ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION

January 25, 2017

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave, NW
Suite CC-5610 (Annex C0)
Washington, DC 20580

RE: Contact Lens Rule, 16 CFR part 315, Project No. R511995

I am writing with regards to the Federal Trade Commission's proposed amendment to the contact lens rule to require that prescribers obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain each such acknowledgment for period of not less than three years. ITIF fully supports the proposed rule as it will impose little burden on prescribers but will give patients stronger and more enforceable rights to exercise choice in their purchase of contact lenses while at the same time providing a means to better assess prescriber's compliance with the original Contact Lens Rule.

The Information Technology and Innovation Foundation (ITIF) is a non-partisan think tank whose mission is to formulate and promote public policies to advance technological innovation and productivity. Recognizing the vital role of technology in ensuring prosperity, ITIF focuses on innovation, productivity, and digital economy issues. We have a long history of working on the issue of contact lens sales because we believe that the ability of consumers to use innovative sales channels, like online sales, boosts consumer welfare and economic productivity.[1] As ITIF has written, the optometry profession has a long history of working to limit competition in the sales of contact lenses, and because of their "gatekeeper" role as prescribers, they have often been able to accomplish their common goals to stifle competition and limit consumer choice.

1. See: *Why UPP Pricing in the Contact Lens Industry Hurts Consumers and Competition,* 113th Cong., July 31, 2014 (testimony of Robert D. Atkinson, President, Information Technology and Innovation Foundation, before the U.S. Senate Committee on Judiciary, Subcommittee on Antitrust, Competition, Policy and Consumer Rights), http://www2.itif.org/2014-senate-contact-lens.pdf; and Robert D. Atkinson, "Public Versus Private Restraints on the Online Distribution of Contact Lenses: A Distinction Without a Difference" (Information Technology and Innovation Foundation, July 2006), http://www.itif.org/files/contactlens.pdf.

For over 15 years, optometrists have lobbied for anti-competitive state laws and engaged in a continuing array of anti-competitive behaviors to make it more difficult for their customers to buy contact lens from other channels, including online and big box retailers.

Unlike medical doctors who sell only their services (examining, diagnosing, and treating patients), optometrists sell both their services (eye exams) and the products they prescribe: contact lenses. It is against the law for consumers to buy lenses without a prescription. And so the profession has both a powerful economic interest (profits) and a powerful tool (the prescription) to ensure that consumers can't buy their lenses from lower cost providers, such as online contact lens companies or big-box retailers.

The optometry industry has long used its unique gatekeeper power to limit patients' ability to buy lenses outside of its cartel. With the advent of disposable lenses in the 1980s and then the emergence of online contact lens sellers in the mid-1990s, it became easy for patients to shop around for the best prices. But faced with this threat, the trade association for optometrists, the American Optometrist Association (AOA), fought back.

According to a complaint filed in 1994 by 32 state attorneys general, the AOA leveraged optometrists' hold on prescriptions to pressure lens manufacturers into distributing only to licensed optometrists, not to alternative providers. The threat was clear: If manufacturers didn't play ball on optometrists' terms, then optometrists would starve the manufacturers of business by refusing to prescribe their brands. After six years of litigation, the AOA in 2001 settled with the state attorneys general and the class of consumers they represented, agreeing to pay a fine for the alleged antitrust activity and pledging to refrain from such activity in the future. But meanwhile, through their state professional associations, optometrists were pressuring state legislatures to block legislation that would require optometrists to give prescriptions to patients to fill wherever they choose. Under this pressure campaign, only 22 states were requiring optometrists to give prescriptions to patients as of 2002.

Attempting to rectify this, Congress in 2003 passed the Fairness to Contact Lens Consumers Act (FCLCA), which, among other things, gave patients the same rights when it comes to contact lenses that they have had with eyeglasses since 1979—the freedom to fill eye prescriptions anywhere they choose. But after this law made it easier for consumers to buy lenses from other distribution channels, optometrists fought back again with further restrictive practices, this time by prescribing so-called "doctor only" lenses—limited-distribution brands of lenses that are available only through eye-care professionals. This practice once again drew the ire of state attorneys general, 36 of whom banded together in 2006 to urge Congress to outlaw it.

That was not the end of the story, however. After the "doctor only" avenue of restricting competition was foreclosed, optometrists pressured most contact lens producers to adopt "unilateral pricing policies"—an arrangement in which optometrists agree to prescribe only lenses from manufacturers that impose retail price maintenance schemes, so that other providers such as big box retailers and online sellers have no way to compete with optometrists on price.

Finally, there appears to be evidence that many prescribers ignore their obligation to provide patients with their prescriptions in order to increase the likelihood that they will be the one making the sale. For example, a 2008 article from *Contact Lens Spectrum* found that their reader survey of optometrists "indicates that despite this federal legislation [FCLCA] only half of the respondents replied 'yes to every patient' when asked if they release contact lens prescriptions."[2] A 2015 survey commissioned by 1-800-Contacts and conducted by Survey Sampling International found that just 35 percent of patients were automatically given a hard copy of their prescription on their day of their office visit. Moreover, the same survey found that 82 percent of eye care professionals presented purchasing options to their patient before providing the prescription. Given that CLR requires that upon completion of a fitting, the patient is to be provided a copy of their prescription automatically, this lax performance of eye care professionals is disturbing.

In other words, simply relying on existing market forces and industry professional norms to advance the intent and purpose of the FCLCA and the Contact Lens Rules does not work because prescribers have both an incentive and ability to limit consumer choice. For any critic who would argue that more regulation cannot be the answer, we would point out that the reason for the regulation is precisely the fact that the industry is already regulated, but in ways that give prescribers power. In other words, consumers are prohibited from buying lenses without a prescription and prescribers have an economic interest in denying their patient's choice. It is in this context of a long set of industry practices to deny consumers the benefit of choice and competition that the FTC is rightly proposing new rules governing contact lens prescription release.

The Commission is also right to include in the proposed rule the requirement to maintain the signed acknowledgement for a period of at least three years. Without such a requirement enforcement of the original Contact Lens Rule will remain difficult. Moreover, despite what some in the optometry industry

2. Carla J. Mack, "Annual Report, Contact Lenses 2007," *Contacts Lens Spectrum,* January 1, 2008 http://www.clspectrum.com/articleviewer.aspx?articleID=101240.

might claim, such a requirement should be easy to administer, particularly if prescribers use an electronic device such as a tablet to present the information to the patient and record the signature electronically. Given that a low-end tablet comes with 32 gigabytes of memory, this means that such a device could hold approximately 1.8 million patient acknowledgement forms.[3] In other words, optometrists could store all their patient signature records for long periods of time at virtually no cost. As such, the Commission's proposed targeted and limited rule works to balance the playing field and create a more competitive market.

In summary, ITIF fully supports the Commission's proposal to require that prescribers obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain each such acknowledgment for period of not less than three years.

I appreciate your consideration of ITIF's comments.

Sincerely,

Dr. Robert D. Atkinson
President and Founder
Information Technology and Innovation Foundation

3. LexisNexis, "How Many Pages in a Gigabyte?" Discovery Series Fact Sheet, https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf.