FEDERAL TRADE COMMISSION

16 CFR Part 315
RIN 3084–AB36

Contact Lens Rule

AGENCY: Federal Trade Commission (“FTC” or “Commission”).

ACTION: Notice of proposed rulemaking; request for public comment.

SUMMARY: As part of its regulatory review of the Contact Lens Rule (“Rule”), and consistent with the requirements of the Fairness to Contact Lens Consumers Act (the “Act”), the Federal Trade Commission proposes to amend the Rule to require that prescribers obtain a signed acknowledgment after releasing a contact lens prescription to a patient, and maintain each such acknowledgment for a period of not less than three years. The Commission seeks comment on this proposal and several other issues.

DATES: Written comments must be received on or before January 30, 2017.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the SUPPLEMENTARY INFORMATION section below. Write “Contact Lens Rule, 16 CFR part 315, Project No. R511995” on your comment, and file your comment online at https://ftcpublic.commentworks.com/ftc/contactlensrule by following the instructions on the web-based form. If you prefer to file your comment on paper, write “Contact Lens Rule, 16 CFR part 315, Project No. R511995” on your comment and on the envelope and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC–5610 (Annex C), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex C), Washington, DC 20024.


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I. Background

A. Overview of the Contact Lens Rule

In 2003, Congress enacted the Fairness to Contact Lens Consumers Act,1 and pursuant to the Act, the Commission promulgated the Contact Lens Rule on July 2, 2004.2 The Rule went into effect on August 2, 2004. The Contact Lens Rule promotes competition in retail sales of contact lenses by facilitating consumers’ ability to comparison shop for contact lenses. When a prescriber completes a contact lens fitting, the Rule requires that the prescriber provide the patient with a portable copy of her prescription. The Rule also requires that the prescriber verify or provide such prescriptions to authorized third parties. At the same time, the Rule requires that contact lens vendors only sell contact lenses in accordance with valid prescriptions written by licensed prescribers.

The Rule specifies that a prescriber may not require: (1) The purchase of contact lenses as a condition of providing the prescription or verification; (2) payment in addition to, or as a part of, the fee for an eye examination, fitting, and evaluation as a condition of providing the prescription or verification; or (3) the patient to sign a waiver or release as a condition of releasing or verifying the prescription.3 The prescriber is also prohibited from requiring immediate payment before the release of a prescription, unless the prescriber requires immediate payment when an exam reveals that the consumer does not need ophthalmic goods.4

The Rule also places certain requirements on sellers. It mandates that sellers dispense contact lenses only in accordance with a valid prescription that is either presented to the seller or verified by direct communication with the prescriber.5 The Rule sets out the information that must be included in a seller’s verification request, and directs that a prescription is only verified under the Rule if: (1) A prescriber confirms the prescription is accurate; (2) a prescriber informs the seller that the prescription is inaccurate and provides an accurate


3 16 CFR 315.3(b).

4 16 CFR 315.4.

5 16 CFR 315.5(a).
prescription in its stead; or (3) the prescriber fails to communicate with the seller within eight business hours after receiving a compliant verification request.6 The Rule states that if the prescriber informs the seller within eight hours of receiving the verification request that the prescription is inaccurate, expired, or invalid, the seller shall not fill the prescription. The Rule requires that the prescriber specify the basis for the inaccuracy or invalidity of the prescription, and if the prescription is inaccurate, the prescriber must correct it.7

Sellers may not alter a prescription, but for private label contact lenses, may substitute identical contact lenses that the same company manufactures and sells under a different name.8 Sellers and others involved in the manufacture, assembly, processing, and distribution of contact lenses are prohibited from representing that contact lenses may be obtained without a prescription.9

The Contact Lens Rule sets a minimum expiration date of one year after the issue date of a prescription with an exception based on a patient’s ocular health.10 The Rule also incorporates the Act’s preemption of state and local laws and regulations that establish a prescription expiration date of less than one year or that restrict prescription release or require active verification.11

B. Regulatory History

The FTC has more than three decades of regulatory and research experience regarding the optical goods industry. In addition to the Contact Lens Rule, the Commission enforces the Ophthalmic Practice Rules (hereinafter ‘‘Eyeglass Practice Rules’’), initially promulgated in 1978,12 Prior to the Eyeglass Rule, many prescribers either refused to release prescriptions to their patients or charged an additional fee to do so.13 Prices for glasses varied widely, but

6 16 CFR 315.5(b)(b)(c).
7 16 CFR 315.5(d).
8 16 CFR 315.5(f).
9 16 CFR 315.5(g).
10 16 CFR 315.6.
11 16 CFR 315.11(a).
12 16 CFR 315.11(b). The Rule states further that “[a]ny other state or local laws or regulations that are inconsistent with the Act or this part are preempted to the extent of the inconsistency.” 16 CFR 315.11(b).
14 43 FR at 23998. The Commission found, for example, that in nearly every survey of practicing optometrists considered in the rulemaking record, more than 50% of optometrists imposed a restriction on the availability of eyeglass prescriptions to patients. See id.
15 Id. See, e.g., Advertising of Ophthalmic Goods and Services, supra note 8.
19 See, e.g., Advertising of Ophthalmic Goods and Services, supra note 8.
20 Id. See, e.g., 16 CFR 315.5(d).
21 16 CFR 315.5(e).
22 See 21 U.S.C. 331(a), 332, 352(f), and 353(b)(1).
23 15 U.S.C. 7601(a); 16 CFR 315.3(a)(i).
25 15 U.S.C. 7601(b)(1)–(3); 16 CFR 315.3(b)(1)–(3).
prescription when “directed by any person designated to act on behalf of the patient.” 26 Sales of contact lenses require a valid prescription that is verified by a prescriber. Such verification takes place: (1) When the prescriber confirms that the prescription is accurate, by phone, facsimile, or electronic mail; (2) when the prescriber informs the seller that the prescription is inaccurate and provides the correct prescription; or (3) when the seller seeks verification of a given prescription from a prescriber, and the prescriber does not communicate with the seller within eight business hours of the seller’s request for information. 27 This eight-hour, default “passive verification” lessens the demands on prescribers in the event a seller forwards a query about an accurate and complete prescription from a properly identified patient. It also prevents prescribers from blocking verification—and impeding consumer access to contact lenses—simply by refusing to respond to verification requests.

C. The Evolving Contact Lens Marketplace

When contact lenses were first introduced, they were made of rigid material that required a prescriber to custom fit each pair. Beginning in the late 1980s, manufacturers began to sell disposable lenses, designed to be replaced on a daily, weekly, or monthly basis. In addition, technological advances resolved most lens-standardization issues, eliminating the need for a prescriber to fit each pair to the individual once the initial prescription had been finalized. Today, the vast majority of replacement lenses bought pursuant to an individual’s prescription will be identical, regardless of whether the patient purchases them from the prescriber or a third-party seller. 28 This enables the sale of lenses to be unbundled from the fitting exam, and makes it feasible for non-prescribers to sell contact lenses.

These technological advances have increased the comfort and convenience of contact lenses, leading to growth in the number of contact lens wearers, and changes in the type and variety of lenses worn. According to the U.S. Centers for Disease Control and Prevention (“CDC”), there are now approximately 40.9 million contact lens wearers in the United States age 18 and older, representing more than 16% of the population. 29

Overall, the U.S. market for contact lenses currently is estimated to be between $4 billion and $5 billion annually. 30 Of that, approximately 40% of sales are made by independent eye care professionals (optometrists and ophthalmologists), 19% by conventional retail chains (such as LensCrafters, etc.), 23% from mass merchants and wholesale clubs (such as Costco, Sam’s Club, etc.), and 18% by online sellers (16% of sales are by “pure play” online sellers, such as 1–800 CONTACTS, that do not have a physical retail presence). 31 By contrast, in 2006, the total U.S. market for contact lenses was approximately $3.3 billion, with estimated online sales representing less than 13% of the market. 32 There also are significantly more types of lenses in the U.S. now than there were 10 to 15 years ago. 33 At the same time, use of daily disposable lenses increased from just 7.5% in 2005 to 28% in 2015, while use of conventional one-year lenses declined sharply, from 19% to 1%. 34

II. Contact Lens Rule Review

On September 3, 2015, the Commission solicited comments on the Contact Lens Rule as part of its periodic review of its rules and guidelines. 35 The Commission sought comments on: The economic impact of, and the continuing need for, the Rule; the benefits of the Rule to consumers purchasing contact lenses; the burdens the Rule places on entities subject to its requirements; the impact the Rule has had on the flow of information to consumers; the degree of industry compliance with the Rule; the need for any modifications to increase its benefits or reduce its burdens or to account for changes in relevant technology; and any overlap or conflict with the Rule and other federal, state, or local laws or regulations. The comment period closed on October 26, 2015.

This Notice of Proposed Rulemaking (“NPRM”) summarizes the comments received and explains the Commission’s decision to retain the Contact Lens Rule. It also explains why the Commission proposes certain amendments and why it declines to propose others. Additionally, it seeks comment on certain questions. Finally, the NPRM sets forth the Commission’s regulatory analyses under the Regulatory Flexibility and Paperwork Reduction Acts, as well as the text of the proposed amendments.

The Commission received 660 comments from individuals and entities representing a wide range of viewpoints, including prescribing eye care practitioners (ophthalmologists and optometrists), opticians and other eye-wear industry members, sellers of contact lenses (both online and brick-and-mortar), contact lens manufacturers, and consumer and competition advocates. 36 Virtually all commenters agreed that there is a continuing need for the Rule and that it benefits consumers and competition. The majority of commenters recommended some modifications to the Rule in order to maximize the benefits to consumers and competition, decrease the burden on businesses, protect consumers’ eye health, or improve overall compliance with the Rule’s existing requirements. Many commenters—including prescribers, sellers, manufacturers, legislators, and consumer advocates—also indicated that increased enforcement efforts would be beneficial.

Some commenters—including contact lens sellers, opticians, state and federal legislators, consumer advocacy groups, and others—stated that the Act’s intent to provide a competitive marketplace is
not being fully realized because prescribers are not complying with one of the major underpinnings of the Rule: the automatic release of prescriptions to patients.37 Some commenters also asserted that some prescribers are interfering with the prescription verification process and thereby impeding consumers’ ability to comparison shop.38

Many commenters discussed the fact that the use of contact lenses presents certain eye health risks. Prescribers pointed out that merely by wearing contact lenses, patients will experience an increased risk for microbial keratitis (also referred to as infectious or bacterial keratitis).39 Indeed, contact lens wear has been identified as the largest single risk factor for microbial keratitis.40 Furthermore, this risk increases if a patient wears the lenses too long, wears the lenses overnight, or fails to comply with the recommended replacement schedule.41 Other commenters noted that additional risk factors for ocular complications include improper lenses or poor hygiene practices.42 Other commenters pointed out that improperly fitting contact lenses may result in corneal ulcers and other health issues.43

In light of the risks associated with the use of contact lenses, many commenters—including individual prescribers, optometric and ophthalmologic associations, and contact lens manufacturers—stressed the important need to adequately protect eye health and safety and argued that the current Rule framework is not sufficient to do so.44 For example, the Contact Lens Association of Ophthalmologists, Inc. (“CLAO”) asserted that the Rule’s passive verification framework “creates a mechanical advantage for dangerous lenses” and “eliminates a critical opportunity to improve the public health of contact lens consumers by addressing risky wear and care practices.”45 As support, the CLAO comment cited to an article in the CDC’s weekly report recommending vigorous health promotion activities to encourage contact lens wearers to improve their hygiene behaviors.46 However, the comment did not include any empirical evidence showing that the passive verification mechanism has actually resulted in the renewal of expired prescriptions. Furthermore, the CLAO did not present any data showing that patients are not visiting their eye care practitioners as a result of the passive verification mechanism (or any other Rule provision).

Other examples of patient harm identified by commenters were either hypothetical or anecdotal (such as case reports about the experiences of individual patients).47 The comments, in particular, canaliculise existing vision issues, including leading to infection in the eye”.

44 Commenters provided illustrations of how they believe the current operation of the Rule is jeopardizing consumer health. For example, some commenters posited that loopholes in the Rule allow patients to obtain lenses with expired, or otherwise invalid, prescriptions. According to this line of argument, patients are obtaining lenses without annual eye examinations, or without the proper medical oversight to monitor their use of contact lenses, and this could result in delayed or missed diagnosis of contact lens-related eye issues, other eye health issues, or other health conditions that otherwise would be detected during an annual eye examination. Commenters also expressed concerns that if patients do not visit eye care prescribers regularly, they will not receive proper training on the care and use of contact lenses.

45 Comment #572. See also American Optometric Association (Comment #644) (“allowing repurchases based on long-expired prescriptions may be, at the time, convenient for the patient and profitable for the seller, but increases the risk of patient harm.”)

46 Cope, supra note 29.

47 See, e.g., Combs (Comment #90) (patient sleeping in lenses for a week at a time, using outdated prescription).


49 Comment #6623.


52 Stapleton, supra note 41.

53 The Fogel and Wu studies have relatively small samples of consumers who purchased contact lenses over the Internet and the sample recruiting methodologies call into question whether the results are generalizable to the national population. In addition, the results of these studies link
Some commenters merely asserted that patient eye health is being compromised because online retailers do not comply with the Rule.\textsuperscript{54} Online retailer practices have convinced consumers that contact lenses are a commodity rather than a medical device,\textsuperscript{55} and online retailers do not provide patients with proper care instructions.\textsuperscript{56} Other prescribers alleged that patients who purchase contact lenses online or through mail order companies are noncompliant with follow-up eye care and the safe use of contact lenses.\textsuperscript{57} or purchase lenses with expired prescriptions and then experience complications.\textsuperscript{58} A few commenters asserted that online purchasing in particular allows patients to obtain lenses without a valid, unexpired prescription and provided anecdotal examples of patients who avoided regular eye examinations by purchasing lenses online.\textsuperscript{59}

The Commission does not find the evidence proffered in this Rule review sufficient to support a conclusion that the Rule is ineffectively protecting consumer eye health. Commenters did not provide sufficient reliable empirical evidence that the current Rule leads to the increased acquisition of contact lenses without a valid prescription or increased incidence of contact lens-related eye disease or adverse eye conditions. Furthermore, despite commenters’ concerns about online or mail order sales of contact lenses, the Commission has not seen reliable empirical evidence to support a finding that such sales are contributing to an increased incidence, or increased risk, of contact lens-related eye problems.\textsuperscript{60} In addition, the particular risks associated with contact lens use (or overuse) were previously considered by Congress and the Commission during the passage of the Act and the implementation of the Rule.\textsuperscript{61} The current rulemaking record does not provide any basis to disrupt this original analysis.

III. Availability of Contact Lens Prescriptions to Patients

Section 315.3 of the Rule provides the framework under which prescribers are required to release contact lens prescriptions to patients and other authorized third parties. Section 315.3 also imposes limitations on the conditions prescribers may require of patients before releasing their prescription.

A. Section 315.3(a)(1)—Automatic Prescription Release

Section 315.3(a)(1) of the Rule requires a prescriber to provide a copy of the contact lens prescription to the patient after completing a contact lens fitting, regardless of whether it was requested by the patient. Section 315.3(a)(1) of the Rule tracks the language of the Act verbatim.\textsuperscript{62} This provision, referred to as automatic prescription release, was intended to empower consumers to comparison shop for contact lenses.\textsuperscript{63} Automatic prescription release has been in effect for 12 years and is now widely supported by commenters, including both prescribers and third-party sellers,\textsuperscript{64} with several recognizing it as the “cornerstone,”\textsuperscript{65} or “pillar,”\textsuperscript{66} of the Act and the Rule. Of the 660 comments received by the Commission, none explicitly opposed the automatic release provision of the Rule although some prescribers asserted that from a safety perspective, it is in patients’ best interests to purchase contact lenses from their prescribers rather than from third-party sellers.\textsuperscript{67} More common, however, were comments supporting automatic prescription release, but suggesting that the provision was not sufficiently complied with or enforced.\textsuperscript{68} Other commenters suggested that the automatic prescription release provision should take into account advances in technology.

1. Compliance With the Automatic Prescription Release Requirement

Several commenters stated that prescribers routinely fail to comply with the automatic prescription release requirement; Some do not—or do not always—provide a prescription unless a consumer explicitly requests it; some do not provide complete prescriptions, as required by the Rule; and some do not provide prescriptions at all.\textsuperscript{69} These comments are, in general, concordant with complaints the Commission has received from numerous consumers apart from this rule review process.\textsuperscript{70} Some consumer complaints, however, may be based on a misunderstanding of the Rule, as there can be confusion about whether contact lenses have become extremely competitive.\textsuperscript{71} This competition has led to increased investment in research and development and a proliferation of innovation that served to benefit the nearly 44 million Americans who use contact lenses every day.\textsuperscript{72} See also Carroll (Comment #5); Voigt (Comment #551); Alinuello (Comment #253).

60 Several commenters referenced the article published in the CDC weekly report (Cope, supra note 29) for the assertion that the sale of contact lenses requires stricter oversight because of this article’s finding that, “approximately 99% of wearers reported at least one contact lens hygiene risk behavior.” The Commission notes two important caveats. First, the authors reached this number by including any wearer that indicated that they had “ever” engaged in a risk behavior. Hence, the 99% figure includes every wearer, who at any time, had engaged in a risk behavior even once. Second, the survey instrument asked users where they purchased their lenses, and in a separate article, the authors did not conclude that there was any difference in either habits or health risks based on whether the lenses were purchased from a provider, retail store without an exam, or over the internet. See Robin Chalmers et al., “Is Purchasing Lenses from the Prescriber Associated with Better Habits Among Soft Contact Lens Wearers?,” Cont. Lens Anterior Eye 2016 Aug 12 (Epub ahead of print) PMID: 27527924. See, e.g., 2004 Possible Barriers to E-Commerce Report, supra note 19, at 8–12.

61 See, e.g., U.S.C. 7601a(b)(1).


about when or under what conditions patients should receive their prescriptions. For example, the Rule requires that a prescription be provided after the completion of the contact lens fitting, not necessarily at the conclusion of the initial visit with the prescriber. Because a fitting may not be complete until a follow-up visit, a patient might incorrectly believe that she should have been provided with her prescription at the conclusion of the first visit.

A number of prescribers commented, to the contrary, that they always provide contact lens prescriptions to their patients, and believe that others in their profession do so as well. Prescribers, for their part, may be aware in a general way of their obligation to release prescriptions and yet be unaware of all of the conditions of prescription release required by the Rule. Hence, they might be mistaken in assessing, and reporting on, their own compliance.

Many reports of compliance and noncompliance are anecdotal, and robust empirical data are sparse. Although the Commission would prefer better empirical evidence about compliance and noncompliance with the Rule, and about the effects of the Rule, some survey evidence has been submitted by sellers, prescribers, and manufacturers. The Commission considers these submissions to be suggestive and, to an extent, informative, but none can be regarded as definitive. It is important to note, at the outset, that all of these surveys are subject to particular methodological limitations, as well as limits commonly associated with survey evidence. For example, patients may sometimes misremember the details of any particular prior encounter with a prescriber; prescribers, for their part, may be mistaken about the particulars of a given clinical encounter, about the frequency with which they do or do not release prescriptions, or about the frequency or severity of problems they may encounter in verifying prescriptions. For the most part, the surveys do not include independent, objective tests of patient or prescriber recollections. In addition, survey responses may be sensitive to the ways in which survey questions are framed.

As part of its comment, 1–800 CONTACTS, the country’s largest online seller of contact lenses, submitted a survey conducted on its behalf by a third-party research firm, Survey Sampling International. That survey found that only 35% of contact lens wearers reported receiving a copy of their prescription without having to ask for it. Another 28% reported receiving their prescription upon request (either at the office or afterwards), while 36% said they never received it at all. Additional, and similarly-designed surveys, conducted on behalf of 1–800 CONTACTS in November 2014 and May 2015 found that 45% and 48% of contact lens wearers, respectively, reported that they were automatically given a hard copy of their prescription at their last eye exam. Some commenters also cited a 2008 report in a contact lens industry publication which found that just half of surveyed optometrists replied, “yes, to every patient,” when asked if they routinely release contact lens prescriptions.

