

Federal Trade Commission  
Denver Regional Office

STAFF REPORT ON  
ADVERTISING OF VETERINARY GOODS AND SERVICES

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This report was prepared by the staff of the Commission's Denver Regional Office. In publishing this report, the Commission has not adopted any findings or conclusions of the staff.

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## Preface

This report recommends the issuance of a proposed Trade Regulation Rule concerning the Advertising of Veterinary Goods and Services. It was drafted in the latter part of 1977 and submitted to the FTC's Bureau of Consumer Protection for its review.

After the draft report was submitted for review, staff learned that the American Veterinary Medical Association (AVMA), the principal national organization representing the veterinary profession in the United States, was recommending revisions to the public and private enactments that, heretofore, have restricted or prohibited veterinary advertising. If these restraints are, in fact, relaxed or eliminated as a result of the AVMA's recommendations, it may not be necessary for the Commission to engage in rulemaking in this area. But, because these restraints are still prevalent, staff believes that it remains important to consider their effects. We have therefore recommended that this report be published, notwithstanding the fact that the proposed rule it recommends may not ultimately be issued.

Because the main body of this report was drafted some months ago, its analysis may in certain respects be outmoded. For example, the rule it proposes would preempt state laws in an indirect manner by creating a repugnancy between the rule's federally-imposed duties and the duties imposed by state enactments. 1/ By contrast, in the Trade Regulation Rule concerning Advertising of Ophthalmic Goods and Services, the Commission has adopted a more direct approach to preemption. 2/ That rule explicitly preempts all state laws which prohibit or burden the advertising of eyewear or eye examinations.

Were we now to recommend commencement of a rulemaking proceeding concerning veterinary advertising, we would revise this report to reflect the policies adopted by the Commission in the Ophthalmic Rule and its accompanying Statement of Basis and Purpose. To the extent that there are variances between that rule and this report, it should be emphasized that the report is the product of the FTC's Denver Regional Office and has not been adopted by the Commission.

This preface is intended to serve as an addendum to our staff report. It discusses a number of matters that, for a variety of reasons, are not treated in the report itself, including the AVMA's recommendations. We have adopted this format to discuss

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1/ See Sections VC and VIIB, infra.

2/ The Commission voted unanimously to promulgate this rule on May 24, 1978.

these matters because we believe it is more efficient than redrafting the entire report. Therefore, the report should be read in conjunction with this prefatory section.

#### A. History of the Investigation

Staff recommended a formal investigation into the regulation of the veterinary profession in the latter part of 1975. This recommendation was based upon information compiled during a preliminary investigation conducted by the Bureau of Economics. On December 19, 1975, the Commission authorized a non-public industrywide investigation to determine whether unnamed providers of veterinary care were engaged in conduct prohibited by Section 5 of the Federal Trade Commission Act. The investigation, which was assigned to the Denver Regional Office in January, 1976, has included the examination of practices "in connection with the disclosure or nondisclosure of information, such as price information, related to the sale of [veterinary] goods and services; entry into the practice of veterinary medicine, such as the accreditation of schools of veterinary medicine and the examination, licensing and training of veterinarians; and acts and practices in connection with the ownership of establishments providing veterinary care, such as provisions limiting the types of entities and individuals who may own such establishments." <sup>3/</sup>

This report and the rule it recommends results from staff's examination of restraints on veterinary advertising. While the report discusses other aspects of veterinary regulation we have examined during this investigation, it is not intended to treat comprehensively any issue other than advertising. Staff is continuing its examination of the other areas of inquiry included in this investigation. Additional rulemaking or other Commission action may be recommended as a result of such examination.

We began our investigation by conducting a survey of state regulation of the veterinary profession. The survey instrument was a voluntary questionnaire sent to the veterinary licensing boards of all fifty states and the District of Columbia. <sup>4/</sup> The questionnaire was designed to elicit information concerning all of the areas of inquiry identified in the Commission's news release of December 28, 1975.

In addition to the State Veterinary Board Questionnaire, we obtained information from practicing veterinarians, educators, humane associations, state and local animal control officers, consumers, complaint letters, trade journals, scholarly papers, maga-

<sup>3/</sup> FTC News Release, Dated December 28, 1975.

<sup>4/</sup> See Appendix 1, infra.

zines and newspaper articles. We have visited a number of veterinary establishments and attended meetings of veterinary associations. We have also interviewed senior executives of the AVMA.

The information we gathered from these sources indicates, among other things, that veterinary advertising is prohibited or restricted by the laws of the majority of states and by the ethical codes of national, state and local veterinary associations. <sup>5/</sup> After we found that restraints on veterinary advertising were prevalent, our next task was to determine what economic effects these restraints had on consumers. To do this, we first conducted a survey designed to establish whether veterinarians perform services which involve the use of standardized procedures. <sup>6/</sup> We hypothesized that if such services did exist, they could easily be advertised; that is, these kinds of services would be analogous to pre-packaged products. The survey indicated: (1) that veterinarians do perform a number of services which are standardized; (2) that the performance of such services occupies a substantial portion of the practice time of most veterinarians; (3) that these services are discrete; and (4) that there is very little risk of harm to the animals upon which these services are performed.

We next conducted a survey to determine whether the veterinary market exhibits relatively high price dispersion. <sup>7/</sup> We surveyed the prices for five services which we had identified in our first survey as amenable to price advertising. Veterinary establishments in six large cities were telephoned and asked for prices. We concluded from this survey that the veterinary market does exhibit a high degree of price dispersion. We also concluded that restraints on veterinary advertising contribute to the maintenance of price dispersion by denying consumers essential market information. Finally, we concluded that the existence of high price dispersion is indicative of substantial consumer injury.

Because we have concluded that veterinary advertising restraints are prevalent, that they contravene public policy, and that they cause consumers to suffer economic harm, we contend that these restraints are "unfair" within the meaning of the Federal Trade Commission Act. The proposed Rule recommended

<sup>5/</sup> Appendix 3, infra, contains a summary of the state laws and regulations that restrain veterinary advertising. This summary is current to December 1, 1977. As noted below, the AVMA has temporarily rescinded its ethical code provision which prohibits veterinary advertising.

<sup>6/</sup> See Appendix 4 infra.

<sup>7/</sup> See Section IV, and Appendix 5 infra.

in the staff report is designed to remedy the effects of these unfair practices.

#### B. The Proposed Rule

The proposed Trade Regulation Rule recommended in this report contains four operative sections:

- (1) Section 4xx.2 prohibits members of the veterinary industry from engaging in any activity which burdens, limits or restricts the ability of any other industry member to advertise, in any medium, nondeceptive statements or claims concerning veterinary goods and services;
- (2) Section 4xx.3 prohibits veterinary industry members from relying on any non-federal laws or regulations or any private codes of conduct as a reason for not advertising, in any medium, nondeceptive statements or claims concerning veterinary goods and services;
- (3) Section 4xx.4 limits the disciplining of veterinary association members who engage in advertising;
- (4) Section 4xx.5 prohibits veterinary industry members from complying with any non-federal law or regulation or any private rule which requires unduly burdensome disclosures.

Each of these sections is designed to facilitate veterinary advertising by addressing a particular variety of restraint on such advertising. Section 4xx.2 is directed at the private restraints on veterinary advertising, most often contained in the ethical codes of private associations.

Section 4xx.3 is directed primarily at the enforcement of state laws and regulations which restrict veterinary advertising. It also applies to private restraints. The effect of this section is to create a conflict between the Rule and state and private enactments that prohibit or restrict veterinary advertising. This conflict is resolved through the effective preemption of the non-federal enactments that are repugnant to the proposed Rule.

Section 4xx.4 is designed to limit the manner in which associations may discipline their members who choose to advertise. This section does not prohibit veterinary associations from disciplining their members who advertise, but requires adherence to procedural due process in such cases.

Section 4xx.5 is designed to discourage the enforcement of public or private enactments requiring unduly burdensome disclosures. This section, like the immediately preceding one, is not aimed at existing practices. Rather, it is intended to prevent evasions of the requirements of Sections 4xx.2 and 4xx.3. Specifica

Section 4xx.5 would prohibit the enforcement of laws requiring unnecessary disclosures, the effects of which are to chill the emergence of advertising.

We believe that each of the four operative sections of the proposed Rule is important. All of these sections are intended to work together to enable veterinarians to advertise if they choose to do so. If any one of these provisions is omitted, veterinarians might be discouraged from advertising, much as they presently are. In such circumstances, consumers would continue to suffer substantial economic harm.

#### C. The AVMA's Recommendations Concerning Veterinary Advertising

As noted in the Addendum to Section II B of the staff report, the AVMA in July, 1977 amended that section of its Principles of Veterinary Medical Ethics which had previously banned virtually all forms of veterinary advertising. This section, "Principle II," had stated, "[The veterinarian] should not solicit clients." The new language of Principle II says "[The veterinarian] should not solicit clients nor announce his fees and services in such a manner as to be misleading."

Under Principle II are a series of annotations which detail the specific prohibitions against veterinary advertising. Simultaneous with its revision of Principle II, the AVMA announced a moratorium on the enforcement of these annotations. Moreover, the House of Delegates of the AVMA announced that all of the annotations would be reviewed and revised in light of the Bates 8/ decision and that a report would be prepared analyzing the impact of Bates on the veterinary profession.

When we first learned of the AVMA's actions, we were frankly skeptical of their ultimate effects. We believed that the AVMA would adopt a narrow interpretation of Bates that would allow the maintenance of many advertising restrictions on veterinarians. After reviewing the AVMA's proposed state regulation regarding veterinary advertising, our original skepticism has been greatly reduced.

The AVMA's proposed regulation is drafted in accordance with its interpretations of the Bates decision. The following summary of the "key points" from Bates is contained in the AVMA's

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8/ Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

letter sent to state veterinary boards together with its proposed advertising regulation:

1. Commercial speech is entitled to First Amendment protection since it "serves individual and societal interests in assuring informed and reliable decision-making."
2. In an earlier case regarding advertising by pharmacists, the Supreme Court left open the question as to such case's applicability to other professions, distinguishing physicians and lawyers from pharmacists on the basis that physicians and lawyers render services of "almost infinite variety and nature" rather than standardized products. However, Bates applied the reasoning of such case to lawyers also, thereby eliminating the utility of the foregoing distinction in professions.
3. Bates specifically does not address advertising of quality of services or in-person solicitation of clients in situations that breed undue influence, although the Court stated that such quality advertising might be false, deceptive or misleading and might warrant restriction and that such in-person solicitation might pose dangers of over-reaching and misrepresentation and might warrant restraints.
4. The First Amendment protects, among other things, basic factual content of advertising such as information as to name, address, telephone number, office hours and "the like."
5. Advertising that is false, deceptive, misleading or that concerns illegal transactions may be restrained.
6. Warnings, disclaimers or the like might be required in advertising so as to assure that the consumer is not misled.
7. There may be reasonable restrictions on the time, place and manner of advertising.
8. Advertising on the electronic broadcast media will warrant special consideration.
9. The majority opinion in Bates stated that "If the information is not misleading when published in a telephone directory, it is difficult to see why it becomes misleading when published in a newspaper." Moreover, one dissenting opinion stated that "[I]t is clear that today's decision cannot be confined on a principled basis to price advertisements in newspapers. No distinction can be drawn between newspapers and a rather broad spectrum of other means, for example, magazines, signs in buses and subways, posters, handbills and mail circulations. But questions

remain open as to time, place, and manner restrictions affecting other media, such as radio and television."

We are in substantial agreement with this summary of the Bates decision. While it is somewhat simplified, it should impart the "spirit" of the Bates holding to veterinary licensing board members.

The "Proposed Advertising and Solicitation Regulations" of the AVMA (hereinafter "AVMA Regulations") are drafted in a manner which should permit most states that have heretofore restricted or prohibited veterinary advertising to relax such restraints rather easily. That is, the AVMA's proposal merely changes the definition of "unprofessional conduct" as applied to advertising and solicitation by veterinarians. Currently, a number of states restrain veterinary advertising through their practice acts by threatening license suspension or revocation for those veterinarians engaged in "unprofessional conduct." "Unprofessional conduct" is generally defined in these states in terms of the AVMA's ethical code. In fact, a number of state licensing boards have "adopted" the AVMA ethical code or the code of their state association which tracks the AVMA's.

Some states, however, restrict veterinary advertising directly. That is, the veterinary practice acts of nine states contain statutory prohibitions or restrictions on such activities. In a number of other states, veterinary licensing boards have adopted regulations which specifically deal with advertising. In these states, conformance to the AVMA's position on advertising will be more difficult.

The following are the AVMA's Proposed Advertising and Solicitation Regulations:

- A. It is unprofessional conduct in the practice of veterinary medicine for a veterinarian, on behalf of himself, his partner, or his associate, or any other veterinarian affiliated with him or his firm, to:
  - 1) use, or participate or aid in or authorize the use of, any form of advertising or solicitation which contains a false, deceptive or misleading statement or claim;
  - 2) seek clients as a private practitioner by any form of in-person advertising or solicitation to a non-client if such non-client has given the veterinarian adequate notice that he does not want to receive communications from the veterinarian;
  - 3) use or participate or aid in or authorize the use of, his name or photograph in combination with his identity, as a veterinarian, doctor, doctor

of veterinary medicine or any abbreviation thereof, as part of any testimonial, endorsement, or sales promotion of any product or service except as otherwise permitted herein;

4) Accept a person as a client when he knows that such person seeks his services as a result of any unprofessional conduct in the practice of veterinary medicine.

B. As used herein, a false, deceptive or misleading statement or claim includes, without limitation, a statement or claim which:

1) contains a material misrepresentation of fact;

2) omits to state any material fact necessary to make the statement not misleading in light of the circumstances under which it is made;

3) is intended or is likely to create an inflated or unjustified expectation;

4) states or implies that a veterinarian is a certified or recognized specialist unless he is board certified in such specialty;

5) relates to professional fees other than:

a) a statement of the fixed fee charged for a specific professional service, provided that the description of such service would not be misunderstood or be deceptive and that the statement indicates whether additional fees may be incurred for related professional services which may be required in individual cases;

b) a statement of the range of fees for specifically described professional services, provided that there is reasonable disclosure of all relevant variables and considerations affecting the fees so that the statement would not be misunderstood or be deceptive, including, without limitation, an indication whether additional fees may be incurred for related professional services which may be required in individual cases; and

c) the availability of credit arrangements.

6) contains a representation or implication that is likely to cause an ordinary prudent layperson to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication

not deceptive;

7) contains statistical data or other information based on past performance or case reports;

8) contains a prediction of future success or guarantees that satisfaction or a cure will result from the performance of professional services;

9) contains a testimonial about or endorsement of a veterinarian;

10) contains a statement of opinion as to the quality of professional services or a representation regarding the quality of professional services which is not susceptible of verification by the public;

11) refers to secret methods of treatment or special services which characterize the ways of a charlatan;

12) results in undue influence;

13) concerns illegal transactions;

14) is not identified as a paid advertisement or solicitation unless it is apparent from the context that it is a paid advertisement or solicitation; or

15) would result in the violation of any law or regulation or a contractual or other legal obligation of any person through whom the veterinarian seeks to communicate.

C. As used herein, advertising or solicitation includes, without limitation, newspaper, magazine, periodical, radio and television announcements and listings, professional cards, professional announcement cards, office and other signs, letterhead, telephone and other directory listings, and any other form of written or verbal public communication, notice or device (in-person or otherwise) having for its purpose the dissemination to the public of information regarding the availability, nature or prices of products or services or the obtaining or attraction of clients.

D. Analysis of AVMA's Recommended Regulations in Relation to Proposed Rule

1. Price Advertising

The AVMA's Regulations are similar to staff's Proposed Rule in a number of important respects. For example, both would permit veterinarians to advertise the prices of many veterinary goods and services. In our view, price advertising is likely to have the greatest beneficial effect for consumers among all the possible forms of veterinary advertising.

If, as suggested by our economic surveys, <sup>9/</sup> the prices for veterinary services are higher than they would be were inexpensive means available for comparison shopping, we may assume that the introduction of price advertising will reduce the average prices for veterinary services. Thus, if our assumption is correct, consumers will receive an economic benefit from veterinary price advertising.

The statements in the AVMA Regulations and staff's proposed Rule concerning the varieties of veterinary goods and services for which prices may be advertised are remarkably similar. The proposed Rule would allow advertising of nondeceptive claims in any medium concerning

the prices of [veterinary] goods or services, provided that the prices of all additional goods and services which are required to be purchased in the majority of cases are disclosed. <sup>10/</sup>

The AVMA Regulations would permit

a statement of the fixed fee charged for a specific professional service, provided that the description of such service would not be misunderstood or be deceptive and that the statement indicates whether additional fees may be incurred for related professional services which may be required in individual cases. <sup>11/</sup>

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<sup>9/</sup> See Section IV, *infra*.

<sup>10/</sup> Sections 4xx.2(e) and 4xx.3(e).

<sup>11/</sup> AVMA Regulations, Sec. B(5).

As noted in the Staff Report, the proposed Rule is intended to permit the advertising of prices for both routine and non-routine services. The prices for a routine service under the proposed Rule could be stated as a "unit price" or "fixed fee" as long as the service is described in a manner which permits the public's understanding of what is being offered. The prices for non-routine services could be stated as a "unit price" or as a "range of prices," "reflecting such price-affecting factors as the age, weight or general physical condition of the animals for which it is provided." <sup>12/</sup>

The AVMA Regulations also appear to permit the advertising of prices for non-routine services. Under the Regulations, advertisements would be permitted which contain:

[a] statement of the range of fees for specifically described professional services, provided that there is a reasonable disclosure of all relevant variables and considerations affecting the fees so that the statement would not be misunderstood or be deceptive, including, without limitation, an indication whether additional fees may be incurred for related professional services which may be required in individual cases. <sup>13/</sup>

The principal variation between the AVMA Regulations and the proposed Rule provisions concerning price advertising concerns disclosure of "additional fees." Under the proposed Rule, fees for services in addition to those advertised must be disclosed only when such additional services are "required to be purchased in the majority of cases." This provision is designed to prevent abuses engendered by price advertisements in a manner which does not unnecessarily burden those who wish to use such advertisements. By requiring disclosures of additional fees only for services which may be required "in the majority of cases," the proposed Rule would foreclose forms of deceptive advertising such as "bait-and-switch" while allowing veterinarians to advertise the prices of most services they provide. The AVMA Regulations, on the other hand, would require disclosure of fees for "related" services in addition to those advertised when such services "may be required in individual cases." We believe the language in the proposed Rule concerning "additional fees" is preferable to that in the AVMA Regulations, since the latter may be read to require the disclosure of services which may only be required in rare instances. In our view, this goes further than necessary to deter abusive conduct.

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<sup>12/</sup> See Section V, *infra*, at 105.

<sup>13/</sup> AVMA Regulations, Sec. B(5)(b).

## 2. Advertising Other Than Prices

Staff's proposed Rule, in addition to permitting veterinary price advertisements, would allow veterinarians to make non-deceptive statements or claims concerning:

1. The availability of veterinary goods and services;
2. Statements as to the advertiser's background, including, but not limited to, training, experience, awards and memberships;
3. Areas of specialization;
4. Equipment and techniques used by the advertiser; and
5. Any other information concerning veterinary goods and services.

The AVMA Regulations are more restrictive. Rather than affirmatively stating permissible categories of advertisements as the proposed Rule does, the Regulations contain a list of prohibited classes of statements and claims. For example, the Regulations would prohibit veterinarians from making statements implying "that a veterinarian is a certified or recognized specialist unless he is board certified in such specialty." <sup>14/</sup> In contrast, the proposed Rule does not define "specialization" so narrowly. <sup>15/</sup> Under it, a veterinarian could advertise as a "specialist" if he or she is board certified, has a special interest in a field of veterinary practice, or limits his or her practice to particular needs or diseases.

We believe that the Rule's treatment of specialization is preferable to that in the AVMA Regulations. Board certification is not granted by the states, but by "colleges" certified by the AVMA. We have received complaints that some of these colleges enact artificially stringent entry barriers after "grandfathering" in a select number of self-proclaimed "specialists." If these complaints are valid, then board certification may not be the best indicator of expertise. Moreover, some areas of "specialization" such as "spaying and neutering," are not subject to board certification. We believe that any veterinarian who can reasonably call himself a "specialist" should be allowed to do so. This is already permitted in some states for the medical and legal profession

The AVMA Regulations would also prohibit an advertisement which "contains statistical data or other information based on past performance or case reports." <sup>16/</sup> It is difficult for

<sup>14/</sup> AVMA Regulations, Section B(4).

<sup>15/</sup> Proposed Rule, Section 4xx.1(d).

<sup>16/</sup> AVMA Regulations, Section B(7).

us to imagine much potential for abuse in this area. In fact, advertisements containing truthful statistical information or case histories would probably have less of a "capacity or tendency to deceive" <sup>17/</sup> than many other forms of advertisements. Rather than prohibiting all advertisements which contain historical or statistical information, we believe that any problems in this area may be dealt with by the Regulations' general provisions prohibiting deceptive advertisements.

Also prohibited under the AVMA Regulations are advertisements which contain a "prediction of future success or guarantees that satisfaction or a cure will result from the performance of a professional service" <sup>18/</sup> and those which contain "a testimonial about or endorsement of a veterinarian." <sup>19/</sup> We can see no reason for the blanket prohibitions of advertisements containing predictions of success or guarantees. If guarantees are permitted to be advertised in other industries, why should they be prohibited for the veterinary profession? Granted, claims related to "customer satisfaction" or "guarantees" are frequently susceptible of deception, yet it is conceivable that such claims could be made in a fair and nondeceptive manner. Moreover, these claims may give rise to a private right of action for breach of warranty. This seems enough to deter irresponsible advertising of warranties or guarantees.

The flat prohibition of endorsements appears to be an irrational carry-over from the "ethical" standards previously applied to veterinary advertising. This restriction also comports with a general standard of behavior contained in Section A of the Regulations which states that it is "unprofessional conduct" for a veterinarian to:

use, or participate or aid in or authorize the use of, his name or photograph in combination with his identity, as a veterinarian, doctor, doctor of veterinary medicine or any abbreviation thereof, as a part of any testimonial, endorsement, or sales promotion of any product or service except as otherwise permitted herein.

<sup>17/</sup> This is the general standard for testing the deceptiveness of an advertisement under the Federal Trade Commission Act. See, e.g., Charles of the Ritz Distributors Corp. v. FTC, 140 F.2d 676 (2d Cir. 1944).

<sup>18/</sup> AVMA Regulations, Section B(8).

<sup>19/</sup> AVMA Regulations, Section B(9).

Testimonial claims of veterinarians for particular products or services may be subject to the standards previously applied by the Commission to such claims. <sup>20/</sup> Similarly, testimonials by consumers with respect to veterinarians may be subjected to these standards. Because both of these varieties of testimonial advertisements may be made in a non-deceptive manner and because such advertisements may be subject to previously enunciated Commission standards, we believe that the blanket prohibition on this form of advertising is not advisable.

Another carry-over of "ethical" standards is the Regulations' prohibition of advertisements which refer to "secret methods of treatment or special services which characterize the ways of a charlatan." <sup>21/</sup> This prohibition, while quaintly archaic in its language, seems vague and circular. Moreover, it could be used to restrict advertisements concerning procedures or techniques that are effective or efficient yet not generally employed. The circularity of this prohibition is apparent when one analyzes how it might be used. Is one who advertises "special services" or "secret methods of treatment" *ipso facto* a "charlatan"? Or are those who are characterized as "charlatans" the only ones who would resort to such advertisements? In short, this prohibition seems to defy logical application and should, in staff's opinion, be deleted from the AVMA Regulations.

Two general restrictions in the AVMA Regulations would prohibit an advertisement which "is intended to create an inflated or unjustified claim" <sup>22/</sup> or one which "contains a statement of opinion as to the quality of professional services or a representation regarding the quality of professional services which is not susceptible of verification by the public." <sup>23/</sup> Both of these prohibitions were apparently drafted in response to dicta in the Bates opinion:

[W]e need not address the peculiar problems associated with advertising claims relating to the quality of legal services. Such claims are probably not susceptible to precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false. <sup>24/</sup>

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<sup>20/</sup> See, e.g., Guides concerning use of endorsements and testimonials in advertising, 16 C.F.R. § 255 (1977).

<sup>21/</sup> AVMA Regulations, Section B(11).

<sup>22/</sup> AVMA Regulations, Section B(3).

<sup>23/</sup> AVMA Regulations, Section B(10).

<sup>24/</sup> Bates v. State Bar of Arizona, *supra* note 8, at 384 (emphasis in original).

If these restrictions are meant to apply to objective claims, they employ a substantiability standard similar in certain respects to that applied in Commission cases. <sup>25/</sup> The principal variation between the Regulation's standard of substantiability and that of the Commission is that the Commission does not require that advertising claims be susceptible of empirical validation by the public. Under the FTC test, the advertiser must possess validation of objective claims prior to the appearance of advertising and such validation must be satisfactory to the trier of fact if the advertising is challenged. We believe this latter standard is preferable to that in the Regulations and therefore urge that the Regulations be amended accordingly. If, on the other hand, these restrictions are meant to preclude the use of non-objective claims in the nature of puffery, we believe that they are overly broad. Puffery has been generally permitted in advertisements concerning many products and services. While the special circumstances of professional advertising may warrant a different analysis concerning non-objective claims, we believe that such claims should be permitted for veterinarians, at least until the need for more restrictive standards becomes apparent.

Section A(2) of the AVMA Regulations prohibits the use of in-person advertisements or solicitations:

[It is unprofessional for a veterinarian] to seek clients as a private practitioner by any form of in-person advertising or solicitation to a non-client if such non-client has given the veterinarian adequate notice that he does not want to receive communications from the veterinarian. <sup>26/</sup>

This restriction is arguably consistent with dicta in Bates. <sup>27/</sup> However, it should be noted that the Supreme Court has accepted two companion cases for consideration during its 1978 term which concern in-person solicitation by lawyers. <sup>28/</sup> Until these cases are decided, it is impossible to know whether the restriction on in-person solicitations in the AVMA Regulations may be constitutionally permissible.

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<sup>25/</sup> See, e.g., Firestone Tire & Rubber v. FTC, 481 F.2d 246 (6th Cir. 1973).

<sup>26/</sup> AVMA Regulations, Section A(2).

<sup>27/</sup> Bates v. State Bar of Arizona, *supra* note 8, at 384.

<sup>28/</sup> In re Smith (No. 77-56) and Ohralik v. Ohio State Bar Assn. (No. 76-1650), probable jurisdiction noted, 46 L. W. 3214 (1978).

Five provisions in the AVMA Regulations may be collectively discussed as general "time, place, or manner" restrictions. Under these provisions, a veterinarian may not:

- 1) "accept a person as a client when he knows that such person seeks his services as a result of any unprofessional conduct in the practice of veterinary medicine"; 29/
- 2) place an advertisement which "results in undue influence"; 30/
- 3) advertise concerning "illegal transactions"; 31/
- 4) fail to identify an advertisement as a "paid advertisement unless it is apparent from the context that it is a paid advertisement"; 32/ or
- 5) place an advertisement which "would result in the violation of any law or regulation or a contractual or other legal obligation of any person through whom the veterinarian seeks to communicate." 33/

Under Bates, such "time, place, and manner restrictions" may be imposed if they are "reasonable." 34/ As the Court noted, it is clearly reasonable to prohibit advertisements concerning illegal transactions. 35/ It also seems reasonable to preclude advertisements which fail to identify themselves as such and those which would result in the violation of laws, regulations or contractual obligations. However, we must question the reasonableness of the restriction on advertisements which result in "undue influence," primarily because that term is vague and undefined. While "undue influence" is the subject of a body of law in the probate area, its use in the context of advertising regulation seems to introduce unwarranted complexity. We must also question the reasonableness of the prohibition on the acceptance of clients who seek services as a result of "unprofessional conduct." In fact, the breadth of this clause makes it much more than an advertising regulation. There is a danger, we believe, in permitting these latter two restrictions to stand. They could assist in the arbitrary prosecution of veterinarians who may choose to advertise. That

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29/ AVMA Regulations, Section A(4).

30/ AVMA Regulations, Section B(12).

31/ AVMA Regulations, Section B(13).

32/ AVMA Regulations, Section B(14).

33/ AVMA Regulations, Section B(15).

34/ Bates v. State Bar of Arizona, supra note 8, at 383.

35/ Id., citing Pittsburg Press v. Human Relations Comm'n, 413 U.S. 376 (1973).

is, these restrictions are so open-ended that they could be interpreted or applied by those hostile to advertising to preclude any form of advertisement vaguely felt to be "unprofessional."

### 3. Affirmative Disclosures

Section 4xx.5 of the proposed Rule requires veterinarians to refrain from complying with "unduly burdensome" disclosure requirements which may be imposed through private or public enactments. An "unduly burdensome disclosure" is defined in 4xx.1(e) as "one which is not necessary to provide consumers with material information concerning the goods or services advertised for sale to the public."

This provision is primarily designed to preclude the imposition of state requirements which may undermine the emergence of veterinary advertising. In the eyeglass industry a number of states have already enacted disclosures which appear to burden advertising. 36/ If restrictions of this kind were allowed to stand, they could stifle the emergence of advertising and thereby negate the protection afforded commercial speech through Bates and other decisions. 37/

On their face, the AVMA Regulations would not permit the imposition of unduly burdensome disclosures. While the Regulations define as "false, deceptive or misleading" any advertisement which "omits to state any material fact necessary to make the statement not misleading in the light of the circumstances under which it is made," 38/ this seems to be harmonious with the policy of the proposed Rule. That is, both the Regulations and the proposed Rule recognize the necessity for some form of advertising disclosures. The key element of such required disclosures in both proposals is apparently the same -- they must provide the consumer with "material" information, in the absence of which the advertisement would be "false or deceptive."

Actual affirmative disclosure requirements that may be imposed under the AVMA Regulations will demand ad hoc analysis.

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36/ See, e.g., Report of the Presiding Office on Proposed Trade Regulation Rule Regarding Advertising of Ophthalmic Goods and Services (Dec. 10, 1976).

37/ E.g., Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

38/ AVMA Regulations, Section B(2).

If these requirements are designed to provide consumers with essential information, they will probably be unexceptionable. On the other hand, if such requirements mandate the disclosure of a great deal of non-essential information, they may effectively chill the emergence of advertising.

#### 4. General Considerations

Both the proposed Rule and the AVMA Regulations would permit nondeceptive veterinary advertising in all media. Although the Bates decision notes that "advertising on the broadcast media will warrant special consideration," <sup>39/</sup> neither the Regulations nor the Rule treat television or radio advertising any differently than advertising in other media.

As noted, the AVMA Regulations would apply only to public regulations. Thus, the Regulations do not comprehend a standard for the conduct of private disciplinary actions as the proposed Rule does in Section 4xx.4. Under this section of the Rule, an association may not expel, censure or otherwise discipline any of its members who advertise unless: (A) a governmental body has entered a final order finding that such member has violated a public law governing advertising; or (B) the association finds in a hearing conducted by an impartial body that such member has violated a private code of conduct governing veterinary advertising.

#### E. Conclusions

We believe that the proposed Rule is preferable to the AVMA Regulations in a number of respects. However, we also believe that the AVMA has thus far made a good faith effort to take self-curative action and that this effort should be commended. Our greatest concern with the AVMA Regulations is that several of their provisions might be interpreted in a manner which precludes some beneficial forms of veterinary advertising. We cannot know, however, how these provisions will actually work unless they are adopted.

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<sup>39/</sup> Bates v. State Bar of Arizona, supra note 8, at 384.

Consequently, we have recommended that the Commission temporarily forego rulemaking concerning veterinary advertising until we learn the actual efforts that state veterinary boards and veterinary associations might take to relax their restrictions on such advertising. We have also recommended that we monitor the progress of such action through June 30, 1979. We will monitor both the revisions to advertising restrictions and the effects these revisions have on the emergence of veterinary advertising. If, at the end of this period, veterinary advertising restrictions are no longer prevalent, we will recommend that our proposed Rule be abandoned. On the other hand, if these restraints remain prevalent or if veterinary advertisers are subjected to harassment notwithstanding the purported liberalization of advertising standards, we will recommend that the Commission commence rulemaking concerning veterinary advertising.

May, 1978  
Denver, Colorado

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## I. INDUSTRY PROFILE

### A. History of the Veterinary Profession in the United States\*

People have been interested in the treatment of the diseases and injuries of animals for at least four thousand years. The Babylonians and ancient Egyptians wrote of animal diseases. <sup>1/</sup> Both Hippocrates and Aristotle made observations on the medical treatment of animals. <sup>2/</sup> But veterinary medicine did not emerge as a separate branch of learning until much later. In fact, what we consider as "modern" veterinary medicine did not begin until the mid-eighteenth century.

Veterinary medicine was recognized as a distinct profession only after the establishment of veterinary schools. The first modern veterinary school was established in France in 1762. <sup>3/</sup> It was begun because the country lacked a trained force of individuals to treat the diseases of cattle which had decimated the French agricultural industry.

From 1762 to the end of the eighteenth century veterinary schools were opened in most European countries. But very few of the graduates of these schools migrated to America. The animal health problems which led to the establishment of these European schools had not yet occurred in North America.

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\*This account of the history of the veterinary profession is derived from several standard texts written by veterinarians. The primary sources used are Smithcors, Evolution of the Veterinary Art (1957) and Smithcors, The American Veterinary Profession (1963). It is important at the outset to recognize that the profession has not progressed to its present state entirely as a result of natural historic or economic forces. Indeed, a revisionist history of the profession might better trace the history of its regulation. We have not attempted in this short section to write such a revisionist history. What we have written is, we believe, fair and objective. It should, however, be considered in the light of other sections dealing with the regulation of the profession.

<sup>1/</sup> Armistead, The Ascent of Veterinary Medical Education, 169 Journal of the American Veterinary Medical Association (hereinafter JAVMA) 38 (1976).

<sup>2/</sup> Id.

<sup>3/</sup> This school was established at Lyon by the French Council of State. Id.

Until the European discovery of America, there were almost no animals on the continent specifically domesticated for food or labor. Colonists brought "seed" stocks of pigs, cattle and sheep with them from Europe, but these were nearly disease-free. <sup>4/</sup> This was due primarily to the fact that the animals which were the "seeds" were survivors of long voyages that acted as effective quarantines.

Certainly, the early American colonists sometimes needed care for their animals. This was generally provided by self-trained healers who were often farriers as well. <sup>5/</sup> The records of the Virginia colonies, for example, refer to a "cow doctor" as early as 1625. <sup>6/</sup>

As the number of animals in the colonies increased, the chances of their contracting diseases also increased. The same influences which prompted the establishment of the European veterinary schools led to the opening of American veterinary schools. <sup>7/</sup>

The first American veterinary college opened in Philadelphia in 1852. <sup>8/</sup> In 1854, a second such school began in Boston. Neither of these schools graduated any veterinarians, but their establishment was important because they successfully transplanted the European theories of scientific education into the United States.

Between 1852 and 1899 a total of thirty-three veterinary schools were established in this country. The first school to produce any graduates was the New York College of Veterinary Medicine, begun in 1857. Most of the early veterinary schools were proprietary, depending entirely on their students' tuition for their survival. The education provided by these schools was often meager and uneven. <sup>9/</sup>

<sup>4/</sup> See, e.g., Kingrey, Farm Animal Practice in the United States, 169 JAVMA 56 (1976).

<sup>5/</sup> See Miller, Veterinary-Farriery Services in the Continental Army--April 1775-May 1777, 169 JAVMA 106 (1976).

<sup>6/</sup> National Academy of Sciences, New Horizons for Veterinary Medicine (Hereinafter "New Horizons") 3 (1972).

<sup>7/</sup> Armistead, supra note 1, at 39.

<sup>8/</sup> Id.

<sup>9/</sup> Bauer, Accreditation of Veterinary Medical Education: Part 1, J. Vet. Med. Ed. 1, 2 (1975).

During the latter half of the eighteenth century a number of veterinary schools were begun in the land grant colleges. <sup>10/</sup> These schools tended to be more economically stable than the proprietary schools, primarily because they received subsidies from state and federal governments.

Early American veterinary education at both the proprietary and public schools stressed the treatment of horses, and to a lesser extent, cattle and other food animals. This emphasis was only natural since these animals, particularly the horse, were the most important economically. This emphasis, however, nearly caused the profession's early extinction.

The value of the horse decreased sharply by the beginning of the twentieth century because of the development of the internal combustion engine and the general economic depression of the period. In 1900, Liautard, considered to be the father of American veterinary medicine, expressed the gloom felt by many in the profession because of the waning value of the horse:

During the past few years of commercial depression in this country the value of horses became so reduced as to render medical attendance on them when sick or disabled a questionable economic problem, and the status of the veterinarian from a financial point of view was very discouraging--so much so that many abandoned the profession. <sup>11/</sup>

By the First World War, the economic importance of the veterinary profession had decreased dramatically. Between 1919 and 1924 eleven veterinary colleges failed. <sup>12/</sup> By 1927 all of the proprietary schools closed. <sup>13/</sup> Even the stronger land grant veterinary schools felt the effects of the decreasing demand for veterinary services. <sup>14/</sup>

During the 1930's the profession gradually shifted its emphasis from the treatment of food and draft animals to the care of pets. The number of veterinarians entering the profession during this period was still quite small, although this may be attributable to economic conditions.

<sup>10/</sup> The first such school was established at what is now Iowa State University in 1879.

<sup>11/</sup> Liautard, The Future of the Veterinary Practitioner, 24 Am. Vet. Rev. 157 (1900).

<sup>12/</sup> New Horizons, supra note 6, at 145.

<sup>13/</sup> Id.

<sup>14/</sup> Armistead, supra note 1, at 39.

During the Second World War the profession began a dramatic upsurge. The affluence created during and immediately after this period allowed people to shift a greater portion of their income to "luxuries," including professional health care for their pets.

The demand for veterinary services increased through the 1950's and 60's. With this came a greater demand for veterinary education. Entry into veterinary schools became more and more difficult. Not only were no new veterinary schools opened during this period, but entrance requirements were substantially raised as well. 15/

The increasing demand for veterinary services has continued into the 1970's. Nevertheless, in 1970 only eighteen American schools were accredited to teach veterinary medicine. 16/ A nineteenth school was added in 1973. 17/

Today there are approximately 25,000 active clinical practitioners out of a total population of about 28,000 veterinarians. 18/ The vast majority of practitioners continue to work as single proprietors or in small partnerships, although some practices are employing more efficient delivery systems. For example, a number of veterinarians are organizing cooperative hospitals where they perform surgery or other procedures requiring expensive equipment. 19/ All-night emergency centers have also been opening throughout the country, offering animal owners the kinds of services for their pets that hospital emergency rooms offer to humans. 20/

The last few years have also seen the emergence of professional veterinary auxiliaries, usually called "animal technicians." Animal technicians are trained to perform a number of tasks previously performed by licensed veterinarians. 21/

Perhaps the most significant recent development in the veterinary profession is the increasing trend toward specialization.

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15/ Bauer, supra note 9.

16/ New Horizons, supra note 6, at 145-46.

17/ Louisiana State University, School of Veterinary Medicine.

18/ See text accompanying note 22 infra.

19/ See, e.g., Veterinary Economics 22 (September, 1976).

20/ E.g., Animal Housecalls of Denver, Colorado.

21/ See Section ID infra.

Because many people are willing to pay substantial fees for their animals' care, some veterinarians have been able to limit their services to particular kinds of practices, e.g., veterinary ophthalmology, radiology, and anesthesiology.

B. The Practice of Veterinary Medicine

The vast majority of veterinarians in the United States are clinical practitioners. That is, most veterinarians are concerned with the diagnosis, treatment, and control of diseases of various animal species on a fee-for-service basis. For descriptive purposes, clinical practices may be divided into four major categories--food animal practice, small animal practice, equine practice, and other clinical practices. Major categories of veterinarians who are not generally considered clinicians include military veterinarians, public health veterinarians, laboratory veterinarians, regulatory veterinarians, and other non-clinical practitioners. Each of these professional classifications is discussed separately below. For illustrative purposes we have included a table which delineates AVMA member veterinarians by practice type as of January 1, 1976. It should be noted that this table includes only AVMA members. 22/

TABLE 1  
U.S. AVMA MEMBER VETERINARIANS AS OF  
JANUARY 1, 1976, CLASSIFIED BY ACTIVITY TO WHICH  
THEY DEVOTE MORE THAN 50% OF THEIR EFFORTS\*

Practice Activity	Number	Percent of Total
Small Animal <sup>A</sup>	13,752	52.90%
Food Animal <sup>B</sup>	6,121	23.58%
Equine	837	3.22%
Military Veterinary Med.	608	2.34%
Regulatory Veterinary Med.	785	3.02%
Laboratory Veterinary Med.	378	1.46%
Veterinary Public Health	248	0.95%
Zoo Animals	73	0.28%
Pathology Specialties <sup>C</sup>	757	2.92%

22/ As noted in Section IIB *infra*, 92 percent of all veterinarians in the United States are AVMA members.

Other Specialties <sup>D</sup>	1,403	5.40%
Extension Services	61	0.24%
Other Practice Types <sup>E</sup>	491	1.89%
Retired	464	1.79%
Total	25,958	

A/ This includes: Small Animal (exclusive); Small Animal (predominant); plus one-half of those in Mixed (50-50 large and small).

B/ This includes: Large Animal (exclusive); Large Animal (predominant); Bovine, Porcine, and Poultry Specialties; plus one-half of those in Mixed (50-50 large and small).

C/ This includes General, Avian and Clinical Pathology specialties.

D/ This includes specialties in: Anatomy, Biochemistry, Parasitology, Microbiology, Pharmacology, Physiology, Radiology, Surgery, Toxicology, Ophthalmology, Nutrition, Clinical Services and Fur-Bearing Animals.

E/ This also includes those whose practice activities are unknown.

\* Data provided by AVMA

1. Clinical Practice

a. Food Animal Practices

Food animal practitioners examine, diagnose, and treat diseases of various food-producing species such as beef and dairy cattle, sheep, swine and poultry. Together with equine practitioners, food animal veterinarians comprise the category of practitioners generally known as "large animal veterinarians." It is difficult to determine the exact number of food animal veterinarians in the United States. However, we have estimated

their number to be 6,576 as of January 1, 1976. <sup>23/</sup> This category accounts for about 23 percent of all United States veterinarians. <sup>24/</sup>

Most food animal veterinarians treat all large animal species indigenous to their practice localities. An increasing number, however, have come to specialize in particular animal species, e.g., cattle, pigs, and poultry. Some food animal practitioners are entirely mobile, operating out of specially equipped vehicles. Others mix their mobile services with "home-office clinics" which offer such services as general anesthetic surgery, radiology and pathology which cannot be provided in the field.

Food animal veterinarians also vary in the manner in which they contract for services. Some operate on a fee-for-service basis while others are retained by larger agricultural units as consultants. Additionally, a number of food animal practitioners treat pet or companion animals as well as large animal species.

Food animal medicine has changed considerably over the past few decades. Some of the major services once performed by veterinarians are now provided by nonprofessional personnel working directly for livestock breeders. The services of food animal veterinarians are increasingly limited to provision of care to valuable single animals or to larger groups and herds. <sup>25/</sup>

Because of the trend toward large agribusiness operations that provide their herds lay preventive health care the need for additional food animal practitioners is minimal. The National Academy of Sciences has estimated that

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<sup>23/</sup> This estimate was derived from AVMA statistics using the following formula:

Large Animal (Exclusive)	823
Large Animal (More than 50%)	3956
1/2 of Mixed (50-50 Large & Small)	1097
Bovine Practice	186
Porcine Practice	16
Poultry Practice	<u>43</u>
Total of AVMA Members	6121

Total of AVMA in Food Animal Practice as a percentage of total AVMA members = 23.58%

23.58% x total number of known U.S. veterinarians (27,889) = 6,576.

<sup>24/</sup> This percentage was derived from a total population including retired and non-clinical practitioners. As noted in Table 2, food animal veterinarians represent 26.46 percent of clinical practitioners.

<sup>25/</sup> New Horizons, supra note 6, at 20.

approximately the same number of food animal veterinarians practicing in 1970 will be needed into the 1990's. <sup>26/</sup>

#### b. Small Animal Practice

Approximately 14,000 or fifty-three percent of all veterinarians in the United States were engaged in small animal practice as of January 1, 1976. <sup>27/</sup> This represents an increase of about 3,000 or twenty-seven percent since 1970. <sup>28/</sup>

Small animal veterinarians are primarily concerned with the health needs of household pets. Practices tend to concentrate around human population centers. Facilities vary widely, from store-front offices with minimal equipment to multi-floor pet hospitals closely resembling the most modern human health-care centers. Except for a few practices which are mobile or highly specialized, small animal practices are almost always confined to in-clinic treatment. <sup>29/</sup>

As discussed below, <sup>30/</sup> a substantial part of a small animal practitioner's activities may be characterized as "routine." Nevertheless, many practitioners are equipped to offer sophisticated surgical or diagnostic services. In recent years there has been a trend among small animal practitioners to specialize in particular kinds of services. Especially in larger cities, many veterinarians now limit their practices to such services as ophthalmology, orthopedic surgery, pathology, and radiology. The small animal segment of the profession has been the leading employer of lay assistants or "animal technicians." <sup>31/</sup> Most lay assistants have been trained "on-the-job" by veterinarians, although an increasing number are being trained by specialized educational facilities. Animal technicians perform a variety of services for small animal practices, including laboratory work, observation, drug administration, surgical preparation, and surgical assistance.

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<sup>26/</sup> Id. at 21. Calculations of "need" here and in the following subsections should not be confused with the demand for veterinary services; see Section ICL infra.

<sup>27/</sup> See Table 2.

<sup>28/</sup> This percentage increase was derived from figures in Table 1 relative to those in New Horizons, supra note 6, at 155.

<sup>29/</sup> A number of cities now have mobile clinics operated by veterinarians, e.g., Animal Housecalls of Denver, Colorado.

<sup>30/</sup> See text accompanying note 257 infra.

<sup>31/</sup> The designations of lay assistants vary among the states. In California, for example, they are called "animal health technicians" or "AHT's."

The National Academy of Sciences estimates that 21,900 small animal practitioners will be needed in the United States by 1980. <sup>32/</sup> Given the current and projected entry levels for veterinarians, it appears that the supply of veterinarians will not be sufficient to meet this need.

c. Equine Practice

Prior to the early twentieth century most veterinarians were equine practitioners. With the waning value of the horse as a draft animal, the interest of the profession shifted away from the treatment of horses. By 1930 almost no veterinarians specialized in equine practice. This situation has now changed substantially. The horse has become a significant "recreational" animal, and, consequently, the demand for veterinarians specializing in equine practice has seen a resurgence. In 1955, the United States had a total estimated population of horses numbering three million. <sup>33/</sup> This population was served by fewer than 100 equine veterinarians. <sup>34/</sup> By 1969, the American Association of Equine Practitioners had a membership of 1,200, forty-seven percent of whom devoted almost full-time service to horses. <sup>35/</sup> We estimate that by January 1, 1976, at least 837 veterinarians were engaged predominantly in equine practice. <sup>36/</sup>

Equine practitioners are located throughout the United States. While one might expect that they would predominate in rural areas, an examination of their actual distribution reveals that many equine veterinarians practice in urban and suburban settings. <sup>37/</sup>

Equine practitioners receive the same basic education as all other veterinarians. While some veterinary colleges stress the treatment of large animals in their curricula, the vast majority of equine practitioners acquire their particular skills

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<sup>32/</sup> New Horizons, supra note 6, at 24.

<sup>33/</sup> Id. at 26.

<sup>34/</sup> Id.

<sup>35/</sup> Id.

<sup>36/</sup> This figure represents the number of AVMA members who in response to a survey of types of practices stated they were equine specialists. Many other large animal veterinarians also treat horses, but do not do so more than 50 percent of the time.

