



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

Office of Policy Planning
Bureau of Competition
Bureau of Economics

November 16, 2011

Teneale E. Johnson
Executive Secretary
Board of Dental Examiners
143 State House Station
Augusta, ME 04333

Re: Rules to Implement a 2-Year Pilot Project for Independent Practice Dental Hygienists to Process Dental Radiographs in Underserved Areas of Maine

Dear Ms. Johnson:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics¹ appreciate this opportunity to provide comments to the Maine Board of Dental Examiners ("Board") regarding its proposed rules to implement a legislatively mandated two-year pilot project.² This pilot project would allow licensed independent practice dental hygienists ("IPDHs") to process dental radiographs ("x-rays") in underserved areas of Maine. We write to address Section II of the Notice of Agency Rule-making Proposal ("Notice").³

Section II would restrict IPDHs to independently taking only two types of x-rays: bitewing and periapical films. It would prohibit IPDHs from independently taking other types of x-rays, including panoramic and full-mouth series. The pilot project aims to foster accessible and cost-effective care in underserved areas of Maine, with no stated limitations on the types of x-rays IPDHs may take independently. The proposed restrictions in Section II, however, appear to limit IPDH practice under the pilot project in ways not contemplated by the enabling legislation. We are concerned that Section II, if adopted, would impede the development of new arrangements for delivering oral health care services in ways contrary to the very intent of the pilot project. Notably, the Notice does not provide any statement of the Board's basis for its proposed restrictions. Nor does the Notice cite to evidence -- and we are aware of no evidence -- that allowing licensed IPDHs independently to process the x-rays that the proposed rule would restrict is likely to harm the public. Absent such evidence, the proposed restrictions could have the unfortunate effect of harming the members of the public by limiting their choices, limiting access to oral health care, and impeding price competition. Therefore, FTC staff at this time believes that the residents of Maine in underserved areas would be better served if the Board eliminates the restrictions in Section II.

The U.S. Surgeon General has found that a “‘a silent epidemic’ of oral diseases” affects our nation’s most vulnerable citizens, such as the underserved communities that the enabling legislation sought to protect.⁴ Dental hygienists play an important role in delivering dental care to these communities.⁵ Therefore, in implementing the pilot project, we urge the Board to avoid imposing what appear to be the unnecessary restrictions of Section II on IPDH practice.

I. Interest and Experience of the FTC

The FTC is charged with enforcing Section 5 of the FTC Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.⁶ Competition is at the core of America’s economy, and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation.⁷ Competition in health care markets has long been an area of focus for the FTC’s law enforcement,⁸ research,⁹ and advocacy¹⁰ activities.

The FTC has examined markets for the provision of dental services in the context of various law enforcement actions. For example, in 2003 the Commission sued the South Carolina Board of Dentistry (“SCBD”), charging that the Board had illegally restricted the ability of dental hygienists to provide preventive dental services in schools.¹¹ The state legislature in 2000 had eliminated a statutory requirement that a dentist examine each child before a hygienist could perform preventive care in schools, in order to address concerns that many schoolchildren, particularly those in low-income families, were receiving no preventive dental services. In 2001, the FTC’s complaint charged, the Board re-imposed the dentist examination requirement.¹² The complaint alleged that the Board’s action unreasonably restrained competition in the provision of preventive dental care services, deprived thousands of economically disadvantaged schoolchildren of needed dental care, and that its harmful effects on competition and consumers could not be justified.¹³ The Board sought to have the complaint dismissed on the ground that its actions were exempt from the antitrust laws by virtue of the state action doctrine, but the Commission denied the motion to dismiss.¹⁴ The Board ultimately entered into a consent agreement settling the charges.¹⁵

FTC staff also has provided comments on competition and consumer protection matters to other state dentistry boards and state officials.¹⁶ In 2009, staff provided comments to Louisiana legislators and the Louisiana Board of Dentistry (“LBD”) to highlight competition concerns raised by proposed bills and proposed LBD rules regarding the practice of in-school dentistry.¹⁷ Consistent with staff’s comments, the LBD ultimately adopted rules for portable and mobile dentistry that more closely align dental practice requirements in schools and other non-traditional settings with requirements applicable to the same dentists in traditional settings.¹⁸ In December 2010, staff urged the Georgia Board of Dentistry not to adopt proposed rule changes that would have required the indirect supervision of a dentist for dental hygienists performing permitted treatments at approved public health facilities, and which could be interpreted

to require a dentist's initial diagnosis of all patients in such settings.¹⁹ Staff expressed concern that the proposed changes likely would raise the cost of such services and reduce the numbers of consumers receiving dental care, with no evidence that additional supervision was needed to prevent harm to dental patients. The Georgia Board has tabled the proposed rules.

