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CONSUMER AND
COMPETITION ADVOCACY

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COMMISSION AUTHORIZED

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Dear Mr. Anliot:

The staff of the Federal Trade Commission¹ is pleased to respond to your request for comment on certain proposed changes to the regulations of the Massachusetts Board of Registration in Optometry. This comment will address the changes that affect commercial practice arrangements. The proposed changes would make it possible for an optometrist to locate within a mercantile establishment, such as an optical goods retailer, which could benefit consumers through increased competition and greater efficiencies of operation. However, it appears that restrictions on more closely integrated operations will remain in place, and those restrictions could make it difficult to achieve some efficiencies.

I. Interest and experience of the Federal Trade Commission.

The Federal Trade Commission is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.² Pursuant to this statutory mandate, the FTC encourages competition in the licensed professions, including the health care professions, to the maximum extent compatible with other state and federal goals. For several years, the FTC and its staff have investigated the competitive effects of restrictions on the business practices of state-licensed professionals, including dentists, physicians,

¹ These comments are the views of the staff of the Federal Trade Commission, and do not necessarily represent the views of the Commission or any individual Commissioner.

² 15 U.S.C. § 41 et seq.

pharmacists, and other health care providers.³ One of these cases resulted in an order against the Massachusetts Board of Registration in Optometry prohibiting certain restraints on discounts and advertising.⁴ In addition, the staff has submitted comments about these issues to state legislatures and administrative agencies and others.⁵ As one of the two federal agencies with principal responsibility for enforcing antitrust laws, the FTC is particularly interested in restrictions that may adversely affect the competitive process and raise prices (or decrease quality) to consumers. And as an agency charged with a broad responsibility for consumer protection, the FTC is also concerned about acts or practices in the marketplace that injure consumers through unfairness or deception.

³ See, e.g., *Iowa Chapter of American Physical Therapy Association*, 111 F.T.C. 199 (1988) (consent order); *Preferred Physicians, Inc.*, 110 F.T.C. 157 (1988) (consent order); *Wyoming State Board of Chiropractic Examiners*, 110 F.T.C. 145 (1988) (consent order); *Connecticut Chiropractic Association*, C-3351 (consent order issued November 19, 1991, 56 Fed. Reg. 65,093 (December 13, 1991)); *Medical Staff of Holy Cross Hospital*, C-3345 (consent order issued September 10, 1991, 56 Fed. Reg. 49,184 (September 27, 1991)); *Southbank IPA, Inc.*, C-3355 (consent order issued December 20, 1991, 57 Fed. Reg. 2913 (January 24, 1992)); *Robert Fojo, MD.*, C-3373 (consent order issued March 2, 1992, 57 Fed. Reg. 9258, (March 17, 1992)); *Texas Board of Chiropractic Examiners*, C-3379 (order modified April 21, 1992, 57 Fed. Reg. 20279 (May 12, 1992)).

⁴ *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).

⁵ See, e.g., *Comments to Florida Office of the Auditor General*, November 28, 1990 (Board of Pilot Commissioners and Board of Medicine); *South Carolina Legislative Audit Council*, February 26, 1992 (Boards of Pharmacy, Medical Examiners, Veterinary Medical Examiners, Nursing, and Chiropractic Examiners); same, January 8, 1993 (Boards of Optometry and Opticianry, Dentistry, Psychology, Speech and Audiology, Physical Therapy, Podiatry, and Occupational Therapy); *Texas Sunset Advisory Commission*, August 14, 1992 (Boards of Optometry, Dentistry, Medicine, Veterinary Medicine, Podiatry, and Pharmacy); see also testimony to the Maine House of Representatives, January 8, 1992 (optometry), and the Washington legislature's Joint Administrative Rules Review Committee, December 15, 1992 (opticians and optometrists).

II. Analysis of the proposed regulations.

This comment will focus on the proposed rules that affect the settings in which optometrists may practice.⁶ Board regulations now prohibit employment of an optometrist by an optician or a mercantile establishment.⁷ The proposed regulations would retain that prohibition.⁸ On the other hand, current regulations permit optometrists to be employed by health maintenance organizations, nonprofit clinics, hospitals, schools and industrial establishments that provide health care to employees and their families.⁹ The proposed regulations would permit optometrists to practice in such settings, but, unlike the present regulations, would not explicitly permit employment by such institutions.¹⁰

The principal proposed change that would affect restraints on commercial practices would permit practicing in mercantile locations where optical goods are sold, as long as no contract or other arrangement gave a non-professional control over matters requiring professional judgment, no referral fees were involved, and "separate facilities" requirements were met.¹¹ The

⁶ The proposed regulations would also expand the provisions concerning patient records, adding definitions of what must be included in prescriptions and establishing regulations about patient access to information. Proposed 246 CMR 5.02. New rules concerning contact lenses, under which a customer who wants the information from the eye examination that is necessary to have contact lenses made up could get it, on paying the bill for the examination, would parallel the Commission's prescription-release rule for eyeglasses. Proposed 246 CMR 5.02(6); cf. 16 C.F.R. §456.2. The Commission has not determined to extend its prescription release rule to contact lenses, and we have no views on this part of the proposal.

