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TESTIMONY OF JUDITH WILLINGHAM SHIMM

BEFORE THE COMMITTEE ON REGULATORY REFORM

FLORIDA HOUSE OF REPRESENTATIVES

April 30, 1986

Thank you, Mr. Chairman. It is a privilege to be here today. This statement reflects the views of the Atlanta Regional Office and the Bureaus of Consumer Protection, Economics and Competition of the Federal Trade Commission, but does not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Commission, however, has reviewed our statement and voted to authorize us to submit this testimony.

The FTC staff is pleased to respond to your request for assistance in your sunset review of the Florida Optometry Act. Our interest in this legislation stems from the Commission's mandate to enforce the antitrust and consumer protection laws of the United States. Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition, and unfair or deceptive acts or practices.

For several years, the Commission has been investigating the effects of state-imposed restrictions on the business practices of professionals, including optometrists. It has sought to encourage the removal of restrictions that impede competition, increase costs to consumers, and reduce consumer access to vision

care, but that provide no countervailing benefits. In doing so, the Commission promotes a policy of encouraging competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals.

In January of 1985, the Commission issued a notice of proposed rulemaking for a Trade Regulation Rule that would remove certain state laws that restrict commercial practices. The affected laws would include those banning branch offices, commercial locations, the use of trade names, and associations between optometrists and non-optometrists. In its notice, the Commission stated that such restrictions appear to increase prices but do not appear to protect the public health or safety.[1] No final action has been taken on this matter, but the premises that underlay the Commission's original proposal will also guide my testimony today.

The FTC staff appreciates the concerns that fostered Florida's regulations regarding optometrists. It is our position, however, that portions of the legislation being considered here, as well as some of the existing statutory provisions, go beyond what is necessary to prevent deception and maintain quality of care in the optometric profession. We are primarily concerned with restrictions on optometrists' use of various business formats and advertising methods, and the resulting effects of those restrictions on consumers.

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1 50 Fed. Reg. 598 (1985).

I. Restrictions on Business Format

A. Business Relationships with Nonprofessionals

The proposed legislation (as well as current Florida law) contains certain provisions that may unnecessarily restrict optometrists from offering their services in a cost-efficient manner. Under § 463.014(a), a lay organization is prohibited from engaging the services of a licensed optometrist, whether upon a salary, commission, or any "other means of inducement".[2] Similarly, under § 463.014(b), an optometrist is prohibited from engaging in the practice of optometry with any organization, corporation, or lay individual.[3]

We would encourage the legislature to consider removing these provisions, and any others that prohibit optometrists from working for, or entering into partnerships or other associations with, lay persons. Restrictions on this type of business format prevent the formation and development of innovative forms of professional practice that may be more efficient, that provide

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2 § 463.014(a) is numbered as § 463.014(b) in the current statute.

3 § 463.014(b) is numbered as § 463.014(c) in the current statute.

comparable or higher quality services, and that offer competition to traditional providers.

Those who propose restrictions on employment, partnership or other business relationships between licensed professionals and non-licensees often claim that such restrictions are necessary to maintain a high level of quality in the professional services market. They express concern over the possibility of lay interference with the professional judgment of licensees. They also allege that lay firms might offer lower prices but encourage their professional employees to cut corners to maintain profits. According to those who oppose opening the market to lay corporations, harm to the public would be compounded because professionals who practice in traditional, non-commercial settings would be forced to lower the quality of their services in order to meet the prices of their commercial competitors.

Available empirical evidence, however, suggests that prohibitions on commercial practice by optometrists, including, among others, prohibitions on the employment of optometrists, may raise prices and reduce consumer access to services without raising the level of quality in the provision of eye care services. We are not aware of any credible evidence demonstrating a benefit to consumers resulting from prohibitions on business relationships between optometrists and non-optometrists.

