

**ANALYSIS OF AGREEMENT CONTAINING  
CONSENT ORDER TO AID PUBLIC COMMENT**

*In the Matter of Boulder Valley Individual Practice Association, et al, File No. 0510252*

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent Order with Boulder Valley Individual Practice Association (“BVIPA”). The agreement settles charges that BVIPA violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by, among other things, orchestrating and implementing agreements among competing physician members of BVIPA to fix the price at which BVIPA physicians contract with health plans.

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 decide whether to 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 the proposed respondent 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.

BVIPA is a type of organization commonly referred to in the health care industry as an “independent practice association” because its members consist of independent physicians in solo and small group practices. BVIPA is controlled by its approximately 365 physician members in the Boulder County, Colorado area.

The Complaint challenges BVIPA’s conduct starting in 2001, when BVIPA, on behalf of its members, began to negotiate the prices and terms in payer contracts at which its otherwise competing physician members would provide services to subscribers of health plans. BVIPA is governed by a board of directors consisting of physician members elected by the membership. Physicians joining BVIPA sign an agreement that gives BVIPA the authority to contract with health plans on their behalf, and they agree to accept the payment for their services that BVIPA negotiates. Members can provide input to BVIPA on whether a proposed rate level was acceptable.

Between 2001 and 2006, BVIPA, on behalf of its members, negotiated and signed agreements with approximately 17 payers and conducted periodic renegotiations of its contracts with large payers to obtain rate increases. BVIPA threatened payers facing rate increases with

termination of their contracts when they refused to negotiate or otherwise respond to BVIPA's demands. Payers threatened with termination ultimately yielded to BVIPA's price demands.

BVIPA actively discouraged members from contracting directly with payers. Some payers attempted to contract with some of BVIPA's physician members with specialties that were important for the marketing of a provider network, and found that the providers refused to contract with payers outside BVIPA. Consequently, payers had to negotiate and sign contracts with BVIPA to ensure that these physicians would participate in the payers' health plans.

In 2004, BVIPA purported to offer payers three options for contracting with BVIPA members: a single-signature contract that "delivered the entire BVIPA network," a "modified messenger model" that "may or may not deliver our entire network;" and direct contracting with individual members outside the IPA. Although BVIPA claimed to offer payers a choice of contracting methods, BVIPA did not develop or use a messenger model, and it continued to encourage its members not to contract outside the IPA.

BVIPA's conduct had the effect of unreasonably restraining trade and hindering competition in the provision of physician services by unreasonably restraining price and other forms of competition among physicians; increasing prices for physician services; and depriving health plans, employers, and individual consumers of the benefits of competition among physicians. BVIPA members did not engage in any efficiency-enhancing integration of their practices sufficient to justify its challenged conduct. Accordingly, the Complaint alleges that BVIPA 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, while leaving BVIPA free to engage in legitimate, potentially procompetitive conduct. 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 BVIPA from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician's behalf; (2) to refuse to deal, or threaten to refuse to deal, with payers in furtherance of any conduct or agreement prohibited by any other provision of Paragraph II, (3) on any terms on which a physician is willing to deal with any payer; or (4) not to deal individually with any payer, or not to deal with any payer other than through BVIPA.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits BVIPA from facilitating exchanges of information between physicians concerning any physician's willingness to deal with a payer or the terms or conditions, including price terms, on which the physician is willing to deal with a payer. Paragraph II.C bars attempts to engage in

any action prohibited by Paragraph II.A, or II.B, and Paragraph II.D. proscribes BVIPA 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, Paragraph II excludes certain kinds of agreements from its prohibitions. First, BVIPA is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The arrangement, however, must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

As defined in the proposed Order, a "qualified risk-sharing joint arrangement" possesses two characteristics. First, all physician participants must share substantial financial risks 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 BVIPA to notify the Commission before it enters into any arrangements to act as a messenger or an agent on behalf of any physicians, with payers regarding contracts. Paragraph IV sets out the information necessary to make the notification complete.

Paragraph V, for three years, requires BVIPA to notify the Commission before participating in contracting with health plans on behalf of either a qualified risk-sharing or a qualified clinically-integrated joint arrangement. Paragraph VI sets out the information necessary to satisfy the notification requirement.

Paragraph VII imposes other notification obligations on BVIPA and requires the termination of certain contracts that were entered into illegally. Paragraphs VII.A requires BVIPA to distribute the Complaint and the Order to (1) physicians who have participated in BVIPA since 2001; (2) to various past and current personnel of BVIPA; and (3) to payers with whom BVIPA has dealt since 2001. Paragraph VII.B requires BVIPA, at any payer's request and without penalty, to terminate its existing contracts with the payer for the provision of physician services. Paragraph VII.B. allows certain contracts currently in effect to be extended at the written request of the payer no longer than one year from the date that the Order becomes final. Paragraph VII.C requires BVIPA to distribute payer requests for contract termination to

physicians who participate in the contract. Paragraph VII.D requires BVIPA, for three years, to provide new members, personnel, and payers not previously receiving a copy, a copy of the Order and the Complaint. Paragraph VII.D also requires BVIPA to publish annually a copy of the Order and the Complaint in its newsletter.

Paragraphs VIII, IX, and X impose various obligations on BVIPA to report or provide access to information to the Commission to facilitate the monitoring of compliance with the Order. Finally, Paragraph XI provides that the Order will expire in 20 years.