

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

before the

**SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION
U.S. HOUSE OF REPRESENTATIVES**

on

**CONSUMER PROTECTION AND COMPETITION ISSUES CONCERNING THE
CONTACT LENS INDUSTRY**

September 15, 2006

I. Introduction

Chairman Stearns, Ranking Member Schakowsky, and members of the Subcommittee, I am Maureen Ohlhausen, Director of the Office of Policy Planning at the Federal Trade Commission (“Commission” or “FTC”).¹ The Commission appreciates the opportunity to provide its views on consumer protection and competition issues concerning the contact lens industry, including views on the practice of contact lens manufacturers limiting the online distribution of some of their products. The FTC’s mission is to promote the efficient functioning of the marketplace by enforcing the FTC Act’s prohibition on unfair or deceptive acts or practices and unfair competition in or affecting commerce.² Pursuant to its statutory mandate, the Commission works to increase consumer choice by promoting vigorous competition. The

¹ This written statement reflects the views of the Federal Trade Commission. My oral statements and responses to any questions you may have represent my own views, and do not necessarily reflect the views of the Commission or any individual Commissioner.

² Section 5 of the FTC Act, 15 U.S.C. § 45.

FTC has extensive experience assessing the impact of regulation and business practices on competition and consumers in many industries, including eyeglasses, contact lenses, and other eye care goods and services.

After providing a brief overview of the contact lens industry, this testimony will discuss the Commission's mission and its history of activity in the eye care industry, and then provide some specific comments on the impact of exclusive distribution contracts on competition and consumers.

II. The Contact Lens Marketplace

Sales of contact lenses have become a multi-billion dollar market in the United States.

The most recent data indicate that nearly 36 million Americans – almost 13% of all Americans – wear contact lenses. The industry includes numerous manufacturers of contact lenses and many different channels of distribution, including eye care practitioners (*e.g.*, ophthalmologists and optometrists), national and regional optical chains, mass merchants, warehouse clubs, and mail order and Internet firms.

The contact lens market has changed significantly in recent years. In the past, contact lenses were designed to last for long periods of time and required daily removal and extensive cleaning regimens. Consumers generally purchased contact lenses from their eye care practitioners (“ECPs”) after an eye examination and lens fitting, and then replaced them when their prescriptions changed or contact lenses were lost or damaged. Contact lens manufacturers had not developed methods for producing standardized contact lenses.

Beginning in the late 1980s, manufacturers began to market and sell “disposable” and “frequent replacement” soft contact lenses. These lenses are designed to be replaced daily, weekly, or monthly. Today, replacement soft contact lenses that a patient receives pursuant to a prescription will be the same, regardless of whether the patient buys the lenses from his or her prescribing ECP or another seller.

This development of standardized soft contact lenses has facilitated the growth of sellers other than ECPs, such as Internet, mail order, and pharmacy sellers. Unlike most ECPs, these alternative sellers do not fit lenses or provide eye care services, but instead sell consumers lenses for which ECPs have already fitted the customers. These sellers provide or ship their customers standardized contact lenses that they have purchased from manufacturers in sealed boxes labeled with the relevant specifications.

III. FTC’s Activities in the Eye Care Industry

Over the years, the Commission has engaged in a wide variety of activities concerning the eye care industry. These activities include law enforcement, rulemaking, business and consumer education, and advocating public policies relating to the marketing and sale of eye care goods and services. The FTC’s activities are all directed toward the same fundamental objective – the promotion of vigorous competition and informed consumer choice, thereby increasing consumer welfare.

A. Law Enforcement

Law enforcement is a critical component of the Commission’s activities related to eye care goods and services. First, the FTC investigates and brings law enforcement actions to

address unfair or deceptive acts and practices³ or unfair methods of competition⁴ in violation of Section 5 of the FTC Act. Second, the FTC investigates and brings law enforcement actions to address violations of the Ophthalmic Practice Rules and the Contact Lens Rule. These Rules empower consumers to comparison shop among sellers of eye glasses and contact lenses, thereby promoting competition among these sellers and enhancing consumer choice.

