

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

May 31, 1985

Mr. Stephen P. Tanzer
Legislative Council of Delaware
Sunset Review Committee
P.O. Box 1401
Dover, Delaware 19901

Dear Mr. Tanzer:

We are pleased to respond to your request for assistance in your sunset review of the Delaware State Board of Optometric Examiners by providing comments concerning the competitive and consumer effects of laws and regulations that prohibit certain business practices by members of the optometric profession.¹

The Federal Trade Commission seeks to promote 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 state restrictions on the business practices of professionals, including optometrists, dentists, lawyers, physicians, and others. Our goal is to identify and seek the removal of restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.² In this regard, the Commission recently issued a Notice of Proposed Rulemaking for a Proposed Ophthalmic Trade Regulation Rule that would prohibit, among other things, state-imposed bans on trade name usage and bans on employment or other relationships between optometrists and non-optometrists.³ The Commission stated in its Notice that public restraints on the permissible forms of

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

² The Commission is empowered under 15 U.S.C. § 41 et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. It has joint responsibility with the Department of Justice for enforcement of the federal antitrust laws.

³ See 50 Fed. Reg. 598 (1985).

ophthalmic practice appear to increase consumer prices for ophthalmic goods and services, but do not appear to protect the public health or safety.⁴

We strongly support the Board's proposal to broaden the scope of permissible advertising and commercial practices by optometrists. The proposed statutory and rule changes, however, retain restrictions that could unnecessarily harm consumers and discourage competition. In the enclosed comments, we discuss several such restrictions. First, we address proposed and existing statutory restraints on professional relationships between optometrists and non-optometrists. Second, we discuss a prohibition on operating under trade names which appears to go beyond that necessary to prevent deception. Third, we express concerns about what appear to be overly broad restrictions on advertising and in-person solicitations.

Thank you for the opportunity to comment on your proposed statute and rules. In addition to our comments, we have enclosed copies of two studies to which we refer in the comments. Please let us know if we can be of any further assistance.

Sincerely,

Carol T Crawford/HJB

Carol T. Crawford
Director

Enclosures

⁴ Id. at 599-600.

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

TO THE
LEGISLATIVE COUNCIL OF THE STATE OF DELAWARE
SUNSET REVIEW COMMITTEE

ON
REVIEW OF THE DELAWARE OPTOMETRY LAW AND
REGULATIONS OF THE BOARD OF OPTOMETRIC EXAMINERS

MAY 31, 1985

These comments represent the views of the Bureaus of Consumer Protection, Competition, and Economics 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.

The Bureaus of Consumer Protection, Competition, and Economics support the Delaware Board of Optometric Examiners' ("Board") proposal to lessen restrictions on permissible optometric advertising and commercial practices. We believe, however, that competition and consumer welfare would be well served by further lessening the restrictions. These comments set forth our suggested changes and raise questions that we believe the Board should consider during this sunset review.

Commercial Practice

The current Delaware Optometry Law and Board Rules contain numerous provisions that may unnecessarily hamper optometrists in their choice of ways to market their services in a nondeceptive, yet cost-efficient manner. The most significant provisions prohibit optometrists from practicing under trade names, locating offices in mercantile establishments, affiliating with opticians, and affiliating in any way with lay organizations or persons, whether through employment, partnership or a corporation.¹ The proposed amendments would eliminate both the restrictions on practice location and the express prohibition on delegating the fitting of contact lenses to opticians, which are positive steps. The proposal would retain, however, the prohibitions on

¹ See Delaware Code Annotated, Title 24, Chapter 21, sections 2101(b), 2113(a)(7)(c), (d), (f), (n) and Board Rules 4.03, 4.08, 4.09, 4.10, 4.11, 4.12.

using trade names² and affiliating with non-optometrists.³

One such restriction is contained in proposed section 2113(a)(13), which would forbid an optometrist from practicing under any arrangement with any company other than a professional corporation. Section 2101(b)(2), which is part of the existing law, would also ban professional relationships with non-optometrists, including the employment of professional managers.⁴ Moreover, proposed section 2113(a)(7)(a) would continue to ban trade names by forbidding an optometrist from listing "in a telephone directory or otherwise holding himself [or herself] out as practicing under any name other than the name" under which the optometrist is registered. Restrictions

² The proposal also requires eliminating from a firm's name the name of any practitioner who leaves the business.