II. Background on Maine Legislation and the Proposed Rules

In 2008, Maine passed legislation to allow dental hygienists meeting certain education and experience requirements to be licensed as "independent practice dental hygienists" and to perform many dental care services independently, without supervision by a dentist.²⁰

In June 2011, Maine enacted a legislative "Resolve" directing the Board to implement a two-year pilot project that expands IPDHs' current scope of practice by allowing them also to take x-rays within areas designated as dental health professional shortage areas by the United States Department of Health and Human Services.²¹ The Resolve addresses "radiographs," i.e., x-rays, in general, with no reference to particular types of x-rays. The Resolve directs the Board to develop protocols for IPDHs to take x-rays²² and further directs that it adopt "routine technical rules" to implement the program.²³

The enabling legislation provides that all x-rays taken by IPDHs will be reviewed by a dentist. Specifically, the Resolve requires that an IPDH performing x-rays must have a written agreement with a licensed dentist who will interpret all x-rays within 21 days and sign a radiographic review and findings form.²⁴

Nothing in the Resolve indicates that the legislature contemplated rules that would prohibit IPDHs from providing particular types of x-rays. Section II of the Board's recently proposed rules, however, would alter the pilot project by limiting IPDHs to taking two types of dental x-rays: bitewing films (vertical and/or horizontal) and periapical films (when necessary to check for subgingival calculus removal). The proposed rules would prohibit IPDHs from taking any other types of dental x-rays, including panoramic images or full-mouth series. The proposed rules indicate no reason for these restrictions,²⁵ and in fact seem to undermine the very purpose of the pilot project, which is to test the effects of expanding the current scope of practice of an IPDH.

III. Discussion

Maine's authorization of IPDHs permits the development of an innovative delivery model for promoting oral health care. Licensed IPDHs serve as the initial point of contact for patients seeking dental care, are authorized to provide various preventive services themselves, assess the need for referrals to dentists for additional treatments, and generate written referral plans. Taking dental x-rays would help IPDHs to fulfill their responsibilities in this new delivery model by enhancing IPDHs' ability to detect abnormalities and determine when referrals are warranted. In dental health professional

shortage areas, easier and more efficient access to dental care can improve health and help to avoid costly procedures that may be required when dental conditions go untreated.

Permitting IPDHs to take x-rays in underserved areas under the pilot project also may encourage more IPDHs to practice in these communities, which is likely to further benefit Maine consumers. In addition to greater access, more convenient locations, and potentially expanded hours of operation, an increased supply of dental health professionals would foster competition in the provision of oral health care, which may create incentives for all providers to lower prices or enhance the quality of their services.

We are therefore concerned by the Board's proposal to limit IPDHs to taking only bitewing and periapical films. If the Board were to adopt Section II, consumers in underserved areas would lose some of the benefits of competition from the new delivery model Maine has encouraged. Consumers would continue to absorb the additional travel costs associated with needing to visit a dentist for certain types of x-rays (e.g., costs incurred to travel to a dentist, or costs incurred by a dentist traveling to the underserved area). Further, consumers would continue to pay the costs of a dentist's time, even in situations where a hygienist otherwise could provide services safely at a lower cost. Such costs may cause some consumers to forgo necessary treatments. In addition, consumers would not receive the other possible benefits of competition by IPDHs, such as more convenient locations or hours of operation.

