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

Office of Policy Planning
Bureau of Economics
Bureau of Competition

December 18, 2009

Louisiana State Board of Dentistry
Barry Ogden, Executive Director
650 Canal St., Suite 2680
New Orleans, LA 70130

Re: Proposed Modifications to Louisiana's Administrative Rules Regarding the Practice of Portable and Mobile Dentistry

Dear Mr. Ogden:

Recently, the Louisiana Board of Dentistry proposed amendments to its rules regarding the practice of "portable and mobile dentistry." [1] These amendments would allow dentists to bring their portable, self-contained offices to the consumer. We are concerned, however, that some of the proposed amendments discriminate between mobile and office-based dentistry and restrict competition in an unnecessarily broad manner. If the Board of Dentistry adopts these proposals, they will deny many of Louisiana's children – particularly Medicaid-eligible children – access to dental care.

For the reasons detailed below, the staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition[2] urge the Louisiana State Board of Dentistry to modify certain sections of the proposed rules that are likely to make it more difficult for mobile dentists to operate, resulting in fewer poor children receiving dental care.

---

[1] The proposed rules would amend Title 46 of the Louisiana Administrative Code by adding a new Section 313, 46 LAC § 313. The proposed rules are located in the Louisiana Register, October 2009 at p. 2226-30; *available at* http://www.doa.louisiana.gov/osr/reg/0910/0910.pdf. The proposed rules make a distinction between portable and mobile dentistry. *See* proposed 46 LAC § 313(A). Aware of this distinction, for remainder of this letter we refer to "mobile and portable dentistry" collectively as "mobile dentistry."

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

Interest and Experience of the Federal Trade Commission

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.[3] Competition is at the core of America's free market economy.[4] Aggressive competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation. Anticompetitive conduct in health care markets has long been a target of FTC law enforcement[5] and research.[6] The FTC and its Staff also encourage competition through advocacy and have urged several states and their regulatory boards to reject or narrow restrictions on competition in health care professions.[7]

---

[3] Federal Trade Commission Act, 15 U.S.C. § 45.

[4] *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) ("The heart of our national economy long has been faith in the value of competition.").

[5] For example, in 2002, the Commission brought suit against the South Carolina Board of Dentistry ("SCBD"), a regulatory body composed largely of practicing dentists, alleging that the Board had illegally restricted dental hygienists from providing preventive dental care services in schools. The South Carolina legislature had previously eliminated a statutory requirement that a dentist must examine a child prior to receiving dental hygiene services such as cleanings and applications of sealants. *See* Opinion of the Commission, *In re South Carolina Board of Dentistry* (July 30, 2004), at http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf. In 2007, the SCBD entered into a consent agreement with the FTC. See *In re South Carolina Board of Dentistry*, Decision and Order (Sept. 7, 2007), *at* http://www.ftc.gov/os/adjpro/d9311/070911decision.pdf.

[6] *See, e.g.*, FEDERAL TRADE COMMISSION, FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS (Mar. 2008), *available at* http://www.ftc.gov/bc/0608hcupdate.pdf ; *see also* Competition in the Health Care Marketplace: Formal Commission Actions, *available at* http://www.ftc.gov/bc/healthcare/ antitrust/commissionactions.htm.

[7] *See, e.g.*, Letter from FTC Staff to Hon. Timothy Burns, Louisiana Legislature, (May 1, 2009) (regarding proposed restrictions on Mobile dentistry); *available at* http://www.ftc.gov/os/2009/05/V090009 louisianadentistry.pdf; Letter from FTC Staff to Hon. Sam Jones, Louisiana Legislature (May 22, 2009) (regarding modifications to bill regulating the practice of in-school dentistry); available at http://www.ftc.gov/os/2009/05/V090009louisianahb687amendment.pdf; Letter from FTC Staff to Elain Nekritz, Illinois Legislature (May 29, 2008) (regarding proposed regulations on limited service health-care clinics); *available at* http://www.ftc.gov/os/2008/06/V080013letter.pdf; Letter from FTC Staff to Massachusetts Department of Health (September 27, 2007) (regarding proposed regulations on limited service health-care clinics); *available at* http://www.ftc.gov/os/2007/10/v070015massclinic.pdf. Many of these advocacy efforts have been successful in preserving competition. For example, following the above referenced advocacy letters, the Louisiana and Illinois legislatures rejected the proposed restrictions on competition, and the Massachusetts Board of Health adopted the guidance recommended by FTC Staff.

