



BUREAU OF COMPETITION

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

February 16, 1988

Stephen J. Maag  
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Washington Health Care Association  
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Suite 102  
Olympia, Washington 98506

Dear Mr. Maag:

This letter responds to your request for a staff advisory opinion concerning possible antitrust issues raised by a proposal by the Washington Health Care Association ("the Association") to establish a Quality Validation Program to be used to evaluate the quality of care provided by nursing homes operating in the state of Washington.

According to the information you have provided,<sup>1</sup> the Association is a membership organization composed of most of the nursing homes and allied long term health facilities in Washington.<sup>2</sup> It provides a variety of services that benefit its members, including educational programs, an annual trade show, regular publications, and the advice of its professional staff on legal, business, governmental and public relations issues. Most of these services are available to nonmembers, but at a higher price than that charged to members. The Association's staff works with state and federal regulators and legislators on issues of concern to long term care facilities. In addition, the Association offers a pension plan at a discounted rate open to members only<sup>3</sup> and workmen's compensation programs for members and nonmembers.

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<sup>1</sup> This response is based on information and documentation supplied with your June 5, 1987, request for a staff advisory opinion, your letter dated August 7, 1987, and in telephone conversations with the staff.

<sup>2</sup> The Association is the largest such organization, having as members 230 of the state's 294 licensed proprietary and non-proprietary long term health care facilities. There is another association with 50 to 60 nonprofit nursing home members.

<sup>3</sup> Nonmember nursing homes can obtain similar plans from other sources at a slightly higher price.

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The Association is developing a Quality Validation Program that will attempt to establish objective criteria for evaluating the quality of care provided by nursing homes. Assessment standards are being developed by a committee composed of Association members, state regulatory and legislative representatives, and consumer and insurer representatives. Technical assistance is being provided by Association staff and by the Joint Commission on Accreditation of Healthcare Organizations ("Joint Commission"), formerly the Joint Commission on Accreditation of Hospitals.<sup>4</sup> Standards will be developed for various components that go into nursing home care, including dietary, infection control, nursing care, and active treatment.

Surveys designed to determine each member home's compliance with the standards will be conducted by the Joint Commission. Each facility's performance will be measured against a predetermined standard, with numerical scores assigned according to the degree of compliance with each standard. In order to obtain a successful assessment, a nursing home would have to attain a set overall score and receive at least a minimum score in each broad area evaluated. Information about individual nursing homes' performance on the assessment will be made available to the public.

Participation in the Quality Validation Program will be a condition of membership in the Association and also will be available to nonmembers upon payment of a fee based on the cost of the program. Evaluations will begin in 1988. If a member fails to attain a successful assessment within 6 months of its second unsuccessful evaluation, its membership in the Association will be terminated. A terminated member will have the right to obtain review of its termination and to present mitigating factors or arguments why it should be continued as a member. There will be a procedure for reinstating terminated members.

The Association is also negotiating with a liability insurance carrier to develop an insurance policy, to be available to member and nonmember nursing homes participating in the Quality Validation Program, that would allow rebates of premiums

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<sup>4</sup> The Joint Commission, which accredits hospitals and other health care institutions nationwide, has its own nursing home accreditation program. It currently accredits about 20 nursing homes in Washington. The Joint Commission accreditation program will continue, and participants in the Association's program will be able to apply for Joint Commission accreditation at a reduced fee.

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based on each facility's performance on the quality assessment survey. If this effort is successful, participants in the Quality Validation Program would be able to purchase liability insurance at lower rates than are currently available.

Based on the description of the Quality Validation Program that you have provided, it does not appear that the program as proposed would be likely to restrain competition in violation of the Federal Trade Commission Act.<sup>5</sup> However, as explained below, the standards used, how they are applied, and the extent to which certification by the program becomes a practical necessity for nursing homes to compete in the market will determine whether in actual operation the program will have an unlawful anticompetitive purpose or effect. I discuss below the limited circumstances under which such a program would likely be found to violate the antitrust laws.

In essence, the Quality Validation Program is an institutional accreditation program,<sup>6</sup> and is similar in many respects to product certification programs. In general, certification and accreditation systems have the potential to improve the performance of markets. Certification programs can provide information about the quality and performance of products or services that may be difficult or expensive for consumers to obtain otherwise, helping buyers make better informed choices among competing offerings. Certification systems can also lead to improvement in the quality standards of an industry, increasing consumer confidence in product quality and thereby increasing demand for the product.

The ability of product standards to improve market operation depends on the extent to which they convey accurate and useful information, that is, on the extent to which the standards applied actually identify pertinent product characteristics and the extent to which certification decisions accurately reflect compliance with the stated standards. If the standards are

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<sup>5</sup> This advisory opinion is limited to the proposed program described in your letters. It does not constitute approval for actions that are different from those described or for those not specified in your request for an advisory opinion.

<sup>6</sup> However, this proposal differs from many accreditation programs in that participation in the Association's program is a condition of membership, and failure to achieve acceptable performance leads not only to withholding of the "seal of approval" but also to loss of membership in the Association and its attendant benefits. This aspect of the proposed program is discussed below.

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reasonable and accurately applied, certification systems are procompetitive, even if competitors whose products do not meet the standards are disadvantaged because consumers prefer certified products. On the other hand, certification may distort the operation of the market if 1) the standards used do not distinguish reasonably accurately and objectively the product characteristics they purport to measure or if they are unduly restrictive or unreasonably discriminatory, or 2) certification decisions do not fairly and objectively apply the stated criteria, so that certification does not accurately reflect compliance with the standards.

