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Statement[1] of

Gary Kennedy
Attorney, Dallas Regional Office
Federal Trade Commission

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[1]This testimony represents the views of the Dallas Regional Office of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

Mr. Chairman and Members of the Board, I am pleased to appear before you today to discuss the proposed revisions to New Mexico's rules governing optometry. The views expressed in this testimony are those of the staff of the Dallas Regional Office of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

The Dallas staff believes that some of the proposed revisions may prevent agreements that may foster efficiency, and may unduly constrain normal commercial relationships. As the Commission found in its rulemaking proceedings involving the optometric industry, such constraints are likely to increase costs and restrict consumers' access to eye care without providing countervailing consumer benefits. Indeed, such restrictions on competition have cost consumers across the country millions of dollars annually. We urge the Board to consider carefully how these proposed revisions might affect consumers and competition and to avoid imposing limitations that may impose unwarranted constraints on the functioning of a free market for optometric goods and services.

## I. The FTC's Experience in the Eye Care Industry.

The Federal Trade Commission is charged by statute with preventing unfair methods of competition and unfair or deceptive practices in or affecting commerce.[2] Under this statutory mandate, the Commission has investigated the effects of restrictions imposed by private parties

[2]15 U.S.C. Section 45.

and by government action on the business practices of professionals, including optometrists. In seeking to improve consumer access to professional services, the Commission has initiated antitrust enforcement proceedings against and conducted studies about the regulation of licensed professions. The Commission's investigation of the optometry industry in 1975 led to the 1978 trade regulation rule, Advertising of Ophthalmic Goods and Services.[3] That investigation revealed that restrictions on advertising were not the only government-imposed restraints that appeared to limit competition unduly, increase prices, and reduce the quality of eye care provided to the public. As a result, the Commission examined other restraints on commercial practices. These included prohibiting optometrists from forming business relationships with non-optometrists (for the purpose of offering eye care to the public) and from locating in mercantile locations, such as in shopping malls and inside optical stores. The Commission also addressed provisions prohibiting optometrists from owning or operating more than one office and against practicing under nondeceptive trade names.

To examine the effects of these other restraints, FTC staff 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 with differing

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[3]16 CFR Part 456 ("Eyeglasses Rule"). The Commission found prohibiting nondeceptive advertising by vision care providers and failing to release eyeglass lens prescriptions to the customer to be 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 review, the court upheld the Eyeglasses Rule's prescription release requirement but remanded the advertising portions 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 exempt from antitrust challenge). *American Optometric Association v. FTC*, 626 F.2d 896 (D.C. Cir. 1980). Rather than reinstate the advertising portions of the Eyeglasses Rule, the Commission has chosen to address advertising restrictions through litigation; *see, e.g., Massachusetts Bd. of Optometry*, 110 F.T.C. 549 (1988).

degrees of regulation.[4] The second, published in 1982 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.[5] Both of these studies were conducted with the assistance of eye care providers.

The FTC staff studies provided evidence that restrictions on optometrists' commercial practices raise prices but do not improve the quality of care. The Bureau of Economics Study was conducted with the help of two colleges of optometry and the Director of Optometric Services of the Veterans Administration. It examined the effect of advertising and commercial practice on the price and quality of optometric services. The resulting data showed that restrictions on commercial practice in a market resulted in higher prices for eyeglasses and eye examinations but did not improve the overall quality of care in that market. In particular, the study data showed that prices were 18 percent higher in the markets that barred commercial chain firms.

The Contact Lens Study was based on a methodology developed after consultation with representatives from the American Academy of Ophthalmology, the American Optometric Association, and the Opticians Associations of America. This study examined the effects on consumers of state laws prohibiting contact lens fitting by opticians. The data showed that, on average, "commercial" optometrists (for example, optometrists who were associated with

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

[5]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").

chain optical firms, used trade names, or practiced in commercial locations) fitted cosmetic contact lenses at least as well as other fitters (based on field-test reviewing criteria developed with the assistance of eye care professionals), but charged significantly lower prices.

During the 1980s, the Federal Trade Commission conducted an extensive rulemaking proceeding to address these state-imposed restraints on commercial eye care practice. In the course of the formal rulemaking that has become known as Eyeglasses II, the Commission received 243 initial comments, 24 rebuttal comments, and testimony from 94 witnesses during three weeks of public hearings.[6] 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.

The evidence assembled in that proceeding showed that many regulatory and legislative restraints on commercial practice had harmful effects. Specifically, the Commission found that the evidence

> demonstrates that these restrictions raise prices to consumers, and, by reducing the frequency with which consumers obtain vision care, decrease the overall quality of care provided in the market. The rulemaking record establishes that the presence of commercial optometric firms lowers the cost of eye care to patients of both commercial and noncommercial optometrists. The evidence also indicates that these restrictions do not provide offsetting quality-related benefits.[7]

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[6]Some organizations sponsored several witnesses; 74 organizations or individuals presented testimony.

