

Complaint

119 F.T.C.

IN THE MATTER OF

DAVID GREEN, M.D.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3589. Complaint, June 23, 1995--Decision, June 23, 1995*

This consent order prohibits, among other things, an individual doing business as The Varicose Vein Center from making various representations about any vein treatment or cosmetic surgery procedure he markets in the future unless he possesses competent and reliable scientific evidence to substantiate the claims.

*Appearances*For the Commission: *Sondra L. Mills* and *Richard F. Kelly*.For the respondent: *Pro se*.

COMPLAINT

The Federal Trade Commission, having reason to believe that David Green, M.D., an individual doing business as The Varicose Vein Center, a sole proprietorship (hereinafter "respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent David Green, M.D. ("Dr. Green") is an individual doing business as The Varicose Vein Center, a sole proprietorship ("VVC"). Respondent operates a VVC clinic located at 4800 Montgomery Lane, Suite M50, Bethesda, MD.

PAR. 2. Respondent is engaged, and has been engaged, in the sale and offering for sale of sclerotherapy treatments for venous disease, including varicose veins and spider veins. Sclerotherapy involves the injection of a solution with a fine needle directly into the vein. The vein turns into scar tissue that fades from view. A variety of solutions, called sclerosing agents, may be used for this procedure. These include, but are not limited to, hypertonic saline, Sotradecol (sodium tetradecyl sulfate), Polidocanol (aethoxysklerol), and sodium morrhuate. In addition to sclerotherapy, other methods are used to

treat varicose and spider veins. These include, but are not limited to, surgical procedures, laser treatments and electrocautery treatments.

Respondent's regimen for treating venous disease involves the injection of solutions of Sotradecol into the veins followed by compression of the surrounding tissue with bandages and wraps and post-procedure ambulation by the patient. In the past, respondent has also used hypertonic saline and Polidocanol as sclerosing agents when administering his sclerotherapy treatments.

As part of his treatment regimen, respondent refers certain patients with varicose veins to surgeons to perform a surgical procedure prior to injecting the veins with a sclerosing agent. These include patients whom respondent has diagnosed as having truncal varicosities with incompetence at the saphenofemoral or saphenopopliteal junction. Respondent refers such patients to a surgeon for surgical division and ligation of these veins before performing his sclerotherapy treatments.

PAR. 3. In the course and conduct of Dr. Green's business, respondent has disseminated or caused to be disseminated advertisements and promotional materials for the purpose of promoting the sale of sclerotherapy services, which include the use of the drug Sotradecol. Sotradecol is a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Respondent has placed, or caused to be placed, advertisements in various periodicals that are in general circulation to the public to promote VVC's treatments of varicose and spider veins to prospective patients. Respondent further advertises and promotes VVC's sclerotherapy services through the use of brochures and pamphlets that are provided to patients and prospective patients.

PAR. 4. The acts and practices of respondent alleged in this complaint are, and have been, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 5. Respondent's advertisements and promotional materials include, but are not necessarily limited to, the advertisements and promotional materials attached hereto as Exhibits A through D.

PAR. 6. Respondent's advertisements and promotional materials contain the following statements:

- (a) "My only mistake was not coming to The Varicose Vain Center first."

....

- Spider and Varicose Veins Permanently Eliminated
 - Painless, Safe, Non-Surgical
 (Exhibit A);

(b) ** The Varicose Vein Center Presents **
 Great Legs for Summer

.....

If varicose or spider veins are the problem, these unsightly veins can be permanently removed by a simple, non-surgical procedure.

(Exhibit B);

(c) "My only mistake was not coming to The Varicose Vein Center first." Don't let the disappointment of other vein treatments keep you from discovering the one that works. With a success rate greater than 95%, our non-surgical, in-office procedure is safe, painless . . . Find out how easy and affordable it is to get rid of spider or varicose veins, often with just one treatment.

(Exhibit C) ; and

(d) The Varicose Vein Center

.....

What You Should Know About Varicose Veins, Spider Veins and Sclerotherapy

.....

WHAT IS SCLEROTHERAPY?

Sclerotherapy is the *non-surgical* procedure used to *permanently* remove spider and varicose veins from the legs and thighs.

IF I HAVE MY VEINS TREATED, CAN THEY REAPPEAR?

Once these spider or varicose veins are treated successfully they disappear permanently. However, this treatment does not prevent new veins, that would otherwise have developed, from appearing.

(Exhibit D).

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph six, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A, B, C and D, respondent has represented, directly or by implication, that:

(a) Spider veins and varicose veins treated by respondent are permanently eliminated;

(b) Greater than 95% of the spider veins and varicose veins treated by respondent are eliminated for at least a significant period of time.

PAR. 8. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph six, including but not necessarily limited to the advertisements and

promotional materials attached as Exhibits A, B, C and D, respondent has represented, directly or by implication, that at the time he made the representations set forth in paragraph seven, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time respondent made the representations referred to in paragraph seven, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation contained in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph six, including but not necessarily limited to the advertisements attached as Exhibits A and C, respondent has represented, directly or by implication, that patients do not experience any pain in connection with respondent's regimen for treating their varicose and spider veins.

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph six, including but not necessarily limited to the advertisements attached as Exhibits A and C, respondent has represented, directly or by implication, that at the time he made the representation set forth in paragraph ten, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 12. In truth and in fact, at the time respondent made the representation referred to in paragraph ten, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation contained in paragraph eleven was, and is, false and misleading.

PAR. 13. The acts and practices of respondent as alleged in this complaint constitute "unfair or deceptive acts or practices" and the making of "false advertisements" in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Chairman Pitofsky not participating.


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EXHIBIT A

"My only mistake was not coming to The Varicose Vein Center first." Cheryl Gates, Dental Assistant
Silver Spring, MD

- Spider and Varicose Veins Permanently Eliminated
- Painless, Safe, Non-Surgical
- Immediate Return to Normal Activity
- No Expensive, Unnecessary Testing
- All Treatments by Dr. Green, Not Assistants
- Treatment Covered by Most Insurance Companies

 **The
Varicose
Vein Center**

David Green, M.D.
4800 Montgomery Lane, Suite M50
Bethesda, Maryland 20814
(One block from Metro-Easy Parking)
(301) 907-7230

★★ The Varicose Vein Center Presents ★★

Great Legs For Summer

When was the last time you wore
shorts or a bathing suit
without embarrassment?

If varicose or spider veins are the
problem, these unsightly veins can be
permanently removed by a simple,
non-surgical procedure.

*Call now for an appointment and
your veins can be gone by summer!*

 The
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EXHIBIT C

"My only mistake was not coming to The Varicose Vein Center first."

*Cheryl Gates, dental assistant
Silver Spring, Md.*

Don't let the disappointment of other vein treatments keep you from discovering the one that works. With a success rate greater than 95%, our non-surgical, in-office procedure is safe, painless and covered by many insurance plans. No expensive lab tests required and all patients are treated only by the physician, not by assistants. Find out how easy and affordable it is to get rid of spider or varicose veins, often with just one treatment. Call for your appointment today!

 **The
Varicose
Vein Center**

David Green, M.D.
4800 Montgomery Lane, Suite M50
Bethesda, Maryland 20814
(One block from Metro-Easy Parking)

(301) 907-7230

DAVID GREEN, M.D.

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EXHIBIT D



David Green, M.D., Director
3 Washington Circle, N.W. #303
Washington, D.C. 20037
(202) 785-0333

What You Should Know About Varicose Veins, Spider Veins and Sclerotherapy

Exhibit D

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EXHIBIT D

WHAT ARE VARICOSE VEINS?

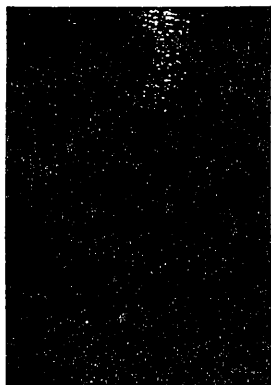
Varicose veins are dilated blood vessels that become enlarged because of a weakness in the wall of the vein. They are most common in the legs and thighs. Spider veins refers to smaller varicose veins that usually appear in patches close to the skin surface.

WHY DO PEOPLE DEVELOP VARICOSE VEINS?

The tendency for having varicose veins is usually hereditary and can begin in adolescence or early adulthood. However, pregnancy, oral contraceptives, and injuries often contribute to the problem. In addition, large varicose veins can give rise to smaller ones. Once formed, these dilated vessels do not disappear without treatment.

WHAT IS SCLEROTHERAPY?

Sclerotherapy is the *non-surgical* procedure used to *permanently* remove spider and varicose veins from the legs and thighs.



Spider veins and varicose veins before treatment.



Spider veins and varicose veins 3 months after treatment.

HOW LONG HAS THIS PROCEDURE BEEN USED BY PHYSICIANS?

Sclerotherapy for varicose veins has been performed for more than 100 years. Spider veins have been treated for more than 50 years. But the smallest spider veins have been effectively treated for only the past 10 years, when needles were developed that were small enough to inject them.

HOW IS THE PROCEDURE DONE?

A sterile salt solution (a saline solution, or sodium chloride in water) is injected into the veins to be removed. This solution is called the sclerosing solution. Injecting directly into the vein insures that only the vein is removed.

HOW DOES THE PROCEDURE WORK?

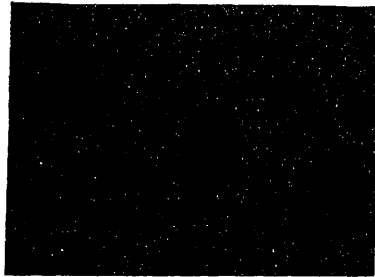
The saline solution, being very concentrated, irritates the injected veins. This irritation damages the veins and closes them off. The body recognizes that the veins are no longer working and dissolves them the same way it would dissolve a bruise in the skin.

IS THE PROCEDURE SAFE?

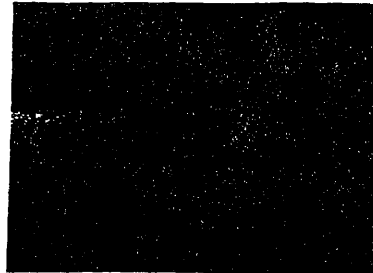
The procedure is *safe* and *effective*. Complications were more common in the past. But with the use of safer sclerosing agents and the availability of very fine sterile needles, complications today are quite uncommon.