Other commenters stated that even when consumers receive a copy of their prescription, the prescription information is not always complete or correct. One online seller of replacement lenses contended that some consumers have received prescriptions incomplete by omitting information, in order to make it more difficult for consumers to buy lenses from third-party sellers. According to an internal review of prescriptions on file with 1–800 CONTACTS, 23% were missing one or more parameters required to fill an order, and 43% lacked complete contact information for the prescriber. Such omissions, when they occur, may be intentional, may reflect clerical or communication errors, or may reflect an imperfect understanding of the Rule’s complete requirements for prescription release. All such errors could reflect failures to comply fully with the requirements of the Rule.

The shear number of verifications conducted by third-party sellers also may suggest that many consumers are not automatically receiving their prescriptions from prescribers, or are not receiving complete prescriptions. Under Section 315.5, verifications are only necessary if a consumer fails to provide a third-party seller with a complete prescription. According to discussions with industry, roughly three-quarters of third-party contact lens sales require prescription verification, meaning that the consumer did not present a complete prescription at the time of the attempted purchase. Seemingly contrary to this data is a survey, conducted on behalf of Johnson & Johnson Vision Care, Inc., a large contact lens manufacturer, according to which 61% of consumer respondents said that they provided the retailer with their prescription the last time they purchased lenses online or by telephone. The Commission does not have enough data or insight to determine if either of these surveys accurately reflects industry practice. It is possible that some of these consumers received incomplete or otherwise problematic prescriptions. If so, those consumers might accurately report that they provided something that they believed to be a prescription at the time of purchase when, in fact, the document they provided was not complete or fillable, and hence (a) required verification and (b) was not a “prescription” as defined by the Rule. Alternatively, some consumers could have received their prescriptions from

72 Howe (Comment #53). See also, e.g., Galdamez (Comment #167); Ahn (Comment #215).
prescribers but misplaced them, forgot them, or simply thought it easier to obtain the refraction information from their contact lens boxes. Whatever the frequency with which each of these possibilities occurs, it is evident that third-party sellers are presently verifying a significant percentage of contact lens prescriptions with prescribers. It is also evident, based on the comments submitted, that many prescribers feel there are too many verification requests, and that it would be helpful if more patients provided a copy of their prescription to sellers rather than rely on the verification process.

Another concern raised by commenters is whether consumers are even fully aware of their right to their prescriptions. According to the aforementioned October 2015 survey conducted on behalf of 1–800 CONTACTS, 46% of contact lens wearers were unaware that they had a right to receive a copy of their prescription, even though the Rule has been in effect since 2004. The manner in which this particular question was phrased in the 1–800 survey, however, raises Commission concerns about the validity of, or the weight that should be accorded to, the results for this question. In particular, the question is leading, it lacks an “I don’t know” option, it uses a term—“hard copy”—which some patients may not understand, and it is phrased in such a way that it could give rise to social desirability bias, since respondents might be reluctant to admit that they are unaware of their rights under federal law. That being said, a response error resulting from social desirability bias in this instance would more likely lead to undercounting, or underestimation, of the number of patients who are unaware they have a right to their prescription. In other words, the way the question was phrased could make it seem that more patients are aware of their right than is actually the case, and it is thus possible that more than 46% of contact lens wearers are unaware that they have a right to automatically receive their prescription at the end of their contact lens fitting.

2. Commenter Suggestions for Improving Automatic Prescription Release Compliance

Some commenters asked the Commission to take specific actions to increase compliance with the automatic prescription release requirement. Some commenters recommended that the Commission increase the number of enforcement actions it takes against prescribers who fail to comply with automatic prescription release in order to “send a message to compliant prescribers.” Another suggestion, put forth by 1–800 CONTACTS and other third-party sellers, is to amend the Rule to require that, immediately upon completing a contact lens fitting, prescribers provide patients with an eye care patients’ “Bill of Rights,” informing them of their right to their prescription, that the prescription will be provided without request, and that they have a right to purchase lenses from the seller of their choice. Another commenter, Consumers Union, the policy and advocacy division of Consumer Reports, suggested that prescribers inform consumers at the beginning of their visit—as part of the initial paperwork—that they will provide a prescription at the end of the examination at no additional cost.

Other commenters suggested requiring patients to sign an “Acknowledgment of Release” document, confirming that they received their prescriptions. Prescribers would be required to retain the signed acknowledgments, which then could be inspected by the Commission to verify compliance.

One commenter, an Arizona state representative, said she was considering introducing state legislation that would mandate such signed acknowledgments for prescribers in her state. Having considered the various comments and suggestions, the Commission believes that improving compliance with automatic prescription release would further the goals of the Act. While none of the five surveys cited by commenters are definitive on the question of automatic release compliance, the Commission believes that the overall weight of evidence in the rulemaking record—including the surveys, the high number of verifications, the ongoing pattern of consumer complaints and anecdotal reports, and the industry’s long history of failing to provide prescriptions to patients even when obligated by state law—indicates that compliance with the automatic prescription release provision could be substantially improved.

Furthermore, the potential benefits of increasing the number of patients who receive their prescriptions are substantial: Increased patient flexibility and choice in shopping for contact lenses; a reduced number of verification requests, which some prescribers find burdensome; a reduced likelihood of errors associated with incomplete prescriptions; and a reduction in the number and complications of failed attempts at verification. Increasing compliance also is likely to spur more competition and innovation among contact lens sellers and manufacturers. It should also reduce the number of attempts by sellers to verify expired or inaccurate prescriptions, as well as attempts to verify prescriptions with the wrong prescriber, practices that many prescribers complained about in their comments. The cumulative effect of increased compliance would likely be lower costs and improved convenience and flexibility for patients, sellers, and prescribers as well as increased accuracy of prescriptions presented to sellers, thereby reducing potential consumer harm from inaccurate, expired, or otherwise invalid prescriptions.

Having determined that it would be beneficial to increase compliance with
the automatic prescription release provision, the Commission now evaluates various proposals put forth by commenters for how to best achieve this goal.

(a) Proposal To Increase Enforcement

Several commenters suggested that one way to better ensure automatic prescription release compliance is for the Commission to become more aggressive about enforcement. According to 1–800 CONTACTS, “Prescribers today clearly believe they can disregard their legal obligations without consequence.”

1–800 CONTACTS urged the Commission to regularly investigate prescriber practices and issue warning letters or take enforcement actions against prescribers that do not comply with the automatic prescription release provision. According to 1–800 CONTACTS, this would not only change the behavior of the targeted prescribers, but would send a signal to other prescribers that they need to comply with the Rule.

The Commission recognizes the need for increased enforcement of the automatic prescription release provision and already has taken some recent steps to achieve better compliance. For example, in April 2016, the Commission sent warning letters to 45 contact lens prescribers after receiving consumer complaints alleging that the prescribers had violated the Rule, often by failing to provide patients with their prescriptions automatically. The Commission acknowledges, however, that the absence of documentation makes it difficult to determine whether a prescriber did or did not provide a patient with a prescription as required, in any particular case. The absence of documentation also makes it difficult to determine how many times, or how frequently, a noncompliant party has violated the Rule. Instead, allegations and denials of Rule violations might often become a matter of the patient’s word against that of the prescriber, making accurate enforcement decisions, as well as enforcement actions predicated on those decisions (as opposed to warning letters) more challenging. The Commission thus believes that enforcement could improve through a mechanism to increase its ability to assess and verify compliance with the Rule’s automatic prescription release requirements.

(b) Proposal To Require an Eye Care Patients’ Bill of Rights or Notice-Upon-Check-In

A number of commenters recommended that the Commission amend the Rule to require that prescribers provide patients with written notices informing them of their right to their prescription. One suggestion, proposed by three online sellers of eye wear, is that, immediately upon completion of a contact lens fitting, prescribers provide patients with a “Bill of Rights”; that is, a written notice informing patients of their rights under the Rule, including: (1) The right to receive their prescriptions; (a) provided promptly and automatically without their having to request them; (b) at no additional charge; and (2) the right to purchase their lenses from the seller of their choice. Another suggestion, put forth by a consumers’ rights organization, is that the Rule require that, “the eye doctor inform the consumer at the beginning of the visit, as part of the initial paperwork, that the prescription will be provided at the conclusion of the visit at no additional cost.”

Either of these proposals, if implemented and complied with, would notify consumers of their rights and, presumably, would increase the percentage of patients who receive prescriptions from their prescribers. Providing the required document would remind prescribers and their staffs to provide patients with their prescriptions, and it would remind patients to ask for their prescriptions in the event that the prescriber might fail to provide them initially and without a request, as the Rule and the Act already require.

Since the Commission could draft the specific language for either the “Bill of Rights” or check-in notice, it could ensure that the notice conveys an accurate explanation of the Rule’s automatic prescription release requirements, something prescribers sometimes fail to do.

(c) Proposal To Require a Signed Acknowledgment Form

Another amendment recommended by some commenters is to require that prescribers present, and patients sign, an “acknowledgment of release,” confirming that they received their prescription at the end of their contact lens fitting. Such an acknowledgment would be a separate, stand-alone document, and prescribers would be required to retain the signed acknowledgments. An acknowledgment of release would notify consumers of their prescription portability rights and, in all likelihood, increase the percentage of patients who receive their prescription from the prescriber. Providing the required form would also serve as a reminder to
prescribers and their staffs to provide
patients with their prescriptions, and
serve as a reminder to patients to ask for
their prescription in the event that they
receive the acknowledgment form but
not the prescription. Once it becomes an
established practice, an
acknowledgment form might also
reduce confusion for patients as to when
their contact lens fitting is actually
complete, thus reducing the likelihood
of erroneous complaints about a
prescriber’s perceived failure to provide
a prescription after the completion of a
preliminary examination but when the
contact lens fitting has not yet been
completed.

Additionally, since patients would
have to affirmatively sign such an
acknowledgment, it is less likely that
such a document would go unnoticed or
unread by patients than a “Bill of
Rights” or notice-upon-check-in type of
document. And perhaps most
importantly, requiring prescribers to
retain a signed acknowledgment form
would improve the Commission’s
ability to verify whether prescribers had
complied with this requirement and had
met their obligation to release
prescriptions to their patients. Being
able to determine more accurately
whether a particular prescriber had
provided a prescription in a particular
case would reduce the number of
instances where a filed complaint
simply pits the patient’s word against
that of the prescriber. It would also
enable the Commission to evaluate the
overall rate at which both individual
prescribers and the population of
prescribers comply with the
requirement.

One potential drawback to requiring a
signed acknowledgment requirement is
the increased recordkeeping burden
imposed on prescribers, since they
would have to provide the forms and
retain the signed acknowledgments for a
certain period of time.104 This
recordkeeping burden could be reduced
to the extent that prescribers have
adopted electronic medical record systems, especially those where patient
signatures can be recorded
electronically and input automatically
into the electronic record. Furthermore,
prescribers also could scan signed paper
copies of the acknowledgment form and
store those forms electronically to lower
the costs of this recordkeeping
requirement. Accordingly, the
Commission believes that any
recordkeeping burden would be
relatively minimal and outweighed by
the benefit of having more patients in
possession of their prescriptions.

(d) Proposal To Require Signage

Another possible Rule revision is to
require that prescribers’ offices post
conspicuous signage informing
consumers of their right to their
prescription. Although this was not
specifically suggested by
commenters,105 it is currently required
by law in California, and the practice
could be expanded via the Rule to apply
nationwide.

In California, the Business and
Professional Code provides that each
prescriber office must post, in a
conspicuous place, a notice informing
patients that eye doctors are required to
provide patients with a copy of their
ophthalmic lenses prescriptions. The
notice also explains that spectacle
prescriptions are released upon the
completion of the exam, and contact
lens prescriptions are released upon the
completion of the exam or upon the
completion of the fitting process.106

Such a requirement, if adopted in the
Rule, could provide some of the same
benefits of the Bill of Rights, notice-
on-check-in, and signed acknowledgment proposals in that it
would, in theory, notify consumers of their
rights and, presumably, increase the
percentage of patients who receive
their prescription from the prescriber. A
sign could also serve as a reminder to
patients to ask for their prescription in
the event the prescriber does not
provide it. Furthermore, a sign would
impose less of a burden on prescribers
than the other proposals, since it would
only have to be posted once, as opposed
to individual copies for each and every
patient. Lastly, enforcing such a
provision would be relatively
straightforward, since the Commission
could perform spot checks on
prescribers’ offices to ensure they have
posted the required signage.

On the other hand, the Commission
lacks good evidence about the effects
of California’s particular version of this
requirement, and it is unclear how
many patients actually read posted
notices at doctors’ offices, particularly
in locations where there are already
numerous ads or other postings about

104 1–800 CONTACTS suggested that prescribers
should maintain records of acknowledgments for
three years or the length of the prescription,
whichever is longer. 1–800 CONTACTS (Comment
#568).

105 It was cited in the National Association of
Optometrists and Opticians comment, but not
expressly recommended. Comment #549.

106 16 CCR § 1566. California also has an
additional state law, CAL Bus. & Prof. Code § 2554,
which essentially requires the same signage, with
the addition of a notice stating, “Patients may take
their prescription to any eye doctor or registered
dispensing optician to be filled,” and requiring the
inclusion of complaint contact information for the
California Board of Optometry.
inability on the acknowledgment form and must maintain the form.

The acknowledgment form may be either paper or in electronic format. The acknowledgment form, whether paper or electronic, must be entitled “Patient Receipt of Contact Lens Prescription,” and must state, “My eye care professional provided me with a copy of my contact lens prescription at the completion of my contact lens fitting. I understand that I am free to purchase contact lenses from the seller of my choice.” The acknowledgment form shall be in a format that allows either conventional or electronic signatures. Prescribers may maintain copies of the acknowledgment forms in paper or electronically.

The Commission, therefore, proposes to amend Section 315.3 to add the requirement that upon completion of a contact lens fitting, and after providing a copy of the contact lens prescription to the patient, the prescriber shall request that the contact lens patient acknowledge receipt of the contact lens prescription by signing an acknowledgment form entitled, “Patient Receipt of Contact Lens Prescription.” This form must state, “My eye care professional provided me with a copy of my contact lens prescription at the completion of my contact lens fitting. I understand I am free to purchase contact lenses from the seller of my choice.” In addition, the form must also include the name of the patient, the patient signature, and the date the form was signed. In the event that the patient declines to sign the acknowledgment form, the prescriber shall note the patient’s refusal on the form and sign it.

No other statements or information, other than the address or letterhead of the prescriber, shall be placed on the acknowledgment form. The Commission also proposes to amend Section 315.3 to add the requirement that prescribers maintain the signed acknowledgments for a period of not less than three years, so that prescribers and manufacturers could demonstrate to the Commission that patients had received the acknowledgment form.

4. Additional Mechanisms for Improving Prescription Portability

The increasing number of prescribers who offer patient “portals” accessible via the Internet has made it possible for prescribers to post, and patients to obtain, prescriptions online, while maintaining the security and privacy of patients’ health information.

This, along with the patient’s ability to email prescription copies to sellers, increases prescription portability. It also could reduce the verification burden on prescribers, to the extent that patients could quickly and reliably obtain complete and accurate copies of their prescriptions, without making specific requests to their prescribers for such copies, and to the extent that such prescriptions could be filled without the seller intervening to verify the prescriptions directly with the prescribers. In addition, patient portals do not raise the same concerns expressed by some prescribers about sharing patient prescription information with third parties, because patient portals enable the secure sharing of such information directly with the patients themselves.

Accordingly, the Commission believes that the use of patient portals to provide patients with access to electronic copies of their prescriptions can benefit prescribers, sellers, and patients. The Commission encourages prescribers, in addition to providing patients with a copy of their prescriptions, to make prescriptions available via patient portals in accordance with federal and state law, including HHS guidance.

Uploading prescriptions to patient portals will make it easier for patients to access their prescriptions and, consequently, to transmit them to sellers when purchasing lenses. This, in turn, may substantially increase the accuracy of seller-filled orders and reduce the verification burden on prescribers.

To facilitate the likelihood that patient portals will increase prescription portability, the patient portal should be configured to allow the patient to download, save, and print the prescription, as well as to allow the patient to email, or otherwise transmit, prescriptions directly to a seller.

At this time, the Commission does not have enough information to determine whether solely posting a contact lens prescription to a patient portal is sufficient to satisfy the Rule’s obligation for prescribers to provide copies of contact lens prescriptions to patients. However, the Commission seeks comment on the use and adoption of patient portals, as well as the potential ability for such technology to allow prescribers to comply with the automatic prescription release requirement of the Rule.

B. Section 315.3(a)(1)—Additional Copies of Prescriptions

Some commenters requested that the Commission amend the Rule to expressly obligate prescribers to provide duplicate prescription copies to patients upon request. According to Consumers Union, such a requirement would provide “additional protection for situations in which the eye doctor neglects to provide the prescription during the visit, as well as for situations in which the prescription is misplaced by the consumer.” Likewise, the health and safety organization Prevent Blindness asserted that duplicate copies should be available upon request since “[i]t is a basic consumer right to own one’s prescriptions.”

During the initial rulemaking, the Commission stated that the Act neither requires prescribers to provide, nor prohibits them from releasing, additional copies of the prescription.

At that time, the Commission declined to endorse patient portals because the Commission was concerned that allowing patients to access prescriptions online could undermine prescription security by allowing individuals other than the intended recipient to access the data. However, since then, the Commission has become aware of technological advancements that have increased prescription security and made patient portals more feasible. Accordingly, the Commission is proposing to amend the Rule to provide for additional copies of prescriptions via patient portals.

107 Although the Commission lacks data on the use of patient portals by ophthalmologists or optometrists in particular, the Commission notes that a recent report to Congress observes that increasing numbers of physicians and other types of health care providers are sharing information electronically with their patients. For example, in 2014, four in 10 office-based physicians reported sharing information electronically with their patients, and 57% of all physicians reported sharing information directly with their patients electronically. U.S. Dep’t Health & Human Servs., Office of the National Coordinator for Health Information Technology, Report to Congress, “Update on the Adoption of Health Information Technology and Related Efforts to Facilitate the Electronic Use and Exchange of Health Information” 28–30 (2016), https://www.healthit.gov/sites/default/files/Attachment_1_2-26-16_RTC_0.pdf.

108 Empirical studies of the integrity of electronic transmission of prescription information chiefly focus on systems for transmitting prescription drug information and not contact lens prescriptions. Still, such studies suggest that the adoption of electronic prescribing greatly reduces the error rate associated with handwritten paper prescriptions. See, e.g., Rainu Kaushal et al., “Electronic Prescribing Improves Medication Safety in Community-Based Office Practices,” 25 J. Gen. Intern. Med. 530, 530 (2010) (finding that, “For e-prescribing adopters, error rates decreased nearly sevenfold, from 42.5 per 100 prescriptions (95% confidence interval (‘CI’), 36.7–49.3) at baseline to 6.6 per 100 prescriptions (95% CI, 5.1–8.3) one year after adoption (p<0.001). For non-adopters, error rates remained high at 37.3 per 100 prescriptions.”).

109 See, e.g., U.S. Dep’t Health & Human Servs., HealthIT.gov, “Do I Need to Obtain Consent From My Patients to Implement a Patient Portal?”, https://www.healthit.gov/providers-professionals/faqs/do-i-need-obtain-consent-my-patients-implement-patient-portal (noting that HIPAA permits the disclosure of health information to the patient without requiring the patient’s express consent and that portals are “an excellent way to afford patients access to their own information and to encourage them to be active partners in their health care.”).
to require or prohibit the release of additional copies of the prescription.\textsuperscript{115} Upon consideration of the comments, the rulemaking record, and a re-examination of the language of the Act itself, the Commission now clarifies that the Act and the Rule require that prescribers provide patients with additional copies of their prescriptions upon request. Accordingly, the Commission believes there is no need to amend the Rule, but seeks comment on this clarification.

This determination is supported by a number of considerations. First, as noted above, during the initial rulemaking, the Commission stated that the Act neither requires nor prohibits additional copies of the prescription. However, this statement was made in response to two commenters who recommended that the prescription release obligation be \textit{limited} to one release per patient. Thus, the Commission did not fully consider whether additional copies should be required, only that the Act did not expressly limit patients to one copy.

