

April 7, 2018

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, Comment, Project No. R511995

I am writing with regards to the Federal Trade Commission's request for public comments related to the March 7, 2018 public workshop examining the contact lens marketplace and analyzing proposed changes to the Contact Lens Rule, including 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. In addition, to spur consumer choice and competition, we believe that the FTC should focus on steps that would lead to more brand substitution.

The Information Technology and Innovation Foundation (ITIF) is Washington, DC-based 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.

For over fifteen 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. And today the industry is lobbying heavily

in state capitals across the nation to ban or significantly limit the ability of patients to have their eyes examined remotely through online tools.

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 the Contact Lens Rule (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 CLR 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 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. Moreover, if optometrists embraced the digital age, they would all utilize electronic patient health record systems in which case the “burden” maintaining such an acknowledgement would be close to nil. As such the

Commission’s proposed targeted and limited rule works to balance the playing field and create a more competitive market.

But even this step, while important, will not be enough to get to a more competitive, consumer-friendly market because optometrists will continue to work, in partnership with lens manufacturers to limit choice. As such, a key step in establishing a more competitive contact lens marketplace that would give consumers more choice would be to remove barriers to brand substitution. Because prescribers can prescribe a particular lens from a particular manufacturer, the consumer’s choice is limited. And because the prescriber has such power, producers are in a position where they need to gain the favors of the prescribing community so that their lenses, rather than their competitors’, are the ones prescribed. This, more than any other factor, explains why some if not all producers have gone to such great lengths over the years to demonstrate their solidarity with optometrists in opposing steps to create more choice and competition, even when it would appear to be against their interests. For example, it should be in the producers’ interests for patients to be able to buy their lenses from the lowest cost channel because doing so leads to more frequent purchases. But in fact, many producers have sided with optometrists opposing laws and regulations that could give consumers more choice (such as attempted industry adoption of universal pricing policy; and in some cases prescribing doctors’ only lenses). The reason of course can be found in game theory; in this case the prisoners dilemma game. It is interest of all producers to support easier access to lenses, but if one producer breaks ranks and signals to the prescriber community that they are their ally, they know that the prescribers will be more likely to prescribe their lenses over their competitors. So all break ranks.

In response to the argument that optometrists should provide generic prescriptions that let consumers obtain a particular kind of lens from more than one manufacturer, optometrists and the lens industry offer the “one perfect lens” argument. In other words, there is only one right lens for each customer. One customer might only be able to use a Johnson and Johnson lens, another a CooperVision lens, etc. For example, Johnson and Johnson argues that a ban on sellers substituting contact lens is needed because “this provision... which helps to ensure consumers receive the exact lenses prescribed by their eye care professional, regardless of where they choose to purchase—is vital to the sustainability of competition and innovation and is an aspect of the market highly valued by consumers.”⁴

But if this is true, why are manufacturers allowed to give steep rebates and other discounts to optometrists for prescribing their lenses? For example, Johnson and Johnson advertises to optometrists that “[t]he company’s new approach includes category growth initiatives and a rewards program that allows patients to submit for savings before they leave their eye care professional’s office.”⁵ Likewise Bausch + Lomb provides “exclusive pricing and rebate programs” to IDOC, an alliance of independent

optometrists.⁶ Similarly, CooperVision provides rebates to patients but only for sales from the prescribing optometrist, creating an incentive for the patient to request CooperVision lens, even if the supposed “one perfect lens” for the patient is from another manufacturer.⁷ It should also be noted that by offering such rebates that can only be applied with the optometrist, and not with a third-party seller, CooperVision is sending a clear signal to the optometrist to prescribe Cooper lens because they are all but assured that the patient will buy the lens from the them. If there is no substitutability between lenses from different manufacturers and there is only one perfect lens for each customer, then these incentives are likely to lead prescribers to prescribe lenses that are in the financial interests of the optometrist rather than the medical interests of their patient. If, of course, a patient can safely wear the lens from multiple manufacturer then these incentives would have the sole effect of encouraging the optician to choose one lens over another, for their gain.