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EXHIBIT D



Small spider veins before treatment.



Small spider veins 2 months after treatment.

HOW EFFECTIVE IS THIS PROCEDURE?

Sclerotherapy is effective in at least 90% of patients at improving the veins that are treated. Some veins may require more than one treatment.

IS THERE DISCOMFORT ASSOCIATED WITH SCLEROTHERAPY?

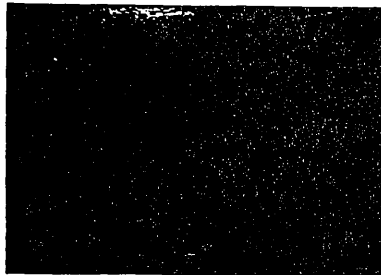
There may be mild discomfort at the site of injection when the procedure is performed. This is caused by the solution and may feel like a stinging or burning sensation. The needle itself is small so there is minimal, if any, discomfort. Some people develop a muscle cramp in the leg or thigh near the veins that are being treated. This is due to the sodium in the saline solution. If a cramp develops, it subsides within minutes after the injection.

IS IT NECESSARY TO TREAT EVERY VEIN IF I HAVE HUNDREDS OF VEINS?

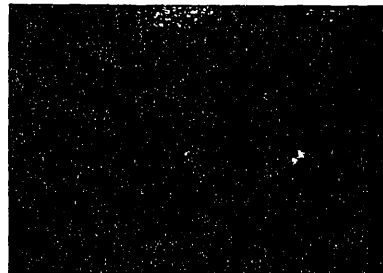
Usually in any area where there are multiple spider veins or varicose veins, these veins are interconnected. When one vein is injected, the solution gets into the adjacent veins and helps eliminate them. Therefore, it is unnecessary to inject each vein in order to have complete clearing.

WHERE IS SCLEROTHERAPY PERFORMED?

The procedure is done in the doctor's office. After a treatment session you may go back to work or resume normal activities. There is no recuperation period and no need for bed rest.



Spider veins before treatment.



Spider veins 3 months after treatment.

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EXHIBIT D

HOW MANY TREATMENT VISITS ARE REQUIRED?

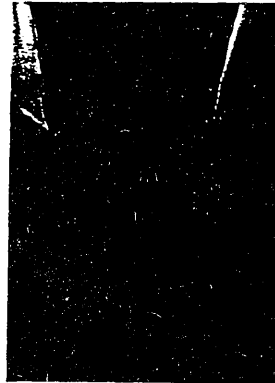
The number of visits depends upon the number of varicose and spider veins that you have. Sometimes only one treatment is needed. However, if there are a great number of veins, several treatment sessions may be required. This can be determined during the first consultation. You should be seen one month after your first treatment to assess the degree of improvement. At that time, if additional veins are present another treatment may be done.

HOW LONG DOES THE PROCEDURE TAKE?

Each session lasts 20 to 30 minutes.

WHAT WILL MY LEGS LOOK LIKE AFTER TREATMENT?

Immediately after a treatment, the skin may be red and there may be some bruising. This color usually disappears within a few days. The treated veins may be firm to the touch until they are absorbed by the body. This process of absorption can take several weeks to several months depending upon the vein size. Before leaving the office, the treated leg or thigh is wrapped with an elastic bandage.



Varicose veins before treatment.



Varicose veins 3 months after treatment.

WILL I HAVE DISCOMFORT AFTER THE PROCEDURE?

Once you leave the office, there is usually no discomfort. However, the elastic bandage may be bothersome because it fits tightly. It remains on for 3 to 7 days, depending on the vein size and location.

ARE THERE ANY LIMITATIONS AFTER THE PROCEDURE OR ANY SPECIAL CARE I MUST PROVIDE?

The elastic bandages may be removed to take a bath or shower but should otherwise be kept on, including at bedtime. Hosiery may be worn over the bandage during the daytime. Some women are prone to swelling of the legs due to fluid retention. If this is a problem the elastic bandage may cause this to be somewhat worse. However, swelling may be seen below the bandages in anyone. This swelling disappears about one day after the bandages are removed. For the first 24 hours after the treatment, it is recommended that no strenuous activity take place, such as running or aerobic exercise. After the first day you may resume all types of activity. Immediately after sclerotherapy you may perform your usual non-strenuous activity, such as going to work.

DO I NEED SOMEONE TO DRIVE ME HOME AFTER A TREATMENT?

No. You should be able to get along well and can even drive yourself.

EXHIBIT D

AFTER A TREATMENT, HOW LONG WILL IT TAKE BEFORE THE VEINS DISAPPEAR?

Spider veins slowly disappear several weeks after the treatment. Large varicose veins may take longer to disappear, sometimes several months. While the veins are fading, there may be some faint redness.

CAN MY LEGS BE EXPOSED TO SUNLIGHT AFTER TREATMENT?

It is recommended that you avoid getting much sunlight to the treated site. If you plan on being outdoors within the first month after the elastic bandage is removed, you should apply at least a #25 SPF sunscreen on the skin over the treated veins.

IF I HAVE MY VEINS TREATED, CAN THEY REAPPEAR?

Once these spider or varicose veins are treated successfully they disappear permanently. However, this treatment does not prevent new veins, that would otherwise have developed, from appearing.

IS THERE ANY HARM DONE IN REMOVING THESE UNSIGHTLY VEINS?

No. These veins are just abnormal veins which have no useful purpose. Their removal is not dangerous since your body doesn't rely on these veins for any useful circulation. By removing them, we don't cause new ones to appear elsewhere on your legs.

WILL TREATING THE VEINS THAT I ALREADY HAVE MAKE IT LESS LIKELY NEW VEINS WILL APPEAR?

Yes. Most spider veins occur in patches connected to one another. These patches slowly enlarge by new veins sprouting out from the original patch. If a patch is treated, then new branches cannot develop. Therefore, treating a site can prevent new veins from developing.

IS THERE ANY TIME OF THE YEAR THAT IS BEST TO HAVE THIS PROCEDURE?

This procedure can be performed any time of the year. However, since there may be a slight bruising and redness to the treated site for a few days to a couple of weeks, you may not want to begin treatment just before taking a vacation or going to the beach.

ARE THERE ANY MEDICAL CONDITIONS WHICH WOULD MAKE ME A POOR CANDIDATE FOR SCLEROTHERAPY?

If you have a history of phlebitis, or blood clot of the legs, this procedure may not be recommended. Before beginning therapy you should inform Dr. Green of any medical problems that you have and all of the medications that you take. Although there is no harmful chemical injected with this procedure, we prefer not to treat women who are pregnant or nursing, since varicose and spider veins that worsen during pregnancy often become smaller or resolve after delivery.

HOW DOES THIS PROCEDURE COMPARE WITH TREATMENT USING A LASER OR AN ELECTRIC NEEDLE?

Laser and electric needle treatments for spider veins scar the overlying skin. The advantage of sclerotherapy is that the needle is placed under the skin directly into the vein. Thus, the likelihood of damaging the skin is greatly reduced.

HOW ABOUT VEIN STRIPPING FOR VARICOSE VEINS?

Only in rare cases is the stripping of large varicose veins, an extensive surgical procedure, required. However, sclerotherapy will usually remove large varicose veins without resorting to surgery. Vein stripping always causes scarring of the legs and thighs.

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EXHIBIT D

WHAT OTHER ADVANTAGES DOES SCLEROTHERAPY HAVE OVER SURGERY?

Sclerotherapy is an outpatient procedure done in the office. It doesn't require hospitalization, anesthesia, or loss of time away from work. It costs a fraction of what surgery would cost with less risk of complications. It is the safest method for vein removal available.

ARE THERE ANY RISKS OR SIDE EFFECTS OF SCLEROTHERAPY?

Temporary or permanent discoloration may result from sclerotherapy after the veins have disappeared. This discoloration may parallel the course of the treated vein. However, such discoloration is usually less unsightly than the veins. Scarring of the skin, although rare, is a potential complication. This results from leakage of the saline solution from the vein into the overlying skin. Such scars are usually very small and are much less obvious than scars that invariably result from surgical vein stripping.

HOW SHOULD I PREPARE FOR MY SCLEROTHERAPY OFFICE VISITS?

On the day of your procedure, you should not apply any moisturizer or use any bath oil on your legs or thighs. It would also be helpful if you bring along a pair of shorts to put on in the office since most women find this more comfortable than a gown.

WHO IS QUALIFIED TO PERFORM SCLEROTHERAPY?

Since this technique is a medical procedure it should only be performed by a qualified physician. In particular, the physician should be one who has a great deal of experience in sclerotherapy.

WHAT QUALIFICATIONS DOES DR. GREEN HAVE?

Dr. Green specializes in sclerotherapy and has been performing it for ten years. He lectures nationally and has written scientific articles about sclerotherapy in well recognized medical books and journals. Dr. Green is recognized by his peers as an authority on sclerotherapy.

Also, Dr. Green is *Certified by the American Board of Dermatology*; a *Fellow of the American Academy of Dermatology*; a *Fellow of the American Academy of Facial Plastic and Reconstructive Surgery*; a *Fellow of the American Society for Dermatologic Surgery*; and a *Member of the North American Society of Phlebology*.

DO INSURANCE COMPANIES PAY FOR SCLEROTHERAPY?

Since health insurance plans vary in their benefits, consult your insurance carrier to determine whether sclerotherapy is covered by your policy.



Copyright. May not be reproduced without permission of David Green.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent David Green, M.D. ("Dr. Green") is an individual doing business as The Varicose Vein Center, a sole proprietorship ("VVC"). Respondent's principal place of business is located at 4800 Montgomery Lane, Suite M50, Bethesda, Maryland.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "*Sclerotherapy*" means the treatment of venous disease by injecting a solution into a vein with a needle.
2. "*Venous disease treatment procedure*" includes, but is not limited to sclerotherapy, laser treatments, electrocautery and surgery.
3. "*Competent and reliable scientific evidence*" means tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondent David Green, M.D., an individual doing business as The Varicose Vein Center, a sole proprietorship, his successors, assigns, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale or sale of any venous disease treatment procedure including, but not limited to, sclerotherapy, or of any other cosmetic or plastic surgery procedure, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That spider veins and varicose veins are permanently eliminated following treatment by respondent, or otherwise making any representation regarding the duration of results following treatment by any cosmetic or plastic surgery procedure, including any venous disease treatment procedure; or

B. That respondent's treatments succeed in eliminating varicose and spider veins at a rate greater than 95%, or otherwise making any representation regarding the success rate for, or the rate at which a condition is likely to recur or return following treatment by, any

cosmetic or plastic surgery procedure, including any venous disease treatment procedure; or

C. That patients do not experience any pain in connection with respondent's regimen for treating their varicose and spider veins, or otherwise making any representation regarding the nature, duration or intensity of pain associated with any cosmetic or plastic surgery procedure, including any venous disease treatment procedure; or

D. Otherwise making any representation regarding the efficacy of, or the risks, side-effects, or recovery period associated with, any cosmetic or plastic surgery procedure, including any venous disease treatment procedure;

unless, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondent, or his successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in his possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

III.

