a very large market share, could such conduct raise the costs of the firm's rivals? If such conduct could raise the costs of the firm's rivals, could that lead to consumer harm? If so, how and under what circumstances?

6. Would you expect such conduct to affect the likelihood of entry into the market? If so, how and under what circumstances?

7. How widespread in your industry are the types of conduct that you have discussed? What features of the conduct may vary and why? What are the typical business contexts in which such types of conduct occur? How frequently do firms that lack market power undertake such conduct and why?

8. What tests and standards should courts and enforcement agencies use in assessing whether such conduct violates section 2?

9. If any scenario that you have discussed could result in liability under section 2, what remedy or remedies would you propose for consideration? What tests and standards should courts and enforcement agencies use in assessing which remedy to apply in a section 2 case? Should section 2 remedies address conduct or market structure, and why should one be preferred over the other? Would your preferred remedy require ongoing oversight by a court or agency—*e.g.*, oversight of prices, conduct between competitors (*e.g.*, licensing), or costs? If so, please describe how such oversight could be conducted.

10. In what circumstances, if any, should an agency decline to pursue a section 2 case due to an absence of a practical, judicially manageable, and economically feasible remedy?

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 06–3366 Filed 4–6–06; 8:45 am]

**BILLING CODE 6750–01–P**

## FEDERAL TRADE COMMISSION

**[File No. 051 0154]**

## Fresenius AG; Analysis of Agreement Containing Consent Orders To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before May 2, 2006.

**ADDRESSES:** Interested parties are invited to submit written comments. Comments should refer to ''Fresenius AG, File No. 051 0154,'' to facilitate the

organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 135–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c). 16 CFR 4.9(c) (2005).[1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments that do not contain any nonpublic information may instead be filed in electronic form as part of or as an attachment to e-mail messages directed to the following e-mail box: *consentagreement@ftc.gov.*

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *http://www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

**FOR FURTHER INFORMATION CONTACT:** Gary H. Schorr, Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3063.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 31, 2006), on the World Wide Web, at *http://www.ftc.gov/os/2006/03/index.htm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

## Analysis of Agreement Containing Consent Order to Aid Public Comment

### 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

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

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.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. E6–5053 Filed 4–6–06; 8:45 am]

**BILLING CODE 6750–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Announcement of Availability of Funds for Cooperative Agreement to the New Mexico Outreach Office To Strengthen Public Health Services at the New Mexico-Chihuahua Border

**AGENCY:** Office of Global Health Affairs, Office of the Secretary, HHS.

*Announcement Type:* Cooperative Agreement—FY 2006 Initial Announcement. Single Source.

*Catalog of Federal Domestic Assistance:* 93.018.

*Key Dates: Application Availability:* April 7, 2006. Applications are due by 5 p.m. Eastern Time on May 8, 2006.

*Executive Summary:* The Office of Global Health Affairs (OGHA) announces that up to $345,600 in fiscal year (FY) 2006 funds is available for a cooperative agreement to the New Mexico Department of Health, New Mexico Outreach Office of the U.S.-Mexico Border Health Commission (USMBHC) to strengthen the binational public health projects and programs along the New Mexico-Chihuahua border. This initiative addresses outreach and health promotion activities, evaluation and assessments,