



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Advertising Practices

October 4, 2006

C. Thomas Crooks, III, O.D.
American Optometric Association
243 N. Lindbergh Boulevard, Floor 1
St. Louis, MO 63141

Dear Dr. Crooks:

I am writing in response to your September 12, 2006 letter regarding 1-800 CONTACTS, Inc.'s ("1-800") recent practice of requesting that contact lens prescribers provide copies of patients' contact lens prescriptions. To provide further guidance concerning how prescribers should respond to these requests, the Federal Trade Commission staff offers the following views.

As you are aware, the Fairness to Contact Lens Consumers Act ("FCLCA") and the Contact Lens Rule state that when a contact lens fitting has been completed, the prescriber "shall, as directed by any person designated to act on behalf of the patient, provide or verify the contact lens prescription by electronic or other means." 15 U.S.C. § 7601(a)(2); 16 C.F.R. § 315.3(a)(2). Neither the FCLCA nor the Contact Lens Rule requires that sellers provide prescribers with written proof that they have been designated as the agents of consumers. *See* Contact Lens Rule, Statement of Basis and Purpose, 69 Fed. Reg. 40,482 at 40,493 (July 2, 2004). Thus, upon receiving a request from 1-800 as the agent of a consumer without any written proof of this agency relationship, the prescriber must provide 1-800 with a copy of the prescription or verify the prescription information.

At the time that they want to order contact lenses, some consumers have neither their prescription nor sufficient information about their prescription for 1-800 to prepare a proper verification request. In these circumstances, 1-800 cannot communicate a proper verification request to the prescriber, and therefore may ask that the prescriber provide a copy of the prescription. Upon receipt of a valid prescription from the prescriber, 1-800 can ship lenses to the consumer.

Your letter raises the concern that a prescriber may question whether a particular consumer in fact has designated 1-800 to act on his or her behalf. If such a question arises, your letter indicates that prescribers should demand that 1-800 provide the written documentation that prescribers may typically require from others before releasing medical information under the Health Insurance Portability and Accountability Act ("HIPAA") of 1996 and its implementing HIPAA Rule.

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We do not believe that the prescriber has the legal right under the FCLCA or the Contact Lens Rule to impose the burden of this written authorization requirement on 1-800. If 1-800 is the agent of the consumer, then the prescriber has an obligation under the FCLCA and the Contact Lens Rule to provide the consumer's prescription to 1-800. The Commission has made clear that this disclosure is permitted without written authorization under HIPAA and the HIPAA Privacy Rule.¹ On the other hand, if 1-800 is not the agent of the consumer, then the prescriber has no obligation under the FCLCA and the Contact Lens Rule to provide the prescription at all.

To clarify any misunderstanding, we have discussed with 1-800 adopting changes in its practices that should reduce prescriber concerns related to the existence of an agency relationship between 1-800 and consumers. As a result of these discussions, 1-800 has made two changes in its practices. First, 1-800 has taken steps to clarify for consumers that they are designating 1-800 to act as their agents. In taking telephone orders, 1-800 has commenced disclosing, immediately after obtaining prescriber contact information, that it will act as the agent of consumers in seeking verification or a prescription from their prescriber. In taking on-line orders, 1-800 has begun disclosing, adjacent to the location on the order form for prescriber contact information, that it will act as the agent of consumers in seeking verification or a prescription from their prescriber. Second, 1-800 now includes the express statement that it is the consumer's agent in its letters to prescribers seeking copies of prescriptions.

These changes in 1-800's practices likely will eliminate many concerns as to the existence of an agency relationship. In the event that a prescriber who receives a letter from 1-800 requesting a consumer's prescription knows that 1-800 is not in fact the consumer's agent, the prescriber should inform 1-800 that he or she is refusing to provide it based on the absence of an agency relationship and submit to 1-800 its affirmative evidence that the seller is not the consumer's agent.² This information should serve as the basis for the prescriber and 1-800 to resolve between themselves the issue of agency with regard to a particular request. If these

¹ The Contact Lens Rule's Statement of Basis and Purpose ("SBP") noted that the HIPAA Privacy Rule permits a covered entity to use or disclose protected health information without patient authorization for treatment, and that providing, confirming, or correcting a prescription for contact lenses constitutes "treatment" under the HIPAA Privacy Rule. SBP at 40,501. In addition, the SBP notes that the HIPAA Privacy Rule allows covered entities to use or disclose protected health information without patient authorization if the use or disclosure is "required by law." *Id.* A disclosure of information required under the FCLCA and Contact Lens Rule is a disclosure required by law under the HIPAA Privacy Rule.

² The FCLCA and the Contact Lens Rule do not preclude prescribers from contacting their patients to inquire whether they have designated a particular seller as their agent. If the patients indicate orally that 1-800 is their agent, prescribers should not impose the unnecessary burden on their patients of completing an extensive written authorization form to confirm the agency relationship.

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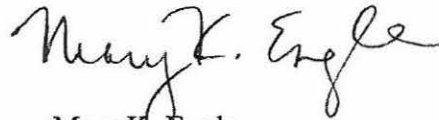
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communications do not resolve the issue, prescribers and sellers, of course, can submit complaints and supporting information to the FTC.

We hope the foregoing is helpful to you. Please feel free to contact Thomas Pahl at (202) 326-2128 or Kial Young at (206) 220-6351 with any further questions or concerns regarding this matter.

Very truly yours,

A handwritten signature in black ink that reads "Mary K. Engle". The signature is written in a cursive style with a large, looped "M" and "E".

Mary K. Engle
Associate Director