



WAL-MART

Optical Division



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Via e-mail: contactlensstudy@ftc.gov

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex L)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Contact Lens Study, Project No. V040010
Comments from Wal-Mart Stores, Inc.'s Optical Division

Dear Sir/Madame:

Wal-Mart submits these comments in response to the Federal Trade Commission's (FTC) request for public comments in connection with the Fairness to Contact Lens Consumers Act, 15 U.S.C. 7601 et. seq. Wal-Mart's responses below were prepared by drawing from the experiences and expertise of various Wal-Mart representatives that have knowledge in many different areas of the Optical industry, including experience and knowledge from our optical goods buying team, our operations group that is primarily responsible for the retail sale of contact lenses and eyeglasses, our government relations team that deals with the various state-specific contact lens dispensing laws, a former independent optometrist that practiced within a Wal-Mart location, and Wal-Mart's legal department.

Wal-Mart recommends the FTC's study focus on more definitive and relevant market groups that exist within the contact lens industry. On page four of the FTC's notice and request for public comment, the FTC has identified two main groups: (1) prescribers (ophthalmologists, optometrists, other persons permitted under state law to issue prescriptions for contact lenses,

and optical chains and retailers that sell contacts and offer eye care practitioner services), and (2) sellers (brick-and-mortar retailers, mail order, Internet firms).

In analyzing the strength of competition in the area of contact lens sales to consumers, the FTC should consider three markets for review. These markets are categorized primarily by the price level at which their products are sold to consumers, and secondarily, the scope of their interaction with the consumer, i.e. prescribing new lenses and selling those lenses, as opposed to simply selling replacement contact lenses. The purpose for the distinctions relate to the FTC's questions regarding the various factors that impact price points to consumers. The markets are as follows:

(1) Private Optometrists and Ophthalmologists – this market segment traditionally writes prescriptions for contact lenses, fits contact lenses, and sells contact lenses. As prescribing sellers, private optometrists and ophthalmologists traditionally charge more for contact lenses (excluding any exam fees) than retailers, internet sellers, or wholesale membership clubs.

(2) Retailers and Internet Sellers – Wal-Mart views retailers and internet sellers (also considered mail order sellers) as similar because they tend to focus on simply selling replacement contact lenses. At a very basic level, they are transferring goods to consumers pursuant to a valid contact lens prescription. In many states they are highly regulated as they are required to employ licensed opticians in order to sale contact lenses. Examples of these sellers include Wal-Mart's Vision Centers and 1-800 Contacts.

(3) Wholesale Membership Clubs - this market segment is also a seller. Wholesalers often have the best price for consumers because the contacts are not being sold at retail prices. A consumer is not required to obtain membership to these clubs in order to purchase ophthalmic goods. These sellers are subject to the same state laws regulating contact lens sales made by retailers and internet sellers. Examples of wholesalers under this view include Sam's Club, Costco, and BJ's.

Exclusive Relationships

1. Please comment on the incidence of exclusive manufacturer-prescriber and manufacturer-seller relationships:

(a) **How common is it for a contact lens manufacturer to sell only to prescribers, to the exclusion of sellers?** This situation is fairly common. The smaller the manufacturer, the more likely or common it is for the manufacturer to have an informal or non-contractual exclusive relationship with a prescriber, usually in the form of a custom labeled contact lens. Wal-Mart has seen this occur when customers bring their contact lens prescriptions to our Vision Centers to purchase replacement lenses, and learn that their prescription is written for a custom labeled contact lens from a private optometrist. The customer is typically disappointed or surprised to learn that their particular lenses may be available only from their prescribing optometrist or ophthalmologist.

(b) How common is it for a contact lens manufacturer to sell only to sellers, to the exclusion of prescribers? This is a rare situation because the seller needs the prescriber to begin the process by prescribing these lenses. When such exclusive relationships do occur, our experience shows the exclusive relationship may be for a limited time to allow new products (e.g. contact lenses) to enter into an existing market.

