



April 5, 2004

BY HAND

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

Re: Contact Lens Rule, Project No. R4110022

To Whom It May Concern:

1-800 CONTACTS, Inc. (“1-800”) respectfully submits the comments attached hereto in response to the Federal Trade Commission’s (“FTC’s”) request for comments on its proposed Contact Lens Rule; Ophthalmic Practice Rules, 69 Fed. Reg. 5440 (Feb. 4, 2004) (the “Contact Lens Rule”). 1-800 is the largest seller of contact lenses to consumers through its Internet website and toll-free telephone number.

Congress enacted the Fairness to Contact Lens Consumers Act (the “Fairness Act”) to break down the barriers established by eye care practitioners (“ECPs”) and mandate consumer choice and competition through meaningful prescription portability. These barriers are largely driven by the fundamental conflict of interest posed by the fact that ECPs – unlike most healthcare practitioners – sell what they prescribe. By promoting consumer choice and competition, the Fairness Act will also promote ocular health because, with less expensive lenses and greater accessibility, consumers are likely to change their lenses more frequently.

However, the question remains whether consumers will reap the benefits of an open market – lower prices, improved service, increased convenience, and improved ocular health. That question will be determined by how the FTC resolves a number of important issues raised by the proposed rule. To that end, the most critical issues addressed in 1-800’s comments include:

- Expanding the Definition of “Business Hour” - The FTC’s proposed definition of “business hour” in no way reflects actual business hours in the eye care industry, and thus constructively forces alternative sellers to be closed when competing ECPs are open. *1-800 recommends that the FTC: (1) expand the definition of “business hour” to 9 a.m. to 6:30 p.m., Monday through Friday, and to 9 a.m. to 4 p.m. on Saturday, in accordance with the results of the Synovate Survey of ECP Business Hours provided herein, and (2) provide an alternative “business hour” definition that permits sellers to verify the actual business hours of an ECP’s office, on an ECP-by-ECP basis.*

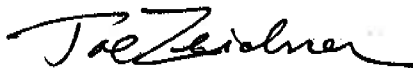
- Shortening the Length of the Prescription Verification Period - The FTC's proposed prescription verification period of 8 hours is too long because it imposes a waiting period on consumers who order from alternative sellers rather than ECPs, and it allows ECPs to continue to use the verification period to call consumers and interfere with the sales of alternative sellers. This situation is made worse by the proposed rule's interpretation of the period as 8-Hours-Plus-One-Day. *1-800 recommends that the prescription verification period, generally, should be 5 hours from the time that the seller makes the prescription verification request, and that it should be 2 hours if a live agent of the seller is able to communicate with a live agent of the prescriber via telephone.*
- Remedying the Anticompetitive Use of Private Label and Doctor Exclusive Contact Lenses - ECPs and manufacturers are already trying to defeat the private label substitution provision in the Fairness Act by making it extremely difficult for alternative sellers to get private label lenses or their equivalents, and by prescribing "doctor exclusive contact lenses," which are lenses distributed only to ECPs for which there is no available substitute. The FTC's proposed regulations provide for substitution for "private label contact lenses," but they do not ensure that alternative sellers can obtain private label substitutes, and they do not address "doctor exclusive contact lenses." *The FTC should require ECPs that prescribe private label lenses to include the name of another lens – one that is sold directly to alternative sellers – in the prescription. The FTC should also require ECPs that prescribe "doctor exclusive contact lenses" to issue a second prescription for a lens that is sold directly to alternative sellers.*
- Broadly Defining the Terms "Direct Communication" and "Completed Communication" - ECPs are already making a concerted nationwide effort to defeat their obligation under the Fairness Act to verify prescriptions by arguing for a narrow definition of "direct communication." Currently, ECPs are avoiding their obligation to verify by unplugging their facsimile (or "fax") machines, and they have a long history of hanging up on alternative sellers attempting to contact their offices. *To prevent ECPs from avoiding their statutory obligation to verify prescriptions, 1-800 recommends that the FTC: (1) broadly define the term "direct communication" to include existing communication technologies, such as telephone, facsimile, and electronic mail (or "e-mail") and future technologies, and (2) broadly define the term "completed communication" to include (a) affirmative evidence that a communication has been completed, (b) evidence that a communication by facsimile, electronic mail, or a substantially equivalent communication technology has been attempted twice, or (c) evidence that live telephone verification has been attempted.*
- Preemption – Several states have existing or pending legislation or regulations that arguably require anyone selling contact lenses to be a licensed ECP. As the FTC recently found in its report on *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, policymakers can advance both consumer health and consumer choice by rescinding or

