Prepared Statement of
The Federal Trade Commission

Before the

Committee on Energy and Commerce
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I. Introduction

Mr. Chairman and members of the Committee, I am Howard Beales, Director of the Bureau of Consumer Protection at the Federal Trade Commission ("Commission" or "FTC"). The Commission is pleased to provide information concerning the contact lens industry and offer comments on the Fairness to Contact Lens Consumers Act (H.R. 2221) ("the bill"). I will discuss the Commission's mission and our long history of activity in the eye care industry, and provide some specific comments on the bill.[(1)]

As the federal government's principal consumer protection agency, the FTC's mission is to promote the efficient functioning of the marketplace by enforcing laws against unfair or deceptive acts or practices in or affecting commerce.[(2)] Pursuant to its statutory mandate, the Commission increases consumer choice by promoting vigorous competition. The Commission has extensive experience assessing the impact of regulation and business practices on competition and consumers in many industries, including, as discussed below, substantial experience with eyeglasses, contact lenses, and other eye care goods and services.

II. The Contact Lens Marketplace

The contact lens market in the United States is a multi-billion dollar market.[(3)] Recent data indicate that nearly 36 million Americans - almost 13% of all Americans - wear contact lenses.[(4)] There are numerous manufacturers of contact lenses (*e.g.*, Johnson & Johnson, Bausch & Lomb, and CIBA Vision) and many different channels of distribution, including eye care practitioners (*e.g.*, ophthalmologists and optometrists), national and regional optical chains, mass merchants (*e.g.*, Wal-Mart and Costco), and mail order and Internet firms.

The contact lens market has undergone significant change in recent years. In the past, for example, contact lenses were designed to last for long periods of time, required daily removal, and involved extensive cleaning regimens. Consumers generally purchased these lenses from their eye care practitioners after an eye exam and lens fitting and then replaced them, for example, when the prescription changed or a contact lens was lost or damaged. Manufacturers had not developed production methods for lenses that provided standardized reproduction.

Beginning in the late 1980s, lens manufacturers began to market and sell "disposable" and "frequent replacement" soft contact lenses, which are designed to be replaced daily, weekly, or monthly. Today, the replacement soft contact lenses that a patient receives pursuant to a prescription specifying brand and power will be the same, regardless of whether the patient buys the lenses from an eye care practitioner or another seller.

The development of standardized lenses has facilitated the growth of sellers other than eye care practitioners. These sellers tend to focus on the sale of replacement lenses for which an eye care professional has already fitted the customer. Unlike many eye care practitioners, these sellers do not sell eyeglasses, and do not fabricate contact

lenses or fit them to the eye. Their business consists simply of shipping to customers lenses that come from the manufacturer in sealed boxes labeled with the relevant specifications. Many of these sellers are located in a single state but ship orders to customers nationwide.

The advent of disposable soft contact lenses, followed by the growth of "alternative" retail sources of contact lenses, including mail order, pharmacy and mass merchants, has changed the market. Eye care practitioners still write prescriptions, but now consumers purchase more contact lenses with greater frequency. Moreover, they have greater choice of sellers and means of delivery when they purchase lenses.

Consumer choice in the contact lens market is expanding, and that can have important benefits to consumers. Competition among contact lens sellers benefits consumers through lower prices, greater convenience, and improved product quality.

III. Overview of FTC's Authority and History of Activity in the Eye Care Industry

The Commission has a long history of activity in the eye care industry - through law enforcement, advocacy before other government agencies, and rulemaking. The underlying objective of these various activities is to promote vigorous competition and consumer choice, thereby increasing consumer welfare.

A. Law Enforcement

Many of the FTC's law enforcement efforts concerning eye care have focused on ensuring that consumers have access to truthful, non-misleading information about the eye care products they need. Until the 1980s many government boards and trade associations imposed restrictions on the ability of eye care practitioners to provide truthful and non-misleading advertising about their goods and services. The Commission brought law enforcement actions challenging some of these advertising restrictions as anticompetitive. For example, in *Massachusetts Board of Registration in Optometry*,[(5)] the Commission challenged a state optometry board's regulations restricting advertising of price discounts, the advertisement of affiliations between optometrists and retail optical stores, and the use of testimonials and similar forms of advertising. The FTC concluded that these restrictions did not serve a legitimate purpose and were anticompetitive, and ordered the board to cease and desist from imposing such restrictions on advertising by optometrists. Removing such advertising restrictions has allowed sellers of eye care goods and services to compete more aggressively with each other.

