



**BEFORE THE  
FEDERAL TRADE COMMISSION  
Washington, D.C. 20580**

**In the Matter of:** )  
 )  
**16 CFR Part 456** )

**COMMENTS OF THE ATTORNEYS GENERAL OF  
ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT,  
DELAWARE, FLORIDA, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MINNESOTA  
NEW YORK, OHIO, PENNSYLVANIA, WEST VIRGINIA AND WISCONSIN**

The Attorneys General of Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Iowa, Maryland, Michigan, Minnesota, New York, Ohio, Pennsylvania, West Virginia and Wisconsin submit their Comments in response to the Federal Trade Commission's ("Commission") Request for Comments concerning Ophthalmic Practice Rules, 16 CFR Part 456, issued on April 3, 1997 ("Spectacle Prescription Release Rule"). This Rule requires eye-care practitioners to release eyeglass prescriptions to their patients. The Commission is seeking comments on whether to continue or amend that Rule. The Attorneys General are the chief enforcers of (1) state and federal antitrust laws, and (2) state consumer protection laws which sometimes incorporate administrative regulatory rules such as the "Prescription Release Rule." The Attorneys General believe the rule has served consumers well over the past 20 years and should be continued. The Rule should also be expanded to cover contact lens prescriptions. The Attorneys General submit the following comments on behalf of their citizens.

## **SUMMARY OF THE POSITION OF THE ATTORNEYS GENERAL**

The Attorneys General believe that the Spectacle Prescription Release Rule should be retained and expanded to require the release of contact lens prescriptions. The existing rule relating to eyeglass prescriptions has presented consumers with a wide variety of alternatives to obtain their eyeglasses. These alternatives have allowed consumers to choose among suppliers at varying price points and service levels. Consumers can have eyeglasses made in as little as one hour and at a very low cost. The Attorney Generals are aware of no harm that has come to consumers as a result of the existing Spectacle Prescription Release Rule.

The Attorneys General assert that the release of contact lens prescriptions will lower consumer costs for contact lenses and increase the safety of these lenses to consumers. The Attorneys General also urge the Commission to expand the applicability of the Prescription Release Rule to contact lens prescriptions, and contend that eye-care practitioners and their trade associations have participated in a conspiracy to refuse to release contact lenses to consumers. Requiring the release of contact lens prescriptions will mitigate the effect of the conspiracy.

## **INTEREST OF THE ATTORNEYS GENERAL**

The Attorneys General, in enforcing both federal and state antitrust laws, have an interest in maintaining an open and competitive marketplace for eyeglasses and contact lens sales. The Attorneys General represent 110,900,621 consumers, an estimated 40% of whom use eyeglasses or contact lenses. In addition, the Attorneys General of 27 states are involved in litigation against several contact lens manufacturers, eye-care practitioners and eye-care practitioner trade associations alleging two conspiracies: (1) that the manufacturers and the practitioners and their

trade associations conspired to eliminate sales of contact lenses by pharmacies, mail order and other alternative sellers; and (2) that the practitioners and their trade associations conspired to prevent the release of contact lens prescriptions to consumers. A copy of the complaint is attached as Exhibit A.<sup>1</sup>

### PRESCRIPTION RELEASE RULE

Twenty years ago, eye-care practitioners attempted to dominate the eyeglass market by withholding prescriptions. This attempt at controlling the eyeglass market prompted the Commission to adopt the Spectacle Prescription Release Rule, which mandates the release of eyeglass prescriptions to patients. This Rule was adopted based on the finding that many consumers were deterred from comparison shopping for eyeglasses because eye-care practitioners refused to release prescriptions. "The rule requires an optometrist or ophthalmologist to provide the patient with a copy of the patient's eyeglass prescription immediately after the eye examination is completed at no extra cost." 16 CFR 456(a) and (c).<sup>2</sup> The rule also has two additional requirements: (1) it prohibits the eye-care practitioner from conditioning the availability of an eye care examination on an agreement to purchase ophthalmic goods; and (2) eye-care practitioner must release copies of eyeglass prescriptions to their customers (patients) regardless of whether they request the prescription.<sup>3</sup> The automatic release rule alerts the consumer to the fact that the purchase of eyeglasses can be separate from obtaining an eye exam. "The

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<sup>1</sup>Since the filing of the original complaint, Alabama, Alaska, Iowa and Nevada have joined the complaint. Florida had previously filed a separate complaint.

