

Comments to the Federal Trade Commission on the Proposed Contact Lens Rule Project No. R411002

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This memorandum responds to the Federal Trade Commission's request for public comments on the proposed Contact Lens Rule, to be promulgated under the authority of the Fairness to Contact Lens Consumers Act, 15 U.S.C 7601–7610 (Pub. L. 108–164), signed by President Bush on December 6, 2003. Following a brief introduction, I comment on specific questions posed in Section IX of the Commission's Notice of Proposed Rulemaking. My comments are intended to assist the Commission in designing a final rule that maximizes the benefits realized by consumers under the Act, which promotes competition in the sale of replacement contact lenses by requiring eye-care professionals unconditionally to release copies of prescriptions to their patients upon the completion of an ocular examination.

1. Introduction

The introduction of disposable “soft”, gas-permeable contact lenses in combination with improved manufacturing methods that minimize quality variation have revolutionized the marketplace for a product once made to order for each wearer. As a result of these innovations, contact lenses are now mass produced and numerous independent sellers are able to supply, off the shelf, lenses to eye-care professionals' precise specifications, including power, diameter and base curve. Competition, with its myriad benefits for consumers, has been promoted by the entry of Internet and mail-order retailers carrying large inventories of replacement lenses and able to fill customers' orders in a timely manner from remote locations.

Like the Ophthalmic Practices Rules before it, the proposed Contact Lens Rule recognizes that it is no longer in the public's interest for consumers to be limited to having their prescriptions filled only by the eye-care professional who evaluates their visual acuity and prescribes the appropriate corrective lenses. By requiring ophthalmologists and optometrists to release contact lens prescriptions to patients upon completion of the ocular examination, the Rule empowers consumers to purchase their lenses from the supplier of their own choice who offers the best combination of price, convenience and quality.

In designing a rule that achieves the pro-competitive purposes of the Fairness to Contact Lens Consumers Act, however, the Commission must take into account a fundamental characteristic of the contact lens marketplace that may inhibit the achievement of the Act's laudable goals. A conflict of interest exists between eye-care professionals and their patients owing to the fact that the former often sell the contact lenses they prescribe. Because ophthalmologists and optometrists who sell contact lenses have a financial interest in the prescriptions they write, they have

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strong incentives to prevent their patients from purchasing lenses from alternative suppliers and, hence, to undertake actions that thwart the Act's objectives.

More specifically, the conflict of interest inherent in the relationship between contact lens prescribers and purchasers creates incentives for eye-care professionals who also sell lenses to:

- Avoid attempts by third-party sellers to verify contact lens prescriptions via telephone, fax or email;
- Preempt patients from contacting alternative suppliers by selling lenses to them before they either know other options are available or have opportunities to comparison-shop;
- Use the prescription verification period to price discriminate – offering lower prices to consumers expressing an interest in purchasing contact lenses from an alternative supplier;
- Limit the number of lenses that may be dispensed at any one time or the number of refills permitted on any one prescription so as to reduce the benefits a consumer may derive from purchasing from third-party suppliers.

Absent changes in law or in codes of professional conduct that preclude ophthalmologists and optometrists from also selling the contact lenses they prescribe, conflicts of interest can be minimized by modifying certain provisions of the proposed Contact Lens Rule. Recommended modifications are described in the following section, where responses to specific questions in Section IX of the FTC's Notice of Proposed Rulemaking are provided.

2. Responses to Questions on the Proposed Contact Lens Rule and the Proposed Clerical Amendments to the Ophthalmic Practice Rules

The following comments on the proposed Contact Lens Rule are identified by the numbers and subsections of the questions being answered. The recommended modifications are summarized in Section 3 of this memorandum.

Definitions

3. Section 315.2 defines “business hour.” (a) Is this definition sufficiently clear? (b) What is the impact, including costs and benefits, of defining the term in this way? (c) Should the definition include provisions addressing (i) prescriber vacation days, (ii) state or local holidays, (iii) weekend days, or (iv) other exceptions to normal business hours?

The definition of “business hour” is abundantly clear. In particular,

Business hour means an hour between 9:00 a.m. and 5:00 p.m., during a weekday (Monday through Friday), excluding federal holidays. For purposes of section 315.5(d)(3), “eight (8) business hours” shall be calculated from the first business hour that occurs after the seller provides the prescription verification request to the prescriber, and shall conclude after eight (8) business hours have elapsed. For verification requests received by a prescriber during non-business hours, the cal-

ulation of “eight (8) business hours” shall begin at 9:00 a.m. on the next weekday that is not a federal holiday.

Unfortunately, however, the definition enshrines a business model that may be convenient for traditional eye-care professionals who work a standard 40-hour week, but will not be convenient for many consumers. Nor does the definition fit the reality of a contact lens marketplace served by large numbers of retailers that cater to customers’ schedules by operating longer hours on weekdays, on weekends and on many Monday federal holidays.

Defining “business hour” as occurring between the hours of nine to five Monday through Friday unduly limits consumers’ options in an industry populated by mass marketers, chain stores, mail-order and Internet retailers of contact lenses. Combined with the requirement that prescribers verify a prescription “within eight (8) business hours” after receiving it from a third-party seller (§ 315.5(c)(3)), the proposed Rule unintentionally confers a competitive advantage on eye-care professionals who also sell lenses at the expense of third-party sellers.

