

**BEFORE THE  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580**

<b>COMMENTS ON PROPOSED</b>	)
<b>RULEMAKING</b>	)
	)
16 CFR Part 315	)
Contact Lens Rule	)
	)
	)

COMMENTS OF THE ATTORNEYS GENERAL OF

ALABAMA • ARIZONA • CALIFORNIA • COLORADO • CONNECTICUT  
•DELAWARE • HAWAII • IOWA • LOUISIANA • MAINE • MARYLAND •  
MASSACHUSETTS • MICHIGAN • MINNESOTA • MISSISSIPPI • MISSOURI •  
NEVADA • NEW YORK • NORTH DAKOTA • COMMONWEALTH OF THE  
NORTHERN MARIANA ISLANDS • OHIO OKLAHOMA • OREGON • RHODE  
ISLAND • SOUTH CAROLINA • SOUTH DAKOTA • UTAH • VIRGINIA •  
WASHINGTON • WEST VIRGINIA • WISCONSIN • WYOMING

The Attorneys General listed above submit their comments on the Federal Trade Commission’s (Commission) Notice of Proposed Rulemaking to adopt a Contact Lens Rule implementing the recently adopted Fairness to Contact Lens Consumers Act (Act), 15 U.S.C. §§ 7601-7610.

**SUMMARY OF THE COMMENTS OF THE  
ATTORNEYS GENERAL**

The Fairness to Contact Lens Consumers Act is sufficiently detailed and explicit that the Commission is not required to exercise much discretion in implementing or interpreting the Act. The Attorneys General, however, are concerned that the Commission’s proposed definition of “eight business hours” is too restrictive and should be revised to give full effect to the pro-competitive and pro-consumer goals of the Act. Because the Act provides that a prescription is

deemed verified if the prescriber does not respond *within* eight hours, the Commission's proposal to require a seller to wait more than eight hours, often an extra day, is not justified and is likely to have anticompetitive effects.

To the extent that competitive forces and consumer demand result in prescribers offering office hours that extend beyond 9 a.m to 5 p.m. on weekdays, the Commission should not impose an artificial presumption of limited business hours, especially when this artificial presumption would force consumers to wait an extra day before receiving contact lenses purchased from a contact lens seller. To force sellers to wait until 9:01 a.m. on the third day rather than letting an order ship at 5:01 on the second day after an order was placed relies on an artificial and often false assumption as to prescribers' hours of service and increases prescribers' ability to subvert competitive challenges.

#### **INTEREST OF THE ATTORNEYS GENERAL**

The Attorneys General, in enforcing both federal and state antitrust laws, have a strong interest in encouraging an open and competitive market place for contact lens sales.

Thirty-nine Attorneys General<sup>1</sup> wrote to members of Congress in 2002 expressing strong support for adoption of the Fairness to Contact Lens Consumers Act. The Attorneys General noted that the Act was "strong pro-consumer, pro-competition legislation that will spur more sales, enhance consumer choice, generate lower prices and better value, and result in more frequent replacement and safer use of contact lenses."

This pro-consumer, pro-competition stance also was reflected in an antitrust lawsuit brought by thirty-two states against the largest contact lens sellers, the American Optometric Association, and a number of optometrists and optometric practice groups. That litigation alleged conspiracies to prevent customers from obtaining their prescriptions and to deny sellers access to contact lens inventories. Importantly, the terms of a resulting settlement and adoption

---

<sup>1</sup>This included the Corporation Counsel for the District of Columbia and the Attorneys General of Puerto Rico, the Northern Mariana Islands, and the Virgin Islands.

of the Act have eliminated many of the anticompetitive practices that harmed contact lens consumers and are yielding meaningful and fair access to this important consumer product.

**COMMENTS ON THE PROPOSED RULE:  
Definition of “Eight Business Hours”**

**Background**

The Act was designed to ameliorate some of the effects of the conflict of interest inherent in contact lens prescribers seeking to sell the lenses they prescribe. Many eye care practitioners (usually optometrists) conditioned eye examinations on the patients’ purchase of contact lenses. That practice probably results from many optometrists earning a substantial portion of their revenue from sales of contact lenses. Evidence developed for the multi-state antitrust litigation showed that in many cases optometrists earned 60% of their revenue from sales of contact lenses; the remaining minority share of income derived from the optometrist’s trained specialty – conducting eye examinations.

