



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

Office of Policy Planning
Bureau of Competition
Bureau of Economics

April 26, 2012

The Honorable Patricia Todd
Representative, Alabama House of Representatives
1320 58th Street, South
Birmingham, Alabama 35222

Dear Representative Todd:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics¹ appreciate the opportunity to respond to your invitation for comments on Alabama House Bill 156 ("the Bill" or "HB 156"). Current Alabama law prohibits veterinarians from being employed by non-veterinarians, unless covered by an exemption under the law. The Bill would add an exemption to allow veterinarians to be employed by a limited services 501(c) (3) nonprofit facility, as defined under Section 501(c) (3) of the Internal Revenue Code,² that performs only spay and neuter surgeries and vaccinations given at the time of surgery, designates a licensed veterinarian to supervise veterinary medical practice, and has received an approved premises permit from the Board of Veterinary Medical Examiners ("Board"). You have asked FTC staff to analyze HB 156's likely effects on competition.³

FTC staff believe the Bill is likely to benefit consumers by increasing consumer access to, and choices among, spay and neuter services for their pets. In general, competition is enhanced when there are fewer restrictions on the ways in which professionals organize their businesses, consistent with consumer safeguards. Absent unnecessary restrictions, professionals may introduce and develop innovative forms of practices that are more efficient, provide comparable or better quality, and offer lower prices and desirable competitive alternatives to consumers. For these reasons, FTC staff support the goals of the Bill.

I. INTEREST AND EXPERIENCE OF THE FTC

The FTC is charged under the FTC Act with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.⁴ Competition is at the core of America's economy,⁵ and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation. FTC staff have investigated and reported on the competitive effects of restrictions on the business practices of state-licensed professionals, including veterinarians.⁶ In addition, staff have submitted comments about the competitive effects of restrictions on the

business practices of state-licensed professionals to state legislatures, administrative agencies, and others.⁷

The Commission has challenged rules prohibiting professionals from entering into business relationships with non-professionals when such rules were imposed by an entity subject to the Commission's law enforcement jurisdiction. For example, the Commission found that the American Medical Association's (AMA) ethical code provisions, which prohibited physicians from working on a salaried basis for hospitals or other lay institutions and from entering into partnerships or similar business relationships with non-physicians, unreasonably restrained competition and violated federal antitrust laws.⁸ The Commission also found there were no countervailing procompetitive justifications for these restrictions.⁹ Similarly, the Commission sought and obtained an order against the Oklahoma State Board of Veterinary Medical Examiners ("Oklahoma Board") to resolve the Commission's allegations that the Oklahoma Board's rules, which restricted veterinarians from being partners with, employed by, or otherwise associated with non-veterinarians or veterinarians licensed in other states, constituted anticompetitive conduct.¹⁰

II. CURRENT PRACTICE ACT, HB 156, AND CURRENTLY LICENSED CLINICS

The Alabama Veterinary Practice Act currently prohibits veterinarians from being employed by non-veterinarians, unless covered by one of four exemptions in the Act.¹¹ HB 156 would add an exemption to allow veterinarians to be employed by 501(c) (3) nonprofit facilities that perform only spay and neuter surgeries and vaccinations only at the time of surgery, provided that "a licensed veterinarian is designated to undertake the direct professional supervision of the veterinary medical services of the spay neuter clinic;" a veterinarian provides all spay and neuter services; the facility obtains a premises permit from the Board; and the facility meets the minimum standards set by rule of the Board for premises where veterinary medicine is practiced.¹² In fact, since 2007, the Alabama Board of Veterinary Medical Examiners has already conducted inspections of, and issued permits to, four nonprofit spay and neuter clinics in Alabama.

III. LIKELY COMPETITIVE EFFECTS OF HB 156

FTC staff recognize that certain professional licensure requirements are necessary to protect consumers. Restrictions on how professionals organize their practices, however, may be unnecessary to protect consumers. Instead, these types of restrictions may reduce competition and consumer choice by preventing the emergence of new, more efficient forms of professional practices. We urge legislators to consider the potential procompetitive benefits of HB 156, including lower prices, improved access, and increased choices for consumers. We suggest you also consider whether the existing restrictions are necessary for consumer protection.¹³

Proponents of laws and regulations limiting different types of "commercial practice" in licensed and regulated businesses have often argued those limits are necessary to maintain quality of service and protect the professional's independent judgment.¹⁴ Among other restrictions, these laws commonly prevent licensed professionals from entering into commercial

relationships, including employment, with non-licensed persons or firms. But one important effect of such restrictions in licensed businesses is often to reduce competition and increase prices.¹⁵

