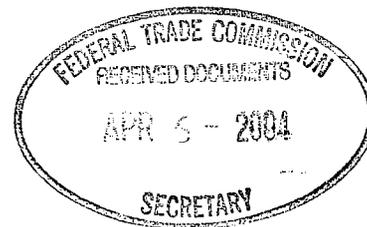




Assembly
California Legislature
COMMITTEE ON BUSINESS AND PROFESSIONS
LOU CORREA, CHAIRMAN
 ASSEMBLY MEMBER, 69TH DISTRICT



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March 31, 2004

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

Re: Contact Lens Rule, Project No. R411002

To whom it may concern:

I appreciate the opportunity to present my views regarding the new federal contact lens law. In my capacity as the representative of California's 69th Assembly District and Chairman of the Committee on Business and Professions, I was honored to be the primary author of AB 2020, the California law which served, in part, as a model for the federal legislation on which you now seek comments.

As Californians, we are proud that one of the national leaders on this issue, Rep. Pete Stark, acknowledged the federal debt to the California law on the floor of the U.S. House of Representatives, when he noted that "[T]his is a law my home state of California has already enacted, and consumers deserve to have in all parts of the country."

The California law was developed with input from eye care professionals and consumers. It was enacted with wide-ranging support, having been endorsed by the entire spectrum of interested parties, including the nation's largest state optometric association, the California Optometric Association, as well as Consumers Union, the Center for Public Interest Law, and the California Public Interest Research Group.

Facilitating agreement among such widely diverging viewpoints was a genuine challenge. But at the end of the day, our efforts produced a strong law, which since having gone into effect over a year ago, has exceeded our already high expectations. This law has received accolades from interested parties, and those of us involved in writing this law are proud that tangible benefits are already being derived by consumers and eye care professionals alike.

Indeed, I understand that based on our experience, the California Board of Optometry has submitted comments urging the FTC to revise its proposed definition of “business hours” to track the proven verification period of our state law. I urge the FTC to give every consideration to these comments, and the suggestions contained within.

The Experience of California

Our experience in California has proven that if our law were to be applied nationwide, it would be similarly effective in promoting competition, lower prices, better service and improved health care. California’s statute provides the Commission with a workable, highly successful model to assist with implementation of the federal statute. (I am attaching a summary of the California law that may be of interest to the Commission.)

When a law such as our contact lens statute works well in California, there is good reason to believe it will work as well throughout the country. California is perhaps the most diverse state in our nation. More than 34 million people – or more than one out of every eight Americans – live in our state. We were the first state to have a Gross State Product in excess of a trillion dollars, and if California were a nation in and of itself, it would have the 7th largest economy in the world. California has two of the ten most populous cities in the country (Los Angeles and San Diego) and some of the most remote and rural areas. Alpine County, for example, has no high school, no ATMs, no dentists, no banks, and no traffic lights.

Our great diversity makes California an ideal model of how to properly implement the federal law. I believe the overwhelming success of California’s law bodes well for contact lens wearers across the country – so long as the federal law, as implemented, closely tracks the California law.

That is why I am so deeply concerned by the FTC’s proposed implementation of the verification period. I strongly agree with the California Board of Optometry’s recommendation, that the FTC “consider modifying the proposed regulatory language to reflect the deadline in California law, which is 2 p.m. of the next business day or the same time of day the seller requested confirmation, whichever is sooner.” I also hope the FTC will consider the Board’s viewpoint regarding how the California law “also recognizes Saturdays as a business day,” and relates how our verification period “has proven to be a successful model.”

In its proposed rule, the FTC proposes to take the federal law in precisely the opposite direction. With its proposal that business hours be defined as 9 am to 5 pm, excluding Saturdays, Sundays and National Holidays, the Commission ignores the actual practices of the eye care industry, does not account for future changes in technologies and lifestyles, and threatens to undermine the fair and effective modernization of the industry that California has accomplished.

Under the FTC’s proposed interpretation, a consumer who orders lenses at 5:01 pm on a Friday afternoon, could be forced to wait to have his or her contact lenses shipped until the following Tuesday. If the Monday happens to be a federal holiday, the consumer would have to wait until the following Wednesday to have the lenses shipped. Even with

over-night shipping, the FTC's arrangement means a consumer could wait nearly a week to receive his or her lenses.