³ The Commission recently issued a Notice of Proposed Rulemaking for a Trade Regulation Rule that would preempt state laws and regulations that ban trade names, professional relationships between optometrists and non-optometrists, locating in mercantile establishments and branch offices. In its notice, the Commission stated that such restraints appear to increase prices without providing offsetting public health or safety benefits. See 50 Fed. Reg. 598, 599-600 (1985).

⁴ That section states:

(b) Any person shall also be deemed to be practicing the profession of optometry who -

(1)

(2) Opens for practice or operates, conducts or manages an office in this state, either directly or indirectly, where optometric practice is carried on with the intent of receiving therefrom, either directly or indirectly, any money, gift or any form of compensation which might result from any part of the practice of optometry as defined in this section

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, such as chain firms. Such firms may have the potential to offer lower prices, or to offer longer office hours or faster service than traditional practitioners.

Trade name bans could create special problems for chains or group practices that employ many practitioners and provide service on a state-wide or regional basis. Trade names can be virtually essential to such practices. They 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, trade names can come to be associated with a certain level of quality, service, and price, thus facilitating consumer search. If trade names are forbidden, larger practices lose an important marketing tool. Prohibiting the use of a trade name in lieu of the names of individual licensees could make advertising, which is also essential to most large group practices, prohibitively expensive, particularly on television or radio. This provision could discourage the development of such firms by effectively prohibiting advertising by large group practices and chains.

We recognize the necessity of ensuring identification and accountability of individual practitioners practicing under a trade name. However, there may be effective ways to achieve this goal without impeding the development of large group practices and chains. For example, states might require that the names of

individual practitioners be conspicuously posted in professional offices and noted on receipts and patient records.

Restrictions on optometrists affiliating with lay corporations may limit the availability of equity capital for professional practices and hinder the development of high-volume practices. These firms can provide comparable quality services and create competitive pressure on traditional providers to pay greater attention to their own costs and fees.

In a case challenging 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 violated the antitrust laws.⁵ 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 restrictions on employment, partnership or other business relationships between licensed professionals and non-licensees and restrictions on the use of trade names claim

⁵ In re American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982).

that restrictions are necessary to maintain a high level of quality in the professional services market. For example, proponents claim that employer-employee and other business relationships between professionals and non-professionals will diminish the overall quality of care because of lay interference with the professional judgment of licensees. They assert that lay corporations such as chain retailers would be unduly concerned with profits to the detriment of the quality of professional care. They also allege that, while lay firms might offer lower prices, such firms might also encourage their professional employees to cut corners 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 meet the prices of their commercial competitors.

The Federal Trade Commission's Bureau of Economics and Consumer Protection have issued two studies that provide evidence that restrictions on commercial practice by optometrists -- including restrictions on business relationships between optometrists and non-optometrists and limits on the use of trade names -- do, in fact, harm consumers.

The first study,⁶ conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Admini-

⁶ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

stration, compared the price and quality of eye examinations and eyeglasses in 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. This study provides important information on the likely effects of state laws that restrict the operation of chain optometric firms.

The study found that prices charged in 1977 for eye examinations and eyeglasses were significantly higher in cities without chain firms and advertising than in cities where advertising and chain firms were present. The average adjusted price charged by optometrists in the cities without chain firms and advertising was 33.6 percent higher than in the cities with advertising and chains (\$94.46 versus \$70.72). Prices were approximately 17.9 percent higher if chain firms offering eye exams were not present; the remaining 15.7 percent 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.

