



TEXAS OPHTHALMOLOGICAL ASSOCIATION

401 West Fifteenth Street • Suite 825 • Austin, Texas 78701-1667 • (512) 370-1504 • Fax (512) 370-1637 • <http://www.TxEyeNet.org>

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Legal Counsel

Sam V. Stone, Jr, JD
(512) 479-9755
Austin

Legislative Consultant

Jay W. Propes
(512) 225-1007
Austin

Executive Director

Michael S. Duncan
(512) 370-1518
Austin

April 5, 2004

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

RE: Contact Lens Rule, Project No. R411002

Chairman Muris and fellow Commissioners:

The Texas Ophthalmological Association (TOA) has long been committed to finding a sensible balance between consumer rights and patient protection. It was with this goal in mind that TOA contributed to the passage of the Texas Contact Lens Prescription Release Act of 1997.

TOA thanks you for the opportunity to comment on the proposed Contact Lens Rule and respectfully submits the following assessment. Specifically, TOA is concerned with four particular items under the proposed rule.

Item 1: § 315.5 (c) (3) Passive verification after eight business hours
Public Law 108-164, the "Fairness to Contact Lens Consumers Act," Section 4 (d) reads in part "A prescription is verified under this Act only if on of the following occurs... (3) The prescriber fails to communicate with the seller within 8 business hours, **or a similar time as defined by the Federal Trade Commission**, after receiving from the seller the information described in subsection (c)" (emphasis added). Clearly the Congress has indicated through such an allowance that eight business hours may not be an adequate time frame for verification.

Any number of reasons could prevent a prescriber from responding to request for verification. An ophthalmologist in a solo practice who is performing surgery may close his/her office or operate it on a skeleton crew. Similarly, a prescriber who is away for illness, a non-federal holiday or for a continuing medical education meeting could be gone for several days, allowing consumers to be sold incorrect or expired prescriptions.

The Congress has opened the door to the Commission to alleviate such issues and it is TOA's sincere hope that the Commission will seize the opportunity to do so. Whether the solution comes in the form of an exception extending the period allowed for response when prescribers are away from the office or an across the

board extension of the time allowed for verification, it is important that the Commission not allow the eight-hour requirement to erode patient safety unnecessarily.

Item 2: § 315.2 and § 315.3 (b) Contact lenses used in fitting process

In neither of the above sections does the proposed rule make clear whether a prescriber may charge a patient for a lens used in the fitting process. § 315.2 states that a contact lens fitting may include examination, evaluation of fit of a lens, and follow-up examinations; the definition does not specifically include the lens itself.

§ 315.3 (b) prohibits a prescriber from requiring a person to purchase lenses as a condition of providing a prescription or requiring payment in addition to the fee for the exam, fitting, and evaluation. No exception is made for a lens which is necessary to the completion of the fitting itself.

TOA believes that clarification of this issue will give prescribers better direction as to the legality of their billing procedures and will give consumers better direction as to whether they have or have not been erroneously charged.

TOA further believes that prescribers should be permitted to charge individually for lenses which are necessary to complete the fitting process. Due to the range of prices on different lenses, bundling the materials cost into the fitting fee would be a clumsy solution to the problem.

Item 3: § 315.5 (various subsections) Telephone Verification

TOA is informed by members that many of the telephone-based requests for verification of prescriptions they receive are on automated systems. Under these systems, when the prescriber's office calls back, they are presented with the prescription and offered a binary option to verify or to refuse to verify. A prescriber who is calling the number with correction to the prescription has no applicable option.

While § 315.5 (b) (6) of the rule requires sellers to include contact information for a person at the seller's company, it makes no allowance for such binary automated systems. TOA asks the Commission to consider a requirement that allows the prescriber to request an operator or to leave a message for a callback so that the prescriber may impart qualitative information about the prescription to the seller.

Item 4: Non-Existent Providers

On two occasions since the enactment of the Texas Contact Lens Prescription Release Act of 1997 which requires similar verification procedures (but actually

requires an affirmative response), TOA staff has placed orders for contact lenses from one national mail-order vendor using a fictitious provider name and lens prescription and a non-working provider phone number.

On the first occasion, the lenses were delivered without delay (postmarked June 30, 1998). On the second occasion, the lenses were received December 13, 2001, shortly after the staff member had ignored several voice and email messages from the seller asking for corrected provider contact information.

Both these orders were placed by TOA staff only after TOA had received multiple complaints of orders being filled without being verified, and both orders point to a potential for abuse under the proposed rule.

Should a buyer place an order using fictional provider contact information, and should the seller use an automated telephone system to "verify" the prescription, it is conceivable that an automated voice message will be left on the answering machine of an unknown third party. Since said third party will have no interest whatsoever in the buyer's contact lens order, the third party will take no action beyond deleting the automated message. And absent a response from a supposed prescriber, the seller will ship the order a mere eight business hours after the message was left.

There are surely multiple solutions to close such a loophole. Since all prescribers, be they physicians or optometrists, must be licensed in the state in which they provided eye care services to the buyer, one simple idea would be to require that sellers dispensing lenses under § 315.5 (c) (3) document affirmative verification of the prescriber's license (whether current or not), so as to demonstrate the prescriber's existence. Such documentation would only have to be performed once per prescriber, and most could be covered en masse by requesting full lists of licensees from state licensing boards in advance of the situation arising.

Thank you in advance for your consideration of the comments of the Texas Ophthalmological Association.

Sincerely,


Michael S. Duncan
Executive Director