

The Contact Lens Rule and the Evolving Contact Lens Marketplace

Introduction

ALYSA BERNSTEIN: Good morning. My name's Alysa Bernstein and I'm an attorney in the Bureau of Consumer Protection at the Federal Trade Commission. On behalf of my colleagues, I'm very excited to welcome you all to the Contact Lens workshop. We're excited to explore the contact lens marketplace with you today. Before we get to the main event, I need to review a few administrative details, so I hope you've had your coffee already.

Please silence any mobile phones and devices. If you need to use them during the workshop, please be respectful of the speakers and your fellow audience members. Be aware if you leave the Constitution Center building for any reason during the workshop, you're going to have to go through security again. Keep this in mind and plan ahead, especially if you're participating on a panel so that we can do our best to remain on schedule.

The restrooms are just outside the auditorium. The plaza east cafeteria is located inside the building. So you can use it without going through security. The cafeteria is the place to go if you like coffee or tea without having to leave the building. It's open till 11 AM, and then it'll reopen at 11:30, and remain open till 3:00 PM. There's no food or drink other than water permitted in the auditorium.

Most of you received a lanyard with a plastic FTC the event security badge. We reuse these for multiple events, so when you leave for the day, please return your badge to the event staff. If an emergency occurs that requires you to leave the auditorium but remain in the building, follow the instructions provided over the PA system.

If an emergency occurs that requires the evacuation of the building, the alarm will sound, and everyone should leave the building in an orderly manner through the main 7th Street exit. After leaving the building, turn left, and proceed down 7th Street, and across E Street to the FTC emergency assembly area. Remain there until instructed to return to the building. If you notice any suspicious activity, please alert building security.

Be advised this event may be photographed, and it is being webcast, and recorded. By participating, you are agreeing that your image and anything you say or submit may be posted indefinitely at FTC.gov or one of the Commission's publicly available social media sites.

Welcome to those watching via the webcast. We'll make the webcast and all of the workshop materials available online to create a lasting record for everyone who is interested in these issues. For those of you on Twitter, we'll be tweeting today's workshop at #ContactLensFTC. If you'd like to ask a question via Twitter, please tweet your question using that hashtag.

We'll also be accepting questions via paper cards. They look like this, for those who are here in the audience. You may have picked up some of these cards already at check in. Workshop staff

will also walk around and distribute these cards during each session. And then we'll collect the cards, and bring them up to the moderators. Due to time constraints, we will not be able to address all questions during the workshop itself, including those we receive via Twitter, but workshop staff will certainly review all of the questions.

If you'd like to submit a formal written comment about issues that we discussed at the workshop, we welcome online submissions at the FTC's website through April 6. If you need anything during the conference today, please feel free to ask FTC staff who are wearing the official workshop badges, including the paralegals who greeted you at the registration desk.

Lastly, I want to thank our panelists for taking part in today's workshop. We're grateful for your time. Aside from the people you'll see on stage today, the program would not be possible without the great work of Kristal Peters and Bruce Jennings, the honors paralegals that have been helping you throughout the day, the assistance of our college interns, Jennifer Thompson and Brianna Thomas. Also providing invaluable support are Nathan Otlewski, from our Division of Consumer and Business Education, Nicole Jones from Office of Public Affairs, and Bonnie McGregor from our Division of Advertising Practices.

Now it's my honor to introduce our acting director of the Bureau of Consumer Protection, Tom Pahl, to give opening remarks. He oversees the Commission's attorneys, investigators, and administrative personnel working to protect consumers from unfair and deceptive practices in the marketplace. Tom first joined the agency in 1990, and spent more than two decades serving in various positions, including as an attorney advisor for former FTC commissioners, Orson Swindle and Mary Azcuenaga, and as assistant director in the Divisions of Financial Practices and Advertising Practices.

In his position as Assistant Director of Advertising Practices, Tom oversaw the Commission's work on the Contact Lens Rule, so he's definitely not a stranger to many of the issues we'll be discussing today. Welcome, Tom.

