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OFFICE OF
CONSUMER AND
COMPETITION ADVOCACY

COMMISSION AUTHORIZED

January 8, 1993

Mr. George L. Schroeder
Director
Legislative Audit Council
400 Gervais Street
Columbia, SC 29201

Dear Mr. Schroeder:

The staff of the Federal Trade Commission[1] is pleased to respond to your request for comment on the statutes and rules of boards that regulate the health care professions. The comments below identify aspects of these statutes and rules that we believe may have anticompetitive effects and thereby injure consumers.

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 FTC encourages competition in the licensed professions, including the health care professions, to the maximum extent compatible with other state and federal goals. For several years, the FTC and its staff have investigated the competitive effects of restrictions on the business practices of state-licensed professionals, including dentists, physicians, pharmacists, and other health care providers.[3] In addition, the

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[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.*, *Iowa Chapter of American Physical Therapy Association*, 111 F.T.C. 199 (1988) (consent order); *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988); *Preferred Physicians, Inc.*, 110 F.T.C. 157 (1988) (consent order); *Wyoming State Board of Chiropractic Examiners*, 110 F.T.C. 145 (1988) (consent order); *Connecticut Chiropractic Association*, C-3351 (consent order issued November 19, 1991, 56 Fed. Reg.
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staff has submitted comments about these issues to state legislatures and administrative agencies and others.[4] As one of the two federal agencies with principal responsibility for enforcing antitrust laws, the FTC 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 FTC is also concerned about acts or practices in the marketplace that injure consumers through unfairness or deception.

II. Analysis of the statutes.

The Legislative Audit Council is reviewing several boards that license and regulate providers of health care services. Some of our previous comments to the South Carolina Legislative Audit Council have discussed general issues associated with occupational licensing and regulation.[5] Occupational regulation may promote or assure a standard of service quality, especially when judging quality is more difficult for consumers than for

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[3](...continued) 65,093 (December 13, 1991)); *Medical Staff of Holy Cross Hospital*, C-3345 (consent order issued September 10, 1991, 56 Fed. Reg. 49,184 (September 27, 1991)); *Southbank IPA, Inc.*, C-3355 (consent order issued December 20, 1991, 57 Fed. Reg. 2913 (January 24, 1992)); *Robert Fojo, MD.*, C-3373 (consent order issued March 2, 1992, 57 Fed. Reg. 9258, (March 17, 1992)); *Texas Board of Chiropractic Examiners*, C-3379 (order modified April 21, 1992, 57 Fed. Reg. 20279 (May 12, 1992)).

[4] *See, e.g.*, Comments to Florida Office of the Auditor General (November 28, 1990) (Board of Pilot Commissioners and Board of Medicine); Jeffrey W. Moran, Commerce and Regulated Professions Committee, General Assembly of New Jersey (April 11, 1991) (dispensing and sale of prescription drugs by physicians); South Carolina Legislative Audit Council (February 26, 1992) (Board of Pharmacy, Board of Medical Examiners, Board of Veterinary Medical Examiners, Board of Nursing, and Board of Chiropractic Examiners); *see also* Statement of David Keniry, Attorney, Boston Regional Office, Federal Trade Commission, before the Committee on Business Legislation, Maine House of Representatives (January 8, 1992) (optometry).

[5] *See* letters from the Bureaus of Economics, Competition, and Consumer Protection to the Legislative Audit Council of February 19, 1987, April 23, 1987, January 23, 1989, March 13, 1989, November 7, 1989, and February 26, 1992.

providers.[6] Regulation may also respond to problems that may arise when a professional's services could affect third parties, and to risks that the combination of "diagnosis" and "prescription" may lead to abuses. Some of the concerns that licensing and regulation address may also be addressed by other means. For example, consumers may get information about some aspects of service quality from their own experiences or from providers' advertising and reputation; however, for other aspects, it may be difficult for consumers to evaluate quality themselves.[7]

Consumers do not always benefit from regulations that restrict the business aspects of professional practice. Studies have often found little relationship between restrictions on professionals' business practices and the quality of service or care they provide.[8] Restrictions on their business practices can limit professionals' ability to compete effectively with each other and can also increase their costs. If restrictions diminish competition among professionals, or if they impose higher costs that are passed on in the form of higher prices or reduced services, then consumers can be harmed. These potential adverse effects of regulation should be considered along with its intended benefits.

