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FEDERAL TRADE COMMISSION

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COMMISSION APPROVED

AUG 21 1986

Mr. Owen H. Yamasaki
Office of the Auditor
465 S. King Street Room 500
Honolulu, HA 96813

Dear Mr. Yamasaki:

You recently requested comments in connection with your sunset review of statutory provisions prohibiting certain business practices by members of the optometric profession.[1] The Federal Trade Commission's Bureaus of Competition, Consumer Protection and Economics, and its San Francisco Regional Office, are pleased to respond to this request.[2] As discussed below, we strongly recommend the repeal of statutory restrictions on truthful advertising, such as the laws that ban the advertising of discounts or claims of superiority. We also recommend the repeal of laws that unduly limit the commercial formats open to optometrists, such as the laws banning trade names or affiliations with lay corporations. Studies conducted by the staff of the Federal Trade Commission and others indicate that such restrictions are likely to raise the price of optometric goods and services without providing any countervailing benefits to consumers.

The Federal Trade 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. Pursuant to this statutory mandate the Commission has attempted to encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years the Commission has been investigating the competitive effects of restrictions on the business practices of state-licensed professionals, including

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1 Hawaii Rev. Stat. Ann. §§ 459 et seq. (1984).

2 These comments represent the views of the Commission's Bureaus of Competition, Consumer Protection and Economics, and those of its San Francisco Regional Office, and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

optometrists, dentists, lawyers, physicians, and others. Our goal has been to identify and seek the removal of those restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.

Advertising Restrictions

As a part of the Commission's efforts to encourage competition among licensed professions, it has examined the effects of public and private restrictions that 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 restricted or prohibited.[4] Studies have also provided evidence that restrictions on advertising raise prices but do not increase the

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[3] See, e.g., 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). The thrust of the AMA decision--"that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011)--is consistent with the reasoning of recent Supreme Court decisions involving professional regulations. See, e.g. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, ____ U.S. ____, 105 S. Ct. 2265 (1985) (holding that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients or using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding state supreme court prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); and Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976) (holding Virginia prohibition on advertising by pharmacists invalid).

[4] Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

quality of goods and services.[5] Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may result.

The Commission has examined various justifications that have been offered for restrictions on advertising and has concluded, as have the courts, that these arguments do not justify restrictions on truthful advertising. For this reason, only false or deceptive advertising should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and may contribute to an increase in prices.

Section 459-9(3A) prohibits optometrists from advertising optometric goods at discount. We urge the elimination of this provision.[6] This section's ban on an important form of price advertising clearly deprives consumers of information central to their purchasing decision. Because it makes comparison shopping on price very difficult, the restriction limits significant and meaningful competition among optometrists. In economic terms, the existing ban unnecessarily increases the "search costs" to optometric patients of identifying those practitioners who offer the price, quality and kind of care suited to the patients' specific needs and desires.

The elimination of the present ban on discount advertising will not inhibit Hawaii from vigorously protecting consumers from false or misleading advertising. We note that § 459-9(3B) condemns false and deceptive advertising. Should a discount advertisement be found deceptive, this section could be successfully invoked to prohibit it. A total proscription on all discount advertising, however, has the effect of prohibiting truthful advertising about a vital subject and is likely to result in a signficant reduction in consumer welfare.

We also recommend the elimination of that part of § 459-9(3B) which prohibits claims of superiority by optometrists. This restriction clearly lessens rivalry among competing sellers. The effects of the restriction will depend on how it is interpreted and applied. At a minimum, a prohibition on

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

[6] A similar ban on discount advertising was held to be an unconstitutional infringement of First Amendment rights in Terry v. California State Board of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975), affirmed, 426 U.S. 913 (1976).

advertisements that contain claims of superiority restricts comparative advertising, which can be a highly effective means of informing and attracting customers and an important competitive force. When a seller cannot truthfully compare the attributes of his service to those of his competitors, the incentive to improve or offer different products, services, or prices is likely to be reduced.

A ban on claims of superiority is likely to be even more injurious to competition and consumers if interpreted to prohibit a wider range of truthful claims. Virtually all statements about a seller's qualifications, experience, or performance can be considered to be implicit claims of superiority. A ban on all such claims would make it very difficult for a seller to provide consumers with truthful information about the differences between his services and those of his competitors.

We also recommend the repeal of § 459-9(3C) which prohibits advertising that identifies an optometrist in conjunction with any "nonlicensed person or groups of individuals." A ban on advertising of lawful affiliations between optometrists and retail sellers of optical goods denies consumers information about "non-traditional" and potentially efficient forms of providing eye care goods and services. It can pose a barrier to entry by large optical establishments and reduce the pressure on other sellers of eye wear to compete, not only with respect to price, but also as to convenience of service. It can thereby injure consumers through higher prices and reduce consumer choice.

We further recommend the elimination of § 459-9(5), which bans the use of house-to-house canvassing. This prohibition may in some instances impede the flow of truthful commercial information from practitioners to potential clients. Such restrictions on the dissemination of information may make it more difficult for buyers to learn about the availability of goods and services and differences in price and quality, thereby insulating competitors from direct competition and reducing the incentive to compete on the merits. Although Hawaii may have a legitimate interest in preventing over-reaching by canvassers in general, we believe that an absolute ban on house-to-house canvassing, singling out optometric goods and services, is unjustified.

Finally, we recommend the repeal of that part of § 459-9(8) which requires that all advertising identify the individual optometrist involved.[7] This provision is likely to raise the

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[7] Section 459-9(8) also seems to prohibit the use of trade names by optometrists. As discussed more fully in the "Commercial Practice Restrictions" section of this letter, we recommend that optometrists be permitted to use trade names. The use of such names can be critical to the establishment of large

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costs of advertising for optometric practices involving many members, and therefore to inhibit advertising by such practices. As a consequence, consumers would be deprived of the benefits of that advertising. Consumers can learn the identity of the optometrist who is responsible for their care in a number of less burdensome ways. For example, a provision could be enacted to require that the names of all optometrists practicing at a particular facility be clearly posted at that location. This alternative would more directly inform patients of the identity of their optometrist without the attendant costs imposed by § 459-9(8).

You have asked whether the Commission has modified its position on advertising restrictions after the decision in American Optometric Association v. FTC,[8] which remanded §§ 456.2 through 456.6 of the Advertising of Ophthalmic Goods and Services Trade Regulation Rule ("Eyeglasses Rule") for further study. In the American Optometric Association case, the court determined, among other things, that the remanded portions of the rule were unnecessary in light of the Supreme Court's decision in Bates v. State of Arizona.[9] The Commission has not altered its position that restrictions on truthful, non-deceptive advertising diminish consumer welfare and should be vigorously opposed. In harmony with this position, the Commission has proceeded on a case-by-case basis to review and, in certain instances, challenge rules affecting ophthalmic advertising.[10]

You also ask whether the advertising disclosure requirements mandated by § 459-10 are "necessary to protect the public's welfare or do they serve to discourage advertising." Section 459-10 is adapted from § 456.5 of the "Eyeglasses Rule." That rule authorized certain permissible state restrictions that did not appear to be unreasonably burdensome limitations on advertising. We do not believe, however, that such restrictions are necessary to prevent deception. Therefore, we recommend the repeal of § 459-10.

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group practices and chain operations, which often offer lower prices to consumers.

8 626 F. 2d 896 (D.C. Cir. 1980).

9 433 U.S. 350 (1977).

10 The most recent example of this effort is the Commission's case against the Massachusetts Board of Optometry (Docket No. 9195). On June 23, 1986, the administrative law judge ruled that the board may not prohibit the advertising or offering of discounts, or advertising that optometrists' services are available in commercial establishments; or restrict advertising that uses testimonials or advertising that the board considers sensational or flamboyant. Both parties have appealed this decision to the Commission.

Commercial Practice Restrictions

We also take this opportunity to comment on several current statutory provisions that limit the manner in which optometrists may do business. Section 459-9(4) prohibits the employment of optometrists by lay persons or corporations. Section 459-9(6) prohibits the practice of optometry on the premises of a commercial firm, and restricts ownership of optometric practices to licensed optometrists. Section 459-9(8) prohibits the use of trade names by optometrists.

We are concerned that these provisions may unnecessarily hamper optometrists who wish to market their services in a cost-efficient manner.[11] For example, banning the practice of optometry on the premises of a commercial concern prevents optometrists from locating their practices inside retail drug or department stores where they can establish and maintain a high volume of patients because of the convenience of such locations and a high number of "walk-in" patients. This higher volume may, in turn, allow professional firms to realize economies of scale that may be passed on to consumers in the form of lower prices. This restriction may also increase costs for chain optical firms by requiring optometrists associated with such firms to locate in separate offices or to establish separate entrances. Such higher costs may decrease the number of chain firms, resulting in higher prices for consumers.

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[11] On January 4, 1985, the Commission proposed an Ophthalmic Practices 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. The Commission stated in its Notice of Proposed Rulemaking that public restraints on the permissible forms of ophthalmic practice appear to increase consumer prices for ophthalmic goods and services, but do not appear to protect the public health or safety. See 50 Fed. Reg. 598, 599-600 (1985).

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. 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). 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.

Similarly, the use of trade names by optometrists can be essential to the establishment of large group practices and chain operations that are able to exploit economies of scale and, consequently, to offer lower prices. Trade names are chosen because they are easy to remember and may also identify the location or other characteristics of a practice. Over time, a trade name ordinarily comes to be associated with a certain level of quality, service and price, which facilitates consumer search.

Proponents of such restrictions say that the restrictions help to maintain a high level of quality in the professional services market. They claim, for example, 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 also allege that, while lay firms might offer lower prices, such firms might also encourage their professsional employees to cut corners to maintain profits. Similarly, it could be argued, that 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 Bureaus 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, 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 provided by optometrists in cities with a variety of regulatory environments. The study found that eye examinations and eyeglasses cost significantly more in cities without chains and advertising than in cities where advertising and chain optical 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. Estimates based on further analysis of the study data showed that prices were 17.9% higher due to the absence of chains; the remaining price difference was attributable to the absence of advertising.

This study also provides evidence that commercial practice restrictions do not result in higher quality eye care. The

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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).

thoroughness of eye exams, the accuracy of eyeglass prescriptions, the accuracy and workmanship of eyeglasses, and the extent of unnecessary prescribing were, on average, the same in restrictive and non-restrictive markets.

A more recent study[13] of cosmetic contact lens fitting conducted by the Commission's Bureaus of Economics and Consumer Protection concluded that, on average, "commercial" optometrists -- that is, optometrists who were associated with chain optical firms, used trade names, or practiced in commercial locations -- fitted cosmetic contact lenses at least as well as other fitters, but charged significantly lower prices.

In sum, restrictions on commercial practice and prohibitions on the use of trade names by professionals all 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. We suggest, therefore, that you consider repeal of §§ 459-9(4), 459-9(6), and 459-9(8), as well as the advertising restrictions discussed above.

Thank you for considering our comments. We have referred to a number of studies, cases and other materials. We would be happy to supply copies of these if you so desire. Please let us know if we may be of any further assistance.

Very truly yours,

Janet M. Grady
Regional Director

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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). This study was designed and conducted with the assistance of the major national professional associations representing ophthalmology, optometry and opticianry.