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

October 11, 1985

Jerald Jacobs
Jenner & Block
21 Dupont Circle, N.W.
Washington, D.C. 20036

Dear Mr. Jacobs:

This letter responds to your request for an informal staff opinion concerning the legality of the American Intra-Ocular Implant Society's ("AIOIS" or "the Society") proposed conduct as outlined in your letter of September 19, 1985. According to that letter, the AIOIS proposes to develop a standard disclosure protocol for use by intraocular lens manufacturers who offer valuable inducements to physicians to promote the sale of their lenses. The Society proposes to encourage manufacturers to use the protocol by one or both of the following methods: urging manufacturers' utilization of the protocol in official AIOIS correspondence and publishing in AIOIS publications the names of those manufacturers who decide to use the protocol. After careful review of the information you submitted, it appears that the proposed conduct would not, under the circumstances described in your letter, constitute a violation of the antitrust laws.

According to your letter, the AIOIS, a professional society of eye surgeons, has developed this proposal in an effort to help curb certain industry marketing and sales practices that recently have been criticized as contributing to excessive Medicare expenditures. According to a recently released congressional report entitled "Cataract Surgery: Fraud, Waste and Abuse," many eye surgeons are failing to disclose and pass on the value of sales inducements paid by intraocular lens manufacturers. Apparently, many intraocular lens sellers offer discounts, rebates or bonuses to eye surgeons who purchase large numbers of intraocular lenses for their own inventory, to eye surgeons who recommend that a hospital pharmacy purchase a certain manufacturer's lenses for its inventory, or to hospital pharmacies purchasing on their own behalf. In some circumstances, these payments can violate federal law. Section 1877 of the Social Security Act makes it a felony to offer or solicit bribes, rebates or kickbacks, in cash or in kind, in return for purchasing an item for which payment under the Medicare Program may be made. However, the Act specifically excludes from its prohibitions such reductions in price obtained by a provider if

"the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider. . . ." The subcommittee report cited evidence of widespread "corruption" in the intraocular lens industry, describing many alleged instances of eye surgeons' failure to comply with Section 1877.

The AIOIS proposes to undertake a course of conduct designed to increase compliance with Section 1877, at least with regard to its members. It appears that the Society's past efforts -- apprising its members of the legal implications of accepting discounts, rebates, or bonuses -- have not been completely effective. Now, the AIOIS wants manufacturers to provide AIOIS members who choose to accept sales inducements with specified information concerning their value to facilitate the eye surgeons' compliance with the disclosure requirements of Section 1877. Specifically, AIOIS has developed a standard disclosure protocol by which the manufacturers would provide information, both prior to the sales of the lenses and with the invoicing, as to the actual reasonable market value of the sales inducement and the value of the inducement related to each lens purchased, as well as a reminder of the purchaser's obligation under Section 1877 to report and reflect the "per lens" value of any inducement when filing a claim for Medicare reimbursement. Then, to encourage manufacturers to use the protocol, AIOIS proposes to urge manufacturer utilization in official correspondence from the Society and/or to publish in the Society's various communications to its members the names of those manufacturers who decide to use of the protocol. According to your letter, the publication would not contain any "express or implied exhortation to action by AIOIS members or other recipients of the communications."

The lawfulness of the Society's proposed action would depend upon whether it constitutes an agreement that restrains trade and if so, whether that restraint is unreasonable. Clearly, any action by an association of individual practitioners, many of whom compete with one another, reflects an agreement to take that action. However, such an agreement is in restraint of trade only if it constitutes or facilitates marketplace conduct on the part of its members or others that restrains trade. For example, association action that advises or suggests or is taken with the intent, or likely consequence of, association members concertedly or interdependently modifying their market behavior to restrain trade, may be treated as an agreement in restraint of trade. See generally Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939).

The AIOIS proposal to develop the protocol, send it to manufacturers, and urge them to adopt it, does not appear, under the circumstances operating here, to give rise to an agreement in restraint of trade. It contains no express or implicit

suggestion to its members to follow a course of conduct in the marketplace. The Society will have merely provided its members and their suppliers with information that they are free to incorporate in their dealings with one another and that may make the market work better.

For the same reason, I do not believe the AIOIS proposal to publish the names of those manufacturers who commit[1] to use the protocol, standing alone, would make the Society and its members parties to an agreement in restraint of trade. Merely listing the names of cooperating manufacturers would not appear to serve as an invitation, implicit or explicit, to engage in concerted boycott action, particularly in view of the Society's stated intention to avoid "any express or implied exhortation to action." Nor is there any indication that a likely response to the list will be a boycott of uncooperative manufacturers.

I wish to caution, however, that under somewhat different circumstances, this aspect of the proposal could give rise to a horizontal agreement in restraint of trade. See, e.g., Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914) (trade association's publication of the names of wholesalers who were competing with the association's member retailers condemned as manifesting a per se illegal agreement to boycott). Thus, if there were indications, despite the Society's stated objectives, that publishing the list would serve as a call to the members to boycott those manufacturers who choose not to use the protocol, the proposed conduct might well be treated as an agreement in restraint of trade. Or, if the Society has previously used this technique as a signal to its members that they should engage in joint conduct, publishing such a list could be interpreted as a call to boycott. Such an agreement to boycott uncooperative manufacturers could be per se unreasonable. See Eastern States, supra.

I hope this analysis will be helpful to your client. As you know, under Section § 1.3(c) of the Commission's Rules of Practice and Procedure, informal staff opinions do not bind the Commission. If I can be of further assistance or if you have any further questions, do not hesitate to call me.

Very truly yours,

Arthur N. Lerner

Arthur N. Lerner
Assistant Director

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[1] While a manufacturer's commitment to use the protocol could reflect an agreement with AIOIS, it would not appear likely to restrain competition unreasonably, unless it were the product of coercion.