(d) How common is it for prescribers to agree to prescribe only certain manufacturers' contact lenses? It may be a common practice for optometrists or ophthalmologists to prescribe certain contact lens brands (e.g. Acuvue 2); however, it is extremely rare for a doctor to prescribe lenses from one particular manufacturer to the exclusion of others.

(e) Do the manufacturers that are parties to agreements in question (d) restrict the sales they make to sellers and prescribers that are not parties to the type of agreements in (d)? Yes, this may occur. Manufacturers may have exclusive relationships with private optometrists and ophthalmologists and refuse to sell the same lenses to retailers or wholesalers. Entering into such an agreement may be an attempt by the prescriber to "capture" the patient and ensure the prescriber of future sales of contact lenses that may be difficult for the consumer to find and purchase elsewhere.

2. Please comment on whether contact lens prescribers advertise their willingness to provide prescriptions for contact lenses available from competing prescribers and sellers:

(a) How prevalent is prescriber advertisement of willingness to prescribe contact lenses available through other prescribers and sellers? This is a rare occurrence. While the prescriber's advertisement could specify common brands of contact lenses, the advertisement of the prescriber's *willingness* to prescribe a contact lens that is available elsewhere would be rare.

(b) How prevalent is consumer awareness of prescribers' willingness to prescribe contact lenses available from alternative prescribers and sellers? Consumers have an expectation that they can take their prescription to other sellers to purchase contacts. However, this expectation is created by the manufacturers' marketing efforts regarding their most popular and widely available lenses, and not from the efforts of the prescribers.

(c) Are consumers able to shop for prescribers that will prescribe contact lenses available from alternative prescribers and sellers? Typically, consumers are unaware that some prescribers will write prescriptions for brands that are not readily available through other channels. Thus, the consumer is also unaware of the need to ask these questions of the prescriber prior to the eye exam.

(d) What role do state regulatory or self-regulatory bodies play in controlling prescriber advertisements, especially with respect to a prescriber's willingness to prescribe contact lenses that are available from alternative prescribers and sellers? State regulations play a significant role in limiting the content of prescriber advertisements overall, not just with respect to restricting prescribers from advertising their willingness to prescribe contact lenses that are available from alternative sources. Regulations that preclude any advertisement of contact lens

price, or even the availability of the contact lenses, limit the information a consumer can obtain and use to comparison shop. See Question 19(c).

(f) Do sellers advertise that lenses may be purchased from sellers that are not prescribers?
Yes.

5. Please comment on the benefits, if any, associated with exclusive manufacturer-prescriber and manufacturer-seller relationships:

(a) To what extent do exclusive relationships lower costs for manufacturers and/or for sellers and prescribers, and to what extent are these cost savings passed on to consumers?
There may be a cost savings for manufacturers and prescribing sellers, however any or all of the costs saving may not be passed on to consumers.

Online and Offline Sellers

8. Are there differences in the prices charged for similar contact lenses by online and offline merchants? Please refer to Wal-Mart's opening comments regarding the three types of relevant markets (private optometrists/ophthalmologists, retail sellers and internet sellers, and wholesale membership clubs). Contact lenses may be available for purchase from each of the three types of groups. Traditionally, prices will be higher for contact lenses from a private optometrist or ophthalmologist than the prices charged by retailers and internet sellers. Furthermore, retailers and internet sellers typically will have slightly higher prices than wholesalers. Contact lens prices will be comparable among major retailers and on-line merchants.

9. Are there any cost advantages associated with selling contact lenses online versus offline? A disadvantage for online sellers may be increased shipping costs. The primary cost advantage of an online seller of contact lenses is reduced operational overhead. For example, offline brick and mortar retailers experience increased payroll costs in states that require licensed dispensing opticians to sell contact lenses to consumers. (In contrast, offline private optometrists and ophthalmologists would not see an increase in payroll because typically they are not required to employ licensed opticians.)