As the members of the eye-care profession have recognized, “immediate lens replacement and competitive prices are largely responsible for the success of mail order and Internet companies.”¹ Indeed, about one-third of 1-800 CONTACTS’ customers request that their replacement lenses be shipped overnight – and are willing to pay for the convenience of next-day delivery. As such, “for patients seeking 1-800’s typical fast turnaround ... anything that causes a wait will be an impediment to smooth business.”² Under the definition of the prescription verification period proposed by the FTC, customers would be required to wait as long as six days to obtain their replacement lenses from a third-party seller.

That extended waiting period would occur in the case of a patient who receives his or her prescription from an eye-care professional at 5:01 p.m. on a Friday afternoon prior to a weekend followed by a Monday federal holiday. Because the prescriber would not be required to verify the patient’s prescription until 8:01 a.m. on Wednesday – eight business hours not elapsing until the end of Tuesday – delivery via an express courier service would be on Thursday at the earliest. A six-day wait would be especially problematic for a contact lens wearer not seeking to fill a new prescription, but instead dealing with an emergency caused by a lens being torn or lost and having no other lenses on hand.

It has been suggested that this unique “eight-hours-plus-one-minute” interpretation is intended to address situations where a prescribing eye-care practitioner’s offices might be closed on the particular weekday on which a verification request is received. However, with the industry trending towards retail establishments expanding their hours of operation, the number of eye-care professionals who choose to close their stores on a weekday is increasingly becoming the exception, rather than the rule.

In effect, the proposed rule would require every contact lens consumer in America who purchases from an alternative retailer to wait an additional day simply to accommodate the sched-

¹ Joe B. Goldberg, “If You Can’t Beat Mail Order Companies, Join Them”, *Contact Lens Spectrum* (June 2002), p. 52.

² Michelle Boyles, “Cole to Give Exams to 1-800 Customers”, *Review of Optometry* (August 15, 2003), p. 4.

ules of eye care practitioners who choose to work less than a full traditional work week. Consumers must wait even if their own eye doctor is not one of those who choose to close during the week.

By establishing a restrictive “nine-to-five, five-days-a-week” definition of business day and then adding an additional day to accommodate eye doctors whose offices may be closed on a week-day, the proposed rule undermines, and indeed, turns on its head, a law intended to facilitate competition and promote more choice, enhanced convenience, and lower prices for consumers. Indeed, by shielding them from competition, the Rule as written would create incentives for eye doctors now seeing patients outside the nine-to-five window, including Saturdays and the many federal holidays observed only by the U.S. Postal Service and local banks, to reduce the hours they are open for business.

The protracted prescription verification period contemplated in the Commission’s proposed Rule also creates a window of opportunity for eye-care professionals to lure Internet-savvy patients back to their offices with the offer of lower prices: “When you receive a telephone inquiry for a patient’s prescription, recognize it as an opportunity for a sale.”³

By offering lower prices for contact lenses to patients who have contacted a third-party seller and who have therefore demonstrated their greater price sensitivity – and by offering to fill their prescriptions immediately – eye-care professionals will be able to deter patients from purchasing from rival suppliers. Operating across the “digital divide”, such price discrimination will tend to benefit high-income contact lens wearers at the expense of low-income patients, surely a direction of wealth redistribution the Commission does not intend to facilitate.

In order to avoid lengthy waits on orders for replacement lenses placed with third-party sellers and to discourage eye-care professionals from engaging in price discrimination, I recommend that the Commission adopt the definition of the prescription verification period contained in the law enacted recently by the State of California, a definition which has received strong support from the California Board of Optometry, among other interested groups. That law permits third-party sellers to fill prescriptions for contact lenses either upon positive verification by the prescriber or, in the absence of such verification, within 24 hours after verification has been requested, or by 2:00 p.m. the next business day, whichever is sooner.

In defining “business day”, California law excludes only Sundays and federal holidays. Saturday is an important business day for many retailers, including chain stores such as LensCrafters, and there seems to be no good reason for prohibiting third-party sellers of replacement lenses from seeking to verify prescriptions on that day and to ship lenses for delivery on Monday, if not a federal holiday, or Tuesday at the latest.

5. Section 315.2 defines “contact lens prescription.” (a) Is this definition sufficiently clear? (b) What is the impact, including costs and benefits, of defining the term in this way? (c) Should the definition include the prescriber’s email address, if any? (d) Should the definition include anything else?

³ Ronald P. Snyder, “Winning the War against Mail-Order Contact Lenses”, *Optometry Today* (January/February 1993), p. 11.

In the language of the proposed Rule, a

Contact lens prescription means a prescription, issued in accordance with State and Federal law, that contains sufficient information for the complete and accurate filling of a prescription for contact lenses, including the following:

- a. The name of the patient;
- b. The date of examination;
- c. The issue date and expiration date of prescription;
- d. The name, postal address, telephone number, and facsimile telephone number of prescriber;
- e. The power, material or manufacturer or both of the prescribed contact lens;
- f. The base curve or appropriate designation of the prescribed contact lens;
- g. The diameter, when appropriate, of the prescribed contact lens; and
- h. In the case of a private label contact lens, the name of the manufacturer, trade name of the private label brand, and, if applicable, trade name of equivalent brand name.