It is further ordered, That respondent shall distribute's copy of this order to each of his agents, representatives, and employees, and shall secure from such person a signed statement acknowledging receipt of this order.

IV.

It is further ordered, That, for a period of five (5) years from the date of entry of this order, the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

V.

It is further ordered, That respondent shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the requirements of this order.

Chairman Pitofsky not participating.

IN THE MATTER OF

EUROPEAN BODY CONCEPTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3590. Complaint, June 23, 1995--Decision, June 23, 1995

This consent order prohibits, among other things, the corporation and its president from making false and unsubstantiated claims that their body wrap causes weight-loss; eliminates cellulite; and is completely safe for all users. In addition, it requires that prominent safety warnings be given to customers.

Appearances

For the Commission: *Nancy S. Warder.*

For the respondents: *Edward Carnot, Carnot, Zapor & Klassen,*
Rockville, MD.

COMPLAINT

The Federal Trade Commission, having reason to believe that European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, and James Marino, individually and as an officer of said corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent European Body Concepts, Inc., a Maryland corporation, had its office and principal place of business at 1 Central Plaza, Suite 907, 11300 Rockville Pike, Rockville, Maryland. Respondent European Body Concepts, Inc., a Virginia corporation, had its office and principal place of business at 6564 Loisdale Court, Suite 420, Springfield, Virginia. Respondent European Body Concepts, Inc., a North Carolina corporation, had its office and principal place of business located at 1515 Mockingbird Lane, Suite 410, Charlotte, North Carolina.

Respondent James Marino is the single shareholder and sole officer and director of the corporate respondents. Individually or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondents, including the acts and practices alleged in this complaint. His office and principal place of business is located at 11940 Alpharetta Highway, Suite 907, Alpharetta, Georgia.

PAR. 2. Respondents have advertised, offered for sale, and sold weight loss and weight maintenance services and products that they have made available at corporately owned European Body Concepts outlets. These products and services include treatments using medical bandages that are soaked in a solution and wrapped around the bodies of users who are then clothed in vinyl body suits ("European Body Wrap treatment"). The European Body Wrap treatment involves the use of drugs and/or devices as "drug" and "device" are defined in Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for their European Body Wrap treatment including, but not necessarily limited to, the advertisements attached hereto as Exhibits A through J. These advertisements contain the following statements:

A. ANNOUNCER: Have you looked at yourself in the mirror lately?

WOMAN [in complaining voice]: All these bumps and bulges and ugly cellulite.

ANNOUNCER: If you're tired of the way you look, tired of the way you feel, call European Body Concepts. We'll rid you of those unwanted inches, bumps and bulges without strict diets or strenuous exercise. We'll wrap you in our all natural mineral solution. We guarantee you'll lose 6 to 30 inches on your first visit or it's free. And it only takes an hour. Right now your introductory visit is \$19.95. This is a limited time offer so call today and watch those inches disappear.

["Wrap it up" lyrics and music continue until end of ad]

European Body Concepts, with 3 convenient locations. In Rockville, call 468-WRAP, that's 468-W-R-A-P. . . . What have you got to lose, but inches. (Exhibit A, radio ad)

B. ANNOUNCER: It's almost that time of year again and the beaches are waiting. It's time to get ready for your bathing suit. Look great without those extra pounds, inches and cellulite with European Body Concepts. The only program that guarantees you'll lose a total of 6 to 30 inches on your first visit or it's free. Men

and women clients agree it really works. Just follow the plan and with each visit watch the pounds and inches disappear. Call now and for a limited time your first visit is only \$19.95. There are no hidden costs such as special foods, vitamins or pills and our staff will assist you in every way. A smaller bathing suit size is awaiting you.

["Wrap it up" lyrics and music played briefly]

So call today and watch those inches start disappearing before you head to the beach. European Body Concepts wraps you in our unique mineral solution while you just relax. Call today.

In Rockville, call 468-WRAP, that's 468-W-R-A-P. . . . (Exhibit B, radio ad)

C. ANNOUNCER: The winds of autumn are coming and before you know it, the holiday parties with all their tempting morsels will be threatening your waistline. Don't wait 'til things get out of control this year, let European Body Concepts help you get a handle on extra pounds and inches. Amazingly, if you call now your first visit is still only \$19.95. Check around, nowhere else will you find a safer, more effective weight control program at a better price. European Body Concepts can wrap you all over or just your problem areas. And we guarantee you'll lose 6 to 30 inches on your first visit. Come in now for your European Body Concepts mineral body wrap and watch those inches disappear in just one hour. How can you lose? European Body Concepts with 3 convenient locations. Call us now.

In Rockville, call 468-WRAP, that's 468-W-R-A-P. . . . (Exhibit C, radio ad)

D. ANNOUNCER: Wait a minute! Will you have this much fun this summer with those extra pounds and inches?

WOMAN [in complaining voice]: Oh, my swim suit didn't look like this last year.

ANNOUNCER: Increase your summer fun factor this year with European Body Concepts. Thousands of our clients have taken-off inches just in time for the summer and you can too. There's still time to look great for the beach season with a European Body Concepts revolutionary body wrap system at an affordable price. Only \$19.95 for your first visit if you call now. Hurry, this offer won't last much longer. The European Body Concepts program is fast, easy and affordable. And we guarantee you'll see results on your first visit. Lose 6 to 30 inches or it's free.

["Wrap it up" lyrics and music until end of ad]

Call now. In Rockville, call 468-WRAP, that's 468-W-R-A-P. . . . (Exhibit D, radio ad)

E. ANNOUNCER: Now's the time to join the thousands of people who are losing inches fast. European Body Concepts, now with 3 Washington locations, celebrates the grand opening of their new Springfield location with a special offer. European Body Concepts guarantees you'll lose 6 to 30 inches on your first visit, or it's free.

MALE CONSUMER: I've lost 60 inches.

FEMALE CONSUMER: I've lost 91 and 3/4 inches.

ANNOUNCER: These are actual European Body Concepts clients. Your results may vary.

FEMALE CONSUMER: I like that it works and that the inches stay off.

ANNOUNCER: We'll wrap you in our special mineral solution and in only one hour you'll lose 6 to 30 inches. Call today for a limited time introductory offer of just \$14.95 for your first visit. You have nothing to lose, but inches.

FEMALE CONSUMER: I have recommended it to many friends.

MALE CONSUMER: I feel good.

ANNOUNCER: European Body Concepts, now with a new Springfield location. Call 313-WRAP. That's 313-W-R-A-P . . . (Exhibit E, radio ad)

F. ANNOUNCER: What can European Body Concepts do for you?

FEMALE CONSUMER: I lost 9 inches my first visit.

ANNOUNCER: Help you lose unwanted inches and pounds easily. Here's your chance to join thousands of successful European Body Concepts clients.

MALE CONSUMER: I feel great. I like it. I enjoy it. I look forward to it. I look forward to going. It's relaxing. I enjoy the weigh in. It's the best. It's marvelous.

ANNOUNCER: Right now for a limited time your first visit is only \$19.95. Plus, we guarantee you'll lose 6 to 30 inches in the first hour or it's free.

MALE CONSUMER: I was plannin' on losing weight but I didn't think I'd take that much, that many pounds off, but I did.

ANNOUNCER: These are actual clients. Your results may vary. You've got nothing to lose but inches. Call European Body Concepts right now and take advantage of our special \$19.95 offer. Lose 6 to 30 inches in the first hour or it's free. In Tysons call 758-WRAP, 758-W-R-A-P. . . .

MALE CONSUMER: I'm living proof that it has worked.

ANNOUNCER: So what are you waiting for? Wrap it up with European Body Concepts. (Exhibit F, radio ad)

G. ANNOUNCER [same statement on full screen video]: Lose 6 to 30 inches on your first visit to European Body Concepts or it's free!

CORINNE [shown speaking]: With this system, you don't get hungry, you don't have to do all these tremendous exercise routines, you don't wear yourself out, you eat the foods that you want to eat, that's the bottom line, it works. It really works.

[full screen video: Corinne Hathaway lost 26 inches and 15 pounds in only 5 visits]

ANNOUNCER: Your introductory visit to European Body Concepts is only \$19.95. In Springfield call 313-WRAP. . . . (Exhibit G, television ad)

H. ANNOUNCER [same statement on full screen video]: Lose 6 to 30 inches on your first visit to European Body Concepts or it's free!

RICHARD [shown speaking]: I've gone down three sizes in my pants size. I've lost 58 pounds.

[full screen video: Richard Shaughnessy lost 44 ½ Inches & 58 Pounds]

RICHARD: I've tried other plans prior to European Body Concepts but the weight would come off, the inches would come off and come right back on. This time, the inches and weight have gone off, stayed off.

ANNOUNCER: Your introductory visit to European Body Concepts is only \$19.95. In Springfield call 313-WRAP. . . . (Exhibit H, television ad)

I. ANNOUNCER [same statement on full screen video]: Lose 6 to 30 inches on your first visit to European Body Concepts or it's free!

DIANE [shown speaking]: I've lost 5 dress sizes and it's the first program that I really have stuck to and felt very comfortable with.

[full screen video: Diane Boyle lost 116 ½ inches]

DIANE: European Body Concepts is not hard to do, the weight came off very easily, the inches. Each time I went it would be a couple more inches and they would start adding up.

ANNOUNCER: Your introductory visit to European Body Concepts is only \$19.95. In Springfield call 313-WRAP. . . . (Exhibit I, television ad)

J. IS THE BODY WRAP HARMFUL?

No. The treatments have proven perfectly safe and non-allergenic. If you have a serious medical problem, we would ask that you consult your physician for our own peace of mind. We will not wrap women during pregnancy, clients who have had recent surgery and have unhealed incisions, or clients with large abrasions or rashes for obvious reasons. Many of our clients have heart trouble, diabetes, kidney or liver problems, varicose veins, asthma, etc. We have not found any condition that the body wrap will aggravate or hurt.