In California, the Board of Optometry acknowledged the rapidly changing nature of the marketplace by setting a 2 p.m. next business day deadline, instead of looking backwards toward the fast-disappearing, and often inconvenient, traditional retail hours. Since implementation of our law, we have heard no complaints related to rural or other eye care professionals who might have more limited hours.

Conclusion

The California law was the result of hours upon hours of hard work on the part of legislators, consumer groups, optometrists, physicians and retailers. At the end of the day, we produced a law that all interested parties endorsed. I am proud of the role our law played serving as the template for the federal bill.

I am also proud of the impact our law has had here in California – promoting convenience, lower prices and improved health care for my constituents and for all Californians. I hope the FTC will gain from our experience, similarly use our law as a template and thus assure the federal law bestows similar benefits nationwide.

I thank you for the opportunity to submit these comments, and hope you will take advantage of our experience with this new law and provide all Americans who wear contact lenses with the rights now bestowed upon California residents.

Sincerely,

A handwritten signature in cursive script that reads "Lou Correa". The signature is written in black ink and is positioned above the printed name and title.

LOU CORREA
Assemblymember, 69th District

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Without Reference to File

CONCURRENCE IN SENATE AMENDMENTS
AB 2020 (Correa)
As Amended August 12, 2002
Majority vote

ASSEMBLY:		(May 16, 2002)	SENATE:	39-0	(August 14,
					2002)

(vote not relevant)

Original Committee Reference: B. & P.

SUMMARY: Requires optometrists and ophthalmologists (prescribers) and registered dispensing optician (RDOs) to provide a patient with a copy of his or her contact lens prescription, with certain exceptions, specifies the requirements of an expiration date on a prescription, and requires that out-of-state sellers of contact lenses must attempt to verify the prescription with the prescriber, under specified conditions.

The Senate amendments delete the Assembly version of this bill, and instead:

- 1) Require a prescriber or RDO to provide a patient with a copy of his or her prescription, subject to certain conditions, upon completion of the eye examination or, if applicable, upon completion of the contact lens fitting process for a patient.
- 2) Prohibit the expiration date of a contact lens prescription from being less than one-to-two years from the date of its issuance, with specified exceptions.
- 3) Prohibit a prescriber or RDO from conditioning the release of a prescription on the patient paying a fee or purchasing contact lenses from that prescriber or RDO.
- 4) Prohibit a prescriber or RDO from placing a notice on a prescription waiving or disclaiming the liability or

responsibility for the accuracy of ophthalmic goods or services dispensed by another seller, but provides that the above prohibition does not impose liability on the prescriber

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or RDO for the ophthalmic goods or services dispensed by another seller.

- 5) Provide that a willful failure or refusal of a prescriber to comply with the above provisions of this bill is unprofessional conduct (and therefore subject to disciplinary action).
- 6) Require the California Medical Board (CMB) and the Board of Optometry (Board) to adopt regulations, including standards for processing complaints received regarding this bill's new requirements.
- 7) Provide that it is a deceptive marketing practice to advertise or make a sales presentation that contact lenses may be obtained without a valid prescription.
- 8) Provide that a violation of the laws regulating prescription lenses is punishable by a fine of not less than \$1,000 and not more than \$2,500, and that the revenue from these fines would be available upon appropriation to the CMB or the Board, respectively.
- 9) Require nonresident contact lens sellers to provide a toll-free telephone number, fax number or email address where contact lens prescribers may confirm their prescriptions.
- 10) Provide that contact lenses may be sold only upon receipt of a written prescription or copy of a written prescription, and may be sold in quantities consistent with the prescription's established expiration date and the standard packaging of the manufacturer or vendor.
- 11) Provide that a prescription is deemed confirmed if the prescriber confirms the prescription, or the prescriber fails

to communicate with the seller within 24 hours of the seller's inquiry or 2 p.m. the next "business day," as defined, whichever occurs first.

- 12) Prohibit a seller from filling a prescription when the prescriber has informed the seller that the prescription is invalid.
- 13) Make a violation of any of the provisions of the nonresident contact seller law subject to a fine of not less than \$1,000

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nor more than \$2,500, and provides that the fines collected pursuant to this provision shall be made available upon appropriation to CMB.

