

Before the FEDERAL TRADE COMMISSION
Washington, D.C. 20580

In the Matter of:

Contact Lens Rule, 16 CFR part 315, Project No. **R511995**

COMMENTS OF
THE NATIONAL ASSOCIATION OF OPTOMETRISTS AND OPTICIANS (NAOO)
CONCERNING THE OPHTHALMIC PRACTICE RULES

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I. INTRODUCTION

The National Association of Optometrist and Opticians ("NAOO") respectfully submits these Comments in response to the Federal Trade Commission' ("FTC's") Request for Comments concerning the Contact Lens Rule.¹

NAOO is a national organization representing the retail optical industry and eye care providers. Our members offer consumers the convenience of optical dispensaries (staffed with opticians) that are co-located with eye care services from eye care providers (typically optometrists) who prescribe corrective eyewear and perform eye health examinations. Most NAOO members also offer e-commerce optical retailing to customers. NAOO members collectively represent nearly 9000 co-located eye care offices and optical dispensaries serving millions of patients and eyewear customers each year.

II. SUMMARY

The Federal Trade Commission has proposed to amend the Contact Lens Rule ("Rule") to require that prescribers obtain a signed acknowledgment after releasing a contact lens prescription to a patient and maintain each such acknowledgment for a period of not less than three years. From comments already posted and information shared at the Contact Lens Workshop, the NAOO is satisfied that there is a continuing need not only for the Rule, but also for active enforcement by the Commission. The NAOO is pleased to offer its comments on ways to improve documenting the confirmation process.

The NAOO continues to support the requirement of an automatic release of a contact lens prescription as found in the *Fairness to Contact Lens Consumers Act* 1 U.S.C. 7601 *et seq* (the "Act") and in the Commission's Contact Lens Rule. We recommend, however, that instead of one single approach for acknowledging the receipt of a contact lens prescription, that prescribers be permitted to choose from a list of accepted forms of acknowledgment to demonstrate compliance with the Rule. We suggest that, in the absence of proof of compliance with one of the approved automatic release provisions of the Rule, that a rebuttable presumption of non-compliance will control.

In March 2018, the Commission held a workshop to examine issues related to the Rule and its proposals. As the result of that workshop it is clear that patients/consumers need more information about their rights under the Rule and that heightened enforcement of the Rule – and advertising about that enforcement – is warranted.

Generally, the NAOO members believe that the Rule works well. No changes are needed to the passive verification system. Questions have come up about automated telephone systems as a method for verifying prescriptions. We recommend that such verification system be allowed to continue with some added requirements regarding those calls. We agree that increased access to prescriptions and ease in securing additional copies of one's prescription will reduce the number of verification requests and make the fulfillment process easier and more accurate. We further agree that the Act already requires that such additional copies be made available or provided to patients upon request. The timeframe for providing additional copies of a prescription to the patient or the patient's agent should be the same eight business hours as required for verifications.

¹ 81 Fed. Reg. 88526 (Dec. 7, 2016.)

III. OPTIONS RELATING TO THE SIGNED ACKNOWLEDGMENT PROPOSAL

The NAOO recommends that the prescriber be permitted to adopt an approved form of proof of release that best fits their practice and still allows the Commission to review compliance efficiently.

As we commented previously, adding a new form for consumers to sign adds a burden to prescribers of creating, producing and maintaining the new form and asking consumers to sign yet another piece of paper in an already administratively overloaded system. We propose options, such as alternative forms of proof of prescription release, including:

- Separate signed acknowledgment (as proposed in the Rule),
- Acknowledgment on a prescriber-retained copy of the prescription that contains the patient' signature evidencing receipt of a notice and of the prescription,
- Purchase receipts that contain the acknowledgment and patient signature,
- copy of and transmission receipt of a fax of the prescription,
- Email and text retention of the sent prescription, including a digital image of the prescription, evidencing the correct address or number for the patient, along with a delivery receipt of record of sending,
- Portal acknowledgment and evidence of the prescription download, and
- Other forms of retention, whether paper or electronic not yet contemplated, that the Commission can approve in the future based on an adequate showing.

Expanding on the methods allowable for release notices and the collection and retention of an acknowledgment or other proof of release, plus offering suggestions on how to collect and save such forms of proof, would assist the industry in, and lighten the burdens of, compliance.

With these suggestions, we recommend that the Commission establish a rebuttable presumption that a prescriber who doesn' have evidence of having released the prescription with one of the approved methods is in violation of the Rule.

In the case of prescribers who do not sell the contact lenses that they prescribe, we recommend an exemption or exception from this proposal, if adopted, as such prescribers have no financial incentive in withholding the prescription from the patient.

IV. CONSUMER EDUCATION

We continue to believe that additional education of consumers will aid in the effectiveness of the Rule. If consumers generally do not know about their rights to the automatic release of the prescription, as reported by the Consumer Action representative at the Workshop, signage, in addition to FTC consumer notices or alerts, can only help. This can be accomplished via required, conspicuous signage in the prescriber's office where the patient checks in/out and by signage on the website of prescribers where the prescribing or sale of contact lenses is referenced. Such in-store signage can be as simple as:

PATIENTS: You have the right to your eye wear prescription without having to ask for it.