Federal Trade Commission
April 5, 2004
Page 3

refraining from adopting such professional licensure requirements for alternative sellers. Although the Fairness Act preempts by implication any existing state requirements allowing only ECPs to sell contact lenses, that preemption should be made express to ensure that ECPs and their state boards do not undermine the very purpose of the Fairness Act to promote consumer choice and competition from alternative sellers through imposition of such requirements. Thus, 1-800 proposes that the FTC add a definition for "seller" to Section 315.2 of the proposed regulations that provides: "*A seller is any person or entity that sells or otherwise distributes contact lenses, and includes, but is not limited to, licensed professionals. Although a state or political division thereof may require a seller to register to sell contact lenses if such registration does not burden commerce in contact lenses, the Fairness to Contact Lens Consumers Act preempts any requirement that a seller must possess a professional license in order to perform the purely retail function of selling contact lenses.*"

Although 1-800 suggests a number of important revisions to the FTC's proposed rule, we greatly appreciate the FTC's efforts to date and its consideration of these comments. We urge the FTC to issue and vigorously enforce final regulations that prohibit the well-documented ECP misdeeds of the past, anticipate and prohibit similar behaviors that are likely to emerge in the future, and take care not to enshrine ECP conflicts and undue advantages. This would set an important example for other industries where entrenched interests have tried to defeat new modes of competition that benefit consumers.

Respectfully submitted,



R. Joe Zeidner
General Counsel
1-800 CONTACTS, Inc.

Federal Trade Commission

April 5, 2004

Page 4

cc:

Attn: Desk Officer for the Federal Trade Commission
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
Room 10102
Washington, DC 20503

Chairman Timothy J. Muris
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Commissioner Pamela Jones Harbour
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Commissioner Thomas B. Leary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Commissioner Orson Swindle
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Commissioner Mozelle W. Thompson
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

J. Howard Beales, III
Director
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Federal Trade Commission

April 5, 2004

Page 5

Thomas Pahl
Assistant Director
Division of Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Maureen K. Ohlhausen
Deputy Director
Office of Policy Planning
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Kial Young
Staff Attorney
Division of Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

BEFORE THE FEDERAL TRADE COMMISSION

Proposed Contact Lens Rule;
Ophthalmic Practice Rules
(69 Fed. Reg. 5440
(Feb. 4, 2004))

)
)
) **Contact Lens Rule, Project No. R411002**
)
)

Comments of



In addition to the cover letter and comment, there are 181 attachments available for public inspection in the Commission's public reading room, located at 600 Pennsylvania Avenue, NW, Room 130, Washington, DC

I. Executive Summary.....	1
II. General Background	5
A. Overview of the Current Eye Care Industry	9
1. Market Share and the Eye Care Business.....	9
2. Consumers Value and Desire Convenience in Purchasing Contact Lenses as Well as Inexpensive Prices	12
3. Structural Deficiencies in the Eye Care Industry Foster Anticompetitive Behavior.....	13
B. History of ECP Anticompetitive Practices	15
1. The History of Egregious Anticompetitive Behaviors by ECPs Began as Far Back as the 1960s.....	17
a. ECPs Have Worked Together for 30 to 40 Years to Influence State Legislation and Enforcement.....	18
b. ECPs Have Been Refusing to Release Eyeglass Prescriptions for Years to Prevent Consumers from Comparison Shopping.....	19
2. <i>In re: Disposable Contact Lens Antitrust Litigation</i>	20
a. Efforts to Suppress Consumer Demand from Alternative Sellers	21
b. Efforts to Restrict the Sale of Replacement Lenses to Alternative Sellers (<i>i.e.</i> , Supply) ..	24
c. The Settlements With All of the Defendants Included Injunctive Relief and Monetary Payments	25
3. Post <i>In re: Disposable Contact Lens Antitrust Litigation</i> – ECPs Continue Their Anticompetitive Practices.....	26
a. ECPs Still Engage In Anticompetitive Practices.....	26
b. ECPs Still Establish and Enforce State Laws and Regulations that Prevent Competition, Increase Consumer Prices, and Compromise Ocular Health.....	29
i. Prescription Release and Verification Requirements	29
ii. Restrictions on Who Can Sell.....	31
iii. Prescription Expiration Requirements	32
iv. Prescription Brand Specification Requirements	33
v. Disparate Enforcement of State Requirements by State Boards.....	34
C. Legislative Success Story: California.....	35
III. Comments Regarding Specific Provisions of the Proposed Contact Lens Rule.....	37
A. Definitions	38
1. Business Hour.....	38
a. 1-800’s Concerns About the Proposed Definition of “Business Hour”	39
i. Three of the Four Examples in the Proposed Rule Are Mathematically Inconsistent with the Statutory 8 Hour Verification Period.....	40