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Bureau of Competition
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

COMMISSION APPROVED

OCT 17 1985

George M. Sanchez, O.D.
President
Arizona State Board of Optometry
1645 West Jefferson, Room 312
Phoenix, Arizona 85007

Dear Dr. Sanchez:

The Federal Trade Commission's Bureaus of Competition, Consumer Protection, and Economics[1] are pleased to submit comments concerning proposed rules of the Arizona State Board of Optometry ("the Board"). We begin by discussing the interest and experience of the Federal Trade Commission in examining the competitive effects of state regulation of licensed professionals. In Part II of this letter, we comment on the Board's proposed regulation R4-21-301.E, which would allow optometrists to work for a corporation or lay person. In Part III of this letter, we comment on proposed regulation R4-21-301.D.1, which would prohibit optometrists from splitting fees with a lay person or corporation. Also in Part III, we discuss proposed regulation R4-21-301.A, which would prohibit optometrists from paying for the solicitation or steering of patients. Finally, in Part IV of this letter, we comment on proposed regulations R4-21-301.B and R4-21-302.B, which would regulate certain types of advertising by optometrists.

I. Interest and Experience of the Federal Trade Commission

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 its statutory mandate, the Commission encourages competition among members of the 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 kinds of business arrangements that state-licensed professionals, including optometrists, den-

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

tists, lawyers, physicians, and others are permitted to use in their respective practices. Our goal is to identify and seek the removal of those restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.

II. Employment of Optometrists by a Corporation or Lay Person

Proposed regulation R4-21-301.E provides:

> This rule [which would, inter alia, prohibit optometrists from fee-splitting and from paying for the solicitation or steering of patients] shall not be interpreted to prevent the use of partnerships or professional corporations for the practice of optometry. Nor shall this section be interpreted to prohibit the employment of an optometrist by a corporation or lay person provided the exercise of the optometrist's professional responsibilities and discretion is not compromised.[2]

We believe that this regulation will likely increase competition in the market for optometric services in Arizona because it would allow the development of alternative forms of delivering optometric services, such as high-volume chain firms, that may be able to reduce costs through economies of scale. Such alternative forms of delivery can provide comparable quality services and put competitive pressure on traditional providers to pay greater attention to their own costs and fees.

The Federal Trade Commission's staff has issued two studies that provide evidence that restrictions on business relationships

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2 This proposed regulation would be a change from Ariz. Admin. Comp. R. 4-21-02.A.2 (Aug. 31, 1977) which does not allow an optometrist to:

> Accept employment or the placing of himself under the control, directly or indirectly, of a Corporation, Trading Partnership or Layman, in which said optometrist performs optometric services for the public (employees excepted). Such acceptance shall be deemed to constitute "Unprofessional Conduct".

between optometrists and non-optometrists do not result in improved quality of care. In the first study,[3] conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, the price and quality of eye examinations and eyeglasses were compared across cities with a variety of legal environments. The data was collected by sending trained subjects to various cities to purchase routine eye examinations and eyeglasses. In the study, cities were classified as markets where advertising was present if there was advertising of eyeglasses or eye exams in the newspapers or the yellow pages. Cities were classified as markets with "chain" firms if eye examinations were available from large interstate optical 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 with chain firms and advertising. The average price charged by optometrists in the cities without chain firms and advertising was 33.6 percent higher than in the cities with chain firms and advertising ($94.46 versus $70.72). Although not reported in the study, calculations of the data also show that prices were approximately 17.9 percent higher as a function of the absence of chain firms; 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 firms 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 compared the cost and quality of cosmetic contact lens fitting by various types of eye care professionals.[4] This study was designed and conducted with the assistance of the major national professional associations representing ophthalmologists, optometrists and opticians. Its

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3 Bureau of Economics, Federal Trade Commission, Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980) [hereinafter cited as The Case of Optometry].

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

findings are based on examinations and interviews of more than 500 contact lens wearers in 18 urban areas. The study found that, on average, "commercial" optometrists -- that is, optometrists who were associated with chain optical firms, used trade names, or practiced in commercial locations -- 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 nonprofessionals 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.

