



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

Bureau of Consumer
Protection
Office of the Director

COMMISSION AUTHORIZED

February 10, 1995

The Honorable Gary A. Merritt
Kansas House of Representatives
State Capitol, Room 175-W
Topeka, Kansas 66612-1504

Dear Mr. Merritt:

The staff of the Federal Trade Commission¹ is pleased to respond to your request for comment on House Bill No. 2164. The bill would clarify the conditions under which optometrists and non-optometrists could enter into lease agreements. Thus, the bill would affect the conditions under which optometrists could practice in conjunction with optical goods companies.

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 Commission encourages competition in the licensed professions, including the health care professions, and in the delivery of health care services to the maximum extent compatible with other state and federal goals. For several years, the Commission and its staff have investigated the competitive effects of restrictions on the business practices of state-licensed professions, including dentists, physicians,

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

² 15 U.S.C. §§ 41 et. seq.

pharmacists, and other health care providers.³ In addition, the staff has submitted comments about these issues to state legislatures and administrative agencies and others.⁴ As one of the two federal agencies with principal responsibility for enforcing antitrust laws, the Commission 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 Commission is also concerned about acts or practices in the market that injure consumers through unfairness or deception.

II. Description of H.B. 2164.

H.B. 2164 would clarify the conditions under which an optometrist could lease office space from an optical company. Kansas statutes prohibit someone who is not a licensed optometrist from "maintaining an office for the practice of

³ See, e.g., American Medical Ass'n, 94 F.T.C. 701 (1979); Iowa Chapter of American Physical Therapy Ass'n, 111 F.T.C. 199 (1988) (consent agreement); Wyoming State Bd. of Chiropractic Examiners, 110 F.T.C. 145 (1988) (consent order); Connecticut Chiropractic Ass'n, 114 F.T.C. 708 (1991); American Psychological Ass'n, C-3406 (consent order issued December 16, 1992), 58 Fed. Reg. 557 (January 6, 1993); Texas Bd. of Chiropractic Examiners, C-3379 (consent order issued, April 21, 1992, 57 Fed. Reg. 20279 (May 12, 1992)); National Ass'n of Social Workers, C-3416 (consent order issued March 3, 1992, 58 Fed. Reg. 17411 (April 2, 1993)); California Dental Ass'n, D-9259 (administrative complaint issued July 9, 1993); and McLean County Chiropractic Ass'n, C-3491, 59 Fed. Reg. 22163 (April 29, 1994) (consent order).

⁴ See, e.g., Comments to 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); Missouri Board of Chiropractic Examiners, December 11, 1992; Massachusetts Division of Registration, April 20, 1993 (Board of Optometry); and New Jersey Board of Medical Examiners, September 7, 1993; see also testimony to the Maine House of Representatives, May 3, 1993 (Board of Optometry); same, January 8, 1992, and the Washington State Legislature's Joint Administrative Rules Review Committee, December 15, 1992 (opticians and optometrists).

optometry," from directly or indirectly controlling or attempting to control a licensee's professional judgment or practice, and from bearing any expenses or having any interest in the licensee's practice, books, records, or materials.⁵ The law permits a licensee to enter into leases and debt instruments not otherwise in violation of the law.⁶

H.B. 2164 would specify terms that would not be construed as "maintaining an office for the practice of optometry" in violation of the law. Payment of rent to an optical company would be permitted (as long as it did not depend on the number of patients, prescriptions, or referrals), as would lease agreements about hours of operation, insurance, equipment and furnishings, and utilities.⁷ In addition, leases between optometrists and optical companies could include agreements about participation in third-party programs and noncompetition agreements about product sales.⁸ Leases would have to recite that the optical company landlord will not interfere with the optometrist's exercise of professional judgment and acknowledge the ownership of the optometrist's patient records.⁹

The optometrist would have to post an appropriate sign at the office entrance indicating that the optometrist is independent.¹⁰ Similar design and decor in adjoining optometry and optical company offices would be permitted, as long as the required sign shows that the optometrist is an independent practitioner.¹¹

⁵ K.S.A. 65-1502(b)(1) and (2).