The principal issues are discussed below in separate sections dealing with the boards for optometry and opticianry, dentistry, psychology, and speech and audiology. Where the same issues appear also in the statutes governing another profession, the principal discussion is cross-referenced.[9]

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[6] *See* C. Cox and S. Foster, *The Costs and Benefits of Occupational Regulation*, FTC Bureau of Economics Staff Report, October 1990.

[7] Often consumers can obtain necessary information about quality by search, that is, by shopping around before buying, or through experience after buying. But for some kinds of goods or services, even with experience the consumer cannot evaluate quality. Some aspects of professional services may display this characteristic of so-called "credence" goods. *See* Cox & Foster, *supra* n. 6, at 6.

[8] Cox & Foster, *supra* n. 6 (reviewing studies reported in economics literature).

[9] Because the volume of materials is large, we have focused on some of the provisions that we believe have the greatest potential for anticompetitive effect. The fact that certain statutory provisions or regulations are not addressed does not

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A. Boards of Optometry and Opticianry.

The statutes and regulations governing the boards of Optometry and Opticianry prohibit or regulate several business practices: locations in business establishments, offers of products or services as a premium or bonus, advertisements of prices, advertisements of claims of superiority, display of licenses and diplomas, and "use" of positions in professional organizations for advertising and self promotion. In our 1987 letter we urged the Council to recommend that these restrictions be eliminated. Most of them remain in place.[10] Hence, the following discussion and recommendation is substantially the same as our previous comment.

1. FTC studies and rulemaking proceedings.

The FTC and its staff have considerable experience with the competitive impact of restraints on business practices in the eye care industry. Two kinds of practices, restraints on advertising and failures to release prescriptions, were examined in an FTC rulemaking proceeding in the 1970's.[11] That proceeding revealed

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[9](...continued)
necessarily imply that they do not have anticompetitive effects. Indeed, in some instances we have intentionally refrained from commenting on restrictions that raise issues related to those in pending law enforcement investigations.

[10] The section of the statute that barred optometrists from offering eye examinations at a discount or as a premium has been repealed, but essentially the same prohibition has been inserted into another section of the statute. Compare S.C. Code Ann. §40-37-190 (1976) and §40-37-180 (1991 Supp.). The prohibition against opticians making superiority claims in advertisements has been repealed. S.C. Code Reg. 96-20.6 (1991 Supp.). The 1987 comment also addressed restrictions on solicitation; restrictions on third party solicitation now prohibit only solicitation that is untruthful, deceptive, and coercive. S.C. Code Ann. §§ 40-37-220(15) and 40-38-220(15) (1991 Supp.).

[11] Advertising of Ophthalmic Goods and Services, 16 CFR Part 456 ("Eyeglasses Rule"). The FTC found that prohibiting nondeceptive advertising by vision care providers and failing to release eyeglass lens prescriptions to the customer were unfair acts or practices in violation of section 5 of the FTC Act. The Eyeglasses Rule prohibited bans on nondeceptive advertising and required vision care providers to furnish copies of prescriptions to consumers after eye examinations. On appeal, the Eyeglasses Rule's prescription release requirement was upheld but the
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that other common restraints on eye care providers also appeared to limit competition unduly, increase prices, and reduce the quality of eye care provided to the public.

To examine the effects of restraints on business practices in the eye care industry, the staff of the FTC conducted two comprehensive studies. The first, published in 1980 by the FTC's Bureau of Economics, compared the price and quality of optometric goods and services in markets where commercial practices were subject to differing degrees of regulation.[12] This study, conducted with the help of two colleges of optometry and the Director of Optometric Services of the Veterans Administration, found that commercial practice restrictions in a market resulted in higher prices for eyeglasses and eye examinations but did not improve the overall quality of care in that market. The second study, published in 1983 by the Bureaus of Consumer Protection and Economics, compared the price and quality of the cosmetic contact lens fitting services of commercial optometrists and other provider groups.[13] It concluded that, on average, "commercial" optometrists (for example, 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.

