IN THE MATTER OF

GODFREY COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3066. Final Order, May 14, 1981—Modifying Order, June 28, 1982

This order reopens the proceeding and modifies the Commission's order issued on May 14, 1981 (97 F.T.C. 456), by modifying Paragraph I(G) of the order to relieve respondent from the obligation of divesting a specified retail grocery store.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED MAY 14, 1981

The Federal Trade Commission having considered respondent Godfrey Company's petition filed on March 12, 1982, to reopen this matter and to modify the consent order to cease and desist issued by the Commission on May 14, 1981, and having determined that reopening and modification of the order is warranted:

It is ordered, That this matter be, and it hereby is reopened and that Paragraph I(G) of the Commission's order be and it is hereby modified to read as follows:

(G) The "disposition stores" means the following Godfrey ("G") stores and Jewel ("J") stores:

1. G–427 (3045 S. 13th St., Milwaukee, WI.).
2. G–810 (3939 S. 76th St., Milwaukee, WI.).
3. J–1201 (1201 N. 35th St., Milwaukee, WI.).
4. J–729 (729 S. Layton Blvd., Milwaukee, WI.).
5. J–15182 (N81 W. 15182 Appleton Ave., Menomonee Falls, WI.).

IN THE MATTER OF

BROWARD COUNTY MEDICAL ASSOCIATION

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

Docket C-3091. Complaint, June 28, 1982—Decision, June 28, 1982

This consent order requires a Florida medical association to cease, among other things, inhibiting competition among health care providers by restricting its members from soliciting patients; advertising fees and services; and by declaring such activities unethical. The association is required to remove from its code of ethics, constitution and bylaws, any provision which is inconsistent with the prohibitions contained in the order; and publish revised versions of these documents. The order also requires that the association take no formal action against a party charged with violating an ethical standard without first providing that party with reasonable notice of the allegations and a hearing, as well as written findings and conclusions concerning the allegations. Further, for a period of ten years, the association is required to provide each new member with a copy of the order.

Appearances

For the Commission: *Steven T. Kessel* and *Laurel H. Brandt.*

For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Broward County Medical Association is a corporation formed pursuant to the laws of the State of Florida, with its mailing address at 2200 South Andrews Ave., Fort Lauderdale, Florida.

PAR. 2. Respondent is a professional association formed to represent the interests of physicians who practice in Broward County, Florida. Respondent has approximately 1500 members, constituting a substantial majority of physicians in Broward County.

PAR. 3. Respondent is a component society of the Florida Medical

Association, which is in turn a constituent society of the American Medical Association.

PAR. 4. Members of respondent are engaged in the business of providing medical health care services for a fee. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other physicians.

PAR. 5. Respondent is organized for the purpose, among others, of guarding and fostering the interests of its members. Respondent engages in activities which further its members' pecuniary interests. By virture of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended. 15 U.S.C. 44.

PAR. 6. In the conduct of their business, members of respondent receive and treat patients from other states and counties, receive substantial sums of money from the federal government and from private insurers for rendering medical services, which money flows across state lines, and prescribe medicines which are shipped in interstate commerce. The acts or practices described below are in interstate commerce, or affect the interstate activities of respondent's members, third parties who pay for medical services, other third parties, and some patients of respondent's members, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 7. Respondent has acted as a combination of at least some of its members or has conspired with at least some of its members to foreclose, frustrate, and eliminate competition among medical doctors in Broward County, Florida by:

A. Prohibiting its members from truthfully advertising their services to the public, from distributing truthful information about their fees and services, and from otherwise soliciting patients' business; and

B. Coercing individual members into abandoning their efforts to truthfully advertise their services, to distribute truthful information about their fees and services, and to otherwise solicit patients' business.

PAR. 8. Respondent has engaged in various acts or practices in furtherance of this combination or conspiracy, including among other things:

A. Adopting and implementing written and unwritten codes of ethics that prohibit efforts by its members to truthfully advertise

their services in the Yellow Pages or in other media, or to otherwise distribute truthful information to the public about their fees and services. (See Exhibits A through C attached hereto). By virtue of such ethical restraints, members are prohibited from advertising, among other things: their fees; whether they accept Medicare assignment of benefits; whether they accept credit cards; their professional training and experience; their business hours and office locations; and their knowledge of languages other than English.

B. Publishing statements by some of its officials advising members that advertising is unethical and threatening disciplinary action and other sanctions against members who advertise. In particular, in 1981, respondent published and distributed statements by some of its officers advising its members that advertisement of their services in the Yellow Pages telephone directory was unethical, and that those members who violated respondent's written and unwritten proscriptions against advertising would be disciplined by respondent (See Exhibits B and C attached hereto);

C. Intimidating those members who seek to truthfully advertise their fees and services or to otherwise solicit patients' business by engaging in a concerted effort to obtain the names of those members and threatening to publish their names in respondent's membership magazine and subject them to the "ridicule of (their) peers" (See Exhibit C);

D. Sending letters to individual members who truthfully advertised their fees and services or who otherwise solicited patients' business that pressured those individual members to abandon such activities; and

E. Summoning individual members to meetings of respondent's Executive Committee and Board of Censors and threatening at those meetings to take disciplinary or other action to compel members to cease truthfully advertising their fees or services or otherwise soliciting patients' business.

PAR. 9. Through the combination or conspiracy and the acts or practices described above members of respondent have agreed not to, and do not, advertise their services or otherwise solicit patients' business, and certain individual members of respondent have been coerced into abandoning advertising their services or otherwise soliciting patients' business. Such advertising and solicitation enables physicians to compete on the basis of price, quality and convenience, and enables individual patients to choose among physicians on the basis of price, quality, or convenience. Consequently:

A. Competition among physicians for patients has been foreclosed, frustrated and eliminated; and

B. Consumers, including senior citizens among others, have been deprived of the benefits of competition among physicians. In particular, patients have been deprived of truthful information about physicians' fees and services, including, among other things: physicians' fees; whether physicians accept Medicare assignment of benefits; whether they accept credit cards; professional training or experience; their business hours and office locations; and their knowledge of languages other than English.

PAR. 10. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices which violate Section 5 of the Federal Trade Commission Act. Such combination or conspiracy is continuing and will continue absent the entry against respondent of appropriate relief.

EXHIBIT A-1

DCCCa

Code of Ethics

EXHIBIT A-2

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CODE
PRINCIPLES OF MEDICAL ETHICS
BROWARD COUNTY MEDICAL ASSOCIATION

* * *

The Code is intended to establish certain general principles or rules of action and conduct for members of the Association. These principles are not rules to govern but are precepts to guide to correct conduct. "Custom is stronger than any law." —Ovid

* *

Chapter I

GENERAL PRINCIPLES

Section 1. CHARACTER OF THE PHYSICIAN. The prime object of the medical profession is to render service to humanity. Reward or financial gain is a subordinate consideration. Whoever chooses this profession assumes the obligation to conduct himself in accord with its ideals. A physician should be "an able and discreet man, learned in the art and science of healing." Milleniums ago Hippocrates summed up the character of a physician, "He should also be modest, sober, patient, prompt to do his whole duty without anxiety, piety without superstition, conducting himself with propriety in his profession and in all the actions of his life."

