



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

Office of the Chairman

April 29, 2003

The Honorable Ward Crutchfield
Senate Majority Leader
Legislative Plaza Suite 13
Nashville, Tennessee 37243

Dear Senator Crutchfield:

The Federal Trade Commission is pleased to respond to your invitation for comments on Senate Bill 855, which would amend Tenn. Code Ann. § 63-8, the portion of the Code regulating the practice of optometry.⁽¹⁾ The FTC is charged by statute with enforcing laws prohibiting 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 optometry, to the maximum extent compatible with other state and federal goals. The Commission has had a long-standing interest in the effects on consumers and competition arising from the regulation of optometry.⁽³⁾ Indeed, the Commission has conducted a series of extensive analyses and rulemakings focused on the kind of regulation contemplated in Senate Bill 855, and we hope our findings will be of use to Tennessee legislators as they consider this Bill.

The proposed legislation

Senate Bill 855 begins with the statement that optometrists "shall be free from any influences that would interfere with their exercise of professional judgment," and that "optometrists shall not be associated with any person or persons in any manner which might degrade or reduce the quality of visual care received by the citizens of this state."⁽⁴⁾

The next section then states: "A manufacturer, wholesaler, or retailer of ophthalmic materials who leases space to an optometrist shall not, directly or indirectly, control or attempt to control the professional judgment, manner of practice, or practice of an optometrist."⁽⁵⁾

The Bill's explicit goal is to prevent commercial entities from interfering with the optometrist's professional judgment in ways that would reduce the quality of eye care. The Bill lists ten specific arrangements that would constitute impermissible attempts to control the practice of an optometrist. This list prohibits some forms of control that could plainly have a negative effect on the quality of care, such as "Restricting an optometrist's access to leased office space when the optometrist needs such access to provide emergency care to a patient."⁽⁶⁾

The Bill also prohibits other negotiations and collaborative arrangements whose impact on the quality of patient care is less clear. These prohibitions would not allow an optical store leasing space to an optometrist to specify the optometrist's professional fees or office hours,⁽⁷⁾ to restrict the use of after-hours appointments,⁽⁸⁾ or to share "telecommunication services" or clerical staff unless the optometrist supervises said clerical staff.⁽⁹⁾

These restrictions would apply to all manufacturers or sellers of ophthalmic materials who lease space to optometrists, thus limiting the relations between optometrists and the optical store in which some may choose to practice.

Senate Bill 855 would likely reduce competition

Senate Bill 855 would likely constrain competition from commercial optical chains that seek to partner with optometrists in offering a combination of professional services and ophthalmic goods that some consumers prefer. These effects would likely occur because the bill would tend to make the operation of commercial optometric practice more difficult and would hamper chain optical stores particularly. Chains operate by creating a generalized business model that aims to reduce both operating costs and the costs to consumers of finding and purchasing ophthalmic goods and services. Optical chains succeed in the marketplace when they offer consumers some combination of cost and quality that consumers prefer. The proposed restrictions would likely reduce competition by impairing the creation of uniform, chain-wide business policies on basic business matters like prices, hours of operation, and services offered.

Unfettered competition is at the heart of the American economy. Vigorous competition forces producers to minimize costs and prices and to increase quality. Through this dynamic, consumer welfare is maximized because consumers reap the benefits of lower prices, greater variety, and higher quality goods and services. The United States Supreme Court has observed, "ultimately, competition will produce not only lower prices but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'"(10)

The Court has also explicitly noted that competition benefits consumers of professional services.(11)

Restraints on competition from optical chains may make consumers better off if such restrictions improve the quality of eye care or lead to other consumer benefits that would not be produced by firms operating in a competitive marketplace. Senate Bill 855 would create net benefits for consumers if the value to consumers of any improvement in the quality of eye care attributable to the Bill is greater than the harm imposed on consumers by the reduction in competition. We respectfully urge the Tennessee legislature to weigh the impact on competition of the prohibitions in Senate Bill 855 against any benefits that the Bill's restrictions might create for consumers.

Empirical evidence suggests restrictions on commercial optometry reduce competition without increasing the quality of care

The Federal Trade Commission itself has engaged in such an evaluation of many restrictions on commercial optometry chains, and our findings may be of help to the Tennessee legislature. Research and rulemakings conducted by the Federal Trade Commission indicate that many such restrictions tend to increase costs while producing no offsetting consumer benefit.(12)

Two major studies by FTC staff examined many of the same issues presented in Senate Bill 855. These studies, plus several others conducted by independent researchers using the FTC staff's data, are the most recent empirical investigations of the consumer impact of commercial optometry restrictions.