Increased competition among sellers through advertising, however, does not benefit consumers if the claims made in the ads are false or misleading. To prevent such claims from being made in the marketplace, the FTC sued sellers who have made deceptive advertising claims for eye care products. For example, the Commission recently issued final consent orders against two of the largest purveyors of LASIK eye surgery services, the most common elective surgery in the United States.[(6)] In these cases, the Commission challenged as unsubstantiated claims that LASIK surgery would eliminate the need for glasses or contacts for life, and that LASIK surgery poses significantly less risk to patients' ocular health than wearing contact lenses or glasses. Our cases have enhanced the ability of consumers to make better-informed choices concerning eye care products.

B. Advocacy

The Commission also has pursued numerous advocacy opportunities involving the eye care industry. In 2002, the Commission staff filed a comment before the Connecticut Board of Examiners for Opticians addressing whether state law requires that out-of-state sellers obtain a license to sell contact lenses to the state's residents. FTC staff argued that out-of-state sellers should not be subject to state licensing requirements because the possible benefit to consumers from increased state protection did not outweigh the likely negative effect from decreased competition.[(7)] Ultimately, the Board held that state law did not require out-of-state sellers to obtain a license to sell contact lenses to consumers.[(8)]

Similarly, in April 2003, the Commission submitted comments to the Tennessee state legislature on proposed legislation that would have restricted the types of agreements that optometrists can make with commercial firms from which they lease space.[(9)] The FTC opposed these restrictions, explaining that they decrease competition among sellers of eye care products, especially competition from chain optical stores, without any offsetting benefits to consumers.

In October 2002, the Commission held a public workshop to evaluate possible anticompetitive barriers to e-commerce in contact lenses and nine other industries.[(10)] Commission staff heard testimony from all sides of the contact lens issue, including eye care practitioners, a major contact lens manufacturer, an online seller, a traditional contact lens seller, and an economics professor. In addition, Commission staff gathered evidence from a wide variety of sources, such as empirical studies, court proceedings, state attorneys general, and the Food and Drug Administration. Commission staff will report on the information obtained in connection with the workshop and the extent to which anticompetitive barriers to e-commerce exist in the contact lens industry.

C. Rulemaking

In 1978, to increase competition in the sale of eyeglasses, the Commission promulgated the Ophthalmic Practice Rule ("Prescription Release Rule"). The Rule requires optometrists and ophthalmologists to provide patients, at no extra cost, with a copy of their eyeglass prescription after completion of an eye exam.[(11)] The Rule was based on the Commission's findings that many consumers were deterred from comparison shopping for eyeglasses because they did not receive a copy of their prescription. Some eye care practitioners refused to release prescriptions, even when requested to do so, while others charged an additional fee for release of a prescription. The Commission also found a lack of consumer awareness that purchasing eyeglasses can be separated from the process of obtaining an eye exam. As part of its program of systematic analysis of its rules and guides, the Commission currently is conducting a review of the overall costs and benefits of the Prescription Release Rule.

One noteworthy issue is whether the Rule should be extended to require eye care practitioners to release contact lens prescriptions to patients.[(12)] The Rule currently does not require an optometrist or ophthalmologist to release a contact lens prescription to a patient after an eye exam. The Commission previously has considered this issue but declined to extend the Rule to contact lenses. In 1989, the Commission found there was not sufficient reliable evidence from which to conclude that the practice of not releasing contact lens prescriptions upon request was prevalent.[(13)] In 1995, in response to a petition for rulemaking, the Commission reached a similar conclusion after conducting a survey on the extent to which patients could obtain their contact lens prescriptions.[(14)]

Commission staff is monitoring the significant ongoing changes in the contact lens marketplace relevant to issues raised in the rule review, including the growth of alternate sellers of replacement contact lenses, state legislation requiring contact lens prescription release and verification, and proposed federal legislation addressing prescription release and verification issues.

IV. H.R. 2221: The "Fairness to Contact Lens Consumers Act"

Drawing on its experience with the eye care industry, the Commission welcomes the opportunity to provide its views on The Fairness to Contact Lens Consumers Act. The bill would require that ophthalmologists and optometrists release contact lens prescriptions to their patients and verify contact lens prescriptions for Internet sellers and other third parties. The bill would provide for FTC enforcement of these requirements. The Commission supports the proposed legislation's goal of promoting greater competition among contact lens sellers and thereby enhancing consumer choice. We have comments on three components of the bill.

