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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
SAN FRANCISCO REGIONAL OFFICE

901 Market Street
Suite 570
San Francisco, CA 94103
(415) 995-5220

February 27, 1989

The Honorable Ray Hamlett
Missouri House of Representatives
State Capitol, House Post Office
Jefferson City, MO 65101

Re: House Bill 320

Dear Mr. Hamlett:

[illegible] in response to your request for our views on House Bill 320 (H.B. 320). [illegible] if enacted, would prohibit any physical therapist from accepting wages or any other form of payment from any person who refers [illegible]. In effect, the bill would prevent physical therapists from working for referring physicians or physician-owned physical therapy services. In addition, H.B. 320 would [illegible] physical therapists receiving referral fees.

We believe that the bill is likely to injure consumers by reducing competition among physical therapy providers, thereby decreasing the choices available to consumers. In addition, restrictions on referral fees may interfere with legitimate health care delivery systems that contain costs. We respectfully recommend that the Missouri legislature consider these effects of the proposed legislation in determining whether to enact H.B. 320.

Interest and Experience of the Federal Trade Commission

For more than a decade, the Commission and its staff have investigated the competitive effects of restrictions on the business practices of state-licensed professionals, including dentists, lawyers, physicians, physical therapists and other non-

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1 These comments represent the views of the staff of the Bureau of Competition and the San Francisco Regional Office of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner. The San Francisco Regional Office participated in the preparation of these comments because of its experience in this subject area.

physician health care providers.[2] The goal of the Commission has been to identify and recommend the removal of those restrictions on practice that impede competition or increase costs without providing adequate countervailing benefits to consumers.

<u>Potential Harm to Competition and Limitation of Consumer Choice</u>

H.B. 320 would add a new section, Section 20, to the Missouri statutes that address the grounds for discipline of health care professionals regulated by the State Board of Registration for the Healing Arts ("the Board"). Section 20 would provide that the Board may refuse to issue or renew the license to practice of any physical therapist who

> . . . engages, directly or indirectly in the division, transferring, assigning, rebating or refunding of fees received for professional services or profits by means <u>of a credit or other valuable consideration such as wages</u>, an unearned commission, or gratuity with any person who referred a patient, or with any relative or business associate of the referring person. [Emphasis added.]

This bill, therefore, would subject to discipline any physical therapist who receives wages from a referring physician. Such a provision would have the effect of prohibiting physical therapists from working for any physician who refers patients to that physical therapist. Although the bill provides for certain

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[2] The Commission's work in this area has [illegible] enforcement investigations involving efforts to restrict the practice of physical therapy. <u>See In re Iowa Chapter of the American Physical Therapy Ass'n</u>, Dkt. No. C-3242 (consent agreement barring state physical therapy association from prohibiting its members from accepting employment by physicians or physician-owned clinics) (Nov. 4, 1988). In addition, the Commission's staff has submitted comments concerning legislative and regulatory proposals to enact such restrictions. Letter to The Honorable Chuck Hardwick, Speaker of the New Jersey Assembly (May 21, 1987) (regarding proposed legislation to prohibit physicians from having financial interests in physical therapy practices); letter to Lin Ng, Nevada Deputy Attorney General (Oct. 23, 1986) (regarding proposed regulation by the Nevada State Board of Physical Therapy to prohibit physician employment of physical therapists).

exemptions from its coverage,[3] it would prohibit physical therapists from accepting employment from physicians. Similarly, it would prohibit physical therapists from working for physician-owned physical therapy services or other specialty clinics.[4] In addition, H.B. 320 would apparently prohibit a physical therapist from employing another physical therapist to whom the employing therapist refers patients.[5]

The primary adverse effect of H.B. 320 is that, if enacted, it would deny consumers the benefits of the full range of service, price, and quality options that a competitive market would offer. H.B. 320 may hinder the development of more [illegible] or scope. For example, an orthopedist and a therapist would be unable to open a joint practice that could reduce the administrative costs associated with consultation. Providers would also be limited in offering, and consumers prevented from purchasing, allied services at a single location. This form of allied practice may provide greater convenience and lower costs to consumers who would otherwise have to go to different locations to obtain these services. For example, a patient may wish to obtain care at a clinic where both diagnosis and therapy are offered (e.g., a sports medicine or occupational health clinic). Similarly, a patient may wish to obtain physical

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3 The proposal exempts positions currently held by physical therapists employed by licensed physicians and surgeons. That is, it "grandfathers" these physician-physical therapy practices already in existence; however, such practices could not be expanded by employing additional physical therapists. Physicians who are "grandfathered" can replace physical therapists who leave. H.B. 320 also provides that the proposal shall not be construed to prohibit business entities comprised of physical therapists from dividing fees as necessary to "defray joint operating costs." Our comments therefore address the effects of H.B. 320 on practices that do not currently employ physical therapists.

