

October 21, 2015

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 ten-year review of the Contact Lens Rule (CLR). The Information Technology and Innovation Foundation has long conducted analysis on the issue of middleman barriers to e-commerce in a wide range of industries, including the optometry industry.<sup>1</sup> 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.

Given optometrists' long history of collusive, anti-competitive behavior when it comes to prescribing and selling contact lens, the best solution would be for Congress to prohibit eye care professionals from selling disposable contact lens altogether, just as medical doctors do not sell drugs they prescribe. Because they do not sell what they prescribe medical doctors have every interest in providing their patients with access to their prescriptions in the most convenient and lowest cost way. In contrast, optometrists operate under and inherent conflict of interest. Even if they sell lenses at the same price as a third party, they have an incentive to keep the sale as they make some profits.

The Fairness to Contact Lens Consumers Act ("FCLCA") that charged the FTC with developing the CLR was a compromise. Rather than prohibit optometrists from selling lenses, the Act intended to include a number of protections for patients' ability to choose where to buy their contact lenses. However, the fact that too many optometrists still try to violate the spirit, and often the letter of the Rule, and use their control over prescriptions to steer patients towards their own retail channel, suggests that the FTC should use its authority under the FCLCA and as part of the CLR to strengthen the CLR rules. In particular, I urge the FTC to support increased consumer choice and contact lens sales

competition by taking steps to improve prescriber compliance with the prescription release and verification mandates provided for in the Fairness to Contact Lens Consumers Act (“FCLCA”).

The history of optometrists’ “protectionism” is clear. Optometrists (unsuccessfully) fought passage of the FCLCA intended to give contact lens consumers the right to choose where they buy their lenses by giving patients an automatic right to copies of their own contact lens prescriptions – despite the fact their eyeglass patients had enjoyed that right for decades. After that legislation was passed, the industry engaged in a range of new anti-consumer practices in order to maintain contact lens sales.

After the FCLCA made it easier for consumers to buy their lenses from other distribution channels, optometrists fought back with a range of restrictive practices, including prescribing doctors’ only lenses that consumers could only fill with their optometrist. Because of these restrictive practices the American Optometric Association (AOA), was sued by 32 state attorneys general and ultimately paid a fine and agreed to not collude with manufacturers, and to cease making unsubstantiated claims that one’s health is impacted by where one’s lenses are purchased.

But in this settlement with AOA and a number of contact lens manufacturers, at least one major provider was not included, CooperVision/OSI. As a result, many optometrists made it known that if CooperVision/OSI sold doctors’-only lenses that they would prescribe these lenses instead of a competitors’. The doctors’-only contact lens marketing practice was designed to shield prescribers from competition, making the lenses more expensive and more difficult to obtain. The passage of legislation in Utah in 2006 that was put in statute was part of the AG settlement agreement led CooperVision to back off from this policy.

More recently the optometry industry sought unilateral pricing policies (UPP), where they would prescribe lenses sold by manufacturers that impose retail price maintenance so that other sellers, such as big box retailers and online sellers, cannot sell for less than the price the optometrist sells for. UPP is being challenged in federal court.

Some have argued that the optometry profession cannot act in anti-competitive ways because no one group has a large share of the market. But the optometry profession uses shared social norms, expressed in a variety of means including in articles in professional journals and on social media channels to coordinate action. This was clear in how the profession/industry “colluded” to support the discriminatory UPP. In an article in *Review of Cornea and Contact Lens* Gary Gerber, OD, writes:

“One of the biggest benefits to practitioners of UPP is that it instantly creates a perfectly level playing field; volume discounts for large practices and online retailers go away. While this may create friction with buying groups, the benefits outweigh any ancillary issues. More importantly, however, it forces practices to focus on something other than price to keep prescriptions in their office – if all retailers’ sell the lenses for the same price, the method and environment under which they are sold will be the factors that determine where a patient decides to purchase their lenses.”<sup>2</sup>

He goes to in essence to say that with UPP, optometrists will prescribe the UPP lens:

