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COMMISSION AUTHORIZED

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
DALLAS REGIONAL OFFICE

100 N. Central Expressway
Suite 500
Dallas, TX 75201
(214) 767-5503

Office of the Regional Director

August 14, 1992

Bill Wells
Director
Sunset Advisory Commission
P. O. Box 13066
Austin, Texas 78711-3066

Dear Mr. Wells:

The staff of the Federal Trade Commission[1] is pleased to respond to the invitation of the Sunset Advisory Commission of the State of Texas ("SAC") to offer comments for the SAC's consideration in its review of the boards that regulate the health care professions. The comments below identify and discuss provisions of the statutes governing these boards that we believe may have anticompetitive effects and thereby injure 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 practices in or affecting commerce.[2] 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 more than a decade, the FTC and its staff have investigated the competitive effects of restrictions on the business practices of state-licensed professionals, including dentists, physicians, pharmacists, and other health care

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[1] These comments are the views of the staff of the Dallas Regional Office of the Federal Trade Commission, and do not necessarily represent the views of the Commission or any individual Commissioner.

[2] 15 U.S.C. § 41, *et seq.*

providers.[3] In addition, the staff has submitted comments about these issues to state legislatures and administrative agencies and others.[4] 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.

II. Analysis of the Statutes

The SAC is reviewing the status of twenty boards that are engaged in licensing and regulating providers of health care services. Occupational regulation may promote or assure a standard of service quality to consumers, especially when judging quality is more difficult for consumers than for providers. Regulation may also counter problems that may arise when a professional's services could affect third parties and risks that the combination of "diagnosis" and "prescription" may lead to abuses. Of course, licensing and regulation are not the only ways to address these concerns. For example, consumers may obtain information about

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[3] *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. 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).

[4] *See, e.g.*, Comments to Florida Office of the Auditor General (November 28, 1990) (Board of Pilot Commissioners and Board of Medicine); Jeffrey W. Moran, Commerce and Regulated Professions Committee, General Assembly of New Jersey (April 11, 1991) (dispensing and sale of prescription drugs by physicians); South Carolina Legislative Audit Council (February 26, 1992) (Board of Pharmacy, Board of Medical Examiners, Board of Veterinary Medical Examiners, Board of Nursing, and Board of Chiropractic Examiners); *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).

service quality from experience, advertising, and reputation, as well as from the assurances provided by licensing and regulation. Texas law applicable to many of these professional boards limits the boards' power to regulate or prohibit truthful advertising, and thus recognizes that regulation should not prevent consumers from obtaining useful information.[5] These limitations appear to be the product of a policy[6] that the SAC applies to all boards with licensing authority.

Restrictions on business aspects of professional practice, even when well-intentioned, do not always benefit consumers. Many studies have found little relationship between restrictions on professionals' business practices and the quality of care provided.[7] Also, restrictions can limit professionals' ability to compete effectively with each other. Consumers may be harmed when professional restrictions diminish competition. Moreover, professional restrictions can make it more difficult and costly for professionals to perform certain business practices, and these higher costs may be passed on to consumers as higher prices and reduced services. The potential for such adverse effects should be weighed against the intended benefits of professional regulation.

The principal issues are discussed in the sections of this comment dealing with the boards for optometry, dentistry, and medicine. Where the same issues appear also in the statutes

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[5] In essentially identical language, several boards are forbidden to adopt rules restricting competitive bidding or advertising, except to prohibit false, misleading, or deceptive practices; moreover, these boards' rules about advertising may not restrict the advertising medium, use of personal appearance or voice, size or duration, or advertisement under a trade name. See Tex. Rev. Civ. Stat. Ann. arts. 4512b, § 17b (chiropractors); 4512c, § 8(h) (psychology); 4512e, § 19(5)(b) (physical therapy); 4512g, § 6(e) (professional counselors); 4512h, § 6(c) (licensed dietitians); 4514, § 3 (nurses); 4528c, § 5(k) (licensed vocational nurses); 4548f, § 1 (dentistry); 4566-1.12A (hearing aids); 8890, § 8 (veterinarians).

