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COMMISSION APPROVED

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

April 10, 1986

Mrs. Moira Lux
Executive Director
Virginia Board of Veterinary Medicine
517 West Grace Street
P.O. Box 27708
Richmond, Virginia 23261

Dear Mrs. Lux:

The Federal Trade Commission's Bureaus of Consumer Protection, Economics, and Competition[1] are pleased to submit this letter in response to your request for public comments on the regulations proposed for adoption by the Virginia Board of Veterinary Medicine.[2]

As you are aware, we submitted comments in 1984 to Richard Morrison, Regulatory Review Coordinator, and in 1985 to Ralph Axselle, Chairman of the Governor's Regulatory Reform Advisory Board, concerning laws and regulations governing a number of professions, including veterinary medicine.[3] In the interest of brevity, we will incorporate by reference portions of those letters as indicated below.

We are pleased to note that the Board has responded to this regulatory review process by proposing regulations that remove burdensome restrictions on the ability of veterinarians to

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1 These comments represent the views of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commisioner. The Commission, however, has authorized the submission of these comments.

2 Our comments are directed only to those provisions that deal with advertising or commercial practices. We offer no opinion on the legality or desirability of other portions of the proposed regulations.

3 Letter to Richard Morrison from Carol T. Crawford, Director, Bureau of Consumer Protection, September 14, 1984 (hereinafter referred to as "Morrison letter"), and letter to Ralph Axselle from Carol T. Crawford, Director, Bureau of Consumer Protection, May 22, 1985 (hereinafter referred to as "Axselle letter"). Copies of both letters are attached.

advertise and to enter into business relationships with non-veterinarians. We applaud the Board's effort and, with two reservations noted below, we support adoption of the proposed rules.

Advertising Regulations

The Board proposes to regulate advertising by veterinarians through Rule 2.4.E., which characterizes as unprofessional conduct "advertising in a manner which is false, deceptive, or misleading." We support the Board's proposal because we believe this type of regulation protects consumers without imposing restrictions on nondeceptive advertising. Bans on nondeceptive advertising, in our experience, tend to result in higher prices and a decrease in consumer welfare. Thus, we also endorse the Board's decision to eliminate two other rules that prohibited veterinarians from disseminating truthful information about their services. As we explained in our previous comments (Morrison letter at pp.2-3 and incorporated by reference herein), we oppose prohibitions on claims of superiority and blanket bans on the use of solicitors because such restrictions deprive consumers of information that may be useful to them in choosing veterinary services and do not provide any offsetting benefits.

Commercial Practice

We also support the Board's decision to eliminate rules that prohibited veterinarians from entering into business relationships with non-veterinarians and from leasing space from commercial establishments. As we noted in prior comments (Morrison letter at p.4 and incorporated by reference herein), we object to such restrictions because we believe that these kinds of limitations reduce competition in health care markets. They prevent veterinarians from entering into relationships that may lower costs and result in increased savings for consumers, without adversely affecting the quality of care provided.

The Board has proposed Rule 2.4.B., which would make it unprofessional conduct for a veterinarian to practice where an unlicensed person has the authority to control the professional judgment of the veterinarian. When this regulation was first proposed as Rule 2.3.B., we acknowledged that the Board might have legitimate concerns about the control of unlicensed persons over the quality of care rendered by veterinarians. However, we suggested in our earlier comments (Axselle letter at pp.15-17 and incorporated by reference herein) that the Board adopt a slightly modified, and in our view clearer, version of this rule. The modification would restrict the employment of veterinarians by non-veterinarians where the non-veterinarian seeks to compromise the judgment of the veterinarian in ways that actually may lower the quality of care rendered by the veterinarian. We continue to encourage the Board to make this clarification to the proposed rule.

Finally, proposed Rule 4.1.B.1 appears to be inconsistent with the Board's decision to remove other restrictions on commercial practice. This provision states that the Board will not register an animal facility unless a veterinarian is the owner, partner, or officer of the facility. This appears to preclude the employment of a veterinarian by a non-veterinarian, even in situations where the veterinarian's professional judgment is not controlled by the non-veterinarian. We urge the Board to eliminate or modify Rule 4.1.B.1 so that veterinarians are not barred indirectly from working as employees of non-veterinarians.

Conclusion

With the exception of our stated concerns with Rules 2.4.B. and 4.1.B.1, we strongly support adoption of the proposed rules. If adopted, these regulations could result in real and substantial benefits for consumers. They would protect the public from false or deceptive advertising without depriving consumers of a wide range of useful information about veterinary services. They would help to stimulate competition among veterinarians and, in the process, improve the efficiency with which veterinarian services are delivered.

Yours truly,

Amanda B Pedersen/HB

Amanda B. Pedersen
Acting Director

Enclosures

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

BUREAU OF
CONSUMER PROTECTION

September 14, 1984

Mr. Richard Morrison
Department of Health Regulatory Boards
Commonwealth of Virginia
517 West Grace Street
P.O. Box 27708
Richmond, VA 23261

Dear Mr. Morrison:

The Federal Trade Commission's Bureaus of Consumer Protection, Economics and Competition[1] are pleased to respond to your invitation to assist you in your review of the statutes and regulations enforced by the Virginia State Board of Optometry and Veterinary Medicine by providing comments concerning the competitive effects of various restrictions on optometrists and veterinarians.