4 The bill exempts from its coverage physical therapy positions "on the premises of Missouri licensed hospitals." It would, however, inhibit the ability of hospitals to open off-premises physical therapy clinics. Physical therapists working from such clinics would be unable to accept referrals from the hospital.

5 As noted above, the bill would allow the division of fees among physical therapists who are partners "to defray joint operating costs," but would not allow the payment of wages to an employed physical therapist.

therapy at a facility affiliated with his physician so that the therapy provided will be closely coordinated with the prescribed treatment plan. If H.B. 320 is enacted, however, it will not be practical for physical therapists to work with physicians to offer consumers either of these options because of the bill's restriction on employment and other financial relationships.

H.B. 320 may also limit a physician's ability to oversee the care provided to patients. A physician who employs a physical therapist in his practice is able to monitor the prescribed treatment directly. The physician is also readily available for consultation with either the patient or the therapist. Although the treating therapist need not be employed by a physician in order to engage in coordination and consultation, some physicians and physical therapists may find such an arrangement to be the most efficient form of practice. The benefits of this arrangement could be lost if physicians and physical therapists are prevented from entering into employment and other business relationships.

Restrictions on financial arrangements among providers of health care may have adverse effects on consumers. For this reason, the Commission has taken legal action against organizations that imposed or allegedly imposed restrictions on such arrangements.[6] For example, the Commission recently accepted a consent agreement with an association of physical therapists that had allegedly communicated to its members that they would be subject to discipline if they worked for physicians. The Commission [illegible] would have deterred physical therapists from offering their services in conjunction with physicians, and that, therefore, the development of efficient forms of practice that may reduce costs

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6 The Commission staff has also, on several occasions, suggested that state regulatory boards avoid enactment or interpretation of regulations that prevent providers from adopting more efficient forms of practice. See, e.g., Letter to [illegible] 1986)(opposing a regulation proposed by the Nevada Board of Physical Therapy that would prohibit physical therapists from accepting employment with physicians); and Letter to H. Fred Varn, Executive Director, Florida Board of Dentistry (November 6, 1985)(opposing an interpretation of Florida law that would prohibit dentists from referring patients to other dental practices in which the referring dentists had an interest).

7 In re Iowa Chapter of the American Physical Therapy Ass'n, Dkt. No. C-3242 (Nov. 4, 1988).

by offering the combination of physician diagnosis, physical therapy treatment, and physician-physical therapist consultation at one location may have been hindered.

Another matter involved various ethical provisions enforced by the American Medical Association. The Commission found that the AMA's restrictions on physician employment relationships and salaried practice inhibited development of innovative forms of health care delivery that could be cost-efficient and, hence, beneficial to consumers.[8] 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.[9]

Potential Harm to Consumers through Restrictions on Referral Fees

H.B. 320 also provides for the repeal and re-enactment of other sections of Missouri Revised Statutes §334.100 regarding discipline of physical therapists. One such section, Section 19, prohibits "any person licensed to practice as a physical therapist [from] paying or offering to pay a referral fee . . . ."[10] We are concerned that this language might be used by the Board or others to stifle innovative practice or referral arrangements. Because referral fees may promote competition as discussed below, we suggest that you consider whether re-enactment of this part of Section 19 may be detrimental to consumers.

Prohibitions on referral fees are often adopted to avoid the danger that a provider of professional services may make a referral for the purpose of receiving compensation, rather than serving the needs of the patient or client. Such broad prohibitions on all referral fees may, however, be too restrictive. This may be particularly true in changing conditions in the health care services market, where payment of [illegible] contain health care costs.

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[8] American Medical Ass'n, 94 F.T.C. 701, 1016-18 (1979), aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982).

[9] American Medical Ass'n, 94 F.T.C. at 1018.

[10] Section 19 also prohibits physical therapists from practicing independent of the prescription and direction of a physician, surgeon, dentist or podiatrist. Our comments do not address this aspect of Section 19.

In recent years, alternative health delivery systems, such as preferred provider organizations ("PPOs") have developed. Although PPOs exist in many forms, all PPO programs involve a series of contractual arrangements between "preferred" health care providers and an intermediary, such as an insurer or self-insured employer, that acts as a third party payor of health care benefits. PPO programs often attempt to select preferred providers for their ability to deliver quality health care at a low cost. Enrollees in PPO programs usually are given financial incentives (such as waivers of co-payments or deductibles) to encourage them to use the lower cost preferred providers.