A. Prescription Verification

First, a central requirement of the bill is that eye care practitioners verify a patient's contact lens prescription "as directed by any person designated to act on behalf of the patient."[(15)] This provision appears aimed at helping

patients who seek to purchase contact lenses from a seller other than their own eye care practitioner. Eye care practitioners would be prohibited from refusing to verify prescription information to a third-party seller, such as a mail order or Internet seller, thus facilitating competition between eye care practitioners and third-party sellers.

The bill does not impose a particular approach to verification. There are two primary approaches to verification: "passive" and "active" verification.[16] Under a passive verification system, a third-party seller must notify the eye care practitioner of its customer's request to purchase contact lenses and inform the practitioner what prescription information the customer has provided. Unless the eye care practitioner affirmatively notifies the seller within a specified time period that the prescription is incorrect, expired, or otherwise problematic, the seller may presume that the prescription is correct and valid and complete the sale to the patient. By contrast, under an active verification system, the third-party seller must wait for affirmative confirmation from the prescriber that the prescription is correct and valid before it can complete the sale.

At its E-Commerce Workshop, the Commission explored the costs and benefits of these two approaches to prescription verification.[17] Proponents of passive verification (including many alternative sellers of contact lenses like mail order and Internet sellers) favor this approach because it allows the seller to presume verification if the eye care practitioner does not take affirmative action to correct any errors in the prescription. These proponents point to difficulties with an active verification regime, such as low response rates or delayed responses by eye care practitioners who have an incentive to impede verification so that their patients will continue to buy contact lenses from them. By contrast, proponents of active verification (including some groups representing eye care practitioners) express concern that passive verification allows sellers to ship contact lenses even if the customer has an invalid or incorrect prescription. According to proponents of active verification, customers may face serious health risks if they obtain and wear contact lenses based on an invalid or incorrect prescription.

The Commission believes that the bill should identify with specificity the type of verification system that would be required. Absent such specificity, the Commission would be in the difficult position of interpreting the law to determine what types of verification systems would be acceptable. If the bill directly and specifically addressed the issue of an acceptable verification system, consumers also would receive the bill's benefits more quickly than if the Commission first had to compile information about various systems, analyze the costs and benefits of these systems, and decide which systems are acceptable.

B. FTC Study

The bill also requires that the FTC undertake a study and prepare a report, within nine months, examining the strength of competition in the market for prescription contact lenses. The study would address several specific issues such as: the merits of active versus passive verification; compliance with and enforcement of state verification laws; and the effects of these state laws on competition and ocular health. In addition, the study would address the costs and benefits of the practice of writing prescriptions for "private label lenses," that is, prescriptions written for contact lenses that only the prescribing eye care practitioner sells.

The FTC study requirement implicates issues well outside the Commission's expertise, such as the effect of state verification laws on ocular health. It also would be very difficult to complete within nine months the broad study that the bill would require. Given the scope and burden of the study requirement in the bill, the Commission respectfully requests that it be eliminated.

C. Prescription Release Requirement

Third, the bill would require that ophthalmologists and optometrists release contact lens prescriptions to their patients, and any person designated to act on their behalf, upon completion of a contact lens fitting.[18] The Commission believes that the availability of contact lens prescriptions benefits consumers because it gives patients the option of purchasing contact lenses from sellers other than the eye care practitioner who wrote their prescription.[19]

More than two-thirds of the states already require that prescribers release contact lens prescriptions to patients.[20] Some states require the release of prescriptions upon request by the patient, while other states require release automatically, regardless of whether the patient requests it. Moreover, a survey conducted by the Commission in 1995 indicated that most consumers who requested their prescription were able to obtain it.[21] Nevertheless, there is anecdotal evidence that some patients have been unable to obtain a copy of their contact lens prescription.[22]

Although it is unclear to what extent consumers currently do not obtain their contact lens prescriptions, the Commission's experience with the prescription release requirements for eyeglasses suggests that the costs associated with a contact lens prescription release requirement are likely to be quite low. Accordingly, the FTC does not oppose such a requirement.[23]

V. Conclusion

The Commission appreciates this opportunity to present its views on the Fairness to Contact Lens Consumers Act, H.R. 2221. I look forward to answering any questions you may have.