Discussion

Children need regular oral health exams and treatments[8] and can be severely hurt when denied access to such care.[9] Access to care (particularly for children who qualify for Medicaid) is a common problem nationwide, despite many efforts to promote access.[10] For example, in 2007, Louisiana increased its public insurance coverage to encourage more dentists to treat children on Medicaid.[11] Still, less than one-third of Louisiana's dentists treat Medicaid-eligible patients, and only 37 percent of Medicaid-eligible children received any dental services at all.[12] Getting children and dentists in the same place at the same time to complete a dental exam poses the greatest barrier to Medicaid-children receiving dental care.[13] A resolution to this issue is to bring the dentist's

---

[8] *See Preventing Dental Caries: School-Based or –Linked Sealant Delivery*, United States Centers of Disease Control, 2002, available at http://www.thecommunityguide.org/oral/supportingmaterials/ RRschoolsealant.html .

[9] *See, e.g.* Mary Otto, *For Want of a Dentist: Pr. George's Boy Dies After Bacteria from Tooth Spread to Brain,* Washington Post (February, 28 2007); *available* at http://www.washingtonpost.com/wp-dyn/content/article/2007/02/27/AR2007022702116.html (discussing how 12-year old Deamonte Driver of Prince George's County, Maryland, died when bacteria from a tooth abscess spread to his brain, and which could have been prevented had he had access to dental care); *see also* Marian Wright Edelman, *Deamonte Driver Dental Project*, Hudson Valley Press (September 23, 2009), *available at http://www.hvpress. net/news/173/ARTICLE/7885/2009-09-23.html* (Discussing the Deamonte Driver case and subsequent efforts in various states to promote mobile dentistry to Medicaid-eligible children.)

[10] Government Accountability Office, *MEDICAID: State and Federal Actions Have Been Taken to Improve Children's Access to Dental Services, but Gaps Remain*, ("GAO Report") Report No. GAO-09-723, September, 2009, at 6, 11; *available at* http://www.gao.gov/docsearch/locate?searched=1&o=0&order _by=date&search_type =publications&keyword=gao-09-723.

[11] *See* Louisiana Act No. 407 (2007) *available at* http://www.dhh.louisiana.gov/offices/miscdocs/docs-119/Act407.pdf

[12] Louisiana Department of Health and Hospitals, Office of Public Health, *Oral Health* Report (Fall, 2009), *available at* http://www.dhh.louisiana.gov/offices/publications/pubs-267/oralhlthnewpdf.pdf, *see also* Jan Moller, *School Dentistry Debate in House Today*, New Orleans Times-Picayune (June 1, 2009); *available at* http://www.nola.com/news/index.ssf /2009/06/school_dentistry_debate_in_hou.html (explaining that more than 400,000 children did not access the care benefits available to them).

[13] GAO Report at 11. According to a 2008-2009 survey, state Medicaid directors cited three factors most frequently as barriers preventing Medicaid-children from accessing care: (1) locating a dentist willing to provide care, (2) travel distance to and from a dentist's office, and (3) parents' inability to get time off work to take children to the dentist's office. GAO Report at 17.

office to the consumer through self-contained mobile offices. Schools are often the destination for these mobile offices.[14]

Pursuant to legislative mandate in the Louisiana Dental Practices Act,[15] the Louisiana State Board of Dentistry has promulgated proposed rules to modify the professional standards of the practice of dentistry in mobile settings.[16] The proposed rules in part ensure adherence to prevailing standards of care to which all dentists must already comply.[17] The proposed rules, however, also would impose unnecessary burdens on dentists who offer services in a mobile setting. Such restrictions on competition are likely to result in fewer children – especially those who are economically disadvantaged – received adequate dental care.

The largest potential barrier to mobile dentistry is found in proposed §313(G)(6), which would require dentists to conduct a separate meeting by telephone or in-person with parents if children will be treated in a portable or mobile setting. This meeting occurs in addition to the written disclosures all dentists must already provide to patients and is required despite the signed

