UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Competition
Bureau of Economics

September 11, 2020

The Honorable Ken Paxton
Attorney General of Texas
Attn: Opinions Committee

Electronic submission Re: RQ-0371-KP: opinion.committe@texasattorneygeneral.gov

Dear Attorney General Paxton:

The staff of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition[1] appreciates the opportunity to comment on the Texas Medical Board's (TMB) request for your opinion, RQ-0371-KP (TMB Request). The Request appears to misconstrue both our December 2019 comments regarding a TMB proposed rule (FTC Staff Comment)[2] and our prior competition advocacy regarding certified registered nurse anesthetist (CRNA) regulations.[3] We write to clarify our position, and we hope that the clarification will be useful as you consider the TMB Request.

The 2019 FTC Staff Comment analyzed the likely competitive effects of certain regulations proposed by the TMB. Our analysis deferred to your prior opinions on the proper construction of Texas statutory provisions at issue;[4] and we deferred to the Texas legislature on the ultimate health and safety standards applicable to CRNAs, physicians,

[1] This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition. The letter does not necessarily represent the views of the Federal Trade Commission ("Commission") or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments.

[2] FTC Staff Comment to the Texas Medical Board on Its Proposed Rule 193.13 to Add Supervision Requirements for Texas Certified Registered Nurse Anesthetists (2019) [hereinafter FTC Staff Comment], https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-comment-texas-medical-board-its-proposed-rule-19313-add-supervision-requirements-texas-certified/v200004_texas_nurse_anesthetists_advocacy_letter.pdf.

[3] The FTC Staff Comment, and other material referenced in the Request, are attached.

[4] FTC Staff Comment, *supra* note 2, at 5-7 (citing Letter from Ken Paxton, Attorney General of Texas, to Sherif Zaafran, M.D., President, Texas Medical Board, Opinion No. KP-0266 (Sept. 5, 2019); 28 Tex. Att'y Gen. Op. No. JC-0117 (1999)).

and other health care professionals.[5] Then, applying our research, advocacy, and enforcement experience and expertise, as well as the findings of expert health and safety authorities, such as the Institute of Medicine (IOM),[6] we recommended that the TMB not adopt the proposed rule in question.[7] Because undue restrictions on the scope of practice of CRNAs and other health care professionals tend to impede competition, which can increase the cost of health care and decrease patients' access to it, we recommended that:

> Texas maintain only those CRNA supervision requirements that advance patient protection, and that the Texas Medical Board avoid adopting regulations that impede CRNA practice in ways that have not been contemplated by the legislature, and that do not demonstrably advance consumer welfare. Correspondingly, we recommend that the Board not impede physician delegation of anesthesia or anesthesia-related services to CRNAs in ways that the legislature did not contemplate and that do not demonstrably advance patient welfare.[8]

We did not advocate for mandatory supervision of CRNAs by physicians.

Discussion

The TMB Request notes that the FTC Staff Comment "expressed concern over CRNA supervision in Texas."[9] That is accurate. The TMB Request then suggests that "the FTC has historically recognized the appropriateness of CRNA supervision."[10] That assertion might lead to a misapprehension of our prior analyses of supervision requirements: the FTC and its staff have never recommended that the states or other regulators mandate physician supervision of CRNAs or other advanced practice nurses. As we explained in 2019, and in the documents cited by the TMB Request, we have observed that mandatory supervision requirements raise competitive concerns. In brief, such requirements "may contract the supply, decrease the availability, or increase the cost of anesthesia services in Texas, without offering countervailing benefits to Texas health care consumers or third-

[5] *Id.* at 11.

[6] The IOM, established in 1970 as the health arm of the National Academy of Sciences, provides expert advice to policy makers and the public and has conducted an intensive examination of issues surrounding advanced nursing practice generally and CRNA practice in particular. *See generally* Inst. of Med., Nat'l Acad. of Sciences, The Future of Nursing: Leading Change, Advancing Health (2011) [hereinafter IOM Report]. Based on a comprehensive literature review, the IOM concluded that, across state regulatory models, CRNAs provide high-quality care, with no evidence of patient harm, with respect to anesthesia and acute services. *Id.* at 108-11.

[7] *Id.*

[8] *Id.*

[9] TMB Request at 14.

