

Testimony of Dr. Wiley Curtis of Arlington, Texas
Member, American Optometric Association
1505 Prince Street, Alexandria, VA 22314
Before the Energy and Commerce Subcommittee on Commerce, Trade and
Consumer Protection, U.S. House of Representatives
Hearing on Contact Lens Sales
September 15, 2006

Good morning Mr. Chairman, Ranking Member Schakowsky and members of the subcommittee. I am Dr. Wiley Curtis, a member of the American Optometric Association (AOA) and a private practice optometrist serving patients in Arlington, Texas and surrounding communities.

On behalf of the 35,000 members of the AOA, America's frontline providers of eye and vision care, I want to thank you for the opportunity to appear at today's hearing. It is a pleasure to have a chance to report to you on the contact lens prescription verification practices of the online and mail order contact lens sales industry, and the concerns I have regarding their impact on the visual health and well-being of my patients and the patients of my colleagues in communities across the country.

The AOA was pleased to be very actively involved and to have played a very positive role in the debate over the contact lens law enacted in 2003, the Fairness to Contact Lens Consumers Act (FCLCA). The AOA supported the legislation because we felt it tried to balance the patient's ability to get his or her prescription with the need to assure that only properly verified prescriptions are filled.

In fact, then-Congressman Richard Burr, once a member of the Energy and Commerce Committee and the sponsor of the FCLCA, specifically recognized the AOA and his own optometrist, my good friend Dr. Michael Burke, in remarks on the floor of the House of Representatives during final consideration of the FCLCA bill:

“I appreciate the support of the American Optometric Association, especially my optometrist in Winston Salem, North Carolina, Dr. Burke, who read through these drafts. He helped us as we put the bill together. He improved the legislation and put us where we are today.”

Three years ago, the President of my association appeared before this panel and affirmed our position that the AOA supports a consumer’s right to receive his or her contact lens prescription and have it verified to a third party. Since then, the AOA has taken a leading role in educating its members about full compliance with the FCLCA.

Our widely disseminated education materials have been reviewed, and even praised, by the Federal Trade Commission (FTC). That’s why, Mr. Chairman, it is not a coincidence that the FTC “test shops” have found optometrists in compliance with the law, even as they have identified serious compliance issues among contact lens sellers.

The primary concerns of the AOA and its members today are the same ones we referenced before this panel in 2003, only now we have clear evidence that those concerns have materialized in tangible form. We do not want to see any interference with the ability of patients to get their prescriptions and purchase their lenses wherever they

choose. We do want to make certain however, as the FCLCA envisioned, that lenses being sold by Internet and mail order sellers are being sold upon verification that a valid prescription exists.

It is important to remember that in spite of advances in safety and convenience – many of which my profession has played a role in – contact lenses are medical devices and must always be treated as such.

The outbreak this year of fungal keratitis among some contact lens wearers underscores the fact that contact lenses are indeed prescription medical devices that can cause serious injury when improperly fitted, worn or cared for. The AOA was a leader in responding to this health situation, providing detailed and reliable information directly to our own members, consumers, Federal and state government officials, manufacturers and sellers, including 1-800 CONTACTS.

Just last year, after reviewing cases in which consumers were harmed by the improper use of decorative, non-corrective contact lenses that were widely available online or at flea markets, Congress took decisive action. The passage of the “Boozman-Barton-Waxman” bill, now Public Law 109-96, provides for the regulation of all cosmetic contact lenses as medical devices by the Food and Drug Administration and requires that such lenses only be sold pursuant to a doctor's examination and prescription, just like corrective contact lenses.

Optometrists remain particularly proud of the leadership role played by our colleague and your colleague, Dr. John Boozman of Arkansas, in making this the priority issue it needed to be for legislation to be enacted and signed into law by the President.

It is the very real potential for harm when contact lenses are worn improperly that makes the prescription verification safeguards the most important element of the FCLCA. We had, and continue to have, reservations about the verification process in the law, and I will offer my own experiences with it and suggestions for improvements to it later in my testimony.

First though, I know that there has been much discussion of so-called “doctor only” lenses. I am aware that Senator Bennett and Congressman Terry have introduced legislation seeking to make changes to the FCLCA to govern how contact lenses may be marketed by their manufacturers. The FTC, under a directive included in the FCLCA, prepared and delivered a report to Congress last year on contact lens marketplace competition. With regard to so-called “doctor only lenses,” the FTC stated:

“Our examination of these issues – exclusive relationships, private label lenses, and limited distribution lenses – suggests that such relationships are not prevalent in the market for contact lenses and are unlikely to limit competition and harm consumers. Exclusive relationships are rare; private label lenses while more common, still represent a small portion of all sales of soft contact lenses; and limited distribution policies are not widely used. Moreover, our inquiry showed that a common, limited distribution lens or its private label equivalent, was available from an overwhelming majority of outlets sampled. Given that the FCLCA permits sellers to fill prescriptions with equivalent national brand or private label lenses, consumers have a number of channels through which to obtain such lenses. In addition, these relationships may be an efficient way for manufacturers to provide

beneficial incentives to their lens distributors, which in turn may lead to increased competition among various brands of lenses. In sum, the theory and the evidence examined do not support the conclusion that these distribution practices harm competition and consumers by allowing prescribers to lock in their patients to supracompetitively priced lenses.”

