

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

In the matter of: The American Academy of Orthopaedic Surgeons, a corporation.

### Order Setting Aside Order

On November 23, 1994, the American Academy of Orthopaedic Surgeons ("AAOS") filed a Petition To Reopen and Rescind or Modify Consent Order ("Petition") in Docket C-2856 ("Order"), 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, 16 C.F.R. § 2.51. In its Petition, AAOS requests that the Commission reopen the Order and rescind it or, in the alternative, modify provisions of the Order that restrict the ability of AAOS to develop and distribute a relative value scale ("RVS"), as defined in the Order.

AAOS asserts in its Petition that changed conditions of law or fact and the public interest warrant reopening the Order and rescinding or modifying it. A redacted version of the Petition was placed on the public record for thirty days; no comments were received. For the reasons described below, the Commission has determined that the Order should be reopened and set aside.

### I. Background

The Commission's complaint alleged, among other things, that the preparation and circulation by AAOS of comparative numerical values for services performed by orthopaedic surgeons had the effect of establishing or maintaining fees charged by orthopaedic surgeons for their services, in violation of Section 5 of the FTC Act. The complaint also alleged that the numerical values were convertible into a monetary fee by application of a dollar conversion factor. The Order, in relevant part, requires AAOS to cease initiating, publishing or circulating, in whole or in part, any relative value scale, as defined.<sup>1</sup> *The American Academy of Orthopaedic Surgeons*, 88 F.T.C. 968 (1976).

The Order does not prevent AAOS from exercising rights under the First Amendment to the Constitution to petition state or federal government agencies and to participate in federal or state administrative or judicial proceedings or from providing information or views to third party payers concerning any issue, including

reimbursement. *The American Academy of Orthopaedic Surgeons*, 105 F.T.C. 248 (1985) (modifying Order).

### II. The Petition

AAOS requests that the Commission reopen the Order and rescind or modify it to permit the AAOS to provide information concerning Medicare resource based relative value scales ("RBRVS") to third party payers, managed care organizations, other physician organizations and others in the private sector, including its members. AAOS states that the information will facilitate the development and adoption of RBRVS that accurately reflect the values of orthopaedic procedures, resulting in the efficient allocation of resources. AAOS already has provided information to government entities involved in medical reimbursement issues; it wants to provide the information to nongovernment entities and to its members.

In particular, AAOS wants to be able to circulate the Abt Restudy, a physician work value scale commissioned by AAOS.<sup>2</sup> AAOS also wants to be able to sponsor and disseminate future research projects that analyze other components of the Medicare RBRVS.

AAOS cites as changed conditions the adoption and implementation by the federal government of resource based relative value scales for purposes of physician reimbursement under Medicare. In 1986, Congress created the Physician Payment Review Commission ("PPRC") to make recommendations regarding physician reimbursement under Medicare. At that time, physician reimbursement was determined by the "customary, prevailing and reasonable" ("CPR") method, which relied on historical fees. The PPRC concluded that the CPR method increased costs under Medicare and recommended adopting instead a relative value scale based on resource costs.<sup>3</sup> In 1989, Congress enacted the Omnibus Budget Reconciliation Act of 1989, which, among other things, requires use of resource based relative value scales for purposes of physician reimbursement under Medicare.<sup>4</sup> The Act provides for

consultations with "organizations representing physicians" to develop relative values for medical services.<sup>5</sup>

According to AAOS, the Abt Restudy was commissioned to respond to perceived shortcomings in Medicare RBRVS for orthopaedic services. See Petition at 13-15; Abt Restudy at 1. Providing the Abt Restudy to government entities is consistent with the proviso to the Order,<sup>6</sup> which permits AAOS to petition government agencies and legislatures. AAOS would like to distribute the Abt Restudy to third party payers and other nongovernment entities, such as other medical societies, and to individual members of AAOS, at least for the limited purpose of preparing AAOS representatives to lobby state government bodies regarding physician reimbursement practices. AAOS also would like to sponsor future research projects analyzing other components of Medicare RBRVS. According to AAOS, to the extent that it is precluded by the Order from providing information concerning reimbursement levels, the efficiency of RBRVS-based systems is lessened, "payers who would benefit from more efficient payment mechanisms are hindered in their ability to compete, and physicians and patients are given distorted incentives, and market signals for production and consumption of resources."<sup>7</sup>

### III. Standard for Reopening a Final Order of the Commission

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so required. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing

and professional liability costs; (2) a geographic adjustment factor; and (3) a conversion factor. Components of the RBRVS are to be updated periodically. Payment is based on the lesser of the RBRVS amount and the physician's actual fee. Petition at 12-13.

<sup>5</sup> 42 U.S.C. § 1395w-4(c)(2)(B)(iii).

<sup>6</sup> 105 F.T.C. at 249; see letter from Roberta S. Baruch, Deputy Assistant Director, Bureau of Competition, FTC, to Richard N. Peterson, General Counsel, American Academy of Orthopaedic Surgeons (May 12, 1993) ("staff advisory opinion"), Petition Exhibit 16.

<sup>7</sup> Petition at 25-26.

<sup>1</sup> "Relative value scale" is defined in the Order as any list or compilation of surgical or medical procedures that states comparative numerical values for those procedures or services. Order Paragraph I.A.

<sup>2</sup> Noether & Sheehy, The Abt Restudy of Physician Work Values for Orthopaedic Surgery (Sept. 23, 1992), attached as Exhibit 8 to the AAOS Petition (hereafter "Abt Restudy").

<sup>3</sup> See Physician Payment Review Commission, *Annual Report to Congress* (1988); Physician Payment Review Commission, *Medicare Physician Payment: An Agenda for Reform* (1987).

<sup>4</sup> Section 6102 of the Omnibus Budget Reconciliation Act of 1989, 42 U.S.C. § 1395w-4. Medicare RBRVS bases physician reimbursement on (1) a relative value unit for the medical service, which is based on physician work, practice costs