[7]Ophthalmic Practices Rule ("Eyeglasses II"), Statement of Basis and Purpose, 54 Fed. Reg. 10286 (March 13, 1989) ("Commission Statement").

The Commission concluded that restrictions on commercial practices have caused significant injury to consumers, in both monetary losses and less frequent vision care, without providing consumer benefit.[8] The Commission also found that, while each of these restrictions may impede the growth and efficiency of chain firms or volume practices, a combination of restrictions may completely bar their entry. Consumers spent over eight billion dollars on eye examinations and eyewear in 1983, a figure that the Commission found included a substantial cost attributable to the inefficiencies of an industry protected from competition.[9] Based on the evidence in the rulemaking record, the Commission adopted a rule[10] to prohibit state-imposed restrictions on four types of commercial practices: affiliating with non-optometrists; locating in commercial setting; opening branch offices; and using nondeceptive trade names.[11]

The rule the Commission adopted in 1989 is not in effect. The Court of Appeals vacated the Eyeglasses II rule in 1990, on the grounds that the Commission lacked the statutory authority to make rules declaring state statutes unfair. In doing so, the court neither rejected nor addressed the Commission's substantive findings that the restrictions harmed consumers.[12] In addition, in a memorandum opinion accompanying the court's denial of rehearing, the court explicitedly recognized that its order vacating Eyeglasses II would not

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[8]*Id.*

[9]Commission Statement at 10285-86.

[10]Commission Statement at 10285.

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

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

"bar the FTC from initiating a new rulemaking ... within the limits of its proper authority."[13] The Commission, however, has not chosen to take such an action.

## II. New Mexico's Proposed Rule.

New Mexico's proposed rule would impose restrictions on optometrists' commercial arrangements that appear similar in likely effects to those that were the subject of the proposed Eyeglasses II rule. Our principal concerns are with several provisions in proposed Rule 11. This proposed rule would prevent optometrists from entering leases or any other kinds of business arrangements that display certain prohibited features. Yet these prohibited features are common aspects of mutually beneficial business arrangements among business ventures of all kinds. And they have at best only a remote relationship to the stated purpose of the rule, which is to protect the "visual welfare of the public" and to defend optometrists' professional judgment against undue influence.

Several provisions appear likely to inhibit potentially efficient and convenient coordination between an optometrist and other professionals or complementary businesses such as optical goods sellers. For example, proposed Rule 11.2.2 would prevent an optometrist from agreeing to leave some block or portion of time available to see walk-in patients. Proposed Rule 11.3 would prevent optometrists from agreeing to maintain particular office hours. These two rules would make it difficult for consumers to count on the availability of the optometrist's services. Proposed Rule 11.2.4, by restricting "non-consensual" agreements to share support services or personnel, could inhibit potentially efficient arrangements such as sharing receptionists or bookkeeping services. This provision, therefore, may raise the costs of providing optometric services. Proposed Rule 11.2.5 would prevent an optometrist from

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[13] *Id.*, (Jan. 8, 1991) (mem. op.).

agreeing to have credit accounts handled by a mercantile establishment. This too could preclude a potentially efficient combination of purely business functions.[14]

Restrictions on affiliations with non-professionals and on associations with other businesses discourage potentially efficient and pro-competitive ways or providing services and may 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 without corresponding additional benefits.[15]

We also encourage the deletion of provisions prohibiting optometrists from working for lay persons or entering into partnerships or other associations with them. In our experience, restrictions on these types of business formats are likely to prevent the formation and development of forms of professional practice that may be innovative and more efficient and that provide comparable or higher quality services while offering competition to traditional providers.[16]

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[14]Several other proposed provisions would treat optometrists differently from other professionals in carrying on ordinary commercial relationships. For example, proposed Rule 11.1.3 appears to prohibit an optometrist from agreeing to lease an office if the lease could be terminated on less than 90 days' notice, regardless of the reason for termination. It is not clear why an optometrist who does not comply with ordinary commercial lease terms should be treated differently from any other commercial tenant in a similar situation. In addition, longer lease terms also may impose higher costs on the optometrist that may be passed on to consumers without added benefits.

[15]Commission Statement at 10288-10289.

[16]*Id.*

We are pleased to have this opportunity to present our views on the Board's proposed rules, which would place restrictions on certain commercial aspects of the practice of optometry. We encourage the Board to consider carefully whether such restraints are truly necessary for the purpose of protecting optometrists' freedom to make professional judgments, because restraints like these may impose costs on consumers without providing corresponding consumer benefits.