Opening Remarks

TOM PAHL: Well, thank you, Alysa, and good morning, everyone. I'm Tom Pahl, the acting director of the FTC's Bureau of Consumer Protection. Welcome to the FTC workshop on the Contact Lens Rule and the evolving contact lens marketplace. It's great to see so many people here getting together on a topic that affects so many Americans. In fact, more than 41 million Americans, more than 16% of the United States population, wear contact lenses, and that number is growing.

In 2002, just prior to the creation of the Contact Lens Rule, about 13% of Americans wore contacts-- 5 million fewer than today. And that growth may be accelerating. According to one industry tracker, The Vision Council, who will be one of our panelists today, 1.3 million more Americans are wearing contacts now than 12 months ago. Contact lenses are also a major purchase for many consumers, with many spending hundreds of dollars a year on lenses.

Besides the benefits that consumers quite literally see, contact lenses are a big business. US sales revenue surpassed \$5 billion last year, up from less than \$2 billion in 2002. The variety of lenses and of places to buy them is far more diverse than it once was. Consumers can now choose from online sellers, big box stores, wholesale clubs, retail chains, and of course, from independent eye doctors.

We at the FTC liked to think that the Contact Lens Rule has contributed to the growth and diversity of the contact lens marketplace. The Rule has been in place since 2004, but it's worth reviewing its history and the statute that provides the framework for the Rule. I'm particularly well-suited, as Alysa had mentioned, to discuss the industry because I was one of the FTC staff members who worked on promulgating the original rule in 2004.

Often, what people think of as requirements imposed by the FTC through the Contact Lens Rule are actually requirements spelled out in the statute. Specifically, the Fairness to Contact Lens Consumers Act, or FCLCA, which went into effect in 2004. At the time of the Act's passage, about two thirds of the states already had statutes requiring some form of prescription release to consumers.

Yet despite these laws, Congress determined that many consumers were still not getting copies of their prescriptions, and were having a tough time obtaining lenses from third party sellers due to prescription verification obstacles. Problems with prescription release and verification hampered competition, and limited the ability of consumers to comparison shop. Congress also had concerns that some sellers were selling lenses without requiring a valid prescription.

The Act was intended to remedy these concerns. Foremost is what's known as the automatic prescription release requirement, which mandates that prescribers give consumers a free copy of their prescription at the end of a contact lens fitting, even if the consumer doesn't ask for it. The Act further provides that consumers can take prescription to any seller to be filled. Because it's not always possible for consumers to present an actual copy-- perhaps the consumer lost the prescription or wasn't given it-- the Act also requires that prescribers verify prescriptions.

In the Act, Congress opted for a framework that includes three possible methods of obtaining verification. A prescription is considered verified if first, the eye doctor confirms the accuracy of the prescription. Second, the eye doctor corrects inaccuracies in the prescription. Or third, the doctor fails to respond to the verification request within eight business hours. This third method is commonly known as passive verification.

In constructing the verification framework this way, the idea was that prescribers can prevent consumers from using an invalid prescription, and there are sound medical reasons for doing so. But prescribers also would not be able to block third parties from selling to consumers simply by ignoring a third party's verification request. The Act also makes it illegal to sell lenses without either verifying the prescription, or obtaining a copy of the consumer's prescription. It also prohibits sellers from altering a prescription or switching from the prescribed brand.

The heart of the Act is automatic prescription release and passive verification. We can, and will, talk today about whether these are working as intended, but to substantially alter these

requirements would require legislative action. It's not something the Commission has the authority to do by rulemaking.

Today, our focus is primarily on the Contact Lens Rule, which the Commission issued in 2004 to implement the Act. The Rule tracks the statute very closely, with the same requirements that prescribers release and verify prescriptions, and don't charge extra for doing so. The Rule also contains some additional provisions, such as a recordkeeping requirement for sellers, a definition as to what constitutes eight business hours, and a requirement that during the eight hour period, a seller has to provide an opportunity for the prescriber to communicate with them.

