IN THE MATTER OF

MASSACHUSETTS BOARD OF REGISTRATION IN OPTOMETRY

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9195. Complaint, July 8, 1985—Final Order, June 13, 1988

This Final Order requires the Massachusetts board to allow truthful advertising by optometrists in the state, requires the optometry board to repeal its current regulation banning advertising of affiliations between optometrists and optical retailers, and also requires respondent to send a copy of the order to all optometrists currently licensed in Massachusetts and to all new applicants for five years.

Appearances

For the Commission: *Elizabeth Hilder.*

For the respondent: *Thomas A. Barnico* and *Steven H. Goldberg, Assistant Attorneys General,* Boston, MA.

APPENDIX

OPINION OF THE COMMISSION

BY CALVANI, *Commissioner:*

I. INTRODUCTION

A. Background

Respondent Massachusetts Board of Registration in Optometry is charged with engaging in practices constituting (1) unfair methods of competition and (2) unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The complaint alleges that respondent has restrained competition among optometrists in the Commonwealth of Massachusetts by unreasonably restricting truthful advertising.

Respondent is a state agency that regulates the practice of optometry in Massachusetts. IDF 1–13.[1] But the Massachusetts Legislature has vested respondent with only limited authority to regulate advertising. Section 61 of Mass. Gen. Laws Ann., ch. 112, provides that: [2]

> Except as otherwise provided in this chapter, no such board shall make any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers, the effect of which would be to restrain trade or lessen competition.

(Emphasis added). In promulgating this law, the Massachusetts Legislature declared that:

> any ordinance, rule or regulation promulgated by an agency of the commonwealth or political subdivision thereof which prohibits or limits competitive advertising relating to the price of consumer goods or services shall be void as against public policy.[2]

These statutes apply to the regulations promulgated by the respondent.

Notwithstanding the determination by the Massachusetts Legislature limiting respondent's authority to issue regulations restricting truthful competitive advertising, on two occasions respondent promulgated regulations that are the subject of the [3] challenge in this action. The first set of challenged regulations became effective on July 1, 1979, and included the following restrictions: (a) Section 3.08 of respondent's regulations prohibited any optometrist from allowing "the use of his name or professional ability by an optical establishment for the financial gain of such establishment;"[3] and (b) Section

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[1] The following abbreviations are used in this opinion:

ID – Initial Decision of the Administrative Law Judge
IDF – Numbered Finding of the Administrative Law Judge
CX – Complaint Counsel's Exhibit
RB – Respondent's Post-Trial Brief
RAB – Respondent's Appeal Brief

[2] Mass. Gen. Laws Ann., ch. 112, §61 (emphasis added). IDF 11. The only limitation on truthful advertisements proscribed by chapter 112 is contained in §73A, which provides:

> Persons may advertise the sale price of eyeglasses, contact lenses or eyeglass frames provided they shall not include in any . . . advertisement any statement which in any way misrepresents any material or service or credit terms, or, any statement containing the words "free examination of eyes", "free advice", "free consultation", "consultation without obligation", or any other words or phrases of similar import which convey the impression that eyes are examined free. Any advertisement offering contact lenses, eyeglasses, or eyeglass frames at a fixed price shall include a statement which indicates that said price does not include eye examination and professional services. Such statement shall indicate whether said price includes lens and, if so, the type of lens, single vision, bi-focal or tri-focal and the strength thereof, low, medium or high.

[3] Respondent claims that this regulation was promulgated in accordance with Sections 72 and 73B of Mass. Gen. Laws Ann., Ch. 112. RAB at 46–48. Section 72 requires an optometrist to practice under his or her own name. Section 73B states:

> No person shall practice optometry on premises not separate from premises whereon eyeglasses, lenses, or eyeglass frames are sold by any other person; nor shall any person practice optometry under any lease, contract or other arrangement whereby any person, not duly authorized to practice optometry, shares, directly, or indirectly, in any fees received in connection with said practice of optometry. For the purposes of this section, any room, suite of rooms or area in which optometry is practiced shall be considered separate premises

(footnote cont'd)

3.12 prohibited any optometrist from "discriminating directly or indirectly in his professional services." Respondent interpreted Section 3.12 to prohibit offering or advertising discounts by optometrists. CX 29 at 4, 6; CX 261 at 10–11.

Consistent with the state policy precluding prohibition of truthful advertising, the Massachusetts Executive Office of Consumer Affairs and the Massachusetts Department of the State Auditor criticized respondent for issuing the anticompetitive [4] restraints. IDF 84–99.[4] Respondent thereafter revised its regulations and on October 18, 1984, promulgated the second set of regulations challenged by the complaint in this matter. IDF 100–103. In the regulations, respondent retained its restriction on affiliation advertising;[5] replaced Section 3.12 of its regulations with an explicit restriction on discount advertising;[6] and added two other explicit restrictions on advertising. Section 5.11(d) declared "advertising which uses testimonials" to be contrary to the public interest. Section 5.11(1)(a) prohibited advertising that appeared to be "sensational" or "flamboyant."[7] In sum, not only did respondent [5] fail to follow the advice of the two state agencies, it acted to impose even more anti-competitive restraints.

After a three-week trial, Administrative Law Judge James P. Timony, in an initial decision filed June 23, 1986, found that respondent has attempted to slow the growth of "commercial" optometric practice through its restraints on truthful advertising, and that the result has been higher prices for eye care in Massachusetts. ID 30–31. He found that respondent's actions were controlled by practicing optometrists who stood to benefit financially from the restraints on competi-

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if it has a separate and direct entrance from a street, public corridor or area available to the public, whether or not it has an entrance from any other room or area in the same building.

[4] To the extent not inconsistent with the Findings in this opinion, the Commission adopts all of the Findings of Facts by Administrative Law Judge James P. Timony in his Initial Decision filed June 23, 1986.

[5] Section 5.07(3) of its 1984 regulation states:

> An optometrist shall not permit or authorize the use of his name or professional ability and services by an optical establishment or business. An optometrist shall not permit or authorize establishment or [sic] authorize an optical establishment or business to advertise, publicize or imply the availability of his optometric services, (either on or off the premises).

IDF 101.

[6] Section 5.11(1)(f) of respondent's 1984 regulations declares advertising which offers gratuitous services, rebates, discounts, refunds, or otherwise, with the purpose of increasing the number of private patients to be contrary to the public interest. Section 5.11(1)(f) expanded respondent's ban on discount advertising, which under Section 3.12 had been limited to optometric services, to include optical goods. IDF 102.

[7] The Commission's investigation came to the attention of respondent in February 1985. IDF 104. On June 27, 1985, respondent published a notice of proposed changes in its regulations in the Massachusetts Register. IDF 105. On November 7, 1985, subsequent to the filing of the complaint in this matter, respondent promulgated revised regulations. IDF 106, 110–115. Section 507(3) of the 1985 regulations continued to prohibit affiliation advertising by prohibiting optometrists from permitting or authorizing the use of his name, professional ability or services by any person or establishment not duly authorized to practice optometry. In addition, respondent imposed a requirement that "[u]nauthorized advertising or publicizing of a license's availability to perform eye-examinations or other professional services shall be immediately reported to the Board by the licensee". The November 1985 amendments also deleted Sections 5.11(1)(a) and 5.11(1)(f). While the absolute bans on sensational, flamboyant, or discount advertisements were deleted, respondent added a new regulation, Section 5.11(6), which required usual and customary fees to be substantiated when optometrists offer discount fees for services or materials.

tion and ruled that respondent's conduct constituted a "combination or conspiracy." ID 31–34. He further ruled that respondent's ban on discount advertising was *per se* unlawful, ID 37–39, and that all of the restraints were unlawful under the rule of reason, finding no valid justification for respondent's suppression of [6] broad categories of truthful information about prices and services offered by optometrists. ID 39–42.

Judge Timony rejected respondent's state action defense and held that respondent's actions constituted unfair methods of competition and unfair acts or practices in violation of Section 5. ID 42–47. He also rejected respondent's contention that part of the case was moot, and held that the evidence established a cognizable danger of a recurrent violation warranting prospective relief. ID 48–50.

Judge Timony issued an order that prohibits respondent from restricting the advertising or offering of discounted prices, advertising of affiliations between optometrists and optical retailers, use of testimonials in advertising, and advertising that respondent considers "flamboyant" or "sensational". ID 51–52. The order permits respondent to regulate false or deceptive advertising and to enforce statutory restraints on advertising. The order also requires respondent to notify optometrists in Massachusetts of the cease-and-desist order.

B. Questions Raised By Appeals

This matter is before the Commission on cross-appeals from Judge Timony's initial decision. Respondent raises seven issues for review. First, respondent argues that Judge Timony incorrectly ruled that respondent was not entitled to state action immunity. Second, respondent argues that the Commission [7] is precluded from finding that respondent has violated the Federal Trade Commission Act absent a showing that the antitrust laws preempt those actions. Third, respondent assigns error to Judge Timony's ruling that the regulations and enforcement actions of respondent constituted a "combination or conspiracy" proscribed by the FTC Act. Fourth, respondent argues that Judge Timony applied the incorrect legal standard in holding that the regulations constitute unfair methods of competition. Fifth, respondent argues that Judge Timony's holding that the challenged acts or practices are unfair in violation of Section 5 is in error. Sixth, respondent assigns error to Judge Timony's conclusion that the repeal of three of the challenged regulations does not render the claims for relief moot. Finally, respondent claims that Judge Timony's order that respondent notify Massachusetts optometrists of the cease-and-desist order is outside of the scope of the Commission's authority.

Complaint counsel appeal Judge Timony's decision not to require repeal of respondent's regulation banning affiliation advertising. In addition, complaint counsel request that the Commission broaden the order to prohibit restraints on all forms of price advertising and make other modifications and clarifications of Judge Timony's order to ensure effective relief. We now take up these issues although in a different order. [8]

II. LEGAL ANALYSIS

A. Restraint of Trade

1. The Law of Horizontal Restraints

The Supreme Court's recent decisions in *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) [hereinafter "*NCAA*"], and *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) [hereinafter "*BMI*"], are important developments in the law on horizontal restraints and merit attention. In *BMI*, the Court remanded for rule of reason analysis an agreement among a group of composers to issue a blanket license to CBS to perform the composers' songs. The Court concluded that a pricing arrangement that is essential to a legitimate purpose is not within the *per se* rule. In doing so the Court observed that the arrangement at bar was necessary to the production of the compositions and therefore served a legitimate purpose in the marketplace. The Court rejected a simplistic and literalistic test whether competitors "fixed" a "price," but rather inquired whether "this particular practice is . . . 'plainly anticompetitive' and very likely without 'redeeming virtue.' " *BMI*, 441 U.S. at 9. It elaborated on how to identify such practices, instructing courts to ascertain "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead [9] one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *Id.* at 19–20.

