



DEPARTMENT OF JUSTICE  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20548

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**COMMISSION AUTHORIZED**

December 11, 1992

Ms. Kay E. Gunter  
Executive Director  
Board of Chiropractic Examiners  
P.O. Box 672  
Jefferson City, MO 65102

Dear Ms. Gunter:

The staff of the Federal Trade Commission<sup>1</sup> is pleased to respond to your request for views on the possible restrictive or anticompetitive aspects of the proposed rule to control how chiropractors in Missouri can offer free or discounted services. Although requiring accurate disclosures about the details of an offer can help prevent deception, this proposal, by potentially preventing truthful and non-deceptive offers and discouraging price discounting, could hamper competition and potentially harm consumers.

**I. Interest and experience of the Federal Trade Commission.**

The Federal Trade Commission is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.<sup>2</sup> Pursuant to this statutory mandate, the FTC encourages competition in the licensed professions, including the health care professions, to the maximum extent compatible with other state and federal goals. For several years, the FTC and its staff have investigated the competitive effects of restrictions on the business practices of state-licensed professionals, including physicians, dentists, chiropractors, pharmacists, and other health care providers.<sup>3</sup>

<sup>1</sup> These comments are the views of the staff of the Chicago Regional Office and the Bureau of Competition of the Federal Trade Commission, and do not necessarily represent the views of the Commission or any individual Commissioner.

<sup>2</sup> 15 U.S.C. § 41 et seq.

<sup>3</sup> See, e.g., Iowa Chapter of American Physical Therapy Association, 111 F.T.C. 199 (1988) (consent order); Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988); Preferred Physicians, Inc., 110 F.T.C. 157 (1988) (consent order); Wyoming State Board of Chiropractic Examiners, 110 F.T.C. (continued...)

In addition, the staff has submitted comments on these issues to state legislatures and administrative agencies and others.<sup>4</sup> As one of the two federal agencies with principal responsibility for enforcing antitrust laws, the FTC is particularly interested in restrictions that may adversely affect the competitive process and raise prices (or decrease quality) to consumers. And as an agency charged with a broad responsibility for consumer protection, the FTC is also concerned about acts or practices in the marketplace that injure consumers through unfairness or deception.

## II. Description of the Proposed Rule.

The proposal would add a new section to the Board of Chiropractic Examiners' Rules of Professional Conduct, directed specifically to offers of free or discounted services. Missouri law now subjects "any misleading or deceptive statement offering or promising a free service" to possible disciplinary action.<sup>5</sup>

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<sup>3</sup>(...continued)

145 (1988) (consent order); Connecticut Chiropractic Association, C-3351 (consent order issued November 19, 1991, 56 Fed. Reg. 65,093 (December 13, 1991)); Medical Staff of Holy Cross Hospital, C-3345 (consent order issued September 10, 1991, 56 Fed. Reg. 49,184 (September 27, 1991)); Southbank IPA, Inc., C-3355 (consent order issued December 20, 1991, 57 Fed. Reg. 2913 (January 24, 1992)); Robert Fojo, MD., C-3373 (consent order issued March 2, 1992, 57 Fed. Reg. 9258, (March 17, 1992)); Texas Board of Chiropractic Examiners, C-3379 (order modified April 21, 1992, 57 Fed. Reg. 20279 (May 12, 1992)).

<sup>4</sup> See, e.g., South Carolina Legislative Audit Council (February 26, 1992) (Boards of Pharmacy, Medical Examiners, Veterinary Medical Examiners, Nursing, and Chiropractic Examiners); Texas Sunset Advisory Commission (August 14, 1992) (Boards of Optometry, Dentistry, Medicine, Veterinary Medicine, Podiatry, and Pharmacy); see also Statement of David Keniry, Attorney, Boston Regional Office, Federal Trade Commission, before the Committee on Business Legislation, Maine House of Representatives (January 8, 1992) (optometry).