Section 2. THE PHYSICIAN'S RESPONSIBILITY. The profession of medicine having for its end the common good of mankind knows nothing of national enmities, of political strife, of sectarian or racial dissension.

Disease and pain, the sole conditions of its ministry, is disquieted by no misgivings concerning the justice and honesty of its client's cause but dispenses its peculiar benefits without stint or scruple to men of every country and party and rank and religion and to men of no religion at all.

Section 3. GROUPS AND CLINICS. The ethical principles actuating and governing a group or clinic are exactly the same as those applicable to the individual. As a group or clinic is composed of individual physicians, each of them, whether employer, employee or partner, is subject to the principles of ethics herein elaborated. The uniting into a business or professional organization does not relieve them, either individually or as a group, from the obligations they assume when entering the profession. A group of physicians in an association, corporation or otherwise organized together may not label their group or its place of practice as a 'clinic' or 'center' unless it consists of five or more physicians.

Section 4. ADVERTISING. Solicitation of patients directly or indirectly by a physician, by groups of physicians or by institutions or organizations is unethical. Among unethical practices are included the not always obvious devices of furnishing or inspiring newspaper or magazine comments concerning cases in which the physician or group or institution is concerned. All newspaper or magazine articles dealing in any way with medical subjects or the practice of medicine written by members of this association either alone or jointly with a newspaper or other reporter will be approved before publication by: (1) A majority of the members of this association practicing the branch of medicine involved; and also, (2) The Chairman of the Public Relations Committee of this association. The above in no way is to restrict the Chairman of the Public Relations Committee or the Broward County Health Department from

EXHIBIT A-3
00004

giving medical information of an emergency nature to the press. Self laudations defy the traditions and lower the moral standard of the medical profession. They are an infraction of good taste and are heartily disapproved.

The circulation of simple professional cards is limited to the giving of one card to a patient if requested. Distribution of cards to hotels, apartment houses, restaurants and the like is unethical. A modest simple announcement of the opening of a new office, change of address or association may be inserted in a newspaper not more than three times. The announcement should be limited to name, address, telephone number, office hours and specialty. Office signs should be limited in size to between two and one-half to three and one-half inch high letters and should be attached to the building or erected only a few feet from it. The use of large signs or neon or other lighted signs or the use of arrows or the distant placement of signs is not approved. Listing of a physician's name in a directory other than the telephone directory, professional directories, and non-commercial directories listing all doctors of medicine in the community without charge *is not approved*. The listing of a specialty for which the physician is not qualified as judged by the membership committee after review of his training and qualifications is fraudulent and unethical. Announcements or special notices may be sent through the mail in case of opening of a new office, removal or change of office, association or dis-association with other physicians, resumption of practice after a military or other leave of absence. These special notices may be mailed to physicians and former patients only. In all signs and directories, it is better not to use Doctor or Dr. The use of M.D. after your name is preferable.

Section 5. EDUCATIONAL INFORMATION, NOT ADVERTISING. Many people literate and well educated do not possess a special knowledge of medicine. Medical books and journals are not easily accessible or readily understandable. The Association considers it ethical for a physician to meet the request of the Associations' Public Relations Committee to write, act or speak for general readers or audiences. The physician should be guided by the decision of the Public Relations Committee in matters of this kind. The most worthy and effective advertisement possible for a physician is the establishment of a well merited reputation for professional ability and fidelity. This cannot be forced but must be the outcome of character and conduct.

Section 6. PATIENTS, COMMISSIONS, REBATES, "KICK-BACKS," AND SECRET REMEDIES. An ethical physician will not receive excessive remuneration from patients on the sale or rental of surgical instruments, appliances and medicines; nor any profit from a copyright on methods or procedures. The acceptance of "kick-backs," rebates on prescriptions or appliances or laboratory work or of commissions from attendants who aid in the care of patients is unethical. The physician should receive his remuneration for professional services rendered only in the amount of his fees specifically announced to his patient at the time the service is rendered or in the form of a subsequent statement and he should not accept additional compensation secretly or openly, directly or indirectly from any other source. It is considered unethical for any physician to charge excessive or exorbitant fees for his services. Furthermore, it shall be considered unethical for any physician to increase his fees by unnecessarily prolonging the care and treatment of any patient. The prescription dispensing or use by a physician of a secret medicine or other remedial agent of which he does not know the composition is unethical.

Section 7. EVASION OF LEGAL RESTRICTIONS. An ethical physician will observe the laws regulating the practicing of medicine and will not assist others to evade such laws. He will observe those laws, not only in the letter but in the spirit of the law.

Chapter II

DUTIES OF PHYSICIANS TO THEIR PATIENTS

Section 1. STANDARDS. USEFULNESS. NONSECTARIANISM. A sectarian or cultist as applied to medicine is one who alleges to follow or in his practice does follow a dogma,

00010 EXHIBIT A-4

TELEPHONE LISTINGS AND PAID NEWSPAPER ANNOUNCEMENTS

1. A physician may list his name, address, and telephone number in the *white pages* of any telephone directory published primarily for the municipality in which he maintains an office or a residence. He may list both residence and office. He must not permit any part of his listing to be printed in bold face type.

2. The physician's degree (M.D.) and the notation P.A. (if applicable) may appear after his given name, but no other designations, degrees are permissible; (exceptions, DMD or DDS, if earned dental degrees).

3. Residences need not be listed in the white pages.

4. A physician may not list in the white pages and professional information other than his office address and telephone number. However, he may list an alternate number in case of no answer.

5. A physician may list his name, address, and telephone number in the *yellow pages* of any telephone directory published primarily for the municipality in which he maintains an office or residence. He may list both residence and office.

6. Physicians names should be listed alphabetically under the heading, "Physicians and Surgeons, M.D." It is permissible in this general alphabetical listing to follow the physician's name with the simple statement, "Practice limited to ————————."

7. In addition to the alphabetical listing, a physician may list himself under no more than two specialty or sub-specialty headings, provided he is Board Certified or Qualified in, or limits his practice to, the primary specialty; and provided further that the specialty or sub-specialty is recognized by the American Medical Association and the Advisory Board for Medical Specialties, and that examination for certification is being conducted.

8. Each physician who uses multiple listings must be prepared to justify these listings if called upon to do so. The BCMA office keeps a current listing of recognized specialties, and may be consulted at any time.

9. A statement that the physicians practice is limited may appear under the general listing only. A brief statement of office hours or a note that patients are seen by appointment only is acceptable. Alternate phone or answering service number may be listed.

10. *NOT ACCEPTABLE:*

    Bold Face Type.

    Listings boxed by lines or rules.

    Any statement such as "Diplomate of the American Board of ————————." or "Fellow of the American College of ————————."

    Any language, symbol or device that tends to direct attention to one particular listing or that could be construed as advertising. i.e., Techniques, Procedures, or Specific Disease entities.

