



**National Association of  
Optometrists and Opticians**

Professionalism Consumerism Education . . . . .

April 5, 2004



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

RE: "Contact Lens Rule, Project No. R411002."

To The Commission:

The National Association of Optometrists and Opticians ("NAOO") is pleased to submit the following comments regarding the Federal Trade Commission's (the "Commission" or "FTC") proposed rule to implement the Fairness to Contact Lens Consumers Act ("the Act"), as published in the February 4, 2004 edition of the *Federal Register*. NAOO is a national organization representing the retail optical industry, with a membership drawn from every type of enterprise in optometry and opticianry. NAOO is consumer oriented and dedicated to the proposition that the consumer's vision needs are met most completely and economically by the free market, in the tradition of the American business system.

In this submission, NAOO offers comments on the Commission's proposed rule in the following five areas: (1) the definition of "business hour" (Question 3); (2) the definition of "direct communication" (Question 7); (3) the prescriber verification procedures (Questions 16, 17, 18, and 19); (4) the prohibition on prescribers' imposition of certain requirements or conditions on patients prior to releasing or verifying contact lens prescriptions (Question 14); and (5) enforcement mechanisms (Question 26).

I. **Definition of "business hour" (Question 3)**

Question 3 invites comment on the proposed rule's definition of "business hour." Section 315.2 of the proposal defines "business hour" as "an hour between 9 a.m. and 5 p.m. during a weekday (Monday through Friday), excluding Federal holidays."

NAOO supports the proposed rule's limitations of this term to weekdays and non-holidays. Store or prescriber operating hours are not uniform throughout the industry, and it would be impractical for the Commission to craft store- or prescriber-specific rules. This aspect of the proposal eliminates almost all guesswork and sets reasonable rules for the industry to follow – at a minimum cost to prescribers, sellers and consumers.

. . . . . **Reply to**  
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Moreover, many practitioners (we estimate more than half) are not open for business on Saturdays and Federal holidays. For the minority of practitioners, especially NAOO members, that are open on Saturdays, these days tend to be particularly busy, leaving very little time for employees to perform additional administrative functions. Moreover, sellers would not be disadvantaged by this aspect of the rule. With so few prescribers open on Saturday, the only realistic alternatives to the Commission's proposed bright-line rule would be (1) to require that sellers have actual knowledge of prescribers' hours or (2) to require that verification requests on Saturdays must be made via person-to-person contacts. Both of these alternatives would expose sellers to significant additional costs, and both would undermine the proposed rule's efforts to foster certainty within the verification process. Further, most in-store sellers would face no added disadvantage under the proposed rule because the majority of their sales are from prescriptions that do not require verification (i.e., prescriptions that the customer personally presents).

NAOO would offer several refinements to the "business hour" definition, however. First, we would note that the proposed 9 a.m. start time does not coincide with the opening times for most stores of most NAOO members. NAOO's preferred definition would encompass a 10 a.m.-6 p.m. "business hour" window, a timeframe coinciding with typical mall hours. The proposed rule's 9 a.m. start time would add costs to many practitioners by requiring them to add staff hours to ensure that responses to verification requests were made by 9 a.m., if required.

Second, NAOO would recommend that the proposal be clarified to state that all times are based on the time zone of the prescriber.

Finally, NAOO would suggest that the proposed rule be further clarified to state that the "business hour" timeframe begins only when the prescriber receives a complete verification request with all patient information required under the Act and supporting regulations. This clarification will ensure all current information is collected and will assist prescribers in the functions necessary to respond to requests for verification. It will also assist consumers because they will be able to receive their lenses as quickly as possible. By the same token, NAOO believes that it would be appropriate to impose reasonable requirements ensuring that prescribers inform sellers if verification requests are incomplete.

## II. **Definition of "direct communication" (Question 7)**

Question 7 requests comment on the definition of "direct communication." Section 315.2 defines "direct communication" as "completed communication by telephone, facsimile, or electronic mail."

NAOO members are experiencing considerable difficulties with the automated verification request methods employed by some sellers. These computer-generated calls operate by means of voice-response systems. They begin with an immediate recitation of a customer's name and information as soon as a voice is heard on the prescriber's end of the line. In many cases, the voice that the seller's automated system hears is a recorded voice, not a live individual with the ability to record a message. Consequently, the prescriber often does not receive the verification request at all or, if the prescriber happens to pick up mid-message, receives only part of it. Frequently, there is no way to retrieve the missed portion of a request, and our members have found it difficult, if not impossible, to get a live individual on the seller's end of the line to provide the missing information (or to successfully transmit a fax requesting further information, for that matter).