<sup>5</sup> Mo. Stat., Title 22, Chapter §331.060.2(14)(c) (1989). In general, the statute authorizes disciplinary action only against advertising or solicitation that is false, misleading, or deceptive. The statute lists six particular kinds of communications as included within that category. For two of them, the statutory language repeats the condition that they be "misleading or deceptive." However, in the phrases describing  
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The statute provides further, though, that it is not to be construed to prohibit offering free services "as part of a full disclosure of routine fees including consultation fees."<sup>6</sup> The current rules of professional conduct concerning advertising contain no further specific regulation about offers of free or discounted services.

The first part of the proposed rule would consider any offer or promise of free or discounted service to be false, misleading, or deceptive, unless certain conditions are met. A disclosure form would have to be signed by the patient and retained in the practitioner's files. This form must disclose specifically what the free or discounted service includes, and also that there will be a charge for any other service or treatment. The form must advise that any treatment other than the free service is not of an emergency nature and the patient has the right to refuse it or to get a second opinion about it. And the form must advise the patient that "any service or treatment rendered on the same day as the 'free' or 'discounted' service shall also be free." Read literally, this last condition would seem to prohibit discounts; however, that reading may result from a mistake in drafting. This last condition is probably intended to permit charging an advertised discounted price for a service, but require that any other service provided that day be at no charge.

The second part of the proposed rule does not refer to whether a communication is false, misleading, or deceptive. It sets out three requirements related to, but in some places inconsistent with, those in the first part. First, any practitioner offering free or discounted service could not charge the patient for any service rendered within 72 hours of providing the free or discounted service. This requirement is more stringent than that implied by the first part of the proposal, that any services provided on the same day must be free. Second, specified disclosures would have to be included in any

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<sup>5</sup>(...continued)

the other four--promises of cure, self-laudatory statements, failure to use a specified identifying designator, and disparaging other practitioners or healing arts--that condition is not repeated. If the omission were interpreted to authorize disciplinary action against truthful, non-deceptive claims, the result could be to discourage advertising and injure competition. The Commission has brought law enforcement actions against rules that banned self-laudatory statements. See, e.g., American Medical Ass'n, 94 F.T.C. 701, 1023 (1979); Texas Board of Chiropractic Examiners, C-3379 (order modified April 21, 1992, 57 Fed. Reg. 20279 (May 12, 1992)).

<sup>6</sup> Id.

communication offering a free or discounted service. These disclosures, which are set out as alternatives, cover three somewhat different subjects: specifying in detail the services that are free and the fact that there will be a charge for all others, or advising that all contemporaneous services will be free, or advising of the right to seek a second opinion. Finally, the practitioner who offers a free or discounted service must send a copy of the communication making that offer to the Board, on request.

### III. Effects of Proposed Rule

The proposed rule may be intended to help consumers by preventing possible deception about the true nature of discount or "free" offers. However, the obligations and conditions that the rule would place on offers of free or discounted services may be more burdensome than necessary to protect against deceptive and misleading advertising. On balance, the proposal may harm consumers, by imposing inconvenience, discouraging non-deceptive price advertising, and reducing price competition.

Consumers benefit from competition over prices, products, and services, including competition among providers of professional services. Competition can enlarge the range of goods and service offered to consumers, and it can also lead to lower prices for the goods and services that are offered. For competition to be effective, it is important to permit providers to advertise their services and their prices.<sup>7</sup> Truthful price advertising informs the public about price alternatives, helping to reward sellers that charge lower prices while maintaining quality, and promoting cost consciousness in both consumers and providers. Restraints on price advertising should be tailored narrowly, so that these benefits from this valuable information are not unnecessarily lost.

