



# WAL-MART



## *Optical Division*

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April 5, 2004

Via email: [contactlensrule@FTC.gov](mailto:contactlensrule@FTC.gov)

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. R11002

Dear Sir/Madame:

Wal-Mart submits these comments in response to the FTC's proposed Contact Lens Rule that appeared in the Federal Register on February 4, 2004. As is evident from the title, the purpose of the Fairness to Contact Lens Consumers Act, which the Contact Lens Rule implements, is to "increase competition in the sale of contact lenses" with the expectation of achieving "substantial savings to America's contact lens wearers." House Report 108-318 at 4. Wal-Mart shares these objectives. Accordingly, Wal-Mart urges the Commission to adopt regulations that maximize consumer choice and convenience. Whenever the interests of the consumer conflict with the interests of the prescriber, the Commission should favor the consumers' interests. Another underlying purpose of the Act is to remove obstacles to competition created by optometrists and ophthalmologists. The FTC regulations should seek to achieve this objective, as well.

### **Definition of "8-Business Hours"**

The Act provides that a prescription is verified if the prescriber fails to respond to a direct communication from the seller for verification of the prescription within "8 business hours, or a similar time as defined by the FTC." The Act leaves it to the FTC to determine whose business hours should be counted and to adopt a reasonable proxy for "8 business hours." The FTC should exercise its discretion by maximizing the convenience of the consumer, not the prescriber. As currently drafted, § 315.2 does not do so.

The proposed regulation defines “8 business hours” as 9:00 a.m. to 5:00 p.m. hours, Monday through Friday. This definition is much too narrow and gives undue weight to the interests of prescribers. Many working people are only able to shop for contact lenses during the evenings or on Saturdays. Under the FTC’s proposed rule, they might have to wait from a Friday to a Monday (or even longer) to pick up their lenses, and they would have to take time off from work to do so.

To better serve consumers, the FTC should define “8 business hours” as at a minimum Monday through Saturday.<sup>1</sup> Additionally, the time frame should be defined as the 24-hour period following the direct communication from the seller to the prescriber requesting verification, provided that, if the 24-hours expires on a Sunday or on Christmas, New Years Day, July 4, or Thanksgiving,<sup>2</sup> the time for responding would be extended until noon the following day. This rule would be easy to administer, and it serves the interests of consumers as well as prescribers and sellers. Although in some cases a prescriber may have less than its own 8 business hours, the prescriber will still have more than sufficient time during normal business to examine a patient’s file and verify a prescription. As a practical matter, a prescriber needs only a few minutes to verify a prescription.

Contact lens prescribers should be presumed to work normal business hours on days when most other people work, whether or not they actually do so.

### **Definition of “Direct Communication”**

The definition of “direct communication” should include a message left on the prescriber’s telephone answering system. Such a definition makes it more difficult for an optometrist or ophthalmologist to obstruct the verification process. It is reasonable to presume that prescribers listen to their answering machines.

Additionally, a seller should not be required to provide the prescriber with a toll-free number to verify a prescription. Currently, sellers and prescribers make calls at their own expense to verify prescriptions across the country. They should continue to share the burden of verification by picking up their own costs.

### **Definition of “Seller”**

The term “seller” should be defined as any retailer, including but not limited to mail order houses, pharmacies, mass-merchants, optical chain stores, and internet sellers. The definition should further provide that a seller is not limited to those entities authorized by a state law to sell contact lenses. Congress intended that the definition of a seller of contact lenses include more than optometrists and ophthalmologists. Indeed, the whole statutory scheme is based on that assumption.

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<sup>1</sup> An informal poll conducted in Washington showed that 17 of the 21 optometrists called at random, were open for business on Saturdays.

<sup>2</sup> Most business are open on the remaining federal holidays, those holidays should thus be considered normal business days. They are Martin Luther King Birthday, President’s Day, Inauguration Day, Armed Forces Day, Memorial Day, Flag Day, Labor Day, Columbus Day, Election Day, and Veterans Day.

The definition of seller also should make clear that the seller includes all branches of a commonly owned entity. Thus, if one Wal-Mart or Sam's Club has a valid prescription on record, any Wal-Mart, Sam's Club, or the walmart.com online service can fill the prescription at the convenience of the consumer. Because the transaction involves an intra-company transfer of the prescription, no further verification should be required.