Five years later, in *NCAA*, the Court refused to apply the *per se* rule to allegations that the NCAA had fixed prices for telecasts of collegiate football games and that the exclusive network contracts were tantamount to a group boycott of all other broadcasters. Although the Court recognized that the exclusive contracts restricted pricing and output, it again declined to invoke the *per se* rule. In order to consider the restraint, the Court considered the defendants' claimed justifications. However, once the Court was convinced that the NCAA's asserted justifications did not withstand scrutiny, it condemned the practice as an unreasonable restraint of trade.[8]

[8] In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), the Court again applied the *NCAA* analysis. It reversed a Court of Appeals decision vacating a Commission decision that a conspiracy among dentists to refuse

(footnote cont'd)

Several points flow from the Court's pronouncements. First, the Court expressly stated that there is often no bright line that separates *per se* from rule of reason analysis, thus [10] destroying the neat taxonomy that characterized many an antitrust course outline. Second, the Court went on to say that the essential inquiry under both is the same, *i.e.*, "whether or not the challenged restraint enhances competition."[9] Thus the Court has explicitly recognized the breakdown of the tidy rules that at least superficially characterized much of the traditional wisdom. One important—perhaps the most important—result of the cases is that the utility of the conventional labelling exercise has been called into question.[10] Indeed, as one commentator has observed, litigants and courts have taken positions that distort *both* ends of this dichotomy—saying that conduct must be condemned automatically, without regard for any redeeming competitive virtues, if it can be categorized as falling into a *per se* category; while conduct falling into the residual rule of reason category cannot be condemned at all until all aspects of definition, market power, intent, and net competitive effect have [11] been analyzed—a process that many consider to be the antitrust equivalent to Chinese water torture.[11]

A structure for evaluating horizontal restraints emerges from the Court's recent decisions. Although the Court has not explicitly adopted this structure for analyzing horizontal restraints, the basic principles of the analysis are set forth in the *NCAA* and *BMI* opinions. The

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to submit x rays to dental insurers for use in benefits determinations constituted an unfair method of competition. In so doing, the Court observed that no elaborate analysis was required to see the anticompetitive nature of the dentists' agreement, "[a]bsent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services. . . ." *Id.* at 459. The Court rejected the dentists' argument that the Commission erred in not making elaborate market power determinations, stating "the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason." *Id.* at 460. The Court found that the boycott of insurers increased the cost of dental care and rejected the quality of care arguments with equal alacrity.

[9] *NCAA*, 468 U.S. at 104.

[10] A good example of the conventional wisdom antedating *NCAA* is the Seventh Circuit's 1982 decision in *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083, 1093 (7th Cir.), *vacated on other grounds*, 1982–83 Trade Case Cas. (CCH) ¶65,214 (7th Cir. 1983), *on rehearing*, 726 F.2d 1150 (7th Cir. 1984), *rev'd*, 470 U.S. 373 (1985) ("The great watershed of . . . [antitrust] law is the distinction between per se illegality and illegal under the Rule of Reason.").

[11] *See* T. Muris, *The Bureau of Competition's Approach To Applying The Rule of Reason* (unpublished manuscript).

Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973), is an excellent example of the former method of analysis. There a professional golfer was alleged to have improved the lie of her ball during a LPGA tournament in violation of the rules of golf. After a complaint, observers were appointed to watch the golfer and they allegedly reported illegal ball movement. The golfer was suspended from play by the LPGA. An antitrust suit for treble damages ensued alleging that the suspension amounted to an illegal group boycott. The plaintiff moved for summary judgment asking the court to characterize defendants' conduct as *per se* in nature and to reject the defendants' explanations of the reasonableness of their suspension of plaintiff. The court agreed: A group boycott of this variety is a *per se* violation of the law. Whether the plaintiff had cheated in professional tournament play, and whether suspension of plaintiff occurred because she had cheated in professional tournament play, were irrelevant and would not be considered by the court. The magic of the label. Hornbook consulted: Group boycotts found to be *per se* illegal. The result automatically follows, like night follows day.

method of analysis we employ here is more useful than the traditional use of the *per se* or rule of reason labels but also is consistent with the recent cases that apply a traditional analysis. Under this analysis, the horizontal restraints in question could be condemned, without further factual development, as inherently suspect restraints for [12] which no justifications seem sufficiently plausible to warrant factual inquiry.[12]

This structure is readily described as a series of questions to be answered in turn. First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and decrease output"? For example, horizontal price-fixing and market division are inherently suspect because they are likely to raise price by reducing output. If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (*e.g.*, by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a [13] *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition. It is noteworthy that the Supreme Court in *NCAA* found a plausible efficiency, considered it, found it wanting, and rendered a decision for the plaintiffs under the rule of reason without employing the full balancing test normally associated with the rule.

We now proceed to apply this structure to the case at bar.

2. Advertising As Competition

Advertising plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Board of Arizona*, 433 U.S. 350, 364 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *American*

[12] We recognize that the Court's opinions have at times continued to apply traditional antitrust analysis. *E.g.*, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). Adoption of our approach would not lead to a different result in cases such as *Catalano* or *Maricopa*, which involved horizontal agreements to fix the terms of credit and horizontal agreements to establish maximum prices for medical services.

Medical Association, 94 FTC 701, 1005 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 445 U.S. 676 (1982). Restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects. "[T]he nature or character of these restrictions is sufficient alone to establish their anticompetitive quality." *American Medical Association,* 94 [14] FTC at 1005. In the same vein, so too are respondent's restraints. Respondent has imposed total bans on general categories of advertising. As the Commission stated in discussing the order it issued in the *American Medical Association* case, "[a]cross-the-board bans on entire categories of representations or general restrictions applicable to any representation made through a specific medium are highly suspect." 94 FTC at 1030.

While this case in large part parallels *American Medical Association,* it presents an important additional factor. The advertising restraints here have the force of law. Optometrists who violate respondent's commands may lose their professional license, and thereby their livelihood. Respondent's restraint on discount price advertising is especially pernicious. By informing the public, price advertising places pressure on sellers to reduce prices, and instills cost consciousness in providers of services. *American Medical Association,* 94 FTC at 1005, 1011.

Banning advertisements of discounts impedes entry by new optometrists that depend on attracting a high volume of patients. IDF 68–69. Discounts also attract patients during times of low demand. IDF 61, 68. A prohibition on discount advertisements obstructs such efforts to promote efficient use of resources. By preventing optometrists from informing consumers that discounts are available, respondent eliminates a form of price competition. IDF 72, 77, 80. *American Medical Association,* 94 FTC at 1005. [15] Advertising of discounts benefits both buyers and sellers and improves the functioning of the market. IDF 60–62, 65. Consumers respond to discount advertising, enabling the optometrist to maintain a larger inventory of lenses and to employ economies of scale, keeping prices low while offering consumers greater choice. IDF 68–70.

Massachusetts statutes and regulations permit optometrists to affiliate with a retail optical store, so long as certain conditions are met. The optometrist must, for example, practice on "separate premises" from the optician, which may include an office next door with a separate public entrance. Mass. Gen. Laws Ann. ch. 112, §73B. CX 18–R. Respondent, however, tried to prevent retail optical stores from informing the public of these lawful affiliations and of the availability of the optometrist's services. IDF 82, 101, 111, 134–46.

A ban on truthful advertising of an affiliation between an optome-

trist and a retail optical store makes entry by retail optical chains more difficult. IDF 79. Many consumers prefer the convenience of "one-stop shopping" available when retail optical chains affiliate with optometrists. IDF 74, 76. Large optical establishments achieve economies of scale that enable them to offer lower prices. IDF 60. They compete successfully by advertising availability of the optometrist. IDF 76. Respondent's ban on affiliation advertising has posed a barrier to entry by optical establishments into Massachusetts. IDF 79. [**16**] Prices are lower in states where affiliation advertising is permitted. IDF 78.

Respondent's ban on the use of testimonials and sensational or flamboyant advertising is also anticompetitive and injures consumers. IDF 103. Testimonials may convey useful information. Like the use of illustrations, these advertising methods attract the attention of the audience to the advertising message. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 647 (1985).

3. Application of Law

a. *Price Advertising*

If a restraint is inherently suspect, that is, it usually restricts output, and has no redeeming virtue, it is unlawful. *BMI,* 441 U.S. at 19–20. The likelihood that horizontal price restrictions restrain output is generally sufficient to dispense with an inquiry into the special characteristics of a particular industry. *NCAA,* 468 U.S. at 546, n.21. Agreements among competitors to limit discounts have been deemed illegal. *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 648–50 (1980). While the Supreme Court has been reluctant to condemn rules adopted by professional associations as presumptively [**17**] unreasonable,[13] rules plainly affecting price have been so treated. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 348–49 (1982); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 782 (1975). Restrictions on price advertising are unlawful because they are aimed at "affecting the market price." *United States v. Gasoline Retailers Association,* 285 F.2d 688, 691 (7th Cir. 1961). A restraint on price competition imposed by a state board like respondent has been held to be unlawful. *United States v. Texas State Board of Public Accountancy,* 464 F. Supp. 400, 402–03 (W.D. Tex. 1978), *aff'd* as modified, 592 F.2d 919 (5th Cir. 1979), *cert. denied,* 444 U.S. 925 (1979).[14] Respondent has prohibited the advertising of discounts on optical goods or services by optome-

[13] *FTC v. Indiana Federation of Dentists,* 476 U.S. 447 (1986).

[14] Respondent informed the State Auditor that its ban on discount advertising was intended to prevent optometrists from charging certain persons higher than usual fees. A horizontal agreement to fix maximum prices is *per se* unlawful. *Maricopa,* 457 U.S. at 348. Moreover, the State Auditor found that: "contrary to this stated intent, however, respondent has invoked the regulation to restrain optometrists from offering reduced fees to certain consumer groups, such as senior citizens and company employees." CX 261 at 10; IDF 83.

trists, IDF 83, 102, and has enforced this ban. IDF 117–133. The restraint is inherently suspect and presents no plausible efficiency justification. Accordingly, it must be summarily condemned. [18]

b. *Affiliation advertising, testimonials, and sensational or flamboyant advertising*

Similarly, we conclude that respondent's ban on affiliation advertising is facially anticompetitive because it makes entry by retail optical stores more difficult and raises prices for eye care. The fact that this ban deprives consumers of information concerning service rather then price in no way diminishes the inherently anticompetitive nature of the restraints. As the Supreme Court observed in *Indiana Federation of Dentists,* 476 U.S. at 459 (1986), in assessing an agreement withholding information from consumers:

> [a] refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them.

Having determined that respondent's ban on affiliation advertising is facially anticompetitive, we turn now to the two procompetitive justifications proffered by respondent. First, it contends that such advertisements are inherently deceptive. Second, it argues that its ban protects the public from the results of "undue commercial influence." RAB 74, 75–78, 96–97. Neither justification withstands scrutiny. The truthful advertising of a lawful business relationship is not inherently deceptive. Prohibiting truthful statements about a lawful affiliation relationship cannot be justified on the ground that some advertisers may seek to deceive the public. *American* [19] *Medical Association,* 94 FTC at 1009–10; *Bates,* 433 U.S. at 372–75. Neither justification is legally plausible. We therefore reject respondent's "inherent deception" justification.

Respondent's true motivation for its ban on affiliation advertising is revealed by the "undue influence" justification it argued before Judge Timony. Respondent argued that its ban was necessary because such affiliation advertising is the "glue that holds the affiliation . . . together," RB at 91, and that a ban would "exert a moderating influence on the unbridled growth of aggressively competing commercial optometrists." RB at 124. Respondent is apparently attempting to override the legislative judgment that affiliation relationships should be permitted. Moreover, respondent's concerns about undue influence were rejected as groundless by the State Auditor. IDF 94–98. Respond-

ent's undue influence justification is merely a euphemistic way of stating that competition is inappropriate. We disagree.

