

COMMISSION AUTHORIZED

Statement of

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on

L.D. 1866

to the

Committee on Business Legislation
Maine House of Representatives

January 8, 1992

The staff of the Federal Trade Commission is pleased to appear at today's hearing to comment on L.D. 1866, a bill to amend Maine's laws governing the practice of optometry. This testimony represents the views of the staff of the Boston Regional Office and the Bureau of Consumer Protection of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

The bill would repeal Maine's current prohibitions against practicing in retail settings and against corporate affiliations. We encourage the legislature to eliminate these prohibitions, because, as the Commission's study of the optometric industry found, such restrictions increase costs and restrict consumers' access to eye care without providing countervailing consumer benefits. Such restrictions on competition have cost consumers across the country millions of dollars annually.

I. The FTC's Experience in the Eye Care Industry

The Federal Trade Commission is charged by statute with preventing unfair methods of competition and unfair or deceptive practices in or affecting commerce.¹ Under this statutory

¹ 15 U.S.C. Section 45.

mandate, the Commission has investigated the effects of restrictions imposed by private parties and by government action on the business practices of professionals, including optometrists. In seeking to improve consumer access to professional services, the Commission has initiated antitrust enforcement proceedings and conducted studies about the regulation of licensed professions. The Commission's investigation of the optometry industry in 1975 led to the 1978 trade regulation rule, Advertising of Ophthalmic Goods and Services.² That investigation revealed that restrictions on advertising were not the only government-imposed restraints that appeared to limit competition unduly, increase prices, and reduce the quality of eye care provided to the public. As a result, the Commission examined other restraints on commercial practices. These included those that prohibit optometrists from forming business relationships with non-optometrists (for the purpose of

² 16 CFR Part 456 ("Eyeglasses Rule"). The Commission found prohibiting nondeceptive advertising by vision care providers and failing to release eyeglass lens prescriptions to the customer to be unfair acts or practices in violation of section 5 of the FTC Act. The Eyeglasses Rule prohibited bans on nondeceptive advertising and required vision care providers to furnish copies of prescriptions to consumers after eye examinations. On appeal, the Eyeglasses Rule's prescription release requirement was upheld but the advertising portions were remanded for further consideration in light of the Supreme Court decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (finding state supreme court rules against attorney advertising exempt from antitrust challenge). American Optometric Association v. FTC, 626 F.2d 896 (D.C. Cir. 1980). Rather than reinstate the advertising portions of the Eyeglasses Rule, the Commission has dealt with advertising restrictions through administrative litigation. See, e.g., Massachusetts Bd. of Optometry, 110 F.T.C. 549 (1988).

offering eye care to the public) and from locating in mercantile locations, such as in shopping malls and inside optical stores. The Commission also addressed prohibitions against owning or operating more than one office and against practicing under nondeceptive trade names.

To examine the effects of these other restraints, FTC staff conducted two comprehensive studies. The first, published in 1980 by the FTC's Bureau of Economics, compared the price and quality of optometric goods and services in markets with differing degrees of regulation.³ The second, published in 1982 by the Bureaus of Consumer Protection and Economics, compared the price and quality of the cosmetic contact lens fitting services of commercial optometrists and other provider groups.⁴

The FTC studies provide evidence that restrictions on optometrists' commercial practices raise prices but do not improve the quality of care. The Bureau of Economics Study was conducted with the help of two colleges of optometry and the Director of Optometric Services of the Veterans Administration.

³ Bureau of Economics, Federal Trade Commission, *Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (1980) ("Bureau of Economics Study").

⁴ Bureaus of Consumer Protection and Economics, Federal Trade Commission, *A Comparative Analysis of Cosmetic Lens Fitting by Ophthalmologists, Optometrists, and Opticians* (1983) ("Contact Lens Study").

It showed that commercial practice restrictions in a market resulted in higher prices for eyeglasses and eye examinations but did not improve the overall quality of care in that market. The study data showed that prices were 18 percent higher in the markets that barred commercial chain firms. And the Contact Lens Study concluded that, on average, "commercial" optometrists (for example, optometrists who were associated with chain optical firms, used trade names, or practiced in commercial locations) fitted cosmetic contact lenses at least as well as other fitters, but charged significantly lower prices.

During the 1980's, the Federal Trade Commission conducted an extensive rulemaking proceeding to address these restraints on commercial eye care practice. In the course of the formal rulemaking that has become known as Eyeglasses II, the Commission received 243 initial comments, 24 rebuttal comments, and testimony from 94 witnesses during three weeks of public hearings.⁵ The commenters and witnesses included consumers and consumer groups, optometrists, sellers of ophthalmic goods, professional associations, federal, state and local government officials, and members of the academic community.

