



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

ROUNDTABLE ON REGULATION AND COMPETITION IN THE HEALTH PROFESSIONS

-- United States --

The attached document is submitted by the delegation of the United States to the Working Party No. 2 of the Competition Committee FOR DISCUSSION under Item III of the agenda at its forthcoming meeting on 11 October 2004.

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ROUNDTABLE ON COMPETITION IN THE HEALTH PROFESSIONS

Submission of the United States

1. Questions about the role of competition and market-oriented strategies in the health care sector are of vital importance as countries seek to meet the challenges of rising health care costs, promoting high-quality, affordable health care, and ensuring access to care. The United States competition enforcement agencies – the Federal Trade Commission and the Antitrust Division of the Department of Justice (“the Agencies”) – have been actively involved in examining health care markets for nearly three decades. Our function is not to regulate these markets, but rather to eliminate barriers to competition that prevent markets from functioning as effectively as possible.

2. Our response to the issues raised in the Secretariat’s paper concerning competition in the health professions begins with an overview of the perspective that underlies the Agencies’ activities in the health care sector. We then discuss agency actions relating to some specific issues regarding health care professionals that are the focus of the Roundtable. Following the framework outlined in the Secretariat’s paper, we address first some activities relating to “structural issues” (entry standards, scope of practice definitions, and regulation of the organizational structure of professional firms), and second the “behavioral issues” (advertising, fee setting, and contractual relationships with payers). As requested, we give special attention to those health care professions in which third party payment has played a less prominent role than in medical services, in particular dental and vision care services and products.

3. In addition, attachments to this report provide: (1) a list of Agency reports relating to health care; (2) a list of competition advocacy activities in health care; and (3) a guide to Agency materials concerning antitrust law in health care available at the Federal Trade Commission and Department of Justice web sites.

Overview

4. It has been almost 30 years since the beginning of active antitrust enforcement in U.S. health care markets. Nonetheless, there is still ongoing debate about whether and how competition policy applies to health care and its potential as a tool for improving the U.S. health care system. Thus, in various settings – whether litigation, competition advocacy, or guidance to the public – there continues to be a need to address fundamental issues about the role of competition and antitrust enforcement in health care. These

other abuses that distort the ability of market forces to reflect consumer preferences, can benefit competition.

- Competition is an important tool for stimulating innovative strategies to control costs, increase quality, and provide consumer choice. The difficult task of improving quality and ensuring cost-effective care requires creativity and experimentation by market participants. It is critically important to address government regulations and private arrangements that unnecessarily impede the incentive or ability of market participants to pursue such innovation.
- Antitrust enforcement plays a key role in ensuring that innovations by governments and private actors are able to compete for acceptance in the marketplace. Antitrust in the health care sector has helped assure that new and potentially more efficient ways of delivering and financing health care services can arise and compete in the market for acceptance by consumers. Although health care markets have changed dramatically over time, and continue to evolve, collective action by health care providers to obstruct new models for providing or paying for care, or to interfere with cost-conscious purchasing, remains a significant threat to consumers.
- *Antitrust does not pick winners and losers.* Many cases have focused on health care providers' efforts to obstruct new approaches to delivery, financing, or paying for care, but the Agencies do not favor any particular model of health care delivery, or type of provider, over another. The goal is simply to deter restraints that unduly limit the options available in the market or artificially raise prices, so that consumers will be free to choose the health care arrangements they prefer at competitive prices.

5. Many of the matters in the discussion that follows reflect these themes, in particular the use of antitrust to address competitors' efforts to resist innovations in delivering or paying for care, and the importance of distinguishing anticompetitive from procompetitive self-regulation.

Structural Issues – Entry, Scope of Practice, and Organizational Structures

6. In the United States, government regulation of health care professionals occurs primarily through state governments. State laws set standards for licensure, define the scope of practice of the profession, and regulate various types of business and professional behavior. These regulatory schemes are carried out through state licensing boards. The boards are typically composed predominantly of members of the regulated profession.

7. Principles of federalism limit the application of the federal antitrust laws to state-imposed restraints on competition. In essence, the "state action doctrine" means that states can decide to displace competition with regulation as long as the state legislature clearly expresses its intent to do so, and state officials actively supervise private conduct taken pursuant to state policy.

8. Actions by state professional licensing boards are sometimes, but not always, exempt from antitrust enforcement by virtue of the state action doctrine. A current Federal Trade Commission case involves restraints on practice by dental hygienists imposed by a state board of dentistry.¹ The nine-member South Carolina State Board of Dentistry includes seven dentists, six of whom are elected by the dentists in their local area.