The second study issued by the FTC staff compared the cost and quality of cosmetic contact lens fitting by various types of

eye care professionals.⁷ 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 were affiliated with 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 and limits on the use of trade names by professionals 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.

Advertising and Solicitation

In its current form, the Optometry Law imposes a virtual ban on advertising.⁸ Such a ban is illegal. As the Commission stated with regard to the American Medical Association's advertising restrictions, advertising is so important to the

⁷ Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983).

⁸ Del. Code Ann. Tit. 24, § 2113(a)(7)(a).

proper functioning of the market that the very nature of the restrictions at issue was "sufficient alone to establish their anticompetitive quality."⁹ Citing the United States Supreme Court's decisions in Bates v. State Bar of Arizona¹⁰ and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,¹¹ the Commission recognized the importance of a free and competitive market in the health care field:

Nor can it be questioned that broad bans on advertising and soliciting are inconsistent with the nation's public policy. "Advertising is the traditional mechanism in a free market economy for a supplier to inform a potential purchaser of the availability and terms of exchange." . . . And "[i]t is a matter of public interest that, [purchasers'] decisions, in the aggregate, be intelligent and well-informed." . . . Apart from its economic function, commercial advertising may convey important information of general public interest. . . . On a more individual level, restraints on the advertising of medical services . . . have a disproportionate effect on the poor, the sick and the aged. . . . Given the prevailing

⁹ 94 F.T.C. at 1005.

¹⁰ 433 U.S. 350 (1977) (holding state supreme court prohibition on advertising invalid under the First Amendment to the United States Constitution, and according great importance to the role of advertising in the efficient functioning of the market for professional services).

¹¹ 425 U.S. 748 (1976). The Court stated in reference to the advertising of pharmaceutical drugs:

Advertising, however tasteless and expensive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. . . . To this end, the free flow of commercial information is indispensable.

425 U.S. at 765.

disparity of prices, information as to who is charging what "could mean the alleviation of physical pain or the enjoyment of basic necessities." [citations omitted]¹²

We are pleased to note that the proposed statutory amendments eliminate many restrictions on advertising. The statute would retain constraints against making false, fraudulent, or misleading statements or engaging in conduct likely to mislead the public.¹³ The proposed rules, however, contain much broader provisions.

Our experience in examining restrictions on professionals together with our review of other empirical data¹⁴ leads us to conclude that, generally, only advertising that is false or deceptive should be prohibited. Any more restrictive standard is likely to suppress the dissemination of potentially useful information and contribute to an increase in prices. We would therefore recommend that the Board consider removing all advertising restrictions except those that employ a false or deceptive standard. Such action would give consumers access to more complete information about prices and other attributes of

¹² 94 F.T.C. at 1011.

¹³ Proposed sections 2113(a)(7)(c) and (a)(10).

¹⁴ Several empirical studies have confirmed the relationship between advertising and lower prices in markets for professional services. See, e.g., Bureau of Economics and Cleveland Regional Office, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Muris & McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179; Benham & Benham, Regulating through the Professions: A Perspective on Information Control, 18 J. Law & Econ. 421 (1975); Benham, The Effect of Advertising on the Price of Eyeglasses, J. Law & Econ. 337 (1972).

available optometric services, while at the same time protecting them from false or misleading claims. The greater availability of information would enable consumers to make more informed decisions about their optometric care. Accordingly, we think it important that the Board reevaluate the advisability of some of the proposed restrictions.

