



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

Office of the Chairman

TO: April Tabor
FROM: Michael Pesin
DATE: November 20, 2019
SUBJECT: Contact Lens Rule: Summary of comments to be placed on the public record

On October 22, 2019, representatives from 1-800 CONTACTS (“1-800”) met with FTC Chairman Joseph J. Simons and other agency staff¹ to discuss amendments to the FTC’s Contact Lens Rule (“Rule”) proposed in the May 2019 Supplemental Notice of Proposed Rulemaking (“SNPRM”).

1-800 stated that it supports most of the proposals in the SNPRM. Specifically, 1-800 asserted that the prescriber signed acknowledgment and recordkeeping requirements are vital because physicians continue to refuse to release prescriptions and consumers do not fully understand their rights. According to 1-800, because a credible enforcement threat is necessary to increase compliance, this proposal is a low cost remedy that will improve prescription release. Additionally, 1-800 expressed support for digital prescription release, uniform quality standards for automated prescription verification calls, and a requirement for prescribers to respond to prescription requests within 40 business hours.

However, 1-800 encouraged the Commission to review some aspects of the SNPRM. Specifically, 1-800 noted that although the Rule is 15 years old, there are still issues with prescription release. 1-800 asserted that various consumer surveys indicated that approximately 60% of consumers did not automatically receive their prescription from the physician, and 30% never got their prescription at all. Although the Commission’s SNPRM proposes to modify the signed acknowledgment proposal to allow for more flexible prescription delivery, 1-800 urged the Commission to reconsider and instead bolster the notice requirement language to prevent any prescribers from “gaming” the system, especially for consumers opting for electronic prescription delivery. According to 1-800, a signed acknowledgment requirement that contains language informing patients of their right to receive a copy of their prescription is a low cost and efficient method to inform consumers. Additionally, 1-800 argued that adding the notice language encourages prescribers to release prescriptions when it matters, which is before selling and dispensing contact lenses.

¹ In attendance on behalf of 1-800 CONTACTS were John Graham, Roy Montclair, Kellen Fowler, Allison Fleming, Lisa Kimmel, and Megan Wolf. In attendance from the FTC were Chairman Joseph J. Simons, Tara Isa Koslov, Morgan Kennedy, Michael Pesin, Alysa Bernstein, Andrew Wone, Richard Cleland, Beth Freeborn, Matthew Jones, and Daniel Gilman.

1-800 noted that some prescribers might object to this proposal because it could portray them in a negative light. However, 1-800 explained that this perception would only occur only if the prescriber routinely refused to release prescriptions in the past.

1-800 also argued that an additional benefit to the signed acknowledgement proposal is that the number of prescription verification requests are likely to decrease, thereby offsetting the costs imposed by implementing the signed acknowledgment.

1-800 expressed support for the SNPRM's proposal to improve automated verification calls. 1-800 played an audio recording of 1-800's current automated verification request, which included the ability to pause and replay the message. When asked about the burdens of requiring sellers to keep a record of the call, 1-800 indicated that it uses call logs, but that there are other ways to track the calls. 1-800 also asserted that noncompliance with the Rule occurs more often with non-automated verification calls. 1-800 explained that it tested both automated and non-automated verification calls and found the former to be more consistent and easier for prescribers to understand.

1-800 expressed concerns that the SNRPM's proposals regarding seller alteration were unclear. 1-800 noted that the reference to an "order form" in the proposed amendment regarding seller alteration is limiting and does not consider modern ways to initiate an order for contact lenses. Modern retailers offer many ways for consumers to select their prescribed product including drop-down menus, search boxes, box scans, and filters, among other methods. Attempting to limit how sellers can accept orders will prove difficult, and may reduce innovation.

1-800 stated that sellers should not deliberately use passive verification to sell contact lenses that are not prescribed to a patient. However, for prescription verification to work as planned, sellers need to assume that patients have valid prescriptions for the contact lenses they order. 1-800 asserted that sellers should be able to rely on passive prescription verification when selling contact lenses, and opposed the imposition of new requirements on sellers acting in good faith. 1-800 estimated that two-thirds of the company's sales relied on verification calls, while the remaining one-third relied on actual prescriptions. 1-800 explained that advances in technology, such as its smartphone app, mobile website, and use of texting to accept prescriptions will help in increasing the number of sales that are verified using prescriptions. Additionally, 1-800 noted that improving verification call quality will enable prescribers to help address the emergence of single brand business models such as Hubble Contacts.

1-800 discussed its online eye examination service, "Express Exam." 1-800 explained that Express Exam uses telemedicine to renew patients' contact lens prescriptions. The service is not available for patients seeking initial contact lens prescriptions. 1-800 explained that the Express Exam asks questions to assess whether the patient is eligible for the service (*e.g.*, to assess whether the patient's ocular health is stable), captures images of the patient's eyes, and performs a visual acuity test. This information is then transmitted to a licensed doctor for review. This service is available in 30 states based on state telehealth laws and regulations. 1-800 explained that it began offering this service as a way to ease the burden on patients of traveling to a physician for an annual comprehensive exam. 1-800 explained that the Express

Exam could allow a patient to change contact lens brands under certain conditions, such as to switch from monthlies to dailies. According to 1-800, the Express Exam may provide a patient with multiple prescriptions to allow a patient to try different lenses (including 1-800's own branded daily disposable lens), but the patient will always receive a prescription for the brand the consumer was previously wearing. However, 1-800 noted that it does not send out trial lenses before a patient obtains a prescription.