Research suggests that restricting non-deceptive price advertising often fails to benefit consumers. The staff of the FTC has examined the effects of restrictions on professionals' ability to advertise, in support of the Commission's efforts to foster competition among licensed professionals. For example,

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<sup>7</sup> As the Supreme Court has noted in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the lack of price information "serves to increase the [consumer's] difficulty of discovering the lowest cost seller of acceptable ability. As a result . . . [professionals] are isolated from competition and the incentive to price competitively is reduced." Id. at 377. The absence of such information "serve[s] to perpetuate the market position of established [parties]. Id. at 378.

the Commission's Bureau of Economics found that advertising by vision care providers does not lead to a decline in service quality, but does lead to a decrease in prices.<sup>8</sup> Other studies have confirmed that relationship between advertising, lower prices, and acceptable quality in markets for professional service.<sup>9</sup> These findings imply that restricting truthful, nondeceptive advertising may lead to higher prices without improving quality, and, as a consequence, may decrease consumer welfare.

While these benefits flow from removing restrictions on advertising that is truthful, consumer harm can result from permitting advertising that is false or deceptive; thus, a principal competition and consumer protection policy concern in regulating advertising is the problem of deception.<sup>10</sup> We believe regulation of advertising should be focused on what may be reasonably necessary to prohibit advertising that is false, misleading, or deceptive. Even where experience has shown abuse of some kinds of representations, so that some form of regulation is called for, restrictions on professional advertising should be no broader than reasonably necessary to prevent the deception.<sup>11</sup>

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<sup>8</sup> Bureau of Economics, Federal Trade Commission, Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

<sup>9</sup> See C. Cox and S. Foster, The Costs and Benefits of Occupational Regulation, FTC Bureau of Economics Staff Report October 1990 (reviewing studies reported in economics literature); Bureau of Economics and Cleveland Regional Office, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (November 1984); L. Benham & A. Benham, Regulating through the Professions: A Perspective on Information Control, 18 J. L. & Econ. 421 (1975); Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. L. & Econ. 337 (1972). See also J.R. Schroeter, S.L. Smith and S.R. Cox, Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation, 36 J. Indus. Econ. 49 (1987); T. Calvani, J. Langenfeld and G. Shuford, Attorney Advertising and Competition at the Bar, 41 Vand. L. Rev. 761 (1988).

<sup>10</sup> See FTC Policy Statement on Deceptive Acts and Practices, Cliffdale Associates, Inc., 103 F.T.C. 110 (1984); Removatron Int'l Corp., 111 F.T.C. 206, 308 (1988).

<sup>11</sup> See In re R.M.J., 455 U.S. 191, 203 (1982) (Missouri ban on certain lawyer advertising and solicitation practices overruled, in First Amendment setting, because there was no  
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In determining whether any kind of advertising is likely to be deceptive, it is important to consider what reasonable consumers are likely to infer from it. It should not be presumed that consumers cannot judge for themselves whether, on balance, the combination of price and service in a non-deceptive "free" or "discount" offer is acceptable.

The proposal apparently addresses two possible problems: inaccurate information about the price and service combinations being offered, and "bait and switch" or "bait and add" tactics, that is, attracting customers by leading them to expect one advertised price-service combination and then trying to sell them something else. If either kind of problem were significant enough to justify a regulatory response, a reasonable corrective would be to ensure that providers disclose more completely and accurately the services and prices they are offering, so the consumer has better information on which to make a choice--in short, to ensure that the offer is not deceptive. In form, the proposal adopts "disclosure" approaches, by requiring a disclosure form for individual patients and by establishing required disclosures to be included in all communications and advertisements. Even though disclosure requirements are generally the preferred form of remedy for these problems, it must be remembered that disclosure requirements impose costs. If they are too extensive, they could discourage advertising by increasing its costs and detracting from its impact.

The proposal would not only require that details of fees and services be disclosed, but also would specify how services can be offered. The proposal could discourage offering services for "free," and even offering discounts, by requiring that, if any service is offered at a discount, then every (other) service provided on that same day must be free.<sup>12</sup> Truthful and timely

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<sup>11</sup>(...continued)  
record of abuse); cf. Friedman v. Rogers, 440 U.S. 1 (1978) (permitting, in First Amendment setting, regulation of trade names for optometrists, where experience had shown they were used deceptively).