<sup>37/</sup> See AVMA Directory-1976.

through "regular" veterinary education coupled with clinical internships or other less formal experiences. Equine practitioners do not show the same trend toward specialization seen among small animal veterinarians. While some equine practitioners specialize in breeding, surgery, or nutrition, the vast majority provide clinical services for all horse breeds and for all varieties of equine health problems. <sup>38/</sup>

The National Academy of Sciences, using statistical projections of the American Horse Council, estimates that more than 1,600 equine practitioners will be needed in 1980. <sup>39/</sup> Given current entry levels of veterinarians, the supply of trained equine specialists will be insufficient to meet this need.

4. Other Clinical Practitioners

As Table 2 below illustrates, 88.54 percent of all clinical practitioners are engaged in small animal, large animal, and equine practice. <sup>40/</sup> The remaining 11.46 percent of the veterinarians in clinical practice are combined for descriptive purposes in the "other clinical practice" category.

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<sup>38/</sup> New Horizons, supra note 6, at 25-26.

<sup>39/</sup> Id.

<sup>40/</sup> Includes estimates only of AVMA members. However, we estimate that the percentages would be nearly the same for all veterinarians in the United States.

TABLE 2

UNITED STATES VETERINARIANS<sup>A</sup> ENGAGED  
PREDOMINANTLY IN CLINICAL PRACTICES<sup>B</sup>  
AS OF JANUARY 1, 1976<sup>B</sup>

	Number	Percent of Total
Small Animal Practice	13,752	59.45%
Food Animal Practice	6,121	26.46%
Equine Practice	608	2.63%
Specialized Practice <sup>C</sup>	2,160	9.34%
Other Practice	<u>491</u>	2.12%
Total	23,132	

A/ Includes only AVMA members.

B/ Data extracted from AVMA publications.

C/ Includes all specialties noted in Table 1.

The majority of veterinarians in the "other clinical practice" category are specialists. Some specialists treat particular animal breeds. Others specialize in particular kinds of services common among all veterinarians. Veterinary service specialties are similar to the specialties of physicians. <sup>41/</sup> Indeed, a number of veterinary specialists receive their post-graduate training in medical colleges.

No state statute specifically requires veterinarians claiming to be specialists to be certified by special examinations or specialty board membership. Some private ethical codes, however, restrict the use of the term "specialist" in public announcements. <sup>42/</sup> The American Veterinary Medical Association recognizes twelve colleges or specialty boards. <sup>43/</sup> Each of

<sup>41/</sup> See, e.g., conversation between Dr. William Richard and F. K. Smith, FTC, Sept. 7, 1976.

<sup>42/</sup> See, e.g., AVMA Code of Professional Responsibility, Sec.

<sup>43/</sup> AVMA Directory-1976, at C-70.

these colleges has its own membership requirements, including, in a number of cases, the attainment of a satisfactory score on an examination. The specialty boards recognized by the AVMA as of January 1, 1976, are:

1. American Board of Veterinary Public Health
2. American Board of Veterinary Toxicology
3. American College of Laboratory Animal Medicine
4. American College of Theriogenologists
5. American College of Veterinary Anesthesiologists
6. American College of Veterinary Internal Medicine
7. American College of Veterinary Microbiologists
8. American College of Veterinary Ophthalmologists
9. American College of Veterinary Pathologists
10. American College of Veterinary Preventive Medicine
11. American College of Veterinary Radiology
12. American College of Veterinary Surgeons

Other veterinarians within the "other clinical practices" category limit their practices to fur-bearing animals such as minks or chinchillas. This group is relatively small and is not predicted to grow significantly within the next decade. <sup>44/</sup> "Other Practice" in Table 1 also includes veterinarians whose types of practices are unknown.

## 2. Non-Clinical Practice

### a. Military Veterinary Medicine

Veterinarians in the Army and Air Force Veterinary Medical Corps perform a variety of functions including public health services, food inspections, clinical veterinary medicine, laboratory medical support, research, and training. According to officials at the Pentagon, as of May 1977, 675 veterinarians were in military service. <sup>45/</sup>

<sup>44/</sup> New Horizons, *supra* note 6, at 21.

<sup>45/</sup> There are 308 veterinarians in the Air Force and 367 in the Army. Telephone interviews conducted by staff of FTC Denver Regional Office.

The majority of military veterinarians are engaged primarily in food inspection. These veterinarians are stationed throughout the world and inspect all meats purchased by military installations. Additionally, some military veterinarians provide technical assistance to supply officers and cooks in such areas as nutrition and food storage.

Military veterinarians also work in laboratories with other medical personnel involved in such research areas as microbiology, serology, pathology, toxicology and radiobiology. Other veterinarians are assigned to the health care of military animals used for tactical and research purposes. The public health activities of military veterinarians are primarily in areas of inspection and zoonoses prevention.

The number of veterinarians in the armed forces has remained relatively static in the past seven or eight years. Unless the United States becomes involved in a long-term military conflict, it is doubtful that this number will increase.

#### b. Public Health Veterinarians

Public health veterinarians are primarily responsible for protecting human health focusing on the inter-relationships between animals and humans. Approximately 248 veterinarians were engaged in this area of practice as of January 1, 1976. <sup>46/</sup> The National Academy of Sciences in New Horizons describes their work as follows:

[Public health Veterinarians] work to prevent and control zoonoses. <sup>47/</sup> They participate in the following activities:

- . The development of animal disease reporting systems to assess zoonoses and other public health threats related to animal diseases
- . Systematic inspection of meat, milk, and other food, including processing and distribution
- . Laboratory and research activities in comparative biology and medicine
- . Various activities related to radioactive hazards and their control

<sup>46/</sup> See Table 1 supra.

<sup>47/</sup> Zoonoses are diseases of animals which may be communicated to humans.

- . Cooperative ventures with private clinical practitioners of veterinary medicine in urban and rural community public health problems

- . Development of programs related to public health responsibilities in the community and in the enforcement of specific health law and regulations

- . Cooperative action, with voluntary and official organizations at local, state, and federal level. <sup>48/</sup>

Most public health veterinarians are employed on either a full or part-time basis by governmental units. At the federal level, public health veterinarians may be found in the Departments of Health, Education and Welfare and Agriculture and in the National Institute of Health. At the local and state levels public health veterinarians may be designated by various titles including "state epidemiologist" or "animal control veterinarian."

The National Academy of Sciences estimates that the need for public health veterinarians will rise to 608 by 1980, an increase of about ten percent per year. <sup>49/</sup>

#### c. Laboratory Veterinary Medicine

Laboratory veterinary medicine is primarily concerned with the health care of animals used in research. Additionally, some laboratory veterinarians conduct experiments on animals. Since 1950 the number of veterinarians whose predominant activity is in this field has increased from 15 to more than 600. <sup>50/</sup>

The majority of veterinarians in laboratory medicine are employed by universities or other private and public research entities. Their activities range from care of individual animals to planning of animal housing facilities.

The National Academy of Sciences estimates that 1,125 veterinarians will be needed for laboratory practice by 1980. <sup>51/</sup> This assumes, however, that research (which is primarily publicly supported) will increase at an annual rate of 10 to 20 percent. Staff believes that this estimate may be unrealistically high because it depends upon substantial increases in public funds for research.

<sup>48/</sup> New Horizons, supra note 6, at 33.

<sup>49/</sup> Id. at 34.

<sup>50/</sup> See Table 1; and cf. id. at 27.

<sup>51/</sup> New Horizons, supra note 6, at 28.

d. Regulatory Veterinary Medicine

Regulatory veterinary medicine includes two major divisions: (1) activities related to the control of communicable diseases across state and federal boundaries; and (2) meat inspection. Veterinarians whose activities are predominantly regulatory are almost all employees of federal, state, or local governments. At the federal level regulatory veterinarians are employed by two divisions of the Agriculture Department. One division, the Agriculture Research Service, has responsibility for the control of communicable diseases transmitted by animals to man or other animals. The second division, the Consumer and Marketing Service is responsible for meat and poultry inspection at the federal level.

Every state has a disease control agency, usually directed by a state veterinarian. Additionally, most states have their own meat inspectors. This pattern is also found in some local governments.

Only 785 AVMA member veterinarians listed regulatory veterinary medicine as their principal practice activity as of January, 1976. However, many veterinarians engaged in food inspection may not be included in this number because they are not AVMA members. In 1970, there were 1885 veterinarians engaged in meat inspection. 52/ Current estimates of their numbers are not available.

The National Academy of Sciences estimates that 5,287 veterinarians will be needed for regulatory activities by 1980. 53/ The Academy estimates that 3,387 of these will be needed solely for meat inspection.

e. Other Non-Clinical Practices

Small numbers of non-clinical practitioners are involved in zoo animal, wildlife and industrial specialties. Zoo animal veterinarians are responsible for the health care of a great variety of species of "exotic" animals found in zoologic parks. Zoo animal veterinarians numbered only 73 as of January 1, 1976.

Wildlife veterinary specialists are nearly all employed by state fish and game departments or the Department of Interior. Their principal activities involve research in such areas as ecology and wildlife management. Because wild animals can transmit

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52/ Id. at 39-40.

53/ Id.

diseases to humans, wildlife veterinarians are also involved with the prevention of zoonoses. Fewer than fifty veterinarians are predominantly involved in wildlife practice. 54/

Industrial veterinarians are employed principally by pharmaceutical, biological, chemical, feed, and poultry industries. They may serve such industries in a variety of capacities including research, management, training, and production. Approximately 500 veterinarians are predominantly concerned with industrial veterinary medicine other than laboratory animal practice. 55/ The National Academy of Sciences predicts that private industry will need about 1,400 such veterinarians by 1980. 56/

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54/ Telephone interviews with state and federal wildlife agencies conducted by staff of FTC Denver Regional Office.

55/ New Horizons, supra note 6, at 42.

56/ Id.

C. Economic Overview of the U. S. Veterinary Profession

1. Veterinary Manpower: Supply and Demand Projections

During the past ten years, a number of studies have concluded that there is, and will continue to be, a shortage of veterinarians in the United States. <sup>57/</sup> Most of these studies, however, fail to come to grips with the economic subtleties of measuring the supply of veterinarians actually needed to meet the demand for veterinary care.

The supply of veterinarians is relatively easy to determine. First, graduation from an accredited college is a requirement for licensure in every state, and accurate data is available on the number of veterinary graduates entering the work force yearly. <sup>58/</sup> Second, the ages of most veterinarians is known, and accurate estimates may be made of attrition from the profession because of death or retirement. <sup>59/</sup> Third, entry into the profession by foreign-educated veterinarians is quite difficult and, consequently, their numbers are very small. <sup>60/</sup>

It is much more difficult to measure the demand for veterinary services. Ordinarily, "demand" means the economic capacity and preference for an industry's goods or services measured in dollars. <sup>61/</sup> In this sense, demand is the determinant of supply through an equilibrium pricing mechanism. Demand, however, does not have quite the same meaning in the veterinary profession because the available supply of veterinarians is constantly controlled through various regulatory devices. Hence, the veterinary services marketplace lacks a mechanism to bring into balance the number of veterinarians which the public is willing to support and the number available at any given time. <sup>62/</sup>

Most of the studies that have concluded that there is a shortage of supply of veterinarians do not speak of demand at all, but use instead the rather amorphous concept of "need." For example,

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<sup>57/</sup> See, e.g., New Horizons, *supra* note 6.

<sup>58/</sup> See, e.g., C. Cole and L. Knezek, A Plan for the New England College of Veterinary Medicine 41 (1974) [hereinafter "Cole"].

<sup>59/</sup> See Section ID *infra*.

<sup>60/</sup> See Section ID *infra*.

<sup>61/</sup> Dickens, A Practical Approach to Determining Demand, *Veterinary Economics* 24 (July, 1976)

<sup>62/</sup> Compare with Kessel, Higher Education and the Nation's Health: A Review of the Carnegie Commission Report on Medical Education, 110 *J. Law and Econ.* 117 (1971).

the National Academy of Sciences (NAS) in New Horizons projected a current and future shortage of veterinarians based on the predicted needs for the services of each category of veterinary practice. The NAS observed past trends in each practice area and, from such observations, projected an optimal supply of veterinarians expressed as a coefficient of veterinarians to human population. <sup>63/</sup>

The NAS found, for example, that the number of horses in the United States doubled between 1960 and 1970. <sup>64/</sup> It was also observed that the number of veterinarians specializing in equine practice increased substantially during this period. By combining these two observations, among others, the NAS projected a future "need" for equine veterinarians. When the "need" calculations for each segment of the veterinary profession were combined, the NAS determined that the optimal supply of veterinarians was 17.5 per 100,000 people. Dr. G. W. McLaughlin used the NAS need coefficient to project the shortages of veterinarians through the year 2020. <sup>65/</sup> His table and graph illustrating these shortages are reproduced below as Tables 3 and 4.

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<sup>63/</sup> Cf. *id.* at 124.

<sup>64/</sup> New Horizons, *supra* note 6, at 25, 26.

<sup>65/</sup> McLaughlin, Veterinary Medical Manpower: Supply-Demand Projections to 2020, 168 *JAVMA* 319 (1976).

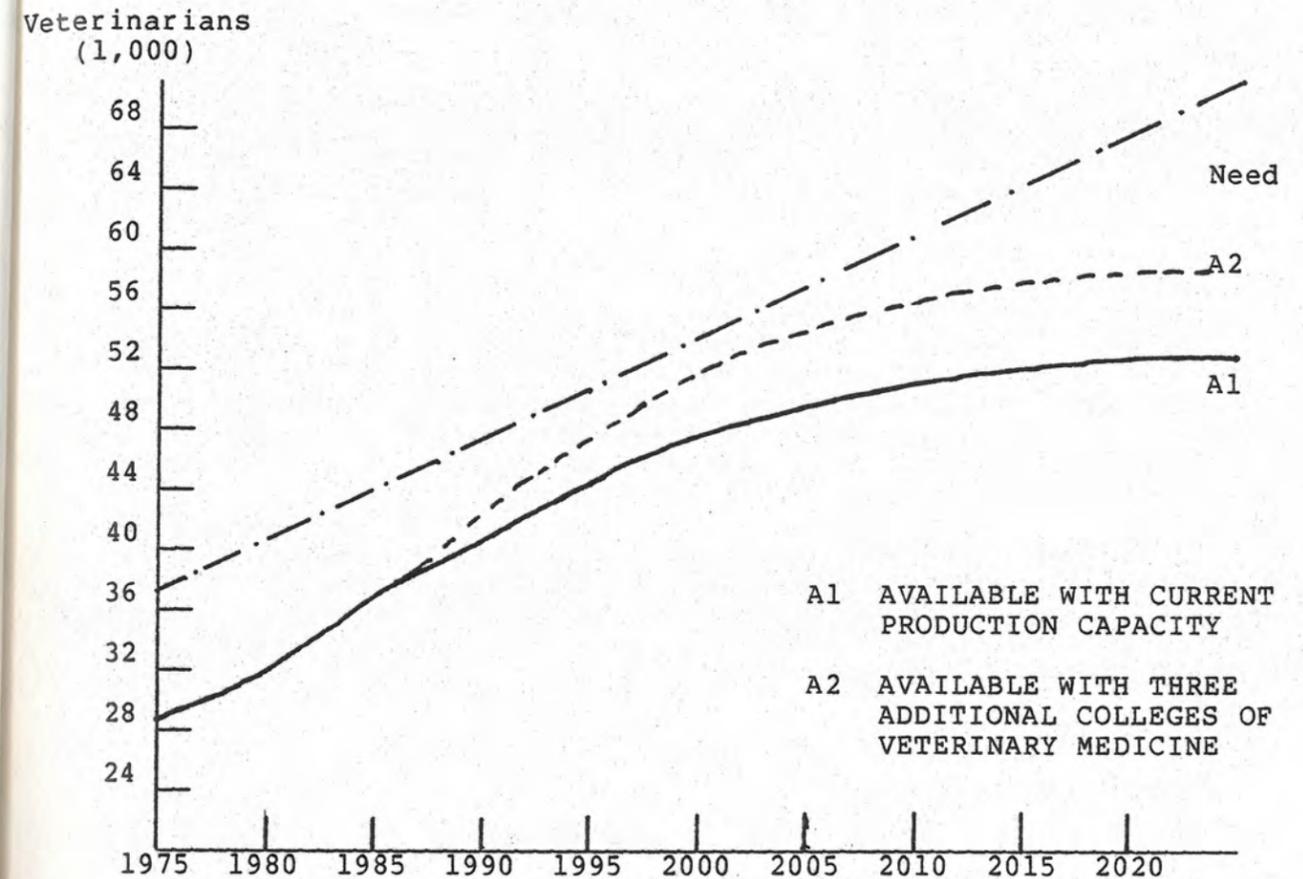
TABLE 3

Veterinarians in the United States:  
Estimated Need and Predicted Shortage

Year	U.S. Population (millions)	Veterinarians Available	Estimated Need	Net Shortage
1975	214.3	29,039	37,562	8,463
1980	227.7	31,961	39,848	7,887
1985	243.0	36,037	43,254	7,217
1990	257.5	40,220	46,644	6,424
1995	272.2	44,013	50,085	6,072
2000	285.0	47,337	53,295	5,958
2005	300.4	49,824	57,076	7,252
2010	317.2	51,404	61,220	9,816
2015	334.0	52,249	65,464	13,215
2020	350.4	52,527	69,730	17,203

TABLE 4

PRODUCTION AND NEED IN THE VETERINARY PROFESSION--1975-2020



While the NAS did not explicitly translate its supply optimality projections into a demand measurement, it is clear that NAS intended its predictions of current and future shortages of supply to imply that demands for veterinary care are and will be unmet. The problem with this implication is that it does not take sufficient account of the absence of an equilibrium mechanism in the veterinary care market. That is, the NAS supply shortfall projections are based almost exclusively on estimates of the output of veterinary services at current price levels.

In our view, the output of veterinary care is restricted through various regulatory devices that preclude the ready introduction

of efficiency mechanisms. <sup>66/</sup> If these devices were eliminated, the supply of veterinarians needed to meet the demand for their services might be smaller than predicted by the NAS. On the other hand, if such efficiencies were introduced, one would expect that the supracompetitive prices which presently exist would be reduced, <sup>67/</sup> and the demand created thereby might necessitate an even larger number of veterinarians than predicted by the NAS.

In sum, the exact number of veterinarians needed to meet demand at competitive price levels is indeterminate. The best available data, however, indicates that the current supply of veterinarians may be insufficient to meet the demands for veterinary services. Information we have received during the course of our investigation tends to support this proposition. For example:

1. Scores of spaying and neutering clinics have been established over the last five years. Such clinics are operated as private corporations, as non-profit "humane" centers and as governmental entities. Indications are that these spaying and neutering clinics are treating the animals of thousands of people who had previously foregone veterinary care for their animals. <sup>68/</sup>
2. In southern California, a veterinary "health maintenance organization" has been established offering preventive care to pets. <sup>69/</sup> The object of this plan, and that of others of a similar nature, is to make veterinary care more cheaply available to greater numbers of people.

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<sup>66/</sup> These regulatory devices include advertising restrictions, restrictions on corporate practice and other forms of ownership, and restrictions on the use of veterinary paraprofessionals.

<sup>67/</sup> For a discussion of why we believe veterinary prices to be supracompetitive, see Section III *infra*.

<sup>68/</sup> E.g., conversation between Dr. Walter Ziegler, Chief Veterinarian, City of Los Angeles, and F. K. Smith, FTC, October 9, 1976.

<sup>69/</sup> The name of this organization is "Medi-Pet." A recent letter in JAVMA warned veterinarians about the "risks" of this plan. "Pet Health Insurance," 171 JAVMA 316.

3. Veterinary journals abound with "new veterinarian wanted" advertisements. According to the dean of one veterinary school, new graduates receive an average of 1.5 job offers. <sup>70/</sup>

4. Over the last five years there has been a proliferation of schools training veterinary auxiliaries, generally called "veterinary technicians." <sup>71/</sup> Such schools are designed to train students to provide many services previously provided only by veterinarians.

## 2. Economic Analyses of Structural Changes in the Profession

During the past twenty years the composition of veterinary practice has undergone major structural changes. For example, there has been a decided shift from large animal practice to small animal practice. Related to this shift has been the movement of veterinarians from rural to more urban areas.

A number of factors may have influenced these changes. Probably the most important factor is the disparity of incomes between large animal and small animal veterinarians. The results of a survey conducted by the AVMA in 1965 show an average gross income for small animal practitioners of \$53,244 compared with an average of \$39,780 for large animal practitioners. <sup>72/</sup> The average gross income for all respondents was \$46,538. <sup>73/</sup> At the same time, variable expenses amounted to 40.6 percent of gross income for small animal practices and 47.2 percent for large animal practices. <sup>74/</sup>

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<sup>70/</sup> Conversation between Dr. W. J. Tietz, Dean of the College of Veterinary Medicine, Colorado State University, and P. C. Daw, FTC, August 31, 1976.

<sup>71/</sup> See Section ID *infra*.

<sup>72/</sup> Snodgrass and Judy, The 1965 Economic Survey of Veterinarians in Private Practice, 150 JAVMA 1465 (1967).

<sup>73/</sup> *Id.* The average gross income found in the 1965 survey is somewhat higher than predictable from later census data. However, the 1965 data may be less reliable than the 1970 census data, since the 1965 data were collected from a relatively small number of veterinarians. Therefore, the 1970 census data was used as a base for calculating current income for the profession.

<sup>74/</sup> *Id.*

Another factor contributing to these changes in the profession is the disparity in the time required for large versus small animal practice. The 1965 AVMA study found that total hours of professional labor input decreased as practice emphasis shifted from large animal practice to small animal practice. <sup>75/</sup> Specifically, the study found that small animal veterinarians average 3,401 hours per year while large animal practitioners averaged 4,825 hours. The number of hours worked per week by owners of veterinary establishments as well as their employees was also greater for large animal than for small animal practices. Owners of large animal establishments worked an average of 64 hours per week while owners of small animal establishments averaged 51 hours per week.

By combining the data concerning labor input with that concerning income, the 1965 study also showed that small animal practitioners were able to generate substantially more gross income per hour of labor input than was true for large animal practitioners (\$15.63 vs. \$9.46). <sup>76/</sup>

Another phenomenon which has affected the structure of the profession is the relative income potentials of practices in urban areas compared to rural practices. In a 1960 survey conducted for the AVMA, it was found that average net incomes of veterinarians in communities with less than 50,000 population were \$3,555 less than those of veterinarians practicing in areas with populations of 500,000 or more. <sup>77/</sup> The income potentials for veterinarians are also related to the regions of the United States where they practice. Table 5 illustrates the differences in average incomes for veterinarians on a regional basis. The table was derived from data in the 1960 AVMA survey.

<sup>75/</sup> Id.

<sup>76/</sup> Id.

<sup>77/</sup> Evangelopoulos, The 1960 Economic Survey of Veterinary Practitioners, 142 JAVMA 393 (1963).

TABLE 5  
PERCENTAGE DISTRIBUTION OF VETERINARIANS  
AND THEIR INCOME - 1960

Region	Animal Population	Veterinarians	Income
New England	0.7%	4.3%	5.2%
Middle Atlantic	3.4	13.5	14.8
Southeast	15.5	15.5	14.7
Midwest	51.6	41.2	40.2
Southwest	13.5	8.3	7.6
West	<u>15.3</u>	<u>17.6</u>	<u>17.5</u>
	100.0%	100.0%	100.0%

Source: AVMA Council on Veterinary Services, The 1960 Economic Survey of Veterinary Practitioners

The National Academy of Sciences has estimated that the trend from large to small animal practice will continue at least into the 1980's. <sup>78/</sup> Consequently, the percentage of veterinarians in small animal practice will probably reach more than 60 percent of all veterinarians by 1980; concurrently, the percentage of veterinarians in large animal practice is expected to decline to 15 percent or less. <sup>79/</sup>

### 3. Incomes of Veterinarians and Return on Investment

Current data on veterinary incomes is not available. <sup>80/</sup> However, by using indirect methods, staff has been able to estimate average gross and net incomes of veterinarians.

<sup>78/</sup> New Horizons, supra note 6.

<sup>79/</sup> Id.

<sup>80/</sup> The AVMA discontinued its economic surveys after 1965. According to officials of the AVMA, many veterinarians were dissatisfied with the 1960 and 1965 surveys; private practitioners thought the income estimates were too high, while federally employed veterinarians thought they were too low.

According to the Bureau of the Census, veterinarians' pre-tax net earnings in 1970 averaged \$19,112. <sup>81/</sup> Total net earnings for the 26,000 veterinarians practicing in 1970 can thus be estimated at \$496,912,000. The AVMA estimates that net earnings represent approximately 39 percent of the gross income of veterinary establishments when all types of practices are averaged. <sup>82/</sup> If this is correct, we may assume that in 1970 the average veterinarian's gross income was \$49,005.90. Thus, total gross income for the 26,000 veterinarians practicing in 1970 may be estimated at \$1,274,153,400.

Studies in Illinois indicated that from 1970 to 1973, salaries of veterinary graduates increased at a rate of 6 percent per year. <sup>83/</sup> Assuming that this figure is correct, we can estimate that net incomes of veterinarians in 1979 will average \$35,516. Using the net to gross ratio noted above, we may also estimate that the average gross income will increase to \$91,066 in 1979, giving a total gross income for the 31,000 veterinarians expected to be practicing by this time <sup>84/</sup> of \$2,832,066,770.

Another measure of economic success is the rate of return on investment. <sup>85/</sup> The rate of return on investment in the veterinary profession may be measured by comparing the costs of becoming a veterinarian with expected earnings received as a result of those costs.

The largest cost of becoming a veterinarian is the income foregone while attending veterinary school. In 1969, the average entrant to veterinary school had attended undergraduate college for 3.28 years. <sup>86/</sup> If it is assumed that the typical entrant has three years of college, then he or she loses no income during the first year in veterinary school since the entrant would have presumably completed undergraduate education during this period, anyway. For the last three years in veterinary college, foregone income may be estimated using the census median

<sup>81/</sup> 1970 U.S. Census of Population, PC(2)-7A, table 38.

<sup>82/</sup> See, e.g., Snodgrass & Judy, *supra* note 72.

<sup>83/</sup> Illinois Veterinarian 6 (August, 1974).

<sup>84/</sup> See Table 4 *supra*.

<sup>85/</sup> The rate of return cited herein was calculated by J. Phelan and C. Keithahn, Bureau of Economics, FTC.

<sup>86/</sup> See New Horizons, *supra* note 6, at 79.

earnings of male professional, technical and kindred workers (PTK) aged 18 to 24. <sup>87/</sup> It is recognized that the PTK factor may underestimate the actual earnings of college graduates aged 18 to 24 and, thus, impart an upward bias to the rate of return. However, there is no perfect substitute. For example, if the rate of return for veterinarians were calculated using the earnings of male engineers aged 18-24 rather than PTK income, the difference in results would be insignificant. In this analysis, the estimates of foregone income were converted to an after-tax basis by subtracting estimates of effective federal income taxes.

The remaining direct costs of becoming a veterinarian are tuition, books, and instruments. Living expenses are not included since they would have been incurred had the veterinary student chosen to enter the work force rather than attending school. Tuition costs were calculated from information available concerning state-supported graduate schools, which averaged \$400 per year for in-state students and \$900 per year for out-of-state students. <sup>88/</sup> We estimated that yearly costs for books and instruments averaged \$500. <sup>89/</sup>

From these opportunity costs, the expected average earnings for summer or part-time work and the average financial assistance experienced including scholarships were deducted. Since information on summer and part-time work was so incomplete, the final rate of return was calculated using a high and low range for these deductions.

Return on investment for the veterinary profession is expressed by additional after-tax income. For the purposes of this analysis, pre-tax estimates from the Bureau of Census for 1969 were used as well as estimated effective income tax rates for this period. The return on investment was calculated as an annuity of 40 years duration. <sup>90/</sup> Details of the calculations of the rate of return and the underlying assumptions may be found in Appendix 2.

<sup>87/</sup> Over 90 percent of the veterinarians in 1970 were males. In order to avoid the problem of comparing groups with different male-female ratios, it was assumed that the prospective veterinarian's next best alternative is to become a typical male with four years of college or a typical male PTK worker.

<sup>88/</sup> J. Graham, *A Guide to Graduate Study* (3d ed. 1965).

<sup>89/</sup> This estimate was derived by averaging the costs for these items cited to staff in telephone interviews with university personnel.

<sup>90/</sup> At current interest rates, a few years difference in the length of a career has very little effect on the present value of the stream of earnings. For example, at ten percent, a dollar a year for 40 years has a present value of \$9.78, and a dollar a year for 50 years has a present value of \$9.92.

Using all of the above data, the expected rate of return for 1970 was calculated to be 16 percent. <sup>91/</sup> This is well above the expected rate of return on equity capital and approaches the rate of return for physicians. <sup>92/</sup>

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<sup>91/</sup> As more fully explained in Appendix 2, this rate of return has been adjusted to reflect the long work weeks of veterinarians. The informal rate of return (non-adjusted) is higher than 16%, but for comparison to PTK has been multiplied by two-thirds which reflects the average work week for veterinarians as a percentage of the average PTK work week (40/60).

<sup>92/</sup> See, e.g., unpublished study by Michael Lynch, Assistant Director for Industry Analysis, FTC Bureau of Economics (1975).

#### D. Regulation of the Veterinary Profession

The veterinary profession is but one of more than 550 occupations and professions which are licensed in the United States. <sup>108/</sup> About eighty percent of these occupations are licensed in ten or fewer states. Twenty-two occupations, including veterinary medicine are licensed in all 50 states. Although the nature of licensing regulations vary among occupations, the economic effects of such regulations are similar.

In most areas of our economy, competitive forces are relied upon to assure that supply balances demand, that quality is maintained or enhanced, and that prices are kept at an optimum level. Both producers and consumers derive benefits from this process; consumers are provided with products and services they need or want at prices they are willing to pay, while producers who are efficient enough to satisfy consumers' demands are assured a profit. Competitive forces also work to remove inefficient producers from the market.

In regulated professions like veterinary medicine, the forces of competition are not permitted to operate freely. First, entry into the profession is restricted in a way which does not allow balancing of supply and demand. Second, information systems which consumers normally require to make purchasing decisions among alternative sellers are absent or severely constrained. In this circumstance, the competitive pressures that would normally result from advertising cannot be relied upon to reward efficient producers and drive inefficient producers from the market.

The Trade Regulation Rule recommended in this report is designed to stimulate competition in the veterinary profession by removing the public and private restraints on advertising. In a later section we discuss the economic effects of advertising prohibitions upon the economic performance of the veterinary profession. <sup>109/</sup> This section discusses other aspects of regulation which have the effect of stifling the forces of competition in veterinary medicine.

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<sup>108/</sup> Testimony of Darius W. Gaskins, Jr., Director, Bureau of Economics, Federal Trade Commission, before the Subcommittee on Monopoly, Select Committee on Small Business, United States Senate (June 7, 1977).

<sup>109/</sup> See Sec. III infra.

1. Demand for Veterinary Education

As we have previously noted, 110/ the demand for veterinary education is extremely high. Lee Edward Bennings in Pet Profiteers discusses this demand in colloquial terms:

In recent years, the pet population explosion combined with the health problems created by puppy mills has made treating animals one of the most lucrative professions in the nation. Whereas once upon a time a kid who couldn't make the grade in medical school could always fall back on veterinary medicine, today the vet schools wouldn't take him either. They're crammed full of applicants. 111/

The Bureau of Economics recently surveyed admission rates in the nineteen accredited U.S. colleges of veterinary medicine for the 1975-76 academic year. 112/ The results of their survey are summarized below in Table 6.

110/ See Sec. I.A. supra.

111/ Benning, The Pet Profiteers 51 (1976).

112/ Survey conducted by J. Phelan and C. Keithahn, Bureau of Economics, Federal Trade Commission, (1975).

Table 6

Applications for Admission to U.S. Colleges of Veterinary Medicine  
Academic Year  
1975-76

University	Number of Applications <u>1/</u>	Number accepted	Percent accepted	Grade Point <u>2/</u> Average Accepted Candidate
Auburn University	679	115	16.9	3.19
University of California, Davis	879	94	10.7	3.40
Colorado State University	512	94	18.4	3.27
Cornell University	1,006	73	7.3	3.40
University of Georgia	600	86	14.3	3.49
University of Illinois	550	86	15.6	3.69
Iowa State University	749	98	13.1	3.46
Kansas State University	1,000	100	10.0	3.50
Louisiana State University	155	48	31.0	N.A.
Michigan State University	700	115	16.4	3.40
University of Minnesota	547	80	14.6	3.70
University of Missouri	551	72	13.1	3.30
Ohio State University	1,000	132	13.2	3.50
Oklahoma State University	430	65	15.1	3.50
University of Pennsylvania	1,280	103	8.0	N.A.
Purdue University	675	72	10.7	3.40
Texas A & M University	531	138	26.0	3.51
Tuskegee Institute	938	45	4.8	3.20
Washington State University	726	76	10.5	3.50
Totals:	13,508	1,692	12.5	

1/ In most instances we used the number of "qualified" applicants who were available. Qualified applicants are students who meet the curriculum and grade point average requirements of the veterinary college.

2/ All GPAs were adjusted to a 4.00 scale.

Source: Federal Trade Commission, Bureau of Economics

As can be seen from Table 6, less than thirteen percent of the qualified applicants were accepted for admission during the survey period. This figure may be compared with the thirty-seven percent average admission rate for the 114 accredited U.S. medical schools for the 1973-74 academic year. 113/

Although acceptance rates for medical and veterinary colleges are not completely comparable, it seems apparent that entry into veterinary school is significantly more difficult than entry into medical school. It seems equally clear that large numbers of qualified candidates are turned away from veterinary school because there are too few places.

The severe limitations imposed by the capacities of accredited veterinary colleges may be viewed as a barrier to entry into the profession. This fact is particularly true since graduation from an accredited veterinary college is an explicit or tacit requirement for licensure in every state. 114/

## 2. Accreditation of Veterinary Education

The AVMA Council on Education is the only body recognized by the Department of Health, Education, and Welfare for accreditation of veterinary education. 115/ This recognition appears to be consistent with H.E.W.'s regulations which make it nearly impossible for more than one accrediting body to be recognized in each profession:

In view of the criteria set forth above, it is unlikely that more than one association or agency will qualify for recognition (a) in a defined geographic area or jurisdiction or (b) in a defined program specialization within post-secondary or collegiate education. 116/

Federally recognized accreditation is a prerequisite to federal support of construction or student loans. It is therefore vital to veterinary schools that they receive and maintain the official imprimatur of AVMA accreditation.

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113/ Boffey, Veterinary Schools Swamped With Applicants, The Chronicle of Higher Education 47 (1975).

114/ See, e.g., responses to State Veterinary Board Questionnaire.

115/ Bureau of Higher Education, Office of Education, U. S. Dept. of Health, Education, and Welfare, Nationally Recognized Accrediting Agencies and Associations (1972).

116/ Id. at 5.

At least in theory, the AVMA may use its accreditation power to limit entry into the profession. Because the AVMA is composed exclusively of veterinarians who may consider proprietary interests in their decision-making, it seems that this hypothesis deserves examination.

The AVMA will not accredit a veterinary college, regardless of its physical plant or academic quality, unless the college is part of an "accredited institution of higher learning." 117/ That is, before a veterinary college can be accepted by the AVMA, it must be part of an institution previously accredited by an agency recognized by H.E.W.'s Office of Education. This requirement makes establishment of specialized veterinary colleges, whether profitmaking or not, quite difficult.

The costs imposed by the AVMA accreditation standards are very high. The experiences of the New England College of Veterinary Medicine (NECVM) serves as a recent example of costs imposed, inter alia, by these standards. 118/ As of 1974, NECVM was estimated to need \$35 million in "start-up" funding. 119/ This figure does not include land acquisition, since the State of Massachusetts has donated over 100 acres to NECVM. It was estimated that NECVM would need 96 faculty members for a student-to-faculty ratio of 1 to 4. The 1 to 4 ratio, while not an explicit requirement of accreditation, seems to be an accepted standard for veterinary education. 120/

The high costs imposed by accreditation, coupled with the requirement that veterinary schools be an integral part of an accredited university, seem to make it economically unfeasible for private, proprietary corporations to enter the veterinary education market. Even though demand for veterinary education is high, meeting this demand is left completely to state and federal governments.

Staff is aware of only one case in recent times where a veterinary school was denied accreditation. This concerned Middlesex University (the precursor of Brandeis). Middlesex

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117/ AVMA, Essentials of an Acceptable Veterinary Medical School (undated publication, submitted by R. L. West, Assistant Director of Scientific Activities, AVMA, July 3, 1975).

118/ Cole, supra note 58.

119/ Id. at 97-111.

120/ E.g., California Postsecondary Education Comm., Veterinary Medical Education in California: An Assessment of the Need for Expansion (April, 1976).

was a private school operated as a proprietary corporation. It appears that Middlesex was denied accreditation primarily because of its proprietary status. 121/

Although accreditation costs are high, a number of new state schools are in planning or implementation stages. Even if these schools become fully operational, they still will not be able to meet demands for either education or veterinary services. 122/

Accreditation of veterinary colleges by the AVMA raises several questions which the staff has not yet fully investigated:

1. Can veterinary education of high quality be offered at reduced costs?
2. Is proprietary veterinary education a reasonable alternative to public education? 123/
3. Is it feasible to have a body other than AVMA recognized as an accrediting agency?
4. Are there alternative means of providing veterinary education which would not require four years of in-house training? 124/

Until these and other questions are answered, we can only hypothesize that current accreditation standards act as effective barriers to entry into the veterinary profession.

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121/ See Kay, Whatever Happened to Middlesex University?, Brandeis University Gazette, June 27, 1974, at 7.

122/ See Table 4 *supra*.

123/ Cf. 63 J.A.B.A. 315 (1977). A recent study by the American Bar Foundation concluded that the "nature of ownership does not distinguish the quality of unapproved law schools." As a result of this study, the American Bar Association has invited proprietary law schools to apply for ABA approval during a two-year trial period.

124/ One alternative that has received some consideration is certification for specialty areas. Another alternative suggested is an externship program in conjunction with regular in-school training. This latter alternative would theoretically free up more spaces in veterinary colleges since at least one-quarter of the students would be off campus at any given time.

### 3. Composition of Veterinary Licensing Boards

According to the most recent information made available to staff, forty-three of the fifty state veterinary licensing boards are composed exclusively of veterinarians. California, Iowa, and Maryland each have two lay members on their boards, and Arkansas, Massachusetts, Michigan and New Jersey each have a single lay board member. 125/ The AVMA in its Model Practice Act recommends that state veterinary boards be composed exclusively of veterinarians:

A person shall be qualified to serve as a member of the Board if he is a graduate of a veterinary school, a resident of this state, and has been licensed to practice veterinary medicine in this state for the 5 years preceding his appointment. No person may serve on the Board who is, or was during the 2 years preceding his appointment a member of the faculty, trustees, or advisory board of a veterinary school. 126/

In the majority of states (including some which have lay board members), the governor appoints veterinary board members from lists provided by the state veterinary medical association. This, too, is in keeping with the AVMA's Model Practice Act. The AVMA's Model Practice Act included a provision concerning the right of veterinary associations to recommend board members for gubernatorial appointment because "it was felt that bringing the state associations into the procedure in this way tends to unify the aims of the regulatory agency with those of the professional society." 127/ The desired unification of the aims of veterinary associations with those of licensing boards seems to illustrate that the draftsmen of the AVMA's Model Practice Act regard licensing boards as servants of the profession rather than the public. 128/

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125/ See responses to State Board Questionnaire and the veterinary practice acts of the states noted.

126/ AVMA Model Practice Act (hereinafter "MPA"), at 2. The Model Practice Act was drafted by the AVMA Judicial Council and approved by the House of Delegates in 1964. It is designed to give guidance to the states in "upgrading" their practice acts in conformance with the aims of the AVMA.

127/ *Id.* at 7.

128/ Cf. Sec. IIC *infra* which discusses how the intertwining of interests of veterinary boards and veterinary associations affect the disciplining of state licensees.

Veterinary boards are generally state instrumentalities operating under delegated authority from the legislature. They perform two principal functions: (1) They regulate the original licensure of veterinarians in the state; and (2) through the disciplinary powers granted them, they police the activities of licensees. Both functions are ostensibly designed to serve a single purpose, to protect the public from the harm which would presumably ensue absent regulation. In protecting the public's interest, veterinary boards are given extensive powers which may have a substantial impact on the economic welfare of the profession. Because the vast majority of boards are composed exclusively of veterinarians, we must question the soundness of granting the profession authority which is tantamount to self-regulation.

The potential conflicts which may arise from the exercise of an all-veterinarian board's disciplinary powers are of particular concern. It is a fundamental principle of law that those with substantial interests in the outcome of legal proceedings should not adjudicate such disputes. 129/ Yet this seems to be allowed under the authority granted many veterinary boards. 130/

Some recent examples of the evils of self-regulation were stated in an article appearing in the Washington Post. 131/ This article cites several cases concerning the Maryland State Board of Veterinary Medical Examiners:

The witnesses complained that when they sought redress before the State Board of Veterinary Medical Examiners, which is supposed to regulate the profession, they got no results or unsatisfactory results. This, they testified, was due in part to the fact that many of their complaints were against members of the veterinary board which is supposed to rule on the complaints. 132/

The "witnesses" referred to in the above quotation were all consumers testifying before a committee of the Maryland Senate considering a bill to restructure the veterinary board. The contrast between the consumers' and the veterinarians' views of the board was sharply drawn. For example, one consumer testified that "bringing a complaint to this board is like bringing a civil rights complaint

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129/ See text accompanying note 136 *infra*.

130/ See Sec. IIC *infra*.

131/ Barbash, Pet Clinic Abuses in Md. Heard, Washington Post, March 4, 1976, at D1.

132/ Id.

to the Ku Klux Klan." 133/ At the other extreme, a veterinarian opposing the legislation said:

It is basic that a person be judged by his peers.  
I don't think any vet in this state minds being judged  
by that board because they're doing a damn good job. 134/

Several board members, including Dr. Robert Patterson, were cited in the article as subjects of complaints from consumers. In Dr. Patterson's case the President of the Board confirmed that he "was sworn in as a member of the Board just 15 minutes before that case [concerning Patterson] was to be heard." 135/ As of March, 1976, the Maryland Board had never revoked any veterinarian's license.

The conflict of interest apparent in decisions of industry-dominated licensing boards has been considered by the Supreme Court. In Gibson v. Berryhill, several licensed optometrists who were not members of the Alabama Optometric Association were charged by the association with unprofessional conduct because they were employed by Lee Optical Co., a for-profit corporation. 136/ The charge was made to the Alabama Optometry Board which was composed exclusively of association-optometrists. In upholding a district court injunction against the board's continuance of disciplinary procedures brought under 42 U.S.C. 1983, Mr. Justice White stated:

Because the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified from hearing the charges filed against the appellees. . . . [W]e affirm [the District Court's opinion]. 137/

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133/ Id.

134/ Id.

135/ Id.

136/ Gibson v. Berryhill, 411 U.S. 564 (1973).

137/ Id. at 579.

Gibson v. Berryhill presented a relatively clear case of potential pecuniary interests inuring to the benefit of licensing board members. Nearly half of the licensees regulated by the board worked for corporations and it was the board's intent to disqualify all of them from practice. However, there seem to be less apparent pecuniary interests inherent in many other activities which licensing boards, including veterinary medical boards, are empowered to undertake.

Many veterinary boards, for example, set the exact standards for licensing in their respective states. In setting such standards, boards may exclude potential competitors. Veterinary boards also discipline licensees for engaging in "unprofessional conduct," generally defined by reference to ethical standards of private associations. The breadth of such standards may also permit the exclusion of competitors, particularly price-cutting veterinarians.

The inherent conflicts manifested by self-regulated occupations have been recognized for some time. For example, Walter Gellhorn wrote in 1956:

Seventy-five percent of the occupational licensing boards at work in this country today are composed exclusively of licensed practitioners in the respective occupations. These men and women, most of whom are only part-time officials, may have a direct economic interest in many decisions they make concerning admission requirements and the definition of standards to be observed by licensees. More importantly, they are as a rule directly representative of organized groups within the occupations. Ordinarily they are nominated by these groups as a step toward a gubernatorial or other appointment that is frequently a mere formality. Often the formality is dispensed with entirely, appointment being made directly by the occupational associations -- as happens, for example, with the embalmers in North Carolina, the dentists in Alabama, the psychologists in Virginia, the physicians in Maryland, and the attorneys in Washington. 138/

In staff's view, the majority of state veterinary boards exhibit many of the same negative attributes addressed by Professor Gellhorn. Boards composed exclusively of veterinarians (who often directly represent the interests of veterinary associations) make important decisions which affect both their peers and the public. Many of these decisions must be questioned because they are likely to be based on the economic interests of veterinarians to a much greater degree than they are based on the interests of the public.

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138/ W. Gellhorn, Individual Freedom and Governmental Restraints 140-41 (1956).

#### 4. Restrictions on Mobility Between States

Veterinarians licensed in one state who wish to obtain a license in another state may face a variety of barriers. Each state has established requirements for licensure of veterinarians previously licensed in another state. These range from a simple oral interview to complete re-examination. The AVMA, in its Model Practice Act, recommends the following reciprocity standard:

The Board may issue a license without a written examination to a qualified applicant who furnishes satisfactory proof that he is a graduate of a veterinary school and who:

- 1) Has for the past 5 years next prior to filing his application been a practicing veterinarian licensed in a State, territory, or district of the United States having license requirements, which were substantially equivalent to the requirements of this act; or
- 2) Has within the 3 years next prior to filing his application successfully completed the examination conducted by the National Board of Veterinary Examiners.

At its discretion, the Board may orally or practically examine any person qualifying for licensing under this section. 139

This standard would allow a recent graduate who has taken the National Board Examination to move rather freely between states. Additionally, under the Model Practice Act, a veterinarian who has practiced for more than five years may be reasonably assured of a high degree of mobility. Veterinarians attempting to gain reciprocity licensure in states which have not adopted the Model Practice Act may find their mobility more constrained. For example, a licensed veterinarian wishing to practice in Florida must meet the following requirements:

(a) Be 21 years of age and a citizen of the U.S. or have filed a petition of intent to become a naturalized citizen.

(b) Be of "good moral character" and has not committed any act or offense within or without the State of Florida which would constitute the basis for disciplining a practitioner of veterinarian medicine pursuant to section 474.35.

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139/ See MPA, supra note 126, at 3-4.

(c) Has graduated from a school or college of veterinary medicine, maintaining a standard and reputability approved by the board pursuant to section 474.131, within the past twenty years and practiced continuously for the past twelve years.

(d) Currently holds a valid license to practice veterinary medicine in a State which uses the American Veterinary Medical Association examination as one of the criteria for licensing veterinarians to practice in that State.

(2) The board may develop a standard oral examination and establish minimum standards therefor which each candidate shall be required to pass successfully. However, the applicant must be given adequate notice of the examination as to the time, place, nature, and scope thereof and a statement of the reasons for requiring such examination.

(3) A license so issued by endorsement shall become void and of no force and effect unless the recipient utilizes the same by actively engaging in the practice of veterinary medicine in this State within three years after issuance of the license and continues his practice in Florida for a minimum period of twelve consecutive months. Use and residence may be postponed until the holder has been discharged from the military service of the United States.

(4) The board may promulgate rules and regulations, to be applied on a uniform and consistent basis, which may be necessary to carry out the provisions of this section. 140/

According to the Florida Board of Veterinary Medicine, no state has licensure requirements "equivalent" to Florida's. 141/ Therefore, since Florida has no reciprocity agreements with other states, all licensure applicants must meet the same examination requirements regardless of their licensure status in other states or their length of experience. 142/ The same is true of Arizona and California. 143/

140/ Fla. Stat. Ann. § 474.141 (West Supp. 1976).

141/ Conversation between president of Florida Board of Veterinary Examiners and J. Phelan, FTC, May 19, 1975.