<sup>2</sup> Proposed Rules, 62 Federal Register 64, 15866. April 3, 1997.

<sup>3</sup> *Id.*

Commission also determined not to extend the 'Prescription Release Rule' to contact lens prescriptions. In making its decision, the Commission concluded that there was not sufficient evidence on the record to permit a conclusion that the practice not to release contact lens prescriptions was prevalent."<sup>4</sup> Moreover, the last time the FTC fully considered the rule in 1989, disposable and frequent planned replacement soft contact lenses had only recently come on the market. Prior to that time and at the time of the Eyeglass I and Eyeglass II proceedings, lenses were not manufactured in a way that always accurately reproduced the same prescription.

Twenty years of actual experience and our investigation of the past three years<sup>5</sup> has shown that not only are restrictions on the release of contact lens prescriptions prevalent, but that eye-care practitioners regularly shared among themselves and discussed in their trade journals, numerous methods to discourage consumers from requesting their prescriptions, or how to make the prescriptions they were forced by law to release less useful. Eye-care professionals have advised colleagues to outright refuse to give consumers prescriptions or make consumers or other possible dispensers of contact lenses sign a waiver of liability which absolves the eye-care practitioner from liability in connection with the prescription. See e.g. Koetting, "I want my Contact Lens RX," *Optometric Economics*, 30-37, (February 1991)<sup>6</sup>; Kirkner, 10 Ways to Keep

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<sup>4</sup> *Id.*

<sup>5</sup> In 1995, the FTC considered a petition for rulemaking from a South Carolina consumer whose optometrist refused to release his prescription. In reviewing that petition, the Commission conducted a survey of 250 contact lens wearers concerning their ability to obtain a prescription. The states believe the survey was much too small to be statistically significant and the survey results are contradicted by actual experience and detailed evidence of an organized effort to prevent consumers from obtaining their prescriptions obtained during their investigation.

<sup>6</sup> Koetting's article describes various optometrists' practices such as outright refusal to give prescriptions, falsely claiming that federal or state law prohibits release of the prescription, writing

RXs from Walking, Review of Optometry, 59-64, (Sept. 15, 1994) (article about a roundtable of optometrists discussing how to keep patients from using competitors); Snyder, Winning the War Against Mail Order Contact Lenses, Optometry Today, Vol., No. 1, (1993).

Another example of the types of restrictions on eye-care practitioners used can be found in Exhibit B to the Settlement Agreement between certain Attorneys General and the Contact Lens Association of Ophthalmologists, Inc. That exhibit shows a release form distributed by an ophthalmologic trade association for use by eye-care practitioners in response to a request from a consumer for a prescription. The document states that it may not be used as a prescription. Given various eye-care practitioners' organized efforts to resist release of prescriptions, the Attorneys General advocate that the Commission order release of prescriptions. A copy of the Settlement Agreement is attached as Exhibit B.

Since the Commission promulgated the original rule in 1978, the contact lens industry has changed radically in other ways. Twenty years ago, the soft contact lens industry relied on lenses that were designed to be replaced annually, coinciding with the period typically recommended for reexamination by eye-care practitioners. Beginning in the late 1980's, lens manufacturers began to market and sell what are now known commonly as "disposable" lens or "frequent replacement" lenses, which are designed to be replaced daily, weekly or monthly. Manufacturers have developed manufacturing methods that eliminated the reproducibility problems of 20 years ago. Consumers have increasingly chosen these lenses over "conventional" soft contact lenses, and a

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prescriptions for brands which are not widely available, or conditioning the prescription on the signing of a waiver or disclaimer by consumers as bad ideas. The remainder of the article encourages optometrists to release prescriptions and improve their services to compete with other sellers of contact lenses. The article is significant for its description of bad practices engaged in by optometrists.

market has developed for their resupply. Today, more than 26 million consumers wear contact lenses. This increase in contact lens wear and sales volume led to the development of alternative suppliers, like pharmacies, buying clubs, department stores, mass merchandisers, and mail order houses. Despite some restrictions on their supply of lenses, these alternative suppliers gave consumers a convenient and cost-effective method of purchasing contact lenses. The alternative suppliers typically apply a smaller markup on the price of the lens relative to that of most eye-care practitioners. These savings were passed on to the eye care consumer in the form of lower costs. Obtaining contact lenses from alternative suppliers may also spare consumers the cost of an extra office visit to an eye-care practitioner.

