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

BUREAU OF
CONSUMER PROTECTION

April 23, 1987

Nancy T. Feldman
Executive Director
Virginia State Board of Dentistry
1601 Rolling Hills Drive
Richmond, VA 23229

Dear Mrs. Feldman:

The staff of the Federal Trade Commission[1] is pleased to respond to your notice requesting public comment on final regulations proposed by the Virginia Board of Dentistry ("Board"). We agree with many of the contemplated regulatory changes, but also believe that some further amendments are appropriate.

As you know, we have submitted comments in each of the last three years concerning existing and proposed laws and regulations governing the practice of dentistry in Virginia.[2] Those comments urged the Board of Dentistry to remove or recommend the elimination of provisions that restrained nondeceptive advertising, the use of trade names, certain commercial forms of practice, and the operation of prepaid dental plans. The Board has now proposed new regulations that would eliminate many of the most troublesome advertising prohibitions. These changes would lift the existing bans on the advertising of statistical data, statements of past performance, representations of quality, the use of testimonials, and implied statements of specialization by general dentists. We applaud these changes because they will broaden the scope of useful information that dentists may advertise, and will thereby benefit consumers.

The Board still retains some regulations, however, unnecessarily inhibiting the offer of discounts and fee advertising for nonroutine services. These provisions, as well as those statutes that restrict the use of trade names,

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1 These comments represent the views of the FTC's Bureaus of Consumer Protection, Competition and Economics, and not necessarily those of the Commission itself. The Commission has, however, voted to authorize submission of these comments.

2 Letter to Nancy T. Feldman from Amanda B. Pedersen, April 3, 1986; letter to Ralph Axselle from Carol T. Crawford, May 22, 1985; and letter to Richard Morrison from Carol T. Crawford, August 21, 1984. These comments, copies of which are attached, are incorporated by reference.

commercial forms of dental practice, and the operation of prepaid dental plans, may have significant adverse consequences for consumers of dental services but appear to provide no countervailing consumer benefits. We therefore again urge the Board to eliminate the proposed administrative rules limiting discount offers and fee advertising, and to recommend to the Legislature, at an appropriate time, the repeal or modification of the statutory restraints discussed below.

We are also taking this opportunity to comment on another proposed Board rule that appears to require the physical presence of a supervising dentist whenever dental services are provided by licensed hygienists. We comment on this rule now because the Virginia legislature just last year relaxed the required level of dentists' supervision of hygienists. Unnecessary restraints on dentists' ability to define the appropriate level of supervision may inhibit the efficient delivery of dental services, and thereby harm consumers. We therefore recommend that the Board implement last year's legislative amendment by adopting a more flexible standard of supervision than is now proposed.

Unnecessary restraints on the delivery of professional services are particularly important in the dental area because of the relatively high number of consumers who may not be receiving the dental services they need. A survey conducted by the National Center for Health Statistics found that in 1975 half of the U.S. population had not visited a dentist in a year, over one-third had not seen a dentist in two years or longer, and about 20 million Americans had never visited a dentist.[3] At the same time, a comprehensive survey of the dental health of Americans for the years 1971-1974 found that at least one-third and possibly as many as two-thirds of all Americans had unmet basic dental needs.[4] Over one-third of the population, for example, were found to have untreated decay in permanent teeth.[5]

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[3] National Center for Health Statistics, U.S. Dept. of Health, Education and Welfare (now the Department of Health and Human Services), Pub. No. (HRA) 77-1543, Current Estimates from the Health Interview Survey, United States, 1975 (1977).

[4] National Center for Health Statistics, U.S. Dept. of Health, Education and Welfare (now DHHS), Pub. No. (PHS) 79-1662, Basic Data on Dental Examination Findings of Persons 1-74 years, United States 1971-1974 (1979). These conclusions were based on dental examinations of a statistical sample (20,749 individuals) of the civilian, noninstitutionalized U. S. population.

[5] Id. at Table 9. Other dental needs identified by the survey included untreated tooth decay in 54% of children aged 12-17; the need for a full upper or lower denture or both in one-fourth of all Americans over the age of 65; untreated gum disease in one of every five Americans; and the need for partial dental appliances (footnote continued)

While these studies were conducted over a decade ago, they represent the most recent comprehensive documentation on the dental health of the U.S. population. The study results may therefore be indicative of the dental needs of Virginia consumers. A potential benefit of removing unnecessary restraints on the efficient delivery of dental services would be the provision of dental services to Virginia consumers who need but are not currently receiving them.[6] For this additional reason, we believe that the restraints discussed below should be removed.

Advertising Restrictions

The proposed final regulations still contain two provisions that we urged the Board to eliminate in our earlier comments and that we believe will reduce consumer welfare. First, rule 4.4.C. requires disclosure of the original price whenever a discount is advertised. Because it is impractical to state in an advertisement the regular prices of all the hundreds of services a dentist provides, this rule effectively bans all across-the-board discount advertising.[7] Discount advertising is not inherently deceptive, and can be of great benefit to consumers by increasing price competition among dentists.

While we recognize the potential for deceptive schemes in discount advertising, we believe that burdensome disclosures on such offers are overly restrictive and unnecessary. Virginia Code § 54-187(7) and proposed Board rule 4.4.F. already contain appropriate general prohibitions on untruthful or deceptive advertising claims. Any deceptive discount offers in advertising

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(fixed bridges or partial removable dentures) in about one-sixth of the population. Id.

[6] Several factors have been identified to explain why individuals are unable or unwilling to seek dental care routinely. Among them are: the high cost, both in terms of price and time of dental services; a lack of awareness of the consequences of untreated dental disease; and the fear of pain. See, e.g., Bureau of Health Manpower, U.S. Dep't. of Health, Education and Welfare (now DHHS), Factors Which Affect the Utilization of Dental Services, Pub. No. (HRA) 78-64 (1978). While we are not in a position to weigh the relative importance of these factors, we believe that the removal of any unnecessary restraint on the delivery of dental services can potentially benefit consumers by increasing the availability of those services.

[7] It should be noted that at least one court has invalidated on First Amendment grounds similar requirements that advertisements for discounted prices include all regular non-discounted prices. South Ogden CVS Store v. Ambach, 493 F. Supp. 374 (S.D. N.Y. 1980).

would therefore be proscribed under current law.

Second, proposed rule 4.4.E. limits fee advertising to certain listed and defined routine dental services. We discussed the potentially harmful effects of this rule when it was first proposed as rule 4.6.E., and we incorporate those comments by reference now. (Letter to Mr. Axselle at pp. 11-12). We believe that this rule needlessly inhibits fee advertising for new or innovative techniques and requires the use of specific scientific terminology that will be confusing to lay consumers. We can envision no consumer benefit from such a restriction.

Finally, we again urge the Board to seek the repeal of Virginia Code §54-187(7), which bans claims of superiority. This provision appears to prohibit the advertising of much useful and nondeceptive information about dentists' practice, qualifications, experience or performance. In the interim, we again urge the Board to interpret this provision to permit the greatest possible amount of nondeceptive advertising that is consistent with the statute.