---

[14] *See* D.M. Jackson, et al., *Creating a Successful School-based Dental Program*, Journal of School Health, 77:1 at 6 (January, 2007), *available at* http://www.stdavidsfoundation.org/downloads/dental_report.pdf (describing a program that provides screening, sealants, treatment and education, the authors explained, "The school setting is an optimal platform for service delivery because the 'captive' audience is made up of many children who have little or no access to dental care. Because the Program provides free services in schools, it removes most barriers to oral healthcare including parents' inflexible work schedules, lack of transportation, eligibility and bureaucratic processes, and cost."); *see also, e.g.* Wright-Edelman, supra n. 9; *see also* Sandra Barbier, *Students Get In-School Dental Care,* The Mississippi Press, (Nov. 25, 2009); *available at* http://www.gulflive.com/news/mississippipress/news.ssf?/ base/news/1259147716297860.xml&coll=5 (describing mobile dentistry provided in Louisiana schools); Ronald McDonald House Charities, *Ronald McDonald Care Mobile® Bring Dental Care to Area Schools*, PR Newswire, *available at* http://www.prnewswire.com/news-releases/ronald-mcdonald-care-mobiler-brings-dental-care-to-area-schools-78799697.html ("Many Northwest Arkansas children will get their first glimpse of a dentist's chair when the new Ronald McDonald Care Mobile®, the area's first mobile dental clinic, comes to their schools.")

[15] *See* R.S. 37:751, et seq. (2009)

[16] The existing rules are codified at LAC 46:XXXIII Ch. 3, §§312, 313, 314

[17] *See* proposed Rule §313 (E)(1), et seq., mandating that dentists in mobile and portable clinics, "shall maintain and uphold the prevailing standard of dental care." Further, proposed Rule §313(C), for example, contains provisions that govern certain licensing, notification, and operation specifications necessary to register and operate a mobile or portable dental clinic, which appear consistent with certain other operational mandates required when services are provided in non-mobile settings.

parental authorization all dentists must obtain before treating children. We are unaware of a parent-dentist conference requirement when a dentist treats a child in an office. Because all practicing dentists must adhere to the same standards of conduct and care, there seems to be no consumer benefit from this requirement. Rather, this requirement will render it more difficult for dentists to provide these services by erecting an additional hurdle to bringing a dentist to a child.

Two other parts of the proposed rules also may make it harder to provide mobile dentistry to children. First, proposed §§313(J)(1) and (2) establish a means by which any member of the Board of Dentistry, which is composed mostly of competing dentists, may punish dentists for providing services in portable and mobile settings. Under Rule §§313(J)(1) and (2), every member of the Board may make an unannounced inspection of a dentist providing services in a portable or mobile setting. Dentists cannot be subject to an unannounced inspection when services are limited to the office; such inspections require at least 48 advance notice.[18] This authority could be seen as an invitation for Board members to act individually or in concert to punish dentists when they compete by providing mobile services. Subjecting dentists to the threat of an unannounced inspection when they treat patients in mobile settings, but not in office settings, may reduce dentists' willingness to treat patients in mobile settings.

Second, proposed §313(G)(1), requires dentists providing services in a portable or mobile setting to include in their consent form a statement "that if the minor already has a dentist, the parent or guardian should continue to arrange dental care through that provider." A dentist does not need to give this advice if the patient seeks treatment in an office. [19] It is unclear why this requirement is based on the setting of such services, especially because all dentists treat patients in accordance to the same prevailing standards of quality, safety and competence, regardless of setting.[20] Further, a rule mandating that one competitor advise a patient to return to another competitor is a form of market allocation that undermines the fundamental principles of competition, particularly because it is applied only in this setting.

---

[18] *See* Rule §1204(A). Under §1204(B), the Board may conduct unannounced inspections of dentists only if "bona fide complaints have been received regarding non-adherence to Federal Centers of Disease Control guidelines or other issues involving sanitation.

[19] It may be the prevailing practice to advise patients in the midst of on-going treatments, to maintain the relationship with the dentist until such treatments are completed.

[20] *Id.*

By making access to dental treatment in a mobile setting more difficult, the proposed rules are likely to reduce the number of poor children in Louisiana who receive dental care. At the same time, we are not aware of any evidence to suggest that the restrictions in the proposed rules identified above are likely to provide Louisianans with any benefits. Moreover, if the proposed amendments are necessary to assure patient safety, it is unclear why mobile dentistry offered by federal, state, and local government agencies, as well as free dental care provided in mobile settings are exempt from the rules.[21]

Conclusion

As detailed above, certain sections of the proposed rules are likely to make it more difficult for poor children to access dental care. Further, these proposals do not seem to be calculated to provide Louisiana citizens with any countervailing benefits. Accordingly, FTC Staff urges the Louisiana Board of Dentistry to modify the proposed rules.

We appreciate your consideration of these issues.

Respectfully submitted,

Susan S. DeSanti
Director
Office of Policy Planning

Richard A. Feinstein
Director
Bureau of Competition

Howard Shelanski
Deputy Director for Antitrust
Bureau of Economics

[21] *See* proposed Rule §313 (B)(1) & (3).