Furthermore, in a case challenging ethical code provisions enforced by the American Medical Association ("AMA"), the Commission found that the AMA's 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 nonphysicians 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, such as health maintenance organizations, not directly and completely under the control of physicians. The Commission also found that there were no countervailing procompetitive justifications for these restrictions.

In conclusion, our experience in studying the effects of restrictions on the business practices of health professionals, particularly optometrists, leads us to believe that proposed regulation R4-21-301.E would increase competition in the market for optometric services in Arizona without causing harm to consumers. Consequently, we urge the Board to adopt this regulation.[6]

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5 American Med. Ass'n, 94 F.T.C. 701 (1979), aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982).

6 Arizona law prohibits optometrists from "knowingly having professional connection with or lending one's name to a person who is not a licensed optometrist." 1985 Ariz. Legis. Serv. 922, 924, 928 (West) (to be codified at Ariz. Rev. Stat. Ann. §§ 32-1701(9)(e), -1743(4)). A literal construc-

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III. Fee-Splitting Regulations

We believe that the Board's proposed regulations that would prohibit optometrists from splitting fees with a lay person or corporation[7] and from paying for the solicitation or steering of patients[8] may unnecessarily restrict the development of innovative health care delivery systems such as preferred provider organizations ("PPOs") and health maintenance organizations ("HMOs"). PPOs and HMOs, however, can promote competition in the markets for delivering and financing health care services and provide benefits to patients and providers alike. The regulations may also restrict the development of referral services and franchise arrangements which can have a procompetitive effect as well. Consequently, we urge the Board to either modify these regulations so that only conduct that is truly harmful to the public is proscribed, or exempt from their application optometrists' basic contractual arrangements with PPOs, HMOs, other alternative health care delivery systems, referral services, and franchisors, which might technically be viewed as involving fee-splitting.

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tion of these statutes would not only prohibit optometrists from working for corporations or from participating in any vision care plan but would also prohibit optometrists from hiring opticians, receptionists, or any other employees who are not licensed optometrists. Such a construction might even prohibit optometrists from purchasing optometric supplies from a person who is not a licensed optometrist. Since we do not think that the Arizona legislature intended to proscribe such a wide range of business practices, we urge the Board to carefully construe the phrase "professional connection." A reasonable construction would only prohibit, as an improper "professional connection," an optometrist's association with an unlicensed person who engages in acts which either constitute "the practice of the profession of optometry," such as the "the examination or refraction of the human eye and its appendages," 1985 Ariz. Legis. Serv. 922, 924 (West) (to be codified at Ariz. Rev. Stat. Ann. § 32-1701(7)), or in acts which interfere with the optometrist's practice of the profession of optometry. Thus construed, these statutes do not interfere with the employment of optometrists by lay persons or corporations.

7 Proposed regulation R4-21-301.D.1.

8 Proposed regulation R4-21-301.A.

A. Impact on Alternative Health Care Delivery Systems

PPO programs are a relatively new type of plan for providing and paying for health care services while controlling health care costs. PPOs are an alternative to other health plans offered by employers to their employees such as Blue Cross/Blue Shield service benefit plans and HMOs. Although they exist in many different forms, all PPO programs involve a series of contractual arrangements between "preferred" health care providers and an intermediary or a third-party payer of health care benefits, such as an insurer or self-insured employer. PPOs often attempt to select preferred providers for their ability to deliver quality health care at a low cost. Enrollees in PPO programs are usually given financial incentives, typically waivers of copayments and deductibles, to use these cost-conscious preferred providers. PPO enrollees and third-party payers benefit from any reduction in health care costs achieved by a PPO program, while preferred providers benefit from increased patient referrals. PPO programs also allow preferred providers to retain their fee-for-service mode of practice. PPO programs can have a procompetitive effect by putting pressure on non-PPO providers to price their services competitively or to risk losing patients to the preferred providers. In addition, efficient PPO programs put pressure on competing health plans to control their health care costs or to risk losing enrollees to the PPOs.

