



The Honorable Joseph J. Simons  
Chairman, Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Chairman Simons:

The following comments are respectfully submitted in response to the Federal Trade Commission's Supplemental Notice of Proposed Rulemaking dated May 28, 2019, regarding the Contact Lens Rule.<sup>1</sup>

In 2003, Congress brought much-needed competition to the contact lens industry by passing the Fairness to Contact Lens Consumers Act. The Federal Trade Commission started the implementation process by promulgating the Contact Lens Rule in 2004, creating a sort of patient's "bill of rights" clarifying that eye doctors could not charge fees for prescriptions, patients could not be forced to buy lenses from doctors after an exam, and alternative retailers could automatically issue lenses if a doctor failed to respond within eight hours of receiving a verification request for a prescription.

Despite these promising advances, the Commission concluded that compliance with the Rule—particularly the automatic prescription-release requirement—could be improved. To address these issues, the Commission, starting in 2015 and continuing through 2018, proposed amendments to the Contact Lens Rule that would require eye doctors to provide patients with a signed acknowledgement form, which would inform them of their rights to a prescription and the ability to purchase lenses from other retailers. Eye doctors would then have to keep the form on file for three years.

This year, after numerous years in regulatory limbo, the Commission issued another Supplemental Notice of Proposed Rulemaking regarding further proposed tweaks and revisions to the Contact Lens Rule. Four years after this revision process was initiated, the Commission should seek to finalize this Rule to ensure continued competition in contact lens markets.

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<sup>1</sup> Federal Trade Commission, *Contact Lens Rule*, Supplemental Notice of Proposed Rulemaking, Federal Register Vol. 84, No. 102, May 28, 2019.  
<https://www.govinfo.gov/content/pkg/FR-2019-05-28/pdf/2019-09627.pdf>.

## The Importance of Expediently Finalizing the Rule

Since its initial enactment, the Contact Lens Rule has provided an important infusion of competition into the contact lens marketplace. The Rule brought about notable changes in the contact lens industry, including an increase in the number of Americans who purchase contact lenses (from 36 million in 2005 to nearly 41 million by 2015).<sup>2</sup>

Changes in the market shares of independent prescribers and online retailers demonstrate the important competitive effects of the Contact Lens Rule. In 2003, a year before the Rule was enacted, the total market share of independent prescribers of contact lenses stood at 68.6 percent.<sup>3</sup> By 2014, the market share of independent prescribers had fallen to 39.9 percent, while the market share of online retailers nearly doubled, reaching 18.6 percent.<sup>4</sup> Research also suggests that there was a modest decrease in optometrists' earnings as a result of the erosion of their monopoly power over contact lens sales, again underscoring the Rule's benefits.<sup>5</sup>

Unfortunately, as noted above, the on-the-ground effect of the Contact Lens Rule has been weaker than many hoped given the compliance issues surrounding the prescription-release requirement. The Commission's proposal to address this via the Confirmation of Prescription Release provision is both reasonable and not overly burdensome. As the Commission has also appropriately concluded, alternatives such as physical signage are likely to be ineffective. The proposed amendments aim to fully realize the promise of the Contact Lens Rule by bringing prescribers into compliance with the Automatic Release of Prescriptions requirement and protecting consumers' ability to comparison shop.

As noted, the Commission's efforts to address these issues were initiated as far back as 2015, which has led to a four-year regulatory limbo as revisions to the Rule were considered. Regulatory uncertainty creates tension in any marketplace, and the lack of certainty caused by this lengthy process has been significant. We urge the Commission to take the necessary steps to expediently finalize its revisions to the Rule and end the long wait.

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<sup>2</sup> Easton Randall, "Let's Open the Market for Contact Lenses in the Manner Congress Intended," *The Hill*, Sept. 8, 2017. <https://thehill.com/blogs/pundits-blog/lawmaker-news/349474-lets-open-the-market-for-contact-lenses-in-the-manner>.

