

I. Background

On November 6, 2012, the Commission issued its Order pursuant to a consent agreement settling charges that Coopharma engaged in anticompetitive conduct by conspiring, with its member pharmacies, to fix prices in negotiations with third-party payers via the collective negotiation of contracts and the organizing of boycotts to coerce payers to accept its demands.

Paragraph II.A. of the Order prohibits Coopharma, among other things, from entering into or facilitating agreements between or among pharmacies; to negotiate on behalf of any pharmacy with any payer; to refuse to deal or threaten to refuse to deal with any payer in furtherance of prohibited conduct; to include any term, condition, or requirement upon which any pharmacy deals, or is willing to deal, with any payer, including price terms; or not to deal individually with any payer or not to deal with any payer other than through Coopharma.

Paragraph II.B. of the Order prohibits facilitating information exchanges between pharmacies regarding whether, or on what terms, to contract with a payer.

The Order runs for 20 years and will expire on November 6, 2032.

II. Standard to Reopen and Modify

Section 5(b) of the Federal Trade Commission Act, and FTC Rule of Practice 2.51(b) provide that the Commission shall reopen an order to consider whether it should be modified if the respondent makes “a satisfactory showing that changed conditions in law or fact” require the order to be altered, modified, or set aside, in whole or in part, 15 U.S.C. § 45(b), or a satisfactory showing that “the public interest so requires.” 16 C.F.R. § 2.51(b). A satisfactory showing sufficient to require reopening is made when a request demonstrates in detail the nature of the changed conditions and the reasons why they require the requested modification, or provides specific reasons why the public interest would be served by the requested modification. *Id.* Rule 2.51(b) requires that the requester’s showing be supported by affidavits setting forth admissible facts, and that all information and material that the requester would like the Commission to consider be contained in the request at the time of filing.

If the required showing has been met, the Commission will reopen the order and balance the reasons for and against the modification. The Commission is not required to modify an order after having made the decision to reopen it,¹ and the burden remains on the petitioner to demonstrate why the order should be modified.²

¹ See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (noting that reopening and modification are separate determinations).

² See 16 C.F.R. § 2.51(d) (placing the decision to take any appropriate action within Commission discretion).

III. Public Comments on the Petition

The Petition was placed on the public record on September 13, 2024, and the comment period expired on October 15, 2024. The Commission received six comments, two of which were non-responsive. Three of the responsive comments support Coopharma's Petition to modify or set aside the Commission's 2012 Order. The comments supporting Coopharma's petition are from: (1) The Open Markets Institute, (2) The Alliance of Health Provider Cooperatives, whose membership includes six Puerto Rico Health Cooperatives including Coopharma, and (3) Ivan E. Colon, a health care executive who has negotiated with Puerto Rico Cooperatives on behalf of insurance company Constellation Health.

Open Markets views the Coopharma Order as perpetuating "the profound inequality in power between independent pharmacies and PBMs," and that "concerted action by Coopharma and its members" which is authorized by, and would be actively supervised by, Puerto Rico would at least partially counter the power of the PBMs. Open Markets cites two independent grounds for terminating the Coopharma order—Puerto Rico's authorization and supervision of collective bargaining and the public interest in countering the power of insurers and PBMs to preserve independent pharmacies and access to medicine.

Likewise, the Alliance of Health Provider Cooperatives and Ivan E. Colon assert that changes to Puerto Rico law insulate collective negotiations from antitrust scrutiny and that withdrawing the Commission's Order is in the public interest to protect independent pharmacies in Puerto Rico. Mr. Colon notes that none of the collective negotiations that he has been party to—presumably on behalf of Constellation Health—involved economic terms and are instead "directed to efficiencies in contractual relation terms for the provider, which resulted in a more extensive, renowned, and accessible network throughout the Island, thus, better care for the enrollees and beneficiaries."³

In addition, there was one comment opposing any modification to the Order from Randall David Marks, a former Commission staff attorney who served as lead on the Coopharma investigation that led to the 2012 Order. Mr. Marks asserts that the Coopharma Order should remain in place. With respect to State Action, Mr. Marks expresses concern as to whether Puerto Rico's regulation satisfies the requirements of active supervision and whether the regulation will protect Puerto Rico consumers. Mr. Marks also questions Coopharma's public interest arguments. First, Mr. Marks asserts that Coopharma's argument is premised on the notion that competition doesn't work and that the Commission should bless the creation of Coopharma's market power to counteract alleged PBM market power. And second, Mr. Marks notes that Coopharma's public interest argument assumes that the Commission's efforts to address any PBM market power will be unsuccessful.

