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

February 2, 1996

The Honorable John T. Bragg
House of Representatives
State of Tennessee
33 Legislative Plaza
Nashville, TN 37243-0148

Dear Mr. Bragg:

The staff of the Federal Trade Commission(1) is pleased to respond to your request for comment on House Bill No. 2542. The bill would make it possible for a veterinarian in Tennessee to be employed by a corporation that is not owned by a licensed veterinarian, as long as the facility is under the direct medical supervision of a licensed veterinarian. Permitting a variety of business formats, subject to appropriate supervision to protect consumers' interests in the quality of care, could lead to efficiencies benefitting consumers. Accordingly, we support this proposal to permit Tennessee veterinarians to adopt different business arrangements.

I. Interest and Experience of the Federal Trade Commission.

The Federal Trade Commission is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.(2) Pursuant to this statutory mandate, the Commission encourages competition in the licensed professions, including the health care professions, and in the delivery of health care services to the maximum extent compatible with other state and federal goals. As one of the two federal agencies with principal responsibility for enforcing antitrust laws, the Commission is particularly interested in restrictions that may adversely affect the competitive process and raise prices (or decrease quality) to consumers. And as an agency charged with a broad responsibility for consumer protection, the Commission is also concerned about acts or practices in the market that injure consumers through unfairness or deception.

For several years, the staff of the Commission has investigated the competitive effects of restrictions on the business practices of state-licensed professions, including dentists, physicians, pharmacists, other health care providers, and veterinarians.(3) In addition, the staff has submitted comments about these issues to state legislatures and administrative agencies and others.(4)

II. Description of H.B. 2542.

Tennessee law now prohibits a licensed veterinarian from practicing as an employee of any person or entity not engaged primarily in the practice of veterinary medicine, and requires that the owner of a veterinary practice be a veterinarian licensed in Tennessee.(5) A veterinary practice, including the shares of a practice organized as a professional corporation, may not be sold or transferred except to a licensed veterinarian.(6)

H.B. 2542 would repeal these prohibitions. It would permit a veterinarian to practice as the employee of an entity that is not owned by another licensed veterinarian, as long as the facility is at all times under the direct medical supervision of a Tennessee-licensed veterinarian.(7) If a non-veterinarian owns or operates a veterinary facility, that facility must be operated at all times under the direct medical supervision of a Tennessee- licensed veterinarian, accountable to the state board for compliance with laws and rules governing the practice. In addition, the owner must

identify the supervising veterinarian to the state board, and must not restrict or interfere with medically appropriate diagnostic or treatment decisions. Finally, H.B. 2542 would repeal outright the ban on transferring a practice or shares in a practice to a non-veterinarian.(8)

III. Effects of Prohibiting Jointly Owned or Operated Facilities.

In licensed and regulated businesses, laws and regulations limiting “commercial practice” have been promoted based on the argument that they are necessary to maintain quality of service and protect the professional’s independent judgment. Among other restrictions, these laws commonly prevent licensed professionals from entering into commercial relationships, including employment, with non-licensed persons or firms. But the effect of such restrictions in licensed businesses is usually to reduce competition and increase prices. That effect should be weighed carefully against effects, if any, on quality of care or service that the restrictions are intended to promote.(9)

Restrictions on the business practices of professionals can reduce competition by preventing the introduction and development of innovative forms of professional practices that may be efficient, provide comparable quality, and offer competitive alternatives to traditional providers. For example, in a case challenging various ethical code provisions that the American Medical Association (AMA) enforced, the Commission found that AMA rules prohibiting physicians from working on a salaried basis for hospitals or other lay institutions and from entering into partnerships or similar business relationships with non- physicians unreasonably restrained competition, and as a result, violated federal antitrust laws.(10) The Commission concluded that the AMA's prohibitions kept physicians from adopting potentially efficient business formats and precluded competition from organizations not directly and completely under the control of physicians. The Commission also found that there were no countervailing procompetitive justifications for these restrictions.(11)

Similar issues were investigated in the Commission’s rulemaking about restraints on commercial eye care practice.(12) Based on the evidence assembled in the rulemaking proceeding, the Commission concluded that restrictions on commercial practices by eye care providers have resulted in significant consumer injury, in the form of monetary losses and less frequent vision care, without providing consumer benefit.(13) The Commission found that a substantial portion of the consumers’ costs for eye examinations and eyewear was attributable to the inefficiencies of an industry protected from competition.(14) The Commission adopted a rule to prohibit state-imposed restrictions on four types of commercial arrangements: affiliating with non- optometrists, locating in commercial settings, operating branch offices, and using nondeceptive trade names. Although the Eyeglasses II rule was vacated on appeal (on the ground that the FTC lacked the statutory authority to make rules declaring state statutes unfair), the FTC’s substantive findings, that the restrictions harmed consumers, were not disturbed.(15) The evidence from the FTC’s rulemaking record remains a persuasive argument for eliminating restraints on commercial practice.(16)

Analogous reasoning might well apply to the veterinary profession. Prohibiting jointly owned or operated facilities could prevent some efficient combinations of business practices or operations that might result in lower prices to consumers. Admitting new business formats that Tennessee's law now prohibits could have a positive effect on competition and might afford consumers a wider selection of services and costs.(17)

IV. Conclusion.

We encourage the removal of provisions prohibiting veterinarians from working for lay persons or other professionals or entering into partnerships or other associations with them. Restrictions on these types of business formats may prevent the formation and development of forms of professional practice that may be innovative and efficient, provide comparable quality service, and offer competition to traditional providers.

