



March 8, 2018

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Room CC-5610 (Annex C)
Washington, DC 20580

RE: FTC 16 CFR Part 315 Public Workshop Examining the Contact Lens Marketplace and Analyzing Proposed Changes to the Contact Lens Rule

Dear Acting Chair Ohlhausen and Commissioner McSweeney:

On behalf of National Taxpayers Union's (NTU's) supporters across America, I congratulate you and the Federal Trade Commission (FTC) staff for holding a public workshop, "Examining the Contact Lens Marketplace and Analyzing Proposed Changes to the Contact Lens Rule." As an organization that avidly follows policy developments falling under the Commission's responsibility, NTU believes that 16 CFR Part 315 and its progenitor (Part 456, the Eyeglass Rule) represent some of FTC's finest work on behalf of innovation, competition, and economic efficiency. An often overlooked salutary impact of these two rules, however, is on government finance, and ultimately, taxpayers. It is this topic upon which NTU will focus its comments, and hopefully provide a perspective FTC will find worthwhile in its deliberations.

As you may recall, in 2017 comments regarding proposed changes to the Contact Lens Rule, 16 CFR Part 315, Project No. R511995, NTU expressed support for the new provisions that the Commission had drafted and made available at that time. Also, in a recent NTU Policy Paper, we cited the Contact Lens Rule and the Eyeglass Rule as models for how the FTC can and should protect consumers while supporting economic freedom:

Some 30 years ago Timothy J. Muris, the FTC's then-Director of the Consumer Protection Bureau, analyzed a spate of FTC rulemaking proceedings subsequent to the Magnuson-Moss Act, and found that most were withdrawn, made obsolete, or delayed.

Muris compared and contrasted several of these rules, concluding that most failures stemmed from two factors: 1) A lack of clear theory to show how a given practice violated the law and why a government remedy is superior to the market; and 2) A lack of 'systematic projectable evidence' that confirms, not just coincides with, the theory.

Muris cited two cogent examples to illustrate his point – proposed rules that would lift states' restrictions on advertising for eyeglasses and regulations disclosing funeral home pricing. In the former case, the FTC relied on systematic projectable evidence that states with advertising prescriptions had 'significantly higher prices' than those offering consumers more access to information. In the latter, the FTC plowed

ahead with requiring price disclosures via telephone and point of sale, relying on ‘no more than a score of anecdotes’ in a funeral industry with (at that point) some 2 million transactions a year.

Today, it is even clearer that the proposed updates to the rule – including more safeguards to ensure consumers have access to their prescriptions for purposes of shopping where they choose – are necessary. Purchasers need more assurance of a competitive marketplace, and providers need more regulatory certainty. Yet, allowing consumers greater freedom to shop for eyewear needs has also served taxpayers well, and can continue to inspire new developments in other types of health services. Along those lines, we offer the following observations:

1) Government Employers and Employees, Like the Private Sector, Benefit from Smart FTC Rules.

Compared to in-person exam fees, online vision services are less expensive and more convenient. Federal, state and local government workers, who have vision care through their employer, can save money to the taxpayer-funded system compensating them as well as increase their own productivity by saving the time of visits to brick-and-mortar retail outlets for simple prescription renewals.

According to a Pew Charitable Trusts report, utilizing data from the Milliman Atlas of Public Employee Health Plans, in 2013 states and their employees spent \$30.7 billion to provide health coverage to 2.7 million households of active state-level employees (not including local government employees, even those who could join state-level plans). State governments – i.e., taxpayers – covered \$25.1 billion of this cost (the employees themselves covered the remainder). This is probably the smallest universe of expense attributable to state and local employee insurance. Taxpayers cover more than 70 percent of the premium cost associated with the Federal Employee Health Benefits Program, which pays out over \$40 billion to current workers and retirees.

It is true that compared to other services such as hospitalization coverage, eye care may be a less of an outlay to government insurance plans. Still, as the Bureau of Labor Statistics reported in December 2017, average employer compensation for states and localities totaled nearly \$49 per hour versus closer to \$34 per hour for the private sector. Health insurance was a driving factor in this differential – states and localities paid out nearly 12 percent of compensation to that benefit, higher by nearly half than what the private sector offered. Thus, with all governments facing long-term liabilities due to employee benefit programs, the need to find solutions that suit both workers and employers has never been more acute. Those solutions can begin with technologies such as ocular telehealth, provided they are allowed to develop through wise policies such as the Contact Lens Rule.

2) Other Government Programs Stand to Save If Telehealth Flourishes. Insurance for government employees is not the only area where taxpayers could gain from online vision care. Governments should be making regulatory burdens less onerous, allowing new services and technologies to participate more fully in the marketplace. Three-quarters of the states allow online vision prescription renewals for consumers, while the U.S. Department of Veterans Affairs utilizes the technology for several eye care purposes. FTC helped to open the door for this increasingly accepted technology, as well as applications related to other areas of health.

