

October 26, 2015

Federal Trade Commission
Office of the Secretary
Constitution Center
400 7th Street SW., 5th Floor, Suite 5610 (Annex C)
Washington, DC 20024

**Comments of Consumers Union
Contact Lens Rule
16 CFR Part 315, Project No. R511995**

Consumers Union, the policy and advocacy division of Consumer Reports, appreciates the opportunity to comment on the Commissions' review of the Contact Lens Rule. We strongly supported the Fairness to Contact Lens Consumers Act of 2003. We believe the Act, and the Contact Lens Rule implementing it, have significantly benefitted consumers by enabling them to comparison shop for their contact lenses, for lower cost and greater convenience for a necessity that can be a significant budget expense.

Previously, consumers often had difficulty obtaining a copy of their prescription, which effectively meant they had to obtain their lenses from their eye doctor, or from their eye doctor's designated supplier. Under the Act and the Rule, consumers have the right to obtain a written copy of their prescription, at no additional cost, and the right for a retailer to verify the prescription within 8 business hours. The Rule prevents eye doctors from tying the medical service to the product sale, enabling effective competition and meaningful consumer choice.

Although, as described below, we are concerned that the Act and Rule have been undermined in some respects by the move by contact lens manufacturers to restrict retail discounting, we continue to strongly support the Rule and urge that it be maintained.

Based on experience under the Rule since 2004, and complaints that have come to our attention, we recommend that the Commission consider the following clarifications and improvements to strengthen the Rule and help ensure it achieve its intended benefits for consumers:

Ensuring Consumers Receive Their Prescription

We have heard reports that many consumers are not being given a copy of their prescription during their eye examination visit, as required by the Rule. We recommend the Commission require that the eye doctor inform the consumer at the beginning of the visit, as part of the initial paperwork, that the prescription will be provided at the conclusion of the visit at no additional cost. We recommend that the Commission also require that the prescription be given to the consumer upon request at any time after the visit – this will be an additional protection for situations in which the eye doctor neglects to provide the prescription during the visit, as well as for situations in which the prescription is misplaced by the consumer.

Ensuring Effective Verification of Prescriptions

A central purpose of the Rule is providing a workable means for a retailer to confirm with a consumer's eye doctor that the prescription it is filling for the consumer is accurate and current.

One reported problem is that retailer phone calls seeking to verify a prescription have been hung up on by the eye doctor's office. This may have been, in part, because some retailers are using automated calling systems to process the verifications, and the individual in the eye doctor's office has perhaps not realized that the automated call is a legitimate call for the verification of a prescription. We would recommend the Commission give appropriate attention to helping ensure that this communication issue is satisfactorily resolved. The Rule does not require that the communication be in real time by a live person on each end of a phone call, only that the communication be "direct."

Automated calling systems would seem, in our view, to be a reasonable means for a retailer to efficiently handle a large volume of prescription verifications. Eye doctors should by now be aware that automated calling is being used. Most eye doctor offices now have their own automated answering systems, and we believe they could set up an efficient means for recording the information without significant burden. E-mail and facsimile can also be efficient means for verifying prescriptions, and the Commission should help ensure that they work effectively.

We also note that under the current Rule, retailers are required to keep records of their communications with eye doctors regarding prescription verifications. We recommend that the Commission consider having similar record-keeping requirements for eye doctors, to help enable more effective resolution of issues regarding the promptness and accuracy of replies.

We also recommend two additional clarifications to §315.5 regarding prescriber verification, to help ensure that the process works effectively for consumers.

First, in subsection (c)(3), we recommend clarifying that the communication described, the failure of which to happen within 8 business hours permits the retailer to treat the prescription as verified, must satisfy either subsection (c)(1) or (c)(2). That is, the eye doctor must either confirm that the prescription is accurate, or must provide the accurate prescription. This clarification could be accomplished by inserting, after "seller" the first time it appears, the phrase "in accordance with paragraph (c)(1) or (c)(2) of this section".

Second, in paragraph (d), we recommend clarifying that all of the information the eye doctor is required to provide the retailer, including the basis for saying the prescription submitted by the retailer is inaccurate or invalid, and the correct prescription information, must be provided within the same 8 business hour timeframe in order to avoid triggering “passive verification” in paragraph (c)(3).

Minimum Effective Period for Prescriptions

The current Rule sets a one-year minimum period for validity of a contact lens prescription. We believe the period should be based on sound medical experience with how long a prescription typically lasts before it may need further correction. The Commission should consider whether a longer minimum period is warranted in the best interests of the consumer.

Ensuring Effective Monitoring and Enforcement

In our view, with the Rule now in effect for more than 10 years, there is no justification for eye doctors to be unfamiliar with it. The Commission should actively monitor complaints, and follow up with warning letters and enforcement as appropriate to ensure that the Rule is working effectively.

Addressing Manufacturer Restrictions on Retail Discounting

This Rule has brought important savings to consumers, and we strongly support maintaining it, and clarifying and strengthening it as discussed above. We are concerned, however, that its effectiveness is being undermined by the restrictions being imposed by contact lens manufacturers on retail discounting. As a result of these discounting restrictions, although consumers still have the ability, as envisioned by the Rule and by Congress, to shop around, prescription in hand, they no longer can expect to find savings by doing so.

As described more fully in our testimony to the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights,¹ we believe these retail discounting restrictions are not only flagrantly anti-consumer, but also potentially a violation of the antitrust laws. We urge the Commission to thoroughly investigate, and to take whatever enforcement action is warranted by the facts uncovered. In addition, we urge the Commission to consider whether other changes to the Rule might help address this new concern.

Respectfully submitted,



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¹ <http://www.judiciary.senate.gov/meetings/pricing-polices-and-competition-in-the-contact-lens-industry-is-what-you-see-what-you-get>