Endnotes:

1. The views expressed in this statement represent the views of the Commission. My oral statements and responses to any questions you may have represent my own views, and not necessarily the views of the Commission or any Commissioner.

2. Federal Trade Commission Act, 15 U.S.C. §§ 45, 52.

3. Annual sales estimates range from $1.95 billion to $3.5 billion.

4. *See* Health Products Research (VIS) - Annual 2000 Year-End Consumer Contact Lens Survey (*cited in* "Trends in Contact Lenses & Lens Care," The Bausch & Lomb Annual Report to Vision Care Professionals (Dec. 2001)).

5. 110 F.T.C. 549, 606-08 (1988).

6. *LCA-Vision, Inc. d/b/a LasikPlus*, Dkt. No. C-4083 (July 11, 2003) (consent) and *The Laser Vision Institute, LLC ,* Dkt. No. C-4084 (July 11, 2003) (consent). LASIK is designed to reduce dependence on eyeglasses and contact lenses for distance and near vision by changing the shape of the cornea.

7. FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002), *available at* <http://www.ftc.gov/be/v020007.htm>.

8. Connecticut Board of Examiners for Opticians, *In re: Petition for Declaratory Ruling Concerning Sales of Contact Lenses*, Declaratory Ruling Memorandum of Decision (June 24, 2003).

9. Letter from Timothy J. Muris, Chairman, Federal Trade Commission, to Hon. Ward Crutchfield, Senate Majority Leader, (Apr. 29, 2003), *available at* <http://www.ftc.gov/be/v030009.htm>.

10. 67 Fed. Reg. 48,472 (2002).

11. 16 C.F.R. Part 456. The original rule also prohibited bans on nondeceptive advertising by vision care providers. That portion of the rule was remanded to the Commission for further consideration in light of the Supreme Court decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). *American Optometric Ass'n v. FTC*, 626 F.2d 896 (D.C. Cir. 1980). The Commission has since taken action against such restrictions through administrative litigation, on a case-by-case basis.

12. *See* Request for Public Comments, 62 Fed. Reg. 15,865 (Apr. 3, 1997).

13. Ophthalmic Practice Rules, Final Trade Regulation Rule, 54 Fed. Reg. 10,285, 10,299, 10,303 (Mar. 13, 1989).

14. Letter from Federal Trade Commission to H. Jeff McLeod, Re: *Petition to Initiate Rulemaking to Require the Release of the Contact Lens Prescription* (June 29, 1995) (on FTC Public Record, Document No. B174817).

15. H.R. 2221, Sec. 2(a)(2).

16. States have taken different approaches to verification of prescriptions. California, for example, has adopted a passive verification regime, Cal. Bus. & Prof. Code § 2546.6(a), while Texas has adopted an active verification system. Texas statute Sec. 351.607.; Tex Adm. Code. § 279.2(e).

17. The choice of a time period in verification systems is a contentious issue, with Internet and mail order sellers generally seeking shorter time periods and eye care practitioners typically seeking longer time periods.

18. H.R. 2221, Sec. 2(a).

19. Release of prescriptions by eye care practitioners to agents of consumers, such as mail order and Internet sellers, also may promote competition.

20. We understand these states to be: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. Some states require prescription release by statute, while others do so through rules.

21. Bruskin/Goldring Research, Contact Lenses, prepared for Federal Trade Commission (Feb. 1995) (available on the FTC public record, Document No. B174829). The Commission, however, has not studied the extent to which agents of consumers have been unable to obtain release of prescriptions.

22. In addition, we note that the Attorneys General of 31 states filed suit in 1996 alleging, in part, a conspiracy among practitioners and their trade associations to prevent the release of contact lens prescriptions to consumers. *See In re Disposable Contact Lens Antitrust Litigation*, No. 94-MDL 1030-J-20A (M.D. Fla.). The case ultimately settled.

23. The Commission also recommends that the bill clarify which state law would apply for purposes of determining the expiration date for contact lens prescriptions. *See* H.R. 2221, Sec. 3(a). As written, the state law "involved" could be interpreted many ways, including to mean the state where the prescription was written, the state where the prescription was filled, or the state where the patient lives.