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Federal Trade Commission
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ACTHURK

May 11, 1987

Ms. Shay Bergin
Executive Director to the
Deputy Majority Leader
The Assembly of the State
of New York
Legislative Office Building, Room 941
Albany, New York 12248

Dear Ms. Bergin:

The staff of the Federal Trade Commission is pleased to respond to your invitation to comment on proposed New York legislation relating to lenses used for simple magnification, including ready-to-wear reading eyeglasses.¹ Assembly Bill 4801 (A. 4801) would permit over-the-counter sale of these products, exempting them from current provisions requiring that all eyeglasses or lenses be sold only by prescription of a licensed physician or optometrist. The proposal would therefore allow New Yorkers to purchase reading glasses without a prescription. In addition, however, the bill would require sellers of these products to disclose in any print advertising and at the point of sale that they are not intended to replace prescription glasses or regular eye check-ups.

We support A. 4801 because it would make reading glasses available to New York consumers without a prescription. These glasses are currently available without prescription in 46 other states. Over-the-counter availability of reading glasses is likely to result in greater competition in the market for eyeglasses and to increase convenience and reduce prices for consumers. However, we are concerned that the disclosures required by A. 4801 may add costs to the product that may unnecessarily diminish the consumer benefits of the bill. Because it seems likely that the information required to be

¹ This letter presents the comments of the New York Regional Office and the Bureau of Competition, Economics and Consumer Protection of the Federal Trade Commission. The views expressed are not necessarily those of the Commission or of any individual Commissioner, although the Commission has voted to authorize the presentation of these comments to you.

disclosed will be provided voluntarily by others in the market who already have significant incentives to do so without regulation, the disclosure requirement is unlikely to produce any benefits to consumers. Accordingly, we urge that the disclosure requirement be deleted from the proposed legislation.

I. Interest and Experience of the Federal Trade Commission

The Federal Trade Commission is an agency empowered by Congress under 15 U.S.C. § 45 with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to this mandate, the Commission seeks to serve the public interest and protect the marketplace from unreasonable restraints of trade. The agency's objective is to identify and seek the removal of restrictions that impede competition or increase costs, without providing countervailing benefits to consumers. As part of these efforts we provide comments, on request, to federal, state, and local legislatures and administrative bodies to explore competition-based approaches to various policy issues.

The Commission's staff has had substantial experience in considering competitive restrictions on commercial practices in the area of eye care, including the over-the-counter sale of ready-to-wear reading glasses.² Accordingly, we offer our comments in the hope that they will aid the New York legislature in its deliberations concerning A. 4801.

II. Background

Ready-to-wear simple magnification reading glasses are primarily used to remedy a common condition known as "presbyopia," which generally affects people over age 40.

² See, e.g., Trade Regulation Rule on Advertising of Ophthalmic Goods and Services, 16 C.F.R. Part 456 (1987); Bureau of Consumer Protection, Federal Trade Commission, Ophthalmic Practice Rules: State Restrictions on Commercial Practice (1986); Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practices in the Professions: The Case of Optometry (1980); Bureau of Consumer Protection, Federal Trade Commission, State Restrictions on Vision Care Providers: The Effects on Consumers (1980).

Presbyopia is the decreased ability of the normal eye to focus on near objects and printed material. Millions of middle-aged and elderly persons remedy this problem by purchasing non-prescription, over-the-counter reading glasses at department stores, drug stores, and other retail outlets. Consumers can select the appropriate glasses simply by trying on different pairs and finding the ones offering the most effective magnification level.

The market for ready-to-wear reading glasses is substantial -- currently accounting for estimated sales of \$100 million annually.³ The products come in different magnifying strengths and generally range in price from \$12 to \$15 a pair. In contrast, prescription reading glasses are more costly. Although prescription glasses, too, often involve simple magnification, they are accompanied by professional services such as lens grinding and fitting into frames. Prescription reading glasses generally range in price from about \$25 to \$75 a pair.

New York is one of only four states that prohibits the sale of non-prescription reading glasses.⁴ The proposed legislation would amend New York law to enable New York consumers to purchase these glasses over-the-counter and thus benefit from the availability of this lower cost alternative.

III. Current Law Raises Costs Without Countervailing Benefits; The Proposed Amendment Enhances Consumer Choice and Saves Consumer Dollars

The current New York prescription requirement increases consumer costs in two ways. First, consumers must bear the cost of purchasing professional examination services they might not otherwise need or desire. Second, consumers must pay the higher price charged for prescription lenses in the absence of effective competition from more economical alternatives.

There do not appear to be significant countervailing benefits associated with the current law that would justify

³ "Spectacles: Legislative Fine Print," New York Times, March 25, 1987, at 42. See also State Restrictions on Vision Care Providers: The Effects on Consumers, supra note 3, at 138.

