

## Health Care Antitrust Alert

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### FTC Cautions States against Overbroad Regulation of Nurse Practitioners in Continued Effort to Promote Expanded Roles for Non-traditional Providers

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The Federal Trade Commission (FTC) has a well-established role in promoting competition in the health care industry through enforcement, study and advocacy. To that end, the agency actively urges the opening of health care markets to a broader range of providers. For example, the FTC previously found that a state dentistry board illegally thwarted competition by working to bar non-dentist providers of teeth-whitening goods and services.<sup>1</sup> In 2011, the agency issued competition advocacy comments to a pending Tennessee state bill, concluding that the proposed physician-supervision requirements for certain pain-management services would result in reduced access and increased prices.<sup>2</sup> Similarly, over the past three years, the FTC has issued comments analyzing the likely competitive effects of proposed changes to advanced practice registered nurses (APRNs) regulations in Massachusetts, Connecticut, West Virginia, Louisiana, Kentucky, Texas and Florida.<sup>3</sup> The FTC has now gone beyond a case-by-case approach on these issues, with the issuance on March 7 of a policy paper titled *Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses*.<sup>4</sup>

The FTC advocates in its paper for the expansion of APRN scope of practice, cautioning state legislators that “[p]hysician supervision requirements may raise competition concerns because they effectively give one group of health care professionals the ability to restrict access to the market by another, competing group of health care professionals, thereby denying health care consumers the benefits of greater competition.”

Most states recognize APRNs as a distinct category of nursing professionals who have been trained to provide a broad range of services, including the diagnosis and treatment of acute and chronic illnesses. APRNs are subject to various types of state regulation, including licensure requirements. Additionally, “scope of practice” rules define the types of services APRNs are authorized to provide and the extent to which they are permitted to practice without direct physician supervision.

#### Potential Harm to Competition

Acknowledging that licensure and scope of practice regulations provide critical consumer protection objectives, including safety and quality, the FTC counsels that the goal of regulations “should be to avoid imposing restraints that may tend to impair competition in a way that is greater than necessary to address legitimate health and safety concerns.” The FTC noted that “there is increasing agreement among health authorities that APRNs could safely provide an even broader range of primary care services, if regulatory and reimbursement policies would permit them to do so.”

The FTC identified several potential competitive harms that may result from certain APRN scope or practice restrictions that limit APRNs’ access to the marketplace, consequently depriving health care consumers of the benefits of competition among different types of health care providers. First, imposing greater restrictions on APRNs may exacerbate existing provider shortages, particularly for underserved populations. The FTC cited expert bodies as recommending that access problems be addressed, in part, by increased reliance on APRNs.

Second, excessive supervision requirements may increase health care costs and prices, as such requirements will result in costs being imposed on the supervising physician as well as the supervised APRN. Third, rigid supervision requirements may also constrain innovation by inhibiting the ability of providers to experiment with flexible oversight and collaboration arrangements for APRNs. Finally, effective collaboration may actually be harmed by requirements that physicians formally supervise APRNs.

## Specific Guidance for State Policymakers

The FTC identified a set of guiding principles and formulated an analytical framework to assist policymakers when evaluating proposed changes to APRN scope of practice regulations. The principles and analytical framework are summarized here.

### Principles

- Consumer access to safe and effective health care is critical.
- Certification and licensure requirements should reflect the types of services APRNs can safely and effectively provide.
- Competition among health care providers yields important consumer benefits, including reduced costs and improved quality.
- APRNs can fulfill unmet health care needs when they are free from undue supervision requirements and practice restrictions.
- APRN and physician collaboration does not always require direct physician supervision of APRNs.
- APRN scope of practice limitations should be narrowly tailored to address well-founded health and safety concerns.
- It is important to scrutinize relevant safety and quality evidence to identify legitimate safety concerns and to determine the best means of addressing them.

### Analytical Framework

- Will the regulation significantly impede competition?
- Are there any significant and non-speculative health and safety needs that the regulatory restrictions are designed to meet?
- Do the regulations actually provide the intended benefits?
- Are there other demonstrated or reasonably likely consumer benefits associated with the regulations?
- When consumer benefits are slight, insubstantial or highly speculative, a regulation that imposes non-trivial impediments to competition is not justified.
- Is the regulation likely to redress consumer harm or risk of harm?
- Are the regulations narrowly tailored to serve the state's policy priorities?

## FTC's Findings and Conclusion

Importantly, the FTC does not advocate a particular model for the scope of APRN practice or the appropriate degree of physician supervision, as those decisions should be made by state legislators, regulators and health care providers. Rather, the FTC's objective is to highlight the importance of competition to the goals of consumer protection. As such, the FTC concluded that "mandatory physician supervision and collaborative practice agreement requirements are likely to impede competition among health care providers and restrict APRNs' ability to practice independently, leading to decreased access to health care services, higher health care costs, reduced quality of care, and less innovation in health care delivery."

The FTC's focus on promoting expanded roles for non-traditional providers in health care is evident from its prior actions and this newly issued policy paper. Continued enforcement, advocacy and policy agendas in this area, following the same logic and analysis set forth in this paper, can be expected from the FTC.

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Endnotes

<sup>1</sup> N.C. Bd. of Dental Examiners v. FTC, 717 F.3d 359 (4th Cir. 2013), cert. granted, 2014 U.S. LEXIS 1710 (U.S. Mar. 3, 2014).

<sup>2</sup> FTC Staff Letter to the Honorable Gary Odom, Tennessee House of Representatives, Concerning Tennessee House Bill 1896 and the Regulation of Providers of Interventional Pain Management Services (September 2011).

<sup>3</sup> FTC Staff Comment Before the Mass. House of Representatives Regarding House Bill 2009 Concerning Supervisory Requirements for Nurse Practitioners and Nurse Anesthetists (Jan. 2014); Comment from FTC Staff to the Hon. Theresa W. Conroy, Conn. House of Representatives (Mar. 19, 2013); Written Testimony from FTC Staff to Subcomm. A of the Joint Comm. on Health of the State of W. Va. Legislature (Sept. 10-12, 2012); Comment from FTC Staff to the Hon. Thomas P. Willmott & Hon. Patrick C. Williams, La. House of Representatives (Apr. 20, 2012); Comment from FTC Staff to the Hon. Paul Hornback, Commonwealth of Ky. State Senate (Mar. 26, 2012); Comment from FTC Staff to the Hon. Rodney Ellis & Hon. Royce West, Senate of the State of Tex. (May 11, 2011); and Comment from FTC Staff to the Hon. Daphne Campbell, Fla. House of Representatives (Mar. 22, 2011).

<sup>4</sup> Available at <http://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicy.pdf>.

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