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[11](...continued) advertising portions were remanded for further consideration in light of the Supreme Court decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (finding state supreme court rules against attorney advertising violated the First Amendment). *American Optometric Association* v. *FTC*, 626 F.2d 896 (D.C. Cir. 1980). Rather than reinstate the advertising portions of the Eyeglasses Rule, the FTC has addressed advertising restrictions through administrative litigation. *See, e.g., Massachusetts Bd. of Optometry*, 110 F.T.C. 549 (1988).

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

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

During the 1980's, the FTC conducted a second rulemaking proceeding about restraints on commercial eye care practice.[14] Based on the evidence assembled in the rulemaking proceeding, the FTC 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.[15] 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.[16] The FTC thus adopted a rule[17] 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.[18] 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.[19] The evidence from the FTC's rulemaking record remains a compelling argument for eliminating restraints on commercial practice.

2. **Location restrictions.**

One of the "commercial practice" restrictions addressed by the Eyeglasses II rule remains in force in South Carolina. A regulation prohibits leasing space for an optometric office "in a business establishment such as a jewelry, department or other

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[14] In the course of the "Eyeglasses II" rulemaking, the FTC received 267 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.

[15] Ophthalmic Practice Rules ("Eyeglasses II"), Statement of Basis and Purpose, 54 Fed. Reg. 10286 (March 13, 1989) ("Commission Statement").

[16] Commission Statement, *supra* n. 15, at 10285-86.

[17] Commission Statement, *supra* n. 15, at 10285.

[18] In addition, the Commission decided to retain, with modifications, the prescription release requirement from the original Eyeglasses Rule.

[19] *California State Board of Optometry v. FTC*, 910 F.2d 976 (D.C. Cir. 1990), *reh'g denied*, January 8, 1991.

store."[20] Locations like these might well be more convenient for consumers and could encourage "walk-in" patients. In addition, locating in such a "retail" setting might lead to higher volume and economies of scale that may be passed on to consumers in the form of lower prices.[21] Our 1987 letter urged that this restraint be removed, and we repeat that recommendation now. We question whether such a restriction serves any purpose other than inhibiting the formation of more convenient or higher-volume commercial practices.

3. **Discounts, premiums or bonuses.**

Optometrists and opticians may not "offer or give eye examinations, eyeglasses, spectacles, lenses, or any part used in connection with them, as a premium or bonus with merchandise or in any other manner to induce trade."[22] We again urge the Council to recommend that this prohibition be removed.[23] Banning premiums and bonuses can deprive consumers of an important form of price competition, one that can be conveyed readily through non-deceptive advertising. Offering such terms can benefit consumers, and may be a valuable promotional tool for new practitioners. We can envision no consumer benefit from prohibiting offers of this type that are non-deceptive. Although it is certainly possible for a premium or bonus offer to be deceptive, banning all such offers is an unnecessarily restrictive way to deal with that risk. The general prohibitions in the optometry and opticianry practice acts against untruthful

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[20] S.C. Code Reg. 95-1(N).

[21] Commission Statement, *supra* n. 15, at 10289. The regulations permit an optometrist to share a reception area with another recognized professional. S.C. Code Reg. 95-1(N). If this regulation permits an optometrist to share some facilities with an optician, some kinds of high-volume operations would still be possible, although they might not be able to achieve all possible economies of joint operation.

[22] S.C. Code Ann. §§ 40-37-180 and 40-38-70. This prohibition does not apply to "ophthalmic products incidental to the use of the product being offered" (such as eyeglass cases or cleaning solutions). The disclosures that are required if a discount is offered are discussed in section II.A.4.

[23] The statutory ban on optometrists' offering examinations at a discount or as a premium has been repealed, but a nearly equivalent prohibition has been inserted into another section of the statute. Compare S.C. Code Ann. §40-37-190 (1976) and §40-37-180 (1991 Supp.).

or deceptive claims[24] should be sufficient to deal with deceptive bonus or premium offers.