Second, the Act and the Rule require that prescribers provide or verify the patient’s prescription when so “directed by any person designated to act on behalf of the patient.”\textsuperscript{116} This provision has been interpreted to mean that prescribers must provide a prescription whenever a patient authorizes an agent to request one, even if the patient previously received a prescription copy from the prescriber.\textsuperscript{117} The Commission’s Division of Advertising Practices, which administers and enforces the Rule, arrived at this interpretation based upon the plain language of the Act and Rule, as well as upon recognition that when consumers want to order contact lenses, “some consumers have neither their prescription nor sufficient information about their prescription for [the seller] to prepare a proper verification request.”\textsuperscript{118} Based upon this interpretation, duly authorized patients’ agents (sellers) are able to obtain a duplicate copy of the patients’ prescription upon request. In addition, patients, acting as their own agents, are able to obtain a duplicate copy of their prescription upon request.\textsuperscript{119}

Furthermore, as discussed earlier, because the Commission believes that many prescribers are not providing patients with their prescriptions upon completion of their contact lens fitting,\textsuperscript{120} there is additional justification for ensuring that patients are able to obtain copies of their prescription when necessary. The Commission therefore believes that requiring prescribers to provide additional copies of contact lens prescriptions to patients upon request is consistent with the language and intent of the Act: Providing prescription portability while protecting consumer health. Consumers with ongoing access to their prescriptions will be able to obtain the correct contact lenses from the seller of their choosing.

\textbf{C. Section 315.3(a)(2)—Provide or Verify the Contact Lens Prescription}

Section 315.3(a)(2) of the Rule requires that prescribers shall, as directed by any person designated to act on behalf of the patient, provide or verify the contact lens prescription by electronic or other means.\textsuperscript{121}

1. Sellers Designated To Act on Behalf of Patients

In addition to the obligation to release the prescription to the patient at the completion of a contact lens fitting, the Rule also requires prescribers to provide the contact lens prescription to third parties acting on behalf of the patient.\textsuperscript{122} Accordingly, some sellers, at the direction of their customers, have requested copies of prescriptions from prescribers rather than just verifications of prescriptions.\textsuperscript{123}

Because this practice historically has been a source of confusion for some eye care practitioners, the staff clarified, in a 2006 letter to the American Optometric Association, that the Rule obligates a prescriber to provide the consumer’s complete prescription to a third-party seller if the consumer has authorized that seller as an agent.\textsuperscript{124} In its letter, FTC staff also made clear that the Act and the Rule do not permit the prescriber to require that sellers provide written documentation of the patient’s authorization before providing the seller with a copy of the patient’s prescription.\textsuperscript{125} In response, the American Optometric Association has provided guidance to its members that they must comply with this provision of the Rule.\textsuperscript{126}

This option may be gaining popularity with at least one seller. As explained by 1–800 CONTACTS, “[d]ue in large part to poor prescriber compliance with prescription release requirements, many customers cannot provide a third-party seller with [a] copy of their contact lens prescription at the time they place their order.”\textsuperscript{127} 1–800 CONTACTS also pointed out that this option benefits consumers because with a copy of the prescription on file, it can ship orders without any delay and without having to contact the prescriber each time the consumer wishes to purchase lenses.\textsuperscript{128}

In its comment, however, the American Optometric Association argued that “[r]equests by sellers directly to physicians for copies of patient prescriptions should be disfavored.”\textsuperscript{129} The American Optometric Association asserted that sellers should use the verification system instead because verification requests consume less time than the retrieval, copying, and transmission of the actual prescription to sellers. The American Optometric Association acknowledged that it believes that the Rule’s verification system needs improvement, but pointed out that it contains safeguards that requests for

\textsuperscript{115} See supra Section III.A.1.

\textsuperscript{116} 15 U.S.C. 7601(a)(2); 16 CFR 315.3(a)(2).

\textsuperscript{117} See Staff Opinion Letter to the American Optometric Association Providing Guidance Regarding How Contact Lens Prescribers Should Respond to Requests for Patients’ Contact Lens Prescriptions, Pursuant to the Fairness to Contact Lens Consumers Act and the Contact Lens Rule, Oct. 4, 2006 (stating that if the seller is an agent of the consumer, “the prescriber has an obligation under the PCLCA and the Contact Lens Rule to provide the consumer’s prescription” to the seller) https://www.ftc.gov/public-statements/2006/10/requests-contact-lens-prescribers-provide-patients-contact-lens-1–800 CONTACTS (Comment #568), Exhibit E (same).

\textsuperscript{118} Id. The American Optometric Association takes exception to this interpretation, and argues that if Congress meant for retailers to be able to demand patients’ prescription at any time, then

\textsuperscript{119} Id.

\textsuperscript{120} See infra Section V.C.

\textsuperscript{121} 16 CFR 315.3(a)(2).

\textsuperscript{122} Id.

\textsuperscript{123} See infra note 116.


\textsuperscript{125} Comment #644.

\textsuperscript{126} See e.g., 1–800 CONTACTS (Comment #568).

\textsuperscript{127} Staff Opinion Letter, supra note 116.

\textsuperscript{128} The American Optometric Association argued that “[r]equests by sellers directly to physicians for copies of patient prescriptions should be disfavored.”\textsuperscript{129} The American Optometric Association asserted that sellers should use the verification system instead because verification requests consume less time than the retrieval, copying, and transmission of the actual prescription to sellers. The American Optometric Association acknowledged that it believes that the Rule’s verification system needs improvement, but pointed out that it contains safeguards that requests for
copies of prescriptions do not. The American Optometric Association stated that sellers would only need to request a copy of a prescription directly from the prescriber when the patient does not submit the prescription and the patient is unable to provide any information about the prescription to the seller in order to permit use of the verification process.

Few other prescribers addressed this issue directly in their comments to this Rule review. However, the Commission also has received anecdotal reports that prescribers are still confused about this provision of the Rule, and some comments appear to conflate requests for a copy of a prescription with an incomplete verification request. For example, some prescribers complained that 1–800 CONTACTS was sending them incomplete verification requests, but instead it appears that 1–800 CONTACTS was sending the prescriber a request for the patient’s prescription. The Commission declines to adopt the American Optometric Association’s suggestion that requests for copies of a prescription by a duly authorized seller be discouraged. The plain language of the Act and the Rule provide for this method of acquiring a prescription and the Association provided no evidence demonstrating that providing a copy of a prescription to a seller, rather than verifying a prescription, was significantly more burdensome to prescribers. As to the contention that the verification system contains safeguards that requests for prescriptions do not, the Commission points out that a prescription provided by a prescriber directly to the seller would necessarily include all relevant information and would avoid some of the issues raised by commenters about the flaws of the verification system. In addition, the copy of the prescription provided by the prescriber to the seller would contain an expiration date, which also serves as a safeguard against the improper dispensing of contact lenses. Despite clarifications that prescribers must provide copies of prescriptions to sellers when authorized by the patient, 1–800 CONTACTS complained in its comment that in its experience, about half of prescribers “routinely ignore [their] requests” for a copy of a patient’s prescription. To address problems encountered by authorized agents in procuring copies of prescriptions, as well as ongoing prescriber confusion about this provision, two commenters proposed amending Section 315.3 “to require that in response to an authorized request, the prescriber send the prescription to the agent (by mail, facsimile or a digital image of the prescription that is sent via electronic mail) within eight business hours as currently defined under the [Rule].”

In support of its proposal, 1–800 CONTACTS stated that, “[e]vidence shows that in about half the cases, prescribers ignore and never respond to 1–800’s authorized requests for a copy of a customer’s prescription.” 1–800 CONTACTS does not specify this evidence in its comment. However, in a 2006 letter to the Commission, 1–800 CONTACTS asserted that an audit of 264 requests for a copy of a customer’s prescription shows that 46% of prescribers did not respond within five business days. The other commenter, Warby Parker, provided no evidence in support of its proposal.

The Act and the Rule currently require the prescriber to provide a copy of a prescription to an authorized third party, but is silent on the timing of the response. The proposed modification would require prescribers to provide a prescription within eight business hours, the same amount of time that prescribers are afforded to respond to a verification request. The Commission notes, however, that there is a qualitative difference between responding to a verification request as opposed to providing a copy of a prescription. First, if the verification request is correct, the prescriber need take no action. Second, the proposed modification would require the prescriber to act within eight business hours, and if the prescriber did not act, or was unable to act, she would be in violation of the Rule. The eight-business-hour window for verification does not place the prescriber in such jeopardy. If the prescriber is unable to respond to a verification request in a timely fashion—for whatever reason—the request is verified, but the prescriber is not in violation of the Rule.

At this time, the Commission has determined that the existing rulemaking record is not sufficient to support a Rule modification requiring a prescriber to respond to a request for a copy of a prescription within eight business hours. Accordingly, the Commission requests additional information from commenters on the costs and benefits of imposing a timeframe for prescribers to respond to requests from authorized third parties for a copy of a patient’s prescription. The Commission also seeks comment on the appropriate amount of time for a prescriber to respond to prescription requests.

IV. Prescriber Verification

Section 315.5 of the Rule provides the framework under which sellers may dispense contact lenses to consumers and requires sellers, before selling contact lenses, to either obtain a copy of the patient’s prescription or verify the prescription. Section 315.5 also sets forth the procedures for obtaining such verification as well as seller recordkeeping obligations.

A. Section 315.5(a)—Prescription Requirement

Section 315.5(a) of the Rule provides that a seller may sell contact lenses only in accordance with a contact lens prescription for the patient that is presented to the seller by the patient or prescriber directly or by facsimile; or verified by direct communication. This provision was taken verbatim from the Act.

1. Presentation of Prescriptions “Directly or by Facsimile”

In the initial rulemaking, the Commission determined that the “directly or by facsimile” language of section 4(a)(1) of the Act allowed the

130 Although the American Optometric Association comment did not specifically mention the safeguards, it is likely that the comment is referring to the fact that if a prescription verification request lists a quantity of lenses that is excessive, the prescriber can deem such a request “inaccurate.”

131 Comment #644.

132 Diener (Comment #6) (the “rule should be restricted to use only upon recent patient request, not used in perpetuity to obtain records for marketing purposes”); Vidulich (Comment #612) (silent on the issue, but attaching request for a copy of the prescription).

133 Comment #568.

134 Id.; see also Warby Parker (Comment #593).

135 Comment #568.

136 See 1–800 CONTACTS (Comment #568), Exhibit E.

137 Warby Parker (Comment #593). Warby Parker also proposed that the prescriber be required to maintain a log recording the date and time a patient’s prescription was requested and released to the authorized agent.

138 Based on discussions with industry, it appears that the vast majority of verification requests are passively verified, with no prescriber action taken.

139 Another commenter, Operative, a telehealth provider, proposed that the Commission “consider expanding the verification requirements so that prescribers’ obligations also apply to any other third party, including other prescribers, that is authorized by the patient.” Comment #648. Section 315.3 explicitly states that the prescriber shall provide or verify the contact lens prescription, “as directed by any person designated to act on behalf of the patient.” Nothing in the Act or Rule precludes the construction of “any person” from including other prescribers. Furthermore, the HIPAA Privacy Rule permits a “covered entity” to use or disclose protected health information without patient authorization “for treatment, payment, or health care operations.” 45 CFR 164.506. The Commission does not believe that the Rule needs any modification on this issue.
patient or prescriber to present a prescription by mail, by facsimile, or through a digital image of the prescription that is sent via electronic mail.\textsuperscript{143} The Commission also decided at that time not to include “substantially equivalent future technologies” within the scope of acceptable direct presentation mechanisms.\textsuperscript{142} In doing so, the Commission noted that section 4(a)(1) of the Act did not expressly reference or contemplate future technologies and the Commission was not aware of other technologies that met the statutory standard. The Commission declined at that time to include future technologies that “do not involve an exact copy of the prescription within the scope of acceptable direct presentation mechanisms.”\textsuperscript{143} Since implementation of the Rule in 2004, technological advances—including many spurred by federal and state health information technology initiatives—have fostered the proliferation of patient portals, through which health care providers can securely share medical information, such as prescription information, directly with patients and certain third parties. The use of patient portals for presentation of contact lens prescriptions to sellers may provide many benefits to consumers and competition. When using a portal, the patient or prescriber will have direct access to a current, exact copy of the contact lens prescription, reducing the chance that an inaccurate or expired prescription might be presented to the seller. The use of patient portals may also reduce costs for prescribers, patients, and sellers by making it easier and more efficient for patients to share and present contact lens prescriptions, and by reducing the number of verification requests placed on prescribers. Because of these potential benefits, the Commission has made an initial determination that the provision “directly or by facsimile” includes the use of online patient portals by patients and prescribers to present contact lens prescriptions to sellers. In doing so, the Commission notes that the use of a patient portal necessarily involves “an exact copy of the prescription within the scope of acceptable direct presentation mechanisms.”\textsuperscript{145} The Commission seeks comment on this clarification and requests that commenters provide information about whether the Commission should consider any other issues related to the presentation of prescriptions to sellers.

2. “Verified by Direct Communication”

Some individual commenters recommended that the Commission revise the Rule to remove verification by direct communication, and argued that the sale of contact lenses should be conditioned upon presentation of a written prescription by the consumer to the seller. These commenters noted that consumers are already being provided with a written prescription as required by the Rule, and that requiring prescribers to verify prescriptions with the seller as well was redundant, time-consuming and burdensome.\textsuperscript{146} Other commenters noted that with electronic means such as email and phone cameras readily available, the consumer should be responsible for presenting the prescription to the seller rather than having the prescriber verify the prescription.\textsuperscript{147} Other commenters argued that contact lens prescriptions should be treated the same way as prescriptions for medications, and that consumers should only be able to obtain contact lenses by presenting a written prescription.\textsuperscript{148} Some commenters also stated that relying on a written prescription to dispense lenses, rather than prescriber verification, would close loopholes in the verification framework that may allow consumers to obtain lenses without a valid, unexpired prescription.\textsuperscript{149}

The language of Section 315.5(a)(2) was taken verbatim from the Act.\textsuperscript{150} Because Congress decided to structure the prescription verification framework to allow for either the direct presentation of a prescription to a seller or, alternatively, the verification of a prescription by direct communication, elimination of verification by direct communication is beyond the scope of this rule review.

3. Automated Telephone Calls as a Method of Direct Communication

The Commission received numerous comments objecting to contact lens sellers’ use of automated telephone calls as a method to communicate verification requests.\textsuperscript{151} These commenters, who often refer to these automated telephone calls as robocalls, are largely prescribers, students of optometry, and associations whose members are prescribers. Commenters described problems arising from the use of automated telephone calls,\textsuperscript{152} and some

\textsuperscript{143} 69 FR at 40495. The Commission also concluded that presentation of the prescription information from the consumer to the seller by telephone or by email (other than an email containing a digital image of the prescription) did not meet the “directly or by facsimile” standard imposed by the Act.

\textsuperscript{144} Id.

\textsuperscript{145} Id.

\textsuperscript{146} Numerous federal and state programs have been designed to foster the development of health information technology and the electronic processing, storage, and transmission of patients’ health information. For example, under the HITECH Act of 2009—Title XIII and Title IV of Division B of the American Recovery and Reinvestment Act of 2009—Congress directed the Medicare and Medicaid programs to make direct payments to eligible healthcare professionals, hospitals, and certain other healthcare providers specifically to incentivize the adoption and meaningful use of electronic health records systems (EHRs). American Recovery and Reinvestment Act of 2009 (Recovery Act), Public Law 111–5, § 4101(a), 4101(b), and 4202 (2009) (Medicare incentives for eligible professionals, Medicare incentives for hospitals, and Medicaid provider payments, respectively). According to the U.S. Department of Health & Human Services, more than $30 billion in such incentive payments were made between 2011 and 2015. U.S. Dep’t Health & Human Servs., Office of the National Coordinator for Health Information Technology, Report to Congress, “Update on the Adoption of Health Information Technology and Related Efforts to Facilitate the Electronic Use and Exchange of Health Information,” 18 (2016), https://www.healthit.gov/sites/default/files/Attachment_1___2-26-16_RTC_Health_IT_Progress.pdf. Regarding patient portals in particular, see, e.g., U.S. Dep’t Health & Human Servs., Office of the National Coordinator for Health Information Technology, “ONC Patient Engagement Playbook,” https://www.healthit.gov/playbook/patient-engagement/

\textsuperscript{147} Id.

\textsuperscript{148} Driscoll (Comment #67); Moody (Comment #92); Filandro (Comment #129); Kirk (Comment #131); Kalman (Comment #150); Boyer (Comment #246); Bolenbaker (Comment #357).

\textsuperscript{149} Driscoll (Comment #67); Beckow (Comment #151); Ahn (Comment #215); Sanders (Comment #235); Smith (Comment #319).

\textsuperscript{150} 69 FR at 40495; see also 5 U.S.C. 7603(a).

\textsuperscript{151} The American Optometric Association pointed to the public’s general disfavor of robocalls, noting that they are commonly understood to be an abuse of telephone communication, one for which companies have been fined millions of dollars. Comment #644. The FTC disagrees with this characterization of automated seller verification calls. Contact lens seller verification calls are not sales calls covered by the Telemarketing Sales Rule (“TSR”), 16 CFR 310, which prohibits certain robocalls. In addition, the TSR does not apply to most business-to-business communications. 16 CFR 310.6(b)(7).

\textsuperscript{152} E.g., Stahl (Comment #19); Lum (Comment #21); Peterson (Comment #22); Borsky (Comment #26); Matthews (Comment #25); Maumun (Comment #23); Chiqui (Comment #31); Hodes (Comment #42); Dodge (Comment #44); Virginia Optometric Association (Comment #46); Alabama Optometric Association (Comment #48); Hove (Comment #53); Iowa Optometric Association (Comment #79); Michigan Optometric Association (Comment #86); Mirkin (Comment #111); California Optometric Association (Comment #119); Hicks (Comment #256); Leach (Comment #257); Chang (Comment #258); Pentacost (Comment #268); Easton (Comment #432); Koch (Comment #539);
commenters called for an outright ban of the use of such calls.\textsuperscript{153} A number of commenters indicated that the automated verification calls are difficult to understand or confusing\textsuperscript{154} or do not provide all of the information required to be a valid request.\textsuperscript{155} Some

Connecticut Association of Optometrists (Comment #560); Lueng (Comment #607); Wu (Comment #608); Hodes (Comment #42); Vidulich (Comment #64); Alaba Optometric Association (Comment #44); Iowa Optometric Association (Comment #48); Ala Optometric Association (Comment #79); Michigan Optometric Association (Comment #80); California Optometric Association (Comment #81); Hicks (Comment #256); Leach (Comment #257); Chang (Comment #258); Easton (Comment #432); New Mexico Optometric Association (Comment #211); Koch (Comment #539); Connecticut Association of Optometrists (Comment #560); Tennessee Association of Optometric Physicians (Comment #575); Colorado Association of Optometrists (Comment #584); Lueng (Comment #607); Wu (Comment #608); Vidulich (Comment #612); Lai (Comment #620); Coalition for Patient Vision Care Safety (Comment #621); Pechko (Comment #628); American Optometric Association (Comment #644); Liu (Comment #656); Louise (Comment #657); Fong (Comment #669); Vo (Comment #673).

\textsuperscript{155} For example, Virginia Optometric Association (Comment #16); Stahl (Comment #19); Lum (Comment #21); Peterson (Comment #22); Maanum (Comment #23); Matthews (Comment #25); Borsky (Comment #26); Matthews (Comment #25); Maanum (Comment #23); Chriqui (Comment #31); Hodes (Comment #42); Dodge (Comment #44); Virginia Optometric Association (Comment #46); Alabama Optometric Association (Comment #48); Iowa Optometric Association (Comment #79); Michigan Optometric Association (Comment #80); California Optometric Association (Comment #81); Hicks (Comment #256); Leach (Comment #257); Chang (Comment #258); Easton (Comment #432); Koch (Comment #539); Coalition for Patient Vision Care Safety (Comment #621); Pechko (Comment #628); American Optometric Association (Comment #644); Liu (Comment #656); Louise (Comment #657); Fong (Comment #669); Vo (Comment #673).

\textsuperscript{154} E.g., Vision Care Safety (Comment #621) (stating that robocalls leave voice messages without contact information and may be cut off before conveying in entirety the patient’s information); American Optometric Association (Comment #644) (stating they have often received complaints over the last ten years from optometrists that robocalls from 1–800 CONTACTS did not include all of the necessary information to confirm a prescription).