In a letter commenting favorably on a proposed bill in Tennessee that would lift restrictions on veterinarians being employed by non-veterinarians,¹⁶ FTC staff pointed out that “[r]estrictions on these types of business formats may prevent the formation and development of forms of professional practice that may be innovative and efficient, provide comparable quality service, and offer competition to traditional providers.”¹⁷ Studies have shown that such restrictions can act as barriers to entry by new competitors, and consumers may end up paying higher prices as a result.¹⁸ By contrast, consumers benefit when professionals, including potential entrants, have the ability to develop more efficient ways to offer their services to consumers at a comparable level of quality.

Information about existing Board-approved 501(c) (3) spay and neuter facilities in Alabama suggests they may charge lower prices for spaying and neutering services, thereby expanding access to spay and neuter pet care for consumers who might not otherwise be able to afford it.¹⁹ Increased spaying and neutering also could reduce taxpayer expenses for unwanted cats and dogs, which often end up in government-supported shelters.²⁰

It is our understanding that the Board has routinely inspected the existing nonprofit clinics, and none have been cited for substandard quality of care or facility conditions.²¹ It appears that, to remain in compliance with existing Alabama law, at least one of these nonprofit clinics has adopted a somewhat complicated business structure that may increase its costs of doing business.²² By eliminating the need for a more complicated business structure, passage of HB 156 could allow more efficient operation of both existing and new Board-approved 501(c) (3) nonprofit organizations that offer only spay and neuter services.

The Bill provides a number of safeguards to ensure that the quality of spaying or neutering services is the same, regardless of whether a facility is owned by a veterinarian or a 501(c) (3) nonprofit. For example, both the current and proposed laws require a supervisory veterinarian to make all medical decisions regarding the appropriate treatments to provide to a particular animal.²³ As a result, it does not appear HB 156 would change the level of professional supervision of spaying and neutering services in Alabama.

IV. CONCLUSION

The Bill would eliminate existing restrictions so that veterinarians can be employed by a 501(c) (3) nonprofit-owned spay and neuter facility meeting certain requirements. FTC staff support the Bill’s goal of allowing Alabama veterinarians to choose different, and potentially more efficient, business arrangements to provide spaying and neutering services to consumers.

Respectfully submitted,

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¹ This staff letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission, however, has voted to authorize staff to submit these comments.

² 26 U.S.C. §501(c) (3) (2010) (tax exempt organizations include "Corporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals"). *See also* Department of the Treasury, Internal Revenue Service, *Publication 557: Tax Exempt Status of Your Organization*, at 32 (Oct. 2011) (specifically recognizing as eligible for 501(c) (3) status organizations to prevent cruelty to animals, including those that provide "funds to pet owners to have their pets spayed or neutered to prevent overbreeding").

³ Letter from the Hon. Patricia Todd, Alabama House of Representatives, to Susan DeSanti, Director, Office of Policy Planning, Federal Trade Commission (Mar. 7, 2012). *See also* HB156, available at <http://alisondb.legislature.state.al.us/acas/ACTIONViewFrameMac.asp?TYPE=Substitute&AMDSUB=140100-2&DOCNAME=140100-2.pdf&DOCPATH=searchableinstruments/2012RS/Printfiles&INST=HB156>.

⁴ Federal Trade Commission Act, 15 U.S.C. § 45.

⁵ *Standard Oil Co. v. Fed. Tr. Comm'n*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

⁶ *See, e.g., Oklahoma State Board of Veterinary Medical Examiners*, 113 F.T.C. 138 (Jan. 31, 1990) (consent order against the Oklahoma State Board of Veterinary Medical Examiners for allegedly restricting veterinarians from being partners with, employed by, or otherwise associated with non-veterinarians or veterinarians licensed in other states). *See also Madison County Veterinary Medical Association.*, 114 F.T.C. 495 (Aug. 16, 1991) (consent order against the Madison County, Alabama Veterinary Medical Association and four individually named respondents to prevent restraints on price competition in the provision of spaying and neutering services and the advertising of veterinary services); STAFF REPORT TO THE FEDERAL TRADE COMMISSION, ADVERTISING OF VETERINARY GOODS AND SERVICES (1978); R. Bond et al., FTC BUREAU OF ECONOMICS STAFF REPORT, THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY (1980).

