

Submitted to:

**The Federal Trade Commission
Office of the Secretary
Room 159-H (Annex A)
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***Written Comments on the Notice of Proposed Rulemaking, “Contact Lens Rule,
Project No. R411002”***

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**On behalf of
Citizens for a Sound Economy
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Citizens for a Sound Economy (CSE), a 360,000-member grassroots organization that promotes market-based solutions to public policy issues, is pleased to submit these comments on the proposed rules to implement the Fairness to Contact Lens Consumers Act (FCLCA) of 2003. Established in 1984, CSE has consistently pursued policies that foster free-enterprise and competition. CSE has been actively involved in a number of regulatory issues and has been particularly interested in technological advances and changes in the marketplace that bolster competition and consumer choice. In such instances it is critical that the regulatory framework adapt to the realities of the marketplace so that consumers are not unnecessarily restricted in their choices. With respect to the market for contact lenses, CSE has been concerned that the existing market structure may harm consumers by hampering competition and restricting choice. CSE urges the commission to use this rulemaking to ensure that consumers have a full range of choice in an open and competitive marketplace.

Given the consumer benefits of a competitive market, it is important that the FTC’s rules implementing FCLCA foster the competition that is, in fact, the spirit of the legislation. Upon reviewing the notice of proposed rulemaking, however, CSE has concerns that, as currently written, the proposed rule may unnecessarily restrict consumer choice. Given the dual role that many optometrists play—including both contacts lens prescriber and contact lens retailer—it is critical that the FTC’s implementation rules

establish a more competitive marketplace for contact lens consumers. In particular, the proposed rule's suggested definition of "business hour" may impede the verification process to the benefit of existing "prescriber/retailers" (those who prescribe contact lenses as well as sell them) and to the detriment of consumers and alternative suppliers. A less restrictive definition would allow consumers more flexibility and access to alternative retailers, thereby increasing consumer choice and strengthening competition. In addition to issues surrounding the verification process, the FTC must also ensure that other competitive aspects of the FCLCA are implemented, such the prohibitions against restrictions on the number of lenses that may be purchased.

I. The Fairness to Contact Lens Consumers Act of 2003

In December 2003, the Fairness to Contact Lens Consumers Act (FCLCA) was signed into law, with the goal of modernizing regulations governing the contact lens industry. As with the changes in many other industries, technological advances and Internet marketing of contact lenses offer consumers greater choice and more convenience when purchasing new contact lenses. The FCLCA sought to remove unnecessary impediments and allow the market to serve consumers more efficiently using all the latest technologies. The Federal Trade Commission's (FTC's) proposed rule seeks to implement the FCLCA.

Technological progress often provides new avenues of competition, allowing competitors to emerge even in industries that have been heavily regulated. The Internet, for example, has been a major impetus for change in a number of industries that allows consumers direct access to a wide range of producers. From online travel reservations, to mortgages and insurance, to online shopping, and to contact lenses, consumers are finding opportunities to save time and money by dealing directly with producers. Aware of these changes, the FTC's E-commerce initiative has been monitoring emerging technological changes and their impact on various sectors of the economy in order to ensure greater competition and increased consumer welfare.

The contact lens industry provides a perfect example. In 1978, the FTC issued a rule requiring eyeglass prescriptions be made available to consumers. The rule was released after the FTC found that it was difficult for consumers to comparison shop for eyeglasses because often eye doctors refused to release their prescriptions. At the time, however, contact lenses were virtually custom fit to consumers, so it made little sense to include contacts in the prescription release rule. Since then, the production of contact lenses has changed tremendously, with disposable lenses coming to dominate the market. Disposable soft contact lenses can be produced consistently to the same prescription, unlike the hard contact lenses they have replaced in the market. Today, almost 36 million Americans use contact lenses.

With the rise of the Internet, new avenues have become available to consumers for purchasing contact lenses more conveniently and at more competitive prices. As in other industries confronted by new forms of competition, some optometrists are attempting to raise barriers to competition using the regulatory process. For example,

some have sought to strengthen requirements for releasing and verifying prescriptions in ways that make it more difficult for consumers to take advantage of alternative low-cost providers. In fact, legislation has been introduced in a number of states to require stricter release and verification procedures, which effectively reduces competition and protects incumbent prescriber/sellers. To the extent that these efforts increase the costs of contact lens replacement, they could actually harm public health, as noted by the FTC in its March 2004 report, “Possible Anticompetitive Barriers to E-Commerce: Contact Lenses.”

Congress passed legislation in 2003 to eliminate such anticompetitive practices and to ensure a competitive market for contact lenses. Simply stated, the FCLCA establishes guidelines for the release of prescriptions that would provide consumers the opportunity to comparison shop for replacement lenses based on the service, convenience, and price that fits their needs.

Consumers are to receive a copy of their prescription at no extra charge, and, when requested, eye care providers are to verify that the prescription is accurate and can be filled. To prevent prescriber/retailers from gaming the verification process in ways that disadvantage competitors, the FCLCA incorporated a “passive” verification process. That is, a prescription would be assumed accurate if the eye care provider did not state otherwise after a request for verification.

II. The Time Frame for Verification

The verification process called for in the FCLCA is critical for the development of a competitive market for contact lenses. The legislation calls for the FTC to establish the appropriate time frame for verification in this rulemaking.

The ultimate parameters of the verification period will establish how convenient it is for consumers to purchase their lenses, and will influence how accommodating business hours of prescribers/retailers are to the needs of their customers. As it stands, the definition of “business hour” included in the rulemaking is restrictive and may limit consumer choice, and chill competition.

As the proposed rule notes, the number of suppliers in the contact lens market has increased considerably and now includes “mail order and Internet firms, and mass merchants [which] has given consumers a greater choice of sellers and means of delivery when they purchase contact lenses.”

