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March 10, 2014

Donald Clark
Secretary
Federal Trade Commission
Office of Secretary
Room h-113 (Annex X)
600 Pennsylvania Avenue, NW
Washington, DC. 20580

Re: Federal Trade Commission: Notice of public workshop and opportunity for comment (Health Care Workshop, Project No. P131207)

Dear Secretary Clark:

On behalf of the American Physical Therapy Association's 85,000 member physical therapists, physical therapist assistants, and students of physical therapy, we welcome the opportunity to participate in the FTC workshop, "Examining Health Care Competition." Physical therapists are committed to participating in a health care delivery system that will enable them to deliver high quality care to patients needing their services. It is critical for any delivery and payment reform policies that are implemented to enable physical therapists to participate effectively. Improving the quality of care while decreasing costs will require participation by all providers.

We look forward to working with the FTC to remove obstacles so that new evolving payment and delivery reform models are successful. The purpose of this letter is to include some preliminary comments for your consideration prior to the FTC workshop. We plan to participate in the workshop and submit additional comments after hearing the discussion.

About Physical Therapists

Physical therapists are health care professionals who maintain, restore, and improve movement, activity, and health enabling individuals of all ages to have optimal functioning and quality of life. Physical therapists provide care to people who have functional problems resulting from, for example, back and neck injuries, sprains/strains and fractures, arthritis, burns, amputations, stroke, multiple sclerosis, cerebral palsy, and other conditions. Physical therapists practice in a wide variety of inpatient and outpatient settings, including hospitals, skilled nursing facilities, home health agencies,

rehabilitation agencies, physical therapists' private practice offices, physician offices, and schools.

The current minimum educational requirement to become a physical therapist is a post-baccalaureate from an educational program accredited by the Commission on Accreditation of Physical Therapy Education (CAPTE). As of January 1, 2016, the doctor of physical therapy degree (DPT) from a CAPTE accredited program will be the required degree for all entry-level physical therapist education programs. In all 50 states, the District of Columbia, and Puerto Rico, a license is required to practice physical therapy.

Professional Regulation of Health Care Professionals

We appreciate the Commission's interest in enabling health care professionals to practice to the full extent of their training. As the Commission has recognized, there is a need to remove regulations that unnecessarily restrict the ability of nonphysician health care professionals, such as physical therapists, from practicing without well-founded consumer safety justifications.

Currently 48 states and the District of Columbia allow for some form of direct access to evaluation and treatment by licensed physical therapists without a physician referral. Unfortunately, in a majority of these jurisdictions the laws include unwarranted restrictions or mandates tied to treatment absent a physician referral. Such restrictions include visit caps or time limits restricting the number of visits or days the physical therapists can treat the patient before being required to refer the patient to a physician. Such restrictions are not based on evidence, clinical need, patient safety, or the best interest of the patient, and were included because of political pressure during the legislative process by groups opposed to patient direct access. These restrictions lead to interrupted episodes of care, increased costs, and patient frustration. Elimination of the unwarranted restrictions tied to treatment associated with physician referral would enhance access to patient services and help to address delays in care and disparities that exist regarding physical therapy in particular and health care in general.

In addition to the legal restrictions that restrict direct access to physical therapists, the payment barrier also still looms quite large. Insurers are reluctant to eliminate the requirement that the physician review and certify the plan of care, even though this involves greater cost. Although legalizing direct access practice for physical therapists is required, very few patients will be able to take advantage of these legislative reforms until payers also accept these changes.

A Resultant problem—physician owned physical therapist services

Whether it is mandated by law or by insurance policies, the restrictions regarding physician referrals for patients to receive services from a physical therapist clearly create an unfair and unlevel playing field between physician owned physical therapists practices and practices owned by physical therapists. If a physician owns a physical therapy practice, the physician has financial incentives to refer the patient to his/her own practice

rather than a practice in which he/she has no interest. Because the physician controls the referral, it makes it difficult for physical therapists who own and operate their own practices to compete for patients whose access to these physical therapists is controlled by the physicians. Physician referral to services within his/her office also limits the consumer's right to choose his/her physical therapist. The consumer may not recognize this loss of choice, as no other option is offered. APTA has heard of numerous instances where the physician refuses to send the patient to an outside practice for physical therapy services.

