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

BUREAU OF COMPETITION

September 20, 1990

Jerald A. Jacobs, Esq.
Jenner & Block
21 Dupont Circle. N.W.
Washington, D.C. 20036

Dear Mr. Jacobs:

This letter responds to your request for a staff advisory opinion concerning proposed advertising guidelines of the American Society of Cataract and Refractive Surgeons. As is discussed below, the guidelines appear generally consistent with the approach the Commission and its staff have taken with respect to private professional associations' regulation of advertising by their members. As such, the proposed guidelines may provide valuable assistance to Society members and others who wish to engage in truthful, nondeceptive advertising of health care services, and thereby advance consumer welfare.

According to the information you have provided, the American Society of Cataract and Refractive Surgeons is a voluntary association of approximately 5,000 ophthalmologists who specialize in the extraction of cataracts, implantation of intraocular lenses, corneal refractive surgery, and other surgery relating to the anterior segment of the eye. As I understand it, roughly half of the Society's members advertise, and many have requested guidance from the Society to help them avoid false and deceptive statements in their advertising. The Society proposes to issue guidelines that set forth its views on criteria for evaluating advertising of cataract and refractive surgery services. You have represented, and the preamble to the guidelines states, that these principles are intended to be advisory. Adherence to the guidelines is not a requirement for membership, and Society does not plan to undertake any enforcement.

Action by professional associations to prevent false or deceptive advertising, even through enforceable rules, is, as a general matter, entirely consistent with the antitrust laws because such action promotes rather than hinders competition. The free flow of truthful information facilitates the efficient operation of a competitive economy, while false or deceptive information distorts the workings of the market. Indeed, the Commission's antitrust enforcement actions challenging agreements among competitors to suppress broad categories of truthful, nondeceptive information have consistently recognized that private professional associations have "a valuable and unique

role to play with respect to deceptive advertising and oppressive forms of solicitation." American Medical Association, 94 F.T.C. 701, 1029 (1979), aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982).

Ethical rules directed toward false or deceptive advertising will promote competition and consumer welfare provided that they are reasonably tailored to that end. Thus, the essential issue in assessing the Society's proposed guidelines is whether they are likely to inhibit significantly the dissemination of truthful, nondeceptive information.

Many of the guidelines require no discussion because on their face they appear simply to advise against advertising that would be false. In particular, this appears to be the case with guidelines numbered Three through Eight, Ten, and Thirteen. For example, Guideline Four provides that advertisers should not suggest that their clinical practice is conducted primarily for charitable or research purposes unless that is the case.

Other guidelines warrant some discussion in order to assess their relationship to Federal Trade Commission policies concerning particular forms of deceptive advertising, and to note potential issues that could arise in the application of the guidelines to individual cases.

Guideline One states:

> Advertising that claims or suggests superiority or uniqueness in an ophthalmologist's training, proficiency, or experience or results is subject to substantiation by the ophthalmologist.

This guideline's requirement for substantiation of certain kinds of advertising claims appears generally consistent with FTC regulation of advertising. The Commission generally requires a reasonable basis for advertising claims because consumers expect that advertisers have a reasonable basis for claims they make, and would therefore be deceived if such support were lacking. The amount and type of substantiation required depends on what kind of support the ad leads consumers to expect. Claims that do not imply substantiation, such as subjective claims ("friendliest service"), do not require such support. The touchstone in assessing substantiation questions is what consumers would reasonably expect. See FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984). Although the Society's proposed guideline does not limit the substantiation requirement to claims for which consumers would expect support, I recognize that the provisions are intended to represent only general guiding principles for advertisers. As such, Guideline One presents no serious concern. I would note, however, that should the Society at some future time decide to enforce the

guidelines as mandatory rules of conduct, it should bear in mind the need to consider the way that a particular advertisement is likely to be understood by consumers and the extent of substantiation, if any, that is implied.

Guideline Twelve appears to represent application of substantiation principles to claims outside the area of the ophthalmologist's professional skills. This provision recommends that if advertising cites "conclusions reported in scientific literature," the literature should be a published work that has been subjected to peer review. Since consumers are likely to expect that scientific articles meet professional standards for scholarly research, such a provision appears intended to prevent consumer deception. I would note that under FTC substantiation analysis, publication in a peer-reviewed journal is neither a necessary or sufficient criterion for determining whether or not scientific material is of such quality as to constitute the type of evidence necessary to establish a reasonable basis for an advertising claim. An unpublished study might in fact meet professional standards for scientific research, and the FTC does not require that advertisers rely only on published works for substantiation of advertising claims. A flat ban on all claims based on unpublished data could deny consumers important truthful information and raise significant antitrust concerns. Guideline Twelve, however, is an advisory statement whose stated purpose is the prevention of deception, and I do not understand it to constitute such a ban.