We similarly conclude that respondent's prohibitions on advertising that uses testimonials or is sensational or flamboyant are anticompetitive on their face because they prohibit techniques that can make the provision of information about optometristic services more effective. Respondent makes no attempt to justify these restraints. Indeed, total bans on testimonials or "undignified" advertising cannot be justified. *American Medical Association,* 94 FTC at 1023–24. Further, the Supreme Court has clearly held that flat bans on "undignified" [**20**] means of advertising lack any justification. *Zauderer,* 471 U.S. at 647–48. In the sum, there is no legitimate justification for respondent's restraints on truthful advertising. Respondent's arguments are not cognizable as antitrust defenses because they are premised on the notion that competition itself is inappropriate in optometry. Accordingly, we conclude that respondent's plainly anticompetitive conduct is unlawful.[15] [**21**]

B. The Commission's Jurisdiction

Respondent argued below that it was not a "person" within the meaning of Section 5 of the Federal Trade Commission Act. This argument was rejected by Judge Timony, ID at 47, and not pressed by respondents on their appeal to the Commission. Nonetheless, we address it here.

"Person" is not specifically defined within the Commission's organic statute.[16] While defined in both the Sherman and Clayton Acts,[17]

[15] On December 15, 1986, after the close of the record and oral argument in this matter, respondent filed a motion to supplement the record in this proceeding to include the Staff Report and Presiding Officer's Report from the Commission's Eyeglasses II rulemaking proceeding. Complaint counsel, on December 22, 1986, filed a timely reply opposing respondent's motion. Respondent argues that the reports' discussion of the optometry industry, including a survey of the 50 state laws that regulate optometric practice, is relevant to its defense that the regulations and enforcement actions which are the subject of the complaint are reasonable exercises to its police power. Further, according to respondent, both proffered exhibits contain extensive analysis of the "quality of care" justifications, which go to its state action defense. Respondent also claims that the analyses of methodology and validity of the "BE Study" in both proposed exhibits are relevant to the validity and usefulness of the BE Study to this proceeding. Having carefully considered respondent's motion, the Commission concludes that the proffered exhibits constitute inadmissable hearsay. The exception in Federal Rule 803(8)(C) for "factual findings resulting from an investigation made pursuant to an authority granted by law . . . unless the sources of information or other circumstances indicate acts of trustworthiness" does not apply to the reports. Both reports are preliminary in nature and do not represent the official views of the Commission. Thus, neither report constitutes "factual findings" of the agency within the meaning of Federal Rule 803(8)(C). *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1145 (E.D. Pa. 1980), *rev'd in part on other grounds sub nom. In re Japanese Products*, 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Moreover, to the extent that any evidence in the Eyeglasses II rulemaking record is relevant to this proceeding, respondent had ample opportunity to seek to offer, and in fact did offer, such evidence while this case was still in trial. Accordingly, the motion is denied.

[16] The principal reference to the word "person" is contained in Section 5(a)(2) of the FTC Act, which provides that the "Commission is . . . empowered to prevent persons, partnerships, or corporations . . . from using unfair methods of competition . . . and unfair or deceptive acts or practices. . . ." 15 U.S.C. §45(a)(2)(1982). Obviously, the state Board is neither a partnership nor corporation. Thus, if the Board is subject to the Commission's jurisdiction, it must be as a person.

state boards are not specifically included in the definitions. Nonetheless, local governments, as agents of the state, have been held to be persons within the meaning of the Sherman Act and the Clayton Act. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394–97 (1978). There the Court relied on the presumption against implied exclusions from [**22**] coverage to the antitrust laws. *Id.* at 398. State and county entities are persons within the meaning of the Robinson-Patman Act, 15 U.S.C. §2(a) (1982). *Jefferson County Pharmaceutical Association v. Abbott Laboratories,* 460 U.S. 150, 155–56 (1983). Terms in the Federal Trade Commission Act, the Sherman Act, and Clayton Act should be construed together. *United States v. American Building Maintenance Industries,* 422 U.S. 271, 277–78 (1975). Accordingly, we hold that respondent is a "person" for purposes of jurisdiction under the Federal Trade Commission Act.

This is consistent with Commission case law. The Commission has held that a state is a "person" within the meaning of Section 5(b) of the Federal Trade Commission Act. *Indiana Federation of Dentists,* 93 F.T.C. 321, n.1 (1979) (interlocutory order);[18] Statement of Basis and Purpose for the Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992, 24004 (1979). And a state board has been held to be such a person. *Rhode Island Board of Accountancy,* FTC Docket No. 9181, order of February 12, 1985 (M. Brown, A.L.J.).

Our holding is also supported by the legislative history of the FTC Act, which indicates that Congress intended an expansive meaning for the word "person." Section 5 of the FTC Act gives [**23**] the Commission jurisdiction over "every kind of person, natural or artificial, who may be engaged in interstate commerce."[19]

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[17] The term is defined in both the Sherman and Clayton Acts, 15 U.S.C. §§7, 12 (1982). Both statutes provide:

> "[t]hat the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

[18] Although in that case the Commission held that a state is a "person" for purposes of intervenor status, it would be unusual for Congress to assign the term "person" two different meanings within the same section of the same statute. *See United Stats v. Cooper Corp.*, 312 U.S. 600, 606 (1941) ("It is hardly credible that Congress used the term 'persons' in different senses in the same sentence.").

[19] 51 Cong. Rec. 14,928 (1914). Rep. Covington, the House sponsor of the FTC Act and a manager of the Act in Conference Committee, made the following statement on the House floor regarding the jurisdictional scope of Section 5.

> The section which deals with unfair methods of competition confers upon the Commission certain administrative powers somewhat analogous to the Interstate Commerce Commission, extending to persons, partnerships, and corporations, and with respect to the great industrial activities in interstate commerce. It embraces within the scope of that section every kind of person, natural or artificial, who may be engaged in interstate commerce.

Id. at 14,928.

Rep. Covington's analogy to the Interstate Commerce Commission underscores the Commission's holding. The Elkins Act, 49 U.S.C. §41(1), which was the ICC's version of the Robinson-Patman Act prior to its repeal in 1978, applied to "person, persons, or corporations." In *Union Pacific R. Co. v. United States,* 313 U.S. 450, 463 (1941), the Supreme Court held that a state entity was a "person" within the meaning of the Elkins Act.

Recent amendments to the FTC Act have broadened the Commission's jurisdiction to include acts or practices "in or affecting commerce."

C. The Contract Combination & Conspiracy Requirement

Respondent urges that complaint counsel has not satisifed the duality requirement of Section 1 of the Sherman Act, 15 U.S.C. 1 (1982). RAB at 16. This Section requires that multiple actors agree to a common design. As the Supreme Court has recently observed: "Independent action is not proscribed." [24] *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752, 761 (1984). Or, as Judge Sprecher has recently observed:

> The fundamental prerequisite is unlawful conduct by two or more parties pursuant to an agreement, explicit or implied. Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited by Section 1. Rather, to establish an unlawful combination or conspiracy, there must be evidence that two or more parties have knowingly participated in a common scheme or design.

Contractor Utility Sales Co. v. Certain-Teed Products Corp., 638 F.2d 1061, 1074 (7th Cir. 1981), *cert. denied*, 470 U.S. 1029 (1985). Respondent urges that respondent is a single entity incapable of conspiring with itself.[20]

We disagree. The Supreme Court and lower courts have recently focused on whether there are separate economic entities in play in determining whether a contract, combination or conspiracy is present. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Court found that a parent corporation was incapable of conspiring with its wholly-owned subsidiary, stressing that economic reality and not formalism control in assessing whether "separate economic entities" engaged in a common course of action. 467 U.S. at 769–76. Applying the *Copperweld* analysis, Judge Timony correctly found that respondent members have separate economic identities and thus engage in a [25] combination when they act together on the Board. ID at 34. He noted that each optometrist on the Board is principally engaged in the private practice of optometry in the market that respondent regulates. ID at 34. Absent respondent members' agreement that imposed the regulations at issue, the members and all other optometrists in the Commonwealth would be free to compete with each other by individually deciding whether to advertise. ID at 34. It is precisely such combinations to suppress competition that are prohibited by Section 1 of the Sherman Act.

Judge Bork recently reached a similar conclusion in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987). There the court found that the

[20] Judge Timony intimates that the terms "contract, combination . . . or conspiracy" probably have slightly different meanings." ID at 31, n.5. *citing FTC v. Retail Credit Co.*, 515 F.2d 988, 994 (D.C. Cir. 1975). Oppenheim, *Federal Antitrust Laws*, 178 n.1 (3d ed. 1968). We read the terms to be synonymous.

directors of Atlas, a nationwide moving company, had conspired among themselves by voting to adopt a policy terminating its contracts with any affiliated carrier in the Atlas network that handled interstate moving business on its own account as well as for Atlas. What took this case "out of the *Copperweld* rule" was the fact that "all but two members of the board represented separate legal entities that competed in interstate commerce." *Id.* at 215. Likewise, the full-time optometrists on the Board are separate legal entities that compete in interstate commerce, and thus are capable of conspiring in restraint of trade. *See also Greenville Publishing Co. v. Daily Reflector,* 496 F.2d 391, 399–400 (4th Cir. 1974) (corporation found capable of conspiring with president of [**26**] corporation because the officer had "an independent personal stake in achieving the corporation's illegal objective.").[21] We apply this reasoning to the case at bar and find that members of the Board are capable of conspiring in violation of the Sherman Act.[22]

Our conclusion that the members of the Board are capable of conspiring is supported by the case law. The Supreme Court, in *Hoover v. Ronwin,* 466 U.S. 558, 575 (1984), acknowledged that the members of the Arizona committee of bar examiners—a state agency composed of practicing lawyers—could conspire with each other. In holding that their actions were immune under the state action doctrine because the challenged conduct was actually that of Arizona Supreme Court, the Court stated that "*[c]onspire as they might,*" the committee members could not affect what was [**27**] ultimately within the control of the Arizona Supreme Court. *Id.* at 575 (emphasis added). Thus the Supreme Court has recognized that state board members are capable of conspiring with each other.

Finally, just as the discussions, voting and agreement in *Rothery* were sufficient to find that the conspiracy requirement was satisfied in that case, we find that the discussion, votes and promulgation of the challenged regulations in the case at bar are sufficient to satisfy the requirement here. *Rothery,* 792 F.2d at 1078–79.

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[21] Professor Philip Areeda has written that the actions of a state agency composed of members of the regulated industry are properly treated by the courts as concerted action. *See* P. Areeda, *Antitrust Law* §203.3c at 17 (Supp. 1982).

[22] Respondent argues that its regulations banning affiliation advertising flow from the broad grant of legislative authority expressed in Sections 72, 73A and 73B of Chapter 112, Mass Gen. Laws Ann. RAB 47. We disagree with this argument. The statutes cited by respondent simply establish the conditions under which optometrists may affiliate with non-optometrists. Judge Timony correctly found that opticians and optometrists, for example, may work together or in affiliation, if the optometrist practices in "separate premises" from the optician. Mass. Gen. Laws Ann. Ch. 112, §73B. IDF 48–49; CX 18R. Contrary to respondent's argument, Sections 72 and 73B, which describe the circumstances under which affiliations may occur, and Section 61, which permits truthful advertising, do not support a finding that the Legislature intended or even contemplated that respondent would promulgate the challenged regulations. We therefore conclude that respondent's argument is erroneous.

