



Publisher of Consumer Reports

**Federal Trade Commission on
Contact Lens Rule, Project No. R411002**

COMMENTS OF CONSUMERS UNION

Consumers Union submits these comments in response to the Federal Trade Commission's request for comments on its proposed Contact Lens Rule.

I. Introduction

Consumers Union, non-profit publisher of *Consumer Reports*, believes that the "Fairness to Contact Lens Consumers Act" signed into law in December 2003, and the accompanying rule to be promulgated by the Federal Trade Commission (FTC), will encourage vigorous and fair competition in the contact lens market, and will ultimately result in lower prices and better service for consumers. All consumers should now be able to obtain their contact lens prescription from their eye doctor, so that they may shop around and buy contact lenses from the vendor of their choice in a competitive marketplace.

However, there are still a number of concerns that Consumers Union has with the proposed rule. It is necessary for the FTC to ensure that even with this law in place, eye doctors do not continue to require patients to attend medically unnecessary follow-up examinations. In addition, we urge the FTC to make it clear that consumers who suffer harm under this federal law, as well as under their state's similar contact lens prescription release law (where applicable), continue to be able to seek redress through both federal and state enforcement mechanisms.

With these comments, we have attached the testimony delivered by Consumers Union on September 9, 2003, before the House Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, on H.R. 2221, the "Fairness to Contact Lens Consumers Act." Although this bill number was not the bill subsequently signed into law (H.R. 3140 was the bill ultimately enacted), H.R. 2221 and H.R. 3140 are mostly analogous, and the concerns raised in our testimony still apply to the enacted legislation and to the FTC's proposed rule.

II. Response to Questions

Question 4: Section 315.2 defines "contact lens fitting." (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 term "medically necessary follow-up examinations" be defined, and, if so, how?

Based on an October 2000 Consumers Union survey of compliance by Texas eye doctors with that state's 1997 prescription release law, the FTC may need to define "medically necessary

follow-up examinations.” While Texas eye doctors surveyed indicated that they would release prescriptions to patients given the new law, the survey found that most doctors required follow-up visits before releasing the prescription, even for long-time contact lens wearers with no medical problems. Fifty-seven percent of optometrists would not release a prescription unless patients came back for a follow-up visit, even if the patient had previously worn the same contact lenses.

In addition, under the proposed rule, an eye doctor conditioning the release of a patient’s prescription on a paid follow-up visit would be violating §315.3(b)(2) of the rule. But even if an eye doctor were conditioning release of the prescription on a free follow-up visit, he or she would still be violating the spirit of the rule and the legislation on which it is based.

In order to prevent the withholding of contact lens prescriptions until patients attend potentially unnecessary follow-up visits with eye doctors, but to also provide eye doctors the ability to provide appropriate medical care for their patients, we recommend that the FTC define “medically necessary follow-up examination.” For guidance on how this term should be defined, we offer the experience of Texas in implementing and enforcing a similar law. In that state, in response to the aforementioned problem concerning follow-up visits, the Texas Board of Optometry issued a rule in 2001 requiring that follow-up exams must be medically indicated, and must occur within 30 days of the original fitting exam.

Question 14: Section 315.3(b) prohibits prescribers from imposing certain requirements or conditions on patients prior to releasing or verifying contact lens prescriptions, including charging them any fee in addition to the fee for an eye examination, fitting, and evaluation to receive a prescription or to have a prescription verified. (a) Do prescribers itemize charges and fees in a manner that distinguishes the amount the patient is paying for an eye examination, fitting, and evaluation from the amount he or she is paying for other goods and services? (b) Are there additional requirements or conditions that should be prohibited to facilitate the release and verification of contact lens prescriptions? (c) What would be the impact, including costs and benefits, of such additional prohibitions?