[6] Sunset Advisory Commission, Summary of Process and Procedure, September 1991, p. 14.

[7] 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).

governing another profession, the principal discussion is cross-referenced.[8]

A. Board of Optometry

The Texas statutes governing the practice of optometry contain restraints on "commercial practice" that have been the subject of extensive FTC study and rulemaking efforts. The FTC's rulemaking proceeding concerning the eye care industry in the 1970's produced the 1978 trade regulation rule against restraints on advertising.[9] That proceeding revealed that restrictions on advertising were not the only government-imposed restraints that appeared to limit competition unduly, increase prices, and reduce the quality of eye care provided to the public.

To examine the effects of these other restraints, the staff of the FTC conducted two comprehensive studies. The first, published in 1980 by the FTC's Bureau of Economics, compared the price and quality of optometric goods and services in markets where commercial practices were subject to differing degrees of

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[8] For the most part, the comment deals with the statutes, rather than the regulations that the Boards may have adopted, except where the implementing regulations are found to raise issues not disclosed in the statute. Because the volume of materials is large, we have focused on provisions that we believe have the greatest potential for anticompetitive effect. The fact that certain statutory provisions or regulations are not addressed does not necessarily imply that they do not have anticompetitive effects.

[9] Advertising of Ophthalmic Goods and Services, 16 CFR Part 456 ("Eyeglasses Rule"). The FTC found that prohibiting nondeceptive advertising by vision care providers and failing to release eyeglass lens prescriptions to the customer were unfair acts or practices in violation of section 5 of the FTC Act. The Eyeglasses Rule prohibited bans on nondeceptive advertising and required vision care providers to furnish copies of prescriptions to consumers after eye examinations. On appeal, the Eyeglasses Rule's prescription release requirement was upheld but the advertising portions were remanded for further consideration in light of the Supreme Court decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (finding state supreme court rules against attorney advertising violated the First Amendment). *American Optometric Association v. FTC*, 626 F.2d 896 (D.C. Cir. 1980). Rather than reinstate the advertising portions of the Eyeglasses Rule, the FTC has addressed advertising restrictions through administrative litigation. *See, e.g., Massachusetts Bd. of Optometry*, 110 F.T.C. 549 (1988).

regulation.[10] The second, published in 1982 by the Bureaus of Consumer Protection and Economics, compared the price and quality of the cosmetic contact lens fitting services of commercial optometrists and other provider groups.[11] The studies concluded that restrictions on optometrists' commercial practices raise prices but do not improve the quality of care. The Bureau of Economics Study was conducted with the help of two colleges of optometry and the Director of Optometric Services of the Veterans Administration. It found that commercial practice restrictions in a market resulted in higher prices for eyeglasses and eye examinations but did not improve the overall quality of care in that market. The study data showed that prices were substantially higher in the markets that barred commercial chain firms. And the Contact Lens Study concluded that, on average, "commercial" optometrists (for example, optometrists who were associated with chain optical firms, used trade names, or practiced in commercial locations) fitted cosmetic contact lenses at least as well as other fitters, but charged significantly lower prices.

During the 1980's, the FTC conducted an extensive rulemaking proceeding concerning restraints on commercial eye care practice.[12] The FTC concluded that restrictions on commercial practices have caused significant injury to consumers, in both monetary losses and less frequent vision care, without providing consumer benefit.[13] Consumers spent over eight billion dollars on eye examinations and eyewear in 1983, a figure that included a substantial cost attributable to the inefficiencies of an industry protected from competition.[14] Based on the evidence assembled in the rulemaking proceeding, the FTC concluded that many regulatory and legislative

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[10] Bureau of Economics, Federal Trade Commission, Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980) ("Bureau of Economics Study").

[11] Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983) ("Contact Lens Study").

[12] In the course of the formal "Eyeglasses II" rulemaking, the FTC received 243 initial comments, 24 rebuttal comments, and testimony from 94 witnesses during three weeks of public hearings. The commenters and witnesses included consumers and consumer groups, optometrists, sellers of ophthalmic goods, professional associations, federal, state and local government officials, and members of the academic community.

[13] Commission Statement, *supra* n. 15 at 10286.