....

BENEFITS AND ADVANTAGES TO YOU

- 100% safe and effective (Exhibit J, brochure)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached hereto as Exhibits A through J, respondents have represented, directly or by implication, that:

A. The European Body Wrap treatment causes users to lose significant numbers of inches from their body measurements;

B. The European Body Wrap treatment causes significant weight loss;

C. The European Body Wrap treatment causes significant inch and weight loss without diet or exercise;

D. The European Body Wrap treatment causes fast and easy inch and weight loss;

E. The European Body Wrap treatment eliminates cellulite;

F. The European Body Wrap treatment causes weight loss at or reduction in the size of specific areas of the body;

G. Users of the European Body Wrap treatment are successful in maintaining their weight and inch loss; and

H. The European Body Wrap treatment is completely safe for all users.

PAR. 6. In truth and in fact:

- A. The European Body Wrap treatment does not cause users to lose significant numbers of inches from their body measurements;
- B. The European Body Wrap treatment does not cause significant weight loss;
- C. The European Body Wrap treatment does not cause significant inch or weight loss without diet or exercise;
- D. The European Body Wrap treatment does not cause fast or easy inch or weight loss;
- E. The European Body Wrap treatment does not eliminate cellulite;
- F. The European Body Wrap treatment does not cause weight loss at or reduction in the size of specific areas of the body;
- G. Users of the European Body Wrap treatment are not successful in maintaining their weight and inch loss; and
- H. The European Body Wrap treatment is not completely safe for all users.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached hereto as Exhibits A through J, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits E through I, respondents have represented, directly or by implication, that the testimonials from consumers appearing in advertisements for the European Body Wrap treatment reflect the typical or ordinary experience of members of the public who have used the treatment.

PAR. 10. In truth and in fact, the testimonials from consumers appearing in advertisements for the European Body Wrap treatment

do not reflect the typical or ordinary experience of members of the public who have used the treatment. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. In their advertising and sale of the European Body Wrap treatment, respondents have represented that the European Body Wrap treatment is completely safe for all users. Respondents have failed to disclose that the European Body Wrap treatment may be dangerous to the health of people with certain medical conditions, including heart disease, high or low blood pressure, or diabetes. This fact would be material to consumers in their purchase or use decisions regarding the treatment. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

PAR. 12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Chairman Pitofsky not participating.

Complaint

119 F.T.C.

EXHIBIT A

"BUMPS AND BULGES"

ANNOUNCER: Have you looked at yourself in the mirror lately?

WOMAN [in complaining voice]: All these bumps and bulges and ugly cellulite.

ANNOUNCER: If you're tired of the way you look, tired of the way you feel, call European Body Concepts. We'll rid you of those unwanted inches, bumps and bulges without strict diets or strenuous exercise. We'll wrap you in our all natural mineral solution. We guarantee you'll lose 6 to 30 inches on your first visit or it's free. And it only takes an hour. Right now your introductory visit is \$19.95. This is a limited time offer so call today and watch those inches disappear.

["Wrap it up" lyrics and music continue until end of ad]

European Body Concepts, with 3 convenient locations. In Rockville, call 468-WRAP, that's 468-W-R-A-P. In Tysons Corner, 758-WRAP, that's 758-W-R-A-P. And in Springfield, 313-WRAP, that's 313-W-R-A-P. What have you got to lose, but inches.

EXHIBIT B

"BEACHES ARE WAITING"

ANNOUNCER: It's almost that time of year again and the beaches are waiting. It's time to get ready for your bathing suit. Look great without those extra pounds, inches and cellulite with European Body Concepts. The only program that guarantees you'll lose a total of 6 to 30 inches on your first visit or it's free. Men and women clients agree it really works. Just follow the plan and with each visit watch the pounds and inches disappear. Call now and for a limited time your first visit is only \$19.95. There are no hidden costs such as special foods, vitamins or pills and our staff will assist you in every way. A smaller bathing suit size is awaiting you.

["Wrap it up" lyrics and music played briefly]

So call today and watch those inches start disappearing before you head to the beach. European Body Concepts wraps you in our unique mineral solution while you just relax. Call today.

In Rockville, call 468-WRAP, that's 468-W-R-A-P. In Tysons Corner, 758-WRAP, that's 758-W-R-A-P. And in Springfield, 313-WRAP, that's 313-W-R-A-P.

EXHIBIT C

"HOLIDAY PARTIES"

ANNOUNCER: The winds of autumn are coming and before you know it, the holiday parties with all their tempting morsels will be threatening your waistline. Don't wait 'til things get out of control this year, let European Body Concepts help you get a handle on extra pounds and inches.

Amazingly, if you call now your first visit is still only \$19.95. Check around, nowhere else will you find a safer, more effective weight control program at a better price. European Body Concepts can wrap you all over or just your problem areas. And we guarantee you'll lose 6 to 30 inches on your first visit. Come in now for your European Body Concepts mineral body wrap and watch those inches disappear in just one hour. How can you lose? European Body Concepts with 3 convenient locations. Call us now.

In Rockville, call 468-WRAP, that's 468-W-R-A-P. In Tysons Corner, 758-WRAP, that's 758-W-R-A-P. And in Springfield, 313-WRAP, that's 313-W-R-A-P.

EXHIBIT D

"SUMMER FUN"

ANNOUNCER: Wait a minute! Will you have this much fun this summer with those extra pounds and inches?

WOMAN [in complaining voice]: Oh, my swim suit didn't look like this last year.

ANNOUNCER: Increase your summer fun factor this year with European Body Concepts. Thousands of our clients have taken off inches just in time for the summer and you can too. There's still time to look great for the beach season with a European Body Concepts revolutionary body wrap system at an affordable price. Only \$19.95 for your first visit if you call now. Hurry, this offer won't last much longer. The European Body Concepts program is fast, easy and affordable. And we guarantee you'll see results on your first visit. Lose 6 to 30 inches or it's free. ["Wrap it up" lyrics and music until end of ad]

Call now. In Rockville, call 468-WRAP, that's 468-W-R-A-P. In Tysons Corner, 758-WRAP, that's 758-W-R-A-P. And in Springfield, 313-WRAP, that's 313-W-R-A-P.

Complaint

119 F.T.C.

EXHIBIT E

"THOUSANDS OF PEOPLE"

ANNOUNCER: Now's the time to join the thousands of people who are losing inches fast. European Body Concepts, now with 3 Washington locations, celebrates the grand opening of their new Springfield location with a special offer. European Body Concepts guarantees you'll lose 6 to 30 inches on your first visit, or it's free.

MALE CONSUMER: I've lost 60 inches.

FEMALE CONSUMER: I've lost 91 and 3/4 inches.

ANNOUNCER: These are actual European Body Concepts clients. Your results may vary.

FEMALE CONSUMER: I like that it works and that the inches stay off.

ANNOUNCER: We'll wrap you in our special mineral solution and in only one hour you'll lose 6 to 30 inches. Call today for a limited time introductory offer of just \$14.95 for your first visit. You have nothing to lose, but inches.

FEMALE CONSUMER: I have recommended it to many friends.

MALE CONSUMER: I feel good.

ANNOUNCER: European Body Concepts, now with a new Springfield location. Call 313-WRAP. That's 313-W-R-A-P, or in Rockville, call 468-WRAP. And in Tysons call 758-WRAP. European Body Concepts. The new number in Springfield is 313-WRAP.

EXHIBIT F

"WRAP IT UP"

ANNOUNCER: What can European Body Concepts do for you?

FEMALE CONSUMER: I lost 9 inches my first visit.

ANNOUNCER: Help you lose unwanted inches and pounds easily. Here's your chance to join thousands of successful European Body Concepts clients.

MALE CONSUMER: I feel great. I like it. I enjoy it. I look forward to it. I look forward to going. It's relaxing. I enjoy the weigh in. It's the best. It's marvelous.

ANNOUNCER: Right now for a limited time your first visit is only \$19.95. Plus, we guarantee you'll lose 6 to 30 inches in the first hour or it's free.

MALE CONSUMER: I was plannin' on losing weight but I didn't think I'd take that much, that many pounds off, but I did.

ANNOUNCER: These are actual clients. Your results may vary. You've got nothing to lose but inches. Call European Body Concepts right now and take advantage of our special \$19.95 offer. Lose 6 to 30 inches in the first hour or it's free. In Tysons call 758-WRAP, 758-W-R-A-P. Rockville call 468-WRAP, 468-W-R-A-P. Springfield call 313-WRAP, 313-W-R-A-P.

MALE CONSUMER: I'm living proof that it has worked.

ANNOUNCER: So what are you waiting for? Wrap it up with European Body Concepts.

947

Complaint

EXHIBIT G

"CORINNE H."

ANNOUNCER [same statement on full screen video]: Lose 6 to 30 inches on your first visit to European Body Concepts or it's free!

CORINNE [shown speaking]: With this system, you don't get hungry, you don't have to do all these tremendous exercise routines, you don't wear yourself out, you eat the foods that you want to eat, that's the bottom line, it works. It really, works. [full screen video: Corinne Hathaway lost 26 inches and 15 pounds in only 5 visits]

ANNOUNCER: Your introductory visit to European Body Concepts is only \$19.95. In Springfield call 313-WRAP. In Tysons call 758-WRAP. In Rockville call 468-WRAP.

[full screen video: Your introductory visit to European Body Concepts is only \$19.95!

European Body Concepts

In Springfield call 313-WRAP

9 7 2 7

In Tysons call 758-WRAP

9 7 2 7

In Rockville call 468-WRAP

9 7 2 7]

EXHIBIT H

"RICHARD S."

ANNOUNCER [same statement on full screen video]: Lose 6 to 30 inches on your first visit to European Body Concepts or it's free!

RICHARD [shown speaking]: I've gone down three sizes in my pants size. I've lost 58 pounds.

[full screen video: Richard Shaughnessy lost 44 ½ Inches & 58 Pounds]

RICHARD: I've tried other plans prior to European Body Concepts but the weight would come off, the inches would come off and come right back on. This time, the inches and weight have gone off, stayed off.

