

**Prepared Statement of  
The Federal Trade Commission**

**Before the**

**Committee on Energy and Commerce  
United States House of Representatives**

**Washington, D.C.**

**September 9, 2003**

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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.<sup>(1)</sup>

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.<sup>(2)</sup> Pursuant to its statutory mandate, the Commission increases consumer choice by promoting vigorous



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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.<sup>(16)</sup> 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.<sup>(17)</sup> 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,

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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.
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