\textsuperscript{155} E.g., Pennsylvania Optometric Association (Comment #46); Iowa Optometric Association (Comment #79); Connecticut Association of Optometrists (Comment #560); Tennessee Association of Optometric Physicians (Comment #575); Rubow (Comment #649).

\textsuperscript{156} E.g., Stahl (Comment #19); Lum (Comment #21); Peterson (Comment #22); Borsky (Comment #26); Matthews (Comment #25); Maanum (Comment #23); Chriqui (Comment #31); Hodes (Comment #42); Dodge (Comment #44); Virginia Optometric Association (Comment #46); Alabama Optometric Association (Comment #48); Iowa Optometric Association (Comment #79); Michigan Optometric Association (Comment #80); California Optometric Association (Comment #81); Hicks (Comment #256); Leach (Comment #257); Chang (Comment #258); Easton (Comment #432); Koch (Comment #539); Coalition for Patient Vision Care Safety (Comment #621); Pechko (Comment #628); American Optometric Association (Comment #644); Liu (Comment #656); Louise (Comment #657); Fong (Comment #669); Vo (Comment #673).

\textsuperscript{157} For example, Virginia Optometric Association (Comment #46); Iowa Optometric Association (Comment #79); Coalition for Patient Vision Care Safety (Comment #621); Pechko (Comment #628); American Optometric Association (Comment #644); Liu (Comment #656); Louise (Comment #657); Fong (Comment #669); Vo (Comment #673).

\textsuperscript{158} Easton (Comment #432); Louise (Comment #657). See also Iowa Optometric Association (Comment #79) (explaining the need to protect small businesses from disruptive calls that interfere with treating patients and tie up phones); Pham (Comment #232); Tennessee Association of Optometric Physicians (Comment #575); Michigan Optometric Association (Comment #86)

\textsuperscript{159} For example, Wisconsin Optometric Association (Comment #30); Pennsylvania Optometric Association (Comment #46); New Mexico Optometric Association (Comment #211); Tennessee Association of Optometric Physicians (Comment #575).

\textsuperscript{160} Scolin (Comment #369).

\textsuperscript{161} E.g., Virginia Optometric Association (Comment #79); Coalition for Patient Vision Care Safety (Comment #621); Pechko (Comment #628); American Optometric Association (Comment #644); Rubow (Comment #656); Louise (Comment #657); Fong (Comment #669); Vo (Comment #673).

\textsuperscript{162} See, e.g., Chang (Comment #126); Scolin (Comment #369); Tennessee Association of Optometric Physicians (Comment #575).

\textsuperscript{163} Connecticut Association of Optometrists (Comment #560); Colorado Optometric Association (Comment #584).

\textsuperscript{164} See, e.g., Iowa Optometric Association (Comment #79); Chriqui (Comment #126); Bricker (Comment #195); Spath (Comment #486).

\textsuperscript{165} Comment #649; Liu (Comment #656); Louie (Comment #657); Fong (Comment #669); Vo (Comment #673).

\textsuperscript{166} Comment #621.

\textsuperscript{167} Comment #560.

\textsuperscript{168} Id.
comment also noted that, while its messages are automated, calls are initiated by live agents to guarantee that all calls are placed to the intended prescribers. 168 1–800 CONTACTS also asserted that when a message is left on an answering machine, the live agent remains on the line during the entire automated message to ensure that the complete message is conveyed to the prescriber. 169

According to 1–800 CONTACTS, each week it places approximately 100,000 calls to prescribers to verify prescriptions. The complete phone script for an automated verification call from 1–800 CONTACTS is 2 minutes, 29 seconds (149 seconds) in length, and prescribers familiar with the system have the option to skip the first 48 seconds of the message to reduce the total time of the message to 1 minute, 41 seconds (101 seconds). 1–800 CONTACTS indicated that the average prescriber receives only one verification request per week from the company, 170 and the highest volume of its recordings, on average, six verification requests per week in 2014. 171 The company explained that it places verification calls as it receives orders, and that it receives orders 24 hours a day, seven days a week, with many orders coming in on weekends or during evening hours. The company further explained that it leaves verification messages shortly after its receipt of orders because a continuous call process is “logistically efficient and prevents a shipping bottleneck at a single hour each day.” 172 Regardless of when it places the verification call to the prescriber, however, 1–800–CONTACTS stated that it never ships an order under the passage of eight business hours. The company added that in almost 30% of verification requests, prescribers hang up on verification calls. 173

The Commission did not receive other comments from contact lens sellers about their use of automated verification systems to verify prescriptions. 174 Consumers Union, the policy and advocacy division of Consumer Reports, also commented in support of automated calling systems, stating that such systems, of which eye doctors should now be aware, are a reasonable means for a retailer to efficiently handle a large volume of prescription requests. Consumers Union also stated that most eye doctors’ offices have automated answering systems and it believed they could set up an efficient means for recording the verification request information without significant burden. 175

The Act expressly authorizes sellers to send prescription verification requests by direct communication 176 and defines “direct communication” to include communication by telephone, facsimile, or electronic mail. 177 In previously considering this issue, the Commission noted that telephone is commonly understood to include automated telephone systems. The Commission therefore concluded in the initial rulemaking that “it would thus seem to be contrary to Congressional intent to prohibit the use of this technology.” 178 Nevertheless, then and now, the Commission emphasizes that automated telephone systems must fully comply with all applicable Rule requirements in order to transmit valid verification requests.

For example, any automated verification request must provide complete verification request information as required under section 315.5(b). 179 and this information must be either received by a person on the telephone or otherwise received in full (e.g., all of the requisite information is left on a telephone answering machine). A request delivered by an automated telephone system does not comply with the Rule if it is not delivered in a volume and cadence that a reasonable person can understand, or if it contains incomplete verification information. The seller must also allow eight business hours for the prescriber to respond. During the initial rulemaking in 2004, the Commission indicated that it would “continue to monitor whether full, valid requests for verification of a prescription are being made through the use of automated telephone systems” and may revisit the issue “[i]f evidence demonstrates that sellers are not making valid verification requests but are providing consumers with contact lenses despite deficient requests.” 180

The comments submitted in this Rule review by optometrists, students of optometry, and their trade associations provide the Commission with some evidence that some prescribers are receiving incomplete or otherwise inadequate verification requests. In addition, the Coalition for Patient Vision Care Safety asserted there is substantial evidence that verification requests are deficient and the American Optometric Association claimed that problems with 1–800 CONTACTS’ automated verification systems are often reported by its members. 181 However, commenters did not provide any empirical data regarding the frequency of these various practices, average or aggregate costs associated with automated calls in particular, or the number of illegal or otherwise deficient contact lens sales that result from such calls. Furthermore, the Commission lacks evidence indicating whether these problems occur with automated calls generally or are chiefly associated with only one or a small group of sellers. If the reported problems chiefly are associated with the practices or systems of a limited number of sellers, the Commission would consider education of, or enforcement against, such sellers, rather than an amendment to the Rule at this time. 182

Incomplete or incoherent verification requests are not valid verification requests. 183 However, a seller may not always realize that it has made an invalid request and, hence, might dispense lenses under an assumption of 180 69 FR at 40489.

181 Coalition for Patient Vision Care Safety (Comment #621); American Optometric Association (Comment #644).

182 In fact, a number of state optometric associations note that the costs prescribers’ offices expend related to the Rule are most often due to incomplete or otherwise inadequate verification requests. Michigan Optometric Association (Comment #86); Wisconsin Optometric Association (Comment #30); Pennsylvania Optometric Association (Comment #46); Iowa Optometric Association (Comment #79); New Mexico Optometric Association (Comment #211). Thus, education and enforcement efforts to improve sellers’ compliance with the verification aspects of the Rule may have a large benefit for prescribers, without the need to prohibit automated verification calls.

183 69 FR at 40496 (“The Commission emphasizes that the sale of contact lenses based on a verification request which does not contain all of the required information constitutes a Rule violation.”).
passive verification if the prescriber does not contact the seller within eight business hours of the invalid request. Accordingly, to prevent the improper dispensing of lenses, the Commission encourages prescribers to contact the seller in these circumstances to inform them that the request is invalid and state the basis for the invalidity. Once the prescriber communicates that the request is invalid and states the basis for the invalidity, the seller shall not fill the order. Alternatively, for incomplete requests, the Commission encourages prescribers, to the extent they are able, to complete the missing information in order to facilitate the dispensing of the contact lenses.

The Commission is sensitive to the business concerns of the prescribers who complain about the burden and inconvenience they experience from the sellers’ use of automated telephone systems. However, the Commission has not seen convincing evidence that the volume of automated verification calls they receive each day presents a burden that is not outweighed by the competitive benefits of the Rule, or that these practices frequently result in illegal sales of contact lenses. If the Commission receives evidence of a compelling widespread problem, it may revisit its position on the use of automated verification requests. At this point, however, the Commission declines to prohibit the use of automated verification calls.

Nevertheless, the Commission encourages sellers, to the extent possible, to consider whether they could alleviate some of the commenters’ concerns by modifying their automated telephonic verification procedures or, alternatively, by increasing the use of other permissible communication methods. The Commission also seeks additional information on possible modifications to the Rule that, short of prohibiting automated verification calls, could address the issues raised by commenters relating to these calls.

The Commission declines to restrict when sellers may place automated phone verification calls. As long as sellers are placing valid and complete verification requests, and are not shipping orders prior to active verification, or the passage of eight business hours, automated telephone verification requests placed outside of a prescriber’s business hours comply with the Rule. Moreover, a review of the comments reveals that some prescribers object to calls during office hours, while others object to calls during evening and weekend hours. The Commission therefore does not propose, at this time, to limit the time period when sellers may place automated calls.

B. Section 315.5(b)—Information for Verification

Section 315.5(b) delineates the information required for a prescription verification request: (1) Patient’s full name and address; (2) the contact lens power, manufacturer, base curve or appropriate designation, and diameter when appropriate; (3) the quantity of lenses ordered; (4) the date of patient request; (5) the date and time of verification request; (6) the name of a contact person at the seller’s company, including facsimile and telephone numbers; and (7) if the seller opts to include the prescriber’s regular business hours on Saturday as “business hours” purposes of computing the eight business hour calculation, a clear statement of the prescriber’s regular Saturday business hours.

1. Vendor Contact Information

A few individual prescribers stated that they were unable to contact vendors in order to get additional information when the verification request was incomplete. The American Optometric Association also voiced concerns about the difficulty that prescribers have in reaching an individual at a company to act as the contact lens retailer to answer questions and concerns. Several state optometric associations recommended that the Commission require larger contact lens retailers to answer prescribers with a reasonable opportunity to discuss prescription concerns. Several state optometric associations advocated that physician small businesses may spend significant time on hold or attempting to use various phone numbers or automated prompts to reach a live person. These commenters asserted that the Commission requires that the seller provide the name of a contact person to act as the contact person for physician questions and concerns. Commenters did not explain the nature of the incomplete verification requests such that a live person was necessary to address the inadequacy of the request, nor did they elaborate upon the reasons why prescribers need to reach live persons at contact lens retailers to answer “questions and concerns.”

The Commission declines to propose this Rule modification. The Rule requires that the seller provide the name of a contact person at the seller’s company, including facsimile and telephone numbers. In requiring a facsimile number as well as a telephone number, it is clear that the Act and the Rule intended to provide for direct communication, but not necessarily contemporaneous, live communication. The language of the Act and the Rule anticipates that some sellers will communicate with prescribers via live agents, but does not require it. Instead, the Act and the Rule allow sellers also to communicate with prescribers about verification requests via facsimile as well as voicemail.

Furthermore, the Commission does not believe it is necessary to require large contact lens retailers to have more than one individual available for prescriber questions and concerns, as long as a contact person is “reasonably accessible to the prescriber.” As discussed in the initial rulemaking, the vendor contact provision is intended to ensure that the prescriber is able to reach a responsible person at the seller’s company. No evidence was presented showing how often prescribers experience difficulty in obtaining reasonable access to a contact person at the seller’s company. Without such
evidence, the Commission cannot determine whether a modification of the Rule is necessary.

Moreover, as discussed earlier, if a verification request is incomplete, the request is invalid. If the prescriber communicates to the seller within the Rule-specified deadline that the verification request or the prescription is invalid, the seller may not fill the prescription. It is not necessary to reach a live person to perform this function. Once alerted that a verification request is invalid and the reason for the invalidity, the burden falls on the seller to resolve the invalidity, if possible. In addition, in routine cases it would not be necessary to reach a live person in order to correct a prescription. Accordingly, the rulemaking record contains insufficient evidence to show that mandating a mechanism for contemporaneous live communications is necessary to carry out the Act.

The American Optometric Association also urged the Commission to amend the Rule to require sellers to respond to prescriber questions within an eight-business-hour window, or cancel the sale without verification. The Association’s comment did not explain the types of concerns that prescribers need to discuss with live agents at contact lens retailers. This proposal would require that once a prescriber contacted a seller with concerns, the seller could not assume the prescription was verified. Instead, the seller would be required to personally contact the prescriber and discuss the concerns communicable with the seller about the verification request.

See supra Section IV.A.3.

If a prescriber deems a prescription invalid, the Rule requires that the prescriber specify the basis for the invalidity. 16 CFR 315.5(d).

In addition, Warby Parker proposed that the Commission include stronger language in the Rule to make clear that it is a violation for prescribers to respond to a verification request by stating that prescription information is incorrect when, in fact, it is not; or to respond to a verification request by stating that prescription information is inaccurate or invalid without providing the basis for the inaccuracy or invalidity of the prescription.

Comment #593. The Rule already provides that if a prescriber indicates that a prescription is inaccurate or invalid, the prescriber shall specify the basis for the invalidity. A failure to do so violates the Rule. See 16 CFR 315.5(d). Further, falsely indicating that a prescription was inaccurate would essentially be a failure to "correct" a prescription, as mandated by the Rule and therefore, also would be a violation. See id. The Commission does not believe it needs to clarify these prescriber obligations further. Warby Parker also proposed that the Commission clarify that it is a violation of the Rule for a prescriber to interfere, in any way, with a seller’s effort to verify a prescription. This proposal is not described in detail nor is the frequency of this problem supported with empirical evidence. The Commission therefore declines to propose this Rule modification.

The Commission declines to propose this modification as well. As discussed above, neither the Act nor the Rule requires contemporaneous, live communication between prescribers and sellers. Furthermore, the Commission believes that such a requirement would undercut the Act’s passive verification framework. Such a mechanism could conceivably allow any prescriber to lodge a concern or question and thereby halt the passive verification mechanism. As discussed above, if the prescription verification request is incomplete or inaccurate, or if the prescription is expired or otherwise invalid, the prescriber may alert the seller. The seller cannot fill a prescription if the prescriber has indicated that the prescription is expired or otherwise invalid.

2. Prescribers’ Selection of Communication Mechanism

A few commenters suggested that the prescriber should have the ability to choose the method of communication. 194 In addition, Warby Parker proposed that the Commission include stronger language in the Rule to make clear that it is a violation for prescribers to respond to a verification request by stating that prescription information is incorrect when, in fact, it is not; or to respond to a verification request by stating that prescription information is inaccurate or invalid without providing the basis for the inaccuracy or invalidity of the prescription. Comment #593. The Rule already provides that if a prescriber indicates that a prescription is inaccurate or invalid, the prescriber shall specify the basis for the invalidity. A failure to do so violates the Rule. See 16 CFR 315.5(d). Further, falsely indicating that a prescription was inaccurate would essentially be a failure to "correct" a prescription, as mandated by the Rule and therefore, also would be a violation. See id. The Commission does not believe it needs to clarify these prescriber obligations further. Warby Parker also proposed that the Commission clarify that it is a violation of the Rule for a prescriber to interfere, in any way, with a seller’s effort to verify a prescription. This proposal is not described in detail nor is the frequency of this problem supported with empirical evidence. The Commission therefore declines to propose this Rule modification.

195 Comment #644.

196 Filandro (Comment #129); Chakuroff (Comment #189); Stuart (Comment #635).

197 Chakuroff (Comment #189).

198 Mirkin (Comment #111) (stating that fax or email communications are quick and easy to answer); Chang (Comment #126) (requesting fax or email verification system); Filandro (Comment #129) (requesting sellers offer all offices fax option for verification requests); Koch (requesting use of fax); Rubow (Comment #649) (seeking a requirement that online retailers verify through a route that is intelligible, including fax or a live person). But see Hicks (Comment #111) (stating simple, quick phone call is much easier and would result in faster turnaround times for the patients); Rubow (Comment #649).

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196 One commenter stated that she requested a seller, who sometimes made requests with their offices. Another proposal stated that fax or email communications are quick and easy to answer; Chang (Comment #126) (requesting fax or email verification system); Filandro (Comment #129) (requesting sellers offer all offices fax option for verification requests); Koch (requesting use of fax); Rubow (Comment #649) (seeking a requirement that online retailers verify through a route that is intelligible, including fax or a live person). But see Hicks (Comment #111) (stating simple, quick phone call is much easier and would result in faster turnaround times for the patients); Rubow (Comment #649).

A number of commenters expressed a preference for sellers to use another type of communication to verify contact lens prescriptions, including facsimile or email. A few prescribers requested that sellers use live telephone calls to communicate with their offices. 197 The concept of having prescribers select the communication method that the seller would use to verify a prescription (i.e. by telephone, fax, or online) was previously raised with the Commission.

198 Comment #644.

199 Filandro (Comment #129); Chakuroff (Comment #189); Stuart (Comment #635).

200 Mirkin (Comment #111) (stating that fax or email communications are quick and easy to answer); Chang (Comment #126) (requesting fax or email verification system); Filandro (Comment #129) (requesting sellers offer all offices fax option for verification requests); Koch (requesting use of fax); Rubow (Comment #649) (seeking a requirement that online retailers verify through a route that is intelligible, including fax or a live person). But see Hicks (Comment #111) (stating simple, quick phone call is much easier and would result in faster turnaround times for the patients); Rubow (Comment #649).

A number of commenters expressed the view that because contact lenses are restricted medical devices, they should not be dispensed unless the prescriber actively verifies the prescription. 203 The Contact Lens Association of Ophthalmologists, for example, in arguing for the elimination of passive verification, stated that it “puts the health of consumers at risk and is inconsistent with regulatory practices for confirmation of the validity and accuracy of prescriptions for drugs and for other Class II and Class III medical devices.” 204

Other commenters expressed the concern that the passive verification framework can be manipulated and, therefore, does not adequately ensure that patients receive contact lenses in accordance with proper medical
oversight. For example, some commenters asserted that passive verification is problematic because patients, in some circumstances, may be able to obtain lenses by providing fictional or incorrect information to sellers.\textsuperscript{205} A common scenario relayed by commenters is that if the patient provides the seller with the name of a fictional prescriber and a fictional fax number, the prescription will be passively verified when there is no response within eight hours.\textsuperscript{206} Some prescribers reported instances where some patients were never seen by a prescriber, and apparently the consumer just pulled the prescriber information from a Web site in an attempt to get a prescription verified via passive verification.\textsuperscript{207} A few commenters reported that patients said they were instructed—by sellers—to use any optometrist name, or any facsimile number, in order to facilitate the order.\textsuperscript{208} A few commenters also complained that after they have flagged a verification request as invalid, some sellers continue to send a trigger a passive verification by then repeatedly faxing the same verification request to the prescriber in the hopes that the prescriber will not have the opportunity to deny the verification request again, and it will end up passively verified.\textsuperscript{209}

In light of these concerns, some commenters concluded that the passive verification system is not working as intended to protect patient eye health and instead, recommended that all contact lens prescriptions be actively verified.\textsuperscript{210} One commenter recommended that the Rule be modified to prevent the shipping of contact lenses without active verification.\textsuperscript{211} Another commenter said that if the retailer has not received an image of the actual prescription, the seller should at least obtain some confirmation that the customer is genuinely a patient of the prescriber that is being contacted for verification.\textsuperscript{212}

The Commission declines to propose these Rule modifications. Issues identical to these were raised during the initial rulemaking process in 2004, when commenters either opposed or expressed significant concern about the passive verification system imposed by the Act and the Rule.\textsuperscript{213} At that time, some commenters were concerned about the use of a passive verification system for prescription medical devices such as contact lenses. Other commenters during the initial rulemaking, expressed concern that verification requests could be sent to the wrong prescriber and might be improperly filled via passive verification because the prescriber neglected to respond to it.\textsuperscript{214}

The Commission responded to concerns about passive verification by finding that “[b]ecause Congress has declined to impose a passive verification system through the Act, whether to adopt a passive verification system is not at issue in this rulemaking proceeding.”\textsuperscript{215} The same holds true today, and this rule review does not revisit the decision to include a passive verification system. With respect to concerns that patients are manipulating the passive verification system by deliberately providing inaccurate prescriber information, the Commission notes that if prescribers receive verification requests for individuals who are not their patients, prescribers have the ability and incentive to respond that such requests are “invalid” under section 315.5(d) of the Rule,\textsuperscript{216} thus preventing an improper passive verification.