Manufacturers also benefit from UPP because retail price erosion can be stopped. With a ‘race to the bottom’ from aggressive price cutting eliminated, motivations to fit a particular lens increase; this has the ability to support and protect brand equity... All things being clinically equal (which of course they rarely are), savvy practitioners will give serious thought to prescribing UPP lenses. For example, if you have a patient with astigmatism and they can wear a UPP lens, and a non-UPP lens is clinically equivalent, a smart doctor will choose the UPP option.<sup>3</sup>

He states what was obvious to most in the industry: “Finally, the actual price mandated by UPP has so far been higher than lenses that do not have a UPP. This has afforded higher profit margins and created a new sense of excitement surrounding contact lenses.”<sup>4</sup>

Likewise, in an article in *Review of Optometric Business*, Paul Karpecki, OD, FAAO wrote “One other exciting development: Independent practice optometry becomes reinvigorated with contact lens prescribing as a profitable specialty and practice differentiator.”<sup>5</sup>

We saw similar statements on optometrist social media sites. On the Facebook site “ODs on Facebook”, a post from a person listed as Steve Silberberg (who lists himself as “ODwire.org supporting member”) on the topic “J&J goes to universal pricing” writes with regard to having to give “No more rebates etc., and 1-800 etc. goes away if they all follow B&L Alcon and now J & J. Cooper next.” In other words he is saying with UPPs other channels that sell for less will go out of business.

Another ODwire.org supporting member listed as Stephen McDaniel writes in response to J&J adopting UPP pricing, “Wow, great news. Now I might actually fit more of their lenses. Hopefully Cooper gets on board with this soon.” In other words, he is saying that he prescribes lenses based on what level of profit he makes. And he is implying that if CooperVision doesn’t also adopt UPP then he will not prescribe their lenses. Another member, listed as Joe DiGiorgio, OD, writes in response to a question of

how to tell your patients that these are prices of industry regulated lens: “I think I’ll tell my patients that the onliner must have been selling counterfeit contacts. Why else would they suddenly raise their prices to what I’m selling them.”

In short, optometrists as a profession are clear what their goal is: to maximize revenues from the sales of contact lenses. As an article in *Contacts Lens Spectrum*, the trade journal for the industry, states, “The FCLCA was of great concern because many believed that a great number of patients would start purchasing their contact lenses from alternative sources, affecting the profitability of contact lenses for practitioners.”<sup>6</sup>

This is not to say that this industry, or any other, should not seek to maximize profits. It is however to say that when representatives of the industry say that they are acting only to protect patient eye health, that these statements should be considered in light of their clear statements as professionals seeking to maximize profits, including by engaging in unfair and anti-competitive practices with regard to contact lens’ prescriptions.

Finally, optometrists have long practiced another protectionist method to limit consumer choice: their failure to comply with the “automatic release” rule that requires optometrists to automatically provide a contact lens prescription to a patient at the completion of the contact lens fitting. The CLR addresses enforcement of the verification system, but it did appear to adequately address enforcement of the automatic prescription release requirement. 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.”<sup>7</sup> 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. As such I urge the FTC to use the occasion of its ten-year review of the CLR to address these problems and foster needed compliance with the Rule.

I appreciate your consideration of ITIF's comments.

Sincerely,

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

**Notes:**

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1. United States. Cong. Senate. 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](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. Gary Gerber, "What's UPP, Doc?", *Review of Cornea & Contact Lenses*, June 15, 2014, [http://www.reviewofcontactlenses.com/content/d/practice\\_management/c/48867/](http://www.reviewofcontactlenses.com/content/d/practice_management/c/48867/).
  3. Ibid.
  4. Ibid.
  5. Paul Karpecki, "Unilateral Contact Lens Pricing: How it Works for the Good of Optometry", *Review of Optometric Business*, June 18, 2014, <http://www.reviewob.com/unilateral-contact-lens-pricing-how-itworks-for-the-good-of-optometry.aspx>.
  6. Jason J. Nichols, "Annual Report, Contact Lenses 2014", *Contact Lens Spectrum*, January 1, 2015, <http://www.clspectrum.com/articleviewer.aspx?articleID=112115>.
  7. Carla J. Mack, "Annual Report, Contact Lenses 2007", *Contacts Lens Spectrum*, January 1, 2008 <http://www.clspectrum.com/articleviewer.aspx?articleID=101240>.