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FEDERAL TRADE COMMISSION

COMMISSION AUTHORIZED

Seattle Regional Office
2806 Federal Building
915 Second Avenue
Seattle, Washington 98174
(206) 442-4656

December 7, 1987

Dorothy Hodgson, Chairman
Idaho State Board of Chiropractic Physicians
Bureau of Occupational Licenses
Department of Self-Governing Agencies
State of Idaho
2417 Bank Drive #312
Boise, Idaho 83705-2598

Attention: M. D. Gregersen, Chief
Bureau of Occupational Licenses

Dear Ms. Hodgson:

The Seattle Regional Office and the Bureaus of Consumer Protection, Economics and Competition of the Federal Trade Commission are pleased to have the opportunity to comment on the proposed amendments to the rules of the Idaho State Board of Chiropractic Physicians.¹

In our comments, we focus upon Section H of the proposed rules. This section governs advertising by chiropractic physicians. Several aspects of the proposed changes to Section H are likely to benefit consumers. For example, the Board's general limitation of its restrictions on advertising by chiropractic physicians to fraudulent, false, deceptive or misleading advertising is likely to benefit consumers by encouraging all forms of truthful, nondeceptive advertising. The Board's proposed deletion of its present restrictions on "sensational or fabulous" statements and on advertising that has "a tendency to . . . impose upon credulous or ignorant persons" may benefit consumers by removing restrictions that may deter some forms of truthful, nondeceptive advertising.

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

We are concerned, however, that two provisions in the proposed amendments may harm consumers by restricting the dissemination of truthful information. These provisions limit advertising by chiropractic referral services and prohibit advertising that "is likely to appeal primarily to a lay person's fears, ignorance or anxieties regarding his state of health or physical well-being." Because these provisions may deter truthful, nondeceptive advertising without providing countervailing benefits, the Board may wish to consider deleting these restrictions from its proposal. Specific instances of false or misleading advertising that fall within these categories would, of course, still be prohibited under the Board's general prohibition of fraudulent, false, misleading or deceptive advertising.

I. Interest and Experience of the Federal Trade Commission

The Federal Trade Commission is empowered under Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to its statutory mandate, the Commission has attempted to encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals.² The Commission's staff has examined the competitive effects of restrictions on the advertising and business practices of state-licensed professionals, including physicians, dentists, optometrists and lawyers. Our goal is to identify and seek the removal of restrictions that impede competition or increase costs without providing countervailing benefits to consumers.

² Under Section 6 of the Federal Trade Commission Act, 15 U.S.C. § 46, the Commission is authorized to make public the information it has gathered on competition and consumer welfare issues. Pursuant to this section, the Commission's staff has previously submitted comments to state governments and professional associations on the regulation of professional advertising. See, e.g., Comments of the Federal Trade Commission Staff on the Rules of Professional Conduct of the New Jersey Supreme Court, submitted to the Committee on Attorney Advertising of the New Jersey Supreme Court, November 9, 1987; Comments of the Federal Trade Commission Staff on the rules of the New Mexico State Board of Chiropractic Examiners, December 17, 1986; Comments of the Federal Trade Commission Staff on the Regulations of the Virginia Board of Dentistry, April 3, 1986 (available from the Office of Public Affairs, Federal Trade Commission).

The Commission has found some restrictions on truthful advertising by professionals to violate Section 5 of the Federal Trade Commission Act.³ These Commission findings are consistent with recent U. S. Supreme Court decisions, which have struck down various restrictions on professional advertising that restrict the flow of useful information to consumers without producing countervailing benefits.⁴ Studies conducted both by the Commission staff and by academic researchers also support the elimination of restrictions on truthful, nondeceptive advertising

³ See American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982) (holding that the AMA had illegally conspired to restrain competition among physicians by suppressing, through its ethical guidelines, truthful advertising and other forms of solicitation by member physicians.) The AMA decision specifically held "that broad bans on advertising and solicitation are inconsistent with the nation's public policy." 94 F.T.C. at 1011. Cf. Wyoming State Board of Chiropractic Examiners, File No. 861-0019 (October 14, 1987) (tentatively approved consent order) (settling charges that the Board, through its regulations, had restrained competition by restricting truthful advertising of prices, terms and other information); Wyoming State Board of Registration in Podiatry, 107 F.T.C. 19 (1986) (consent order) (settling charges that the Board, through its regulations, had restrained competition among podiatrists by restricting the truthful advertising of podiatric goods and services); and Louisiana State Board of Dentistry, 106 F.T.C. 65 (1985) (consent order) (settling charges that the Board, through its regulations, had restrained competition by restricting the truthful advertising of prices and claims of professional superiority.