[14] Commission Statement, *supra* n. 15 at 10285-86.

restraints on commercial practice had harmful effects, and adopted a rule[15] to prohibit state-imposed restrictions on four types of commercial arrangements: affiliating with non-optometrists, locating in commercial settings,[16] operating branch offices, and using nondeceptive trade names.

The Eyeglasses II rule was vacated by the court, on the ground that the FTC lacked the statutory authority to make rules declaring state statutes unfair. But the FTC's substantive findings,[17] that the restrictions harmed consumers, were not disturbed. The evidence from the FTC's rulemaking record remains a compelling argument for eliminating restraints on commercial practice.

Texas law tends to inhibit commercial practices in two of the ways addressed by the FTC's rule: limiting affiliations with non-optometrists and restricting branch offices.[18] Business relationships with non-professionals, including manufacturers, wholesalers or retailers of ophthalmic goods, are sharply restricted.[19] An optometrist may not work for such an entity, as an employee or under contract, or share employees or services with

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[15] Ophthalmic Practices Rule ("Eyeglasses II"), Statement of Basis and Purpose, 54 Fed. Reg. 10285 (March 13, 1989) ("Commission Statement").

[16] In addition, the Commission decided to retain, with modifications, the prescription release requirement from the original Eyeglasses Rule.

[17] *California State Board of Optometry* v. *FTC*, 910 F.2d 976 (D.C. Cir. 1990), *reh'g denied*, January 8, 1991.

[18] Texas does permit some practices that have been considered "commercial." Optometrists may practice under trade names, occupy space in commercial or mercantile locations, and enter lease arrangements with dispensing opticians. Tex. Rev. Civ. Stat. Ann. arts. 4552-5.13(d), 4552-5.14(a), and 4552-5.15(d). In some respects, optometrists may be confined to conventional office locations; they may not provide services "house to house or on the streets and highways." *See* Tex. Rev. Civ. Stat. Ann. art. 4552-5.04(5). The effect of this prohibition is unclear. Possible problems of prohibiting practice outside conventional office settings are discussed at p. 14 below, in connection with the limitation of mobile dental care services.

[19] Tex. Rev. Civ. Stat. Ann. art. 4552-5.11, Control of optometry prohibited.

it.[20] Aspects of the optometrist's practice that may not be "controlled" by another entity include not only professional judgment and fees, but also such details of "manner of practice" as office hours and whether the optometrist sees patients on a walk-in basis.[21] The name or practice of an optometrist may not be used in advertisements or signs in connection with any mercantile establishment.[22] The "two-door" rules require that an optometrist practicing in the same building as a dispensing optician must occupy a separate space with a separate entrance, walled off from the optician's business.[23] Relationships between optometrists and dispensing opticians' businesses are permitted only one-way: firms in the dispensing business may not employ optometrists, set up optometry practices as divisions of their operations, or even share a receptionist with an optometry office, but optometrists may hold shares in and be partners in optical goods businesses whose operations are integrated with their practices.[24] Even then, such a combined entity may not have more than three branch offices.[25]

Restrictions on affiliations with non-professionals and on associations with other businesses prevent business corporations or non-optometrists from employing optometrists and prevent optometrists from entering partnerships and franchise agreements with non-optometrists. Such restrictions may deny optometrists access to sources of capital and tend to inhibit the development of large-scale practices that can take advantage of volume purchase discounts and other economies of scale. The likely result of

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[20] In addition, optometrists may not "split" fees with any non-professional individual, firm or corporation; however, arrangements for services paid for by a percentage of gross receipts are permitted. Tex. Rev. Civ. Stat. Ann. art. 4552-5.13(b).

[21] Tex. Rev. Civ. Stat. Ann. art. 4552-5.11(b)(3).

[22] Tex. Rev. Civ. Stat. Ann. art. 4552-5.14(g). The FTC has held that a rule adopted by a professional regulatory board to the same effect as this statute was an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).

[23] Tex. Rev. Civ. Stat. Ann. art. 4552-5.15(b).

[24] Tex. Rev. Civ. Stat. Ann. art. 4552-5.15(c), (d). The businesses must have separate books and records.

