

**Kansas House of Representatives  
State Capitol, Room 175-W  
Topeka, Kansas 66612-1504**

Dear Mr. Merritt:

The staff of the Federal Trade Commission(1) is pleased to respond to your request for comment on House Bill No.

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)

### **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 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 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.

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 of an industry protected from competition.(18) The FTC thus adopted a rule(19) 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



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).

(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).

(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

(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.

(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.