4. Price advertising disclosures.

Price advertising is subject to two kinds of required disclosures. The first applies to offers of "sale" or discount prices and requires that such offers either state that the reduction is from the offeror's regular selling price, or if it is not, disclose the reference price and its source.[25] The second specifies information that must be included in all price advertisements: whether an advertised price for eyeglasses includes single vision or multi-focal lenses; whether a price for contact lenses refers to soft or hard contacts; whether a price for ophthalmic materials includes all dispensing fees; whether a price for ophthalmic materials includes an eye examination; and whether a price for eyeglasses includes both frame and lenses.[26]

The Council may wish to consider carefully whether these disclosure requirements are necessary to prevent deception, or whether instead they may reduce price advertising by increasing its cost. Consumers generally benefit when competing sellers provide truthful information about their products and services. But disclosure requirements more extensive than necessary to prevent deception could discourage beneficial advertising by increasing its costs and detracting from its impact. Their effect thus could be to deny consumers useful information. If the amount of information available about prices is reduced, price competition may also be reduced and prices may increase. To balance these concerns, we believe that disclosures should be mandated only where necessary to prevent deception.

Both of these disclosure requirements may be intended at least in part to prevent deception, but each may also inhibit truthful advertising. The reference price disclosure requirement for discount advertisements may discourage the promotion of some

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[24] S.C. Code Ann. §§ 40-37-180 and 40-38-70.

[25] *Id.* §§ 40-37-180 and 40-38-70.

[26] *Id.* §§ 40-37-180 and 40-38-70. Such state-imposed disclosure requirements were permitted by the Commission's original Eyeglasses Rule, *supra* n. 11. When it issued this 1978 rule against banning nondeceptive advertising, the Commission did not believe it necessary to require these disclosures, because most advertising already contained the information voluntarily and would probably continue to do so; however, the Commission believed that it would not be unreasonable for the states to require them. 43 Fed. Reg. 23,992, 23997 (June 2, 1978).

kinds of discounts. An advertisement for a discount off anything other than "regular" prices might have to list the entire fee schedule, which could be impracticable. The general disclosure requirements for all price advertising could call for the kind of detail that can inhibit price advertising in formats, such as broadcast, where limitations of time or space make "fine print" impracticable. If some kind of disclosure is considered necessary, the Council may wish to consider whether a less detailed disclosure requirement might still be sufficient.[27]

5. Signs and displays of licenses, etc.

The Optometry Board's rules prohibit displaying licenses, diplomas or certificates where they are visible outside the office[28] and displaying eyeglass signs, lenses and frames in optometric offices.[29] Optometrists thus cannot use their office space to inform consumers about their educational backgrounds and the products they may have available for sale. We can envision no consumer benefits from these prohibitions and again recommend their repeal.

6. Superiority claims.

Optometrists may not make the "slightest intimation of having superior qualifications or being superior to other [licensees]".[30] This regulation may be too broad, for claims that imply superiority are not inherently deceptive. Most truthful statements about qualifications, experience, or performance, and most comparative statements could be interpreted as making implicit claims of superiority.[31] Thus, this regulation could prohibit conveying such truthful and valuable information to consumers. The regulation may also prohibit

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[27] *See* J. Murphy and J. Richards, *Investigation of the Effects of Disclosure Statements in Rental Car Advertisements*, 26 J. Consumer Aff. 351 (1992) (reporting an experiment in which a short disclosure was as effective as a longer one in dispelling deception.)

[28] S.C. Code Reg. 95-1(D).

[29] S.C. Code Reg. 95-1(H), (K).

[30] S.C. Code Reg. 95-1(E). A rule that previously imposed a similar restraint on opticians has been deleted.