Because PPOs can promote cost containment and stimulate competition in the health care industry, the Commission has viewed their development favorably. For example, in 1983, the Commission issued an advisory opinion to Health Care Management Associates ("HCMA")[9] concerning a PPO program in which HCMA proposed to serve as an intermediary between participating physicians and third-party payers. The Commission concluded that such a program would likely promote competition in the health care sector and would not violate the Federal Trade Commission Act or any other antitrust statute.[10]

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9 Health Care Management Associates, 101 F.T.C. 1014 (1983) (advisory opinion). See also Letter from Arthur N. Lerner, Assistant Director, Bureau of Competition, Federal Trade Commission, to Michael L. Denger, Counsel for Great-West Life Assurance Company and Health Data Institute (Sept. 24, 1985) (staff advisory opinion regarding proposed PPO).

10 See also Letter from James C. Miller III, Chairman of the Federal Trade Commission, to Representative Ron Wyden (July

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HMOs are similar, in many respects, to PPO programs. Both types of arrangements utilize a limited panel of health care providers and afford coverage for a wide range of health care services. HMOs have built-in incentives to control health care costs and thus have a procompetitive effect in the market for health care services.[11] HMOs differ from PPOs in that they assume a responsibility to deliver these services directly to enrollees by employing or contracting with health care providers, as well as by undertaking the insurance function that third-party payers provide in PPO arrangements. In addition, HMOs generally provide coverage only if enrollees obtain their health care services from these participating providers. PPOs, by contrast, often provide coverage for use of nonparticipating providers, albeit at a higher out-of-pocket cost to enrollees.

The Board's proposed regulation that would prohibit optometrists from fee-splitting with a lay person or corporation may interfere with the operation of some forms of PPOs, HMOs, and other alternative health care delivery systems, as well as some referral services and franchise arrangements. For example, some PPOs require participating providers to remit to the PPO a percentage of the fees earned from treating PPO patients. Although not all PPOs are financed in this manner, this type of PPO may be attractive to many providers because the fees they pay to the PPO are directly proportional to the benefits (i.e., the number of referred patients) that they receive from participating in the program. Because the financial success of a new program often is uncertain, providers may prefer to participate in such PPO programs that "meter" benefits[12] rather than in programs that require substantial up-front capital contributions or annual charges. On its face, however, this type of PPO plan might

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29, 1983) (commenting favorably on proposed federal legislation which would have exempted PPOs from the coverage of certain state laws and regulations).

11 See, e.g., Bureau of Economics, Federal Trade Commission, Staff Report on the Health Maintenance Organization and Its Effects on Competition (1977).

12 A similar metering of benefits occurs where an optometrist pays a percentage of total net sales as rent. In State ex rel. Board of Optometry v. Sears, Roebuck & Co., 102 Ariz. 175, 427 P.2d 126, 128 (1967), the Arizona Supreme Court found such an arrangement "not only not illegal, but . . . a rather common mode of measuring the value of rental property."

violate proposed regulation R4-21-301.D.1, which provides, in part:

> An optometrist shall not: Divide, share, split, or allocate, either directly or indirectly, any fee for optometric services or materials with any lay person, firm or corporation.[13]

In addition, some HMOs, particularly those known as the IPA (individual practice association) type, hold back a certain percentage of each individual provider's fees for services rendered in order to create a reserve to pay for an unexpectedly high use of services by the entire subscriber population. This "holdback" fund is later distributed pro rata to the providers if the program's aggregate utilization levels, and hence its costs, do not exceed the anticipated levels upon which the HMO's premiums were based. This arrangement, which is used to impose some of the HMO's financial risk on participating providers and thus to help control unnecessary utilization of expensive health care services, also might be viewed as violating proposed regulation R4-21-301.D.1.

