

October 26, 2015

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

Re: Comments of 1-800-CONTACTS, Inc. on the Advance Notice of Proposed Rulemaking, Ophthalmic Practices Rules (Eyeglass Rule); 16 C.F.R. Part 456 (Project No. R511996)

1-800-CONTACTS, Inc. (“1-800-CONTACTS” or “1-800”) respectfully submits its comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) request for comments on its review of the Ophthalmic Practices Rules (“Eyeglass Rule”), 16 C.F.R. Part 456.

1-800-CONTACTS is the largest seller of contact lenses in the United States through its website, smartphone application and toll-free number. Established in 1995, 1-800 has filled over 41 million orders for more than ten million customers. We have an established track record of providing excellent service and affordable prices to our customers. Our customers are very loyal: more than 80 percent of our sales come from repeat business. In addition, until recently, 1-800 CONTACTS was also involved in the online eyeglass business. As a result, we understand not only the benefits to consumers from online sales of contact lenses and eyeglasses, but also the challenges faced by online third-party sellers of those products.

The following comments regarding the Eyeglass Rule are based on our familiarity with online sales of eyeglasses as well as our extensive firsthand experience with the Fairness to Contact Lens Consumers Act (“FCLCA”) and the Contact Lens Rule, 16 C.F.R. Part 315.

Background

The Eyeglass Rule was promulgated in 1978 – long before the emergence of the online market for eyeglasses – to increase consumer choice and promote competition in a market in which eye care practitioners – ophthalmologists, optometrists, and opticians – had (and continue to have) a direct financial interest in selling eyeglasses to consumers immediately after completing an eye examination rather than releasing the prescription to consumers and permitting consumers to exercise their choice to purchase eyeglasses from third-party sellers. The Eyeglass Rule requires eye care practitioners to, among other things, automatically provide a copy of the prescription to the patient, and not require a patient to purchase eyeglasses as a condition of receiving an eye examination. 16 C.F.R. § 456.2(a), (b).

The market for eyeglasses has changed significantly over the past 37 years, including with the emergence of third-party online sellers. However, the Eyeglass Rule has not kept pace with market developments. As a result, the consumer choice and increased competition that the Eyeglass Rule was intended to encourage is being adversely affected by eye care practitioners who engage in conduct that is, at the very least, inconsistent with the purpose and intent of the Eyeglass Rule, if not unlawful. For example, even though the Eyeglass Rule requires prescriptions to be provided to all patients “immediately after the eye examination is completed,” an independent study of randomly selected prescription eyeglass wearers showed that only 61 percent received their prescriptions at all, and only 55 percent of that group received their prescription automatically on the day of their office visit. *See* FCLCA Study, Focus on Prescription (Rx) (Oct. 15, 2015) at 9, *attached as Exhibit B to* Comments of 1-800-CONTACTS, Inc. on the Contact Lens Rule; 16 C.F.R. Part 315 (Project No. R511995), Submission #00568 (Oct. 26, 2015).

This conduct is well within the Commission’s authority to address by revising and clarifying the Eyeglass Rule and by making clear that future FTC enforcement activities will address compliance with the Eyeglass Rule.

Response to Specific Questions Asked by the FTC in its Advanced Notice of Proposed Rulemaking

1. Should the definition of “prescription” be modified to include pupillary distance?

Yes. The intent of the Eyeglass Rule is to permit consumers to obtain eyeglasses from third-party sellers, and consumers cannot do so without a complete and accurate prescription. The Eyeglass Rule’s current definition of “prescription” requires eye care practitioners to provide “all of the information specified by state law, if any, necessary to obtain lenses for glasses.” Effective prescription eyeglasses cannot be provided by eye care practitioners or third-party sellers without the pupillary distance. As a result, any conduct by eye care practitioners that makes it difficult for consumers or third-party sellers to obtain the pupillary distance – including omitting the measurement from prescriptions or verifications or charging consumers a fee in addition to the eye examination fee to obtain their pupillary distance – defeats the intent of the Eyeglass Rule. 1-800 recommends that the Eyeglass Rule’s definition of “prescription” be revised and expanded to list all items that must be included on a prescription to permit prescription eyeglasses to be provided to consumers, including pupillary distance. By way of example, the Contact Lens Rule includes a detailed definition of “contact lens prescription” to identify all necessary components for third-party sales of contact lenses. *See* 16 C.F.R. § 315.2.

2. Should the Eyeglass Rule be extended to require that prescribers provide a duplicate copy of a prescription to a patient who does not currently have access to the original?

Yes. The prescription is the fundamental mechanism that allows consumers to obtain eyeglasses from third-party sellers. Limiting consumers to a single prescription, rather than permitting them to request a duplicate copy (or, as recommended below, to authorize release of a copy to a designated third-party seller), impairs the goal of the Eyeglass Rule to promote consumer choice

and improve competition. Permitting consumers to request, at any time before their prescription expires, a duplicate copy for themselves places control over the prescription where it belongs under the Eyeglass Rule: with the consumer who has already paid for the eye examination that generated the prescription, rather than with the eye care practitioner who has competing financial incentives to limit consumer choice with regard to eyeglass sales.

3. *Should the Eyeglass Rule be extended to require that a prescriber provide a copy to or verify a prescription with third parties authorized by the patient?*

Yes. The prescription is the fundamental mechanism that allows consumers to obtain eyeglasses from third-party sellers. Preventing consumers from authorizing release of their prescription to third-party sellers impairs the intent of the Eyeglass Rule to promote consumer choice and improve competition in the sale of eyeglasses. In addition, the requirements that eye care practitioners provide a copy of the prescription to a third-party seller with the consumer's authorization should include a time limit for responding to those requests to ensure that the requests receive the prompt attention necessary to promote the intent of the Eyeglass Rule.

Additional Comments Regarding the Eyeglass Rule and the FTC's Advanced Notice of Proposed Rulemaking

1. *The Eyeglass Rule Should Address the Expiration of Prescriptions*

The Eyeglass Rule currently does not include a provision that standardizes the expiration period for prescriptions. Permitting eye care practitioners and overly protective provisions of state law to impose arbitrary and, in some cases, unnecessarily short, expiration periods for prescriptions impairs the intent and effectiveness of the Eyeglass Rule and inhibits consumer's ability to choose to obtain eyeglasses from third-party sellers. For this reason, the Contact Lens Rule includes a provision that addresses the expiration of contact lens prescriptions. *See* 16 C.F.R. § 315.6. The Eyeglass Rule should include a provision imposing a minimum expiration period for prescriptions, with an exception for documented medical necessity.

2. *The Eyeglass Rule Should Make Clear that All Violations, Including Violations by Eye Care Practitioners, Are Unfair or Deceptive Acts and Practices that are Subject to FTC Enforcement Action*

Consistent with the FTC's preferred practice of putting an industry on notice of specific concerns about violative conduct and about the possibility of future enforcement action, 1-800 recommends that the Eyeglass Rule make clear that any violation is an unfair or deceptive act or practice under Section 5 of the FTC Act. Although that enforcement mechanism currently exists, it is not clearly spelled out, and eye care practitioners are less familiar with FTC Act jurisdiction and enforcement activities than are marketers and advertisers, including third-party sellers of eyeglasses. A stand-alone provision would put all entities on notice that any conduct that interferes with, delays, or hinders consumers' rights to obtain a prescription and to purchase eyeglasses from a seller of their choice will be subject to FTC enforcement action.

1-800 greatly appreciates the FTC's consideration of these comments.

Respectfully submitted,


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