The Commission promulgated the Ophthalmic Practice Rules (“Eyeglass Rule”) in 1978 to increase competition and consumer choice in the sale of eyeglasses.⁵ The Eyeglass Rule requires ECPs to provide patients automatically, at no extra cost, with a copy of their eyeglass prescriptions after completion of an eye examination. The FTC promulgated this Rule because it found that many consumers were deterred from comparison shopping for eyeglasses because they did not receive copies of their prescriptions. A recent analysis by the Commission concluded that this Rule has “facilitated comparison shopping by consumers, thereby spurring competition and leading to lower prices and more choices for consumers.”⁶

³ For example, the Commission entered into consent agreements with two of the largest sellers of LASIK eye surgery services to resolve complaint allegations that they made the unsubstantiated claims that LASIK surgery would eliminate the need for glasses for life, and that LASIK surgery poses significantly less risk to the ocular health of patients than wearing contact lenses or eye glasses. *LCA-Vision, Inc. d/b/a LasikPlus*, FTC Docket C-4083 (July 8, 2003) (consent agreement); *The Laser Vision Institute, LLC*, FTC Docket No. C-4084 (July 8, 2003) (consent agreement).

⁴ *See, e.g., Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988) (Commission concluded that a state optometry board’s regulations restricting advertising of price discounts, the advertisement of affiliations between optometrists and retail optical stores, and the use of testimonials and similar advertising were an unfair method of competition).

⁵ 16 C.F.R. Part 456.

⁶ Federal Trade Commission, “The Strength of Competition in the Sales of Rx Contact Lenses: An FTC Study,” at 45 (Feb. 2005), *available at*

In 2003, Congress enacted the Fairness to Contact Lens Consumers Act⁷ (“FCLCA”) to increase competition and consumer choice in the sale of contact lenses, similar to what the Eyeglass Rule had done with respect to the sale of eyeglasses. Among other things, under the FCLCA, ECPs must: (1) provide patients with a copy of their contact lens prescriptions immediately upon completion of a contact lens fitting, and (2) provide or verify contact lens prescriptions to sellers of contact lenses. The Act also states that, before providing customers with contact lenses, sellers must either obtain copies of their prescriptions or verify the information in the customers’ prescriptions with their prescribing ECPs. The FCLCA does not require that sellers receive affirmative responses to their verification requests before providing lenses to customers. Instead, the Act adopts a “passive verification scheme” – it allows sellers to provide lenses to their customers if ECPs have not responded to their verification requests within eight business hours.

To implement the FCLCA, the FTC issued its Contact Lens Rule (the “Rule”), which closely tracks the Act’s provisions.⁸ Since the Rule was issued, the Commission has undertaken substantial efforts to educate sellers and eye care practitioners about its requirements. Coincident with issuing the Rule in the summer of 2004, the agency widely distributed consumer education materials to inform consumers of their rights, as well as business education materials to provide guidance to sellers and ECPs about how to comply with the Rule. In late 2005, the Commission issued updated business education materials to address questions that had arisen in Rule

<http://www.ftc.gov/opa/2005/02/contactlens.htm>.

⁷ 15 U.S.C. §§ 7601-7610.

⁸ 16 C.F.R. Part 315.

compliance, particularly questions related to telephone communications between sellers and ECPs.

In addition to these general efforts to educate sellers and ECPs about their responsibilities under the Rule, the FTC staff has issued warning letters to individual companies to alert them that they may be in violation of the Rule and request that they modify their practices as necessary to come into compliance with the law. In 2004, the FTC staff sent warning letters to ECPs who allegedly were not releasing contact lens prescriptions as the Rule requires.⁹ In 2005, the FTC staff sent a warning letter to a leading contact lens seller that may have violated the Rule by not providing ECPs with a reasonable opportunity to communicate with the seller regarding verification requests.¹⁰ Specifically, complaints received by the FTC alleged that the seller's fax lines were often busy, and, therefore, the responses of ECPs to verification requests were not getting through to the seller. Finally, in 2006, the FTC staff sent 18 warning letters to online sellers of cosmetic or colored contact lenses.¹¹ Most of these sellers allegedly falsely claimed that cosmetic contacts are non-prescription or that they do not require a prescription, in violation of the Rule.¹² In addition, most of them did not appear to obtain a copy of the prescription or

⁹ See Federal Trade Commission, "The Contact Lens Rule and the Eyeglass Rule" (Oct. 22, 2004), available at <http://www.ftc.gov/opa/2004/10/contactlens.htm>.