⁶ K.S.A. 65-1502(c).

⁷ H.B. 2164, §1, proposed K.S.A. 65-1502(c)(2)(A), (B), (C), (E) and (F).

⁸ H.B. 2164, §1, proposed K.S.A. 65-1502(c)(2)(D) and (G).

⁹ H.B. 2164, §1, proposed K.S.A. 65-1502(c)(2). Under Kansas decisions, a corporation cannot engage in the practice of optometry. This concept includes maintaining an office, K.S.A. 65-1502(a)(1), which in turn includes controlling professional judgment, K.S.A. 65-1502(b)(1), and having any interest in books, records, or materials, K.S.A. 65-1502(b)(2). Thus, the records must be the property of the optometrist.

¹⁰ H.B. 2164, §1, proposed K.S.A. 65-1502(c)(2).

¹¹ H.B. 2164, §1, proposed K.S.A. 65-1502(c)(2).

III. FTC studies and rulemaking proceedings concerning eye care.

Regulations that restrict the business aspects of professional practice can impose costs on consumers. Studies have often found little relationship between restrictions on professionals' business practices and the quality of service or care they provide.¹² Restrictions on their business practices can limit professionals' ability to compete effectively with each other and can also increase their costs. If restrictions impose 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 the subject of an FTC rulemaking proceeding in the 1970's.¹³ That proceeding revealed 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

¹² 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).

¹³ 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 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., Mass. Bd. of Registration in Optometry, 110 F.T.C. 549 (1988).

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.¹⁴ 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.¹⁵ 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 restraints on commercial eye care practice.¹⁶ 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.¹⁷ The Commission found that a substantial portion of the consumers' costs for eye examinations and eyewear was attributable to the inefficiencies

¹⁴ 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").

¹⁵ 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").

¹⁶ 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").

¹⁷ Commission Statement, supra note 16, at 10285.

of an industry protected from competition.¹⁸ The FTC thus adopted a rule¹⁹ 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.²⁰ 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.²¹ 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 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.²²

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

¹⁸ Commission Statement, supra note 16, at 10285-86.

¹⁹ Commission Statement, supra note 16, at 10285.

²⁰ In addition, the Commission decided to retain, with modifications, the prescription release requirement from the original Eyeglasses Rule.

²¹ California State Board of Optometry v. FTC, 910 F.2d 976 (D.C. Cir. 1990).

²² Commission Statement, supra note 16, at 10288-10289.

quality services, and offer competition to traditional providers.²³ 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.²⁴

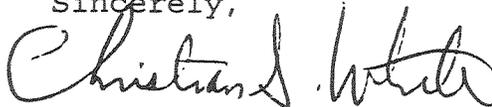
H.B. 2164, which would make it easier for optometrists to locate in space leased from optical goods stores, represents a step toward eliminating a restriction on commercial forms of practice. We believe that making it clear that the business relationships outlined in H.B. 2164 are permitted could benefit consumers.

We note, however, that potentially significant constraints may remain in place. Kansas law apparently continues to ban employment of optometrists by non-professionals, and thus could prevent some potentially efficient forms of collaboration. Other forms of economic collaboration between optometrists and optical goods companies, such as coordinated promotions or pricing, could also benefit consumers. Because H.B. 2164 is limited to the subject of leases, its failure to include such promotions or other kinds of relationships may not necessarily mean they are not permitted, of course.

V. Conclusion.

Relaxing constraints on commercial practices is consistent with the direction the Commission took in its Eyeglasses II rulemaking. The proposal to clarify conditions under which optometrists may lease space from optical goods stores could benefit consumers through greater competition and efficiencies in operation.

Sincerely,



Christian S. White
Acting Director

²³ Commission Statement, supra note 16, at 10288-10289.

²⁴ For a general discussion of the effects of restricting locations in mercantile settings, see Commission Statement, supra note 16, at 10289.