IV. Changes of Law Warrant Reopening and Modifying the Order

³ Comment of Ivan E. Colon, FTC-2024-0035-007, at 2.

Coopharma asserts that its conduct would today be protected under state action immunity due to changes to Puerto Rico’s laws and regulations. The Commission agrees with Coopharma and therefore has determined that: (i) changes of law require that the Order be reopened and (ii) the Order should be modified to alter Paragraph II and include new definitions in Paragraph I.

In *Parker v. Brown*, the Supreme Court held that the Sherman Act does not reach conduct by states acting in their sovereign capacity.⁴ Thus, states may, within certain limits, adopt and implement policies that would otherwise violate the Sherman Act. Application of the state action defense is “disfavored,” however, and the doctrine must be applied narrowly.⁵ That is because “[t]he preservation of the free market and of a system of free enterprise” is a “national policy of . . . a pervasive and fundamental character.”⁶

“[W]hile the Sherman Act confers immunity on the States’ own anticompetitive policies out of respect for federalism, it does not always confer immunity where a State delegates control over a market to a non-sovereign actor”—including a regulatory board whose members are engaged in the occupation it regulates.⁷ In *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, the Court set out a two-part test to evaluate the applicability of the state action immunity covering the conduct of a state regulatory agency that is controlled by private parties.⁸ To qualify for state action immunity, the conduct at issue must be: (1) taken in furtherance of a clearly articulated state policy to displace competition; and (2) actively supervised by the state itself.⁹

a. Clear Articulation

Coopharma can satisfy the first element of the *Midcal* test if its actions were undertaken pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition.¹⁰ Coopharma satisfies this test with respect to joint negotiations on behalf of pharmacies with insurers and PBMs.

Previously, the Commission determined that Puerto Rico had not clearly authorized Coopharma’s joint negotiations with health insurers and PBMs. This was because two different

⁴ *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

⁵ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

⁶ *Id.* at 632.

⁷ *N.C. State Bd. of Dental Exam’rs v. F.T.C.* 135 S. Ct. 1101, 1110 (2015).

⁸ 445 U.S. 97 (1980); see also *Patrick v. Burget*, 486 U.S. 94, 100 (1988); *In re Ky. Household Goods Carriers Ass’n, Inc.*, 139 F.T.C. 404, 489 (2005).

⁹ *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); see, e.g., *N.C. Dental*, 135 S. Ct. at 1110; *FTC v. Phoebe Putney*, 568 U.S. 216, 225 (2013). Although the majority of state action cases deal with Sherman Act violations, the state action doctrine has also been implemented in cases where the challenge is made under Section 7 of the Clayton Act, 15 U.S.C. § 18 (1996). See, e.g., *Phoebe Putney*, 568 U.S. at 236 (state action immunity defense rejected under § 7 Clayton Act violation); *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1040 (2d Cir. 1986) (concluding that the state action defense is generally available to parties defending against § 7 Clayton Act violation).

¹⁰ *Midcal*, 445 U.S. at 105.

Puerto Rico Laws—Law 203¹¹ and Law 239¹²—potentially applied to Coopharma’s conduct, with Law 239 containing broad language authorizing collective negotiations under the supervision of a regulator (Corporación para la Supervisión y Seguro de Cooperativas de Puerto Rico (“COSSEC”)) and Law 203 containing a narrower exemption that would not apply to Coopharma due to its market share. The ambiguity as to which law applied demonstrated the absence of a “clear” articulation to displace competition with regard to Coopharma’s bargaining with payers.

However, Puerto Rico in 2015 passed Law 228,¹³ which clarifies Puerto Rico’s intent to allow for joint negotiations by health services provider cooperatives such as Coopharma.¹⁴ As the Act’s “Statement of Motives” explains, Act 228 authorizes “the [Cooperative], on behalf of its health service provider members, to negotiate collectively with Health Service Organizations . . . and Third-Party Administrators . . . so that there is a balance in the negotiations of these parties, since currently the contractual terms between these parties are imposed through adhesion contracts.”¹⁵ Based on the passage of Law 228, it is clear that the Puerto Rico legislature has consciously chosen to permit joint price negotiations by health services provider cooperatives and to oversee the results of such negotiation. In 2020, COSSEC promulgated Regulation No. 9161¹⁶ governing the joint price negotiations between health services provider cooperatives and health service organizations.

