

April 2, 2004

Federal Trade Commission
Office of the Secretary, Room 159-H (Annex A)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Contact Lens Rule, Project No. R411002

Dear Sir or Madam:

The Progressive Policy Institute (“PPI”) is pleased to submit these comments to the Federal Trade Commission (“FTC”) on the Notice of Proposed Rulemaking for the Contact Lens Rule.

PPI is a think tank whose mission is to define and promote a new progressive politics and policy for America in the 21st Century. PPI has been keenly interested in promoting public policies to foster e-commerce, which we view as a major driver of economic growth. In this context, PPI has published a number of reports documenting the extent to which existing laws, regulations, and business practices hinder the growth of e-commerce, particularly regulations designed to protect incumbent businesses or professions from more robust e-commerce competitors. We see this wide array of protectionist laws and regulations as a major threat to the growth of e-commerce. In fact, in our report entitled, “The Revenge of the Disintermediated: How the Middleman is Fighting E-Commerce and Hurting the American Consumer” we estimated that Americans pay a minimum of \$15 billion more per year for goods and services because of e-commerce protectionism by middlemen. The report specifically identified the Internet sale of contact lenses as an industry where optometrists have worked to make it increasingly difficult for contact lens wearers to buy contacts online. In addition, in our report “The Best States for E-commerce”, we identified state laws and regulations in a host of industries, including contact lens, that limited consumer choice without providing any other benefits, such as health or safety.

We were pleased to see Congress pass The Fairness to Contact Lens Consumers Act (H.R. 3140, P.L. 108-164). As the FTC considers the proposed rule to implement the Act we strongly encourage the FTC to focus on consumers’ interests and their freedom to choose where they may purchase their contact lenses by developing meaningful regulations that ensure that e-commerce competitors can compete on a level playing field without being burdened with unfair and discriminatory rules. In particular, the FTC should consider amending its proposed definition for business hours.

As Congress demonstrated when they passed The Fairness to Contact Lens Consumers Act, there is clear need for federal action. E-commerce continues to grow as a greater share of Americans get online, however, barriers exist in the contact lens market. The ability to purchase contact lenses online offers consumers choice, convenience, and substantial cost savings. Moreover, as 17 State Attorneys’ General argued in their filing with the FTC on September 2, 1997, there is no evidence that purchasing contact lenses online poses any health risks; in fact they stated, “Easier access to, and lower

prices for, replacement lenses should encourage consumers to wear and use the lenses properly, thereby increasing patient safety."

As e-commerce grows, those middle men threatened with disintermediation and loss of sales are not sitting by idly, many are not only working to have government pass laws or rules to protect them from competition, but are also pressuring manufacturers to limit sales to e-commerce competitors. This middle-man resistance is occurring in a wide range of industries, including the online sale of contact lenses. As documented in PPI's March 2002 report entitled, "The Best States for E-Commerce" (a copy of which is attached for the record), optometrists and other contact lens providers have successfully lobbied around the country for laws that limit online competition and have the effect of encouraging, or even requiring consumers to purchase contact lenses directly from their doctors. Optometrists have been able to establish numerous barriers to the online sale of contact lenses, due in large part to the fact that, unlike most other health care providers, they sell the products they prescribe. In fact, the products they sell account for a significant share of their revenue. Therefore, providers have a powerful economic incentive to ensure that patients buy eye care products from them, to put in place barriers to online sales and to engage in anticompetitive behavior. To the extent consistent with consumer protection and health, public policy should be neutral with respect to how and where consumers purchase eye care products.

As the FTC considers the rule making to implement The Fairness to Contact Lens Consumers Act it needs to make sure that the rules promote healthy competition and a level playing field between on-line and in-person providers. However, the FTC's proposed definition of "business hour" is structured in a way that could limit competition. One of the things consumers have begun to expect with respect to Internet purchases is close-to-real-time transactions. Indeed, it is not uncommon for some e-commerce companies to be able to take an order at 7PM and have the product on the consumer's doorstep by 9:00AM the next morning. If the federal government is to encourage a level playing field so that consumers can benefit from the competition that e-commerce brings, it's critical to structure the rules in a way that minimize time delays. Unfortunately, the proposed rule's definition of "business hour" as "an hour between 9 a.m. and 5 p.m., during a weekday (Monday through Friday), excluding Federal holidays," is overly and needlessly restrictive. As the FTC examples show, in some cases the consumer may have to wait three business days before their prescription is even verified by the prescriber. While an eye care provider can sell contact lenses to patients anytime they are open, they will only be expected to verify prescriptions between the hours of 9 and 5 on weekdays. Yet, many eye care providers have longer business hours, including being open on Saturdays and weekday evenings. The result will be that online sellers will in many cases be at a competitive disadvantage. Therefore, I would encourage the FTC to broaden its definition of "business hour" and take steps to ensure that consumers can expeditiously get verification decisions on their contact lens prescriptions.

Respectfully submitted,

Dr. Robert D. Atkinson