The first study, 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.(13)

This study was conducted with the help of two colleges of optometry and the Director of Optometric Services of the Veterans Administration. It compared four dimensions of quality in markets with chain firms and markets without chain firms: 1) the thoroughness of the eye examination; 2) the accuracy of the prescription; 3) the accuracy and workmanship of the eyeglasses; and 4) the extent of unnecessary prescribing. The study found that optometric 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, as measured by these four attributes. Later analyses of the FTC data by

academic researchers came to similar conclusions.(14)

The second study, published in 1983 by the Bureau 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.

Thus, three findings emerge from the FTC staff studies that may be of interest to Tennessee legislators as they consider Senate Bill 855:

- Restrictions on commercial optometry tend to make commercial optometric practice more difficult and therefore to drive up prices.(16)
- The higher prices lead many price-sensitive consumers to defer seeking eye care, and thus affirmatively harmed that group of citizens.(17)
- There is no evidence that restrictions on the commercial aspects of optometric practice raise the quality of services for those people who do obtain them.(18)

On the basis of these studies and other evidence assembled in that rulemaking proceeding,(19) the FTC concluded that unnecessary restrictions on commercial practices by eye care providers resulted in significant consumer injury, in the form of monetary losses and less frequent vision care, without providing consumer benefit.(20)

The Commission concluded that "the record is quite clear on this central issue: There is no difference in the average quality of care available to consumers in restrictive and nonrestrictive markets."(21)

The Commission also found that of the more than \$8 billion consumers spent on eye exams and eyewear in 1983, a substantial portion was attributable to inefficiencies resulting from state regulation that reduced competition.(22) The evidence from the FTC's rulemaking record thus provides a strong argument for avoiding unnecessary restraints on the commercial practice of optometry.

The rulemaking studies took place over 20 years ago, and some aspects of the market have undoubtedly altered over time. For example, the changing patterns of insurance coverage may alter the price effects of practice restrictions; advertising is more widespread(23); and chain stores and mass merchant sellers of ophthalmic goods have become more common. Nevertheless, no persuasive empirical evidence alters the rulemaking's most important conclusion - the absence of positive quality effects from restrictions on commercial practice.

Conclusion

Senate Bill 855 includes several restrictions on the commercial practice of optometry. Economic analysis and the most recent empirical evidence available suggest that such restrictions on optical chains tend to increase prices, but the restrictions produce no improvement in the quality of eye care that consumers receive. Therefore, the commercial restrictions probably would not benefit and likely would harm consumers. Consumers generally benefit from robust competition among optometric care providers, and a statute that unnecessarily restricts that competition is likely to harm consumers in the state of Tennessee. For these reasons, we urge Tennessee legislators to consider carefully the impact of Senate Bill 855 on consumers and competition.

By direction of the Commission.

Timothy J. Muris
Chairman

Endnotes:

1. The Commission's vote to approve this letter was 5-0.
2. Federal Trade Commission Act, 15 U.S.C. § 45.
3. See, e.g., 16 CFR Part 456 (prescription release rule); *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988); Comments of the Staff of the Federal Trade Commission, Intervenor, before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002), available at <<http://www.ftc.gov/be/v020007.htm>>.
4. Bill, section 1.
5. Bill, section 2, *creating* new code section 63-8-125(a).
6. Bill, section 2, *creating* new code section 63-8-125(b)(7).
7. Bill, section 2, *creating* 63-8-125(b)(1) (ban on "attempting to set the professional fees or office hours of an optometrist").
8. *Id.* at (b)(2) (ban on "attempting to restrict an optometrist's discretion to schedule appointments at times convenient to the optometrist's patients").
9. *Id.* at (b)(4) (ban on "Sharing . . . telephone lines or other telecommunication services; provided, however, nothing in this section shall preclude an optometrist from entering into a business arrangement involving the delegation of clerical tasks and functions to persons who are not employees of the optometrist but under the optometrist's general supervision...").
10. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co. V. FTC*, 340 U.S. 231, 248 (1950)); accord, *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990).
11. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *National Society of Professional Engineers*, 435 U.S. at 689.
12. The Commission addressed issues relating to the commercial practice of optometry in the course of promulgating the Ophthalmic Practice Rules, commonly known as "Eyeglasses II." An earlier rulemaking - Eyeglasses I - considered two relatively narrow types of competitive restrictions but also revealed the existence of other restraints on eye care providers that appeared to limit competition unduly, increase prices, and reduce the quality of eye care provided to the public. See Advertising of Ophthalmic Goods and Services, Statement of Basis and Purpose, 43 Fed. Reg. 23992 (June 2, 1978) (promulgating 16 CFR Part 456) ("Eyeglasses I"). The Eyeglasses I Rule prohibited bans on nondeceptive advertising and required vision care providers to furnish copies of prescriptions to consumers after eye examinations. On appeal, the 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 Assn. v. FTC*, 626 F.2d 896 (D.C. Cir. 1980). The FTC has continued to address advertising restrictions through administrative litigation. See, e.g., *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).