[25] Tex. Rev. Civ. Stat. Ann. art. 4552-5.11(g). As long as it is owned completely by health care professionals, it would be exempt from many restrictions on integrating the optometry and optical goods businesses.

excluding high-volume practitioners from the market and preventing practitioners from operating at the most efficient level is higher prices for optometric goods and services.[26]

We encourage the removal of provisions prohibiting optometrists from working for lay persons or entering into partnerships or other associations with them. Restrictions on these types of business formats may prevent the formation and development of forms of professional practice that may be innovative or more efficient, provide comparable or higher quality services, and offer competition to traditional providers.[27] We also support efforts to remove restrictions on optometrists practicing in commercial locations. Texas permits operation in such locations, but the "two-door rule" inhibits coordinating an optometry practice with a dispensing optician's outlet. We question whether such a restriction serves any purpose other than inhibiting the formation of high-volume commercial practices.[28]

B. Board of Dentistry

Several aspects of the law governing dentists raise concerns. Some features of the regulation of advertising and solicitation may restrict the flow of truthful and nondeceptive information to consumers, and the controls on employment and practice under trade names may inhibit innovative forms of practice.

Advertisements that make claims of superiority and predictions of future satisfaction are treated as "unprofessional conduct,"[29] and statements of opinion about quality of services may be prohibited.[30] The effect of these regulations, which may amount to banning comparative advertising and advertising based on subjective criteria, may be to deprive consumers of truthful information. Because consumers' ability to make informed choices among dentists would thus be impeded, dentists may in effect be insulated from competition. Prohibiting only those claims, express or implied, that are false or deceptive should be sufficient to protect consumers without imposing these costs.

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[26] Commission Statement, *supra* n. 15 at 10288-10289.

[27] Commission Statement, *supra* n. 15 at 10288-10289.

[28] For a general discussion of the effects of restricting locations in mercantile settings, see Commission Statement, *supra* n. 15, at 10289.

[29] Tex. Rev. Civ. Stat. Ann. art. 4548g(4), (7), (8).

[30] Tex. Rev. Civ. Stat. Ann. art. 4548f §1(c)(2). The Board's regulations follow the statutory text. 22 TAC §109-204.

Subjective claims, comparative claims, and claims that imply superiority are not necessarily false or deceptive. Because almost any statement about qualifications, experience, or performance could be considered an implicit claim of superiority, banning such statements could prevent providers from making claims that consumers may find useful and that are not deceptive. Banning opinions about quality might mean prohibiting claims about such potentially useful information as waiting room conditions and courtesy. It also may mean prohibiting advertisements that include expert assessments of service quality, regardless of who the experts were or whether their assessments could be substantiated.

Consumers may benefit from the kinds of statements that may now be prohibited. Consumers may find it useful to know whether experts -- or other consumers -- are willing to vouch for an individual professional's service quality. Indeed, some consumers may want to know which dentist claims to be the "kindest" or "most sympathetic," because they may care that the dentist considers these aspects of practice important. Banning all such claims would make it more difficult for professionals to provide consumers with truthful information about the differences between their services and their competitors'. The ban thus could deprive consumers of valuable information, increase consumer search costs, and lessen competition. A general prohibition of false, misleading, or deceptive advertising, such as the rule that has been adopted for most of the other boards,[31] should be sufficient to deal with harmful subjective representations, without limiting competition by restricting nondeceptive advertising.[32]

Under Texas law, advertisements may not contain statistical data that is not reasonably verifiable by the public.[33] This standard is not necessarily anticompetitive on its face, but the requirement of verification "by the public" could lead to overly

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[31] *See* n. 5, *supra*.

[32] There are provisions in the statute governing dentists that are essentially identical to the limited advertising regulation set out for the other boards. Tex. Rev. Civ. Stat. Ann. art. 4548f(1)(a), (b). The problems discussed here are raised by some of the exemptions, qualifications, and interpretations of these basic provisions. Some refinements of the concept that are consistent with regulating only deceptive advertising would of course not pose problems. For example, permitting regulation of advertisements that promote "unjustified expectations" seems equivalent to targeting deception. *See* Tex. Rev. Civ. Stat. Ann. art. 4548f(c)(4).

