

Office of Policy Planning
Bureau of Competition
Bureau of Economics

October 6, 2014

Simone Salloum
Assistant General Counsel
Texas State Board of Dental Examiners
333 Guadalupe, Suite 3-800
Austin, Texas 78732
rulecomments@tsbde.texas.gov

Dear Ms. Salloum:

The staffs of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Competition, and Bureau of Economics¹ appreciate the opportunity to respond to the invitation for public comments on two rules proposed by the Texas State Board of Dental Examiners ("Board"): 22 TEX. ADMIN. CODE § 108.70, which would replace the current version of that rule; and 22 TEX. ADMIN. CODE § 108.74, a new rule.²

Proposed 22 TEX. ADMIN. CODE § 108.70 imposes new restrictions on the ability of Texas dentists to enter into contracts with "unlicensed persons" for the provision of nonclinical services, such as administrative support and business functions. Proposed 22 TEX. ADMIN. CODE § 108.74 would make dentists who own, maintain, or operate a dental practice that employs a dentist "responsible for all administrative and operational" functions. Although the proposed rules do not expressly refer to Dental Service Organizations ("DSOs"),³ the rules seem likely to discourage dentists from affiliating with DSOs by mandating that dentists assume responsibility for the types of functions that DSOs typically provide, and by expanding the Board's authority to take disciplinary action against dentists who enter into such prohibited agreements.

FTC staff are concerned that the proposed rules, if they are adopted and if they discourage dentists from affiliating with DSOs, may deny consumers of dental services the benefits of competition spurred by the efficiencies that DSOs can offer. The central theme of this letter is a relatively narrow one; it focuses on the *nonclinical* functions of a

common, which would deprive the market of the competitive benefits those foregone DSO arrangements otherwise would have had.

IV. Likely Competitive Effects

Competition spurs both current providers and potential entrants to develop more efficient and innovative ways to deliver their services, without compromising quality. For these reasons, in health care markets as in other markets, competition should be restricted only when necessary to protect against a credible risk of harm, such as health and safety risks to consumers, or fiscal risks to the government. Any warranted restrictions should be narrowly crafted to minimize their anticompetitive impact.³¹ DSOs can increase efficiency and support entry of new dental practices. Dentists generally have little training in administration, which means that carrying out administrative tasks can be time consuming. Relieving dentists of the need to perform administrative tasks could increase the amount of dentistry services dentists could provide, and lower the costs of providing dental services. In addition, DSOs may support entry into Texas, or prevent exit, by dentists who prefer to affiliate with a DSO.³² This new entry may lead to lower prices, expanded services, and improved access to dental services. Because the proposed rules may well deter licensed dentists from contracting with DSOs, the proposed rules appear likely to impede competition and deprive consumers of these potential benefits.

Although there has been justifiable concern about fraud in Texas's Medicaid dental programs, broad restraints on contractual arrangements with non-dentist providers of business services such as DSOs are unlikely to address such concerns.³³ Incentives for over treatment "exist across all dental provider types as virtually all dental care in the US is paid on a fee-for-service quantity-of-care basis."³⁴ The OIG's recommendations to Texas's Health and Human Services Commission noted above are specifically designed to address the suspected problems and appropriately cover DSO- as well as non-DSO-affiliated dentists.³⁵ Importantly, this type of solution does not risk losing the efficiency and competition benefits that DSOs may provide.

A. Dental Care: Price and Access

Proposed 22 TEX. ADMIN. CODE §§ 108.70 and 108.74 likely would create a very restrictive regulatory environment for DSOs and other companies that provide administrative services to Texas dental practices. Although Texas's Dental Practice Act prohibits the Board from adopting rules that would prevent a dentist from contracting with a management service organization,³⁶

the exit of those currently operating in Texas, resulting in less competition in the markets for dental management services.

effects, and to avoid unduly discouraging innovative and efficient models of practice that could compete against traditional providers without compromising safety or quality. Otherwise, such restrictions can be expected to inhibit competition, increase prices, and decrease access to dental services. Moreover, those anticompetitive effects could impose the greatest impact on underserved populations that can least afford it, and state programs that cover such costs.

V. Conclusion

Restrictions on the ability of dentists to contract out business functions provided by DSOs may reduce competition by preventing the emergence and expansion of efficient forms of professional practice that could increase the supply of dental services. The proposed rules appear unnecessary to address any concerns about the independent judgment of dental professionals—DSO-affiliated dentists retain full control over the clinical aspects of caring for their patients and Texas already has laws and regulations that prohibit unlicensed persons from influencing a dentist’s professional judgment. In addition, although there have been concerns about unauthorized treatment and the quality of care provided to

¹ This staff letter expresses the views of the Federal Trade Commission’s Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission, however, has voted to authorize staff to submit these comments.

² See 39 Tex. Reg. 6973, 6975 (Sept. 5, 2014). The open comment period extends 30 days from the date of publication in the Texas Register. *Id.*

³ A DSO is defined under Texas law as “an entity that . . . is owned wholly or partly by a person who is or is not a dentist; and . . . under a dental service agreement, provides or offers to provide services to a dentist

251.003(a)(9) (prohibiting unlicensed persons from controlling or influencing dentist's judgment);
§ 258.001 (dentists may not delegate dental care to unlicensed persons).

⁴⁵ An unlicensed person (or corporation) engages in the illegal practice of dentistry if the person “controls, influences, attempts to control or influence, or otherwise interferes with the exercise of a dentist’s independent professional judgment regarding the diagnosis or treatment of a dental disease, disorder, or physical condition.” TEX. OCC. CODE ANN. § 251.003(a)(9). *See also* 22 TEX. ADMIN. CODE § 108.70 (“Improper Influence on Professional Judgment”).