

COMMISSION AUTHORIZED

PREPARED STATEMENT¹

OF

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FEDERAL TRADE COMMISSION

BEFORE THE
JOINT STANDING COMMITTEE ON BUSINESS LEGISLATION
OF THE
MAINE HOUSE OF REPRESENTATIVES

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¹ This testimony represents the views of the Boston Regional Office and the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

Madam Chairman and Members of the Committee: I am pleased to appear before you today to discuss L.D. 1151, which would amend Maine's laws governing optometry. This testimony represents the views of the Boston Regional Office and the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.²

We support provisions of the bill that parallel provisions the Commission adopted in its own rules dealing with commercial practices in the eye care industry. We encourage the legislature to eliminate restrictions on commercial practices such as locations and advertising, because, as the Commission found in its rulemaking proceedings involving the optometric industry, such restrictions are likely to increase costs and restrict consumers' access to eye care without providing countervailing consumer benefits. Such restrictions on competition have cost consumers across the country millions of dollars annually.

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.³ 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, pharmacists, and other health care providers.⁴ In addition, the

² Inquiries regarding this testimony should be directed to David Keniry, Boston Regional Office (617- 565-7240) or to Elizabeth Hilder, Bureau of Competition (202-326-2545).

³ 15 U.S.C. § 41 et seq.

⁴ See, e.g., Iowa Chapter of American Physical Therapy Association, 111 F.T.C. 199 (1988) (consent order); Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988); 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 Ass'n, C-3351 (consent order issued November 19, 1991, 56 Fed. Reg. 65093 (December 13, 1991)); Medical Staff of Holy Cross Hospital, C-3345 (consent order issued September 10, 1991, 56 Fed. Reg. 49184 (September 27, 1991)); Southbank IPA, Inc., C-3355 (consent order issued December 20, 1991, 57 Fed. Reg. 2913 (January 24, 1992));
(continued...)

staff has submitted comments about these issues to state legislatures and administrative agencies and others.⁵ In January of last year I testified before the Committee on Business Legislation of the Maine House of Representatives on a similar bill to amend Maine's laws governing the practice of optometry. 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 the acts or practices in the marketplace that injure consumers through unfairness or deception.

II. FTC studies and rulemaking proceedings concerning eye care.

Regulations that restrict the business aspects of professional practice may have unintended consequences for consumers. A number of studies have found little relationship between restrictions on professionals' business practices and the quality of service or care they provide.⁶ 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

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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 (consent order issued, 57 Fed. Reg. 20279 (May 12, 1992)).

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); Massachusetts Division of Registration, April 20, 1993 (Board of Optometry).

⁶ 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).

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.⁷ That proceeding revealed that other common restraints on eye care providers also appeared to limit competition, 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.⁸ 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 the 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 the commercial optometrists and

⁷ 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 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).

⁸ Bureau of Economics, Federal Trade Commission, The Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

other provider groups.⁹ 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.

During the 1980's, the FTC conducted a second rulemaking proceeding about the restraints on commercial eye care practice.¹⁰ 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.¹¹ The FTC 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.¹² The FTC adopted a rule¹³ 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.¹⁴ 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.¹⁵ The evidence from the

⁹ Bureaus of Consumer Protection and Economics, Federal Trade Commission, *A Comparative Analysis of Cosmetic Lens Fitting by Ophthalmologists, Optometrists, and Opticians* (1983).

¹⁰ 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").

¹¹ Commission Statement, *supra* n. 10, at 10285.

¹² Commission Statement, *supra* n. 10 at 10285-86.

¹³ Commission Statement, *supra* n. 10 at 10285.

¹⁴ In addition, the Commission decided to retain, with modifications, the prescription release requirement from the original Eyeglasses Rule.

¹⁵ *California State Board of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), reh'g denied, January 8, 1991.

FTC's rulemaking record remains a compelling argument for eliminating restraints on commercial practice.

III. Maine's current law and L.D. 1151.

Maine prohibits optometrists from associating with other businesses or with persons who are not optometrists "for the promotion of any commercial practice for profit."¹⁶ Maine law also prohibits optometrists from practicing as employees of mercantile establishments, from encouraging promotion of their services as part of a mercantile or commercial establishment, and from practicing as lessees of a business that sells optical goods.¹⁷ These prohibitions are similar to restrictions that were the subject of the Eyeglasses II rule. The bill now under consideration would remove one of those prohibitions against aspects of commercial practice, by permitting optometrists to practice as lessees of businesses that sell optical goods.¹⁸

Restrictions on affiliations with non-professionals and on associations with other businesses prevent business corporations or non-professionals from employing professionals and prevent partnerships and franchise agreements with non-professionals. Such restrictions may deny professionals access to potentially important sources of capital and 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.¹⁹

Thus, we support efforts like L.D. 1151 to remove restrictions on practicing in commercial locations. We question

¹⁶ 32 Me. Rev. Stat. Ann. § 2435.

¹⁷ 32 Me. Rev. Stat. Ann. § 2434.4.

¹⁸ The bill would also repeal two sections of the law that inhibit coordinating an optician's business with an optometrist's practice: § 2431-A:2.J now makes it a grounds for disciplinary action to practice on premises where "materials other than those necessary to render optometric services" are dispensed, and §2443 makes it a misdemeanor for an optician to attempt to influence a patron's choice of optometrist or ophthalmologist.

¹⁹ Commission Statement, supra note 10, at 10288-10289.

whether such restrictions serve any purpose other than inhibiting the formation of high-volume commercial practices.²⁰

We would also encourage the removal of prohibitions against eye care providers working for lay persons or other professionals or entering into partnerships or other associations with them. The bill about which I testified last year would have taken this additional step, as well as removing the restraint on practicing in commercial locations. 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.²¹

Maine also requires an optometrist to practice only under the name shown on his or her certificate.²² L.D. 1151 does not address this part of Maine's law, which would prevent practicing under a trade name. The Commission has found that such restrictions on the use of nondeceptive trade names hinder the growth and development of optometric firms and make it difficult for high-volume operators to advertise multiple outlets.²³ These restrictions thus may deprive consumers of valuable information and increase consumer search costs.

IV. Conclusion.

We are pleased to have this opportunity to present our views on L.D. 1151, which would remove some of the restrictions Maine law imposes on optometrists' commercial practices. Some remaining restraints may still inhibit forms of providing services that might increase competition and benefit consumers. The Commission has found that restrictions like these have resulted in significant consumer injury, in the form of monetary losses and less frequent vision care, without providing consumer benefit. Permitting 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.

²⁰ For a general discussion of the effects of restricting locations in mercantile settings, see Commission Statement, supra note 10, at 10289.

²¹ Commission Statement, supra note 10, at 10288-10289.

²² 32 Me. Rev. Stat. Ann. § 2431-A:2.K. The law evidently requires that certificates be issued to individuals.

²³ Commission Statement, supra note 10, at 10289.