The Federal Trade Commission seeks to promote the national policy of encouraging competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the effects of restrictions on the business practices of professionals, including optometrists, dentists, lawyers, physicians and others. Our goal is to identify and seek the removal of such restrictions that impede competition, increase costs and harm consumers without providing countervailing benefits. In offering these comments, we acknowledge that we are not in a position to offer advice on what minimum level of quality of care the states should require.

I. Restrictions on Advertising by Optometrists and Veterinarians

Advertising "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."[2] Because of the significant benefits

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[1] These comments represent the views of the Bureaus of Consumer Protection, Economics and Competition of the Federal Trade Commission and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Federal Trade Commission, however, has reviewed these comments and has voted to authorize their presentation.

[2] Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977).

that can accrue to consumers from nondeceptive advertising, we believe that only false and deceptive advertising should be prohibited. Any other standard is likely to suppress potentially useful information and may well contribute to an increase in prices. Studies have shown that prices for professional services are lower where advertising exists than where it is prohibited.[3] Studies have also shown that advertising, which leads to lower prices, does not lead to lower quality services.[4] Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may well result.

Certain provisions of the statutes and regulations governing the practice of optometry and veterinary medicine in Virginia do restrict truthful advertising. For example, Virginia Code §§ 54-388(A)(2)(d) and 54-396(9)(ii) prohibit optometric advertising that "directly or indirectly" contains a claim of "professional superiority." Similarly, the Board of Veterinary Medicine's Regulation 15-J defines as unprofessional conduct any advertising that "directly or indirectly makes claims of professional superiority."

Such prohibitions on claims of superiority clearly lessen rivalry among competing sellers, and the effects of the restriction will depend on the extent to which it prevents the communication of truthful information. At a minimum, a prohibition on advertisements that contain claims of superiority restricts comparative advertising, which can be a highly effective means of informing and attracting customers and an important competitive force. When a seller cannot compare the attributes of his or her service to those of his or her competitors, the incentive to improve or to offer different products, services, or prices is likely to be reduced.

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3 Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980) (discussed at pp. 5-7 below); Benham & Benham, _Regulating through the Professions: A Perspective on Information Control_, 18 J.L. & Econ. 421 (1975); Benham, _The Effects of Advertising on the Price of Eyeglasses_, 15 J.L. & Econ. 337 (1972).

4 Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980) (discussed at pp. 5-7 below); J. Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976); McChesney & Muris, _The Effects of Advertising on the Quality of Legal Services_, 65 A.B.A.J. 1503 (1979); Muris & McChesney, _Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics_, 1979 Am. B. Found. Research J. 179 (1979).

A ban on claims of superiority is likely to be even more injurious to competition and consumers if interpreted to prohibit a wider range of truthful claims. Virtually all statements about a seller's qualifications, experience, or performance can be considered to be implicit claims of superiority, and a ban on all such claims would make it very difficult for a seller to provide consumers truthful information about the differences between his services and those of his competitors.

Virginia Code § 54-388(A)(2)(d) also prohibits the advertising of offers of free optometric services or examinations. We are aware of the potential for "bait and switch" and other deceptive schemes in such advertising. However, we do not believe that a total ban on the offering of free services is necessary. Truthful advertising of the availability of free services can obviously be of great benefit to consumers; also, such offers can be a particularly valuable promotional tool for new practitioners who are trying to enter the market.

Finally, Regulation 15-I of the Board of Veterinary Medicine's Rules and Regulations defines unprofessional conduct to include "utilizing the services of solicitors." This rule may in some instances impede the flow of truthful commercial information from veterinarians to potential clients. Such restrictions on the free flow of information may make it more difficult for buyers to learn about differences in price and quality, thereby insulating competitors from direct competition and reducing the incentive to compete on the merits. Although a state may insist that solicitors be held to the same standard of conduct as the professionals that they represent, and a past pattern of abuses may warrant regulations tailored to prevent specific abuses, a blanket ban on the utilization of solicitors is overly broad to be a justifiable form of professional regulation.

II. Restrictions on Other Business Practices by Optometrists and Veterinarians

Other provisions of the statutes and regulations governing the practice of optometry in Virginia restrict business practices other than advertising. For example, Virginia Code § 54-388 (A)(2)(i) prohibits the dividing of professional fees with non-optometrists. This provision may restrict partnerships or other business relationships between optometrists and other health care providers (such as dentists or podiatrists) who might provide complementary health care services at a single office location.