⁷ 246 CMR 5.05(2).

⁸ Proposed 246 CMR 5.03(2).

⁹ 246 CMR 5.05(1).

¹⁰ Proposed 246 CMR 5.03(1). The proposed regulations would also recognize explicitly that an optometrist might practice entirely through visiting patients at hospitals, nursing homes, or private residences. Proposed 246 CMR 5.04(2).

¹¹ Proposed 246 CMR 5.03(3). The proposed provisions concerning contract arrangements would replace provisions that now ban any "direct" sharing of fees with a non-professional. 246 CMR 5.06(1).

statutory "separate facilities" requirements permit setting up a practice in a "definite and distinct" space, with separate signs clearly indicating that the optometrist is independent.¹²

III. FTC studies and rulemaking proceedings concerning eye care.

Consumers do not always benefit from regulations that restrict the business aspects of professional practice. Studies have often found little relationship between restrictions on professionals' business practices and the quality of service or care they provide.¹³ Restrictions on their business practices can limit professionals' ability to compete effectively with each other and can also increase their costs. If restrictions diminish competition among professionals, or if they impose higher costs that are passed on in the form of higher prices or reduced services, then consumers can be harmed. These potential adverse effects of regulation should be considered along with its intended benefits.

The FTC and its staff have considerable experience with the competitive impact of restraints on business practices in the eye care industry. Two kinds of practices, restraints on advertising and failures to release prescriptions, were examined in an FTC rulemaking proceeding in the 1970's.¹⁴ That proceeding revealed

¹² Mass. Gen. L., Ch. 112, §73B. The statute also forbids any lease or contract that results in direct or indirect sharing of "any" fees. These terms are broad enough to ban all leases or other commercial arrangements with non-professionals whatever. However, the law has been interpreted to permit percentage lease arrangements. See *Bronstein v. Board of Registration in Optometry*, 531 N.E.2d 593 (Mass. 1988).

¹³ See C. Cox and S. Foster, *The Costs and Benefits of Occupational Regulation*, FTC Bureau of Economics Staff Report, October 1990 (reviewing studies reported in economics literature).

¹⁴ Advertising of Ophthalmic Goods and Services, 16 CFR Part 456 ("Eyeglasses Rule"). The FTC found that prohibiting nondeceptive advertising by vision care providers and failing to release eyeglass lens prescriptions to the customer were unfair acts or practices in violation of section 5 of the FTC Act. The Eyeglasses Rule prohibited bans on nondeceptive advertising and required vision care providers to furnish copies of prescriptions to consumers after eye examinations. On appeal, the Eyeglasses Rule's prescription release requirement was upheld but the advertising portions were remanded for further consideration in
(continued...)

that other common restraints on eye care providers also appeared to limit competition unduly, increase prices, and reduce the quality of eye care provided to the public.

To examine the effects of restraints on business practices in the eye care industry, the staff of the FTC conducted two comprehensive studies. The first, published in 1980 by the FTC's Bureau of Economics, compared the price and quality of optometric goods and services in markets where commercial practices were subject to differing degrees of regulation.¹⁵ This study, conducted with the help of two colleges of optometry and the Director of Optometric Services of the Veterans Administration, found that commercial practice restrictions in a market resulted in higher prices for eyeglasses and eye examinations but did not improve the overall quality of care in that market. The second study, published in 1983 by the Bureaus of Consumer Protection and Economics, compared the price and quality of the cosmetic contact lens fitting services of commercial optometrists and other provider groups.¹⁶ It concluded that, on average, "commercial" optometrists (for example, optometrists who were associated with chain optical firms, used trade names, or practiced in commercial locations) fitted cosmetic contact lenses at least as well as other fitters, but charged significantly lower prices.

¹⁴(...continued)

light of the Supreme Court decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (finding state supreme court rules against attorney advertising violated the First Amendment). *American Optometric Association v. FTC*, 626 F.2d 896 (D.C. Cir. 1980). Rather than reinstate the advertising portions of the Eyeglasses Rule, the FTC has addressed advertising restrictions through administrative litigation. See, e.g., *Massachusetts Bd. of Optometry*, 110 F.T.C. 549 (1988).

¹⁵ Bureau of Economics, Federal Trade Commission, *The Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (1980) ("Bureau of Economics Study").