While we appreciate the importance of safety considerations regarding the taking of x-rays,²⁶ we know of no reason why IPDHs should not be expected to be mindful of safety, and the Board's proposed prohibitions in Section II do not appear to be tailored to address any safety concerns. We also note that existing Board rules allow hygienists working under "public health supervision" to perform the full range of x-rays, without the need for a dentist to be present or to evaluate each individual patient before the x-rays are performed.²⁷ These rules merely require written standing orders by a supervising dentist who will be available to read them within 21 days. The pilot program already subjects IPDH x-rays to the same type of review.

In general, sound competition policy calls for competition to be restricted only when necessary to protect the public from significant harm and, if there is a restriction, for the restriction to be crafted narrowly to minimize its anticompetitive impact.²⁸ This is because consumers benefit from competition, including competition among health care professionals.²⁹ Absent evidence of likely harm from the provision of panoramic or full-mouth series x-rays by IPDHs practicing under the pilot program, the restrictions proposed in Section II would be unnecessary and overly broad.

Conclusion

By prohibiting IPDHs from providing certain types of x-rays to patients in underserved areas of Maine, Section II of the Board's proposed rules threatens to deny Maine consumers the potential benefits of expanded practice by IPDHs under the pilot project. We urge the Board to consider whether the restrictions contained in Section II

may be unnecessarily restrictive, and to limit its final rules to those needed to protect the public.

Respectfully submitted,

Susan S. DeSanti, Director
Office of Policy Planning

Richard A. Feinstein, Director
Bureau of Competition

Joseph Farrell, Director
Bureau of Economics

¹ This staff letter expresses the views of the Federal Trade Commission’s Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission, however, has voted to authorize staff to submit these comments.

² LD 230, 125th Maine State Legis. (Me. 2011).

³ Board of Dental Examiners, Notice of Agency Rule-making Proposal Concerning Ch. 16: Rules to Implement a 2-Year Pilot Project for Independent Practice Dental Hygienists to Process Dental Radiographs in Underserved Areas of the State (2011), *available at* <http://www.mainedental.org/forms/Chapter16Proposed.pdf>.

⁴ DEPARTMENT OF HEALTH AND HUMAN SERVICES, ORAL HEALTH IN AMERICA: A REPORT OF THE SURGEON GENERAL 1 (2000), *available at* <http://silk.nih.gov/public/hck1ocv.@www.surgeon.fullrpt.pdf>.

⁵ *See generally id.* at 3, 18.

⁶ FTC Act, 15 U.S.C. § 45.

⁷ Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy long has been faith in the value of competition.”).

⁸ *See generally* FTC Staff, Overview of FTC Antitrust Actions in Health Care Services and Products (Sept. 2011), *available at* <http://www.ftc.gov/bc/healthcare/antitrust/hcupdate.pdf>; *see also* FTC, Competition in the Health Care Marketplace: Formal Commission Actions, *available at* <http://www.ftc.gov/bc/healthcare/antitrust/commissionactions.htm>.

⁹ *See, e.g.*, FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE (“DOJ”), IMPROVING HEALTH CARE: A DOSE OF COMPETITION Ch. 7 (2004), *available at* <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>.

¹⁰ FTC and staff advocacy may include letters or comments addressing specific policy issues, Commission or staff testimony before legislative or regulatory bodies, amicus briefs, or reports. *E.g.*, FTC and DOJ Written Testimony before the Illinois Task Force on Health Planning Reform Concerning Illinois Certificate of Need Laws (Sept. 2008), *available at* <http://ftc.gov/os/2008/09/V080018illconlaws.pdf>; FTC Amicus Curiae Brief in *In re Ciprofloxacin Hydrochloride Antitrust Litigation Concerning Drug Patent Settlements Before the Court of Appeals for the Federal Circuit* (Case No. 2008-1097) (Jan. 2008), *available at* <http://www.ftc.gov/os/2008/01/080129cipro.pdf>; FTC & DOJ, A DOSE OF COMPETITION, *supra* note 9.

¹¹ *In re South Carolina State Board of Dentistry, Opinion and Order of the Commission IV. Factual Allegations and Statutory Framework* (2004) (Dkt. No. 9311), *available at* <http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf>.

¹² *Id.*

¹³ *In re South Carolina State Board of Dentistry, Complaint* (2003) (Dkt. No. 9311), *available at* <http://www.ftc.gov/os/2003/09/socodontistcomp.pdf>; *see also* *In re South Carolina State Board of Dentistry, Opinion and Order of the Commission II. Procedural Background*.