D. State Action Immunity

The state action immunity doctrine is the vehicle created by the Supreme Court to resolve conflict between the national policy of competition embodied in the federal antitrust laws and state regulation in our federal system. State action immunity shields the activity challenged here if: (a) the party is acting as the sovereign state; or (b) the state elects to insulate the conduct by adhering to certain narrowly prescribed procedures.

1. Conduct by the State as Sovereign

If a State, acting as sovereign, restrains competition, its actions are *ipso facto* immune from federal antitrust laws. *Hoover v. Ronwin,* 466 U.S. at 567–68. Respondent argues that as a [**28**] matter of state law, it exercises sovereign, statewide authority over the practice of optometry and that it is therefore immune from prosecution. RAB at 27.

We disagree. The Supreme Court has accorded only legislatures and courts status as sovereign. *Hoover v. Ronwin,* 466 U.S. at 568; *Bates,* 433 U.S. at 363. The Court has not accorded other state subdivisions status as the sovereign.[23] For example, although municipalities are state subdivisions, the Court has not accorded them status as the sovereign entity. *Community Communications Co. v. Boulder,* 455 U.S. 40, 44–50 (1981); *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. at 411.

Further, federal appellate and district court rulings involving state regulatory boards have not held that such boards are, merely by virtue of their governmental status, "the state acting as sovereign" for purposes of immunity under *Parker v. Brown,* 317 U.S. 341 (1943). In *Federal Trade Commission v. Monahan,* 832 F.2d 688, 689 (1st Cir. 1987), *cert. denied,* 108 S. Ct. 1289 (1988), the First Circuit declared that the Massachusetts Board of Registration in Pharmacy is not the sovereign, but "a subordinate governmental unit."[24] In this and other cases, the [**29**] courts have looked to state policy as articulated in enactments of the legislature. *See, e.g., First American Title Co. of South Dakota v. South Dakota Land Title Association,* 714 F.2d 1439, 1451 (8th Cir. 1983), *cert. denied,* 464 U.S. 1042 (1984); *Benson v. Arizona State Board of Dental Examiners,* 673 F.2d 272, 275 (9th Cir. 1982); *Gambrel v. Kentucky Board of Dentistry,* 689 F.2d 612, 618–20 (6th Cir. 1982), *cert. denied,* 459 U.S. 1208 (1983); *Brazil v. Arkansas Board of Dental Examiners,* 593 F. Supp. 1354, 1361–68 (D. Ark. 1984),

[23] *See New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96 (1978).

[24] The Massachusetts Board of Registration in Pharmacy and the Board of Registration in Optometry are two of several boards in the Massachusetts Division of Registration. Mass. Gen. Laws Ann. ch. 13, §§8, 9, 16–18, 22–25. Some of the basic powers and procedures of these two boards are set out in statutory provisions governing all of the boards in that Division. Mass. Gen. Laws Ann. ch. 112, §§61–65.

aff'd per curiam, 759 F.2d 674 (8th Cir. 1985); *United States v. Texas State Board of Public Accountancy*, 464 F. Supp. 400 (W.D. Tex. 1978), *modified per curiam*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979). Employing the same method of analysis as used in these cases, we hold that the respondent is not entitled to immunity as the sovereign.[25] [30]

2. Conduct That Is Immunized by the State

Second, under the state action doctrine, a state may insulate a regulatory regime from federal antitrust scrutiny where two criteria are satisfied. *California Retail Liquor Dealers' Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," and, second, the policy must be "actively supervised" by the state itself. *Id.* (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 410). However, in *Town of Hallie v. City of Eau Claire*, [31] 471 U.S. 34, 47 (1985), the Court held that the second prong of the *Midcal* test, *i.e.*, active supervision, need not be satisfied in the context of local government regulation where the defendant is an organ of local government. *See generally* ABA Antitrust Section, *Antitrust Law Developments* 606–11 (2d ed. 1984). We need not reach that question here as complaint counsel and respondent agree that the Commonwealth need not demonstrate active supervision to establish state action immunity in this case.

We now address the first, and determinative prong of the test. Is

[25] Respondent relies primarily upon three cases in support of its argument. First, in *Limeco, Inc. v. Division of Lime of the Miss. Dep't. of Agric. and Commerce*, 778 F.2d 1086, 1087 (5th Cir. 1985), the Fifth Circuit held, without discussion, that the Lime Division was an enterprise undertaken by the State to operate lime plants as a commercial enterprise, and, therefore, enjoyed sovereign immunity. Second, respondent cites *Deak-Perera Hawaii, Inc. v. Department of Transportation*, 553 F. Supp. 976 (D. Hawaii), *aff'd*, 745 F.2d 1281, (9th Cir. 1981), *cert. denied*, 470 U.S. 1053 (1985), where a state agency's grant of an exclusive currency exchange concession at an airport was found to be the action of the State of Hawaii acting as sovereign and entitled to state action immunity. (Following their earlier decision in *Deak-Perera*, the Ninth Circuit recently reached the same conclusion in *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 875 (9th Cir. 1987), which involved a "factual setting nearly identical" with that in *Deak-Perera:* a grant of exclusive taxi privileges at the same airport as in *Deak-Perera.*) Third, in *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir. 1978), *cert. denied*, 439 U.S. 966 (1978) the Third Circuit held that an advisory committee to the New Jersey Supreme Court was immune because it acted as the sovereign. Respondent argues that these cases recognize the virtual *per se* antitrust immunity afforded to state agencies.

None of the cases relied upon by the Board is dispositive. *Limeco* involved an executive department in that state, the Division of Lime. Rather than holding that the Division was the sovereign, the Fifth Circuit held that it was an enterprise undertaken by the state, which operated in accordance with the directives of the Mississippi Legislature. *Deak-Perera* and *Charley's Taxi* also do not appear to be dispositive. Although the *Deak-Perera* court held that a state executive agency, when operating within its constitutional or statutory authority, should be deemed to be the State acting in its sovereign capacity, the complaint and the evidence introduced here concern a defendant that has acted outside the statutory authority delegated by the State. At least two district courts have rejected arguments, based on *Deak-Perera*, that state regulatory agencies are automatically entitled to state action immunity because they act as the sovereign. *Bigelsen v. Arizona Bd. of Medical Examiners*, 1985–1 Trade Cas. (CCH) ¶66,488 (D. Ariz. 1985) (immunity does not apply to acts outside agency's statutory authority); *Flav-O-Rich, Inc. v. North Carolina Milk Commission*, 593 F. Supp. 13, 16 (E.D.N.C. 1983) (agency entitled to immunity only when it acts pursuant to clearly articulated state policy to displace competition), *aff'd*, 734 F.2d 11 (4th Cir.), *cert. denied*, 469 U.S. 853 (1984). Finally, the Board's reliance on *Princeton Community Phone Book* is unpersuasive. That case is pre-*Hoover* and contrary to *Hoover's* result.

there a clear articulation of a state policy to displace competition by regulation in the case at bar? Massachusetts law provides the answer to this question. Section 61 of Mass. Gen. Laws Ann., ch. 112 states:

[e]xcept as otherwise provided in this chapter, *no such board shall make any rule or regulation prohibiting the advertising* or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers *the effect of which would restrain or lessen competition.* (emphasis added).

In promulgating this law, the Massachusetts Legislature declared that:

any ordinance, rule or regulation promulgated by an agency of the commonwealth or political subdivision thereof which prohibits or limits competitive advertising relating to the price of consumer goods or services shall be void as against public policy.[26]

Rather obviously, the Commonwealth articulated a policy *favoring*—[32] *not displacing*—competition.[27] (It is probably not mere coincidence that this legislation was enacted shortly after the Supreme Court's decision in *Bates*).[28] Finding no clear articulation to displace competition by state regulation,[29] we [33] find that the state action immunity doctrine is inapplicable to the instant case.[30]

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[26] Mass. Gen. Laws Ann., ch. 112, §61. IDF 11 (emphasis added).

[27] Judge Timony has noted that two organs of the Commonwealth's government, the Massachusetts Executive Office of Consumer Affairs and the Massachusetts Department of the State Auditor have specifically criticized the anticompetitive nature of these regulations. IDF 88–99, 107–09.

[28] In *Bates*, the Supreme Court held that governmentally imposed bans on advertising of professional services violated the First Amendment. 433 U.S. at 350.

[29] The Commission is not persuaded that the three cases cited by respondent in its motion of May 1, 1987, support its claim of state action immunity. In *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. March 30, 1987), the Court held that the Massport was entitled to state action immunity on two grounds. First, the court stated that the Supreme Judicial Court in Massachusetts had explicitly recognized that Massport resembles a municipal corporation and also possesses the powers of eminent domain and bonding authority. In this case, however, there has been no such judicial recognition nor does respondent possess such powers. Second, Circuit Judge Breyer, speaking for the court, held that Massport was acting pursuant to a clearly articulated and affirmatively expressed state policy. The Commission has found otherwise here. Moreover, in his opinion for the court in *Federal Trade Commission v. Monahan*, Judge Breyer distinguished *Massport*. In *Monahan*, the Commission sought to enforce investigative subpoenas directed to the Massachusetts Board of Registration in Pharmacy. Judge Breyer held that the Pharmacy Board, unlike Massport, was not clearly inside "the area of immunity delineated by clear state policy." *Monahan*, 832 F.2d at 690. He concluded that the immunity status of the Pharmacy Board could only be determined after the completion of the FTC investigation.

In *United States v. State Board of Certified Public Accountants*, No. 83–1947, Trade Reg. Rep. (CCH) ¶67,516 (E.D. La. March 11, 1987), the court found that the state statute regulating advertising by professionals specifically authorized the Board to issue the challenged regulations. Further, the challenged rules were reviewed and approved by the state legislature in accordance with state law, thus making the Board's actions the actions of the legislature. The record in the case at bar does not present similar facts.

Finally, as discussed above, the Ninth Circuit's decision in *Charley's Taxi* rests on that court's earlier decision *Deak-Perera*. As we have indicated, the Commission does not believe that these cases are dispositive.

[30] Respondent urges that complaint counsel has failed to establish that the state regulation in issue has been preempted by the federal antitrust laws. Respondent has confused the relationships between the law of federal preemption and state action immunity. We have addressed the requirements of a state action immunity and found respondent's argument wanting. It is *not* state action. Accordingly, the conduct at bar is *private*. The laws on preemption would be relevant only if there were some conflict between state—not private—action and a federal statute.

E. Unfair Acts or Practices

Complaint counsel allege, and Judge Timony has found, that respondent has committed unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1982). In considering whether conduct is unlawful as an unfair act or practice, the test is whether the consumer injury is: (1) substantial; (2) not outweighed by any offsetting consumer or competitive benefits that the practice produces; and (3) one which consumers could not reasonably have avoided. *Orkin Exterminating Co.*, 108 FTC 263 (1986), *aff'd, Orkin Exterminating Co. v. Federal Trade Commission*, 1988–1 Trade Cas. [**34**] (CCH) §67,969 (11th Cir. April 19, 1988); *International Harvester Co.*, 104 FTC 949, 1061 (1984); *Amrep Corp.*, 102 FTC 1362, 1669 (1983); *Horizon Corp.*, 97 FTC 464, 849 (1981).[31]

Having found respondent to have violated the federal antitrust laws, we need not reach the question of whether respondent has committed an unfair act or practice.