¹⁰ See Federal Trade Commission, "Announced Actions for October 14, 2005" (Oct. 14, 2005) (announcing results of test shop to follow up on warning letters), available at <http://www.ftc.gov/opa/2005/10/fyi0575.htm>.

¹¹ See Federal Trade Commission, "FTC Staff Sends Warning Letters to Marketers of Cosmetic Contact Lenses" (June 30, 2006), available at <http://www.ftc.gov/opa/2006/06/fyi0643.htm>.

¹² In late 2005, Congress amended Section 520 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 360(j), to clarify that such lenses are medical devices for which a

verify the information in the prescription with ECPs as required by the Rule.

The Commission uses business education and warning letters to encourage voluntary compliance by sellers and ECPs with the Rule. Nevertheless, in appropriate circumstances, the FTC initiates investigations and takes law enforcement action against those who violate the Rule. For example, on August 3, 2006, the Department of Justice, at the request of the FTC, filed a complaint and settlement agreement against Walsh Optical, Inc., and its owner, Kevin Walsh, in the United States District Court for the District of New Jersey.¹³ The defendants operate three Web sites – www.lensworld.com, www.contactmania.com, and www.contactlensworld.com – through which they sell contact lenses directly to consumers. The FTC’s complaint alleged that the defendants violated the Contact Lens Rule by selling contact lenses to consumers without first obtaining their prescriptions or verifying the prescriptions with their prescribing ECPs. The consent decree required the defendants to pay \$40,000 in civil penalties and, among other things, prohibits them from violating the Rule in the future.

B. State-Imposed Restrictions on Competition from Alternative Sellers

In addition to its law enforcement role, the Commission has long studied the effects of state-imposed restrictions in the optical goods industry and advocated policies for the optical goods industry that would benefit consumers and competition.¹⁴ In October 2002, the

prescription is required. See Pub. L. No 109-96, 119 Stat. 2119 (Nov. 9, 2005).

¹³ *United States v. Walsh Optical, Inc.*, Civ. No. 06-3591 (D.N.J. Aug. 30, 2006) (consent decree entered).

¹⁴ THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSION: THE CASE OF OPTOMETRY, FTC BUREAU OF ECONOMICS STAFF REPORT

Commission held a public workshop to evaluate possible anticompetitive barriers to e-commerce,¹⁵ and in March 2004, the Commission staff issued a report analyzing potential barriers to Internet commerce in contact lenses (“Contact Lens Report”).¹⁶ The Contact Lens Report expressed concern that state laws and regulations may limit competition in contact lenses, raise consumer costs, and harm public health. For example, the Contact Lens Report noted that licensing requirements may insulate in-state sellers from out-of-state competition, or insulate ECPs from non-ECP sellers. Further, as noted in the report, staff found that health concerns do not appear to justify the costs imposed by these requirements.¹⁷

The FTC staff also has provided comments to state agencies and legislatures regarding the effects of restrictions on the sale of replacement contact lenses. For example, in March 2002, the Commission staff filed a comment before the Connecticut Board of Examiners for Opticians in a declaratory ruling proceeding on the interpretation and applicability of various statutes and regulations concerning the sale of contact lenses.¹⁸ In that comment, Commission staff

(1980).

¹⁵ 67 Fed. Reg. 48,472 (2002).

¹⁶ POSSIBLE BARRIERS TO E-COMMERCE: CONTACT LENSES: A REPORT FROM THE STAFF OF THE FEDERAL TRADE COMMISSION (Mar. 29, 2004), *available at* <http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf>.

