



U.S. Department of Justice

Antitrust Division

Liberty Square Building

450 5th Street, N.W.
Washington, DC 20001

November 29, 2016

Senator Peter MacGregor
28th District, Michigan State Senate
P.O. Box 30036
Lansing, MI 48909-7536

RE: State Legislation Addressing Telehealth Services

Dear Senator MacGregor:

In response to your letter dated November 23, 2016, the U.S. Department of Justice, Antitrust Division provides its views on proposed Michigan Senate Bill 753, H-1 (SB 753), providing for the regulation of telehealth.

Competition offers consumers lower prices, higher quality goods and services, greater access to goods and services, and innovation. As explained in more detail below, telehealth services can offer patients innovative options for quality care that can be convenient, efficient, and competitive. Such options can be especially valuable since consumers may opt to forego or delay health care that is inconvenient or costly. The Department believes that lowering and avoiding unnecessary barriers to the delivery of innovative health services can produce important competitive benefits for patients and consumers, particularly in terms of access and cost. At the same time, we recognize the critical importance of patient health and safety and the role of state legislators and regulators in determining the optimal balance of policy priorities as they regulate new models of care. For this reason, we generally have encouraged legislatures to limit restrictions to those needed—for example, to address safety concerns, to improve the public health, or to protect against fraud.¹

The Department believes that SB 753 has the potential to enhance consumer options and improve health care competition for services appropriately offered through telehealth because it covers a broader range of services than existing law and limits or avoids certain unnecessary barriers to care. In particular, SB 753 (1) specifies that permitted telehealth services extend beyond Michigan's existing statutory definition of

¹ See FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION, Ch. 2, 31-33 (2004), <https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/204694.pdf> [hereinafter A DOSE OF COMPETITION] (describing consumer benefits and risks of telemedicine).

telemedicine,² (2) provides for flexibility in how patients must provide consent for telehealth treatments, and (3) allows health professionals to prescribe drugs that are non-controlled substances through telehealth services. These provisions have the potential to help telehealth become a more robust competitive option for Michigan patients and consumers.³

I. The Department's Interest and Experience in Competition and Innovation in Health Care Markets

Competition is a core organizing principle of the U.S. economy,⁴ and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality goods and services, greater access to goods and services, and innovation.⁵ The Department works to promote competition throughout the economy via enforcement of the nation's antitrust laws, which prohibit certain transactions and business practices that harm competition and consumers, and through competition advocacy, whereby the Department advances outcomes that benefit competition and consumers.

² We refer to “telemedicine” or “telehealth” as those terms are used in Michigan law and in the proposed bill that is the subject of this letter. In general, telehealth and telemedicine do not have universally accepted definitions. Both refer to the use of electronic communications to “exchange information to improve a patient’s health status,” though telemedicine “typically” refers only to “direct clinical services.” INST. OF MED., THE ROLE OF TELEHEALTH IN AN EVOLVING HEALTH CARE ENVIRONMENT: WORKSHOP SUMMARY 3 (Tracy A. Lustig, Rapporteur) (2012), <http://www.nap.edu/catalog/13466/the-role-of-telehealth-in-an-evolving-health-care-environment>; see also *Telemedicine Glossary*, AM. TELEMED. ASS’N, <http://thesource.americantelemed.org/resources/telemedicine-glossary> (last visited Nov. 25, 2016) (“Closely associated with telemedicine is the term ‘telehealth,’ which is often used to encompass a broader definition of remote healthcare that does not always involve clinical services.”).

³ The Department believes that unnecessary barriers on qualified out-of-state telehealth providers to treat Michigan consumers can harm competition, and we would encourage the state legislature also to consider the competitive benefits of improving access for its citizens to qualified telehealth providers. See A DOSE OF COMPETITION, *supra* note 1, Executive Summary, at 23; *id.* Chapter 2, at 33 (recommending that states consider the competitive benefits of licensure options that improve interstate telemedicine practice); see also Comment from FTC Staff to Steve Thompson, Rep., Alaska State Leg. (May 25, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-alaska-state-legislature-regarding-telehealth-provisions-senate-bill-74-which/160328alaskatelehealthcomment.pdf (seeing a procompetitive improvement in an Alaskan bill that allows for out-of-state care from telehealth providers without an in-person examination).

⁴ See, e.g., *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2014) (“Federal antitrust law is a central safeguard for the Nation’s free market structures.”); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy has long been faith in the value of competition.”).