First, Rule 3 could have the effect of prohibiting price advertising of optometric goods or products unless such ads contain voluminous information, much of which may not be helpful to the consumer, particularly when received in the context of an advertisement. The rule would require, for example, that price ads for ophthalmic frames and lenses contain the name of the manufacturer, the manufacturer's identification number, and the country of manufacture. It would require the inclusion of the manufacturer's name and the country of manufacture in contact lens ads. The rule would require that ads for each of these three products contain numerous other items of information as well. We recognize that affirmative disclosures may be justified in some instances. Indeed, in the Commission's Rule on Advertising of Ophthalmic Goods and Services,¹⁴ it declared that limited disclosure requirements created by state law would not constitute violations of the FTC Act. The disclosure requirements contained in the proposed rules, however, seem much

¹⁴ 16 C.F.R. Part 456. On February 6, 1980, the United States Court of Appeals for the District of Columbia remanded this rule to the Commission for reconsideration in light of Bates v. State Bar of Arizona. American Optometric Association v. FTC, 626 F.2d 896. The rule has not been reissued.

more extensive than those approved in the Ophthalmic Rule and may provide no benefit to consumers. These requirements seem to require disclosure of information only marginally related to the primary message in a price advertisement. Consumers who desire such information are not precluded from requesting it of the advertiser. Moreover, the disclosures would require significant time in a radio or television ad, and significant space in a printed ad. Thus, they could greatly increase the cost of the ad. We therefore believe the Board should reconsider the need for any of the proposed disclosure requirements.

Second, Rule 4 would limit price advertising to only two "routine services" (eye exams and fitting of ophthalmic prosthetic devices), and require that price advertisements list the services included in the examination. We suggest the Board reconsider the obligation to list the components of an examination, for the same reasons as explained above. We also question whether it is necessary to circumscribe price advertising so narrowly in order to prevent consumer deception.

Third, Rule 6 would forbid use of the terms "specialist, consultant, etc.," except where the optometrist is certified by the American Academy of Optometry or the American Optometric Association. The proposal implies that it is deceptive to claim to have special expertise unless an optometrist has achieved formal recognition. Expertise may be acquired through training, even though it does not lead to certification, or through extensive or intensive practice in a particular field. The Board may appropriately reserve the use of the word "specialist" to

optometrists satisfying certain criteria. But the Board should ensure that such criteria are reasonable and that optometrists who do not satisfy the criteria may nonetheless convey to the public truthful, non-deceptive information about their training, experience, ability and the nature of their practice. We ask that the Board re-examine this provision to ensure that it does not unnecessarily deter optometrists from conveying truthful information to consumers.

Fourth, Rule 1(c) would ban any statement making unsubstantiated price comparisons. We support this provision insofar as it would require comparisons to be truthful. But this provision could be construed to create a requirement that such ads be submitted to the Board for its approval before they are published or aired. If this is the intent of the Board, we believe that the requirement may be overly burdensome.

Fifth, proposed Rule 1(b), would ban all promises of guaranteed cures, which may be too broad. Such a rule could discourage non-deceptive offerings of guarantees of consumer satisfaction or money-back. For example, an optometrist may wish to advertise that if he or she cannot correct certain vision problems to 20-20, all fees will be refunded. While we recognize the vulnerability of consumers to false and deceptive claims of curative results, a truthful communication of a satisfaction guarantee could be beneficial to consumers.

Finally, we invite your attention to proposed section 2113(a)(11) of the statute, which would permit the Board to revoke or suspend a license where it finds an optometrist guilty

of "soliciting in person or through an agent . . . [to sell] ophthalmic materials or optometric services, or employing what are known as 'chasers,' 'steerers,' or 'solicitors' to obtain business, unless in conjunction with a vision service plan approved by the Board. . . . " This provision may in some instances impede the flow of truthful commercial information from optometrists to potential patients. For example, it might bar optometrists or their agents from distributing flyers or from speaking to interested groups about ophthalmic care. A state may legitimately insist that optometrists and their agents not exert undue influence and that solicitors be held to the same standard of conduct as the professionals they represent. A state may also determine that a past pattern of abuses warrants regulations tailored to prevent specific abuses, but a blanket ban on the utilization of solicitors is probably overly broad. Therefore, we suggest that the Board reevaluate the need for such sweeping regulation in this area.

