



## KANSAS BOARD OF EXAMINERS IN OPTOMETRY

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**SENT VIA E-MAIL TO: [contactlensrule@ftc.gov](mailto:contactlensrule@ftc.gov)  
AND FIRST CLASS MAIL**

Federal Trade Commission  
Office of the Secretary  
Room 159-H (Annex A)  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

**RE: Contact Lens Rule, Project No. R411002**

To Whom It May Concern:

This letter is intended to be comments by the Kansas Board of Examiners in Optometry (the "Kansas Board") on the Federal Trade Commission's proposed rules implementing the Fairness to Contact Lens Consumer Act.

I. The Kansas Board. The Kansas Board<sup>1</sup> is charged with enforcement of the Kansas Optometry Law and is the agency that licenses optometrists in the state. The Kansas Optometry Law includes a provision at K.S.A. 65-4966 dealing with a patient's right to receive a copy of his or her contact lens prescription, and a provision at K.S.A. 65-1504b making it unlawful for any person to dispense contact lenses without first obtaining a valid prescription for the lenses. The Kansas Board has been engaged in litigation for 5 years over whether 1-800-CONTACTS, a large seller of contact lenses, violated K.S.A. 65-1504b by selling contact lenses to Kansas citizens without having obtained a valid prescription. In addition, the Kansas Board has investigated over 100 complaints resulting from 1-800-CONTACTS advising customers that prescribers refused to verify a contact lens prescription.<sup>2</sup> Therefore, the Kansas Board has unique and significant first hand experience with the issues these rules are intended to address.

II. The Proposed Rules. Because one of the primary functions of the Kansas Board is to protect the Kansas public, we are limiting our comments to items we believe have a direct affect on public safety. The Kansas Board believes that if contact lenses are sold, other than in conformance with a valid prescription, a significant risk to the ocular health of the purchaser is

<sup>1</sup> The Kansas Board is comprised of 4 licensed optometrists and 1 public member.

<sup>2</sup> With very few exceptions the investigation indicated the allegation was not true.

presented. The Kansas Board also believes that the majority of contact lens wearers do not fully appreciate the potential risks contact lens wear can pose. Additionally, the majority of contact lens wearers do not understand that there can be significant differences in contact lenses manufactured by different companies or even different lenses manufactured by the same company. Therefore, consumers do not appreciate the risks associated with substituting a different lens for the one prescribed.

A. Definition of Contact Lenses. The Kansas Board believes the definition of contact lenses should include non-corrective contact lenses. Most of the risks associated with contact lens wear are equally present with non-corrective lenses. Additionally, a significant portion of those purchasing non-corrective contact lenses are minors who, because of their age and experience, are least equipped to protect themselves. Attached is a letter in which the Department of Health and Human Services of the Food and Drug Administration indicates that lenses with no dioptric refractive power (Plano lenses) are regulated as medical devices and that a prescription from a licensed eye care provider is necessary to purchase them.

B. Definition of Direct Communication.

1. Confirmation that a facsimile or email communication was successful will be crucial to enforcement. Virtually all of the reports to the Kansas Board alleging an optometrist had refused to respond to a contact lens verification request involved the request allegedly being made by facsimile. Many times the prescriber denied having received the facsimile. In those cases, the Kansas Board requested that the seller provide documentation indicating that the facsimile was received. No such documentation was ever provided – presumably because it did not exist. This lack of documentation made reaching a definitive determination of what actually happened impossible. The Kansas Board believes that the crucial component, in terms of public safety, is that the prescriber have 8 business hours to respond to a verification request. Because the seller will be entrusted with determining when the 8 business hour period expires, it is important the seller have verification the request has been received. The Kansas Board has also received evidence indicating that there can be a significant lapse in time between the “sending” of a facsimile and the time it is actually received by the addressee machine. The seller will not be able to accurately know when the intended 8 hour period ends without having verification of the time the facsimile is actually received. Additionally, the FTC will be unable to determine whether the intent of the law has been met by the prescriber actually having the required 8 business hours to respond unless confirmation is obtained and maintained. The recent investigative experiences of the Kansas Board have proven this to be true.

2. A message left on an answering machine should not be considered a direct communication. For the same reason, the Kansas Board feels a message left on an answering machine should not be considered a “direct communication”. It is not unusual for Kansas optometrists to have satellite offices that are not staffed every business day. In such instances a person may not be present to even check answering machine messages, let alone respond to the verification request.
  3. The required record should include the name of the person(s) involved in the direct communication. The Kansas Board has learned through its numerous investigations of alleged refusal to verify contact lens prescriptions that being able to identify the persons allegedly involved is a key investigative tool. Adding to the required records the name the person making the record and the name of the person spoken to, in the event of telephone verification, would require very little additional effort by those creating the records, but would provide a significant piece of information for the FTC. Such a requirement would also foster accountability for the records and thereby encourage accuracy.
- C. Communications after the 8 business hour period. The Kansas Board believes the rules should address the situation in which a prescriber advises the seller, after the 8 business hour period, that the prescription is incorrect, invalid or expired. We believe the rules should prohibit shipping lenses (or any additional lenses) once it is learned the prescription described in the verification request is incorrect, invalid or expired even if that information is first received by the seller after the 8 business hour period. If the safety of the public is of any importance, no other result can be acceptable.
- D. An ability to effectively communicate with the seller. The Kansas Board is aware of instances in which an optometrist has attempted to communicate with a seller, but could not reach a person familiar with the individual patient or that patient’s proposed purchase. Therefore, the Kansas Board believes the regulations should require sellers to maintain a “Physician’s Hot Line.” When an eye care professional perceives a risk to the patient it is important that the professional be able to talk with an employee of the seller who has specific knowledge regarding the patient and the ability to take the needed action.
- E. The definition of a prescription. The Kansas Board believes that it is important to include the number of potential lenses or refills that can be purchased on a contact lens prescription. The FTC has commented that, in its opinion, “[t]he primary health care concern with contact lenses appears to be ensuring that contact lens wearers return to their doctors regularly for eye examinations.”<sup>3</sup> A one year expiration date will not protect the contact lens wearer if during the one year the contact lens wearer purchases enough lenses or refills to last multiple years. The Board recommends the definition

<sup>3</sup> Comments of the Staff of the Federal Trade Commission, Intervenor to the State of Connecticut, Department of Public Health, Connecticut Board of Examiners for Opticians, March 27, 2002.

of prescription be amended to include the total number of lenses that may be dispensed using the prescription.

- F. Accurate communications. The Kansas Board believes when an eye care professional refuses to verify a prescription because it is incorrect, invalid or expired, the seller should be required to notify the patient of the precise reason given.

The Kansas Board greatly appreciates the opportunity to comment on these proposed regulations.

Sincerely,

Larry Stoppel, O.D.  
President

LDS/RJF/dkd