



Office of Policy Planning  
Bureau of Competition  
Bureau of Economics

November 1, 2017

Director, Regulation Policy and Management (OOREG)  
Department of Veterans Affairs  
810 Vermont Ave., NW, Room 1063B  
Washington, DC 20420

**Re: RIN 2900-AQ06-Authority of Health Care Providers to Practice Telehealth**

The staffs of the Federal Trade Commission’s (“FTC”) Office of Policy Planning, Bureau of Economics, and Bureau of Competition<sup>1</sup> (collectively, “FTC staff”) appreciate the opportunity to respond to your request for comments on the Department of Veterans Affairs’ (“VA”) proposed rule entitled, “Authority of Health Care Providers to Practice Telehealth” (“Proposed Rule”). We write in support of the Proposed Rule, which would “clarify that VA health care providers may exercise their authority to provide care through the use of telehealth, notwithstanding any State laws, rules, or licensure, registration or certification requirements to the contrary.”<sup>2</sup> Thus, if adopted, the Proposed Rule will ensure that VA telehealth providers may provide services to or from non-federal sites, such as a home, regardless of whether the provider is licensed in the state where the patient is located.

In recent years, FTC staff have had numerous opportunities to examine the impact of telehealth regulations on health care competition. Our findings reinforce the VA’s view that the Proposed Rule would enable the use of telehealth to reach underserved areas and VA beneficiaries who are unable to travel, improving the ability of the VA to utilize its health care resources. Accordingly, we believe that the Proposed Rule would likely increase access to telehealth services, increase the supply of telehealth providers, increase the range of choices available to patients, improve health care outcomes, and reduce the VA’s health care costs, thereby benefiting veterans.

The VA’s rulemaking would also provide an important example to non-VA health care providers, state legislatures, employers, patients, and others of telehealth’s potential benefits. The rulemaking may spur innovation among other health care providers and thereby promote competition and improve access to care, which will benefit consumers so long as providers are

held to the appropriate standard of care for the services they are providing remotely. Additionally, the Proposed Rule may afford a valuable opportunity to gather data and provide additional evidence for the VA and outside policymakers to assess the effects of telehealth expansion, thus benefitting VA patients and health care consumers generally.

#### **I. 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>3</sup> Competition is at the core of America's economy,

these recent FTC staff comments, which support reduction of unjustified barriers to telehealth, underpin this comment.<sup>17</sup>

## **II. Current Regulatory Framework and the VA's Proposed Rule**

Under current law, VA health care practitioners who work within the Veterans Health

## **A. The VA's Telehealth Program**

The ability of telehealth to expand access to health care services, address provider supply issues, and reduce costs has made telehealth a key element in the VA's ongoing efforts to ensure that all beneficiaries have access to convenient, high-quality mental health care, specialty care, and general clinical care. Indeed, the VA is a leader in the development and use of telehealth to expand access to health care.<sup>29</sup> In FY 2016, the VA provided 2.17 million episodes of care via telehealth, serving more than 702,000 veterans, of whom 45 percent lived in rural communities. To put these numbers in perspective, 12 percent of the veteran patient population received some form of telehealth care in FY 2016.<sup>30</sup>

## **B. Likely Effects of the VA's Proposed Rule**

### **1. Effects Within the VA System**

By ensuring that the VA can provide telehealth services regardless of the location of the provider or patient, the Proposed Rule will allow the VA to expand its telehealth services beyond what it is already doing successfully, thereby further improving access, innovation, and quality, and further reducing costs. In particular, the Proposed Rule would eliminate concerns relating to VA telehealth practitioners who provide services to patients located in states in which they are not licensed, when either the provider, the patient, or both are not on federal property. This flexibility is critical to the VA's ability to enhance the reach of practitioners affiliated with VA Medical Centers ("VAMCs"). The VA has 168 VAMCs and at least one in every state, but 16 states, the District of Columbia, and Puerto Rico have only one VAMC.<sup>42</sup> Especially in large rural states, telehealth is a highly effective means of improving health care delivery by expanding patients' access to both out-of-state and in-state practitioners.<sup>43</sup> Because telehealth services are not intrinsically limited by jurisdiction, elimination of out-of-state licensure requirements, and any other legal impediments to interstate practice, would help the VA more efficiently allocate its health care resources, consistent with appropriate standards of care.<sup>44</sup>

State requirements for licensure of out-of-state telehealth providers have inhibited the expansion of critical VA home-based telehealth services, which have great potential to improve access and health care outcomes for beneficiaries who are unable to travel or are located in rural and underserved areas.<sup>45</sup> If adopted, the Proposed Rule would allow

FTC staff recognize that state licensure requirements for health care professionals are intended to protect patients. Such restrictions should, however, be narrowly tailored to address legitimate health and safety issues. Well-intentioned laws and regulations may impose unnecessary, unintended, or overbroad restrictions on competition, thereby depriving health care consumers of the benefits of vigorous competition.<sup>50</sup>

In this case, the VA's proposal to preempt state laws and regulations would ensure that a VA health care practitioner can provide telehealth in reliance on a single state license, as is

Respectfully submitted,

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APRNs, and an in depth analysis of the competitive effects of statutes and rules governing APRN scope of practice and supervision).

