

COMMISSION  
APPROVED

10-1007



FEDERAL TRADE COMMISSION

San Francisco Regional Office

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OCT 23 1988

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").<sup>1</sup> The proposed regulation<sup>2</sup> 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 physical 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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<sup>1</sup> 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.

<sup>2</sup> Chapter 640, Section 21.

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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> The proposed rule could have similar anticompetitive

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<sup>4</sup> 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.

<sup>5</sup> 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.

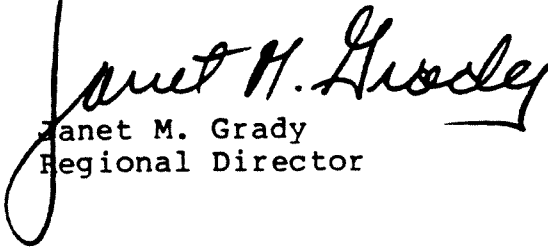
<sup>6</sup> American Medical Ass'n, 94 F.T.C. 701, 1016-18, aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982).

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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  
Regional Director