Today’s busy lifestyles simply do not lend themselves to traditional retail hours. This is especially the case with dual income, single-parent and suburban households who commonly face challenges balancing the needs of work and of raising families. Time and convenience come at a premium in such households. Retailers across the spectrum of commerce have responded to meet consumer needs and demands for more choice and convenience. Eye-care practitioners are no exception. In many areas it is now common for eye care providers to operate on Saturdays, and during evening hours. An increasing number of prescribers/retailers are open on Sundays as well.

Just as technology has changed to meet consumer demand, eye-care providers are adapting as well, offering exams during hours that are most beneficial to the customers they serve, and increasingly by making their products available over the Internet. Regrettably, the definition of “business hour” fails to take into account these seminal developments in how this business is conducted, and could perversely reverse the trend towards more competition, choice, and convenience for consumers.

Specifically, the proposed definition is “an hour between 9 a.m. and 5 p.m., during a weekday (Monday through Friday), excluding Federal holidays.” Further, “‘eight (8) business hours’ shall begin at the time that the seller provides the prescription verification request to the prescriber and conclude after eight (8) business hours have elapsed, except that the period for verification requests received during non-business hours shall begin at 9 a.m. on the next weekday that is not a Federal holiday.” Under these definitions, as the FTC examples in the proposed rulemaking demonstrate, consumers may face undue delays in the verification process, especially in cases with verification requests sent over the weekend.

The potential negative impact of this “business hour” definition is exacerbated by the FTC’s interpretation that the alternative seller must wait until “business hours” commence the “business day” following expiration of the eight (8) business hours. For example, in the case of an order received by an alternative seller after 5:30 p.m. on a Tuesday, the “eight (8) hour clock” would start ticking at 9 a.m. Wednesday. Instead of permitting the seller to ship after the eight hours expires at 5 p.m. Wednesday, the proposed rule would bar the seller from shipping until 9:01 a.m. Thursday, thus depriving the consumer for an *additional* 16 hours. Since shippers commonly do not receive and transport goods until later in the day, the eight (8) “business hour” waiting period is effectively extended a full day.

This “8 business hour plus one day” interpretation, which effectively more than doubles the verification period, will have significant repercussions in the marketplace. Presumably, it was proposed to account for situations where the offices of an eye care practitioner may not be open on any given weekday. However, the basis for such an interpretation is not apparent from either a plain reading of the statute or the legislative history. As such, a question could be raised as to whether this interpretation could potentially be deemed a policy decision beyond the authority of the rulemaking process.

This interpretation will effectively require a contact lens consumer to wait at least an additional 24 hours to receive his or her contact lenses. The impact of the additional waiting period could be considerable. Many consumers have come to rely upon alternative retailers doing business over the Internet or telephone due to immediate needs created by travel, or the loss or tearing of a lens. To the extent it unnecessarily infringes on the ability of consumers to obtain lenses promptly from alternative retailers, the expanded verification period imposed on alternative retailers will make purchasing from these retailers less convenient, and could be used as a competitive advantage by prescriber/retailers not bound by the waiting period. Such an advantage imposed by

regulation will affect sales patterns, and could ultimately leave consumers with fewer, rather than more, choices for purchasing their lenses.

As an alternative to the definition offered in the proposed rule, CSE recommends that the FTC adopt the verification time frame developed by the state of California as it sought to implement similar rules to expand consumer choice at the state level. Like the Federal bill, California used a passive verification procedure. However, with respect to the timeframe for verification, there are two critical differences. First, a prescription is assumed to be verified unless the prescriber says otherwise *by 2 p.m.* of the next business day. Second, business day means any day except Sunday or a Federal holiday. For verification purposes, the prescriber has until the same time the seller requested verification or 2 p.m. on the next day, whichever is sooner.

The California law is preferable to the FTC's proposed rulemaking on both practical grounds and in terms of real-world experience. From a practical sense, the California law is more in tune with the lifestyle of most consumers, where time is scarce and suppliers are adjusting their operations to provide customers with better service. In terms of real-world experience, the California law has been in place for over a year, and has worked well. The law was developed through negotiations with all interested parties, including eye-care providers, alternative sellers, and consumer groups. The resulting policies have been effective, spurring competition in the marketplace while providing consumers greater choice and convenience.

By contrast, CSE believes the FTC's proposed rule could unnecessarily diminish competition in the contact lens marketplace. If business hour definitions create needless delays in the ability of alternative providers to respond to consumer requests for lenses, competition suffers and consumer welfare is reduced. The problems created by these delays are compounded for mail order and Internet suppliers, whose customers value convenience but must wait longer than necessary for the verification process. The overall goal of the FTC's proposed rule should be to expand the existing number of suppliers rather than locking in an old business model with more impediments to alternative suppliers.

III. Conclusion

Optometrists are in a unique position of both providing health services and retail services. This dual role has led to conflicts with alternative suppliers, who have found it difficult in some cases to fill prescriptions on replacement lenses in a market dominated by incumbent prescriber/sellers who may be motivated as much by economic self interest as public health concerns. Indeed, such allegations ultimately led to legal actions and state-level legislation on issues of prescription verification. The FCLCA provides a broader solution to these problems, hewing important distinctions between questions of public health and retail sales. The proposed rule must keep these distinctions in mind and implement the spirit and intent of the FCLCA: a robust competitive market for contact lens consumers.

Consumers are best served by open and competitive markets. The Fairness to Contact Lens Consumers Act is an attempt to ensure that regulatory barriers do not impede consumer choice for the benefit of incumbent producers. Markets and technology have evolved in ways that serve consumers better, but those benefits are threatened by politics and regulation. To implement this Act, the FTC's rules should not impede competition or restrict consumer choice.

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