

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

Office of Policy Planning  
Bureau of Economics  
Bureau of Competition

January 28, 2010

Kentucky Cabinet for Health and Family Services  
Attention: Jill Brown, Office of Legal Services  
275 East Main Street 5 W-B  
Frankfort, KY 40601

Dear Ms. Brown,

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition are pleased to respond to the invitation for comments on the proposed regulation of limits

Association has reported that consumers perceive advantages LSCs, including factors such as convenient locations, shorter wait times, longer operating hours, and lower prices.<sup>6</sup>

The New Administrative Regulation for LSCs (Proposed Rule) would regulate the operation of LSCs. Numerous provisions of the Proposed Rule – such as the requirement that licensed health care professionals at LSCs operate within the scope of their licensure – mirror basic consumer protection standards that are imposed on competing providers of basic health care services.<sup>7</sup> As such, they do not raise competition concerns. However, several provisions impose costs and restrictions on both LSCs and the health care professionals who practice there, such as physicians and advanced registered nurse practitioners (ARNPs) that do not apply in other limited care settings, such as urgent care centers.<sup>8</sup>

Imposing disparate regulations on competitors can reduce competition among them and thereby harm consumers. By reducing competition among providers of basic health care services, the Proposed Rule is likely to raise prices and decrease the availability of health care services for Kentucky consumers. Consumers may conceivably benefit from this disparate regulation only if it is necessary to protect consumers' interests. Studies indicate, however, that the quality of LSC care is just as good as that of other clinic settings.<sup>9</sup> LSCs are operating successfully in more than 100 markets, including Kentucky.<sup>10</sup> Thus, the available evidence does not appear to suggest a need for additional costs and limits on LSCs that do not apply in analogous limited care settings.<sup>11</sup> Moreover, the Proposed Rule does not articulate a justification for treating LSCs and other limited care settings differently.

In the absence of a justification, the Proposed Rule appears likely unnecessarily to limit competition from LSCs to provide basic health care services. Therefore, FTC staff

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<sup>6</sup> See American Medical Association, Report 7 of the Council on Medical Service (A-06), Store-Based Health Clinics 1 (June 2006).

<sup>7</sup> For the purposes of this comment, FTC staff have analyzed, and do not address, Kentucky's basic requirements for the licensure of health care professionals or the state's basic standards of care for health care clinics. This comment addresses only the competitive implications of those requirements that (a) discriminate between licensed providers of basic health care based on clinic ownership or setting, and (b) are not evident health or safety rationales for that discrimination.

<sup>8</sup> FTC staff understand that the nurse practitioner and advanced practice nurses, who would help staff LSCs in Kentucky are advanced registered nurse practitioners (ARNPs), whose scope of practice generally is established LSCs in 2010.

<sup>9</sup> See, e.g. Attey, Mehr et al., Comparing Costs and Quality of Care at Retail Clinics with that of Other Settings, 15 LSCs 1 ANNALS I

recommend that The Kentucky Cabinet for Health and Family Services (Cabinet) eliminate the provisions of the Proposed Rule that would impose greater costs and limits on LSCs (and the professionals who practice there) than on other limited care settings.

The Cabinet also might wish to consider whether a separate rule for LSCs is necessary or whether existing standards for licensing comparable facilities, such as primary care centers, might be adapted to regulate Kentucky LSCs as well. We understand that LSCs in Kentucky already operate successfully under such regulations<sup>12</sup>, and that primary care centers, hospitals, and other providers can offer the same basic services and staffing at satellite or extension facilities<sup>13</sup>. The Proposed Rule does not clearly distinguish when such services, staff, and facilities would be regulated under LSC regulations or otherwise. To the extent that the Cabinet does not identify distinct health and safety concerns associated with doctor and ANP provision of basic health care services in these settings, this ambiguity might be resolved better by modifying existing general regulations to accommodate LSCs.

### **Interest and Experience of the Federal Trade Commission**

The FTC is charged under the FTC Act with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce<sup>14</sup>. Competition is at the core of America's economy<sup>15</sup>, and vigorous competition among sellers in an open market place gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation. Because of the importance of health care competition to the economy and consumer welfare, anticompetitive conduct in health care markets has long been a key target of FTC law enforcement<sup>16</sup> and research<sup>17</sup>. The FTC and its staff also encourage health care competition through advocacy, and have urged several states to reject or narrow restrictions that limit health care access and raise prices to consumers by limiting competition among health care providers and professionals<sup>18</sup>.

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<sup>12</sup> FTC staff have been told that LSCs presently operate in Kentucky under primary care center licensure, ambulatory care clinic licensure, and otherwise. Cf. Kentucky Cabinet for Health and Family Services, Office of Inspector General, Direct ory of Licensed Health Care Facilities: Miscellaneous Direct ory (OIG direct ories

## A Brief Background on Limited Service Clinics

LSCs –sometimes called “retail clinics” or “store-based clinics” –are one way to deliver a limited range of basic health care services in a clinic setting. LSCs are staffed by licensed health care professionals, typically nurse practitioners or ANPs who are overseen by physicians, and sometimes physicians or physician assistants.<sup>19</sup> LSCs tend to be located in non-traditional provider settings, such as pharmacies and supermarkets, and tend to offer more extensive evening and weekend hours of operation than many primary care clinics.<sup>20</sup> LSCs generally provide only a pre-specified menu of basic health care services, with retail prices posted so that they are conspicuous to consumers prior to treatment.<sup>21</sup>

Evidence shows that the quality of care in LSCs is similar to that provided in physician offices and urgent care centers and slightly superior to that of emergency departments.<sup>22</sup> Indeed, [f]or most measures, quality scores of retail clinics were equal to or higher than those of other care settings.<sup>23</sup> Patients at LSCs and their primary care clinics appear equally likely to receive preventive care, including follow-up visits to doctors’ offices where such care is typically delivered.<sup>24</sup> In addition, prescription rates are similar at LSCs,

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Provisions of Senate Bill 58, Matter No. V090006, available at <http://www.ftc.gov/os/2009/04/V090006neworkpbm.pdf>; Letter from FTC Staff to Elaine Nekritz Illinois

physician offices, and urgent care centers (p

settings. In turn, the additional restrictions are likely to increase prices and decrease choices for Kentucky patients, without providing any countervailing benefits.

### A. The Proposed Rule

The Proposed Rule contains three categories of regulatory provisions that are likely to raise competitive concerns. The first involves limitations on the scope of professional services that may be provided at an LSC – limits that do not apply to the same credentialed professionals in comparable limited care settings. The second involves certain physical or operational restrictions that do not apply to comparable limited care clinics. The third involves mandatory licensing fees in excess of those required of any other health care facility.

**(1) Scope of Service.** The Proposed Rule, while listing thirty-nine services that LCSs may provide,<sup>30</sup> appears to prevent credentialed health care professionals from providing basic health care services in LCSs that they can provide in comparable limited care settings, such as urgent care clinics. If this list were to exhaust the types of care that physicians and ANPs are (and should be) allowed to provide in these settings, it would effectively limit the ability of these providers to offer care in these settings. This is particularly concerning given the fact that many of these services are those that are most likely to be needed in these settings.

restrictions on the scope of practice in primary care centers, special health clinics, or ambulatory care clinics.<sup>36</sup>

We are unaware of any justification for restricting types of services physicians and ANCs may provide based solely on the type of basic care settings in which they provide it.





impose distinct regulatory burdens on LSCs and the professionals who practice at LSCs. As

Respect fully submit t ed,

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