With regard to concerns that patients are deliberately providing fictional prescriber information and fictional contact information, commenters produced only anecdotal evidence of such actions, and did not provide empirical data regarding the frequency of these activities. Although it is possible that such activities could allow some patients to obtain contact lenses without a valid prescription, the Commission notes that in doing so, such individuals are intentionally circumventing the Rule. As discussed above, the passive verification framework has been mandated by Congress in an effort to balance the interests of consumer health and prescription portability. At the time the Act was under consideration, Congress was aware—after being informed by the Commission and the American Optometric Association, among others—that passive verification was not a foolproof method for preventing the verification of invalid prescriptions.\textsuperscript{217} The Commission will consider consumer education efforts designed to encourage consumers to act responsibly.

\textsuperscript{205} Wang (Comment #94) (discussing “deliberate attempts to evade verification with the knowledge that a lack of verification is equivalent to a prescription being verified”); Anklkin (Comment #107) (describing the use of incorrect or even falsified information); Filandro (Comment #129) (noting that patients can fax the request to their own home or email); Stewart (Comment #136) (patients are able to use any fax number); McCutchan (Comment #624) (describing use of fax number for prescriptions that are no longer active).

\textsuperscript{206} Caughell (Comment #7); Truong (Comment #55); Navarro (Comment #117); Zierlein (Comment #123); Amnon (Comment #126); Giszok (Comment #134); Lee (Comment #138); Ambrose (Comment #196); Ahmed (Comment #209); Dell (Comment #227); Williston (Comment #252); Pentecost (Comment #268); Smith (Comment #319); Makler (Comment #356); Bolenbaker (Comment #357); McWilliams (Comment #362); Diaz (Comment #380); Liebg (Comment #478); Ballitsi (Comment #485); Garcia (Comment #511); Loerzel (Comment #550); Pham (Comment #641); Lisenby (Comment #662).

\textsuperscript{207} Driesen (Comment #47); Howe (Comment #53); Cheryan (Comment #169); Hosaka (Comment #240); Chaves (Comment #334); Liu (Comment #390); Redder (Comment #454); Nakasone (Comment #469); Ball (Comment #590); Heuer (Comment #467); Ostrom (Comment #489); Hartman (Comment #522); Mills (Comment #559).

\textsuperscript{208} Sadeghian (Comment #242) (“A number of patients tell me that it is common practice by these online contact lens companies to tell the consumer to leave the (seller’s) fax number as the doctor’s fax so nobody would respond to their requests.”); Allaniello (Comment #253) (“I asked where he’s been buying contact lenses and he told me the online avenue he uses asked him for his doctor’s name, and when he told them he couldn’t spell my last name they told him to look in the phone book and give them a name of an optometrist and they’d take care of it.”).

\textsuperscript{209}See, e.g., Christensen (Comment #149).

\textsuperscript{210}Driscoll (Comment #67); Diaz (Comment #380); Whittington (Comment #443).

\textsuperscript{211} Palmer (Comment #464).

\textsuperscript{212}Milsky (Comment #559). This commenter also proposed that in order to allow eye doctors and the Commission to be able to track in detail what happens to online orders after the verification request is sent, the seller should be required to inform the prescriber whether the transaction was cancelled or completed, and if so, what exactly was shipped and when. This measure would document whether lenses were shipped before any active verification took place.

\textsuperscript{213} 69 FR at 40497 and note 206.

\textsuperscript{214} 69 FR at 40497 and note 198.

\textsuperscript{215} 69 FR at 40497.

\textsuperscript{216} Id.

\textsuperscript{217}See, e.g., “Fairness to Contact Lens Consumers Act: Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce,” 108th Cong. 1 (Sept. 12, 2003) (testimony of J. Pat Cummings, American Optometric Association) (testifying that “the problem with passive verification” is that some people will be able to get contact lenses without a prescription).

\textsuperscript{218}The Commission will consider consumer education efforts designed to encourage consumers to act responsibly, Congress opted for passive verification after hearing repeated reports of the difficulties consumers confronted having prescriptions verified in states with active verification systems. See H.R. Report No. 108–318, at 5 (2003) (stating the Fairness to Contact Lens Consumers Act “adopts a passive verification system in order to best serve the consumer,” after hearing concerns from consumers and businesses of the “unusually high number of consumer complaints in states that rely on active verification schemes.”). See also “Fairness to Contact Lens Consumers Act: Hearing Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce,” 109th Cong. 1 (Sept. 12, 2003) (testimony of Jonathan C. Coon, 1–800 CONTACTS) (testifying that under an active verification system in Texas, there was a “widespread practice [by optometrists] of failing to verify the prescription”); in “Sound Economy) (testifying that under an active verification system in Texas, there was a “widespread practice [by optometrists] of failing to verify the prescription.”)
within the confines of the Rule. In addition, to the extent that the Commission receives evidence that sellers are encouraging consumers to provide inaccurate or fictional prescriber information, the Commission will investigate such allegations, as appropriate.

#2. Issues Regarding the Eight-Business-Hour Window

Some commenters stated that the current eight-business-hour window is a reasonable length of time for prescribers to respond to verification requests. 218—800 CONTACTS, for example, asserted that the “eight business-hour time frame for passive verification gives prescribers sufficient time to confirm important health information and correct any inaccurate orders without imposing a needless delay on consumers who place a premium on quick delivery.” 219 As support, 1—800 CONTACTS stated that last year it cancelled orders worth approximately $40 million in response to communications from prescribers, and that the “number of deleted orders and the value of sales cancelled demonstrate that prescribers have more than adequate time to respond when necessary.” 220

Other commenters, however, argued that the eight-business-hour time frame for passive verification does not allow enough time for doctors to notify sellers that a prescription is expired, inaccurate, or nonexistent. The American Academy of Ophthalmology, for example, stated that the eight-business-hour requirement “is far too short and ultimately imposes significant burdens on providers and in many instances eliminates a necessary patient safety check.” 221 Some prescribers noted that their offices are very busy and that eight business hours was not enough time to verify prescriptions. 222 The CLAO suggested that eight business hours was insufficient because

“validation requests arrive with incomplete or erroneous patient information complicating the process by which clinical records are retrieved.” 223 These comments, however, did not quantify how the eight-business-hour time frame imposed “significant burdens” on providers, nor establish that a significant number of prescribers were unable to respond to verification requests within eight business hours.

Commenters similarly failed to provide specific information quantifying the frequency of incomplete or incorrect validation requests. Many commenters did not propose a specific extension of time to respond to a verification request, 224 and merely stated that eight business hours was not enough. Some commenters did put forth specific proposals, such as changing the language to “eight (8) business hours or twenty-four (24) clock hours, whichever is later,” 225 doubling the length of time to 16 hours, 226 or extending the verification window to at least two business days. 227 Others suggested providing at least 48 to 72 hours, 228 or to three business days, 229 to confirm the validity of a prescription. A few commenters suggested that increasing the window to 72 hours would alleviate issues that arise when verifications are received on Friday, Saturday or Sunday. 230

Having considered these comments, the Commission declines to propose a Rule modification lengthening the eight-business-hour timeframe during which a prescriber must respond to a verification request. Despite comments that the timeframe is too short, the Commission believes that the current eight-business-hour time frame is adequate for the vast majority of prescribers. Commenters put forth no empirical evidence that prescriptions are being improperly verified via passive verification due to prescribers not having enough time to respond, and cited no compelling changes in the marketplace that would justify extending the time frame beyond eight business hours. If anything, because of advances in technology, electronic communications, and record-keeping, eight business hours is as appropriate, if not more so, when implemented in 2004. As the Commission explained in the initial rulemaking, “Congress recognized that consumers may be harmed if they face undue delays in receiving their contact lenses from a seller” and balanced that consideration against the possible harm consumers may experience if sellers provide contact lenses based on invalid prescriptions. 231 The Commission has found nothing thus far in the record for this rule review proceeding to disturb that determination.

In addition to concerns about the time prescribers have to respond, some commenters expressed concern about when verification calls are placed and received. Some optometrists expressed concern that some sellers are exploiting the Rule by placing verification requests after hours in order to circumvent the eight-business-hour window. 232 Other prescribers noted with frustration that sellers fax verification requests outside of normal business hours, such as in the middle of the night or on weekends, thereby making it impossible for them to respond in a timely fashion. Some commenters complained that because they only had 24 hours to respond to a

221 Comment #611.
231 69 FR at 40482.
232 Berger (Comment #200) (“[u]nder the current law, retailers are allowed to fill a prescription if verification is not received within 8 hours. This is commonly exploited by faxing or robo dialing verification requests outside of normal business hours, then filling the prescription before the prescriber responds.”).
verification request, some such verifications would be confirmed automatically over the weekend because no one was in the office. Other commenters noted that they receive verification faxes outside of normal business hours and therefore have no way of verifying, denying, or correcting prescriptions. Many of these commenters recommended that the Rule be amended to prohibit sellers from sending prescription verification requests after business hours and on weekends. Along the same lines, the Coalition for Patient Safety recommended that the Commission modify “the eight-hours of communication when the initial communication begins prior to a holiday or on the weekend when the doctor is not conducting normal office hours.”

At this time, the Commission does not propose to amend the Rule to prohibit sellers from sending prescription verification requests after business hours and on weekends or to otherwise extend the eight-business-hour window to accommodate weekends and holidays. It appears that the majority of commenters suggesting this prohibition are concerned that they do not have the opportunity to verify a prescription because they believe the eight-business-hour window for verification of a contact lens order is triggered upon receipt of a verification request, no matter when that request is received. That concern is misplaced. Section 315.2 of the Rule provides that “[f]or verification requests received by a prescriber during nonbusiness hours, the calculation of ‘eight (8) business hours’ shall begin at 9 a.m. on the next weekday that is not a Federal holiday or, if applicable, on Saturday at the beginning of the prescriber’s actual business hours.”

Other commenters expressed frustration that verification requests were sent after regular business hours with the statement that the prescription would be filled unless the prescriber contacted the seller within 12 to 24 hours. Depending upon when these requests are sent, these sellers’ practices could result in contact lenses being shipped before or after the end of the eight-business-hour window. To the extent that sellers are dispensing contact lenses prior to the end of the eight-business-hour window, the Commission notes that this practice violates the Rule. If the Commission receives evidence that sellers are dispensing contact lenses before the end of the eight-business-hour window, the Commission will investigate such allegations, as appropriate.

A few commenters expressed concern that some prescriptions were being automatically filled without a prescriber’s oversight because the calculation of an eight-business-hour window does not take into consideration the fact that their offices may not be open or able to verify prescriptions during the Rule’s established timeframe for business hours. For example, an office may be closed due to vacation, inclement weather, or regularly scheduled office closures that occur during the normal workweek.

Similar concerns were raised by commenters in the initial rulemaking in 2004. At that time, the Commission declined to adopt an actual hours or other prescriber-specific approach to business hours, noting that “[i]t likely would be difficult and burdensome—perhaps impossible—for some sellers to determine and keep track of the actual hours of 50,000 prescribers. By contrast, a general rule using a uniform definition of business hours for all prescribers provides clarity and relative ease of compliance and enforcement.”

In addition, the Commission recognized that there “does not appear to be any practical way to accommodate the myriad circumstances during which the offices of 50,000 individual prescribers may be closed or otherwise not able to respond to a prescription verification request.” The Commission continues to believe that such an approach would be impractical and declines to propose an actual hours or other prescriber-specific approach to calculating business hours.

V. Contact Lens Prescriptions

A. Section 315.6—Expiration of Contact Lens Prescriptions

As set forth by Section 315.6(a) of the Rule, a contact lens prescription expires on the date specified by the law of the State in which the prescription was written, if that date is one year or more after the issue date of the prescription. 243 If State law specifies no date or specifies a date less than one year after the issue date of the prescription, the Rule provides that the prescription shall not expire less than one year after the issue date of the prescription. 244 A prescriber, nonetheless, can specify a shorter expiration date if that date is “based on the medical judgment of the prescriber with respect to the ocular health of the patient.” 247 The prescriber then must document the reasons in the patient’s medical record. In other words, contact lens prescriptions cannot expire in less than one year unless, based on medical judgment, a prescriber specifies a different date and documents the

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234 Whipple (Comment #15); Huang (Comment #17); Wilson (Comment #76); Green (Comment #162); Frederick (Comment #207); Zair (Comment #512).

235 Magee (Comment #95); Mueller (Comment #513); Born (Comment #570); Sluagman (Comment #266).

236 Glavine (Comment #62); Tolchin (Comment #194); Bricker (Comment #195). Ahn (Comment #215); Lester (Comment #231); Kegarise (Comment #447).

237 California Optometric Association (Comment #119); Stahl (Comment #19); Lam (Comment #21); Peterson (Comment #22); Maanun (Comment #23); Matthews (Comment #25); Borsky (Comment #26); Chiurqi (Comment #31); Hodes (Comment #42); Dodge (Comment #44); Loydall (Comment #225); Leach (Comment #257); Chang (Comment #258); Liebig (Comment #478); Harris (Comment #490); Leung (Comment #607); Wu (Comment #608); Vidulich Lai (Comment #620); Pechko (Comment #628); Liu (Comment #656); Louie (Comment #657); Fong (Comment #669); Vo (Comment #673).

238 Comment #621. Similarly, some commenters suggested increasing the eight-business-hour window because, based on their apparent misunderstanding of how the eight business hours are calculated, they believed that they did not have enough time to respond to verification requests received after business hours and on weekends. See Mirkin (Comment #111); Kalman (Comment #150); Bendet (Comment #164); Hans (Comment #168); Baur (Comment #170); Yaklich (Comment #364); Raff (Comment #373); Diaz (Comment #380); Kegarise (Comment #447); Heuer (Comment #467); Zair (Comment #512); Gandhi (Comment #588).

239 Comment #513; Born (Comment #570); Sluagman (Comment #266).

241 Huang (Comment #17); Magee (Comment #95); Green (Comment #162); Sluagman (Comment #266).

242 Whipple (Comment #15); Huang (Comment #17); Magee (Comment #95); Green (Comment #162); Sluagman (Comment #266).

243 69 FR at 40484.

244 16 CFR 315.6(a)(1). The majority of states require that a contact lens prescription not expire less than one year after the issue date, except when a special medical circumstance necessitates that it expire sooner. A few states, such as Maryland and Washington, require that contact lens prescriptions not expire less than two years after the issue date except for special medical circumstances. See, e.g., Maryland Code § 11–404.4; Wash. Admin. Code § 246–852–010(1)(f).
reasoning. The language of these Rule provisions closely tracks that of the Act.249

1. Length of Contact Lens Prescriptions

The Commission received several comments about the length of contact lens prescriptions. Some commenters expressed the view that the prescription length should be longer. For example, Consumers Union requested that the Commission "consider whether a longer minimum period is warranted in the best interests of the consumer." 250 One consumer commented that contact lens prescriptions should be at least two years in length.251

The Professional Opticians of Florida recommended that the Commission modify the Rule to prohibit the use of expiration dates on prescriptions for adult patients with low risk factors,252 while an optometrist argued that, "[c]ompetition for the sales of contact lenses is so great that placing any regulations on the length of the prescription is unnecessary and should be at the sole discretion of the prescriber." 253 LD Vision Group, a contact lens retailer, declared that while it generally makes sense for patients to undergo a comprehensive eye examination to ensure good eye health, patients should not have to undergo a follow-up contact lens fitting after receiving a trial pair of contact lenses from a prescriber.254 Furthermore, according to that commenter, patients should be able to waive the requirement that their contact lens prescriptions be verified—and yet still be able to obtain contact lenses, acknowledging that they are aware of the risks of not obtaining an annual eye examination.255

However, many commenters, primarily prescribers, urged the Commission not to "deregulate" prescription length 256 or otherwise extend the length of contact lens prescriptions.257 Other prescribers encouraged the Commission to retain the one-year prescription length, citing the importance of annual eye examinations for preventing complications related to contact lens use, diagnosing other conditions by examining the eyes, and providing patient education about contact lens use.258 A few commenters expressed satisfaction with the two-year prescription length imposed by some States' laws.259

The Commission declines to propose any changes—either removing or lengthening—the Rule's prescription length provisions. As indicated above, the Rule's language closely tracks that of the Act, which set a minimum expiration date "to prevent prescribers from selecting a short expiration date for a prescription that unduly limits the ability of consumers to purchase contact lenses from other sellers, unless medical reasons justify setting such an expiration date," 260 Accordingly, the Commission is not at liberty to remove the prescription expiration provision. In addition, the Commission declines to propose to lengthen the Rule's prescription expiration provisions and believes the current framework is appropriate. As the Commission concluded in response to commenters arguing for a longer expiration date of two years during the initial rulemaking, in drafting the Act, Congress intended to defer to applicable State law except where such law establishes an expiration period of less than one year.261

Nguyen (Comment #142); Eng (Comment #414); Frady (Comment #440); Santhanan (Comment #444); Calhoun (Comment #448); Howard (Comment #450); Desai (Comment #462); Douglas (Comment #526); Geiger (Comment #598); Ancoma (Comment #650); Webster (Comment #670).

266 16 CFR 315.5(a).

See e.g., Coalition for Patient Vision Care Safety (Comment #621); Williford (Comment #38); Kapoor (Comment #58); Anderson (Comment #96); Nguyen (Comment #412); Eng (Comment #414); Frady (Comment #440); Santhanan (Comment #444); Calhoun (Comment #448); Howard (Comment #450); Desai (Comment #462); Douglas (Comment #526); Geiger (Comment #598); Ancoma (Comment #650); Webster (Comment #670).

263 Comment #582 (emphasis deleted). The survey, conducted on behalf of Johnson & Johnson Vision Care, Inc., included 500 contact lens users 18 years of age or older who had purchased contact lenses online in the prior six months. See also Coalition for Patient Vision Care Safety (Comment #621) (referencing 2015 APCO Insight Survey).

264 Stahl (Comment #19); Lum (Comment #21); Peterson (Comment #22); Maanum (Comment #23); Matthews (Comment #25); Borsky (Comment #26); Chiqui (Comment #31); Hodes (Comment #42); Dodge (Comment #44); Ellington (Comment #60); Leach (Comment #257); Chang (Comment #258); Leung (Comment #607); Wu (Comment #608); Vidiulich (Comment #612); Lai (Comment #620); Pechko (Comment #628); Liu (Comment #650); Louie (Comment #657); Fong (Comment #669); Vo (Comment #672).

265 15 U.S.C. 7603(e); 16 CFR 315.5(d).

266 16 CFR 315.5(a).
seller must contain an expiration date in order to satisfy the definition of contact lens prescription.267 If the prescription presented to, or in possession of, the seller is expired, that prescription is invalid and the seller cannot use the expired prescription to dispense lenses to the patient. Because the seller has actual knowledge that the prescription is expired, neither may the seller use the expired prescription as the basis for a passive verification request. If, however, a seller has been presented with, or is in possession of, a prescription that does not contain an expiration date, or is otherwise relying on prescription information provided by the patient, then the seller may proceed to verify such prescription with the prescriber.268 In this latter instance, the seller does not have any knowledge as to whether or not the prescription is expired, and can rely on the prescriber to alert the seller if the prescription is expired.

Other commenters, recognizing that selling contact lenses on an expired prescription is not allowed by the Rule, instead urged the Commission to increase enforcement.269 The Commission believes that the clarification regarding expired prescriptions as set forth in this document will assist sellers in understanding their obligations under the Rule. In addition, if the Commission receives evidence that sellers are dispensing contact lenses based on expired prescriptions, the Commission will investigate such allegations, as appropriate.