F. Mootness

Respondent argues that the repeal of three of the challenged regulations in November 1985 has mooted all claims and foreclosed all relief based on these regulations. RAB at 49. The legal principles for determining when an issue is moot, and thereby requiring dismissal, indicate that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of that practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Otherwise, the defendant would be "free to return to his old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). As the Supreme Court held in *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952): [**35**]

> [W]hen defendants are shown to have . . . entered into a conspiracy violative of the antitrust laws, courts will not assume that it had been abandoned without clear proof. . . . It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption.

Thus, when the respondent has voluntarily ceased the challenged activity, a case is not moot unless there is a showing "that there is no reasonable expectation that the alleged violation will recur and that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Conyers v. Reagan*, 765 F.2d 1124,

[31] *See also FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 n. 5 (1972); *Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction*, letter from the FTC to Senators Ford and Danforth, December 17, 1980 ("Unfairness Statement"), reprinted at Trade Reg. Rep. (CCH), Transfer Binder, Current Comment 1969–1983 ¶50,421 at 55,948.

1128 n.9 (D.C. Cir. 1985); *see also County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979). The relevant factors to be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance, and in some cases, the character of the past violations." *W.T. Grant Co.,* 345 U.S. at 633. The burden of these demonstrations is a heavy one, and falls on the respondent. *In Re Center for Auto Safety,* 793 F.2d 1346, 1352 (D.C. Cir. 1980). In our view, the respondent has not met its burden in this case.

The only assurance we have that the respondent has permanently ceased its anticompetitive practices is its argument that repeal of the regulations is tantamount to abandonment. However, the Commission notes that the respondent made a similar claim in an August 1983 letter to the Massachusetts State Auditor, responding to criticism from the State Auditor that Board regulation 3.12 injured consumers because it prevented [**36**] optometrists from offering discounts. IDF 93. Contrary to its protests regarding "time spent on matters which have become obsolete," respondent subsequently issued revised regulations that explicitly banned advertising discounts. IDF 102. Respondent's prior claim to have eliminated a challenged regulation, only to readopt it in another form, leads the Commission to conclude that respondent has not met its burden to prove the "bona fides" of its expressed intent to comply.

Second, although respondent has repealed the three challenged regulations, and claims that it will not reenact or enforce the repealed regulations, the Commission concludes that the respondent has not met its burden to prove effective discontinuance of the illegal activity. The issue is not whether the respondent will reenact the repealed regulations. The focus is more properly on whether the respondent will engage in repeated violations of the same law, namely, imposing anticompetitive restraints on truthful advertising, and not merely with repetition of the same offensive conduct. *TRW, Inc. v. FTC,* 647 F.2d 942, 953 (1981). In our view, respondent's failure to disavow its position that the challenged advertisements are inherently deceptive demonstrates that respondent sees no legal constraint to engaging in similar conduct in the future.

Finally, respondent's continuation of unlawful conduct for years after it had knowledge that the rules and practices were illegal and probably unconstitutional speaks to the serious [**37**] nature of the violative activity. The ALJ found that respondent's conduct was "egregious." ID 50. This characterization was based upon respondent's persistent refusal over a period of years to modify its regulation despite "knowledge that [they] were illegal and probably unconstitutional." ID 50.

Nine years ago, in 1977, respondent became aware of the *Bates*

decision regarding the legality of restraints on advertising by professionals banning truthful advertising, including one prohibiting the advertising of discounts. IDF 83. In 1981, the Massachusetts Executive Office of Consumer Affairs notified respondent that its advertising restraints, including its prohibition of discount advertising, were unduly restrictive in light of *Bates*. IDF 84. Nevertheless, respondent continued to enforce its prohibition of discount advertising. IDF 117–33. In 1983, in a written report, the Massachusetts State Auditor criticized respondent's rule because it prevents "optometrists from offering reduced fees to certain consumer groups, such as senior citizens. . . ." IDF 98. Yet in 1984, respondent adopted Section 5.11(1)(f) which explicitly banned discount advertising. IDF 102. Respondent vigorously enforced this regulation, IDF 126–133, until just prior to the issuance of the complaint in this matter. ID 49, IDF 132.

In light of the record in this case, we agree with Judge Timony that there is "some cognizable danger of recurrent [**38**] violation." ID 50. Therefore, we conclude that the complaint cannot be dismissed on grounds of mootness.

III. THE ORDER

We conclude that an order prohibiting respondent from continuing to engage in the same or similar unlawful activities in the future is in the public interest. After considering the record in this case and the arguments of counsel for both parties, we have decided to issue an order that differs in some respects from Judge Timony's order. Our discussion of each section of the final order includes on explanation of the changes that have been made.

A. *Part I of the Order*

Part I of Judge Timony's order contains definitions of terms used in the order. Part I.F. defines price advertising as advertising the price of any optometric service or optical good. As complaint counsel argue, the definition in Judge Timony's order does not make clear that the order would cover ads that provide price information, including credit terms or statements such as "reasonable prices," in addition to ads that make specific price claims. We agree and have modified Part I.F. accordingly. [**39**]

B. *Part II of the Order*

Part II.A of Judge Timony's order prohibits acts by respondent to prevent the advertising of discounts. It also prevents respondent from restricting the offering of discounts. Complaint counsel argue that the evidence in this case establishes a risk that respondent will seek to interfere with other forms of price advertising and that, therefore,

fencing-in relief is needed for price advertising. As we noted in *AMA*, "it is especially important that price advertising remain as unfettered as possible." 94 FTC 1030. In this case, the evidence introduced reveals that respondent has exhibited hostility to various forms of price advertising, not merely discounted prices. For example, its October 1984 rules prohibited "[a]dvertising which offers gratuitous services, rebates, discounts, refunds or otherwise, with the purpose of increasing the number of private patients. . . ." 246 C.M.R. §5.11(f). We agree with complaint counsel's conclusion that the evidence suggests a basic opposition to competition among optometrists based on price, and a likelihood that respondent might seek to prohibit or restrict other forms of price advertising besides the offering of discounts, absent a broader remedial provision. Part II.A has therefore been modified to include this fencing-in relief.

Part II.B of the order has not been changed. Parts II.C and II.D of the order have been revised to clarify the scope of the [**40**] provisions. Finally, the proviso at the end of Part II, which permits the regulation of false and deceptive advertising, has been clarified to limit the proviso to actions based on a reasonable belief that statutory restraints on advertising are violated.[32] Under Judge Timony's order the proviso may have been interpreted to allow respondent to argue that it may ban advertising on the basis of statutes aimed not at advertising but at other conduct.

C. *Part III*

Part III of Judge Timony's order has not been changed.

D. *Part IV*

A new Part IV.A has been added to require respondent to repeal its current regulation banning affiliation advertising. 246 C.M.R. §5.07(3). This order was originally proposed by complaint counsel before Judge Timony, who rejected it because the complaint had not charged that the regulation was preempted by the FTC. We agree with Judge Timony's observation that this is not a preemption case. *See* Footnote 30 *supra*. However, having found that respondent has unlawfully conspired to prohibit [**41**] the advertising of affiliations between optometrists and optical retailers, the Commission has the authority to issue an order eliminating that unlawful activity. The Commission has the authority to fashion appropriate relief, so long as the remedy selected has a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946). We conclude that repeal of the affiliation advertising ban is reasona-

[32] By "reasonable belief," we mean a belief that is based on the relevant facts and legal precedents. *See Rhode Island Board of Accountancy*, Dkt. No. 9181 (consent order issued February 25, 1986).

bly related to respondent's violation, and necessary to obtain comprehensive relief. If the Commission were to issue an order that did not include repeal, leaving the regulation on the books would have a chilling effect on those who, for whatever reason, are unaware that respondent is barred from enforcing it. The Commission, therefore, has added Part IV.A, which requires respondent to repeal Rule 5.07(3).

Part IV.B requires respondent to notify Massachusetts optometrists of the issuance of the cease-and-desist order in this case. Respondent argues that the Commission is without authority to issue "notification" orders. RAB 119. Relying on cases interpreting the powers of the Consumer Product Safety Commission, respondent contends that the Commission is authorized only to issue cease and desist orders. *See Barrett Carpet Mills Inc. v. Consumer Product Safety Commission,* 635 F.2d 299 (4th Cir. 1980); *Congoleum Industries Inc. v. Consumer Product Safety Commission,* 602 F.2d 220 (9th Cir. 1979).

We disagree. The Commission's authority to issue remedial orders requiring respondents to make affirmative disclosures, [42] including sending notices to affected parties, is well-established. *See e.g., Southwest Sunsites, Inc. v. FTC,* 785 F.2d 1431, 1439 (9th Cir. 1986); *Amrep Corp. v. FTC,* 768 F.2d 1171, 1180 (10th Cir. 1985), *cert. denied,* 475 U.S. 1034 (1986); *Warner-Lambert Co. v. FTC,* 562 F.2d 749, 756–62 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978). *See also American Medical Association,* 94 FTC 701, 1039–40 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 452 U.S. 960 (1982). Respondent's reliance on cases holding that the Consumer Product Safety Commission lacked authority to order a program of notification, recall, and repurchase is misplaced, because neither case addressed the issue of affirmative disclosures independent of a restitution program, of which notice was an integral part.[33] We therefore, have not changed Part IV.B of the order.

Parts IV.C and IV.D of the order contain reporting and recordkeeping requirements. Respondent claims that those provisions are onerous and should be modified or eliminated. RAB at 120. Respondent has made no attempt to show undue burden or in what respects the provisions should be modified. The [43] requirements are all limited in time and scope and are reasonably related to respondent's violation. They remain unchanged.

[33] Both of the cases cited by respondent were premised on the decision in *Heater v. FTC,* 503 F.2d 321 (9th Cir. 1974), which held that Section 5(b) of the Federal Trade Commission Act does not empower the Commission to order a respondent to pay restitution to injured consumers. The court in *Heater* viewed restitution as a "private" remedy outside the Commission's authority. In *Heater,* the Ninth Circuit Court of Appeals specifically recognized the Commission's authority to order affirmative relief, 503 F.2d at 323 n.7 and 324 n.13, and recently, in *Southwest Sunsites,* 785 F.2d at 1439, that court reaffirmed that affirmative disclosure remedies do not constitute the retroactive private relief condemned by *Heater.*

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I concur in sections I, IIB, IID, IIF and III of the Commission decision in this case. In addition, I concur in all aspects of the Final Order. Because I conclude that the Massachusetts Board of Registration in Optometry ("Respondent" or "Board") has engaged in unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, I do not reach the question of whether respondent has engaged in unfair methods of competition.