Accreditation and certification schemes are often sponsored and run by an association composed of the persons or institutions who produce the products or services to be certified. Although control of the certification process by a group of competitors can create potential antitrust problems, it does not itself violate the antitrust laws. In antitrust parlance, a legitimate certification or accreditation program is a business joint venture established to provide a product or service that could not or would not be supplied by firms acting individually. To determine their legality, the activities of such joint ventures are subject to the antitrust rule of reason analysis discussed below.

Under the rule of reason, joint action among competitors is illegal if it has a predominantly anticompetitive purpose or it has a substantially restrictive effect on competition that is not outweighed by the restraint's beneficial competitive effects. A certification program carried out by a competitor-controlled group could violate the antitrust laws in the following situations. First, particular standards would be subject to challenge if they directly restrained significant competition among the accredited entities without a procompetitive justification. For example, a standard that prohibited nursing homes from advertising or providing services desired by consumers would be treated as a suspect agreement among the participating institutions that they would not compete with each other in those respects. Second, a certification program could in some circumstances be found to have an unreasonably anticompetitive effect by excluding from the market products or services desired by consumers. If lack of certification by a competitor-controlled entity substantially impairs the ability of firms to

market their products or services,<sup>7</sup> a standard-setting organization could be found liable for failing to grant certification if the standards it applied were designed to restrain competition by arbitrarily excluding a class of competitors or otherwise were not reasonably related to the legitimate purposes of the organization or if certification decisions did not accurately reflect compliance with the standards.<sup>8</sup>

Applying the foregoing analysis to the Association's proposed Quality Validation Program, described above, there does not appear to be any basis for concluding at this time that the program is likely to pose a serious danger to competition among nursing homes. The program has the potential to stimulate competition, because consumers could benefit from reliable information about the relative quality of competing nursing homes. There is nothing in the information you have supplied to us that suggests that the program is intended to suppress nursing home competition. On the contrary, the Association appears to have made a substantial effort to ensure that the standards have a reasonable basis and that they are fairly applied. For example, the Committee developing the standards is apparently not controlled by industry members,<sup>9</sup> and the Association has contracted with an independent third party -- the Joint Commission on Accreditation of Healthcare Organizations -- to evaluate nursing homes.

We cannot determine at this time whether the program will obtain the power to significantly influence consumers' choices among nursing homes. Without such power, it is unlikely that the

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<sup>7</sup> The availability of alternative sources of certification and the ability of producers to establish a separate certifying body are relevant to consideration of the necessity of certification.

<sup>8</sup> The antitrust laws do not require that any particular procedural steps be followed in withholding certification, nor does the presence of procedural protections validate restrictions that are substantively unreasonable. Procedural steps can, however, limit antitrust exposure by making it more likely the rules and requirements of the certifying body are reasonable in scope, and fairly applied.

<sup>9</sup> Of the 21 members on the committee, 9 are provider or Association representatives, 4 represent government agencies, and 8 appear to represent consumer groups.

program could restrain competition. We do not know to what extent the program will be relied upon by third parties, and we do not know to what extent alternative sources of certification may be available to nursing homes who do not obtain certification from the Association.<sup>10</sup> We note that the Association is composed of a substantial majority of nursing homes operating in Washington, raising the possibility that it may be able to wield market power. On the other hand, at least one other Association of nursing homes currently exists in Washington. It might be able to establish its own certification program if there were a demand for alternative sources of certification. In addition, a separate accreditation program, established by the Joint Commission, is available to at least some Washington nursing homes.

The Association's requirement that members obtain certification warrants some additional discussion. It is illegal for a group of competitors to attempt to drive uncertified products or services from the market through the use of a boycott. Therefore, certified firms may not agree among themselves not to deal with uncertified firms, and they may not orchestrate an agreement among suppliers or customers not to deal with such firms.

This does not necessarily mean, however, that the Association may not condition membership on achievement of certification. If access to a competitor-controlled entity is necessary for firms to compete effectively in the market, the entity may be limited in its ability to deny access to an applicant. However, it does not appear that the Association is an essential facility for nursing homes. Most of the benefits that the Association provides to members are available to nonmembers, either from the Association or from other sources, at similar or somewhat higher cost.<sup>11</sup> In addition, there is no reason to

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<sup>10</sup> A liability insurance policy offering rebates tied to a facility's performance on the quality assessment would tend to increase the attractiveness of certification to nursing homes. However, it would not be evidence that certification was an important factor in a nursing home's ability to compete effectively unless the amount of the discount was enough to significantly affect an institution's costs and similar insurance policies were not reasonably available outside the Association's program.

<sup>11</sup> Issues relating to the need for, and alternative sources of, certification itself, have already been discussed.

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believe that excluded nursing homes could not establish a separate association that could provide similar benefits to members. The one exception may be the liability insurance policy discussed above, about which the Association is currently negotiating, which apparently will be available only through the Quality Validation Program. However, the insurance package, if it is obtained, is tied to certification rather than to Association membership as such. Therefore, its effect, if any, would be to increase the attractiveness of certification, rather than suggesting that Association membership is a competitive necessity even for uncertified nursing homes.

Based on the facts presented, it does not appear that the Quality Validation Program is likely to violate the antitrust laws. The Bureau of Competition retains the right to take such action as may be in the public interest if in actual operation the certification program is used for improper purposes or results in substantial anticompetitive effects. The above legal advice is that of the staff of the Bureau of Competition only. Under Section 1.3(c) of the Commission's Rules of Practice, the Commission is not bound by this advice and reserves the right to rescind it at a later time.

We are placing copies of your request and this response on the public record pursuant to Section 1.4 of the Commission's Rules of Practice.

Yours truly,



M. Elizabeth Gee  
Assistant Director