- **For EYEGLASSES: at the end of your eye examination**
- **For CONTACT LENSES: when your contact lens fitting is complete.**

If you do not automatically receive a copy of your prescription, or are not given your prescription after requesting it, you may file a complaint with the Federal Trade Commission at:

Email: www.ftc.gov and click "file a complaint"

Phone: 1-877-382-4357

For prescriber's Website notice, in conjunction with first reference to the prescribing or sale of contact lenses and at the point of purchase, there must be conspicuous notice such as:

YOU HAVE THE RIGHT TO YOUR CONTACT LENS PRESCRIPTION WITHOUT HAVING TO ASK.

We also suggest that the Commission require notices to consumers on the websites of online sellers of contact lenses.

Still within the realm of consumer education but in further support of the Commission's declaration that consumers are entitled to multiple copies of their contact lens prescription, the NAOO proposes statement to that effect on all prescriptions for contact lenses. In Section 315.2 of the Rule, it is recommended that a ninth element be added by inserting the following language in the definition of "Contact lens prescription":

- (9) the following statement: "YOU HAVE THE RIGHT TO ADDITIONAL COPIES OF YOUR PRESCRIPTION UPON REQUEST."

The Commission could make clear that the failure of a prescriber to include such statement on a contact lens prescription does not make the script invalid for the seller to fill; rather, any prescription that is valid under state law may be filled by the seller and any prescriber that failed to put the message on the prescription would be in violation of the Rule.

Compliance with these proposals would require extra focus on the prescription release requirement by prescribers and staff based on, if nothing else, the risk of penalties for an inability to demonstrate compliance with the Rule. Such additional compliance, however, would be better guaranteed with increased attention to education of the public regarding their rights to an automatic release of the script not only at the time of the initial exam but also throughout the life of the prescription validity.

V. AUTOMATED CALLS

The NAOO sees no need to significantly modify the Rule as it relates to automated telephone verification requests. From our members' general perspective, there are only a few issues with the use of automated calls, which tend to be infrequent to any particular prescriber's office. The NAOO agrees that such calls provide an efficient method to transmit a verification request to a prescriber. In order to address some of the assumptions on the part of the FTC about communication in its December 7, 2016 Notice of Proposed Rulemaking and Request for Comment, and to avoid uncertainty on the part of sellers, we recommend a modification to the definition of "Direct Communication" in §315.2, as follows: "Direct Communication means completed communication in English by telephone, facsimile or electronic mail that is, as appropriate for such various forms, clear, legible, in plain language and, if spoken, delivered in a cadence, pronunciation and volume that a reasonable English-speaking person can understand. Any communication that includes a pre-

recorded message cannot begin until a confirmed live connection has been made with the intended recipient or voice message recorder.” (addition to existing definition underlined)

As part of the Direct Communication requirement in the Verification process, we recommend:

- § 315.5(b)(6), which describes the information needed for verification, be amended to read: “The name of the seller and the name of a contact person at seller’s company, including facsimile and telephone numbers; and”
- 315.5(f)(2) of the Rule be amended as follows:
 - (ii) If the communication occurs via telephone, [to maintain] a log:
 - (A) Describing the information provided pursuant to paragraph (b) of this section,
 - (B) Setting forth the date and time the request was made,
 - (C) Indicating how the call was completed, and
 - (D) If the call has been made with a live recipient, listing the names of the individuals who participated in the call on behalf of both the prescriber and the seller.
 - § 315.5(f)(2) be amended by adding a new paragraph (iii) that reads: If the communication occurs via telephone that contains a pre-recorded message containing the information required in paragraph (b), the seller shall retain a copy of the recording, which recording shall be retained for a period of one year from the date of leaving the message with the prescriber.

(Additions to existing wording underlined)

These suggestions address several of the main complaints about so-called automated calls and will provide the Commission with more information for any investigation or enforcement action.

VI. ADDITIONAL RECOMMENDATIONS FROM PRIOR COMMENT

In addition to the above, and to ratify other recommendations made in our previous comment, we suggest:

- Removal of the phrase “private label” is beneficial in clarifying the right to make lens substitutions from brand name to private label and vice versa for the same manufacturer’s lenses.
- Promote the use of portals or cloud-based prescription retention solutions.
- Adopt the proposed three-year retention period for proof of release.
- Allow proof of acknowledgement/release to be in either paper or electronic format.
- Reinforce the FTC determination that under the Act prescribers must release additional copies of contact lens prescription upon request of the patient or a designated third-party.
- Requests for a copy of the contact lens prescription must be met within 8 business hours.

VII. CONCLUSION

In summary, the NAOO recommends that the Contact Lens Rule be continued and that there be increased public and practitioner education about the Rule as well as increased enforcement of its provisions. We suggest that the Commission provide options for prescribers to demonstrate compliance with the Rule in the event of a patient complaint about compliance.