Virginia Code §§ 54-388(A)(2)(k) and 54.397.1 make it illegal for an optometrist to be employed by or locate his or her practice at a "commercial or mercantile establishment."[5]

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[5] Section 54-388(A)(2)(k) does allow such an establishment to employ an optometrist if it employed a full-time optometrist on (footnote continued)

Similarly, Board of Veterinary Medicine Regulation 15-C bans the practice of veterinary medicine by a lessee of any commercial or mercantile etablishment. These provisions prevent optometrists and veterinarians from locating their practices inside retail drug or department stores, where they can establish and maintain a high volume of patients because of the convenience of such locations and a high number of "walk-in" patients. This higher volume may, in turn, allow professional firms to realize economies of scale that may be passed on to consumers in the form of lower prices. These restrictions also may limit the availability of equity capital for professional practices, which increases the cost of capital to professional firms and further hinders the development of high-volume practices that may be able to reduce costs through economies of scale.

Virginia Code § 54-388(A)(2)(g) and Board of Optometry Regulation II-D prohibit the use of trade names by optometrists. Trade names -- such as "Fourth Street Contact Lens Clinic" or "Southern Vision Care Centers" -- can be virtually essential to the establishment of large group practices and chain operations that are able to exploit economies of scale and, consequently, to offer lower prices. Trade names are chosen because they are easy to remember and may also identify the location or other characteristics of a practice. Over time, a trade name ordinarily comes to be associated with a certain level of quality, service and price, which facilitates consumer search.

These kinds of restrictions on the business practices of professionals can reduce competition in health care markets by preventing the formation and development of innovative forms of professional practice, such as chain optometric firms, that may be more efficient, provide comparable quality, and offer competition to traditional providers. For example, in a case challenging various ethical code provisions enforced by the American Medical Association ("AMA"), the Commission found that AMA rules prohibiting physicians from working on a salaried basis for a hospital or other lay institution and from entering into partnerships or similar relationships with non-physicians unreasonably restrained competition and thereby violated the antitrust laws.[6] The Commission concluded that the AMA's prohibitions kept physicians from adopting more economically efficient business formats and that, in particular, these restrictions precluded competition by organizations not directly and completely under the control of physicians. The Commission also found that there were no countervailing procompetitive justifications for these restrictions.

June 3, 1938.

6 In re American Medical Association, 94 F.T.C. 701 (1978), aff'd, 638 F.2d. 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982).

Proponents of such restrictions claim that they are necessary to maintain a high level of quality in the professional services market. For example, they claim that employee-employer and other relationships between professionals and non-professionals will result in lay interference in the professional judgment of licensees, thus causing a decline in quality. They assert that lay corporations such as chain retailers would be unduly concerned with profits, not with the quality of professional care. Allegedly, while such firms might offer lower prices, they might also encourage their professional employees to cut corners in order to maintain profits. According to those who favor restrictions, the public would suffer doubly because professionals who practice in traditional, non-commercial settings would be forced to lower the price and quality of their services in order to compete.

The Federal Trade Commission's Bureaus of Economics and Consumer Protection have issued two studies that provide evidence that restrictions on commercial practice by optometrists -- including restrictions on the business relationships between optometrists and non-optometrists, on commercial locations and on trade name usage -- are, in fact, harmful to consumers.

The first study,[7] conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, compared the price and quality of eye examinations and eyeglasses across cities with a variety of legal environments. Cities were classified as markets where advertising was present if there was advertising of eyeglasses or eye exams in local newspapers or "Yellow Pages." Cities were classified as markets with chain optometric practice if eye examinations were available at large interstate optical firms. Since restraints on corporate practice of optometry, commercial locations and trade name usage necessarily restrict the operations of chain optometric firms, the study provides important information on the likely effects of such restrictions.

The study found that prices charged in 1977 for eye examinations and eyeglasses were significantly higher in cities without chains and advertising than in cities where advertising and chain firms were present. The average price charged by optometrists in the cities without chains and advertising was 33.6% higher than in the cities with advertising and chains ($94.46 versus $70.72). Prices were approximately 17.9% higher as a function of the absence of chains; the remaining price difference was attributed to the absence of advertising.

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7 Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

The data also showed that the quality of vision care was not lower in cities where chain optometric practice and advertising were present. The thoroughness of eye examinations, the accuracy of eyeglass prescriptions, the accuracy and workmanship of eye-glasses, and the extent of unnecessary prescribing were, on average, the same in the both types of cities.

The second study compared the cost and quality of cosmetic contact lens fitting by various types of eye care professionals.[8] This study was designed and conducted with the assistance of the major national professional associations representing ophthalmologists, optometrists and opticians. Its findings are based on examinations and interviews of more than 500 contact lens wearers in 18 urban areas.

The study found that there were few, if any, meaningful differences in the quality of cosmetic contact lens fitting provided by ophthalmologists, optometrists, and opticians. The study also showed that, on average, "commercial" optometrists -- that is, optometrists who worked for a chain optical firm or advertised heavily -- fitted contact lenses at least as well as other fitters, but charged significantly lower prices.