⁵ See, e.g., *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (The antitrust laws reflect “a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”).

Because of the importance of health care competition to the economy and consumer welfare, this sector has long been a priority for the Department. Health care accounts for over 17 percent of GDP⁶ and impacts Americans when they are most vulnerable: during birth, illness, and death. The Department has accrued deep expertise in health care markets through its efforts in merger review and enforcement, civil non-merger and criminal enforcement, and competition advocacy.⁷ We have investigated and litigated antitrust cases in markets across the country involving insurers, hospitals, physicians, and other health care goods and services. In addition to our enforcement activities, we have conducted workshops and undertaken research on various issues in health care competition. Further, we periodically issue reports and general guidance on competition to the health care community. We also issue letters, such as this one, examining how regulation may affect competitive dynamics in health care markets. Through this work, we have developed a keen understanding of the competitive forces that drive innovation, costs, and prices in health care.

That learning extends to telemedicine and telehealth. Over a decade ago, the Department issued a joint report, *Improving Health Care: A Dose of Competition*, which noted that “telemedicine has considerable promise as a mechanism to broaden access, lower costs, and improve health care quality.”⁸ Today, the promise of these services is increasingly being realized.⁹ *A Dose of Competition* also observed that telemedicine has “crystallized tensions between the states’ role” in both ensuring quality of care and ensuring patients benefit from competition in provider markets.¹⁰ The Department offers the following competitive considerations for the Michigan legislature as it evaluates this legislation affecting telehealth and telemedicine services.

⁶ *National Health Expenditure Data: Historical*, CTRS. FOR MEDICARE AND MEDICAID SERVS., <http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html> (last updated Dec. 3, 2015).

⁷ *See generally Health Care*, U.S. DEP’T OF JUSTICE, ANTITRUST DIV. (Feb. 24, 2016), <http://www.justice.gov/atr/health-care> (providing an overview and links to the Division’s many health care-related activities in enforcement, advocacy, and written publications).

⁸ A DOSE OF COMPETITION, *supra* note 1, Executive Summary, at 23.

⁹ *See, e.g.,* Robin Gelburd, *Telehealth: Insights from Claims Data*, FAIR HEALTH 1, <http://www.fairhealth.org/servlet/servlet.FileDownload?file=01532000001nuLs> (last visited Nov. 25, 2016) (using a database of over 20 billion privately billed healthcare claims in the U.S. and finding that telehealth use grew from 7.8 percent of claim lines in 2007 to 14.6 percent in 2015); VA OFFICE OF THE INSPECTOR GEN., AUDIT OF THE HOME TELEHEALTH PROGRAM 1, 7-8 (2015), <http://www.va.gov/oig/pubs/VAOIG-13-00716-101.pdf> (reporting that patient enrollment in the Veterans Health Administration’s Home Telehealth Program increased from about 37,200 patients in FY 2009 to about 80,200 patients in FY 2013 and recommending the program expand further to meet projected needs); *cf. Telemedicine Frequently Asked Questions*, AM. TELEMED. ASS’N, <http://www.americantelemed.org/about/telehealth-faqs-> (last visited Nov. 25, 2016) (“Estimates on the market size for telemedicine vary widely, depending on each analyst’s precise definition of telemedicine. While they can’t agree on a single number, one area where all research firms concur is that the telemedicine market is growing rapidly.”).

¹⁰ A DOSE OF COMPETITION, *supra* note 1, Chapter 2, at 32.

II. Current Michigan Law and Senate Bill 753

Current Michigan law expressly permits the provision of telemedicine services by health care professionals that are licensed, registered, or otherwise authorized to practice “in the state where the patient is located.”¹¹ Michigan law defines telemedicine as:

[T]he use of an electronic media to link patients with health care professionals in different locations. . . . [T]he health care professional must be able to examine the patient via a real-time, interactive audio or video, or both, telecommunications system and the patient must be able to interact with the off-site health care professional at the time the services are provided.¹²

Current state law also proscribes requirements of “face-to-face contact between a health care professional and a patient for services appropriately provided through telemedicine,” as determined by the relevant insurer, health maintenance organization, or health care corporation.¹³

