OFFICE OF THE REGIONAL DIRECTOR
150 William Street, 13th FL
New York, N.Y. 10038
(212) 264-1200

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
NEW YORK REGIONAL OFFICE

V930023

COMMISSION AUTHORIZED

September 7, 1993

Ms. Katherine M. Carroll
Executive Director
Medical Practitioner Review Panel
Board of Medical Examiners
28 West State Street
Trenton, New Jersey 08608

Dear Ms. Carroll:

The staff of the Federal Trade Commission[1] is pleased to respond to your request for comment on one of the advertising regulations of the New Jersey Board of Medical Examiners. The regulation requires that licensees advertising a board-certified specialty must be certified by an agency recognized by the Board of Medical Examiners. This comment will address protecting consumers against deceptive certification advertising while ensuring that consumers are not denied relevant, truthful information about professional services.

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,

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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.

pharmacists, and other health care providers.[3] In addition, the 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. 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. Description of the regulation.

The Board's current advertising regulations require that physicians who advertise board certification in a specialty "must possess certification by a certifying agency recognized by the

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[3] See, e.g., American Medical Ass'n, 94 F.T.C. 701 (1979); Iowa Chapter of American Physical Therapy Ass'n, 111 F.T.C. 199 (1988) (consent order); Wyoming State Bd. of Chiropractic Examiners, 110 F.T.C. 145 (1988) (consent order); Connecticut Chiropractic Ass'n, C-3351 (consent order issued November 19, 1991, 56 Fed. Reg. 65093 (December 13, 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 (order modified 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)); and California Dental Ass'n, D-9259 (administrative complaint issued July 9, 1993).

[4] See, e.g., comments to South Carolina Legislative Audit Council, February 26, 1992 (Boards of Pharmacy, Medical Examiners, Veterinary Medical Examiners, Nursing, and Chiropractic Examiners) and January 8, 1993 (Boards of Optometry and Opticianry, Dentistry, Psychology, Speech and Audiology, Physical Therapy, Podiatry, and Occupational Therapy); Texas Sunset Advisory Commission, August 14, 1992 (Boards of Optometry, Dentistry, Medicine, Veterinary Medicine, Podiatry, and Pharmacy); Montana House of Representatives, October 30, 1992 (dentists and denturists); Missouri Board of Chiropractic Examiners, December 11, 1992; and Massachusetts Division of Registration, April 20, 1993 (optometry). See also testimony to the Washington legislature's Joint Administrative Rules Review Committee, December 15, 1992 (opticians and optometrists) and to the Maine House of Representatives, January 8, 1992 (optometry) and May 3, 1993 (optometry).

Board of Medical Examiners."[5] The regulation states that the Board will maintain a list of recognized certifying agencies; it is not clear whether this list has actually been prepared and promulgated. The regulation is not presently being enforced, pending the completion of the Board's review for which this comment was invited.[6] In the course of that review, a committee appointed by the Board is studying whether the regulation "protect[s] the public against the advertising of specious certification," whether standards and guidelines should be established for recognizing certifying agencies, and if so, what those standards and guidelines should be.

III. Issues raised by regulating certification claims.

Voluntary programs for certifying professional competence can help consumers to differentiate among professionals and predict the nature and quality of services available from different practitioners. The fact that a professional has obtained certification of specialist qualifications could be material to a consumer's decision, because certification can convey information about the services offered and about the professional's recognized competence to perform them.

Two principles should guide the formulation of rules on the subject. First, claims about certification should not be deceptive. Second, consumers should not unnecessarily be denied non-deceptive information about certification. Attempting to ensure both non-deceptiveness and availability requires care and is difficult if little or no evidence is available about how consumers actually understand the certification claims at issue.

Literally truthful claims about a certification that is issued indiscriminately for a price or that does not reflect a thorough inquiry into a professional's qualifications could be misleading.[7] Although the Supreme Court has held that truthful

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[5] N.J. Admin. Code 13:35-6.10(m).

[6] The staff of the FTC has reviewed only this section of the advertising regulation. The absence in this comment of any discussion of other provisions of the regulations should not be taken to imply anything about the staff's views, if any, about those other sections.

[7] The Commission has taken law enforcement action against alleged misrepresentations that an "association" is a disinterested "consumer protection" organization that ensures that products and services meet certain standards. FTC v.

(continued...)

statements about certification of specialty qualifications are not inherently misleading, it is possible that such claims could be used to mislead.[8] Identifying bona fide certification calls for assessing the certifying organization's standards and procedures. The Peel decision suggests factors to consider in making this assessment. The certifying body under consideration there, which the Court implicitly deemed legitimate,[9] applied standards that were approved by relevant professionals, that were objective and demanding, and that required specified experience, continuing education, demonstration of skills, and an examination; in addition, certification had to be renewed periodically by another demonstration of qualifications. Peel, 496 U.S. at 95.[10] The Court did not hold or even suggest that this set of features, or any of them individually, was legally necessary or required for a legitimate certification process.