These studies provide evidence that restrictions on employment, partnership, or other relationships between professionals and non-professionals, on commercial locations and on trade name usage tend to raise prices above the levels that would otherwise prevail, but do not seem to raise the quality of care in the vision care market. Although these studies deal specifically with restrictions on the practice of optometry, the results may be applicable to analogous restrictions in other areas, such as veterinary medicine.

III. Restrictions on Prepaid Optometric Service Plans

We also have reviewed Chapter 27, Title 38.1 of the Virginia Code, relating to Plans for Future Dental or Optometric Services, and have identified several provisions that appear to be unnecessarily restrictive or whose anticompetitive effects may outweigh any countervailing benefits to the public.

Virginia Code § 38.1-898 requires that a majority of the board of directors of a prepaid optometric service plan be optometrists. It is not apparent what public benefit results from requiring provider control of all plan boards. We are unaware of any reason why consumers, entrepreneurs, and others should not also be permitted to establish and operate such plans in competition with provider-controlled plans. Such lay boards

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[8] Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983).

can certainly obtain any necessary professional expertise without having providers control the plan's board of directors.

Section 38.1-903 requires that optometric service plan subscribers have "free choice of any participating . . . optometrist." Some states interpret such clauses to require that participation be open to any licensed provider. If this section is interpreted in this way, it in fact could restrict the choices available to consumers. Mandating free choice of provider in all prepayment programs prevents plans from offering, and subscribers from freely and voluntarily choosing to enroll in, programs that may limit subscriber choice of participating providers. Such plans, in turn, may lower program costs by selecting less expensive and more quality-conscious providers, and may generate competitive pressure on all providers to control costs or raise quality. This concept is evident in both health maintenance organizations ("HMOs") and preferred provider organizations ("PPOs"). As you know, Virginia was one of the first states to pass legislation authorizing PPO arrangements, and the mandatory "free choice" provision of Section 38.1-903 appears to be at odds with the purpose and intent of that more recent statute. In its case against the American Medical Association, the Commission found that the origin and history of the medical profession's insistence on this type of provision for prepayment plans "makes clear that the purpose . . . is primarily the anticompetitive one of suppressing the activities of competitors, not solicitude for the rights of patients."[9]

Section 38.1-904 denies the Insurance Commission discretion to license more than one plan in a given geographic area if "licensing more than one plan for the same geographical area will not promote the public welfare." While we do not know how this provision in fact has been applied or will be applied, it could be used to protect current market participants from competition from new market entrants, or at least to discourage such new entry. In any event, it does not appear to serve any substantial public interest.

Section 38.1-909 provides that prepaid optometric service plans subject to this chapter "shall not engage in any other business," with the exception of governmental health care programs. This restriction may unnecessarily prevent plans from diversifying and offering their subscribers additional products or benefits packages that may be more convenient and desirable. For example, many commercial insurers have offered coverage packages to employers that include accident and health insurance, dental benefits, life insurance, workers' compensation coverage, and even pensions and annuities. Permitting optometric plans to diversify in at least some ways to meet market demands -- subject, of course, to appropriate regulatory oversight -- may help

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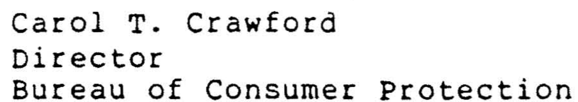
9 In re American Medical Association, supra n.7 at 1015.

them to be more effective competitors and better meet the needs of the public.

In conclusion, thank you for your willingness to consider our comments. We are enclosing copies of the studies referred to in our comments. Please let us know if we can be of any further assistance.

Sincerely,



Carol T. Crawford
Director
Bureau of Consumer Protection

Enclosures

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

May 22, 1985

The Honorable Ralph L. Axselle, Chairman
Governor's Regulatory Reform Board
General Assembly Building
Commonwealth of Virginia
910 Capitol Street
Richmond, VA 23219

Dear Mr. Chairman:

The Federal Trade Commission's Bureaus of Consumer Protection, Economics, and Competition are pleased to respond to the invitation of Richard D. Morrison, Regulatory Review Coordinator, to assist you in the ongoing review of health professional regulatory boards by the Commonwealth of Virginia.[1] As you are aware, we submitted comments last year to Mr. Morrison concerning laws and regulations governing the professions of Dentistry, Medicine, Optometry, and Veterinary Medicine.[2] Our previous comments focused on (1) restrictions on advertising by these professionals, (2) restrictions on the business practices of these professionals, including corporate employment, business relationships between professionals and non-professionals, commercial locations, and trade name usage, and (3) restrictions on the formation and operation of prepaid dental and optometric plans. Our previous comments also addressed both statutory and regulatory provisions covering all three of these areas. Finally, our previous comments discussed in some detail the negative effects that restrictions on nondeceptive advertising and commercial practices can have on consumers and competition.

