

the Texas Optometric Association, Inc.

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March 26, 2004
Federal Trade Commission
Office of the Secretary
Room 159-H, (Annex A)
600 Pennsylvania Ave., NW
Washington, DC 20580



Also sent as an email attachment in Word format to: contactlensrule@ftc.gov

Re: Contact Lens Rule, Project No. R411002.

Dear Sirs:

The Texas Optometric Association, Inc. appreciates this opportunity to comment upon the proposed rules implementing the Fairness to Contact Lens Consumers Act. Texas has had a similar law in place for several years, though it does not have the extremely complicating factor of "passive verification."

In reviewing the proposed rules, we have two changes that we strongly recommend. One issue is universal in scope, and if not adopted will result in an unintended economic hardship to non-disposable soft and rigid gas permeable contact lens patients. The second issue deals with a problem that is common in Texas and in any other state with large rural areas.

1. We request that the FTC clarify that a doctor may charge an appropriate materials fee for non-disposable contact lenses used in the contact lens fitting process to determine the accurate parameters of a non-disposable contact lens prescription.

When prescribing for patients for whom disposable soft contact lenses are not appropriate due to unusual eye powers or non-standard eye shapes, diagnostic lenses must be ordered and paid for by the prescribing doctor during the contact lens fitting (definition §315.2). Ordering these diagnostic lenses when disposable lenses are inappropriate is essential to the contact lens fitting. Diagnostic lenses are necessary to achieve the proper contact lens fit, and to insure that the lenses do not damage the eye tissue.

The customary practice has been that the final diagnostic lenses have been dispensed to the patient at the end of the contact lens fitting, since many of these diagnostic lenses are custom made, and are of no use to other patients, and since the lenses had already been paid for by the patient. Especially for the custom soft toric, rigid gas permeable, and rigid gas permeable scleral lenses, these diagnostic lenses can cost up to \$200.00 each.

The TOA is concerned that Section 315.3 of the proposed rule could be construed to mean that the prescribing doctor must bear the cost of diagnostic lenses used to determine the prescription for these patients. The language of HR 3140 (Sections 2 [b] [1] and [b] [2]) and the proposed FTC Rule (§315.3) seem to prohibit the prescribing doctor from requiring that these lenses be purchased, or from incorporating the cost of these lenses into the examination and fitting fees.

We do not believe that it is the legislative intent of HR 3140 that the prescribing doctor should bear the cost of necessary diagnostic lenses, or that the patient should bear the extra expense and hardship of purchasing additional lenses after the fitting process.

Visit us on the web at: www.texas.optometry.net

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We, therefore, strongly believe that the FTC should modify the rules to allow the prescribing doctor, when not prescribing disposable soft contact lenses, to charge an appropriate materials fee for all diagnostic lenses used during the fitting.

Without this modification to the proposed rule, the time tested method for prescribing non-disposable lenses will be severely altered, thus resulting in significantly more cost, inconvenience, and danger to these patients. Further, if prescribing these non-disposable, specialty lenses becomes unprofitable, then few, if any, doctors will prescribe these much needed lenses, resulting in further harm to the contact lens wearing population.

2. Extend the current verification response time so as to insure that rural optometric offices have a full 8 business hours to respond to a verification request.

Many optometry offices, particularly those located in rural areas, are only open 1 or 2 days per week. This practice is common in Texas and any other states with significant rural areas. For those businesses, there are many days when it would be impossible for the office to respond within the time specified in the rule. For those offices, actual business hours do not come close to being accurately reflected by the proposed rule definition of "business hours."

Unless there is some way for sellers to know the actual business hours of each prescriber's office, it is very difficult to devise a rule that solves this on an office-by-office basis. Accordingly, the FTC must ask, what is the best "one size fits all" definition of response time that adequately prevents expired and inaccurate prescriptions from being filled, while giving the sellers and consumers the full right to sell or receive contact lenses from a valid prescription on a timely basis.

We believe that Congress recognized this problem, and gave the FTC the right to determine by rule the appropriate response time so as to adequately reflect the fact that different businesses have different "business hours."

We recommend that the FTC change the term "business hour" as used in the rule to "standard business hour" and that the rule be changed so as to permit prescribers to respond to a verification request within 24 standard business hours. This modification to the proposed rule would allow the vast majority of prescribers, including the many prescribers in rural areas, to have eight full business hours in which to respond to a verification request.

While this change would not solve all "one size fits all" problems, it would solve the vast majority of them, and would involve minimum interference on a patient's right to receive their lenses in a timely manner. An additional two days in delivery is not a major hardship on contact lens patients, and would be a valuable protection to insure that inaccurate or expired prescriptions are not routinely re-filled.

Conclusion. We urge the FTC to modify its proposed rules in the two ways outlined above.

Respectfully submitted;



by: _____

Dennis Neely, O.D., President

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