11. Newspaper Announcements:

    A member may purchase newspaper space for the following:

    A. To announce the opening of an office of a physician new in the community.

    B. To announce the relocation of a professional office to a new address or the establishment of a second office.

    C. To announce the association of a new physician with an established professional office.

EXHIBIT A-5 CC01

D. To announce that an office will be closed for an extended period (30 days or more) for reason of illness, vacation or other cause, and to announce the reopening of the office. However, if the office telephone is to be answered by office or answering service, announcements will not be permitted.

12. The number of insertions should not exceed four within a 30 day period. Insertions limited to two column width (5 inches) and three inches in depth. Type size not to exceed 18 point. Black ink, and not surrounded by excessive white space.

13. Use of pictures, drawings. logotypes expressly forbidden.

The Association will take disciplinary action as may be indicated against violators; except that the Judicial Council of the Florida Medical Association may intervene if the Association fails to take adequate and proper action.

EXHIBIT B

I was encouraged by the recent publication of the telephone book yellow page directory. In spite of a dishonest campaign by certain employees of Southern Bell Telephone Company to induce physicians to alter their yellow page listings, a relatively small number of BCMA members responded contrary to our association's Code of Ethics. Those physicians who took advantage of the opportunity to alter their listing and/or subscribe to a small ad in the yellow pages will be summarily called before the Executive Committee of the BCMA to explain their actions.

Let there be no doubt that in spite of the Federal Trade Commission's contention that restriction of advertising is tantamount to restraint of trade, the "principles" of medical ethics in Broward County remain unchanged. Exceptions to the standard yellow page listing, including bold face type, will continue to represent conduct unbecoming to a professional.

It is my hope that tradition will prevail over law.

Phillip A. Caruso, M.D.
President

EXHIBIT C

BCMA NEWS LETTER

Dear Colleague: June, 1981

YELLOW PAGE ADVERTISING

Your Executive Committee for years has been waging a campaign against unwarranted listings in the Yellow Pages. The primary reason is that we do not believe such flagrant listings are ethical, for ours is a profession in which dignity is and should be one of our foremost tenets.

The BCMA, as a guardian of the highest principles in medicine, has asked those who broke our unwritten code to appear and offer explantation. Names henceforth will be published in THE RECORD.

The most frequent excuse is a plea of ignorance; that an office girl was responsible.

Come September you will be called again by those who market space in the Yellow Pages. It would behoove you to advise your staff that you alone are responsible for what appears in those listings, and that they must be cleared by your personally. Better that them to suffer the ridicule of your peers!

ON PROFESSIONAL LIABILITY

All insurance codes, including professional liability, is due for review in 1982 by the Florida Legislature.

We have scheduled a special September session on the subject of risk management with PIMCO and you will be kept advised as plans are formulated.

IMPAIRED PHYSICIANS PROGRAM

Member volunteers are being sought for a BCMA committee to work with the Florida Medical Foundation-Florida Medical Association Impaired Physicians Program. Such volunteers will serve primary physicians in their area to monitor physicians who have completed treatment and are returning to their local county.

If you are interested in serving, please contact Bill Stafford at the BCMA offices, (525-2142).

IRISH TRIP CANCELLED

The proposed golf-sightseeing trip to Ireland in August has been cancelled because of lack of participation. Time obviously was too short. We will start at year's end to line up a trip for next July, hoping that this will give more members an opportunity to plan ahead and thus be able to participate.

BCMA TELEVISION SHOW

We have ceased taping our half hour medical show on HBO Channel 25 for the summer but will resume in September. Plans are in process to televise these shows in the Plantation and Hollywood areas futurely. Members interested in appearing on the program when taping is resumed are urged to contact Public Information Director Oscar Fraley (527-0778) for a list of shows we already have done so that you may come up with a new approach.

This is my opening news letter as your new president and I will strive to keep you fully informed of everything we are doing in your interests at the BCMA

Sincerely,

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 Competition 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 excuted 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, 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 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, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, 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 Broward County Medical Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2200 South Andrews Ave., in the City of Fort Lauderdale, State of Florida.

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

I.

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

A. *BCMA* means respondent Broward County Medical Associa-

tion, its delegates, trustees, councils, committees, Board of Censors, officers, representatives, agents, employees, successors and assigns.

II.

It is ordered, That BCMA shall cease and desist from, directly or indirectly, or through any corporate or other device:

A. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms or conditions of sale of physicians' services, or of information about physicians' services, facilities or equipment which are offered for sale or made available by physicians or by any organization with which physicians are affiliated;

B. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the solicitation, through advertising or by any other means, including but not limited to bidding practices, of patients, patronage, or contracts to supply physicians' services, by any physician or by any organization with which physicians are affiliated; and

C. Inducing, urging, encouraging, or assisting any physician, or any medical association, group of physicians, hospital, insurance carrier, telephone company or any other non-governmental organization to take any of the actions prohibited by this part.

Nothing contained in this part shall prohibit respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence.

III.

It is further ordered, That BCMA shall cease and desist from taking any formal action against a person alleged to have violated any ethical standard promulgated in conformity with this Order without first providing such person with:

A. Reasonable written notice of the allegations against him or her;

B. A hearing wherein such person or a person retained by him or her may seek to rebut such allegations; and

C. The written findings or conclusions of respondent with respect to such allegations.

IV.

It is further ordered, That BCMA shall:

A. For a period of ten years, provide each new member of BCMA with a copy of the complaint and this Order at the time the member is accepted into membership;

B. Within sixty (60) days after this Order becomes final, publish a copy of the complaint and this Order with such prominence as feature articles are regularly published in the BCMA *Record* or in any successor publications;

C. Within ninety (90) days after this Order becomes final, remove from its *Code of Ethics,* its constitution and bylaws, and any other existing policy statements or guidelines of respondent, any provision, interpretation or policy statement which is inconsistent with Part II of this Order, and within one hundred and twenty (120) days after this Order becomes final, publish in the BCMA *Record* or in any successor publications the revised versions of such documents, statements, or guidelines;

D. Within one hundred and twenty (120) days after this Order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this Order;

E. For a period of five (5) years after this Order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Part II of this Order, including but not limited to any advice or interpretations rendered with respect to advertising or solicitation involving any of its members; and

F. Within one year after this Order becomes final, and annually thereafter for a period of five (5) years, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with the activities covered by Part II of this Order, including but not limited to any advice or interpretations rendered with respect to advertising, or solicitation involving any of its members.

V.

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

Minor deviations from previously issued Consent Order's model year designation guidelines would be permissible for trucks manufactured to fill fleet order specifications in situations where manufacture of the fleet of vehicles overlap model year changeover date. [*Paccar, Inc., C-2981*]

January 11, 1982

Gentlemen:

This responds to your request, by letter of May 27, 1981, for advice as to whether the Commission would seek to enforce the above referenced order against Paccar in cases where it uniformly assigns succeeding model year designations to fleet order vehicles (10 or more) manufactured during production runs which overlap the model year changeover date.

