



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

Office of Policy Planning
Bureau of Economics
Bureau of Competition

May 22, 2009

Hon. Sam Jones
State Representative - District 50
Louisiana House of Representatives
900 Third Street
Baton Rouge, LA 70804

Re: Amendments to Louisiana House Bill 687

Dear Representative Jones:

House Bill 687 will restrict competition among dentists and does not appear to provide any countervailing benefits to consumers. Further, the recent bill amendments appear to exacerbate the competition concerns by restricting the market only to present incumbents in many circumstances and raise concerns over the role of competitors in regulating and potentially raising their rivals' operating costs in the Louisiana dental market. If enacted, HB 687 is likely to make the most vulnerable of Louisiana's children worse off by denying many the opportunity to receive dental care. Accordingly, the Staff of the Federal Trade Commission urges the Louisiana Legislature to reject HB 687.

This letter follows our recent correspondence to Representative Tim Burns regarding his inquiry about the likely competitive effects of Louisiana House Bill 687 ("HB 687," "the Bill" or "the proposed legislation").¹ We understand that after we provided our comments, amendments were made to the bill.² The Staff of the Federal

¹ This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments. The letter to Representative Burns, dated May 1, 2009, is available at <http://www.ftc.gov/os/2009/05/V090009louisianadentistry.pdf>

² The proposed legislation is available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=645549>, and the committee and House floor amendments are available at <http://www.legis.state.la.us/billdata/byinst.asp?sessionid=09rs&billtype=HB&billno=687>. We also understand that on May 19, 2009, HB 687 was put to vote by the Louisiana House, and failed to pass. Currently pending is a motion for reconsideration, and we understand that the House will reconsider the bill on or about May 26, 2009.

Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition are pleased to provide the following comments to supplement our previous letter regarding House Bill 687.

We are concerned that Amendment 8 from the Health and Welfare Committee will impose additional restraints on competition. That amendment contains the following restrictions on how in-school dental services in Louisiana must be provided:

(3) The dentistry is practiced within a mobile dental unit owned and operated by the state or local government, within a federally qualified health center with permanent or mobile dental facilities, or within a school-based health clinic with permanent dental facilities, provided such government mobile dental unit service, federally qualified health center or school-based health clinic has been providing dental services on the property of a Louisiana elementary or secondary school for at least six months total time during the five years immediately prior to the effective date of this legislation.

Qualifying providers under paragraph (3) will be limited to those who have provided these services for at least six months during the last five years. This restriction will limit new market entry for in-school services, and will have a deterrent effect on potential price and quality innovations and improvements that would benefit the children who could receive in-school dental care. Indeed, to the extent the Bill's sponsors are concerned with remedying any ongoing adverse effects of in-school dentistry, evidence of which we have not seen, this restriction will serve only to maintain those effects and insulate these providers from competition that could bring improvements to all dental services.

Paragraph (4) of the Committee Amendment states:

(4) The dentistry is practiced within any rural community or other communities, with the approval of the superintendent of the respective elementary or secondary school districts, with a shortage or inadequate number of permanent dental offices as designated and determined by the Louisiana State Board of Dentistry to be an underserved area for dental care.

Under paragraph (4), the Bill will permit the practice of in-school dentistry by non-incumbent dentists only in communities that are "underserved" by dentists. By restricting entry of in-school dentistry only to these areas, the bill thereby prohibits many children from receiving the benefits of competition among providers. In addition, under paragraphs (3) and (4) combined, in-school dental services may be provided in non-rural and non-underserved schools only if such services are already performed. This means that only those children who potentially may receive in-school dental services (except for

sealants) are children attending non-restricted schools where those services are already provided.

Further, paragraph (4) gives responsibility to the Louisiana State Board of Dentistry to decide whether or not an area is in fact “underserved.” It is our understanding that the Louisiana State Board of Dentistry is a body composed primarily (though not exclusively) of dentists. The Bill thus mandates that, prior to authorizing in-school dental services, competitors on the Louisiana Board of Dentistry must first determine, and then rely on, existing levels of market competition as the primary metric for deciding whether or not in-school dentists may compete.

The FTC supports legitimate industry self regulation by such boards because, when implemented properly, it can provide efficiencies and other benefits to consumers.³ However, there are risks to competition when one group of competitors is charged with regulating another. For example, dentists on the board may have the incentive, and would have the ability, to limit entry by in-school dentists in a way that would soften competition and thereby adversely affect dental consumers.⁴

Similar competition concerns were raised in the FTC matter brought against the South Carolina State Board of Dentistry. The Commission’s complaint there charged the South Carolina State Board of Dentistry with unlawfully restraining competition in the provision of preventive dental care services in South Carolina, in violation of Section 5 of the Federal Trade Commission Act. To aid you in your deliberations, we enclose the FTC’s Complaint, Decision and Order, and Analysis to Aid Public Comment involving the action brought against the South Carolina Board of Dentistry.⁵

Finally, Rep. Nowlin also proposed an amendment, which the floor adopted, and which would add the following caveat:

Providers of dental services at elementary or secondary schools shall provide copies of any medical record created for a student patient to any dentist to whom a patient is referred or from whom a request for such a record is received within seventy-two hours of the referral or request and at no cost to the dentist to whom the referral is made or from whom the request is received.

³ See Deborah Platt Majoras, “Self Regulatory Organizations and the FTC,” Address to the Council of Better Business Bureaus (April 11, 2005), available at <http://www.ftc.gov/speeches/majoras/050411selfregorgs.pdf>.

⁴ Under the law, even a rural dentist seeking to provide services in his local school system to meet a community need could be prohibited from doing so because the fact of his mere presence may mean the community does not qualify as underserved.

⁵ Copies of the Complaint, Decision and Order, and Analysis to Aid Public Comment , as well as all other pleadings in the matter, are available at <http://www.ftc.gov/os/adjpro/d9311/index.shtm>.

Because the Nowlin Amendment appears to allow all dentists anywhere in Louisiana to examine the records of any patient who receives in-school dental services, regardless of who provided such services and under what circumstances, the amendment raises privacy concerns with respect to these types of health care records.

In addition, this provision of the Nowlin Amendment could allow dentists throughout Louisiana to raise the operating costs of their competitors who provide in-school dental care. Requiring in-school providers to prepare, copy, and deliver medical records within 72 hours of any request by any dentist, and bear the cost of such, could raise the costs of providing such in-school services. Further, such a provision may invite collusion among licensed dentists insofar as developing a scheme, tacit or otherwise, that would punish rival dentists who provide in-school services. Indeed, such activity if undertaken by dentists individually or collectively, could be in violation of the Sherman Act, 15 U.S.C. §1 and §2, and the FTC Act, 15 U.S.C. §45, et seq., both of which prohibit attempts to monopolize and engage in unfair trade practices.

We recognize that the Nowlin Amendment could prevent duplication of services by requiring transparency through access to records, and that some may have concerns about patients becoming locked-in to a dentist providing services for free at a school if records cannot be accessed by other dentists. However, that concern could be addressed in a less anticompetitive way by requiring the release of the patient's records at the request of the patient and allowing a nominal charge for duplication and processing.

We appreciate your consideration of these issues.

Respectfully submitted,

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