¹ *South Carolina State Board of Dentistry*, FTC Docket No. 9311 (complaint issued September 17, 2003) (<http://www.ftc.gov/os/adjpro/d9311/index.htm>).

9. The Federal Trade Commission complaint alleges that the Board illegally restricted the ability of dental hygienists to provide preventive dental services (cleanings, fluoride, and sealants) in school settings. The state legislature in 2000 eliminated a statutory requirement that a dentist examine each child before a hygienist may perform preventive care in schools, in order to address concerns that many schoolchildren, particularly those in low income families, were receiving no preventive dental services. In 2001, the complaint states, the Board re-imposed the dentist examination requirement. The complaint charges that the Board's action unreasonably restrained competition in the provision of preventive dental care services, deprived thousands of economically disadvantaged schoolchildren of needed dental care, and that its harmful effects on competition and consumers could not be justified. The Board sought to have the complaint dismissed on the ground that its actions are exempt from the antitrust laws under the state action doctrine. The Commission denied the motion to dismiss, and the Board is seeking an interlocutory review of that ruling by a federal appellate court.

10. Concerns about the potential for overly restrictive regulation by state licensing boards composed of members with a stake in competitive conditions in the regulated market are longstanding. Years ago many states responded by adding a public member to such boards. As part of a recent series of hearings addressing a broad range of issues relating to competition and health care, the Agencies received testimony concerning restraints on allied health providers. In its report on the hearings, the Agencies recommend that states consider a proposal for restructuring licensing boards advocated by the Institute of Medicine (a private advisory body), which undertook an extensive, congressionally-mandated study of the role of allied health professionals.²

an Internet seller have a professional license to sell replacement contact lenses, and, if further regulation is deemed necessary, states should consider adopting simple registration requirements. The use of contact lenses raises significant health issues, but the report concludes that requiring a professional license to sell replacement contact lenses over the Internet is likely to raise prices and reduce convenience to consumers, without substantially increasing health protections provided by existing prescription requirements and general consumer protection laws.

13. With respect to limits on the organizational structures that health professionals may adopt, such restraints have arisen both in state regulation and in private association codes of ethics. These include bans on: employment by a “lay” corporation; partnerships with allied health providers; use of branch offices or trade names; and salaried employment. The Federal Trade Commission has undertaken extensive study of such “commercial practice” restraints in optometry. After an empirical study comparing states with different regulatory schemes, it found that restrictions on the commercial practice of optometry increased prices but did not improve the quality of professional services available in the market.⁵ In addition to advocating the relaxation of state-imposed restraints,⁶ the Commission has taken enforcement action against private optometric association rules limiting organizational structures.⁷

Behavioral Issues

Advertising

14. The importance of advertising to competition is well-understood. Advertising can provide consumers with information about who is selling what

proceedings would be confidential; and the committee's opinions on the reasonableness of fees would not be publicized.

24. The AMA proposal also sought to establish a program to discipline members for charging unusually high fees. In cases where the fee charged arose from fraud, misrepresentation, undue influence, or other abusive behavior by the provider, professional discipline may improve the functioning of the market by deterring such behavior. Thus, the Commission found no antitrust problem in discipline based on such abuses. But the Commission warned that professional society discipline based on fee levels alone without regard to abusive conduct would amount to competitor regulation of fee levels. As such, it would pose inherent dangers to consumers.

Contractual Arrangements Between Providers and Payers

competition among providers and also among health plans. The Agencies have challenged the use of an MFN by provider-controlled health plans in dentistr

A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians, Federal Trade Commission Bureaus of Consumer Protection and Economics (1983)

Entrepreneurial Trends in Health Care Delivery: The Development of Retail Dentistry and Freestanding Ambulatory Services: Report by the Institute for Health Policy Studies, University of California, San Francisco, for the Federal Trade Commission (July 1982)

Competition and Health Planning: An Issues Paper by Staff in the Federal Trade Commission Bureau of Economics (April 1982)

Antitrust and the Health Professions: Policy Planning Issues Paper , Office of Policy Planning, Federal Trade Commission (July 1981)

Competition Among Health Practitioners: The Influence of the Medical Profession on the Health Manpower Market: A Report for the Federal Trade Commission by Lewin and Associates (February 1981)

Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry. Bureau of Economics, Federal Trade Commission (September 1980)

State Restrictions on Vision Care Providers: The Effects on Consumers, Report of the Staff to the Federal Trade Commission (July 1980)

Drug Product Selection: Bureau of Consumer Protection Staff Report to the Federal Trade Commission (January 1979)