The Commission's Unfairness Jurisdiction

The Commission was granted specific jurisdiction over "unfair or deceptive acts or practices" in 1938 when Congress enacted the Wheeler-Lea Act, ch. 49, 52 Stat. 111 (1938). Since that time, this unfairness jurisdiction has played an integral role in shaping the Commission's pro-consumer mission. Indeed, the unfairness jurisdiction has been an important basis for the Commission's law enforcement efforts in both individual cases[1] and in trade regulation rules.[2] [2]

Consumer unfairness is not defined precisely by statute. Rather, its meaning has evolved over a fifty-year period, with governing standards gleaned from the case law and rules. The basic premise underlying this broad grant of authority to combat unfairness is to protect consumers from coercion, the suppression of important information or similar practices.[3]

The framework for analyzing whether or not challenged conduct is an unfair act or practice was synthesized by the Commission in its 1980 policy statement on the scope of consumer unfairness jurisdiction. *See* FTC Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, letter from the FTC to Senators Ford and Danforth, *reprinted in* [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 (Dec. 17, 1980) (hereinafter cited as "Unfairness Statement"). The Unfairness Statement focuses primarily on two criteria in order to [3] demonstrate the existence of legal unfairness: substantial consumer injury or the violation of established public policy.[4]

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[1] *See, e.g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

[2] *See, e.g.*, Trade Regulation Rule on Credit Practices, 16 C.F.R. §§ 444.1–.5 (1988) (prohibiting various credit practices); Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 16 C.F.R. §§ 456.1–.9 (1988) (requiring optometrists to provide consumers copies of their lens prescriptions); Trade Regulation Rule on Labeling and Advertising of Home Insulation, 16 C.F.R. §§ 460.1–.24 (1988) (requiring sellers of home insulation to provide specified product information in order to enable consumers to compare the efficiency of competing products).

[3] *See* Companion Statement on the Commission's Consumer Unfairness Jurisdiction Accompanying FTC Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction, letter from the FTC to Senators Ford and Danforth, *reprinted in* [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 at 55,951 (Dec. 17, 1980).

[4] As noted in the Unfairness Statement, these criteria were a refinement of factors first identified by the Commission in 1964 in its Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964). The criteria also were cited with approval by the Supreme Court of the United States in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n.5 (1972).

To meet the consumer injury unfairness criterion, three tests must be met. First, the injury must be substantial. Second, the injury must not be outweighed by any offsetting consumer or competitive benefits that the practice produces. Finally, the injury must be one which consumers could not reasonably have avoided.

To meet the public policy criterion, the policy must be clear and well-established (*e.g.*, declared or embodied in formal sources such as statutes or judicial decisions). In most (if not all) matters, an act or practice that violates public policy will also cause substantial consumer injury. Accordingly, there usually is no need for separate analysis of the public policy criterion. Indeed, the Commission's Unfairness Statement correctly notes that the public policy criterion has been used by the Commission most frequently as a means of providing additional [4] evidence on the extent of consumer injury.[5] *See* [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 at 55,949.

Recent Applications of the Unfairness Statement

The Commission has adopted and applied the reasoning of the Unfairness Statement in its subsequent decisions. The first opportunity for the Commission to apply its then recently-issued Unfairness Statement to the facts of an adjudicated proceeding was in *Horizon Corp.*, 97 FTC 464, 849–52 (1981). In that case, the Commission found that a land sales company's retention of all sums paid in the event of buyer default was, under the circumstances, an unfair act or practice.

A unanimous Commission held that Horizon Corp.'s one-hundred percent forfeiture provisions enabled that firm to retain sums greatly in excess of any actual damages occasioned by purchaser default—thus satisfying the substantial injury test contained in the Unfairness Statement. The Commission also was unable to detect any countervailing benefits to consumers or competition [5] produced by the practice. Finally, the Commission concluded that the forfeiture clauses reasonably could not have been avoided by consumers who were unable to bargain over these clauses. Moreover, these clauses were contained in a contract that was adhesive in nature and signed in an atmosphere of deceptive misrepresentations by the seller about the value of the investment and the nature of the deal being offered under the contract.[6]

[5] In light of the Massachusetts statute providing respondent only limited authority to regulate advertising, Mass. Gen. Laws Ann., ch. 112, § 61, it could be argued that respondent's acts or practices challenged in this case violate established public policy. After all, in enacting this statute, the Massachusetts Legislature declared that regulations which "limit competitive advertising relating to the price of consumer goods or services shall be void as against public policy." *Id.* However, because I conclude that respondent's acts or practices are covered by the consumer injury unfairness criterion, I need not reach the public policy criterion.

[6] The Commission in *Horizon Corp.* also found the company culpable under an unfair acts or practices theory based upon the firm's violation of public policy. The Commission cited the Uniform Commercial Code's unconscionable contract provisions as well as various specific federal and state statutes pertaining to forfeiture clauses as evidence of a developing public policy against provisions such as the one used by Horizon Corp. in its adhesion contracts.

In 1983, the Commission applied the consumer injury analysis to another land sales company's practices to find that firm in violation of the unfair acts or practices prohibition of Section 5. *Amrep Corp.*, 102 FTC 1362, 1644-46 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986). In that case, the Commission found that the consumer injury amounted to more than $200 million in one "development" alone and thus constituted substantial consumer injury. In addition, the Commission could identify no countervailing benefits stemming from Amrep Corp.'s misrepresentations. Finally, the Commission determined that non-sophisticated investors reasonably could not [6] have avoided consumer injury in the face of the sales tactics employed by Amrep Corp.

In *International Harvester Co.*, 104 FTC 949, 1060–62, 1064–67 (1984), the Commission again found a firm liable under an unfairness theory. In that case, the Commission found substantial consumer injury because the respondent's failure to disclose that certain of its gasoline-powered tractors were subject to "fuel geysering" caused serious personal injury and even death. With respect to the countervailing benefits test, the Commission determined that no benefit from the firm's nondisclosure was even remotely sufficient to compensate for the human injuries involved. Finally, the Commission found that consumers could not reasonably have avoided injuries because they were not informed by the company of the importance of certain precautions.

The most recent Commission decision to apply the analysis set forth in the Unfairness Statement was *Orkin Exterminating Co.*, 108 FTC 263 (1986), *aff'd*, 5 Trade Reg. Rep. (CCH) ¶ 67,969 (11th Cir. April 19, 1988). In *Orkin*, the respondent for several years had offered termite and pest control service contracts to consumers with guarantees for the lifetime of the treated structure as long as the consumer paid a pre-determined annual renewal fee. Despite the "lifetime" guarantees in the contracts, Orkin claimed its costs were rising and unilaterally raised the renewal fees. [7]

Once again, the Commission applied the three tests of the consumer injury criterion of the Unfairness Statement and concluded that Orkin's conduct constituted an unfair act or practice. With respect to the first test, the Commission found that the failure to honor some 207,000 contracts representing over $7.5 million in increased renewal revenue in an approximately four-year period constituted "substantial" consumer injury. 108 FTC at 362.[7]

On the issue of countervailing benefits, the Commission found that

[7] The Commission also specifically noted that the financial injury to each individual consumer was relatively small if measured on a yearly basis. Yet, the injury was deemed to be substantial because it did "a small harm to a large number of people." 108 FTC at 362.

consumers received nothing from the increase in annual renewal fees other than the additional burden of paying more for Orkin's services than agreed upon originally. The Commission also found that raising the annual renewal fee did not enhance competition. *Id.* at 364–65.

Finally, the Commission determined that consumers reasonably could not have avoided the injury. For one thing, Orkin's competitors did not offer similar "lifetime" price guarantees. Moreover, the Commission also held that mitigation of injury for Orkin's breach of contract by utilizing competing pest control companies might not be satisfactory. Consumers still would incur transactions costs in searching for reliable firms willing to [8] provide the same service on the same terms Orkin had offered in its original contracts. *Id.* at 366–68.

The United States Court of Appeals for the Eleventh Circuit recently affirmed the Commission's decision in *Orkin. See Orkin Exterminating Co. v. FTC,* 5 Trade Reg. Rep. (CCH) ¶ 67,969 (11th Cir. April 19, 1988). In doing so, the appellate court accepted and applied the three tests developed by the Commission to determine whether the consumer injury criterion has been met. *Id.* at 57,937–40. For example, the court wrote:

> [T]he Commission's three-part standard does little to isolate the specific types of practices and consumer injuries which are cognizable. But "the consumer injury test is the most precise definition of unfairness articulated by either the Commission or Congress"; consequently, we must resolve the validity of the Commission's order "by reviewing the reasonableness of the Commission's application of the consumer injury test to the facts of this case, and the consistency of that application with congressional policy and prior Commission precedent."

Id. at 57,938 (quoting *American Financial Services v. FTC,* 767 F.2d 957, 972 (D.C. Cir. 1985)). In addition, the Eleventh Circuit concluded: "Thus, because the Commission's decision fully and clearly comports with the standard set forth in its Policy Statement, we conclude that the Commission acted within its section 5 authority." *Id.* at 57,940.

Analysis of Respondent's Conduct

The actions taken by respondent created conditions comparable to those at issue in three of the four previous cases that have applied the Commission's Unfairness Statement. These three cases (*Horizon Corp., Amrep Corp.* and *International Harvester Co.*) dealt with the failure of respondents to provide consumers with truthful and nondeceptive information that would contribute to making informed decisions concerning the purchase or use of the product or service involved. Similarly, consumers here have not been provided with truthful and nondeceptive information that would contribute to making informed decisions concerning the purchase or use of the product

or service involved. However, the case at hand differs from these preceding cases in two regards.

First, the Board itself has not failed to provide consumers with truthful and nondeceptive information concerning the purchase of optometric services. Rather, it has prohibited licensed optometrists from providing consumers with truthful and nondeceptive information likely to be relevant to consumers interested in purchasing optometric services. This difference, however, is not determinative.

The Commission, in prior cases involving its unfairness jurisdiction, has examined prohibitions on certain types of advertising by private associations of professionals. These private professional associations, like governmental state boards, do not themselves advertise specific prices and services to the public. Instead, they seek to regulate the advertising **[10]** practices of members of the associations, and sometimes impose sanctions on professionals who fail to abide by the established codes.

The preeminent case in this area is *American Medical Association,* 94 FTC 701, 1010–11 (1979), *aff'd as modified,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court,* 445 U.S. 676 (1982) (order modified 99 FTC 440 (1980) and 100 FTC 572 (1982)). In that case, the Commission found that the American Medical Association's ("AMA's") code of ethics proscribed "almost all advertising and promotional activity" by physicians. *Id.* at 1004. The Commission concluded that the AMA's virtual ban had at least three adverse consequences on competition. First, the ban made it more difficult for consumers to locate the lowest-cost qualified physicians. Second, it isolated physicians from competition—including making it more difficult for new physicians to enter into direct competition with established physicians. Third, it also reduced the incentive for physicians to price competitively. *Id.* at 1005.

The Commission held that the AMA's advertising restrictions constituted both unfair methods of competition and unfair acts or practices within the meaning of Section 5 of the FTC Act. Neither of these bases for liability was disturbed on appeal. Thus, certain restrictions on advertising practices imposed by an organization may constitute unfair acts or practices just as a decision by individual entities not to advertise in certain circumstances may be an unfair act or practice. **[11]**

The second difference from the three previous unfair acts or practices cases cited is that respondent has invoked the coercive power of the Commonwealth to prevent the dissemination of information to consumers. This coercive power of the Board extends not only to preventing noncomplying optometrists from earning a livelihood in their chosen profession, but also to the ability to seek criminal sanc-

tions, including fines and imprisonment, for violations of its rules and regulations. Certainly, one would expect such coercive threats to deter many optometrists from using the types of truthful and nondeceptive advertising prohibited by respondent. The record shows in fact that the Board's regulations and its enforcement of those regulations reduced the dissemination of truthful and nondeceptive information to consumers (IDF 117–32, 134–46, 150, 152–54, 159, 172–75).

This second difference also is not determinative. As discussed in more detail below, respondent has proscribed truthful and nondeceptive advertisements in contravention of the law of Massachusetts. The Board, therefore, has not acted within the scope of its mandate with respect to these regulations. Accordingly, it has forfeited its claim to preferential treatment relative to private associations of professionals that restrict their members.