The Act recognizes that the public will benefit by greater choices, more convenience (in the form of longer store or office hours, home delivery, shop-from-home availability, and volume discounts), lower prices, and the ocular-health benefits of more frequent replacement of lenses. Nevertheless, consumer access to competitive alternatives continues to be impaired. The use of private labels on consumer products simply to increase the likelihood that the product can be purchased only from the prescriber has no pro-competitive benefit. Prescription verification requirements can slow delivery of lenses purchased from on-line sellers (thereby reducing their appeal) and facilitates prescriber efforts to prevent customers from purchasing lenses from other sources. This reduction in competition leads ineluctably to higher prices and fewer choices for consumers. The Act takes important steps toward reducing this consumer harm.

Nevertheless, prescribers that sell contact lenses still retain a significant competitive advantage because they sell what they prescribe - despite the Act and the proposed Rule. A prescriber must be notified of every instance in which the prescriber’s patient is attempting to purchase contact lenses from another seller, unless the seller has a copy of the prescription itself.

As part of this process - verifying the accuracy of the prescription information - the prescriber has obtained valuable, sensitive information about the customers of a competitor. Indeed, almost all the information a prescriber needs to increase his “sales” business and decrease sales by a competitor has been delivered directly to the prescriber by the competing seller in the form of a request for prescription verification. The prescriber then has at least eight business hours to persuade that customer to terminate efforts to buy lenses from the competing seller.

Even under the Act, prescribers will continue to have two significant advantages over non-prescribing sellers: an ability to make a sale immediately<sup>2</sup> and advance knowledge that a patient is trying to purchase replacement lenses from a competing seller.

### **Concerns Regarding the Definition of the “Eight Business Hours”**

In light of the Act’s goals, but recognizing the competitive inequalities still extant in this industry, the Commission should facilitate consumer efforts to purchase contact lenses from a greater variety of sellers. The proposed Rule fulfills the statutory objectives in all regards except one, as it defines “eight business hours” too restrictively, and thus needlessly constrains prompt consumer access to replacement lenses.

The Act provides that a prescription is verified if a “prescriber fails to communicate with the seller *within* 8 business hours . . . .” 15 U.S.C. §7603(d)(3) (emphasis added). The Commission’s proposed Rule, however, would presume verification only “*after* eight (8) business hours have elapsed.” (emphasis added). This definition in proposed Rule §315.2 reads:

*Business Hours* means an hour between 9 a.m. and 5 p.m., during a weekday (Monday through Friday), excluding Federal holidays. For purposes of §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

---

<sup>2</sup>We recognize that a non-prescribing seller can sell or ship an order immediately if it has a copy of the customer’s prescription. We hope that the Act’s prescription release requirement will accelerate the frequency of this result. We also assume that the “facsimile” provision found in section 315.5(a)(1) of the Rule permits a customer to deliver a digital image of a prescription to the seller via electronic mail.

the prescriber and shall conclude after eight (8) business hours have elapsed. For verification requests received by a prescriber during non-business hours, the calculation of “eight (8) business hours” shall begin at 9 a.m. on the next weekday that is not a Federal holiday.

We believe the proposed Rule’s insistence that verification only occurs *after* eight business hours have passed is not justified in light of the Act’s language that verification is to occur *within* eight hours.

A major goal and expected benefit of the Act and Rule will be greater convenience for consumers. A primary convenience we would expect to see for a product like contact lenses is longer business hours during the day and service offered on weekends. By defining business hours as only nine to five on weekdays, the Commission is ignoring the reality that many prescribers are open longer hours and on weekends in response to consumer demand and is creating a disincentive for prescribers to expand their hours or open on weekends. While the Commission may have an interest in a uniform approach to office hours, this definition increases the inconveniences that consumers face.