<sup>3</sup> Ashley N. Baker and Alan Smith, "Regulatory Protectionism in the Contact Lens Market," R Street Policy Study No. 80, Jan. 2017. <http://www.rstreet.org/wp-content/uploads/2017/01/80.pdf>.

<sup>4</sup> R Street Institute, "Comment Letter to FTC," Jan. 30, 2017. <https://keepcontactlenschoice.org/from-ctac/r-street-institute-comment-letter-ftc/>.

<sup>5</sup> Edward J. Timmons and Conor Norris, "Restoring Vision to Consumers and Competition to the Marketplace," Working Paper, 2017. <https://www.mercatus.org/system/files/timmons-restoring-vision-mercatus-working-paper-v1.pdf>.

## **Digital Compliance for Prescription Release Requirement**

The R Street Institute has long supported cutting-edge innovations and emerging technologies. We are a tech-friendly think tank and are proud to be one of the few policy research organizations with a dedicated Technology and Innovation policy program. In the health care sphere, we have consistently supported efforts to embrace technology such as telehealth and other advances that help both patients and consumers.

Overall, we are sympathetic to the Commission's proposal to permit compliance of the Confirmation of Prescription Release provision via digital means. However, we strongly believe that the efficacy and appropriateness of the Commission's proposed patient portal is highly detail-dependent.

Many Americans still lack access to internet service or smartphones, meaning that their access to a patient portal could be limited. Furthermore, many patients—particularly among older generations—are not tech-savvy and therefore may have trouble accessing or understanding a portal. In light of these facts, potential mitigation measures—such as requiring that providers send patients a digital link and access instructions to the portal—should be considered.

Ultimately, it is critical that the Commission ensure that patient portals are not being used as a mechanism for avoiding compliance or leading to excessive consumer confusion.

## **Brand-Only Contact Lens Prescriptions**

We appreciate the Commission's focus on alterations to contact lens prescriptions, and we remain cognizant of the potential safety concerns when it comes to altering lenses. Going forward, however, we would urge the Commission to study this issue further and take into account the potential patient benefits that could come from safe, generic eye-care options.

The R Street Institute focuses extensively on the issue of medical disintermediation, including finding the best ways to enhance consumer freedom in health care markets without sacrificing safety. Allowing access to generic drugs and other medicines would allow consumers greater choice while also generating significant cost-savings.

The promise of generic eye care should not be ignored. Currently, eye doctors prescribe more brand-name medications than any other group of health care providers,<sup>6</sup> and there is no

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<sup>6</sup> HealthDay News, "Generic Eye Drops Could Save Millions in Medicare Funding, Study Says," *United Press International*, July 29, 2017.

[https://www.upi.com/Health\\_News/2017/07/29/Generic-eye-drops-could-save-millions-in-Medicare-funding-study-says/7021501349495/](https://www.upi.com/Health_News/2017/07/29/Generic-eye-drops-could-save-millions-in-Medicare-funding-study-says/7021501349495/).

empirical evidence to suggest that brand-name medications are superior to generic options.<sup>7</sup> Researchers have also found that switching to lower-cost generic eye care could produce significant cost-savings as well.<sup>8</sup>

The use of generic medication has been widespread across the medical industry, and we therefore urge the Commission to continue researching the issue with an eye toward adopting a hospitable posture regarding generic eye care.

Respectfully submitted,

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<sup>7</sup> Shantell M. Kirkendoll, "A Switch to Generic Eye Drugs Could Save Medicare Millions Annually," *M Health Lab Blog*, July 18, 2017. <https://labblog.uofmhealth.org/industry-dx/a-switch-to-generic-eye-drugs-could-save-medicare-millions-annually>.

<sup>8</sup> Paula Anne Newman-Casey, et al., "Brand Medications and Medicare Part D: How Eye Care Providers' Prescribing Patterns Influence Costs," *Ophthalmology* 125:332 (Mar. 2018), pp. 332–339. [https://www.aaojournal.org/article/S0161-6420\(17\)30971-5/fulltext](https://www.aaojournal.org/article/S0161-6420(17)30971-5/fulltext).