¹⁷ *Id.* at 3.

¹⁸ *See* FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002), *available at* <http://www.ftc.gov/be.v020007.htm>; *see also* Letter from Maureen K. Ohlhausen *et al.*, Acting Director, Office of Policy Planning to Arkansas State Representative Doug Matayo (Oct. 4, 2004) (commenting on legislative proposal that likely would have conflicted with the FCLCA’s release and verification requirements), *available at* <http://www.ftc.gov/os/2004/10/041008matayocomment.pdf>.

concluded that out-of-state sellers should not be subject to state licensing requirements because the possible benefit consumers might receive from increased state protection did not outweigh the likely negative effect from decreased competition. Ultimately, the Connecticut Board of Examiners decided that state law did not require out-of-state sellers to obtain a license to sell contact lenses to consumers.¹⁹

C. Limited Distribution Policies

When Congress passed the FCLCA, it required the FTC to “undertake a study to examine the strength of competition in the sale of prescription contact lenses.”²⁰ This study, released in February 2005, examined, among other things, two contact lens distribution policies – private labeling and limited distribution – that some have argued allow prescribing ECPs to lock their patients into lenses that must be purchased from them at inflated prices.²¹ The Commission concluded that “the theory and the evidence examined do not support the conclusion that these

¹⁹ Connecticut Board of Examiners for Opticians, *In re: Petition for Declaratory Ruling Concerning Sales of Contact Lenses*, Declaratory Ruling Memorandum of Decision (June 24, 2003).

²⁰ 15 U.S.C. § 7609(a). Congress directed the Commission to address the following specific issues: “1) The incidence of exclusive relationships between prescribers or sellers and contact lens manufacturers and the impact of such relationships on competition; 2) The difference between online and offline sellers of contact lenses, including price, access and availability; 3) The incidence, if any, of contact lens prescriptions that specify brand name or custom labeled contact lenses, the reasons for the incidence, and the effect on consumers and competition; 4) The impact of the FTC eyeglasses rule on competition, the nature of enforcement of the rule, and how such enforcement has impacted competition; and 5) Any other issues that have an impact on competition in the sale of prescription contact lenses.” *Id.* at (1)-(5).

²¹ See THE STRENGTH OF COMPETITION IN THE SALE OF PRESCRIPTION CONTACT LENSES: AN FTC STUDY 16-18 (Feb. 2005) (“CONTACT LENS STUDY”), available at <http://www.ftc.gov/reports/contactlens/050214contactlensrpt.pdf>.

distribution practices harm competition and consumers by allowing prescribers to lock in their patients to supracompetitively priced lenses.”²²

The first practice, “private labeling,” involves an outlet selling a national name brand lens under a different name, sometimes unique to that seller. Wal-Mart, Pearle Vision, Target, and LensCrafters, for example, offer OSI’s Biomedics55 lens under the names UltraFlex, Polysoft, Target55, and Versaflex, respectively. In some instances the term private label may be a misnomer, however, because a specific private label brand may be available at multiple outlets. For example, the FTC survey discovered that the UltraFlex private label is available at Wal-Mart, BJ’s, Sam’s Club, and America’s Best. Thus, a private label brand may not be exclusive to a seller in the way that a generic store brand would be.

The FTC study found no evidence that private labeling is likely to harm consumers. Data from the price survey showed average prices for private label lenses to be statistically equivalent to their national name brand counterparts.²³ Further, the FCLCA and the FTC’s Contact Lens Rule mandate that ECPs release prescriptions to patients and allow competing retailers to fill private label prescriptions with either national brand-name or private label equivalents.²⁴ These provisions allow a customer who receives a private label prescription to take it to competing retailers that sell the same lens under either the national brand name or equivalent private label.

²² *Id.* at 33.

²³ *Id.* at 24-26.