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[7](...continued)
National Energy Specialist Ass'n, Civ. No. 92-4210, 1993-1 Trade Cas. (CCH) ¶ 70,211 (D. Kan. April 29, 1993); see also National Ass'n of Scuba Diving Schools, Inc., 100 F.T.C. 439 (1982) (consent order barring organization from issuing seals of approval without conducting tests to determine whether products meet an objective standard of quality or performance).

[8] The Court in Peel v. Attorney Reg. & Disciplinary Comm'n of Illinois, 496 U.S. 91 (1990) struck down, on First Amendment grounds, a total ban on statements by attorneys concerning their certification by private certifying bodies. There was no evidence that consumers had actually been misled by an attorney's truthful letterhead statement that he was certified by the National Board of Trial Advocacy. On whether the statement was nonetheless likely to be misleading, the Court's four opinions split three ways. In the lead opinion, which is treated here as the opinion of the Court, four justices found the statement unlikely to mislead. Three justices thought that such statements were potentially misleading; one of these justices wrote separately concurring in the judgment, one joined both the opinion of the Court and the concurring opinion, and one wrote separately in dissent. Three justices joined in another dissenting opinion supporting the lower court's view that the claim was inherently misleading.

[9] None of the opinions contended that the certifying organization was not legitimate.

[10] Another formulation articulated in the four-justice plurality opinion found it important that certification be available to all professionals who met objective and consistently applied standards relevant to practice in a particular area. Peel, 496 U.S. at 109.

Particular details of the certification process are less important than the ultimate purpose, namely assuring that the certification reflects a thorough evaluation of the professional's knowledge and skills in the relevant area.

The adoption of standards to identify those deemed to be bona fide specialists clearly has the potential to promote competition by deterring deceptive claims. But rules governing those standards should not be so restrictive or inflexible that they deny consumers access to nondeceptive information about certification. The Board's present regulation would limit permissible claims to those for certifications by groups on a list of approved certifying bodies. Whether such a limitation will deprive consumers of valuable, nondeceptive information may depend largely on whether bona fide certification programs could apply for and receive approval for listing without undue cost or delay. Although consumers would be denied information about certifications by programs that had not applied for approval or whose applications were pending, that denial might well be a reasonable cost when balanced against the interest in deterring deceptive certification claims. But if bona fide certification programs found it difficult to obtain approval in a reasonable time, consumers could be deprived of access to valuable, nondeceptive information and the development of new credentialing bodies could be impeded.

The Court observed in Peel that, to respond to potential consumer confusion about whether certification recognition was a public or a private function, "a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty." Peel, 496 U.S. at 110.[11] Here, the Board proposes to take on that screening function. Where there is an official program to screen certifying bodies, certifications by non-recognized bodies might be confused with certifications by bodies that are officially recognized. Although tighter regulation of certification claims involving non-recognized bodies might thus be justified, the Board might consider whether a regulation short of a complete ban

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[11] Six of the justices, in three different opinions, supported the possibility of requiring a disclaimer where there was a possibility of confusion or misunderstanding. In addition to the general statement from the four-justice plurality opinion that is quoted in the text, Justice Marshall's concurrence suggested that the state could require a disclaimer if consumers might mistakenly understand a certification claim to represent an official government endorsement, 496 U.S. at 117. Justice White's dissent also appears to endorse the same requirement, 496 U.S. at 119, but based on his belief that the claim that was challenged in that case would actually be misunderstood.

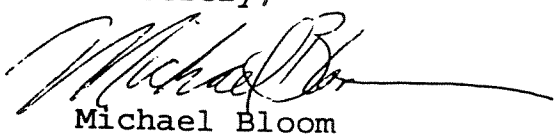
might be appropriate. As the Court pointed out in Peel, 496 U.S. at 110, requiring some kind of disclaimer might be enough to clarify consumers' possible confusion.

IV. Conclusion.

Consumers are best served by certification programs when certification represents an objective measure of performance that is relevant to the professional's services. There is a legitimate interest in preventing deceptive or misleading advertising of expertise that is very difficult for the general public to evaluate. For example, consumers may be misled by claims about expertise that are not actually relevant to the particular services provided, or by claims based on certifications from "diploma mills" that certify everyone who pays the required fee, regardless of their competence. But it is important to structure any actions taken against such problems so that they do not prevent consumers from obtaining truthful information about objective and relevant measures of professional expertise.

We are pleased to have this opportunity to present our views on this issue. We hope these comments are helpful. Please feel free to contact me if you have any further questions.

Sincerely,



Michael Bloom
Director