[10] *Id.*

party payors."[11] We also noted that the risk of such competitive harm is "likely to be greater in rural and other medically underserved areas of Texas."[12]

In support of a seemingly contrary position, the Request quotes a footnote from prior FTC advocacy, in which we observed that "'[i]ndependent practice' does not . . . mean isolated or unregulated practice."[13] That is, we have observed diverse forms of collaboration and professional oversight in states that do not require direct physician supervision of CRNAs, and that:

> [p]atterns of collaboration are independently established by institutional providers, from large hospital systems to small physician practices, to individual practitioners, with the particulars varying according to resources and demands at the point of service, and standards of care, as well as other regulations.[14]

Similar points could be made about collaboration between and oversight of physicians and other health care professionals, independent of particular state regulatory requirements. We have never endorsed regulatory mandates for physician supervision of CRNAs. To the contrary, we pointed out that "rigid supervision . . . requirements may impede, rather than foster, development of effective models of team-based care."[15] Our analysis there, as in the 2019 FTC Staff Comment, suggested that undue regulatory restrictions—including supervisory requirements—"can impose significant competitive costs on health care consumers—patients—as well as both public and private third-party payors . . . [and] raise considerable competitive concerns."[16]

According to the TMB Request, "[e]ven more compelling is the following statement in the FTC letter . . . 'Based on an extensive review of the safety literature, the IOM has recommended that state laws permit nurses to practice to the full extent of their education, training, and experience.'"[17] Indeed, that is what the IOM has recommended,

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[11] FTC Staff Comment, *supra* note 2, at 1.

[12] *Id.* at 11.

[13] TMB Request at 14 (citing FTC Staff Comment to South Carolina Representative Jenny A. Horne regarding House Bill 3508 and 3078 on Advanced Practice Registered Nurse Regulations, n. 14 (2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-south-carolina-representative-jenny.horne-regarding-house-bill-3508-3078-advanced-practice-registered-nurse-regulations/151103scaprn.pdf).

[14] *Id.*

[15] FTC Staff Comment to South Carolina Representative Jenny A. Horne, *supra* note 13, at 4.

[16] *Id.*; *see also, e.g.*, FTC Staff Comment to the Dep't of Veterans Affairs: Proposed Rule Regarding Advanced Practice Registered Nurses (2016), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-ftc-office-policy-planning-bureau-competition-bureau-economics-department-veterans/v160013_staff_comment_department_of_veterans_affairs.pdf.

[17] TMB Request at 14.

but it has made that recommendation in support of the rescission or repeal of mandatory supervision requirements, not their imposition, as the Request seems to imply. In the IOM's view, such scope of practice restrictions "have undermined the nursing profession's ability to provide and improve both general and advanced care."[18]

In sum, the material from the FTC staff work and the IOM Report cited by the TMB Request, read in context, cautions against undue restrictions on CRNA practice, including supervision requirements, which tend to harm competition and consumers.

Conclusion

We understand that the questions before you are these:

> Whether chapter 157 of the Occupation Code requires a physician to provide any level of supervision to a certified registered nurse anesthetist to whom the physician has delegated authority, and the potential liability for such delegation (RQ-0371-KP).

As noted above, we have not advocated any particular reading of Texas law, but, instead, have relied on prior opinions provided by your office. As discussed in the 2019 FTC Staff Comment, your plain reading of pertinent Texas statutes suggested:

> first, the law does not require the direct supervision of CRNAs; second, the legal responsibility (or liability) of delegating physicians is expressly limited by Texas law; third, particular treatment decisions of CRNAs, acting under delegated authority, are the independent responsibility of those CRNAs; and finally, Texas delegation requirements "shall be liberally construed to permit the full use of safe and effective medication orders to use the skills and services of certified registered nurse anesthetists."[19]

Because health care competition and Texas health care consumers—patients—are likely to be harmed by undue restrictions on CRNA practice, we urge you to consider not just the question of whether Texas law implies "any level" of supervision for CRNAs, or any potential liability associated with the delegation of authority to CRNAs, but the scope of such supervision and potential liability, if any. You have, in the past, avoided expansive readings of Texas law, and you have done so to the benefit of Texas consumers. We hope that, within the bounds of Texas law, you will continue to help maintain the access to competitive markets and affordable care that are crucial for millions of Texans—now more than ever.

[18] IOM Report, *supra* note 6, at 4.

[19] FTC Staff Comment, *supra* note 2, at 7.

Respectfully submitted,

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