Trade Name Restriction

Section 54-184 of the Virginia Code prohibits dentists from practicing under a trade name. We understand that the Board recommends no changes to this statutory provision. As we discussed in our earlier comments, trade names can lead to significant benefits for consumers of dental services, as they do in markets for other goods and services. Moreover, we believe that the goal of professional accountability can be better accomplished by requiring the conspicuous posting of individual practitioners' names at offices where they provide services, or requiring that they be noted on bills, receipts and patient records. We believe that the use of trade names is not inherently deceptive, and we are aware of no evidence of abusive or deceptive use of trade names by dentists in Virginia. The use of deceptive trade names in advertising would, of course, already be prohibited under § 54-187 (7) of the Virginia Code and proposed rule 4.4.F. For these reasons, we again urge the Board to actively seek the repeal or modification of § 54-184.

Commercial Practice Restrictions

Virginia Code §§ 54-146, 54-183 and 54-147.1 prohibit employment and other business relationships between dentists and non-dentists, and ban dentists from leasing space from any commercial establishments. As we discussed in our earlier comments, the available empirical evidence indicates that restraints such as these may harm consumers by increasing prices without providing any quality-related benefits. Such restrictions may actually decrease the quality of dental care in the market by decreasing the frequency with which consumers obtain care. Evidence from the optometric area indicates that consumers tend to purchase eyecare less frequently and may even

forego care altogether as a result of the higher prices associated with restrictions on commercial forms of practice.[8]

For these reasons, we continue to urge the Board to recommend the modification or repeal of these statutory provisions.

Prepaid Dental Plan Restraints

As discussed in our earlier comments, we believe that several statutory provisions regulating prepaid dental plans will reduce competition in the dental services market and will tend to raise prices without providing any countervailing benefits to consumers. The Board has not proposed changes to these statutory provisions. We therefore again urge the Board to seek the removal of §§ 38.1-903, 904 and 909, and § 38-2-898 because they restrict the development and operation of prepaid dental plans.

Supervision of Dental Hygienists

Section 5.2 of the Board's proposed final regulations requires that the dentist "shall be present and evaluate the patient during the time the patient is in the facility" whenever dental hygienist services are performed. This provision defines the general requirement in § 5.2 that hygienists shall perform their duties under the "direction and control" of an employing dentist or dentist-in-charge. "Direction" is also defined by the Board in § 1.1 of the proposed rules to mean the "presence of the dentist for the evaluation, observation, advice and control over the performance of dental services."

We are concerned that these provisions, which appear to require dentists' "direct" supervision of dental hygienists in all instances, may unnecessarily restrict the efficient delivery of high quality preventive dental services, and thereby reduce consumers' access to those services. We ask the Board to consider whether a more relaxed supervision standard for all or certain service settings would adequately protect the public while allowing dentists the flexibility to determine whether a higher level of supervision is appropriate in particular circumstances. We do not attempt to offer advice on the quality of care or medical safety questions that may be involved in

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[8] Public Health Service, Eyeglasses and Contact Lenses: Purchases, Expenditures, and Sources of Payment, National Health Care Expenditures Study 4 (1979); Benham and Benham, Regulating through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421, 438 (1975); Kernan, U.S. Health Profile, Washington Post, Apr. 26, 1979, at p. C-1, col. 4. Like the empirical studies in the optometric area discussed in detail in our earlier comments, this evidence may be applicable to analogous restrictions in other areas, such as dentistry.

determining the appropriate supervision standard, but we are unaware of any evidence indicating that a less restrictive standard than that proposed by the board, such as general supervision, does not adequately protect the public's health and safety.

The Legislature just last year amended § 54-200.7 of the Virginia Code to give licensed dental hygienists the right to practice "under the direction" of a supervising dentist. In so doing, the Legislature specifically removed the more stringent requirement that hygienists practice under a dentists' "direct supervision." This action appears to reflect the Legislature's determination that "direct" supervision, which, like the Board's proposed rule § 5.2, requires the physical presence of the dentist, is not necessary in all instances to protect the public.

We understand that most states take a similar position, requiring only that hygienists practice under the dentist's "supervision" or "direction" with no further definition. We further understand that these undefined provisions have been interpreted, in a majority of the states, to mean that hygienists may practice in private offices under a dentist's "general" supervision. General supervision, as you are aware, means that the dentist must in some manner delegate and be responsible for the task, but need not be present in the operatory or office during the hygienist's performance of the service. General supervision has also apparently become the norm in two-thirds of the states for hygienists practicing in non-traditional settings such as schools, state and local public health department clinics, health maintenance organizations, hospitals, and other institutions where dental services are provided. The District of Columbia, for example, permits hygienists to perform their traditional functions (preliminary examination, prophylaxis, polishing of teeth, charting of cavities, applying flourides and other medicinal agents, taking dental x-rays, and oral health care education) under general supervision in all dental service settings.[9] Some states permit this more relaxed standard for practice in institutional settings even though they require direct supervision in private offices. Maryland, for example, permits a waiver of its "on premises" supervision requirements on a facility-by-facility basis for government-owned and operated facilities upon application and good cause shown.[10]

The potential benefits to consumers under a general supervision standard could be substantial. Under it, dentists who need not be present in the operatory or facility during the performance of authorized hygienist services could spend that time engaged in the more complex services for which they were

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9 D.C. Code Ann. § 2-3301.2(4)(B) (1985).

10 Md. Health Occ. Code Ann. § 4-308(d)(2)(1986).

primarily trained, such as diagnosis and treatment of other patients. At the same time, the cost of providing preventive dental care, such as prophylaxis, could be reduced significantly because of the reduced amount of dentist time required to provide those services. Lower costs could, in turn, lead to increased output of dental services, better consumer access to those services, and improved dental health.[11]

For these reasons, we urge the Board to consider the potential benefits to consumers of adopting a general supervision standard for some or all service settings, or of permitting dentists to exercise their professional judgment in determining the appropriate level of supervision by adopting no standard beyond the "under the direction" requirement enacted by the Legislature.

Conclusion

In sum, we urge the Board to consider the consumer harm that may come from restrictions on truthful, nondeceptive advertising, on commercial forms of practice, and on prepaid dental plans. Such restrictions tend to raise prices and decrease the quality of care. We therefore urge the Board to amend, eliminate or recommend the repeal of the rules and statutory provisions discussed above. We further recommend that the Board consider relaxing the proposed requirement for supervision of dental hygienists.

Sincerely,

William C. MacLeod
Director

Enclosures

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11 See supra text accompanying notes 3-6.

COMMISSION APPROVED

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

April 3, 1986

Nancy T. Feldman
Executive Director
Virginia State Board of Dentistry
517 West Grace Street
P.O. Box 27708
Richmond VA 23261

Dear Ms. Feldman:

The Federal Trade Commission's Bureaus of Consumer Protection, Economics, and Competition[1] are pleased to offer comments in response to your invitation of February 3, 1986, for public comments on the regulations that the Virginia Board of Dentistry proposes to adopt on April 11, 1986.[2]

As you are aware, we submitted comments in 1984 to Richard Morrison, Regulatory Review Coordinator, and in 1985 to Ralph Axselle, Chairman of the Governor's Regulatory Reform Advisory Board, concerning laws and regulations governing a number of professions, including dentistry.[3] In the interest of brevity, we will incorporate by reference portions of those letters as noted below.

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[1] These comments represent the views of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

[2] Our comments are directed only to those provisions, both regulatory and statutory, that deal with advertising, trade names, commercial practices, or prepaid dental plans. We offer no opinion on the legality or desirability of other portions of the proposed regulations.

[3] Letter to Richard Morrison from Carol T. Crawford, Director, Bureau of Consumer Protection, August 21, 1984 (hereinafter referred to as "Morrison letter"), and letter to Ralph Axselle from Carol T. Crawford, Director, Bureau of Consumer Protection, May 22, 1985 (hereinafter referred to as "Axselle letter"). Copies of both letters are attached.