The order is designed to protect original and secondary retail purchasers of heavy duty trucks from model year misrepresentations made orally and on certificates of origin, and on any other documents identifying such vehicles. In pertinent part, the order provides:

It is further ordered, That respondent shall not represent orally or in any document identifying any vehicle, or in any advertisement or promotional material, or in any number or code incorporated into a vehicle identification number, that any vehicle is of a particular model year, or designate or cause to be designated any vehicle as being of a particular model year, unless for each such vehicle:

1. Such designation or representation is made in accordance with written designation standards which clearly identify the vehicles to which they apply and the starting dates when such standards take effect; and
2. The aforementioned designation standards are uniformly applied throughout a model year to all vehicles of the same model assigned a model year designation, whether such vehicles are distributed for sale to the first retail purchaser through factory-owned branches or through dealers; and
3. The aforementioned designation standards are such that the model year asigned particular vehicles is determined by:

a. The characteristics of the vehicles designated, or
b. The date of manufacture (regardless of the extent, if any, of changes in physical characteristics from vehicles of a preceding model year); *provided, however,* that;

(1) Vehicles whose assembly began before the model year changeover date but were completed after such date, may be designated as being of the earlier model year, and
(2) Where a particular model is manufactured in two or more plants, all vehicles of that model manufactured after a particular date in one plant and after a later date (or dates) in another plant (or plants) may be designated as being of the same model year provided that the date of manufacture of the last vehicle designated as of a particular model year in any plant, occur no later than thirty (30) days after the date of manufacture of the first vehicles designated as of the succeeding model year in any other plant;

4. All vehicles designated as being of a particular model year shall be so designated on or before the date of manufacture; and

5. All vehicles once designated as being of a particular model year shall remain so designated except that the model year designation may be corrected when a vehicle at the time of manufacture is assigned an incorrect designation which is inconsistent with the previously established standards;

provided, however, that nothing in this order shall require that the first and last days of a model year coincide with the first and last days of the corresponding calendar year.

For purposes of this order, the date of manufacture shall be the date upon which the last act of manufacturing or assemblage to be performed by respondent is completed by respondent. Further steps of manufacture by a later state manufacturer (for example, the installation of a truck body) however initiated or contracted shall not affect the date of manufacture of vehicles manufactured by respondent, for the purposes of this order.

In your letter of May 27, you state that design changes to the trucks manufactured by Paccar's Kenworth and Peterbilt divisions are made on an irregular basis, so that a difference in model year between two trucks of the same type does not normally mean that the trucks are physically different. Your letter indicates that model year designations are significant in other respects, however. Price increases are usually timed to occur with model year changes. Furthermore, fleet orders handled by Kenworth and Peterbilt typically specify that fleet vehicles be identical in price and other characteristics.

We understand that under Subpart 3(b) of the order quoted above, Paccar has elected to use the date of manufacture as the standard for model year designations. The company states that in those instances where fleet production straddles the standard model year changeover date, a conflict develops between the customer's requirement that all trucks in the fleet have identical model years (and prices) and the order's apparent requirement that trucks produced before the changeover date have an earlier model year designation than those produced afterward. Your letter advises that to avoid this conflict, Paccar presently delays the completion of fleet vehicles until after the changeover date. This solution disrupts the manufacturing process, however, and it imposes artificial costs on fleet production during the model changeover period.

Your letter states that "[t]o allow the divisions to complete the manufacture of some of the vehicles which are part of a fleet order prior to the 'model year' changeover date but deliver them after that date and designate them at the later model year does not violate the intent of the order." We understand that Paccar has offered to notify the Commission each time this approach is taken.

The Commission believes that no harm to competitors or purchasers would result if fleet vehicles manufactured by Kenworth and Peterbilt shortly before the standard model year changeover date are designated with the succeeding model year. The Commission will take no enforcement action with respect to such designations if the following conditions are fulfilled:

(1) Paccar must notify the Commission of each fleet order so affected, and for each provide:

(a) the name and address of the fleet customer(s);
(b) the number of vehicles comprising the fleet, and their make and model;
(c) the vehicle identification number (VIN) for each fleet vehicle;
(d) the model year changeover date(s);
(e) the date of delivery for the fleet; and
(f) the model year designation assigned to the fleet;

(2) The foregoing information should be submitted to the Commission as a supplemental compliance report no later than thirty (30), days after the fleet is delivered; and
(3) Only vehicles whose last act of manufacturing occurred within the period thirty (30) days before or thirty (30) days after the model year changeover date are included under this exception.

The foregoing statement of enforcement intention is binding upon the Commission with respect to Paccar, Inc., and with regard to the acts, practices, and conduct described in the request, so long as all relevant facts were fully, completely and accurately presented to the Commission, until such time as the statement has been rescinded or revoked and notice thereof has been given to the requester. No enforcement actions will be initiated by the Commission concerning any conduct undertaken by the requester in good faith reliance upon the foregoing statement where such conduct is discontinued promptly upon notification of rescission or revocation of the Commission's statement.

Notwithstanding its present determination, the Commission will not be precluded from later taking appropriate action if it subsequently learns that violations concerning other aspects of the order have occurred or that the information submitted in the above-mentioned request was inaccurate or incomplete, or if it determines that such further action would serve the public interest.

Finally, the Commission notes that it has issued orders, similar to Paccar's, against other truck manufacturers. These manufacturers may also have encountered compliance problems concerning the assignment of model years to fleet vehicles produced during a model

year change. Accordingly, they may wish to seek the Commission's advice on acceptable means of making model year designations in such circumstances. To assist them in submitting such requests, the Commission has determined that a copy of this letter should be placed on the public record along with Paccar's letter dated May 27, 1981.

By direction of the Commission.

Letter of Request

May 27, 1981

Gentlemen:

As we have discussed on several occasions, the present form of the referenced Consent Order presents a potential problem for our Kenworth and Peterbilt truck divisions with regard to the scheduling of customer fleet orders during the time of our "model year" changeover date.

As you are aware, Kenworth and Peterbilt build Custom trucks. Neither division makes physical changes to its vehicles to correspond to a model year. Product improvement and style changes are normally evolutionary and introduced when completed. Therefore, there is normally no physical difference in the vehicle between any consecutive model years. The divisions usually do coordinate a price increase, if one is necessary, with the "model year" change.

When a customer orders a fleet of vehicles, it normally "specs" all the vehicles identically and a uniform price is established for all the vehicles. If manufacture of a fleet is in progress on a model changeover date, some vehicles will bear the present model year designation and some will bear the next year's model designation with corresponding differences in price. Since all the vehicles are mechanically the same, this situation is unacceptable to the fleet customer. It is, likewise, unacceptable to disrupt the manufacturing process so that all the fleet vehicles will bear the same model year designation.

Both divisions attempt, to the extent practical, to schedule fleet vehicles so that their production is not interrupted by the "model year" changeover date. But, on occasion, because of production factors and other promised delivery dates, it cannot be avoided.

Under the present terms of the Consent Decree, the divisions have only one alternative in order to provide the fleet customer with what he ordered and still maintain its production schedule and delivery deadlines; to not complete the manufacturing process on any of the

trucks, regardless of when they began down the production line, until after the "model year" changeover date. Although this would allow all of them to be designated as the later model year, this solution is both costly and disruptive.