As Medicaid programs continue to evolve in offering vision services, online options will become increasingly important in delivering quality care that is affordable to taxpayers. This is especially true in rural states, where Medicaid participants may have easier access to an online connection and smartphone (even through a friend or family member) than they would to an eye care provider’s office that could be miles away from their homes. For instance, the Healthy Indiana Plan, approved under a federal Medicaid waiver, makes use of a premium-based benefit coverage (one option for which includes some vision care) along with individual health expense

accounts. This structure will over time involve more decision making among individual beneficiaries on where to prioritize their own health care dollars. To give another example, if Kentucky's ambitious post-Affordable Care Act overhaul of Medicaid is to succeed, it is important for the Commonwealth to avail itself of every advantage afforded by technology. To give one example, the proposed work requirement for able-bodied Medicaid recipients would be made more viable by innovations that allow workers to obtain eyeglass and contact lens prescription renewals more affordably and conveniently, without taking costly time off their jobs.

And while Medicare and Medicaid generally do not provide for online lens purchases, the stifled development of new examination and purchasing venues will impact other areas of health care delivery. At the same time, citizens who might be deterred from maintaining their eye care because of more onerous procedures for purchase could eventually suffer health problems that will rack up more Medicare and Medicaid expenses. Keeping a robust Contact Lens Rule in place is key to avoiding these undesirable outcomes.

Governments in the U.S. must continue to embrace technologies that can provide quality care at fiscally sustainable levels, and FTC's leadership is vital in this regard. We encourage the agency to continue examining literature from the U.S. and abroad that provides guidance on where telehealth can make the best bottom-line difference. We have noted that some federal entities, including budget "scorekeepers," have failed to appreciate the fiscal advantages to ocular and other telehealth services that we have briefly outlined in these comments. Common mistakes among such agencies include a failure to account for the net benefit of an initial investment in the technology over a sufficient number of years, along with the preventative effect that can head off costlier treatments over time.

Such savings can often be found in unlikely places: as a 2016 report from Pew Charitable Trusts concluded, "States increasingly have adopted telemedicine in prisons to save money, improve inmates' health, and lessen the risk of taking prisoners to outside hospitals." Even in this environment, where there is obviously not the same dynamic of consumers making purchases from contact lens prescriptions, the ocular telehealth technologies engendered by FTC rulemaking has likely paid at least some dividends.

3) States Must be Reminded that When the "Precautionary Principle" Wins, Taxpayers Lose. As is the case with innovations throughout the economy (e.g., the Internet of Things), preemptive regulation on the part of governments in the name of protecting consumers can actually cause harm. This unfortunate problem also extends to taxpayers. Presupposing that a given technology is harmful and must "prove" itself non-disruptive too often serves to protect market incumbents. Although FTC has, in our opinion, unevenly applied proper standards of actual harm to consumer welfare rather than precautionary principles, in its promulgation of the Contact Lens Rule the agency has been admirably outspoken.

As an example, last month FTC recognized this fact when staff from several of the agency's divisions commented on legislation in Washington State undermining the Contact Lens Rule, which has heretofore provided customers with more purchasing options for corrective eyewear. The staff wrote that "the Bill, if adopted, may reduce competition, access, and consumer choice in eye care services, and might also raise costs for consumers." We would add that Washington State's bill could also have a "chilling effect" on the development of other telemedicine technologies that have the potential to save taxpayer dollars in state health care programs. To NTU, this type of outreach from the FTC to public officials on threats to pro-taxpayer policies is critical.

For these and other fiscally-grounded reasons, NTU and its members are pleased that the FTC is taking a proactive approach to ensure that the Contact Lens Rule will continue to operate as intended. Yet, there is still a great deal of work ahead. The Contact Lens Rule and its proposed updates comprise but one area of online consumer innovation where a sensible, “light touch” toward regulation is needed to encourage competition.

As we noted in our comments last year, NTU applauds FTC’s decision to avoid relying on the optometry industry’s anecdotal claims about health issues associated with online purchases – and in the process, avoid repeating the tarnished history surrounding FTC’s funeral industry regulation. Instead, the agency methodically examined the evidence, and recognized that the process whereby customers automatically obtain a copy of their prescription should be improved. FTC’s proposal for tracking this transaction point seeks to minimize recordkeeping headaches while providing greater assurance that the original intent of the Contact Lens Rule and the Fairness to Contact Lens Consumers Act is upheld. Our members remain pleased with the direction you are taking in this area of rulemaking.

Sincerely,

A handwritten signature in black ink, appearing to read "Pete Sepp", with a stylized flourish at the end.

Pete Sepp, President