ANNOUNCER: Your introductory visit to European Body Concepts is only \$19.95. In Springfield call 313-WRAP. In Tysons call 758-WRAP. In Rockville call 468-WRAP.

[full screen video: Your introductory visit to European Body Concepts is only \$19.95!

European Body Concepts

In Springfield call 313-WRAP

9 7 2 7

In Tysons call 758-WRAP

9 7 2 7

In Rockville call 468-WRAP

9 7 2 7]

Complaint

119 F.T.C.

EXHIBIT I

"DIANE B."

ANNOUNCER [same statement on full screen video]: Lose 6 to 30 inches on your first visit to European Body Concepts or it's free!

DIANE [shown speaking]: I've lost 5 dress sizes and its the first program that I really have stuck to and felt very comfortable with.

[full screen video: Diane Boyle lost 116 ½ inches]

DIANE: European Body Concepts is not hard to do, the weight came off very easily, the inches. Each time I went it would be a couple more inches and they would start adding up.

ANNOUNCER: Your introductory visit to European Body Concepts is only \$19.95. In Springfield call 313-WRAP. In Tysons call 758-WRAP. In Rockville call 468-WRAP.

[full screen video: Your introductory visit to European Body Concepts is only \$19.95!

European Body Concepts

In Springfield call 313-WRAP

9 7 2 7

In Tysons call 758-WRAP

9 7 2 7

In Rockville call 468-WRAP

9 7 2 7]

947

Complaint

EXHIBIT J

BENEFITS AND
ADVANTAGES
TO YOU

- Noticeable difference in one visit
- Works for men & women
- No special foods to buy
- No pills or shots
- No exhausting exercise or perspiration
- 100% safe and effective
- Skin feels tighter, cleaner & silky soft
- Great maintenance program

AND BEST OF
ALL A SLIMMER
AND TRIMMER
LOOKING YOU
STARTING TODAY

*Sounds incredible but we
prove it every hour of the day
with our thousands of clients
that have been to European
Body Concepts.*



**EUROPEAN
B O D Y
CONCEPTS, INC.**

8260 Greensboro Drive
Suite 550
McLean, VA 22102
703-758-9727

6564 Loisdale Ct.
Suite 420
Springfield, VA 22150
703-313-9727

11300 Rockville Pike
Suite 907
Rockville, MD 20852
301-468-9727

**Y
O U
W E R E
M E A N T
T O B E
B E A U T I F U L**

**EUROPEAN
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Suite 907
Rockville, MD 20852
301-468-9727

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to send to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent European Body Concepts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of Maryland, with its office and principal place of business formerly located at 1 Central Plaza, Suite 507, 11300 Rockville Pike in the City of Rockville, State of Maryland.

Respondent European Body Concepts, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of Virginia, with its office and principal place of business formerly located at 6564 Loisdale Court, Suite 420 in the City of Springfield, State of Virginia.

Respondent European Body Concepts, Inc., is a corporation organized, existing and doing business under and by virtue of the

laws of North Carolina, with its office and principal place of business formerly located at 1515 Mockingbird Lane, Suite 410 in the City of Charlotte, State of North Carolina.

Respondent James Marino is an officer of said corporations. He formulated, directed, and controlled the policies and practices of said corporations, and his principal office and place of business is located at 11940 Alpharetta Highway, Suite 709 in the City of Alpharetta, State of Georgia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For purposes of this order:

1. *"Clearly and prominently"* means as follows:

A. In a television or videotape advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In a print advertisement the disclosure shall be in at least twelve (12) point type, in print that contrasts with the background against which it appears, and in a location that is sufficiently noticeable that the ordinary consumer will see and read it.

2. *"Competent and reliable scientific evidence"* means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and, evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

3. "*European Body Wrap treatment*" means the treatment used at European Body Concepts centers during which clients are wrapped in medical bandages and placed in vinyl body suits.

I.

It is ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of the European Body Wrap treatment or any substantially similar treatment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

- A. Such treatment causes weight loss;
- B. Such treatment causes weight loss without diet or exercise;
- C. Such treatment causes fast or easy weight loss;
- D. Such treatment eliminates cellulite;
- E. Such treatment causes weight loss at specific areas of the body;
- F. Users of such treatment are successful in maintaining their weight loss;
- G. Users of such treatment are successful in maintaining their inch loss; or
- H. Such treatment is completely safe for all users.

II.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division

or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any body wrap treatment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

- A. Such treatment causes users to lose inches from their body measurements;
- B. Such treatment causes inch loss without diet or exercise;
- C. Such treatment causes fast or easy inch loss; or
- D. Such treatment causes reduction in the size of specific areas of the body;

unless, (1) such representation is true, and at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; and (2) respondents disclose, clearly and prominently, that: (a) any inch loss or reduction in body size will be temporary; provided however, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that any such inch loss or reduction in body size will not be temporary; and (b) such treatment does not cause weight loss; provided however, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that such treatment causes weight loss.

III.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of the European Body Wrap treatment or any substantially similar treatment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the safety of any such treatment, unless respondents disclose, clearly and prominently, and in close proximity to such representation that the treatment may be dangerous to the health of people with heart disease, high or low blood pressure, or diabetes and that any such person should consult a doctor before using the treatment;

B. Failing to disclose prior to purchase the warning set forth below to each prospective user of any such treatment:

(i) By including the warning in the program description brochure delivered to each such person, with the warning printed in bold on the front panel in ten (10) point type surrounded by a bold two (2) point rule, in print that contrasts with the background against which it appears; or

(ii) If respondents cease to provide prospective users with a program description brochure, by delivering to each such person a five (5) by eight (8) inch card on which the warning and nothing else is printed in twelve (12) point type:

"CAUTION: If you suffer from heart disease, high or low blood pressure, or diabetes, you should consult your physician before using this treatment to determine whether it poses a risk to your health;" and

C. Failing to post in a conspicuous place where it is likely to be noticed by, and is legible to, prospective users, in the reception area of any location where any such treatment is offered for sale, sold, or used, a sign containing the warning in subpart B and nothing else printed in letters one inch high.

IV.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division

or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any weight control or weight reduction treatment, program, product, or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that any such treatment, program, product, or service has any effect on weight or body size, unless they disclose, clearly and prominently, and in close proximity to such representation that diet and/or increasing exercise is required to lose weight; provided however, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that the treatment, program, product, or service is effective without either dieting or increasing exercise.

V.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as the sole officer and director of said corporations; and respondents, agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any weight control or weight reduction treatment, program, product, or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) represents the typical or ordinary experience of members of the public who use such treatment, program, product, or service.

VI.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, their successors and assigns, and their officers; James Marino, individually and as an officer and director of said corporations; and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any treatment, program, product, or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that:

A. Such treatment, program, product, or service has any weight control, weight loss or weight maintenance benefit;

B. Such treatment, program, product, or service has any effect on cellulite;

C. Such treatment, program, product, or service has any effect on users' body measurements; or

D. Using any such treatment, program, product, or service designed or used to prevent weight gain or produce weight loss, reduce or eliminate fat or cellulite, or reduce body measurements is safe or without risk;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

VII.

Nothing in this order shall prohibit respondents from making any representation that is specifically permitted in labeling for any product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VIII.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IX.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, and European Body Concepts, Inc., a North Carolina corporation, shall:

A. Within thirty (30) days after service of the order, provide a copy of this order to each of respondents' current principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order; and

B. For a period of five (5) years from the date of issuance of this order, provide a copy of this order to each of respondents' future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this order, within three (3) days after the person assumes his or her responsibilities.

X.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. Copies of all advertisements which contain any such representation, including tape recordings of all broadcast advertisements;

B. All materials that were relied upon in disseminating such representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including but not limited to, complaints from consumers and complaints or inquiries from government organizations.

XI.

It is further ordered, That respondents European Body Concepts, Inc., a Maryland corporation, European Body Concepts, Inc., a Virginia corporation, European Body Concepts, Inc., a North Carolina corporation, shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate structures, including but not limited to dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or affiliates, or any other corporate change that may affect compliance obligations arising out of this order.

XII.

It is further ordered, That respondent James Marino shall for a period of five (5) years from the date of issuance of the order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include respondent's new business address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XIII.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Chairman Pitofsky not participating.

IN THE MATTER OF

MATTEL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3591. Complaint, June 23, 1995--Decision, June 23, 1995*

This consent order prohibits, among other things, a California-based corporation from representing that any aerosol product it sells offers any environmental benefit, unless it can substantiate the claim.

Appearances

For the Commission: *Michael Dershowitz, Kevin Bank and Michael Ostheimer.*

For the respondent: *James M. Johnstone, Wiley, Rein & Fielding, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Mattel, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Mattel, Inc. ("Mattel"), is a Delaware corporation with its principal office or place of business at 333 Continental Blvd., El Segundo, CA.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed foam soap products including Barbie Bath Blast Fashion Foam Soap, and other products to the public. Barbie Bath Blast Fashion Foam Soap contains hydrochlorofluorocarbons -- chlorodifluoroethane (HCFC-142b) and chlorodifluoromethane (HCFC-22).

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for Barbie Bath Blast Fashion Foam Soap, including but not necessarily limited to the attached Exhibit A.

The aforesaid product labeling (Exhibit A) includes the following statements:

Contains no
Chlorofluorocarbons (CFC's)
Non-Irritant Non-Toxic

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the product labeling attached as Exhibit A, respondent has represented, directly or by implication, that because Barbie Bath Blast Fashion Foam Soap contains no chlorofluorocarbons, it will not deplete the earth's ozone layer or otherwise harm or damage the atmosphere.

PAR. 6. In truth and in fact, Barbie Bath Blast Fashion Foam Soap contains the harmful ozone-depleting ingredients chlorodifluoroethane (HCFC-142b) and chlorodifluoromethane (HCFC-22), which harm or cause damage to the atmosphere by contributing to the depletion of the earth's ozone layer. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the product labeling attached as Exhibit A, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 8. In truth and in fact, at the time it made the representation set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Chairman Pitofsky not participating.