⁷ FTC and staff advocacy may comprise letters or comments addressing specific policy issues, Commission or staff testimony before legislative or regulatory bodies, amicus briefs, or reports. *See, e.g.,* FTC Staff Comment to

the Honorable John T. Bragg Concerning Tennessee H.B. 2542 Allowing Veterinarians to be Employed by Non-Veterinarian Corporations (Feb. 1996) (V960005) (commenting favorably on a bill to eliminate restrictions on veterinarians being employed by non-veterinarians), *available at* <http://www.ftc.gov/be/v960005.shtm>; FTC Staff Comment Before the Texas Sunset Advisory Committee Concerning its Review of Boards that Regulate Health Professions (Aug. 1992) (comments on review of legislation governing various professional boards, including veterinarians, physicians, and dentists, noting “studies have found little relationship between restrictions on professionals’ business practices and the quality of care provided”), *available at* <http://www.ftc.gov/be/healthcare/docs/AF%2017.pdf>. *See also* FTC Comment Before the Texas Board of Veterinary Medical Examiners Concerning Rule 573.17 on Animal Teeth Floating (Sep. 2010) (V100015) (noting that restricting the practice of teeth floating to veterinarians likely would “eliminate important competition between veterinarian and non-veterinarian teeth floaters, likely reducing Texas consumers’ choices and increasing the prices they must pay for floating”), *available at* <http://www.ftc.gov/os/2010/09/100910texasteethfloating.pdf>.

⁸ American Medical Ass’n, 94 F.T.C. 701 (1979), *aff’d* 638 F.2d 443 (2d Cir. 1980), *aff’d mem. by an equally divided court*, 455 U.S. 676 (1982).

⁹ American Medical Ass’n, 94 F.T.C. at 1012-13, 1015-1018 (the Commission also concluded the AMA’s prohibitions kept physicians from adopting potentially efficient business formats and precluded competition from organizations not directly and completely under the control of physicians).

¹⁰ *Oklahoma State Board of Veterinary Medical Examiners*, 113 F.T.C. 138 (Jan. 31, 1990). To resolve the Commission’s charges, the Board agreed to stop “prohibiting, restricting, impeding, or discouraging any veterinarian from associating with, being employed by or forming and maintaining a partnership with any non-veterinarian. *Id.* at 148.

¹¹ ALA. CODE §34-29-87 (1975). Section 34-29-87 (c) specifies the following exemptions:
(1) A veterinarian employed by a person treating his or her employer's animals; (2) A veterinarian employed by an official agency of the federal or state government or any subdivision thereof;
(3) A veterinarian employed by any licensed research facility; and (4) An heir or heirs inheriting under the terms of a will or by intestate succession for a period of two years following the death of the licensee.

¹² HB156, proposed amendment to ALA. CODE §34-29-88. The Bill further requires that:

A permittee shall notify the board immediately upon the resignation or termination of a designated supervisory veterinarian of record. A permit shall be suspended upon the resignation or termination of a designated supervisory veterinarian until such time as a new veterinarian is designated as the supervisory veterinarian of record and a reinspection of the premises is completed that is satisfactory to the board.

¹³ *See generally* CAROLYN COX & SUSAN FOSTER, FEDERAL TRADE COMMISSION, BUREAU OF ECONOMICS, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION, 25-27, 29-36 (1990) (discussing effects from restrictions on the business practices of licensed professionals), *available at* <http://www.ftc.gov/be/consumerbehavior/docs/reports/CoxFoster90.pdf>. This report, a review of economic studies of licensing, found licensing frequently increases prices and imposes substantial costs, but generally does not appear to increase the quality of service, especially with respect to restrictive regulation of business practices. The report recommends careful weighing of likely costs against prospective benefits. [Hereinafter COX & FOSTER, OCCUPATIONAL REGULATION].

¹⁴ *See* COX & FOSTER, OCCUPATIONAL REGULATION, at 25 (noting proponents of “regulations governing the business practices of professionals” argue they are needed to increase the quality of services, but the majority of studies find “quality to be unaffected by licensing or business practices” and in “some cases quality actually decreases”) [emphasis in original].

¹⁵ See American Medical Ass'n, 94 F.T.C. 701 (1979), *aff'd* 638 F.2d 443 (2d Cir. 1980), *aff'd mem. by an equally divided court*, 455 U.S. 676 (1982); *Oklahoma State Board of Veterinary Medical Examiners*, 113 F.T.C. 138 (Jan. 31, 1990).

¹⁶ FTC Staff Comment to the Honorable John T. Bragg Concerning Tennessee H.B. 2542 Allowing Veterinarians to be Employed by Non-Veterinarian Corporations (Feb. 1996) (V960005), *available at* <http://www.ftc.gov/be/v960005.shtm>.

