

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
Federal Trade Commission
October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

- the average purchaser of a car could save approximately two percent using an online service rather than buying in person from a dealer¹
- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

- in 1998, the FTC entered a consent decree with 25 car dealers in five Northwest

¹ Robert Atkinson and Thomas Wilhelm, *The Best States for E-Commerce* 19 (Mar. 2002) (second report of the Progressive Policy Institute) (citing Fiona Scott Morton, Florian Zettelmeyer, and Jorge Silva Risso, *Internet Car Retailing*, working paper, School of Management, Yale University, September 2000).

² See USA Today, Oct. 8, 1999 (reporting mark-ups of 500%); Modern Maturity, "R.I.P. Off" (Mar.-Apr. 2000).

³ Robert Atkinson, *The Revenge of the Disintermediated* 2 (Jan. 2001) (first report of the Progressive Policy Institute) ("First PPI Report").

states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

⁴ See Consent Agreement in *In re Fair Allocation System*, No. 971-0065 (1998), available at <http://www.ftc.gov/os/1998/9808/9710065.agr.htm>.

⁵ First PPI Report at 14 (citing Candace Talmadge, "Retailers concerned as manufacturers sell online," *Reuters Internet*, December 31, 2000, <http://www.mercurycenter.com/svtech/news/breaking/internet/docs/7956161.htm>).

⁶ Doug Bartholomew, *E-Commerce Bullies* 51 (Sept. 4, 2000) (published in industryweek.com).

⁷ FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) available at <http://www.ftc.gov/be/V020006.htm>.

⁸ FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) available at <http://www.ftc.gov/be/v020013.pdf>.

⁹ FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <http://www.ftc.gov/be/v020007.htm>.

To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools:

Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages:

As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine:

In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.