¹⁶ Bureaus of Consumer Protection and Economics, Federal Trade Commission, *A Comparative Analysis of Cosmetic Lens Fitting by Ophthalmologists, Optometrists, and Opticians* (1983) ("Contact Lens Study").

During the 1980's, the FTC conducted a second rulemaking proceeding about restraints on commercial eye care practice.¹⁷ Based on the evidence assembled in the rulemaking proceeding, the FTC concluded that restrictions on commercial practices by eye care providers have resulted in significant consumer injury, in the form of monetary losses and less frequent vision care, without providing consumer benefit.¹⁸ The Commission found that a substantial portion of the consumers' costs for eye examinations and eyewear was attributable to the inefficiencies of an industry protected from competition.¹⁹ The FTC thus adopted a rule²⁰ to prohibit state-imposed restrictions on four types of commercial arrangements: affiliating with non-optometrists, locating in commercial settings, operating branch offices, and using nondeceptive trade names.²¹ Although the Eyeglasses II rule was vacated on appeal (on the ground that the FTC lacked the statutory authority to make rules declaring state statutes unfair), the FTC's substantive findings, that the restrictions harmed consumers, were not disturbed.²² The evidence from the FTC's rulemaking record remains a compelling argument for eliminating restraints on commercial practice.

IV. Effects of location restrictions and regulation of employment relationships.

In general, restrictions on affiliations with non-professionals and on associations with other businesses prevent business corporations or non-professionals from employing

¹⁷ In the course of the "Eyeglasses II" rulemaking, the FTC received 287 comments and heard testimony from 94 witnesses. The commenters and witnesses included consumers and consumer groups, optometrists, sellers of ophthalmic goods, professional associations, federal, state and local government officials, and members of the academic community. See Ophthalmic Practice Rules ("Eyeglasses II"), Statement of Basis and Purpose, 54 Fed. Reg. 10285, 10287 (March 13, 1989) ("Commission Statement").

¹⁸ Commission Statement, *supra* n. 17, at 10285.

¹⁹ Commission Statement, *supra* n. 17, at 10285-86.

²⁰ Commission Statement, *supra* n. 17, at 10285.

²¹ In addition, the Commission decided to retain, with modifications, the prescription release requirement from the original Eyeglasses Rule.

²² *California State Board of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), *reh'g denied*, January 8, 1991.

professionals and prevent partnerships and franchise agreements with non-professionals. Such restrictions may deny professionals access to sources of capital and thereby tend to inhibit the development of large-scale practices that can take advantage of volume purchase discounts and other economies of scale. The likely result of excluding high-volume practitioners from the market and preventing practitioners from operating at the most efficient level is higher prices for optometric goods and services.²³

We encourage the removal of provisions prohibiting eye care providers from working for lay persons or other professionals or entering into partnerships or other associations with them. Restrictions on these types of business formats may prevent the formation and development of forms of professional practice that may be innovative or more efficient, provide comparable or higher quality services, and offer competition to traditional providers.²⁴ We also support efforts to remove restrictions on practicing in commercial locations. We question whether such restrictions serve any purpose other than inhibiting the formation of high-volume commercial practices.²⁵

The present proposal, to permit optometrists to locate within and lease space from optical goods stores, represents a step toward eliminating a significant restriction on commercial forms of practice. But potentially significant constraints remain in place (some of which, we recognize, may be required by statute). The "separate facilities" requirements may continue to impose some unnecessary costs. The continuing ban on employment by non-professionals could prevent some potentially efficient forms of collaboration.²⁶ It is unclear whether the regulations (or the statute) would permit other forms of economic integration or collaboration. For example, the proposal to relax the constraints on financial relationships between optometrists and optical goods stores enough to permit leasing of space may still

²³ Commission Statement, *supra*, n. 17 at 10288-10289.

²⁴ Commission Statement, *supra*, n. 17 at 10288-10289.

²⁵ For a general discussion of the effects of restricting locations in mercantile settings, see Commission Statement, *supra* n. 17, at 10289.


²⁶ This could be especially true if the new regulations repeal the present regulation's permission for optometrists to be employed by certain other kinds of institutions. See text at n. 10 *supra*.

not permit coordinated promotions or pricing that could benefit consumers.²⁷

V. Conclusion.

The proposal to permit optometrists to locate within and lease space from optical goods stores or other mercantile establishments could lead to greater competition and to efficiencies in operation that could benefit consumers. Relaxing constraints on commercial practices is consistent with the direction the Commission took in its Eyeglasses II rulemaking. Some remaining restraints may still inhibit forms of providing services that might increase competition and benefit consumers, however.

Sincerely,



Michael O. Wise
Acting Director

²⁷ Board actions that affect promotions, and other actions, must be consistent with the requirements of the outstanding order, which deals with, among other things, restraints on advertising prices and discounts and on advertising the availability of optometric services. *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).