The Federal Trade Commission's Bureaus of Economics and Consumer Protection have issued two studies that provide evidence that restrictions on commercial practice by optometrists -- including restrictions on business relationships between optometrists and non-optometrists -- do, in fact, harm consumers.

The first study, conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, compared the price and quality of eye examinations and eyeglasses in cities with a variety of legal environments.[4] Cities were classified as markets with chain optometric practice if eye examinations were available at large interstate optical firms.

The study found that prices charged in 1977 for eye examinations and eyeglasses were significantly higher in cities without chains and advertising than in cities where advertising and chain firms were present. The average price charged by optometrists in the cities without chains and advertising was 33.6% higher than in the cities with advertising and chains ($94.46 versus $70.72). Prices were approximately 17.9 percent higher because of the absence of chains; the remaining price difference was attributed to the absence of advertising.

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[4] Bureau of Economics, Federal Trade Commission, Staff Report on Effects of Restrictions on Advertising and Commercial Practices in the Professions: The Case of Optometry (1980).

The data also showed that the quality of vision care was not lower in cities where chain optometric practice and advertising were present. The thoroughness of eye examinations, the accuracy of eyeglass prescriptions, the accuracy and workmanship of eyeglasses, and the extent of unnecessary prescribing were, on average, the same in both types of cities.

The second study issued by the FTC staff compared the costs and quality of cosmetic contact lens fitting by various types of eye care professionals.[5] This study was designed and conducted with the assistance of the major national professional associations representing ophthalmologists, optometrists and opticians. Its findings are based on examinations and interviews of more than 500 contact lens wearers in 18 urban areas. The study found that, on average, "commercial" optometrists -- that is, optometrists who were associated with chain optical firms, who used trade names, or who practiced in commercial locations -- fitted cosmetic contact lenses at least as well as ophthalmologists, opticians, and other optometrists, but charged significantly lower prices.

Because restrictions on employment, partnership, or other relationships between professionals and non-professionals necessarily hinder the development of chain firms, these studies

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5 Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983).

provide important evidence that such restrictions tend to raise prices above the levels that would otherwise prevail, but do not raise the quality of care in the vision care market. Further, because of the increased prices, it is likely that these restrictions result in decreased consumer access to vision care. Consumers are likely to purchase vision care less frequently because of the higher prices.

In a case that challenged various ethical code provisions enforced by the American Medical Association (AMA),[6] the Commission found that AMA rules prohibiting physicians from working on a salaried basis for a hospital or other lay institutions and from entering into partnerships or similar relationships with non-physicians unreasonably restrained competition and thereby violated Section 5 of the FTC Act. The Commission concluded that the AMA's prohibitions kept physicians from adopting more economically efficient business formats; in particular, these restrictions precluded competition by organizations not directly and completely under the control of physicians. The Commission also found that there were no countervailing procompetitive justifications for these restrictions.

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6 In re American Medical Association, 94 F.T.C. 701 (1978), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982).

Section 463.014(c) of the proposed bill prohibits the board from forbidding the practice of optometry in or on the premises of a commercial or mercantile establishment.[7] However, a new portion to this subsection states that "[n]othing in this subsection shall be deemed to authorize any licensed practitioner to enter into any agreement . . . which would enable, directly or indirectly, any unlicensed person or entity to practice optometry through control over the licensed practitioner's provision of optometric services to the public." The language "control over the . . . provision of optometric services" is vague and could lead to restrictive interpretations. For example, currently some retail stores make their credit card system available to professionals who lease space in their buildings. Because this provision does not define the type of control that is prohibited, it could be interpreted as including control over credit, refund, or warranty policy. Such an interpretation would make illegal the use of a retail store's credit card by an optometrist, since the retail store would have responsibility for servicing the account, assessing any finance charge, and collecting the fee charged. A convenience to consumers would therefore be lost.