The Board of Dentistry, in response to this regulatory review process, is proposing new regulations that will broaden the scope of permissible advertising by dentists. While these regulations represent a significant improvement over the existing rules, they still contain troublesome provisions regarding the offer of discounts and fee advertising for nonroutine services. The adoption of these provisions, without the modifications discussed below, could have significant anticompetitive effects.

Finally, we again draw the Board's attention to a number of statutory restrictions on the use of trade names, the commercial practice of dentistry, and the functioning of prepaid dental plans in Virginia. We believe the statutory restrictions discussed below may impede competition and we therefore urge the Board to consider making recommendations to the Legislature for appropriate changes in these statutes.

Advertising Regulations

The proposed regulations eliminate provisions in earlier versions of the regulations that prohibited advertising of statistical data, information on past performance, representations of quality, and the use of testimonials, showmanship or puffery. As noted in our earlier comments and incorporated by reference herein (Morrison letter at pp.2-3 and Axselle letter at pp.9-10), the removal of these prohibitions will allow the dissemination of nondeceptive information that will aid consumers in their choice of dental services. The Board also rejected previously proposed regulation 4.6.B.2, which would have required disclosure of the time period an advertised fee would be in effect, if the offer was good for less than ninety days. We agree with the Board's decision because disclosure requirements increase advertising costs and should be imposed only where necessary to avoid deception.

Proposed regulation 4.4.A. ("Practice Limitation") allows dentists who limit their practices, but who are not Board-eligible or ADA-certified specialists, to advertise the fact that their practice is limited, provided that they state in addition that they are general dentists. This regulation represents a substantial improvement over the former prohibition contained in Rule 7.A.2.d on any statements that implied specialization where a dentist was not a certified specialist. Athough we are not convinced that the disclosure requirement is necessary to avoid deception, the proposed disclosure may not be unduly burdensome and permits dentists to promote the whole range of services they are licensed to perform.

The proposed regulations contain two provisions that we objected to in our earlier comments and that we continue to believe will have anticompetitive effects. First, proposed regulation 4.4.C. allows offers of discounts only when the nondiscounted price also is stated in the advertisement. As noted in our earlier comments and incorporated by reference herein (Morrison letter at p.3 and Axselle letter at p.10), there is nothing inherently deceptive in advertising a discount without stating the nondiscounted price. Moreover, such a requirement effectively bans across-the-board discounts and imposes increased costs on dentists who advertise discounts.[4] As a result, dentists are less likely to offer discounts, thereby lessening price competition and increasing the likelihood that consumers will pay higher prices for dental services. Therefore, we urge the Board to consider eliminating this requirement.[5]

Second, proposed regulation 4.4.E. limits fee advertising to certain listed and defined routine dental services. When this rule was first proposed as rule 4.6.E. we outlined its potentially harmful effects and we incorporate those comments by reference herein (Axselle letter at pp.11-12). We continue to believe that this regulation will deter the advertising of fees for new or innovative techniques and will result in the use of terminology that may be confusing and not easily understood by consumers.

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[4] Such requirements may also pose constitutional problems. In New York, a federal district court found that the First Amendment rights of a pharmacist were violated by state rules that effectively banned the offer of across-the-board discounts for prescription drugs. South Ogden CVS Store, Inc. v. Ambach, 493 F.Supp. 374 (S.D.N.Y. 1980).

[5] In a situation involving similar restrictions on the advertising of discounts, the Federal Trade Commission filed a complaint against and ultimately negotiated a consent agreement with the Louisiana State Board of Dentistry. As part of the agreement, the Board was ordered not to prohibit dentists from advertising the availability of discounts. The Order further provided that the Board could find discount advertising to be fraudulent, false, or deceptive if the price advertised as a discount were in fact the usual price charged by the dentist or if the dentist failed to provide the same quality and components of service at the discounted price that are normally provided at the regular or nondiscounted price.

Thus, we urge the Board to reconsider our previous comments and recommend that the Board eliminate proposed regulation 4.4.E.[6]

Finally, Virginia Code Section 54-187(7), which bans claims of superiority, appears to prohibit at least some nondeceptive advertising. We continue to encourage the Board to recommend, at the appropriate time, statutory revision of this provision. In the meantime, we urge the Board to interpret this provision to allow the greatest possible amount of nondeceptive advertising that is consistent with the statute.

Trade Names

The proposed regulations do not address the use of trade names by dentists. We recognize that Section 54-184 of the Virginia Code, which prohibits dentists from practicing under a name other than their own or that of dentists operating a partnership or professional corporation, may restrict the Board's actions in this area. For the reasons discussed in our earlier comments and incorporated by reference herein (Morrison letter at p.5), we believe that the use of trade names can lead to significant benefits for consumers, and we continue to encourage the Board to recommend the modification or repeal of Section 54-184.

Commercial Practice

As noted in our previous comments and incorporated by reference herein (Morrison letter at pp.4-8 and Axselle letter at p.13), we have concerns about Virginia's statutory ban on employment, partnership, and other business relationships between dentists and other persons (Va. Code Sections 54-146 and 54-183) and the ban on dentists leasing space from commercial establishments (Va. Code Section 54-147.1). We believe these prohibitions hinder the development of high-volume, lower-priced practices that may be able to reduce costs through economies of scale, and encourage the Board to recommend the modification or repeal of these statutory provisions.

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6 Proposed regulation 4.4.D. ("Retention of Broadcast Advertising") requires that "a pre-recorded copy of all advertisements on radio or television must be retained for a six-month period following the final appearance of the advertisement." It is unclear from this language if the Board intends to prohibit any broadcast that is not prerecorded--a restriction that we would oppose. If the Board's intention is to guarantee that copies of all advertising be preserved in a form that allows the Board to review advertising where necessary, this can be done without requiring that the material be prerecorded. Therefore, we suggest that the Board clarify the language of this provision by deleting the word "pre-recorded."

Prepaid Dental Plans

As discussed in our previous comments and incorporated by reference herein (Morrison letter at pp.7-8 and Axselle letter at pp.13-14), we also have concerns about several statutory restrictions affecting prepaid dental plans. Section 38.2-898 requires that a majority of the board of directors of a prepaid dental plan be dentists. Such a requirement prevents consumers and others from establishing and operating such plans in competition with provider-controlled plans. Such lay boards are capable of obtaining the necessary professional expertise without relinquishing control of the board to dentists.

Section 38.1-903 requires that subscribers to a dental plan "have free choice of any participating dentist." If this provision is interpreted, as it is in some states, to require that participation be open to any licensed provider, it may prevent plans from offering lower-cost programs that may involve some limitations on a subscriber's choice of providers.

Section 38.1-904 limits the ability of the Insurance Commission to license more than one plan in the same geographical area. This provision does not appear to serve any substantial public interest and could be used to protect established plans from new market entrants, thereby lessening competition and increasing the likelihood of higher prices for subscribers.

Section 38.1-909 forbids dental plans from engaging in any other business. This restriction may unnecessarily prevent plans from diversifying and offering their subscribers additional products or benefits packages. Subject to appropriate regulatory oversight, diversified dental plans may be able to compete more effectively and to offer better services to the public.