⁴ See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (holding that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information regarding the legal rights of potential clients or for using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding a state supreme court prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding a Virginia prohibition on advertising by pharmacists invalid).

by professionals. For example, several studies indicate that prices for professional goods and services are higher when advertising is restricted or prohibited than when it is allowed.⁵ Empirical evidence also indicates that, even though such restrictions lead to increased prices, they do not increase the quality of the services provided to consumers.⁶

II. Proposed Deletion of Restrictions on Sensational or Fabulous Statements and on Advertising That May Tend to Impose Upon Credulous or Ignorant Persons

The proposed amendments would delete the Board's present restrictions on "sensational or fabulous" statements and on advertising that "has a tendency to . . . impose upon credulous or ignorant persons." Since these provisions may deter truthful, nondeceptive advertising, the proposed deletion of these restrictions may benefit consumers. Specific instances of false or misleading advertising that fall within these categories would, of course, still be prohibited under the Board's general prohibition of fraudulent, false, misleading or deceptive advertising.

The Board's current ban on sensational or fabulous advertising may deter truthful advertising because it is subject to broad and subjective interpretations. Such interpretations may prohibit nondeceptive statements or innovative marketing techniques that are commonly used by other providers of goods and services. For example, the use of certain words or phrases, such as "superb" or "money-back guarantee", or certain types of advertising techniques, such as television jingles, may be

⁵ Bureau of Economics and Cleveland Regional Office, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and 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).

⁶ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976); McChesney and Muris, The Effect of Advertising on the Quality of Legal Services, 65 A.B.A.J. 1503 (1979); Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979).

viewed as sensational when used to advertise professional services. Such advertisements may, however, be particularly effective in communicating accurate information to consumers.

The Board's current prohibition of advertising that has a tendency to impose upon credulous or ignorant persons may similarly deter the dissemination of truthful, nondeceptive information. Under this standard, a chiropractor could be held responsible for ensuring that his or her advertisements will not be unreasonably misinterpreted by a few uninformed or unrepresentative members of the target audience. Such a standard may be broader than necessary to protect consumers from false or deceptive advertising. For example, in the Federal Trade Commission's 1983 Deception Policy Statement, the Commission noted that, to be deceptive, an advertisement must be likely to mislead consumers acting reasonably under the circumstances.⁷ Imposing responsibility for unreasonable interpretations of their advertisements upon chiropractors may significantly deter truthful advertising about chiropractic services, thereby depriving chiropractors of a significant competitive device and denying potentially valuable information to consumers. As discussed below, however, if particular advertisements are targeted at a group that is likely to be particularly credulous or ignorant, it may be appropriate to examine the advertisements from the perspective of the typical member of that group.⁸ By employing such a standard in enforcing its general prohibition of deceptive or misleading advertising, the Board should be able to effectively prohibit advertising that is likely to deceive or mislead particularly susceptible groups.

⁷ Cliffdale Associates, 103 F.T.C. 110, 174 (1984) (appendix to opinion.) The Commission has also held that:

An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it therefore an actionable deception to advertise "Danish pastry" when it is made in this country? Of course not. A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.

Heinz W. Kirchner, 63 F.T.C. 1282, 1290 (1963).

⁸ See Cliffdale Associates, 103 F.T.C. 110, 179 (1984).

III. Proposed Restrictions on Advertising by Chiropractic Referral Services and on Advertisements Likely to Appeal to Fears, Ignorance or Anxieties Concerning Health

Sections H(2) and H(4) of the Board's proposed rules impose new restrictions on advertising by chiropractic referral services and prohibit advertisements that are "likely to appeal primarily to a lay person's fears, ignorance or anxieties concerning his health or physical well-being." Since both of these provisions may prohibit the dissemination of truthful, nondeceptive information, the Board may wish to consider narrowing or deleting Sections H(2) and H(4).⁹

In general, referral services serve a valuable function for health care professionals and for consumers. Such services enable practitioners to pool their advertising resources while maintaining independent practices. Referral services also benefit consumers by providing useful information about the availability, locations, hours or areas of expertise of particular chiropractors. Section H(2) of the proposed rule states, however, that it is "misleading and deceptive for a chiropractor or group of chiropractors to advertise a chiropractic referral service or bureau unless each advertisement specifically names each of the individual chiropractors who are participating in such service or bureau." Advertisements that do not contain the names of all members of the referral bureau are not, however, inherently deceptive and thus do not seem appropriate targets for a total ban. Furthermore, requiring a chiropractic referral service to list all members of the service in each advertisement is likely to be unduly costly. Indeed,

⁹ It is our understanding that Section H(2) is not intended to prohibit all advertisements that make only a partial disclosure of relevant facts. An absolute prohibition on advertisements that make only a partial disclosure of relevant facts would seem overly broad since, by their very nature, most advertisements could not disclose all the facts relevant to decisions to select particular chiropractic services or particular chiropractors. The wording of Section H(2) may suggest, however, that advertisements that make only a partial disclosure of all relevant facts are prohibited. The Board may wish to clarify the language of the introductory sentence of Section H(2) to make it clear that this section prohibits only advertisements that omit material facts in a manner that is likely to deceive consumers.