Consumers Union’s 2000 survey of compliance by Texas eye doctors with that state’s contact lens prescription release law found evidence of eye doctors charging customers for a “service agreement” covering follow-up visits that tied the patient to that practitioner’s office. Given this experience, it is possible that some prescribers may not itemize charges and fees in a manner that distinguishes the amount a consumer is paying for an eye exam from other goods and services, or he or she may attempt to tie subsequent visits beyond the completed “contact lens fitting” (as defined in the rule) into such “service agreements,” in order to delay release of the prescription to the patient.

Therefore, we suggest that the FTC clarify its rule in Section 315.3(b)(2) to state that prescribers may not “require payment or ‘service agreements’ or similar follow-up examinations beyond the contact lens fitting in addition to, or as part of, the fee for an eye examination, fitting, and evaluation as a condition of providing a copy of a prescription under paragraph (a)(1) or (a)(2) of this section or as a condition of verification of a prescription under paragraph (a)(2) of this section.”

In addition, one common practice of prescribers is to offer package deals rather than itemizing charges and fees. We recommend that the FTC clarify section 315.3(b)(2) to require prescribers to itemize all charges and fees presented to a patient for payment at the end of a “contact lens fitting.”

Question 20: Section 315.5(e) prohibits sellers from altering contact lens prescriptions, but allows them to substitute identical contact lenses from the same manufacturer for private label lenses specified on a prescription. (a) Is this provision sufficiently clear? (b) What is the impact, including costs and benefits, of this provision?

We believe that the language of Section 315.5(e) is sufficiently clear, and that it is an improvement over the language in the Act on which the rule is based. The language in this section, accompanied by the definition of “private label contact lenses” in section 315.2, should facilitate the filling of prescriptions with contact lenses that provide the same medical benefit as the particular brand prescribed by an eye doctor, while also allowing consumers to shop for the best-priced contact lenses.

Question 26: Section 315.9 explains how the Commission will treat violations of the Contact Lens Rule and defines the scope of the agency’s enforcement power and jurisdiction. (a) Is this provision sufficiently clear? (b) What is the impact, including the costs and benefits, of this provision?

According to the American Optometric Association, thirty-two states have passed laws requiring eye doctors to give patients their contact lens prescriptions.¹ The provision in Section 315.9 is not sufficiently clear, because it does not state whether consumers may still seek redress via state government officials for the violation of such a state law.

We strongly urge the FTC to clarify that consumers may seek redress for a violation of either the federal “Fairness to Contact Lens Consumers” Act through the FTC, as described in section 315.9 of the Contact Lens rule, as well as through state enforcement mechanisms (e.g., state attorney general’s office) for violations of state law. Those consumers living in states without contact lens prescription release laws would, of course, have to rely on FTC enforcement. However, for those consumers in states with such laws in place, state enforcement is a critical mechanism. States are typically better able to respond quickly to a violation by a state-licensed eye doctor against an in-state consumer. In addition, when a consumer is wronged in a situation such as this, they usually think first of their state resources – e.g., the state attorney general’s office – instead of about the Federal Trade Commission. We therefore strongly urge the Commission to clarify that both federal and state (where applicable) enforcement mechanisms are available for violations of prescription-release laws. This dual enforcement will ensure the fastest resolution of consumer harms.

¹ “Passive Verification: What’s It Mean,” *edited by Joseph P. Shovlin, O.D.*, November 2002. Available at http://www.revoptom.com/index.asp?page=2_716.htm. Downloaded September 6, 2003.

III. Recommendations for Federal Trade Commission Action

In addition to the recommendations we have made within the text of our answers to the questions above, Consumers Union makes two recommendations for Commission Action.

We note that section 10 of the enacted legislation requires the FTC to study, within 12 months of the effective date of the act, the strength of competition in the sale of prescription contact lenses.² As mandated by the act, we fully support investigation by the FTC as to whether consumers are in fact achieving cost savings by purchasing contact lenses from third-party sellers as opposed to from prescribers.