We believe that all of these restrictions on prepaid dental plans may reduce competition in the market for dental services and tend to raise prices above the level that would otherwise prevail, without providing any countervailing public benefit. Thus, we continue to encourage the Board to support the removal of these restrictions.

Conclusion

The Board has made significant strides in removing unnecessary restraints on advertising by dentists and we support these changes. However, we continue to have serious reservations with proposed regulations regarding the offer of discounts and fee advertising for nonroutine services. If adopted with the modifications discussed above, these regulations could result in real and substantial benefits to the public. They would permit

the public to have access to a wider range of truthful information about the availablity of dental services. They also would help to stimulate valuable competition among dentists and, in the process, improve the efficiency with which dental services are delivered, while still protecting the public from false or deceptive advertising.

Yours truly,

Amanda B. Pedersen

Amanda B. Pedersen
Acting Director

Enclosures

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

May 22, 1985

The Honorable Ralph L. Axselle, Chairman
Governor's Regulatory Reform Board
General Assembly Building
Commonwealth of Virginia
910 Capitol Street
Richmond, VA 23219

Dear Mr. Chairman:

The Federal Trade Commission's Bureaus of Consumer Protection, Economics, and Competition are pleased to respond to the invitation of Richard D. Morrison, Regulatory Review Coordinator, to assist you in the ongoing review of health professional regulatory boards by the Commonwealth of Virginia.[1] As you are aware, we submitted comments last year to Mr. Morrison concerning laws and regulations governing the professions of Dentistry, Medicine, Optometry, and Veterinary Medicine.[2] Our previous comments focused on (1) restrictions on advertising by these professionals, (2) restrictions on the business practices of these professionals, including corporate employment, business relationships between professionals and non-professionals, commercial locations, and trade name usage, and (3) restrictions on the formation and operation of prepaid dental and optometric plans. Our previous comments also addressed both statutory and regulatory provisions covering all three of these areas. Finally, our previous comments discussed in some detail the negative effects that restrictions on nondeceptive advertising and commercial practices can have on consumers and competition.

We are now commenting on the regulatory changes that have been proposed by the Boards governing these professions. In offering these comments, our goal continues to be to identify and seek the removal of such restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits. While we also direct these comments to the Regulatory Boards, we urge the Reform Board to consider our

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[1] These comments represent the views of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

[2] We submitted separate comments on the regulations of the (1) Boards of Dentistry and Medicine, dated August 21, 1984, and (2) Boards of Optometry and Veterinary Medicine, dated September 14, 1984. Copies of both comments are attached.

views when it recommends to the Governor the position he should take when he makes final comments to the Regulatory Boards.[3]

We will first provide a brief overview of our previous comments, the Boards' responses thereto, and provisions in the proposed regulations that we believe continue to present potential problems. In an attachment, we then discuss individually and in detail each Board's proposed regulations. While this format leads to some repetition because of similar provisions proposed by several Boards, we believe that each Board will find it easier to read the comments that apply to it separately.

One of the primary issues that our previous comments addressed was restraints on nondeceptive advertising. We listed statutory and regulatory provisions that appeared to restrict nondeceptive advertising by dentists, physicians, optometrists, and veterinarians, and we urged their removal. In response, the Board of Veterinary Medicine proposed the removal of many of the restrictions in this area, the Board of Optometry also proposed simplifying the rules governing advertising, and the Board of Dentistry proposed the elimination of certain restrictions. The Board of Medicine stated that it would take our comments under advisement.

Potential problems remain, however. Neither the Board of Optometry nor the Board of Medicine has recommended removal of statutory restrictions that appear to prohibit some types of nondeceptive advertising. Moreover, the Board of Dentistry has proposed new regulations that appear to go beyond prohibiting false and deceptive advertising, and impose additional unnecessary burdens on nondeceptive advertising.

The second major issue that we addressed in our previous comments involved restrictions on commercial practice, including corporate employment, commercial locations, and trade name usage. Again, the Board of Veterinary Medicine proposed the removal of those restrictions contained in its regulations. In addition, the Board of Optometry proposed to allow some trade name usage.

Potential problems remain in this area, too, however. Although many of the commercial practice restrictions are statutory, none of the Boards recommended any changes to existing statutory prohibitions on commercial practice by optometrists, dentists, and physicians. (No such restrictions governing veterinarians exist.) Further, the Board of Optometry's proposed

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[3] We note that we are not in a position to offer advice on what minimum level of quality of care the states should require.

regulations governing trade name usage appear to go beyond what is necessary to prevent deception and may unduly burden trade name usage.

Thank you for your willingness to consider our comments. Please let us know if we can be of any further assistance.

Sincerely,

Carol T. Crawford

Carol T. Crawford
Director

Attachments

REPORT OF THE BUREAUS OF CONSUMER PROTECTION, COMPETITION, AND ECONOMICS OF THE FEDERAL TRADE COMMISSION

TO THE
COMMONWEALTH OF VIRGINIA
GOVERNOR'S REGULATORY REFORM BOARD

ON
REVIEW OF REGULATIONS PROPOSED BY

THE BOARD OF OPTOMETRY
THE BOARD OF DENTISTRY
THE BOARD OF VETERINARY MEDICINE, and
THE BOARD OF MEDICINE

May 22, 1985

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

BOARD OF OPTOMETRY

Our previous comments[1] discussed several statutory provisions restricting advertising and business practices that we suggested may harm consumers. The Board of Optometry did not recommend any statutory changes but did propose changes in its regulations that would simplify the rules governing advertising and would allow some use of trade names. However, some of the proposed restrictions may go beyond what is necessary to prevent deception.

Advertising Restrictions

The Board of Optometry has proposed replacing the current list of advertising disclosure requirements (Regulation III) with Section 3.1G., which would prohibit false and misleading advertising and require, whenever a price is advertised, that the advertisement state what goods and services are included in the price. The purpose of this provision appears to be to prevent false and misleading advertising. We have some concern, however, about the proposed requirement that any price advertisement state what goods and services are included in the price. This provision could be interpreted to require detailed and lengthy disclosures that are not necessary to prevent deception but merely impose extra costs on the advertisers, costs that are

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[1] Letter to Richard Morrison, Department of Health Regulatory Boards from Carol T. Crawford, Director, Bureau of Consumer Protection (September 14, 1984) (hereinafter referred to as the "September 1984 comments").

ultimately paid for by consumers. For example, an optometrist who wished to advertise a price for an eye exam could be required to disclose the specific procedures that are included in the exam. Further, the vague language of the provision could chill legitimate advertising because potential advertisers might be unsure of its meaning. We recommend that the Board reconsider the need for this provision.

We again urge the Board to recommend that Virginia Code Sections 54-388 (A)(2)(d) and 54-396 (9)(ii), which prohibit claims of superiority and advertising of free services, be repealed, so that only false or deceptive advertising is prohibited. A prohibition of false advertising should be sufficient to prevent deceptive claims of superiority and of free services. As noted in our previous comments (September 1984 comments, at pp. 2-3), these code provisions appear to restrict nondeceptive advertising, thereby lessening competition and harming consumers.

Trade Names

The Board of Optometry has proposed removing a complete ban on the use of trade names (Reg. II-D) and allowing their use

under certain circumstances (proposed Section 4.1).[2] As we stated in our earlier comments (September 1984 comments, at p. 4), the use of trade names can be virtually essential to the establishment of group practices and chain operations that are able to take advantage of economies of scale and consequently to offer lower prices. Trade names can also minimize consumer search costs because, over time, a trade name ordinarily comes to be associated with a certain level of quality, service, and price.