Other commenters explained that because of flaws in the passive verification system sellers “can request verification of an otherwise expired prescription and can ship the lenses if the prescriber does not recognize within eight business hours that the expiration date has passed and inform the seller.” 270 In its comment, the Contact Lens Association of Ophthalmologists argued that passive verification “creates a mechanism for renewal of expired prescriptions, which is in the seller’s interest, may be in the consumer’s immediate interest, but is not in the interest of the consumer’s long term ocular health.” 271 In its comment, the American Optometric Association noted that “an expiration date and issue date are required elements of a prescription” and the FTC “should require the expiration date or issue date to be provided in prescription verification.” 272 This commenter argued that this requirement would incentivize sellers to make sure patients know their prescription expiration date when placing orders. The American Optometric Association further explained that because sellers often market to consumers to reorder in the final month or weeks that the prescription is valid, it believes that sellers already know the prescription expiration date. 273 This commenter concluded that by requiring the expiration date or issue date in the verification request, sellers would be aware, and could not deny when they are using an invalid prescription.274

The Commission declines to propose that the Rule be amended to require the verification request to contain the prescription expiration date. 275 As the Commission recognized at that time, there is “no reason to believe or evidence to suggest that a seller who is attempting to verify a prescription would necessarily have this information.” 276 Furthermore, the Commission believes that adopting such a proposal might thwart the intent of the Act. For example, although prescribers themselves have the prescription expiration information because they issued the prescription, a seller verifying a prescription—as opposed to a seller who has a copy of a prescription with an expiration date—may not have access to this information. Because a verification request that does not contain all the required information is not a valid verification request, 277 sellers without expiration information would be at a disadvantage in that they would not be able to verify patient prescriptions based on Section 315.5(e)(3). Furthermore, as noted, prescribers are already in possession of the expiration date, and it is in their economic and professional interest to check the prescriptions and respond to verification requests by informing the seller whenever a prescription has expired.278

For the same reasons, the Commission declines to propose to amend the Rule to reflect the American Optometric Association’s proposal “to ban sellers from marketing to specific customers to reorder their lenses after the prescription has expired (more than one year after the issue date or when the customer originally ordered lenses from the seller) unless the seller has specific knowledge the customer’s prescription is valid for more than one year.” 279 To the extent a patient does not have a valid prescription, the Rule already prohibits the sale of contact lenses. However, nothing in the Act supports the extension of this prohibition to the marketing (as opposed to the sale) of contact lenses. It may be in the patient’s best interest to receive a reminder to reorder lenses. If the patient does not have a valid prescription, the seller is prohibited from selling the lenses. However, if the patient has visited a prescriber in the interim, the patient will have a valid prescription and the sale can be made.

3. Quantities of Contact Lenses Obtained by Patients

Many commenters expressed the concern that because of inadequacies in the Rule or lack of enforcement, consumers are able to obtain more than a year’s supply of contact lenses.280 For example, some commenters asserted that this occurs because some contact lens retailers allow patients to purchase

267 Comment #572. See also American Optometric Association (Comment #644) (“allowing repurchases based on long-expired prescriptions may be, at the time, convenient for the patient and profitable for the seller, but increases the risk of patient harm.”).  
272 American Optometric Association (Comment #644).  
273 Id.  
274 Id.  
275 A state optometry association requested that the Commission prohibit the sale of contact lenses based on Section 315.5(e)(3). Furthermore, as noted, prescribers are already in possession of the expiration date, and it is in their economic and professional interest to check the prescriptions and respond to verification requests by informing the seller whenever a prescription has expired.278

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278 American Optometric Association (Comment #644).  
270 See, e.g., Rohleder (Comment #57) (“Because of lack of enforcement, patients are able to purchase more contact lenses than they can use in a year, thus allowing them to circumvent seeing their doctor almost indefinitely.”); Filandro (Comment #129) (“A patient can order ten years’ worth of contacts and can’t be stopped by the law. A patient can order one year’s [sic] worth of contacts from ten different vendors and can’t be stopped by the law.”); Stewart (Comment #136) (“Patients are able to purchase multi-years [sic] worth of contact lenses even though the prescription only states six months in one year.”); Tjandera (Comment #502) (noting that the Rule can be evaded because patients can order from multiple online retailers before the prescription expires).
more than a year’s supply of contact lenses,281 while other prescribers reported that patients are able to refill their contact lenses prescription and obtain more lenses just prior to the prescription expiring.282 Prescribers also were concerned that they were receiving verification requests from sellers for contact lenses just as the patient’s prescription was expiring.283 A number of commenters complained that contact lens sellers are actively encouraging patients to refill their prescriptions right before they expire.284 For example, one commenter reported that sellers “send reminders to patients about a month before their contact lens prescription is expired, to buy another whole year’s prescription.”285 One contact lens manufacturer reported that an online survey that it had commissioned showed that 58% of the online consumers that were surveyed indicated that they had received an email or letter from their retailer reminding them that their prescription was expiring.286 Another commenter noted that patients are able to obtain a result’’).

expiring soon (58%) and the vast majority who consumers say they have received an email or letter from their retailer reminding them their Rx was 283 Young (Comment #91); Anklin (Comment #107); American Optometric Association (Comment #644).

284 Day (Comment #4); Driessen (Comment #47); Schwartz (Comment #80); Magee (Comment #95); Johnson (Comment #109); Rosemore (Comment #468); Garcia (Comment #511). See also Milsky (Comment #559) (“Another common concern among prescribers is, for example, a prescription for a year’s supply of contact lenses getting filled one month before it expires, eleven months after the exam and fitting.”).

285 Mathai (Comment #33) (“1800 contacts and other retailers prompt their customers to purchase an annual supply before their prescription expires so they can save a trip to their Dr [sic] office.”); Jones (Comment #83) (“Contact lens suppliers are actively targeting patients to get them to order outside the limits of the prescription and/ or fishing for patient information.”); Young (Comment #91) (“Some online retailers are actively marketing to consumers to purchase more contact lenses when their prescription is ‘about to expire.’”); Nelson (Comment #130) (“1–800 Contacts also will not respect a number of refills on the Rx. Instead, they will email the patient before their Rx expires to remind them to order more. Patients then order another year of contacts and then cancel their yearly examination.”); Hans (Comment #168) (patients prompted to save trip to doctor’s office): Ellenberger (Comment #272) (same); Gandy (Comment #530) (stop sellers from aggressive and unethical practice of encouraging patients to buy another years’ supply of lenses right before their prescription expires): Tass (Comment #586) (same).

286 Combs (Comment #90).

287 Johnson & Johnson Vision Care, Inc. (Comment #582) (“nearly six-in-ten online consumers say they have received an email or letter from their retailer reminding them their Rx was expiring soon (58%) and the vast majority who received this notice (86%) ordered more contacts as a result”).

more than a year’s supply of contact lenses by ordering from multiple sources.287

As explained by other commenters, if patients can obtain lenses in excess of a year’s supply, expiration dates on prescriptions become meaningless288 and patients do not return to their eye care professional on an annual basis.289 Some prescribers provided anecdotal reports of patients not returning for an annual eye exam, sometimes for several years, because they had been able to purchase contact lenses online.290

To address these concerns, a number of commenters—optometric and ophthalmologic associations, individual prescribers, and contact lens manufacturers—proposed that the Commission amend the Rule to require contact lens prescriptions to include a maximum quantity of lenses that consumers can purchase prior to the prescription’s expiration.291 These commenters asserted that including a quantity limit on prescriptions would be beneficial to patients’ health and safety.292 One contact lens manufacturer stated that quantity limits “impose important safeguards and also strengthen the prescriber-patient relationship,” arguing that if a patient runs out of contact lenses, this would “offer[] yet another opportunity for consumers to ask questions, share health and other issues they may be encountering with their lenses, or adjust their prescription under the supervision of an eye care professional.”293

In addition to including the maximum quantity on the prescription itself, several state optometric associations also recommended that the Commission “limit the number of contact lens boxes that can be purchased from a retailer at one time.”294 Similarly, the Coalition for Patient Vision Care Safety proposed that the Commission “forbid retailers to sell in a single transaction a quantity of contact lenses that exceeds a single year’s supply.”295 As an alternative, the Coalition suggested that the Commission require that sellers only provide a supply equal to the length of the underlying prescription.296 A few commenters stated that because passive verification might allow the consumer to obtain more lenses than medically prescribed, quantity limits should be considered.297

A number of commenters argued that contact lenses prescriptions should be

287 Jones (Comment #83); Filandro (Comment #129); Heuer (Comment #467); Endy (Comment #552); Milsky (Comment #559).

288 See, e.g., Rohleder (Comment #57); Buthod (Comment #81); Lai (Comment #102); Anklin (Comment #107); Nett (Comment #449); Lisenby (Comment #662).

289 See, e.g., Weissman (Comment #50) (five years); Grace (Comment #64) (several years); Buthod (Comment #81) (3–5 years); Patel (Comment #168) (companies filling prescriptions for 10 years without successful verification); Pentecost (Comment #268); Silani (Comment #270) (returning for an exam “years” later); Chesa (Comment #352); Arthur (Comment #371) (five years); Hornberger (Comment #457) (as many as five years); Pickering (Comment #475) (five years); Boyer (Comment #570) (many years); Gronquist (Comment #630) (years).

290 American Optometric Association (Comment #644); American Optometry Association (Comment #623); Virginia Optometric Association (Comment #16); Wisconsin Optometric Association (Comment #30); Utah Optometric Association (Comment #39); Pennsylvania Optometric Association (Comment #46); Alabama Optometric Association (Comment #48); Iowa Optometric Association (Comment #79); Michigan Optometric Association (Comment #86); California Optometric Association (Comment #1109); New Mexico Optometric Association (Comment #211); Mississippi Optometric Association (Comment #548); Ohio Optometric Association (Comment #556); Connecticut Association of Optometrists (Comment #560); North Carolina State Optometric Society (Comment #567); Tennessee Association of Optometric Physicians (Comment #575); Colorado Optometric Association (Comment #584); New Jersey Society of Optometric Physicians (Comment #595); Coalition for Patient Vision Care Safety (Comment #621); Stahl (Comment #19); Lum (Comment #608); Vidulich (Comment #612); Lai (Comment #620); Peckho (Comment #628); Liu (Comment #655); Louie (Comment #657); Fong (Comment #673).

291 See, e.g., American Optometric Association (Comment #644).

292 Johnson & Johnson Vision Care, Inc. (Comment #582).

293 Virginia Optometric Association (Comment #16); Wisconsin Optometric Association (Comment #30); Utah Optometric Association (Comment #39); Pennsylvania Optometric Association (Comment #46); Alabama Optometric Association (Comment #48); Iowa Optometric Association (Comment #79); Michigan Optometric Association (Comment #86); California Optometric Association (Comment #1109); New Mexico Optometric Association (Comment #211); Mississippi Optometric Association (Comment #548); Ohio Optometric Association (Comment #556); Connecticut Association of Optometrists (Comment #560); North Carolina State Optometric Society (Comment #567); Tennessee Association of Optometric Physicians (Comment #575); Colorado Optometric Association (Comment #584); New Jersey Society of Optometric Physicians (Comment #595).

294 Virginia Optometric Association (Comment #582).

295 Johnson & Johnson Vision Care, Inc. (Comment #582).

296 Johnson & Johnson Vision Care, Inc. (Comment #582).

297 See also Diers (Comment #32); Ellingson (Comment #66); Moody (Comment #92); Bhadra (Comment #105); Rana (Comment #139); Patel (Comment #237); Santry (Comment #529).

298 Wilson (Comment #76) (passive verification allows the contact lens seller to sell the patients more lenses than are medically prescribed); Kline (Comment #161) (same); Johnson & Johnson Vision Care, Inc. (Comment #582).
treated the same way as pharmaceutical prescriptions in order to prevent the dispensing of excess quantities. As described by one commenter, this would require the quantity to be included on the prescription and the retention of the prescription by the dispenser filling it. A few commenters suggested a pro rata approach. For example, one prescriber recommended that consumers should only be able to obtain refills commensurate with the amount of time left on the prescription. Likewise, the Coalition for Patient Vision Safety proposed a similar approach, suggesting that the Commission “restrict the sale of contact lenses on a prescription that is nine months after issuance or older to up to 25 percent of the prescription’s course.” One contact lens manufacturer recommended that the Commission modify the Rule to “[place[] reasonable limits on the quantity of contact lenses a patient can purchase under a prescription (especially within a few months of a prescription expiring)” in order to encourage patients to go to their eye care professional for routine examinations. However, other commenters disagreed with the proposal to include quantity limits on contact lens prescriptions. CONTACTS argued that imposing quantity limits would “inconvenience consumers and lead to unhealthy practices, such as wearing lenses longer than recommended.” This commenter asserted that patients could misplace or tear lenses, or might replace their lenses more frequently than anticipated by their prescription, and consequently concluded that “there are any number of very legitimate reasons a consumer may want to purchase what appear to be (based on simple multiplication) extra lenses and there is no valid reason to restrict that consumer’s options.”

Another contact lens retailer claimed that prescribers were circumventing the minimum one-year expiration period by “limit[ing] the quantity of replacement lenses, despite the lack of any medical reason for ever doing so” and that “a consumer’s need for additional lenses could arise for a number of reasons.” This commenter proposed that the Commission amend Section 315.6 of the Rule to include a provision stating that a “contact lens prescription shall be valid for an unlimited quantity of lenses regardless of any prescriber-imposed limitation to the contrary.”

After reviewing the comments, the Commission has determined not to propose to amend the Rule to adopt any of the contact lens quantity proposals put forth by commenters. First, the Commission does not believe that there is sufficient evidence in the rulemaking record to support amending the Rule to impose the quantity limit proposals suggested by commenters. Although some commenters conducted and submitted data from online surveys for the proposition that consumers are purchasing contact lenses as their prescriptions are about to expire, this data does not show the quantity of lenses that consumers are actually purchasing. For example, even if one were to assume that the APCO online survey results were completely reliable, the survey only asked consumers whether they purchased lenses at certain points in time; it did not assess the quantity of lenses that consumers actually purchased. The fact that a consumer purchased some contact lenses just prior to a prescription expiring does not necessarily mean that the consumer has purchased an excessive amount of contact lenses, nor does it support the contention that consumers are no longer getting eye examinations. Instead, consumers could be purchasing small amounts of lenses to last until their next scheduled eye examination. When the Commission examined the contact lens industry in 2005, it found that consumers do not typically purchase a full year’s supply at one time. The Commission has not seen any evidence indicating that this has changed. Although commenters to the current Rule review provided various anecdotal and hypothetical accounts of consumers buying excessive quantities of lenses, they did not provide empirical evidence regarding the amount of lenses consumers are obtaining, nor did they submit evidence to show that consumers are not visiting their eye care practitioners as frequently. Second, regardless of the evidence, or lack thereof, in the record to support the quantity limit proposals, the Commission believes that it would be difficult to administer the proposed limits, and that rather than increasing patient eye health and safety, such proposals could have the opposite effect. For example, if a consumer is running out of contact lenses and does not have time to see a prescriber promptly, there is a significant chance that the consumer will not adhere to the recommended contact lens replacement schedule and will instead try to “stretch out” their lenses by re-wearing them until they can visit a prescriber. The failure to replace lenses is a well-documented cause of many contact-lens-related health issues. Absent empirical evidence that a substantial number of consumers are obtaining excessive amounts of contact lenses, or are not returning to their prescribers for eye examinations, the Commission believes that the risk of not replacing lenses outweighs the harm of consumers obtaining more lenses than strictly anticipated by the length of a contact lens prescription.

Nevertheless, the Commission is concerned about anecdotal reports that sellers are contacting patients and encouraging them to stockpile contact lenses prior to the expiration of their prescriptions in order to avoid visiting their eye care professionals. The Commission cautions sellers that such practices run counter to the spirit of the Act, and the Commission will look closely at these alleged practices.

The Commission also declines to propose that the Rule be amended to provide that a “contact lens prescription shall be valid for an unlimited quantity of lenses regardless of any prescriber-imposed limitation to the contrary.” The commenter suggesting this amendment produced no evidence supporting the allegation that prescribers are using quantity limits to undercut the length of a prescription.

The Commission also notes that, as recognized during the initial rulemaking, some State laws or regulations may require prescribers to include quantity information on the prescription and some prescribers in other States without such requirements.

See, e.g., Filandro (Comment #129); Kalman (Comment #150); Bainbridge (Comment #152); Anderson (Comment #185); Palermo (Comment #212); Sanders (Comment #235); Sanders (Comment #236); Smith (Comment #319); Chesin (Comment #350); Perichak (Comment #415); Witmeyer (Comment #418); Palmer (Comment #484); Pierzchala (Comment #500); Haefs (Comment #525); Johnson & Johnson Vision Care, Inc. (Comment #582); Tass (Comment #586); Ball (Comment #590); Alexander (Comment #615).

Kalman (Comment #150).

See, e.g., Milsky (Comment #559).

Comment #561.

CooperVision, Inc. (Comment #591).

Comment #568.

Id.

LD Vision Group (Comment #544).

Id. 306

2005 Contact Lens Report, supra note 29, at 6 note 18 (citing two studies that found that just 12–20% of consumers purchase a year’s supply at a time).

Indeed, the Coalition for Patient Vision Care Safety indicated that “87 percent of contact lens patients had an eye exam last year.” Comment #621.

Cope, supra note 29, at 867 (“contact lens wearers who do not follow recommended contact lens replacement schedules have more complications and eye discomfort”).

LD Vision Group (Comment #544).
may choose to include such information on the prescription. At this time, the Commission reiterates that such prescribers must not use quantity limits to frustrate the prescription expiration requirements of Section 315.6, and that the quantity specified in the prescription must be sufficient to last through the prescription’s expiration date.311

Finally, the Commission also believes that the Rule, as currently drafted, is sufficient to address the quantity limit concerns posited by commenters. During the prior rulemaking, the Commission examined the issue of requiring quantity limits on prescriptions.312 At that time, the Commission concluded that it was not necessary to include the quantity of lenses on the prescription to limit patients’ ability to circumvent the expiration date because the verification process would allow prescribers to prevent patients from ordering excessive contact lenses.313 In this rule review, commenters raised concerns that the verification process was not an adequate safety net because the “verification process is not triggered when a patient provides a contact lens retailer with a complete copy of prescription” and the verification process is bypassed.314 Accordingly, it is possible that consumers could use a copy of a prescription to shop at multiple retailers, or engage in other practices, in order to obtain excessive amounts of contact lenses.315 Although it is possible that these practices could occur, there is no empirical evidence in the record to show the frequency or extent of such practices.316

Other commenters encouraged the Commission to increase enforcement efforts to prevent consumers from obtaining more contact lenses than anticipated by the length of the prescription.317 As already noted, if the Commission receives evidence that sellers are dispensing contact lenses in violation of the Rule, the Commission will investigate such allegations, as appropriate.