Turning to the three tests of the consumer injury unfairness criterion, I address first whether the consumer injury that results from respondent's acts or practices is substantial. The [12] Administrative Law Judge ("ALJ") found that more than $100 million is spent on eyecare annually in Massachusetts (IDF 55);[8] that restrictions on advertising in the market for optometric goods and services raise prices and total costs to consumers without improving quality (IDF 62); that advertising has the effect of lowering the total cost, including out-of-pocket and search costs, of optometric goods and services (IDF 60, 65, 176, 178); that prices are lower for eye examinations and for optical goods in states where advertising is permitted than they are in Massachusetts (IDF 77–78, 177); and that the supply of optometric goods and services in Massachusetts may be lower than they would be absent the advertising restrictions at issue in this case (IDF 79). I agree with these factual findings and note that respondent does not challenge them. I therefore conclude that the consumer injury that results from respondent's acts or practices is substantial. [13]

The second test of the consumer injury unfairness criterion is whether the consumer injury is outweighed by any offsetting consumer or competitive benefits produced by the practice. Interestingly, respondent has not even attempted to justify its complete ban on discount advertising. Further, respondent has not proffered any ostensible offsetting consumer or competitive benefits that would justify its restrictions on advertising that uses testimonials or advertising

[8] The ALJ's Initial Decision does not specify what portion of this $100 million market is served by optometrists. However, in the unfair acts or practices discussion of its *AMA* decision, the Commission addressed the question of whether injury could be substantial where the dollar amounts of injury were not calculated specifically: "While it is impossible to quantify precisely how much of the aggregate annual expenditures for physician services represents consumer injury attributable to the challenged restrictions, we are convinced that the record in this case supports a finding of substantial injury." 94 FTC at 1011. This statement also holds true for the acts or practices of respondent given the size of the market and the potential consumer benefits from the prohibited advertising.

that the Board believes is sensational or flamboyant. Thus, as to the bans on discount advertising, advertising that uses testimonials or advertising that the Board believes is sensational or flamboyant, the record does not show any offsetting consumer or competitive benefits. Consequently, I conclude that there are indeed no such offsetting consumer or competitive benefits.

Respondent has asserted that three "costs" are associated with affiliation advertising: (1) affiliation advertising is alleged to be "a species of false and deceptive advertising"; (2) affiliation advertising is alleged to "obfuscate the relationship between optometrists and retail optical establishments and simulate unlawful forms of optometric practice"; and (3) affiliation advertising is alleged to "enable commercial firms to exert undue influence over optometrists." (RAB at 74–82, 96–97.) The relevant questions are whether respondent has correctly identified costs of affiliation advertising, and if so, whether these costs outweigh the benefits to consumers to such an extent as to justify a complete prohibition of such advertising. [14]

As to these questions, I concur with the reasoning of the Commission decision that the truthful advertising of a lawful business relationship is not inherently deceptive. The wholesale prohibition of all affiliation advertisements here is not justified merely because some such advertisements may be deceptive.[9] I also agree with the Commission's conclusion that the respondent's "undue influence" argument is merely camouflage for a distaste for competition among optometrists.

In each of the types of advertisements cited by respondent there are far less restrictive ways to protect consumers from deceptive practices than to impose an absolute prohibition. Respondent has not explained why it needs to ban all truthful and nondeceptive advertisements simply because some advertisements may contain misleading claims. [15]

Respondent has every right, and indeed the obligation, to prevent the dissemination of false or deceptive advertisements. Unfortunately, respondent's broad restrictions are far more likely to insulate established optometrists from the rigors of competition than to protect consumers from deceptive optometric practices. Accordingly, I

[9] Indeed, respondent recognizes the benefits of affiliations. In its initial brief the Board states: "Referral relationships enable both optometrists and optical stores to offer their patients and customers, respectively, the convenience of 'one-stop shopping.'" (RAB at 79.) The Board also argues, however, that "even if some affiliation advertisements are not actually deceptive, they may be prohibited as an easily and often abused method 'to facilitate the large-scale commercialization which enhances the opportunity for misleading practices.'" (RAB at 78) (citing *Friedman v Rogers*, 440 U.S. 1, 15 (1979)). Respondent has failed to offer any record evidence that large-scale commercial chain optical establishments engage in misleading practices more frequently than other providers of optical goods and services. In fact, the ALJ found that no deceptive advertising complaints had ever been received by the Massachusetts Board of Registration of Dispensing Opticians against a chain and that no evidence was introduced to show that the Board ever charged any optometrists with false or deceptive advertising (IDF 47, 133).

conclude that the consumer injury caused by respondent's ban on the various types of advertising at issue is not outweighed by any offsetting consumer or competitive benefits.

The third test of the Commission's consumer injury unfairness criterion is whether consumers reasonably could have avoided the injury caused by the conduct. When consumers do not obtain sufficient information to make rational economic decisions, it is difficult, if not impossible, for them to avoid injury. The Unfairness Statement sets forth one indication of whether consumer injury is reasonably avoidable:

> Sellers may adopt a number of practices that unjustifiably hinder such free market decisions. Some may withhold or fail to generate critical price or performance data, for example, leaving buyers with insufficient information for informed comparisons. . . . Each of these practices undermines an essential precondition to a free and informed consumer transaction, and, in turn, to a well-functioning market. Each of them is therefore properly banned as an unfair practice under the FTC Act. [16]

Unfairness Statement, [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421 at 55,949 (footnote omitted).[10]

An argument might be made that consumers could establish a clearinghouse for information about optometrists in Massachusetts, including which optometrists offer discounts and which are located near sellers of glasses and contact lenses. Such information gathering, however, is cumbersome and expensive. Moreover, optometrists might be concerned reasonably that any cooperation with the effort would be considered a violation of respondent's rules. Even if such a project were undertaken, dissemination of the findings to consumers of optical services would be costly and could become outdated quickly.

In *Orkin Exterminating Co.*, 108 FTC at 267–68, the Commission concluded that the costs of searching for suppliers of [17] services are germane to whether consumers reasonably could have avoided or mitigated the injury sustained from a respondent's acts or practices. The Commission's reasoning in *Orkin* is relevant as well to the search costs present in this case.

Alternatively, consumers could demand that the Board modify its rules to permit the dissemination of truthful and nondeceptive adver-

[10] The fact that the Unfairness Statement uses the word "sellers" rather than the phrase "state boards" does not render this passage inapplicable. First, as section IIB of the Commission decision points out, the Commission has jurisdiction over respondent. Second, four of the five members of the Board are sellers of optometric services and the fifth member has not participated in any Board activities since December 1982 (IDF 3). As sellers of optometric services, Board members have an incentive to regulate in a manner that enhances their ability to compete. Third, in its analysis in the Unfairness Statement, the Commission cited *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) as support for the proposition that the withholding of information is properly condemned as an unfair practice under the FTC Act. Unfairness Statement, [1969–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,421, at 55,949 n.21. This citation to a case involving the Virginia State Board of Pharmacy (a state board analogous to respondent) provides some indication of the Commission's intent to construe broadly the term "sellers."

tising by optometrists. Failing that, consumers could seek to change the membership of the Board. But, these options do not seem realistic for at least two reasons. First, it would require consumers to embark upon a process that is arduous, time-consuming, uncertain and expensive at best. Indeed, according to "the logic of collective action," a few individuals with a great deal at stake often can out-organize and defeat a much larger number of people who collectively have more, but individually have less, at stake.[11]

Second, some other facts suggest that consumers may face an uphill climb. The Board consists of five members, four of whom are optometrists and the fifth is a public member who has not participated in any Board activities since December 1982 (IDF 3). In addition, both the Massachusetts Executive Office of Consumer Affairs, a cabinet office whose area of responsibility includes the Board, and the Massachusetts Department of the State Auditor have criticized the Board's advertising restrictions. It is unlikely that consumers would succeed rapidly where these two [18] arms of the Commonwealth of Massachusetts have failed (IDF 84–99).

In any event, it clearly is beyond the capability of an individual consumer, acting alone, to mount the types of concerted campaigns hypothesized above. The third test of whether consumers reasonably could avoid injury must be understood as an inquiry into individual options rather than group activism. To require more would stretch the qualifier, "reasonably," past the breaking point. Otherwise, one could always suppose some form of joint action that might suffice if taken to an extreme. For example, consumers in theory always could demand of a corporation that it change its unfair acts or practices, or seek to have its board of directors replaced. But such a standard illogically would place the burden of securing change upon the consumer victims and would allow the illegal practices to continue for the duration of any "reform efforts."

For all these reasons, I conclude that consumers reasonably could not have avoided the injury caused by respondent's conduct. In sum, then, respondent's conduct runs afoul of all three tests of the consumer injury unfairness criterion: the conduct has caused substantial consumer injury; the injury is not offset by corresponding consumer or competitive benefits; and the injury reasonably could not have been avoided by consumers. [19]

Respondent's Specific Arguments on the Unfairness Issue

Having explained why the respondent's conduct meets the legal standard for invoking the Commission's unfairness authority, I now turn to the three specific arguments raised by respondent in its ap-

[11] M. Olson, *The Logic of Collective Action* (1965).

peal.[12] These arguments are: (1) governmental regulatory bodies do not engage in acts or practices [**20**] as those terms are used in the FTC Act; (2) the state action exemption applies to the Commission's unfair acts or practices jurisdiction; and (3) the conduct complained of is not unfair because the Board has determined that the beneficial effects of its regulations on the public health outweigh the alleged consumer injury.

First, respondent argues that governmental regulatory bodies do not engage in acts or practices as those terms are used in the FTC Act. Nonetheless, the Commission successfully has asserted jurisdiction over several state boards for allegedly engaging in unfair acts or practices. Since each of these cases was resolved by consent agreement, the issue of jurisdiction has never been litigated fully. *See Wyoming State Board of Chiropractic Examiners,* 3 Trade Reg. Rep. (CCH) ¶ 22,477 (FTC Jan. 13, 1988); *Rhode Island Board of Accountancy,* 107 FTC 293 (1986); *Wyoming Board of Registration in Podiatry,* 107 FTC 19 (1986); *Montana Board of Optometrists,* 106 FTC 80 (1985); *Louisiana State Board of Dentistry,* 106 FTC 65 (1985).