EXHIBIT A

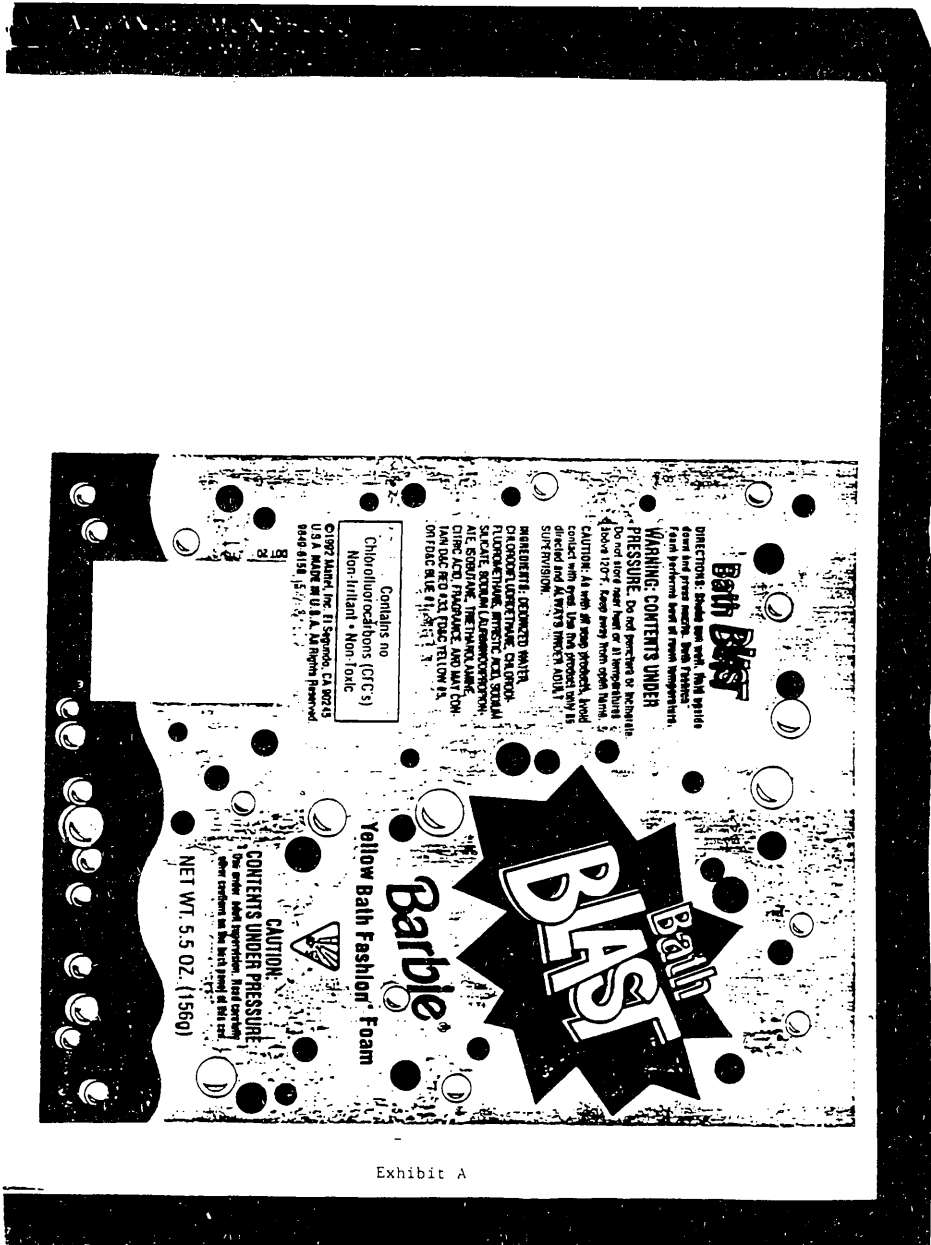


Exhibit A

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mattel, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 333 Continental Blvd., El Segundo, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this order.

VI.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Chairman Pitofsky not participating.

Re: The proposal to adopt and enforce certain accrediting standards on tuition and fees would not violate antitrust laws. [*Accrediting Commission on Career Schools and Colleges of Technology, P944015*]

January 19, 1995

Dear Mr. Pelesh:

This letter responds to your request on behalf of the Accrediting Commission on Career Schools and Colleges of Technology for an advisory opinion on the permissible means, under the antitrust laws, of adopting and enforcing an accrediting standard on tuition and fees, as the Higher Education Amendments of 1992 require. You have proposed three possible standards by which your organization might assess tuition and fees, and asked us to provide guidance on the permissibility of each.

On the basis of information you provided, the Commission has no present objection to an accreditation program along the lines of your third proposal, but believes your first and second proposals raise substantial antitrust concerns.

I. BACKGROUND OF THE REQUEST

According to the request for advisory opinion, the Accrediting Commission on Career Schools and Colleges of Technology ("ACCSCT") is a private, nonprofit organization that adopts and enforces standards for accrediting and evaluating educational institutions with trade and technical objectives. The United States Department of Education ("DOE" or "Department") recognizes ACCSCT under the Higher Education Act of 1965 as a reliable authority on the quality of its accredited institutions, education and training. To participate in federal student financial assistance programs, a post-secondary institution of higher education must maintain accreditation from a recognized organization such as ACCSCT. ACCSCT is a membership organization, composed of the accredited schools. Five of its eleven Commissioners have no affiliation with any of the schools accredited by ACCSCT, while six are owners or executives of accredited schools.

In 1992, Congress re-authorized the student financial assistance programs of the Higher Education Act with the Higher Education Amendments of 1992. Through this re-authorization, Congress specified in great detail the requirements that accrediting agencies like ACCSCT must meet in order to receive DOE recognition. One requirement is that their accrediting standards assess the institutional "program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered." 20 U.S.C. 1099b(a)(5). ACCSCT will be eligible for re-recognition in Fall of 1995, at which time DOE expects it to have adopted new accreditation standards on tuition and fees.

The Department of Education's Notice of Proposed Rulemaking ("NPRM") included a commentary in which the Department proposed that accrediting organizations use one of three ratios comparing tuition to expected earnings to determine whether tuition and fees are excessive. DOE stated that it could recognize an accrediting agency even if its standards departed from these proposals, but that the agency would bear the burden of justifying different standards. 59 Fed. Reg. at 22,273. The DOE rules implementing the statutory requirements for accrediting standards repeat the statutory provisions, without including the ratios in the NPRM commentary. 34 CFR 602.26(b)(7); 59 Fed. Reg. 22,250, 22,260 (April 29, 1994).

II. EFFECT OF THE 1992 HIGHER EDUCATION AMENDMENTS

ACCSCT has raised the possibility that Congress impliedly exempted educational accrediting bodies from the antitrust laws when it required them to adopt a standard assessing tuition and fees in order to be recognized by DOE. It is well-established, however, that, where antitrust immunity is not express, it is disfavored and to be implied only where "necessary to make the . . . [a]ct work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *see also United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 456-57 (1945). Indeed, except for industries in which Congress has committed pricing to agency regulation rather than to normal market forces, *see e.g., Keogh v. Chicago & Northwestern Railroad*, 260 U.S. 156 (1922) (Interstate Commerce Commission rates), the courts have found

implied repeal very rarely and then only under extremely limited circumstances.

The courts have found an implied repeal where Congress has established a substantial regulatory scheme and there is a clear repugnancy between that scheme and the application of the antitrust laws to the conduct in question. *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) (statute provided for Securities and Exchange Commission review of exchange's self-regulation of commission rates so that application of antitrust laws conflicted with SEC's vigorous supervision of such rates); *United States v. National Association of Security Dealers*, 422 U.S. 694 (1975) (finding price-fixing on inter-dealer sales of mutual fund shares immune because of conflict between antitrust laws and regulatory scheme; Congress had given agency power over such sales and agency had accepted practice over long period); *Behagen v. Amateur Basketball Association of the U.S.*, 884 F.2d 524, 529 (10th Cir. 1989) (court found an implied repeal in rejecting the claim that the antitrust laws prohibited an amateur athlete's exclusion from defendant Association; Amateur Sports Act required the establishment of gatekeeping, governance organizations to determine amateur eligibility); *see also Thill v. New York Stock Exchange*, 433 F.2d 264 (7th Cir. 1970) (remanding for determination whether restriction on sharing commissions was necessary to meet the goals of the Securities Exchange Act).

Absent a clear repugnancy between the antitrust laws and the regulatory scheme, however, the courts have rejected the implied repeal claim. *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985), *cert. denied sub nom. Simplot v. Strobl*, 474 U.S. 1006 (1985) (no implied repeal because no conflict between antitrust laws and Commodities Futures Trading Commission's oversight); *Typhoon Car Wash, Inc. v. Mobil Oil Corp.*, 770 F.2d 1085 (Temp. Emer. Ct. App. 1985), *cert. denied*, 474 U.S. 981 (1985) (Robinson-Patman Act not preempted by regulations promulgated under the Emergency Petroleum Allocation Act because no conflict between statutes); *Huron Valley Hospital v. City of Pontiac*, 666 F.2d 1029 (6th Cir. 1981) (no implied repeal where no direct conflict between antitrust laws and National Health Planning Act); *Essential Communications Systems v. AT&T*, 610 F.2d 1114 (3d Cir. 1979) (no implied repeal because no conflict between antitrust laws and Federal Communication Commission's regulatory activities).

The courts have refused to imply a repeal when the regulatory scheme did not protect consumer interests by supervising the challenged conduct. In rejecting a claim that the securities regulatory scheme conflicted with the antitrust laws and thus implied antitrust immunity, the Supreme Court noted that:

By providing no agency check on exchange behavior in particular cases, Congress left the regulatory scheme subject to "the influences of * * * [improper collective action] over which the Commission has no authority" Since the antitrust laws serve, among other things, to protect competitive freedom . . . it follows that the antitrust laws are peculiarly appropriate as a check on the anticompetitive acts of exchanges Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented.

Silver, 373 U.S. at 357 (no implied exemption because exchange's rule that excluded non-members from access to exchange without a hearing not necessary to make securities act work), quoting *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. at 460.