[33] Tex. Rev. Civ. Stat. Ann. art. 4548f(c)(6).

restrictive interpretations. An alternative would be simply to require advertisers to have a reasonable basis for claims that refer to statistical data. This substantiation standard is the criterion that the FTC applies generally to material claims made in advertisements.[34] To be sure, a claim that uses statistical information, or is difficult for the public to confirm, may call for a higher degree of substantiation.[35] But barring such claims regardless of whether they can be substantiated may deprive the consumer of useful, truthful information.

Texas law requires advertisements promoting discounts to state the price from which the discount is taken.[36] This requirement, which may be intended in part to discourage deception, may also discourage the promotion of certain kinds of discounts, such as an across-the-board discount for senior citizens. Advertising discounts based on such a simple principle could be impracticable, because the advertisement would have to list the entire fee schedule. Without advertising, the benefits to consumers from such price competition could thus be reduced, as fewer consumers would be aware that discounts were available.

Soliciting business by verbal communication with an individual or small group of people is unlawful "unprofessional conduct" under current Texas law.[37] Solicitation is a form of advertising. Both advertising and solicitation can be useful sources of information to consumers and can convey truthful, nondeceptive information about terms of service that will help consumers select a dentist (or other professional). Direct contacts between a professional and prospective clients can convey information about the availability and terms of services. To be sure, some kinds of solicitation may not serve the individual's and society's interest

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[34] FTC Policy Statement Concerning Advertising Substantiation, 49 Fed. Reg. 30,999 (1984).

[35] *See* Thompson Medical Co., 104 F.T.C. 648, 821-29 (1984). Other factors the FTC considers in determining the degree of substantiation that is reasonable are the nature of the product, the benefits of a truthful claim, the ease of developing substantiation for the claim, the consequences of a false claim, and the amount of substantiation that experts in the field would consider reasonable. *Id.*

[36] Tex. Rev. Civ. Stat. Ann. art. 4548f(c)(8).

[37] Tex. Rev. Civ. Stat. Ann. art. 4548g(2).

in informed and reliable decisionmaking.[38] Thus, a regulation that was appropriately limited, such as one that prohibited solicitation aimed at individuals who could be particularly vulnerable to undue influence, or at individuals who have made it clear they do not wish to be contacted, could be beneficial. By contrast, a relatively broad regulation that did not address directly[39] the problem of undue influence could raise competition concerns.

The only criterion in the regulation of dentists' verbal solicitation, which presumably includes telephone as well as direct contact,[40] is the size of the group solicited. The statute presumes conclusively that any solicitation of an individual or a small group is improper. This prohibition could preclude truthful, nondeceptive communications in circumstances that pose little or no risk of undue influence. Legitimate concerns about overreaching or undue influence could be addressed by a narrower regulation. For example, when the FTC considered these problems in *American Medical Association*,[41] it permitted a rule against uninvited, in-person solicitation of persons who, because of their particular circumstances, may be vulnerable to undue influence. Texas law concerning dentist advertising prohibits intimidation or exerting undue pressure or influence over a prospective patient.[42] If this principle were applied to solicitation, it would seem unnecessary to maintain a blanket ban on solicitation of any individual or small group.

Texas law also discourages commercial practice by dentists. Anyone who employs a dentist must also be a licensed dentist; thus,

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[38] *See Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

[39] A broad ban on solicitation once found in the American Medical Association's Principles of Medical Ethics was the foundation of an AMA ban on advertising that the Commission held to be a violation of the Federal Trade Commission Act. *American Medical Ass'n*, 94 F.T.C. 701 (1979), *enforced as modified*, 638 F.2d 443, 451 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

[40] The statute restricts "verbal" communication; it is not clear whether "verbal" means only "oral," or also includes written communications. Because a solicitation through a written communication is likely to be less coercive than an in-person conversation, the law would be even more problematic if it also applied to written solicitations.

[41] 94 F.T.C. 701 (1979).

[42] *See* Tex. Rev. Civ. Stat. Ann. art. 4548f(c)(3).

