

Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

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

January 15, 2021

Today, the Federal Trade Commission (the “Commission”) voted to submit an advocacy comment in support of the Department of Veterans Affairs’ (“VA”) interim final rule entitled Authority of VA Professionals to Practice Health Care (“the Rule”).¹ To facilitate the delivery of care to our nation’s veterans, the VA authorizes its health care professionals – who are required by statute to be licensed, registered, or certified by at least one state and working within the scope of their duties – to deliver their services in any state. The Rule codifies this long-standing VA practice and expressly preempts conflicting state laws and regulations by allowing VA healthcare workers to offer their services to veterans and their families, regardless of a state’s licensure or scope of practice requirements, “thereby enhancing beneficiaries’ access to critical VA health care services”.²

Advocacy is a long-standing and essential part of the Commission’s role in protecting American consumers. The original version of the FTC Act passed by the House of Representatives “created the agency solely to gather and disseminate information.”³ During the 1970s, Congress increasingly required government agencies to obtain the FTC’s views on the competitive impact of their actions.⁴ Commissioners’ support for the advocacy program historically has been bipartisan.⁵ During the last eight years, spanning the presidential administrations of both a Democrat and a Republican, the Commission voted to submit approximately 90 advocacy comments on an unanimous or bipartisan basis. We are disappointed by our colleagues’ opposition to the submission of this comment, which advocates for better health care for America’s veterans.

The comment states the Commission agrees with the VA that the Rule will expand access to health services for veterans, increase the supply of available VA health care services, and potentially reduce health care costs. The Rule would benefit veterans, especially those in rural or

¹ Authority of VA Professionals to Practice Health Care, 85 Fed. Reg. 71,838 (Nov. 12, 2020) (to be codified at 38 CFR § 17.419).

² *Id.*

³ Arnold C. Celnikier, *The Federal Trade Commission’s Competition and Consumer Advocacy Program*, 33 ST. LOUIS U. L. J. 379, 380 (1989).

⁴ *Id.* at 382.

⁵ *Id.* at 382-383 (“After the 1976 elections, President Carter appointed liberal Democrat Michael Pertschuk as chairman of the FTC. During Pertschuk’s tenure, the FTC began to actively explore expanding its role as an advisor to certain federal agencies regarding the anticompetitive impact of agency actions... the FTC under Chairman Pertschuk commented on an ad hoc basis upon the competitive implications of a potpourri of federal regulations”).

underserved locations, as VA health care practitioners routinely travel to smaller medical facilities, mobile health units, and clinics in nearby states to provide care that is otherwise unavailable or difficult to obtain.⁶

In the letter, and elsewhere, the Commission recognizes that state licensing regulations can serve a beneficial role by protecting the health and safety of the public.⁷ But licensing regulations can also set up entry barriers, limiting the number of workers who can provide certain services—a matter of longstanding bipartisan agreement.⁸ This limit on the labor supply can restrain competition and result in higher prices and reduce access to health care services, especially those provided across state lines.

Much of the Commission’s competition advocacy is targeted at restraints on competition in the health care sector, a segment of our economy that has a profound impact on consumers’ wallets and well-being. The Rule and the Commission’s support for it are particularly timely given the COVID-19 pandemic, which has necessitated quick responses by the VA to shortages of frontline health care workers in hotspots around the nation.⁹ The federal government and states alike have wisely reacted by expanding access to telemedicine and other mechanisms for

⁶ The VA has previously issued other rules to increase veterans’ access to healthcare from out-of-state providers, including the rule titled *Authority of Health Care Providers to Practice Telehealth*, which received unanimous, bipartisan support from the FTC. Press Release, *FTC Staff Comment Supports VA Telehealth Rule that Will Increase Access to Care, Promote Competition, and Benefit Veterans*, Nov. 2, 2017, <https://www.ftc.gov/news-events/press-releases/2017/11/ftc-staff-comment-supports-va-telehealth-rule-will-increase>. In response to comments raising concerns about discipline of misconduct by out-of-state telehealth practitioners, the VA noted that it “has robust requirements for disciplining providers who fail to provide adequate health care, which includes reporting that provider to his or her licensing board, if applicable. . . . VA currently has a system in place for reporting health care providers to State licensing boards whose behavior or clinical practice so substantially failed to meet generally-accepted standards of clinical practice as to raise reasonable concern for the safety of patients. VA continues to work closely with State licensing boards to further improve the reporting of VA health care providers who have failed in VA’s mission of providing safe care to its beneficiaries. Patients would still have the ability to file a tort claim and States would still have ability to prosecute for criminal offenses. However, this rulemaking only focuses on the expansion of VA telehealth services and only prohibits States from taking actions to enforce a State law, rule, regulation or requirement against VA health care providers while practicing telehealth.” *Authority of Health Care Providers to Practice Telehealth*; Final rule. 83 Fed. Reg. 21897, 21900-21901 (May 11, 2018).

⁷ See FTC STAFF, POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES (“APRNs”) (2014), <https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf>.

⁸ See Obama Administration’s New Steps to Reduce Unnecessary Occupation Licenses that are Limiting Worker Mobility and Reducing Wages, June 17, 2016, available at <https://obamawhitehouse.archives.gov/the-press-office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting>.

⁹ See e.g., Katelyn Burns, *Governors plead with other states for more health care workers to fight coronavirus*, VOX, Mar. 31, 2020, <https://www.vox.com/policy-and-politics/2020/3/31/21201281/coronavirus-staffing-shortage-governors-health-care-workers-help> (“Governors in several of the hardest-hit states put out calls on Monday for health care workers from other states to help treat patients suffering from Covid-19, the disease caused by the novel coronavirus.”).

allowing care to cross state lines.¹⁰ The Rule will mitigate challenges to the VA’s ability to respond quickly in other emergency situations, without fear of state licensing regulations.

The Commission has a long and proud history of bipartisan support for its advocacy comments. This traditional approach relies on Commissioners’ willingness to engage with each other and staff to improve Commission work product. While that support did not materialize with this comment, we hope the agency will soon resume its bipartisan commitment, through competition advocacy and otherwise, to reducing barriers to entry in the provision of healthcare.

¹⁰ See, e.g., Comment from FTC Staff to the Centers for Medicare & Medicaid Services (“CMS”), Dep’t of Health & Human Services (May 29, 2020), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-letter-centers-medicare-medicaid-services-regarding-interim-final-rule-policy-regulatory/v200009_staff_advocacy_letter_cms_telehealth_comment.pdf (supporting provisions in CMS Interim Final Rule that reduce or eliminate restrictive Medicare payment requirements for telehealth during the pandemic, and suggesting that CMS consider making some of these changes permanent); Interim Final Rule with Comment Period, Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency, 85 Fed. Reg. 19,230, 19,246 (April 6, 2020) (temporarily relaxing a requirement for direct supervision requirement of nonphysician practitioners when physicians bill Medicare “incident to” their services by allowing supervision using audio/video telecommunications technology).