As revised by the Michigan House on September 20, 2016, SB 753 builds on existing state law in three particular ways. First, the provisions in SB 753 apply more broadly to “Telehealth [which] may include, but is not limited to, telemedicine.”¹⁴ Telehealth is defined to encompass “the use of electronic information and telecommunication technologies to support or promote long-distance clinical health care, patient and professional health-related education, public health, or health administration.”¹⁵ Second, SB 753 permits a health professional to “directly or indirectly” obtain consent required from patients for treatment provided through telehealth.¹⁶ Third, SB 753 allows health professionals to prescribe drugs through telehealth if they are authorized to prescribe drugs in person and the prescribed drug is not a controlled substance.¹⁷

¹¹ MICH. COMP. LAWS §§ 500.3476(1), 550.1401k(1). The Department notes that SB 753 does not address the in-state licensing requirement in current Michigan law for the provision of telehealth services. *See supra* note 3.

¹² MICH. COMP. LAWS §§ 500.3476(2), 550.1401k(2).

¹³ *Id.*

¹⁴ S.B. 753 (H-1), 98th Legis., Reg. Sess. 2016 § 16283(C) (as revised by Mich. House, Sept. 20, 2016).

¹⁵ *Id.*

¹⁶ S.B. 753, § 16284.

¹⁷ S.B. 753, § 16285.

III. Evaluating Senate Bill 753 in Light of Competitive Considerations

Competition consistent with patient safety can bring important benefits to health care consumers, and for this reason, we recommend that the Michigan legislature consider the potential benefits of enhanced competition offered by telehealth. The three changes to Michigan law in SB 753 have the potential to facilitate more robust use of telehealth services and expand health care competition by limiting or avoiding certain unnecessary barriers.

By broadening the scope of state law from “telemedicine” to “telehealth services,” SB 753 may facilitate more diverse and innovative uses of telecommunication technologies to improve health care offerings beyond direct clinical services. For example, improved health administration through telehealth services has the potential to act as a complement that enhances the quality of in-person care, as well as potentially supporting competitive alternatives.

Barriers on the use of telehealth services with unnecessarily restrictive consent regulations can substantially reduce the promise of improved care potentially offered by telehealth. SB 753, however, permits patients to provide consent that is required for treatments through telehealth “directly or indirectly.” We understand this provision as permitting consent to be communicated flexibly but not as changing the underlying requirement of consent for treatment.¹⁸ Such flexibility may enable providers to obtain consent remotely at the time of telehealth treatment or in advance when a patient first seeks care from a particular provider, practice, or institution. That flexibility can help health professionals compete to improve access and provide health care services to patients.

Unnecessary constraints on remotely provided prescriptions also can hamper the provision of telehealth services. However, with the exception of controlled substances, SB 753 authorizes remote prescriptions by health professionals who can prescribe drugs in-person. By expressly empowering health professionals to prescribe patients remotely when medically appropriate, SB 753 helps telehealth become a more robust competitive option that can fulfill a broader set of patient needs.

These competitive benefits, when provided consistent with consumer safety and welfare, are potentially significant. Access and costs are especially important in health care because consumers may forego or delay care if it is inconvenient or costly to obtain.¹⁹ For example, patients may want to consult a provider after hours for a

¹⁸ See MICH. H. OF REP., H. FISCAL AGENCY, LEGISLATIVE ANALYSIS: TELEHEALTH SERVICES, SENATE BILL 753 (REPORTED FROM HOUSE COMMITTEE AS H-1) 1 (Oct. 26, 2016), <http://www.legislature.mi.gov/documents/2015-2016/billanalysis/House/pdf/2015-HLA-0753-6B614C58.pdf> (summarizing the bill as “requir[ing] that a health professional obtain the patient’s consent before providing telehealth services”).

¹⁹ See Emilio Carrillo et al., *Defining and Targeting Health Care Access Barriers*, 22 J. OF HEALTH CARE FOR THE POOR & UNDERSERVED 562, 564-67 (2011) (describing barriers to care associated with fewer screenings, late presentation to care, or lack of treatment, including financial barriers and barriers related to

nonemergency, which can be difficult.²⁰ The convenience and affordability of telehealth may encourage patients to seek out care sooner or obtain care faster. That is possible because wait times to see health professionals through telehealth can be shorter,²¹ consultations can be cheaper,²² and many patients prefer treatment in the privacy of their home²³ or after regular business hours.²⁴ Thus, when a telehealth service can save a patient from an unnecessary in-person visit to provide consent or to obtain a prescription or can otherwise enhance quality or lower costs, SB 753 may improve patient care and consumer welfare.²⁵

the availability of providers, proximity to providers, transportation, child care, and wait times, among others).