10. Please comment whether consumers find it more convenient to purchase contact lenses online or offline: Some states restrict home delivery services of contact lenses sellers by requiring licensed opticians or optometrists to be involved in the shipping and handling of the contact lens orders. If this requirement is not met by these businesses, consumers in those states are precluded from enjoying the ease, access and convenience of purchasing their contact lenses on-line. This could be a significant problem for consumers who may not have an optometrist, ophthalmologist or contact lens seller in their area, and thus no access to purchase contact lenses and have them delivered to their homes.

12. Please comment on the extent to which online and offline contact lens sellers compete:

(c) To what extent do prices charged for identical contact lenses vary among online sellers, and is the variance any greater or smaller than that found between prices offered by offline sellers? Prices do vary, but there is less of a variance in price between brick-and-mortar retailers and online sellers. Typically, contact lens prices for a commonly available contact lens at a major retail outlet such as Wal-Mart will be very similar to the price of that same lens at an online contact lenses seller. The FTC could expect to see the greatest price variation between private optometrists/ophthalmologists and wholesale clubs.

Prescriptions that Specify Brand Name or Custom Labeling

14. Please comment on the incidence of brand name and custom label contact lens prescriptions:

(a) What is the incidence of contact lens prescriptions that specify a brand name? It occurs because the brand name is required to be placed on all contact lens prescriptions in most states.

15. What are the benefits of contact lens prescriptions that specify a brand name or custom labeled contact lenses? One benefit of specifying brand name is the prescribing doctor will establish a baseline by knowing how that particular lens fits and performs for the consumer during the trial contact lens fitting. (Fitting is a process by which the doctor checks whether the lens is fitting properly on the individual's eye and whether overall the lens is appropriate.) If an individual is fitted with one brand of lens during the fitting process but purchases a different type/brand of lens elsewhere, it may become challenging for the doctor to identify the root cause of problems that may occur that can affect the individual's eye health care. However, there are no benefits for prescribing custom labeled contact lenses. The disadvantage of having custom labeled contact lenses is the doctor may not indicate the brand equivalent lens available and the consumer will not be able to comparison shop for the best value.

What are the costs of contact lens prescriptions that specify a brand name or custom labeled contact lenses? There may be brand equivalents but there are no true generic equivalents for contact lenses. Because the manufacturers make brand equivalents, there may be a difference in price among those equivalents.

16. What role do state laws or regulations play in determining what a prescriber must include on a prescription, including whether a prescription must contain a brand name? State laws and regulations play a significant role. In many instances, the state boards of optometry typically dictate what information must be included in a valid, written prescription. An optometrist may be subject to disciplinary action for failing to include the requisite information.

18. How prevalent is consumer awareness that a prescriber may prescribe custom labeled or brand name lenses that are available only from the prescriber? Consumer awareness of this practice is very low. We have seen many instances of consumers who request to purchase

prescribed custom labeled lenses from our Vision Centers, only to discover that the desired lens is available only from the prescriber.

19. Please comment on whether contact lens prescribers advertise their ability to prescribe custom labeled lenses or their willingness to prescribe contact lenses available from a variety of sellers:

(a) How prevalent are prescriber advertisements that they prescribe custom labeled lenses or advertisements that they prescribe contact lenses available from a variety of sellers?

These types of advertisements are extremely rare.

(b) Are consumers able to shop for prescribers based on whether they prescribe custom labeled contact lenses or contact lenses available from a variety of sellers? This is possible, but due to the naïveté of the average contact lens consumer regarding the custom labeled lenses, it is probably not practicable for consumers to shop in this manner.

(c) What role do state regulatory or self-regulatory bodies play in controlling prescriber advertisements with respect to their ability to prescribe custom labeled lenses or their willingness to prescribe contact lenses available from a variety of sellers? The regulatory bodies play a significant role as some states have laws that curtail or preclude any advertisement of contact lenses. For example, a Louisiana Board of Optometry statutes states: "No person shall[] . . . [a]dvertise as free or for a price contact lenses or contact lens services in any of their forms." La. Rev. Stat. Ann. Section 1063(10) (emphasis added). In this instance, if a Louisiana prescriber were interested in advertising their willingness to prescribe lenses that are widely available from a variety of sellers, they could not do so.

