ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT
In the Matter of Partners Health Network, Inc., File No. 041-0100

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Partners Health Network, Inc. The agreement settles charges that Partners Health violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among members of Partners Health 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 Partners Health 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.

Partners Health is a physician-hospital organization consisting of approximately 225 physicians, Palmetto Health Baptist Medical Center at Easley, and Cannon Memorial Hospital. Partners Health does business in the Pickens, South Carolina, area, which is located in northwestern South Carolina. Partners Health was "created to develop, negotiate, enter into, and administer contracts" for its physician members, and its "primary function" is described as "centralized managed care contracting."

Partners Health's physician members account for approximately 75% of the physicians independently practicing (that is, those not employed by area hospitals) in and around the Pickens County area. To be marketable in this area, a health plan must have access to a large number of physicians who are members of Partners Health.

Although Partners Health purports to operate as a "messenger model"[1] – that is, an arrangement that does not facilitate horizontal agreements on price – it orchestrated such price

---

[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.

agreements. The Partners Health Executive Director negotiates physician contracts with payors using a physician fee schedule that he created with input from the Partners Health physician members. This contracting process is overseen from start to finish by the Advisory Board and the Board of Directors. The Advisory Board is a 12-member committee that provides consultation to both the Board of Directors and the Executive Director during contract negotiations.

The Executive Director creates the Partners Health fee schedule by first polling the Partners Health physician practices to determine what prices they would like to receive in managed care contracts. The Executive Director then the takes the highest prices he receives from among the physicians' responses for a given medical procedure, and assembles those highest prices into a single fee schedule. The Executive Director uses this fee schedule to negotiate contract terms with health plans. Whenever a health plan rejects the Partners Health fee schedule, Partners Health's Executive Director negotiates, in consultation with the Advisory Board, a contract with a "comparable" fee schedule. After notifying the Board of Directors, the Executive Director transmits these contract terms to the Partners Health member practices for their review. Physician members are automatically bound by the contract unless they specifically opt out within 30 days of receiving the offer.

When they join Partners Health, the physician members agree to refer the patients they see under Partners Health contracts only to other Partners Health physicians, except in medical emergencies. This requirement stands even if non-Partners Health physicians are in the contracted payor's network.

Partners Health has orchestrated collective agreements on fees and other terms of dealing with health plans, carried out collective negotiations with health plans, fostered refusals to deal, and threatened to refuse to deal with health plans that resisted Partners Health's desired terms. Partners Health succeeded in forcing numerous health plans to raise the fees paid to Partners Health physician members, and thereby raised the cost of medical care in the Pickens County area. Partners Health engaged in no efficiency-enhancing integration sufficient to justify joint negotiation of fees. By the acts set forth in the Complaint, Partners Health 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 Partners Health 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 Partners Health.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Partners Health 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 Partners Health 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. Partners Health 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 Partners Health 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 Partners Health 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 Partners Health and health plans. Paragraph IV also sets out the information necessary to satisfy the notification requirement.

Paragraph V requires Partners Health to distribute the complaint and order to all physicians who have participated in Partners Health, and to payors that negotiated contracts with Partners Health or indicated an interest in contracting with Partners Health. Paragraph V.D requires Partners Health, 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 Partners Health 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 Partners Health to distribute payor requests for contract termination to all physicians who participate in Partners Health.

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

The proposed order will expire in 20 years.