¹⁴ *In re South Carolina State Board of Dentistry, Opinion and Order of the Commission*.

¹⁵ *In re South Carolina State Board of Dentistry, Decision and Order* (2007) (Dkt. No. 9311), *available at* <http://www.ftc.gov/os/adjpro/d9311/070911decision.pdf>.

¹⁶ FTC, Advocacy Filings by Subject, Dentistry, *available at* http://ftc.gov/opp/advocacy_subject.shtm#detg.

¹⁷ FTC Staff Comment to the Hon. Timothy G. Burns Concerning Louisiana H.B. 687 (May 1, 2009), *available at* <http://ftc.gov/os/2009/05/V090009louisianadentistry.pdf>; FTC Staff Comment to the Hon. Sam Jones Concerning Amendments to Louisiana H.B. 687 (May 22, 2009), *available at* <http://ftc.gov/os/2009/05/V090009louisianahb687amendment.pdf>; FTC Staff Comment Before the Louisiana State Board of Dentistry Concerning Proposed Modifications to Louisiana’s Administrative Rules Regarding the Practice of Portable and Mobile Dentistry (Dec. 18, 2009), *available at* <http://ftc.gov/os/2009/12/091224commentladentistry.pdf>.

¹⁸ Louisiana Administrative Code, Title 46 § 313 (Portable and Mobile Dentistry), *available at* <http://www.lsbdo.org/applications/dentalact2010.pdf>.

¹⁹ FTC Staff Comment Before the Georgia Board of Dentistry Concerning Proposed Amendments to Board Rule 150.5-0.3 Governing Supervision of Dental Hygienists (Dec. 30, 2010), *available at* <http://ftc.gov/os/2010/12/101230gaboarboarddentistryletter.pdf>.

²⁰ LD 2277, 123rd Maine State Legis. (Me. 2008), codified at ME. REV. STAT. 32 §§ 1094-I-T.

²¹ LD 230, *supra* note 2.

²² *Id.* at § 1.

²³ The pilot project’s enabling legislation directs the Board to implement the project by adopting routine technical rules, as defined by the Maine Administrative Procedure Act. *Id.* Routine technical rules are “procedural rules that establish standards of practice or procedure for the conduct of business with or before an agency and any other rules that are not major substantive rules. . . .” ME. REV. STAT. 5 § 8071 2. A. By contrast, major substantive rules are those that, in the judgment of the Maine State Legislature, “[r]equire the exercise of significant agency discretion or interpretation in drafting” or impose various types of “serious burdens on the public or units of local government.” *Id.* at §§ 8071 2. B.

²⁴ LD 230, *supra* note 2, at § 1. As an additional safeguard during implementation of the pilot project, the Board proposes to require each IDPH to maintain an exposure log to document details for each patient receiving an x-ray.

²⁵ Minutes of the Board’s August 19, 2011 meeting simply state that “[t]he majority of the Board feels that this limitation [on the type of x-rays that can be taken] is needed in order not to exceed the scope of practice on an IPDH.” Maine Board of Dental Examiners Board Meeting Minutes (Aug. 19, 2011), *available at* <http://www.mainedental.org/forms/Aug19,2011.pdf>.

²⁶ We understand that the need for and selection of dental x-rays depends on a variety of factors, including the particular patient’s medical and dental history, symptoms, age, and conditions visible during an oral examination, as well as the goal of avoiding unnecessary or inappropriate exposure to radiation.

²⁷ Maine Board of Dental Examiners Ch. 2: Rules Relating to Dental Hygienists Section III. B. (2) e., *available at* <http://www.maine.gov/sos/cec/rules/02/chaps02.htm#313>. *See also* Maine Board of Dental Examiners, Frequently Asked Questions . . . About Independent Practice Dental Hygiene 4, Radiographs (Nov. 1, 2010), *available at* <http://www.mainedental.org/forms/FAQs-IPDH.pdf> (referencing this point).

²⁸ *Cf. FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (“Absent some countervailing procompetitive virtue,” an impediment to “the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.”) (internal quotations and citations omitted).

²⁹ *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).