⁴ The other states are Louisiana, Minnesota and Rhode Island. (Minnesota restricts only high magnification reading glasses).

depriving consumers of the freedom to choose this lower cost alternative. Proponents of the prescription requirement argue that consumers are benefited by the intervention of an eye care professional who can determine whether presbyopia is accompanied by a more serious problem. However, if a person has symptoms of eye problems other than simple presbyopia, these symptoms will generally continue despite the use of reading glasses.⁵ Consequently, persons would not be deterred from seeking proper medical attention as a result of their over-the-counter purchase. At most, they may delay securing medical care addressing these symptoms for only a brief period.⁶ During our examination of over-the-counter ready-to-wear eyeglass restrictions, we have found no reliable evidence that suggests that consumers have been injured by the availability of ready-to-wear reading glasses in those 46 states that allow their sale.⁷

⁵ For example, Dr. Calvin W. Roberts, the Director of Cornea Services at Cornell Medical Center, has expressed the view that reading glasses will not mask eye diseases or other defects and do not cause consumers to forego seeking professional help for such conditions. According to Dr. Roberts, a consumer with an eye problem other than or in addition to presbyopia would realize immediately upon obtaining reading glasses that such glasses were an inadequate remedy for the problem. See Affidavit of Dr. Calvin W. Roberts, M.D., Assistant Professor, Attending Surgeon, and Director of Cornea Services at New York University Hospital-Cornell Medical Center (Sept. 30, 1985). (Dr. Roberts' affidavit, designated Exhibit E, is contained in the record compiled by the New York legislature). See also State Restrictions on Vision Care Providers: The Effects on Consumers, supra note 3, at 138.

⁶ An apt analogy may be the use of over-the-counter analgesics to treat headaches. A headache may merely be a medically insignificant discomfort, or it may be a symptom of a serious disorder. Nevertheless, New York does not ban the sale of over-the-counter headache remedies.

⁷ The Commission sought comment on the effects on consumers of state restrictions on the over-the-counter sale of ready-to-wear reading glasses, in conjunction with other issues, in its Eyeglasses II Advance Notice of Proposed Rulemaking (45 Fed. Reg. 79823 (1980)). This aspect of the rulemaking was closed in 1984, however, because of the small number of states involved and inconclusive information on this issue.

While some eye care professionals may nonetheless believe that professional intervention and supervision of consumers' purchasing decisions is preferable, it is the consumer who bears the substantial financial burden of additional precautions. A. 4801, by amending New York law to make reading glasses available over-the-counter, will eliminate serious restrictions on competition and will expand the range of consumer choice.

IV. Proposed Specific Mandatory Disclosures May Not Optimally Serve Consumer Interests

Consumer choice and competition are enhanced when accurate, relevant information is made available in the marketplace. Indeed, certain information may be essential to enable consumers to make reasoned, safe choices. Although disclosure of such information should be encouraged, and in some instances may be required,⁸ it is never without its costs. These costs are usually passed on to consumers in the form of higher prices. Consequently, disclosure requirements should be imposed only where the benefits of the disclosure demonstrably outweigh their costs. This does not appear to be the case in the proposed legislation.

A. 4801 would require a specific affirmative disclosure. In all print advertising of non-prescription reading glasses, and at the point of sale, the proposed legislation would require the following notice:

ATTENTION; READY-TO-WEAR, NON-PRESCRIPTION READING GLASSES ARE NOT INTENDED TO REPLACE PRESCRIBED CORRECTIVE LENSES OR EXAMINATIONS BY AN EYE CARE

⁸ The Federal Trade Commission has required disclosures as a remedy where necessary to avoid consumer injury, such as where consumers are likely to be deceived without the disclosure or otherwise confronted with a serious safety hazard. See, e.g., Thompson Medical Co., 104 F.T.C. 648 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 55 U.S.L.W. 3369 (Feb. 23, 1987) (affirmative disclosure ordered to remedy misrepresentations regarding health products); Figgie Int'l, Inc., 107 F.T.C. 313 (1986), aff'd 4th Circuit, No. 86-3075 (April 21, 1987) (affirmative disclosure ordered to remedy deception with regard to fire safety devices).

PROFESSIONAL. CONTINUOUS EYE CHECK-UPS ARE NECESSARY TO DETERMINE YOUR EYE HEALTH STATUS AND VISION NEEDS.

The disclosure at the point of sale (whether on a display, or, if there is no display, in the area of sale) must be in at least 10-point bold type.

The specific disclosure contained in A. 4801 is likely to add to the cost of selling over-the-counter reading glasses. Any disclosure obligation increases advertising costs, either because it increases the length of the message or requires suppliers to forego some portion of the advertising message they would have delivered had the space not been taken by the disclosure. Unnecessary disclosure requirements could therefore result in less information being made available to consumers.

In addition, because New York will be the sole state to require specific disclosures in advertisements as well as at point of sale, sellers may be required to create and print separate advertisements and point-of-sale displays for that market. Resulting costs may be substantial because advertisers will be required to produce multiple versions of advertisements and point-of-sale displays. These costs could become prohibitive if other states were to follow suit with additional, and different, disclosure requirements.