²⁰ See Cathy Schoen, et al., *A Survey Of Primary Care Doctors In Ten Countries Shows Progress In Use Of Health Information Technology, Less In Other Areas*, 31 HEALTH AFF. 2805, 2807 (2012) (finding that only 34 percent of U.S. primary care physicians had arrangements for after-hours care without having patients go to an emergency department); Ann S. O'Malley, *After-Hours Access to Primary Care Practices Linked with Lower Emergency Department Use and Less Unmet Medical Need*, 32 HEALTH AFF. 175, 178 (2013) (finding that 20.8 percent of those who tried to reach their primary care provider after-hours reported that it was "very difficult" or "somewhat difficult").

²¹ E.g., Joseph Kvedar, Molly Joel Coye, & Wendy Everett, *Connected Health: A Review of Technologies and Strategies to Improve Patient Care with Telemedicine and Telehealth*, 33 HEALTH AFF. 194, 197-98 (2014) (noting that each implementation of a particular telemedicine program for specialist referrals reduced lengthy wait times).

²² See, e.g., John D. Whited, *Economic Analysis of Telemedicine and the Teledermatology Paradigm*, 16 TELEMEDICINE & E-HEALTH 223, 225-28 (2010) (reviewing studies that compare teledermatology and conventional care with various measures of cost); *Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529, 537 (W.D. Tex. 2015) (citing plaintiffs' evidence that "average costs of visits to a physician or emergency room are \$145 and \$1957, respectively, and the cost for a Teladoc consultation is typically \$40.").

²³ E.g., *Pneumonia: More Patients May Be Treated at Home*, U.S. DEP'T HEALTH & HUMAN SERVS., AGENCY FOR HEALTH CARE RESEARCH & QUALITY, <http://archive.ahrq.gov/consumer/pneucons.htm> (last updated Jan. 1997) (finding that most low-risk pneumonia patients surveyed prefer home-based care).

²⁴ See e.g., Shreya Kangovi et al., *Understanding Why Patients of Low Socioeconomic Status Prefer Hospitals Over Ambulatory Care*, 32 HEALTH AFF. 1196, 1199 (2013) ("After-hours care was an additional factor that made hospital-based care more accommodating than ambulatory care, particularly for patients who worked during regular office hours.").

²⁵ If in-person care is ultimately found to be necessary by, for example, a telehealth physician, the physician should inform the patient to seek in-person care and refer the patient accordingly. See e.g., Press Release, Am. Med. Ass'n, *AMA Adopts New Guidance for Ethical Practice in Telemedicine* (June 13, 2016), <https://www.ama-assn.org/ama-adopts-new-guidance-ethical-practice-telemedicine> ("Physicians who provide clinical services through telemedicine must recognize the limitation of the relevant technologies and take appropriate steps to overcome those limitations"); *Model Policy for the Appropriate Use of Telemedicine Technologies in the Practice of Medicine*, FED'N OF STATE MED. BDS. 5 (adopted Apr. 2014), https://www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/FSMB_Telemedicine_Policy.pdf [hereinafter *Model Policy*] (requiring that physicians provide patients with a plan "when the care provided using telemedicine technologies indicates that a referral to an acute care facility or ER for treatment is necessary for the safety of the patient"); *Teladoc*, 112 F. Supp. 3d, at 538 (the practice of Teladoc physicians is to refer patients they cannot reasonably or safely diagnose); cf. *Model Policy*, *supra*, at 2 ("Treatment and consultation recommendations made in an online setting . . . will be held to the same standards of appropriate practice as those in traditional (encounter in person) settings.").

IV. Conclusion

As the Michigan legislature evaluates the health and welfare implications of telehealth legislation such as SB 753, it is appropriate to consider the competitive effects potentially associated with such legislation. The Department has found that innovative, competing models for delivering and promoting health care, like telehealth, can substantially benefit consumers by improving access to care, containing costs, and encouraging more ways to deliver needed care. By addressing a broader range of telehealth services and by not imposing unnecessary burdens on telehealth providers and patients, SB 753 can encourage these competitive benefits with further entry and innovation in the market and greater use of telehealth services.

We appreciate this opportunity to present our views.

Sincerely yours,

A handwritten signature in cursive script that reads "Robert Potter". The signature is written in dark ink and is positioned above a horizontal line.

Robert Potter
Chief, Legal Policy Section
Antitrust Division