



UNITED STATES OF AMERICA
Federal Trade Commission
Washington, D.C. 20580

Office of the Chairman

TO: April Tabor
FROM: Michael Pesin
DATE: September 27, 2019
SUBJECT: Contact Lens Rule: Summary of comments to be placed on the public record

On September 18, 2019, representatives of the American Optometric Association (“AOA”) and American Academy of Ophthalmology (“AAO”) met with FTC Chairman Joseph J. Simons and other agency staff¹ to discuss proposed amendments to the FTC’s Contact Lens Rule (“Rule”).

On behalf of the AOA, Dr. Cockrell asserted that the contact lens market has changed since 2015, when the FTC initiated its 10-year review of the Rule. He stated that prescribers of contact lenses sold 68% percent of all lenses at that time; today, that number is down to 39%. AOA attributed the decline in market share to the growth of the Internet, which is currently the largest access point for purchasing contact lenses. AOA cited new business models, including sellers of “generic” contact lenses and subscription-based services such as Hubble Contacts, that have increased the number of competitors, as well as companies, such as Simple Contacts and 1-800-CONTACTS, which conduct online vision tests.

AOA asserted that contact lens prices are competitive, citing a 2005 FTC study that found that “contact lenses sold online are on average \$15 less expensive than those sold offline.”² AOA also cited its own study of 81 different contact lens brands and found an average price difference of \$0.32 across all lenses.³ AOA stated that its study found that 28 brands were more expensive online, while 53 brands were more expensive in the doctor’s office. Moreover, according to AOA, 80% of contact lenses are now ordered through distributors, not manufacturers. AOA urged the FTC to consider the current state of the market and prices when assessing the competitiveness of the market.

AOA stated that it disagrees with commenters who have asserted that the contact lens market is “unique” because doctors are selling the products they are prescribing. AOA cited

¹ In attendance on behalf of the American Optometric Association were Dr. David Cockrell, OD and Kara Webb. In attendance on behalf of the American Academy of Ophthalmology were Rebecca Hyder and Scott Haber. In attendance from the FTC were Chairman Joseph J. Simons, Morgan Kennedy, Michael Pesin, Mary K. Engle, and Andrew Wone.

² The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study (February 2005).

³ See Comment Submitted by the American Optometric Association in Response to Supplemental Notice of Proposed Rulemaking (July 26, 2019), at 12 (“AOA Supplemental Comment”), *Contact Lens Rule Review, 16 CFR part 315, Project No. R511995*.

FTC complaint counsel's filing in a 2017 Part 3 enforcement proceeding stating that "it is common knowledge that healthcare professionals at ambulatory surgery centers, orthopedic centers, dental service providers, and many other 'healthcare providers' may sell the products that they prescribe."⁴

Dr. Cockrell stated that available data shows a low rate of prescription release noncompliance. AOA cited data obtained through a 2017 Freedom of Information Act request showing that the FTC received a total of 309 complaints regarding prescription release between 2011 and 2016.⁵ AOA asserted that approximately 200 million contact lens prescriptions were issued in the same timeframe. AOA noted concerns raised by FTC staff during a 2018 workshop that consumers may not know that they have a right to their prescription, nor to whom to complain should they not receive it.⁶ To address this concern, AOA recommended that doctors should be required to post a sign in their offices notifying patients of the right to their prescription in lieu of a prescription verification requirement.

AOA raised questions about a consumer survey submitted by 1-800 CONTACTS,⁷ which asked about prescriber compliance with the Rule's prescription release requirement. AOA noted that the 1-800 CONTACTS survey concluded that 56.9% of patients who were not "automatically provided Rx" had to ask for their prescription. AOA asserted that the survey equates a patient asking for his or her prescription with noncompliance with the Rule. Dr. Cockrell asserted that it is common for a patient to ask for his or her prescription before a fitting is complete. AOA argued that better data is needed to fully assess compliance rates, and recommended the FTC create a dedicated complaint system for complaints related to the Contact Lens Rule.

AOA and AAO suggested that the shift towards online sales for contact lenses raises additional concerns. AOA and AAO cited 1-800 CONTACTS advertisements on Twitter that direct patients towards an online eye exam, and asserted that such advertising discredits the importance of comprehensive eye exams. Mr. Haber stressed that in addition to determining a patient's prescription, comprehensive eye exams also check for other conditions such as high ocular pressure and glaucoma.

AOA stated that it received 1,028 unique complaints of contact lens sale violations from doctors of optometry and their staff from 2017-July 2019. AOA identified the primary complaints as relating to: the sale of contact lenses without a prescription; sales that were not prescribed to the patient or were based on an incorrect prescription; incomplete verification requests; and sales based on expired prescription. AOA asserted that 41% of these complaints concerned Hubble Contacts, an online retailer of "generic" contacts. AOA stated that some of

⁴ See FTC Complaint Counsel Finding of Fact in the Matter of 1-800 CONTACTS, INC., a corporation, Docket No. 9372.

⁵ See Comment Submitted by the American Optometric Association in Response to Notice of Proposed Rulemaking (April 6, 2018), at 7, *Contact Lens Rule Review*, 16 CFR part 315, Project No. R511995.

⁶ See FTC Workshop, *The Contact Lens Rule and the Evolving Contact Lens Marketplace* (March 7, 2018).

⁷ See Comment Submitted by 1-800 CONTACTS in Response to Supplemental Notice of Proposed Rulemaking (July 30, 2019), *Contact Lens Rule Review*, 16 CFR part 315, Project No. R511995.

these complaints included selling without a valid prescription and prescription verification issues.

AOA expressed concern about the increased use of robocalls to verify patient prescriptions. AOA stated that these complaints made up 21% of the 1,028 complaints that AOA received from 2017-July 2019. AOA asserted that over 85% of doctors noted that robocall use increased over the last five years, but that the quality of these calls decreased simultaneously. AOA expressed support for the SNPRM's proposals regarding robocalls for prescription verification.

AOA expressed concerned about potential new regulatory burdens on doctors, especially those in smaller offices. AOA stated that the average independent doctor's office has only three staff members. AOA asserted that requiring doctors to upload prescriptions for passive verification purposes may impose an additional burden because only 50% of prescribers use electronic health records/patient portals. AOA also asserted that EHRs are a relatively new technology, so some offices may not have the financial resources or necessary capabilities to upload prescriptions for verification.