Impact of the FTC Eyeglass Rule on Competition

21. Describe the state of competition in the market for the retail sale of prescription eyeglasses at the time the Commission issued the Eyeglass Rule in 1978, including, but not limited to, a description of the products included in the market, the market's geographic scope (e.g. national, regional, local), the market shares of firms, and any barriers to entry. Prior to the Eyeglass Rule, there was less competition in general in the optical industry, and less of an incentive to create innovative optical products.

22. Referring to the factors listed in question 21, describe how competition in the market for the retail sales of prescription eyeglasses has changed since the Commission issued the Eyeglass Rule in 1978. Competition in the market has allowed optometrists to consider practicing their profession in a corporate setting and focus their efforts on providing examinations instead of selling ophthalmic goods. Additionally, the consumer's ability to shop for glasses from a variety of sellers has increased competition among the sellers to best meet the consumer's needs. Optical shops benefitted by gaining the ability to better compete with private optometrists in selling prescription eyewear, which increased competition and decreased prices for the consumer. This may have provided an incentive for some sellers to begin manufacturing their own eyeglasses products, thereby further reducing the cost to the consumer.

23. To what extent are the differences in competition in the market for the retail sale of prescription eyeglasses since 1978 attributable to the following factors: (a) changes in the federal law, including the issuance and enforcement of the Eyeglass Rule; (b) changes in state law; (c) changes in industry standards or trade association rules or policies; (d) changes in technology; or (e) other changes in the marketplace? While the prescription release provisions of the Eye Glasses I rules were ultimately beneficial in reducing costs to consumers, it did not address the most expensive barriers to competition covered in Eye Glasses II. If Congress wants to achieve significant reductions in the price of ophthalmic goods to consumers, it must mandate the provisions of Eye Glasses II that remove anticompetitive barriers to market efficiencies. For example in Oklahoma, Wal-Mart is precluded from entering the market as a brick and mortar contact lens and eyeglasses seller. Oklahoma law states "it shall be unlawful for any person to display, dispense, sell, provide or otherwise purvey to the public, prescription eyeglasses, prescription lenses, frames or mountings for prescription lenses, within or on the premises of in any manner, any retail or mercantile establishment in which the majority of the establishment's income is not derived from the sale of such prescription optical goods and materials." 59 Okl.St. Ann. Section 596. The FTC's own studies indicate that in the absence of these anticompetitive restrictions, consumer cost savings of 20% or more can be achieved without impacting the quality of care. Wal-Mart is committed to providing the highest quality at the lowest prices to deliver value to consumers. We look forward to any opportunity to lower consumer prices in the sale of ophthalmic goods that Congress wishes to provide.

26. Has the issuance and enforcement of the Eyeglass Rule caused or prompted states to change their laws or policies regarding prescription eyeglasses? If so, what changes were made and what effect did they have? The Eyeglass Rule prompted a more consistent and level playing field for the industry, due in part to the Eyeglass Rule's pre-emption of any conflicting state laws. Also the Eyeglass Rule contributed to allowing opticians to sell eyeglasses. However, this may have generated an increase in protectionist legislation by some states that in turn require opticians to be licensed before they can dispense eyeglasses. Other regulations impacting such areas as advertising of eyeglasses may have also arisen in an effort to protect the private optometrists' and ophthalmologists' market share.

28. Please provide any other information regarding the impact on competition of the Eyeglass Rule. The Eyeglass Rule, overall, has helped competition, yet certain states, such as Oklahoma, still have protectionist laws that limit the consumers' ability to obtain prescription eyewear at the best possible price. It is difficult to believe that such laws were drafted with the intention of protecting the consumer.