We are now commenting on the regulatory changes that have been proposed by the Boards governing these professions. In offering these comments, our goal continues to be to identify and seek the removal of such restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits. While we also direct these comments to the Regulatory Boards, we urge the Reform Board to consider our

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1 These comments represent the views of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

2 We submitted separate comments on the regulations of the (1) Boards of Dentistry and Medicine, dated August 21, 1984, and (2) Boards of Optometry and Veterinary Medicine, dated September 14, 1984. Copies of both comments are attached.

views when it recommends to the Governor the position he should take when he makes final comments to the Regulatory Boards.[3]

We will first provide a brief overview of our previous comments, the Boards' responses thereto, and provisions in the proposed regulations that we believe continue to present potential problems. In an attachment, we then discuss individually and in detail each Board's proposed regulations. While this format leads to some repetition because of similar provisions proposed by several Boards, we believe that each Board will find it easier to read the comments that apply to it separately.

One of the primary issues that our previous comments addressed was restraints on nondeceptive advertising. We listed statutory and regulatory provisions that appeared to restrict nondeceptive advertising by dentists, physicians, optometrists, and veterinarians, and we urged their removal. In response, the Board of Veterinary Medicine proposed the removal of many of the restrictions in this area, the Board of Optometry also proposed simplifying the rules governing advertising, and the Board of Dentistry proposed the elimination of certain restrictions. The Board of Medicine stated that it would take our comments under advisement.

Potential problems remain, however. Neither the Board of Optometry nor the Board of Medicine has recommended removal of statutory restrictions that appear to prohibit some types of nondeceptive advertising. Moreover, the Board of Dentistry has proposed new regulations that appear to go beyond prohibiting false and deceptive advertising, and impose additional unnecessary burdens on nondeceptive advertising.

The second major issue that we addressed in our previous comments involved restrictions on commercial practice, including corporate employment, commercial locations, and trade name usage. Again, the Board of Veterinary Medicine proposed the removal of those restrictions contained in its regulations. In addition, the Board of Optometry proposed to allow some trade name usage.

Potential problems remain in this area, too, however. Although many of the commercial practice restrictions are statutory, none of the Boards recommended any changes to existing statutory prohibitions on commercial practice by optometrists, dentists, and physicians. (No such restrictions governing veterinarians exist.) Further, the Board of Optometry's proposed

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3 We note that we are not in a position to offer advice on what minimum level of quality of care the states should require.

regulations governing trade name usage appear to go beyond what is necessary to prevent deception and may unduly burden trade name usage.

Thank you for your willingness to consider our comments. Please let us know if we can be of any further assistance.

Sincerely,

Carol T. Crawford
Director

Attachments

REPORT OF THE BUREAUS OF CONSUMER PROTECTION, COMPETITION, AND ECONOMICS OF THE FEDERAL TRADE COMMISSION

TO THE
COMMONWEALTH OF VIRGINIA
GOVERNOR'S REGULATORY REFORM BOARD

ON
REVIEW OF REGULATIONS PROPOSED BY

THE BOARD OF OPTOMETRY
THE BOARD OF DENTISTRY
THE BOARD OF VETERINARY MEDICINE, and
THE BOARD OF MEDICINE

May 22, 1985

These comments represent the views of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

BOARD OF OPTOMETRY

Our previous comments[1] discussed several statutory provisions restricting advertising and business practices that we suggested may harm consumers. The Board of Optometry did not recommend any statutory changes but did propose changes in its regulations that would simplify the rules governing advertising and would allow some use of trade names. However, some of the proposed restrictions may go beyond what is necessary to prevent deception.

Advertising Restrictions

The Board of Optometry has proposed replacing the current list of advertising disclosure requirements (Regulation III) with Section 3.1G., which would prohibit false and misleading advertising and require, whenever a price is advertised, that the advertisement state what goods and services are included in the price. The purpose of this provision appears to be to prevent false and misleading advertising. We have some concern, however, about the proposed requirement that any price advertisement state what goods and services are included in the price. This provision could be interpreted to require detailed and lengthy disclosures that are not necessary to prevent deception but merely impose extra costs on the advertisers, costs that are

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[1] Letter to Richard Morrison, Department of Health Regulatory Boards from Carol T. Crawford, Director, Bureau of Consumer Protection (September 14, 1984) (hereinafter referred to as the "September 1984 comments").

ultimately paid for by consumers. For example, an optometrist who wished to advertise a price for an eye exam could be required to disclose the specific procedures that are included in the exam. Further, the vague language of the provision could chill legitimate advertising because potential advertisers might be unsure of its meaning. We recommend that the Board reconsider the need for this provision.

We again urge the Board to recommend that Virginia Code Sections 54-388 (A)(2)(d) and 54-396 (9)(ii), which prohibit claims of superiority and advertising of free services, be repealed, so that only false or deceptive advertising is prohibited. A prohibition of false advertising should be sufficient to prevent deceptive claims of superiority and of free services. As noted in our previous comments (September 1984 comments, at pp. 2-3), these code provisions appear to restrict nondeceptive advertising, thereby lessening competition and harming consumers.