### **Inaccurate Prescriptions**

The Act provides that, for purposes of the verification process, a prescription is verified "if the prescriber informs the seller that the prescription is inaccurate and provides the accurate prescription." Section 315.5(c)(2) of the regulations should expressly state that a prescriber cannot declare a prescription as inaccurate unless the prescriber at the same time provides the accurate prescription. An inaccurate prescription should be defined as anything other than an accurate, incomplete or invalid prescription.

### **Invalid Prescriptions**

An invalid prescription should be defined as a prescription that has expired or does not apply to the buyer. Optometrists or ophthalmologists should not be able to subjectively define "invalid" and thereby prevent consumers from doing business with rival sellers of contact lenses. Additionally, if the optometrist or ophthalmologist has custody or access to the patient's file, he should be required to verify the prescription, whether or not he personally treated the patient.

Also, § 315.5(d) of the regulations should clarify that, if prior to the expiration of "8 business hours," a prescriber informs a seller that a prescription is invalid, the prescriber must at the same time state why it is invalid and, to the extent a valid prescription exists, that prescription should be provided to the seller. The burden imposed on a prescriber who states that a prescription is invalid should be no less than the burden imposed upon the prescriber who states that a prescription is inaccurate.

Finally, § 315.5(d) of the regulations should explicitly provide that it is an unfair and deceptive trade practice for a prescriber to state that a prescription is invalid if there is no basis for that conclusion. Such a provision would discourage optometrists or ophthalmologists from improperly asserting that a prescription is invalid in order to block the sale of contact lenses by a rival.

### **Incomplete Prescriptions**

When a consumer lacks full information about his or her prescription, the regulations should require a prescriber to provide the authorized seller with the necessary information within "8 business hours," as proposed above. Further, the regulations should provide that refusal of a prescriber to provide complete information within "8 business hours" constitutes an unfair or deceptive practice. Such a sanction is necessary because, when the seller lacks complete prescription information, as is frequently the case, passive verification becomes impossible and the consumer cannot buy needed contact lenses from the seller of his or her choice. Consumers who fail to save their prescriptions or who do not have them when they shop at a Wal-Mart or Sam's Club should not be penalized.

Once the fitting process has been completed, there is no good reason for a prescriber to withhold verification when a consumer authorizes a seller to obtain complete prescription information from a prescriber. Moreover, in such a situation, once the prescriber provides the complete prescription information, the regulations should provide that the prescription has been verified. To ensure that there is no confusion about the identity of the consumer, it would be appropriate to require that the consumer's date of birth be provided. Also, a contact person at the seller's location should be provided to the prescriber.

Section 315.5(b) should also be modified to reflect this proposed change. Moreover, no additional information should be required to start the verification process.

In response to the FTC's request for comment on the Ophthalmic Practice Rules, Wal-Mart believes a similar provision should be added that would allow sellers to request spectacle prescriptions from prescribers on behalf of the patient.

### **Verification by Prescriber**

Section 315.5 should make clear that verification can be made by anyone in the prescriber's office authorized to do so. There is no need for an optometrist or an ophthalmologist to personally make the verification. Indeed, the verification merely involves checking the relevant records at a prescriber's office.

### **Copies of Prescription**

In § 315.5(a), the FTC should clarify that a seller does not need the original prescription in order to sell a contact lens. A copy, including an electronic copy or electronic data records from a computer system, is sufficient.

### **Recordkeeping**

The Act requires that "[a] seller shall maintain a record of all direct communications" relating to prescriber verification. However, the Act does not specify the kind of records that must be kept. Section 315.5(f) of the FTC regulations should specify that, with respect to telephone calls, an electronic entry by the seller making or receiving the call is sufficient, without having to incur the burden of retaining actual telephone records, such as telephone bills. Telephone bills have only limited value because they have no information about inbound calls or local outbound calls. Moreover, if for any reason telephone records are needed, they are readily available from the telephone company.

Section 315(f) also requires the recording of too much information regarding telephone communications. The regulation should not require that all the information set forth in Section 315(b) be repeated, as long as that information is contained in the verification records. All that should be required are the name and telephone number of the person called, the request made of that person, the response, the name of the person seeking to buy the contact lenses, and the date and time of the call.

With respect to emails, saving the email should be sufficient. There should be no requirement to verify that the email was received. Wal-Mart is unaware of any inexpensive technology that can be deployed economically to do this. Of course, to the extent the seller receives an email notice of nondelivery, that notice should be saved and the email notification would be deemed ineffective.