Although we believe that the general trend of the proposed regulations may well benefit consumers, some of the specific proposed limitations may restrict trade name usage more than is necessary to prevent deception. For example, some of the restrictions appear to limit trade name usage by group practices with branch offices. Proposed sections 4.1A.2. and 4.1A.3. appear to restrict the use of a trade name consisting of the name of one or more of the optometrists in the practice to the office where the named optometrists practice. This would appear to preclude the use of trade names such as "Optometric Offices of Smith and Jones," and possibly "Smith Optometric Clinic" at all branch offices of a multi-office practice. One of the important advantages of trade names is to facilitate the development of group practices with many offices. By allowing employing doctors' names to be used only at those offices where the doctors

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[2] The Board has proposed these changes in the regulations but has not recommended a change in Virginia Code Section 54-388(A)(2)(g), the statute that bans trade names.

actually examine patients, use of a uniform trade name for multiple branch offices is made more difficult.

We understand and support the Board's desire to preclude the use of deceptive trade names. However, we would urge the Board to evaluate whether there is any evidence that the use of trade names such as "Optometric Offices of Smith and Jones," or "Smith Optometric Clinic" are deceptive when used for branch offices. Especially where a number of branch offices are advertised under such a trade name, it seems doubtful that consumers would assume that they would be examined by one of the named doctors.

Proposed Section 4.1B.9., which prohibits use of trade names containing the names of deceased or retired optometrists, also raises some concerns about whether such trade names are inherently deceptive in every instance. This provision would mean that a trade name such as "Smith Optometric Clinic" would have to be changed upon the death of Dr. Smith, thus preventing the use over time of such trade names, although they may be valuable to consumers because they have come to be associated with a certain level of quality or price. Although we understand the Board's concern about possible deception, we would urge the Board to evaluate whether there is any evidence that consumers are actually deceived by such usage. Law firms for years have used trade names of this type, and we are unaware of any evidence of resulting deception.

We recognize that the Board may wish to ensure identification and accountability of individual practitioners

practicing under a trade name. However, the Board has already proposed regulations that appear to accomplish this end without unduly restricting nondeceptive advertising. Section 4.1B.5. requires conspicuous posting in the reception area of the names of all optometrists practicing at a location. Sections 4.1B.7. and 8. require that the examining optometrist's name appear on the patient's records and on all invoices and receipts.

Proposed Section 4.1B.2. prohibits optometrists from practicing under more than one fictitious name. It is unclear whether this prohibits practicing under a number of trade names at one time or during a lifetime. If the former, this would restrict optometrists from working part-time for more than one group practice using a trade name. If the latter, it could severely restrict the employment options available to optometrists and hinder the ability of large group practices to recruit optometrists. We believe that it is preferable for the Board to proceed on a case-by-case basis against optometrists who use trade names in a deceptive manner rather than to issue a broad ban on practicing under more than one trade name.

Proposed Sections 4.1A and 4.1B.3. requires all advertisements using trade names to include the name of at least one optometrist associated with the office. While this is somewhat less of a burden than requiring such advertisements to include the names of all the associated optometrists, it would still increase the costs of advertising without necessarily providing information that would help consumers because the named

optometrist would not necessarily examine the consumer's eyes. This requirement would appear unnecessary since adequate professional identification will likely result when the consumer calls or visits the office. Further, the Board can respond if individual complaints arise because it will have a record of all trade names in use, along with the responsible optometrists. (See Section 4.1B.1.)

Proposed Section 4.1B.4. prohibits trade names that do not include the words "optometry" or "vision" or reasonably recognizable derivatives thereof. This would appear to preclude the use of trade names such as "Southern Contact Lens Clinic" and other nondeceptive trade names as well. Presumably, the intent of this proposal is to ensure that the trade name conveys the fact that the firm is an optometric practice. However, it is not clear that this is necessary since most advertisements would probably convey this fact anyway. For example, this fact would likely be conveyed through use of the word "optometrists" in the text of the ad.

Commercial Practice Restrictions

Lastly, we would urge the Board of Optometry to reconsider our previous comments concerning statutory restrictions on business relationships between optometrists and non-optometrists (Section 54-388 (A)(2)(i)) and on employment by or location at commercial establishments (Sections 54-388 (A)(2)(k) and 54-397.1) (September 1984 comments, at pp. 3-4) In our previous

comments we raised questions about the potential harm which could result from such restrictions and discussed evidence that "commercial practice" such as chain firms may benefit consumers by lowering prices without decreasing the quality of service. Our comments also noted that several of the statutory provisions governing prepaid dental plans (Virginia Code Section 38.1-892 et seq.) appear to be unnecessarily restrictive or have anticompetitive effects which may outweigh any countervailing benefits to the public. In its report, the Board of Optometry neither addressed our concerns nor recommended any statutory changes. We urge the Board to reconsider our previous comments.

BOARD OF DENTISTRY

In our prior comments[3] regarding the Board of Dentistry we discussed a number of statutory and regulatory provisions that appeared to prohibit nondeceptive advertising or place unnecessary burdens on such advertising. The Board has proposed removing some of these regulations but has proposed several new regulations that also appear to go beyond prohibiting false and deceptive advertising. Our previous comments also discussed the potential harm to consumers that could result from several statutory restrictions on commercial practices, including a ban on trade name usage. The Board did not recommend changes to any of these statutory provisions.

Advertising

We turn first to the areas covered by our previous comments regarding several advertising provisions (August 1984 comments, at pp. 2-4). Our previous comments stated that Virginia Code Section 54-187(7), which bans advertising claims of superiority, appears to prohibit at least some nondeceptive advertising. Our comments also stated that portions of Section 7.A.4. of the Board's regulation, prohibiting advertising of statistical data, information on past performance, representations of quality and

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[3] Letter to Richard Morrison, Department of Health Regulatory Boards from Carol T. Crawford, Director, Bureau of Consumer Protection (August 21, 1984) (hereinafter sometimes referred to as the "August 1984 comments").

showmanship or puffery, appear to prohibit nondeceptive advertising. We also expressed concern that Section 7.A.2.d., governing advertising of specialties, could be interpreted to prohibit nondeceptive advertising. The Board supports the elimination of all these restrictions. We believe that these proposed changes will benefit consumers. However, some of the remaining provisions as well as some of the new proposed revisions appear to go beyond what is necessary to prevent deception.

Previously we stated that Section 7.A.2.f., which requires disclosure of the original price whenever a discount is advertised, would likely prevent the dissemination of useful and nondeceptive price information. For example, this provision would prohibit ads stating "10% off for senior citizens" or "$10 off for all new patients." Further, since it could be very costly to state in an advertisement the regular price of each of the hundreds of services a dentist provides, this rule will likely decrease the amount of discount price advertising that occurs. The Board has now recommended that the requirements of Section 7.4.2.f. be incorporated into proposed Section 4.6C., and we urge the Board to reconsider our previous comments on this point and consider eliminating this requirement.

Proposed Section 4.6B.2. states that an advertisement of a fee for a dental service must state the period of time for which the fee shall be in effect unless the fee is in effect for at least 90 days. In evaluating whether an ad without such a

disclosure is misleading it is important to consider normal consumer expectations about the effective dates of advertised prices. We suggest that the Board evaluate whether consumers expect advertised prices to be effective for at least 90 days, especially if the ad uses terms such as "special offer," or "introductory offer." Any disclosure requirement adds to the cost of advertising and, we believe, should be imposed only where necessary to prevent deception.