142/ Id.

143/ See California and Arizona responses to State Veterinary Board Questionnaire.

Another interesting aspect of Florida's licensure requirements is the manner of examination. The following statement appears in a report from Raoul Arreola, a testing consultant, concerning the procedures of the Florida Board of Veterinary Medicine:

The examination procedure consists of a series of paper and pencil tests of lengthy duration. We were informed that it was not unusual for the tests to last from 8:00 a.m. to late in the evening for each of the three days of the exam.

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One of the most serious problems we encountered was in the administration of the National Board Exam which comprises only one part of the state board examining procedure. Normally the National Board Exam as administered nationally is given under standardized procedures in three 3-hour testing periods taking 1 1/2 days. The State Board of Examiners, however, forced the candidates to take the exam in one afternoon stretching late into the evening. Additionally, the examiners reduced the time in order to complete the exam by 11:00 p.m. that night. 144/

This process seems designed to discourage veterinarians from sitting for the examination. Its effect is especially debilitating for older veterinarians who have not recently attended veterinary college. Although there may be legitimate reasons for strict reciprocity standards, they seem to be designed primarily to control the supply of licensed veterinarians. Thus, restrictions on mobility may be viewed as barriers to entry.

#### 6. Licensure of Foreign-Educated Veterinarians

During and shortly after World War II, a number of foreign veterinary colleges were "recognized" or approved by the AVMA. Veterinarians stationed in Europe, Asia, and Africa inspected veterinary colleges and recommended approval or disapproval of their curricula and facilities. This process was continued as long as there were plentiful numbers of American veterinarians in foreign countries who could act as "mini-accreditation bodies."

For a number of reasons, this process proved unreliable. As a result, in the late 50's and 60's foreign schools were no longer officially recognized. Instead, many states (with the approval of the AVMA) simply allowed any foreign veterinary graduates (FVG's) who could reasonably call themselves veterinary graduates to sit for examinations.

144/ Arreola, Report on Veterinary Board Licensing Examinations, presented to Committee on Commerce, Florida House of Representatives, 1974.

This procedure, too, proved unworkable primarily because many FVG's were unable to pass licensure examinations after repeated attempts to do so. Consequently, the AVMA's Council on Education established the Educational Council for Foreign Veterinary Graduates (ECFVG) in 1971. <sup>145/</sup> The ECFVG was designed to examine FVG's who wished to be licensed in the United States. Individual licensing boards have amended their practice acts or regulations to recognize the ECFVG standards for licensure in their respective states.

Under the ECFVG requirements, a foreign graduate must undertake a four-step process before he or she is eligible to take the national board or state examinations:

(1) First, the candidate must submit proof of graduation from a veterinary college. This requirement, itself, may be difficult to meet since transcripts written in English are generally required. This may involve expensive translation of transcripts and other credentials.

(2) Second, the candidate must submit proof of his ability to communicate in English, which may be satisfied by passing the Educational Testing Service's Test of English as a Foreign Language.

(3) Next, the candidate must sit for the ECFVG examination. The examination is given only in the United States. Thus, unlike foreign medical school graduates, the FVG must come to the United States to be considered for licensure.

(4) When the candidate has successfully completed the first three steps, he or she must then satisfactorily complete one year of supervised clinical experience in a veterinary clinic approved by the ECFVG. <sup>146/</sup> The AVMA does not help the candidates find a clinic for the requisite year's service. Candidates must make their own contacts and arrangements. The difficulties faced by FVG's are well summarized in the informational booklet given to ECFVG candidates:

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<sup>145/</sup> See Freeman, A Brief History of the AVMA, 169 JAVMA 120, 125 (1976).

<sup>146/</sup> Id.

The applicant will report the name and address of the clinic or practice and the name of the supervising veterinarian to ECFVG as soon as arrangements are completed. The applicant must be prepared to support himself during this year and in most university clinics will be expected to pay tuition comparable to that paid by regular students. It is the intent of the ECFVG that an applicant will not receive pay for work directly involved in the evaluated clinical experience. <sup>147</sup>

Once the ECFVG certificate is obtained the candidate must then apply for licensure in the state where he intends to practice and submit to that state's usual examination process. Thus, the ECFVG certificate is akin to a degree from an AVMA accredited school.

The ECFVG program appears to discriminate against foreign graduates in a manner which is inconsistent with the national demand for veterinarians. The one year's uncompensated service required of ECFVG candidates seems to be intended to make the FVG's licensure more difficult than necessary. We can conceive of no legitimate purpose for this requirement. Statistics support the proposition that the ECFVG program is designed to keep out FVG's. The following status report covers the period from the inception of the ECFVG program in 1973 to November 12, 1976.

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TABLE 7

STATUS OF ECFVG PROGRAM AS OF NOVEMBER 12, 1976

Number of candidates registered	345
Number of examinations given since start of program January 1, 1973	466
Number of candidates taking the examination since start of program	238
Number of candidates passing the examination	148
Number of certificates awarded	31 <sup>148/</sup>

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<sup>147/</sup> AVMA Council on Education, Information for Graduates of Veterinary Colleges Outside the U.S. and Canada 6 (Dec. 1, 1974) (emphasis added).

<sup>148/</sup> Unpublished report of the AVMA submitted in response to FTC request; received December 10, 1976.

Although these figures are somewhat confusing, it appears that some of the 238 candidates taking the ECFVG examination have done so more than once. If we use the figures of 466 examinations given and 148 passing scores obtained, the pass rate is only 32 percent. Only 31 or 9 percent of the registered candidates had gone through the entire program as of November, 1976. It is unknown how many of these 31 have actually received state licenses.

The ECFVG program applies in the states which recognize it to both American and alien FVG's. In Massachusetts the requirements apply to FVG's even if they have a valid license from another state. We have received correspondence from a veterinarian licensed in Pennsylvania who is a graduate of a Greek veterinary college. <sup>149/</sup> This individual also has an advanced degree from an American school and has published scores of scientific articles related to veterinary medicine. Although he has been licensed in Pennsylvania for several years, the Massachusetts Board of Registration in Veterinary Medicine has refused to consider his licensure application until he has obtained an ECFVG certificate. Massachusetts' stance has effectively prohibited this veterinarian's entry into the state even though statistics indicate that Massachusetts suffers from a shortage of veterinarians. <sup>150/</sup>

#### 7. Ownership Restrictions

Corporations or other businesses not controlled by veterinarians are generally prohibited from employing veterinarians for the practice of veterinary medicine. These prohibitions take two essential forms. First, most states restrict the practice of veterinary medicine to licensed professionals. Except for professional veterinary corporations which are recognized in some states, corporations are barred from practice. <sup>151/</sup> Second, veterinarians are ethically prohibited from practicing "under terms and conditions which tend to interfere with the free exercise of [their] judgment." <sup>152/</sup>

In 1970, the AVMA issued a Statement on Corporate Ownership of Veterinary Practices which appears to reflect the "official" attitude of the profession. <sup>153/</sup> This statement says in part:

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<sup>149/</sup> Letter from Dr. V. Theodorides to F. K. Smith, FTC, dated January 21, 1977.

<sup>150/</sup> Cole, supra note 58, at 44.

<sup>151/</sup> See, e.g., Florida's Veterinary Practice Act, Appendix 3 infra.

<sup>152/</sup> AVMA, Principles of Veterinary Medical Ethics, Sec. III.

<sup>153/</sup> See 156 JAVMA 14 (1970).

The American Veterinary Medical Association believes that the public interest will be served best when decisions affecting the care and treatment of animal patients are made by veterinarians . . . Therefore, the American Veterinary Medical Association recommends that private practices of veterinary medicine be governed by veterinarians rather than nonprofessional individuals.

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So that all animal patients will secure the best possible medical care, veterinarians should retain full control over all professional corporations, associations, or partnerships whose members practice veterinary medicine. <sup>154/</sup>

Thus, the AVMA restricts ownership of all forms of business arrangements offering veterinary care to licensed veterinarians. While this restriction has no legal validity, it may be used to interpret the "ethical" standards for veterinary care.

Staff is aware of several corporations which have considered entering the veterinary care market. <sup>155/</sup> Apparently, some of these corporations were confronted by state veterinary licensing boards and abandoned their plans. There are no non-veterinarian controlled corporations of which we are aware that provide private veterinary care.

Unless the restrictive standards on the ownership of veterinary practices are changed, it is doubtful that the profession can ever perform competitively. One of the hallmarks of competitive industries is relative ease of entry. Entry into veterinary medicine is difficult enough for those wishing to become licensed professionals. Entry by nonprofessionals is virtually impossible.

#### 8. Regulation of Veterinary Auxiliaries

Until the late 1960's almost all lay assistants working for veterinarians were trained on the job. Their job titles and functions were determined by the veterinarians for whom they worked. This system began to change with the development of specialized college courses for "animal technicians."

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<sup>154/</sup> Id. (emphasis in original).

<sup>155/</sup> Staff obtained this information during interviews with AVMA staff members and others.

These courses were developed during the time when technical training money was freely available and their appearance seems to have caught many within the profession off-guard. 156/ That is, many animal technician programs developed in response to the perceived needs of educational facilities rather than the actual demands of the profession.

Around 1969, veterinary journals began to stress the need to regulate animal technicians. 157/ In response, the AVMA formed a body called the "Committee on Accreditation of Training for Animal Technicians (CATAT)." 158/ By 1975, CATAT accredited 16 of the 57 animal technician programs then in existence. 159/ Additionally, CATAT was instrumental in the adoption of state statutes designed to regulate the activities of animal technicians.

Currently, animal technicians are regulated in 21 states through a registration or certification process. 160/ In 14 of these states animal technicians are registered with state veterinary examining boards. 161/ In the other seven states they are registered with state veterinary associations. 162/

According to a leading educator of animal technicians, technicians are "registered" rather than "licensed" because licensing implies, to him, the right to "do something on their own." The registration process is used to express the actual status of technicians; that is, they cannot provide services on their own,

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156/ See, e.g., Editorial, AVMA Council on Education, We Need You, Veterinary Economics 10 (May, 1969).

157/ Id.

158/ This was changed in 1975 to "The Committee on Animal Technician Activities and Training," but the acronym "CATAT" remained.

159/ See 168 JAVMA 207 (1976).

160/ Id.

161/ Id.

162/ Id.

but must be under the constant supervision of a licensed veterinarian. 163/

While it can be argued that regulation of veterinary technicians serves the public welfare, it appears that such regulations also serve the profession's welfare. The profession benefits from the regulation of technicians' activities, because the present regulatory scheme limits to veterinarians the performance of those functions defined as "veterinary practice." In our view, some of the activities comprising veterinary practice could be performed by technicians. In fact, accredited technician training facilities teach their students techniques which they are required to learn but are prohibited from using. 164/

The increasing use of animal technicians has clearly contributed to improved efficiency in the delivery of veterinary care. In staff's opinion, however, the full potential for increased efficiency through the use of animal technicians will not be realized until technicians are permitted to do what they are capable of doing. Technicians should not remain under the absolute control of veterinary boards or veterinary associations. Veterinarians have too great a proprietary interest in technicians to be the only ones regulating their activities. 165/

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163/ Conversation between Dr. H. W. Knirk, Michigan State University, and L. Petros, FTC, May 26, 1976. Staff would draw quite a different distinction between registration and licensing. In our view, both "registration" and "licensing" may be used to officially recognize members of an occupation. Registration differs from licensing in that the latter requires special attainments such as college degrees or successful completion of examinations.

164/ See, e.g., Barker, Helping Veterinarians Is a Growing Job Field, Kansas City Star (Magazine Supplement), March 14, 1976.

165/ See Section ID supra.

## 9. Conclusions

Each of the regulatory activities discussed in this section has the capacity to affect the economic performance of the profession. The system of accreditation of veterinary education appears to limit the number of places available at veterinary colleges. Control of veterinary licensing by members of the profession may result in decisions which give greater weight to the interests of the profession than the interests of the public. Restrictions on the mobility of licensed practitioners may artificially regulate the supply of veterinarians in each state. The ECFVG program makes entry of foreign-educated veterinarians extremely difficult. Restrictions on the ownership of veterinary care facilities and the regulation of animal technicians apparently reduce competition from non-veterinarians. Overall, these regulatory activities have the capacity to preclude competitive behavior.

This report recommends a Trade Regulation Rule concerned with another aspect of veterinary regulation, the restriction of advertising by members of the profession. As we discuss in later sections, this regulatory activity may also be perceived as anticompetitive and substantially detrimental to consumers. We do not intend to end our investigation of the veterinary profession with this proposed rule. Indeed, we expect to continue our investigation of other aspects of regulation reviewed in this section and, if warranted, recommend further Commission action.

## II. PUBLIC AND PRIVATE RESTRAINTS ON VETERINARY ADVERTISING

### A. Public Restraints

It is evident from staff's investigation that consumer access to information about veterinary goods and services is totally inadequate. One major obstacle to such access is the existence of a panoply of state laws and regulations which, in a variety of ways, restrict the ability of veterinary service industry members to disseminate such information. 166/

One of the principal purposes of the proposed trade rule is to preempt the enforcement of such laws and rules in order to facilitate the dissemination of information about veterinary goods and services to the public. Appendix 3 contains a narrative summary of the laws and regulations of each state and the District of Columbia relating to the ability of veterinary service industry members to advertise. Data for this summary was obtained in the following manner:

(1) The majority of the information was received in response to a voluntary questionnaire sent to the state veterinary licensing authorities in each state and the District of Columbia; 167/

(2) Where necessary, state licensing boards which did not respond to our questionnaire were contacted again and asked specifically for all laws and regulations related to the practice of veterinary medicine in their respective states;

(3) Where we did not receive responses from either request, we researched the statutes and regulations of each state for relevant material;

(4) In response to our Notice of Intent to Recommend Rulemaking, 168/ we received a number of current copies of laws and regulations; these were cross-checked against materials already received.

We believe that Appendix 3 is a summary of the most currently available laws and regulations which may restrict advertising by veterinarians. These restrictions take four essential forms:

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166/ The second major obstacle to access is the existence of a structure of private restraints usually effectuated through "codes of ethics." Private restraints are discussed in the following section.

167/ See Appendix 1 infra.

168/ See Section VIII and Appendix 6 infra.

1. Nine states have specific advertising restrictions within their veterinary practice acts or general occupational licensure statutes. These states are Arkansas, Connecticut, Illinois, Iowa, Nevada, New Jersey, Ohio and Utah.

2. Six states through their practice acts, prohibit "false, misleading or unprofessional" advertising by veterinarians. These states are Delaware, New Hampshire, Indiana, Louisiana, North Carolina, and West Virginia. Veterinary licensing boards in these states generally refer to private ethical codes when determining what constitutes "unprofessional" advertising.

3. Thirteen states restrict veterinary advertising through rules or regulations adopted by their veterinary licensing boards pursuant to statutory authority. These states are Alaska, Florida, Georgia, Kansas, Kentucky, Maryland, Nebraska, New Mexico, Oklahoma, Texas, Virginia, Washington, and Wyoming.

4. Seventeen states restrict veterinary advertising through the enforcement of their practice acts which prohibit veterinarians from engaging in "unprofessional or unethical conduct." These states are Alaska, Arizona\*, Colorado\*, Hawaii\*, Idaho, Maine, Massachusetts, Mississippi, Missouri\*, Montana, North Dakota\*, Pennsylvania\*, Rhode Island, South Carolina\*, South Dakota, Tennessee, and Vermont. Those states marked with an asterisk have adopted specific ethical codes which define "unprofessional conduct" to include most forms of advertising.

Michigan appears to have no legal restrictions on advertising by veterinarians. However, the State Veterinary Medical Board, in response to our State Board Questionnaire, indicated that all forms of advertising are prohibited.

Wisconsin allows veterinary advertising for "non-variable services" and "informational services". Advertisements for "variable services" are prohibited. According to the office of the Attorney General of Wisconsin, variable services include almost everything a veterinarian does, including such routine procedures as rabies inoculations.

Three states and the District of Columbia have no legal restrictions on veterinary advertising. These states are California, Minnesota, and Oregon.

## B. Private Restraints

The American Veterinary Medical Association (AVMA) is the principal national professional association of veterinarians in the United States. Of the estimated 27,889 veterinarians in the United States, 25,645, or 92 percent, were members of the AVMA as of January 1, 1976. <sup>169/</sup> Generally, AVMA membership is a prerequisite for membership in state and local veterinary medical associations (VMA's).

The stated objective of the AVMA is to "advance the science and art of veterinary medicine, including its relationship to public health and agriculture." <sup>170/</sup> In furtherance of this objective, the AVMA has promulgated its "Principles of Veterinary Medical Ethics" (hereinafter "AVMA Code"), with which each association member must comply. <sup>171/</sup>

The current AVMA Code was adopted in 1960 to supersede the 1952 "Principles." The language of the current AVMA Code is purposefully broad. It is designed, together with more specific annotations, to serve as an ethical guide for local veterinary medical associations:

Ideally, all questions of ethical behavior on the part of a veterinarian should be considered and dealt with by his local association's ethics or grievance committee . . . . In some instances, a solution at the local level may be impossible and referral to the ethics committee of the state association may be advisable. Occasionally, a problem not resolved at either local or state levels should be considered by the AVMA Judicial Council . . . . Having issued annotations on such topics as telephone directory listings and advertising it [the Judicial Council] should be left free to deal with such broader problems as admission and dismissal of AVMA members . . . . It's the local and state ethics committees that should decide whether someone's telephone listing is acceptable or whether a sign on a veterinary hospital is too large. <sup>172/</sup>

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<sup>169/</sup> AVMA, Directory-1976, at B-216-18.

<sup>170/</sup> AVMA, Constitution art. II.

<sup>171/</sup> A condition of membership in the AVMA is that members must "comply with the provisions of the Constitution, Bylaws, and Principles of Ethics of the Association." AVMA, Constitution art. III, § 3; cf. text accompanying note 315 infra.

<sup>172/</sup> AVMA, Principles of Veterinary Medical Ethics, "Introduction."

In other words, all member veterinarians are subject to the broad sanctions of the AVMA Code as interpreted in specific cases by local or state associations. Sanctions range from censure to loss of membership in the association. These sanctions appear to be sufficient to chill advertising by member veterinarians.

It is quite clear from the annotations to the Preamble, that the AVMA intends to apply the AVMA Code as universally as possible:

1952 Report: Our educational program should be intensified on a national scale, and emphasis should be placed on the importance of the enforcement of the Principles by local and component associations.

Recommendations:

- (1) That all component associations that have not done so, adopt the AVMA Principles or a similar code of ethics, and all associations appoint an active committee on ethics.
- (2) That all state associations endeavor to include in the programs of their state meetings, a paper or discussion on professional ethics.
- (3) That since a good many violations of the Principles have been observed during the first year of practice, it is suggested that the teaching of ethics and professional morals be intensified in the schools.
- (4) That the Principles be given a thorough study with a view to clarification of certain sections and amendments to strengthen it.
- (5) That a more determined effort be made to enforce the Principles in their entirety. 173/

Section II of the AVMA Code is concerned, in part, with advertising by veterinarians:

A veterinarian may choose whom he will serve. Once he has undertaken care of a patient he must not neglect him. In an emergency, however, he should render service to the best of his ability. He should not solicit clients. 174/

173/ Id., Annotation to Preamble, "Principles Applicable to All."

174/ Id., Sec. II [emphasis added].

Although this section of the Code includes a number of broad ethical concepts other than a general prohibition against "solicitation," all of the interpretive language in the section as well as all of the annotations deal with advertising. By way of clarification, advertising is defined in a "comment" to Section II:

The word "advertising" in relation to the veterinary medical profession must be taken in its broadest terms. It includes all those methods by which a practicing veterinarian is made known to the public, either by himself or by others without his objection, in a manner which can be fairly regarded as having for its purpose the obtaining of patients or promotion in other ways of the veterinarian's individual professional advantage.

Objectionable advertising consists of:

- (a) advertising personal superiority over one's colleagues.
- (b) advertising secret remedies or exclusive methods.
- (c) advertising fixed fees for given services.
- (d) advertising as a corporation or partnership beyond that which would be ethical for either party.
- (e) advertising case reports, allegedly unintentional.
- (f) advertising hospital and office equipment and the special service rendered therewith.
- (g) advertising the building or occupation of a new hospital as an unsolicited news item of the local press may be considered unavoidable and unobjectional. Solicited and repeated publicity of this class is, however, frowned upon by the association. 175/

Additionally, under this "comments" section, a number of particular kinds of advertisements are discussed:

Directory Listings

Advertising in a city, commercial telephone, or any widely circulated directory is a violation of this code.

A member who permits his name to be listed in directories in bold-face type or who advertises his name or hospital or institution in any way differing from the standard

175/ Id., Annotation to Sec. II, "Traditional Concepts."

style, type, or size used in the directory for the listing of professional groups (physicians, dentists, lawyers, nurses) is subject to the charge of unprofessional conduct. It is also unethical for a veterinarian to allow his name to be printed in public directories as a specialist in the treatment of any disease or in the performance of any service within the scope of veterinary practice.

In principle, this section of the Code of Ethics is intended to improve the listing of names in such a way as to give all of them identical visual prominence.

#### Local Newspaper Listing

It is customary and advisable in certain communities to print advertisements of professional men in local newspapers, but, such advertisements should be reasonable in size and display. They should be limited to name, title, address, office hours, and telephone number.

#### Professional Stationery

The letterhead of a professional man should be modest, announcing only name, title, address, telephone number, and office hours.

In view of the turn veterinary practice has taken in recent years, a veterinarian may announce on his cards and letterheads that his practice is limited to treatment of diseases of small animals or poultry, provided that such cards or letterhead indicate that he is a member of the veterinary profession and thus distinguish him from groups of irregular practitioners who are not eligible to membership in the Association.

The mailing of letters or cards announcing a new location of office, hospital, or other place of business is permissible, but such occasions should not be used as an excuse for violating the code in other instances.

#### Professional Signs

Display signs of reasonable size and dimensions on veterinary hospitals are not regarded as objectionable, provided they do not announce special services, such as bathing, plucking, clipping, and x-ray work, which characterize the ways of the charlatan. 176/

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176/ Id.

Annotations to Section II are in the nature of "opinions" or answers to specific questions. They are written by the Judicial Council of the AVMA on an "as needed" basis. 177/ The annotations are classified by subject matter, for example "Telephone Directory Listings." Under the cited heading there are ten separate annotations, many of them either redundant or inconsistent. For example:

1954 Report: It is unethical for a veterinarian to have more than one listing under any given heading in the classified section of a telephone directory . . . .

1962 Report: The Council recommends that telephone directory listings carry not more than two headings pertaining to veterinary practice. Under each heading, a veterinarian's name should be listed not more than one time.

1963 Report: . . . .The veterinarians in a community served by a telephone directory should decide first of all whether to list themselves under only one heading ("Veterinarians") in the classified section of the telephone directory or whether to use two headings ("Veterinarians" and "Veterinary Hospitals" or "Veterinarian and "Animal Hospitals"). Of the two choices the latter seems preferable. 178/

As these examples suggest, the annotations to Section II are quite specific. Various activities, while not in the nature of "solicitation" as that term is commonly understood, are nonetheless labeled "unethical" because they may be interpreted as "advertisements." For example, under the heading of "Telephone Directory Listings" we find this annotation:

1969 Report: A telephone directory listing of a veterinarian's availability to make house calls is an offer to perform services rather than a statement of a practice restriction and it is therefore not acceptable. 179/

The language of Section II, including the "comments" and annotations, strongly suggests that this part of the AVMA Code is meant to enforce uniformity or homogeneity in the public posture of veterinarians. Nearly every kind of public activity which sets apart one veterinarian from another is considered "advertising" and is therefore "unethical." The force of the motivation to assure uniformity results in some rather attenuated ideas about what constitutes "advertising":

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177/ See note 172 supra.

178/ See note 175 supra.

179/ Id.

## Professional Stationery

1954 Report: The Committee has noted an increase in the use of professional envelopes and letterheads making use of cuts, mostly outlines of animals. Such stationery is considered unprofessional and unethical and is in violation of the principles.

## Identification Tags

1958 Report: An opinion was requested as to whether it was considered ethical for a veterinarian to place an identification tag on the collar of his client's pets with the doctors name and address upon it, so in the event the animal became lost, it could be returned to the owner through contact with the veterinarian. We advised that we did not approve of this.

## Signs

1956 Report: . . . The American Veterinary Medical Association considers it to be a breach of professional ethics for a sign to use animal figures, animated or otherwise, to announce special services such as bathing, clipping, plucking or x-ray work, as this characterizes the way of the charlatan. 180/

One need only examine the regulations adopted by a number of state licensing boards to see the influence the AVMA Code has had on the public constraints against veterinary advertising. 181/ In many instances it is difficult, if not impossible, to differentiate the restraints against such advertising as either "public" or "private". Even in states which have no legal restrictions on advertising, veterinarians seem constrained from engaging in such activity because it is regarded as "unethical". In summary, the AVMA Code acts as a codification of the "ethical" concerns inherent in veterinary advertising. The Code serves as the focal document in a complex program of moral suasion which begins during veterinary school. The Code seems to be viewed as a legal document with the same effect on advertising as that produced through public restrictions.

180/ Id.

181/ E.g., Washington's Veterinary Practice Act lists as a ground for suspension or revocation of a license:

(10) Violation of ethics of the profession. The code of ethics adopted by the board of governors shall be the standard of ethics for the licensed veterinarians of this state.

Wash. Rev. Code §18.92.160(10)(1976).

## Addendum to Section II B

As staff was in the final stages of preparing this report, we were informed that the AVMA House of Delegates accepted a recommendation of its Judicial Council concerning Principle II (advertising prohibition section) of the Principles of Veterinary Medical Ethics. This resolution states:

The Judicial Council has considered the recent decision by the United States Supreme Court in the Bates case (which invalidated certain restraints imposed upon attorney advertising by The Supreme Court of Arizona).

In light of this and because the Federal Trade Commission and others are scrutinizing certain restrictions on advertising by veterinarians (see "Annotations" to Principle II of the "Principles of Veterinary Medical Ethics"), it is resolved that:

1) The last sentence in Principle II which reads "He should not solicit clients" is hereby revised to state that "He should not solicit clients nor announce his fees and services in such a manner as to be misleading, fraudulent, or deceptive."

2) The Judicial Council hereby adopts a moratorium until mid-1978 on all enforcement or disciplinary action based on the explanatory text following Principle II (including all text appearing under the headings "Traditional Concepts" and "Annotations").

3) The Judicial Council will undertake as promptly as possible to review and revise the "Traditional Concepts" and "Annotations" to the Principles of Veterinary Medical Ethics, as may be necessary or appropriate in light of the Bates decision. A report of these revisions will be submitted to the House of Delegates in mid-1978.

4) Cognizant that the Bates litigation differentiated between restrictions upon advertising imposed by (1) the various states of the United States, and (2) private organizations, the Judicial Council recommends the prompt preparation of a comprehensive report, to be submitted to the various state veterinary medical licensing boards. This report should include (1) an analysis on the impact of Bates upon any continuing restrictions on any such professional advertising in the future, (2) recommended restrictions or regulations which could be used by state veterinary medical licensing boards, if desired and (3) any appropriate revision of the AVMA Model Practice Act. The Judicial Council believes that it would be an appropriate AVMA body to prepare such a comprehensive report; and, subject to authorization by the Executive

Board and the House of Delegates, the Judicial Council proposed to undertake this project as promptly as possible, with the expectation that the report will be circulated widely before the end of 1977. <sup>182/</sup>

In staff's opinion, it is too early to determine the effect of this resolution on advertising in the profession. Any report which the AVMA prepares will not be binding on the states. They may continue to restrict veterinary advertising regardless of the AVMA's opinion. Furthermore, in light of the numerous questions left open by Bates, we do not anticipate that the AVMA will take an expansive view toward advertising.

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<sup>182/</sup> See 171 JAVMA 409 (1977).

### C. Enforcement of Public and Private Restraints

#### 1. Procedures for Enforcing the Restraints

Public restrictions on veterinary advertising are generally enforced by state veterinary licensing boards. Procedures for disciplining licensed veterinarians vary among the states, but the usual form followed by state authorities involves a three-step process:

1) Complaints are received by the veterinary licensing board, generally through the president or secretary of the board. In a number of states, complaints are directed to the executive secretary who is usually a non-veterinarian. The board president, secretary, or executive director assigns investigation of the complaint to one or more board members or to an "investigator."

2) If the investigation discloses a probable violation of the state practice act or regulations, a proceeding is held involving the entire board. The actual process varies considerably from state to state. For example, it may involve a formal hearing to establish probable cause before the board. At the other extreme, a formal request for action by a law enforcement agency may be made in an executive session of the board.

3) Actual prosecutions are generally handled by the state attorney general's office. <sup>183/</sup> In the larger states, specific divisions of the attorney general's office formally investigate and prosecute violations of occupational licensure acts.

Alleged violations of private restraints are usually handled by the disciplinary committees of state and local veterinary medical associations. These procedures also vary widely among such associations. They may be conducted in a formal "trial" setting or may involve informal meetings and interviews. The only penalties which the associations may impose are suspension or revocation of membership. Consequently, disciplinary problems are frequently referred by associations to the state licensing boards.

The distinctions between public and private enforcement of advertising restrictions are often blurred. Some states, for example, enforce ethical proscriptions pursuant to practice

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<sup>183/</sup> In practice, the board is the usual forum for deciding the "merits" of a complaint. Since boards lack prosecutorial jurisdiction, however, the enforcement of the practice acts are left to attorneys general. Some states (e.g., Florida) also provide a private right of action under their veterinary practice acts; see text accompanying note 190 infra.

acts or regulations. While such practice acts and regulations may not explicitly prohibit advertising, their effect is the same when they rely upon interpretations of ethical codes to define "unprofessional conduct."

Staff is aware of one state where, until recently, the executive secretary of the veterinary licensing board was simultaneously the secretary of the state veterinary association. <sup>184/</sup> In another state, a member of the veterinary board was simultaneously an officer in the state veterinary association. <sup>185/</sup> Staff believes that this latter type of board and association relationship is not uncommon.

According to several veterinarians, in California complaints are handled in accordance with the veterinarian's status as a member or non-member of a veterinary association. <sup>186/</sup> When complaints are received by either the board or the association, they are handled by the association if the veterinarian in question is an association member and by the state board if he is not. This bifurcated disciplinary procedure appears to discriminate against veterinarians who are not association members. While complaints against association members may be resolved through informal mechanisms, non-members are subjected to the full force of a governmental investigation.

In addition to situations where the veterinary board and the veterinary association employ the same person, these entities are often intertwined. For example, in a number of states board members are appointed on recommendation from the state association. Responses to the State Veterinary Board Questionnaire indicate that virtually all veterinary board members nationwide are members of their state associations. Some of the cases noted immediately below may also serve to illustrate the closely linked nature of board and association relationships.

## 2. Some Cases Concerning Veterinary "Advertising"

Advertising (in the commonly understood sense) by veterinarians is extremely rare. The only advertisements by veterinarians are generally informational announcements concerning

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<sup>184/</sup> Documents evidencing this relationship are subject to a ten-day notice of release.

<sup>185/</sup> Conversation between Dr. G. E. Boyle, and P.C. Daw, FTC, September 9, 1976.

<sup>186/</sup> E.g., Conversation between Dr. Stuart Friedman of North Hollywood, California, and Lynne Petros, FTC, June 17, 1976.

new practices. However, because "advertising" is interpreted so broadly in ethical codes and state laws and regulations, a number of cases may be cited to illustrate the enforcement of advertising restrictions.

For example, there are a number of recent cases alleging advertising violations concerning spaying and neutering clinics. In one recent case, The Pet Assistance Foundation (PAF), Mercy Crusade, Inc. (MCI) and Dr. Andrew Smith were able to obtain an injunction against the Southern California Veterinary Medical Association (SCVMA). <sup>187/</sup> Dr. Smith was one of some forty veterinarians participating in referral programs run by PAF and MCI. Through these programs, pet owners could have their animals spayed or neutered at reduced costs. The plaintiffs charged that SCVMA engaged in a year-long program designed to harass and intimidate cooperating veterinarians, including Dr. Smith. In some instances, representatives of SCVMA warned and privately reproved cooperating members about their reduced fees in the spay-neuter program.

MCI and PAF placed advertisements in local newspapers encouraging people to telephone for information about low-cost spays and neuterings. When people called, they were given the name and address of one of the program's cooperating veterinarians. None of these advertisements ever mentioned prices or the names of cooperating veterinarians.

SCVMA adopted a resolution in September of 1973 designed to eliminate price discounting for animal birth control. The resolution held that an arrangement through which veterinarians performed spaying and neutering at reduced fees on animals referred by arranging agencies was "considered unethical advertising by a veterinarian and incompatible with membership in the Southern California Veterinary Medical Association." <sup>188/</sup>

Pursuant to this resolution, the SCVMA threatened to investigate veterinarians cooperating with MCI and PAF and to expel those found to be cooperating. Additionally, SCVMA threatened to send any record and finding concerning cooperating veterinarians to the California State Board of Veterinary Medical Examiners. The threats on SCVMA members proved to be successful. A number of cooperating veterinarians severed their relationships with PAF and MCI. Those who did not were informed that they would have to quit either the SCVMA or the humane groups as soon as investigations were completed. Dr. Smith was one of those who retained his relationship with MCI and PAF even though he was threatened with expulsion from the SCVMA.

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<sup>187/</sup> Smith v. Southern California Veterinary Medical Ass'n, No. 72-2813-RJK (C. D. Ca., entered Aug. 7, 1973).

<sup>188/</sup> Report of the Society for Animal Rights, Inc., January, 1973.

The injunction obtained by plaintiffs prohibits SCVMA from "taking any steps directly or indirectly, to harass, coerce, intimidate or otherwise prevent its member or non-member doctors of veterinary medicine from cooperating with plaintiffs PET ASSISTANCE FOUNDATION and MERCY CRUSADE, INC., or either of them, in their respective programs to provide spaying and neutering services for cats and dogs in the Southern California area." 189/

The theme which the SCVMA case represents is not atypical. While "advertising" appears to be the concern, the real sin committed by "advertisers" is price-cutting. Another recent case, Walrath v. Society for Welfare of Animals, Inc., 190/ also seems to fit this pattern. Dr. David B. Walrath is a private practitioner from Homestead, Florida. He brought suit against Society for Welfare of Animals, Inc. (S.W.A.) pursuant to a private right of action authorized by the Florida veterinary practice act. S.W.A. is a non-profit corporation which operates a low-cost spaying and neutering clinic in Dade County, Florida. S.W.A. employs its own full-time veterinarian, Dr. Louis Horvath. According to Dr. Horvath, the Humane Society of the United States donated some of their public service television time to S.W.A. 191/ S.W.A. used this time to run short commercials urging people to have their pets spayed and neutered. At the end of these spots, a video transparency overlay which read "low cost" was used. 192/

Dr. Walrath charged that S.W.A.'s television spots were in violation of Florida's veterinary practice act which prohibits, inter alia, price advertising. 193/ The court agreed with Dr. Walrath and enjoined S.W.A.:

It is hereby ordered, adjudged and decreed that the defendant, his employees, servants, agents, and members be, and they are hereby, perpetually enjoined and restrained from all objectionable advertising, including but not limited to, advertising on television, radio and newspapers in violation of F.S. 474 (the so-called Practice Act) and rules implemented thereunder as

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189/ See note 187 supra.

190/ No. 75-13473 (11th Cir. Ct. Fla., 1976).

191/ DVM News, June 1977, at 1.

192/ Conversation between Michael Lipsky, counsel for Soc'y For Welfare of Animals, and J. Phelan, FTC, Aug. 14, 1976.

193/ See Appendix 3 infra.

applied to the practice of veterinary medicine. It is the purpose and intent of this order to restrain and limit all advertising by the defendant to that which may ethically be done by a veterinarian duly licensed to practice in the state of Florida. The defendant is specifically restrained from the advertising of fees charged for services or of so called "low cost" fees for services. 194/

On appeal to the Florida Third District Appeals Court, the defendants argued that the lower court's injunction abridged their constitutional rights of free speech. The appeals court rejected this argument and upheld the lower court. 195/ The case is now on appeal to the Florida Supreme Court. 196/

It is interesting to note Dr. Walrath's expressed purpose for filing this suit. He said that he felt the advertisements were not only unfair "but implied that I was overcharging." 197/ Dr. Walrath also noted that he was supported in his suit by the South Florida Veterinary Medical Association (FVMA) and the Florida Medical Association. 198/ The FVMA's opposition to non-profit spaying and neutering clinics is well illustrated in a flyer entitled "'They' Hit Where It Hurts--Your Pocketbook." This flyer is directed specifically at county-supported spaying and neutering clinics and states in part:

#### TAXPAYER ANIMAL CLINICS

"THEY" HAVE JAMMED THEM DOWN OUR THROATS IN LEON AND PINELLAS [Counties] AND NOW BROWARD [County] IS GOING INTO THE PRACTICE OF VETERINARY MEDICINE.

#### AND AT YOUR EXPENSE

WHY: The constant heavy pressure by our enemies on the politicians.

WHY: Our failure to properly organize and fight back to protect our pocketbooks.

#### YOU CAN BE HIT, TOO

Our enemies are highly skilled pressure groups. Their first

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194/ See note 190 supra.

195/ See note 191 supra.

196/ Id.

197/ Id.

198/ Id.

targets are the urban Florida counties. But we are all in the line of fire.

THEY CAN BE DEFEATED

It will take unity, organization, financing, leadership, and professional communications and legal guidance.

WE CAN BEAT THEM  
BUT WE CAN'T STOP THEM

We can win the battles. But "they" will continue to fight us. Don't underestimate them. "They" are vocal, "they" are cunning, "they" are resourceful, "they" use subversive tactics, "they" are well-organized, "they" are powerful, "they" are vicious, "they" know what they want--and "they" won't give up.

FREE SPAYING-NEUTERING

That is only the beginning of taking money from your pocketbook. Rabies shots are next. After that distemper shots. Before long these county clinics will be into regular veterinary practice.

\* \* \*

These tax supported animal clinics are still another move on the government's wild ride toward the road of socialism. The immediate damage is to your pocketbook, but the greatest damage is more socialized medicine with government taking over our profession. 199/

While this flyer is not specifically directed against "advertising", it is intended to influence veterinarians against cooperating practitioners as well as spay clinics themselves. 200/ Again, the object of criticism is price-cutting in any form. The Florida example of vituperation directed specifically against spaying and neutering clinics is by no means unique. We have had several veterinarians operating spaying and neutering clinics complain to us of harassment by state and local veterinary associations. The pattern of such alleged harassment is quite consistent. In most cases, the veterinarians are investigated for "gross incompetence." Additionally, these veterinarians may be charged

199/ Publication of the Florida Veterinary Medical Association, undated (cir. March, 1977).

200/ Letter from K. Gutman to F. K. Smith, FTC, dated May 17, 1977.

with advertising violations because they have appeared in newspaper articles or have otherwise had their practices publicized. The following case is a typical example. 201/

The veterinarian in question experienced some minor problems with the state veterinary association and the state veterinary licensing board concerning advertising early in his career. After practicing in several places immediately after graduation, he moved to the locale in question to open a large animal practice. As the veterinarian recently testified:

I put an ad in the paper and unbeknownst to me they made it twice the size of the business card and said that [I] specialized in dairy and equine practice and I got [word] from the ethics committee saying that was unethical advertising. 202/

This experience caused him to drop his membership in the AVMA and the state veterinary association.

Well, I think the thing that made me bitter is like when I first started practice in the . . . area there and I put that ad in the paper and rather than--being a new practitioner in the area, if I was in error it had to be some of my colleagues around the vicinity who had reported me. If one of them had come in and said, "Look, . . . , this isn't right. You're just new in the area and no sense getting started on the wrong foot. We don't like you to advertise this way." I would have said fine. But they--every place I've gone, they just really hurt me that they would want to go about it in this manner when the error isn't severe. It was only in the weekly paper and it came out once a week and in three issues I never ran across anyone who has ever seen it. I never ran into a client who ever saw my ad in the paper. The only one who saw it was the veterinarian who wrote a letter to the Board about it. 203/

201/ The disclosure of documents supporting the text accompanying notes 201 through 205 will, in staff's view, constitute an unwarranted invasion of personal privacy. See 5 U.S.C. §205(b)(7)(c). The identities of all persons and places in the text accompanying these notes have been excised.

202/ Id.

203/ Id.

He had no further problems with the state veterinary medical association and Board for another seventeen years until he opened a spaying and neutering clinic. This clinic was opened with the aid of several non-veterinarians. When the clinic was opened, an advertisement was taken out in a local newspaper. 204/ This advertisement was a "display" type announcing the opening of the Spay and Neuter Clinic by the veterinarian in question and one of the non-veterinarians. Included in the advertisement were a map, a picture of a dog and cat, and the words "specializing in animal birth control and immunizations only." According to the veterinarian in question, this advertisement was placed by a lay subordinate without his knowledge. 205/

At about the same time the advertisement was published, listings for the Spay and Neuter Clinic appeared in the telephone directory "Yellow Pages." Again, according to the veterinarian in question, these listings were placed without his knowledge of their exact content.

Shortly after the advertisement for the opening of the Spay and Neuter Clinic appeared, [the veterinarian in question] received the following letter from the secretary of the state veterinary licensing board, who was simultaneously the executive secretary for the state veterinary medical board.

The Veterinary Practice Act of the State . . . contains the Code of Ethics of the American Veterinary Medical Association as part of the statute. Any violation of the statute may be considered as grounds for revocation or suspension of license.

The Board reviewed the advertisement for your new clinic which appeared in the February 21st issue of the [newspaper in question]. We quote excerpts from the Code:

1. "The term 'specialist' or 'specialising' should never be used."
2. "Newspaper announcements and telephone directory listings should be limited to the actual area served."
3. "Announcement insertions should be limited to name, title, address, office hours and telephone number."
4. "Such listings may indicate practice restrictions such as Practice Limited to Pet Animals, Practice Limited to Horses, Feedlot Consultant Practice Only, and House Calls Only but shall not indicate services and equipment available (such as boarding, grooming, radiology, surgery,

204/ Id.

205/ Id.

nutritional consultation, fertility testing, pet health insurance, and pregnancy examinations)."

The [use of the] name [of a non-licensed veterinarian] is in violation of the Code of Ethics, since she would appear to be advertising veterinary services and is not a licensed veterinarian. The pictures and the map are also a violation. The heading "Dog & Cat Spay & Neuter Clinic" should not appear as the name . . . . Your name, the address and telephone number are all that are permitted.

The advertisement in [a newspaper outside the local area] was a violation, since your announcement is restricted to the newspaper in your immediate practice area . . . . Even the name of this clinic implies a specialty, and could also be considered a violation. The Board considers the proper size for an announcement advertisement to be two columns by three to four inches. This would allow ample space to announce the opening of your practice listing the name, address, telephone number and office hours.

The Board requests that you reply to the above allegations. 206/

This matter was disposed of in 1974 when the veterinarian in question signed a consent order agreeing to limit his Yellow Pages listings in accordance with the AVMA's Principles of Ethics. 207/

But his troubles did not end with the consent order. From 1974 on, he became the subject of numerous complaints directed to both the Board and the State VMA. Most of the complaints presented similar themes: that he was incompetent in performing spays and neuterings or that his clinic was unsanitary and the source of infectious diseases.

These complaints were thoroughly investigated by state officials. He was frequently subjected to unannounced visits by these investigators. All complainants were contacted and other veterinarians interviewed about his methods and the state of his clinic. Reports of these investigations and their supervisors relate an interesting story.

For example, one investigator wrote this in a report after interviewing the veterinarian in question and inspecting his clinic:

206/ Documents supporting the text accompanying notes 206 through 212 are subject to a ten-day notice of release. The identities of all persons and places in the text accompanying these notes have been excised to protect the personal privacy of the persons involved.

207/ Id.

As observed by this investigator, [he] has an immaculately clean clinic throughout. The animals present appear alert and in good condition.

As he does his services for a nominal fee and does not belong to the state veterinary medical association, he feels this complaint was probably encouraged by another veterinarian. I would expect to receive more in the future. 208/

Another investigator wrote in his report:

During the period from April 8, 1976, until this date April 30, 1976, this Investigator has been hit with a deluge of mail, forty-six (46) letters from various people from various walks of life all in support of [the veterinarian in question] and his clinic. In the course of this investigation, this Investigator has made a number of unannounced calls on his clinic . . . and have never found the clinic to be in any condition other than in a sanitary condition.

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After talking to many veterinarians and doing a good amount of research, it is the opinion of this Investigator that it would be impossible to prove the allegations made . . . 209/

After several months, the state investigators became restive. It seemed to them that the investigation had been prompted by ulterior purposes. One investigator wrote:

[I]t is the opinion of this investigator and others in the investigations unit that there has been and still is a concerted effort been made by [the executive secretary of the state veterinary licensing board] and various veterinarians in the . . . area to discredit [the veterinarian in question]. 210/

In the same vein, the following statement appears in a memorandum from a supervisor to the chief of the investigations unit:

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208/ Id.

209/ Id.

210/ Id.

I have attached correspondence sent to us by . . . and I certainly agree with her as to where does this rat race ever stop on the [veterinarian in question] versus "establishment" issue? Nevertheless, I don't think we can take a do-nothing position since this complaint originates from the Veterinary Board of Governors. 211/

The above memorandum was prompted by a memorandum from an assistant attorney general which stated in part:

[The board] forwarded this for the [veterinarian in question's] file.

When previous complaints haven't held up under scrutiny, how do we handle new ones? When do we quit investigating?

Here, for example, we don't know what disease killed the cat and whether it was caught at [the veterinarian in question's clinic] and why . . . , DVM complained, unless the Executive Secretary asked him to. 212/

The investigations were finally concluded without any action taken against the veterinarian in question. The final memorandum in the file is perhaps the most insightful of all. It was written by the same assistant attorney general quoted above and directed to the investigations unit:

Thank you for the long hours your investigators put in on this complaint. Despite frequent complaints from [the Executive Secretary], the complaints appear unjustified. I'm afraid the only real offense was charging less money than anybody else, and refusing to join the professional association. It's the sort of mess we don't need to be involved in. Hereafter, I'll have to be quite cautious of complaints from the Vet Assc office . . . AND it shouldn't take me as much investigation time to decide whose license should be acted on, at least from the legal standpoint. 213/

In relating this story, we do not intend to single out one state for criticism. Indeed, we have received complaints alleging similar harassment of price-cutting veterinarians in a number of areas, including Ohio, Texas, Florida, California, Washington and Puerto Rico.

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211/ Id.

212/ Id.

213/ Id.

### 3. Conclusions

It seems to staff that an essential conclusion may be drawn from the cases we have related: that many veterinarians oppose those who advertise or provide alternative delivery systems because they view these "mavericks" as threats to their livelihood. Price-cutters and advertisers are seen by the established veterinary community as "cheaters," who, if allowed to continue their activities, may imperil the complex system of controls which assures high rates of return.

Regulation of advertising by veterinarians represents the very antithesis of public-mindedness. Such regulations are not intended to protect the public from the "unscrupulous." Rather, they seem to have as their real purpose the economic protection of veterinarians. The actions taken by veterinary boards and associations to police the activities of advertisers and other mavericks speak forcefully of the probable effects of advertising. What is feared by the veterinary establishment is that advertising will drive down the prices for veterinary goods and services. We concur in this analysis.

### III. The Economic Effects of Restraints on Veterinary Advertising

A number of arguments have been advanced to justify the restrictions on veterinary advertising described in Section II supra. These arguments are discussed below in Section IV. At this point, it is necessary to determine whether the public and private restraints on veterinary advertising affect the market for veterinary goods and services. Our contention that these restraints are unfair practices within the meaning of the Federal Trade Commission Act is dependent, in part, on a showing that they have a substantial detrimental effect on consumers. 214/

We believe that it is possible to demonstrate both theoretically and practically that veterinary advertising restraints have a detrimental effect on consumers. In the discussion which follows we will first describe the consumer ignorance hypothesis: that the absence of material information, particularly price information, causes prices for relatively homogeneous products to vary widely. Second, we will describe how the existence of widely dispersed prices in a market relates to unnecessarily high price levels within such market. Finally, we will discuss a price dispersion study which demonstrates the practical effects of veterinary advertising restrictions.

