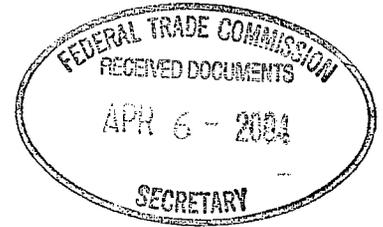


# ~~AMERICANS FOR PROSPERITY~~

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April 1, 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

To whom it may concern:

The Americans for Prosperity Foundation ("AFPF") is pleased to submit these comments to the Notice of Proposed Rulemaking for contact lenses published in the Federal Register of February 4, 2004.

AFPF is a nationwide nonpartisan grassroots organization established to advocate and protect individual rights to economic freedom and opportunity to pursue prosperity. AFPF achieves its mission through educating consumers and promoting the adoption of free-market policies.

The marketplace for disposable soft contact lenses has long been distorted by a central conflict of interest – eye care professionals are permitted to prescribe what they sell and sell what they prescribe. This market anomaly has led to restrictions on competition, some of which have been established and enforced by state regulatory boards comprised of, or dominated by, eye care professionals.

We applaud Congress for recognizing this problem and enacting the Fairness to Contact Lens Consumers Act (FCLCA), which is intended to promote competition in the marketplace for contact lenses and thus lower prices and improve service for the 36 million Americans who wear contact lenses.

## **Purpose of Enactment of FCLCA**

Suppose you had your child fitted for shoes, but the salesman -- hoping you'd only buy from him -- refused to reveal your child's shoe size. Or imagine you couldn't buy new tires unless you bought them from the dealer who sold you the car. These examples sound far-fetched, but this kind of treatment is what many contact lens wearers have come to expect from their eye doctors.

Congress enacted FCLCA to give contact lens wearers new rights that enable them to get lenses from the retailer of their choice, and to give consumers the right to shop based on their own preferences: price, convenience, or quality of service. In turn, they can expect lower prices and enhanced service.

Compare this to California law, which served as the model for the federal statute. Under that statute, a consumer who orders his or her lenses at 5:01 p.m. on a Friday evening would have to wait until no longer than 2 p.m. Saturday to have his or her lenses shipped. With overnight shipping, the consumer could have the lenses by Monday morning – a full two or three days before what would be the case under the FTC’s proposed interpretation.

For many consumers, doing business within the traditional 9am to 5pm framework simply does not work, as they are often compelled to do their shopping and other errands in the evenings or during weekends. Furthermore, for many Americans who live in metropolitan areas, heavy traffic makes the convenience offered by firms doing business either during non-traditional hours or through direct marketing an important option.

Having the ability to shop for contact lenses on one’s own schedule is important to consumers whose lifestyle does not fit into the 9 to 5 mold. Alternative sellers, including those who conduct business through the Internet, can offer such consumers the ability to purchase lenses in a convenient fashion. The ability to purchase lenses over the Internet can also be important to recent immigrants who are uncomfortable with relying upon their English language skills in face-to-face transactions.

The trend for years now has been for retail establishments to be open well beyond the traditional 9 to 5, Monday to Friday model. As you know, mass retailers and chain stores are commonly open for longer hours during the week and on Saturday and often Sunday. Unfortunately, the proposed rule doesn’t acknowledge a rapidly evolving, modernized market place, but instead holds consumers hostage to a small minority of optometrists who work fewer days and less hours.

Many dual income and single-parent households have difficult times balancing the needs of work and of raising families. Time and convenience come at a premium in such households. The desire of consumers to minimize the time they spend driving to do errands helps explain the explosion of Internet commerce.

However, if consumers are compelled to wait unnecessarily long periods to obtain their lenses from Internet or other direct sellers, those in immediate need of replacements will be left no choice but to travel to a retail store. The difficulties this could entail for parents of larger families is only compounded. We should be looking for ways to make raising families easier for such parents, not more difficult.

Furthermore, many Americans travel either for business or for pleasure. The proposed verification period set forth by the FTC, by making consumers wait as long as five days for replacement lenses, appears to ignore the urgent need travelers may have to replace lost or torn contact lenses.