¹⁷ *Id.* at 2.

¹⁸ See Deborah Haas-Wilson, *Strategic Regulatory Entry Deterrence: An Empirical Test in the Ophthalmic Market*, 8 J. HEALTH ECON. 339 (1989) (econometric study of optical goods markets concludes that “form of practice” restrictions have been used to deter entry and maintain higher prices); COX & FOSTER, OCCUPATIONAL REGULATION, at 25-27, 29-36 (discussing higher prices associated with restrictions on business practices); R. Bond et al., THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY, FTC BUREAU OF ECONOMICS STAFF REPORT (1980) (restrictions on advertising and commercial practice may increase price by as much as 33%).

¹⁹ See, e.g., Veronica Kennedy – The Birmingham News, Everything Alabama.com, *Free spay, neutering day at Irondale clinic brings lots of pets; more planned* (Mar. 7, 2011) (noting at the nonprofit clinic, male dogs are neutered for \$65 and females are spayed for \$80, with additional charges for dogs over 50 pounds or if pregnant, but the same procedures at a typical veterinary clinic range from approximately \$135 to \$300), *available at* http://blog.al.com/spotnews/2011/03/free_spay_neutering_day_at_iron.html; Birmingham News Editorial Board, *Our View: Senate mustn't let bill to allow nonprofit spay/neuter clinics to operate slip through the cracks as session winds down* (April 14, 2012) (discussing cost differences between nonprofit spay and neuter clinics and private veterinary practices), *available at* http://blog.al.com/birmingham-news-commentary/2012/04/our_view_senate_mustnt_let_bill.html.

²⁰ See, e.g., Shelby Humane Society, Open Letter Re: HB 156/Spay and Neuter Bill (Mar. 1, 2012) (noting if “residents do not have access to affordable spay and neuter surgeries for their pets, they simply will not be able to have their pets fixed,” that many of their “clients have *never* taken their pets to a vet,” and that eliminating access to low cost surgeries exacerbates overpopulation which costs tax dollars).

²¹ It is our understanding that when one facility in Huntsville changed its supervisory veterinarian, the Board refused to inspect and permit it for approximately 8 months in 2011, which led to its temporary closure. The Board allowed that facility to reopen in January 2012.

²² See Veronica Kennedy – The Birmingham News, Everything Alabama.com, *Agency quiet on threat to close Irondale vet clinic* (June 19, 2011) (noting the Board alleged one of the nonprofit clinics was not owned by a veterinarian, but the clinic responded that, although it owns the equipment and pays the support staff, a veterinarian with a private animal clinic is a partner in the nonprofit clinic and he contracts with and pays the two veterinarians who perform the spaying and neutering services at the clinic), *available at* http://blog.al.com/spotnews/2011/06/post_655.html. See also The Humane Society of Elmore County, Letter to Alabama Senator Marsh (Mar. 5, 2012) (suggesting current state law requiring ownership of nonprofit clinics by veterinarians causes hurdles to veterinarians who wish to relocate or retire).

²³ Specifically, HB156 would define “spay neuter clinic” as follows:

g. Spay Neuter Clinic: A nonprofit, tax exempt entity, as defined under Section 501(c)(3) of the Internal Revenue Code, which performs only spay and neuter surgeries for dogs and cats. However, if the licensed veterinarian designated to undertake the direct professional supervision of the veterinary medical services at such clinic determines that vaccinations, pain medications, or other treatments or procedures are medically advisable in accordance with the standard of care ascribed to and practiced by licensed veterinarians, then those treatments or procedures may also

be performed at the time of surgery, provided that the veterinarian documents those treatments or procedures. It shall be unlawful for any person other than the licensed veterinarian to make any policy or decision relating to the medical treatment of an animal including, but not limited to, decisions relating to the number of surgeries to be performed per day and the number of auxiliary veterinary medical personnel, licensed veterinary technicians, and unlicensed veterinary assistants necessary to provide adequate surgery services at the clinic. Each licensed veterinarian employed by a 501(c)(3) spay neuter clinic shall be subject to the standards of care for veterinary medicine as established in this article and rules promulgated by the board pursuant to this article. The facility in which the clinic is housed shall meet or exceed all physical requirements and minimum standards for veterinary facilities providing limited services as established by this article and rules promulgated by the board pursuant to this article. Service contracts with a licensed emergency clinic shall be required for after-hour emergencies.