For example, a customer wanting to buy replacement lenses before a weekend trip might place an order with an Internet or mail order seller Wednesday at 6:00 p.m. To ensure prompt delivery, the customer may be willing to pay for overnight shipping. Even if her prescriber is open evenings until 8:00 p.m., the seller cannot ship the replacement lenses until Friday. This means delivery would not be accomplished until Monday.<sup>3</sup>

Requiring a customer to wait five days for replacement lenses is not convenient. We recognize that concerns over potential abuses of prescription information led to the requirement of an eight-hour delay before a non-prescribing seller can ship lenses. *Yet, that eight-hour delay*

---

<sup>3</sup>We recognize that Saturday delivery may be available, but only upon payment of a higher delivery charge.

*should not exceed one business day.* If a prescriber has a request for verification in its possession at the time it opens for business, that prescriber should be able (and expected) to give an answer some time that day.

As the Rule currently is proposed, a seller cannot presume verification after a prescriber's entire business day, but can presume verification only one minute after 9:00 a.m. on the following business day. We fail to understand what goals would be promoted by imposing an additional one minute (or one second) delay and adding it to a second business day. Any consumer benefits that might accrue reasonably could have been achieved the first business day.

In fact, the only legitimate possible justification for the extra day's delay would be to give the prescriber additional time after 5:00 p.m. the first business day or before 9:00 a.m. the second day to verify the prescription. If this is the rationale, it is flawed on three accounts. First, it admits that the 9:00 a.m. to 5:00 p.m. office hour presumption is a false one. Otherwise, nothing is gained by the delay. Second, if the prescriber failed or refused *within* eight business hours to verify the prescription, there is no basis to believe he would provide the verification overnight. Third, if the prescriber works later hours or opens earlier, he actually would have had an opportunity to verify the prescription after hours on the day the order was placed with the non-prescribing seller or before 9:00 a.m. on the next business day.

Indeed, there are significant illegitimate justifications for adding an extra day of delay before a seller can ship an order. Each additional day of delay will decrease the convenience offered by alternative sellers, increasing the chance that the inconvenience will force the customer to return to his prescriber to purchase lenses. Moreover, the additional day gives the prescriber extra time to coax the customer into canceling her purchase order from the non-prescribing seller.

Finally, we believe that the "within 8 business hours" language of the Act (15 U.S.C. §7603(d)(3)) requires that prescribers verify a prescription *inside of, or not beyond* eight business hours. If a full business day has transpired, the prescriber already has failed to verify a prescription. Under the Act, the prescription is deemed verified and the contact lens seller

should be permitted to fill the customer order. We do not believe this statutory language provides any justification for requiring the customer to wait yet another day for her order.

### **Our Recommendation**

We believe that competition for the sales of contact lenses will increase as a result of the Act and this Rule. A consequence of that heightened competition is expected to be longer business hours and weekend service by prescribers offering more convenience for customers. We fear that the Commission's implied assumption that prescribers are open only eight hours daily and only on weekdays may become a self-fulfilling prophecy; prescribers will have less incentive to expand their business hours.

We suggest that the eight business hours be defined as ending at 5:00 p.m. (for a verification request submitted before 9:00 a.m.), rather than at 9:00 a.m. the following day. As noted above, no legitimate consumer benefit is gained by adding one minute to the eight business hour rule and moving that minute to the following day.

A second solution to this problem would be to apply the language of the Act very literally. A seller will be permitted to ship lenses after two conditions are met: the prescriber has received a prescription verification request and the seller has been opened for eight hours. This would enable sellers to deliver lenses as soon as eight business hours have passed, while imposing on the seller an obligation to know the business hours of each prescriber.

A third approach would be to grant non-prescribing sellers two alternative methods of complying with the eight business hour requirement. Sellers can choose to rely on the presumption of 9:00 a.m. to 5:00 p.m. on non-holiday weekdays or opt to use the actual business hours of the prescriber. To the extent a prescriber maintains regular office hours longer than eight hours on a weekday or is open on a weekend day, the seller should be free to ship its product eight hours after it has requested verification of the prescription.