#### A. The Consumer Ignorance Hypothesis

Consumers receive essential product information in a number of ways. They may seek it out in directories, through friends, or by performing their own telephone "surveys." They may receive it "accidentally" through newspaper advertisements, billboards, displays or television and radio commercials. They may be targeted as potential purchasers and receive such information in the mail, by telephone, or on door-hangers. No matter how this information is received, it is used once the consumer decides to make a purchase.

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214/ The theory of unfairness upon which we have relied to recommend issuance of a Trade Regulation Rule is discussed in Section VI infra. Basically, this theory holds that acts or practices are unfair and subject to the Commission's jurisdiction when: (1) they offend a clear national policy; and (2) they cause consumers to suffer substantial economic harm.

The process whereby consumers seek information is referred to by economists as "search." Search is frequently considered as an item of cost which influences the total price of goods or services. <sup>215/</sup> Thus, the economic cost of a product is made up of several components including its "asking" price and search cost. When essential information is readily available, search cost is said to be low and of little influence on total price.

Some economists differentiate between price search and quality search. <sup>216/</sup> Price search is used typically to make purchasing decisions concerning commodities which are inexpensive or frequently purchased. Quality search is typically used when consumers make purchasing decisions concerning commodities which are expensive or infrequently purchased. For many purchasing decisions, however, both quality and price search are used.

When price and quality search become difficult or impossible, the consumer is unable to make rational purchasing decisions. Instead, he or she acts out of ignorance of essential market information. We might expect that the degree of this ignorance is measurable. Professor Stigler has hypothesized that price dispersion offers such a measurement.

Price dispersion is defined as a variation between high and low prices for similar goods and services without a strong tendency for clustering of prices around an average price. As Professor Stigler states:

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<sup>215/</sup> See, e.g., Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. of Law and Econ. 337 (1972) (hereinafter cited as "Benham I"):

The full cost of purchase ( $C_f$ ) of a good to a consumer includes not only the cost of the item itself ( $C_g$ ) but the cost of knowledge ( $C_k$ ) concerning the location of sales outlets and prices and the cost of time and transportation ( $C_t$ ) required to purchase the item:

$$C_f = C_g + C_k + C_t$$

These components of full cost are in part jointly determined. For a given frequency distribution of retail prices offered in the market, the distribution of prices paid ( $C_g$ ) will depend upon the extent of the consumers' knowledge of the alternative prices available and the cost of time and transportation. Id. at 338.

<sup>216/</sup> See, e.g., Nelson, Advertising as Information, 82 J. of Political Econ. 729 (1974).

Price dispersion is a manifestation--and, indeed, it is the measure--of ignorance in the market. Dispersion is a biased measure of ignorance because there is never absolute homogeneity in the commodity if we include the terms of sale within the concept of the commodity. Thus, some automobile dealers might perform more service, or carry a larger range of varieties in stock, and a portion of the observed dispersion is presumably attributable to such differences. But it would be metaphysical, and fruitless, to assert that all dispersion is due to heterogeneity. <sup>217/</sup>

The degree of consumer ignorance in the market is related to the search costs expended to obtain relevant product information. <sup>218/</sup> The more readily available the information, the lower the search cost. If price search alone is considered relevant, we might predict that increased price advertising would reduce the degree of measurable dispersion. This point has been addressed by Professor Stigler:

Price advertising has a decisive influence on the dispersion of prices. Search now becomes extremely economical, and the question arises why, in the absence of differences in quality of products, the dispersion does not vanish. And the answer is simply that, if prices are advertised by a large portion of the sellers, the price differences diminish sharply. That they do not wholly vanish (in a given market) is due simply to the fact that no combination of advertising media reaches all potential buyers within the available time.

. . . The effect of advertising prices, then, is equivalent to that of the introduction of a very large amount of search by a large portion of the potential buyers. It follows from our discussion . . . that the asking prices will be much reduced. <sup>219/</sup>

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<sup>217/</sup> G. Stigler, The Organization of Industry, Chapter 16: "The Economics of Information" 172 (Irwin 1968).

<sup>218/</sup> See, e.g., Maurizi, The Effect of Law Against Price Advertising: The Case of Retail Gasoline, 10 West. Econ. J. 321, 386-87.

<sup>219/</sup> Stigler, supra note 217, at 186-87.

Professor Lee Benham and others have noted that non-price information is also essential to rational purchasing decisions, and that its absence may significantly increase consumer prices. <sup>220/</sup> Apparently, dissemination of non-price information is an important element of establishing a business reputation. As the business's reputation is enhanced, more consumers are attracted to it. This increase in business activity permits the introduction of efficiency mechanisms which result in the reduction of prices to consumers.

Several studies have confirmed the relationship between advertising bans and price dispersion. For example, Alex Maurizi examined such relationships in the retail gasoline market. <sup>221/</sup> He found that price dispersion was significantly greater in markets where retail gasoline dealers were prohibited from posting prices than in markets where such posting was permitted. <sup>222/</sup> While agreeing with Professor Stigler that the degree of dispersion can never approach a zero limit, Maurizi concluded that consumer ignorance was less apparent in markets where price information was available than in those where it was not. <sup>223/</sup>

B. The Relationship of Price Dispersion and Average Price Levels

The existence of relatively high price dispersion in an industry indicates more than a lack of relevant consumer information. Where high dispersion is present in an industry, we can predict that average prices for goods and services produced by that industry will be higher than they would be if more consumer information were available. That is, when consumers lack relevant information, they are likely to pay more for goods and services than they would if such information were easily obtainable.

This phenomenon has been analyzed by a number of economists, including Professor Stigler. <sup>224/</sup> He links higher

<sup>220/</sup> Benham I, supra note 215, at 349:

[I]n states prohibiting only price advertising, prices are slightly higher than in states with no restrictions, and are considerably lower than in states prohibiting all advertising. This estimate suggests that even 'non-price' advertising may lower prices. (Internal footnote omitted.)

See also American Assn. of Advertising Agencies, The Case for Advertising, Ch. XI, "The Effects of Advertising" (1973).

<sup>221/</sup> Maurizi, supra note 218.

<sup>222/</sup> Id.

<sup>223/</sup> Id. at 328.

<sup>224/</sup> Stigler, supra note 217.

prices in markets exhibiting dispersion to the ability of consumers to identify low-cost sellers in such markets. When search cost is a significant factor in total price, the consumer may forego search altogether and rely on irrational factors to reach initial purchasing decisions. On the other hand, where search is cheap, the consumer is likely to seek the low-cost seller; purchasing decisions then become rational since they maximize disposable income. Thus, where relevant information is available at low cost, competition works to drive down average prices.

When a market in which search is cheap exhibits a wide range of prices, consumers are more likely to choose sellers whose prices are below the mean than they are in markets exhibiting a narrow range of prices. As Professor Stigler notes, "greater amounts of search will lead to a smaller dispersion of observed selling prices by reducing the number of purchasers who will pay high prices." <sup>225/</sup>

Studies by Professor Lee Benham confirm the theories of Professor Stigler and others that both the mean and the dispersion of prices decreases as the extent of search increases. <sup>226/</sup> Benham analyzed the prices for eyeglasses in comparative markets characterized by the "restrictiveness" of public advertising regulations in those markets. He found that prices for eyeglasses in markets which restrict advertising were significantly higher on average than in markets where restrictions were absent or less severe:

Despite the shortcomings of these estimates, they serve to indicate the direction and magnitude of effect. The estimates of eyeglass prices alone suggest that advertising restrictions in this [product] market increase the prices paid by 25 percent to more than 100 percent. Furthermore, these estimates are likely to understate the total savings to consumers occasioned by advertising, since the search process itself is less expensive when information is more readily and cheaply available. <sup>227/</sup>

In a second study, Lee and Alexandra Benham analyzed prices in comparable markets, taking into account the private restraints on advertising effectuated through professional ethical codes. Their findings were similar to those in the first study:

<sup>225/</sup> Stigler, supra note 217, at 178.

<sup>226/</sup> Benham I, supra note 215; Benham, Lee and Benham, Alexandra Regulating Through the Professions: A Perspective on Information Control, 18 J. of Law and Econ. 421 (hereinafter "Benham II").

<sup>227/</sup> Benham I, supra note 215, at 344-45 (internal footnotes omitted).

There is a basic incompatibility between providing consumers with the information which is generated in the usual commercial market and the implementation of professional codes of ethics. This raises a fundamental question, given that these information constraints appear to result in significantly higher prices and lower utilization, as to the magnitude of the benefits derived from professionalization compared to the costs. 228/

Maurizi's studies of gasoline prices support the Benhams' findings. 229/ Additionally, the Supreme Court in Bates cited Benham I to support the proposition that advertising may reduce prices:

Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products; where consumers have the benefit of price advertising, retail prices are often dramatically lower than they would be without advertising. 230/

The hypothesis that search barriers artificially increase consumer prices seems well supported by empirical studies. It is equally apparent that significant rates of price dispersion within markets are direct indicators of consumer ignorance. In the following sections we describe a survey carried out by staff which demonstrates the existence of significant rates of price dispersion in the veterinary market. We believe that these results are sufficient to demonstrate that veterinary advertising restrictions cause consumers to suffer substantial economic harm.

#### C. Price Dispersion Measurements in the Veterinary Profession

Staff's investigation has revealed virtually no independent studies of price dispersion in the veterinary profession. Indeed, the profession has produced a very small number of economic studies of any kind. Because of this absence of data on prices, we found it necessary to perform our own measurements of prices. While these measurements are not statistically sophisticated, we believe that they are sufficiently reliable to indicate that consumers are faced with significant price differences for veterinary goods and services within relevant geographic markets.

228/ Benham II, supra note 226, at 446.

229/ Maurizi, supra note 218.

230/ Bates v. State Bar of Arizona, 45 U.S.L.W. 3852 (June 27, 1977).

#### 1. Survey Design

The first task in designing our price dispersion survey was to determine which services we could reliably inquire about. We decided to concentrate on services performed by most small animal practitioners. This decision was based on several factors:

(1) Available evidence indicates that the majority of practicing veterinarians are engaged primarily in small animal practice; 231/

(2) The percentage of veterinarians engaged primarily in small animal practice has increased substantially over the past twenty years and this increase appears to be continuing; 232/

(3) Small animal practitioners are more susceptible to competitive forces than large animal practitioners, since they tend to concentrate in human population centers; 233/ and

(4) Substantially more economic data is available about small animal practitioners than about large animal practitioners.

In a previous survey of the frequency of performance of small animal veterinary services, we concluded that certain of these services are of a "routine" nature. 234/ We define a service as "routine" if it has these characteristics: (1) techniques employed in its performance are similar among providers; (2) it is performed frequently by most practitioners; and (3) there is little risk of death or complications directly due to its performance. From the services identified as routine we chose five which the owner of a dog and cat might require. The five services included in our survey were:

1. The spaying of a female dog (bitch);
2. DHL (distemper, hepatitis and leptospirosis) booster shots for a female dog;
3. A rabies shot for a dog;
4. Neutering (castrating) a male cat; and
5. Feline distemper and rhinotracheitis inoculations for a cat.

231/ See Section IB supra.

232/ Id.

233/ See, e.g., AVMA Directory - 1976.

234/ See Appendix 4 infra.

We then wrote descriptions for two fictional animals. These descriptions included characteristics for each animal that could have affected the prices for the surveyed services. Each of the persons conducting the survey were given an instruction sheet which contained the following descriptions of the fictional dog and cat:

Female Dog (Bitch):

1. This dog is a German Shepherd.
2. She's about a year-and-a-half (18 mos.) old.
3. She weighs approximately 37 pounds.
4. She's never been bred and she's not "in heat."
5. The dog is not registered but is purebred.
6. She's been raised as a pet, lives indoors and is house-trained.
7. She's had all her "puppy shots."
8. She seems healthy, does not have fleas or any visible signs of disease.
9. The dog was raised by a private family (not a kennel).
10. She's never been to a "pound" or other public facility.
11. Her name is Cass.

Male Cat (Tom):

1. This cat is a Siamese sealpoint.
2. He's about a year-and-a-half (18 mos.) old.
3. The cat is not registered, but is purebred.
4. The cat is a family pet. Although he's an "indoor animal," he's allowed to roam freely outdoors.
5. He's had feline distemper shots as a kitten, but has never had Rhino vaccine administered.
6. He's healthy and has no visible signs of disease.
7. The cat was raised by a private family and has never been impounded.
8. His name is Zak.

We chose six cities for our survey on the basis of their geographic location and size. <sup>235/</sup> The six cities surveyed were: Denver, Colorado; Atlanta, Georgia; Washington, D. C.; Dallas, Texas; Chicago, Illinois; and San Francisco, California. Using random selection techniques, we selected a minimum of thirty percent of the practicing small animal veterinarians in each area for the survey sample.

The veterinary facilities selected for our sample were telephoned by a member of the Denver Regional Office staff and asked for prices for the five services detailed above. The callers did not identify themselves as members of the FTC staff and spoke to whoever answered the telephone. Each caller used a standardized "script" which he or she memorized. The results of this survey are summarized in Tables 8 and 9. It should be noted that staff encountered very little resistance from survey respondents. Price quotations were given over the telephone by the vast majority of establishments in our survey. This would seem to indicate that it is possible for consumers to engage in search for veterinary goods and services. Such search, however, is both difficult and expensive. On average, it took more than sixteen hours per city to obtain the information we were seeking. Were this information available through advertisements, both the time and cost of search would be reduced considerably.

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<sup>235/</sup> See Appendix 5 infra.

TABLE 8  
SUMMARY OF PRICE DISPERSION  
CHARTS

Frequency distribution of the percentage differences between the high and low price for 1,052 veterinary service entries. 236/

Price Difference Between the High and Low Prices (High as % of Low)	Number of Occurrences (N=1,052)	Frequency of Occur.	Cumulative Frequency
100%-124%	180	17.11%	100.00%
125%-149%	241	22.91%	82.89%
150%-174%	236	22.43%	59.98%
175%-199%	97	9.22%	37.55%
200%-224%	133	12.64%	28.33%
225%-249%	35	3.33%	15.69%
250%-299%	63	5.99%	12.36%
300%-399%	52	4.94%	6.37%
400%-above	15	1.43%	1.43%

Source: Denver Regional Office  
Federal Trade Commission

As Table 8 illustrates, more than 37 percent of the prices for the surveyed services were 175 percent or more of the lowest prices for each service in each of the geographic markets. Twenty-eight percent of the prices were 200 percent or more of the low prices.

Table 9 summarizes the dispersion measurements for each surveyed service in each geographic area.

236/ This table is not intended to illustrate inter-city price dispersion. It is merely a summary of the Tables appearing in Appendix 5 *infra*.

TABLE 9

	SPAY DOG	DHL BOOSTER DOG	RABIES DOG	NEUTER CAT	FELINE DIST. & RHINO CAT
1. WASHINGTON, D. C.:					
RESPONSE SIZE	28	31	31	32	29
RANGE	\$40-85	\$3-15	\$3-15	\$15-45	\$6-20
MEAN	\$54.62	\$10.16	\$8.90	\$23.86	\$13.72
STAND. DEVIATION	12.13	2.42	2.29	7.73	3.40
COEFFICIENT OF VAR.	22.21	23.82	25.73	32.40	24.78
2. DALLAS, TEXAS					
RESPONSE SIZE	32	32	32	33	32
RANGE	\$40-72	\$6-14	\$5-7	\$15-40	\$6-20.50
MEAN	\$53.47	\$8.31	\$6.00	\$21.65	\$12.00
STAND. DEVIATION	7.75	1.48	.57	4.85	3.34
COEFFICIENT OF VAR.	14.49	17.81	9.50	22.40	27.83
3. DENVER, COLORADO					
RESPONSE SIZE	33	33	33	33	31
RANGE	\$30-76.50	\$6-12	\$5-8	\$13.50-30	\$7-15
MEAN	\$49.47	\$8.61	\$5.33	\$20.26	\$11.05
STAND. DEVIATION	9.65	1.55	.69	3.55	2.26
COEFFICIENT OF VAR.	19.51	18.00	12.95	17.52	20.45
4. CHICAGO, ILLINOIS					
RESPONSE SIZE	39	40	40	40	39
RANGE	\$45-90	\$5-21	\$5-10	\$15-60	\$6-30
MEAN	\$63.35	\$8.79	\$8.09	\$27.19	\$12.75
STAND. DEVIATION	10.50	2.51	1.29	8.04	4.65
COEFFICIENT OF VAR.	16.57	28.56	15.95	29.57	36.47
5. SAN FRANCISCO, CALIFORNIA					
RESPONSE SIZE	50	50	50	51	45
RANGE	\$40-77.50	\$4.50-15	\$4.50-12.50	\$12-41.50	\$8-21.50
MEAN	\$56.12	\$10.68	\$8.73	\$20.58	\$13.90
STAND. DEVIATION	9.37	2.23	1.40	4.94	3.24
COEFFICIENT OF VAR.	16.57	20.88	16.04	24.00	23.31

	SPAY DOG	DHL BOOSTER DOG	RABIES DOG	NEUTER CAT	FELINE DIST. & RHINO CAT
6. ATLANTA, GEORGIA					
RESPONSE SIZE	28	26	26	27	26
RANGE	\$40-90.50	\$6-15	\$5-8	\$20-69.50	\$6-18.50
MEAN	\$58.29	\$10.58	\$6.04	\$30.24	\$11.87
STAND. DEVIATION	10.16	1.85	.5274	10.69	5.06
COEFFICIENT OF VAR.	17.43	17.49	8.73	35.35	42.63

SOURCE: Federal Trade Commission, Denver Regional Office

The standard measure of dispersion noted in this table is the "coefficient of variation." This is a measure of the "clustering" of observed prices around the mean or average price. <sup>237/</sup> As the reader will note, the coefficients of variation range from 8.73 percent to 42.63 percent. The lowest coefficients of variation calculated were generally for rabies shots. These measurements skew our statistics in both Tables 8 and 9. They should be substantially discounted, however, for two reasons: (1) veterinarians rely on the provision of rabies shots to puppies and kittens as a primary business-builder; consequently, when independently determined, the price of this service tends to be as low as practicable; (2) there is substantial evidence that veterinarians in some areas, including at least two of our survey areas, have fixed the prices of rabies shots. <sup>238/</sup>

Staff believes that the data we have collected demonstrates that the prices for the surveyed services are widely dispersed within relevant geographic markets. We further believe that the magnitude of the price dispersion found supports the hypothesis that consumers of veterinary services are substantially harmed by the system of restrictions on veterinary advertising.

D. Price Dispersion in the Veterinary Profession As an Indicator of Substantial Economic Harm to Consumers

As previously noted, where a high degree of price dispersion is present in an industry that restricts advertising, we can usually predict that the average prices for goods and services

<sup>237/</sup> The coefficient of variation is calculated by dividing the mean by the standard deviation.

<sup>238/</sup> Documents supporting these allegations are, in staff's opinion, exempt from public disclosure. Their release could substantially interfere with ongoing law enforcement efforts.

produced by that industry will be higher than they would be if more relevant consumer information were available. <sup>239/</sup> Unless the low-priced sellers within such industries are selling at prices below their costs, we may assume that they are able to realize a profit notwithstanding the fact that they charge less than the mean price for substantially similar goods or services. We may also assume that the high prices charged by some sellers in such an industry are at least partially justified on the basis of purported "quality" differences. For example, some sellers may charge higher prices than others because they are more experienced, or because they are more conveniently located, or because they are open during more convenient hours. While consumers may choose among alternative providers on the basis of such "quality" differences, it is difficult to determine how they affect a market where price search is absent. It is correspondingly difficult, if not impossible, to determine whether price differences among sellers are cost-justified on the basis of "quality" when search is absent.

It is logical to assume that many consumers of veterinary services choose among alternative providers on the basis of incomplete information. That is, since search is difficult and expensive in the veterinary market because of restrictions on veterinary advertising, consumers must base their purchasing decisions primarily on experience. While some of the trial-and-error aspects of such search may be eliminated by word-of-mouth referrals, the consumer is left, on the whole, to his or her own experience to determine whether the veterinarian chosen provides high-quality services at "fair" prices.

Because prices vary widely among veterinarians for substantially identical services and because the consumer is generally unaware of the magnitude of these variations, we must assume that the veterinary market lacks a competitive pricing structure. (Although we recognize the possibility of price differences based on "quality" factors, it seems illogical to assume that the whole of the demonstrated price dispersion within the market is cost-justified on the basis of such factors.) Consequently, the restraints on veterinary advertising have the capacity to cause two kinds of economic harm. First, they may cause consumers to pay higher prices than they would if they could inexpensively compare price and non-price information concerning alternative sellers. This variety of loss is referred to by economists as a "redistributive" loss since its effect is the inequitable transfer of wealth from consumers to producers. The second variety of economic harm resulting from veterinary advertising restraints occurs because existing and potential

<sup>239/</sup> See, e.g., text accompanying notes 224 and 228 *supra*. This is because we have no markets where advertising occurs which we can compare with the markets where advertising is absent.

consumers may forego purchases of veterinary services out of ignorance of providers who offer such services at prices that they are willing and able to pay. As a result, the demand for veterinary services is depressed, and concomitantly, the output of these services is restricted. Economists call the harm which results from this process "welfare" or "deadweight" loss. This loss does not represent the transfer of existing wealth, but rather the suppression of potential wealth to the detriment of the entire society.

It is difficult to measure accurately either the redistributive or deadweight losses that occur in the veterinary market as a result of advertising prohibitions and restrictions. Although advertising is legally permissible in several states, virtually no advertising occurs.

Even though we cannot provide statistics of economic losses due to restrictions on veterinary advertising in a manner similar to that provided by Professor Benham for the ophthalmic industry, we can provide some figures which strongly imply that substantial harm to consumers results from the absence of inexpensive price search mechanisms. For example, from our survey of the frequency of performance of selected veterinary service we can estimate that the average small animal practitioner performs 7.72 dog and cat spays per week. <sup>240/</sup> On average, 55 percent of these spays are performed on dogs. <sup>241/</sup> From our price dispersion surveys, we can then estimate that the average price for dog spays by private, small animal veterinarians is \$55.89. <sup>242/</sup> By multiplying the average number of dog spays performed per veterinarian per year by the number of small animal practitioners and then multiplying this result by the average price of such service, we estimate that \$173,200,650 per year is spent for dog spays at private veterinary facilities in the United States. <sup>243/</sup> If all dog spays during a year were performed by the low-priced providers identified in our price dispersion survey, the total

<sup>240/</sup> This figure is derived from the information summarized in Table 11, Appendix 4 *infra*. Where ranges of spayings and neuterings per week were given, we determined the mean for the range.

<sup>241/</sup> This is the mean of the data concerning the "percentage of dog spays" summarized in Table 11, Appendix 4 *infra*.

<sup>242/</sup> This is the mean of all prices for dog spays in our six-city sample.

<sup>243/</sup> The number of small animal practitioners used in this calculation was derived from the estimate in Table 2 *supra*.

cost for such service would be \$121,240,455, a difference of nearly \$52 million. <sup>244/</sup> Thus, if all veterinary consumers who purchase dog spays were to choose among alternative providers solely on the basis of price, we can predict that they would receive a substantial economic benefit.

We do not, of course, expect consumers to make purchasing decisions based solely on price. Nor do we expect prices to become absolutely homogeneous at a low-price level no matter how inexpensive search becomes. We do believe, however, that consumers will be influenced by price when making purchasing decisions among veterinarians once search becomes less difficult. The calculations cited immediately above are admittedly rough. However, they do indicate, by order of magnitude, the potential benefits which may accrue to consumers if advertising for veterinary services is permitted.

Other information we have received indicates a high-degree of price elasticity for veterinary services. <sup>245/</sup> Such price elasticity reinforces a prediction of relatively high deadweight loss. If advertising by low-priced sellers occurs, one would expect this deadweight loss to be reduced since more consumers would enter the veterinary services market. The demand thus created by their entry would further the establishment of an equilibrium pricing mechanism.

Using the same data cited above to calculate potential redistributive losses for dog spays, we have estimated that the potential deadweight or "welfare" loss for dog spays to be approximately \$11.7 million annually. <sup>246/</sup> This potential loss is significant since it represents a net loss to societal welfare. This may be illustrated graphically using a simple price/output model.

<sup>244/</sup> Here, "low-priced provider" means the average of all prices charged by the lowest-priced sellers in our six-city survey.

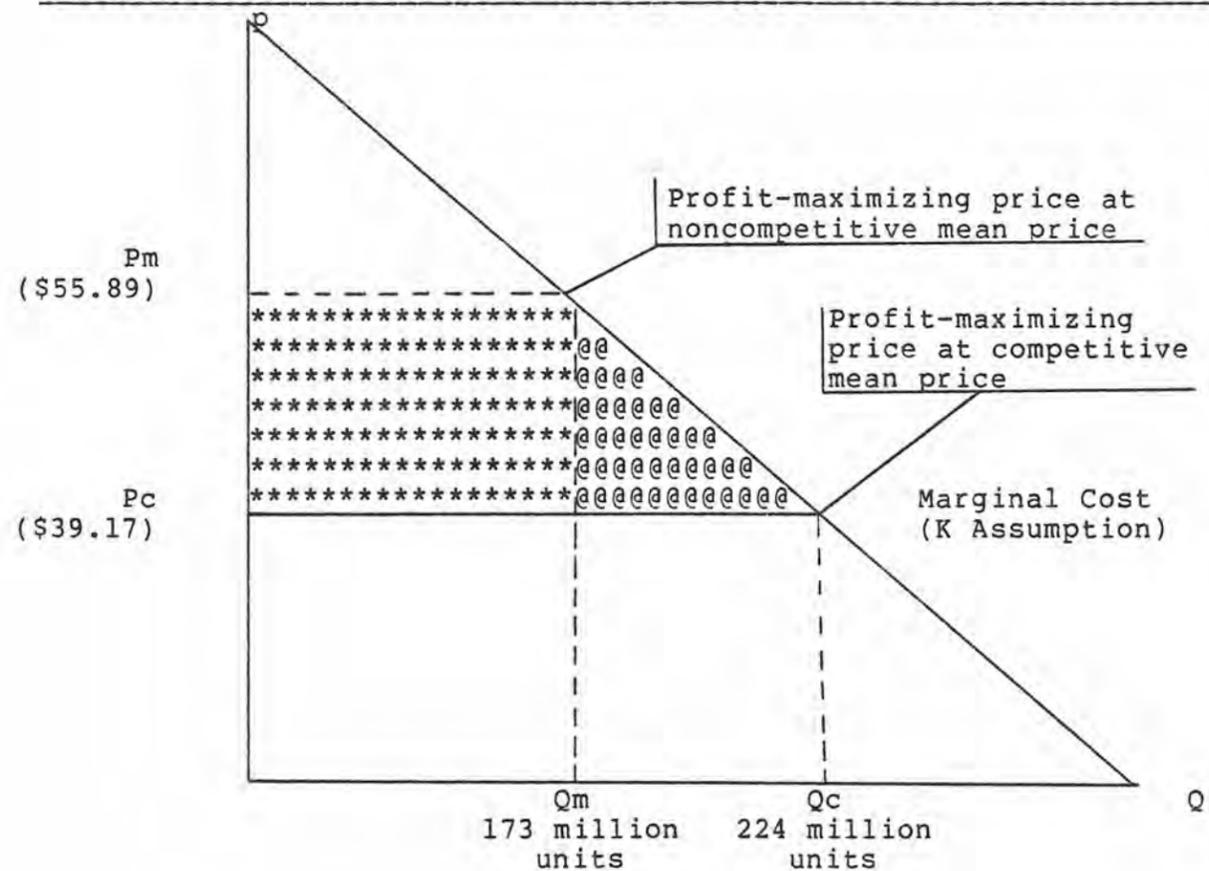
<sup>245/</sup> See, e.g., conversation between W. Ziegler, Chief Veterinarian, City of Los Angeles and F. K. Smith, FTC, September 28, 1976. When the city of Los Angeles offered spayings and neuterings for dogs and cats through municipal facilities at prices significantly below the prevailing prices for these services, the total number of animals spayed and neutered in the city increased at a rate substantially higher than the rate of increase of the dog and cat population.

<sup>246/</sup> Deadweight loss =  $1/2 E P_M Q_M T^2$ , where  $T = \frac{P_M - P_C}{P_M}$ .

E (price elasticity) was assumed to be 1.5.  $P_M$  is the current mean price for spays.  $P_C$  is the average price charged by low-cost sellers and  $Q_M$  is the total output of spays at the  $P_M$  price.

TABLE 10

Potential Redistributive and Deadweight Losses  
To Consumers of Dog Spays in the U. S.



Pm = mean price for dog spays.  
Pc = mean of low-price providers of dog spays.  
Qm = current output at mean price.  
Qc = output at mean of low price.

In this graph Pm represents the mean price for dog spays calculated from our price dispersion data. Pc is the assumed pro-competitive price, calculated as the mean of the low prices for dog spays. Qm is the current output of dog spays and Qc is the output of dog spays at the Pc mean price. We have assumed a price elasticity of 1.5 (though this assumption is arbitrary, it seems conservative on the basis of limited information regarding price elasticity). We also assume that the marginal costs for dog spays are constant. The total potential benefit to consumers from a shift from the Pm to the Pc price is represented by the area of the graph shaded by \*\*\*. This shift represents an equitable transfer of wealth from producers

(veterinarians) to consumers. The triangular area shaded by @@@ represents the creation of benefits to consumers through the increased production of services at the Pc price. In our estimation, both of these potential losses are significant.

This graph may be overly simplified, since it uses pure monopoly versus pure competition profit-maximizing prices as the basis for determining potential consumer benefits. However, since staff has concluded that the economic performance of the veterinary profession is noncompetitive, we believe that the pure monopoly/pure competition model from which our calculations derive is valid at least for illustrative purposes.

Thus far, our calculations of potential consumer losses due to price dispersion in the veterinary profession have considered only dog spays. However, an examination of the data we have collected on other services commonly performed by small animal veterinarians reveals that the differences between the mean and low prices charged for these services are as large or larger than such differences noted for dog spays. <sup>247/</sup> We therefore conclude that the total economic losses due to price dispersion, unknown to consumers because of advertising prohibitions, are quite substantial.

It is staff's view that our surveys demonstrate the existence of relatively high price dispersion in the veterinary profession. We believe that such dispersion cannot be the result of deliberate consumer decisions differentiating among veterinary service providers on the basis of "quality." The potential consumer losses resulting from such dispersion are apparent. Such potential losses are directly related to the absence of inexpensive search mechanisms in the veterinary market. Therefore, we submit that the lifting of restrictions on veterinary advertising will permit the introduction of inexpensive search mechanisms substantially benefiting the public.

<sup>247/</sup> See Tables 14-19, Appendix 5 *infra*.

IV. ARGUMENTS ATTEMPTING TO JUSTIFY VETERINARY ADVERTISING RESTRAINTS

The restraints on veterinary advertising discussed in Section II supra exist because they are thought to be justified. In this section we discuss the asserted justifications for such restrictions. We believe that none of these arguments, either singly or in combination, persuasively demonstrates an interest sufficient to overcome the conclusion that public and private restrictions on veterinary advertising are unfair acts or practices within the meaning of the Federal Trade Commission Act. 248/

A. Argument: Advertising Will Have an Adverse Effect on the Professional Image of Veterinarians

This argument is frequently made for all of the so-called "learned professions." It is based on the contention that professions are different from other occupations and, therefore, ought to be accorded different treatment for the following reasons: First, professionals are not tradesmen and need not resort to the "coarse practice" of advertising; second, unlike such tradesmen, professionals perform their services for the "public good."

The President of the Mississippi Board of Veterinary Examiners stated the argument as follows:

[V]eterinarians are members of a profession. They are not salesmen engaged in the sale of various commodities in the marketplace.

With this in mind we should next seek to analyze the essential elements of a profession . . .

- (1) A special training and long experience [are] required beyond the usual callings of life;
- (2) An ideal of service to the public and clients . . . puts a limitation on normal trade acquisitiveness
- (4) Professions have a certain economy, dignity and status, which together create a certain spirit, a certain professionalism. 249/

248/ See Section VI infra.

249/ Letter from C. Bert Hill, President, Mississippi Board of Veterinary Examiners, to J. W. Madden III, FTC, dated April 28, 1977.

While this argument may have had widespread public support in the past, we doubt that it does today. It is premised on the bald notion that veterinarians, because of their long years of training, should be accorded a special status which accrues to all "learned professionals." Somehow this status entitles veterinarians to conceal information about themselves from the public. In refuting a similar argument made for lawyers, Mr. Justice Blackmun stated:

[We] find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception. And rare is the client, moreover, even one of modest means, who enlists the aid of an attorney with the expectation that his services will be rendered free of charge.

\* \* \*

Moreover, the assertion that advertising will diminish the attorney's reputation in the community is open to question. Bankers and engineers advertise, and yet these professions are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney.

\* \* \*

Since the belief that lawyers are somehow "above" trade has become an anachronism, the historical foundation for the advertising restraint has crumbled. 250/

We submit that the observations made concerning lawyers in the above quotation are equally valid for veterinarians. While some aspects of the rather amorphous concept of "professionalism" may enjoy legal recognition, we doubt that such recognition extends to those facets of the concept which promote self-esteem or encourage special treatment based on status. Whether veterinarians, or other professionals are highly regarded by the public hardly seems an appropriate basis for regulation. Staff does not believe that

250/ Bates v. State Bar of Arizona, 45 U.S.L.W. 4895, 4900 (June 27, 1977) (internal footnotes omitted).

advertising will demean the professional status of veterinarians. But even if advertising were to tarnish the "image" enjoyed by veterinarians, this effect should not form a basis for denying consumers the substantial benefits they may derive from advertising.

B. Argument: Advertising, Particularly Price Advertising, Will Be Inherently Misleading

This argument is based upon two essential assumptions:

(1) Advertisements which offer particular veterinary services mislead the consumer by inducing the false belief that he or she, rather than the veterinarian, can determine what animals require.

(2) Veterinarians do not provide pre-packaged, fungible services, but instead offer each purchaser a unique set of services; therefore, advertisements, particularly those which contain prices, are inherently misleading since they necessarily imply that consumers may make comparisons based on the content or quality of such advertised services.

1. They Don't Know What's Good For Them

In response to staff's Notice of Intent to Recommend Rulemaking, the chairman of a state veterinary board made the following statement:

[Veterinarians engage in] the performance of services which are sufficiently beyond common understanding. The public frequently can neither know what services it truly wants and needs, nor can it evaluate what it has received.

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[T]he professional has knowledge beyond the common public knowledge. Unfortunately, the public often does not know what it wants or needs; because of this disparity in knowledge, to permit veterinarians to advertise will be uncontrollable and will encourage fraud and over-reaching. How will the public, without some specialized training or basis to form an educated opinion, know if the advertised veterinarian's service is essential, non-essential, advisable, or just a luxury to be performed at the whim of the advertiser? <sup>251/</sup>

The above quotation is typical of the "they-don't-know-what's-good-for-them" argument urged by veterinarians and other professionals. It assumes that consumers are ignorant and cannot know how to judge what services their animals may need among the

<sup>251/</sup> See note 249 *supra*.

great array that may be offered. Thus, the argument continues, it is better to keep any information about veterinary services from the public view; to do otherwise would merely encourage confusion among consumers. Staff does not share the belief that consumers are so ignorant of their animals' needs that they cannot benefit from veterinary advertising.

In order to test whether consumers of veterinary services might benefit from advertising, we conducted a telephone survey of fourteen dog breed associations. <sup>252/</sup> Representatives of these associations were asked if they would choose veterinarians on the basis of price advertising. The general response was that such advertisements would be very helpful, especially when the advertisements were for standardized services such as spaying, worming, or inoculations. Nearly all those surveyed also volunteered the comment that they can and do distinguish among veterinarians on the basis of both prices charged and "quality." That is, these representatives seemed quite willing to receive the benefits of all types of veterinary advertising since they felt well-equipped to judge the importance of the advertised service for themselves. They would not, therefore, depend entirely on advertisements to choose among veterinarians but would make use of the content of such advertisements when they believed it would be helpful.

Even some veterinarians seem to recognize the ability of consumers to determine whether their services are needed. For example, a number of veterinarians operate specialized clinics offering only a limited range of services. Frequently, services are limited to spays, neuterings and inoculations. Consumers bring

<sup>252/</sup> Representatives of the following dog breed associations were contacted by A. Franck, FTC, between February 10, 1977 and February 17, 1977.

Akita Club of America  
American Brittany Club  
Basset Hound Club of America  
Weimaraner Club of America  
Collie Club of America  
Irish Wolfhound Club of America  
Great Dane Club of America  
German Shepherd Dog Club of America  
American Bloodhound Club  
Borzoi Club of America  
Dachshund Club of America  
English Cocker Spaniel Club of America  
Saint Bernard Club of America  
Australian Terrier Club of America

their animals to such clinics for services they perceive to be needed or desired. While these consumers may not know all of the details of the procedures their animals receive, they can determine whether the services received were "good" or "bad."

There are many other examples of veterinarians allowing their clients to determine whether certain services are needed. For example, we interviewed a veterinarian from California who conducted an informal survey of his clients over a two-year period to determine which of the services he performed was perceived as over-priced. <sup>253/</sup> The vast majority of respondents indicated that distemper and rabies shots seemed to be priced higher than necessary. When the veterinarian responded to such critics by noting that the prices of these shots included a physical examination, most clients indicated that they were not aware of this and, even if they were, they would rather be given the choice of paying for the shots alone. Consequently, the veterinarian established an evening "inoculation clinic" offering only distemper and rabies shots. This clinic has been quite successful. An interesting finding to emerge from surveys of the clinic's clients is that the majority of animals inoculated had never been seen by a veterinarian previously.

While we readily agree that advertising will not provide the sole determinant for the consumer's choice among veterinarians, we cannot agree that such advertising will be either useless or misleading. The they-don't-know-what's-good-for-them argument which supports advertising prohibitions must be weighed against potential benefits consumers will receive once such prohibitions are lifted. The argument is at once paternalistic and fallacious. In refuting similar arguments made by pharmacists, Mr. Justice Blackmun in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. stated:

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and the best means to that end is to open the channels of communication rather than to close them. <sup>254/</sup>

## 2. All Services Provided by Veterinarians Are Unique

While it may be true that some of the services veterinarians perform are unique, a significant amount of veterinary practice time is consumed in the provision of routine or standardized

<sup>253/</sup> Conversation between Dr. Lester Schwabe, Walnut Creek, California, and F. K. Smith, FTC, February 10, 1977.

<sup>254/</sup> 425 U.S. 748, 770 (1976).

services. <sup>255/</sup> For example, many of the services small animal practitioners offer are of such a standardized nature that they rarely vary from one veterinarian to the next. This fact is recognized by the profession itself in standard fee schedules, standardized billing forms, and technical reports of various associations. <sup>256/</sup> Several veterinarians we have interviewed have agreed that much of what veterinarians do is standardized or routine. For example, one California veterinarian stated substantially as follows:

Every veterinary student, no matter where he attends school, learns the same basic theories. These theories are put into effect by technical procedures. Because the theories which every veterinarian learns are standard, the procedures used to put them to use are also standard.

Additionally, veterinary students learn some specific surgical and non-surgical techniques in veterinary school. These, too, become standardized methods, used in essentially the same form by all veterinarians. Dog spaying may be used as an example. Spaying is a relatively simple operation. Unless there are special circumstances present, nearly every veterinarian performs spays using the same techniques. There are variations in technique, but these are regarded as 'theoretical aberrations' by most practitioners. <sup>257/</sup>

By examining veterinary fee schedules, staff selected three areas of veterinary services performed by small animal practitioners which appeared to be routine. <sup>258/</sup> These services

<sup>255/</sup> "Routine" and "standardized" are used in this section as interchangeable concepts. It should be noted, however, that standardized services might also include those which are not routine but are provided at a fixed fee.

<sup>256/</sup> The fee schedules we examined are not currently in use. Standardized billing forms are supplied by specialized printers with the assistance of veterinarians. Technical reports of veterinary associations describe "accepted" methods for performing various veterinary services.

<sup>257/</sup> Interview with veterinarian in Anaheim, California, February 2, 1977. This individual has expressed a desire to have his identity held in confidence.

<sup>258/</sup> The selected service areas are: (1) spaying (ovario-hysterectomies) and neutering (castration) of dogs and cats; "distemper series" inoculations for dogs and cats (feline panleukopenia plus rhinotracheitis for cats and distemper, hepatitis and leptospirosis for dogs); and (3) parasitism diagnosis and treatment (commonly referred to as "worming" for intestinal parasites in dogs and cats plus heartworm parasitism detection and treatment for dogs).

were sufficiently similar among veterinarians that they were listed without definitions or descriptions on standard fee schedules. The fact that such services lend themselves to fixed prices seems enough to make them susceptible of price advertising. We theorized that the degree to which services are routine can also be inferred from the frequency of their performance. In order to test whether the three selected areas of service occupy substantial or insubstantial portions of veterinarians' practice time, we conducted a telephone survey of fifty-four veterinarians throughout the United States. <sup>259/</sup> The results of this survey indicated that a considerable part of the practice time of those contacted consists of the performance of the three tested service areas. (The results also indicate that each of the services about which we inquired is relatively discrete and may generally be offered independently from other services. <sup>260/</sup> Additionally, indications were that each of the three surveyed service areas involve very little risk of harm to the animals for which they are performed. <sup>261/</sup>)

Although we tested the "routineness" of only three services, we believe that many other procedures also may be so characterized. One of the fee schedules which we examined, for example, lists more than forty different procedures for which prices were established. The existence of a substantial number of routine veterinary services belies the argument that veterinarians always perform unique sets of procedures for each purchaser. Even though variations in required procedures may exist when routine services are provided, it appears that these services, at least, may be price advertised in a manner which does not mislead consumers. The majority in Bates came to essentially the same conclusion in refuting similar arguments made in behalf of the legal profession:

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<sup>259/</sup> See Appendix 4 infra for a more detailed analysis of this survey.

<sup>260/</sup> Id.

<sup>261/</sup> Id.

The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like--the very services advertised by appellants. Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising misleading so long as the attorney does the necessary work at the advertised price. <sup>262</sup>

In summary, staff contends that the assumptions underlying the "inherent deception" argument are not valid. First, veterinarians perform a number of services which lend themselves to non-misleading advertising. Second, consumers are not completely dependent upon veterinarians in determining the needs of their animals.

C. Argument: False, Deceptive or Unfair Business Practices Will Result from Unrestricted Veterinary Advertising

A number of representatives of state governments and professional associations have claimed that unrestricted advertising by veterinarians, particularly in the area of price advertising, will promote deceptive or unfair practices. Typical of such claims is one made by the president of the Connecticut Board of Veterinary Registration and Examination:

It seems to us that advertising prices for veterinary services is opening and expanding the opportunities for the 'bait and switch' problems that are frequently a complaint to Better Business organizations and the FTC. The advertising of fee structures will create many more problems for the regulatory agencies representing the consumer welfare. <sup>263/</sup>

This argument assumes, first, that price advertising automatically leads to deceptive practices. We agree that, as a general principle, the opportunities for deceptive practices increase when advertising is permitted. We do not agree, however,

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<sup>262/</sup> Bates v. State Bar of Arizona, supra note 250, at 4901. It should be noted that the Rule which we propose does not distinguish between "routine" and "non-routine" services. We suspect that routine services will be those which are most often price advertised. But the advertising of prices for non-routine services would also be permitted under our Rule. In staff's view, the key to the nondeceptive advertising of any service is whether the necessary work is done at the advertised price.

<sup>263/</sup> Letter from Willard H. Daniels, D.V.M., President, State of Connecticut Board of Veterinary Registration and Examination to FTC Denver Regional Office, dated April 14, 1977.

that such potential practices are best prevented by banning price advertising. This indirect method of preventing deceptive advertising forces consumers to pay higher prices for goods and services than they would if some information about costs were available. <sup>264/</sup> Furthermore, it is illogical to assume that consumers can separate the trustworthy from the unreliable sellers already in the marketplace without the benefit of easily obtained information.

A second assumption underlying this argument is that great numbers of veterinarians will deceive the public given the opportunity. Staff is unwilling to believe that a profession which has long prided itself on providing unselfish public service is composed of great numbers of cheats and mountebanks. <sup>265/</sup> Nor are we willing to believe that the majority of the public is so vulnerable that they cannot determine whether buying the advertised service at the advertised price will be beneficial.

Any deception which may result from price advertising can be dealt with through the enforcement of existing state and federal laws. <sup>266/</sup> Staff contends that this direct method of dealing with potential deception is far preferable to the indirect method of banning advertising altogether.

D. Argument: If Advertising is Permitted, the Quality of Veterinary Services Will Deteriorate

This argument assumes that the rigors of competition resulting from advertising will require veterinarians to cut corners and thereby reduce the quality of service delivery. An example of this "quality reduction" assertion is contained in a letter from the Wisconsin Veterinary Examining Board:

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<sup>264/</sup> See Section III *infra*.

<sup>265/</sup> The court in Consumers Union of the United States v. American Bar Ass'n, 427 F. Supp. 507, 508 (E.D. Va 1976), vacated and remanded for further consideration, 45 U.S.L.W. 3852 (June 28, 1977) considered a similar argument made on behalf of the legal profession:

This assumes that lawyers will be extravagant, artful, self-laudatory, and brash if released from the bonds of the advertising prohibition. If accurate, this is indeed a sad commentary on the profession. Fortunately, there is no evidence to suggest that lawyers will behave in an irresponsible manner if the advertising restrictions are removed.

<sup>266/</sup> E.g., The F.T.C. Act and similar acts of 49 states and the District of Columbia.

In order to be competitive price wise, with a fellow practitioner who is carrying on a "price war" on broken legs, the veterinarians will have to cut corners on how they perform the service. The unsuspecting consumer who feels he has gotten a bargain will never know until it's too late that what he really got was a second-rate job. . . . Does advertising improve the quality of service and improve health care to the consumer's animal? It appears that in this profession it may do just the opposite. Veterinarians may be encouraged into development of low-overhead, poorly-equipped and staffed veterinary facilities because that is all the owner veterinarian can afford. As a result, the quality of animal care declines. In this profession, the pursuit of excellence is continually stifled by cost. <sup>267/</sup>

Staff believes that this argument is based on the specious assumption that bans on advertising contribute significantly to maintenance of quality in the veterinary profession. We can find no empirical evidence to support this proposition. In fact, several studies of the effects of advertising on the quality of services offered by other professions tend to refute this "quality reduction" assertion. <sup>268/</sup>

In our opinion, advertising need not affect the quality of service delivery by veterinarians to any significant degree. Veterinarians who offer high quality services may continue to do so whether they advertise or remain silent. Similarly, veterinarians who offer inferior quality services may continue to do so. The Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council made a similar observation in considering the "quality reduction" argument asserted by pharmacists:

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<sup>267/</sup> Letter from Max E. Barth, D.V.M., Chairman, Wisconsin Veterinary Examining Board to J. W. Madden III, FTC, dated April 25, 1977.

<sup>268/</sup> See, e.g., Report of the Presiding Officer on Proposed Trade Regulation Rule Regarding Advertising of Ophthalmic Goods and Services [16 C.F.R. 111 Part 456, Public Record 215-52], FTC, December 10, 1976.

The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event. The only effect the advertising ban has on him is to insulate him from price competition and to open the way for him to make a substantial and perhaps even excessive, profit in addition to providing an inferior service. 269/

Staff contends that restrictions on advertising are improper vehicles for assuring the maintenance of high quality veterinary service delivery. Even if such restrictions have a positive influence on the maintenance of quality (which we are unwilling to believe), they result in economic losses to consumers. 270/ Already available to assure the maintenance of high quality are restrictions which do not exact such losses from consumers.