Proposed Section 4.6E. limits fee advertising to certain listed and defined routine dental services. This provision would apparently prohibit the advertising of fee information for non-routine services, including, for example, new or innovative techniques that are not yet widely used by practitioners. It also may be interpreted to prohibit any advertisements that do not state specific prices but rather use terms such as "discount prices" or "low cost" to attract consumer attention and communicate a message effectively. Such advertising is not inherently deceptive. The proposed rule also appears to require advertisers to use terminology that may be confusing and not easily understood by consumers. For example, it seems to require advertisers to use only the specific terminology listed in the regulations, such as "prophylaxis" to describe cleaning of teeth. It also seems to require that "examination," "diagnosis," and "treatment planning" be advertised separately, although diagnosis and treatment planning are often considered to be part of a routine dental examination and consumers may not understand the distinction between these terms. Such requirements limit the

ability of advertisers to convey their message as effectively as possible and thus may have a chilling effect upon valuable advertising. The requirement also appears to impose additional burdens on advertisers that are not imposed on other dentists. For example, if a dentist advertises "treatment planning," he or she must give the patient a written itemized treatment recommendation and a written itemized fee statement. Those requirements are not imposed on nonadvertising dentists.

In our view, proposed Section 4.6E. is not necessary to prevent deceptive advertising. While we recognize that problems may occur, we suggest that the Board respond to these problems on a case-by-case basis, seeking to remove advertising that is actually deceptive, rather than through broad rules that would likely preclude the dissemination of valuable nondeceptive information. Thus, we urge the Board to reconsider the necessity of proposed Section 4.6E.

Trade Names

In our previous comments we also discussed the statutory prohibition on trade name usage by dentists (Virginia Code Section 54-184) and pointed out that trade names can be essential to the establishment of large group practices and chain operations that can offer lower prices (August 1984 comments, at pp. 5-7). While the Board of Dentistry initially proposed a

series of regulations that would permit some trade name usage,[4] we understand that it now recommends no changes to the current law banning trade name usage. We would urge the Board to reconsider our previous comments.

Commercial Practice

Our previous comments also addressed several statutory restrictions on commercial practice, including a ban on employment, partnership, and other business relationships between dentists and other persons (Virginia Code Section 54-146, Section 54-183), and a ban on leasing space from commercial establishments (Virginia Code Section 54-147.1). We raised the question whether such restrictions may harm consumers and presented evidence that the presence of commercial practitioners such as chain firms may lower prices without decreasing the quality of care (August 1984 comments, at pp. 4-7). Our comments also noted that several of the statutory provisions governing prepaid dental plans (Virginia Code Section 38.1-892 et seq.) appear to be unnecessarily restrictive or have anticompetitive effects which may outweigh any countervailing benefits to the public. The Board of Dentistry did not address these concerns in

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[4] Those revisions, while allowing certain forms of trade name usage, still appeared to restrict unnecessarily the use of trade names. See our comments relating to several similar provisions proposed by the Board of Optometry on pp. 3-7, supra. The Board also noted that a statutory change may be necessary to allow trade name usage. Presumably, this recommendation also has been withdrawn.

its Report and did not propose changes to these statutory provisions. We would urge the Board to reconsider our previous comments.

BOARD OF VETERINARY MEDICINE

Our previous comments[5] regarding the Board of Veterinary Medicine discussed the potentially harmful effects of Board rules prohibiting veterinarians from utilizing the services of solicitors (Rule 15(I)), making claims of superiority (Rule 15(J)), entering into business relationships with non-veterinarians (Rule 15(B)), and leasing space from commercial establishments (Rule 15(C)). We support the Board's decision to propose the elimination of all of these rules. We believe that these changes may well benefit consumers by increasing competition and lowering costs without decreasing quality.

Commercial Practice

The Board of Veterinary Medicine has proposed a new regulation (Section 2.3.B.) that would make it unprofessional conduct for a veterinarian to practice veterinary medicine if a non-veterinarian has the right to control the professional judgment of the veterinarian. According to the Board, the purpose of the current ban on commercial practice is to ensure that the professional judgment of a veterinarian is not compromised by someone who is not a veterinarian. As stated, the purpose of the proposed changes is to deal directly with this

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[5] Letter to Richard Morrison, Department of Health Regulatory Boards from Carol T. Crawford, Director of Consumer Protection (September 14, 1984) (hereinafter sometimes referred to as the "September 1984 Comments").

problem without intruding upon business relationships "so long as veterinary medicine is practiced safely and well." (Bd. of Veterinary Medicine, Regulatory Review Report, p. 9.)

While we recognize that the Board may consider proposed Section 2.3.B. necessary to protect consumers, we believe that a slightly modified version of this provision may achieve the Board's goals without unnecessarily interfering with business relationships between veterinarians and non-veterinarians. As currently drafted, Section 2.3.B. might be interpreted to prevent veterinarians from working for lay employers since all employers exercise control over the work-related activities of their employees. The Board may be able to accomplish its express purpos of prohibiting only those controls that compromise the professional judgment of veterinarians by recommending a narrower rule that would restrict veterinarians from working for non-veterinarians where the non-veterinarian seeks to compromise the veterinarian's professional judgment in ways that might lower the quality of care rendered by the veterinarian.

Opponents of commercial practice often argue that lay employers will compromise the quality of care in an effort to increase profits. However, it is also possible that they will attempt to ensure high quality in an effort to establish a good reputation, thereby increasing patronage and profits in the long run. Our study regarding the quality of cosmetic contact lens

fittings by optometrists,[6] discussed more fully in our previous comments (September 1984 comments, at p. 6), tends to support the latter argument since it shows that the quality of commercial optometrists' cosmetic contact lens fittings are at least as good as those of noncommercial optometrists and ophthalmologists.

We applaud the Board's positive response to our previous concerns. We urge the Board to review these additional comments and consider whether a narrower rule might not better accomplish its stated goal of not intruding on business relationships so long as veterinary medicine is practiced safely and well.

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

BOARD OF MEDICINE

In our previous comments[7] we discussed three statutory provisions that may harm consumers. We noted that Virginia Code Section 54-317(3), which bans advertising claims of superiority by physicians, would appear to prohibit at least some nondeceptive advertising (August 1984 comments, at p. 2). We also discussed in detail two provisions of the Virginia Code, Section 54-278.1, prohibiting physicians from leasing from commercial establishments, and Section 54-317, which may be interpreted to prohibit trade name usage (August 1984 comments, at pp. 4-7). Both of these provisions may harm consumers by hindering competition from high-volume, lower-priced practices. In its Report,[8] the Board noted that our recommendations relating to advertising will be taken under advisement. We appreciate this consideration of our comments. However, the Board did not recommend any statutory revisions and we would urge the Board to reconsider our previous comments regarding these provisions.

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[7] Letter to Richard Morrison, Department of Health Regulatory Boards from Carol T. Crawford, Director, Bureau of Consumer Protection (August 21, 1984) (hereinafter sometimes referred to as the "August 1984 comments.")