Staff Report on Medical Participation in Control of Blue Shield and Certain Other Open-Panel Medical Prepayment Plans, Bureau of Competition, Federal Trade Commission (April 1979)

Advertising for Over-the-Counter Drugs: Federal Trade Commission Staff Report and Recommendations (May 1979)

Health Services Policy Session (edited version), Office of Policy Planning, Federal Trade Commission (June 1979)

Staff Report on Physician Control of Blue Shield Plans, Bureau of Economics, Federal Trade Commission (November 1979)

Competition in the Health Care Sector: Past, Present, and Future, Proceedings of a Conference Sponsored by the Federal Trade Commission Bureau of Economics (March 1978)

Drugs and Medical Devices Policy Session (edited rt610.1(e84(e HBi TD 0.1615 Tc -0.038 T [(Stafrs11.8(:))T6(t

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Advertising of Ophthalmic Goods and Services: St

COMPETITION ADVOCACY FILINGS IN HEALTH CARE²¹

- Comments from FTC Staff to The Honorable Patrick C. Lynch, Attorney General, and The Honorable Juan M. Pichardo, Deputy Majority Leader, Senate, State of Rhode Island and Providence Plantations, Concerning the Competitive Effects of General Assembly Bills Containing "Freedom of Choice" and "Any Willing Provider" Provisions (April 8, 2004)
- Comments from FTC Staff to The Honorable Ward Crutchfield, Tennessee Senate Majority Leader, on Senate Bill 855, which would amend the portion of the Tennessee Code regulating the practice of Optometry (April 29, 2003)
- Response from FTC Staff to The Honorable Richard P. Ieyoub, Attorney General of the State of Louisiana, concerning the potential effect of Tenet Healthcare Corporation's proposed purchase of Slidell Memorial Hospital (April 1, 2003)
- Response from FTC Staff to The Honorable Dennis Stapleton, Ohio House of Representatives, concerning House Bill 325, which would permit competing health care providers to engage in collective bargaining with health plans over fees and other contract terms (October 16, 2002)
- Comments of FTC Staff to the Connecticut Board of Examiners for Opticians concerning the declaratory ruling proceeding on the interpretation and applicability of various statutes and regulations concerning the sale of contact lenses (March 27, 2002)
- Statement of FTC Staff to The Committee on Labor and Commerce, Alaska House of Representatives, concerning the threat of consumer harm resulting from physician collective bargaining under Alaska Senate Bill 37 (March 22, 2002)
- Comments from FTC Staff to The Honorable Brad Benson, State of Washington House of Representatives, concerning Washington House Bill 2360, which would allow physicians and other health care providers to engage in collective bargaining with health plans over a variety of contract terms and conditions, including fees they would receive for their services (February 8, 2002)
- Comments of FTC Staff to the Food and Drug Administration in the r Aiti9(18-2.40- A)19(D3 T11
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which would permit competing physicians to jointly negotiate contractual terms with health plans under certain circumstances (May 13, 1999)

- Letter from FTC Staff to The Honorable Gary A Merritt, Kansas House of Representatives, responding to House Bill No. 2164 concerning the conditions under which optometrists and non-optometrists can enter into lease agreements (February 10, 1995)
- Statement from FTC Staff to the Joint Committee on the Public Interest in Competitive Practices in Healthcare of the Vermont Legislature concerning competition and antitrust enforcement in health care markets (October 20, 1994)
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- Response from FTC Staff to The Honorable Joseph P. Mazurek, Attorney General of the State of Montana, concerning the sunset review of an “any willing provider” law (February 4, 1993)
- Response from FTC Staff to the Legislative Audit Counsel, State of South Carolina, concerning the statutes and rules that regulate the health care professions (January 8, 1993)
- Statement from FTC Staff to the Joint Administrative Rule Review Committee of the Washington State Legislature, concerning recent amendments to the rules of the Washington State Board of Optometry that affect how optometrists deal with opticians concerning contact lens prescriptions (December 15, 1992)
- Response from FTC Staff to the Board of Chiropractic Examiners, State of Missouri, concerning a proposed rule to control how chiropractors may offer free or discounted services (December 11, 1992)
- Response from FTC Staff to The Honorable Robert J. Pavlovich, Montana House of Representatives, concerning proposed legislation concerning denturists (October 30, 1992)
- Response from FTC Staff to the Sunset Advisory Commission, State of Texas, concerning the review of the boards that regulate the health care professions (August 14, 1992)
- Response from FTC Staff to The Honorable Patrick Johnston, California State Senate, concerning Senate Bill 1986, which would limit the ability of health insurance companies to arrange for pharmacy services through contracts with non-resident pharmacy firms, by prohibiting exclusive contracts with them and by requiring that resident firms be allowed to contract to provide services on the same terms as non-resident firm (June 26, 1992)
- Response from FTC Staff to the Senate Legal Counsel, State of New Hampshire, concerning a bill to require any health maintenance organization that solicits bids for pharmacy providers to contract with any willing provider (March 17, 1992)
- Response from FTC Staff to the South Carolina Legislative Audit Council concerning statutes and regulations of the South Carolina Board of Pharmacy, Board of Medical Examiners, Board of Veterinary Medical Examiners, Board of Nursing, and Board of Chiropractic Examiners (February 26, 1992)
- Statement from FTC Staff to the Committee on Business Legislation, Maine House of Representatives, concerning a bill to amend Maine’s laws governing the practice of optometry (January 8, 1992)
- Response from FTC Staff to Assemblyman Jeffrey W. Moran, General Assembly of New Jersey, concerning Senate Bill No. 2051, which would prohibit a physician from dispensing more than a 72-hour supply of drugs or medicines to any patient, unless the drugs or medicines are dispensed at no charge (April 11, 1991)
- Response from FTC Staff to the Office of the Auditor General of the State of Florida concerning state statutes and regulations governing the activities of several licensed occupations (November 28, 1990)
- Response to The Honorable H. Craig Lewis, Senate of Pennsylvania, concerning Pennsylvania Senate Bill 675, entitled the “Pharmaceutical Services Freedom of Choice Act” (June 29, 1990)