Also, if there is really only one right lens for each patient why do so many nations allow lens substitutability and why do U.S. contact lens manufacturers sell in those nations and not press policy makers for changes. For example, in the Canadian province of British Columbia a relatively new law requires opticians and optometrists to give clients, free of charge, a copy of their prescription, sight-test assessment or contact-lens specifications — whether or not it is requested by the client — and also to give a copy, free of charge, to a third-party eyewear seller or other person if requested by the client. In France, the prescription is a guideline and the user has a choice of brand. In Spain a prescription is required but consumer can choose the brand. In Italy, Japan, Hong Kong and Netherlands there is no requirement of a prescription. In Sweden the National Board of Health and Welfare was confident that prior restrictions were not needed to protect health and supported the Swedish Patient Safety Act from 2011 that let anyone freely provide contact lenses. In Japan, consumers can buy contact lenses in vending machine. In Australia the contact lens prescription includes brand, size (curvature and diameter) and power and is valid for 2 years, but the buyer self certifies that he or she has a prescription. A leading Australian online lens seller eContactLenses.com.au states “We make ordering prescription lenses easy as you are able to simply confirm your prescription when placing your order. The contact lens prescription includes brand, size (curvature and diameter) and power and is valid for 2 years.”⁸

Moreover, given these differences there appears to be no positive correlation between online sales or requirements for brand specific prescriptions and microbial keratitis. A study by F. Stapleton and N. Carnt published in the journal “Eye” reviewed a range of studies from different nations on incidence of keratitis.⁹ It found for example the incidence per 10,000 daily wear users was lower in Australia, the Netherlands, Scotland, and Sweden than in the United States. The former area all nations where the patient is not required to show a prescription to purchase lenses and therefore can choose their own brand. And in the case of Sweden and the Netherlands it appears that the online market share is higher

than in the United States. As such ITIF urges the FTC to use its research, policy and advocacy tools to promote greater brand choice at point-of-sale for consumers.

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. In addition, we encourage the FTC to advocate for greater brand choice at point-of-sale for consumers.

I appreciate your consideration of ITIF's comments.

Sincerely,



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

Notes:

1. United States Congress Senate Committee on Judiciary, Subcommittee on Antitrust, Competition, Policy and Consumer Rights, *Why UPP Pricing in the Contact Lens Industry Hurts Consumers and Competition*, July 31, 2014. 113th Cong. (testimony of Robert D. Atkinson, President and Found of Information Technology and Innovation Foundation, http://www2.itif.org/2014-senate-contact-lens.pdf?_ga=1.72515347.1831456108.1435966265 and Robert D. Atkinson, *Public Versus Private Restraints on the Online Distribution of Contact Lenses: A Distinction Without a Difference* (Washington: ITIF, 2006).
2. Carla J. Mack, "Annual Report, Contact Lenses 2007", *Contacts Lens Spectrum*, January 1, 2008 <http://www.clspectrum.com/articleviewer.aspx?articleID=101240>.
3. "How Many Pages in a Gigabyte?" Lexis Nexis: Discovery Services Fact Sheet, accessed April 2, 2018, https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf.
4. "Comments to the Federal Trade Commission's Notice of Proposed Rulemaking re: Contact Lens Rule, 16 CFR Part 315 Project No. R511995," Johnson & Johnson Vision Care, Inc., January 20, 2017, <http://jnvisioncareinfo.com/sites/default/files/2017-03/JJVC1%20Full%20FTC%20Comment%202016%20NPRM%20CLR.pdf>.
5. "Johnson & Johnson Vision Care, Inc. Focuses Advocacy Efforts to Defend Regulation Of The Contact Lens Industry," Johnson & Johnson Vision Acuvue, accessed April 2, 2018, <https://www.jnvisionpro.com/contact-lens-update-jjvci>.
6. "Contact Lens Spectrum Weekly Newsletter," Contact Lens Spectrum, March 4, 2018, <https://www.clspectrum.com/newsletters/contact-lenses-today/march-4,-2018>.
7. "CooperVision Rebate," CooperVision, accessed April 2, 2018, <https://coopervision.com/coopervision-rebate>.

8. “How to Buy Contact Lenses Online in Australia,” *eContactLenses.com.au*, accessed April 3, 2018, http://www.econtactlenses.com.au/buy_contact_lenses_online_Australia/.
9. F. Stapleton and N. Carnit, “Contact Lens-Related Microbial Keratitis: How Have Epidemiology and Genetics Helped Us with Pathogenesis and Prophylaxis,” *Eye* 26.2 (2012): 185–193, PMC, April 6, 2018, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3272197/>.