Furthermore, referral services, either for-profit or not-for-profit, that refer prospective patients to one or more providers, based on the stated needs of the patients and the qualifications or prices of the providers, may also violate this regulation if providers are required to pay a fee to the service for each referral. These services may provide valuable information to consumers about health care providers and thus may have a pro-competitive effect. Finally, this proposed regulation may interfere with certain franchise arrangements where providers pay a percentage of their fees to a franchisor in return for marketing, advertising services, and the use of a trade name.

Because PPOs, HMOs, other alternative health care delivery systems, referral services, and franchise arrangements may help to lower the cost of health care services, we urge the Board to reexamine its reasons for proposing regulation R4-21-301.D.1 to determine whether such organizations and arrangements pose the kinds of harm to the public that this fee-splitting regulation is intended to prevent. We believe that the reasons often given for prohibiting fee-splitting do not apply to these arrangements. We

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13 This proposed regulation essentially restates Ariz. Admin. Comp. R. 4-21-04.A.1 (Dec. 31, 1979).

reach this conclusion by examining three rationales often given for prohibiting fee-splitting.

B. Rationales for Fee-Splitting Regulations

One justification typically offered for fee-splitting regulations is to prevent abuse of the special trust that a patient places in a practitioner to make appropriate referrals based on his or her independent professional judgment of the patient's best interests. Suppose, for example, an optometrist refers a patient to an ophthalmologist for further testing. The patient, because he or she may be relatively uninformed about eye diseases, unsure how to choose among competing ophthalmologists, and worried about his or her condition, may rely heavily on the optometrist's recommendation. The rationale for prohibiting fee-splitting here is that if, unbeknownst to the patient, the optometrist will receive a referral fee or kickback from the ophthalmologist,[14] the optometrist may, consciously or not, refer the trusting patient for unnecessary medical care. There is also a concern that the optometrist will refer the patient to the ophthalmologist who pays the highest referral fees, rather than to the most competent one.

A PPO which receives a percentage of fees from optometrists, however, does not pose this problem of unnecessary or inappropriate referral of patients because the PPO "referral" takes place after a PPO enrollee has already independently decided to seek optometric care. There is no doctor-patient relationship that can be used to influence a patient to see another doctor in order to generate a referral fee. Instead, the PPO merely provides PPO enrollees with a list of practitioners. Although enrollees may rely on PPOs, to some extent, to assemble competent panels,[15] such reliance is not comparable to a patient's reliance on an optometrist who makes an in-person referral to a specific practitioner in the course of a professional diagnosis. This is especially true if PPO enrollees can also choose practitioners outside the PPO panel and if enrollees understand the criteria used by PPOs to

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14 This is an example of fee-splitting among health care practitioners and is addressed by Ariz. Admin. Comp. R. 4-21-04.A.2 (Dec. 31, 1979) and proposed regulation R4-21-301.D.2, which we do not take a position on.

15 It is an open question whether a PPO program is liable for the quality of care provided by the panel of practitioners it has assembled.

assemble their provider panels, including any requirement that providers remit a percentage of their fees to the PPO. Consequently, we see little danger that PPO patients will receive inferior or unnecessary health care because of improper referrals.

If the Board finds that consumers are being deceived by PPO programs, requiring disclosures necessary to prevent such deception would be less restrictive of PPOs than proscribing a whole category of relationships with optometrists. Similarly, disclosures necessary to prevent any deception caused by HMOs, referral services, or franchise arrangements could be required.

A second rationale for prohibiting fee-splitting is that fee-splitting may increase costs to the patient. The concern is that a patient referral fee paid by a practitioner ultimately will be passed along to the patient in the form of higher fees charged by that practitioner. This is unlikely to be a problem with PPOs and HMOs because the prices charged by providers are a key part of a bargain negotiated in advance by third-party payers. Indeed, the PPOs and HMOs that are likely to succeed in the increasingly price-competitive health care industry are those that best help employers and insurers to cut health care costs.