EXISTING LAW :

- 1) Provides for the licensure and regulation of physicians and RDOs by CMB and of optometrists by the Board.
- 2) Provides for the regulation of prescription lenses and prohibits any person other than a physician or optometrist from prescribing ophthalmic goods. Prohibits any person other than a physician, optometrist, or RDO from dispensing, selling, or furnishing prescription lenses.
- 3) Requires a person located outside California to be registered with the Division of Licensing of CMB in order to ship, mail or deliver contact lenses at retail to a patient at a California address.
- 4) Restricts nonresident contact lens sellers to provide only replacement contact lenses to a patient, pursuant to a valid, written prescription dated one year or less from the date the lenses are supplied or within a shorter period of time if that is specified on the prescription. Requires the seller, if a written prescription is not available to the seller, to confirm the prescription by direct communication with the prescriber or his or her authorized agent prior to selling any

lens, and to maintain a record of that communication.

AS PASSED BY THE ASSEMBLY, this bill directed the Board and CMB to adopt regulations requiring optometrists and ophthalmologists to release contact lens prescriptions to their patients upon completion of the contact lens fitting process. CMB was also directed to adopt regulations relating to the interpretation and implementation, including enforcement, of the "Nonresident Contact Lens Seller Registration Act."

FISCAL EFFECT: According to the Assembly Appropriations analysis, minor, absorbable costs to the Board and CMB to adopt regulations. Costs would be funded by licensing fees.

COMMENTS: According to the author, this bill will add California to the list of 27 other states in which a contact lens prescription release is required. The author states that

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this bill is pro-consumer, allowing patients of optometrists and ophthalmologists to obtain contact lenses quickly, cheaply, and safely. Proponents contend that this bill is consistent with pending federal legislation, will lead to greater competition and lower prices in the sale of contact lenses, and will at long last open the replacement contact lens marketplace to California consumers, giving them greater choice at lower prices without sacrificing quality. In addition, supporters have noted that this bill will also facilitate consumers' access to their medical records without compromising ocular health.

Federal Trade Commission (FTC) rules dating back to the 1970s require optometrists and ophthalmologists to release eyeglass prescriptions to patients. The Spectacle Prescription Release Rule (16 CFR, Chapter 1, Part 456) was adopted based on the finding that many consumers were deterred from comparison shopping for eyeglasses because eye-care practitioners refused to release prescriptions. This rule specifies that the prescription shall be released to the patient immediately upon completion of an eye examination, at no extra cost, without conditioning the release on an agreement to purchase ophthalmic

goods or services, and regardless of whether or not the patient requests the prescription. The automatic release rule alerts the consumer to the fact that the purchase of eyeglasses can be separate from obtaining an exam. At the time the "Prescription Release Rule" was adopted, FTC determined not to extend it to contact lens prescriptions, based on its conclusion that there was not sufficient evidence on record that the practice of not releasing contact lens prescriptions was prevalent.

However, the author states that since FTC promulgated the original rule in 1978, the contact lens industry has changed radically. Twenty years ago, the contact lens industry relied on lenses that were designed to be replaced annually. Beginning in the late 1980s, lens manufacturers began to market and sell what are now commonly known as "disposable" and "frequent replacement" lenses, which are designed to be replaced daily, weekly, or monthly. Manufacturers also have developed manufacturing methods that eliminated the reproducibility problems of 20 years ago. Consumers have increasingly chosen these lenses over "conventional" contact lenses, and a market has developed for their resupply. Today, more than 26 million consumers wear contact lenses, and it has been estimated that four million of these consumers reside in California. This increase in contact lens wear and sales volume has led to the

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development of alternative suppliers, such as pharmacies, buying clubs, department stores, mass merchandisers, mail order and online distributors. These alternative suppliers provide consumers with convenient and cost-effective methods of purchasing contact lenses.

The author states that the existing prescription release rule for eyeglasses saves California's consumers money. He and this bill's proponents believe that expanding the rule to cover contact lenses will likewise allow consumers to save money, potentially tens of millions of dollars. The author notes that when legislation requiring the release of contact lens prescriptions has been debated in other states, the primary argument against release involves concerns about patients'

ocular health. This bill contains a provision that would require a valid contact lens prescription to have an expiration date that can be set by the eye-care practitioner based on the ocular health of each individual patient. The author also notes that according to documents submitted by the Attorneys General of 17 states, including California, to FTC on September 7, 1997, a multi-state investigation failed to reveal any study showing a correlation between compromised ocular health and receipt of lenses through alternative channels rather than through eye-care practitioners.

Analysis Prepared by: Mark McKenzie / B. & P. / (916) 319-3301
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