The Commission believes the 1992 Higher Education Act amendments do not impliedly repeal the antitrust laws as they apply to the technical school industry. Congress has not authorized the Department of Education to supervise or review accrediting agency self-policing of tuition and fees. The most persuasive argument for an implied repeal is that Congress, in requiring that accrediting agencies have a standard for assessing tuition, intended for them to exclude any school with a tuition that is unreasonable in light of expected earnings. Indeed, the tuition assessment standard seems superficially similar to the eligibility standard at issue in the Behagen case. There, the Amateur Sports Act authorized the U.S. Olympic Committee to recognize and monitor a governance organization in each sport to determine amateur eligibility and provide a mechanism to assure compliance with the Act. 884 F.2d at 528. In dismissing a group boycott claim against a governance organization for its refusal to reinstate an athlete's amateur status, the Tenth Circuit held that the defendant Association's "actions in this case were clearly within the scope of activity directed by Congress, and were necessary to implement Congress' intent with regard to the governance of amateur athletics." *Id.* at 527. The court noted that the Association's "monolithic control exerted . . . over its amateur sport is a direct result of the congressional intent expressed in the Amateur Sports

Act." *Id.* at 528. The court added that the Association "could not be authorized under the Act unless it maintained exactly that degree of control over its sport that Behagen here alleges as an antitrust violation." *Id.* at 529.

Unlike Behagen, the 1992 Higher Education Act Amendments do not require accrediting agencies to fix tuition levels; they merely require that accrediting agencies have a standard for assessing tuition as one of many standards for determining accreditation. (ACCSCT's submission of a less restrictive accreditation standard, requiring only disclosure, indicates that setting tuition levels is not necessary to achieve the statute's mandate to curb school loan abuse. Indeed, as noted above, the Department stated that it would recognize an accrediting agency even if its standards departed from DOE's suggested tuition-to-expected-earnings ratios.) Thus, there is no broad or inherent conflict between the antitrust laws and the regulatory regime. *Cf. Behagen*, 884 F.2d at 529 ("Behagen complains of exactly that action which the Act directs"); *see also Gordon*, 422 U.S. at 692 (Stewart, J., concurring) ("The Court has never held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants").

III. ANALYSIS OF ACCSCT'S PROPOSED STANDARDS

A. *First Proposed Standard*

Under ACCSCT's first proposed standard, ACCSCT would determine whether the tuition and fees charged by its accredited schools are too high and enforce this standard by withdrawing accreditation. The standard might use one of the following three measures to cap tuition at a certain level: (1) a percentage of annualized minimum wage, (2) a percentage of graduates' earnings for their first year of employment, or (3) a percentage of average annualized wages. ACCSCT believes that adopting this standard would require it to collect tuition data from its members, define acceptable tuition limits, and enforce its standard by potentially withdrawing accreditation. Thus, ACCSCT members would in effect be agreeing to charge no more than the ACCSCT standard would allow.

As ACCSCT recognizes, such a standard, like any system for collective competitor regulation of prices, raises grave antitrust concerns. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (maximum price fixing is *per se* illegal); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) (maximum price fixing is *per se* illegal); McLean County Chiropractic Association, 59 Fed. Reg. 22163 (April 29, 1994) (consent order settling FTC charges that chiropractor association members fixed maximum prices); *see also* American Medical Association (FTC Advisory Opinion, February 14, 1994) (adopting fee peer review program with disciplinary sanctions would present serious antitrust concerns, because it would allow competitors to set the maximum fees of their rivals) ("AMA Opinion").

Even under a rule of reason approach similar to the Third Circuit's approach in *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993), ACCSCT's first proposal would pose significant antitrust risks. An accrediting criterion based on tuition and fee level would be inherently suspect because it sets prices and impedes the ordinary functioning of the free market. *Brown University*, 5 F.3d at 674; *see generally Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988).

Further, the only efficiency justification that ACCSCT could offer would be that the standard "protects" consumers, because unfettered competition over tuition levels is unwise or dangerous. The Courts have consistently rejected this argument as "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978); *see also FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 463 (1986); *Brown University*, 5 F.3d at 676-77. Moreover, even if consumer protection justified regulation of tuition levels, the first proposed standard is not reasonably necessary to achieve this objective. Courts often rule that such overbroad restraints are unreasonable and in violation of the antitrust laws. *See Brown University*, 5 F.3d at 678-79; *Bhan v. NME Hospitals*, 929 F.2d 1404, 1413 (9th Cir. 1991); *Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139, 151-52 n.18 (3d Cir. 1981). The fact that ACCSCT has proffered less restrictive alternatives that it believes can achieve the statutory goal of assessing tuition and fees for trade school consumers indicates that the proposed standard is not reasonably necessary.

B. Second Proposed Standard

Under the second proposed standard, ACCSCT would collect and analyze tuition information from accredited schools to compare the tuition charged for a given program at a particular school with that charged for similar programs and schools. Any tuition in the ninetieth percentile or above of similar programs would trigger requirements that the school explain why its tuition was so high and provide this information to students and prospective students.

This approach appears to be less restrictive than the first, primarily because, rather than denying accreditation, it would require that a school disclose and justify its relative tuition. Nonetheless, because it targets for attention institutions charging prices of a certain top percentage or level, the standard may have the same effect as the first proposed standard. Hence there is a substantial danger that implementation of this standard may violate the antitrust laws. *See Maricopa*, 457 U.S. at 332.

In evaluating the reasonableness of the standard, the Commission would find the following factors particularly relevant. First, targeting would identify high tuition schools, opening them up to pressure to conform. Indeed, that appears to be the very purpose of the standard.

Second, the Commission in reviewing association fee peer review programs has emphasized the increased potential for antitrust problems where participation is mandatory. *See AMA Opinion*, at 6; *Iowa Dental Association*, 99 FTC 648 (1982) (advising association not to discipline members who refuse to use peer review process or accept its guidance). Here, the mandatory nature of ACCSCT's proposed standard compounds the antitrust concerns.

Third, the potential for antitrust concern is reduced when peer review programs involve mediation of specific fee disputes. A peer review program based on tuition or fees runs a more serious antitrust risk when it involves review of all schools' tuition levels, particularly in the form of a systematic exchange of data and identification of schools with high tuition. *See Iowa Dental Association*, 99 FTC at 649 ("Competition will be best protected if all concerned parties view fee peer review as a means of mediating specific fee disputes, rather than a process for the collective sanctioning of fee levels or particular practices").

Finally, as discussed above, the antitrust laws do not condone a restraint that is not reasonably necessary to achieve its stated

procompetitive objective. *See Brown University*, 5 F.3d at 678-79; *Fleer Corp.*, 658 F.2d at 151-52 n.18. Thus, the availability of a less restrictive plan (ACCSCT's third proposed standard) suggests that its second proposed standard would fail to meet this test.

C. Third Proposed Standard

As a third alternative for assessing tuition and fees, ACCSCT proposes a standard requiring schools to inform students in the catalog, enrollment agreement, and other publications that they may obtain information about tuition charges for comparable programs from ACCSCT. ACCSCT would collect tuition information from accredited schools and make it available to students who could use the information to compare the cost of similar programs at other institutions.

Based upon the information ACCSCT has provided, there appears to be little cause for concern that the information exchange contemplated by ACCSCT will have any anticompetitive effects. The school tuition information ACCSCT proposes to collect already is widely available and easily accessible to the industry, alleviating the concern that members would use the exchange to set prices. *Cf. United States v. Container Corp of America*, 393 U.S. 333, 335 (1969) (striking down exchange among competitors of information that "was not available from another source"); *Cement Manufacturers Protective Association v. United States*, 268 U.S. 588, 605 (1925) (when information is publicly available, court will not infer purpose to fix prices).

The procompetitive effects of increasing consumers' access to information about relative trade school tuition levels could outweigh any potential anticompetitive concerns raised by the collection of tuition data. *See Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563 (1925) (association survey of members' prices held not unlawful under rule of reason). To the extent ACCSCT's proposal will provide information useful to trade school consumers, it is likely to promote competition. *See AMA Opinion*, at 3. Indeed, ACCSCT could require other disclosures, *e.g.*, how the tuition level compares to graduates' earnings for their first year of employment, as a condition of accreditation without injuring consumers or violating the antitrust laws.

Thus, insofar as ACCSCT merely collects tuition information and disseminates that information to students, it would not be likely to run into any antitrust risks. ACCSCT, however, could violate the antitrust laws if it combined its data collection activities with any sort of coercion or admonishment of its members to adhere to certain tuition levels. *See Maple Flooring Manufacturers Association*, 268 U.S. at 563; cf. *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

IV. CONCLUSION

Accordingly, the Commission does not presently object to ACCSCT's third proposed standard to assess tuition, insofar as it calls for ACCSCT merely to collect and disseminate tuition information. The Commission believes that the first and second proposals, because they involve ACCSCT acting against members due to their tuition levels, may involve a significant risk of violating the antitrust laws.

This advisory opinion, like all those that the Commission issues, is limited to the proposed conduct that your request describes. It does not constitute approval for specific aspects of the proposal that may become the subject of litigation before the Commission or any court, since application of the proposal in particular situations may injure competition and consumers and violate the Federal Trade Commission Act. The Commission reserves the right to reconsider the questions involved, and with notice to the requesting parties in accordance with Section 1.3(b) of the Commission's Rules of Practice, to rescind or revoke its opinion in the event that implementation of the third proposal results in significant anticompetitive effects, should the purposes of the proposal be found not to be legitimate, or should the public interest so require.

Letter of Request

August 4, 1994

Dear Mr. Clark:

On behalf of the Accrediting Commission of Career Schools and Colleges of Technology ("ACCSCT" or the "Commission"), I hereby request an advisory opinion on the permissibility under the antitrust laws of ACCSCT's adoption and enforcement of an accrediting standard on tuition and fees. In order to ensure that this request is considered by the Department or agency with appropriate jurisdiction, we have also filed a request for a business review letter on the same subject with the Antitrust Division of the Department of Justice. We respectfully ask that the FTC and Antitrust Division coordinate a response to these requests.

Description of ACCSCT. The Commission is a private nonprofit organization with exclusively educational purposes. It adopts and applies standards for the accreditation and evaluation of educational institutions with trade and technical objectives. The Commission is recognized by the U.S. Department of Education under the Higher Education Act of 1965 as a reliable authority as to the quality of education and training offered by its accredited institutions. (Pub. L. No. 89-329, 79 Stat. 1219, codified as amended in scattered sections of 20 U.S.C.). As a result of this recognition, accreditation by the Commission, together with licensure by a state and certification by the Department, make a post-secondary institution of higher education eligible to participate in the student financial assistance programs authorized by the Act. (20 U.S.C. 1088). The Commission currently accredits approximately 950 schools located in all 50 states, the District of Columbia and Puerto Rico. These schools educate and train 450,000 students and employ 16,000 instructors.