It is also our understanding that Section H(2) prohibits advertisements that omit material facts in a manner that is likely to deceive consumers whether or not such advertisements fall within the specific categories set forth in Section H(2). To make this clear, the Board may wish to replace the phrase "more specifically" with the phrase "for example" in the second sentence of Section H(2).

this requirement may render some forms of advertising, such as radio or television advertising, prohibitively expensive, as well as significantly less effective. Placing such a burdensome requirement upon chiropractic referral services would seem harmful both to chiropractors and to consumers, who may be denied access to useful information about chiropractic services.

It is our understanding that the proposed restrictions on advertising by chiropractic referral services were designed at least in part to address instances in which a few chiropractic practitioners may mislead consumers by deceptively advertising themselves as chiropractic referral services. Such deceptive practices could, however, be addressed under the Board's general prohibition of false, misleading or deceptive advertising. In the alternative, the Board could draft a narrow restriction that would prohibit this type of practice without imposing burdensome restrictions on legitimate referral services. As presently drafted, this provision would actually place a greater burden on legitimate referral services that have large numbers of members than on referral services that have only a few members.

The Board's proposed prohibition of advertising that is likely to appeal primarily to the fears, ignorance or anxieties of lay persons regarding their health or physical well-being may also deter truthful, nondeceptive advertising by chiropractic physicians. For example, this provision appears to prohibit truthful, nondeceptive advertising that addresses prospective patients' concerns or anxieties about their health even if those concerns or anxieties are fully justified and could be alleviated by appropriate chiropractic treatment. Moreover, this prohibition could be construed to prohibit virtually any advertisement designed to attract the attention of, or even to provide truthful information to, persons with particular physical problems that could be helped by chiropractic physicians. As a result, this restriction may stem the flow of useful information about chiropractic services to the very consumers who need and desire that information the most.

We appreciate the Board's interest in prohibiting advertisements that prey upon lay persons' apprehensions about their health, and we commend the Board's efforts to clarify its previous standard. However, a prohibition on all advertising that may appeal to such apprehensions seems overly broad. The Board can attack specific instances of abusive advertising that might fall within this category under its general prohibition of misleading or deceptive representations. In considering such advertising, the Board may wish to take into account the possibility that the advertising is targeted at groups that may not interpret it in the same manner that an ordinary, reasonable consumer would. In its Deception Policy Statement, the Commission discussed advertising directed at these types of consumers. The Commission indicated that terminally ill consumers, for example, might be particularly susceptible to exaggerated claims of cures. In such cases, the Commission

indicated that it would evaluate the advertising "from the perspective of how it affects the ordinary member of [the] group."¹⁰ Thus, in examining chiropractic advertising that may prey upon lay persons' apprehensions about their health, the Board may wish to evaluate the advertising from the perspective of the ordinary member of the groups to whom such advertising is targeted in determining whether the advertising is misleading or deceptive.

Furthermore, in some instances, misleading or deceptive advertising of this type may be proscribed by Section H(3) of the Board's proposed rules, which prohibits advertising that creates false or unjustified expectations of beneficial treatment or successful cure. Addressing specific instances of false or misleading advertising seems preferable to prohibiting all advertising that appeals primarily to prospective patients' concerns about their health.

IV. Conclusion

The Board's proposed limitation of its restrictions on advertising by chiropractic physicians to fraudulent, false, ~~misleading or deceptive~~ advertising is likely to prove beneficial to consumers. The Board may, however, wish to consider narrowing or deleting its broad proposed restrictions on advertising by chiropractic referral services and on advertising that is likely to appeal primarily to the fears, ignorance or anxieties of lay persons regarding their health or physical well-being. Such restrictions could have the unintended effect of inhibiting the dissemination of truthful information about the nature and availability of chiropractic services.

We appreciate your willingness to consider our comments on the Board's proposed rules. Please feel free to call or write if we can be of any further assistance.

Sincerely,



George J. Zweibel
Director
Seattle Regional Office

¹⁰ Cliffdale Associates, 103 F. T. C. 110, 179 (1984).