Every state already requires that applicants for veterinary licensure demonstrate minimum educational attainment. A number of states are also considering continuing education requirements for licensed practitioners. 271/ Some states also require that veterinary establishments have a minimum level of equipment. 272/ While some of these requirements may be questionable under a "least restrictive alternative" test, they do seem to be much more directly concerned with quality control than are advertising restrictions.

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269/ Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 769 (1976).

270/ See Section IV infra.

271/ E.g., California, Colorado, Oregon.

272/ E.g., Florida, Washington.

## V. Proposed Trade Regulation Rule

### A. Introduction

We have concluded that the restraints on veterinary advertising are widespread and pervasive. We have concluded, moreover, that such restraints cause consumers substantial economic harm and are not justified on the basis of the arguments proffered for their maintenance. Consequently, we believe that restraints on veterinary advertising are unfair within the meaning of the Federal Trade Commission Act. 273/ Specifically, we contend that these restraints are unfair because they contravene the clear national policy which allows the unfettered dissemination and reception of truthful commercial information. In so doing, these restraints cause consumers to pay more for veterinary goods and services than they would if sufficient commercial information were available through advertising.

We recommend the issuance of a Trade Regulation Rule to correct the abuses caused by these restraints. The Rule which we propose has the effect of limiting the enforcement of both the private and public restraints on veterinary advertising. The Rule is intended to facilitate advertising by members of the veterinary industry and, as a result, enhance the competitive performance of the veterinary profession.

We recognize that this proposed Rule alone is not sufficient to transform the veterinary profession into a model competitive industry. As previously noted, the profession is burdened with a number of other regulatory devices which need to be changed before it can perform in a reasonably competitive manner. Staff believes, however, that our proposed Rule offers a logical beginning for reform of the regulations stifling competition in the profession.

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273/ Section VI infra discusses the theory of unfairness upon which we have relied to reach this conclusion.

B. The Proposed Rule

ADVERTISING OF VETERINARY GOODS AND SERVICES

Proposed Trade Regulation Rule

§ 4xx.1 Definitions.

For this rule, these terms apply:

(a) A "disclosure" is any notice, listing, statement, or advertising format used in connection with the advertising of goods or services to the public;

(b) An "impartial body" is one or more persons who are not industry members and have no direct or indirect interest or bias with respect to the welfare of any of the parties subject to its jurisdiction;

(c) An "industry member" is a person, partnership, or corporation, or an employee or agent thereof, offering veterinary goods or services to the public or an association or group which seeks to promote veterinary care or the veterinary profession;

(d) "Specialization" means membership in a veterinary specialty board or college; limitation of veterinary practice by a person or group; or a special interest in a field of veterinary practice;

(e) An "unduly burdensome disclosure" is one which is not necessary to provide consumers with material information concerning the goods or services advertised for sale to the public.

(f) "Rudimentary principles of due process" include the opportunity: (1) to be given adequate notice of the nature of each charge; (2) to be heard concerning each charge; (3) to confront and cross-examine adverse witnesses; and (4) to be represented by retained counsel.

§ 4xx.2 Advertising of Veterinary Goods and Services. [Private Restraints]

When veterinary goods or services are offered to the public in or affecting commerce, it is an unfair act or practice for an industry member to engage, directly or indirectly, in any activity which restricts, burdens, or limits the ability of another industry member to advertise, in any medium, nondeceptive statements or claims about:

(a) the availability of such goods or services;

(b) the background of an industry member, including but not limited to, training, experience, awards, and memberships;

(c) the specialization of an industry member;

(d) the equipment or techniques used by an industry member;

(e) the prices of such goods or services, provided that the prices of all additional goods or services which are required to be purchased in a majority of cases are disclosed;

(f) any other information concerning such goods or services.

§ 4xx.3 Advertising of Veterinary Goods and Services. [Prohibited Reliance on Private or Public Restraints]

When veterinary goods or services are offered to the public in or affecting commerce, it is an unfair act or practice for an industry member to rely on or comply with any law, rule, or code of conduct of a private or non-federal governmental body as a reason for not advertising, in any medium, nondeceptive statements or claims about:

(a) the availability of such goods or services;

(b) the background of an industry member, including but not limited to, training, experience, awards, and memberships;

(c) the specialization of an industry member;

(d) the equipment or techniques used by an industry member;

(e) the prices of such goods or services, provided that the prices of all additional goods or services which are required to be purchased in a majority of cases are disclosed;

(f) any other information concerning such goods or services.

§ 4xx.4 Disciplining of Industry Members For Advertising. [Limited Private Enforcement]

To assure compliance with the provisions of this Rule and to prevent the future occurrence of the unfair acts or practices it prohibits, veterinary industry members are required to avoid taking any action to expel, censure or otherwise discipline any other industry member in reliance on any law, rule or code of conduct governing advertising, unless:

(a) a final order has been entered by a governmental body finding that the other member has engaged in acts or practices in connection with the offering of veterinary goods or services to the public in violation of any law or rule governing unfair or deceptive advertising; or

(b) as a result of a hearing comporting with rudimentary principles of due process, an impartial body finds that the other member has engaged in acts or practices in connection with the offering of veterinary goods or services to the public in violation of a code of conduct governing unfair or deceptive advertising.

§ 4xx.5 Advertising of Veterinary Goods or Services. [Prohibited Compliance with Private or Public Restraints Requiring Unduly Burdensome Disclosures]

To assure compliance with the provisions of this Rule and to prevent the future occurrence of the unfair acts or practices it prohibits, in connection with any advertisement or other publication offering veterinary goods or services to the public, industry members are required to refrain from complying with any part of any law, rule, or code of conduct of any private or non-federal governmental body requiring any unduly burdensome disclosure.

§ 4xx.6 Declaration of Commission Intent.

(a) The purpose of the rule is to remove barriers to the dissemination of nondeceptive information by industry members who wish to advertise their goods and services. It is not the intent of the Commission to require industry members to advertise.

(b) It is Commission's intent that this rule preempt all non-federal enactments which would in any way prevent or restrict dissemination of nondeceptive information by industry members. The Commission does not intend to preempt state authority to protect its citizens from unfair or deceptive advertising of veterinary medical goods or services. It is, however, the Commission's intent to preempt all non-federal enactments which would require disclosures that unnecessarily burden and thereby chill a veterinarian's right to advertise. Non-federal enactments which require disclosures in a manner consistent with, and no more restrictive than, the Federal Trade Commission Act and this rule are not intended to be preempted.

(c) The Commission intends this rule to be as self-enforcing as possible. Accordingly, it is intended that the rule be available as a defense to any proceeding which may be brought or threatened to be brought against any industry member who advertises nondeceptive information. It is also intended that the rule be employed where permitted as the basis for declaratory injunctive, or other relief against the threat or prosecution of any such proceeding.

(d) It is the intent of the Commission that all words and phrases of the rule be interpreted in a manner consistent with Federal Trade Commission Act and the cases decided thereunder.

(e) All provisions of this part are separate and severable.

## C. Discussion of the Proposed Rule

### 1. Parties Subject to the Rule

The proposed Rule applies to two types of "industry members." First, it is intended to cover any person, partnership, or corporation, or any employee or agent thereof, providing or offering veterinary goods or services. "Person, partnership, or corporation" in this context includes individual veterinarians, professional corporations, charitable organizations, or other entities providing or offering veterinary goods or services. Municipal, county, and state-operated clinics or agencies that provide veterinary goods or services are "industry members" and thus their freedom to advertise is intended to be protected by the proposed Rule. An "agent" as used in the definition of "industry member" is intended to include, but not to be limited to, referral services, advertising agencies, and groups advertising on behalf of industry members. The term "offering veterinary goods or services" is intended to cover free goods or services provided by any entity otherwise covered by the Rule.

Second, the proposed Rule is intended to cover any association, group, or person which seeks to promote veterinary care or the veterinary profession. "Associations" and "groups" are used in their broad sense, including every type of group, trade association, organization, and professional society seeking to advance or promote the veterinary profession or veterinary care. The members of such associations or groups and persons seeking those ends need not be engaged in the practice of veterinary medicine for purpose of inclusion within the coverage of the Rule as "industry members." Thus, organizations which, for example, encourage the control of animal population through veterinary care would be covered.

It is intended through the Rule's definition of "industry member" to provide the broadest possible protection to any person or entity choosing to advertise information concerning veterinary goods and services. This definition, however, is not intended to imply that the Rule is enforceable against entities over which the Commission lacks statutory jurisdiction.

### 2. Means of Publication

The proposed Rule is designed to permit the use of any and all means of communication by an industry member to bring to the public's attention any nondeceptive information, statements, or claims concerning the sale or offering for sale of veterinary goods or services. "Any medium," as used in the proposed Rule, includes, but is not limited to, newspapers, magazines, books, directories, notices, circulars, pamphlets, letters, handbills, signs, placards, displays, cards, labels, tags, telephone, radio, or television.

The effect of this aspect of the proposed Rule is thus to

make the fullest possible range of advertising media available to industry members. It is intended to supersede limitations on the use, for example, of advertisements in any type of publication, listings in any type of directory, including city, commercial, or consumer directories, and tags on animals which include commercial information. It is also intended to allow the circulation of handbills or flyers, the use of signs on motor vehicles, the mailing of advertisements, including bulk mailing, and the use of billboards or signs. It is not the intent of the Rule, however, to preempt any federal, state, or local laws or regulations prohibiting or limiting the use of specific forms of advertising such as billboards or signs for all commercial entities.

### 3. Content of the Advertisements

Section 4xx.2 of the proposed Rule is intended to facilitate the advertising of nondeceptive statements or claims concerning: (a) the availability of veterinary goods or services; (b) an industry member's background; (c) an industry member's specialization; (d) an industry member's equipment or techniques; (e) prices of veterinary goods or services; and (f) any other information about veterinary goods or services.

#### (a) Availability

Under this provision, industry members are permitted to advertise their willingness to provide veterinary goods and services to the public. Thus, for example, this provision allows the dissemination of information concerning the opening or moving of veterinary practices, office hours and locations, and offers to provide particular goods and services.

#### (b) Background

In offering veterinary goods or services, an industry member may inform the public about his background. For example, he may state his qualifications for practice, including his education, training, awards, and membership in professional or other organizations.

#### (c) Specialization

Nondeceptive statements or claims concerning the specialization of an industry member is also intended to be clearly permitted under the proposed Rule. "Specialization," as defined by the Rule in Section 4xx.1(g), includes an officially designated or authorized membership in a veterinary specialty board or college, a limitation of practice by a person or group, or a special interest in a field of practice. Thus, for example, an industry member may advertise that he specializes in a certain type of animal practice, disease, or breed.

#### (d) Techniques or Equipment

The proposed Rule is designed to permit an industry member to make nondeceptive statements or claims concerning the type of equipment or the nature of the clinical, diagnostic, and therapeutic techniques used by an industry member.

#### (e) Prices

Under the proposed Rule, an industry member may advertise the prices for any goods or services provided that adequate disclosures are made. Adequate disclosures as defined in Section 4xx.1(a) are those which set forth the prices and other material information concerning the advertised goods and services, including the prices of all additional goods and services required to be purchased in conjunction with such advertised goods and services in the majority of cases. In this context, a "good or service" is any act, tangible thing, or combination of acts or things which can be described in a manner sufficient to permit the public's understanding of what is being offered.

The Rule is intended to permit the advertising of prices for both routine and non-routine services. When the prices for routine services are advertised, the service should be described in a manner sufficient to permit the public's understanding of what is being offered. For example, if an industry member advertises the price for a rabies inoculation, the price stated should include all goods or services which are reasonably expected to be provided in the performance of rabies inoculations. If the advertiser requires additional goods or services to be purchased in conjunction with rabies inoculations in the majority of cases, he or she must disclose the prices for such goods and services in the advertisement. Thus, if the advertiser requires the purchase of a physical examination or a laboratory test in the majority of cases when rabies inoculations are provided, he or she must include the prices for these services in the advertisement.

When the prices for non-routine services are advertised, the advertiser must again describe the service in a manner sufficient to permit the public's understanding of what is being offered. The price stated may then be given as a unit price charged for the advertised service regardless of circumstances which could otherwise affect the final price charged. Alternatively, an advertiser could describe a particular surgical procedure giving a range of prices for this procedure reflecting such price-affecting factors as the age, weight or general physical condition of the animals for which it is provided.

When prices for either routine or non-routine services are advertised, the general rule to be followed is the same as that for any type of advertising -- advertisements must not be unfair or deceptive. In this context the terms "unfair" or "deceptive" shall be interpreted in a manner consistent with the Federal Trade Commission Act and the cases decided thereunder.

#### 4. Preemptive Effect of the Proposed Rule

The proposed Rule in Section 4xx.3 makes it an unfair act or practice for any industry member to rely on or comply with non-federal laws, Rules, or codes of conduct as a reason for not advertising or disseminating nondeceptive information concerning veterinary goods or services. The purpose of this section is to create a duty on the part of industry members not to be influenced by, *inter alia*, state laws, regulations of state boards, or professional association codes in making decisions on whether and how to advertise veterinary goods and services. By forcing a conflict between this federally-created duty and existing state law, this section, together with the Declaration of Commission Intent (Section 4xx.6), seeks to preempt repugnant state law by providing industry members who wish to advertise with a valid defense to any formal or informal actions brought against them. The Rule is also designed to permit this federally-created duty to supersede private codes of conduct which restrict or prohibit veterinary advertising.

The Commission by promulgating the proposed Rule would be defining federal law. The Rule would become the supreme law of the land on the matters it covers by virtue of the supremacy clause of the United States Constitution. This section of the Rule imposes the duty on each seller not to give consideration to any non-federal regulation relating to the dissemination of accurate information pertaining to the sale or offer for sale of veterinary goods and services, except as specified in the Rule. If a seller were to be prosecuted by a state for violating state law inconsistent with this Rule, the seller would be able to raise this Rule as an absolute defense against the state suit.

In addition to defensive uses, the Rule could be used affirmatively to seek declaratory judgments, injunctions, or other relief against the threatening or bringing of any such proceeding, where permitted. The Rule, however, does not create any substantive or jurisdictional rights; rather it is designed to be used within the existing framework of substantive and procedural rights.

#### 5. Limitation of Private Enforcement

Section 4xx.4 of the proposed Rule is intended to assure compliance with the other provisions of the Rule by limiting the manner whereby members of veterinary associations may be disciplined for advertising. This provision is designed to prevent the potential chilling effect on advertising which may result from private disciplinary actions directed at members

of veterinary associations who choose to advertise. <sup>274/</sup> This provision allows veterinary associations two options with respect to disciplinary actions against its members in reliance on non-federal laws and regulations or private codes of conduct governing advertising. Under the first option, members of such associations may be disciplined for advertising veterinary goods or services only after the entry of a final judgment by a governmental body finding that a violation of a public law, rule or regulation has occurred. Under the second option, the association may discipline its members only upon a finding by an impartial body, as defined in Section 4xx.1(c), that a violation of such code of conduct has occurred.

The requirement that private disciplinary proceedings be conducted by an impartial body is designed to protect veterinary association members who choose to advertise from actions based upon the proprietary interests or other biases of the association. It is not intended that the Rule foreclose the referral of complaints about association members to appropriate state or federal agencies. Nor is it intended that the Rule preclude veterinarians from offering their expert opinions in either private or public disciplinary proceedings.

#### 6. Unduly Burdensome Disclosure Requirements

Section 4xx.5 of the proposed Rule requires industry members who choose to advertise to refrain from complying with unduly burdensome disclosure requirements which may be imposed by public laws and rules or private codes of conduct. Like Section 4xx.4, this provision is designed to prevent the occurrence of future practices which have the effect of chilling the use of advertising by industry members.

It is intended that this provision create a duty on industry members who wish to advertise to ignore any unduly burdensome disclosures which may be imposed by public or private enactments. This provision has the effect of preempting future state laws that require unduly burdensome disclosures by forcing a conflict between such laws and the duty created by the proposed Rule.

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<sup>274/</sup> Pursuant to Section 18(a)(1)(B) of the FTC Act, the Commission may prescribe rules which include requirements designed to prevent the occurrence of unfair acts or practices. The unfair acts or practices which this provision is designed to prevent are those defined in Sections 4xx.2 and 4xx.3 of the proposed Rule.

The only disclosures which may be mandated under the Rule are those which are designed to provide sufficient information for consumers to ascertain what is being offered for sale. Such information must be couched in terms that are meaningful to consumers and which will enable them to identify the goods or services that are offered at the advertiser's place of business. The proposed Rule is not intended to interfere with non-federal laws or Rules of general applicability to all types of advertising of consumer goods and services. For example, if a non-federal law or Rule of general application required that a particular advertising format not be used, all advertising of veterinary goods or services must comply with that law or Rule. On the other hand, if a particular advertising format is mandated only for veterinary advertising and if such format imposes an undue burden on the advertiser, the Rule prohibits compliance with such requirement.

We recognize that, as it is now drafted, Section 4xx.5 places a heavy burden on veterinarians who wish to advertise. If in complying with the Rule, they fail to include state-required disclosures which they believe to be unduly burdensome, they run the risk of state prosecution. If, on the other hand, they include such disclosures in their advertisements, they may violate the Rule.

During the the rulemaking process we hope to develop a more definitive method for dealing with unduly burdensome disclosures. On the basis of information elicited by the rulemaking proceeding, we may, for example, recommend that certain affirmative disclosures be mandated by the Rule and that the imposition of additional disclosure requirements be prohibited. For now, though, we believe that the provision we have drafted comports with the Commission's rulemaking requirements and addresses a central issue regarding veterinary advertising.

## VI. VETERINARY ADVERTISING RESTRAINTS AS "UNFAIR" ACTS OR PRACTICES

### A. The Commission's Authority to Prohibit Unfair Acts or Practices

Section 5 of the Federal Trade Commission Act grants the Commission authority to prohibit "unfair or deceptive acts or practices." 275/ The Commission's quasi-legislative discretion to define unfair acts or practices has been recognized by the Supreme Court 276/ and reaffirmed by Congress in the Federal Trade Commission Improvement Act of 1975. Under the Improvement Act, the Commission is authorized to promulgate "rules which define with specificity acts or practices which are unfair or deceptive acts or practices." 277/ The Commission's authority to proscribe unfair acts or practices has been frequently employed as an independent basis for Commission action. 278/

### B. Scope of the Unfairness Doctrine

The responsibility of the Commission to define unfair practices is a dynamic one. As Judge Learned Hand stated:

The Commission has a wide latitude in such matters; its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop. 279/

While the courts have not expressly determined the extent of the Commission's authority to define "unfairness to consumers," the Commission has articulated its meaning on several occasions.

275/ 15 U.S.C.A. § 45(a)(1) (West Supp. 1977).

276/ See FTC v. Sperry & Hutchison Co., 405 U.S. 233, 244, (1972).

277/ 15 U.S.C.A. § 57a(a)(1)(B) (West Supp. 1977).

278/ See, e.g., All-State Indus., Inc., 75 F.T.C. 465 (1969), aff'd 423 F.2d 423 (4th Cir. 1970), cert. denied, 400 U.S. 828; FTC v. R.F. Keppel & Bros., 291 U.S. 304 (1934); Wolf v. FTC, 135 F.2d 564 (7th Cir. 1943); First Buckingham Community, Inc., 73 F.T.C. 938 (1968) (complaint dismissed); Chemway Corp., 78 F.T.C. 1250 (1971); Pfizer, Inc., 81 F.T.C. 23 (1972) (complaint dismissed). See also Comment, Section 5 of the Federal Trade Commission Act--Unfairness to Consumers, 1972 Wis. L. Rev. 1071.

279/ FTC v. Standard Educ. Soc'y, 86 F.2d 692, 696 (2d Cir. 1936), rev'd on other grounds, 302 U.S. 112 (1937).

For example, in the "Statement of Basis and Purpose" accompanying the Trade Regulation Rule for the Prevention of Unfair or Deceptive Labeling of Cigarettes, the Commission provided three factors to consider in determining whether particular acts and practices are unfair. These factors are:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether the practice is immoral, unethical, oppressive or unscrupulous, (3) whether the practice causes substantial injury to consumers (or competitors or other businessmen). 280/

In the S & H case the Supreme Court indicated that for a practice to be unfair it is not necessary that all three of these factors be present. 281/ Although elements of each factor will often be apparent, where a single factor clearly exists, and the countervailing commercial interest is slight or absent, the practice may be considered unfair and violative of the Federal Trade Commission Act.

The most recent decisions by the Commission and the courts with respect to unfairness have reaffirmed the basic principle that unfairness may be based on the commercial realities and public policy of the time. For example, the Commission in its Beneficial 282/ decision stated:

There is no doubt at this point that the Commission may adapt the substance of Section 5 to changing forms of commercial unfairness, and is not limited to vicariously enforcing other law. Therefore, in this case, as in others, those who engage in commercial conduct which is contrary to a generally recognized public value are violating the Federal Trade Commission Act, notwithstanding that no other specific statutory strictures apply. 283/

280/ Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to The Health Hazards of Smoking, 29 Fed. Reg. 8325, 8355 (1964).

281 FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45, n.5 (1972).

282/ Beneficial Corp., 86 F.T.C. 119 (1975), aff'd in pertinent part, 542 F.2d 611 (3d Cir. 1976).

283/ Id. at 171.

In the Spiegel decision, the Commission reiterated the factors enumerated in its statement of basis and purpose accompanying the Cigarette Rule as guideposts for determining whether conduct violates the unfairness standard of the Federal Trade Commission Act. 284/ On appeal, the Seventh Circuit upheld this determination. 285/ The Court of Appeals also recognized that the Commission has the authority to prohibit unfair conduct even though that conduct is specifically permitted by state law. 286/

Based on the broad definition of unfairness articulated by the Commission and affirmed by the Courts, we contend that bans on the corporate practice of veterinary medicine imposed by private and non-federal governmental bodies are unfair to consumers within the meaning of the Federal Trade Commission Act because those restraints:

- (1) cause substantial harm to consumers; and
- (2) contravene clearly articulated national policies.

C. Application of the Unfairness Theory to Bans of Corporate Veterinary Practice

1. Corporate Practice Bans Cause Substantial Harm To Consumers

When considering whether a particular practice results in substantial injury to consumers, we must determine if the social or economic benefits derived from the prohibition of that practice are greater than the benefits derived from its continuance. In essence, this determination involves a "balancing of interests" test or "marketplace fairness" test which in this context weighs the putative benefits of the corporate practice bans against the concurrent losses. 287/

284/ Spiegel, Inc., 86 F.T.C. 425, 438 (1975), modified, 540 F.2d 287 (7th Cir. 1976).

285/ 540 F.2d 287, 292-93 (7th Cir. 1976).

286/ Id. at 293. In Spiegel, the respondent's conduct involved the use of Illinois' long-arm jurisdiction to sue consumer debtors. The Commission expressed doubt that the challenged conduct was within the reach of state law and held that its jurisdiction would not be barred even if it were. 86 F.T.C. 425, 444-45 (1975).

287/ See Pfizer, Inc., supra note 278, at 60-63.

As we have discussed in Section III, "The Economic Effects of Regulation," available data indicates a strong inference of substantial harm to consumers resulting from the enforcement of veterinary advertising restrictions. The higher prices paid by consumers because of these restrictions cannot be justified by the putative benefits derived from their imposition. Viewed from another perspective, the probable reduction of consumer prices expected from the pressures derived from advertising seems clearly to overbalance whatever conceivable benefits consumers receive from a system which maintains their ignorance of essential market information. 288/

2. The Advertising Bans and Restrictions Offend Clear National Policy Favoring the Free Flow of Commercial Information

When determining whether an act or practice offends public policy, the act or practice must be viewed in light of the "conscience of the community" 289/ or "public values." 290/ These standards reflect prevailing public policy and the commercial realities of the time.

Bans and restrictions on the advertising of veterinary goods or services intrude upon a clearly established national policy favoring the free flow of commercial information to consumers. The interests of the free exchange of ideas and information are among the most highly valued of our society. These interests have their paramount expression in the First Amendment guarantee of free speech. The concept is also reflected in the heavy burdens imposed on governmental attempts to use speech as an element of any criminal offence 291/; and in the limited showings required by the courts

288/ See Sections III and IV.

289/ FTC v. Standard Educ. Soc'y, 86 F.2d 692, 696 (2d Cir. 1936), rev'd on other grounds, 302 U.S. 112 (1937).

290/ FTC v. Sperry & Hutchinson Co., supra note 281, at 244.

291/ See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969) (states may proscribe advocacy of the use of force or of law violation only where such advocacy is directed to inciting imminent lawless action and is likely to incite such action); Street v. New York, 394 U.S. 576 (1969) (conviction is subject to automatic reversal if constitutionally protected speech may have been relied on by the trier of fact to convict).

for a finding of "state action" sufficient to invoke proscriptions against interference with First Amendment freedoms by private persons. 292/

The Supreme Court has made clear in such cases as Virginia State Board of Pharmacy that the interest in free expression comprehends not only that of the speaker but also the interests of society and of potential recipients of the information. 293/ The Court has also held that the speech to which these interests extend includes not only speech concerning "truth, science, morality and arts in general," but also information of a commercial nature even when the motive for the communication is entirely economic. 294/

292/ Congress has specifically protected Constitutional rights against deprivation by private persons acting under color of state law or custom, 18 U.S.C. § 242 (1970), 42 U.S.C. § 1983 (1970); and against deprivation by private persons acting in conspiracy, 18 U.S.C. § 241 (1970), 42 U.S.C. § 1985(3) (1970). See, e.g., United States v. Guest, 383 U.S. 745 (1966) (the filing of false reports which result in arrests is sufficient state action and, as such, may invoke laws which bar private conspiracies from interfering with federally protected rights).

293/ Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

294/ Cases in addition to Virginia State Board of Pharmacy holding that interests in the flow of commercial information are protected by the First Amendment include Bates v. State Bar of Arizona, 45 U.S.L.W. 4895 (June 27, 1977) (attorney advertising restrictions violate the First Amendment); Bigelow v. Virginia, 421 U.S. 809 (1975) (conviction of newspaper editor for violation of statute prohibiting sale or circulation of a publication which encourages the procurement of an abortion, reversed on First Amendment grounds); Anderson, Clayton & Co. v. Washington State Dep. of Agriculture, 402 F. Supp. 1253 (W.D. Wash. 1975) (margarine advertising restrictions violate First Amendment); Consumers Union of United States, Inc. v. American Bar Ass'n, 427 F. Supp. 506 (E.D. Va. 1976), vacated and remanded for further consideration, 45 U.S.L.W. 3852 (June 28, 1977) (attorney advertising restrictions); Health Sys. Agency v. Virginia State Bd. of Medicine, 424 F. Supp. 267 (E.D. Va. 1976) (physician price advertising restrictions violate First Amendment); Terminal-Hudson Elecs. v. Department of Consumer Affairs, 407 F. Supp. 1075 (C.D. Cal. 1976) (restrictions on advertising of prices and places to buy eyeglasses violates First Amendment); Oklahoma State AFL-CIO v. Derryberry, 422 F. Supp. 1085 (W.D. Okla. 1976) (prescription drug price advertising restrictions violate First Amendment); Carey v. Population Serv. Int'l, 97 S. Ct. 2010 (1977) (prohibitions on advertising of (cont.)

In Virginia State Board of Pharmacy, the Court described the nature and importance of the consumer's interest in the free flow of commercial information with respect to the prices of prescription drugs as one which

. . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate . . . . Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. . . . [Y]et they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities. 295/

In the recent Bates decision, 296/ the Court continued its support of the application of First Amendment protection of commercial advertising. The constitutional issue in Bates was whether the State of Arizona could prevent attorneys from publishing in a newspaper truthful advertisements concerning

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(294 cont.) contraceptives violates First Amendment); Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Calif. 1975) (prescription drug price advertising restrictions violate First Amendment); Texas State Bd. of Pharmacy v. Gibson's Discount Center, Inc., 541 S.W.2d 884 (Tex. Civ. App. 1976) (prescription drug advertising restrictions violate state constitution); Louisiana Consumers League, Inc. v. Louisiana State Bd. of Optometry Examiners, per curiam opinion, No. 76-4471 (5th Cir. August 12, 1977) (prescription eyeglass advertising restrictions contravene consumers' First Amendment right to receive information).

295/ 425 U.S. at 763-64 (footnote omitted). The Court also emphasized:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, at what price. So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. Id. at 765 (emphasis added).

296/ Bates v. State Bar of Arizona, supra note 294.

the availability and terms of routine legal services. The Court held that "the flow of such information may not be restrained [and that] the present application of the disciplinary rule against appellants [is] violative of the First Amendment." 297/ The Bates decision, however, dealt only with attorneys' First Amendment right to advertise and did not specifically reach the related issue decided in the Virginia State Board of Pharmacy case concerning consumers' First Amendment rights to receive information. 298/

In addition to judicial recognition, numerous federal laws and regulations reflect a national policy favoring the free flow of commercial information. These laws and regulations are designed to provide consumers with information necessary for intelligent purchasing decisions and include, for example, USDA Meat Grading Requirements, 299/ the FTC Cigarette Rule, 300/ and the FTC Trade Regulation Rule Concerning Care Labeling of Textile Wearing Apparel. 301/ The consumer's interest in obtaining price information (which is surely among the most essential to intelligent purchasing of any goods or services), particularly in a manner which facilitates price comparison, forms the basis for such laws as the Automobile Information Disclosure Act, 302/ the Truth

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297/ Id. at 4904.

298/ The pending case of Consumers Union of the United States, Inc. v. American Bar Association, supra note 294, involves the publication of a directory of lawyers which would include not only prices for basic services, but also information concerning each lawyer's expertise, background and participation in organization, as well as other types of information relevant to intelligent decision-making by consumers.

299/ 7 C.F.R. § 53.1 et seq. (1977).

300/ The Cigarette Rule was superseded by the Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-40 (1970).

301/ 16 C.F.R. § 423.1 et seq. (1977).

302/ 72 Stat. 325 (1958). The House Report accompanying the Automobile Disclosure bill declared that "[t]he primary purpose of the bill is to disclose the manufacturer's suggested retail price of the new automobile so that the buyer will know what it is. This information is not available now." H.R. Rep. No. 1958, 85th Cong., 2d Sess. (1958).

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in Lending Act, 303/ and state supermarket unit pricing laws. 304/ Other states which have mandatory unit pricing laws include Connecticut, Massachusetts, Rhode Island, and Vermont; evidently no state prohibits unit pricing.

3. The Advertising Bans and Restrictions Offend Clear National Policy Favoring Competition.

Bans and restrictions on veterinary advertising also contravene a second clearly established national policy. A national policy favoring competition as our principal mode of economic organization is reflected in numerous statutes, 305/ common law principles, 306/ and other sources. 307/ That policy has been recognized by the Supreme Court: "[S]ubject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy." 308/ This policy rests on competition's proven ability to spur business efficiency and innovation and to allocate society's resources effectively. In sum, unrestrained competition yields

the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions. 309/

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303/ Consumer Credit Protection Act, 15 U.S.C.A. § 1601 et seq. (West 1976). Congress declared that "[t]he informed use of credit results from an awareness of the cost thereof by consumers." Id. at § 1601 (Congressional Findings and Declaration of Purpose).

304/ E.g., Md. Code Ann., Commercial Law § 14-101 et seq. (1975).

305/ The Sherman, Clayton, Truth in Lending, Federal Trade Commission, and Fair Packaging and Labeling Acts are a few examples.

306/ See, e.g., United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

307/ See, e.g., A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (Modern Library ed. 1937); J. Clark, Competition as a Dynamic Process (1961).

308/ United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963) (emphasis added).

309/ Northern Pac. Ry. v. United States. 356 U.S. 1, 4 (1958).

It has long been recognized that commercial advertising is an important means of implementing our national policy favoring competition. For example, courts have condemned agreements among competitors to limit price advertising as one form of price fixing, a per se violation of the antitrust laws. 310/ The Federal Trade Commission has also charged in two recent complaints that private restrictions on advertising may have anticompetitive effects. 311/ FTC has further declared that competitors' agreements to suppress certain forms of price advertising "would constitute an agreement in restraint of trade violative of Section 5 of the Federal Trade Commission Act." 312/

4. Conclusions

a. Public Restraints

Staff obviously does not dispute the propriety of state and local governmental bodies prohibiting false or unfair advertising of veterinary goods or services. Nevertheless, we have concluded that the justifications proffered on behalf of public restraints which totally ban or severely limit veterinary advertising do not justify those broad restrictions. Such restrictions on veterinary advertising go beyond what is necessary to protect the public from deception or exploitation and are not vital to the accomplishment of important state policy goals. 313/

Veterinarians and others have relied on these unduly restrictive laws and regulations prohibiting the dissemination of information concerning veterinary goods or services. This reliance offends the national policy favoring competition and the free flow of commercial information to consumers and causes

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310/ See United States v. Gasoline Retailers Ass'n, Inc., 285 F.2d 688 (7th Cir. 1961).

311/ See American Medical Association, F.T.C. Docket No. 9064 (complaint issued Dec. 19, 1975, alleging, inter alia, that respondents have illegally restrained competition among physicians in violation of FTC Act by preventing solicitation of business by advertising); and American Dental Association, FTC Docket No. 9093 (complaint issued Jan. 4, 1977, alleging, inter alia, that respondents have illegally restrained competition among dentists in violation of FTC Act by preventing solicitation of business by advertising); see also proposed Trade Regulation Rules concerning the advertising of retail prices in the prescription drug, 40 Fed. Reg. 2403 (June 4, 1975), funeral, 40 Fed. Reg. 39901 (Aug. 29, 1975), and ophthalmic goods and service industries, 41 Fed. Reg. 2399 (Jan. 16, 1976).

312/ FTC Advisory Opinion No. 268, 74 F.T.C. 1655 (1968).

313/ See Section IV supra.

consumer harm. It is therefore staff's conclusion that this reliance violates the unfairness test of Section 5 of the Federal Trade Commission Act.

Staff recognizes that state and local governmental bodies may impose disclosure requirements to prevent the occurrence of unfair or deceptive advertising practices. Requirements which specifically require the disclosure of material information, in the absence of which advertisements would have the capacity or tendency to deceive, are not unfair within the meaning of Section 5 of the Federal Trade Commission Act. That is, this kind of requirement may represent a necessary deterrent to deceptive advertising and thereby be vital to the achievement of important state policy goals.

However, if states are allowed unfettered discretion to require disclosures in advertisements for veterinary goods and services, there is a danger that unduly burdensome disclosures will be required. <sup>314/</sup> That is, if disclosures are not necessary to provide consumers with material information and would not cause

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<sup>314/</sup> For example, after the Supreme Court's decision in Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, supra note 291, the Virginia Board of Ophthalmology, on advice from the state's Attorney General, repealed its complete ban on price advertising of eyeglasses. In lieu of the absolute prohibition, the Board promulgated new regulations which require, inter alia, the disclosure of the following categories of information in all price advertisements for eyeglasses: (1) the "type and quality" of the lens material; (2) the "type and quality" of frame material; (3) the country of origin of the frame manufacturer, and (4) the frame manufacturer's identifying name or number of the advertised frame. At least one eyeglass dispenser has ignored this regulation because of its asserted "chilling effect" on First Amendment speech, see Washington Post, June 6, 1976, at D9. Considering advertising disclosure regulations such as those of Virginia, the Presiding Officer assigned to the Commission's Proposed Trade Regulation Rule Regarding Advertising of Ophthalmic Goods and Services, 16 C.F.R. Part 456, said:

It could be expected that the influential optometric organizations who oppose competition would exert strong pressure on state legislative and regulatory bodies to require so many disclosures that price advertising would be virtually unpracticable. Such disclosures would indeed eliminate any potential for deception, but again the other remedies available against deceptive advertising are far more appropriate and better designed to regulate advertising without eliminating it.

FTC, Report of the Presiding Officer on Proposed Trade Regulation Rule Regarding Advertising of Ophthalmic Goods and Services, at 86-87 (December 10, 1976) (internal footnotes omitted).

advertisements lacking such disclosures to have the capacity or tendency to deceive, then such disclosures are unduly burdensome. Unduly burdensome disclosures may effectively chill the potential for veterinary advertising and, consequently, maintain the apparent harm borne by consumers when they are unable to receive relevant market information in an inexpensive manner.

b. Private Restraints

Restrictions on advertising by veterinary professional associations as well as their effects have been discussed in detail in Section II of this report. The impact of these restraints is similar to that of public restraints. As in the case of the public restraints, the justifications proffered on behalf of these restraints do not justify these broad private restrictions.

In addition, members of the American Veterinary Medical Association agree to follow <sup>315/</sup> the Association's Principles of Veterinary Medical Ethics which prohibit, inter alia, price advertising. <sup>316/</sup> These agreements are akin to price fixing and could be condemned as an unfair method of competition <sup>317/</sup>. Nonetheless, because these practices so directly and immediately impact on consumers and conflict with basic national policies favoring competition and the free flow of commercial information to consumers, staff believes the Commission can wholly rely on an unfairness theory to condemn this conduct as an unfair act or practice. It is, therefore, staff's conclusion that these private restrictions are unfair acts or practices within the import of Section 5 of the Federal Trade Commission Act. Furthermore, staff considers the reliance on such private restrictions as a reason for not advertising to be an unfair act or practice in violation of Section 5.

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<sup>315/</sup> A condition of membership in the American Veterinary Medical Association is that members must "comply with the provisions of the Constitution, Bylaws, and Principles of Ethics of the Association." AVMA, Constitution art. 111, §3.

<sup>316/</sup> AVMA, Principles of Veterinary Medical Ethics, Annotation to Section II, "Traditional Concepts."

<sup>317/</sup> See text accompanying notes 310-12 supra.

Since private enforcement may lead to or promote other conduct which would violate Section 5, <sup>318/</sup> the Commission has the authority to impose requirements limiting such enforcement. Under the proposed Rule these requirements include a limitation on private disciplining of advertisers. Such a limitation may help to protect individual association members who wish to advertise from unwarranted disciplinary actions which are based upon proprietary interests or other biases of the association and are designed to chill veterinary advertising.

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<sup>318/</sup> See text accompanying notes 312-15 *supra*; cf. *Fashion Originators Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941).

## VII. JURISDICTIONAL CONSIDERATIONS

### A. Introduction

This section considers (1) whether the Commission has the authority to preempt state and local laws through rulemaking under the 1975 FTC Improvement Act; (2) whether the acts and practices of public and private entities which restrict or unduly burden veterinary advertising are "in or affecting commerce" and are thus subject to the Commission's jurisdiction; and (3) whether the American Veterinary Medical Association and related veterinary professional organizations are immune from the Commission's jurisdiction because of their "non-profit" status.

### B. Preemption of State Law by the Proposed Trade Regulation Rule

#### 1. Preemptive Effect of the Proposed Rule

The proposed Trade Regulation Rule is designed to remove present and future barriers to the dissemination of nondeceptive information concerning veterinary goods and services, including those barriers created by non-federal laws and regulations. Specifically, two types of enactments are intended to be preempted by the proposed Rule:

(a) non-federal laws and regulations which restrict the nondeceptive advertising of prices and other information concerning veterinary goods or services; and,

(b) non-federal laws and regulations that require disclosures which unduly burden veterinary advertising.

The proposed Trade Regulation Rule does not entirely displace the states' powers to regulate veterinary advertising. Except as limited in the manner described in (a) and (b) above, states may continue to regulate veterinary advertising by enforcing their laws prohibiting unfair or deceptive advertising.

#### 2. Issues Raised by the Proposed Preemption of State Law

The preemption of state laws and regulations by the proposed rule raises two basic issues:

(a) Does the Commission have the power to preempt state laws and regulations which are inconsistent with a Trade Regulation Rule promulgated under the authority granted by Congress in the Federal Trade Commission Improvement Act of 1975?

(b) Does the judicially developed "state action" anti-trust doctrine of Parker v. Brown and subsequent cases prevent a Trade Regulation Rule promulgated under the 1975 Improvement Act from preempting repugnant state laws and regulations?

The following sections address these two issues. Staff concludes that the Commission has the power to preempt state laws and regulations which are repugnant to a Trade Regulation Rule lawfully promulgated under the 1975 Improvement Act. Staff further concludes that the preemptive force of such a Rule is unaffected by the Parker doctrine.

3. F.T.C. Power to Preempt State Law by Promulgating Trade Regulation Rules Under the 1975 Improvement Act

a. The Preemption Doctrine

Two types of preemption can occur. <sup>319/</sup> The first is "occupation of the field," which excludes all state regulation once Congress has expressed its intent to do so. The second is "repugnancy," which excludes only those state laws and regulations which directly conflict with federal law. Repugnancy preemption is the basis of the proposed Trade Regulation Rule on veterinary advertising. Federal power to override state laws and regulations under either type of preemption derives from the supremacy clause of the Constitution. <sup>320/</sup>

Preemption under the supremacy clause occurs automatically. No inquiry is made into the importance of the state interest supporting its law. <sup>321/</sup> When preemption is based upon repugnancy with a federal statute, all that must be established is that a conflict exists between the federal statute and state law. <sup>322/</sup> Similarly, courts have generally held that valid federal

<sup>319/</sup> See generally 16 Am. Jur. 2d Constitutional Law § 207 (1962).

<sup>320/</sup> U.S. Const. art. VI, cl.2; see Gibbons v. Ogden, 22 U.S. (Wheat.) 1 (1824).

<sup>321/</sup> Free v. Bland, 369 U.S. 663, 666 (1962).

<sup>322/</sup> Note, The State Action Exemption and Antitrust Enforcement Under the Federal Trade Commission Act, 89 Harv. L. Rev. 715, 741 (1976) (hereinafter cited as "Harvard Note").

agency rules promulgated pursuant to a congressional grant of substantive rulemaking power preempt conflicting state laws. <sup>323/</sup> In such cases, agency rules have been treated like statutes, having the force and effect of "Laws of the United States" within the meaning of the supremacy clause. <sup>324/</sup> These decisions do not distinguish between various federal agencies, nor do they suggest any basis for finding that some valid substantive rules override state law while others do not. <sup>325/</sup>

b. Congressional Intent As a Factor in Determining Whether Rules of a Federal Agency Have Preemptive Force

With respect to substantive rules promulgated by a federal agency under a Congressional grant of rulemaking authority, the cases have generally been concerned only with the intent of the agency to promulgate rules with the "force and effect of law." <sup>326/</sup> The Supreme Court has indicated that Congressional intent is immaterial once a clear conflict is found between state law and federal agency rules having the force and effect of law.

<sup>323/</sup> See, e.g., Houston, E. & W. Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914) (ICC regulations); Public Util. Comm'n v. United States, 355 U.S. 534 (1958) (military procurement regulations); Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (Sup. Ct., 1963) (Dept. of Agriculture rules); Free v. Bland, 369 U.S. 663 (Sup. Ct. 1968) (Treasury regulations); Marino v. Town of Ramapo, 68 Misc. 2d 44, 58, 326 N.Y.S.2d 162, 180 (Sup. Ct. 1971) (HUD regulations); Brown v. Bates, 363 F. Supp. 897, 902 (N.D. Ohio 1973) (HEW regulations).

<sup>324/</sup> In Marino, the court stated that the "pre-emption doctrine applies where valid regulations enacted by a Federal agency conflict with state legislation. . . . In other words, the phrase in the supremacy clause 'Laws of the United States' encompasses valid Federal regulations." Marino v. Town of Ramapo, 68 Misc. 2d 44, 58, 326 N.Y.S.2d 162, 180 (Sup. Ct. 1971). Professor Davis has written that a grant of substantive rulemaking power to a federal agency gives "the rules that the agency makes . . . the same force as a statute. . . ." K. Davis, Administrative Law 126 (3d ed. 1972). See also Abbott Laboratories v. Gardner, 387 U.S. 136, 151-52 (1967).

<sup>325/</sup> See Harvard Note, supra note 322, at 742.

<sup>326/</sup> E.g., Free v. Bland, 369 U.S. 663 (1962); Public Utilities Commission v. U.S., 355 U.S. 534 (1958); Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956). See also Verkuil, Preemption of State Law By the Federal Trade Commission, 1976 Duke L.J. 225, 229 (hereinafter cited as "Verkuil").

[A] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility. 327/

A Congressional grant of authority to a federal agency to promulgate substantive rules having the force and effect of law is thus ordinarily sufficient for that agency's rules to preempt repugnant state law. This conclusion is reinforced when the legislative history of a particular statute granting rulemaking authority indicates specific Congressional intent that a federal agency's substantive rules shall preempt repugnant state law.

c. The Congressional Grant of Rulemaking Authority in the Federal Trade Commission Improvement Act of 1975

The Federal Trade Commission's power to issue substantive rules under Section 6(g) of the FTC Act, was judicially confirmed in 1973. 328/ That power was considered by Congress and specifically validated in the Federal Trade Commission Improvement Act of 1975. 329/ Section 202(a)(1)(B) of the 1975 Act provides:

[T]he Commission may prescribe . . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce. . . . Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices. 330/

327/ Florida Lime & Avocado Growers, Inc. v. Paul, *supra* note 323, at 142-43. (Dep't of Agriculture rules) (emphasis added).

328/ See Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (authority to promulgate an octane-posting rule under Section 6(g) of the FTC Act upheld).

329/ The original House version of the Improvement Act granted the FTC power to promulgate substantive rules governing "unfair or deceptive practices," but withdrew from the Commission substantive rulemaking power with respect to "unfair methods of competition." H.R. Rep. No. 1107, 93d Cong., 2d Sess., 45-46 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7702, 7727. A compromise was reached between the House and Senate which explicitly confirmed the Commission's substantive rulemaking authority with respect to "unfair practices," without affecting "any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition in or affecting commerce." S. Rep. No. 1408, 93d Cong., 2d Sess., 32 (1974) (conference report), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7755, 7764.

330/ 15 U.S.C. § 57(a)(1)(B).

Rules promulgated under this portion of Section 202 have the force and effect of law. 331/ As such, they preempt repugnant state laws and regulations. 332/ The proposed Rule on veterinary advertising will be issued under Section 202 (a)(1)(B) of the 1975 Act and is intended to and will have the force and effect of law. It therefore preempts repugnant state laws and regulations governing veterinary advertising.

d. Specific Congressional Intent Concerning the Preemptive Force of Rules Promulgated Under the Improvement Act

The legislative history of the 1975 Improvement Act on the issue of preemption by rulemaking reinforces the conclusion reached directly above. Of principal relevance are three Senate bills 333/ and one House bill, 334/ each with amendments and accompanying legislative reports.

The first Senate Bill, S. 3201, contained a specific section affirming the repugnancy preemptive effect of all exercises of FTC authority under the FTC Act. 335/ This Bill, introduced in December of 1969, failed to pass the Senate.

The second Senate Bill, S. 986, included the Magnuson-Moss warranty legislation and was introduced in February, 1971. 336/ This Bill did not contain a preemption provision, but the Committee Report specifically acknowledged repugnancy preemption by rulemaking. 337/ The Senate passed this Bill by vote of 72-2 on November 8, 1971. It received no further consideration before the end of the Ninety-Second Congress.

331 "After any substantive trade regulation rule takes effect, a violation thereof would be an unfair or deceptive act or practice in violation of Section 5(a)(1) of the Federal Trade Commission Act unless the rule specifically provides otherwise." S. Rep. No. 1408, 93d Cong. 2d Sess., 34 (1974) (conference report), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7755, 7766 (1974). The Commission is also granted authority under the 1975 Act to issue "interpretive rules" and "general statements of policy" not having the force and effect of law when it so desires. See 15 U.S.C. § 57(1)(A) See also text accompanying note 340 *infra*.

332/ See Section VII B(3)(b) *supra*.

333/ S. 3201, 91st Cong., 2d Sess. (1969); S. 986, 92d Cong., 1st Sess. (1971); S. 356, 93d Cong., 1st Sess. (1973).