Some of the contractual arrangements used by PPOs may, however, involve legitimate payments that could be construed as referral fees, and therefore prohibited under §334.100(19). For example, some PPO programs require participating providers to remit to the PPO a percentage of the fees earned from treating PPO [illegible] This is one method used to fund a PPO's administrative expenses. Under §344.100(19), this payment could be construed as a referral fee. Prohibiting payment of fees in such circumstances might restrict the ability of physical therapists to participate in such alternative health delivery systems. Consumers could therefore lose the advantages of obtaining physical therapy services at preferred provider rates.

Prohibitions on payment of referral fees may also restrict the ability of physical therapists to participate in referral services. Referral services, which can be either for-profit or not-for-profit, refer prospective patients to one or more providers based on the stated needs of the patients and the qualifications or prices of the providers. They also typically make available a wide variety of information on the providers to whom they refer patients. Such information can promote competition by enabling patients to compare fees and services offered. For example, a referral service can inform patients as to which providers will accept Medicare assignment. The fees paid to a referral service are unlikely to provide an incentive for anyone to refer patients for unnecessary care. This is because the entity receiving the fee -- the referral service -- does not recommend or suggest that the patient obtain medical care. In the case of physical therapy, the patient already has a prescription from his or her physician and is using the service to locate a physical therapist with particular qualifications (location, price, area of specialization). Prohibitions on payment of fees for referral services may limit the availability of such services, and hinder consumers in locating independent physical therapy practices.[11] For these reasons, we believe that [illegible] may raise costs to consumers.

Less Restrictive Alternatives

One reason that has been advanced for adopting legislation, such as that proposed by H.B. 320, that places restrictions on the relationship between referring entities and health care services providers is to ensure that medical care referrals are based on the needs of the patient, rather than on the financial interests of the practitioner. This argument contends that if a physician has a financial relationship with a physical therapist, then the physician has an incentive to prescribe treatment that may not be appropriate. In those instances in which patients are unaware that a physician's referral could be motivated by financial considerations, they arguably may be misled about the necessity and cost of the recommended treatment. Prohibitions on the underlying relationship may be intended to avoid the potential for abuse of the trust that a patient places in a practitioner to make appropriate referrals based on independent professional judgment of the patient's best interest.

The possibility that a physician may order unnecessary [illegible] service delivery, not just physical therapy. Whenever a physician prescribes x-rays, injections, surgical procedures, or other forms of treatment (including follow-up visits) to be provided in the doctor's office, financial considerations could, in theory, affect the recommendation. States, however, generally do not ban doctors from ordering those other services, even when the services are provided by the doctor's own practice.

Moreover, there are clearly less restrictive means of preventing abuse or deception than prohibiting all employment relationships. For example, an ownership disclosure requirement could be adopted.[12] Such a requirement would provide patients

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11 We understand that, to date, the Board has not brought [illegible] discussed above. We are concerned, however, that the language of Section 19 is susceptible to such an interpretation. Because of this, even without disciplinary action by the Board, Section 19 may chill practice arrangements beneficial to consumers.

12 For example, in California, the Business & Professions Code 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
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with information to aid in their decision whether to use the recommended provider. In addition, we note that current Missouri law already prohibits physicians from requiring patients to take prescriptions to any particular facility; patients may use any facility they wish to select.[13] We believe that concerns with preventing potential deception can be alleviated without proscribing physician-physical therapist employment or other business relationships.

<u>Conclusion</u>

In sum, we believe that H.B. 320 may unnecessarily inhibit [illegible] choice. The proposal is broader than necessary to protect consumers from physicians' potential conflicts of interest. Consumers should not be deprived unnecessarily of the benefits of competition, including the ability to choose the provider and practice arrangements most suited to their needs. For these reasons, you may wish to consider whether enactment of provisions prohibiting employment of physical therapists by physicians or others and reenactment of provisions prohibiting all referral fee arrangements are detrimental to consumer welfare.

We appreciate the opportunity to present these comments.

Very truly yours,

Janet M. Grady

Janet M. Grady
Regional Director

12(...continued) provider that the physician has selected. Cal. Bus. & Prof. Code § 654.2 (Deering 1988).

13 Under Missouri Rev. Stat. § 334.100.2 (21) (Supp. 1988), any person licensed to practice as a physician or surgeon may be subject to discipline for requiring that a patient obtain "prescription drugs, devices or other professional services directly from facilities of that physician's office or other entities under that physician's ownership or control." That statute further states that "a physician shall provide the patient with a prescription which may be taken to the facility selected by the patient."