B. Private Label Lenses and Contact Lens Substitution

1. Private Label Lenses

A few sellers commented on the Rule provision regarding private label lenses.318 Section 315.2 of the Rule defines private label contact lenses as “contact lenses that are sold under the label of a seller where the contact lenses are identical to lenses made by the same manufacturer but sold under the labels of other sellers.”319 A prescription for private label contact lenses, in addition to other required information, must include the name of the manufacturer, trade name of the private label brand, and if applicable, trade name of equivalent brand name.320 The Rule’s requirements for private label lenses prescriptions track the language of the Act.321 Although most contact lenses are sold under their national brand name, some manufacturers also distribute their lenses to prescribers and retailers under private labels. Sometimes the private label is unique to that seller and other times the private label brand may be available at multiple outlets.322

LD Vision Group, an online contact lens retailer, asserted that manufacturers and prescribers design anticompetitive strategies involving private label lenses to “thwart consumer freedom.”323 Specifically, the company contended that to keep consumers from purchasing contacts elsewhere, some prescribers “will provide unpopular or private-label lenses without published equivalents or for which the equivalents are confusing.”324 For instance, the company stated that one private label “is purportedly available with an 8.3 or 8.6 base curve, while the brand name lens—though it is the exact same lens—is purportedly available with an 8.4 or 8.7 base curve.”325 Another manufacturer, according to LD Vision Group, “offers four different lenses under a private label: Standard, plus, premium, and premium plus, but the national-label equivalents do not use the same identifiers.”326 Although prescribers are required by the Rule to list equivalent information on the prescription, LD Vision Group asserted that prescribers do not always comply, and absent manufacturers’ identification of equivalent lenses, “the retailer must either refuse to dispense unknown equivalents or make assumptions based on intentionally misleading private-label designations and risk dispensing the wrong lenses to the potential detriment of their customers’ eye health.”327 LD Vision Group did not quantify the extent of this problem, or provide empirical evidence as to its scope.328

In order to remedy the aforementioned issues, LD Vision Group proposed that the Commission amend the Rule to require prescribers to annotate a private label lens prescription with the brand-name equivalent and, if a name-brand equivalent is unavailable, the private label prescription must be medically necessary for that particular patient. It also recommended requiring manufacturers of contact lenses to disclose brand equivalency information on private label and brand-label packaging, or otherwise make it available to sellers.329

The Commission declines to propose to modify the Rule to implement these recommendations. Although the Act expressly requires that, in the case of private label contact lens prescriptions, prescribers include “trade name of equivalent brand name,” the Act does...
not impose a requirement of medical necessity in order for a prescriber to prescribe a private label lens for which no name-brand equivalent exists. Nor does the Act expressly contemplate the imposition of disclosure requirements on manufacturers. However, nothing in the Act or Rule prohibits manufacturers from making brand equivalency disclosures on their packaging, or otherwise making such information available to sellers. The Commission understands that some, if not all, manufacturers who offer private labels already make this information readily available to retailers. Additionally, the Commission notes that it is a violation of the Rule for prescribers to fail to comply with their obligation to specify a brand equivalent, should one exist, when writing a prescription. The Commission encourages sellers and consumers to submit evidence of any such violations to the agency for possible enforcement action.

2. Alteration of Contact Lens Prescriptions by Sellers

Section 315.5(e) of the Rule prohibits sellers from altering a contact lens prescription. 

Notwithstanding this prohibition, a seller may substitute for private label contact lenses specified on a prescription, "identical contact lenses that the same company manufactures and sells under different labels." The language of this Rule provision is substantively the same as the language of the Act, with one exception discussed below. The Commission received a number of comments, primarily from prescribers, that complained that online contact lens sellers are selling patients lenses different from those they prescribed. Prescribers expressed concern that contact lenses are being treated like commodities, rather than restricted medical devices regulated by the FDA. These commenters contended that contact lenses, even those with similar refractive specifications, are not interchangeable. One commenter, a manufacturer, opined that “each brand is unique and proprietary to each manufacturer and designed to suit a different set of corresponding patient physiology and consumer needs.”

Several prescribers and a manufacturer also explained that prescribers work with patients to fit them with the most compatible, safe, and effective contact lens and that each patient’s eyes react differently to individual brands. According to these commenters, when a patient receives a contact lens that is not identical to the one prescribed, those lenses have not been fit on the patient, may not be appropriate, and can even be harmful for the patient. Specifically, prescribers stated that scarring, infection, allergic reactions, corneal ulcers, impaired or even lost vision can result or have resulted from patients wearing lenses that were not prescribed.

A few prescribers described patients who, after wearing lenses that had not been prescribed for them, could no longer wear contact lenses or whose vision could no longer be fully corrected.

As to the source of the alteration problem, commenters pointed to both online sellers as well as patients. Commenters, almost exclusively prescribers, asserted that sellers want to maximize their profits and may have little to no consideration for their customers’ eye health. And that patients switch brands to obtain cheaper lenses or seek brands they have seen in commercials. Some prescribers also stated or implied that these substitutions occur as a result of the passive verification system, and encouraged the Commission to adopt an active verification system.

It is unclear how frequently illegal substitutions are occurring, or how many sellers are engaged in this activity. In its comment, Johnson & Johnson Vision Care, Inc. cited a 2015 online survey conducted on its behalf that found that "one-in-four online consumers report having received a different brand of contact lenses than they had ordered without being given advanced warning they were getting another brand." Even assuming the survey methodology is sound and the stated conclusion of the survey is accurate, it is not clear whether the positive responses reflect instances...
when sellers made illegal alterations or, alternatively, instances when consumers ordered a brand other than the prescribed brand and the prescribers then corrected the prescriptions. Nor is it clear whether positive responses include instances where eye care professionals prescribed private label lenses and sellers appropriately substituted them with identical lenses, made by the same manufacturer and sold under a different label, as expressly permitted by Section 315.5(e). Because one cannot tell the percentage that was the result of the included alterations, the survey data is not conclusive. 346

The Commission notes that unauthorized alterations violate the Rule as currently written, and thus there is no need to amend the Rule to address this issue. 347 In some cases, patients may request to purchase a brand of lenses not identical to the one prescribed. In those instances, the seller may include the wrong brand in the verification request. If any of the information required by Section 315.5(b)(2) is included in the verification request is incorrect, respondents are encouraged to provide the correct information to the seller.

Several commenters requested that the Commission better enforce the Rule against sellers that engage in illegal substitutions. 348 If the Commission receives evidence that sellers are engaged in illegal substitutions, the Commission will investigate the allegations, as appropriate. 349

346 Other seemingly relevant survey questions, one of which a commenter cited to, may be similarly flawed. For example, the Coalition for Patient Vision Care Safety pointed out that 31% of respondents answered positively when asked: “When buying contact lenses online or over the phone in the past, has the company you were phoned by the company informing you that they do not carry or do not currently have stocked, the brand of contact lenses on your prescription, and advised you to get another brand of contact lenses instead?” Comment #621. In response to a subsequent survey question, 80% of those respondents indicated that they “then order[ed] that other brand of contact lenses.” The Commission notes that positive responses to these questions do not necessarily reflect a violation of the Rule. For example, a prescriber changing a prescription to a different lens in the interim would thereby render the sale proper.

347 Because prescription alteration violates the Rule, the Commission need not make its own assessment of Johnson & Johnson Vision Care, Inc.’s and numerous prescribers’ statements concerning the non-interchangeability of lenses and the resulting eye health risks.

348 Thomas (Comment #61); Lai (Comment #541); Johnson & Johnson Vision Care, Inc. (Comment #582).

349 The Commission notes that the prescriber has the ability to block an illegal substitution by actively responding to a verification request for a non-prescribed lens and indicating its invalidity. In fact, in circumstances where a consumer selects a non-prescribed brand, the prescriber is likely the only one who can “catch” the error.

Lastly, one commenter, an optometrist, recommended that a retailer should be required to warn or educate patients about the potential consequences of changing brands or other parameters without a doctor’s authorization through a “statement of education” with every order, warning patients that “contact lenses are a medical device and the wearing of or changing of a brand or prescription without a doctor’s authorization is illegal and could result in damage, even blindness to the recipient.” 350 The Commission declines to modify the Rule in such a fashion. Although the Commission does not take issue with the importance of educating patients about the need to consult their prescriber before switching contact lens brands, and encourages sellers, prescribers, and manufacturers to do so, we have no evidence that the benefit of imposing such a requirement on sellers would outweigh the costs.

Through discussions with industry members, it has come to the Commission’s attention that in addition to prescribers, some other sellers market and sell private label contact lenses that are identical to, and are made by the same manufacturer as, brand name contact lenses. As a result, when a patient presents a contact lens prescription for brand name contact lenses to certain sellers, those sellers may wish to sell, as a substitute, their own private label lenses to the patient. The language of the Act clearly permits substitution in cases where the same contact lenses are manufactured by the same company and sold under multiple labels to individual providers. 351 Although the Rule similarly permits a seller to substitute lenses that are identical to, and are made by the same manufacturer as, the one listed on the prescription, the language set forth in Section 315.5(e) of the Rule could be read to limit such substitution to instances where private label lenses are listed on the prescription and the seller wishes to substitute brand name lenses. 352

The Commission recognizes that the current construction of Section 315.5(e) of the Rule does not conform to the language or intent of the Act. The clear language of the Act allows sellers to substitute private label lenses for brand name lenses when the substituted lenses are “manufactured by the same company and sold under multiple labels to individual providers.” 353 To conform the Rule to the Act, the Commission proposes to strike the words “private label” from Section 315.5(e) and seeks comment on its proposal. The definitions in the Rule of a “contact lens prescription” and of a “private label contact lens” would remain unchanged.

C. HIPAA Issues

The Commission received a few comments that identified concerns with how the Rule’s verification framework interacts with the Health Insurance Portability and Accountability Act of 1996 354 (“HIPAA”) Privacy and Security Rules (“HIPAA Rules”). One prescriber expressed the opinion that the Contact Lens Rule’s verification system was in direct conflict with HIPAA and detailed his attempts to procure HIPAA authorizations from his patients prior to releasing the prescription to a third-party seller. 355 Another commenter recommended that HIPAA should apply to the verification process and that any verification request should be accompanied by an authorization signed by the patient. 356 A third commenter expressed concern that automated telephonic verification requests were in direct violation of HIPAA because the patient’s personal information was relayed to the person answering the telephone, without any mechanism to ensure that it was the intended recipient. 357 A few prescribers also complained that sellers’ practices of trying to obtain prescriptions without patient authorization violated HIPAA. 358

Other commenters stated that some prescribers were not complying with the Contact Lens Rule and were using HIPAA to avoid doing so. One seller complained that “[s]ome prescribers will still refuse to verify even with the law in place, stating (incorrectly) that HIPAA or a state privacy rule prohibits

350 Kegarise (Comment #447).


352 16 CFR 315.5(e).

353 Section 315.5(e) modifies “contact lenses” with the term “private label,” but the Act does not contain that modifier. C.F. 15 U.S.C. 7603(f).

354 15 U.S.C. 7603(f). Although the Commission imagines it would be quite rare, it believes a seller should be permitted under the Rule to substitute one private label lens for another private label lens as long as the lenses are identical.


356 45 CFR parts 160, 164.

357 Ciszek (Comment #134).

358 Pao (Comment #181).

359 Stuart (Comment #635) (“consumers’ personal and medical information is currently being transmitted unsecured to a third party by using an automated phone verification system”).

360 St. Martin (Comment #292) (“their phishing for prescriptions should be considered a HIPAA violation because often this is done without the patient’s permission”). See also Vensand (Comment #59) (expressing concern about the acquisition and sale of patient information); Ciszek (Comment #134) (complaining that sellers are calling of their own accord, without the patient initiating the request).
release of the prescription and that only the patient can ask for it.” Likewise, the National Association of Optometrists and Opticians noted that it was “aware of instances where prescribers incorrectly inform patients that HIPAA or other laws require a written authorization from the patient or face-to-face requests by the patient to the prescriber.” This commenter recommended that the Commission make clear to prescribers, sellers, and consumers that HIPAA does not prevent compliance with the Rule’s verification process and that to claim otherwise is an unfair and deceptive practice.

The Commission reiterates that the HIPAA Privacy Rule does not restrict prescribers’ ability to provide or verify contact lens prescriptions under the Rule. As a preliminary matter, HIPAA does not require submission of a HIPAA authorization for the prescriber to release a contact lens prescription to a patient. Furthermore, as the Commission explained in the initial rulemaking, the HIPAA Privacy Rule permits a HIPAA covered entity, such as a covered prescriber, to disclose protected health information (“PHI”) without patient authorization for “treatment” purposes or when “required by law,” as well as for other specified purposes. Providing, confirming, or correcting a prescription for contact lenses for a contact lens seller as contemplated under the Contact Lens Rule constitutes “treatment” under the HIPAA Privacy Rule. In addition, to the extent the disclosure of PHI to provide, confirm, or verify a contact lens prescription is required under the Act and the Rule, such disclosure constitutes a disclosure “required by law” under the HIPAA Privacy Rule. For these reasons, patient authorization is not required for a prescriber to provide or verify a contact lens prescription with the contact lens seller, or to provide a contact lens prescription to the patient.

In addition to the comments submitted in this rule review, the Commission has received other questions and complaints related to prescribers’ HIPAA obligations under the Rule. For example, one prescriber asked whether HIPAA precluded his office from emailing a copy of a prescription to a patient without written authorization if the email communication was not encrypted. Correspondingly, some consumers have complained that their eye care practitioners have refused to email contact lens prescriptions to them. As a threat to HIPAA covered entity, the Contact Lens Rule itself contemplates email communication, stating that the prescriber shall “provide or verify” the prescription “by electronic or other means.” Further, the HIPAA Rules do not preclude covered prescribers from emailing contact lens prescriptions to patients or sellers. According to guidance provided by the U.S. Department of Health & Human Services, the HIPAA Rules allow health care providers to communicate electronically with patients, provided they apply reasonable safeguards.

Although a covered provider must consider encryption to protect against unintentional disclosures, the provider may determine that it is not reasonable and appropriate, and may instead apply precautions when transmitting unencrypted email, such as checking the email address for accuracy before sending, sending an email alert to the intended recipient for address confirmation prior to sending the message, and limiting the amount and type of PHI transmitted through the email.

Regardless, where an individual requests that the covered entity transmit PHI by unencrypted email, as is their right under the HIPAA Privacy Rule right of access, a covered entity must do so. Before sending unencrypted email containing PHI to a patient, the entity should advise the patient of the risk that the unencrypted PHI could be intercepted and accessed by unauthorized third parties. If, after having been advised of the risks the patient still prefers to receive his or her PHI via unencrypted email, the patient has the right to receive the PHI in that manner and the covered entity is not responsible for unauthorized access to the PHI during electronic transmission, nor is the covered entity responsible for safeguarding the PHI once delivered to the patient. Conversely, a covered prescriber also must honor a patient’s reasonable request that the prescriber not send communications via unencrypted email, by offering other means, such as encrypted email, secure patient portal, postal mail, or telephone.

D. Enforcement Efforts

In addition to proposing amendments to specific Rule provisions to further the Rule’s goals of competition and patient welfare, several commenters also urged the Commission to increase its enforcement efforts and stressed the importance of enforcing the Rule to ensure that its benefits are realized and

Encryption of PHI must be implemented where a covered entity has determined that it is a reasonable and appropriate safeguard as part of its risk management. See U.S. Dep’t Health & Human Servs., Health Information Privacy, FAQs, “Is the use of encryption mandatory in the Security Rule?” http://www.hhs.gov/hipaa/for-professionals/security-rule/index.html. A covered health care provider also must protect PHI in those emails while they are stored on servers, workstations, mobile devices, and other computer systems, through encryption and other safeguards, as appropriate. See 45 CFR 164.306(a).

374 78 FR 5634 (Jan. 25, 2013).

375 45 CFR 164.522(b).
action against prescribers has been limited to a handful of warning letters. These commenters proposed that the Commission amend Section 315.9 of the Rule, the enforcement provision, to add language to clarify that any violation of the Rule—by either sellers or prescribers—constitutes a violation of a rule under Section 18 of the Federal Trade Commission Act, subject to the same fines and penalties as any other violation of the Act. With respect to commenters’ recommendations that the Commission increase its enforcement efforts, the Commission notes that the rule review process has been instrumental in identifying areas that need further investigation. Accordingly, the Commission will consider ways to leverage its enforcement, consumer education, and business guidance efforts to address the concerns identified. However, the Commission does not believe it necessary to amend Section 315.9 of the Rule to clarify that violations by either sellers or prescribers constitute a violation of the Rule under Section 18 of the Federal Trade Commission Act. The language of the Act and Rule are clear on this point.

E. Recommendations Regarding the Commission’s Complaint Reporting System

The Commission received a variety of comments suggesting proposals to improve perceived shortcomings in the agency’s complaint reporting system to aid Rule enforcement efforts. Several optometric associations, for example, expressed their opinion that the Commission’s consumer reporting process is not adequately designed to deal with contact lens complaints, and recommended that the Commission “develop a distinct complaint submission process for contact lens-related concerns.” More specifically, the American Optometric Association asserted that the online complaint assistant service is not appropriately set up to receive these types of complaints, and doctors who report issues of concern often feel their reports go unnoticed. This commenter stated that setting up a distinct Contact Lens Rule complaint system would benefit patients as well, providing them with a simple process to follow in case they have contact lens sale-related concerns. Likewise, the Coalition for Patient Vision Care Safety was troubled that the agency “routes eye contact complaints about non-compliance to its general complaint lines” and asserted that the general routing of complaints discourages the reporting of complaints and fails to provide the Commission with adequate and accessible information to enforce the Rule. The Coalition recommended that the Commission instead utilize dedicated personnel paired with a dedicated Web site or phone number within the Commission.

Other commenters expressed doubts that the complaint reporting system was adequate to capture specific types of complaints. For example, two State representatives, Rhode Island State Rep. Brian Patrick Kennedy and Arizona State Rep. Heather Carter, argued that the current system favors eye care providers and their ability to file complaints against resellers of contact lenses. These commenters recommended that the Commission consider simplifying the complaint process to make it easier for consumers.

See, e.g., Barr (Comment #639).

376 See, e.g., Virginia Optometric Association (Comment #16); Wisconsin Optometric Association (Comment #30); Utah Optometric Association (Comment #39); Pennsylvania Optometric Association (Comment #45); Alabama Optometric Association (Comment #49); Iowa Optometric Association (Comment #79); Michigan Optometric Association (Comment #66); California Optometric Association (Comment #119); New Mexico Optometric Association (Comment #211); Mississippi Optometric Association (Comment #548); Ohio Optometric Association (Comment #556); Connecticut Association of Optometrists (Comment #560); North Carolina State Optometric Society (Comment #567); Tennessee Association of Optometric Physicians (Comment #575); Colorado Optometric Association (Comment #584); New Jersey Society of Optometric Physicians (Comment #595). See also American Academy of Ophthalmology (Comment #611) (“Wearing improper lenses can further complicate existing vision issues, including leading to infection in the eye. The sale of lenses without a prescription is a practice that exists despite the Rule, and the Academy believes that the Commission should take swift action to improve enforcement of the Rule.”).

377 American Optometric Association (Comment #644); Virginia Optometric Association (Comment #16); Wisconsin Optometric Association (Comment #16); Utah Optometric Association (Comment #30); Pennsylvania Optometric Association (Comment #39); Iowa Optometric Association (Comment #49); New Mexico Optometric Association (Comment #66); California Optometric Association (Comment #119); Mississippi Optometric Association (Comment #548); Ohio Optometric Association (Comment #556); Connecticut Association of Optometrists (Comment #560); North Carolina State Optometric Society (Comment #567); Tennessee Association of Optometric Physicians (Comment #575); Colorado Optometric Association (Comment #584); New Jersey Society of Optometric Physicians (Comment #595).

378 See also Senator Perdue (Comment #569).

379 See, e.g., Filandro (Comment #129); Sandler (Comment #135); Jankowski (Comment #153); Hans (Comment #168); Nguyen (Comment #175); Robertson (Comment #180); Schumacher (Comment #193); Sisson (Comment #254); Frederick (Comment #269); Bolenbaker (Comment #357); Yamamoto (Comment #408); Palmer (Comment #464); Williams (Comment #490); Marler (Comment #504); Koop (Comment #506); North Carolina State Optometric Society (Comment #567); Tennessee Association of Optometric Physicians (Comment #575); Colorado Optometric Association (Comment #584); New Jersey Society of Optometric Physicians (Comment #595).

380 Comment #621.

381 Id.

382 S.U.C.S. 57a.

383 The state optometric associations also encouraged the Commission to do more to “ensure that patients are aware that contact lenses are regulated medical devices, whose safe use and optimal performance depends on eye examinations and professional supervision.” Virginia Optometric Association (Comment #16); Wisconsin Optometric Association (Comment #30); Utah Optometric Association (Comment #39); Pennsylvania Optometric Association (Comment #46); Alabama Optometric Association (Comment #48); Iowa Optometric Association (Comment #79); Michigan Optometric Association (Comment #86); California Optometric Association (Comment #119); New Mexico Optometric Association (Comment #211); Mississippi Optometric Association (Comment #548); Ohio Optometric Association (Comment #556); Connecticut Association of Optometrists (Comment #560); North Carolina State Optometric Society (Comment #567); Tennessee Association of Optometric Physicians (Comment #575); Colorado Optometric Association (Comment #584); New Jersey Society of Optometric Physicians (Comment #595).