It is noteworthy that the overwhelming majority of states have long permitted the sale of ready-to-wear reading glasses without requiring any disclosure. Of the 46 states permitting the sale of non-prescription reading glasses, only one, Massachusetts, requires a specific disclosure stating essentially that the glasses are not a substitute for an eye examination and corrective lenses. However, unlike the proposed New York provision, which would require affirmative disclosures

in all advertising and at point of sale, the Massachusetts provision requires disclosure only at the point of sale.⁹

Against the costs of New York's proposed disclosure requirement we must weigh the benefits afforded consumers by the proposed disclosure. We do not believe that the disclosure offers any substantial benefits because the market is already providing consumers with relevant eye care information without regulatory intervention. At least some major suppliers of reading glasses voluntarily inform consumers that their product is not a substitute for an eye examination.¹⁰ If such suppliers were required to adhere to specific disclosure language, they would lose the flexibility to convey useful information in a manner most efficient for them, would incur increased advertising costs, and might ultimately face varying state disclosure requirements. This may not only result in a higher price for

⁹ The Massachusetts provision reads as follows:

[A] seller of said ready-to-wear magnifying spectacles or eyeglasses shall have the following notice permanently affixed in plain view to the top of any point of sale display or, if there is no such display, in the area of sale: These magnifiers are not intended to be a substitute for corrective lenses; only a professional eye examination can determine your eye health status and vision needs. Mass. Ann. Laws ch. 112, § 73M (Law. Co-op. Supp. 1987).

Note also that the Minnesota state legislature recently voted in favor of a bill relating to reading glasses which would require a disclosure at the point of sale stating as follows: "If you have experienced a vision loss the selection of these glasses should not take the place of an eye exam."

¹⁰ For example, in a brochure accompanying its reading glasses, the Foster Grant Corporation advises consumers that they should "absolutely not" bypass the eye care professional, and that "regular eye examinations" are recommended for "everybody, especially those over 40 years of age." A brochure accompanying Magnivision reading glasses made by Al-Site Corporation also contains extensive disclosures. This brochure states: "It should be emphasized that ready-to-wear glasses aren't intended to replace examinations by an eye doctor. Continuous eye check-ups, especially after the age of 40, will maintain the health of your eyes."

the product, but also may have a chilling effect on suppliers' national or regional advertising efforts. The result may be more detrimental than beneficial to consumer interests.

Moreover, there are others who have a strong interest in making this information available. Providers of eye care services themselves have ample incentive to promote their services through advertising and otherwise. Indeed, the Federal Trade Commission has made considerable efforts to ensure that eye care professionals are not hampered in their freedom to advertise their services.¹¹

Nonetheless, should the New York legislature determine to require some form of disclosure to the effect that reading glasses are not a substitute for an eye examination, we suggest alternatives that may accomplish the bill's objectives at a lower cost.

In lieu of mandating specific disclosures and a required format, A. 4801 might be modified to require a general disclosure, stated in "clear and conspicuous" language, to the effect that reading glasses are not a substitute for prescribed glasses or eye check-ups. Such a disclosure would provide the desired information without requiring manufacturers to print different documents on a state-by-state basis.

In addition, we recommend that this disclosure requirement be limited to the point of sale. Such a lower cost alternative would still provide consumers with information at time of purchase and would alert them to the value of gathering additional information if their condition so warranted. If A. 4801's disclosure provisions are modified in this way, the

¹¹ See, e.g., American Academy of Optometry, Inc., FTC slip op., No. C-3193 (July 21, 1986) (consent order requiring Academy to refrain from restricting truthful advertising); Oklahoma Optometric Ass'n, 106 F.T.C. 556 (1985) (consent order requiring Association to cease prohibiting members' truthful advertising of prices, terms and availability of services or goods); Michigan Optometric Ass'n, 106 F.T.C. 342 (1985) (consent order requiring Association to cease prohibiting or restraining any optometrist from disseminating truthful, non-deceptive information); Montana Bd. of Optometrists, 106 F.T.C. 80 (1985). (consent order requiring Board to cease adopting or maintaining any rule or policy that has the effect of prohibiting or discouraging price-related advertising).

Ms. Shay Bergin

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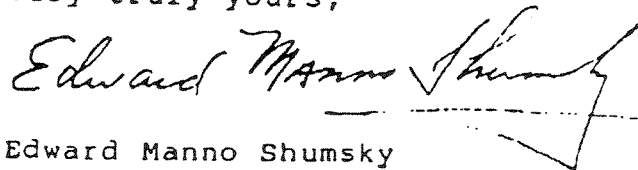
costs of disclosure and attendant increases in the cost of the product could be reduced.

V. Conclusions

We support the proposed legislation to make simple magnification reading glasses available without a prescription, as is the case in 46 states. Nevertheless, we caution that the proposed required advertising disclosures may add unnecessary costs to the product. Should the legislature determine to adopt a disclosure requirement, it may wish to consider the modifications discussed above. We believe the enactment of A. 4801 as so modified would satisfy the intent of the bill's framers without imposing excessive costs on consumers.

We hope that our comments have been of assistance in the deliberations concerning this legislation. Please do not hesitate to contact us if you have any questions or would like further information.

Very truly yours,



Edward Manno Shumsky
Regional Director