physicians in a manner that substantially replicates ownership. These requirements will assure that there is a sufficient divergence of economic interest between those subcontracting physicians and the owners such that the owners have the incentive to bargain down the fees of the subcontracting physicians. Indeed, without these requirements, the organization could serve as a cartel manager for all members of Danbury Hospital's active medical staff by, for example, passing through directly to payers substantial liability for making payments to the subcontracting physicians.

A QMCP would meet the subcontracting requirements if, for example, a QMCP were compensated on a capitated, per diem, or diagnostic related group basis and, in turn, reimbursed subcontracting physicians pursuant to a fee schedule. In such a situation, an increase in the fee schedule to subcontracting physicians during the term of a QMCP's contract with the particular payer would not be directly passed through to the payer but rather would be borne by a QMCP itself. This would provide a substantial incentive for a QMCP to bargain down its fees to the subcontracting physicians.

On the other hand, the subcontracting requirements would not be met if a QMCP's contract with a payer were structured so that significant changes in the payments by a QMCP to its physicians directly affected payments from the payer to a QMCP, or if the payer directly bears the risk for paying the panel physicians or pays the panel physicians pursuant to a fee-for-service schedule. The requirements would also not be satisfied if contracts between a QMCP and the subcontracting physicians provided that payments to the physicians depended on, or varied in response to, the terms and conditions of a QMCP's contracts with payers.8 Any of these scenarios would permit a QMCP to pass through to payers, rather than bear, the risk that its provider panel will charge fees that are too high or deliver services inefficiently.9

### 2. Prohibitions Against Exclusionary Acts

In addition to helping to organize HealthCare Partners and DAIPA, DHS used other exclusionary acts to maintain its market power in acute impatient hospital services and to gain an unfair advantage in markets for outpatient services. The proposed Final Judgment eliminates the continuance or recurrence of such exclusionary acts.

Section IV(C) of the proposed Final Judgment prohibits Danbury Hospital from exercising its control over staff privileges with the purpose of reducing competition with the Hospital in any line of business, tying the availability of inpatient services to any other service, or conditioning favorable inpatient rates on exclusive use of Danbury Hospital's outpatient services. These prohibitions are crafted to permit Danbury Hospital to assure the quality of care delivered at the Hospital, participate in managed care plans, retain freedom to contract on acceptable terms, and compete aggressively in outpatient markets, while at the same time ensure that Danbury Hospital does not unlawfully abuse its monopoly in acute inpatient services. The Hospital is also required to report annually its inpatient rates to payers. (Section V(B))

# 3. Other Substantive Provisions

Section IV(B)(2) of the proposed Final Judgment enjoins the disclosure to any physician of any financial or competitively sensitive business information about any competing physician. It also enjoins defendants' requiring any physician to disclose competitively sensitive information about any payer. This provision will ensure that defendants do not exchange information that could facilitate price fixing or other anticompetitive harm.

Section V(A) requires DAIPA and HealthCare Partners to give notice to doctors and managed care plans that each doctor currently under contract with HealthCare Partners is free to contract separately from DAIPA and HealthCare Partners. This will help abate any continuing effect from the unlawful conspiracy.

## 4. Conclusion

The Department of Justice believes that the proposed Final Judgment contains adequate provisions to prevent further violations of the type upon which the Complaint is based and to remedy the effects of the alleged conspiracy and DHS' exclusionary acts.

payments in such a way that ensures that subcontracting and owning physicians receive equal overall compensation. The proposed Final Judgment's injunctions will restore the benefits of free and open competition in the Danbury area and will provide consumers with a broader selection of competitive health care plans.

#### IV

Alternative to the Proposed Final Judgment

The alternative to the proposed Final Judgment would be a full trial on the merits of the case. In the view of the Department of Justice, such a trial would involve substantial costs to the United States, the State of Connecticut, and defendants and is not warranted because the proposed Final Judgment provides all of the relief necessary to remedy the violations of the Sherman Act alleged in the Complaint.

#### V

Remedies Available to Private Litigants

Section 4 of the Clayton Act. 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and a reasonable attorney's fee. Entry of the proposed Final Judgment will neither impair nor assist in the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent lawsuits that may be brought against one or more defendants in this matter.

## VI

Procedures Available for Modification of the Proposed Final Judgment

As provided by Sections 2 (b) and (d) of the APPA, 15 U.S.C. § 16 (b) and (d), any person believing that the proposed Final Judgment should be modified may submit written comments to Gail Kursh, Chief: Professions & Intellectual Property Section/Health Care Task Force; United States Department of Justice; Antitrust Division; 600 E Street, N.W.; Room 9300; Washington, D.C. 20530, within the 60-day period provided by the Act. Comments received, and the Government's responses to them, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free, pursuant to Paragraph 2 of the Stipulation, to withdraw its consent to the proposed Final Judgment at any time before its entry, if the Department should

<sup>&</sup>lt;sup>8</sup> Nothing in the proposed Final Judgment prohibits a QMCP from entering into arrangements that shift risk to subcontracting physicians, such as may be desirable to create cost-reducing incentives, so long as those arrangements are consistent with the criteria for a QMCP set forth in Section II(L) of the Judgment.

<sup>&</sup>lt;sup>9</sup> Similarly, a QMCP would fail the ownership replication restriction of Section II(L) of the proposed Final Judgment if, for example, the owners paid themselves a dividend and then, through declaration of a bonus, paid the same or similar amount to the subcontracting physicians. The same would be true if the owners otherwise structured dividends, bonuses, and incentive