[31] Thus, the Commission in *Oklahoma Optometric Ass'n*, 106 F.T.C. 556 (1985) ordered the respondent to cease and desist from rules against comparative advertising or against advertising "special qualities."

subjective, self-laudatory assertions about the quality and nature of services offered, as well as innocuous "puffery," that can convey information that consumers may value, such as the firm's belief that courtesy and attentiveness are important. Making it impossible to call attention to these features as desirable aspects of a practice reduces practitioners' incentive to provide them. This regulation could deprive consumers of valuable information, increase consumer search costs, and lessen competition. We again urge the Council to recommend that this rule be eliminated, because it may inhibit competition by preventing truthful, nondeceptive advertising.

7. Professional organization position.

Optometrists and opticians may not use positions in professional organizations "for advertising purposes or for self-aggrandizement".[32] That prohibition may prevent consumers from getting information they might find helpful. The level of quality supplied by practitioners in any profession can vary widely.[33] Knowledge of awards, titles, or other forms of recognition conferred by bona fide professional organizations can help compensate for consumers' comparative lack of information about practitioners' experience, knowledge, and skills, and help predict the nature and quality of their services. And membership in professional organizations that devote time and resources to studying particular areas of vision care may indicate interest and knowledge in that area. Of course, claims about professional status and recognition that are neither objective nor relevant may be deceptive, and false claims should always be subject to disciplinary action. But the possibility of falsehood or deception in claims about professional positions would not necessarily justify banning all mention of them. We repeat our recommendation from 1987, that the Council urge the replacement of the broad ban with more limited restrictions on deceptive statements about professional affiliation and recognition.

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[32] S.C. Code Regs. 95-1(F) and 96-20.7.

[33] The Alabama Supreme Court has observed that "[i]t would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge and skills with regard to any area of legal practice." *Ex Parte Howell*, 487 So.2d 848, 851 (1986) (total ban on attorneys' truthful representations of professional recognition by certification organizations held unconstitutional; advertising permitted of certification by approved organizations).

B. **Board of Dentistry.**

The statutes and regulations governing dentistry restrain certain kinds of advertising, ban referral fees, and control how dentists can employ the services of dental assistants. The dentistry board has not been the subject of a previous staff comment to the South Carolina Legislative Audit Council.

1. **Advertising and solicitation.**

The regulation that was provided for our review imposed severe restraints on dentists' advertising.[34] Your office has advised us that this regulation has been repealed.[35] However, advertising content still appears to be subject to the requirement that dentists "should represent themselves in a manner that contributes to the esteem of the profession."[36] And, although practice under a trade name is permitted, the name must not "attempt to create any impression of superior skills or qualifications."[37] These two sections of the statute may still inhibit truthful and nondeceptive advertising, if they discourage effective forms of advertising and prohibit statements and claims about quality.

The "esteem of the profession" requirement is similar to the "dignity" requirement that the Supreme Court addressed in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S. Ct. 2265 (1985). The Supreme Court held in

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[34] Regs. 39-9 (1991 Supp). Advertising was prohibited, except in compliance with particular rules; because these rules specified only directory listings, signs, cards, and newspaper advertisements, advertising in other media was apparently prohibited. A dentist could not even make, let alone advertise, any public self-laudatory statement or statement about the quality of services offered. Block advertisements in yellow pages were effectively prohibited. Announcement cards could not be printed in media. Newspaper advertising was limited by requiring small type, banning color or illustrations, and restricting price advertisements. The size and content of signs was strictly limited.

[35] The detailed controls that were repealed, which were more severe than necessary to prevent deception, may have had the effect of preventing competition among dentists, by prohibiting many effective forms and methods of advertising and ruling out many kinds of truthful and useful claims.

[36] S.C. Code Reg. 39-11, Section [4].

[37] S.C. Code Ann. § 40-15-130.