Accordingly, NAOO recommends that the Commission's final rule require that, in a telephone verification, the seller must ensure actual contact with a live individual on the prescriber's end of the line before transmitting verification information. We note that the proposed rule permits sellers to transmit its requests by facsimile or e-mail as well. We believe that sellers would be more likely to succeed in transmitting required verification information through one of these alternate means of communication than through computer-generated calls (although we suspect that relatively few prescribers currently have e-mail capabilities.)

### III. Prescriber verification procedures (Questions 16, 17, 18, and 19)

Questions 16, 17, 18, and 19 inquire about various aspects of the proposed rule's prescriber verification procedures. NAOO provides the following comments for the Commission's consideration.

Question 16 invites comment on the circumstances under which contact lens sellers may sell contact lenses to a patient under section 315.5(a) of the proposed rule. Subsection (c) of Question 16 asks whether the Commission should impose any additional requirements on sellers within the context of the prescriber verification process. NAOO believes that the proposed rule should make clear that a seller is permitted to send only one verification request to a prescriber for a particular patient unless the new request contains additional or revised information. We understand that one seller is already in the habit of sending multiple identical requests after a verification has been properly disapproved. Such repeated requests add significantly to the administrative costs of prescribers. Moreover, this practice enhances the risk that, where an original request is answered but subsequent requests continue to flow in, a seller may construe a prescriber's failure to respond to those subsequent requests as, in effect, an approved verification.

Question 17 requests comment on the particular information that a seller must provide to a prescriber, under section 315.5(b) of the proposed rule, when the seller seeks verification of a prescription. Subsection (c) of Question 17 asks whether there is any additional information that a prescriber needs in order to verify a contact lens prescription. In addition to the information required under Section 315.5(b), NAOO would encourage the Commission to require sellers to provide two additional information items: (1) the patient's telephone number and (2) his date of birth. It is not unusual to have multiple patients with the same name at the same address. Additionally, because prescribers do not always have accurate addresses for patients, an address, by itself, will not necessarily be sufficient for proper identification. Patients frequently move, and prescribers are seldom informed of a new address until a subsequent visit (if there is one). Further, sellers frequently misspell patients' names or fail to provide their full names. The result is in an inability to match the verification request to the prescriber's records (especially in some computer database files). This results in long, often unproductive searches. This has become an even bigger problem because many verification requests turn out to be for individuals that neither the prescriber nor the dispensary have ever seen before. Additional identifying information – such as a patient's telephone number and his date of birth – will aid in the prescriber's ability to search for a patient by increasing the number of relevant data points.

Question 18 seeks comment on the circumstances under which a contact lens prescription is deemed verified. Subsection (a) of Question 18 asks if section 315.5(c) of the proposed rule, the provision defining these circumstances, is sufficiently clear. NAOO wishes to comment on the verification event described in section 315.5(c)(1), whereby “the prescriber confirms that the prescription is accurate by direct communication with the seller.” As noted in our earlier discussion of the definition of “direct communication” in the previous section of this comment letter, our members have encountered significant difficulties in responding to verification requests made by some sellers. In our members' experience, responding to these requests by fax or by phone has proved nearly impossible due to a frequent inability to reach the seller. Prescribers often get continuous busy signals when trying to respond by fax, resulting in the need to attempt to send the same fax numerous times. Likewise, they are typically unable to get a live individual on the seller's end of the line when trying to respond by telephone.

NAOO would recommend that the Commission require sellers to have a sufficient number of dedicated fax lines (or to have fax machines with significant memory capability) to ensure the successful receipt of faxes transmitted by prescribers. In our view, prescribers should not have to make numerous, usually unsuccessful, attempts to get information through to sellers.

Moreover, in the case of a seller providing the name of a contact person, the name given by the seller should be the name of the person who is handling the verification request or who is expected to handle follow-up when the verification response is due. Frequently, the contact person listed is a supervisor or department head who is not accessible to the prescriber and not actually working on verification requests. Prescribers are told that they cannot actually speak to

this person, or the prescriber is entered into a voice-mail system that does not permit the prescriber to leave a message. We appreciate that the Commission has sought to address this issue to some degree with the “reaching and speaking with” language in the proposed rule’s definition of “direct communication” and with the requirement that the seller record the name of the person at the prescriber’s office with whom the seller spoke. We would respectfully suggest, however, that further reinforcement of these concepts is necessary to facilitate the verification process, especially where prescribers encounter problems with the information presented by sellers.

Question 19 invites comment on Section 315.5(d) of the proposed rule, the provision prohibiting sellers from filling a prescription if the prescriber provides timely notice to the seller that the prescription is inaccurate, expired, or otherwise invalid, unless the prescriber has corrected the inaccuracy. Subsection (a) of Question 19 asks whether this provision is sufficiently clear. NAOO would recommend that the Commission clarify that an expired prescription is not an inaccurate prescription that must be corrected. NAOO understands that at least one seller is advising prescribers that, under the definition of an “invalid prescription,” prescribers are required to verify the accuracy of even an expired prescription. In fact, the verification request form does not have a space for the prescriber to indicate that the prescription has expired. We believe that the Commission’s final rule should clarify that where the prescriber has identified the prescription as expired, the verification may properly be denied due to an invalid prescription and that, under these circumstances, the lenses may not be sold.