b. Active Supervision

Active supervision is a necessary prerequisite for state action to apply to the conduct of private parties. The active supervision requirement is designed to ensure that anticompetitive activity pursued by a private party is furthering state regulatory policy.¹⁷ At a minimum, active supervision requires a state supervisor to: (1) review the substance of the anticompetitive conduct; (2) have the power to veto or modify the decision to ensure that it accords with state policy; (3) actually supervise the conduct of the private party—and not merely have the potential for supervision; and (4) not be an active market participant.¹⁸ Act 228 and Regulation No. 9161

¹¹ Puerto Rico Insurance Code, 26 L.P.R.A. § 3101, *et seq.*

¹² 2004 General Cooperative Associations Act of Puerto Rico, 5 L.P.R.A. § 4381 *et seq.*

¹³ 26 P.R. Laws §§ 3101-3108.

¹⁴ Law 228 and Regulation No. 9161 explicitly forbid cooperatives from boycotting or threatening to boycott health plans. *See* Act 228 Article 20A.9; Reg. No. 9161 § 8.05e3. Regulation No. 9161 also prohibits cooperatives from requiring that members contract solely through the cooperative and not enter into individual contracts. *See* Reg. No. 9161 § 7.01f; § 8.05e3. Thus, the prohibitions in Paragraph II.A of the Order related to that conduct are not affected by the changes in Puerto Rican law.

¹⁵ Law 228. The specific terms of the Act allows cooperatives to negotiate collectively the terms and conditions of health services contracts and identify the specific terms and conditions that may be collectively negotiated.

¹⁶ Public Corporation for the Supervision and Insurance of Cooperatives of Puerto Rico Regulation for the Supervision and Oversight of Collective Bargaining for Health Care Provider Cooperatives (HCPC) with Third Party Administrators (TA) and Health Care Service Organizations (HSO), number 9161 dated February 13, 2020.

¹⁷ *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

¹⁸ *N.C. Dental*, 135 S. Ct., at 1117.

satisfy these requirements so long as COSSEC substantively exercises the supervisory rights granted pursuant to the Act and Regulation.

First, the entity appointed by Puerto Rico reviews the substance of the anticompetitive decision and has the power to veto or modify the decision to ensure that it comports with state policy. COSSEC implements this responsibility through the Committee for the Supervision and Oversight of Collective Bargaining Procedures (“the Committee”).¹⁹ The Committee authorizes the initiation of collective bargaining, monitors the process, and approves any resulting agreement between the health care services cooperative and payers or PBMs.²⁰ Further, the Committee has the power to suspend or terminate collective bargaining if it understands the parties are not complying with the provisions of the law regarding collective negotiations by health care services cooperatives or are engaging in unfair practices.²¹ The Committee evaluates a final report submitted by the health care services cooperative as well as the draft agreement reached in the negotiations and can approve, modify, or deny the agreement.²² Thus, Puerto Rico clearly maintains the right to review the joint negotiations and the power to veto or modify the results of the negotiations to ensure compliance with state policy.

Second, neither COSSEC nor the Committee that oversees negotiations are market participants or controlled by market participants. According to Regulation No. 9161, COSSEC has the power to attend, supervise and oversee the collective bargaining procedure of health care services cooperatives with third-party administrators and health services organizations.²³ The Committee is not controlled by health care services cooperative members.²⁴ Thus, the state supervisor is not an active market participant.

Coopharma has satisfied all the elements for state action that it can satisfy at this time, and any future negotiations with insurers and PBMs would likely qualify for state action immunity. The Commission therefore considered whether modifying or setting aside the Order would be the appropriate remedy. As noted above—and as Coopharma acknowledges—active supervision is a necessary prerequisite for state action immunity. Here, Act 228 provides that health care cooperatives can conduct collective negotiations with insurers and PBMs because there is state oversight of such negotiations in place by a designated government body that has issued relevant regulations. Accordingly, the Commission has determined to modify the Order to incorporate the Act 228 and Regulation 9161 framework and incorporate the requirement that Puerto Rico supervises the negotiations according to its statutory and regulatory framework.

¹⁹ *Id.*

²⁰ Reg. No. 9161 § 6.01.

²¹ Reg. No. 9161 § 8.08; 8.10.

²² Reg. No. 9161 § 8.09. The Committee also reviews an initial report and progress reports following each negotiation session. Reg. No. 9161 § 8.07.

²³ Reg. No. 9161 § 6.01.