However, we recommend that this study be expanded so that the FTC also investigate two additional items: a) compliance by prescribers, and b) just as importantly, the behavior of third party sellers (e.g., 1-800-CONTACTS) to ensure that these sellers are not themselves engaging in any abusive or deceptive trade practices. For example, staff at Consumers Union recently called a nationally-known seller of contact lenses, for a refill of a contact lens order that this individual had had with the seller for over two years. However, the staff member was told by the seller's customer service representative that their prescription could not be filled because their prescription had expired; they were informed, correctly, by the customer service representative that they would need to sit for a new eye exam to obtain an up-to-date contact lens prescription.

The seller's representative then, however, offered to transfer the customer to their "doctor network," which could identify an eye doctor who could provide them with an eye exam and ostensibly, a new prescription which could then be filled. The Consumers Union staff member declined this option, as they had an eye doctor whom they preferred and who is a part of their insurance payment network.

We relay this experience out of concern that such sellers may somehow be funneling patients to particular eye doctors who may or may not be financially connected to the lens seller. We recommend that the FTC investigate this practice to ensure that consumers are not being coerced into seeing eye doctors who do not offer exam services any cheaper than those of their own eye doctor, or who may not be on a consumer's pre-existing health insurance plan (therefore costing the consumer more for the eye exam than if they had gone to their own eye doctor for a check-up).

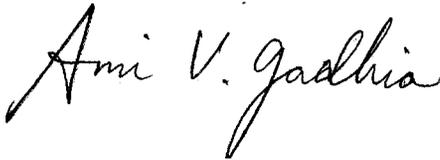
²Section 10, "Study and Report," "Fairness to Contact Lens Consumers Act," enacted December 6, 2003.

IV. Conclusion

Overall, Consumers Union believes that the “Fairness to Contact Lens Consumers” Act, and the corresponding Contact Lens rule to be enforced by the FTC, promise to be beneficial to consumers. Our surveys of eye doctors in Texas, designed to gauge the success of that state’s contact lens prescription release law, showed that consumers have benefited from the passage of that law. We believe that the federal “Fairness to Contact Lens Consumers” will likely result in lower prices and better service for consumers in all states. However, we believe that follow-up investigation by the FTC, as well as the maintenance of both state and federal enforcement mechanisms for violations of the law(s), are critical if the intended effect of the law is to become reality for contact lens consumers.

April 5, 2004

Respectfully submitted,
CONSUMERS UNION

A handwritten signature in cursive script that reads "Ami V. Gadhia".

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Nonprofit Publisher of Consumer Reports

**Testimony of Ami V. Gadhia,
Assistant Legislative Counsel
Consumers Union**

Before the

**Subcommittee on Commerce, Trade, and Consumer Protection, House Committee
on Energy and Commerce**

On H.R. 2221, the “Fairness to Contact Lens Consumers Act”

September 9, 2003

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SUMMARY

Consumers Union¹ supports H.R. 2221, the “Fairness to Contact Lens Consumers Act,” because we believe that it will encourage vigorous and fair competition in the contact lens market, and that it will ultimately result in lower prices and better service for consumers. Consumers should be able to obtain their contact lens prescription from their eye doctor, so that they may shop around and buy contact lenses from the vendor of their choice in a marketplace that is allowed to be competitive. According to the American Optometric Association, thirty-two states have passed such laws.²

Two surveys conducted by Consumers Union’s Southwest Regional Office in 1995 and 1997 indicated that in the majority of situations, consumers were unable to obtain their contact lens prescription from their eye doctor and that as a result, they were prohibited from purchasing contact lenses from lower-priced vendors. In 1997, the Texas Legislature passed the Contact Lens Prescription Act, to which H.R. 2221 is comparable.

An October 2000 follow-up survey and subsequent survey analysis in January 2001 show that consumers have benefited from the Texas Contact Lens Prescription Act. Eye doctors have accepted that they must release a prescription to a patient³, consumers have

¹ Consumers Union is a non-profit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education, and counsel about goods, services, health, and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union’s income is solely derived from the sale of *Consumer Reports*, its other publications, and from noncommercial contributions, grants, and fees. In addition to reports on Consumers Union’s own product testing, *Consumer Reports*, with more than 4 million paid circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union’s publications carry no advertising and receive no commercial support.