Of these three alternative approaches, we urge adoption of the first. The eight business hour wait should end at 5:00 p.m.

CONCLUSION

Unless one of these substitute approaches is adopted, the Commission unwittingly may tip the competitive balance back towards prescribers. Granting such an advantage would be contrary to the public interest and the goals of the Act. Alternative sellers still face significant disadvantages; this Rule should not exacerbate the competitive imbalance.

Respectfully submitted, April 5, 2004.



Troy King  
Attorney General of Alabama



Terry Goddard  
Attorney General of Arizona



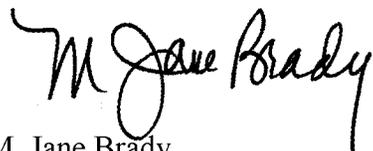
Bill Lockyer  
Attorney General of California



Ken Salazar  
Attorney General of Colorado



Richard Blumenthal  
Attorney General of Connecticut



M. Jane Brady  
Attorney General of Delaware



Mark J. Bennett  
Attorney General of Hawaii



Tom Miller  
Attorney General of Iowa



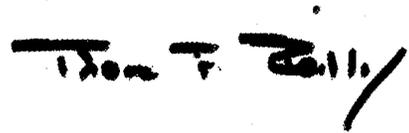
Charles C. Foti, Jr.  
Attorney General of Louisiana



G. Steven Rowe  
Attorney General of Maine



J. Joseph Curran, Jr.  
Attorney General of Maryland



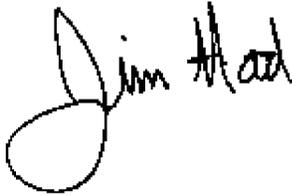
Tom Reilly  
Attorney General of Massachusetts



Michael A. Cox  
Attorney General of Michigan



Mike Hatch  
Attorney General of Minnesota



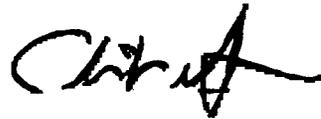
Jim Hood  
Attorney General of Mississippi



Jeremiah Nixon  
Attorney General of Missouri



Brian Sandoval  
Attorney General of Nevada



Eliot Spitzer  
Attorney General of New York



Wayne Stenehjem  
Attorney General of North Dakota



Pam Brown  
Attorney General of Northern  
Mariana Islands



Jim Petro  
Attorney General of Ohio



W.A. Drew Edmundson  
Attorney General of Oklahoma



Hardy Meyers  
Attorney General of Oregon



Patrick C. Lynch  
Attorney General of Rhode Island



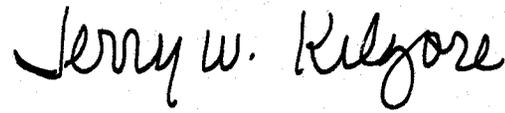
Henry D. McMaster  
Attorney General of South Carolina



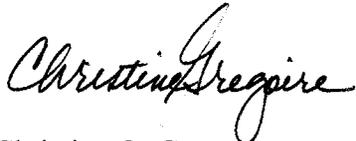
Lawrence E. Long  
Attorney General of South Dakota



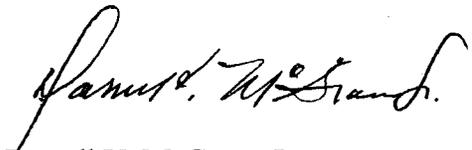
Mark L. Shurtleff  
Attorney General of Utah



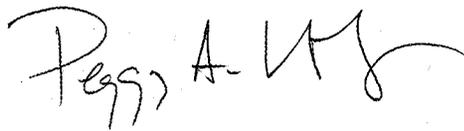
Jerry W. Kilgore  
Attorney General of Virginia



Christine O. Gregoire  
Attorney General of Washington



Darrell V. McGraw, Jr.  
Attorney General of West Virginia



Peggy A. Lautenschlager  
Attorney General of Wisconsin



Patrick J. Crank  
Attorney General of Wyoming