UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rebecca Kelly Slaughter

STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

In the Matter of Contact Lens Rule Review
Commission File No. R511995
June 23, 2020

The Commission's staff thoroughly reviewed thousands of comments from prescribers, sellers, manufacturers, consumers, advocates, and other stakeholders in a multi-part, systematic review of the Contact Lens Rule, 16 C.F.R. pt. 315, which implements the Fairness to Contact Lens Consumers Act of 2003. I support this resulting Final Notice of Rulemaking, which updates the Rule with reasonable compromises that further the Act's purpose of empowering consumers when shopping for contact lenses.

I write to candidly observe an anticompetitive dynamic in the contact-lens market in the United States that cannot be fixed within the bounds of our rulemaking authority under the current Act. I therefore respectfully suggest to Congress that it consider a narrow legislative fix that could further empower consumers and promote competition among contact-lens sellers, including by facilitating new entrants. In nearly every other developed economy, consumers have more choices and pay far less for their contact lenses. One reason for this disparity is that, in the United States, a prescription is required for contact lenses, and, under the Act, that prescription must indicate not only the power and diameter of the lens but also its "manufacturer." 15 U.S.C. §§ 7603(c)(2), 7610(3)(E). In short, once a patient receives her prescription, she cannot shop for other brands because it authorizes only the sale and purchase of a single manufacturer's lenses. But consumers have a substantial appetite for shopping among competing brands, as demonstrated by the rise of new single-manufacturer sellers that rely almost exclusively on so-called "passive verification" of prescriptions because virtually no prescriptions are written for lenses made by those manufacturers. Consumers want competition after they leave their prescriber's office, but the Act prohibits that with respect to brand selection, though some new entrants use passive verification to sell consumers a brand that is not on their prescriptions.

Congress should consider a small change to the Act that could bring clarity to this burgeoning gray market, protect consumers, and promote competition. One possibility is to strike the word "manufacturer" from §§ 7603(c)(2) and 7610(3)(E), which describe the essential elements of a prescription. That way, most consumers could then choose the right contact lens brand or manufacturer for themselves based on price, comfort, ease of delivery, and other criteria over which sellers would compete. The majority of contact-lens consumers, who would benefit from choosing among multiple manufacturers or sellers, would then be empowered to

comparison-shop without being locked into a single manufacturer by their prescriptions.

My observations do not arise from any medical expertise. I understand that there are important subsets of consumers for whom the selection of a particular brand or manufacturer on the prescription does represent the prescriber's medical judgment about the ocular health of the patient. One example is patients with astigmatism, who require special lenses outfitted with tiny weights to keep the lens in place, and only one manufacturer presently makes such lenses. The updated Act could account for such situations by allowing otherwise anticompetitive lock-in of brands on prescriptions where the prescribers' selection is based on their medical judgment about the patient's ocular health (perhaps with a phrase such as "material or manufacturer where appropriate," following the Act's other prescription elements such as "diameter where appropriate," § 7610(3)(G)). The Rule presently relies on prescribers' medical judgment in allowing exceptions to the baseline standard that prescriptions last at least one year. *See* 16 C.F.R. § 315.6(a)(3) (prescriptions can expire in less than one year "if that date is based on the medical judgment of the prescriber with respect to the ocular health of the patient").

Another path that may prove fruitful is for Congress to task the Food and Drug Administration with conducting a study about the therapeutic interchangeability of different kinds of lenses for common ocular ailments, such as nearsightedness. The FDA could also study whether a minimum prescription period of two years instead of one year would benefit consumers without threatening ocular health. Such an effort would follow in the footsteps of the modern generic-substitution revolution in pharmaceuticals, facilitated by the Drug Price Competition and Patent Term Restoration Act and Biologics Price Competition and Innovation Act, which has proved a great boon to consumers nationwide. My hope is that policymakers do not see this Final Notice of Rulemaking as the final step in the long journey to improve the contact-lens market for American consumers. We have more work to do.