## **2. Discouraging Competition**

The irony of the proposed rule is that it may take legislation intended to increase competition in the contact lens business and turn it into a law which discourages competition. If a “9 to 5, five

day a week” verification period is adopted across the nation, optometry shops will effectively be shielded from competition from alternate retailers during “non-business hours” – including all day Saturday and Sunday.

Over time, this will encourage optometry shops to stay open fewer, rather than more hours, with the FTC’s proposed “9-5, Monday through Friday” becoming the industry standard. This is despite the fact the consumer is better served by having optometry stores open more hours during the week rather than less.

Furthermore, the restrictive verification period proposed in the rule will make purchasing from alternative retailers less convenient. Since part of what alternative retailers sell is convenience, this will naturally impact the sales of such retailers, and eventually leave consumers with fewer rather than more choices for purchasing their lenses.

### **3. Discriminatory Pricing**

The sole purpose of the statute providing a verification period was to provide optometrists with sufficient time to respond to verification requests from alternative sellers. However, there is reason to believe that some optometrists may be using this courtesy period for other purposes, specifically to contact and solicit patients seeking to purchase lenses from alternative retailers.

For example, the “Annual Report for 2003” printed in the January 2004 edition of Contact Lens Spectrum, described the verification period provided for in the federal bill as follows: “Certainly this process allows the prescriber time to contact the patient to attempt to provide the lenses before the mail-order firm processes the order.”

The verification period should not be used as a marketing tool for optometrists. The use by optometrists of the verification period as an opportunity to market to patients who had already placed an order with an alternative retailer runs counter to the spirit and intent of the authors of the federal statute.

Specifically, if optometrists are permitted to use the verification period to attempt to lure back patients seeking to purchase from alternative sellers by matching their prices, it will have an intense impact on these alternative sellers. If the practice is allowed to proliferate, the long-term effect will be that alternative sellers would continue to face decreasing sales, and eventually would be run out of business. Once alternative sellers disappear, optometrists would be free to raise prices once again.

Furthermore, use of the verification period by optometrists to undersell alternative sellers could have a perverse impact on the market. Specifically, those who use the Internet to comparison shop tend to be better educated and/or wealthier. They would be more likely to benefit from any discriminatory pricing scheme implemented by optometrists than would be those who do not have access to, or do not frequently utilize the Internet, and thus would be left to pay the higher “list” prices offered by such optometrists.

Thus, unless the FTC bars prescribers from using the verification process for selling or for other competitive purposes, the law could perversely result in the wealthier and better educated paying less than, and effectively being subsidized by, those contact lens wearers who are less educated and have a lower income.

### **Rigorous FTC Enforcement Will Prevent New Barriers to Competition**

An unfortunate by-product of the ability of eye-care professionals selling what they prescribe is the role State Optometry Boards – which are comprised wholly or in large part of licensed, practicing optometrists – play in perpetuating the market distortions this conflict of interest brings about. FCLCA was passed in order to preserve consumer choice under such a regime, and the FTC should take steps to ensure that Optometry Boards or other state action does not violate the letter or spirit of FCLCA.

There are numerous states where the State Optometry Boards often unjustifiably institute requirements under the guise of public health to restrict the sale of contact lenses and help members of the profession maintain their market share. Worse still are states whose Board permits unlawful behavior by failing to reprimand eye care professionals who fail to follow state procedures in this area.

A recent example of State Boards ignoring the complaints of consumers occurred in my home state of Texas. Prior to passage of FCLCA, Texas law required a burdensome verification process known as positive verification (i.e., the prescription must be confirmed correct through direct communication). Under this unwieldy system, delays and outright failure to respond to the verification process eliminated consumers' choices to purchase contact lenses from other sources. Yet the Texas Optometry Board appeared to take no action when thousands of consumers complained that their orders were cancelled when their eye doctor failed to verify the order.

Clearly, it is not the intent of Congress to allow optometrists to circumvent the law by merely instituting requirements within their states. It is necessary to closely monitor states' activities related to contact lens sales to ensure that consumers are permitted unencumbered access to contact lens sellers and artificial restraints on consumers' choice created by these states are immediately removed.