Which brings us to the current rule review. In September 2015, as part of our periodic regulatory review process, the Commission sought public comment on the Contact Lens Rule -- how it was functioning, whether it was still needed, its benefits and its burdens. In response, the FTC received 660 comments. Virtually all of them agreed that there is a continuing need for the Rule, and that it benefits consumers and competition.

At the same time, many commenters also recommended that the Commission make modifications to the Rule. Some felt that sellers and consumers were abusing the passive verification system to avoid seeing their eye doctor, and were getting lenses without a valid prescription. Other commenters said that verification requests, robocalls in particular, were a burden on doctors. Yet other commenters said that even after more than a decade, many prescribers were still not releasing prescriptions. Some released them, but only if patients requested them. Others never released them at all, instead steering patients into doctor-owned optical shops for their contact lens purchases.

After viewing all the comments, surveys, and other information that was submitted, the Commission decided in November 2016 that there was need for improved compliance with the Rule's automatic prescription release requirement, as well as a need to create a mechanism for monitoring and enforcing the Rule. To accomplish this, the Commission proposed to amend the Rule to require that prescribers obtain a signed acknowledgment form from patients, confirming that they had received prescriptions. Prescribers would have to hold onto these signed receipts for three years.

The Commission believed these changes would lead to increased prescription release, which in turn would improve compliance with the Rule. Increased prescription release would enhance patient flexibility and choice, reduce costs for patients, sellers and prescribers, and reduce consumer harm from verification errors. The Commission believed that these benefits exceeded the burden of one minute per patient that it had estimated it would take to obtain a signed receipt, and save into the patient's file.

In response to this proposed amendment, we received over 4,000 comments, including more than 800 from eye doctors alone. While many commenters supported the proposed amendment, the comments raised many issues the Commission decided deserved additional attention and examination. The optical marketplace is evolving in many ways with new developments in telehealth, patient portals, online and subscription delivery models, as well as developments in the types of lenses that people wear. As just one example, less than 8% of consumers used daily

disposable lenses in 2005. Nearly 30% use them in 2017 and as many as 50% are projected to use them by 2021.

In light of the changes to the market, and the comments we received, the Commission has decided to hold the workshop that we are going to have today. We've assembled a great group of panelists that include optometrists and ophthalmologists, online sellers, brick and mortar retailers, academics, consumer advocates, economists, and of course, one or two lawyers, because you can never have a panel in Washington without lawyers.

Today, we'll have six panels. We'll start with a short look at the marketplace. Then move on to discuss health and safety. And then competition. After lunch, we'll resume with a panel examining verification, followed by a panel on facilitating consumer choice. We'll wrap up with a panel looking ahead at developments and disruptions that may be coming down the pike.

By having these discussions today, we hope to educate ourselves about changes in the marketplace that may create opportunities for consumers to obtain contact lenses safely, and at competitive prices. We'll also explore how the Contact Lens Rule can foster competition, maximize consumer benefits, and minimize burdens on prescribers and sellers.

So let me thank our panelists for agreeing to share their knowledge and experience with us. I know some of you have come great distances to join us here today, and we appreciate it very much. And let me also thank everyone who couldn't make it in person, submitted comments in advance, or is joining us via online. We read all comments that we receive, and take them seriously.

Finally, I want to thank the FTC staff from the Bureau of Consumer Protection, the Bureau of Competition, the Bureau of Economics, and the Office of Policy Planning, who have worked so hard and well to put this workshop together. The fact that this workshop draws from all the different parts of the FTC, to me, really speaks to the breadth of the issues, their complexity, and their importance to the agency. And so I've been thrilled to see that our staff have been able to work together to make sure that the expertise of all parts of the agency are brought to bear on the issues that we're going to discuss today.

So with that, I'm going to turn the podium over to Beth Freeborn and the first panel to get us started. Thank you everyone, and have a great day.