Zauderer, in a First Amendment context, that a state's interest in promoting dignity in an attorney's communication with the public is insufficient to justify a restriction on truthful and nondeceptive advertising.[38] Like the disciplinary rule invalidated in *Zauderer*, a rule requiring advertisements to contribute to the "esteem" of the profession may be interpreted to prohibit, or may have a chilling effect on, truthful, nondeceptive advertising. It is, like "dignity," vague and subjective. It may be interpreted so broadly as to prohibit a wide variety of truthful, nondeceptive advertising. Advertising techniques such as dramatizations, graphic illustrations, comparative advertising, or testimonials, although sometimes considered "undignified," are not inherently deceptive. As long as the advertising is truthful and non-deceptive, these techniques are permitted in other contexts to communicate messages effectively to consumers. An additional "esteem" or "dignity" requirement is unnecessary to protect consumers against deception, for consumers can decide themselves about what they consider acceptable forms of marketing, and withhold their business from providers whose (non-deceptive) advertisements they regard as "undignified" or offensive.[39]

Banning trade names that imply superiority raises the same issues as banning advertising or other communications that imply superiority, discussed above concerning eye care providers.

2. **Referral fees.**

South Carolina prohibits "rebates" and "split fees," and thus may prohibit dentists from paying or accepting referral

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[38] 105 S.Ct. at 2280-81.

[39] It may be necessary to prevent or discipline some kinds of unsubstantiated claims that are overreaching or potentially misleading on which consumers could be expected to place serious reliance. These might include some kinds of "quality" claims that suggest that they are supported by objective substantiation, when in fact they are not. A form of substantiation requirement is already stated in the statute, which does not permit advertising that attempts to create an "impression, unsupported by fact, of superior skills or qualifications." S.C. Code Ann. § 40-15-130. This standard could yield anticompetitive results if applied to ban subjective, non-specific claims, such as "we practice gentle dentistry," for which the consumer is unlikely to expect the same kind of factual basis as for more specific claims.

fees.[40] Prohibitions against so-called kickbacks can benefit patients by preventing deception or abuse of the provider-patient relationship.[41] But regulations adopted to control referral fee abuses should not be so broad that they interfere with procompetitive practices such as the operation of integrated health care delivery systems and legitimate referral services.

Harm to patients from referral fees is less likely when referrals are made among providers in an integrated operation such as a health maintenance organization (HMO) or a preferred provider organization (PPO). HMOs and PPOs may use incentive arrangements in which fees are divided between the medical plan and participating professionals. In form, these arrangements may appear to be "rebates" or "split fees," but reimbursement arrangements designed to encourage consumer and professional participation in these plans are unlikely to provide an incentive for anyone to refer patients for unnecessary care. Another application where harm is less likely is referral services that respond to inquiries from consumers looking for professional services. Referral services can help consumers locate appropriate health care alternatives and increase competition among health care professionals by facilitating the gathering and dissemination of information. Referral services may charge practitioners a fee for participation, but here again, it is unlikely that the payment will provide an incentive to refer a patient for unnecessary care.

3. Supervision of hygienists.

Dental hygienists must practice under the "direct supervision" of a dentist, who must be on the premises when

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[40] "Misconduct . . . is when the holder of a license or certificate: . . . has obtained any fee which is charged or any reimbursement from third parties . . ." S. C. Code Ann. § 40-15-190(13); dentists shall not accept or tender "rebates" or "split fees", S. C. Code Reg. 39-11 1(H).

[41] The primary justification usually advanced for restrictions on referral fees is to prevent abuse of the patient's trust that a referral will be based on independent professional judgment of the patient's best interest; the concern is that a practitioner who stands to receive a referral fee might refer a patient for unnecessary care or refer a patient to a provider who might not be the most appropriate one, but who pays the highest referral fee. In contrast to this concern is the argument advanced against restrictions, that if referral fees are banned, some practitioners might provide services themselves rather than refer patients to others who could better provide quality care.

services are performed.[42] This requirement may increase the costs of dental services by restricting the best use of dental auxiliary personnel to provide services to patients.

Some, if not most, states require only that dental hygienists practice under a dentist's general supervision. A "general supervision" standard, less restrictive than South Carolina's requirement of "direct supervision" and presence on the premises, could make possible more flexible provision of services in such non-traditional settings as nursing homes, schools, public health department clinics, HMOs, hospitals, and other institutions. Requiring direct supervision may increase the costs of providing dental care, by drawing more highly trained professionals away from the more complex services, such as diagnosis and treatment of other patients, and increasing the costs of preventive dental care, such as prophylaxis.[43] If costs increase, consumers may purchase fewer dental services and overall dental health may decline.[44] We suggest that the Council consider whether the more flexible "general supervision" approach could reduce costs of providing dental care services without compromising the quality of care consumers receive.