The activity of State Optometry Boards is far from the only inherent problem with optometrists being able to sell what they prescribe. In order to make sure that consumer choice is protected, the role of eye care professionals as potential retailers should be distinct and subject to competition. Therefore, it is necessary to scrutinize optometrist behavior to ensure that they comply with the law before the sale of contact lenses take place.

The FCLCA specifically states that a contact lens fitting is complete when a successful fit has been achieved. Any attempt to sell contact lenses before the completion of the lens fitting and the consumers' receipt of a prescription is prohibited under the FCLCA. Without these events, optometrists may not attempt to sell contact lenses.

I urge the FTC to keep in mind that this law is necessary because, unlike other medical doctors, eye care professionals have the ability to sell the same products they prescribe. As patients, we are accustomed to our doctor providing us with a prescription, which we then take to the pharmacist of our choice. This greatly limits any conflict of interest the doctor may have in the medicine being prescribed.

Yet contact lens wearers have for years been denied this most basic protection. Many are often either unaware they can shop around for lenses or have been hampered in so doing. Though lenses are available from many retailers in storefronts, over the phone and on the Internet, many of the 36 million Americans who wear contacts have been left with little choice but to buy their lenses from their eye doctor.

By making their role as potential retailers separate and subject to competition, the new law protects contact lens consumers and introduces real choice into the market. That's why the law received the support of the American Optometric Association, whose leadership acknowledged the need for the new legislation to protect patients' rights.

We urge the FTC, as it develops the final regulations for FCLCA, to focus on the long term impact its decisions will have on the marketplace and on consumers. Specifically, we call on the FTC to (1) revise the proposed definition of "business hours" to reflect the hours individual eye care practitioners are actually open and to permit consumers to obtain lenses from the seller of their choosing in the most convenient and efficient manner possible; and (2) rigorously enforce FCLCA to assure that state regulatory boards and state legislatures do not utilize their authorities to erect the very barriers to competition FCLCA seeks to dismantle.

### **FTC Proposed Definition of Business Hours**

The verification regime proposed by the FTC will require consumers to wait longer than necessary to obtain their lenses, and as such, could turn the legislation on its head, making this industry less competitive rather than more. The proposal that business hours be defined as 9 am to 5 pm, excluding Saturdays, Sundays and National Holidays, with "8 hours" being interpreted as actually "8 hours plus one day" is not grounded in the actual practices of the eye care industry, and does not account for future changes in technologies and lifestyles.

The proposed FTC rule fails consumers in three ways. First, it makes it less convenient for consumers to buy replacement contact lenses, despite the fact technology exists within the market to ensure speedier delivery. Second, it makes it more difficult for alternative retailers to compete within the industry. Third, it encourages discriminatory pricing and anticompetitive behavior by optometrists who are given a competitive advantage under the proposed rule.

#### **1. Consumer Convenience**

Under the FTC's proposed interpretation, a consumer who orders lenses at 5:01 pm on a Friday afternoon could be forced to wait to have his or her contact lenses shipped until the following Tuesday. If the Monday happens to be a federal holiday, the consumer would have to wait until the following Wednesday to have the lenses shipped. Even with over-night shipping, the FTC's arrangement means a consumer could wait nearly a week to receive his or her lenses.

In order to allow consumers the freedom to determine where to purchase their lenses, they must first be empowered with their prescription. Until then, consumers are unfairly disadvantaged, and optometrists should not be permitted to exploit patients by treating them as potential retail consumers. Therefore, FTC should regularly review optometrists' conduct to ensure compliance with the law and to ensure that consumers are protected.

### **Conclusion**

Ultimately, if the FCLCA is properly implemented, all interested parties in the eye-care industry would benefit. Liberal business hours would encourage competition and, thereby, decrease the price of contact lenses. Consumers would more frequently change their lenses because cost would no longer be a contributing factor to overwearing their lenses. Consequently, consumers would purchase more lenses, which would improve ocular health and encourage regular eye exams, and all as a result of deregulation. Therefore, AFP strongly urges FTC to consider consumers' interest and develop regulations accordingly.

Respectfully submitted,

A handwritten signature in black ink that reads "Peggy Venable". The signature is written in a cursive, flowing style.

Peggy Venable  
Texas Director  
Americans for Prosperity Foundation