To allow the divisions to complete the manufacture of some of the vehicles which are part of a fleet order prior to the "model year" changeover date but deliver them after that date and designate them as the later model year does not violate the intent of the order.

Paccar does not believe that either party to the Consent Order contemplated this problem or the unsatisfactory and limited solution. Paccar, therefore, requests that the FTC provide relief from this situation. The wording of the Consent Order does not lend itself to an interpretive letter as a method of relief. Paccar suggests resolving the matter by the FTC providing Paccar an official letter stating that as long as Paccar notifies the FTC of any situation where the production of vehicles for a fleet overlaps the "model year" changeover date, the FTC will not consider it a material violation of the order and will not initiate any action, enforcement or otherwise, under the Consent Order against Paccar because of such a situation.

Your consideration in this matter is appreciated.

Very truly yours,

/s/ Kenneth R. Brownstein

Counsel

Code of ethics, proposed by stevedoring and marine terminal industry trade association, that requires expulsion from the association for conviction or guilty plea to unlawful acts warrants no enforcement action by FTC. [*P82-3803, National Association of Stevedores*]

March 9, 1982

Dear Mr. Wilcox:

The Federal Trade Commission has considered your request for an advisory opinion dated September 9, 1981.

The Commission understands that the National Association of Stevedores (NAS) is a trade association of domestic stevedores and marine terminal operators. Stevedores provide port services, contracting with the owner or operator of a vessel to load and unload the vessel at a marine terminal. The Association was founded in 1933 and has 66 full and 2 associate member companies.[1] These member companies represent approximately 75 percent of the total workhours performed by stevedores other than at inland river terminals. Members operate in all the major coastal areas: Great Lakes, North Atlantic, South Atlantic, Gulf Coast, West Coast, Hawaii and Puerto Rico.

The Association primarily monitors federal and state legislation and regulation which may affect the stevedore industry. In addition, the Association performs lobbying services, provides its members access to Congress, analyzes relevant court decisions, and, on occasion, files *amicus* briefs.

In response to legislative hearings by the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the United States Senate and to recommendations made to NAS by the Subcommittee Chairman and ranking minority member, NAS proposes to make effective a "Code of Business Ethics of the National Association of Stevedores." This ethical code was approved by the NAS Board of Directors on June 16, 1981, and will become effective upon approval by the Federal Trade Commission.

The proposed code declares the policy of NAS member companies with regard to lawful competitive and business practices. The first six sections express the general policies of the Association but provide no sanctions. Section 7 establishes a special rule for automatic termination of membership when any member company pleads guilty

[1] Associate members pay 75% of full membership dues, but are not entitled to vote or hold office. The two current associate members include a Hawaiian stevedore who is too far away to attend NAS functions and a New England stevedore who performs only approximately 10,000 workhours a year. Membership dues are currently a basic fee of $1500 plus an assessment based on workhours performed.

to or is convicted of making illegal payments or other illegal acts. This rule includes explusion of the member company when any officer pleads guilty to or is convicted of such acts committed with the knowledge of the president and/or board of directors. Section 8 of the proposed code provides a procedure whereby a member terminated pursuant to Section 7 can seek reinstatement.[2]

These two last provisions raise a possible antitrust issue if restrictions on membership result in competitive harm and such restrictions are imposed without adequate procedural safeguards.

The Commission issues the following advice pursuant to Rule 1.1 of its Organization, Procedures and Rules of Practice, 16 CFR 1.1, because it believes that the publication of such advice is of significant public interest.

Based upon the information furnished to the Federal Trade Commission by NAS and the Commission's understanding of the nature and scope of the Association's activities, the Commission does not presently intend to commence enforcement proceedings against NAS or its member companies if they make effective the "Code of Business Ethics of the National Association of Stevedores."

The Commission's present enforcement intentions are based primarily on its view that denial of membership in NAS would not presently have substantial competitive effects. NAS represents that membership in the Association does not confer any particular competitive advantages. Activities of the Association appear to benefit nonmembers as well as members. It thus appears that, at this time, exclusion from NAS would not competitively disadvantage a member company and would not constitute an unlawful restraint of trade. Consequently, the Commission has concluded that no enforcement action based on the proposed code is warranted.

Circumstances may change, however, and loss of NAS membership and resulting benefits may come to represent a significant competitive disadvantage. The Association should be aware that in those circumstances any membership restriction such as exclusion, suspension, or termination that is unreasonable or made without adequate procedural safeguards could result in an antitrust violation.[3]

If membership in the Association were to become a valuable property right and competitive factor, certain actions performed by the Association pursuant to the proposed ethical code would be likely to raise enforcement concern. They include (1) arbitrary application of the provision permitting termination of a member company for

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[2] Article III, Section 6 of the Association By-Laws currently provides that NAS may suspend or expel any member company, after notice and an opportunity for hearing, for any of a number of violations including violation of any rule or practice of the Association. The activities covered by Section 7 of the proposed code are the only activities for which a member company will be automatically expelled from the Association without a prior hearing.

[3] *See, e.g., Silver v. New York Stock Exchange,* 373 U.S. 341 (1963).

"other unlawful acts" which are not corrupt practices declared illegal by the Taft-Hartley Act, 29 U.S.C. 186; (2) automatic termination of a member company without a proper determination that a person who pleaded guilty to or was convicted of unlawful payments was in fact an officer for whose conduct the company properly may be held responsible and that the president and/or board of directors had sufficient knowledge of the acts committed; or (3) refusal to grant an application for reinstatement by a member company without applying fair and objective standards or criteria. Use of procedures such as those provided in Article III, Section 6, of the Association By-Laws, in certain circumstances could provide appropriate procedural safeguards.

This opinion is being rendered solely upon the issue of membership termination pursuant to your proposed "Code of Business Ethics." It does not cover any other course of action by NAS or its member companies, such as concerted refusals to deal, that might constitute a commercial boycott or other collusive behavior in restraint of trade. The Commission reserves the right to commence enforcement proceedings against any conduct that was not disclosed in the request and to rescind the advice in accordance with Rule 1.3 of its Rules of Practice, 16 CFR 1.3, if warranted.

By direction of the Commission.

Letter of Request

September 9, 1981

Dear Secretary:

Pursuant to Rules 1.1-1.4 (16 CFR 1.1-1.4) of the Commission's Rules and Regulations, the National Association of Stevedores (NAS) hereby requests the Federal Trade Commission for an advisory opinion concerning the implementation by the NAS of the enclosed proposed NAS Code of Business Ethics, and in particular whether the implementation of the proposed Code would be in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45); Section 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2) and/or any existing rule or regulation promulgated by the Commission.

The Association

The NAS is a trade association incorporated under the laws of the District of Columbia and has obtained Section 501(c)(6) non-profit tax exemption from the Internal Revenue Service. Article II of the Bylaws of the NAS states that "The object and purpose of the Association is to promote, further, and support the stevedoring and

marine terminal industry in the United States and its territories and possessions". At present the NAS has 66 member companies which operate at all major ports on the four seacoasts of the United States, the states of Alaska and Hawaii and the commonwealth of Puerto Rico. Although the member companies of the NAS account for some 75 percent of all industry manhours (excluding inland river operations) there are many stevedore/marine terminal operators who are not members of the NAS.