A third rationale arises from the concern that fee-splitting may facilitate lay interference with the practice of optometry. The concern is that a lay person who shares in an optometrist's fees might be able to exert some control over the optometrist's professional practice to the detriment of the optometrist-patient relationship.[16] It does not appear, however, that an optome-

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16 A related rationale, sometimes advanced for prohibiting the splitting of fees, particularly between optometrists and lay persons, is that such a practice may lead to violations of statutes such as Ariz. Rev. Stat. Ann. § 32-1741 (Supp. 1984-1985), which prohibit anyone from practicing optometry without a license. It does not appear, however, that PPOs pose any danger of the unauthorized practice of optometry. The principal activities of PPOs consist of contracting with providers and with third-party payers and matching them with each other. PPOs do not diagnose or treat patients. In fact, other than providing patients with the names of preferred providers, most PPOs do not deal directly with patients. Consequently, we foresee little danger that PPOs will illegally engage in the practice of optometry. In the unlikely event that they do, the Board would be able to discipline violators of § 32-1741 on a case-by-case basis.

trist's affiliation with a PPO or an IPA-type HMO that receives or holds back a portion of the optometrist's fees necessarily poses any danger of interference with the optometrist's independent professional judgment.[17] Indeed, we believe that the participation of an optometrist in a PPO or HMO poses no greater danger of lay interference with an "optometrist's professional responsibilities and discretion" than the employment of the optometrist by a lay person or corporation, as contemplated by proposed regulation R4-21-301.E.

C. Proposed Regulation R4-21-301.A: Payments for the Solicitation or Steering of Patients

Proposed regulation R4-21-301.A also may inhibit the operation of some PPOs, HMOs, and other alternative health care delivery systems. This regulation provides, in part:

> An optometrist shall not employ, pay, or reward or agree to employ, pay, or reward in any manner any person or organization for services in soliciting or steering patients or patronage to himself or any other optometrist.[18]

For the same reasons that we have set forth above, we believe that the dangers sought to be avoided by this proposed regulation are not likely to occur when an optometrist affiliates with a PPO, HMO, or other alternative health care delivery system that receives or holds back a portion of the optometrist's fees.[19]

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17 See State ex rel. Board of Optometry v. Sears, Roebuck & Co., 427 P.2d at 129 (finding that an arrangement whereby an Arizona optometrist paid a percentage of his total net sales to Sears as rent did not give Sears any "control over the professional activities of the optometrist.")

18 This proposed regulation essentially restates Ariz. Admin. Comp. R. 4-21-02.A.1 (Feb. 29, 1980).

19 Arizona law prohibits optometrists from "employ[ing] . . . a solicitor to solicit business or soliciting from house to house or person to person." Ariz. Stat. Ann. § 32-1743(5) (Supp. 1984-1985). We do not believe that this statutory provision warrants regulations as broad as Ariz. Admin. R. 4-21-02.A.1 or proposed regulation R4-21-301.A, particularly in light of evolving law regarding advertising and solicitation by professionals. See, e.g., Zauderer v.

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D. Conclusion

The views expressed in this letter are consistent with the conclusions of the Commission in American Medical Association that the AMA's fee-splitting restrictions

> preclude on their face a wide variety of professional ventures by physicians that may involve some financial or other type of association with non-physicians (be they lay persons or other health care professionals). It is difficult to see how such sweeping ethical proscriptions are needed to prevent deception or to prevent non-physicians from having undue influence over medical procedures . . . .

94 F.T.C. at 1018 (footnote omitted).

In sum, the harm typically sought to be avoided by fee-splitting regulations and regulations that prohibit optometrists from paying for the solicitation or steering of patients is not likely to occur where an optometrist affiliates with a PPO, HMO, or other alternative health care delivery system. For similar reasons, we believe that such harm is not likely to occur when an optometrist affiliates with a referral service or a franchisor. Since such organizations and arrangements can be procompetitive and can help to contain health care costs, we urge the Board to either repeal Ariz. Admin. R. 4-21-04.A.1 and R. 4-21-02.A.1 and not adopt proposed regulations R4-21-301.D.1 and R4-21-301.A, modify these regulations so that only conduct that truly poses a danger to the public is prohibited, or amend these regulations so that optometrists' basic contractual arrangements with PPOs, HMOs, other alternative health care delivery systems, franchisors, and referral services are exempt.[20]

Supreme Court of Ohio, 105 S. Ct. 2265 (1985).