²⁴ Reg. No. 9161 § 6.01. The Committee is composed of one member from the Department of Health, one representative of Office of Patient Advocate, one representative of the Health Services Organization, one representative of the Third Party Administrator, one representative from the Cooperative sector, an expert economist with actuary certification, and a COSSEC representative. Reg. No. 9161 § 6.03. And even the representatives of the Health Service Organization and the Third Party Administrator cannot be active participants in the market. *Id.*

V. Public Interest Claims Do Not Warrant Further Modifications to the Order

Coopharma separately asserts that it is in the public interest to set aside or modify the Order. According to Coopharma, Puerto Rico has authorized health care services cooperatives to negotiate jointly with third-party payers to remove an imbalance in negotiating leverage.²⁵ Coopharma also argues that the growth of PBMs threatens the survival of small independent pharmacies, including Coopharma members,²⁶ which play an important role in improving access and quality of health services.²⁷ Coopharma points to examples where the Commission has previously modified orders where the market conditions have changed such that the entity under order no longer possesses market power or where the existing Order prevents the respondent from competing with competitors not subject to the Order's prohibitions.²⁸

Because the Commission has already determined that changes to Puerto Rico's laws and regulations support modifying the Order to allow for joint negotiations consistent with the policy and supervision set forth in Law 228 and Regulation No. 9161, it does not need to reach a conclusion as to whether allowing such negotiations is in the public interest.

Petitioner makes no argument about why the Commission should modify or vacate any other terms, which cover conduct that—with the exception of joint negotiations described above—remain illegal under federal and Puerto Rico law. Indeed, Coopharma acknowledges that—in addition to permitting joint negotiations that are overseen by COSSEC under Regulation 9161—Act 228 confirms that other types of conduct (including some in which Coopharma allegedly engaged in the Commission's 2012 complaint) remain illegal under Puerto Rican law.²⁹ Because Coopharma concedes that the other terms of the Order govern conduct that remains unlawful, the petition presents no argument that it is in the public interest to modify or vacate those terms.

VI. Conclusion

For the reasons explained above, the Commission has determined to reopen and modify the order.

Accordingly, **IT IS ORDERED** that this matter be, and it hereby is, reopened;

IT IS FURTHER ORDERED that Paragraph I be modified to add:

- H. "Overseen by COSSEC" means COSSEC having authorized Respondent's specific activities (e.g., Respondent can coordinate member Pharmacies on the terms of collective bargaining, but only after COSSEC has authorized collective bargaining) with the

²⁵ Coopharma Petition, at 26-27.

²⁶ Coopharma Petition, at 28-29.

²⁷ Coopharma Petition, at 27.

²⁸ Coopharma Petition, at 30-35.

²⁹ Petition at 33, fn. 113.

opportunity for COSSEC to review Respondent's conduct, suspend, or terminate the negotiations, and approve, modify, or deny any resulting agreement.

- I. "COSSEC" means Corporación para la Supervisión y Seguro de Cooperativas de Puerto Rico.
- J. "Act 239" means 2004 General Cooperative Associations Act of Puerto Rico, 5 L.P.R.A. § 4381 *et seq.*
- K. "Act 228" means 26 P.R. Laws §§ 3101-3108.
- L. "Regulation 9161" means the Public Corporation for the Supervision and Insurance of Cooperatives of Puerto Rico Regulation for the Supervision and Oversight of Collective Bargaining for Health Care Provider Cooperatives (HCPC) with Third Party Administrators (TA) and Health Care Service Organizations (HSO), number 9161 dated February 13, 2020.

IT IS FURTHER ORDERED that Paragraph II be modified to add:

Provided, however, that nothing in this Order shall prohibit Respondent from negotiating (including rejecting any offer or counter-offer, declining to agree to a contract, and exchanging such information as is reasonably necessary to negotiate or enter into a contract) on behalf of any Pharmacy with any Payer undertaken pursuant to Act 239, as amended by Act 228, if (1) such negotiations are Overseen by COSSEC in accordance with Regulation 9161, and (2) within three business days of filing a notice of intent to negotiate with COSSEC under Section 8.05 of Regulation 9161, Coopharma provides notification (including a copy of the notice of intent to negotiate) to the Commission via email to the Secretary of the Commission at ElectronicFilings@ftc.gov and the Compliance Division at bccompliance@ftc.gov, and the Commission, at its discretion, may request a supplemental compliance report under Paragraph IV.A or otherwise seek additional information.

By the Commission.

April J. Tabor
Secretary

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ISSUED: December 6, 2024