



Office of Commissioner
Rohit Chopra

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

*Regarding the Commission's Advocacy to the Department of Veterans Affairs
Commission File No. V210000*

January 15, 2021

The Commission has voted to authorize a comment submission in support of a rule by the Department of Veterans Affairs (VA). The rule seeks to confirm the VA's ability to preempt certain state patient protection laws for health care professionals employed by the VA in certain circumstances.

While I have supported efforts for states to offer reciprocity and portability for licensed workers, elimination of state patient protections through federal preemption is a different proposition altogether and requires a more careful, rigorous analysis.¹ I am troubled that the staff comment's embrace of preemption focuses solely on competition-related issues and does not consider important consumer protection issues relating to veterans' health. I understand the VA's need to deploy its health care professionals across state borders, especially during a national health emergency, but the comment goes beyond the VA's rule with regard to preemption.

In the past, the Commission has taken a more thoughtful approach to balancing federal and state laws that protect consumers and competition.² The Commission has long recognized how state laws can play a role in protecting consumer interests. State medical boards, in particular, play a

¹ The federal government has a long history of ill-conceived preemption efforts that undermine protections for families. In finance, efforts by federal banking regulators to preempt state enforcement contributed directly to the financial crisis. See Alan White et al., *The Preemption Effect: The Impact of Federal Preemption of State Anti-Predatory Lending Laws on the Foreclosure Crisis*, UNIVERSITY OF NORTH CAROLINA: CENTER FOR COMMUNITY CAPITAL (Aug. 2010), <https://communitycapital.unc.edu/research/the-impact-of-federal-preemption-of-state-anti-predatory-lending-laws-on-the-foreclosure-crisis/>. In the airline sector, federal efforts to block state enforcement have resulted in weakened protection for passengers, and have impeded state attorneys general during this pandemic. See, Press Release, Off. of the Colorado Att'y Gen., Att'y Gen. Phil Weiser Urges Congress to Adopt New Consumer Protections for Airline Industry Customers (Oct. 2, 2020), <https://coag.gov/press-releases/10-2-20/>. And when it comes to consumer privacy, tech behemoths are eagerly trying to hit delete on critical state protections, knowing that federal legislation is often weaker. See Michael Beckerman, *Americans Will Pay a Price for State Privacy Laws*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/opinion/state-privacy-laws.html>.

² In the context of data security, the Commission has determined it would be inappropriate to preempt state laws that are more protective of consumers, but do not conflict with federal requirements. See, e.g., Letter from Donald S. Clark, Sec'y, Fed. Trade Comm'n, to the Hon. John P. Burke, Comm'r, Dep't of Banking (June 7, 2002), https://www.ftc.gov/system/files/documents/rules/privacy-consumer-financial-information-financial-privacy-rule/response_preemption_connecticut.pdf.

critical role when it comes to taking disciplinary actions against medical practitioners who have engaged in misconduct and malpractice.

The VA is lucky to attract outstanding physicians among its ranks. However, we shouldn't lose sight of the fact that there have been situations where VA physicians have had their licenses revoked by a state medical board, which has been a source of past controversy.³

Unfortunately, the FTC staff comment – which is not joined by the staff of the FTC's Bureau of Consumer Protection – does not address how, under the VA rule, veterans harmed by physician misconduct can seek appropriate disciplinary action, as well as other patient protection concerns. This failure to outline the full range of impacts of the rule on veterans is a mistake. I am also disappointed that the Commission has failed to maintain its traditional bipartisan approach to advocacy on competition and consumer protection issues. For these reasons, I dissent.

³ Donovan Slack, *Illegal VA policy allows hiring since 2002 of medical workers with revoked licenses*, USA TODAY (Dec. 21, 2017), <https://www.usatoday.com/story/news/politics/2017/12/21/va-policy-years-allows-hiring-medical-workers-revoked-licenses-violationhiring-policy-breaks-breaks-1/971058001/>.