Wal-Mart agrees that the FTC should be permitted to inspect the records. However, the regulation should make clear that the FTC must give reasonable notice of when it will inspect the records.

## **HIPAA**

The regulations should confirm that a prescriber cannot withhold verification based on an assertion that providing verification information to a seller somehow violates the Health Insurance Portability and Accountability Act (“HIPAA”) or some other federal or state law. HIPAA rules provide that the disclosure of protected health information by an eye doctor to a distributor of contact lenses for the purpose of confirming a contact lens prescription is a permitted treatment disclosure and does not require a patient’s written authorization. 45 CFR 164.506.

## **Expiration of Prescription**

The Commission asks whether §315.6, which pertains to the expiration of prescriptions, is necessary. Wal-Mart believes that it is necessary because it prevents unreasonably short expiration periods. Optometrists and ophthalmologists have been able to push through anticompetitive state laws, and any law that provides that a prescription expires in less than a year should be preempted. Moreover, other state laws that interfere with the purpose of the Act should also be preempted, as discussed in the next section.

This regulation should also address the situation when there has been a passive verification of a prescription and the seller does not know the expiration date. In that situation, the prescription should be presumed valid for thirty days after the passive verification. If the consumer seeks to purchase additional contact lenses after thirty days, another verification should be attempted.

## **Preemption of State Laws**

The Supreme Court has consistently held that a federal law preempts state laws or regulation when a federal law either “occup[ies] the field,” *Mich. Cannery & Freezers v. Agr. Marketing & Barg.*, 104 S.Ct. 2518 (1984), or “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). *See also, Fidelity Federal Savings & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). Here, Congress has expressly recognized that “[t]he consumer’s right to a copy of their contact lens prescription means nothing unless consumers can fill that prescription at the business of their choice.” House Report at 4.

Several state laws, enacted at the behest of optometrists and ophthalmologists, frustrate that purpose. For example, Oklahoma prohibits anybody from selling contact lenses other than retailers for whom the sales of ophthalmic goods account for at least 50% of total sales. Thus, in Oklahoma,

Wal-Mart, which operates vision centers within its stores, cannot sell contact lenses in Oklahoma. In Arkansas, only an Arkansas-licensed optometrist or ophthalmologist can sell contact lenses. In 2003, Arkansas passed a contact lens release law that included a provision that requires mail order contact lens sellers to register with the state optometry board. The board, in turn, has promulgated proposed rules that define mail order contact lens sellers as Arkansas-licensed optometrists or ophthalmologists. These proposed rules are anti-consumer and anti-competitive, because they limit the mail order sale of contact lenses to Arkansas-licensed optometrists and ophthalmologists. Consumers will thus continue to be denied the choice of purchasing contact lenses from a seller of their choice.

In several other states, internet sales cannot be made without registration and obtaining a permit to operate as a mail order seller. Moreover, New Hampshire requires all out of state sellers to notify the doctor each time the prescription is filled. Georgia prohibits mail order delivery if a Georgia-licensed optician does not dispense the mail order contact lens sales, regardless of whether there are other state-licensed opticians involved in the process. As the Commission staff noted in its comments to the Connecticut Board of Examiners for Opticians in a declaratory ruling proceeding on the interpretation and applicability of various statutes and regulations concerning the sale of contact lenses, there are convenient and less expensive alternatives to these restrictive regulatory schemes. FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <http://www.ftc.gov/be/v020007.htm>. For example, a state could simply require registration in lieu of licensing. “A registration system, unlike licensing, would not require that individuals or firms that want to sell replacement lenses fulfill expensive and unnecessary requirements in order to do so.” Rather, replacement lens sellers would merely file their names and other required contact information with the Board. *Id.* at 11. The FTC regulations should underscore that these anti-competitive laws, as well as other similar state laws, have been preempted by the Act.

### **Enforcement**

To facilitate enforcement, and therefore compliance, the FTC should designate on its website a procedure for making complaints regarding violations of the rules. It should also name a contact person whom consumers and sellers can contact when they encounter improper conduct by optometrists or ophthalmologists.

Respectfully submitted,

**WAL-MART STORES, INC.**

A handwritten signature in black ink, appearing to read "Ron Tiarks", written over a horizontal line. The signature is stylized and cursive.

**RON TIARKS**

**Sr. Vice President Optical Division**

cc: Office of Information and Regulatory Affairs, OMB