<sup>12</sup> Both parts of the proposal include a same-day-free-service requirement; in addition, the second part also extends that requirement to all services provided within 72 hours. The second part is superficially analogous to rules like the FTC's own "cooling off" period rule that gives the consumer three days after a door-to-door sale during which the sale can be cancelled. 16 CFR Part 429 (1992). Missouri's proposed rule is more stringent than the Commission's door-to-door sales rule, though; rather than give the consumer a right to a refund, it prohibits the practitioner from offering services for a fee.

disclosure to the patient about what the offer covered and what it did not could not avoid this obligation to provide free services, even to a patient who was in no way deceived and was willing to pay.<sup>13</sup> One effect of the proposal could be immediate inconvenience to consumers, who would have to return to the practitioner's office at a later date for services they might well prefer to get at one time. In addition, the proposal could dampen competition through discount offers, because practitioners offering a discount would have to forgo revenues from other services, at least for a time.<sup>14</sup>

Discount offers, even offers of "free" services, are not inherently deceptive. Like other kinds of price advertising, they can stimulate healthy competition and benefit consumers. In particular, they can be a valuable promotional tool for new practitioners trying to enter the market. While a deceptive offer of free or discounted goods is certainly possible,<sup>15</sup> the proposed rule's free-service mandate is much broader than necessary to prevent such deception. We are unaware of the extent to which such offers by chiropractors have been misleading

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<sup>13</sup> The statute itself may be read to discourage discounts and "free service" offers, although that reading is not required. The section of the statute that prohibits "any misleading or deceptive statement offering or promising a free service" contains a proviso, that it does not prohibit offering a free service "if the offer is announced as part of a full disclosure of routine fees including consultation fees." §331.060.2(14)(c). It is conceivable that truthful, non-deceptive offers of free or discounted services could be made in other settings as well, without a full, detailed disclosure of all fees. These could include across-the-board or targeted discounts, such as "10 percent off for senior citizens." The statute does not require that offers of "free" or discounted services be made only in connection with a full fee disclosure. If it were interpreted so that only that single format was permissible, then it could unnecessarily prevent dissemination of truthful and nondeceptive information about prices.

<sup>14</sup> The prohibition would attach to any discount offer, not just one that was included in an advertisement. Any "communication" of the discount offer, even one made orally in the office, would apparently be subject to the rule. Thus a practitioner who offered during an office visit to reduce or waive part of a patient's bill, perhaps because of inability to pay, would be required to waive all fees for all services performed that day and for the next three days.

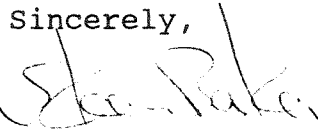
<sup>15</sup> The FTC has issued a guide concerning the use of the word "free" and similar representations. See 16 CFR § 251 (1990).

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or deceptive. Thus we are not in a position to say that no corrective action is called for. But case by case enforcement of the statute's general "false, misleading or deceptive" standard, or a disclosure requirement that is targeted directly at the problem of deception, would be preferable to a regulation like this one, which could eliminate non-deceptive price offers and unnecessarily discourage price competition.<sup>16</sup>

#### IV. Conclusion

We believe that the proposal to regulate offers of "free" and "discounted" services could harm consumers by prohibiting truthful and non-deceptive advertising, discouraging discounts, and dampening competition.

Sincerely,  
  
C. Steven Baker  
Director

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<sup>16</sup> Four subsections of the statute concerning advertising might be read to prohibit advertising and solicitation that is not false, misleading, or deceptive, and if so, could raise competition concerns. See n. 5. In addition, two other aspects of the existing rule about advertising could raise problems. Direct mail solicitation, except by mass mailing, is "presumed to be vexatious, harassing and unprofessional," and is apparently banned. Rule 6(H). That ban may extend further than necessary and inhibit useful and non-coercive marketing practices. See Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (regulation banning direct, targeted mail solicitation held unconstitutional). The listing in Rule 6(G) of the topics that are permitted in communications is unobjectionable in itself, but problems could arise if it were applied to discourage communicating any information other than the three types specifically listed (professional credentials, basis for fees, and available credit).