<sup>8</sup> See, e.g., Comment from FTC Staff to the Dep't of Veterans Affairs (July 25, 2016),

[https://www.ftc.gov/system/files/documents/advocacy\\_documents/comment-staff-ftc-office-policy-planning-bureau-competition-bureau-economics-department-veterans/v160013\\_staff\\_comment\\_department\\_of\\_veterans\\_affairs.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-ftc-office-policy-planning-bureau-competition-bureau-economics-department-veterans/v160013_staff_comment_department_of_veterans_affairs.pdf)

(supporting proposed rule that would allow APRNs to provide services required by the VA without the oversight of a physician); Comment from FTC Staff to the Iowa Dep't of Public Health (Dec. 20, 2016),

[https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-professional-licensure-division-iowa-department-public-health-regarding-proposed/v170002\\_ftc\\_staff\\_comment\\_to\\_iowa\\_dept\\_of\\_public\\_health\(e\)4.0.481\\_d\\_\(-\)Tj\\_-0.0Pu\\_0Td\\_ET\\_72\\_621.9\(c\)4.2\(s\)9.4](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-professional-licensure-division-iowa-department-public-health-regarding-proposed/v170002_ftc_staff_comment_to_iowa_dept_of_public_health(e)4.0.481_d_(-)Tj_-0.0Pu_0Td_ET_72_621.9(c)4.2(s)9.4)

level of supervision of physician assistants). Most FTC staff competition advocacy comments have focused on proposed state-level changes to statutes and ~~COMPARISONS~~ **COMPARISONS**, *supranote*



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<sup>18</sup> See 38 U.S.C. § 7402(b) (setting for the qualifications for appointment as a VHA physician, dentist, nurse, podiatrist, optometrist, pharmacist, psychologist, social worker, marriage and family therapist, mental health counselor, chiropractor, or other health care provider).

<sup>19</sup> See, e.g., 20 Reasons Nurses Love Working for the Veterans Health Administration 37 (2017),

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ANN. INT. MED. 787, app. (2015) (“Limited access to care is not an issue specific to rural communities; underserved patients in urban areas have the same risks as rural patients if they lack primary or specialty care . . .”).

<sup>29</sup> See, e.g., Authority of Health Care Providers to Practice Telehealth, 82 Fed. Reg. at 45,757; John Wennergren et al., *Implementation of Clinical Video (CVT) within a VA Medical Center is Cost Effective and Well Received by Veterans*, 5 INT’L J. CLIN. MED. 711, 714 (2014), [http://file.scirp.org/Html/11-2100844\\_47385.htm](http://file.scirp.org/Html/11-2100844_47385.htm) (the VA is ahead of many private institutions and health care organizations with regard to the implementation of innovations and “the wide dissemination and integration of telehealth in clinical practice”).

<sup>30</sup> See Authority of Health Care Providers to Practice Telehealth, 82 Fed. Reg. at 45,758.

<sup>31</sup> See *id.* at 45,758; Adam Darkins, *U.S. Department of Veterans Affairs*, in INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, *THE ROLE OF TELEHEALTH IN AN EVOLVING HEALTH CARE ENVIRONMENT: WORKSHOP SUMMARY* 99, 101, 103 (National Academies Press 2012) [hereinafter Darkins, *U.S. Department of Veterans Affairs*]; Leslie A. Morland, *Telemedicine: A Cost-Reducing Means of Delivering Psychotherapy to Rural Combat Veterans with PTSD*, 19 TELEMED. & EHEALTH 754 (2013).

<sup>32</sup> See Joel E. Chasan et al.,

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health care (25 percent).”). In FY 2011, the VA’s telemental health programs resulted in a 30 percent reduction in hospital a

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<sup>51</sup> National Defense Authorization Act for Fiscal Year 2012 § 713, 10 U.S.C. § 1094(d)(1) (2016) (incorporating H.R. 1832, Servicemembers' Telemedicine and E-Health Portability Act of 2011). Unlike the provision at 10 U.S.C. § 1094(d)(2), however, the VA's Proposed Rule would not cover contractors. *See* Authority of Health Care Providers to Practice Telehealth, 82 Fed. Reg. at 45,758 ("A health care provider as defined in this regulation cannot be a VA-contracted employee. Contract health care providers would be required to adhere to their individual State license, registration, or certification requirements.") The VA could improve the effectiveness of its Proposed Rule by changing it at proposed 38