² “Passive Verification: What’s It Mean?”, *Edited by Joseph P. Shovlin, O.D.*, November 2002. Available at http://www.revoptom.com/index.asp?page=2_716.htm. Downloaded September 6, 2003.

³ The Texas Contact Lens Prescription Act states that an eye doctor must provide the prescription at the time he or she “determines the parameters of the prescription.” (Texas Occupations Code, Chapter 353, Contact Lens Prescription Act, Article 353.156(b)). H.R. 2221 states that an eye doctor must release the prescription “upon completion of a contact lens fitting.” (H.R. 2221 Section 2(a)).

acquired the power to shop around for lower-priced contact lens, and they have greater choice. In addition, eye doctors have responded to this more competitive marketplace by lowering prices and providing other services to patients.

The results of Consumers Union's survey in 2000 also demonstrated the possible cost savings for consumers because prices can vary dramatically. The cost of an eye exam ranged from \$55 to \$180. Prices for replacement boxes of contact lenses ranged from \$18 to \$42 for the same brand and type. Since buying lenses from the eye doctor may cost more, consumers benefit from immediate access to their prescriptions.

Although the follow-up survey also showed that some doctors were refusing to give patients their contact lens prescriptions by exploiting loopholes in the Texas law, the overall result of the law was that most eye doctors comply with the law by giving patients their contact lens prescription, and that consumers are reaping the benefits in the form of lower prices for contact lenses.

CONSUMERS UNION'S WORK IN TEXAS

In 1995, Consumers Union conducted a survey of optometrists and ophthalmologists ("eye doctors") in nine Texas cities⁴ to determine whether consumers could get their prescription from their eye doctor and use it to purchase lenses from the dispenser of their choice. At that time, Consumers Union found that most eye doctors would not release the prescription to the patient, forcing consumers to purchase their lenses from the eye doctor who provided the exam. Consumers Union also determined

⁴ Austin, Corpus Christi, Dallas, El Paso, Houston, Laredo, Midland/Odessa, San Antonio, and Tyler.

from their 1995 survey that the price of such lenses varied considerably, and the practice of withholding the prescription limited the consumer's ability to shop for the best price.

In 1997, just before the introduction of the Contact Lens Prescription Act in the Texas State Legislature, Consumers Union again surveyed optometrists in the same nine Texas cities. Like the prior survey, this one was designed to recreate the actual experience of a consumer shopping for the best buy in contact lens care. From area phone books in nine cities, Consumers Union compiled a list of optometrists and eye care discount centers and made 71 contacts.⁵

Of the 71 inquiries to Texas Optometrists, only 24 responded that they would release a contact lens prescription to a patient. Forty-six practitioners, or 65 percent, refused to release the prescription to a patient. In addition to holding the prescription, some eye doctors also resisted competition by creating package deals that tied the consumer to them in the future. A typical package deal included the eye exam, a set of lenses, a follow-up visit, and a cleaning kit.

In addition, consumers were often unaware that their eye doctor would not release the contact lens prescription until *after* they purchased a package deal. They were therefore forced into returning to that eye doctor for their replacement contacts unless they wanted to pay for another exam.

⁵ Consumers Union staff inquired as to whether or not each office would fill a contact prescription that was over six months old without first examining the patient's eyes; they asked how much a contact lens eye exam would cost the consumer if he or she wanted to be sure that their prescription had not changed; they asked if the optometrist would give us our contact lens prescription; and they requested prices of replacement lenses. To be consistent, the questions focused solely on *clear daily wear soft contact lenses*.

Finally, the 1997 survey found that when a patient returned to the optometrist for replacement lenses, replacement costs varied widely.⁶ A package deal that initially appeared to be a bargain may actually have cost consumers more in the long run. A patient could probably save money by paying for the eye exam only and having the prescription filled elsewhere.

