FEDERAL TRADE COMMISSION

San Francisco Regional Office

Box 36005
450 Golden Gate Ave.
San Francisco, CA 94102
(415) 556-1270

OCT 2 3 1989

Lin Ng, Esq.
Deputy Attorney General
Office of the Attorney General
300 South Fourth Street, Suite 1100
Las Vegas, Nevada 89101

Re: Proposed Regulation of State Board of Physical Therapy

Dear Ms. Ng:

The Federal Trade Commission's Bureaus of Competition, Consumer Protection and Economics, and its San Francisco Regional Office, are pleased to respond to your request for comments on a regulation proposed by the Nevada State Board of Physical Therapy ("Board").[1] The proposed regulation[2] defines certain prohibited business practices that may subject physical therapists to discipline by the Board. As discussed below, we believe that Section 21 of the proposed regulation, which apparently is primarily intended to prohibit a physical therapist from being employed by a referring physician, would unreasonably restrict competition among physicial therapists, and between physicians and physical therapists. As a result, consumers would be deprived of the benefits of competition among these providers, and would be limited in their choice of the types of practices from which they may obtain physical therapy treatment. The Board thus runs significant antitrust risk if it adopts the proposed regulation.

For several years, the Commission has investigated the competitive effects of restrictions on the business practices of state-licensed professionals, including dentists, lawyers, physicians, non-physician health care providers, and others.

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[1] These comments represent the views of the Commission's Bureaus of Competition, Consumer Protection, and Economics, and of its San Francisco Regional Office, and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

[2] Chapter 640, Section 21.

The goal of the Commission has been to identify and urge the removal of those restrictions on practice that impede competition, increase costs, or harm consumers without providing adequate countervailing benefits. We believe that proposed Section 21 may have these effects.

Section 21 of the proposed regulation identifies the kinds of financial arrangements that would subject a physical therapist to discipline. Part 1(b) of proposed Section 21 prohibits a physical therapist from:

> Profiting by means of credit or other valuable consideration, including wages, an unearned commission, a discount or gratuity, from a referral of a patient including any relative or associate of the person making the referral.

We understand that the Board's intent is to prohibit employment of physical therapists by physicians who prescribe physical therapy services.[3] This intent is evident from the language of Section 21.2, which excludes from the rule's coverage only employment situations where physical therapists work for either hospitals or other physicial therapists. However, the proposed rule's effect is much broader than prohibiting physician-physical therapist employment relationships. The rule would also prohibit employment of a physical therapist by a clinic, health maintenance organization, or any health care entitity not specifically excluded under Section 21.2. We believe this will have significant anticompetitive results.

Our primary concern is that the proposed rule would deny consumers the benefits of the full range of service, price, and quality options that a competitive market would provide. The proposed employment restrictions would hinder the development of more efficient practices that reduce costs through economies of scale or scope. In addition, providers would be limited in offering allied services at a single location, which may provide greater convenience and lower costs to consumers who would otherwise have to go to different locations to obtain these services. For example, a patient may wish to obtain care at a

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[3] A literal reading of the regulation, however, might lead to absurd results. For example, under the regulation, a physical therapist may not receive any remuneration from a referral of a patient. Because proposed Section 21.1(b) does not define the source of the remuneration, it could conceivably subject physical therapists to discipline for receiving payment (i.e., "valuable consideration") from patients who are referred, thus outlawing free standing physical therapy practices. We do not believe this was the Board's intent.

clinic where complementary medical services (i.e., diagnosis and therapy) are offered at the same location (e.g., a sports medicine clinic, or occupational health clinic). If the proposed regulation is adopted, this option will not be available.[4]

We understand that the regulation may be intended to prevent the potential for abuse of the trust that a patient places in a practitioner to make appropriate referrals based on his or her independent professional judgment of the patient's best interest. The Board may be concerned that consumers could be deceived about the financial arrangement between physicians and physical therapists. There are, however, less restrictive means of preventing abuse or deception than prohibiting employment arrangements. For example, an ownership disclosure requirement could be adopted. Nevada law already provides that a physician may be disciplined for failing to disclose to patients any conflict of interest.[5]

