

**Analysis of Agreement Containing Consent Order to Aid Public Comment**  
***In the Matter of Evanston Northwestern Healthcare Corporation***  
***and ENH Medical Group, Inc., Docket No. 9315***

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Evanston Northwestern Healthcare Corporation (“ENH”), ENH Medical Group, Inc. (“ENH Medical Group”), and ENH Faculty Practice Associates (“Faculty Practice Associates”). On February 10, 2004, the Commission issued a three-count complaint, alleging in Count III that ENH and ENH Medical Group (“Respondents”) violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by negotiating price and other competitive terms on the collective behalf of otherwise independent, competing physicians. The proposed consent order, should the Commission accept it, would settle solely the allegations that are set forth in Count III of the complaint. The hearing on the remaining charges in the complaint is scheduled to commence before the Administrative Law Judge on February 10, 2005.

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 its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by ENH, ENH Medical Group, or Faculty Practice Associates that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

**The Complaint Allegations Pertaining to Count III**

ENH, a non-profit corporation, owns Faculty Practice Associates, which is also a non-profit corporation. Faculty Practice Associates employs approximately 460 physicians (“salaried physicians”) who practice medicine in several offices either in Cook or Lake Counties, Illinois, and who primarily serve ENH’s patients. Faculty Practice Associates is the sole shareholder of ENH Medical Group, a for-profit corporation. ENH Medical Group, on behalf of physicians whom it represents, negotiates and enters into contracts with health plans and other third-party payors (“payors”), pursuant to which the physicians provide services to the payors’ insureds in exchange for a fee. Among the contract terms that ENH Medical Group negotiates is the price by which payors compensate physicians for their provision of services.

ENH Medical Group jointly represented two categories of physicians in its negotiations with payors for contracts: the salaried physicians, and about 450 other, independent physicians, who also practice medicine throughout Cook and Lake Counties (“independent physicians”). The salaried and independent physicians both include within their ranks specialists and primary

care physicians. In the absence of their collective price fixing through ENH Medical Group, these physicians compete in the same geographic area for the sale of comparable physician services.

Competition has the effect of lowering the costs, and improving the quality, of physician services. ENH Medical Group deprived payors, employers, and individuals of the benefits of physician competition, by orchestrating agreements among rival physicians on price and other competitively significant terms, and by negotiating with payors for contracts that contained such fixed terms. By eliminating physician competition, ENH Medical Group was able to obtain increases in the prices that payors paid to the salaried and independent physicians.

The salaried physicians and independent physicians have not integrated their practices in a meaningful manner to enhance efficiency. In connection with the activities described in the complaint, the physicians have not shared financial risk. They also have not shared information technology systems, or complied with common performance standards or clinical protocols, to enhance services. ENH Medical Group's contracting practices violate of Section 5 of the Federal Trade Commission Act.

### **The Proposed Consent Order**

The proposed consent order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence, while allowing Respondents to engage in legitimate conduct that does not impair competition. The proposed order is similar to recent orders that the Commission has issued to settle charges relating to unlawful agreements to raise physician prices.

The proposed order's specific provisions are as follows:

The order's core prohibitions are contained in Paragraphs II, III, and IV. Paragraph II.A prohibits Respondents 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 Respondents' arrangements.

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

As in other orders addressing health care providers' collective contracting with payors, certain kinds of agreements are excluded from the general bar on joint negotiations. Respondents are not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, whether a

“qualified risk-sharing joint arrangement” or a “qualified clinically-integrated joint arrangement.” However, such arrangements must not restrict the ability, or facilitate the refusal, of the arrangements’ physician members to deal with payors on an individual basis or through any other arrangement. As discussed below in connection with Paragraph IV, Respondents are required to notify the Commission about such an arrangement prior to negotiating on behalf of the arrangement’s members, or before those members jointly discuss any terms of dealing with a payor.

Respondents would not be barred from activities solely involving the salaried physicians with respect to ENH physician services.

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 agreements concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

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 agreements concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

Paragraph III requires Respondents 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. The paragraph also sets out the information necessary to make the notification complete.

In the event that a Respondent forms a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, Paragraph IV requires the Respondent, for five years, to notify the Commission at least 90 days prior to initially contacting, negotiating, or entering into agreements with payors concerning the arrangement. Notification is not required for subsequent negotiations or agreements with payors pursuant to any arrangement for which notice was already given under Paragraph IV, nor is notice required for renegotiation of any risk-sharing contract identified at confidential Appendix 1 of the Order. The final proviso to Paragraph IV sets out the information necessary to make the notification complete, and establishes the Commission’s right to obtain additional information regarding the arrangement.

Paragraph V, which applies only to ENH Medical Group, requires ENH Medical Group to distribute the complaint and order to: (1) all physicians that have participated in ENH Medical Group since January 1, 2000, and (2) payors that ENH Medical Group has a record of having been in contact with regarding contracting for the provision of affiliated physician services since

January 1, 2000. Paragraph V.B requires ENH Medical Group, at any payor's request and without penalty, or within one year after the Order is made final, to terminate its current contracts with respect to providing physician services. However, ENH Medical Group is not required by Paragraph V.B to terminate its risk-sharing contracts identified in confidential Appendix 1 of the order. Paragraph V.C requires ENH Medical Group to distribute payor requests for contract termination to all physicians who participate in ENH Medical Group.

The remaining provisions of Paragraph V, and Paragraphs VI through X, of the proposed order impose obligations on ENH Medical Group and ENH to report or provide access to information to the Commission to facilitate monitoring Respondents' compliance with the order.

The proposed order will expire in 20 years.