Texas apparently bans a form of commercial dental practice.[43] The use of trade names is subject to a requirement that any firm name include, prominently, the names of the persons practicing under the trade name.[44] Because it would be impracticable to include many names in a useful trade name, the effect is to rule out large-scale practices.

The same principles that apply to permitting commercial forms of practice in optometry would also apply in dentistry. In the context of optometry, the FTC has found that restrictions on the use of non-deceptive trade names hinder the growth and development of firms and make it difficult for high-volume operators to advertise multiple outlets.[45] Such restrictions may deprive consumers of valuable information, increase consumer search costs, and lessen competition. In some professional fields trade names can be essential to the establishment of large group practices or chain operations that can offer lower prices. Trade names can be chosen that are easy to remember and, in addition, convey useful information, such as the location or other characteristics of a business. Over time, trade names can come to be associated with a certain level of quality, service and price, thus aiding consumers' search and promoting competition.

Restrictions on trade names are often intended to ensure identification and accountability of individual licensees. But this goal may be achieved by other means, without losing the competitive benefits of trade names, such as requiring that the names of individual practitioners be conspicuously posted in the practice's offices, or noted on contracts, bills, or receipts. When advertising in media other than print, only one of a practice's licensed professionals must be named.[46] This permission to name only one individual evidently recognizes the costs involved in naming all, yet implicitly recognizes that the more limited identification is not deceptive. The same considerations would seem to apply equally to print advertising.

Finally, Texas law limits the ability of dentists to offer services in settings other than conventional offices. Dental care services provided through mobile facilities are closely regulated

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[43] Tex. Rev. Civ. Stat. Ann. art. 4551a(4).

[44] Tex. Rev. Civ. Stat. Ann. art. 4548e.

[45] Commission Statement, *supra* n. 15 at 10289.

[46] Tex. Rev. Civ. Stat. Ann. art. 4548e.

and may be provided only to indigents, on a no-fee basis.[47] Mobile offices could benefit consumers, particularly for geographic areas or populations that traditionally have been underserved. Restricting use of mobile offices could reduce some consumers' access to health care services.[48] Even indigents who qualify for service on a no-fee basis could benefit if lifting the restrictions on mobile offices increased the number of mobile services available to them. Restrictions may also inhibit expansion by individual practitioners (or commercial practices, if those were permitted). Requirements that may be needed to protect consumers' interests in adequate staffing and professional accountability need not unreasonably restrain practitioners from providing health care services through mobile offices.[49]

C. Board of Medicine

Two aspects of the statute governing physicians raise competition concerns. The restraint against advertising claims of superiority could impede the flow of truthful and nondeceptive information, and the prohibition of commissions or referral fees could inhibit cost-saving practices.

Physicians, like dentists, may not make claims of superiority in advertisements.[50] The prohibition is stated more simply than the one for dentists, but the effect is likely to be similar. For the reasons set out above, this prohibition may be undesirable and unnecessary.

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[47] This restriction is found in the Regulations, not the Statute. 22 TAC §109.151.

[48] Even in areas served by conventional dental offices, the availability of services from mobile offices, where feasible, could stimulate competition and benefit consumers.

[49] The statute permits the board to adopt regulations limiting the number of dental hygienists a dentist may employ. Tex. Rev. Civ. Stat. Ann. art. 4551e-1(g). At one time, the statute itself limited that number sharply, but the statute has been amended. There appears to be no current regulation limiting the number. The FTC's Bureau of Economics studied the effects of restraints on using dental "auxiliaries." Its study concluded that restraining the employment of dental auxiliaries increased prices for dental services and that removing the restrictions would benefit consumers by providing service of comparable quality at lower prices. *See* J. Liang and J. Ogur, *Restrictions on Dental Auxiliaries*, FTC Bureau of Economics Staff Report, May 1987.

[50] Tex. Rev. Civ. Stat. Ann. art. 4495b §3.07(c), §3.08(7).