Trade Names

The Board of Optometry has proposed removing a complete ban on the use of trade names (Reg. II-D) and allowing their use

under certain circumstances (proposed Section 4.1).[2] As we stated in our earlier comments (September 1984 comments, at p. 4), the use of trade names can be virtually essential to the establishment of group practices and chain operations that are able to take advantage of economies of scale and consequently to offer lower prices. Trade names can also minimize consumer search costs because, over time, a trade name ordinarily comes to be associated with a certain level of quality, service, and price.

Although we believe that the general trend of the proposed regulations may well benefit consumers, some of the specific proposed limitations may restrict trade name usage more than is necessary to prevent deception. For example, some of the restrictions appear to limit trade name usage by group practices with branch offices. Proposed sections 4.1A.2. and 4.1A.3. appear to restrict the use of a trade name consisting of the name of one or more of the optometrists in the practice to the office where the named optometrists practice. This would appear to preclude the use of trade names such as "Optometric Offices of Smith and Jones," and possibly "Smith Optometric Clinic" at all branch offices of a multi-office practice. One of the important advantages of trade names is to facilitate the development of group practices with many offices. By allowing employing doctors' names to be used only at those offices where the doctors

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[2] The Board has proposed these changes in the regulations but has not recommended a change in Virginia Code Section 54-388(A)(2)(g), the statute that bans trade names.

actually examine patients, use of a uniform trade name for multiple branch offices is made more difficult.

We understand and support the Board's desire to preclude the use of deceptive trade names. However, we would urge the Board to evaluate whether there is any evidence that the use of trade names such as "Optometric Offices of Smith and Jones," or "Smith Optometric Clinic" are deceptive when used for branch offices. Especially where a number of branch offices are advertised under such a trade name, it seems doubtful that consumers would assume that they would be examined by one of the named doctors.

Proposed Section 4.1B.9., which prohibits use of trade names containing the names of deceased or retired optometrists, also raises some concerns about whether such trade names are inherently deceptive in every instance. This provision would mean that a trade name such as "Smith Optometric Clinic" would have to be changed upon the death of Dr. Smith, thus preventing the use over time of such trade names, although they may be valuable to consumers because they have come to be associated with a certain level of quality or price. Although we understand the Board's concern about possible deception, we would urge the Board to evaluate whether there is any evidence that consumers are actually deceived by such usage. Law firms for years have used trade names of this type, and we are unaware of any evidence of resulting deception.

We recognize that the Board may wish to ensure identification and accountability of individual practitioners

practicing under a trade name. However, the Board has already proposed regulations that appear to accomplish this end without unduly restricting nondeceptive advertising. Section 4.1B.5. requires conspicuous posting in the reception area of the names of all optometrists practicing at a location. Sections 4.1B.7. and 8. require that the examining optometrist's name appear on the patient's records and on all invoices and receipts.

Proposed Section 4.1B.2. prohibits optometrists from practicing under more than one fictitious name. It is unclear whether this prohibits practicing under a number of trade names at one time or during a lifetime. If the former, this would restrict optometrists from working part-time for more than one group practice using a trade name. If the latter, it could severely restrict the employment options available to optometrists and hinder the ability of large group practices to recruit optometrists. We believe that it is preferable for the Board to proceed on a case-by-case basis against optometrists who use trade names in a deceptive manner rather than to issue a broad ban on practicing under more than one trade name.

Proposed Sections 4.1A and 4.1B.3. requires all advertisements using trade names to include the name of at least one optometrist associated with the office. While this is somewhat less of a burden than requiring such advertisements to include the names of all the associated optometrists, it would still increase the costs of advertising without necessarily providing information that would help consumers because the named

optometrist would not necessarily examine the consumer's eyes. This requirement would appear unnecessary since adequate professional identification will likely result when the consumer calls or visits the office. Further, the Board can respond if individual complaints arise because it will have a record of all trade names in use, along with the responsible optometrists. (See Section 4.1B.1.)

Proposed Section 4.1B.4. prohibits trade names that do not include the words "optometry" or "vision" or reasonably recognizable derivatives thereof. This would appear to preclude the use of trade names such as "Southern Contact Lens Clinic" and other nondeceptive trade names as well. Presumably, the intent of this proposal is to ensure that the trade name conveys the fact that the firm is an optometric practice. However, it is not clear that this is necessary since most advertisements would probably convey this fact anyway. For example, this fact would likely be conveyed through use of the word "optometrists" in the text of the ad.

Commercial Practice Restrictions

Lastly, we would urge the Board of Optometry to reconsider our previous comments concerning statutory restrictions on business relationships between optometrists and non-optometrists (Section 54-388 (A)(2)(i)) and on employment by or location at commercial establishments (Sections 54-388 (A)(2)(k) and 54-397.1) (September 1984 comments, at pp. 3-4) In our previous

comments we raised questions about the potential harm which could result from such restrictions and discussed evidence that "commercial practice" such as chain firms may benefit consumers by lowering prices without decreasing the quality of service. Our comments also noted that several of the statutory provisions governing prepaid dental plans (Virginia Code Section 38.1-892 et seq.) appear to be unnecessarily restrictive or have anticompetitive effects which may outweigh any countervailing benefits to the public. In its report, the Board of Optometry neither addressed our concerns nor recommended any statutory changes. We urge the Board to reconsider our previous comments.