- Response from FTC Staff to the Division of State Audit of the State of Tennessee concerning its review of statutes governing state agencies attached to the Tennessee Department of Health and Environment, including Chiropractic Examiners, Dentistry, Dispensing Opticians, Examiners in Psychology, Medical Examiners, Optometry, Osteopathic Examiners, Registration in Podiatry and Veterinary Medical Examiners (April 13, 1990)
- Response from FTC Staff to the Virginia Board of Pharmacy concerning proposed regulations for the dispensing and sale of prescription drugs by practitioners of the healing arts (November 27, 1989)
- Response from FTC Staff to New York State Senate, concerning Senate Bill No. 3094-A, which would prohibit, with certain exceptions, the dispensing of more than a 72-hour supply of prescription drugs by physicians and dentists (June 2, 1989)
- Response from FTC Staff to The Honorable John C. Bartley, Massachusetts House of Representatives, concerning Senate Bill 526, “An Act Providing For Accessibility To Pharmaceutical Services,” which would require prepaid health benefits programs that include coverage of pharmaceutical services, and provide those services through contracts with pharmacies, either to allow all pharmacies to provide services to program subscribers on the same

- Comments from FTC Staff to The Honorable Chuck Hardwick, Speaker of the Assembly of the State of New Jersey, concerning Assembly Bill 2647, which would prevent a physician from having a financial interest in any entity that provides physical therapy services, and from referring patients for physical therapy to an entity in which the physician's family has any financial interest (May 21, 1987)
- Response from FTC Staff to The Honorable John A Lynch, Majority Leader, New Jersey Senate, concerning Senate Bill No. 1367, which would permit opticians to fit contact lenses provided that they first obtain certification as contact lens dispensers from the state board of opticians (May 14, 1987)
- Response from FTC Staff to The Honorable Harry Hill, State Representative of Missouri, concerning bills to regulate advertising by dentists (May 13, 1987)
- Response from FTC Staff to The Assembly of the State of New York (0.6)8.3(ici)8.3(a)0.as N2e13 Tse()

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- Response from FTC Staff to the Honorable Ralph L. Axelle, Chairman of the Governor's Regulatory Reform Board of the Commonwealth of Virginia, concerning review of health professional regulatory boards by the Commonwealth of Virginia (May 22, 1985)
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- e. Advisory Opinions – full text of advisory opinions in the health-care industry issued by the Commission and FTC staff since 1993.
Available at: www.ftc.gov/bc/advisory.htm
- f. Staff Letters to Other Governmental Bodies – letters to federal and state governmental bodies in response to requests for guidance on various aspects of competition policy in the health-care industry.
Available at: www.ftc.gov/bc/hcpolicy.htm
- g. Speeches – speeches by Commission personnel concerning the health-care industry.
Available at: www.ftc.gov/bc/speeches.htm
- h. FTC/DOJ Hearings on Health Care and Competition Law & Policy – lists all publicly available information about the hearings.
Available at: www.ftc.gov/ogc/healthcarehearings/index.htm

3. Other Materials Concerning the U.S. Department of Justice, Antitrust Division, Actions in Health Care

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