Prohibitions against so-called kickbacks[51] can benefit patients by preventing deception or abuse of the provider-patient relationship.[52] But regulations adopted to control referral fee abuses should not be so broad that they interfere with procompetitive practices, such as the operation of integrated health care delivery systems and legitimate referral services. Harm to patients from referral fees is less likely when referrals are made among providers in an integrated operation such as health maintenance organization (HMO) or preferred provider organization (PPO). HMOs and PPOs may use incentive arrangements in which fees are divided between the medical plan and the professionals. But fees paid to these entities are unlikely to provide an incentive for anyone to refer patients for unnecessary care, since the entity receiving the fee does not receive additional fees for each referral. Referral services, including those that charge a fee for participation, can help consumers locate appropriate health care alternatives and increase competition among health care professionals by facilitating the gathering and dissemination of information. To prevent abuse, it may be enough to require disclosure that the provider will pay or receive a fee in consideration for a referral. Such disclosure could provide patients with information to help them decide whether to use the recommended provider.

D. Veterinarians

One aspect of the law governing veterinarians raises a competition concern, the ban on "kickbacks" or referral fees.[53] If this ban is applied too broadly, it could interfere with legitimate functions such as referral services that consumers may find valuable, and thus its effects might be similar to those of the ban affecting physicians.

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[51] Tex. Rev. Civ. Stat. Ann. art. 4495b, §3.07(c).

[52] The primary justification usually offered for restrictions on referral fees is to prevent abuse of the patient's trust that a referral will be based on independent professional judgment of the patient's best interest. The usual concern is that a practitioner who stands to receive a referral fee might refer a patient for unnecessary care or refer a patient to a provider who might not be not the most appropriate one, but who pays the highest referral fee. On the other hand, if referral fees are banned, some practitioners might provide services themselves rather than refer patients to others who could provide better quality care.

[53] Tex. Rev. Civ. Stat. Ann. art. 8890, §14(a)(10).

E. Podiatrists

Podiatrists, like dentists and doctors, are barred from making claims of superiority in advertising.[54] For the reasons set out above, this prohibition may be undesirable and unnecessary.

F. Pharmacy

Texas prohibits physicians from dispensing drugs, with limited exceptions.[55] Physician dispensing may expand consumers' options for purchasing prescription medicines, leading to increased competition, lower prices and better services. Physician dispensing is not free of risks, but abuses might be dealt with by disciplining physicians who prescribe inappropriately, rather than prohibiting physician dispensing altogether. We do not endorse physician dispensing as preferable to pharmacist dispensing. Rather, we support informed consumer choice among qualified providers of drugs or medicines.

Dispensing drugs or medicines is a traditional part of a physician's medical practice, which was once quite common and is still authorized in all but a few states. Some consumers may value the option of obtaining drugs or medicines prescribed by their physician without having to make a separate trip to a pharmacy. A concern may be that physicians motivated by profit might overprescribe or prescribe inappropriately.[56] These concerns could be remedied by means other than banning dispensing, for example, by disciplinary action against physicians who prescribe and dispense inappropriately. In addition, physicians who dispense drugs might well be subject to sanitation, recordkeeping, and other requirements like those that apply to pharmacists. Reasonable requirements related to public health and safety advance public welfare without limiting consumer choice among qualified providers of prescription drugs or medicines.

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[54] Tex. Rev. Civ. Stat. Ann. art. 4570(d)(7) (podiatrists). The Commission has recently addressed similar issues in the Texas chiropractic profession in a law enforcement matter; *see supra* n. 3.

[55] Tex. Rev. Civ. Stat. Ann. art. 4542a-1 §33; *see also* art. 4495b §3.06(d)(2), (3), §5.09.

[56] Another concern may be deception, that patients will be assume incorrectly that a dispensing physician has no financial interest in the drug dispensed. If such misimpressions are common and injure consumers, this concern might be addressed by requiring disclosure to patients of the physician's financial interest or of alternative sources of the prescribed drug.

III. Conclusion

We are pleased to have this opportunity to present our views on these medical occupational licensing statutes of the State of Texas. We recommend that in several respects, as detailed above, restrictions on forms of practice and on communication of truthful and nondeceptive information to consumers be eliminated. Eliminating these restrictions could promote competition and benefit consumers.

Sincerely,

Thomas B. Carter
Regional Director