A stevedore is either a person or company who contracts with the owners or operators of a vessel for the loading and unloading of the vessel when in port. A marine terminal operator is the owner/operator of the facility at which water-borne cargo is loaded or unloaded. In some instances the marine terminal operator and the stevedore contrator may be the same, or corporately related, entity. In many instances the stevedore and the marine terminal are unrelated entities, and the latter often is a public instrumentality, either state or local. The stevedore/marine terminal operator hires longshoremen to perform its contractual duties with ship owners pursuant to collective bargaining agreements with two major longshore unions—the International Longshoremen's Association (ILA) on the East and Gulf Coast, the Great Lakes, and Puerto Rico, and the International Longshoremen's and Warehousemen's Union (ILWU) on the Pacific Coast, Alaska and Hawaii.

The activities of a stevedore contractor are not subject to economic regulation by any federal agency. Some activities of a marine terminal operator are subject to regulation by the Federal Maritime Commission and the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*). However, the regulatory scope of the Shipping Act does include matters such as the proposed Code.

The stevedoring/marine terminal industry is highly competitive. There is competition between companies in each port in which more than one is in business, and there is competition between ports. To date there is no evidence that membership in the NAS has any significant effect on competition.

The Reasons For the Code

One of the purposes and major goals of the NAS is to improve the public's and government's images of the industry. The industry is little understood and over the years has suffered from adverse publicity. The NAS was attempting to correct that situation when in 1977 the Department of Justice revealed the largest labor racketeering investigation and strike force in its history—Operation UNIRAC. Operation UNIRAC resulted in numerous convictions of both waterfront management and labor and culminated in hearings in February,

1981, before the Senate Permanent Subcommittee on Investigations. A detailed account of those hearings is enclosed* (*American Shipper,* April, 1981, pgs. 4-14) and the printed record of the hearings is available should the Commission require.

At the conclusion of those hearings Senators Nunn and Rudman issued a joint statement, a copy of which was sent to the NAS (letter dated March 12, 1981, enclosed*). Item 7 of those joint recommendations stated that industry trade associations should establish strict ethical standards of conduct for their members. Upon receipt of the recommendations the NAS contacted Senator Nunn, the Department of Justice, and the Federal Trade Commission. On March 26 Senator Nunn addressed the Annual Meeting of the NAS (speech enclosed*) and presented some specific recommendations for an industry code of ethics (pages 7-11 of enclosed* speech). The NAS immediately undertook the establishment of an effective code of business ethics and so advised Senator Nunn.

The proposed Code of Business Ethics was formally adopted by the NAS Board of Directors on June 16, 1981, and a copy was sent to Senator Nunn and Commission staff for comments. Senator Nunn's letter of July 28, 1981 is enclosed.* On August 25 the NAS membership was informed of the Board's actions and was sent a copy of the proposed Code of Business Ethics and memorandum of explanation (copy enclosed*).

The proposed Code is not now in effect and will not be implemented until receipt of an advisory opinion from the Commission. Should the Commission recommend changes to the proposed Code, the Code will not be implemented until those recommendations are adopted. In that regard, the NAS has its semiannual meeting on September 23-25, 1981, and we respectfully request a response from the Commission prior to that meeting so that prompt action may be taken to establish and implement an effective and lawful Code of Business Ethics.

We have carefully reviewed the applicable law and Commission rules and published Administrative Opinions and Rulings (16 CFR 15.1-15.491) and believe that the proposed Code does not violate any of them. In all cases, save one, a member company may be disciplined only after notice and hearing by the NAS Board of Directors. We believe that automatic termination of membership upon conviction of a crime is not discriminatory or arbitrary, and that the conviction of

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*Not reproduced herein. Copies of all Attachments are available for inspection in Room 130, Public Reference Branch, Federal Trade Commission, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

a crime, or a plea of guilty, is just as damaging to one's reputation or ability to compete as explusion from the NAS.

We look forward to early advise by the Commission.

Sincerely yours,

/s/ Thomas D. Wilcox

Executive Director and General Counsel

Peer review plan for resolving fee-related disputes. [*823 0001, Iowa Dental Association*]

April 3, 1982

Dear Mr. Sfikas:

This is in response to your request for an advisory opinion concerning a proposed program for peer review of dental fees by the Iowa Dental Association ("IDA" or "Association") and its component district dental societies.

It is the Commission's understanding that IDA wishes to institute a peer review program to aid the cost containment efforts of third-party payors[1] and assist patients in the resolution of fee-related disputes with dentists. Under the proposed IDA peer review program, a patient, a third-party payor or a dentist involved in a particular fee dispute may request a determination by a peer review panel of an IDA component district dental society as to the appropriateness of the fee charged in that particular case. Participation in the program will be purely voluntary (with no proceeding held unless each of the disputants agrees to participate)[2] and all determinations will be purely advisory in nature. Furthermore, the decision of each peer review panel will be based solely on the facts and circumstances of the particular case and will not be disseminated beyond the patient, third-party payor, and dentist involved in the case. Similarly, distribution of decisions internally will be limited to the dissemination required to perform appellate and administrative functions, and the Association will neither collect information on dental fees nor conduct surveys relating to such fees.

Based on its understanding of the fee peer review program as it is outlined above and further detailed in your submissions, it is the Commission's opinion that operation of the program would not, in and of itself, be violative of Section 5 of the Federal Trade Commission Act.

The Commission is of the view, however, that great care must continually be taken in carrying out the program to assure that its purpose remains legitimate and that it does not produce significant an-

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[1] Third-party payors (also called "third-party providers" in IDA's submissions) are entities — such as insurance companies, service companies, or employers — who reimburse patients for all or part of the cost of dental care, or make direct payments to dentists on behalf of patients for such services.

[2] Thus, when a dispute is between a third-party payor and a dentist, both the third-party payor and the dentist must agree to participate in the particular proceeding. Likewise, when the dispute is between a patient and his or her dentist, both the patient and dentist must agree to participate for the peer review process to be utilized.

ticompetitive effects and thereby run afoul of the antitrust laws.[3] Proffered guidance given under the auspices of a major professional society can readily become coercive if the voluntary and advisory nature of the program is not perceived and sustained by all participants. Likewise, joint action relating to fees can readily threaten independent pricing, if determinations about particular past prices become generalized in future fee or reimbursement decisions. IDA should avoid antitrust risk, therefore, by vigilantly safeguarding the voluntary and advisory nature of the fee peer review process, and the limited scope of each proceeding, to prevent a lessening of price competition or innovation and to avoid unlawful coercion.

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. The Commission believes that limited dissemination of fee decisions by the peer review panels is crucial if the program is to serve as a mediation service, rather than a means to faciliate price fixing or coercion. Serious antitrust concerns would therefore arise if IDA, district societies, Association members, or the disputants involved in particular peer review proceedings allowed panel decisions to become widely known.