Eyeglasses II considered many of the same issues presented by Bill 855, including such topics as whether the lay business partners of optometrists could properly be involved in "setting of fees, salaries, or minimum office hours;

location of the practice; choice of suppliers of material, equipment, services, and laboratory work; . . . and other activities that involve business judgments to a similar degree." The Commission found that "The record . . . demonstrates that lay control over the business aspects of an optometric practice is an integral element of commercial practice." See Ophthalmic Practice Rules ("Eyeglasses II"), Statement of Basis and Purpose, 54 Fed. Reg. 10285 (Mar. 13, 1989) ("Commission Statement") at 10300. (The Statement of Basis and Purpose is attached to this letter.) The Eyeglasses II Rule - put into effect in 1989 - was intended to limit the ability of states and state optometric boards to restrict the commercial aspects of optometric practice. The D.C. Circuit struck down the Rule on the grounds that the FTC Act did not give this agency such authority over the states. See *California Bd. of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990). The Court's decision should not be read as a rejection of the factual underpinnings of the FTC effort. Because the Court vacated the Rule solely on jurisdictional grounds, it did not address the factual underpinnings of the FTC effort.

13. 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").

14. John Kwoka, "Advertising and the Price and Quality of Optometric Services," *American Economic Review* 74(1), 211-16 (1984); and Debra Haas-Wilson, "The Effect of Commercial Practice Restrictions: The Case of Optometry," *Journal of Law and Economics* 29(1), 165-86 (1986). Both of these studies examined differences in quality across markets with varying degrees of commercial restrictions. Philip Parker ('*Sweet Lemons: Illusory Quality, Self-Deceivers, Advertising, and Price*, *Journal of Marketing Research*, Vol.32, Aug. 1995, at 291-307) offers a somewhat contrary view. Using the same FTC dataset, he questioned the robustness of the previous research's price results, finding that some alternative formulations failed to find a significant price effect due to differences in commercial restrictiveness. Parker did not, however, directly dispute the key quality finding of the FTC report - that restrictions on commercial optometric practice did not influence average quality levels for eye exams.

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. See Commission Statement, *supra* n.12, at 10286 ("prices for eye care are 18 percent higher in markets where chain firms are totally restricted than in markets where chain firms operate freely"). Changing market circumstances could make the size of the price effect today smaller than 18 percent. Nevertheless, we have identified no change in the marketplace that economic analysis suggests would likely reverse or eliminate the price effect if a new study were conducted with more recent data.

17. See Commission Statement, *supra* n.12, at 10290 (a survey of 10,000 people "found that significantly fewer individuals purchased eyeglasses in a given year in states with higher prices than in states with lower prices"); *id.* (testimony by the AOA suggests that "85 percent of all serious injuries sustained by persons 65 and older are caused by falls; 25 percent of these relate directly to uncorrected vision problems").

18. In fact, studies of professional services have often found little relationship between professionals' business practices and the quality of service they provide. See C. Cox and S. Foster, *The Costs and Benefits of Occupational Regulation*, FTC Bureau of Economics Staff Report, October 1990.

19. 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 Commission Statement, *supra* n.12, at 10287.

20. Commission Statement, *supra* note 12, at 10285.

21. Commission Statement, *supra* n.12, at 10290-91.

22. Commission Statement, *supra* note 12, at 10285-86.

23. See, e.g., James H. Love and Frank H. Stephen, "Advertising, Price and Quality in Self-Regulating Professions: A Survey," 3 Intl. J. Econ. Bus. 227 (1996). This 1996 survey of empirical economics literature on professional advertising revealed that most studies find advertising tends to reduce the price of professional services without reducing quality. On price, the authors concluded, "the overwhelming impression from the results reviewed...is of advertising having a downward effect on professional fees." On quality, they concluded that the empirical literature generally shows that advertising does not lead to lower quality.