334/ H.R. 7917, 93d Cong., 2d Sess. (1974).

335/ S. 3201, § 106, 91st. Cong., 2d. Sess. (1969).

336/ S. 986, 92d Cong., 1st Sess. (1971).

337/ S. Rep. No. 269, 92d Cong., 1st Sess., 28 (1971).

The third Senate Bill, S. 356, was introduced in the First Session of the Ninety-Third Congress. <sup>338/</sup> It also contained the Magnuson-Moss warranty legislation. Bill 356 initially had a section broadly confirming and detailing the reasons for repugnancy preemption by rulemaking. This preemption provision was deleted, along with the entire rulemaking section, after Chairman Engman of the FTC sent a letter to Chairman Magnuson of the Senate Commerce Committee requesting deletion of the rulemaking provisions. Chairman Engman's letter refers to "the imminent court decision" of National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (1973), then pending before the U.S. Court of Appeals for the D.C. Circuit. The National Petroleum Refiners case did not deal with preemption issues. It concerned the authority of the FTC to issue substantive rules under § 6 (g) of the FTC Act. Only in the event of an "adverse decision" did Chairman Engman feel it would be necessary to seek "additional legislative authority" for FTC rulemaking. Chairman Magnuson pledged to reintroduce a bill granting "legislative" rulemaking power to the Commission in the event of an adverse decision. The Senate Report states:

In other words, the deletion of rulemaking powers by the Committee is not to be read in any way as a reversal of the Senate's position in the 92d Congress, when it passed legislation by a vote of 72-2, which expressly conferred legislative rulemaking power upon the Commission. <sup>339/</sup>

The Committee Report to the legislation passed by Senate vote of 72-2 in the 92d Congress specifically acknowledged repugnancy preemption by rulemaking. The Senate passed Bill 356 without rulemaking or preemption provisions on September 12, 1973.

House Bill 7917 paralleled Senate Bill 356. <sup>340/</sup> Initially it contained no reference to rulemaking or preemption. A rule-making provision, ultimately enacted, was added in committee. The House Committee report is silent on preemption and rulemaking. <sup>341/</sup>

Compromises between the House and Senate were reached in December of 1974, including adoption of the House Bill rulemaking provisions. There was no conference committee discussion of preemption issues. <sup>342/</sup> The Improvement Act became law on January 4, 1975.

<sup>338/</sup> S. 356, 93 Cong., 1st Sess. (1973).

<sup>339/</sup> S. Rep. No. 151, 93d Cong., 1st Sess. 32 (1973).

<sup>340/</sup> H.R. 7917, 93d Cong., 1st Sess. (1973).

<sup>341/</sup> H.R. Rep. No. 1107, 93d Cong., 2d Sess. 32-33 (1974).

<sup>342/</sup> H.R. Rep. No. 1606, 93d Cong., 2d Sess. (1974); S. Rep. No. 1408, 93d Cong., 2d Sess. (1974).

The legislative history on the issue of preemption by rulemaking under the 1975 FTC Improvement Act can be summarized as follows: (1) it was probably not the intent of Congress in the 1975 Improvement Act to give the Commission the authority to occupy the field through promulgation of Trade Regulation Rules; and (2) it was, in all probability, the specific intent of Congress to empower the FTC to preempt state laws and regulations repugnant to Trade Regulation Rules governing unfair or deceptive acts or practices. <sup>343/</sup>

e. Procedural Safeguards in Rulemaking Under the Improvement Act

The FTC's preemption of repugnant state laws and regulations through rulemaking will always be tempered by the realities of federalism. In recognition of federal-state comity, the Commission has amended Section 1.14(a) of its Rules of Practice to insure due consideration in the course of trade regulation rulemaking of "the effect of the rule on state and local law." <sup>344/</sup> The Commission has also instructed its staff to consult with representatives of state and local governments during the course of developing a proposal for a Trade Regulation Rule. FTC staff is to "ascertain the potential effect of the proposed rule on state and local laws and the ways, if any, of resolving or minimizing potential conflicts." <sup>345/</sup> Efforts are to be made to ensure that notice is given at an early stage to state and local governments and that their participation in each stage of the rulemaking process is encouraged. <sup>346/</sup> Staff has already given such notice and encouraged such participation. <sup>347/</sup>

Congress' provision in the 1975 Improvement Act for stringent procedural safeguards provide states with an opportunity to present their views before the promulgation of Trade Regulation Rules. Hearing procedures guarantee that all states will have notice of impending Rules as well as the opportunity to make a record with written and oral presentations (including

<sup>343/</sup> See generally Verkuil, supra note 326.

<sup>344/</sup> 41 Fed. Reg. 47230-31 (1976).

<sup>345/</sup> F.T.C. Staff Bulletin No. 77-3 (Dec. 1976).

<sup>346/</sup> Id.

<sup>347/</sup> See "Notice of Intent to Recommend Rulemaking," Appendix 6. This notice was mailed to approximately 360 addresses. Those on the mailing list included state governors, state attorneys general, state legislative research staffs, and state and local consumer protection agencies. Staff received 88 responses to this mailing.

cross-examination at appropriate times). 348/ The 1975 Act specifically requires that a Rule be supported by "substantial evidence in the rulemaking record . . . taken as a whole." 349/ "Rulemaking record" is statutorily defined to include rulemaking transcripts, written submissions and any observations considered relevant by the FTC. 350/ The procedural requirements guarantee that state interests will be reflected in the record. The substantial evidence standard of judicial review ensures that those interests will be fully considered by the Commission. 351/ Rules not meeting the substantial evidence test must be set aside by U.S. Courts of Appeals. 352/

As Professor Verkuil has pointed out, "in some ways states get a much better hearing on the preemption issue before the FTC than they would before a congressional committee that was proposing a federal law which would have a similar preemptive effect." 353/

#### 4. Parker v. Brown and Preemption of State Law By Trade Regulation Rules

This section considers whether the Sherman Act antitrust analysis employed by the Supreme Court in Parker v. Brown 354/ and subsequent cases 355/ affects preemption of state law by an FTC

348/ The Act requires the Commission to publish notice of proposed rulemaking, to allow interested persons to submit written statements of their views, and to provide an opportunity for an informal hearing at which evidence and argument may be presented. 15 U.S.C. §§ 57(b)(1)-(2), (c)(1). Exemptions for a few states from the application of a Rule may be possible under the 1975 Act. See 15 U.S.C. § 57(g).

349/ 15 U.S.C. § 57(e)(3)(A).

350/ 15 U.S.C. § 57(e)(1)(B).

351/ See Harvard Note, supra note 322, at 750.

352/ 15 U.S.C. § 57(e)(3).

353/ Verkuil, supra note 326, at 246.

354/ 317 U.S. 341 (1943). The Parker analysis was foreshadowed by Lowenstein v. Evans, 69 F. 908 (C.C.D. S.C. 1895), Northern Securities v. U.S., 193 U.S. 197 (1904), and Olsen v. Smith 195 U.S. 332 (1904).

355/ Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Bates v. State Bar of Arizona, supra note 294.

Trade Regulation Rule promulgated under the Improvement Act. 356/ The Parker line of cases holds that conflicts between the Sherman Act and sovereign state action under regulatory programs will be resolved in favor of states. Such state action is, therefore, immune from the Sherman Act. 357/

(a) The inappropriateness of extending the Parker state action immunity doctrine to FTC rulemaking under the 1975 Act becomes apparent once the purposes of such rulemaking are compared with Sherman Act objectives. 358/ While the former is part of the FTC's broad consumer protection effort, 359/ the latter is predominantly concerned with antitrust considerations.

356/ There have been no cases dealing with the issue of whether an FTC Trade Regulation Rule can override inconsistent state law. In administrative complaints under Section 5 of the Federal Trade Commission Act, there has been some suggestion that the principles developed in Parker may provide a defense to an FTC proceeding against a private party or immunity to a state named as a party to an FTC action. See Asheville Tobacco Bd. of Trade v. FTC, 263 F.2d 502, 508-10 (4th Cir. 1959) (dictum); California ex rel. Christensen v. FTC, 1974-2 Tr. Cas. ¶75,328 (N.D. Cal. 1974), rev'd on other grounds, 549 F.2d 1321 (9th Cir. 1977), cert. denied, 46 U.S.L.W. 3211 (U. S. Oct. 3, 1977) (No. 76-1678). In Christensen, the district court concluded there was a substantial probability that Parker was applicable to the FTC Act. This holding immunized certain allegedly false and misleading milk advertisements from FTC suit under Section 5 because the issuer of the advertisements, the California Milk Producers' Advisory Board, was "an instrumentality of the State" and because the advertising had been authorized and issued pursuant to state law. California ex rel. Christensen v. FTC, supra, at 98,039. The district court's decision has been criticized as suffering "from insufficient analysis of the differences between the FTC and Sherman Acts." Harvard Note, supra note 322, at 719.

357/ No immunity for private parties results from state authorization, approval, encouragement or participation in conduct violating the Sherman or Clayton Acts. Parker v. Brown 317 U.S. 341, 351 (1943); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951); Cantor v. Detroit Edison Co., 428 U.S. 579, 592-3 (1976).

358/ See Badal, R. G., Restrictive State Laws and the FTC, 29 Admin. L.R. 239 (1977).

359/ See generally Reich, R. B., Consumer Protection & the First Amendment: A Dilemma for the FTC?, 61 Minn. L.R. 705 (1977); Pitofsky, R., Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L.R. 660 (1977).

In 1938, Congress enacted the Wheeler-Lea amendments to the FTC Act. These amendments expanded the Commission's jurisdiction under § 5 to "unfair or deceptive acts or practices" in addition to "unfair methods of competition" over which the Commission was given jurisdiction in 1914. The focus of the 1938 legislation was to allow proof of injury to consumers as well as competitors as a basis for Commission action. The House Report states: By the proposed amendment to Section 5, the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors. In other words, this amendment makes the consumer who may be injured by an unfair trade practice of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor. 360/

The FTC's role as a consumer protection agency, in addition to its longstanding antitrust authority, was stressed by the Supreme Court in FTC v. Sperry & Hutchinson Co., decided in 1972:

Thus, legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive but congressionally mandated standard of fairness, it, like a court of equity, considers the public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws. 361/

Improved FTC consumer protection activities were mandated by Congress in the 1975 Act authorizing the issuance of Trade Regulation Rules dealing with "unfair or deceptive acts or practices." 362/ Statutory authority under the 1975 Act does not exist for the issuance of Trade Regulation Rules dealing with "unfair methods of competition." The proposed Rule is grounded on the unfairness to consumers of the enforcement of restrictive or unduly burdensome state laws and regulations governing veterinary advertising. Such enforcement abridges First Amendment constitutional rights and has a substantial adverse economic effect upon consumers of veterinary goods and services.

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360/ H.R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937). The Wheeler-Lea amendments effectively reversed a line of Supreme Court cases: FTC v. Gratz, 253 U.S. 421 (1920), FTC v. Winsted Hosiery Co., 258 U.S. 483 (1922), FTC v. Raladam, 283 U.S. 643 (1931), and R.F. Keppel & Bros. v. FTC, 291 U.S. 304 (1934).

361/ 405 U.S. 244 (1972). See also Pep Boys-Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158 (3d Cir. 1941).

362/ 15 U.S.C. § 57(a)2.

Consumer protection policies comparable to those of the FTC Act and the 1975 Improvement Act are not to be found in the Sherman Act and its amending statutes. This is a fundamental difference. The Parker state action immunity doctrine is Sherman Act antitrust law, not FTC consumer protection law. 363/ Parker ought not, therefore, be extended to the FTC when it is enacting consumer protection Rules under the 1975 Act against unfair or deceptive acts or practices. 364/

(b) Considerations inherent in the nature of rulemaking under the Improvement Act reinforce this conclusion. 365/ The FTC Rules of Practice and the 1975 Improvement Act procedural requirements discussed in the preceding section 366/ carefully provide important procedural safeguards that are not present under the Sherman Act. These provisions are even more stringent than those of the Administrative Procedures Act. 367/ The substantial evidence standard for judicial review of the rulemaking record is also a unique safeguard not found in Sherman Act proceedings.

Ultimately, the Commission has administrative discretion to weigh in the balance and defer to important state regulatory interests in prescribing the preemptive effect of a Trade Regulation Rule. The proposed rule, for example, actually encourages enforcement of state law concerning unfair or deceptive veterinary advertising.

Private parties cannot carry out rulemaking under the 1975 Act, nor sue for damage based upon an FTC rule. The Commission alone controls the areas of state law which might be preempted. These areas will be limited in number compared to the potential for private litigation under the Sherman Act to raise issues of preemption. Finally, unlike a court of law, the Commission is able to supervise its consumer protection rules continuously, thus minimizing any disruptive effect on states.

(c) In sum, the differences in purpose, procedure, subject matter, and legislative history between the Sherman Act and the FTC Act, as amended by the 1975 Improvement Act, demonstrate

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363/ See Harvard Note, supra note 322.

364/ Staff also believes that Parker ought not be extended to substantive Trade Regulation Rules promulgated under Section 6(g) of the FTC Act. The preemptive effect of such rules need not, however, be considered here.

365/ See Harvard Note, supra note 322.

366/ Section VII (B)(3)(e).

367/ Cf. 5 U.S.C. §§ 551-557.

the inappropriateness of an extension of the Parker doctrine to the proposed Rule. 368/ Parker should not affect preemption of repugnant state laws and regulations governing veterinary advertising.

C. "In or Affecting Commerce" Jurisdiction

Prohibited conduct which has a substantial effect on interstate commerce, whether or not such conduct is itself within the flow of interstate commerce, is subject to the provisions of the FTC Act. 369/ To the extent that private acts or practices of veterinary industry members affect commerce 370/ within the meaning of the FTC Act, they are thus subject to its provisions.

It is beyond question that veterinary advertising, if not prohibited by the private action of industry members and their reliance on non-federal laws and regulations, would be in the flow of interstate commerce. Interstate commerce includes not only the sale of goods, but also the importation from one state to another of information with a commercial purpose. 371/ The Commission has expressly held that advertising across state lines is sufficient to establish Commission jurisdiction under Section 5. 372/ Proof of interstate sales is not required. 373/ Advertising of veterinary goods and services, if permitted, would undoubtedly be placed in newspapers with interstate circulations and on broadcast media received in more than one state.

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368/ This line of reasoning is supported by the Parker opinion, in which the Supreme Court examined the "purpose, the subject matter, the context and the legislative history" of the Sherman Act. 317 U.S. at 351 (1943).

369/ The FTC Act, as amended in 1975, extends to unfair or deceptive acts or practices "in or affecting commerce" 15 U.S.C. § 45(a)(1).

370/ See Goldfarb v. Virginia State Bar, supra note 355, and Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976), for recent and expansive Court readings of interstate commerce under the Sherman Act.

371/ Progress Tailoring Co. v. FTC, 153 F.2d 103, 105 (7th Cir. 1946).

372/ Surrey Sleep Prods., Inc., 73 F.T.C. 523, 554 (1968); S. Klein Dept. Stores, Inc., 57 F.T.C. 1543, 1544 (1960).

373/ Id.

The sale of veterinary goods and services in the United States amounts to more than a billion dollars annually. 374/ The practices of veterinarians directly affect the course of trade in veterinary supplies and equipment, a business involving hundreds of thousands of dollars in sales each year of which a substantial portion moves in interstate commerce. A substantial number of veterinary services are also provided to persons who cross state lines for the purpose of obtaining such services. 375/

In conclusion, the inseparability of the provision of veterinary goods and services from interstate aspects of veterinary care and advertising clearly indicate an effect on interstate commerce sufficient to invoke the jurisdiction of the Federal Trade Commission.

D. "Not For Profit" Jurisdictional Considerations

The American Veterinary Medical Association (AVMA) and related veterinary professional organizations' enjoy non-profit status. Section 4 of the Federal Trade Commission Act renders only a corporation "organized to carry on business for its own profit or that of its members" subject to the Commission's jurisdiction. 376/ However, if acts and practices which are otherwise unlawful are achieved through non-profit corporations, their "non-profit" status will not insulate them from liability under the FTC Act. It has long been held that

[the] language of the [FTC] act affords no support for the thought that individuals, partnerships and corporations can escape restraint, under the act, . . . merely because they employ as a medium therefor an . . . association . . . not itself engaged in commercial business. 377/

Moreover, whether a corporation is organized to carry on business for its own profit or that of its members within the meaning of Section 4 of the FTC Act must be determined on an ad hoc factual basis. 378/

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374/ See Section I C (3).

375/ Interviews with veterinarians in multi-state metropolitan areas, for example, indicate that many consumers cross state lines to obtain veterinary services.

376/ 15 U.S.C. § 44.

377/ National Harness Mfrs. Ass'n v. FTC, 268 F. 705, 709 (6th Cir. 1920).

378/ Community Blood Bank v. FTC, 405 F.2d 1011, 1018 (8th Cir. 1969).

Factual inquiry into the organization, purposes, and activities of the American Veterinary Medical Association and its constituent and component societies leaves no doubt that they are organized and conducted for the "profit . . . of . . . members." Article II of the Constitution of the AVMA states that the "objective of the association is to advance the science and art of veterinary medicine, including its relationship to public health and agriculture." 379/ This mandate has been broadly interpreted. The following quotation from a staff member of the AVMA illustrates the way the association represents, or is intended to represent, its members:

There is little doubt that in the future AVMA will continue to be important to its members, because it alone can represent veterinarians in all their diverse pursuits and on a national scale. It will be called upon more and more to cope with regulations imposed by federal agencies, to protect the interests of the profession . . . . It will be expected to monitor the growing specialty activities of veterinarians. It will be expected to counter deprofessionalizing influences, and to assure that veterinarians in private pursuits, in universities, in government, and in military service are fairly treated. 380/

The AVMA protects the proprietary interests of its members, inter alia, by regulating the employment of paraprofessional animal technicians, 381/ by directly participating in the accreditation of veterinary medical education, 382/ and by controlling the licensure of foreign-educated veterinarians. 383/ In light of these circumstances, it cannot be concluded that the AVMA's technical non-profit status exempts its acts and policies from FTC jurisdiction. Indeed, the AVMA clearly is the principal organization concerned with protection of the interests of veterinarians, including their proprietary interests. As such, the AVMA is subject to the Commission's jurisdiction under the FTC Act.

379/ American Veterinary Medical Association Constitution, Article II, AVMA Directory - 1976 at C116.

380/ Freeman, A Brief History of the AVMA, 169 JAVMA 120, 126.

381/ See Section ID (8).

382/ See Section ID (2).

383/ See Section ID (6).

State Veterinary Board Questionnaire

The following letter and questionnaire were sent to the state veterinary licensing boards of all fifty states and the District of Columbia.

[ Address ]

Approved by GAO  
B-180229 (S76021)  
Expires 12-31-76

Dear :

The Federal Trade Commission has directed its staff to investigate whether or not veterinarians and others may have been, or may now be, engaged in unlawful practices under the FTC Act. We have enclosed a copy of the Commission's resolution authorizing this investigation which describes the particular areas of inquiry. The staff, after completing its investigation, will present its conclusions to the Commission and make recommendations for appropriate corrective action, if any seems warranted.

Because your board is likely to possess information pertinent to the Commission's investigation, we are writing to enlist your board's voluntary assistance in our compilation of investigatory materials.

Enclosed is a list of questions, which we would appreciate your answering as completely as possible. You may answer the questions on the form provided. Please use additional sheets if necessary, numbering your answers to correspond to the numbers of the questions. You should refer to statutes, regulations or other materials in your answers; in doing so, please provide us with a complete citation to the materials you are referencing.

We would also very much appreciate your sending us a complete, current copy of the regulations, statutes, and by-laws pursuant to which your board operates. You are free, of course, to send us any other materials which you believe may be relevant to our investigation and to submit to us your views and opinions.

To be certain that your response receives due consideration, please submit it no later than \_\_\_\_\_ . Earlier responses will be greatly appreciated. You may send your responses to:

Federal Trade Commission  
Denver Regional Office  
Attn: F. Kelly Smith, Esq.  
1405 Curtis, Suite 2900  
Denver, Colorado 80202

Thank you for your kind attention.

Sincerely,

F. Kelly Smith  
Attorney

State Veterinary Board Questionnaire

1. How are members of your board selected? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
2. Does the state VMA submit to the Governor a list of candidates for appointment to the board? \_\_\_\_\_ If so, approximately what percentage of candidates recommended to the Governor by the state VMA during the last five years have not been members of the state VMA? \_\_\_\_\_
3. Is the Governor free to appoint persons whose names do not appear on a list submitted by the state VMA? \_\_\_\_\_  
  
If so, approximately how many persons appointed during the last five years were not recommended to the Governor by the state VMA? \_\_\_\_\_
4. Does your board maintain records of complaints it receives from veterinarians, the public, or from other sources? \_\_\_\_\_
5. If records of complaints are maintained, do you make summaries of such complaints for reporting purposes? If so, please furnish us with copies of such summaries for the past five years.
6. When such complaints are informally resolved, does the board maintain records of such resolutions? \_\_\_\_\_
7. If records of informal resolutions are maintained, do you make summaries of such resolutions for reporting purposes? If so, please furnish us with copies of such summaries for the past five years.
8. Does your board maintain records of disciplinary proceeding it initiates for alleged violations of its practice act, regulations or policies? \_\_\_\_\_
9. If records of disciplinary actions are maintained, do you make summaries of such actions for reporting purposes? \_\_\_\_\_ If so, please furnish us with copies of summaries for the past five years, and please furnish us with the name and address of each individual against whom formal disciplinary action has been taken within the last five years, together with the nature of the violation(s) engaged in by each such individual.
10. Does your board have the authority to recommend criminal prosecutions or civil injunctive actions for violation of your state's practice act? \_\_\_\_\_ Do you maintain records of such recommendations? We have records only on \_\_\_\_\_

such cases in which disciplinary action by the Board against an individual's license follows and is based in part on a criminal conviction.

11. If records of recommendations are kept, do you make summaries of such recommendations for reporting purposes? \_\_\_\_\_ If so, please furnish us with copies of such summaries for the past five years, and please furnish us with the name and address of each individual or business entity prosecuted or sued civilly as a result of your recommendation within the last five years.
12. Do you require that applicants for licensure attain a satisfactory score on the National Board Examination? \_\_\_\_\_ If the answer to this question is "yes", please answer the following:
- A. What is the passing grade or percentile score required for licensure in your state? \_\_\_\_\_
- B. Does your board have the authority to change the passing percentile score requirement? \_\_\_\_\_
- C. On what basis may the passing grade or percentile score be adjusted? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- D. What is the weight (on a percentage basis) given to the National Board Examination relative to other licensure requirements? \_\_\_\_\_

13. Do you require that applicants for licensure take and pass an oral-practical examination? \_\_\_\_\_

If the answer to this question is "yes," please complete the following:

- A. Please describe the manner in which the oral-practical examination is administered. (For example, how large a panel of examiners quizzes the candidate? Do you use visual aids?) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- B. What knowledge or skills does an oral-practical examination evaluate which a written examination does not or cannot? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- C. What is the weight (on a percentage basis) given to oral-practical examination relative to other licensure requirements? \_\_\_\_\_

- D. Is a record made of the oral-practical examination? \_\_\_\_\_ If so, is this record made available to the candidate? \_\_\_\_\_

- E. Does the oral-practical examination include questions not directly related to the practice of veterinary medicine? (For example, the reasons for wishing to set up practice in your state.) \_\_\_\_\_ If so, by what standards are particular answers adjudged "correct" or "incorrect"? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

14. How many candidates have been examined for licensure in each of the last five years? \_\_\_\_\_  
\_\_\_\_\_

15. Is the list of veterinary schools from which your board will accept candidates for licensure the same as the list of schools accredited by the AVMA Council on Education? \_\_\_\_\_

16. If a veterinarian licensed in another state (which does not have a reciprocity agreement with your state) wishes to obtain a license in your state, what requirements must he meet and what procedures must he follow? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

In addition to the foregoing, please answer the following specific questions:

- A. Under what circumstances must a veterinarian licensed in another state and seeking licensure in your state take and pass a written examination? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- B. Under what circumstances must such a veterinarian take and pass an oral examination? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

17. Does your state have agreements with one or more other states whereby veterinarians licensed in those states may be approved for licensure in your state on the following terms:

A. Without any examination? (If so, please list the states with which your state has such an arrangement.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

B. Without a written examination? (If so, please list the states with which your state has such an arrangement.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

C. Without an oral examination? (If so, please list the states with which your state has such an arrangement.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

D. Upon fulfillment of conditions which are otherwise less demanding than those required of candidates licensed in states with which your state does not have a reciprocity agreement? (If so, describe the conditions and list those states with which your state has such an arrangement.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

18. Since 1970, how many veterinarians licensed in other states have applied for licensure in your state? \_\_\_\_\_ How many such applicants have obtained a license? \_\_\_\_\_

19. Does your state license graduates of foreign veterinary institutions? \_\_\_\_\_

If the answer to this question is "yes," please answer the following:

A. Must a foreign-educated veterinarian obtain a certificate from the AVMA Education Commission for Foreign Veterinary Graduates (ECFVG) as a prerequisite to licensure in your state? \_\_\_\_\_

B. If so, may such a veterinarian obtain a license without further examination by presenting the ECFVG certificate to your board? \_\_\_\_\_

C. If the answer to "B" above is "No," what additional written or oral testing must such a veterinarian undergo? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

D. Must a foreign-educated veterinarian obtain a degree from an American institution of higher learning as a prerequisite to licensure in your state? \_\_\_\_\_

E. Does your state license foreign-educated veterinarians using procedures different from those recommended by the ECFVG? If so, please explain your procedures. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

20. Since 1970, how many graduates of foreign veterinary institutions applied for licensure in your state? How many such applicants have obtained a license? \_\_\_\_\_

21. Are animal technicians or veterinary assistants licensed in your state? \_\_\_\_\_

If the answer to this question is "yes," please answer the following:

A. Is the licensure of animal technicians or veterinary assistants administered by your board, by the state VMA, or by a separate board? \_\_\_\_\_

B. Approximately how many animal technicians or veterinary assistants are licensed in your state? \_\_\_\_\_

C. Approximately what percentage of candidates for licensure as animal technicians or veterinary assistants are successful in obtaining licenses? \_\_\_\_\_

D. What services may an animal technician or veterinary assistant perform? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

E. Has the board received any complaints about, or discovered any instances of, the unauthorized practice of veterinary medicine by animal technicians or veterinary assistants? What was the nature of the complaints? were they resolved? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

22. Please indicate for each of the following types of information whether it may be legally or ethically advertised by veterinarians. If it is not permissible to advertise the particular type of information listed, please cite the governing statute or regulation or summarize the policy which prohibits the advertisement of that kind of information.
- A. Announcements concerning the opening of a new practice or the moving of an existing practice; \_\_\_\_\_
  - B. Prices charged for various veterinary services; \_\_\_\_\_
  - C. Availability of prepaid veterinary care plans; \_\_\_\_\_
  - D. Credit availability or terms; \_\_\_\_\_
  - E. "Free Services"; \_\_\_\_\_
  - F. Kennel services; \_\_\_\_\_
  - G. Breeding services; \_\_\_\_\_
  - H. Animals for purchase; \_\_\_\_\_
  - I. Veterinary pharmaceuticals; \_\_\_\_\_
  - J. "Moderate," "reasonable," "low," or "discount" prices, or other terms connoting lower relative prices; \_\_\_\_\_
  - K. Specialization or limitation of practice; \_\_\_\_\_
  - L. Claims of professional superiority; \_\_\_\_\_
  - M. Trademark information \_\_\_\_\_
23. Does your board enforce adherence to a "code of ethics" of a national, state or other association of veterinarians? If so, which "code of ethics" is followed? \_\_\_\_\_

24. Do laws in your state allow veterinarians to form professional corporations? \_\_\_\_\_ If so, please cite the governing statute \_\_\_\_\_
25. May non-professional corporations legally establish veterinary care facilities in your state? \_\_\_\_\_ If not, please cite the controlling legal authority. \_\_\_\_\_
26. May veterinarians licensed in your state legally be employed by a non-professional corporation engaged in the provision of veterinary care? \_\_\_\_\_ If not, please cite the controlling legal authority. \_\_\_\_\_
27. Are there any laws, regulations, or policies in your state which:
- A. limit the number of veterinary care establishments which any veterinarian or business entity may own or operate? \_\_\_\_\_ If so, please cite the governing authority or policy. \_\_\_\_\_
  - B. restrict the location or type of building in which a veterinary care establishment may locate? \_\_\_\_\_ If so, please cite the governing authority or policy. \_\_\_\_\_
  - C. restrict the location or type of building in which a veterinary care establishment may locate? \_\_\_\_\_ If so, please cite the governing authority or policy. \_\_\_\_\_
  - D. restrict part-time practice? \_\_\_\_\_ If so, please cite the governing authority or policy. \_\_\_\_\_
28. Is there any law, regulation, or policy prohibiting the establishment of franchised veterinary care establishments in your state? \_\_\_\_\_ If so, please cite the governing authority or policy. \_\_\_\_\_
29. Is there any statute administered by the board, or any regulation or policy of the board which would prohibit or restrict a veterinarian or a veterinary care establishment from entering into a pre-paid contract to provide veterinary care to an animal or animals owned by an individual, or to all animals owned by an affiliated group of people? If so, please cite the governing authority or summarize the policy which prohibits this kind of activity. \_\_\_\_\_

30. Has the existence of a pre-paid veterinary care plan ever come to the attention of your board? \_\_\_\_\_ If the answer to this question is "yes," please complete the following:

A. Describe for each such plan, its nature, the dates of its inception and operation, and the name and location of the veterinarian or the veterinary care establishment involved. \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

B. With regard to each such plan, did the board take any action upon learning of it? \_\_\_\_\_ If so, what action, and with what result? \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

APPENDIX 2

Rate of Return Calculations 1/

High and low estimates of the rate of return for 1970 were calculated. For the high estimate, the opportunity costs were assumed to be as follows:

Year in vet. school	1	2	3	4
Books, instruments, tuition	\$400	\$1,200	\$1,200	\$1,200
Foregone income <u>2/</u>		\$6,000	\$6,000	\$6,000
Earnings (subtracted)		(\$2,000)	(\$2,000)	(\$2,000)
Total Cost	\$400	\$5,200	\$5,200	\$5,200

The return is the difference in after-tax income between veterinarians and all professional, technical and kindred workers (PTK).

	Income <u>3/</u>	Tax rate <u>4</u>	After-tax Income
PTK	\$13,257	13.7%	\$11,441
Veterinarians	19,112	16.6%	15,939
Difference			\$ 4,498

1/ Rate of return calculations were made by J. Phelan and C. Keithahn, Bureau of Economics FTC (1975).

2/ Foregone income is after-tax estimate for male PTK aged 18-24 for 1970.

3/ Bureau of the Census, 1970 Census of Population, PC(2) - 7A, table 19. Earnings in 1969 of the Experienced Civilian Labor Force who worked 50-52 weeks in 1969, males 16 years and older.

4/ Bureau of the Census, Statistical Abstract of the U.S., 1970, at 386. Rates shown here calculated by linear interpolation.

For a 40-year career, this investment has a rate of return of about 22 percent. This estimate of the rate of return may be biased upward for several reasons.

(1) Approximately 30 percent of the students may be paying out-of-state tuition. \$900 may be a better estimate of average tuition.

(2) Earnings of male PTK aged 18-24 may not be the best estimate of foregone income. Male engineers aged 18-24 who worked 50-52 weeks in 1969 had median earnings of \$8,903. <sup>5/</sup>

(3) Earnings of \$2,000 while in school may be too high. \$1,000 may be more accurate.

Using these assumptions to produce a low estimate, the opportunity cost of attending veterinary college was:

Year	1	2	3	4
Books, instruments, tuition	\$600	\$1,400	\$1,400	\$1,400
Foregone income		7,900	7,900	7,900
Earnings (subtracted) <sup>6/</sup>		(1,000)	(1,000)	(1,000)
Total	\$600	\$8,300	\$8,300	\$8,300

(4) Perhaps earnings of PTK are not the best measure of what veterinarians would have earned had they chosen to complete undergraduate college and enter the labor force. Males with

<sup>5/</sup> 1970 Census of Population, PC(2)-7A, table 23.

<sup>6/</sup> According to a survey of seventy 1974 University of Illinois graduates, "All but three answering the survey had supplemented both knowledge and income with jobs in a veterinary-related field before graduation. Nearly half (31) reported more than one type of experience. The largest number had worked in either a mixed practice, a small animal practice or at the College of Veterinary Medicine as salaried help at the clinics or as research assistants. Most reported the experience was received during their third and fourth years although many had experience prior to veterinary college or during the first two years." Illinois Veterinarian 6 (August, 1974). Thus, the \$1,000 figure is conservative.

four years (only) of college, who worked 50-52 weeks in 1969, had average earnings of \$14,313. <sup>7/</sup>

	Income	Tax Rate	After-tax Income
4 years of college	\$14,313	14.3%	\$12,266
Veterinarians	19,112	16.6%	15,939
Difference			3,673

The implied rate of return on investment is now about 13 percent.

(5) The long veterinary workweek of 1970 is likely to shorten substantially in subsequent years. This will be especially true for the new graduates. Long workweeks are mainly a feature of livestock practices, and result from the necessity of bringing the doctor to the patient. <sup>8/</sup> According to the National Academy of Sciences demand projections for 1980, only about 15 percent of the veterinarians would be in food animal practice. It thus appears that the large majority of recent graduates will be employed in the fields other than large animal practice and will thus have normal workweeks. Consequently, no adjustment for hours was made in the calculation for 1970.

(6) The high earnings of physicians occur relatively late in life, because of the years spent in internship, residency, and building up a practice. In 1969 the median earnings of male physicians aged 25-34 were less than 40 percent of the median for older physicians. Since a dollar now has a higher present value than a dollar in the future, the physician's return

<sup>7/</sup> 1970 U.S. Census of Population, PC(2)-8B. \$14,313 is the weighted average of the figure in tables 1, 5, and 6, age groups 25-64, 18-24, and 65 and older, respectively.

<sup>8/</sup> A survey of 85 Michigan practices reported an average of 60.3 hours per week for owners of large animal and mixed practices, and 42.2 hours per week for owners of small animal practices. Partners and professional assistants had shorter workweeks. *Veterinary Economics* 54 (September, 1972). In another survey, small animal veterinarians in proprietorships averaged 1,843 hours per year; in partnerships, 2,351; and in corporations, 2,278. The corresponding figures for mixed and large-animal practices were 2,613, 2,676, and 2,553. *Veterinary Economics* 27 (March, 1975). The Southern California Veterinary Medical Association 1972 survey of the Los Angeles area reported a 43-hour average workweek for veterinarians employed by private practitioners, a 38-hour week for those employed by private industry and institutions, and a 40-hour week for those working for Los Angeles County.

on his investment in medical school is less than it would be if his income were more evenly distributed over his lifetime.

The return is further reduced by the operation of the progressive income tax.

The problem of deferred earnings is much smaller for veterinarians than it is for physicians. Most start practice soon after graduation. One survey <sup>9/</sup> of income by years of practice yielded the following results:

<u>Years in Practice</u>	<u>1965 Income</u>
1 - 6	\$12,527
7 - 12	\$17,271
13 - 21	\$17,323
over 25	\$17,245
all	\$16,674

Income in the first six years of practice was 72 percent of income in the highest bracket, and 75 percent of income of all veterinarians in the survey. By contrast, in 1969 median earnings of male PTK aged 25-34 were 79 percent of the median earnings of male PTK aged 35-44. <sup>10/</sup> Adjustment for this difference in age profile of earnings reduces the return on the veterinarian's investment by about one percentage point.

(7) Wives of veterinarians often supply unpaid labor to their husband's practices. In theory, the value of this labor should be subtracted from veterinarians' earnings before calculating the rate of return. However, we have no accurate information on the number of such wives, the amount of time they worked, or the value of their time. The 1970 Census reported that the 10,098 veterinary establishments had 11,646 unpaid workers who worked more than 150 days and 1,362 unpaid workers who worked less than 150 days. <sup>11/</sup> Since proprietors and partners are included in the unpaid workers' group, it appears that most of the unpaid workers were in fact proprietors or partners. Therefore, no adjustment was made for unpaid labor of wives.

(8) Owners of veterinary establishments have a substantial investment in land, buildings, equipment, and drugs.

<sup>9/</sup> Snodgrass and Judy, The 1965 Economic Survey of Veterinarians in Private Practice, 150 JAVMA, 1465 (1967).

<sup>10/</sup> 1970 U. S. Census of Population, PC(2)-7A, table 23. Includes males in the experienced civilian labor force who worked 50-52 weeks in 1969.

<sup>11/</sup> Veterinary Economics 26 (Nov., 1972). There were 8,465 sole proprietors, 1,132 partnerships, and 497 corporations.

The return on the equity in this investment should be subtracted from the earnings of veterinarians before calculating the return on their investment in education. In 1970, total investment per practice may have been in the neighborhood of \$60,000. <sup>12/</sup> However, part of this investment was financed by debt, or perhaps leased. The cost of borrowed or leased capital is an expense and thus has already been subtracted from veterinarians' incomes. On the basis of one study <sup>13/</sup> which lists both assets and liabilities, it is assumed that the average ratio of equity to capital is 60 percent. Thus, the average equity per practice is about \$36,000. Since the ratio of practices to total veterinarians is about 40 percent, equity per veterinarian is about \$15,000. If 10 percent is a normal return on equity, then we should subtract \$1,500 per year from veterinarians' incomes before calculating the rate of return on the investment in education.

(9) However, the increasing demand for veterinarians should cause their incomes to rise relative to the rest of the population in the 1970's. During 1970-73 starting salaries of University of Illinois graduates rose more than six percent per year, <sup>14/</sup> while median income of families rose about five percent per year. Thus, it appears likely that the income trends of the 1960's will continue through the 1970's. If this does turn out to be the case, veterinarians' mean income will rise from \$19,112 in 1969 to \$35,516 in 1979, while earnings of males with four years of college will rise from \$14,313 to \$22,948. Of course, animal hospital investment requirements will also rise. But even if they were to double in a decade, the expected rate of return on the investment in veterinary education is a minimum of 16 percent. <sup>15/</sup>

<sup>12/</sup> Snodgrass and Judy, note 10 supra, reported an average of \$39,043 for solo practices in 1965. A survey of Illinois practices gave \$45,310 as the average capital investment in 1971. Other surveys give higher figures.

<sup>13/</sup> Veterinary Economics 54 (September, 1972).

<sup>14/</sup> Illinois Veterinarian 6 (August, 1974).

<sup>15/</sup> Subtracting \$1,500 cost of equity from 1969 earnings of veterinarians leaves \$17,612, or about \$14,882 after taxes for a married man with two children. The corresponding man with four years of college would have earned \$12,266, so the difference is \$2,616. Subtracting \$3,000 cost of equity from 1979 earnings of \$35,516 leaves \$32,516, or about \$26,000 after taxes. The man with four years of college would make about \$19,200 after taxes. The difference would grow by equal amounts annually until 1979, and remain at \$6,800 thereafter. The higher of the two estimates of veterinary college cost was used in this calculation.

APPENDIX 3

Summary of State Laws and Regulations  
Restricting Veterinary Advertising

1. Alabama

The board may revoke a license when the holder is ". . . habitually guilty of practices considered unethical by reputable practitioners of veterinary medicine and surgery." Ala. Code tit. 46 § 318 (1958).

2. Alaska

Regulations of the board prohibit advertising by veterinarians:

(a) no member of the veterinary profession may utilize the services of solicitors. No licensed veterinarians may participate in arrangements which share the proceeds from professional services with individuals who may have been instrumental in his having been selected to perform the particular service.

(b) A licensed veterinarian shall avoid the impropriety of employing questionable methods to attract public attention or claim to possess superior knowledge or skill in the treatment or prevention of a disease.

12 Alaska Ad. Code 68.120.

3. Arizona

The board may revoke the license of any veterinarian for "unprofessional or dishonorable conduct." Ariz. Rev. Stat. § 32-2233 (1976).

"Unprofessional conduct" is defined by Rule 8 of the Rules and Regulations of the Arizona State Veterinary Medical Examining Board:

Unprofessional and dishonorable conduct shall include such unethical and/or unprofessional acts that reflect very unfavorably upon the honor, dignity, and standing of the veterinary profession. The professional ethical standards of veterinarians licensed to practice in Arizona shall be in conformity to those standards of ethics set by the constitution, by-laws and code of ethics of the American Veterinary Medical Association and the Arizona Veterinary Medical Association.

According to the Arizona State Veterinary Medical Examining Board (letter of April 13, 1977, to the Governor of Arizona), the Arizona Veterinary Medical Association amended its code of ethics in November, 1976, so that:

1. Veterinarians may advertise in the yellow pages of the telephone book.

2. Veterinarians may advertise in veterinary journals.

3. Fraudulent or deceptive advertising is prohibited.

These amendments were evidently made in response to a suit against the association filed by the Arizona Attorney General.

4. Arkansas

The board may deny, suspend or revoke the license of any veterinarian for the "[u]se of advertising or solicitation which is false, misleading or otherwise deemed unprofessional under regulations promulgated by the Board." Ark. Vet. Med. Pract. Act Sec. 13.

The Rules and Regulations of the Arkansas Veterinary Medical Board (at Section 15) discuss advertising in some detail:

The word "advertising" in relation to the veterinary medical profession must be taken in its broadest sense. It includes all those methods by which a practicing veterinarian is made known to the public, either by himself or by others without his objection, in a manner which can fairly be regarded as having for its purpose the obtaining of patients or the promotion in other ways of the veterinarian's individual professional advantage.

Advertising, as such, is not allowed in any form.

A. Directory Listing:

Commercial telephone directory listings are limited to two in number in the classified section. One listing may be in the individual practitioner's name under the heading Veterinarians, and the other listing may be placed under the category of a veterinary hospital or veterinary clinic listing.

All listings will be in standard body type. All listings will be limited to the name, address, and telephone number of the hospital or clinic and may include the practice restrictions. In the situation of a new practice begun after the publishing of a local telephone directory, the practitioner may place his name, address, and telephone number in the classified section of local newspapers pending publishing of the next

local telephone directory. This announcement shall not exceed a standard business card size of 3 1/2" x 2".

B. New Practice or Change in Location:

A licentiate may secure a paid advertisement of not greater than two columns in width and four inches in length solely for the purpose of announcing the opening of his practice or the change of location. Such announcements may be made in local papers; limited to three consecutive issues, no pictures or graphs may be used.

C. Professional Signs:

Display signs of reasonable size and dimensions on veterinary hospitals or clinics are not regarded as objectionable, provided they do not announce special services, such as bathing, plucking, clipping, and x-ray work, which characterize the ways of the charlatan.

Display signs with lettering over 6" high would be considered unethical.

Advertising the location of facilities or the identification of premises by a veterinary practitioner through the use of display or roadside signs of such size, frequency, or poor taste as to be offensive to community standards or professional propriety shall be a violation of the rules of professional conduct. Such signs may display only the name of the establishment and the names of the veterinarians maintaining offices therein, and such traffic directions as are appropriate. The use of moving background or lettering, or the flashing signs, or representations of animals or parts of animals, is expressly prohibited, as is also the advertising of special services rendered.

D. Announcements by Mail:

Announcements of new openings, new associations, and relocations shall be sent first class in sealed envelopes. The distribution of cards or letters reminding clients of the need for seasonal or recurrent services, shall carry no further imprint than the practitioner's letterhead.

E. Advertising by Personal Cards and Letterheads:

Professional stationery and business cards may be used showing name, title, professional practice limitation, address, telephone number and office hours.

5. California

The response to our questionnaire indicates that all forms of advertising are permitted. However, under Section 4882(k) of the veterinary practice act, the board may revoke the license of veterinarians for "[a]ny act or omission with knowledge thereof which reflects unfavorably on the profession of veterinary medicine." Cal. Bus. & Prof. Code § 4882(k) (West Supp. 1977).

6. Colorado

The board may revoke the license of any veterinarian for "[u]nprofessional or unethical conduct or the engaging in practices in connection with the practice of veterinary medicine which are in violation of the standards of professional conduct as defined in this article or prescribed by the rules of the board. . ." or for "[c]onduct reflecting unfavorably on the profession of veterinary medicine." Colo. Vet. Prac. Act § 145-1-12(n), (o).

The Rules and Regulations of the Colorado Board of Veterinary Medicine at 1 c. interpret "unprofessional conduct":

The Board shall use as a guideline the code of ethics for the veterinarians as adopted by the American Veterinary Medical Association and the Colorado Veterinary Medical Association as the basis for evaluating professional conduct of licensees. Such rules shall include those pertaining to advertising and solicitation.

7. Connecticut

The board may suspend or revoke the license of any veterinarian for:

. . . (7) advertising professional superiority or the performance of professional services in a superior manner; (8) advertising fees; (9) advertising by means of large display, glaring, colored or flickering lights or neon sign or signs displaying as a part thereof the representation of any animal or part thereof; (10) advertising either by sign or printed advertisement, under the name of any corporation, company, association or trade name; (11) advertising for patronage by means of handbills, posters, circulars, motion picture, radio, television, telephone directory, newspapers, or any other media; (12) unprofessional conduct . . . .

Conn. Vet. Prac. Act § 20-202.

8. Delaware

The board may suspend or revoke the license of any veterinarian who engages in "[t]he use of advertising or solicitation which is false, misleading or is otherwise deemed unprofessional under the regulations adopted by the Board. Del. Code tit. 24, § 3313 (We have been unable to obtain the board's regulations after repeated requests.)

9. District of Columbia

The D. C. veterinary board has no statutes or regulations related to advertising practices.

10. Florida

The board is statutorily authorized to ". . . adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity . . . in the profession of veterinary medicine . . ." In adopting these rules, ". . . the board may be guided by the principles of veterinary medical ethics adopted by the American Veterinary Medical Association and the Florida State Veterinary Medical Association." Fla. Stat. § 474.081(2) (West Supp. 1976).

The board may deny, suspend or revoke the license or otherwise discipline any licensee found guilty of "[u]nprofessional or unethical conduct, or engaging in practices . . . which are in violation of the standards of professional conduct as . . . prescribed by the rules of the board," or for "[c]onduct reflecting unfavorably on the profession of veterinary medicine." Fla. Stat. § 474.31(12), (13) (West Supp. 1976).

The board further regulates advertising practices under the code of ethics it has adopted (Rules of State Board of Veterinary Medicine, Chapt. 21X-1, "Code of Ethics"):

21X-1.04 Advertising. It is unprofessional to solicit professional employment, or to employ unprofessional methods to attract public attention, or advertise the possession of a superior knowledge or skill in the treatment or prevention of any disease.

It is permissible and ethical to secure only two listings which may appear under the heading of Veterinarians in the classified section of the telephone directory. One listing may be under the individual practitioner's name, while the other listing may be placed under the category of a hospital listing. No other listing by a veterinarian under any other heading is permissible. The listing will be in standard body type and limited to the name, address and telephone number of the hospital or clinic. A qualifying statement such as "Practice Limited to Large (or Small) Animals" is acceptable, plus a telephone number for nights, Sundays and holidays.

It is permissible for a practitioner opening a hospital or office in a new locality to insert in the local newspaper an advertisement no larger than 3 x 5 for a period no longer than three days. The advertisement should be conservative, giving the name, address and telephone number of the new location. Certain additional but limited comments such as the former name and location of a clinic or hospital are permissible.

It is also permissible and ethical for a practitioner opening a hospital or office in a new locale to send dignified announcement cards informing members of the community of his opening. These announcements should be limited to the residents of the immediate vicinity and to neighboring veterinarians and friends. However, it is permissible for a veterinarian to send an announcement to a patient that he has been regularly servicing if that particular patient resides outside of the immediate vicinity.

The distribution of cards or letters by mail to remind one's clients that the time is at hand for rendering certain specific vaccinations or parasite treatment is considered a public service and the practice of preventive medicine. However, this type of distribution should be very limited and any undue mailing will cause such activity to be objectionable advertising and constitute unethical conduct.