We note that there has been a long history of problems relating to physician-owned physical therapy arrangements. Studies have demonstrated that physician-owned physical therapy arrangements have a significant adverse economic impact on consumers, third-party payers, and physical therapists.¹ Specifically, a 2006 report by the Department of Health and Human Services' Office of the Inspector General (OIG)² showed that physical therapy billed directly by physicians represents a large and growing percentage of Medicare's total expenditures for these services. The OIG found that 91% of PT billed by physicians and allowed by Medicare did not meet Medicare guidelines which resulted in a significant amount of improper payments. In addition, Medicare claims from 2002 to 2004 were analyzed and aberrant patterns of billing and unusually high volumes of claims were identified. In a report issued in August 2009, the OIG examined physician "incident to" services billed in 2007 under the Medicare program, and found that 49 percent of rehabilitation therapy services (including primarily therapeutic exercise, massage therapy, ultrasound therapy, therapeutic activities, and electrical stimulation) performed by non-physicians were furnished by staff not trained as therapists that the OIG found to be unqualified.³

Network Adequacy

APTA is concerned about the potential effect network adequacy may have on market practices and competition. As the Department of Health and Human Services (HHS) proceeds with expansion of health insurance coverage through the implementation of the Marketplaces (*formerly known as the health care exchange), it is imperative that each Qualified Health Plan (QHP) have the responsibility to provide enrollees with timely access to a sufficient number of in-network providers to provide physical therapy and other services. While it is true that the Patient Protection and Affordable Care Act (PPACA) and subsequent regulations promulgated by the Centers for Medicare and

¹ Mitchell JM, Scott E. Physician ownership of physical therapy services: Effects on charges, utilization, profits, and service characteristics. *JAMA*. 1992; 268:19-23; Swedlow A, Johnson G, Smithline N, Milstein A. Increased costs and rates of use in the California Workers' Compensation System as a result of self-referral by physicians. *N Engl J Med*. 1992;327:1502-1506; Office of the Inspector General, Department of Health and Human Services. 1994.

² *Physical Therapy in Physician's Offices*, no. OEI-02-90-00590. Washington, DC: OIG and OIG, Physical Therapy Billed By Physicians (May 1, 2006).

³ Office of the Inspector General, Department of Health and Human Services. 2009. *Prevalence and Qualifications of Nonphysician Who Performed Medicare Physician Services*, no. OEI-09-06-00430. Washington, DC.

Medicaid Services (CMS) does mandate that each Marketplace meet certain network adequacy standards to ensure that consumers have necessary access to medical services without unreasonable delays, much of the focus is on hospital systems, primary care, mental health, and oncology providers. We believe that these standards should be expanded to encompass non-physician providers such as physical therapists in private practice, rehabilitation agencies, skilled nursing facilities, home health agencies, and other providers.

Largely, the topic of network adequacy has ignored the potential impact that the marginalization of non-physician providers out of these new QHPs will have on the market place competition and it is our fear that some providers such as physical therapists in private practice will not be afforded adequate safeguards from unfair competition practices through broad and general standards set forth by the PPACA. Therefore, we urge the FTC to examine the market power of health care entities through implementation of the Marketplaces within a Primary Service Area (PSA) and conduct an analysis on whether there are anti-trust implications directly tied to lack of independent non-physician providers within a network.

In addition, we urge FTC to examine the impact that higher cost sharing for consumers when receiving care from an out-of-network provider may have on unfair competition practices. The PPACA does not impose network adequacy requirements on health plans outside the Marketplace. Therefore, if network adequacy standards vary between plans outside and inside of the Marketplace, it could potentially create an unfair advantage for providers within the network, to unduly influence patient selection and amass an abusive share of market power.

Innovations in health care delivery

While APTA supports new innovative models of health care delivery, we believe it is important for the FTC to ensure that these new models do not have anticompetitive effects because they are under-inclusive. In particular, we are concerned about bundled payment models, accountable care organizations, and medical homes because there are inherent incentives to restrict patient choice and control the settings and health care professionals who deliver care. We appreciate the steps that the FTC has taken in the past to safeguard against unfair competition that can arise from the collaborative care models, such as Accountable Care Organizations (ACOs). However, models could still potentially exclude from participation certain classes of providers, and thereby reduce consumer choice and quality, and increase costs. Hospitals or health systems, participating in new delivery models could have considerable power and choose to provide all services through their entities rather than sending them to any other settings that provide physical therapy services. Another concern is that hospitals and health systems could choose to enter into agreements with physicians who are important as referral sources and limit participation of other health care professionals, such as physical therapists in private practice, who are not referral sources. We urge the FTC to guard against anti-competitive actions that result in inappropriate exclusion of providers.

Conclusion

We appreciate the Agencies' efforts through this workshop to enrich its knowledge of the competitive dynamics of evolving health care markets. We urge the FTC to ensure that a legal and regulatory framework is in place that enables hospitals, physicians, physical therapists and other providers to work together to improve the quality of care and to save costs. Thank you for your consideration of these comments. If you need additional information, please contact Gayle Lee at 703-706-8549 or gaylelee@apta.org.

Sincerely,

Paul A. Rockar, Jr, PT, DPT, MS
President

PAR: grl