[8] Board of Medicine, Summary of Regulations, p. 6.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

August 21, 1984

COMMISSION APPROVED

Mr. Richard Morrison
Department of Health Regulatory Boards
Commonwealth of Virginia
517 West Grace Street
P.O. Box 27708
Richmond, VA 23261

Dear Mr. Morrison:

The Federal Trade Commission's Bureaus of Consumer Protection, Economics and Competition[1] are pleased to respond to your invitation to assist you in your regulatory review of the Virginia State Boards of Dentistry and Medicine, and to provide comments concerning the effects of various restrictions on health professionals.[2] In these comments we address the following points: (1) restrictions on advertising by dentists and physicians, (2) restrictions on the business practices of these professionals, including corporate employment, commercial locations, and trade name practice and (3) restrictions on the formation and operation of prepaid dental plans.

The Federal Trade Commission seeks to promote the national policy of encouraging competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the effects of restrictions on the business practices of professionals, including optometrists, dentists, lawyers, physicians and others. Our goal is to identify and seek the removal of such restrictions that impede competition, increase costs and harm consumers without providing countervailing benefits. The Commission has also been investigating the effects of other restrictions affecting health care delivery and has sought to identify restrictions that may limit competition and harm consumers without providing

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1 These comments represent the views of the Bureaus of Consumer Protection, Economics and Competition of the Federal Trade Commission and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Federal Trade Commission, however, has reviewed these comments and has voted to authorize their presentation.

2 We have found no similar restrictions in the regulations of the Virginia Boards of Pharmacy or Nursing, also currently being reviewed by your Department.

In conclusion, thank you for your willingness to consider our comments. We are enclosing copies of the studies referred to in our comments. Please let us know if we can be of any furtner assistance.

Sincerely,

Carol T Crawford/HB

Carol T. Crawford
Director

Enclosures
(Sent out separately by DHL).

countervailing benefits. In offering these comments, we acknowledge that we are not in a position to offer advice on what minimum level of quality of care the states should require.

For some time, the Commission has been concerned about public and private restrictions which limit the ability of professionals to engage in nondeceptive advertising.[3] Studies have shown that prices for professional goods and services are lower where advertising exists than where it is prohibited.[4] Studies have also shown that while advertising leads to lower prices it does not lead to lower quality services.[5] Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may well result. For this reason, we believe that only false and deceptive advertising should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and may well contribute to an increase in prices.

Several provisions of Virginia law appear to ban the dissemination of nondeceptive information. Va. Code §54-187(7) (1982) bans advertising claims of superiority by dentists and §54-317(3) bans claims of superiority by physicians. These provisions would appear to prohibit at least some nondeceptive claims and therefore, at the appropriate time, you may wish to consider recommending any appropriate statutory revision. In addition, we would urge you to interpret these provisions to avoid prohibiting nondeceptive advertising to the extent possible. Some of the dental regulations which we discuss below -- for example, the provisions prohibiting all quality claims --

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3 See, e.g., In re American Medical Association, 94 F.T.C. 701 (1978), aff'd, 638 F.2d. 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982).

4 Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980) (discussed at page 9 below); Benham and Benham, Regulating through the Professions: A Perspective on Information Control, 18 J. L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J. L. & Econ. 337 (1972).

5 Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980) (discussed at page 9 below); J. Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976); McChesney & Muris, The Effects of Advertising on the Quality of Legal Services, 65 A.B.A.J. 1503 (1979); Muris & McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979).

appear to go beyond what is necessarily prohibited by the statute.

Board of Dentistry Rule 7.A.4.a. bans advertising of any statistical data or other information relating to past performance which could be interpreted as a representation of superiority or quality. Quality information, as well as price and availability information, is important to consumers because consumers ordinarily seek lower prices for a given level of quality and higher quality for a given price. Nondeceptive statistical data or other data on past performance may be particularly valuable in assessing quality because they provide consumers with objective, factual information. Of course, incomplete data that mislead consumers into believing that past results are more favorable than they really are could be banned as deceptive.

Rule 7.A.4.c. also bans representations regarding quality, including implications of quality and statements of opinion. This section might be interpreted to prohibit the dissemination of much truthful information, including statements about a practitioner's office equipment, personnel or techniques. Truthful claims about a practitioner's background, training or experience, which may be very useful to consumers in choosing a practitioner, may also be banned by this rule. Statements of opinion, which could also be nondeceptive in many cases, are also banned.

Rule 7.A.2.d. prohibits advertising which states or implies that a dentist is a certified or recognized specialist other than as permitted by the American Dental Association (ADA). We are concerned that this Rule may be broadly interpreted to prohibit, for example, advertising of denture services as implying that the practitioner is a specialist in the area of prosthodontics, or advertising of root canals as implying that the practitioner is a specialist in the area of endodontics, thus effectively prohibiting dentists from advertising many of the services they routinely perform.

Rule 7.A.2.f. requires disclosure of the original price whenever a discount is advertised. This has been interpreted in Policy Statement #14 to prohibit advertising which states "call and ask about our family, student and senior citizen discounts." Since it is impractical t state in an advertisement the regular prices of all the hundreds of services a dentist provides, this rule implicitly bans all advertising of discounts unless only a few specific services are advertised. Thus, this rule would prohibit dissemination of coupons entitling the bearer to a percentage discount on all of a dentist's services, as well as advertising of discounts on all services to certain groups. Truthful discount price advertising such as these examples would likely be particularly useful to consumers. We are aware of no evidence that such advertising is inherently misleading to consumers.

Rule 7.A.4.d., which prohibits "showmanship, puffery," "slogans," and so on, in effect prohibits dentists from using nondeceptive advertising and marketing techniques commonly used by other providers of goods and services. These techniques are used by advertisers to attract and hold consumers' attention; they help to communicate the message more effectively to consumers. Such techniques do not appear to be inherently deceptive and prohibiting them may well decrease the effectiveness of advertising, resulting in higher costs and possibly less frequent advertising. In addition, the vagueness of this provision may chill nondeceptive advertising in general.

The statutes and regulations governing dentists and several statutory provisions governing physicians also contain provisions that prohibit certain forms of commercial practice. The Virginia Code prohibits employment of dentists by lay corporations and bans associations and partnerships between dentists and other persons for the performance of dental services.[6] These restrictions prohibit, for example, partnerships between dentists and physicians or other professionals who might provide complementary health care services in a single office, as well as associations between dentists and lay persons or business corporations. Such restrictions, which limit the availability of equity capital for professional practices, may well increase the cost of capital to professional firms and hinder the development of high-volume practices that may be able to reduce costs through economies of scale.

The Virginia Code also prohibits both dentists[7] and physicians[8] from practicing their professions as lessees of any commercial or mercantile establishment. These provisions prevent physicians and dentists from locating their offices inside commercial establishments such as drug or department stores, where they can establish and maintain a high volume of patients because of the convenience of such locations and because of a high level of "walk-in" patients. This higher volume may, in turn, allow professional firms to realize economies of scale which can be passed on to consumers in the form of lower prices. Restrictions on leasing from commercial establishments may, therefore, hinder the development of such high-volume, lower-priced practices.

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6 Va. Code §54-146, §54-183 (1982). Dentists even appear to be prohibited from hiring lay persons to manage their dental businesses. Va. Code §54-146 (1982). This appears to be an unnecessary restriction on the ability of dentists to hire persons with business expertise to handle the non-professional aspect of a dental office.