Respondent questions whether governmental bodies ever can engage in "acts" or "practices" within the meaning of the FTC Act. At the outset, I conclude (as does the Commission in section IIB of its decision) that governmental entities are encompassed within the meaning of the word "person" in Section 5 of the FTC Act. If the Commission has jurisdiction over governmental entities, then it may examine the acts or practices of those entities. [**21**]

In addition, Congress purposely avoided enumerating or defining unfair acts or practices in the FTC Act.[13] When the unfair methods of competition language was enacted, Congress carefully considered whether to prohibit specific abuses, rather than provide general guid-

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[12] When the Commission issued its Complaint against respondent on July 8, 1985, respondent was put on notice that the Commission was proceeding under both an "unfair methods of competition" theory and an "unfair acts or practices" theory. For example, paragraph 15 of the Complaint reads as follows:

> The combination or conspiracy and the acts and practices described above [in paragraphs 12 and 13 of the Complaint] constitute unfair methods of competition *or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act.*

Complaint, ¶ 15 (emphasis added). In addition, Administrative Law Judge Timony's Initial Decision specifically found liability on an unfair acts or practices theory, distinct from the liability he found under the unfair methods of competition theory. *See Massachusetts Board of Registration in Optometry,* Docket No. 9195 slip op. at 42–43 (June 20, 1986) (Initial Decision). Finally, both respondent and complaint counsel addressed this issue in their respective briefs before the Administrative Law Judge and the Commission. *See* Complaint Counsel's Brief in Support of Proposed Conclusions of Law, pp. 60–63 (April 28, 1986); Post-Trial Brief for Respondent Massachusetts Board of Registration in Optometry, pp. 59–60 (May 9, 1986); Complaint Counsel's Reply to Respondent's Post Trial Brief and Proposed Findings, p. 21 (May 16, 1986); Appeal Brief for Respondent Massachusetts Board of Registration in Optometry, pp. 59–61 (Aug. 8, 1986); Complaint Counsel's Answering and Cross-Appeal Brief, pp. 105–06 (Sept. 17, 1986). Therefore, the unfair acts or practices theory of liability properly is before the Commission.

[13] Indeed, the words "act" and "practice" are both defined broadly in dictionaries and are not defined so as to exclude the acts or practices of governmental bodies. *See, e.g., Webster's Third New International Dictionary* 20, 1780 (1976).

ance to the Commission. In explaining its decision, the Senate Commerce Committee wrote:

> The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.

S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914). *See also* H.R. Rep. No. 1142, 63d Cong. 2d Sess. 19 (1914) ("It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case.").

This legislative history of the FTC Act indicates that governmental bodies may engage in acts or practices that are unfair. While Congress never addressed the specific issue, it [22] purposely drafted a broad statutory mandate that was to be expanded as warranted by new forms of conduct that ultimately injured consumers. The FTC Act contains several specifically identified industries that are exempted from its jurisdiction,[14] yet Congress never has precluded the Commission from prosecuting governmental entities.

Respondent's second argument is that its prohibition on truthful and nondeceptive advertising by professionals is exempt from scrutiny under the Commission's unfair acts or practices jurisdiction due to the state action exemption. The argument is made in conclusory fashion and no support is provided for it.

Assuming arguendo that the state action exemption applies to the Commission's unfair acts or practices jurisdiction, I conclude, for the reasons stated in section IID of the Commission decision, that the exemption is inapplicable on the facts of this case. The Massachusetts Legislature has not clearly articulated a state policy to install regulation and displace competition in advertising by optometrists. Instead, the Legislature has clearly articulated its insistence that a board, such as [23] respondent, shall not make "any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the prices, nature and availability of goods and services to

[14] Section 5 of the FTC Act excludes from the Commission's jurisdiction banks, savings and loan institutions, common carriers, air carriers and persons, partnerships, or corporations subject to the Packers and Stockyards Act. *See* 15 U.S.C. § 45(a)(2). In addition, Congress has proscribed the Commission's authority to use funds to study agricultural marketing orders or to study, investigate or prosecute matters related to agricultural cooperatives. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 20, 94 Stat. 393.

consumers the effect of which would restrain or lessen competition." Mass. Gen. Laws Ann., ch. 112, § 61 (1983). Any such rule or regulation promulgated by a board is declared "void as against public policy." *Id.*[15]

Respondent's final specific argument is that the restraints on truthful advertising are not unfair because the Board reasonably determined that the beneficial effects of its regulations on the public health outweigh the alleged consumer injury. This argument already has been addressed, in part, in the discussion of the second test of the consumer injury unfairness criterion. I concluded there, and restate here, that the consumer injury caused by the Board's acts or practices is [**24**] not outweighed by any offsetting consumer or competitive benefits.

This response, however, is not a complete reply to the Board's argument. The Commission is not intended to merely substitute its view of what constitutes "the public health" for that of the Board. Under our federalist system, the Board has a valid and lawful interest in regulating the level of public health and safety. Indeed, it is proper for the Commission to display considerable deference to the decisions of state entities. A mere preference for a different outcome would not justify Commission involvement. But when the Board oversteps its bounds and imposes regulations that cause substantial consumer injury and do not demonstrably improve public health, the Commission has the authority and the responsibility to examine the acts or practices.

There may well be some advertisements where some optometrists deceive some consumers in some fashion. Yet, the possibility that optometrists may deceive consumers in some circumstances does not justify a complete ban on entire areas of advertising absent a showing that consumers will be harmed significantly by such advertising. Moreover, the record in this case is clear that price advertising, affiliation advertising, testimonials and flamboyant advertisements, when truthful and nondeceptive, serve to provide immensely useful information to consumers. The benefits of this information, thus, exceed the cost of whatever action the Board may have to take in those few [**25**] instances where optometrists disseminate false or deceptive advertisements.

Just because a state board asserts that its regulations are intended

[15] Neither respondent nor complaint counsel has briefed the issue of whether the state action doctrine applies to the Commission's unfair acts or practices jurisdiction. In *Amrep Corp.*, 102 FTC 1362, 1621–22 (1983), the respondent argued that because the relevant states had enacted their own land sales disclosure and registration statutes, the state action exemption precluded Commission action on the basis of its unfair or deceptive acts or practices jurisdiction. The Commission held that the state action exemption was inapplicable in that case because "[n]o question of conflict with federal antitrust laws is involved here." Therefore, it is possible that the state action exemption is inapplicable to the Commission's unfair acts or practices jurisdiction inasmuch as the jurisdiction does not arise from a federal antitrust law.

to improve public welfare does not necessarily mean that those same regulations comport with federal statutes. At least where, as here, the Board operates in defiance of state legislation, ignores the criticism of two different state agencies, and causes substantial, unjustified and unavoidable interstate[16] consumer injury, respondent's prohibition on the dissemination of truthful and nondeceptive advertising constitutes unfair acts or practices.

Conclusion

Accordingly, I join in the Commission's order on the basis of the Commission's unfair acts or practices authority. I express no opinion about the Commission's unfair methods of competition authority as it relates to this case.

Final Order

This matter has been heard by the Commission upon the cross-appeals of respondent, Massachusetts Board of Registration in Optometry, and complaint counsel from the Initial Decision, and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm in part and reverse in part the Initial Decision. Accordingly, the Commission enters the following order.

I.

It is ordered,, That for the purpose of this order, the following definitions shall apply:

A. "*Board*" shall mean the Massachusetts Board of Registration in Optometry, its officers, committees, representatives, agents, employees, and successors.

B. "*Discounted price*" shall mean a price that is less than the price the person or organization usually charges for the good or service.

C. "*Disciplinary action*" shall mean:

1. the revocation or suspension of, or refusal to grant, a license to practice optometry in Massachusetts, or the imposition of a reprimand fine, probation, or other penalty or condition; or

2. the initiation of an administrative, criminal, or civil proceeding.

D. "*Optical good*" shall mean any commodity for the aid or correction of visual or ocular anomalies of the human eyes, such as lenses,

[16] *See* IDF 56–59.

including contact lenses, spectacles, eyeglasses, eyeglass frames, and appliances.

E. "*Optometric service*" shall mean any service that a person duly registered and licensed to practice optometry under Mass. Gen. Laws Ann. ch. 112 §§ 66 *et seq.*, or any future recodification thereof, is authorized to provide pursuant to those statutory provisions.

F. "*Price advertising*" shall mean advertising information about the price of any optometric service or optical goods.

II.

It is further ordered, That the Board, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from, directly or indirectly, or through any rule, regulation, policy, disciplinary action or other conduct:

A. Prohibiting, restricting, impeding, or discouraging any person or organization from advertising or offering a discounted price or from otherwise engaging in price advertising;

B. Prohibiting, restricting, impeding, or discouraging the advertising or publishing of the name of an optometrist or the availability of an optometrist's services by a person or organization not licensed to practice optometry;

C. Prohibiting, restricting, impeding, or discouraging any advertising that uses testimonials and advertising that the Board believes is sensational or flamboyant;

D. Inducing, urging, encouraging, or assisting any person or organization to take any of the actions prohibited by this Part.

Nothing in this order shall prevent the Board from adopting and enforcing reasonable rules, or taking disciplinary or other action, to prevent advertising that the Board reasonably believes to be fraudulent, false, deceptive, or misleading within the meaning of Massachusetts General Laws, Chapter 112, Sections 71 and 73A, or that the Board reasonably believes to be otherwise unlawful under Massachusetts General Laws, Chapter, 112, Section 73A, or any future recodification thereof.

III.

It is further ordered, That this order shall not be construed to prevent the Board from engaging in activity protected under the First Amendment to the United States Constitution to petition for legislation concerning the practice of optometry.

IV.

It is further ordered, That the Board shall:

A. Within sixty (60) days after the date that this order becomes final, institute procedures to repeal 246 C.M.R. §5.07(3), and complete such repeal within a reasonable time thereafter;

B. Distribute by mail a copy of this order, and executed Appendix:

1. to each person licensed to practice optometry in Massachusetts within one (1) year after the date this order becomes final;

2. within thirty (30) days after this order becomes final, to each person whose application to practice optometry in Massachusetts is pending, and to each person who applies for five (5) years thereafter, within sixty (60) days after the filing of the application; and

3. to the Massachusetts Optometric Association, within sixty (60) days after the date this order becomes final;

C. Within one hundred twenty (120) days after the date that this order becomes final, and annually for a period of five (5) years on or before the anniversary of the date on which this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner in which the Board has complied with this order;

D. For a period of five (5) years after the date that this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, all documents and records containing any reference to any matter covered by this order.

Commissioner Strenio concurring.

APPENDIX

The Federal Trade Commission has issued an order against the Massachusetts Board of Registration in Optometry. This order provides that the Board may not prohibit or restrict:

1. offering, or truthful advertising that offers, discounted fees for goods and services provided by optometrists, or other truthful price advertising;
2. truthful advertising of an optometrist's name and the availability of his or her services by retail sellers of optical goods or other persons not licensed to practice optometry;
3. advertising that uses testimonials or that the Board believes is sensational or flamboyant.

The order does not affect the Board's authority to prohibit advertising that is fraudulent, false, deceptive, or misleading, or advertising that otherwise violates Massachusetts statutes.

Pursuant to the Federal Trade Commission's order, the Board has undertaken to repeal 246 C.M.R. §5.07(3), which states, in part, that a "licensee shall not permit or

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authorize the use of his name, professional ability or services by any person or establishment not duly authorized to practice optometry."

In conformity with the Federal Trade Commission's order, you are advised that the prohibition on advertising gratuitous services contained in 246 C.M.R. §5.11(1)(b) does not prohibit all advertising of gratuitous services. It only applies to those advertisements of gratuitous services prohibited by Massachusetts law, specifically M.G.L. c. 112 s. 73A. This statute prohibits "in any newspaper, radio, display sign or other advertisements . . . any statement containing the words 'free examination of eyes', 'free advice', 'free consultation', 'consultation without obligation', or any other words or phrases of similar import which convey the impression that eyes are examined free." The Board's rule is no broader than that statutory prohibition.

Pursuant to 246 C.M.R. § 5.11(6), the Board may require reasonable substantiation of a licensee's usual fees for services or goods, for the purpose of preventing the false, deceptive, or misleading advertisement of discounted fees by a licensee.

For more specific information, you should refer to the order itself, a copy of which is enclosed.

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Chairman
Massachusetts Board of Registration
in Optometry