Based on the evidence assembled in that proceeding, which showed that many regulatory and legislative restraints on

⁵ Some organizations sponsored several witnesses; 74 organizations or individuals presented testimony.

commercial practice had harmful effects, the Commission adopted a rule⁶ to prohibit state-imposed restrictions on four types of commercial arrangements: affiliating with non-optometrists, locating in commercial settings, opening branch offices, and using nondeceptive trade names.⁷ The Commission concluded that restrictions on commercial practices have caused significant injury to consumers, in both monetary losses and less frequent vision care, without providing consumer benefit.⁸ The Commission also found that, while each of these restrictions may impede the growth and efficiency of chain firms or volume practices, a combination of restrictions may completely bar their entry. Consumers spent over eight billion dollars on eye examinations and eyewear in 1983, a figure that included a substantial cost attributable to the inefficiencies of an industry protected from competition.⁹

⁶ Ophthalmic Practices Rule ("Eyeglasses II"), Statement of Basis and Purpose, 54 Fed. Reg. 10285 (March 13, 1989) ("Commission Statement").

⁷ In addition, the Commission decided to retain, with modifications, the prescription release requirement from the original Eyeglasses Rule.

⁸ The Commission found that this evidence "demonstrates that these restrictions raise prices to consumers, and, by reducing the frequency with which consumers obtain vision care, decrease the overall quality of care provided in the market. The rulemaking record establishes that the presence of commercial optometric firms lowers the cost of eye care to patients of both commercial and noncommercial optometrists. The evidence also indicates that these restrictions do not provide offsetting quality-related benefits." Commission Statement, at 10286.

⁹ Commission Statement at 10285-86.

The rule the Commission adopted in 1989 is not in effect. The Court of Appeals vacated the Eyeglasses II rule in 1990, on the grounds that the Commission lacked the statutory authority to make rules declaring state statutes unfair. In doing so, however, the court did not reject, or even address, the Commission's substantive findings that the restrictions harmed consumers.¹⁰

II. Maine's Current Law and L.D. 1866

Maine's current law includes restrictions that were the subject of the Eyeglasses II rule. Maine now prohibits optometrists from associating with other businesses or with persons who are not optometrists "for the promotion of any commercial practice for profit."¹¹ Maine law also prohibits optometrists from practicing as employees of mercantile establishments, from encouraging promotion of their services as part of a mercantile or commercial establishment, and from practicing as lessees of a business that sells optical goods.¹²

¹⁰ California State Board of Optometry v. FTC, 910 F.2d 976 (D.C. Cir. 1990), reh'g denied, January 8, 1991.

¹¹ 32 Maine Rev. Stat. Ann. §2435.

¹² 32 Maine Rev. Stat. Ann. § 2434-4. See also § 2431-A, sub-§2, ¶J, making it a grounds for disciplinary action to practice on premises where "materials other than those necessary to render optometric services" are dispensed.

The bill now under consideration would remove those prohibitions against aspects of commercial practice.¹³

Restrictions on affiliations with non-professionals and on associations with other businesses prevent business corporations or non-optometrists from employing optometrists and prevent optometrists from entering partnerships and franchise agreements with non-optometrists. Such restrictions may deny optometrists access to sources of capital and tend to inhibit the development of large-scale practices that can take advantage of volume purchase discounts and other economies of scale. The likely result of excluding high-volume practitioners from the market and preventing practitioners from operating at the most efficient level is higher prices for optometric goods and services.¹⁴

We encourage the removal of provisions prohibiting optometrists from working for lay persons or entering into partnerships or other associations with them. In our experience, restrictions on these types of business formats prevent the formation and development of forms of professional practice that may be innovative, be more efficient, provide comparable or

¹³ The bill would also amend certain other grounds for discipline in 32 Maine Rev. Stat. Ann. § 2431-A, sub-§2. This testimony does not address those amendments.

¹⁴ Commission Statement at 10288-10289.

higher quality services, and offer competition to traditional providers.¹⁵

We also support efforts to remove restrictions on optometrists practicing in commercial locations, including being a lessee of a commercial or mercantile establishment. Restrictions against such locations can raise prices to consumers by inhibiting the formation of high-volume commercial practice. Mercantile locations, which are generally more convenient to consumers, generate a high volume of consumer traffic.¹⁶

Maine also requires optometrists to practice only under the name on their certificate.¹⁷ L.D. 1866 does not address this part of Maine's law. The Commission has found that such restrictions on the use of non-deceptive trade names hinder the growth and development of optometric firms and make it difficult for high-volume operators to advertise multiple outlets.¹⁸ These restrictions thus may deprive consumers of valuable information and increase consumer search costs.

¹⁵ Id.

¹⁶ Id. at 10289.

¹⁷ 32 Maine Rev. Stat. Ann. §2431-A sub-§2, ¶K.

¹⁸ Commission Statement at 10289.

We are pleased to have this opportunity to present our views on L.D. 1866, which would remove Maine's restrictions on certain commercial aspects of the practice of optometry. We encourage the legislature to take steps to remove these restraints, which impose costs on consumers yet provide no consumer benefits.