Guideline Two addresses advertising of professional titles, degrees, and memberships. It provides that where such matters are represented to be "professional medical credentials that relate to expertise," then they should in fact reflect that the individual has been evaluated and found to meet "objective and reasonable criteria for medical education, training, experience or examination." On its face, the guideline appears aimed at deception, providing in essence that advertisers should not claim that titles, memberships, or other credentials signify professional recognition of expertise unless that is the case. Advertising of bogus credentials issued by a "diploma mill" would represent deceptive advertising that would conflict with this provision. The intended scope of Guideline Two, however, is not entirely clear, because it is unclear when an advertiser would be deemed to have "represented" that his or her membership in a professional organization is a credential that relates to expertise. For example, if one simply announces one's membership in a professional organization such as one's state or local medical society, that does not appear, without more, to be a representation that such membership "relate[s] to expertise," and it is my understanding that the Society does not view such announcements as falling within the purview of this guideline. Any application of this guideline should of course focus on how consumers are likely to understand particular advertisements.

Guideline Nine addresses use of testimonials by patients, and provides that they should only be used where the testimonial reflects representative results in the ophthalmologist's practice. It also states that only actual patients, rather than actors or models, should be used. I would note that the Commission's "Guides Concerning Use of Endorsements and Testimonials in Advertising," 16 C.F.R. § 255, are more flexible, and permit such testimonials provided that the advertiser discloses the limited applicability of the endorser's experience and the fact that persons in the advertisement are not actual consumers. This aspect of the Society's proposed guidelines, however, would raise antitrust concerns only if it substantially inhibited the dissemination of truthful, nondeceptive information. Such an effect appears unlikely to result from the Society's advisory statement.

Guidelines Eleven, Fifteen, Eighteen, Nineteen, and Twenty all recommend the inclusion of certain disclosures in advertising. Disclosure requirements can be beneficial when they are reasonably related to the prevention of deception. They should be applied with some caution, however, for such requirements can serve to discourage advertising by making it more costly and diluting the advertiser's message. Some of the provisions, if construed to impose across-the-board disclosure requirements, could raise concerns, but we do not understand these advisory guidelines to do so. In applying these guidelines to individual advertisements, the critical inquiry should be whether without the disclosure the advertisement would deceive consumers.

Guideline Fourteen provides that advertising should not suggest that the physician routinely waives deductible or copayment obligations under the Medicare program. Unlike other proposed guidelines, this provision appears to be aimed not simply at deceptive advertising but rather at the underlying conduct. Federal law makes it a felony for anyone to knowingly and willfully offer, pay, solicit, or receive any remuneration in order to induce business reimbursed under the Medicare or Medicaid programs. The Department of Health and Human Services has declared that physicians that routinely waive Medicare Part B copayments and deductibles are in violation of that law. See, e.g., 54 Fed. Reg. 3088, 3092 (January 23, 1989). Thus, an ophthalmologist who truthfully advertises that he routinely waives Medicare copayments and deductibles is effectively announcing a practice or intention to violate federal law. Advising against such advertising, even though the advertising is not deceptive, does not appear to present any risk to competition.

Guideline Sixteen advises that "[a]dvertising should not promote equipment, devices, or drugs awaiting approval by the

Food and Drug Administration as safe and effective." The provision is entitled "Experimental/Investigational Products," and, as I understand it, is intended to apply only to such products and to recommend that members comply with Food and Drug Administration regulations concerning representations regarding safety and efficacy of investigational products. As such, it does not appear to raise antitrust concerns. Moreover, to the extent that the rule is aimed at medical safety and efficacy claims that cannot be adequately substantiated, it addresses advertising that may be deceptive under FTC standards.

Finally, Guideline Seventeen states that medical equipment, drugs, or devices should not be advertised as approved by the Food and Drug Administration. Such advertising is prohibited by federal statute. 21 U.S.C. § 331(l). Whether or not such advertising is inherently deceptive, I see no antitrust problem in the Society counseling its members to avoid such a clear violation of law.

In sum, the Society's proposed guidelines appear on the whole to be consistent with Federal Trade Commission precedent with regard to private associations' regulation of advertising by their members. As I am sure you are aware, this conclusion reflects only the opinion of the staff of the Bureau of Competition. Under the Commission's Rules of Practice § 1.3(c), the Commission is not bound by this advice and reserves the right to rescind it at a later time and take such action as the public interest may require. This office retains the right to reconsider the questions involved, and, with notice to the requesting party, to rescind or revoke its opinion if implementation of the proposed conduct results in substantial anticompetitive effects, if the guidelines are used for other improper purposes, or if it otherwise would be in the public interest to do so.

Very truly yours,

Mark Horoschak by Eas

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