IV. **Prohibition on prescribers’ imposition of certain requirements prior to action on contact lens prescriptions (Question 14)**

Question 14 inquires about the prohibition contained in section 315.3(b) of the proposed rule against prescribers’ imposition of certain requirements or conditions on patients prior to releasing or verifying contact lens prescriptions. In our view, specialty lenses – those that are custom designed from a prescriber’s specific work order, not mass produced, and correct for refractive errors in addition to spherical myopia or hyperopia – present separate issues that are best addressed outside the context of the proposal’s general rules in this area. Examples of such lenses include rigid gas permeable lenses and toric lenses. Accordingly, NAOO respectfully suggests that an exemption to these general rules is appropriate in the case of specialty lenses.

Specialty lens patients historically have been required to pay for such lenses in conjunction with the fitting. That is because these lenses must be specially manufactured for the particular patient according to his individual specifications. Indeed, unlike with soft, disposable lenses, there are no “trial sets” available for specialty lenses. Consequently, specialty lenses tend to be far more expensive than soft, disposable lenses, typically in the range of \$150 per pair. The

highly individualized nature of these lenses and their considerable expense have led to the practice of requiring purchasers to pay for them in conjunction with the fitting.

In seeking an exemption in this area for specialty lens prescriptions, NAOO would note that such lenses constitute a very small portion of the market (typically less than 5% in the case of our members) and are not typically sold by mail order or mass merchant sellers. As such, we would argue that such lenses are not within the intended reach of the Act, and, as importantly, would not deprive consumers of the Rule's major benefits.

The unique circumstances surrounding specialty lenses suggest that a general rule prohibiting a requirement of purchase would be ill-suited for application to specialty lenses. For these reasons, NAOO would urge the Commission, as a first option, to provide a specific exemption for "specialty contact lenses," which could be defined as "contact lenses custom designed from a prescriber's specific work order, not mass produced, and that correct for refractive errors in addition to spherical myopia or hyperopia." NAOO also would recommend that a new subsection (c) be added to section 315.3 of the proposed rule as follows:

*"(c) Exemption.* Notwithstanding subsections (b)(1) and (b)(2) of this section, a prescriber may require the purchase of specialty contact lenses from the prescriber as part of the fitting process and as a condition of providing a copy of a prescription."

NAOO would note that the Commission could reach the same result by crafting a definition of "contact lenses" (the issue raised in Question 7) that exempts "specialty contact lenses" as we have defined that term above.

Alternatively, the Commission could recognize that the purchase of specialty lenses is part of the fitting process and not a condition on providing the prescription. Using this approach, the final rule could clarify that it is lawful for a prescriber to require the purchase of trial lenses as part of the fitting process so long as the requirement is applicable only to minimal number of lenses necessary in order to complete the fitting process (as defined in the proposed rule).

#### V. **Enforcement mechanisms (Question 26)**

Finally, Question 26 solicits comments about the Commission's enforcement power and jurisdiction, a topic covered in section 315.9 of the proposed rule. NAOO would suggest that a formal complaint mechanism would be a useful and appropriate tool that could greatly aid the Commission in its efforts to enforce the rule. Specifically, NAOO suggests that the Commission establish a dedicated e-mail address (e.g., [contactlenscomplaints@ftc.gov](mailto:contactlenscomplaints@ftc.gov)) and a dedicated phone line to permit prescribers, sellers, and consumers alike to lodge complaints alleging non-compliance with the rule. From the point of view of prescribers, for example, this mechanism

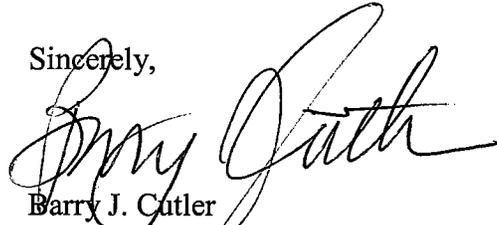
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could provide a forum to register complaints against sellers who are selling lenses despite notification that the associated prescriptions are expired or otherwise invalid. Sellers, on the other hand, might use this complaint mechanism to report a pattern of non-compliance on the part of a particular prescriber.

NAOO recognizes that the Commission's enforcement resources are limited. However, we believe that such a complaint mechanism could provide the Commission an efficient means of identifying rule violations as part of its enforcement efforts.

The National Association of Optometrists and Opticians appreciates this opportunity to comment on the Commission's proposed rule. If you have any questions about this submission – or if NAOO can provide any additional information regarding this issue – please contact me at 202-861-1572.

Sincerely,



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