Sincerely,

Harold Kirtz
Deputy Director

(1) These comments are the views of the staff of the Federal Trade Commission, and do not necessarily represent the views of the Commission or any individual Commissioner.

(2) 15 U.S.C. § 41 et seq.

(3) See, e.g., American Medical Ass'n, 94 F.T.C. 701 (1979); Oklahoma State Board of Veterinary Medical Examiners, 113 F.T.C. 138 (1990); Madison County Veterinary Medical Ass'n, 114 F.T.C. 495 (1991); American Psychological Ass'n, C-3406 (consent order issued December 16, 1992, 58 Fed. Reg. 557 (January 6, 1993)); Texas Bd. of Chiropractic Examiners, C-3379 (consent order issued, April 21, 1992, 57 Fed. Reg. 20279 (May 12, 1992)); National Ass'n of Social Workers, C-3416 (consent order issued March 3, 1992, 58 Fed. Reg. 17411 (April 2, 1993)); California Dental Ass'n, D-9259 (administrative complaint issued July 9, 1993); McLean County Chiropractic Ass'n, C-3491, 59 Fed. Reg. 22163 (April 29, 1994) (consent order). See also Staff Report to the Federal Trade Commission, Advertising of Veterinary Goods and Services (1978).

(4) See,, e.g., Comments to Virginia Department of Health Regulatory Boards, April 10, 1986 (veterinary medicine, restraints on advertising and commercial practice); South Carolina Legislative Audit Council, February 26, 1992 (Boards of Pharmacy, Medical Examiners, Veterinary Medical Examiners, Nursing, and Chiropractors); Texas Sunset Advisory Commission, August 14, 1992 (Boards of Optometry, Dentistry, Medicine, Veterinary Medicine, Podiatry and Pharmacy); Missouri Board of Chiropractic Examiners, December 11, 1992; Massachusetts Division of Registration, April 20, 1993 (Board of Optometry); New Jersey Board of Medical Examiners, September 7, 1993; and Kansas House of Representatives, February 10, 1995 (Board of Optometry); see also testimony to the Maine House of Representatives, May 3, 1993 (Board of Optometry); same, January 8, 1992, and the Washington State Legislature's Joint Administrative Rules Review Committee, December 15, 1992 (opticians and optometrists).

(5) Tenn. Code Ann. § 63-12-137(a). Veterinarians employed to treat the employer's own animals and those employed by governments or research facilities are exempt from this prohibition. Tenn. Code Ann. § 63-12-137(b).

(6) Tenn. Code Ann. § 63-12-136.

(7) H.B. 2542, § 5, proposed new Tenn. Code Ann. § 63-12-137.

(8) H.B. 2542, § 4.

(9) See C. Cox and S. Foster, The Costs and Benefits of Occupational Regulation, FTC Bureau of Economics Staff Report (1990). This report, a review of economic studies of licensing, finds that licensing frequently increases prices and imposes substantial costs, but that many licensing restrictions do not appear to increase the quality of service. The report recommends careful weighing of likely costs against prospective benefits. Id. at v. Where consumers are in a relatively poor position to evaluate the product or service, regulation of some kind can provide benefits to consumers.

(10) See American Medical Ass'n, 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).

(11) See also comment of the staff of the Federal Trade Commission on the American Bar Association's Model Rules of Professional Conduct, March 26, 1991, addressing issues raised by proposals to allow firms to provide ancillary, non-legal services. In that comment, the staff pointed out that law firm diversification could benefit consumers by allowing firms to provide an efficient mix of services that consumers seek, and that rules restricting such services could harm consumers by restricting consumer choice. The comment also analyzed how different proposals would meet concerns about professional standards and ethical obligations.

(12) In the course of the "Eyeglasses II" rulemaking, the FTC received 287 comments and heard testimony from 94 witnesses. The commenters and witnesses included consumers and consumer groups, optometrists, sellers of

ophthalmic goods, professional associations, federal, state and local government officials, and members of the academic community. See Ophthalmic Practice Rules ("Eyeglasses II"), Statement of Basis and Purpose, 54 Fed. Reg. 10285, 10287 (March 13, 1989) ("Commission Statement").

(13) Id. at 10285.

(14) Id. at 10285-86.

(15) California State Bd. of Optometry v. FTC, 910 F. 2d 976 (D.C. Cir. 1990).

(16) See also R. Bond et al., The Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry, FTC Bureau of Economics Staff Report (1980); Deborah Haas-Wilson, The Regulation of Health Care Professionals Other than Physicians, Regulation, Fall 1992, at 40; and Deborah Haas-Wilson, Strategic Regulatory Entry Deterrence: An Empirical Test in the Ophthalmic Market, 8 J. Health Econ. 339 (1989) (econometric study of optical goods markets concludes that "form of practice" restrictions have been used to deter entry and maintain higher prices).

(17) Where a restraint against a veterinarian's employment by or partnership with a non-veterinarian was imposed by a body that was subject to the Commission's law enforcement jurisdiction, the Commission has sought and obtained an order against the restraint as an unfair method of competition. Oklahoma State Board of Veterinary Medical Examiners, supra note 3.