384 The state optometric associations also encouraged the Commission to do more to “ensure that patients are aware that contact lenses are regulated medical devices, whose safe use and optimal performance depends on eye examinations and professional supervision.” Virginia Optometric Association (Comment #16); Wisconsin Optometric Association (Comment #30); Utah Optometric Association (Comment #39); Pennsylvania Optometric Association (Comment #46); Alabama Optometric Association (Comment #48); Iowa Optometric Association (Comment #79); Michigan Optometric Association (Comment #86); California Optometric Association (Comment #119); New Mexico Optometric Association (Comment #211); Mississippi Optometric Association (Comment #548); Ohio Optometric Association (Comment #556); Connecticut Association of Optometrists (Comment #560); North Carolina State Optometric Society (Comment #567); Tennessee Association of Optometric Physicians (Comment #575); Colorado Optometric Association (Comment #584); New Jersey Society of Optometric Physicians (Comment #595).

385 Furthermore, the Commission believes that the proposed Rule amendment requiring a signed acknowledgment of receipt of a contact lens prescription will also aid Rule enforcement efforts. See supra Section III.A.3.


387 American Optometric Association (Comment #644); Virginia Optometric Association (Comment #16); Wisconsin Optometric Association (Comment #16); Utah Optometric Association (Comment #30); Pennsylvania Optometric Association (Comment #46); Alabama Optometric Association (Comment #48); Iowa Optometric Association (Comment #79); Michigan Optometric Association (Comment #86); California Optometric Association (Comment #119); New Mexico Optometric Association (Comment #211); Mississippi Optometric Association (Comment #548); Ohio Optometric Association (Comment #556); Connecticut Association of Optometrists (Comment #560); North Carolina State Optometric Society (Comment #567); Tennessee Association of Optometric Physicians (Comment #575); Colorado Optometric Association (Comment #584); New Jersey Society of Optometric Physicians (Comment #595).

388 Comment #644.

389 Id.

390 Comment #621.

391 See also Senator Perdue (Comment #569).

392 Other commenters expressed doubts that the complaint reporting system was adequate to capture specific types of complaints. For example, two State representatives, Rhode Island State Rep. Brian Patrick Kennedy and Arizona State Rep. Heather Carter, argued that the current system favors eye care providers and their ability to file complaints against resellers of contact lenses. These commenters recommended that the Commission consider simplifying the complaint process to make it easier for consumers.
Accordingly, the Commission believes that the FTC Complaint Assistant is configured to capture and report all contact lens-related complaints, whether they originate from consumers, prescribers, sellers, or others. However, resources permitting, the Commission will explore whether a dedicated email address would also be beneficial to complement the Complaint Assistant.

VI. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 30, 2017. Write “Contact Lens Rule, 16 CFR part 315, Project No. R511995” on the comment. Your comment, including your name and your state, will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at http://www.ftc.gov/os/publiccomments.shtm. As a matter of discretion, the Commission tries to remove individuals’ home contact information from comments before placing them on the Commission Web site. Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as a Social Security number, date of birth, driver’s license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, do not include any “[t]rade secret or any commercial or financial information which is . . . privileged or confidential,” as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you must follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comments to be withheld from the public record. Your comment will be kept confidential only if the FTC

to file complaints against their eye care provider, as well as replacement contact lens resellers. Likewise, some online retailers recommended that to facilitate enforcement efforts the Commission should “create a user-friendly online complaint process for consumers.”

These commentators argued that the online complaint assistant is difficult to navigate and does not ask the appropriate questions to identify a Rule violation.

After careful consideration of these comments, the Commission declines to redesign its complaint reporting mechanism. The Commission has designed the FTC Complaint Assistant, the agency’s online complaint reporting system, to be responsive to consumers who wish to file complaints about more than a hundred different types of products or services, while at the same time facilitating the filing of complaints regarding the most common complaint areas. Accordingly, the home page of the complaint system contains primary links for the FTC’s seven most common complaint areas. The Commission’s goal is that the primary links on the home page be responsive to at least 80 percent of the consumer complaints the agency receives. Although highlighting the most frequent types of complaints necessarily means that many areas of concern cannot be listed as separate categories, users can easily submit their complaint under the category “Other” when there is no listed category for the complaint, as is the case with contact lenses. Once the “Other” category is selected, the subsequent Web page includes the categories “Health and Fitness” subcategory, which is described as including, “prescriptions, eye care.”

After screening out complaints related to telemarketing phone calls and spam email, the first option on the following Web page asks whether the complaint relates to “Eyeglasses or Contact Lenses.” During this process, the person lodging the complaint is given ample room to describe the details of the complaint.

Instructions on the FTC Complaint Assistant page explain that the FTC will categorize a complaint even if it does not fit one of the listed categories. In addition, the Web page also informs users that if they are “having trouble categorizing [their] complaint,” they can chat online with FTC tech support.
and minimize the costs for prescribers and sellers (including small businesses), the Commission seeks views and data on the following general questions for each of the proposed changes described in this NPRM:

1. What benefits would a proposed change confer and on whom? The Commission in particular seeks acknowledgment form to be in either paper or electronic format increase, or have no effect on the extent to which patients understand their rights under the Rule? What other languages should the Commission consider to lower the cost and improve the reliability of executing, storing, and retrieving the signed acknowledgment forms?

6. Should the proposed amendment contain specific language about the use of electronic acknowledgment forms and electronic signatures? If so, what? Should the proposed amendment contain particular requirements about the type of electronic acknowledgment forms and electronic signatures to be used? If so, what types should be required?

7. Are there alternate ways to structure a patient acknowledgment requirement that would reduce the burdens of the proposed amendment while providing the same or greater benefits?

8. What evidence supports your answers?

B. Acknowledgment of prescription release:

1. Would the proposed amendment to require prescribers, after the completion of a contact lens fitting, to request the contact lens patient acknowledgment receipt of the contact lens prescription by signing an acknowledgment form increase, decrease, or have no effect on compliance with the Rule’s requirement that patients receive a copy of their contact lens prescription after the completion of the contact lens fitting? Why?

2. Would the proposed amendment to require prescribers to maintain copies of the signed acknowledgments for a period of not less than three years increase, decrease, or have no effect on the Commission’s ability to measure and enforce the Rule’s automatic prescription release provision? Why?

3. Would the proposed amendment to require the acknowledgment form to inform patients that they may purchase contact lenses from the seller of their choice increase, decrease, or have no effect on the extent to which patients understand their rights under the Rule? Why?

4. Should the Commission consider other language to be included in the signed acknowledgment form? If so, what?

5. Would allowing the acknowledgment form to be in either paper or electronic format increase, decrease, or have no effect on the extent to which patients understand their rights under the Rule? What other evidence supports your answers?

6. What other technologies are available that could be implemented to improve prescription portability and thereby increase benefits and decrease burdens related to prescription release?

D. Additional copies of prescriptions:

1. In this NPRM, the Commission has preliminarily determined that requiring prescribers to provide additional copies of contact lens prescriptions to a patient upon request is required by the Act. How does this determination affect, if at all, the portability of contact lens prescriptions?

2. Does this determination affect the accuracy of contact lens prescriptions presented to sellers? If so, how?

3. Does this determination affect the administrative burden of prescribers? If so, how? Would any burden caused by this determination be offset by a reduced burden related to prescription verification requests? If so, how?

4. What evidence supports your answers?

E. Sellers designated to act on behalf of patients:

1. Should the Commission impose a timeframe for prescribers, under Section 315.3(a)(2) of the Rule, to respond to requests from authorized third parties for a copy of a patient’s prescription?

2. If so, what should be the appropriate amount of time for a prescriber to be required to respond to a request from an authorized third party for a copy of a patient’s prescription?

3. What evidence supports your answers?

F. Presentation of prescription “directly or by facsimile” under Section 315.5(a)(1):

1. The Commission has initially determined that presenting a prescription to a seller “directly or by facsimile” includes the use of online patient portals. Does this determination further the Act’s goal of prescription portability? If so, how?

2. What is the impact, including costs and benefits, of this determination?

3. What evidence supports your answers?

G. Automated telephone systems as “direct communication” under Section 315.5(a)(2):

1. What modifications to automated telephone calls, short of prohibiting the use of such calls, should the Commission consider to address the concerns raised by prescribers about the burden of such calls?

H. Section 315.5(e)—No alteration of prescription provision:

1. To conform the language of the Rule to the language of the Act, the Commission proposes to amend Section 315.5(e) to strike the words “private label.” Would this proposed amendment alter the way that prescribers, sellers, or manufacturers do business, and if so, how?
2. Are there alternative proposals that the Commission should consider?  
3. What evidence supports your answers?  

VII. Communications by Outside Parties to the Commissioners or Their Advisors  
Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding, from any outside party to any Commissioner or Commissioner’s advisor, will be placed on the public record. See 16 CFR 1.26(b)(5).

VIII. Paperwork Reduction Act  
The existing Rule contains recordkeeping and disclosure requirements that constitute “information collection requirements” as defined by 5 CFR 1320.3(c) under Office of Management and Budget (“OMB”) regulations that implement the Paperwork Reduction Act (“PRA”), 44 U.S.C. 3501 et seq. OMB has approved the Rule’s existing information collection requirements. (OMB Control No. 3084–0127).

The proposed modifications to the Rule would require that prescribers obtain from patients, and maintain for a period of not less than three years, a signed acknowledgment form, entitled “Patient Receipt of Contact Lens Prescription,” confirming that patients received their contact lens prescriptions at the completion of their contact lens fitting. The proposed recordkeeping requirement would constitute an information collection as defined by 5 CFR 1320.3(c). Accordingly, the Commission is providing PRA burden estimates for them, as set forth below. The Commission will also submit this notice of proposed rulemaking and associated Supporting Statement to OMB for review under the PRA. The proposed requirement that prescribers provide an acknowledgment form to patients, however, does not constitute an information collection under the PRA, in that the Rule specifies the language that the form must contain.

A. Estimated Additional Hours Burden  
Commission staff estimates the paperwork burden of the proposed modifications based on its knowledge of the eye care industry. The staff believes there will be an additional burden on individual prescribers’ offices to maintain the signed acknowledgment forms for a period of not less than three years.

The number of contact lens wearers in the United States is currently estimated to be approximately 41 million.396 Therefore, assuming an annual contact lens exam for each contact lens wearer, approximately 41 million people would read and sign an acknowledgment form every year.397

Maintaining the form for a period of not less than three years does not impose a substantial new burden on individual prescribers and their office staff. The majority of states already require that optometrists maintain records of eye examinations for at least three years,398 and maintaining a one-page acknowledgment form per patient per year should not take more than a few seconds of time, and an inconsequential, or de minimis, amount of record space. Some prescribers might present the acknowledgment form electronically, and such format would allow the signed acknowledgment to be preserved without any additional burden. For other prescribers, the new recordkeeping requirement would likely require that office staff either preserve the signed acknowledgment form in paper format or electronically scan the signed acknowledgment form and save it as an electronic document. In the latter scenario, the Commission estimates this scanning and saving would take approximately one minute.

The Commission does not possess any information regarding the percentage of prescribers’ offices that use paper forms, electronic forms, or that scan paper files and maintain them electronically. Therefore, for purposes of this notice, staff will assume that all prescriber offices require a full one minute per form per year for record maintenance purposes arising from the proposed modifications.

As noted above, the number of contact lens wearers in the United States is currently estimated to be approximately 41 million. Therefore, assuming one signed acknowledgment form for each contact lens wearer per year, prescribers’ offices, collectively, would have to spend approximately 41 million minutes, or 683,333 hours, per year maintaining records of eye examinations (recordkeeping requirement).

In all likelihood, the actual overall increased burden on prescribers may be less than 683,333 hours, because increasing the number of patients in possession of their prescriptions should correspondingly increase the number of consumers who provide their prescriptions to third-party sellers when purchasing contact lenses. This, in turn, should reduce the number of verification requests that third-party sellers would otherwise make to prescribers. Based on current estimates, responding to verification requests requires that prescribers spend approximately five minutes per request.399 The Commission, however, does not presently have enough information to devise a reliable estimate for how many more consumers are likely to present third-party sellers with a complete copy of their prescription following the proposed Rule modification. Therefore, for purposes of calculating the burden, the Commission, at this time, will not credit the expected reduction in verification burden.

B. Estimated Total Labor Cost Burden  
Commission staff derives labor costs by applying appropriate hourly cost figures to the burden hours described above. The Commission assumes that office clerks will perform most of the labor when it comes to printing, disseminating, and storing the acknowledgment forms for prescribers’ offices. According to Bureau of Labor Statistics, general office clerks earn an average wage of $15.33 per hour.400 Based on this data, the estimated total additional labor cost attributable to the proposed modifications to the Rule would amount to approximately $10,475,495.

While not insubstantial, this amount constitutes just under one-fourth of one percent of the estimated overall retail market for contact lens sales in the year.
United States. Furthermore, the burden is likely to be less, because many prescribers’ offices will not require a full minute to store the acknowledgment form. And, as noted above, increasing the number of patients in possession of their prescriptions should correspondingly increase the number of consumers who provide their prescriptions to third-party sellers when purchasing contact lenses. This, in turn, could potentially reduce the number of verification requests made to prescribers, and the time prescribers spend responding.

The Commission invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (2) the accuracy of the FTC’s burden estimates, including whether the methodology and assumptions used are valid; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of collecting information.

Comments on the information collection requirements subject to review under the PRA should also be submitted to Office of Management and Budget. If sent by U.S. mail, address comments to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Room 10102, 725 17th Street NW., Washington, DC 20503. Comments sent to OMB by U.S. postal mail, however, are subject to delays due to heightened security precautions. Thus, comments instead should be sent by facsimile to (202) 395–5167.

IX. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”)402 requires the Commission to conduct an analysis of the anticipated economic impact of the proposed amendments on small entities.403 The purpose of a regulatory flexibility analysis is to ensure the agency considers the impacts on small entities and examines regulatory alternatives that could achieve the regulatory purpose while minimizing burdens on small entities. Section 605 of the RFA404 provides that such an analysis is not required if the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.

The Commission does not anticipate that the proposed amendments will have a significant economic impact on small entities, although they may affect a substantial number of small businesses. The proposed amendments require that prescribers obtain from patients, and maintain for a period of not less than three years, a signed acknowledgment form, entitled “Patient Receipt of Contact Lens Prescription,” confirming that patients received their contact lens prescriptions at the completion of their contact lens fitting. The Commission believes the burden of complying with this requirement likely will be relatively small. As discussed in the Paperwork Reduction Act section, the majority of states already require that optometrists maintain records of eye examinations for at least three years. The proposed amendment would require one additional page to be maintained as a record, which is likely a minimal burden. Therefore, based on available information, the Commission certifies that amending the Rule as proposed will not have a significant economic impact on a substantial number of small businesses.

Although the Commission certifies under the RFA that the proposed amendment will not, if promulgated, have a significant impact on a substantial number of small entities, the Commission has nonetheless determined it is appropriate to publish an Initial Regulatory Flexibility Analysis to inquire into the impact of the proposed amendment on small entities. Therefore, the Commission has prepared the following analysis:

A. Description of the Reasons the Agency Is Taking Action

In response to public comments, the Commission proposes amending the Rule to ensure that patients are receiving a copy of their contact lens prescription at the completion of a contact lens fitting.

B. Statement of the Objectives of, and Legal Basis for, the Proposed Amendments

The objective of the proposed amendment is to clarify and update the Rule in accordance with marketplace practices. The legal basis for the Rule is the Fairness to Contact Lens Consumers Act.405 The Act authorizes the Commission to implement its requirements through the issuance of rules.

C. Small Entities to Which the Proposed Amendments Will Apply

The proposed amendments apply to prescribers of contact lenses. The Commission believes that many prescribers will fall into the category of small entities (e.g., offices of optometrists less than $7.5 million in size).406 Determining a precise estimate of the number of small entities covered by the Rule’s prescription release requirements is not readily feasible because most prescribers’ offices do not release the underlying revenue information necessary to make this determination.407 Based on its knowledge of the eye care industry, staff believes that a substantial number of these entities likely qualify as small businesses. The Commission seeks comment with regard to the estimated number or nature of small business entities, if any, for which the proposed amendments would have a significant impact.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Covered Small Entities and Professional Skills Needed To Comply

As explained earlier in this document, the proposed amendments require that prescribers obtain from patients, and maintain for a period of not less than three years, a signed acknowledgment form, entitled “Patient Receipt of Contact Lens Prescription,” confirming that patients received their contact lens prescriptions at the completion of their contact lens fitting. The small entities potentially covered by these proposed amendments will include all such entities subject to the Rule. The professional skills necessary for compliance with the Rule as modified by the proposed amendments will include office and administrative support supervisors to create the acknowledgment form and clerical personnel to collect signatures from patients and maintain records. The Commission believes the burden imposed on small businesses by these requirements is relatively small, for the reasons described previously in Section 402 5 U.S.C. 601(6).


E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any other federal statutes, rules, or policies duplicating, overlapping, or conflicting with the proposed amendments, but as noted previously, the majority of states already require that optometrists—of which many are most likely small businesses—maintain records of eye examinations for at least three years. The Commission invites additional comment on this issue.

F. Significant Alternatives to the Proposed Amendments

The Commission has not proposed any specific small entity exemption or other significant alternatives, as the proposed amendments clarify and update the Rule in light of marketplace practices to ensure that patients are receiving a copy of their contact lens prescription at the completion of a contact lens fitting. Under these limited circumstances, the Commission does not believe a special exemption for small entities or significant compliance alternatives are necessary or appropriate to minimize the compliance burden, if any, on small entities while achieving the intended purposes of the proposed amendments. As discussed above, the proposed recordkeeping requirement likely involves minimal burden and prescribers would be permitted to maintain records in either paper or electronic format. This recordkeeping burden could be reduced to the extent that prescribers have adopted electronic medical record systems, especially those where patient signatures can be recorded electronically and input automatically into the electronic record. Furthermore, prescribers also could scan signed paper copies of the acknowledgment form and store those forms electronically to lower the costs of this recordkeeping requirement. Nonetheless, the Commission seeks comment on the need, if any, for alternative compliance methods to reduce the economic impact of the Rule on small entities. If the comments filed in response to this NPRM identify small entities affected by the proposed amendments, as well as alternative methods of compliance that would reduce the economic impact of the proposed amendments on such entities, the Commission will consider the feasibility of such alternatives and determine whether they should be incorporated into the final Rule.

X. Proposed Rule Language

List of Subjects in 16 CFR Part 315

Advertising, Medical devices, Ophthalmic goods and services, Trade practices.

Under 15 U.S.C 7601–7610 and as discussed in the preamble, the Federal Trade Commission proposes to amend title 16 of the Code of Federal Regulations by revising part 315 as follows:

PART 315—CONTACT LENS RULE

1. The authority citation for part 315 continues to read as follows:


2. Amend §315.3 by adding paragraph (c) to read as follows:

§315.3 Availability of contact lens prescriptions to patients.

(c) Acknowledgment of prescription release. Upon completion of a contact lens fitting, and after providing a copy of the contact lens prescription to the patient, the prescriber:

(1) Shall request that the contact lens patient acknowledge receipt of the contact lens prescription by signing an acknowledgment form entitled, “Patient Receipt of Contact Lens Prescription” that states, “My eye care professional provided me with a copy of my contact lens prescription at the completion of my contact lens fitting. I understand I am free to purchase contact lenses from the seller of my choice.”

(2) The acknowledgment form shall include, in addition to the title and statement specified in paragraph (c)(1), the name of the patient, the patient signature, and the date executed. In the event that the patient declines to sign the acknowledgment form, the prescriber shall note the patient’s refusal on the form and sign it. No other statements or information, other than the address or letterhead of the prescriber, shall be placed on the acknowledgment form.

(3) The prescriber shall maintain the signed acknowledgments received under paragraph (c)(1) for a period of not less than three (3) years, and such signed acknowledgments shall be available for inspection by the Federal Trade Commission, its employees, and its representatives.

3. Amend §315.5 paragraph (e) by revising the second sentence to read as follows:

§315.5 Prescriber verification.

(e) * * * * Notwithstanding the preceding sentence, a seller may substitute for contact lenses specified on a prescription identical contact lenses that the same company manufactures and sells under different labels.

* * * *

By direction of the Commission.

Donald S. Clark, Secretary.