ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Aurora Associated Primary Care Physicians, L.L.C. ("AAPCP"), Richard A. Patt, M.D., Gary L. Gaede, M.D., and Marcia L. Brauchler ("Respondents"). The agreement settles charges that Respondents violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating and implementing agreements among AAPCP's members to fix prices and other terms of dealing with health insurance firms and other third-party payors (hereinafter, "payors"), and to refuse to deal with payors 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 any Respondent that said Respondent violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint

The allegations in the Commission's proposed complaint are summarized below.

AAPCP has approximately 45 primary care physicians in its membership. A board of managers operates AAPCP, and Dr. Patt is the board's chairman. Except to the extent that competition has been restrained as alleged in the proposed complaint, AAPCP's members compete with each other as internists, pediatricians, family physicians, or general practitioners, in offices located in the Aurora, Colorado, area. To be competitively marketable to employers and other purchasers in the Aurora area, a payor's health insurance plan must include in its network of participating physicians a large number of primary care physicians who practice in the Aurora area.

The physicians formed AAPCP as a vehicle collectively to negotiate contracts with payors, and thereby to achieve contracts containing higher fees and other, more advantageous terms than the individual physicians could obtain unilaterally. AAPCP members authorized AAPCP to negotiate for this purpose. Members also agreed to accept "non-risk" contracts, which are contracts that do not involve sharing among physicians of financial risk, through arrangements such as capitation or fee withholds. Further, before the entire organization could accept a proposed payor contract, AAPCP's board had to approve it.

In or about May 2000, AAPCP retained Ms. Brauchler, a non-physician consultant, after she had made a board presentation showing how AAPCP could collect fee information from members and

use that information to reach a consensus on an initial fee level to demand from payors on the collective membership's behalf.

Sometimes a network of competing physicians uses an agent to convey to payors information obtained individually from the physicians about fees or other significant contract terms that they are willing to accept. The agent may also convey to the physicians all payor contract offers, which the physicians then unilaterally decide whether to accept or reject. Such a "messenger model" arrangement, which 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 (*see* http://www.ftc.gov/reports/hlth3s.htm.), can facilitate and minimize the costs involved in contracting between physicians and payors, without fostering an agreement among competing physicians on fees or fee-related terms.

AAPCP purported to operate as a messenger, but, in practice, it did not do so. Rather, in 2000 and 2001, Dr. Patt and Ms. Brauchler, together with Dr. Gaede, who is an *ex-officio* member of the board, and other physicians designated by Respondent AAPCP, on behalf of Respondent AAPCP's members, used the information gathered from members to negotiate fees and other competitively significant terms collectively on behalf of AAPCP's members. Only if a payor offered a contract containing sufficiently high fees did Drs. Patt and Gaede and Ms. Brauchler recommend that the board approve the contract and that the members accept it. The Respondents refused to recommend to the board, or convey to AAPCP's members, contract offers containing price and other terms that they deemed to be deficient. Instead, they demanded, and received, contract terms that were more economically advantageous, from the physicians' perspective, than the physicians themselves could have obtained by negotiating individually rather than collectively.

AAPCP functioned as its members' *de facto* exclusive representative. Dr. Patt and Gaede and Ms. Brauchler told payors that AAPCP had the authority to negotiate and sign contracts on behalf of all of its members, and AAPCP's members themselves sent letters to payors, asserting that they would deal with payors only through AAPCP and not unilaterally. Respondents also successfully applied coercive tactics. For example, they advised AAPCP members to terminate, or threaten to terminate, their pre-existing, individual contracts with payors. Many AAPCP members complied, to pressure payors into offering a new contract to AAPCP that paid fees at or above the level that the physicians, through AAPCP, collectively demanded. The terminations and threats of termination left payors in the untenable position of having to pay higher fees to AAPCP members, or being denied such members' inclusion in the payors' respective provider networks. As a consequence of this conduct, AAPCP or its members contracted with various payors for fees that were higher than the fees such payors had agreed to pay other primary care physicians in the area.