THE TEXAS CONTACT LENS PRESCRIPTION LAW AND H.R. 2221

In 1997, the Texas Legislature passed the Contact Lens Prescription Act. This act requires eye doctors to give a patient their contact lens prescription upon request, at the time that the eye doctor “determines the parameters of the prescription.”⁷ The Texas law states that prescriptions expire after one year. Under the Texas law and the opinion of the state Optometry Board, eye doctors were also only required to give out a prescription once, so consumers who lost their prescriptions were left with no alternative but to purchase lenses from the prescribing doctor.

H.R. 2221 is comparable to the Texas law in that it requires eye doctors to release prescriptions for contact lenses to consumers. The Texas law requires the patient to request the prescription, while H.R. 2221 improves on this provision by requiring the eye doctor to give the prescription to all patients.

H.R. 2221 is also similar to the Texas law in that it requires prescriptions to be for at least one year unless medically indicated to expire in a shorter time period. This ensures

⁶ In 1997, the replacement costs ranged from \$40 to \$140 a pair. Consumers Union does not have updated dollar figures for this survey result.

⁷ Texas Occupations Code, Chapter 353, Contact Lens Prescription Act, Article 353.156(b).

that eye doctors do not place arbitrary expiration dates on the prescription to force the patient to return to the office for replacement lenses.

Another issue that arises when comparing the Texas law and H.R. 2221 is that of active versus passive verification by an eye doctor to a third party of a consumer's prescription. The Texas law was silent on the issue of verification, and H.R. 2221 requires the Federal Trade Commission to study this issue.

Consumers Union believes that as long as a vendor has a reason to believe that the prescription is still valid, i.e., as long as there is evidence of some kind (such as a fax of the prescription), then passive filling should be appropriate. A reasonable period of time for verification might be two business days, but this is a debate best worked out between the eye doctors and vendors. Our goal is to ensure that consumers with a valid prescription can get it filled by whomever they choose, and to ensure that the system accommodates that choice.

THE TEXAS LAW IN PRACTICE

In order to determine if eye doctors were complying with the new Texas statute, in October 2000 Consumers Union conducted a follow-up to its two prior surveys. Consumers Union reviewed 44 complaints with the Texas Optometry Board⁸, and surveyed optometrists in the same nine cities as in the prior surveys.

A January 2001 analysis of the October 2000 follow-up survey shows that consumers have benefited from the Texas Contact Lens Prescription Act. Eye doctors

⁸ While the complaint information was largely anecdotal, the files revealed interesting details about the process some consumers had to go through to get their contact lens prescriptions.

have accepted that they must release a prescription to a patient⁹, consumers have acquired the power to shop around for lower-priced contact lens, and they have greater choice. In addition, eye doctors have responded to this more competitive marketplace by lowering prices and providing other services to patients, such as conveniently mailing lenses directly to them (and as is done by third-party contact lens vendors) and selling lenses in 6-month bundles.

However, the survey also revealed certain areas of the Texas law that, when put into practice, show ways that the Texas law can be improved upon. For example, while eye doctors surveyed said they would now release prescriptions to patients, most required follow-up visits before releasing the prescription, even for long-time contact lens wearers with no medical problems. Fifty-seven percent of optometrists would not release a prescription unless patients came back for a follow-up visit, even if the patient had previously worn the same contact lenses.

The review of the complaints filed with the Texas Optometry Board provided anecdotal evidence of a number of other barriers to competition in the contact lens market. About one third of contact lens complaints to the Board reviewed by Consumers Union involved follow-up cases where doctors refused to release prescriptions because patients did not come back for a follow up exam.

Under H.R. 2221, an eye doctor conditioning the release of a patient's prescription on a paid follow-up visit would be violating Section 2(b)(2) of the legislation. But even if the eye doctor were conditioning release of the prescription on a free follow-up visit, he or

⁹ The Texas Contact Lens Prescription Act states that an eye doctor must provide the prescription at the time he or she “determines the parameters of the prescription.” (Texas Occupations Code, Chapter 353,

she would at the very least be violating the spirit of the legislation. While Texas legislation in 2001 failed to correct this problem, the Board of Optometry issued a rule later that year requiring that follow-up exams must be medically indicated and must occur within 30 days of the original fitting exam.