To give another example, "control" could be interpreted to include control over hours of practice, despite the fact that this is not really a quality of care issue. Such an

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[7] § 463.014(c) is numbered as § 463.014(d) in the current statute.

interpretation could be fatal to optometric practices located in retail stores and shopping centers, since their leases usually regulate, in some manner, their hours of operation. This would be a particularly ironic result, since the hours dictated might well be longer than those of an optometrist operating in a traditional location. Thus, this language could operate to eliminate any procompetitive effect that the first sentence in § 463.014(c) might have.

To summarize, we believe that if the legislature is concerned about quality of care issues, it should regulate quality of care in as direct a manner as possible. If it instead tries to regulate indirectly by limiting the organizational forms in which optometrists can practice, too much of this restriction will miss the mark. Unnecessary regulation will result, and consumer costs will go up.

B. Business Relationships with Health Care Delivery Systems

In addition to prohibiting the development of commercial firms that employ optometrists, § 463.014, by limiting the permissible relationships between optometrists and lay organizations, may also unnecessarily restrict the development of innovative health care delivery systems, such as preferred provider organizations ("PPOs") and health maintenance organizations ("HMOs"). PPOs and HMOs can promote competition in the markets for delivering and financing health care services and

can provide benefits to patients and providers alike. However, because HMOs employ or contract with health providers, they may be prohibited under proposed § 463.014(a) from offering optometic services to consumers, except to the extent that they are exempt as nonprofit corporations covered by § 637.001, Similarly, some PPOs require participating providers to remit to the PPO a percentage of the fees earned from treating PPO patients. They might therefore be interpreted as violating proposed § 463.014(b), because fee splitting could be considered a means of "engaging in the practice of optometry . . . with any organization, corporation, group, or lay individual."

C. Business Relationships with Other Professionals

Section 463.014 would also outlaw partnerships and other associations between optometrists and other state-licensed professionals, such as ophthamologists or opticians. Such arrangements would be beneficial to consumers because they would enable several health care services to be provided in a single office, thus providing greater convenience and lower costs to consumers who might otherwise have to go to different locations to obtain the services of both an optometrist and another health-care provider. Furthermore, we see no countervailing harm to consumers associated with partnerships and associations of this type. We urge that you consider allowing these types of arrangements.

D. Landlord-Tenant Arrangements

We are also concerned about the possibility that § 463.014 may be interpreted to prevent certain types of landlord-tenant arrangements. For example, an optometrist's payment of a percentage of his or her profits or sales as rent would result in a situation in which the nonpractitioner landlord would be sharing in an optometrist's profits. That arrangement could be interpreted under subsection (b) as "engag[ing] in the practice of optometry" with a non-optometrist or corporation. We do not believe an optometrist's professional independence would be curtailed by such an arrangement, and we know of no evidence that quality of care would suffer. We would therefore recommend that this provision be clarified if such a prohibition is not its intent.

II. Advertising Restrictions

A. General Advertising Restrictions

Florida's current Optometry Act permits advertising except that which is "fraudulent, false, deceptive or misleading in form or content." In contrast, however, the proposed bill would

impose new advertising restrictions. We urge you to reject these restrictions, because we believe they would undermine existing law and harm consumers.

As a part of the Commission's effort to foster competition among licensed professionals, it has examined the effects of public and private restrictions that limit the ability of professionals to engage in nondeceptive advertising. As I previously described, the Bureau of Economics study showed that advertising does not reduce quality of vision care but does decrease prices. Other empirical studies have confirmed the relationship between advertising and lower prices in markets for professional services.[8]

We have reached the conclusion that only false or deceptive advertising should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and may contribute to an increase in prices. Increasingly, state legislatures have amended laws regulating professionals to more closely reflect the "false or deceptive" standard.

Specifically, the Florida Board's proposed § 463.015(2)(b) would prohibit "displaying any sign or taking any other action

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8 See, e.g., Bureau of Economics and Cleveland Regional Office, Federal Trade Commisssion, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Benham & Benham, Regulating through the Professions: A Perspective on Information Control, 18 J. Law & Econ. 421 (1975); Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. Law & Econ. 337 (1972).

that would lead the public to believe that a corporation or other unlicensed person is licensed to practice optometry or board certified optometry."