The Commission is a membership corporation. The Commissioners serve as the board of directors; five of the Commissioners are public members (*i.e.*, they have no affiliation with any of the schools accredited by the Commission), and six of the Commissioners are school members (*i.e.*, they are owners or executives of accredited schools). The members of the corporation are the accredited schools; membership status is coterminous with accreditation. Further, the rights of the members are restricted: They

elect the school-affiliated Commissioners and two of five members of a nominating committee, receive various informational reports, and approve (but may not initiate) amendments to the articles of incorporation and bylaws, mergers and other fundamental transactions, and dues and assessments. The Commission is unaffiliated with any trade association. It has applied for tax-exempt status under Section 501(c) (3) of the Internal Revenue Code.

Higher Education Amendments of 1992. In 1992, Congress reauthorized the student financial assistance programs of the Higher Education Act by enacting the Higher Education Amendments of 1992. (Pub. L. No. 102-325, 106 Stat. 448, codified in scattered Sections of 20 U.S.C.). This reauthorization formally provided for a "Program Integrity Triad" of accrediting agencies, the states and the Department of Education to control access to the student financial assistance programs. Although such a Triad effectively had existed prior to the 1992 reauthorization, abusive practices of some institutions of higher education impelled Congress to specify in greater detail the gatekeeping responsibilities of each leg of this Triad.

Thus, the statute specifies numerous requirements that accrediting agencies like the Commission must meet in order to be recognized by the Department of Education. One of these requirements is that an agency's accrediting standards must assess 12 areas, including "program length and tuition and fees in relation to the subject matters taught and the objectives of the degrees or credentials offered." (20 U.S.C. 1099b(a)(5)).

The Department of Education has now completed the rulemaking to implement the statutory requirements for the recognition of accrediting agencies. In regard to accrediting standards, the regulations simply repeat the statutory provisions. (34 CFR 602.26(b)(7); 59 Fed. Reg. 22,250, 22,260 (April 29, 1994)). In the commentary accompanying the regulations, the Department noted that its original proposals, which elaborated on the statute, had prompted substantial adverse comment. Nonetheless, the Department's commentary stated that those proposals provided a "sound framework" for an assessment of the 12 areas, and summarized them. The summary for program length and tuition and fees was as follows:

An accrediting agency's standard for assessing this area should generally address the appropriateness of an institution's program length and tuition and fees, taking into account such factors as program objectives and content, the types and locations of instructional delivery, the knowledge and skills necessary for students to reach competence in the field being taught, and generally accepted practices in higher education.

(*Id.* at 22,273).

The Notice of Proposed Rulemaking ("NPRM") more extensively addressed how to judge the "appropriateness" of tuition and fees. It specified that, in developing a standard for tuition and fees, an accrediting agency should take into account the factors quoted above and "[f]or any pre-baccalaureate vocational education program, consideration of the remuneration that can reasonably be expected by students who complete the program." (59 Fed. Reg. 3,578, 3,597 (January 24, 1994)). In the commentary accompanying the proposed regulations, the Department explained that the basis for this proposal was its concern that tuition and fees for pre-baccalaureate vocational education programs may be "excessive." (*Id.* at 3,586). The commentary also suggested three possible approaches under which annualized tuition and fees for a program could not exceed: (1) a percentage of the annualized minimum wage; (2) a percentage of graduates' earnings for their first year of employment; and (3) a percentage of average annualized wages. (*Id.* at 3,587). The NPRM provided no specifics on these various maximum percentage levels. Although the Department stated that an agency could still be recognized even if its standards departed from the original proposals, it also stated that the agency would bear a burden of justifying the appropriateness of different standards. (59 Fed. Reg. at 22,273).

Development of ACCSCT Standard. In order to comply with the statutory and regulatory requirements described above, ACCSCT will have to adopt and apply an accrediting standard that assesses tuition and fees. It has created a committee of Commissioners to study the issue and develop a proposal. In addition to the inherent difficulty of the task, the Commission is concerned that any standard it adopts not be violative of the antitrust laws.

As explained above, the Commission is a private body consisting in substantial part of school-affiliated Commissioners who could be viewed as competitors. Further, the Commission is legally classifiable as a form of association, although it is not a trade association in the conventional sense that seeks to advocate and

advance the interests of its members. (*See Parsons College v. North Central Ass'n. of Colleges and Sch.*, 271 F. Supp. 65, 70 (N.D. Ill. 1967); *Transport Careers v. National Home Study Council*, 646 F. Supp. 1474 (N.D. Ind. 1986)). Thus, the Commission would appear to be a combination subject to Section 1 of the Sherman Act. (15 U.S.C. 1).

Association activities which limit or set maximum prices are vulnerable to attack as price-fixing. (*Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332 (1982); *McLean County Chiropractic Ass'n.*, 5 Trade Reg. Rep. (CCH) ¶23, 524 (FTC Consent Order to Cease and Desist Complaint, Dkt-3491, April 7, 1994)). The nonprofit and educational nature of the Commission does not necessarily exempt it from such antitrust liability. (*See United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993) (colleges and universities not immune from antitrust laws for price-fixing); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (no "learned professions" exemption); *American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (nonprofit nature of organization does not shield it from antitrust liability)). Moreover, paternalistic aims, such as protection of students, which unduly restrict competition are not a defense to such liability. (*See National Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)).

Of particular importance to this request, the FTC recently issued an advisory opinion which found violative of the antitrust laws a physician fee review program proposed by the American Medical Association and state and local medical societies which provided for the imposition of disciplinary sanctions for "fee gouging" or fees that were deemed by peer review panels to be "excessive." (*American Medical Ass'n.*, 5 Trade Reg. Rep. (CCH) ¶ 23,602 at 23,284-87, (FTC Advisory Opinion, Feb. 14, 1994)). In contrast, the FTC found permissible sanctions for abusive conduct in connection with fees, such as misrepresentation, deception, or the exertion of undue influence. (*Id.* at 23,284). Private, non-binding advice on fee levels, not based upon benchmarking of fees, and requirements, for disclosure of fee-related information were also found to be permissible. (*Id.* at 23,283; *accord, Iowa Dental Ass'n.*, 99 FTC 648 (FTC Advisory Opinion, April 3, 1982)).

In view of the regulations promulgated by the Department of Education, the Commission appears to be obliged to consider adoption of an accrediting standard under which it would determine whether the tuition and fees charged by its accredited schools are too high and enforce this standard potentially by withdrawing accreditation. Such a standard might use one or more of the three approaches suggested in the NPRM with tuition capped at a percentage of expected earnings. Yet, such action by the Commission could be viewed as price fixing under the antitrust laws since the Commission is arguably a combination which would be limiting the pricing discretion of competitors.

It might be argued that Congress impliedly exempted accrediting bodies like the Commission from the antitrust laws when it conditioned recognition of accrediting agencies upon the adoption of a standard for the assessment of tuition and fees. (*See Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524 (10th Cir. 1989) (private governing board for amateur basketball exempt when it set and enforced player qualifications pursuant to Amateur Sports Act)). However, this is an uncertain basis for actions which could have extremely severe consequences. Congress did not speak directly to the issue, and such exemptions are disfavored. (*Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)).

The Third Circuit's holding in *Brown University* indicates that the rule of reason would be applied to evaluate a tuition and fees standard. Under the rule of reason, it might be argued that the standard is designed not to inhibit competition but to protect students who lack the knowledge and sophistication to make informed choices. However, such a paternalistic justification was rejected by the Supreme Court in *National Society of Professional Engineers and Indiana Federation of Dentists*. Further, less restrictive means may be available to achieve the pro-competitive aims of correcting information deficiencies in the market. (*See Brown University, supra*).

Alternatively, the Commission might collect tuition information from its accredited schools and analyze this information to determine how the tuition charged for a given program at a particular school compares to similar programs and schools. If the tuition were in the top tenth percentile of all similar programs, for example, the Commission might then require the school to explain why its tuition was so high and to provide this information to students and

prospective students. Under this approach, the school would retain its pricing discretion and remain free to charge the tuition that it wished. A standard establishing this procedure would provide students with useful information on which to base a decision to attend an institution and improve the functioning of the market.

Even this approach may present difficulties under the antitrust laws. In its advisory opinions on the fee review proposals in American Medical Ass'n. and Iowa Dental Ass'n., the FTC cautioned that the associations should not systematically collect fee data, develop any explicit or implicit "benchmarking" scheme, or publicly disclose their review of particular fees. The alternative approach described above could be viewed as inconsistent with these conditions. The heart of the accrediting standard would be the systematic collection of tuition data and the disclosure to students of information comparing and explaining the school's tuition in relation to other schools. Since schools may wish to avoid this disclosure because it could inhibit students' decisions to attend, the standard could be regarded as an implicit form of benchmarking, with the benchmark as the range of tuition levels where disclosure would not be mandated by the Commission.

A final possibility would be an accrediting standard which required schools to inform students in the catalog, enrollment agreement and other publications that they may obtain information about tuition charges for comparable programs from the Commission. The Commission would again collect tuition information from accredited schools about their programs, and assemble this information in a data base. Students could access this information to determine the cost of similar programs at other institutions. The data base might also contain other information useful to consumer choice, such as geographic location, size of the institution, and other programs and services offered at the school.

This approach would avoid any benchmarking of acceptable tuition levels. Schools would retain full discretion to price their services. The accrediting standard would be formulated to address directly the underlying problem of lack of consumer information by providing students with the data necessary to make informed choices. By assembling, categorizing and providing context to the data, the commission would still meet the requirements of the Higher Education Amendments of 1992 since it would be "assessing" the tuition and fees of schools. The Antitrust Division recently released

a business review letter stating that a similar type of fee survey should not be subject to challenge under the antitrust laws. (Trade Regulation Reports (CCH), No. 322 at 3 (July 6, 1994)).

Request for Guidance. The Commission respectfully requests guidance on the permissibility under the antitrust laws of the approaches to an accrediting standard on tuition and fees outlined above. The Commission will in the near future begin the process to renew its recognition by the Department of Education. As part of that process, the Commission will have to demonstrate its compliance with the statutory and regulatory recognition criteria, including the requirement for a standard to assess tuition and fees. Your review of the approaches under consideration by the Commission will be of substantial assistance as it seeks to continue to demonstrate that it is a reliable authority as to the quality of the education and training offered by its accredited institutions. Accordingly, we respectfully urge expedited consideration of this request.

Sincerely,

Mark L. Pelesh
Counsel to ACCSCT

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