7 Va. Code §54-147.1 (1982).

8 Va. Code §54-278.1 (1982).

Virginia law also prohibits dentists[9] from practicing under a trade name. Trade names can be virtually essential to the establishment of large group practices and chain operations which can offer lower prices. Trade names are chosen because they are easy to remember and because they can convey useful information such as the location or other characteristics of a practice. Over time, a trade name can also come to be associated with a certain level of quality, service and price, thus facilitating consumer search. Without trade names, larger practices must use lengthy and difficult-to-remember names that include the individual names of all the practitioners or owners of a practice, and that communicate less information, as currently required by Virginia law.[10] The name of the practice also has to be changed periodically as members join or leave the firm, contributing to consumer confusion. Thus, without convenient and enduring trade names, development of high-volume, low-price practices becomes more difficult.

Restrictions such as these on the business practices of professionals can reduce competition in health care markets by preventing the formation and development of innovative forms of professional practice that may be more efficient, provide comparable quality, and offer competition to traditional providers. For example, in a case challenging various ethical code provisions enforced by the American Medical Association (AMA), the Commission found that AMA rules prohibiting physicians from working on a salaried basis for a hospital or other lay institution and from entering into partnerships or similar relationships with non-physicians unreasonably restrained competition and thereby violated the antitrust laws.[11] The Commission concluded that the AMA's prohibitions kept physicians from adopting more economically efficient business formats and that, in particular, these restrictions precluded competition by organizations not directly and completely under the control of physicians. The Commission also found that there were no countervailing procompetitive justifications for these restrictions.

Proponents of such restrictions claim that they are necessary to maintain a high level of quality in the professional services market. For example, they claim that employee-employer and other relationships between professionals and non-

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9 Va. Code §54-184 (1982). Va. Code §54-317 (1982) prohibits physicians from practicing under a false or assumed name. Many states interpret such language to prohibit trade name usage.

10 Va. Code §54-184 (1982).

11 In re American Medical Association, 94 F.T.C. 701 (1978), aff'd, 638 F.2d. 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982).

professionals will result in lay interference in the professional judgment of licensees, thus causing a decline in quality. They assert that lay corporations such as chain retailers would be unduly concerned with profits, not with the quality of professional care. Allegedly, while such firms might offer lower prices, they might also encourage their professional employees to cut corners in order to maintain profits. The public would suffer doubly, according to those who favor restrictions, because professionals who practice in traditional, non-commercial settings would be forced to lower the price and quality of their services in order to compete.

The Federal Trade Commission's Bureaus of Economics and Consumer Protection have issued two studies that provide evidence that restrictions on commercial practice of optometry -- including restrictions on the business relationships between optometrists and non-optometrists, on commercial locations and on trade name usage -- are, in fact, harmful to consumers. The first study,[12] conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, compared the price and quality of eye examinations and eyeglasses across cities with a variety of legal environments. Cities were classified as markets where advertising was present if there was advertising of eyeglasses or eye exams in local newspapers or "yellow pages." Cities were classified as markets with chain optometric practice if eye examinations were available at large interstate optical firms. Since restraints on corporate practice of optometry, commercial locations and trade name usage necessarily restrict the operations of chain optometric firms, the study provides important information on the likely effects of such restrictions.

The study found that prices charged in 1977 for eye examinations and eyeglasses were significantly higher in cities without chains and advertising than in cities where advertising and chain firms were present. The average price charged by optometrists in the cities without chains and advertising was 33.6% higher than in the cities with advertising and chains ($94.46 versus $70.72). Prices were approximately 17.9% higher as a function of the absence of chains; the remaining price difference was attributed to the absence of advertising.

The data also showed that the quality of vision care was not lower in cities where chain optometric practice and advertising were present. The thoroughness of eye examinations, the accuracy of eyeglass prescriptions, the accuracy and workmanship of eyeglasses, and the extent of unnecessary prescribing were, on average, the same in both types of cities.

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12 Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

The second study compared the cost and quality of cosmetic contact lens fitting by various types of eye care professionals.[13] This study was designed and conducted with the assistance of the major national professional associations representing ophthalmologists, optometrists and opticians. Its findings are based on examinations and interviews of more than 500 contact lens wearers in 18 urban areas.

The study found that there were few, if any, meaningful differences in the quality of cosmetic contact lens fitting provided by ophthalmologists, optometrists, and opticians. The study also showed that, on average, "commercial" optometrists -- that is, optometrists who worked for a chain optical firm or advertised heavily -- fitted contact lenses at least as well as other fitters, but charged significantly lower prices.

These studies provide evidence that restrictions on employment, partnership, or other relationships between professionals and non-professionals, on commercial locations and on trade name usage tend to raise prices above the levels that would otherwise prevail, but do not seem to raise the quality of care in the vision care market. Although these studies deal specifically with restrictions on the practice of optometry, the results may be applicable to analogous restrictions in other areas, such as medicine and dentistry.

We also have reviewed Chapter 27, Title 38.1 of the Virginia Code, relating to Plans for Future Dental or Optometric Services, and have identified several provisions that appear to be unnecessarily restrictive or whose anticompetitive effects may outweigh any benefits to the public.

Va. Code Section 38.1-898 requires that a majority of the board of directors of a prepaid dental plan be dentists. It is not apparent what public benefit results from requiring provider control of all plan boards, as this section does.[14] We are unaware of any reason why consumers, entrepreneurs, and others should not also be permitted to establish and operate such plans in competition with provider-controlled plans. Such lay boards can certainly obtain the necessary professional expertise without having providers control the plan's board of directors.

Section 38.1-903 requires that dental or optometric service plan subscribers have "free choice of any participating dentist or optometrist." Some states interpret such clauses to require

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

14 The antitrust laws do not normally prohibit provider control of prepaid health care plans.

that participation be open to any licensed provider. If this section is interpreted in this way, it in fact could restrict the choices available to consumers. Mandating free choice of provider in all prepayment programs prevents plans from offering, and subscribers from freely and voluntarily choosing to enroll in, programs that may limit subscriber choice of provider. Such plans, in turn, may lower program costs by selecting less expensive or more quality-conscious providers, and may generate competitive pressure on all providers to control costs or raise quality. This concept is evident in both health maintenance organizations ("HMOs") and the recent emergence of preferred provider organizations ("PPOs"). As you know, Virginia was one of the first states to pass legislation authorizing PPO arrangements,[15] and the mandatory free choice provision of Section 38.1-903 may be at odds with the purpose and intent of that more recent statute. In its case against the American Medical Association, the Commission found that the origin and history of the medical profession's insistence on this type of provision for prepayment plans "makes clear that the purpose . . . is primarily the anticompetitive one of suppressing the activities of competitors, not solicitude for the rights of patients."[16]

Section 38.1-904 denies the Insurance Commission discretion to license more than one plan in a given geographic area if "licensing more than one plan for the same geographical area will not promote the public welfare." While we do not know how this provision in fact has been applied or will be applied, it could be used to protect current market participants from competition from new market entrants, or at least to discourage such new entry, and would not appear to serve any substantial public interest.

Section 38.1-909 provides that dental plans subject to this chapter "shall not engage in any other business," with the exception of governmental health care programs. This restriction may unnecessarily prevent plans from diversifying and offering their subscribers additional products or benefits packages that may be more convenient and desirable. For example, many commercial insurers have offered coverage packages to employers that include accident and health insurance, dental benefits, life insurance, workers' compensation coverage, and even pensions and annuities. Permitting dental plans to diversify to meet market demands -- subject, of course, to appropriate regulatory oversight -- may allow them to compete more effectively and better meet the needs of the public.

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15 S.B. 110, Chap. 464, 1983 Session (effective July 1, 1983).

16 In re American Medical Association, 94 F.T.C. 701, 1015 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982).