²⁴ 15 U.S.C. § 7609(4)(f); 16 C.F.R. § 315.2 (A)(8) (“[i]n the case of a private label contact lens, [a contact lens prescription must contain] the name of the manufacturer, trade name of the private label brand, and, if applicable, trade name of equivalent brand name.”)

The second practice studied involves certain contact lens manufacturers' decisions to limit the online distribution of some of their lenses. For example, some manufacturers limit the distribution of their lenses to outlets that provide eye care services, which necessarily precludes distribution through pure online sellers like 1-800 Contacts or Coastal Contacts.²⁵ As in the case of private labeling, the Commission's study found no evidence that limited distribution policies are likely to harm consumers.

Limited distribution lenses appear still to be available through many distribution channels, making it unlikely that the limited distribution is allowing retailers to raise prices. The study examined two lenses produced by CooperVision, Proclear Compatible and Biomedics55.²⁶ Although Proclear and Biomedics55 are not available to online sellers through normal distribution channels, the Commission found them to be available to consumers at most online and offline sellers sampled, including discount retailers, warehouse clubs, and these outlets' Web sites. For example, Biomedics55 – or its private label equivalent – is available from all offline and nearly all online outlets sampled, including all optical chains sampled: Wal-Mart, Sam's Club, BJ's, Target, and Sears. These lenses also are sold on Wal-Mart's, BJ's, and America's Best's Web sites. Proclear lenses were found at 88 percent of online sellers' sites and were available at all but three offline stores (Wal-Mart, Sam's Club, and Pearle), including Target and

²⁵ See CONTACT LENS STUDY at 15-16.

²⁶ CooperVision acquired Ocular Sciences, which produced Biomedics55, in early 2005. CooperVision produces at least eight brands of lenses and several types of lenses within each brand. To the Commission's knowledge, of CooperVision's lenses, only Biomedics and Proclear Compatibles are subject to limited distribution policies. At the time of the Contact Lens Study, Ocular Sciences produced Hydrogenics, which was subject to a limited distribution policy as well. However, this lens does not appear as a lens currently produced by CooperVision. See CooperVision Web Site, at http://www.coopervision.com/us/patient_browsebyname.asp.

BJ's.²⁷ Given that ECPs must release prescriptions to patients under the FCLCA, it appears that they face significant competition in the sale of these limited distribution lenses. Moreover, warehouse clubs like BJ's tend to offer the lowest prices, making it even less likely that an ECP would be able to raise prices for a limited distribution lens.²⁸ Thus, consumers who receive a prescription specifying a limited distribution lens are not forced to purchase that lens from their prescribing ECPs and instead appear to have several online and offline options. Consistent with this observation, the Commission's examination of the data did not suggest that limited distribution lenses were sold at prices any higher than similar lenses that are not subject to limited distribution policies.

It is important to note that limited distribution policies – including those that limit online distribution – are common across industries.²⁹ Limits on distribution can allow a manufacturer to compete more effectively with rival manufacturers.³⁰ For example, a manufacturer may depend on the retailer to educate customers about the merits of a particular product. A retailer

²⁷ See CONTACT LENS STUDY at 39. A recent search shows that Proclear lenses are also available at Wal-Mart's Web site.

²⁸ See *id.* at 43.

²⁹ See, e.g., Dennis W. Carlton & Judith A. Chevalier, *Free Riding and Sales Strategies for the Internet*, 49 J. INDUS. ECON. 441 (2001) (examining fragrance, DVD, and refrigerator manufacturers' policies regarding online distribution of their products); Robert H. Gertner & Robert S. Stillman, *Vertical Integration Strategies in the Apparel Industry*, 49 J. INDUS. ECON. 417, 428-30 (2001) (describing various apparel manufacturers' online selling policies that are designed to avoid conflict with offline retailers' interests).