C. Board of Psychology.

South Carolina law previously required that the Board of Psychology Examiners adopt the Code of Ethics of the American Psychological Association ("APA").[45] In 1987 we urged the Council to recommend the repeal of both that statute and certain of the Board's implementing regulations. Although the statute no longer requires the Board to use the APA Code of Ethics, the Board has apparently continued to do so, both in its rules themselves (at least in part) and by incorporating the APA's ethical principles as an appendix to its rules. A code of ethics written by a private organization composed of competitors may

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[42] S.C. Code Ann. § 40-15-85.

[43] *See* J. Liang and J. Ogur, *Restrictions on Dental Auxiliaries* 2, FTC Bureau of Economics Staff Report, 1987. *See also* Institute of Medicine, Committee to Study the Role of Allied Health Personnel, *Allied Health Personnel: Avoiding Crises* 253 (1989) (stating that "[T]he committee believes that it is important to maintain flexibility in the use of existing personnel and a variety of routes of entry for new personnel.")

[44] See General Accounting Office, *Increased Use of Expanded Function Dental Auxiliaries Would Benefit Consumers, Dentists, and Taxpayers*, HRD-80-51, March 1980, at 14-15.

[45] S.C. Code Ann. § 40-55-60.

restrict competition among members of the group and inhibit entry by other qualified providers, and thus be inconsistent with the best interests of consumers.[46] Significant competition problems can arise when such a code is adopted as state law or regulation.

1. Advertising.

Board regulations still prohibit advertisements or other public statements by psychologists "implying unusual, unique, or one-of-a-kind abilities."[47] This prohibition applies regardless of whether the statement is true or deceptive. Thus, its effect may be similar to that of other statutes and rules banning claims of "superiority," discussed above.[48] We recommend that this part of the rule be deleted.

2. Referral fees.

Psychologists are prohibited from receiving a "commission, rebate, or other form of remuneration . . . for the referral of clients for psychological services"[49] or from hiring a solicitor to obtain patronage.[50] This prohibition is similar to the prohibition discussed above that applies to dentists. For the same reasons, this prohibition may be undesirable if it tends to impair procompetitive practices such as the operation of integrated health care delivery systems and legitimate referral services.

D. Speech and Audiology.

Regulations restrain how speech pathologists and audiologists may advertise their services and use their commercial affiliations. Our 1987 letter recommended that these

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[46] The Commission has issued a consent order settling charges that APA unlawfully restricted its member's advertising, solicitation, and participation in certain patient referral services. *American Psychological Association*, Docket No. C-3406 (Dec. 16, 1992), 58 Fed. Reg. 557 (Jan. 6, 1993); *see* 57 Fed. Reg. 46028 (accepted for public comment, Oct. 6, 1992).

[47] S.C. Code Reg. 100-6 A(2)(iv).

[48] The Commission's recent *APA* order prohibiting restrictions on these kinds of claims is directed at language identical to that in the South Carolina regulations. *American Psychological Association*, *supra* n. 46, Section II.A.2.

[49] S.C. Code Reg. 100-4 I(6).

[50] S.C. Code Ann. § 40-55-150(14).

regulations be repealed; we repeat that recommendation here. Some other aspects of the regulations, concerning guarantees and bundling services with products, that are discussed below were not addressed in our previous letter.

1. **Advertising issues.**

Two regulations affecting advertising could have anticompetitive effects. The first requires speech pathologists and audiologists to "announce their services in a manner consistent with the highest standards in the community."[51] The second prohibits speech pathologists and audiologists from "using professional or commercial affiliations in any way that would mislead or limit services to persons served professionally."[52]

A "highest standards in the community" requirement is similar to, and raises the same competitive problems as, the "esteem of the profession" requirement discussed above for dentists. Such a vague requirement, like one requiring "dignity," may be interpreted to prohibit, or may have a chilling effect on, truthful, nondeceptive advertising.