Other Issues Related to Competition in the Sale of Prescription Contact Lenses

29. Do state licensing requirements affect out-of-state sellers' abilities to compete with in-state sellers or prescribers for the sale of prescription contact lenses? Yes, however, the licensing requirements may equally impact the out-of-state retail sellers and the in-state retail sellers. It is helpful to draw an analogy between the licensing requirements for dispensing prescription eyeglasses and the licensing requirements for dispensing contact lenses. To dispense prescription eyeglasses, many states have laws that limit the fitting, adjusting, and

dispensing of eyeglasses to licensed opticians, or other personnel working under the supervision of a licensed optician. The reasoning behind the licensing requirement appears to be the skill and mechanics involved in properly fitting and adjusting the eyeglasses to the customer's face.

In contrast, however, the sale of contact lenses does not require any specialized technical expertise. Contact lenses are pre-packaged, pulled from a store's stock, and are simply matched to the prescription written by the doctor. Nonetheless, many states require a licensed optician to be involved in the process. It is important to remove the concept of "fitting" from the definition of "selling" contact lenses. If a seller is interested in fitting contact lenses (i.e. putting the contact lens on the eye and checking to make sure it fits properly), then the optician licensing regulations may be warranted because of the technical aspects of fitting. But the mere selling of pre-packaged replacement contact lenses to a customer is a simple transaction of matching the prescription with the product. Laws and regulations that require a licensed optician to be involved in the basic sales transaction of replacement contact lenses are unnecessary and only limit the in-state and out-of-state sellers' ability to compete with private optometrists and ophthalmologists, thereby increasing the cost to consumers.

30. What role do state licensing requirements applicable to sellers of contact lenses play in protecting consumers? The most likely form of protection would be a state's ability to revoke the license of a seller that acts or fails to act in a manner that harms the consumer. There are undoubtedly other ways to provide this protection to consumers without imposing licensing requirements for individual opticians to sell contact lenses. As the Commission staff noted in its comments to 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, there are convenient and less expensive alternatives to these restrictive regulatory schemes. FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at www.ftc.gov/be/v020007.htm. For example, a state could simply require registration in lieu of licensing. "A registration system, unlike licensing, would not require that individuals or firms that want to sell replacement lenses fulfill expensive and unnecessary requirements in order to do so." Rather, replacement lens sellers would merely file their names and other required contact information with the Board. *Id.* at 11.

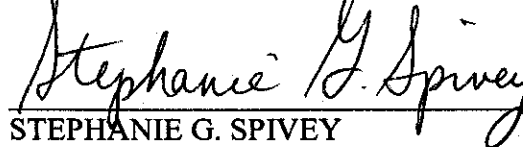
31. Please provide any other information regarding issues that affect competition in the sale of prescription contact lenses. Currently, with the passage of the Fairness to Contact Lens Consumers Act, Wal-Mart has experienced the following issues which have contributed to preventing some consumers from obtaining contact lenses:

- Optometrists do not have answering machines in which the seller can leave a message with a prescription verification request in order to comply with the Act's direct communication requirement.
- States have not reconciled their laws with the new federal law, thus creating confusion. For example, while the Act recognizes that the category of contact lenses sellers includes mass merchants such as Wal-Mart, Arkansas law currently limits the sale of contact lenses to optometrists and ophthalmologists.

- There is little or no guidance regarding the requirements online contact lens sellers must comply with in some individual states. Some states have even refused to provide any direction to online sellers, as their state optometry and opticianry laws and regulations did not contemplate the sale of contact lenses over the internet.
- Optometrists are unfamiliar with the Act. The industry needs to be educated by the FTC.
- In some instances, doctors have refused to verify prescriptions. There needs to be a formal enforcement mechanism developed by the FTC to address these violations.

Respectfully submitted,

WAL-MART STORES, INC.


STEPHANIE G. SPIVEY

Professional Services – Optical Division