### **IMPORTANCE OF PRESCRIPTION RELEASE**

The existing prescription release rule has already saved consumers money on eyeglasses. Expanding the rule to cover contact lenses will likewise allow consumers to save money on contact lenses and increase the safety of using lenses for most consumers. Requiring the ready release of a prescription would have almost no cost impact on eye-care practitioners.

Allowing consumers to shop for lenses at multiple possible dispensing locations rather than only from their eye-care practitioners will increase their options. Generally, when consumers have more choices, they pay lower prices. In this instance, this is particularly true because the expanded distribution of contact lenses through traditionally lower cost suppliers, like pharmacies, buying clubs, mail order and mass merchandisers, results in distribution cost savings which normally will be passed on to consumers.

As costs of lenses come down, the eye health of consumers using soft lenses, particularly disposable or frequent replacement lenses, will benefit. At present, consumers may exceed the recommended wearing schedule for a lens or engage in other possibly injurious conduct in an attempt to save money by extending the life of their disposable lenses. Such conduct could harm consumers should their lenses become dirty or carry bacteria or viruses which would not have a chance to develop if they were worn and disposed of properly. Easier access to, and lower prices for, replacement lenses should encourage consumers to wear and use the lenses properly, thereby increasing patient safety.

Not only would costs to consumers go down and safety increase as the result of an expanded prescription release rule, but the costs to eye-care practitioners of releasing prescriptions is nominal. Eye-care practitioners must simply provide the consumer with a copy of a prescription he or she is recording anyway. The slight cost of providing a written copy of a prescription does not justify a failure to mandate the release of prescriptions.

Eye-care practitioners may complain that a prescription release rule may "cost" them lost profits or the sale of contact lenses to their patients. This is not a "cost." Eye-care practitioners are free to compete for sales to their own patients and those of other practitioners.

### **ARGUMENTS AGAINST RELEASE**

Eye-care practitioners cite two reasons in defense of their practice of withholding prescriptions: (1) liability and (2) consumer eye health. The argument involving liability is simply that, if alternative suppliers incorrectly provide the wrong contact lenses, the eye-care practitioner can be held liable. While the ability of plaintiffs' lawyers to create liability theories is endless,

physicians are not normally held liable when a pharmacist provides the wrong drug in response to a prescription. It is unclear how misfilling a contact lens prescription by a pharmacist, for example, would create grounds for liability for the eye-care practitioner.

The second argument against releasing prescriptions involves consumer eye health. By withholding prescriptions, eye-care practitioners argue they are ensuring the patient comes back for eye care. If a consumer wants a new batch of lenses, the eye-care practitioner theoretically uses the trip to the office to check the general eye health by a range of activities, from having a receptionist or nurse interrogate the consumer or by having the eye-care practitioner actually perform an examination. This "consumer health" argument is based on a contention that a contact lens, a "medical device," somehow requires an eye care professionals' care and attention at every possible wearing of both the original and replacement lenses. In fact, as a Class II medical device, a disposable contact lens is subject to the same standards of FDA review as a toothbrush.

As such, it is clear that to claim that contact lenses should be marketed only by eye-care professionals, is to claim they are only safe to use after the inspection of each and every lens by an eye-care practitioner. In fact, almost all manufacturers now provide direct shipment of replacement contact lenses to consumers as a matter of general commercial practice. Our investigation has revealed that many eye-care practitioners mail replacement contact lenses to their patients without an office visit during the life of the prescription.

Purchasers from alternative channels have had no greater ocular health problems than purchasers from eye-care practitioners. Our multistate investigation has failed to reveal any study showing any correlation between compromised ocular health and receipt of lenses through alternative channels. Many other medical products, such as pharmaceutical drugs, have been and

are regularly dispensed safely via these same alternative channels of distribution. Clearly, if these methods of distribution are acceptable for prescription drugs, which can cause far more potential harm if the prescription is filled improperly than an improperly filled contact lens prescription, then using the alternative channels of distribution for contact lenses should be acceptable as well. Prescription drugs are widely available through grocery stores, mass merchandisers, pharmacies and through mail order and require only that the consumer have a prescription readily available. The more than 26 million consumers who use soft contact lenses should have the same financial and convenience benefits available to them as those consumers who purchase prescription drugs or eyeglasses.

#### CONCLUSION

The foregoing comments are submitted to demonstrate the need for continuing the Prescription Release Rule. Moreover, the Attorneys General believe the interests of consumers will be best served by expanding coverage of the rule to contact lenses.

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Respectfully submitted,

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