Proposed § 463.015(2)(c) would also prohibit advertising:

> the availability of optometric services on the premises of a commercial or mercantile establishment which implies or suggests that a corporation or other entity provides such optometric services; or which does not state clearly that such services are provided by an independent licensed practitioner not affiliated with or employed by the commercial or mercantile establishment and which does not specifically identify such licensed practitioner by name as licensed by the department.

To the extent that these provisions are targeted only at deceptive advertising, they are unnecessary; the law already prohibits advertising which is "deceptive or misleading." Moreover, the proposed provisions may have harmful effects on competition. First, the vagueness of the proposed restrictions may discourage optometrists from providing accurate and useful information to consumers. Second, optometrists may also be discouraged from entering into certain legal business arrangements because of uncertainty over how these restrictions will be interpreted. For example, an optometrist may hesitate to rent space in a mercantile establishment, fearing that his or her mere presence could be interpreted as "an action that would lead

the public to believe that a corporation . . . is licensed to practice optometry."

Subparagraph (2)(c) is particularly burdensome. More than simply prohibiting deception, it requires every advertisement to include a lengthy disclaimer as well as the name of every optometrist operating on the premises. Although these disclosures might be accommodated fairly readily in large display advertisements, they would be awkward in smaller ads. Moreover, working the disclosures into television and radio commercials could be prohibitively expensive. One possible justification for requiring every associated optometrist to be listed in each advertisement is that this would ensure identification and accountability of individual practitioners within a practice. We believe, however, that this goal could be accomplished through less burdensome methods. For example, the names of individual practitioners could be conspicuously posted in the reception area of optometric offices and noted on bills, receipts, and patient records. We fail to see why practitioners located on the premises of a commercial or mercantile establishment have been singled out in this provision; no such requirement applies to traditional group optometric practices, which may also employ or affiliate optometrists whose individual names do not appear in the name of the practice.

Finally, subparagraph (2)(b) appears to be aimed at a problem which probably does not exist; we have seen no evidence

indicating that the public actually believes that organizations can be licensed as doctors, lawyers, or other professionals. Such titles are commonly understood to belong to individuals, not to corporate entities.

B. Trade Name Restrictions

Section 463.014(a) currently appears to prohibit an optometrist from practicing under a trade name. That provision permits an optometrist to practice only under his or her own name or, as interpreted by the Board, under the name of a professional association. We urge that this provision be repealed to allow the use of any trade name that is not false or misleading. Trade names can be essential to the establishment of group practices and chain operations, which can offer lower prices. They are chosen because they are easy to remember and because they can convey useful information, such as the location or other characteristics of a practice. Over time, a trade name can also come to be associated with a certain level of quality, service, and price, and can therefore aid a consumer's search for an optometrist. Without convenient and enduring trade names, development of high-volume, low-price practices becomes more difficult. The current prohibition of trade names thus impedes competition, increases costs to consumers, and reduces consumer access to vision care.

In contrast to current law, the Board of Professional Regulation's proposed bill would allow the use of certain trade names. It still, however, would prohibit practice under any name that did not include the name of the licensed practitioner or the name of a professional association. Because the name of the professional association would not necessarily include the name of the optometrist examining the consumer's eyes, a trade name permissible under this provision would not necessarily provide more information to a consumer than would a wholly assumed name. A wholly assumed name might actually be easier for a consumer to remember. As mentioned above, adequate professional identification can always be achieved by requiring that the names of individual optometrists practicing at one location be posted at that location or noted on patient receipts and records.

We understand and support efforts to protect the public from deceptive trade names. We believe, however, that it is preferable for the Board to proceed on a case-by-case basis against optometrists who use trade names in a deceptive manner rather than for the Legislature to issue broad bans on certain types of trade names.

This concludes my testimony. Thank you very much.