³⁰ See *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977) (noting that exclusive territories have the potential to "induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer").

will be reluctant to expend those resources, however, if consumers can take this information and purchase the good at a lower price from a discounter that charges less because it does not provide any additional services. Additionally, a manufacturer may want its brand associated only with a certain type of retailer to maintain a reputation for quality or may require retailers to perform certain tasks to maintain a level of quality that consumers associate with the manufacturer's brand. Limited distribution policies are a means by which a manufacturer can compensate retailers for providing such services that consumers value.³¹

When limited distribution makes a manufacturer a more effective competitor against its rivals, that competition can lead to better quality or more variety, all of which benefits consumers. Typically, therefore, a supplier's unilateral decision to restrict the distribution channels in which its product is available raises antitrust concerns only if such a restraint is likely to harm competition among rival manufacturers and that this harm outweighs any procompetitive benefits.³² A restriction on distribution can harm consumers, for example, if the restraint lessens

³¹ Ocular Science, producer of the limited distribution lens Biomedics55, and since purchased by CooperVision, stated in its public comment for the CONTACT LENS STUDY that it relied on a limited distribution policy to "encourage eye care professionals and chains to promote its products." CONTACT LENS STUDY at 32. Due to a lack of data, the CONTACT LENS STUDY did not reach any conclusions regarding the role that limited distribution policies played in providing ECPs incentives to engage in promotional activities. *See id.* at 33.

³² Non-price vertical restraints such as limited distribution policies are judged under the rule of reason, which requires a plaintiff to show that the agreement at issue is likely to have "genuine adverse effects on competition." *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986). *See also Virgin Atl. Airways, Ltd. v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001) (plaintiff is required to show that the agreements in question "had an actual adverse effect on competition as a whole in the relevant market"); *Ezzo's Investments, Inc. v. Royal Beauty Supply, Inc.*, 243 F.3d 980, 988 (6th Cir. 2001) (affirming summary judgment for defendant where plaintiff failed to present evidence that defendant had "sufficient market power to affect competition within the relevant market," or that defendant's restrictive distribution policies "had an effect on interbrand competition"); *Generac Corp. v. Caterpillar Inc.*, 172 F.3d

competition in a relevant market without providing any off-setting benefits like increased information or quality. Indeed, as the Supreme Court has stated, “[a] manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes as long as it does so independently.”³³ At the same time, it is important to distinguish unilaterally imposed distribution restraints from those that manufacturers adopt at the behest of a group of retailers acting in concert. Joint efforts by retailers to coerce manufacturers to disadvantage discounters are a *per se* violation of the antitrust laws because such agreements among competitors suspend the normal give and take of the marketplace.³⁴

IV. Conclusion

The FCLCA and the Contact Lens Rule are intended to promote competition and consumer choice in the sale of contact lenses. The Commission will continue to engage in educational and law enforcement activities to encourage compliance with the law to assure that consumers obtain the benefits Congress intended the FCLCA to confer. Limited distribution

971, 977 (7th Cir. 1999) (to prevail in a rule of reason challenge to territorial restrictions on distribution, a plaintiff “must demonstrate, at a minimum, that its agreement with Caterpillar has an anticompetitive, welfare-reducing effect that is not overcome by any pro-competitive, welfare-enhancing consequences of the agreement”). For challenges to a dominant firm’s vertical restraints under section 2 of the Sherman Act, a plaintiff must first show a causal link between the monopolist’s actions and its market power. That is, the monopolist’s conduct must “reasonably appear capable of making a significant contribution to creating or maintaining monopoly power.” *U.S. v. Microsoft*, 253 F.3d 34, 79 (D.C. Cir. 2001) (quoting P. AREEDA & H. HOVENKAMP, III ANTITRUST LAW ¶ 651f (2d ed. 2002)).

³³ *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752, 761 (1984).

³⁴ *See, e.g., U.S. v. General Motors Corp.*, 384 U.S. 127 (1966); *In re Disposable Contact Lens Antitrust Litigation*, MDL 1030, 2001 WL 493244 (M.D. Fla. Feb. 8, 2001); *In re Fair Allocation System, Inc.*, FTC Docket No. C-3832 (1998).

policies are common in the U.S. market and can provide important benefits to consumers. The FTC's Congressionally-mandated study of the contact lens industry provided no indication that limited distribution policies in the contact lens industry harm consumers.