ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT
In the Matter of Health Care Alliance of Laredo, L.C., File No. 041 0097

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Health Care Alliance of Laredo, L.C. ("HAL"). The agreement settles charges that HAL violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among physician members of HAL to fix prices and other terms on which they would deal with health plans, and to refuse to deal with such purchasers except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by HAL that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint

The allegations of the complaint are summarized below.

HAL is a multi-specialty independent practice association ("IPA") in the Laredo, Texas, area with approximately 80 member physicians, a substantial majority of whom are competitors of one another. HAL contracts with payors on behalf of its member physicians and thereby establishes uniform prices and other contract terms applicable to its members.

Although purporting to employ a "messenger model,"[1] from 1998 to 2005, HAL attempted to and did negotiate higher reimbursement rates for its member physicians, sent payor offers to its members only after HAL negotiated and approved the rates, and urged its members not to deal individually with payors.

HAL's Board of Managers, nine physicians who are elected by and represent HAL's physician members, authorized and directed each step of the contracting process. The Board initiated negotiations by directing HAL personnel to contact a payor. On several occasions, HAL

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[1] Some arrangements can facilitate contracting between health care providers and payors without fostering an illegal agreement among competing physicians on fees or fee-related terms. One such approach, sometimes referred to as a "messenger model" arrangement, is described in the 1996 Statements of Antitrust Enforcement Policy in Health Care jointly issued by the Federal Trade Commission and U.S. Department of Justice, at 125. *See* http://www.ftc.gov/reports/hlth3s.htm#9.

personnel contacted payors after learning that the payors were soliciting contracts with individual physicians. HAL personnel told the payors that HAL would represent and contract on behalf of HAL's physician members. As negotiations between payors and HAL personnel proceeded, HAL personnel were required to report to the Board on the progress of negotiations, and to seek authorization from the Board before making counterproposals. Ultimately, the Board either accepted or rejected contracts which HAL personnel presented to it. If the Board accepted the contract, HAL would then, and only then, "messenger" the contract to HAL's members for their individual acceptance or rejection. HAL did not messenger any rates proposed by the payors during negotiations, and messengered only the rates that the Board approved.

HAL members were fully aware of the payor negotiations HAL conducted on their behalf. HAL's staff provided updates to members on the status of contract negotiations via telephone, monthly newsletters, and monthly meetings. On several occasions, as HAL personnel were attempting to negotiate a group contract, HAL urged its members not to negotiate individually with the health plans, and significant numbers of HAL members refused to deal individually with those payors.

HAL members also had direct input in payor negotiations, aside from their representation on the Board. In 1999, HAL surveyed its members, asking them for "the 20 most common codes used in the office and the maximum discount that you are willing to accept." HAL's Executive Director explained that "[t]his will help me when I negotiate contracts on behalf of the organization, since I would present these codes as those for which I will seek the advantageous rates." In addition to the 1999 survey, HAL personnel and Board members regularly solicited input on acceptable rates from HAL's members, which were then used in negotiations with payors.

HAL has orchestrated collective agreements on fees and other terms of dealing with health plans, carried out collective negotiations with health plans, and fostered refusals to deal. HAL succeeded in forcing numerous health plans to raise the fees paid to HAL physician members, and thereby raised the cost of medical care in the Laredo, Texas, area. HAL engaged in no efficiency-enhancing integration sufficient to justify joint negotiation of fees. By the acts set forth in the Complaint, HAL violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence. It is similar to recent consent orders that the Commission has issued to settle charges that physician groups engaged in unlawful agreements to raise fees they receive from health plans.

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits HAL from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving HAL.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits HAL from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes HAL from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing providers' collective bargaining with health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. HAL would not be precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians in a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The arrangement, however, must not facilitate the refusal of, or restrict, physicians in contracting with payors outside of the arrangement.

As defined in the proposed order, a "qualified risk-sharing joint arrangement" possesses two key characteristics. First, all physician participants must share substantial financial risk through the arrangement, such that the arrangement creates incentives for the physician participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

A "qualified clinically-integrated joint arrangement," on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among physicians. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III, for three years, requires HAL to notify the Commission before entering into any arrangement to act as a messenger, or as an agent on behalf of any physicians, with payors regarding contracts. Paragraph III also sets out the information necessary to make the notification complete.

Paragraph IV, for three years, requires HAL to notify the Commission before participating in contracting with health plans on behalf of a qualified risk-sharing joint arrangement, or a qualified clinically-integrated joint arrangement. The contracting discussions that trigger the notice provision may be either among physicians, or between HAL and health plans. Paragraph IV also sets out the information necessary to satisfy the notification requirement.

Paragraph V requires HAL to distribute the complaint and order to all physicians who have participated in HAL, and to payors that negotiated contracts with HAL or indicated an interest in contracting with HAL. Paragraph V.D requires HAL, at any payor's request and without penalty, or, at the latest, within one year after the order is made final, to terminate its current contracts with respect to providing physician services. Paragraph V.D. also allows any contract currently in effect to be extended, upon mutual consent of HAL and the contracted payor, to any date no later than one year from when the order became final. This extension allows both parties to negotiate a termination date that would equitably enable them to prepare for the impending contract termination. Paragraph V.E requires HAL to distribute payor requests for contract termination to all physicians who participate in HAL.

Paragraphs VI, VII, and VIII of the proposed order impose various obligations on HAL to report or provide access to information to the Commission to facilitate monitoring HAL's compliance with the order.

The proposed order will expire in 20 years.