Missing from this list are provisions that would prohibit eye-care professionals from undermining the intent of the Fairness to Contact Lens Consumers Act by limiting the quantity of lenses consumers may purchase at any one time or the number of refills permitted on any one prescription. Contact lenses are not created equal. Some are intended to be replaced daily and others are designed for periods of extended wear ranging from one-to-two weeks to 30 days. Wearing schedules vary from patient to patient and individual lenses can be torn or lost, but in any case, frequent replacement of contact lenses promotes ocular health.

Absent regulatory instructions addressing order size and replacement frequency, eye-care professionals who also sell lenses on their own accounts may place third-party sellers at a competitive disadvantage by writing prescriptions that limit quantities or refills, thereby rendering the minimum one-year prescription expiration date contemplated by the Commission meaningless. Such limits also would reduce the price-competitiveness of third-party sellers, given that fixed delivery charges make filling large orders more economical for consumers than filling small orders.

That eye-care professionals might well respond to the proposed Contact Lens Rule in this way is illustrated by a message posted on the *Review of Optometry Forum* by Dr. Cory Steed on February 25, 2004. Addressing a concern raised by another practitioner about having to verify a patient's prescription every time the patient reorders lenses from a third-party seller on an existing valid prescription, Dr. Steed wrote that

I treat the CL [contact lens] Rx as exactly that; and [sic] Rx. It has a specific number of lenses ("tabs") to be dispensed with a certain number of refills (i.e., Ciba N&D/8.6/-2.50 disp[ense] one box of six lenses, right eye with one refill within six months). When I fill the year supply I write at the bottom of the Rx "filled (date filled) by (me). NO REFILLS REMAIN" and hand the patient their copy of the Rx ... just like a pharmacy. A partially filled Rx would get a corresponding note, indicating how many lenses remain.⁴

⁴ Accessible at <http://www.revoptom.com/index.asp?show=content&idx=3285>. Last accessed March 1, 2004.

Including limits on quantities and refills would, by forcing consumers to return to the prescriber's office to obtain new prescriptions, making it uneconomical for them to purchase contact lenses in bulk from third-party sellers, or both, reduce the competitiveness of the market for replacement lenses. I therefore recommend that the Commission insert language into the definition of "contact lens prescription" that prohibits such limits unless medically necessary.

Availability of contact lens prescriptions to patients

13. Section 315.3(a) requires prescribers to release and verify contact lens prescriptions to their patients and to any person designated to act on behalf of the patient. (a) Is this provision sufficiently clear? (b) Is it clear the means by which a prescriber shall provide or verify a contact lens prescription as directed by a third party authorized to act on behalf of the patient?

The proposed Contact Lens Rule obligates a prescriber to release a prescription to the patient when he or she "completes a contact lens fitting". Section 315.2 defines contact lens fitting to mean "the process that begins after an initial eye examination for contact lenses and ends when a successful fit has been achieved or, in the case of a renewal prescription, ends when the prescriber determines that no change in the existing prescription is required...."

Timing is everything. Unlike prescription eyeglasses, which are manufactured to the prescriber's specifications after the patient's eyes have been examined and necessary corrective adjustments, if any, have been determined, contact lens fittings take place while the patient is still sitting in the ophthalmologist's or optometrist's examination room. These fittings consume samples supplied, often free of charge, to eye-care professionals by the manufacturers of contact lenses. The fact that the eye examination and the fitting occur in a nearly continuous stream provides an opportunity for the practitioner to sell lenses stocked by his or her office prior to releasing the prescription to the patient.

That possibility seems especially likely when the eye-care professional deals in private-label lenses or lenses supplied by manufacturers, such as Ocular Sciences Inc. and ProClear, that refuse to sell to third-party retailers.⁵ In a panel discussion posted on *Contact Lens Spectrum* in January 2002, for example, Dr. Charles Hom stated that

I often don't give patients a choice. I don't say this is a private label lens. I just say, "This is the best lens for you. It's the one you should be wearing."⁶

⁵ Such refusals to deal seem to violate the spirit of the settlement reached in *In re: Disposable Contact Lens Antitrust Litigation*, No. MDL 1030 (complaints filed M.D. Fla. 1994). As part of that settlement, "Johnson & Johnson agreed to sell its lenses to alternative distribution channels, as long as those firms sell lenses to customers in accordance with a valid prescription and in compliance with all federal and state laws and regulations." See Comments of the Staff of the Federal Trade Commission, Intervenor, in re: Declaratory Ruling Proceeding on the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses, State of Connecticut, Department of Public Health, Connecticut Board of Examiners for Opticians, March 27, 2002, p. 4.

⁶ Accessible at http://www.clspectrum.com/archive_results.asp?loc=archive\2002\January\ocular\0102private.htm. Last accessed September 4, 2003.