Of equal importance, the difficulty and complexity of a procedure should be evaluated based on the individual expertise and judgment of the panel members. To the extent that any reference is made to external factors or benchmarks, such as relative value scales, consideration should be limited to fee information not sponsored or sanctioned by the Association or a component dental society. Likewise, peer review of fees would be subject to antitrust challenge if it were used either to discipline dentists who engage in advertising or other forms of competition or to discourage innovative practices not officially approved or widely used within the professional community. The Association should take no steps to discipline either panelists who do not follow IDA's policies or member dentists who decline to utilize the peer review process or accept its guidance.

To prevent unlawful coercion of third-party payors, IDA should make it clear that the Association is neither conferring preferred status on insurers and other companies that participate in the program and accept panel recommendations, nor urging members den-

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[3] The Supreme Court will clarify in a pending case the extent to which peer review is within the antitrust exemption for the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq. Pireno v. New York State Chiropractic Association*, 650 F.2d 387 (2d Cir. 1981), *cert. granted*, _____ U.S. _____ (Sup. Ct. Nos. 81-389, 81-390 Nov. 16, 1981). It therefore does not seem warranted for the Commission to offer its own advice to IDA on this issue at this time.

tists to avoid or pressure companies that fail to participate in the program and acquiesce in panel recommendations. Furthermore, antitrust concern would be triggered if the program were used to determine whether a third-party payor's fee schedule or reimbursement program is sufficient or reasonable — the likelihood that the program would have anticompetitive effects would be minimized if it only determines the appropriateness of a particular dental fee charged in a particular case. Likewise, the fee review program may not be used to pressure third-party payors into accepting or standardizing particular definitions of what is a "usual" or "customary" fee. When a dispute involves one of those terms, antitrust risk would be reduced if the panel takes the third-party payor's definition as given.

Furthermore, dentist-patent disputes need to be handled with special care when no third-party payor is involved. A third-party payor independently establishes its own general contractual criteria and standards for reimbursement and is often able to make an independent appraisal of the overall fairness of the fee peer review process and of individual peer review decisions. A patient bringing a claim to the program will have no previously established criteria or payment formula and will usually be unable to make such appraisals. And, unlike the third-party payors, the patient may not have the financial ability or incentive to defend his or her position in court if dissatisfied with the peer review determination. Where no insurance contract or prior fee agreement between dentist and patient exists, IDA should be particularly careful not to let the peer review process be used to set or sanction particular "reasonable" or "customary" fee levels for general use by members. Also, it is most important that the patient be made aware of the voluntary and advisory nature of the process and, if he or she chooses to participate, be given a fair hearing. IDA might specifically advise patients that peer review determinations are based on the experience and judgment of the individudal panel members and do not represent formal adjudications, based on a formula, that the patient is bound to accept. IDA might also consider adding safeguards that will help assure that dentist-patient disputes are resolved in an even-handed manner. Though not required, having local consumer organizations help select "consumer representatives" to be added to panels hearing such disputes might be one such safeguard. Alternatively, local government representatives or consumer organizations might supply IDA or their district dental society with a list of knowledgeable "consumer advisors" to assist a patient who chooses to participate in fee peer review.

Lastly, the Commission maintains the right to reconsider the questions involved or to rescind or revoke its opinion in accordance with Section 1.3(b) of the Rules of Practice in the event that implementation of the peer review program results in anticompetitive effects,

should the purposes of the program no longer remain legitimate, or should the public interest otherwise so require.[4]

By direction of the Commission.

Letter of Request

March 17, 1981

Dear Secretary Thomas:

I represent the Iowa Dental Association (IDA) and on their behalf we hereby request an Advisory Opinion, pursuant to 16 C.F.R. 1.1, permitting IDA to engage in peer review of fees of Iowa dentists.

Frequently, consumers, and in most instances, third-party providers, request IDA's guidance in determining whether fees charged by particular dentists are "excessive" or "unreasonable." IDA should be permitted to aid in this cost containment effort by providing its judgment, when requested, about the reasonableness of specific fees in light of the facts and circumstances of a particular case.

As you are aware, there is ample case support for the proposition that peer review of professional fees is lawful. In *Bartholomew v. Virginia Chiropractors Association,* 612 F.2d 812 (4th Cir. 1980), *cert. denied* 100 S.Ct. 158 (1980), the Court of Appeals upheld a system whereby the Virginia Chiropractors Association, through peer review, advised insurance companies whether questioned fees from chiropractors exceeded usual, customary and reasonable levels.

Similarly, in *American Medical Association v. Federal Trade Commission,* 1980-2 Trade Cas. ¶ 63,569 (2d Cir. 1980), the Court of Appeals specifically stated that a Commission order propriety the AMA from in any way rendering advice about the propriety of the consideration offered for physician's fees "is so broad as to impinge upon valid activity such as professional peer review of the fee practices of physicians." 1980-2 Trade Cas. ¶ 65,569 at p. 77,030. Accordingly, the Federal Trade Commission final order was modified to expressly allow peer review of physicians' fees.

There have also been consent decrees suggesting that peer review of professional fees can be conducted lawfully. Thus, in *United States v. Illinois Podiatry Society,* 1977-2 Trade Cas. ¶ 61,767 (N.D. Ill. 1977), the parties agreed that the podiatry association could not determine maximum fees on the basis of a "relative value guide," but

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[4] This Advisory Opinion, like all those issued by the Commission, is limited to the proposed conduct described in the petition being considered. It does not, or course, constitute approval for the specific operations of any particular peer review program that may be or become the subject of litigation before the Commission or any court.

did allow podiatrists to advise third-parties about the propriety of fees upon their own professional experience as podiatrists. In another related instance, the Department of Justice granted clearance to a proposal by the Maryland State Bar Association to collect statistical information, including fees for typical services. *See* Trade Reg. Rep. (CCH) No. 221 at p. 6 (March 29, 1976).

Although it is clearly unlawful for competitors to agree in any fashion to fix prices, *see, e.g., United States v. Socony-Vacuum Oil Co., Inc.,* 310 U.S. 150 (1940), the fee peer review, clearly, does not rise to the level of fee fixing because it is after the fact. In addition, it is considered procompetitive to make information available in order that markets will operate more rationally. In the instance of professional peer review, patients, and particularly third-party providers, may find it procompetitive and beneficial from a standpoint of cost containment to seek the guidance of dentists in determining whether particular fees are excessive. So long as the third-party is not coerced, directly or indirectly, into seeking this review, the effect should not be anti-competitive. This is particularly true in the area of the professions, since the competitive considerations may be somewhat different than those involved in a typical commercial field. *See, e.g., Goldfarb v. Virginia State Bar,* 421 U.S. 773, 788-89, n.17 (1975). Among those competitive considerations are the needs of third parties to seek advice from professionals regarding particular fees.

Based upon a review of the language in *Bartholomew* and *AMA,* it appears that there is little doubt that a properly structured peer review process is lawful. However, out of an abundance of caution, we wish to present a peer review concept to the Commission for its guidance before IDA takes any steps to effectuate peer review of fees. We bring this matter to the Commission because we are well aware of the FTC efforts to aid the containment of costs in the health care field.