Because of their adverse effects on consumer welfare, the Commission has taken legal action against restrictions on employment relationships in health care practice. For example, in a case challenging various ethical code provisions enforced by the American Medical Association, the Commission found that restrictions on physicians' employment relationships precluded the use of salaries or other arrangements that may permit the development of innovative forms of health care delivery that are cost efficient, and therefore beneficial to consumers.[6] In addition, the Commission found that the AMA's restrictions on joint business arrangements between physicians and non-physicians inevitably had an adverse effect on competition because they prevented physicians from adopting more efficient business formats.[7] The proposed rule could have similar anticompetitive

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[4] Arguably, the proposed regulation's prohibitions on employment would still permit physicians and physical therapists to practice at the same location as separate business entities. Restrictions on efficient forms of practice, however, generally harm consumers by raising costs and prices.

[5] Nev. Rev. Stats. § 630.305(6) (1985). See also Cal. Bus. & Prof. Code §654.2, which requires that physicians disclose in writing to patients any financial interest they have in facilities to which patients are referred, and inform patients that they do not have to go to the provider the physician has selected.

[6] American Medical Ass'n, 94 F.T.C. 701, 1016-18, aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982).

(Footnote continued)

effects and therefore be the subject of antitrust scrutiny.[8]

Finally, we understand that the Board is relying on Nevada Revised Statutes §640.160 to support promulgation of Section 21. The statute prohibits physical therapists from "entering into any contract or arrangement which provides for the payment of an unearned fee to any person following his referral of a patient." Although we are not expert in Nevada law, we do not believe this section of the statute provides a legally sufficient basis for the proposed regulation. There is no indication in the legislative history that the term "unearned fee" was intended to include payment for services actually provided by an employee.[9] Nor is the plain meaning of the statute susceptible to such an interpretation. Payment received for a nurse's administration of an injection can hardly be considered an unearned fee to the physician who employs the nurse. Similarly, payment received for a physical therapist's administration of therapy does not constitute an unearned fee to the physician who employs the physical therapist.[10]

In conclusion, the proposed regulation is likely to injure consumers by reducing competition. It is also broader than necessary to serve the Board's interest in protecting consumers, who could be protected through less severe restrictions such as

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7 American Medical Ass'n, supra, 94 F.T.C. at 1018.

8 Absent state action, anticompetitive conduct by state regulatory boards can violate the antitrust laws. See, e.g., United States v. Texas State Board of Public Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978), aff'd per curiam as modified, 592 F. 919 (5th Cir.), rehearing denied, 595 F.2d 1221, cert. denied, 444 U.S. 925 (1979); Louisiana State Board of Dentistry, FTC Dkt. 9188 (Consent, Aug. 26, 1985); Massachusetts Board of Registration in Optometry, FTC Dkt. 9195 (Initial Decision filed June 23, 1986).

9 Meeting of the Senate Committee on Commerce and Labor, March 11, 1981, at p. 8 (Senator Wilson, Chairman).

10 It is significant that other legislation directed at resolving the same problem of patient exploitation and physician conflict of interest has made it clear that employment relationships do not fall into the category of financial arrangements that should be prohibited. For example, the Medicare and Medicaid Antifraud and Anti-abuse Amendments of 1977, 42 U.S.C. §§1395nn(b)(3)(B) and 1396h(b)(3)(B)) specifically do not apply to "any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services."

disclosure of financial interests. Finally, the adoption of the proposed regulation may expose the Board to antitrust risk. For all of these reasons, the staff of the Federal Trade Commission opposes the promulgation of the proposed regulation.

Very truly yours,

Janet M. Grady

Janet M. Grady
Regional Director