It is unethical to make public announcements concerning veterinary activities unless said announcements are made by and through the secretaries of local or state veterinary associations. However, it is permissible for individual veterinarians to personally announce any award or scientific accomplishments after the proposed announcement has been approved by the executive board of the local or state association.

It is permissible for a veterinarian to list his name, address and telephone number on a rabies vaccination tag. Any other use of an identification tag shall be considered a form of advertisement.

11. Georgia

The board may revoke, suspend or deny the license of any veterinarian found guilty of "[t]he use of advertising or solicitation which is false, misleading or is otherwise deemed unprofessional under regulations adopted by the board," or for engaging in "[u]nprofessional conduct as defined by the board." Ga. Code Ann. § 84-1509(4), (14) (1975).

Chapter 700-8.01 of the Rules of State Board of Veterinary Medicine defines "unprofessional conduct":

Within the meaning of Ga. Code subsection 84-1509, unprofessional conduct means:

(a) Advertising:

1. Advertising in any manner except as permitted herein for the purpose of soliciting patronage.

(i) A licensed veterinarian may list his practice in any directory of general or special circulation by including therein his name, the veterinary degree to which he is entitled, his office and home address, his in-office hours of practice and his telephone numbers, and a statement of any limitation of his practice, but nothing more.

(ii) A licensed veterinarian may also list his practice in any directory of general or special circulation under a listing of Veterinary Clinics or hospitals in the same manner as set forth in subsection (a)1.(i). All listings permitted herein shall be in the same size, style, and face type as each other veterinary listing therein so that each veterinarian listed has equal visual prominence.

2. Without limitation of the foregoing, unprofessional conduct includes:

. . . (ii) Advertising professional superiority over other veterinary practitioners for the purpose of soliciting patronage. . . .

(iii) Advertising secret remedies or exclusive methods for the purpose of soliciting patronage.

(iv) Soliciting news accounts relating to the licentiates practice.

(v) A licentiate may secure a paid advertisement of not greater than two columns in width and five inches in length solely for the purpose of announcing the opening of his practice or the change of location thereof containing nothing more than the information permitted under subsection (a)1. and a brief statement of the opening of his practice or the change of location.

12. Hawaii

The board may suspend or revoke the license of any veterinarian for "[m]aking any false representations or promises through advertising or otherwise or in any manner dealing fraudulently or dishonestly in connection with the practice of veterinary medicine," or for "[p]rofessional misconduct, gross negligence or manifest incapacity." Haw. Rev. Stat. § 471-10(3),(1) (Supp. 1975).

Additionally, a response from the Governor of the State of Hawaii indicates that the "Hawaii Board of Veterinary Examiners support[s] the American Veterinary Medical Association on advertising restraints."

13. Idaho

The board may revoke, suspend or otherwise discipline any veterinarian found guilty of "[u]nprofessional conduct as defined in regulations adopted by the board." Idaho Code § 54-2112-14 (Supp. 1976).

The regulations of the board do not define "unprofessional conduct."

14. Illinois

Veterinarians are limited to the same type of advertising as medical doctors. Ill. Ann. Stat. Ch. 91, § 124.12(14) (Smith-Hurd Supp. 1977). Medical doctors are prohibited from advertising or soliciting for professional business with the exception of listings in professional and telephone directories and public print which listing may contain only name, title, degree, office location and hours, phone number and any specialty. Ill Ann. Stat. Ch. 91 §§ 16a(13), 16-1 (Smith-Hurd Supp. 1977).

15. Indiana

The board may revoke or suspend the license of any veterinarian who engages in [f]alse advertising of veterinary medical practice intended or having the tendency to deceive and defraud the public", or, "[a]ny act which in the opinion of the board is detrimental to the public interest and health." Ind. Code Ann. § 15-5-1-16(b),(d) (Burns 1973).

16. Iowa

The board may revoke or suspend the license of any veterinarian found guilty of using "untruthful or improbable statements in advertisements, publicity material or interviews having a tendency to deceive or defraud the public." Iowa Code §169.36 (7). Additionally, a veterinarian's license may be suspended or revoked for engaging in "immoral, unprofessional, or dishonorable conduct" or for "employing directly or indirectly a capper, solicitor or drummer to secure patients." Iowa Code §169.36(3),(10).

17. Kansas

The board may revoke or suspend the license of any veterinarian for engaging in "[u]nprofessional conduct as defined in regulations adopted by the board." Kan. Stat. § 47-830(n) (1973).

The Rules and Regulations of the Kansas Board at 70-1-3 (1974) defines "unprofessional conduct":

Unprofessional conduct. The term "unprofessional conduct" shall consist of any of the following acts:

(a) To solicit professional employment by word of mouth, by letters, circulars, pamphlets, newspapers, magazines, telephone books, radio, television, billboards, sign boards, hand bills, placards, posters, touters, solicitors, or any other form of advertising or by communication or interviews not warranted by personal relations.

(b) To solicit professional employment by any indirect advertisement employing any of the foregoing methods of advertising or by furnishing or inspiring magazine, newspaper, radio or television comments or procuring one's photographs to be used or published in connection with treatment of cases and all other self-laudation which offends the traditions and lowers the tone of the veterinary profession and is reprehensible.

(c) Making use of any advertising statement of a character tending to deceive or mislead the public.

(d) Advertising professional superiority of the performance of professional services in a superior manner.

(e) Advertising prices for professional services or knowingly permitting another to advertise prices for professional services.

(f) Advertising by means of a large display, lights or signs.

(g) Employing or making use of advertising solicitors or free public press agents.

(h) Advertising any free, discounted, or reduced rates for professional services or for free discounted or reduced examinations.

(i) Advertising any price or prices of corrective devices or services.

#### 18. Kentucky

The board may suspend or revoke the license of any veterinarian for engaging in "misconduct in the practice of veterinary medicine . . ." or for "any violation of the code of conduct promulgated by the board . . . ." Ky. Rev. Stat. § 321.350(6),(7) (1972).

Sections 8 and 9 of the code of conduct define the limitations on advertising (201 KAR 16:010 Secs. 8 and 9):

Section 8. A veterinarian will be guilty of misconduct if he solicits clients by direct personal solicitation or by advertising of any nature or description other than specifically permitted herein.

Section 9. A veterinarian is limited in his advertising to his professional card and announcement of the opening of his office, his listing in the telephone directory and identification of his office or clinic by proper signs. He may permit his name to be listed in directories in the same style, type or size used in the directories for the listing of professional groups such as physicians, dentists and lawyers. His listing in the yellow pages of telephone directories should be only under the heading of veterinarians or some other similar title which has long been used in the area of the listing of veterinarians. Newspaper announcements shall only announce the opening of practice or a change of location of the office, clinic or hospital of the veterinarian. Such announcements shall be reasonable in size and display and shall be limited to names, titles, address, office hours and telephone numbers. The inclusion of "practice limited to small animals" or "practice limited to horses" etc. is acceptable. The announcement may be run for a reasonable time only, but in no case shall said announcement be run for a period of more than thirty (30) days in a daily newspaper or more than four (4) times in a weekly newspaper. The only exception to the above stated number of publications shall be in the case of a beginning practitioner who shall be permitted to have the announcement published until such time as a new telephone directory is printed for the area in which he is practicing. The veterinarian may mail, to his regular clients, letters or cards announcing his movement of his office, clinic or hospital to a new location. Display signs on veterinary hospital clinics and offices shall be of a reasonable size and in good taste. It shall be misconduct for a veterinarian to advertise or announce special services such as bathing, plucking, clipping and x-ray work. Advertisements of the name of the practitioner or his office, clinic or hospital address on motor vehicles is prohibited.

#### 19. Louisiana

The board may revoke or suspend the license of any veterinarian who engages in "[t]he use of any advertising or solicitation which is false, misleading, or is otherwise deemed unprofessional under regulations adopted by the board" or for "[u]nprofessional conduct as defined in regulations adopted by the board." La. Vet. Prac. Act § 1526(4),(14).

We have been unable to obtain a copy of the board's regulations after repeated attempts.

20. Maine

The board may revoke or suspend the license of any veterinarian found guilty of "unprofessional conduct." "Unprofessional conduct" is defined to include "[a]dvertising in any manner considered by the board to be false, misleading or otherwise deemed unprofessional." Me. Rev. Stat. tit. 32 § 4864.

21. Maryland

The board is empowered to ". . . prescribe reasonable standards for the conduct of veterinary medicine, including conduct and ethics." Md. Vet. Prac. Act (Agriculture Bill, Subtit. 3) § 2-310. A licensee may have his license suspended or revoked for engaging in practices proscribed by the board's standards of conduct.

Pursuant to its authority, the board has promulgated "Standards of Practice and Code of Ethics" which includes the following section on advertising:

ADVERTISING

It shall be considered unethical for any veterinarian to violate any of the following requirements and limitations on advertising:

1. Appointment cards may be issued if the information thereon is limited to matter pertaining to the time and place of appointment and that permitted on the professional card. A professional card shall contain only the name of the veterinarian, the institution, if any, the professional title or degree, address, office hours and telephone number. It may, however, also contain a statement that the veterinarian's practice is limited to the treatment of small or large animals.
2. No veterinarian shall advertise falsely, fraudulently or in a manner likely to mislead the public or to announce his name and/or institution in any city, commercial, telephone or other public directory in public or office buildings using display or boldface type. Such listing may include any limitation of practice but shall not include any claim of specialization or any reference to special services or special equipment. No veterinarian shall use the title "doctor" or its abbreviation without further qualifying this title or abbreviation with the word, "veterinary" or "veterinarian" or his professional degree.

3. No veterinarian shall advertise for patronage by means of handbills, posters, billboards, circulars, stereopticons, slides, motion picture, radio, television, newspaper, magazine, classified directories or any other printed publications or mediums, or by means of flamboyant, glaring or flickering signs; or by means of any signs containing as part thereof any representation of any animal or any part of an animal. Lettering on signs designating hospitals, or the owner's name or profession shall not exceed eight inches in height. Such a sign shall be placed only on or near the hospital except that an additional sign may be placed away from the hospital if it otherwise meets the requirements of this regulation, is for the convenience of the public and not, in the judgment of the Board, for solicitation purposes.

4. The announcement by a veterinarian of the opening of a practice or a new office may include only the name, office, address and telephone number, any limitation in type of practice, resident address and telephone number for use if office telephone does not answer, and, in addition thereto, the professional degree, office hours, and date of opening of office and provided further that such announcement, if published in a newspaper, shall not be published in more than three issues in the local newspaper, which publications shall be consecutive and provided further that such published announcement shall not exceed one column in width and one and one-half inches (1 1/2") in length.

5. No veterinarian shall hold himself forth as being better qualified or equipped in any one or all fields of veterinary medicine as respects the skill of the operator, the quality of materials, drugs, medicines or biologicals used or methods practiced either verbally or by advertising in writing.

6. Nothing contained in these regulations shall prevent the listing of veterinarians and veterinary hospitals in classified telephone directories, provided these listings are limited to the categories of Veterinarians and Veterinary Hospitals as set forth here.

(1) If the directory has only one heading, "Veterinarians", the veterinarians' names and hospital names may be listed alphabetically and the names of associated veterinarians may be shown under each hospital name.

(2) If the directory has two headings, "Veterinarians" and "Veterinary Hospitals", only the name of the veterinarian shall appear under the "Veterinarians" heading.

(3) The "Veterinary Hospital" heading shall contain the hospital name and may list the names of associated veterinarians. Each veterinarian's name and veterinary hospital name may be accompanied by address, phone numbers, office hours, and practice restrictions - no part of any listing may be in bold type.

7. No veterinarian may list his establishment under the heading of Boarding Kennels in the classified telephone directory unless such establishment has a different name, address, entrance, and phone number from that of his office or hospital.
8. It shall be considered unethical for a veterinarian to advertise secret remedies or exclusive methods of treatment.
9. It shall be considered unethical for a veterinarian to engage in advertising as a member of partnership or corporation beyond that which would be legal for the individual.
10. It shall be considered unethical for a veterinarian to advertise case reports whether overtly or by subterfuge.
11. It shall be considered unethical for a veterinarian to offer professional services as prizes in animal shows.
12. It shall be considered unethical for a veterinarian to have his name, title or that of his hospital appearing in letters on the side of or portion of any vehicle appearing before the public.
13. No veterinarian may endorse by direct statement of implication, any product in any medium of mass communication.

22. Massachusetts

The board may suspend or revoke the license of any veterinarian who engages in "[c]onduct reflecting unfavorably on the profession of veterinary medicine." Mass. Gen. Laws Ann. ch. 112, § 59(8) (West Supp. 1977).

In response to our questionnaire, the chairman of the Massachusetts board said of our questions concerning advertising, "These questions are of an ethical nature and are not covered by any specific legislation that I am aware of. If an incident developed the board itself would have to make a judgment as to whether it was behavior reflecting poorly on the practice of veterinary medicine."

23. Michigan

The response to our questionnaire indicates that no kind of advertising is permitted by the board. However, there appear to be no legal constraints to advertising by veterinarians in Michigan.

24. Minnesota

There appear to be no legal restrictions on advertising by veterinarians in Minnesota.

25. Mississippi

The board may suspend or revoke the license of any veterinarian who engages in "unprofessional or dishonorable conduct." Miss. Code Ann. § 73-39-19 (1972).

We have been unable to acquire copies of the board's regulations after repeated attempts. Additionally, the board refused to respond to our questionnaire.

26. Missouri

The board may revoke or suspend the license of any veterinarian engaged in ". . . dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public." Mo. Vet. Med. Prac. Act § 340.140(5). "Unethical conduct" is defined by the board in terms of the Code of Ethics of the Missouri Veterinary Medical Association, which includes the following sections pertaining to advertising:

ADVERTISING IN GENERAL

Paragraph 8. Advertising as a means of obtaining patronage is objectionable in the practice of any branch of medicine. It is denounced as unethical and unprofessional. Veterinary medicine is not an exception. On the contrary, on account of its widely misunderstood objectives, it is the branch of medical practice that is most vulnerable to fair and unfair criticism from other scientific pursuits.

Paragraph 9. Objectional advertising consists of:

- a) Advertising personal superiority over one's colleagues.
- b) Advertising secret remedies or exclusive surgical procedures.
- c) Advertising fixed fees for given services.
- d) Advertising as a corporation or partnership beyond that which would be ethical for either party.
- e) Advertising case reports, allegedly unintentional.
- f) Advertising hospital and office equipment and the special service rendered therewith.
- g) Advertising the building or occupation of a new hospital as an unsolicited news item of the local press may be considered unavoidable and unobjectionable. Solicited and repeated publicity of this is, however, frowned upon by the Association.

#### DIRECTORY ADVERTISEMENT

Paragraph 10. Advertising in a city, commercial, telephone or any widely circulated directory is a violation of this code.

Paragraph 11. A member who permits his or her name to be listed in directories in bold face type or who advertises his or her name or hospital or institution in any way differing from the standard style, type or size used in the directory for the listing of professional groups (physicians, dentists, lawyers, nurses) is subject to the charge of unprofessional conduct. In the yellow pages, listings should be confined to one listing only--under veterinarians.

Paragraph 12. It is also unethical for a veterinarian to allow his or her name to be printed in public directories as a specialist in the treatment of any disease or in the performance of any service within the scope of veterinary practice. This is not to imply that a veterinarian specializing for example in ophthalmology, cardiology, internal medicine or orthopedics should not be allowed to list under one such heading if desired and if listing is in a manner similar to the medical profession.

Paragraph 13. In principle, this section of the code of ethics is intended to improve the listing of names in such a way as to give all of them identical visual prominence.

#### ADVERTISING IN LOCAL NEWSPAPERS

Paragraph 14. A veterinarian who is establishing a new practice, or is moving an established office to a new location, or is changing from an individual to a partnership, or is becoming associated with an already established practice, or is making any other similar move, may announce that fact in each and every one of the local, regularly published newspapers. Such announcements shall be no larger than two columns wide and six inches long. They may state the name of the individual and/or hospital, the address, telephone number and office hours. Such announcements may be run no more than three times in any one paper, and all must appear within 30 days of the publication of the first one. Any exceptions to the above should have approval of the Ethics Committee.

Paragraph 15. All members of the Missouri Veterinary Medical Association should belong to their respective district organizations. Each organization should have its own Public Relations Committee. No veterinarian shall edit or publish any article or announcement or other information for the press until cleared by his or her local committee on public relations. All such veterinary releases should appear to emanate from the District and not from the individual. Statewide releases must clear the State Committee on Public Relations. Any private releases to the press by any individual veterinarian is unethical.

#### ADVERTISING BY MAIL

Paragraph 16. The notification by mail or otherwise reminding clients that the time is at hand for rendering certain services (vaccination) must be done with discretion. To the extent that the mailing of reminder notices falls within the area of solicitation, it should be discouraged. To the extent that this practice serves the public and is done in good taste and does not sacrifice professional dignity, then it should be permitted.

Paragraph 17. An individual veterinarian or establishment that qualifies for newspaper announcements as in paragraph 14 above, shall also be allowed to announce the new location or association through the mails. In this case, a card announcing the new situation, the name, telephone number, address and office hours shall be allowed to be mailed providing the entire mailing is accomplished within 30 days of the appearance of the first announcement.

ADVERTISING BY PERSONAL CARDS  
AND LETTERHEADS

Paragraph 18. The letterhead of a veterinarian should be modest, announcing only name, title, address, telephone number and office hours.

Paragraph 19. In view of the turn veterinary practice has taken in recent years, a veterinarian may announce on cards and letterheads that the practice is limited to the treatment of diseases of small animals or poultry, provided that such cards or letterheads indicate that he or she is a member of the veterinary profession and thus distinguish him or her from groups of irregular practitioners who are not eligible to membership in the Association.

ADVERTISING BY DISPLAY SIGNS

Paragraph 21. Display signs of reasonable size and dimensions on veterinary hospitals are not regarded as objectionable, provided they do not announce special services, such as bathing, plucking, clipping and X-ray work, which characterize the ways of the charlatan.

27. Montana

The board may revoke or suspend the license of any veterinarian who engages in "[i]mmoral, unprofessional, or dishonorable conduct manifestly disqualifying [him] from practicing veterinary medicine." Mont. Rev. Codes Ann. § 66-2210(e) (1975).

28. Nebraska

The board may revoke or suspend the license of any veterinarian for engaging in "[u]nprofessional conduct . . . as defined in regulations adopted by the board." Neb. Rev. Stat. § 71-147 (1976). "Unprofessional conduct" includes, inter alia, the following acts (Neb. Rev. Stat. § 71-148 (1976)):

- (1) Solicitation of professional patronage by agents or persons, popularly known as cappers or steerers, or profiting by the acts of those representing themselves to be agents of the licensee; . . .
- (9) making use of any advertising statements of a character tending to deceive or mislead the public;
- (10) advertising professional superiority or the performance of professional services in a superior manner;
- (11) advertising prices for professional services; . . .
- (14) advertising any free professional services or free examination;
- (15) offering discounts or inducements to prospective patients, by means of coupons or otherwise, to perform professional services

during a given period of time or during any period of time for a lesser or more attractive price; . . . and (17) advertising any price or prices of corrective devices or services.

29. Nevada

The board may "discipline" veterinarians for engaging in "[u]nprofessional conduct . . .," "[t]he claiming or inferring of professional superiority over other veterinary practitioners," or "[s]oliciting patronage directly or by employing solicitors directly or indirectly." Nev. Rev. Stat. § 638.140(1), (11), (14) (1975). According to the response to our questionnaire, the last quoted clause prohibits advertising in any form.

30. New Hampshire

The board may revoke or suspend the license of any veterinarian who engages in "[t]he use of advertising or solicitation which is false, misleading or is otherwise deemed unprofessional . . ." or for "[u]nprofessional conduct . . ." N.H. Rev. Stat. Ann. § 332-B:14 (IV), (XIV) (Supp. 1975).

Additionally, information from the Office of the Attorney General indicates that the board feels bound "to follow the Principles of Veterinary Ethics of the American Veterinary Medical Association in judging the conduct of veterinarians. . . ."

31. New Jersey

The New Jersey Veterinary Practice Act directly prohibits most forms of advertising by veterinarians (Sec. 3, P.L. 1952, c. 198):

3. No advertising shall be allowed by persons licensed to practice veterinary medicine, surgery, and dentistry except the following:

a. Appointment cards may be issued when the information thereon is limited to matter pertaining to the time and place of appointment and that permitted on the professional card.

b. The name of the licensee and institution, if any, shall be displayed on the premises where the practice of the profession is conducted and all information displayed shall be limited to that of the professional card. A professional card shall contain only the name of the licensee or licensees, the institution if any, the professional title or degree, address, office hours, telephone number and specialized practice, if any.

ADVERTISING BY PERSONAL CARDS  
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Paragraph 18. The letterhead of a veterinarian should be modest, announcing only name, title, address, telephone number and office hours.

Paragraph 19. In view of the turn veterinary practice has taken in recent years, a veterinarian may announce on cards and letterheads that the practice is limited to the treatment of diseases of small animals or poultry, provided that such cards or letterheads indicate that he or she is a member of the veterinary profession and thus distinguish him or her from groups of irregular practitioners who are not eligible to membership in the Association.

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The board may revoke or suspend the license of any veterinarian who engages in "[i]mmoral, unprofessional, or dishonorable conduct manifestly disqualifying [him] from practicing veterinary medicine." Mont. Rev. Codes Ann. § 66-2210(e) (1975).

28. Nebraska

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- (1) Solicitation of professional patronage by agents or persons, popularly known as cappers or steerers, or profiting by the acts of those representing themselves to be agents of the licensee; . . .
- (9) making use of any advertising statements of a character tending to deceive or mislead the public;
- (10) advertising professional superiority or the performance of professional services in a superior manner; (11) advertising prices for professional services; . . . (14) advertising any free professional services or free examination; (15) offering discounts or inducements to prospective patients, by means of coupons or otherwise, to perform professional services

during a given period of time or during any period of time for a lesser or more attractive price; . . . and (17) advertising any price or prices of corrective devices or services.

29. Nevada

The board may "discipline" veterinarians for engaging in "[u]nprofessional conduct . . .," "[t]he claiming or inferring of professional superiority over other veterinary practitioners," or "[s]oliciting patronage directly or by employing solicitors directly or indirectly." Nev. Rev. Stat. § 638.140(1), (11), (14) (1975). According to the response to our questionnaire, the last quoted clause prohibits advertising in any form.

30. New Hampshire

The board may revoke or suspend the license of any veterinarian who engages in "[t]he use of advertising or solicitation which is false, misleading or is otherwise deemed unprofessional . . ." or for "[u]nprofessional conduct . . ." N.H. Rev. Stat. Ann. § 332-B:14 (IV), (XIV) (Supp. 1975).

Additionally, information from the Office of the Attorney General indicates that the board feels bound "to follow the Principles of Veterinary Ethics of the American Veterinary Medical Association in judging the conduct of veterinarians. . . ."

31. New Jersey

The New Jersey Veterinary Practice Act directly prohibits most forms of advertising by veterinarians (Sec. 3, P.L. 1952, c. 198):

3. No advertising shall be allowed by persons licensed to practice veterinary medicine, surgery, and dentistry except the following:

- a. Appointment cards may be issued when the information thereon is limited to matter pertaining to the time and place of appointment and that permitted on the professional card.
- b. The name of the license and institution, if any, shall be displayed on the premises where the practice of the profession is conducted and all information displayed shall be limited to that of the professional card. A professional card shall contain only the name of the licensee or licensees, the institution if any, the professional title or degree, address, office hours, telephone number and specialized practice, if any.

c. It shall be unlawful for a licensee to advertise falsely, fraudulently or in a manner likely to mislead the public or to announce his name in any city, commercial telephone or other public directory or directories in public or office buildings using display or boldface type or type that is in any way dissimilar in size, shape or color to that used by other practitioners of the healing arts in the same directory, or under any category but that of veterinarians or to use the title "doctor" or its abbreviations without further qualifying this title or abbreviation with the word "veterinary" or "veterinarian" or his professional degree.

d. Stationery, labels, prescription blanks, cheques, et cetera, shall not have pictures or representations of an animal, or any other matter that is unprofessional.

e. It shall be unlawful for a licensee to advertise for patronage by means of brochures, handbills, posters, billboards, circulars, stereo-opticon slides, motion pictures, radio, television, newspapers, magazines, classified directories, or any other printed publications or unclassified mediums; or by means of flamboyant, glaring or flickering signs; or by means of any signs containing as part thereof any representation of an animal.

f. Licensed veterinarians who own or make use of a commercial vehicle shall not display thereon a legend containing information other than name, address and telephone number of the owner of the institution and such lettering shall not exceed 3 inches in height.

### 32. New Mexico

The board may revoke or suspend the license of any veterinarian for the "use of any advertising or solicitation which is false, misleading or otherwise deemed unprofessional under regulations promulgated by the board", or for "unprofessional conduct by violation of a regulation promulgated by the board under the Veterinary Practice Act." N.M. Stat. Ann. § 67-11-20(3), (12) (1974).

"The Rules Governing the Professional Conduct of Veterinarians" treat advertising practices with more specificity:

. . . 3. A licensed veterinarian shall not make any effort, direct or indirect, which in any way encroaches upon the practice of another licensed veterinarian. It is the right of any veterinarian, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful veterinary services, generally after communication with the veterinarian of whom complaint is made.

. . . 23. Utilization of the services of solicitors is reprehensible in the veterinary profession. A licensed veterinarian shall not participate in arrangements which share the proceeds from professional services with individuals who may have been instrumental in his having been selected to perform the particular service.

24. Except as hereinafter provided, a veterinarian shall not advertise his services, his facilities, his training or his fees.

a. Advertising in any of the news media is expressly forbidden with the single exception of the placing of a professional listing in newspapers and magazines of such quality as not to reflect unfavorably upon the profession, such listing to conform to locally acceptable professional card size and to consist of name, title, address, office hours, practice limitations and telephone numbers only and this for a period of time upon the opening of a new practice, relocation or a new association not to exceed three (3) days.

b. Advertising in telephone, city, commercial or other directory shall be in the standard style, type and size used in the directory for other professional groups (medical Doctors, Dentists and Attorneys only) and shall consist only of name, title, address, telephone number and practice limitations when appropriate.

c. Veterinarians shall confine their directory listings to those appearing under the Classifications Veterinarians and Veterinary Hospitals or Animal Hospitals. No listings are permissible under the headings, Bathing and Grooming, Boarding, Kennels, etc., unless the veterinarian operates such facilities separately and apart from the practice of veterinary medicine and upon nonadjacent premises, and then in no manner linking or implying linkage to himself as a veterinarian or to his professional office or hospital.

d. Advertising by mail shall be sent first-class in sealed envelopes and shall be confined to the distribution of cards or letters reminding clients of the need for seasonal or recurrent services and shall carry no further imprint than the practitioner's letterhead except for standard announcements of new openings, new associations and relocations.

e. The letterhead and card of licensed practitioners shall be of modest dimension displaying only names, title (degrees and/or fellowships), professional affiliations, addresses, telephone numbers, office hours and practice limitations.

f. Advertising the location of facilities, or the identification of premises, by a veterinary practitioner through the use of display or roadside signs of such size, frequency or poor taste as to be offensive to the community and the Rules of Professional Conduct. Such signs may display only the name of the establishment and the names of the veterinarians maintaining offices therein and such traffic directions as are appropriate. The use of moving background or lettering, or of flashing signs, or representations of animals or parts of animals is expressly prohibited, as is also the advertising of special services rendered.

B.V.E. Rule No. 75-2.

33. New York

All but the following kinds of advertisements are prohibited:

(a) Listing in telephone directories other than classified directories, provided such listing is not in boldface type.

(b) Listing in classified telephone directories under the heading "Veterinarians", provided that all such listings shall be uniform as to size, style and type and provided further that no boldface type is used in such listing and that no information is given in such listing in addition to name, office address and telephone number, residence address and telephone number if different from office, and a telephone number for use if office or residence does not answer. Such listing may include any limitation of practice but shall not include any claim of specialization or any reference to special services or special equipment.

(c) The announcement by a veterinarian of the opening of a practice or a new office, provided that such announcement shall include only the name, office address and telephone number, any limitation in type of practice, residence address and telephone number for use if office telephone does not answer, and, in addition thereto, the professional degree, office hours and date of opening of office, and provided further that such announcement, if published in a newspaper, shall not be published in more than three issues of the local newspaper, which publications shall be consecutive, and provided further that such published announcement shall not exceed one column in width and one and one-half inches in length.

(d) Nothing contained herein shall be construed as preventing the listing of veterinary hospitals in

classified telephone directories under that heading, provided such listing is under a business classification and provided further that in such listing the information provided with respect to the veterinarians maintaining said hospitals shall conform to the provisions of subdivisions (a) and (b) hereof.

Section 62.3, N.Y. Vet. Prac. Act.

34. North Carolina

The board may take "disciplinary action" against any veterinarian who engages in "[t]he use of advertising or solicitation which is false, misleading, or is otherwise deemed unprofessional under regulations adopted by the Board," or for "[u]nprofessional conduct. . ." N.C. Gen. Stat. § 90-187.8(4), (14) (1975). The board does not define "unprofessional conduct" in its regulations.

35. North Dakota

The board may revoke or suspend the license of any veterinarian who engages in "[i]mmoral, unprofessional, or dishonorable conduct manifestly disqualifying the licensee from practicing veterinary medicine." N.D. Cent. Code § 43-29-14.(4) (Supp. 1975).

The response to our questionnaire indicates that all advertising except announcements of new practices, pre-paid care plans and limitations of practice are "considered unethical."

36. Ohio

Veterinarians are statutorily prohibited from engaging in false, misleading, or fraudulent advertising, promotional advertising through a second or third party that the board determines is contrary to good public policy or violating any rules concerning advertising which the board adopts. Ohio Rev. Code Ann. § 4741.21 (Page 1977). The board has adopted no specific rules regulating advertising.

37. Oklahoma

The board is empowered to establish rules of professional conduct and such rules shall govern the behavior of every licensed veterinarian. Okla. Vet. Prac. Act § 698.7.

The Rules of Professional Conduct discuss advertising in some detail:

. . . 2. Any effort, direct or indirect, which in any way encroaches upon the practice of another veterinarian is a violation of these rules. It is the right of any veterinarian, without fear or favor, to give proper

advice to those seeking relief against unfaithful or neglectful veterinary services, generally after communication with the veterinarian of whom complaint is made.

. . . 22. Utilization of the services of solicitors is reprehensible in the veterinary profession. A licensed veterinarian shall not participate in arrangements which share the proceeds from professional services with individuals who may have been instrumental in his having been selected to perform the particular service.

23. Except as hereinafter provided, a veterinarian shall not advertise his services, his facilities, his training, or his fees.

A. Advertising in any of the news media is expressly forbidden with the single exception of the placing of a professional listing in newspapers and magazines of such quality as not to reflect unfavorably upon the profession, such listing to conform to locally acceptable professional card size, and to consist of name, title, address, office hours, practice limitation, and telephone numbers only, and this for a reasonable period of time upon the opening of a new practice, relocation, or a new association.

B. Advertising in telephone, city, commercial, or other directory shall be in the standard style, type, and size used in the directory for other professional groups (Medical Doctors, Dentists and Attorneys only) and shall consist only of name, title, address, telephone number, and practice limitations when appropriate.

C. Veterinarians shall confine their directory listings to those appearing under the Classifications Veterinarians and Veterinary Hospitals, or Animal Hospitals. No listings are permissible under the headings, Bathing and Grooming, Boarding, Kennels, etc., unless the veterinarian operates such facilities separately and apart from the practice of veterinary medicine and upon nonadjacent premises, and then in no manner linking or implying linkage to himself as a veterinarian or to his professional office or hospital.

D. Advertising by mail shall be sent first-class in sealed envelopes and shall be confined to the distribution of cards or letters reminding clients of the need for seasonal or recurrent services and shall carry no further imprint than the practitioner's letterhead except for standard announcements of new openings, new associations, and relocations.

E. The letterhead and card of licensed practitioners shall be of modest dimension displaying only names, titles (degrees and/or fellowships), professional affiliations, addresses, telephone numbers, office hours, and practice limitations.

F. Advertising the location of facilities, or the identification of premises, by a veterinary practitioner through the use of display or roadside signs of such size, frequency, or poor taste as to be offensive to community standards or professional propriety shall be a violation of the rules of professional conduct. Such signs may display only the name of the establishment and the names of the veterinarians maintaining offices therein, and such traffic directions as are appropriate. The use of moving background or lettering, or of flashing signs, or representations of animals or parts of animals, is expressly prohibited, as is also the advertising of special services rendered.

#### 38. Oregon

The board administers no statutes or regulations which prohibit advertising by veterinarians.

#### 39. Pennsylvania

The board may revoke or suspend the license of any veterinarian guilty of "[e]ngaging in practices in connection with the practice of veterinary medicine which are in violation of the standards of professional conduct . . . prescribed by the rules of the board." Pa. Vet. Prac. Act § 21.

The board is also empowered to promulgate rules of professional conduct. "In prescribing such rules of professional conduct the board shall be guided by the Principles of Veterinary Medical Ethics adopted by the American Veterinary Medical Association and the Pennsylvania Veterinary Medical Association." Pa. Vet. Prac. Act. § 5(2). According to the Secretary of the board, the rules are not yet available. However, in response to our questionnaire she indicated that all advertising is prohibited by the practice act except announcements concerning the opening of a new practice or moving an existing one and advertisements concerning specialization or limitations of practices.

#### 40. Rhode Island

The board may suspend or revoke the license of any veterinarian who ". . . has been guilty of gross unprofessional conduct or conduct of a character likely to deceive or defraud the public . . . or for any other cause which, in the opinion of said board, shall render the [veterinarian] an unfit person to practice veterinary medicine, surgery and dentistry in this state."

41. South Carolina

The board is empowered to promulgate rules and regulations governing the practice of veterinary medicine. "In prescribing such rules . . . the Board may be guided by the principles of veterinary medical ethics adopted by the American Veterinary Medical Association and the South Carolina Association of Veterinarians." S.C. Code § 40-69-70(2) (1976). Veterinarians may have their licenses suspended or revoked for violation of these rules.

Additionally, the practice act defines unethical and unprofessional conduct to include ". . . any conduct of a character likely to deceive or defraud the public" and "objectionable advertising." S.C. Code § 40-69-20(11) (1976).

42. South Dakota

The board may suspend or revoke the license of any veterinarian for engaging in "[i]mmoral, unprofessional, or dishonorable conduct manifestly disqualifying the licensee from practicing veterinary medicine." S.D. Compiled Laws Ann. § 36-12-22(4) (1972).

43. Tennessee

The board is empowered to promulgate rules of professional conduct for veterinarians. "In prescribing such rules . . . the Board may be guided by the principles of veterinary medical ethics adopted by the American Veterinary Medical Association and the Tennessee Veterinary Medical Association." Tenn. Vet. Prac. Act § 6. The board may suspend or revoke the license of any veterinarian for engaging in "[u]nprofessional or unethical conduct, or engaging in practices . . . which are in violation of the standards of professional conduct . . ." or "[c]onduct reflecting unfavorably upon the profession of veterinary medicine." Tenn. Vet. Prac. Act § 24(12), (13).

44. Texas

The board is empowered to promulgate standards of professional conduct which, if violated, may subject a veterinarian to license suspension or revocation. Tex. Vet. Lic. Act §§ 8, 14(c).

The following sections are excerpted from the "Rules of Professional Conduct" adopted by the board:

. . . 22. Utilization of the services of solicitors is reprehensible in the veterinary profession. A licensed veterinarian shall not participate in arrangements which share the proceeds from professional services with individuals who may have been instrumental in his having been selected to perform the particular service.

23. Except as hereinafter provided, a veterinarian shall not advertise his services, his facilities, his training, or his fees.

A. Advertising in any of the news media is expressly forbidden with the single exception of the placing of a professional listing in newspapers and magazines of such quality as not to reflect unfavorably upon the profession, such listing to conform to locally acceptable professional card size, and to consist of name, title, address, office hours, practice limitation, and telephone numbers only, and this for a reasonable period of time upon the opening of a new practice, relocation, or a new association.

B. Advertising in telephone, city, commercial, or other directory shall be in the standard style, type, and size used in the directory for other professional groups (Medical Doctors, Dentists and Attorneys only) and shall consist only of name, title, address, telephone number, and practice limitations when appropriate.

C. Veterinarians shall confine their directory listings to those appearing under the classifications Veterinarians and Veterinary Hospitals, or Animal Hospitals. No listings are permissible under the headings, Bathing and Grooming, Boarding, Kennels, etc., unless the veterinarian operates such facilities separately and apart from the practice of veterinary medicine, and upon nonadjacent premises, and then in no manner linking or implying linkage to himself as a veterinarian or to his professional office or hospital.

D. Advertising by mail shall be sent first-class in sealed envelopes and shall carry no further imprint than the practitioner's letterhead except for standard announcements of new openings, new associations, and relocations.

E. The letterhead and card of licensed practitioners shall be of modest dimension displaying only names, titles (degrees and/or fellowships), professional affiliations, addresses, telephone numbers, office hours, and practice limitations.

F. Advertising the location of facilities, or the identification of premises, by a veterinary practitioner through the use of display or roadside signs of such size, frequency, or poor taste as to be offensive to community standards of professional propriety shall be a violation of the rules of professional conduct. Such signs may display only the names of the establishment and the names of the veterinarians maintaining offices therein, and such traffic directions as are

appropriate. The use of moving background or lettering, or of flashing signs, or representations of animals or parts of animals, is expressly prohibited, as is also the advertising of special services rendered.

45. Utah

The Veterinarians License Act defines "unprofessional conduct" to include "[s]oliciting patronage by employing directly or indirectly solicitors." Vet. Lic. Act § 58-28-7(c).

46. Vermont

The board may revoke or suspend the license of any veterinarian who engages in "gross, immoral, unprofessional or dishonorable conduct." Vt. Stat. Ann. tit. 26 § 2435 (1975). The response to our questionnaire indicates that advertising shall be regulated in accordance with the "A.V.M.A. Code of Ethics."

47. Virginia

The board is empowered to prescribe ". . . reasonable standards of conduct and ethics for the practice of veterinary medicine . . ." POR.10-12 (Regulations of the Virginia State Board of Veterinary Examiners). The board has adopted such standards, which includes the following:

. . . 2. Efforts direct or indirect, which in any way encroach or invade upon the practice of another veterinarian, are unworthy of veterinarians of the Commonwealth of Virginia; . . .

5. In the formation of partnerships for the practice of veterinary medicine, no person shall be admitted as a partner who is not a member of the veterinary profession, duly authorized to practice, and amenable to professional discipline. No person shall be held out as a practitioner of veterinary medicine or a member of the firm who is not so admitted. In the selection and use of a firm name, no false or misleading name shall be used. Partnerships between veterinarians and members of other professions or nonprofessional persons shall not be formed or permitted if a part of the partnership employment consists of the practice of veterinary medicine.

6. The professional services of a veterinarian shall not be controlled or exploited by any lay agency, personal or corporate, which intervenes between the client and the veterinarian. A veterinarian's responsibilities and qualifications are individual. He shall avoid all relations which direct the performance of his duty by or in the interest of such intermediary. A

veterinarian's relation to his client should be personal, and his responsibility shall be direct to the client or his authorized agent. . . .

12. Utilization of the services of solicitors is reprehensible in the veterinary profession. A licensed veterinarian shall not participate in arrangements which share the proceeds from professional services with individuals who may have been instrumental in his having been selected to perform the particular service.

13. A licensed veterinarian shall avoid the impropriety of employing questionable methods to attract public attention or boast of possessing superior knowledge or skill in the treatment or prevention of any disease.

POR.10-22.

According to the Executive Director of the Virginia State Board of Veterinary Examiners ". . . acting on advice of counsel, the Board has deleted any regulations pertaining [to advertising]." However, we have not been able to obtain copies of regulations which demonstrate that these deletions have been made.

48. Washington

The board is required to ". . . adopt a code of ethics for the practice of the veterinary profession in this state." Wash. Rev. Code § 18.92.030 (1976). The board may revoke or suspend the license of any veterinarian for "[v]iolation of ethics of the profession. The code of ethics adopted by the board of governors shall be the standard of ethics for licensed veterinarians of this state." Wash. Rev. Code § 18.92.160(10) (1976).

The "Veterinary Code of Ethics" contains the following provisions:

WAC 308-105-015 ADVERTISEMENT. It is unethical to advertise or otherwise solicit professional employment except:

(1) Professional signs may be used at the place of business.

(2) Professional stationery and business cards may be used showing name, title, professional practice limitation, address, telephone number, office hours, and professional logos as approved by the board of governors.

(3) Commercial telephone directory listings are limited to two in number in the classified section. One listing may be in the individual practitioner's name and

may be placed under the category of a Veterinary Hospital or Veterinary Clinic listing. All listings will be in standard body type and limited to the name, address, and telephone number of the hospital or clinic and may include the practice restrictions. In the situation of a new practice begun after the publishing of a local telephone directory, the practitioner may place his name, address, and telephone number in the classified section of local newspaper(s) pending publishing of the next local telephone directory.

(4) Announcements of new practice or change in location, except such announcements may be made in local papers; limited to three consecutive issues; no pictures or graphs may be used; size is limited to two columns wide by four inches high.

(5) Reminders of professional services needed in conjunction with a preventative medicine program, provided said reminders are mailed only to existing clients.

WAC 308-150-010 THIRD PARTY ADVERTISEMENT. It is unethical to pay or otherwise reimburse any individual person or organization, association, or corporation for obtaining clients.

#### 49. West Virginia

The board may revoke or suspend the license of any veterinarian found guilty of "[t]he use of any advertising or solicitation which is false, misleading or is otherwise deemed unprofessional. . ." or for "[u]nprofessional conduct. . . ." W. Va. Code § 30-10-12(d),(n) (1976).

#### 50. Wisconsin

The "Rules of the Veterinary Examining Board," as codified in Subsec. VE 3.02(16)(a)-(b), Wis. Adm. Code state that:

. . . The following acts constitute unprofessional conduct by a veterinarian and are prohibited:

\* \* \*

(16) The following kinds of advertising:

(a) Advertising professional superiority or the performance of professional services in a superior manner.

(b) False or misleading advertising.

(c) Advertising secret remedies, exclusive methods or guaranteed cures.

(d) Authorizing or permitting advertising as a member of a corporation or partnership which would be unprofessional for an individual veterinarian.

(e) Advertising case reports other than reporting on that case in the professional media.

(f) Advertising of variable services (non-variable and informational services may be advertised.)

"Non-variable services" (which may be advertised) are defined in Subsec. VE 3.01(8), Wis Adm. Code:

"Non-variable services" includes but is not limited to services for which the fee charged the client can be objectively determined without viewing the specific patient. Non-variable services include but are not limited to boarding of healthy animals, dehorning, collection of samples for testing, dispensing other than prescription legend animal drugs under FDA Reg. 21 CFR 1.106c and drugs listed in U.S. Controlled Substances Act of 1970 as amended and charges for the aforementioned.

"Variable services" (which may not be advertised) are defined in Subsec. VE 3.01(9), Wis. Adm. Code:

"Variable services" includes but are not limited to services on which the fee charged the client is based on the individual veterinarian's judgment, as to each individual patient's condition when presented to the veterinarian. Variable services are based upon the level and area(s) of expertise, advanced training, the professional time involved, and other factors related to the art of practice as the basis for that service. Variable services include surgery (with local and general anesthesia), diagnosis, prognosis,

Additionally, "informational services" may be advertised as limited by Subsec. VE 3.01(8), Wis. Adm. Code:

"Informational service" means advertising to inform and assist the public in easily contracting for veterinary services. Such informational advertising is limited to: office name(s), doctor's name(s), address(es) and telephone number(s), regular and emergency office hours, areas of practice limitation (i.e., large animal, small animal, horses, poultry), diplomate status of individual doctors, the opening of new or remodeled facilities.

Informational advertising also includes notices to clients of records advising them of informational meetings or of vaccinations and other services due.

51. Wyoming

The board may revoke or suspend the license of any veterinarian who "[h]as used advertising or solicitation deemed unprofessional by the board," or "[h]as been guilty of unprofessional conduct as defined in regulations adopted by the board." Wy. Vet. Med. Prac. Act § 12(F),(M).

Chapter III, Section 2 of the "Standards of Professional Conduct for the Practice of Veterinary Medicine in Wyoming" contains the following provisions:

. . . b. A veterinarian may choose whom he will serve. Once he has undertaken care of a patient, he must not neglect him. In an emergency, however, he should render service to the best of his ability. He should not solicit clients.

(1) In advertising, the veterinarian shall confine himself to his business address. Advertising specific medicine, specific plans of treatment, or advertising through the medium of posters, illustrated stationery, newspapers, puffs, etc., will not be countenanced by this profession.

APPENDIX 4

Frequency Survey

I. Survey Design

A. Selection of Respondents

In this survey, veterinarians were randomly selected as respondents from seven states and the District of Columbia. We used the list of "Practitioner Affiliate Members" of the American Animal Hospital Association (AAHA) for 1976-77 to make our random selections. Veterinarians practicing in the following locations were telephoned:

1. Denver, Colorado (metropolitan area)
2. Colorado Springs, Colorado
3. Grand Junction, Colorado
4. The District of Columbia (metropolitan area)
5. San Francisco, California
6. Oakland, California
7. Palo Alto, California
8. New York City, New York
9. Atlanta, Georgia
10. Cleveland, Ohio
11. Minneapolis/St. Paul, Minnesota
12. Jacksonville, Florida

Where the practitioner randomly selected as a respondent was unable to answer our survey questions, we selected an alternate respondent by using the next name on the AAHA list after the originally-chosen respondent. A total of fifty respondents or alternates were telephoned. We obtained information from forty respondents.

B. Calling Instructions

Each staff member assisting in the survey was given a "General Instructions" sheet which is reproduced below.

S1 - FREQUENCY SURVEY

GENERAL INSTRUCTIONS

This survey is designed to elicit information from small animal veterinarians. There are three major areas of inquiry:

1. What is the frequency of performance of "routine" veterinary services;
2. What is the demonstrated risk factor involved in this performance; and

3. What additional services are required or recommended in conjunction with the procedure.

We will be phoning a sample of practitioners in several areas throughout the U. S. For the most part, the parties surveyed can be reached without going through an FTS switchboard.

Be prepared to meet a good deal of resistance. The FTC is looked upon as "the enemy" by many in the profession. Numerous veterinary journal articles have been written about our investigation, at least one cautioning practitioners to seek the advice of their associations before speaking to us.

If you meet resistance in the survey, politely terminate the conversation. Don't engage in arguments. Don't "explain" the survey or our investigation any more than absolutely necessary. Don't threaten the subjects; the survey depends on voluntary compliance. Above all, don't resort to subterfuge or lying.

You must record all your conversations on the forms provided. Be sure to include the name, phone number and city of every veterinarian contacted. If the veterinarian you are trying to reach is not in, ask the receptionist when it would be most convenient to call back. Tell her or him that it's a "personal call."

C. Data Collection Forms

All information obtained was recorded on pre-printed data collection forms. A copy of the form used is reproduced below.