Basically, IDA proposes to handle peer review of fees through a free standing committee which would only be involved in fee review. IDA has another mechanism for quality review. This existing council, which does not review fees, undertakes peer review to determine the appropriateness of care and the quality of treatment.

As presently perceived, the IDA peer review committee would have a ten member group that would be composed of one member from each of ten geographically determined district (local) societies.

Under existing procedure regarding quality of care, the chairman of the local peer review committee appoints a panel of not fewer than three dentists who hear all relevant evidence from both the complainant and the dentist. If necessary, the dentists also will conduct a clinical examination, and if a question of specialty is involved, ask a

specialist to consult with them. After reviewing all of the evidence and performing the clinical review, the committee issues written findings that are transmitted to the IDA Council on Dental Care Programs. The peer review committee would follow a similar procedure.

It would be IDA's intention to ask the dentist and the patient to agree prior to the Peer Review to be bound by the Council's determination, although some consideration has been given to the notion that the committee may state its determination and then let the third party make an independent decision about how much of the claim it wishes to honor.

As IDA envisions it, the following would be reviewed in the fee area:

1. The committee would determine whether the dentist in question has charged that dentist's usual fee. In such instances, the dentist would need to submit to an office audit, so that it would be possible for the committee to determine whether the fee is the same fee charged other patients for the same procedure;
2. The committee would also determine whether the fee is "reasonable" because of any special circumstances involved in the case.

The committee would expressly not determine whether the fee is "customary" for that community and would compile no statistics regarding customary fees or in any other way seek to determine whether the fee is customary. The dentists on the committee would, however, seek to determine what is reasonable in light of all circumstances, including their own professional experience as dentists.

Although the decision in *Arizona v. Maricopa County Medical Society,* 1980-1 Trade Cas. ¶ 63,239 (9th Cir. 1980), *pet. for cert. granted* (March 11, 1981), in which the Ninth Circuit Court of Appeals refused to find the imposition of maximum fees by a group of physicians unlawful *per se,* supports IDA's position, it is by no means necessary to reach that issue to approve the IDA plan. *Maricopa County* involved an agreement by physicians to limit fees, something which comes very close to an agreement regarding fees. On the other hand, in the IDA plan, dentists will merely provide information when the reasonableness or excessiveness of fees are placed in issue.

This whole topic of cost containment of professional fees is not only in the public interest but is also extremely important today.

A state dental association as public spirited as the Iowa State Dental Association should be encouraged by government to undertake a fee peer review. I enclose two typewritten pages prepared by the IDA describing this concept of peer review.

Because of the importance of this topic to all of dentistry we would appreciate your very prompt attention.

I would be happy to supply any further information desired by the Commission and to discuss this proposal with Commission personnel.

Respectfully submitted

/s/ Peter M. Sfikas

PEER REVIEW

I. INTRODUCTORY COMMENTS:

Peer review is accomplished almost daily in each dental office albeit in an unconscious fashion. We all judge our diagnosis, treatment plans and work, and we also judge the diagnosis, treatment plan and work of those who have previously cared for our patients.

Basically, only those with something to hide should fear peer review. Many others fear the process because it is not understood. Review can be successful only when dentists understand the process and are willing to cooperate and respect review. We need to realize that review frequently is for the dentist's protection and for the clarification of points between parties. The Peer Review Committees must demonstrate to all concerned that their actions are just and creditable, not white-washing or excuse making.

The system can be successful only if all involved realize its potentials and are willing to accept the review idea as an essential part of business dealings. The review organization must be fair to the patient, the dentist, the third party and the dental profession.

If communication gaps exist, peer review will not realize its full potential. We must explain principles and ideas to one another. Open communication will establish an easy working arrangement with all involved and let the peer review committees function as such, and not as dental consultants, interpreters of contracts or fee negotiators.

The composition of the District Peer Review Committee should be such that the majority of the members are active general practitioners with several years of experience. The members must be respected for their judgement and integrity, and must be convinced of the actual worth of peer review. These persons should be even tempered and level headed, for some review situations will provide rather strong emotional stimuli. The ability to make a fair judgement, despite personalities, is all-important.

STATEMENT REGARDING PEER REVIEW
COMMITTEES AND FEE REVIEWS

In the event the complaint being investigated involves a complaint regarding the fee charged by the dentist, the committee may evaluate the dentist's usual fee and the reasonableness of the fee.

In evaluation of a dentist's usual fee, much will depend of the willingness of the dentist to allow the committee to conduct an in-office audit. The committee must be able

to compare the questioned fee against fees the dentist charges other patients for the same procedures, everything else being relatively equal. The purpose of such review will be to make a determination that the challenged fee is or is not the dentist's usual fee for the same procedure.

The committee may review the reasonableness of a fee to determine that the circumstances of a particular case are such as to warrant the dentist charging more than his usual fee. The purpose of the committee review is not to determine what the fee should be, but only to determine whether the fee is reasonable because of special circumstances, to charge a fee different than the usual fee charged by the dentist.

The committee should not make any determination whether the fee is the customary fee charged in the community. The committee should not collect any fee data or attempt in any way to determine a composite of fees charged in the community in order to determine whether or not a particular fee is in keeping with the customary fees charged in the community. There should be no attempt to investigate what fees are charged for a particular procedure in the community by other dentists.

Second Letter of Request

March 4, 1982

Dear Chairman Miller:

On March 17, 1981, I wrote to the Commission on behalf of the Iowa Dental Association requesting an advisory opinion concerning an Iowa Dental Association proposal for providing peer review of dental fees that patients or insurance carriers question as being excessive. This request for an advisory opinion was made out of an excess of caution because of positions the FTC had taken with reference to the dental profession.

Since this request will aid the effort to contain health care costs, I anticipated that it would be processed quickly by the Commission. To my dismay, I find that the one year anniversary of my request is approaching without any assurance that my request will even have advanced from the Bureau of Competition to the Commission itself.

The advisory opinion procedure is a highly desirable one for clients, such as the Iowa Dental Association, who wish to avoid any possibility that their activities might be deemed improper by the Commission. Moreover, the procedure is far more satisfactory than an adjudicatory procedure for determining, in an economical, timely and cooperative fashion, unique questions of law and policy. However, all of the theoretical benefits of the advisory opinion procedure are negated when it takes over a year to receive a response from the Commission. Both our client and the interested third parties have been completely immobilized by this delay. It is, or course, the ultimate consumer—the patient—that is without this significant effort at cost containment.

Accordingly, I respectfully request that the Commission make every effort to expedite its final decision on the Iowa Dental Association's request for an advisory opinion.

Respectfully,

/s/ Peter M. Sfikas

TABLE OF COMMODITIES*

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*Commodities involved in dismissing or vacating orders are indicated by *italicized* page reference.

DECISIONS AND ORDERS

* Covering practices and matters involved in Commission orders. References to matters involved in vacating or dismissing orders are indicated by *italics*.

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