The scope of the second provision, banning "using" commercial affiliations improperly, is unclear. To the extent that this regulation prohibits materially misleading practices, it is unnecessary, because such practices are prohibited by other regulations.[53] To the extent that this regulation is intended to go beyond a simple prohibition on deceptive practices, and to restrict forms of commercial practice by speech pathologists or audiologists, it may interfere with the efficient delivery of professional services.

Because both restrictions appear to limit competition and consumer choice unnecessarily, we again urge the Council to recommend their repeal.

2. **Guarantees.**

Speech pathologists and audiologists "must not guarantee the results of any therapeutic procedures, directly or by implication."[54] This regulation could prohibit "satisfaction" guarantees, offering refunds to consumers who are dissatisfied

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[51] S.C. Code Reg. 115-15 D(5).

[52] S.C. Code Reg. 115-15 D(4).

[53] S.C. Code Reg. 115-15 D(3).

[54] S.C. Code Reg. 115-15 B(10).

with services, and appears broader than necessary to prevent deception.

3. Pricing goods and services separately.

Fees for professional services must be independent of whether a product is dispensed.[55] Moreover, specified price information must be disclosed through a schedule of fees and charges that differentiates between fees for professional services and charges for products dispensed.[56] Although these regulations may be intended to prevent some kinds of deception, they may also discourage offering discounts in the form of a package of services and products.

E. Physical Therapy.

No competition problems were found in the statute or regulations governing physical therapy.

F. Podiatry.

Our 1987 letter urged the repeal of prohibitions on corporate practices[57] and on locating in commercial establishments.[58] Since then, those sections of the statute have been repealed.

G. Occupational Therapy.

Our 1987 comment discussed the effects of a 1982 state attorney general's opinion that interpreted South Carolina common law and the statute governing occupational therapists to prohibit corporate practice or employment by a corporation.[59] The statute has not been amended, so we assume that the letter still

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[55] S.C. Code Reg. 115-15 E(2)(b).

[56] S.C. Code Reg. 115-15 E(2)(d).

[57] S.C. Code Ann. § 40-51-210.

[58] S.C. Code Ann. § 40-51-250.

[59] *See* letter from Robert D. Cook, Assistant Attorney General to Barbara Waugh, Secretary, Occupational Therapy Board (September 8, 1982). The opinion cites South Carolina caselaw holding that a corporation was forbidden to employ a licensed professional, because employment by a corporation could be used as an "expedient" to circumvent the existing restrictions on corporate practice. *See* Ezell v. Ritholz, 188 S.C. 30, 198 S.E. 419 (1938).

reflects accurately the law of South Carolina. We again urge the Council to recommend that the legislature act to alter the common law, in order to permit employment of occupational therapists by a corporation. Restricting corporate practice and employment by corporations could hinder or prevent the formation and development of alternative forms of professional practice, thus dampening competition.[60] Removing the restriction could benefit consumers by reducing the costs of providing services and increasing price and service competition.

III. Conclusion.

We are pleased to have this opportunity to present our views on these medical occupational licensing statutes of the State of South Carolina. We recommend that in several respects, as detailed above, restraints on innovative and competitive forms of practice and unnecessary limits on communication of truthful and nondeceptive information to consumers be lifted.

Sincerely,

Michael O. Wise
Acting Director

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[60] Agreements to restrict corporate practice or employment have often been found to be anticompetitive. *See e.g.*, *American Medical Association*, 94 F.T.C. 1016 (finding that AMA had illegally conspired to restrain its members from working on a salaried basis or at less than ordinary rates for hospitals, HMOs, and other institutions); *American Society of Anesthesiologists*, 93 F.T.C. 101, 102 (1979) (consent order) (settling charges that the Society, through its ethical guidelines and membership requirements, illegally restrained members from being paid on other than a fee-for-service basis or from becoming salaried hospital employees).