20 Arizona law prohibits optometrists from "giving or receiving rebates." 1985 Ariz. Legis. Serv. 922, 924, 928 (West) (to be codified at Ariz. Rev. Stat. Ann. §§ 32-1701(9)(b), -1743(4)). Because the meaning of a "rebate" under the statute is not clear and because of the low risk of harm to the public as outlined above, we likewise urge the Board to construe this section so as not to apply to contractual arrangements between optometrists and alternative health care delivery systems, referral services, or franchisors.

IV. Advertising Restrictions

As a part of the Commission's effort to foster competition among licensed professionals, it has examined the effects of public and private restrictions that limit the ability of professionals to engage in nondeceptive advertising.[21] Studies have shown that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.[22] Other studies have also provided evidence that higher prices occur where advertising is restricted and that these restrictions do not change the quality of services available in the market place.[23] Therefore, to the extent that nondeceptive

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21 See, e.g., American Med. Ass'n, 94 F.T.C. at 1002-11. The thrust of the AMA decision, "that broad bans on advertising and solicitation are inconsistent with the nation's public policy," id. at 1011, is consistent with the reasoning of recent Supreme Court decisions involving regulation of advertising by professionals. See, e.g., Zauderer v. Supreme Court of Ohio, 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); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding state supreme court prohibition on price advertising invalid under the First Amendment); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding Virginia prohibition on price advertising by pharmacists invalid).

22 Bureau of Economics & Cleveland Regional Office, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); The Case of Optometry, supra note 3; Benham & 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).

23 The Case of Optometry, supra note 3; Muris & 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); McChesney & Muris, The Effects of Advertising on the Quality of Legal Services, 65 A.B.A.J. 1503 (1979).

advertising is restricted, higher prices and a decrease in consumer welfare may result. For this reason we believe that 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.

Accordingly, we urge the Board to reconsider proposed regulation R4-21-301.B, which is one such rule that may suppress the dissemination of useful information. It provides:

> All cards, stationary, prescriptions, or advertising materials used by an optometrist must clearly identify the individual optometrist involved.

This proposed rule may inhibit advertising by chain firms or group practices by requiring that <u>every</u> associated optometrist be listed in each advertisement. We, of course, recognize the necessity of ensuring identification and accountability of individual practitioners within such a practice. However, this goal could be accomplished through several methods less burdensome than the one proposed in the rule. For example, the Board could require that the names of individual practitioners be conspicuously posted in the reception area of optometric offices and noted on bills, receipts, and patient records.

Finally, we also urge the Board to reconsider proposed regulation R4-21-302.B which provides:

> An optometrist shall not advertise as a specialist unless he or she has been certified by the American Academy of Optometry as a diplomate in that specialty or as a fellow in the College of Optometrists in Vision Development.

It may be appropriate for the Board to reserve the use of the word "specialist" for optometrists satisfying reasonable criteria.[24] We are concerned, however, that the proposed regulation may be interpreted by the Board or by practitioners to prohibit optometrists from conveying truthful, non-deceptive information about

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24 The Board should consider whether this proposed regulation may serve to foreclose advertising as a specialist by optometrists who may be certified by other legitimate certifying organizations.

their practices and their expertise. Such expertise may be acquired through education, training, or practice in a particular field, even though it does not lead to certification. For example, adoption of this proposed regulation may prevent an optometrist from truthfully stating that his or her practice is "limited to the prescribing and fitting of contact lenses" when he or she has not in fact been certified in that field. Consequently, we ask that the Board re-examine this provision to ensure that optometrists are not deterred from conveying truthful information to consumers.

We appreciate this opportunity to comment on the proposed regulations. Please let us know if we can be of any further assistance.

Sincerely,

Walter T. Winslow

Walter T. Winslow
Acting Director

cc: William J. White, Esq.
Assistant Attorney General, State of Arizona