BOARD OF DENTISTRY

In our prior comments[3] regarding the Board of Dentistry we discussed a number of statutory and regulatory provisions that appeared to prohibit nondeceptive advertising or place unnecessary burdens on such advertising. The Board has proposed removing some of these regulations but has proposed several new regulations that also appear to go beyond prohibiting false and deceptive advertising. Our previous comments also discussed the potential harm to consumers that could result from several statutory restrictions on commercial practices, including a ban on trade name usage. The Board did not recommend changes to any of these statutory provisions.

Advertising

We turn first to the areas covered by our previous comments regarding several advertising provisions (August 1984 comments, at pp. 2-4). Our previous comments stated that Virginia Code Section 54-187(7), which bans advertising claims of superiority, appears to prohibit at least some nondeceptive advertising. Our comments also stated that portions of Section 7.A.4. of the Board's regulation, prohibiting advertising of statistical data, information on past performance, representations of quality and

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[3] Letter to Richard Morrison, Department of Health Regulatory Boards from Carol T. Crawford, Director, Bureau of Consumer Protection (August 21, 1984) (hereinafter sometimes referred to as the "August 1984 comments").

showmanship or puffery, appear to prohibit nondeceptive advertising. We also expressed concern that Section 7.A.2.d., governing advertising of specialties, could be interpreted to prohibit nondeceptive advertising. The Board supports the elimination of all these restrictions. We believe that these proposed changes will benefit consumers. However, some of the remaining provisions as well as some of the new proposed revisions appear to go beyond what is necessary to prevent deception.

Previously we stated that Section 7.A.2.f., which requires disclosure of the original price whenever a discount is advertised, would likely prevent the dissemination of useful and nondeceptive price information. For example, this provision would prohibit ads stating "10% off for senior citizens" or "$10 off for all new patients." Further, since it could be very costly to state in an advertisement the regular price of each of the hundreds of services a dentist provides, this rule will likely decrease the amount of discount price advertising that occurs. The Board has now recommended that the requirements of Section 7.4.2.f. be incorporated into proposed Section 4.6C., and we urge the Board to reconsider our previous comments on this point and consider eliminating this requirement.

Proposed Section 4.6B.2. states that an advertisement of a fee for a dental service must state the period of time for which the fee shall be in effect unless the fee is in effect for at least 90 days. In evaluating whether an ad without such a

disclosure is misleading it is important to consider normal consumer expectations about the effective dates of advertised prices. We suggest that the Board evaluate whether consumers expect advertised prices to be effective for at least 90 days, especially if the ad uses terms such as "special offer," or "introductory offer." Any disclosure requirement adds to the cost of advertising and, we believe, should be imposed only where necessary to prevent deception.

Proposed Section 4.6E. limits fee advertising to certain listed and defined routine dental services. This provision would apparently prohibit the advertising of fee information for non-routine services, including, for example, new or innovative techniques that are not yet widely used by practitioners. It also may be interpreted to prohibit any advertisements that do not state specific prices but rather use terms such as "discount prices" or "low cost" to attract consumer attention and communicate a message effectively. Such advertising is not inherently deceptive. The proposed rule also appears to require advertisers to use terminology that may be confusing and not easily understood by consumers. For example, it seems to require advertisers to use only the specific terminology listed in the regulations, such as "prophylaxis" to describe cleaning of teeth. It also seems to require that "examination," "diagnosis," and "treatment planning" be advertised separately, although diagnosis and treatment planning are often considered to be part of a routine dental examination and consumers may not understand the distinction between these terms. Such requirements limit the

ability of advertisers to convey their message as effectively as possible and thus may have a chilling effect upon valuable advertising. The requirement also appears to impose additional burdens on advertisers that are not imposed on other dentists. For example, if a dentist advertises "treatment planning," he or she must give the patient a written itemized treatment recommendation and a written itemized fee statement. Those requirements are not imposed on nonadvertising dentists.

In our view, proposed Section 4.6E. is not necessary to prevent deceptive advertising. While we recognize that problems may occur, we suggest that the Board respond to these problems on a case-by-case basis, seeking to remove advertising that is actually deceptive, rather than through broad rules that would likely preclude the dissemination of valuable nondeceptive information. Thus, we urge the Board to reconsider the necessity of proposed Section 4.6E.

Trade Names

In our previous comments we also discussed the statutory prohibition on trade name usage by dentists (Virginia Code Section 54-184) and pointed out that trade names can be essential to the establishment of large group practices and chain operations that can offer lower prices (August 1984 comments, at pp. 5-7). While the Board of Dentistry initially proposed a

series of regulations that would permit some trade name usage,[4] we understand that it now recommends no changes to the current law banning trade name usage. We would urge the Board to reconsider our previous comments.