S1 (FREQUENCY) SMALL ANIMAL

STAFF: \_\_\_\_\_ VETERINARIAN: \_\_\_\_\_

CONTROL NUMBER: \_\_\_\_\_ CITY, STATE: \_\_\_\_\_

RESPONSE COMPLETE \_\_\_\_\_ PHONE NO.: \_\_\_\_\_

PARTIAL RESPONSE \_\_\_\_\_ RETURN CALL: \_\_\_\_\_

REFUSED \_\_\_\_\_ TIME (MST) \_\_\_\_\_

DATE \_\_\_\_\_

RESPONSE DATE: \_\_\_\_\_

1. A. APPROXIMATELY WHAT PERCENTAGE OF YOUR PRACTICE TIME WOULD YOU ESTIMATE THAT YOU SPEND PERFORMING DISTEMPER SERIES OR BOOSTER INOCULATIONS ON EITHER CATS OR DOGS? \_\_\_\_\_

B. DO YOU GENERALLY ADMINISTER A "TEMPORARY DHL SERIES" TO PUPPIES? \_\_\_\_\_

(IF 1B YES) (i) CAN YOU ESTIMATE HOW MANY TEMPORARY DHL INOCULATIONS YOU ADMINISTER DURING AN AVERAGE WEEK? \_\_\_\_\_

(ii) CAN YOU ESTIMATE HOW MANY "ADULT DHL" INOCULATIONS, INCLUDING "BOOSTERS" YOU ADMINISTER DURING AN AVERAGE WEEK? \_\_\_\_\_

(IF 1B NO) CAN YOU ESTIMATE HOW MANY "ADULT DHL" INOCULATIONS, INCLUDING "BOOSTERS" YOU ADMINISTER DURING AN AVERAGE WEEK? \_\_\_\_\_

C. HOW MANY OFFICE VISITS ARE REQUIRED FOR A COMPLETE DHL SERIES? \_\_\_\_\_ ARE LEPTOSPIROSIS INOCULATIONS GIVEN SEPARATELY? \_\_\_\_\_

D. CAN YOU ESTIMATE HOW MANY ANIMALS YOU INOCULATE DURING AN AVERAGE WEEK FOR FELINE DISTEMPER AND RHINOTRACHEITIS? \_\_\_\_\_

E. HOW MANY OFFICE VISITS ARE REQUIRED FOR A COMPLETE FELINE DISTEMPER SERIES? \_\_\_\_\_ ARE RHINOTRACHEITIS INJECTIONS GIVEN SEPARATELY? \_\_\_\_\_

F. IN YOUR EXPERIENCE, WHAT PERCENTAGE OF ANIMALS TO WHICH DISTEMPER SERIES INOCULATIONS ARE GIVEN EXPERIENCE COMPLICATIONS AS A DIRECT RESULT OF THE PROCEDURE? \_\_\_\_\_

G. WHEN YOU ADMINISTER DISTEMPER SHOTS TO EITHER DOGS OR CATS, DO YOU GENERALLY RECOMMEND OR REQUIRE THAT OTHER PROCEDURES ALSO BE ADMINISTERED: FOR EXAMPLE, A PHYSICAL EXAMINATION, MICRO-HEMATOCRIT TEST, OR A FECAL EXAMINATION? \_\_\_\_\_

(IF "YES") (i) WHAT SPECIFIC ADDITIONAL PROCEDURES ARE RECOMMENDED \_\_\_\_\_

OR REQUIRED? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(ii) DO YOU CHARGE SEPARATELY FOR THESE ADDITIONAL SERVICES?  
\_\_\_\_\_  
\_\_\_\_\_

2. A. APPROXIMATELY WHAT PERCENTAGE OF YOUR PRACTICE TIME WOULD YOU ESTIMATE THAT YOU SPEND PERFORMING SPAY OR NEUTER SURGERY FOR CATS AND DOGS? \_\_\_\_\_

B. CAN YOU ESTIMATE HOW MANY ANIMALS YOU SPAY DURING AN AVERAGE WEEK? \_\_\_\_\_  
APPROXIMATELY WHAT PERCENTAGE OF THIS NUMBER REPRESENTS CAT SPAYS? \_\_\_\_\_

C. CAN YOU ESTIMATE HOW MANY ANIMALS YOU NEUTER DURING AN AVERAGE WEEK? \_\_\_\_\_  
APPROXIMATELY WHAT PERCENTAGE OF THIS NUMBER REPRESENTS CAT NEUTERINGS? \_\_\_\_\_

D. IN YOUR EXPERIENCE, WHAT PERCENTAGE OF ANIMALS WHICH YOU SPAY OR NEUTER EXPERIENCE COMPLICATIONS AS A DIRECT RESULT OF THE PROCEDURE? \_\_\_\_\_  
(IF ASKED TO EXPLAIN "COMPLICATIONS," REPLY: ANOTHER WAY OF EXPRESSING "COMPLICATIONS" IN THIS CASE IS IN RATES OF MORBIDITY OR MORTALITY.)

E. WHEN YOU PERFORM SPAY OR NEUTER SURGERY ON EITHER CATS OR DOGS, DO YOU GENERALLY RECOMMEND OR REQUIRE THAT OTHER PROCEDURES ALSO BE ADMINISTERED, FOR EXAMPLE DISTEMPER SHOTS, OR PARASITISM EXAMINATIONS? \_\_\_\_\_

(IF "YES") (i) WHAT SPECIFIC ADDITIONAL PROCEDURES ARE RECOMMENDED

OR REQUIRED? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(ii) DO YOU CHARGE SEPARATELY FOR THESE ADDITIONAL SERVICES?  
\_\_\_\_\_  
\_\_\_\_\_

3. A. APPROXIMATELY WHAT PERCENTAGE OF YOUR PRACTICE TIME WOULD YOU ESTIMATE THAT YOU SPEND DIAGNOSING OR TREATING PARASITISM IN CATS OR DOGS? \_\_\_\_\_

B. CAN YOU ESTIMATE HOW MANY CANINES YOU EXAMINE OR TREAT DURING AN AVERAGE WEEK FOR INTESTINAL PARASITISM? \_\_\_\_\_  
FOR HEARTWORM? \_\_\_\_\_

C. CAN YOU ESTIMATE HOW MANY FELINES YOU EXAMINE OR TREAT EACH WEEK FOR INTESTINAL PARASITISM? \_\_\_\_\_

D. IN YOUR EXPERIENCE, WHAT PERCENTAGE OF ANIMALS WHICH YOU TREAT FOR PARASITISM EXPERIENCE COMPLICATIONS AS A DIRECT RESULT OF THE PROCEDURE? \_\_\_\_\_  
(IF ASKED TO EXPLAIN "COMPLICATIONS" REPLY AS IN 2.D.)

E. WHEN YOU TREAT ANIMALS FOR PARASITISM, DO YOU GENERALLY RECOMMEND OR REQUIRE THAT OTHER PROCEDURES ALSO BE ADMINISTERED, FOR EXAMPLE DISTEMPER SHOTS OR A MICRO-HEMATOCRIT TEST? \_\_\_\_\_  
(IF "YES") (i) WHAT SPECIFIC ADDITIONAL PROCEDURES ARE RECOMMENDED OR REQUIRED? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(ii) DO YOU CHARGE SEPARATELY FOR THESE ADDITIONAL SERVICES?  
\_\_\_\_\_  
\_\_\_\_\_

4. APART FROM THE SERVICES I HAVE ALREADY MENTIONED, WHAT OTHER

SERVICE OR GROUP OF SERVICES DO YOU PERFORM WHICH REQUIRES A SUBSTANTIAL PORTION OF YOUR PRACTICE TIME? \_\_\_\_\_

ABOUT HOW MUCH OF YOUR TIME DO YOU SPEND PROVIDING THESE SERVICES? \_\_\_\_\_

CAN YOU ESTIMATE IN RAW NUMBERS HOW MANY SUCH SERVICES [OR NAME OF SERVICE, IF POSSIBLE] YOU PERFORM DURING AN AVERAGE WEEK? \_\_\_\_\_

5. ARE THERE ANY OTHER SERVICES NOT PREVIOUSLY MENTIONED WHICH YOU PERFORM RELATIVELY FREQUENTLY? IF SO, WHAT ARE THEY? \_\_\_\_\_

6. A. DO YOU CONSIDER YOURSELF TO BE A SPECIALIST OR DO YOU HAVE A SPECIAL INTEREST IN ONE OR MORE AREAS OF VETERINARY MEDICINE? \_\_\_\_\_

B. IF SO, WHAT AREA OR AREAS DO YOU SPECIALIZE OR HAVE A SPECIAL INTEREST IN? \_\_\_\_\_

C. ARE YOU CERTIFIED AS DIPLOMATE IN ANY OF THESE SPECIALTY AREAS? \_\_\_\_\_

IF SO, FOR WHICH ONES ARE YOU SO RECOGNIZED? \_\_\_\_\_

7. INTERVIEWER'S COMMENTS: \_\_\_\_\_

## II. Survey Results

The information obtained in this survey was summarized from the data collection forms and appears below as Tables 11 through 13.

TABLE 11  
SPAYING (OVARIOHYSTERECTOMY) AND NEUTERING (CASTRATION)

Cont. No.	Spay/Neuter % of Practice	Spay/Neuter No./Wk. Average	Spay Cats %	Spay Dogs %	Neuter No./Wk. Average	Neuter Cats %	Risk of Comp. Spay/Neuter	Add'l Proc. Rec. or Reg.	Charge for Add'l Proc.
13	15-20%	10-15	25%	75%	6-7	90%	< 1%	a.	yes
9	25%	15	60%	40%	10	90%	< 1%	a.	yes
4	20-30%	6-7	30%	70%	2-3	50%	< 5%	1. a.	1. yes
33	10%	4	50%	50%	3	99%	< 1%	2. b.	2. no
40	10-15%	4-5	40%	60%	1	?	< 1%	1. a.	1. yes
28	25%	3	90%	10%	1-2	approx. 99%	1-2%	2. b.	2. no
44	30%	15-20	50-70%	30-50%	10-15	70%	.25%	none	N/A
36	5-10%	?	90%	10%	10	approx. 99%	0	1. a.	1. yes
5	30-35% (1)	10	33%	67%	5	67%	5%	none	N/A
60A7	20%	2	40%	60%	2-4	40%	< 5%	2. c.	2. yes
15	< 1% (2)	1-2	25%	75%	1-2	25%	< .5%	1. a.	1. yes
19	?	5	20%	80%	5	approx. 99%	1-5%	2. d.	2. yes
23	10%	6-8	50%	50%	3	95%	< 5%	e.	yes
27	5% (3)	8	50%	50%	4-5	90%	0	1. a.	1. yes
31	15-20%	10	50%	50%	30	50%	? (4)	2. d.	2. yes
35	15%	10	60%	40%	12	90%	(5)	a.	yes
39	20-25%	20	80%	20%	10	90%	< 5%	1. a.	1. yes
43	10%	2	50%	50%	2	86%	0	1. b.	1. yes
46	25%	10	40%	60%	6	75%	4%	2. a.	2. yes
3	10-15%	4-5	50%	50%	4-5	75%	5%	1. a.	1. yes
50	10%	5	50%	50%	5	90%	< 1%	2. c.	2. yes
45	(6) 10%	10-12	100%	0%	8-10	100%	0-.005%	1. b.	1. no
34	?	2-3 (7)	33%	67%	4 (7)	33%	0	2. a.	2. yes
22	2%	8	50%	50%	8	90%	< .01%	1. b.	1. no
8	20%	10	50%	50%	5	67%	2%	2. a.	2. yes
52A2	10%	10 (1)	33%	67%	10 (1)	66%	< 1%	1. b.	1. no
14	10-20%	5-7	30-40%	60-70%	5	60%	< 1%	2. a.	2. yes
18	30%	6	35%	65%	5	65%	< 1%	a.	yes

Cont. No.	Spay/Neuter % of Practice	Spay/Neuter No./Wk. Average	Spay Cats %	Spay Dogs %	Neuter No./Wk. Average	Neuter Cats %	Risk of Comp. Spay/Neuter	Add'l Proc. Rec. or Req.	Charge for Add'l Proc.
47	10-15%	2-3	40%	60%	3	60%	5%	a.	yes
41	20%	6-10	40%	60%	4-6	40%	4%	a.	yes
62A37	10%	15	10%	90%	5-10	90%	0	1. a. 2. b. 3. g.	1. yes 2. no 3. no
51A1	10%	8	40%	60%	16	75%	< .5%	a.	yes
44	10%	15	33%	67%	7	50%	< 2%	a.	yes
29	3%	4	75%	25%	2-3	66%	.5%	1. b. 2. a.	1. no 2. yes
25*	25%	3-4	40%	60%	3-4	80%	5%	1. b. 2. a.	1. yes 2. yes
55A5	8%	5	66%	37%	4	75%	0	a.	yes
61A21	10%	6	50%	50%	8-10	95%	3-4%	1. b. 2. a.	1. yes 2. yes
16	(8)	7	50%	50%	30	50%	0	(9)	
59A9	5%	4	40%	60%	3	60%	< .1%	a.	yes

KEY TO ADD'L PROC. REC. OR REQ. COLUMN:

- a. Current Shots
- b. Physical Exam
- c. Fecal Exam
- d. Geriatric Series
- e. Dental Exam
- f. Hernia Exam
- g. Micro-hematocrit Exam

NOTES:

- (1) Figure stated for total practice.
- (2) With 14 other vets.; she performs very little surgery herself.
- (3) Does few spays/neuters because "low-cost clinic" next door.
- (4) Very few.
- (5) 1 per year.
- (6) Practice limited to cats only.
- (7) No. has gone down considerably since groups like "Friends of Animals" have come in.
- (8) 1/2 of all surgery is spay/neuter; about 3 hours/day.
- (9) Recommend multiple surgery to save on anesthetic, s.s., claw removal.

TABLE 12  
PARASITISM (FELINE & CANINE)

Cont. No.	Diag. & Treat. % Pract.	Canine Intest. Para. No./Wk.	Canine Heart-worm No./Wk.	Feline Intest. Para. No./Wk.	Risk of Compli-cations	Add'l Services	Add'l Charge
13	? (1)	15	1	10	"rare"	(2)	yes
9	10% (1)	25	< 1 (3)	25	0	none	N/A
4	10%	4-5	< 1 (3)	2 or 3	< 1%	b.	yes
33	10%	20	5	1 or 2	< 1%	a.	yes
40	10-20%	10-20	< 1	1 or 2	< 1%	a.	yes
28	5-7%	1-2	0	3-5	< 1%	a.	yes
44	< 10%	5-6	3	5-6	(4)	none	N/A
36	5-10%	10-20	< 1	?	.1%	none	N/A
5	10% (5)	10	0	5	0	none	N/A
60A7	80% (6)	5-10	< 1	5-10	< 5%	none	N/A
15	< 5%	5	< 1	< 1	< 1%	none	N/A
19	5%	?	< 1	1	"small %"	none	N/A
23	? (7)	?	5-10	?	5%	a.	yes
27	(1)	20	< 1	10	1%	a.	yes
31	?	10	< 1	12	"very few"	a.	yes
35	5% (7)	10	2	4	2%	none	N/A
39	5-10% (1)	30-40	10	20	1%	c.	yes
43	?	2-3	< 1	1	.5%	c.	yes
46	5%	10	< 1	10	.1%	c./d.	yes
50	20%	90-100	40-50	25	1-2%	none	N/A
3	5%	20-40	1-2	?	5%	none	N/A
45	5%	(8)	(8)	6	0	a.	yes
34	20%+	?	< 1	< 4	0	e.	no
22	5-10%	5-6	30	3-4	1%	a.	yes
8	(1)	10	< 1	2	rare	a.	yes
52A2	5%	5	0	?	< 1%	a.	yes
14	< 5%	10	< 1	1-2	< 5%	a.	yes
18	5%	1-2	1-2	1-2	2%	none	N/A
47	5-10%	3	3-5	3	25-30%	none	N/A
41	20% (9)	15	5-10	10	5%	none	N/A
62A37	10-15%	60	0	40	0	none	N/A
51A1	1%	2-3	0	< 1	0	none	N/A
44	3%	10	1	5	< 1%	none	N/A
29	3%	5	0	2	.1%	e.	no
25*	15%	4	< 1	3-4	5%	none	N/A
55A5	1%	2	0	.5	0	none	N/A
61A21	8%	20	?	18	5-7%	a.	yes
16	(10)	40-50	1	30	0	none	N/A
59A9	2%	< 1	< 1	< 2	< .1%	none	N/A

KEY TO ADD'L SERVICES COLUMN:

- a. Current Shots
- b. 2nd Fecal
- c. Micro-hematocrit Exam
- d. Distemper Shots
- e. Physical

NOTES:

- (1) Fecal exam or treatment by veterinary technician.
- (2) Worm twice; fecal exam after each; charge for 2d fecal.
- (3) Not heartworm area.
- (4) High if use "Task" by Shell; low otherwise.
- (5) Figure given for total practice.
- (6) Included in routine exams 80%.
- (7) Stool specimen done by owner.
- (8) Practice limited to cats.
- (9) Vets. have had decline of 50% in recent years.
- (10) Do fecals on every new animal; 350/month.

TABLE 13

 DISTEMPER INOCULATIONS  
 DHL - CANINE; FELINE DISTEMPER/RHINOTRACHEITIS

Cont. No.	Distemper %	Temp. DHL No./Wk.	Adult DHL Ave. No./Wk.	No. Visits DHL	Lepto Separate	Feline Distemper Ave. No./Wk.	Rhino Separate	Feline Distemper No. Visits	Risk of Complication	Additional Procedures	Additional Charge
13	40% (1)	yes - 1 or 2	15-20	2 > 10 wks	no	12	?	2 > 10 wks	rare (2)	a.	no
9	10%	yes - 10	50	2 > 9 wks	no	50-60	yes	2 - kittens	< 1%	a.	no
4	25%	yes - 4-5	20-30	1 > 3 1/2 mo. 2 > 9 wks 3 < 9 wks	no	5-10	yes	1 > 9 wks 2 < 9 wks	< 1% (3)	1. a. 2. b.	1. no 2. yes
33	15%	no	20	1 > 9 wks 3 < 9 wks	no	5	no	2	(4)	a.	no
40	5%	yes - 5	40	2 > 12 wks 3 < 12 wks	yes (5)	1-4	no	1	0	a.	no
28	30%	yes - 2	7-10	(6)	no	12-15	no	2	< 1%	1. a. 2. b.	1. no 2. yes
44	15%	no	?	1 > 6 mo. 2 > 3 mo. 3 < 3 mo.	no	25	varies	1 - cats 2 - kittens	0	no	N/A
36	5-10%	no	?	3 to puppy	no	20	yes	2	0		N/A
5	20-30%	yes - 50	50/75 (1)	3	no	30 (1)	no	2	< 1%	(7)	no
60A7	30%	yes - 5-30 (8)	10-20	3	no	10	yes	3	< 5%	1. a. 2. b.	1. no 2. yes
15	25% (9)	yes - 2	10-15	2 or 3	no	3	no	2	< 1%	b.	yes
19	25%	no	?	2 or 3	occasionally	7	no	2	.25%	b.	yes
23	12.5%	yes - 5-10	57	2 or 3	yes	9.6	no	2	0	a.	yes
27	< 10% (10)	yes - 35	35	2 or 3	no	25-30	no (11)	2	1%	no	N/A
31	20%	no	30	3	no	15-20	no	2	< 1%	1. a. 2. b.	1. yes 2. yes
35	25-30%	yes (12) - 10	40	2 > 12 wks 3 < 12 wks	no	10	no	2	1%	1. a. 2. b. 3. c.	? ? ?
39	50%	yes (12) - 15-20	40-50	2	no	22-28	yes	2	0	1. a. 2. c. 3. d.	1. no 2. yes 3. yes

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Cont. No.	Distemper %	Temp. DHL No./Wk.	Adult DHL Ave. No./Wk.	No. Visits DHL	Lepto Separate	Feline Distemper Ave. No./Wk.	Rhino Separate	Feline Distemper No. Visits	Risk of Complication	Additional Procedures	Additional Charge
43	12%	yes - 4	30	3	yes	2	no	2	.5%	1. a. 2. b. 3. e.	1. no 2. yes 3. yes
46	25-30%	yes (12) - 75	65	3	no	45	yes	2	< 1%	1. a. 2. b.	1. no 2. yes
3	25-40%	no	50	2 or 3	no	15	no	2 or 3	5%	a.	yes
45	N/A (13)	N/A	N/A	N/A	N/A	25	?	1 > 13 wks 1 < 13 wks	0	b.	no
34	20% (14)	no	?	2 or 3	no	?	yes	2	< 1%	1. a. 2. b.	1. no 2. yes
22	10-15%	yes - 20	50	2-4	no	10-15	yes	1	0	1. a. 2. b.	1. no 2. no
8	10%	no	200	2	yes	100	no	2	< 1%	a.	no
52A2	40%	yes	50 (14)	1-3	no	20-30 (15)	yes	2	< 1%	a.	no
14	10-20%	yes - 5-6	30	2 or 3	no	15	no	2 or 3	< 1%	b.	usually
18	20%	no	20	2 or 3	no	27	yes	1 or 2	< 1%	a.	varies
47	10%	yes -	10	2	yes	10	yes	2	< 1%	no	N/A
41	10%	no	60	1 or 2	no	20-25	no	2	< 1%	a.	no
62A37	15-20%	no	100	3	no	50	no	2	rare	1. a. 2. b.	1. no 2. yes
51A1	20% (17)	no	20	3	no	10	yes	1 > 3 mo. 2 < 3 mo.	< .5%	a.	no
44	10%	no	50 (1)	1-4	yes	15-18 (1)	sometimes	1-4	.5%	a.	no
29	10%	yes - ?	20-25	3	no	7	no	2	0	a.	no
25 <sup>#</sup>	35-40%	yes - 15	20	2-4	no	20	no	2 > 9 wks 3 < 9 wks	< 1%	1. a. 2. b.	1. no 2. yes
55A5	15%	yes - 10	20	2 > 10 wks 3 < 10 wks	no	7	yes	2 or 3	0	a.	no
61A21	6%	no	25	2 > 9 wks 3 < 9 wks	no	20	no	3 < 9 wks 2 > 9 wks	< .5%	1. a. 2. b.	1. no 2. yes
16	20%	no	30	2	no	15	yes	1 or 2	.5%	f.	no
59A9	10%	no	?	1 or 2	no	20	yes	2 < 4 wks 1 > 4 wks	< 1%	1. a. 2. b.	1. no 2. yes

<sup>#</sup> Other veterinarian at same number as original.

## KEY TO ADDITIONAL PROCEDURES COLUMN:

a. Physical Exam    b. Fecal Exam    c. Heartworm Exam    d. Booster Shot    e. Dental Exam    f. Office Call

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## APPENDIX 5

### Price Dispersion Survey

#### I. Survey Design

##### A. Selection of Respondents

Six cities were chosen for the survey: Washington, D. C.; Denver, Colorado; San Francisco, California; Dallas, Texas; Chicago, Illinois; and Atlanta, Georgia. The cities were selected to give a broad geographic base for measuring prices.

The Standard Metropolitan Statistical Areas (SMSA's) for 1975 were used to describe the geographic limits of the cities chosen for the survey.

The Yellow Page listings for "veterinarians," "veterinary clinics," "veterinary hospitals" and "animal hospitals" were obtained for each area within the SMSA for each city. Using a manual process, we cross-checked each listing under the above Yellow Pages designations to avoid duplications. If the Yellow Pages listing did not clearly indicate whether the clinic or veterinarian was engaged in either "small animal" or "mixed" practice, we cross-checked such listings with the AVMA Directory - 1976 (The AVMA Directory uses a coding process to describe the predominate area of practice engaged in by each listed veterinarian.).

We then counted the number of listings resulting from the above process. Next, we selected at least thirty percent of the total number in each city for inclusion in the survey by counting off every third, fourth or fifth listing, as necessary. Each respondent thus selected was assigned a control number.

##### B. Calling Instructions

Each staff member assisting in the survey was given a "General Instructions" sheet which is reproduced below.

#### 2 - GENERAL INSTRUCTIONS

The goal of this survey is to obtain price information concerning five services: dog spaying; cat neutering; DHL boosters; rabies booster and feline distemper plus Rhino boosters. You will be telephoning veterinary clinics in one of five cities. You should not identify yourself except by name (if necessary). Your questions will probably be directed to the person answering the phone. If he or she wishes for you to talk with someone else after you explain why you are calling, you should do so. Do not, however, ask to speak to a veterinarian unless you are offered the opportunity.

You need never say that you own or even possess the dog and cat about which you are calling. As you will see from the suggested script, it is quite possible to ask for prices without referring to "my dog" or "my cat." You should commit to memory the following facts about the hypothetical dog and cat:

Female Dog (Bitch):

1. This dog is a German shepherd.
2. She's about a year-and-a-half (18 mos.) old.
3. She weighs approximately 37 pounds.
4. She's never been bred and she's not "in heat."
5. The dog is not registered but is purebred.
6. She's been raised as a pet, lives indoors and is house-trained.
7. She's had all her "puppy shots."
8. She seems healthy, does not have fleas or any visible signs of disease.
9. The dog was raised by a private family (not a kennel).
10. She's never been to a "pound" or other public facility.
11. Her name is Cass.

Male Cat (Tom):

1. This cat is a Siamese sealpoint.
2. He's about a-year-and-a-half (18 mos.) old.
3. The cat is not registered, but is purebred.
4. The cat is a family pet. Although he's an "indoor animal," he's allowed to roam freely outdoors.
5. He's had feline distemper shots as a kitten, but has never had Rhino vaccine administered.
6. He's healthy and has no visible signs of disease.
7. The cat was raised by a private family and has never been impounded.
8. His name is Zak.

Use the forms provided for recording the information obtained from each call. You should find it helpful to know the contents of the form thoroughly before making any calls. Try to not sound "canned." Be conversational, but stick with the same general format for each call. Give only the information about the animals contained in the suggested script. If asked, supply whatever other information you can from the facts given. If you are asked for information not in the facts lists, respond by saying, "I don't know." Do not make up any information which isn't in the facts lists.

C. Data Collection Forms

All information obtained was recorded on pre-printed data collection forms. A copy of the form used is reproduced below.

2 - PRICE DISPERSION

Name of Establishment: \_\_\_\_\_

Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Phone No.: \_\_\_\_\_

Interviewer's Name \_\_\_\_\_

Date of Interview: \_\_\_\_\_

A. GENERAL PRICE INFORMATION:

1. Prices quoted over telephone: \_\_\_\_\_

2. Prices not quoted over telephone: \_\_\_\_\_

A. Any other way of obtaining price information prior to completion of procedure;

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

B. DOG SPAY:

1. Initial Price Given: \_\_\_\_\_

2. Additional charges (required):

- A. None (check): \_\_\_\_\_
- B. Boarding: \_\_\_\_\_ days @ \_\_\_\_\_ per day
- C. Pre-op. exam.: \_\_\_\_\_
- D. Post op. exam.: \_\_\_\_\_; number \_\_\_\_\_  
(inc. suture removal)
- E. Other (specify): \_\_\_\_\_  
\_\_\_\_\_
- Total Price: \_\_\_\_\_

II. Survey Results

The information on prices was summarized from the data collection forms. Only "total" prices were summarized. If a range of prices was given, we determined the mean of the range for summation. From these data, we calculated the mean, standard deviation and coefficient of variation for each of the surveyed services in each city. The results of these calculations appear below as Tables 14 through 19.

TABLE 14  
WASHINGTON, D.C. AREA  
PRICE DISPERSION SURVEY

CONTROL NO.	SPAY DOG	DHL BOOSTER DOG	RABIES DOG	NEUTER CAT	FELINE DIST. & RHINO CAT
WA 1	\$40.00	\$ 9.00	\$10.00	\$15.00	\$17.00
WA 2	75.00	10.00	10.00	45.00	16.00
WA 3	43.00	7.00	8.00	15.00	13.00
WA 4	62.50	12.00	10.00	20.00	12.00
WA 5	75.00	12.00	10.00	30.00	16.00
WA 6	50.00	10.00	8.00	20.00	(1)
WA 7	61.50	10.00	9.00	30.00	14.00
WA 8	(2)	(2)	(2)	20.00	20.00
WA 9	79.00	10.00	8.00	30.00	16.00
WA 10	(2)	(2)	(2)	(2)	(2)
WA 11	55.00	10.00	10.00	18.00	10.00
WA 12	(2)	(2)	(2)	(2)	(2)
WA 13	65.00	10.00	8.00	45.00	10.00
WA 14	(2)	8.00	8.00	25.00	16.00
WA 15	57.00	9.00	12.00	31.00	10.00
WA 16	70.00	15.00	15.00	25.00	20.00
WA 17	75.00	12.00	10.00	37.50	14.00
WA 18	40.00	8.00	8.00	15.00	12.00
WA 19	62.50	10.00	6.00	25.00	12.00
WA 20	85.00	10.00	8.00	27.00	8.00
WA 21	60.00	12.00	8.00	20.00	14.00
WA 22	(2)	3.00	3.00	15.00	6.00
WA 23	55.00	9.00	9.00	20.00	12.00
WA 24	60.00	10.00	12.00	20.00	14.00
WA 25	50.00	8.00	6.00	20.00	(1)
WA 26	45.00	15.00	8.00	20.00	14.00
WA 27	50.00	10.00	10.00	20.00	16.00
WA 28	52.50	10.00	8.00	25.00	20.00
WA 29	48.00	10.00	5.00	15.00	14.00
WA 30	60.00	8.00	7.00	20.00	(1)
WA 31	57.50	10.00	10.00	20.00	16.00
WA 32	45.00	10.00	10.00	25.00	10.00
WA 33	60.00	15.00	10.00	25.00	12.00
WA 34	(2)	13.00	12.00	25.00	14.00
TOTAL	\$1638.50	\$315.00	\$276.00	\$763.50	\$398.00
RESPONSE SIZE	29	31	31	32	29
RANGE	\$40-85	\$3-15	\$3-15	\$15-45	\$6-20
MEAN	\$54.62	\$10.16	\$8.90	\$23.86	\$13.72
STAND. DEVIATION	12.13	2.42	2.29	7.73	3.40
COEFFICIENT OF VAR.	22.21	23.82	25.73	32.40	24.78

NOTES: (1) Refused to give prices  
(2) Service not performed at establishment

SOURCE: Federal Trade Commission, Denver Regional Office

TABLE 15  
CHICAGO AREA  
PRICE DISPERSION SURVEY

CONTROL NO.	SPAY DOG	DHL BOOSTER DOG	RABIES DOG	NEUTER CAT	FELINE DIST. & RHINO CAT
CH 1	\$80.00	\$ 7.00	\$ 8.00	\$25.00	\$ 6.00
CH 2	57.50	7.50	7.50	20.00	12.00
CH 3	70.00	7.00	7.00	25.00	7.00
CH 4	90.00	9.00	9.00	40.00	12.00
CH 5	55.00	8.00	8.00	21.00	12.00
CH 6	55.00	8.00	10.00	30.00	8.00
CH 7	75.00	10.00	10.00	25.00	15.00
CH 8	70.00	9.00	9.00	35.00	12.00
CH 9	77.50	21.00 (1)	8.00	60.00	20.00 (1)
CH 10	45.00	7.00	7.00	15.00	(2)
CH 11	60.00	10.00	10.00	25.00	10.00
CH 12	50.00	8.00	8.00	25.00	9.50
CH 13	47.50	8.00	6.00	20.00	8.00
CH 14	60.00	10.00	7.00	30.00	10.00
CH 15	62.50	9.00	9.00	27.50	18.00
CH 16	65.00	9.00	8.00	25.00	10.00
CH 17	50.00	8.00	8.00	25.00	19.00
CH 18	75.00	10.00	10.00	25.00	30.00
CH 19	75.00	8.00	7.00	25.00	12.00
CH 20	65.00	10.00	8.00	25.00	16.00
CH 21	62.50	5.00	5.00	25.00	11.00
CH 22	65.00	7.00	7.00	20.00	13.00
CH 23	57.50	7.00	7.00	20.00	12.00
CH 24	67.50	7.00	7.00	32.00	12.00
CH 25	50.00	8.00	8.00	35.00	8.00
CH 26	63.00	8.00	8.00	20.00	12.00
CH 27	60.00	10.00	12.00	25.00	15.00
CH 28	87.50	8.00	8.00	25.00	16.00
CH 29	65.00	8.00	8.00	40.00	12.00
CH 30	(3)	8.00	9.00	37.50	10.00
CH 31	50.00	8.00	8.00	34.50	11.50
CH 32	65.00	10.00	10.00	30.00	10.00
CH 33	67.50	8.00	8.00	30.00	16.00
CH 34	65.00	8.00	8.00	25.00	16.00
CH 35	50.00	9.00	8.00	35.00	18.00
CH 36	67.50	10.00	9.00	25.00	12.00
CH 37	52.50	8.00	7.00	20.00	8.00

CONTROL NO.	SPAY DOG	DHL BOOSTER DOG	RABIES DOG	NEUTER CAT	FELINE DIST. & RHINO CAT
CH 38	65.00	8.00	7.00	20.00	10.00
CH 39	65.00	8.00	7.00	20.00	18.00
CH 40	60.00	15.00	8.00	20.00	16.00
TOTAL	\$2470.50	\$351.50	\$323.50	\$1087.50	\$510.00
RESPONSE SIZE	39	40	40	40	39
RANGE	\$45-90	\$5-21	\$5-10	\$15-60	\$6-30
MEAN	\$63.35	\$8.79	\$8.09	\$27.19	\$12.75
STAND. DEVIATION	10.50	2.51	1.29	8.04	4.65
COEFFICIENT OF VAR.	16.57	28.56	15.95	29.57	36.47

NOTES: (1) Includes required charge for "office call."  
(2) Service not performed at establishment

SOURCE: Federal Trade Commission, Denver Regional Office

TABLE 16  
ATLANTA AREA  
PRICE DISPERSION SURVEY

CONTROL NO.	SPAY DOG	DHL BOOSTER DOG	RABIES DOG	NEUTER CAT	FELINE DIST. & RHINO CAT
AT 1	\$52.50	\$15.00	\$6.00	\$23.00	\$14.00
AT 2	49.00	10.00	6.00	20.00	10.00
AT 3	65.00	10.00	6.00	40.00	7.50
AT 4	50.00	10.00	6.00	25.00	12.00
AT 5	60.00	10.00	6.00	25.00	10.00
AT 6	60.00	10.00	6.00	25.00	10.00
AT 7	50.00	10.00	8.00	35.00	10.00
AT 8	55.00	10.00	6.00	25.00	10.00
AT 9	55.00	10.00	6.00	20.00	10.00
AT 10	65.00	(1)	(1)	(1)	(1)
AT 11	60.00	(1)	(1)	(1)	(1)
AT 12	60.00	10.00	6.00	35.00	10.00
AT 13	40.00	6.00	5.00	20.00	6.00
AT 14	75.00	8.00	6.00	50.00	8.00
AT 15	57.50	11.50	6.00	25.00	13.00
AT 16	65.00	12.00	6.00	28.00	18.00
AT 17	60.00	11.50	6.00	35.00	14.50
AT 18	65.00	10.00	6.00	28.00	12.00
AT 19	60.00	9.00	6.00	30.00	8.00
AT 20	60.00	10.50	6.00	28.00	10.50
AT 21	(1)	(1)	(1)	25.00	12.00
AT 22	50.00	10.00	6.00	30.00	10.00
AT 23	(1)	(1)	(1)	(1)	(1)
AT 24	40.00	10.00	5.00	25.00	15.00
AT 25	90.50	12.50	7.00	69.50	17.50
AT 26	50.00	10.00	6.00	25.00	12.00
AT 27	60.00	10.00	6.00	25.00	(2)
AT 28	70.00	15.00	6.00	45.00	18.50
AT 29	52.50	12.00	6.00	25.00	18.00
AT 30	55.00	12.00	6.00	30.00	12.00
TOTAL	\$1632.00	\$275.00	\$157.00	\$816.50	\$308.50
RESPONSE SIZE	28	26	26	27	26
RANGE	\$40-90.50	\$6-15	\$5-8	\$20-69.50	\$6-18.50
MEAN	\$58.29	\$10.58	\$6.04	\$30.24	\$11.87
STAND. DEVIATION	10.16	1.85	.5274	10.69	5.06
COEFFICIENT OF VAR.	17.43	17.49	8.73	35.35	42.63

NOTES: (1) Refused to give prices  
(2) Service not performed at establishment

SOURCE: Federal Trade Commission, Denver Regional Office

TABLE 17  
DALLAS AREA  
PRICE DISPERSION SURVEY

CONTROL NO.	SPAY DOG	DHL BOOSTER DOG	RABIES DOG	NEUTER CAT	FELINE DIST. & RHINO CAT
DL 1	\$55.00	(1)	(1)	\$20.00	\$20.50
DL 2	70.00	\$ 8.00	6.00	40.00	16.00
DL 3	(2)	(2)	(2)	(2)	(2)
DL 4	55.50	8.00	7.00	23.00	14.00
DL 5	53.00	10.00	6.00	20.00	17.00
DL 6	55.00	7.00	6.00	20.00	14.00
DL 7	60.00	7.50	6.00	20.00	12.00
DL 8	58.00	9.00	6.00	20.00	17.00
DL 9	55.00	8.00	6.00	20.00	10.00
DL 10	52.00	14.00	6.00	25.00	12.00
DL 11	72.00	9.00	6.00	20.00	12.00
DL 12	(2)	(2)	(2)	(2)	(2)
DL 13	55.00	8.00	6.00	22.50	10.00
DL 14	50.00	8.00	6.00	20.00	(2)
DL 15	53.00	10.00	6.00	27.50	10.00
DL 16	47.50	7.50	6.00	22.50	15.00
DL 17	65.00	7.50	5.00	25.00	10.00
DL 18	50.00	7.00	6.00	20.00	12.50
DL 19	53.50	8.50	5.00	18.50	15.00
DL 20	44.00	8.00	6.00	22.50	10.00
DL 21	50.00	8.00	7.00	20.00	14.00
DL 22	50.00	8.00	7.00	20.00	10.00
DL 23	40.00	7.50	6.00	20.00	15.00
DL 24	50.00	8.50	5.00	15.00	7.50
DL 25	62.50	8.00	5.00	15.00	10.00
DL 26	50.00	6.00	5.00	15.00	6.00
DL 27	45.00	7.50	6.00	25.00	10.00
DL 28	57.50	8.00	7.00	25.00	15.00
DL 29	(2)	8.00	7.00	30.00	8.00
DL 30	40.00	8.00	6.00	17.50	10.00
DL 31	65.00	12.00	6.00	25.00	12.00
DL 32	57.50	8.50	6.00	25.00	14.50
DL 33	45.00	8.00	6.00	20.00	8.00
DL 34	50.00	8.00	6.00	20.00	10.00
DL 35	45.00	7.00	6.00	15.00	7.00
TOTAL	\$1711.00	\$266.00	\$192.00	\$714.00	\$384.00
RESPONSE SIZE	32	32	32	33	32
RANGE	\$40-72	\$6-14	\$5-7	\$15-40	\$6-20.50
MEAN	\$53.47	\$8.31	\$6.00	\$21.65	\$12.00
STAND. DEVIATION	7.75	1.48	.57	4.85	3.34
COEFFICIENT OF VAR.	14.49	17.81	9.50	22.40	27.83

NOTES: (1) Refused to give prices  
(2) Service not performed at establishment

SOURCE: Federal Trade Commission, Denver Regional Office

TABLE 18  
DENVER AREA  
PRICE DISPERSION SURVEY

CONTROL NO.	SPAY DOG	DHL BOOSTER DOG	RABIES DOG	NEUTER CAT	FELINE DIST. & RHINO CAT
DN 1	\$50.00	\$ 6.00	\$5.00	\$20.00	\$13.00
DN 2	50.00	8.50	5.00	22.00	12.00
DN 3	(1)	(1)	(1)	(1)	(1)
DN 4	30.00	6.00	5.00	20.00	13.00
DN 5	46.50	10.00	5.00	20.00	11.00
DN 6	40.00	6.00	5.00	20.00	10.00
DN 7	62.00	10.00	5.00	20.00	10.00
DN 8	45.00	8.00	5.00	17.00	8.00
DN 9	54.00	12.00	5.00	25.50	10.00
DN 10	48.00	8.00	5.00	17.50	13.50
DN 11	40.00	8.00	5.00	15.00	10.00
DN 12	62.00	9.00	5.00	24.00	9.00
DN 13	64.50	10.50	5.00	20.00	10.00
DN 14	52.50	10.00	5.00	21.00	8.00
DN 15	60.00	10.00	5.00	20.00	14.00
DN 16	47.50	7.00	5.00	13.50	8.50
DN 17	50.00	8.00	6.00	20.00	10.00
DN 18	45.00	8.00	6.00	25.00	12.00
DN 19	45.00	8.00	5.00	20.00	10.00
DN 20	52.50	9.00	5.00	17.00	10.00
DN 21	40.00	11.00	8.00	17.00	13.00
DN 22	(2)	(2)	(2)	(2)	(2)
DN 23	50.00	9.00	6.00	20.00	12.00
DN 24	52.50	8.00	5.00	20.00	12.00
DN 25	40.00	7.00	5.00	20.00	10.00
DN 26	35.00	6.00	5.00	15.00	8.50
DN 27	45.00	8.00	5.00	20.00	9.00
DN 28	64.00	11.00	6.00	24.00	15.00
DN 29	45.00	10.00	5.00	22.50	15.00
DN 30	47.50	7.00	6.00	20.00	7.00
DN 31	37.50	8.00	5.00	15.00	(2)
DN 32	45.00	9.00	7.00	25.00	14.00
DN 33	60.00	9.00	6.00	25.00	10.00
DN 34	50.00	9.00	5.00	17.50	(2)
DN 35	76.50	10.00	5.00	30.00	15.00
TOTAL	\$1632.50	\$284.00	\$176.00	\$668.50	\$342.50
RESPONSE SIZE	33	33	33	33	31
RANGE	\$30-76.50	\$6-12	\$5-8	\$13.50-30	\$7-15
MEAN	\$49.47	\$8.61	\$5.33	\$20.26	\$11.05
STAND. DEVIATION	9.65	1.55	.69	3.55	2.26
COEFFICIENT OF VAR.	19.51	18.00	12.95	17.52	20.45

NOTES: (1) Refused to give prices  
(2) Service not performed at establishment

SOURCE: Federal Trade Commission, Denver Regional Office

TABLE 19  
PRICE DISPERSION SURVEY

CONTROL NO.	SPAY-DOG	DHL BOOSTER-DOG	RABIES-DOG	NEUTER-CAT	FELINE DIST. & RHINO-CAT
SF 1	\$45.00	\$ 8.00	\$8.00	\$14.00	\$14.50
SF 2	60.00	10.00	9.00	25.00	10.00
SF 3	45.00	10.00	8.00	20.00	9.00
SF 4	59.00	10.50	9.00	22.50	15.00
SF 5	65.00	10.00	8.00	22.50	9.00
SF 6	55.00	7.00	6.00	15.00	(1)
SF 7	75.00	9.00	9.00	12.00	15.00
SF 8	77.50	11.00	10.00	25.00	(2)
SF 9	70.00	12.00	10.00	25.00	15.00
SF 10	52.50	12.00	10.00	20.00	20.00
SF 11	57.50	10.00	9.00	20.00	15.00
SF 12	45.00	11.00	10.00	22.00	15.00
SF 13	50.00	10.00	8.00	20.00	(1)
SF 14	55.00	10.00	10.00	20.00	18.00
SF 15	47.50	11.00	9.00	20.00	15.00
SF 16	50.00	12.50	9.00	20.00	12.50
SF 17	50.00	12.50	10.00	18.00	12.50
SF 18	53.00	11.50	9.00	23.50	19.00
SF 19	75.00	9.50	8.50	18.00	19.00
SF 20	45.00	11.00	10.00	20.00	15.00
SF 21	60.00	11.00	9.00	18.00	15.00
SF 22	40.00	11.00	8.00	12.00	15.00
SF 23	70.00	12.00	9.00	20.00	9.00
SF 24	50.00	10.00	7.00	17.50	8.00
SF 25	55.00	12.50	7.00	20.00	(2)
SF 26	50.00	12.00	10.00	25.00	(1)
SF 27	55.00	10.00	9.00	19.00	16.00
SF 28	60.00	8.50	8.00	20.00	16.00
SF 29	55.00	9.00	7.00	17.50	16.00
SF 30	50.00	11.50	9.00	20.00	21.50
SF 31	50.00	11.00	9.00	20.00	15.00
SF 32	71.50	4.50	4.50	41.50	8.00
SF 33	(2)	(2)	(2)	35.00	(1)
SF 34	67.50	10.00	10.00	20.00	15.00
SF 35	42.50	9.50	8.50	19.00	16.50
SF 36	45.00	12.50	9.00	25.00	12.50
SF 37	50.00	14.50	9.00	20.00	14.50
SF 38	77.50	11.00	11.00	20.00	19.00
SF 39	50.00	15.00	12.50	20.00	15.00
SF 40	50.00	8.50	7.00	15.00	10.00
SF 41	50.00	8.50	8.00	20.00	10.00
SF 42	65.00	10.00	8.00	25.00	12.00
SF 43	55.00	13.50	9.00	20.00	14.50
SF 44	57.50	9.00	9.00	20.00	14.00

CONTROL NO.	SPAY-DOG	DHL BOOSTER-DOG	RABIES-DOG	NEUTER-CAT	FELINE DIST. & RHINO-CAT
SF 45	60.00	9.00	8.00	20.00	12.00
SF 46	50.00	5.00	5.00	15.00	12.50
SF 47	52.50	11.50	8.50	22.50	11.50
SF 48	60.00	15.00	10.00	25.00	20.00
SF 49	57.50	10.00	10.00	25.00	15.00
SF 50	62.50	15.00	10.00	15.00	15.00
SF 51	55.00	15.00	8.00	15.00	12.50
TOTAL	\$2806.00	\$534.00	\$463.50	\$1049.50	\$639.50
RESPONSE SIZE	50	50	50	51	45
RANGE	\$40-77.50	\$4.50-15	\$4.50-12.50	\$12-41.50	\$8-21.50
MEAN	\$56.12	\$10.68	\$8.73	\$20.58	\$13.90
STAND. DEVIATION	9.37	2.23	1.40	4.94	3.24
COEFFICIENT OF VAR.	16.70	20.88	16.04	24.00	23.31

- NOTES: (1) Refused to give prices  
(2) Service not performed at establishment

SOURCE: Federal Trade Commission, Denver Regional Office

APPENDIX 6

Notice of Intent to Recommend Rulemaking

By minute of October 21, 1976, the Commission instructed staff to consult with representatives of state and local governments whose laws would be affected by a Trade Regulation Rule. This process is to begin at the earliest possible time, while staff is developing a proposal for a Trade Regulation Rule. A memorandum recommending a Rule to the Commission must describe the results of this process. Pursuant to the Commission's instruction, we drafted a "Notice of Intent to Recommend Rulemaking," describing, in general terms, our intent to recommend a Rule concerning advertising of veterinary goods and services. This notice is reproduced below:

TO STATE AND LOCAL GOVERNMENTS

NOTICE OF INTENT TO RECOMMEND RULEMAKING AND INVITATION TO COMMENT

The Denver Regional Office of the Federal Trade Commission intends to recommend publication of a proposed trade regulation rule which may have a significant effect on existing state law.

Before making this recommendation, however, we must inform the Commission of the potential effect of such a trade regulation rule on state and local law. We seek your assistance in ascertaining how this proposed rule may affect the laws of your state and how we may resolve or minimize potential conflicts between the rule and state law. This process is in keeping with the Commission's policy of seeking involvement of representatives from state and local governments at the earliest possible stage in our rulemaking efforts.

The trade regulation rule which the staff of this office intends to recommend to the Commission deals with the broad subject of advertising by veterinarians. This recommendation is based, in part, on our initial examination of state laws and regulations applicable to veterinary advertising. It appears that a majority of states prohibit veterinarians from advertising the prices of the services they perform and that many states also prohibit the dissemination of non-price veterinary advertising. Veterinarians are constrained as well from advertising both price and non-price information by codes of ethics of various national, state and local veterinary associations.

The rule contemplated by the staff of this office would limit the enforcement of both the public and private constraints against veterinary advertising. We

--Thirteen expressed opposition on grounds of "quality issues,"

--Fifty-one expressed no particular opinion, evenly divided between those reserving judgment for a later time, and those simply evidencing disinterest in the matter.

All 88 responses to the notice will be made a part of the rulemaking record, should the Commission approve the staff's proposal.