The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study

February 2005, Page 33

I will expect to look to the FTC to provide any relevant updates to this finding.

I would like now to return to the issue of prescription verification. Mr. Chairman, this is an area of the FCLCA that is breaking down and, as a result, patients are needlessly placed at risk. Over the last year, the AOA has received hundreds of FCLCA violation complaints about sellers, has evaluated them and, when necessary and appropriate, forwarded them to the FTC. The FTC has also received many direct complaints from doctors.

However, it's not only optometrists and ophthalmologists who are concerned about violations of the FCLCA:

- Last October, after evaluating FCLCA complaints, the FTC issued a warning letter to 1-800 CONTACTS, the nation's largest Internet seller. The FTC's warning cited a "substantial number of complaints" and urged the company to "review the Contact Lens Rule and revise its practices as necessary to ensure that they comply with its requirements.”

- In a press release issued last November, 1-800 CONTACTS charged that a competing online seller, Coastal Contacts, was engaged in activities “inconsistent with the prescription verification requirements of the FCLCA and...practices that misled consumers.”
- In late June of this year, the FTC issued a series of 18 warning letters to sellers of cosmetic contact lenses for failure to comply with the FCLCA based on statements made on the sellers’ Web sites.
- More recently, in August, the FTC imposed formal sanctions on Walsh Optical, an Internet contact lens seller.

In light of this and new complaints about deficient verification practices, the AOA is urging a crackdown on unscrupulous contact lens sellers. In addition, we believe the time has come for some common-sense and pro-patient updates to the prescription verification safeguards included in the FCLCA. Here’s why:

1. We are seeing contact lens orders being filled by sellers without any verification of the prescription by the prescribing optometrist.
2. We are seeing contact lens prescriptions being overfilled, well beyond the time period the prescription in question is valid.
3. We are seeing sellers use mechanisms like automated calling systems to verify prescriptions, which impose needless burdens on doctors who want to communicate important patient information to the seller.

Some of my own experiences are very relevant to this discussion. Over the course of this year, I have tracked 18 contact lens orders placed with 1-800 CONTACTS. I am

saddened to report that the first 17 orders were all filled by the company without any verification contact with my office, in apparent violation of the FCLCA.

No contact through the telephone.

No contact through the fax machine.

No contact through an e-mail.

A subsequent order – the 18th – did generate a combination live / automated telephone call request for a patient's prescription to be verified.

Since then I am aware of additional cases in which my patients received contact lenses though my office was not contacted with a verification request.

These are not the results this committee intended when it crafted what were supposed to be prescription verification safeguards for patients in the FCLCA. I can't imagine that anyone on this committee envisioned automated telephone calls would be the primary mechanism used by a seller to verify a prescription. I can't imagine that anyone on this committee envisioned that a seller would undermine the law's intention of encouraging patient-focused prescriber-dispenser communications. Unfortunately, that's what's happening.

That's why the AOA is encouraging Congress to examine the practices used by sellers and to take the following corrective actions:

1. Allow eye care providers the opportunity to choose to receive verification requests from sellers through e-mails and faxes, rather than automated telephone calls. This would help facilitate the type of patient-focused communication that occurs between doctors and pharmacists.

2. Ensure that all patient health considerations raised by an eye care provider are addressed by the seller before a contact lens order is filled.
3. To increase the fines that could be imposed by the FTC on unscrupulous contact lens sellers that would violate the law and endanger patients.

These proposals are embodied in legislation we expect to be introduced in Congress in the near future. Optometry and, I am pleased to report, ophthalmology, are in agreement about these proposals and about the need for patients to come first.

Again, Mr. Chairman, let me emphasize that the AOA supported passage of the FCLCA in 2003 and continues to support it now. Our concern – then as now – is that the Internet and mail order contact lens sales industry must provide doctors with basic patient information, in an appropriate manner, so we may respond efficiently, and require that prescriptions be positively verified by the doctor before lenses are sold. This is the balanced and reasonable approach to the competition and health concerns that Congress intended and consumers now expect.

Thank you for the opportunity to present this testimony. We hope you find our input useful and that we can work with you and the members of the subcommittee to move forward with legislation to strengthen prescription verification safeguards and crack down on the unscrupulous sellers who place profits ahead of patients.