Commercial Practice

Our previous comments also addressed several statutory restrictions on commercial practice, including a ban on employment, partnership, and other business relationships between dentists and other persons (Virginia Code Section 54-146, Section 54-183), and a ban on leasing space from commercial establishments (Virginia Code Section 54-147.1). We raised the question whether such restrictions may harm consumers and presented evidence that the presence of commercial practitioners such as chain firms may lower prices without decreasing the quality of care (August 1984 comments, at pp. 4-7). Our comments also noted that several of the statutory provisions governing prepaid dental plans (Virginia Code Section 38.1-892 et seq.) appear to be unnecessarily restrictive or have anticompetitive effects which may outweigh any countervailing benefits to the public. The Board of Dentistry did not address these concerns in

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[4] Those revisions, while allowing certain forms of trade name usage, still appeared to restrict unnecessarily the use of trade names. See our comments relating to several similar provisions proposed by the Board of Optometry on pp. 3-7, supra. The Board also noted that a statutory change may be necessary to allow trade name usage. Presumably, this recommendation also has been withdrawn.

its Report and did not propose changes to these statutory provisions. We would urge the Board to reconsider our previous comments.

BOARD OF VETERINARY MEDICINE

Our previous comments[5] regarding the Board of Veterinary Medicine discussed the potentially harmful effects of Board rules prohibiting veterinarians from utilizing the services of solicitors (Rule 15(I)), making claims of superiority (Rule 15(J)), entering into business relationships with non-veterinarians (Rule 15(B)), and leasing space from commercial establishments (Rule 15(C)). We support the Board's decision to propose the elimination of all of these rules. We believe that these changes may well benefit consumers by increasing competition and lowering costs without decreasing quality.

Commercial Practice

The Board of Veterinary Medicine has proposed a new regulation (Section 2.3.B.) that would make it unprofessional conduct for a veterinarian to practice veterinary medicine if a non-veterinarian has the right to control the professional judgment of the veterinarian. According to the Board, the purpose of the current ban on commercial practice is to ensure that the professional judgment of a veterinarian is not compromised by someone who is not a veterinarian. As stated, the purpose of the proposed changes is to deal directly with this

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5 Letter to Richard Morrison, Department of Health Regulatory Boards from Carol T. Crawford, Director of Consumer Protection (September 14, 1984) (hereinafter sometimes referred to as the "September 1984 Comments").

problem without intruding upon business relationships "so long as veterinary medicine is practiced safely and well." (Bd. of Veterinary Medicine, Regulatory Review Report, p. 9.)

While we recognize that the Board may consider proposed Section 2.3.B. necessary to protect consumers, we believe that a slightly modified version of this provision may achieve the Board's goals without unnecessarily interfering with business relationships between veterinarians and non-veterinarians. As currently drafted, Section 2.3.B. might be interpreted to prevent veterinarians from working for lay employers since all employers exercise control over the work-related activities of their employees. The Board may be able to accomplish its express purpose of prohibiting only those controls that compromise the professional judgment of veterinarians by recommending a narrower rule that would restrict veterinarians from working for non-veterinarians where the non-veterinarian seeks to compromise the veterinarian's professional judgment in ways that might lower the quality of care rendered by the veterinarian.

Opponents of commercial practice often argue that lay employers will compromise the quality of care in an effort to increase profits. However, it is also possible that they will attempt to ensure high quality in an effort to establish a good reputation, thereby increasing patronage and profits in the long run. Our study regarding the quality of cosmetic contact lens

fittings by optometrists,[6] discussed more fully in our previous comments (September 1984 comments, at p. 6), tends to support the latter argument since it shows that the quality of commercial optometrists' cosmetic contact lens fittings are at least as good as those of noncommercial optometrists and ophthalmologists.

We applaud the Board's positive response to our previous concerns. We urge the Board to review these additional comments and consider whether a narrower rule might not better accomplish its stated goal of not intruding on business relationships so long as veterinary medicine is practiced safely and well.

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6 Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983).

BOARD OF MEDICINE

In our previous comments[7] we discussed three statutory provisions that may harm consumers. We noted that Virginia Code Section 54-317(3), which bans advertising claims of superiority by physicians, would appear to prohibit at least some nondeceptive advertising (August 1984 comments, at p. 2). We also discussed in detail two provisions of the Virginia Code, Section 54-278.1, prohibiting physicians from leasing from commercial establishments, and Section 54-317, which may be interpreted to prohibit trade name usage (August 1984 comments, at pp. 4-7). Both of these provisions may harm consumers by hindering competition from high-volume, lower-priced practices. In its Report,[8] the Board noted that our recommendations relating to advertising will be taken under advisement. We appreciate this consideration of our comments. However, the Board did not recommend any statutory revisions and we would urge the Board to reconsider our previous comments regarding these provisions.

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[7] Letter to Richard Morrison, Department of Health Regulatory Boards from Carol T. Crawford, Director, Bureau of Consumer Protection (August 21, 1984) (hereinafter sometimes referred to as the "August 1984 comments.")

[8] Board of Medicine, Summary of Regulations, p. 6.