What is more, many patients who have worn contact lenses before do not need to return for a follow-up visit to finalize their prescription, and eye doctors have a clear financial interest in bringing consumers back into their store. A long-time contact lens wearer, and particularly a typical wearer of two-week disposable soft contact who likes his or her lenses, can probably be examined and “fitted” at a single visit for replacement lenses, according to the Contact Lens Clinic at the University of Washington.¹⁰

The 2000 Consumers Union survey also found evidence of eye doctors charging customers for a “service agreement” covering follow-up visits that tied the patient to that practitioner’s office. Some eye doctors also refused to release the prescription if the patient’s insurance company was late paying a claim. We see no reason why the consumer should be prevented from shopping around for the lowest price for contact lenses because of a dispute between the insurance company and the provider.

QUALITY OF CARE AND LIABILITY CONCERNS

The majority of optometrists surveyed by Consumers Union in 1997 cited two particular reasons for refusing to release prescriptions directly to all patients: to control the quality of care and to protect themselves from liability. Regarding the first concern, to

Contact Lens Prescription Act, Article 353.156(b)). H.R. 2221 states that an eye doctor must release the prescription “upon completion of a contact lens fitting.” (H.R. 2221 Section 2(a)).

ensure that a patient continues to receive quality eye care, most of those surveyed said that a contact lens is a “medical device” and therefore requires a professional’s care. They say it is in the patient’s own best interest that they do not release the prescription.

However, patients must still rely on an eye doctor for exams to renew their prescriptions, check their vision, and to respond to any problems they are experiencing. And, because contacts are worn directly on the eye, any discomfort will lead most patients back to their eye doctor for help.

In the case of replacement lenses, the primary protection of product quality rests with the manufacturer, since most eye doctors sell replacement lenses in pre-packaged containers, as do other dispensers.¹¹ Furthermore, regardless of the source, patients who get these pre-packaged lenses can and should always check the expiration date on the package.

Regarding liability, many of the offices contacted in Consumers Union’s 1997 survey said that the practitioner would not release the contact lens prescription to the patient for dispensing elsewhere because the prescribing eye doctor would still be held liable if the prescription were filled incorrectly by a different vendor. However, assuming that an eye doctor provides a reasonable level of care, it seems that doctors would have little to worry about in terms of liability, especially for the actions of another (e.g., either the third-party vendor or the lens manufacturer) that result from the legal release of a prescription to the patient.

¹⁰ Contact Lens Clinic at the University of Washington, <http://www.depts.washington.edu/opthweb/contacts.html>. Downloaded September 7, 2003.

¹¹ If a consumer were given replacement lenses that had a broken seal, we would advise them to return the lenses for a different box, unless the patient has watched the optometrist remove them from the box. In reality, the eye doctor is not handing over the box of replacements; his employees are doing so.

CONCLUSION

Contact lenses are a fact of daily life for millions of consumers. The increasing popularity of daily-wear, 2-week, and 30-day disposable lenses means that the number of consumers seeking the most affordable contact lenses will only grow. Consumers Union supports H.R. 2221 because it will give consumers the means to shop around to find contact lenses at the best price.

Concerns over the liability of eye doctors are perhaps misplaced, because the lenses that consumers receive from a doctor's office are in most cases shrink-wrapped and packaged in the same manner as those consumers would receive from another vendor. The doctor-patient relationship is one based on care and trust, and doctors should not force a consumer to continue seeing them by holding the consumer's lens prescription hostage. Our experience with the Contact Lens Prescription Act in Texas indicates that the "Fairness to Contact Lens Consumers Act" will most likely result in lower prices and better service for consumers, and Consumers Union urges its passage.