Respondents' joint negotiation of fees and other competitively significant terms has not been reasonably related to any efficiency-enhancing integration. AAPCP members have not financially or clinically integrated their practices to create sufficiently substantial potential efficiencies. Respondents'

actions have restrained price and other forms of competition among the members, caused fees for physician services to rise, and harmed consumers, including health plans, employers, and individual patients.

The Proposed Consent Order

The proposed order is designed to prevent recurrence of these illegal concerted actions, while allowing Respondents to engage in legitimate conduct that does not impair competition. The proposed order's core prohibitions are contained in Paragraphs II and III.

Paragraph II is intended to prevent the Respondents from participating in, or creating, future unlawful physician agreements.

Paragraph II.A prohibits AAPCP, Drs. Patt and Gaede, and Ms. Brauchler 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 not to deal with any payor through an arrangement other than AAPCP.

Paragraph II.B prohibits these Respondents from facilitating exchanges of information between physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C prohibits them from attempting to engage in any action prohibited by Paragraph II.A or II.B. Paragraph II.D prohibits them from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

Paragraph II also contains three provisos intended to clarify certain types of agreements that Paragraph II does not prohibit. The first proviso applies to Ms. Brauchler, the second to Drs. Patt and Gaede, and the third to AAPCP. Each provides that nothing in Paragraph II prohibits the applicable Respondent from engaging in conduct that is reasonably necessary to form, participate in, or act in furtherance of, a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The proviso applies to AAPCP only if the physicians who participate in the arrangement are available to enter into payor contracts outside the arrangement, *i.e.*, the arrangement is not exclusive.

As defined in the proposed order, a "qualified risk-sharing joint arrangement" must satisfy two conditions. First, all physician participants must share substantial financial risk through the arrangement and thereby create 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. The definition of financial risk-sharing tracks the discussion of that term contained in

the Health Care Statements.

As defined in the proposed order, a "qualified clinically-integrated joint arrangement" also must satisfy two conditions. First, all physician participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns, creating a high degree of interdependence and cooperation among physicians, in order to control costs and ensure the quality of services provided. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement. This definition also reflects the analysis contained in the Health Care Statements.

Paragraph II's provisos, as they apply to Drs. Patt and Gaede and Ms. Brauchler, also provide that Paragraph II does not prohibit them from facilitating an agreement solely between physicians who are part of the same medical group practice. The proposed order defines such a practice as a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one physician practices medicine.

Paragraph III prohibits Ms. Brauchler, for a period of three years, from negotiating with any payor on behalf of any current or past member of AAPCP, and from advising any current or past member of AAPCP to accept or reject any term, condition, or requirement of dealing with any payor.

Ms. Brauchler is not prohibited from performing legitimate "messenger" services, including with respect to AAPCP. As noted above, a properly constituted messenger can efficiently facilitate the establishment of physician-payor contracts and avoid fostering unlawful agreements among the participating physicians. As set forth in the proposed complaint, however, while Ms. Brauchler purported to operate as a legitimate messenger, in practice she fostered anticompetitive physician agreements by negotiating directly with payors for higher fees on behalf of AAPCP's entire membership, and by advising AAPCP's members collectively to reject various payor offers and to engage in concerted refusals to deal. For this reason, Paragraph III is a necessary and appropriate supplement to Paragraph II's provisions. Under the proposed order, Ms. Brauchler may serve as AAPCP's messenger, but, pursuant to Paragraph III, may not negotiate for or advise any AAPCP member with respect to payor contracts.

Paragraph IV.C requires AAPCP to terminate, without penalty at any payor's request, current contracts with payors with respect to providing physician services. This provision is intended to eliminate the effects of Respondents' anticompetitive concerted actions. The remaining provisions of Paragraph IV and Paragraphs V through VIII of the proposed order impose obligations on Respondents with respect to distributing the proposed complaint and order to AAPCP's members and to other specified persons, and reporting information to the Commission.

The proposed order will expire in 20 years.