

BEFORE THE FEDERAL TRADE COMMISSION

Call for Comments)
On the Contact Lens Study) **Contact Lens Study, Project No. V040010**
(69 Fed. Reg. 21833)
(Apr. 22, 2004)))

Comments of



Comments on Issues Related to the Contact Lens Study Mandated by the Fairness to Contact Lens Consumers Act, Project No. V040010 (69 Fed. Reg. 21833 (Apr. 22, 2004))

1-800 CONTACTS, Inc. (“1-800”) respectfully submits these comments in response to the Federal Trade Commission’s (“FTC’s”) request for information regarding the study on the strength of competition in the contact lens industry (the “Contact Lens Study”),¹ which was mandated by the Fairness to Contact Lens Consumers Act (the “Fairness Act”).² Through its Internet website and toll-free number, 1-800 is the largest seller of contact lenses to American consumers. Since its inception in 1995, the company has filled over 10 million orders for approximately 5 million customers. Its years of experience have afforded it a unique view of the practical obstacles that contact lens consumers face in obtaining the benefits of competition and choice. Accordingly, 1-800 has a significant interest in ensuring that the FTC’s Contact Lens Study adequately reflects the actual competitive dynamics in the contact lens market.

1-800 appreciates the FTC taking this opportunity to study the contact lens industry. Over 36 million Americans wear contact lenses. These consumers are subject to a disjointed and inefficient marketplace, which makes contact lenses expensive and difficult to obtain.

The marketplace for contact lenses is defined by – and overshadowed by – a fundamental anomaly. Eye care professionals (“ECPs”) may prescribe lenses by brand, and then sell the very lenses they have prescribed. Consumers are “locked in” to the brand prescribed because contact lenses may not be purchased without a prescription.

This anomaly is a vestige of a largely bygone era. Contact lenses were originally comprised of a hard substance and custom made to each patient’s individual specifications. At that time, there was no other realistic means for a patient to obtain lenses but from his or her prescriber.

Over the past twenty years, the market has shifted so that the vast majority of Americans who wear contact lenses wear lenses made of a soft, porous material. These lenses are mass produced by the millions. Once the lenses are prescribed, they require no additional fitting or other activity by the prescriber.

Today, there is no medical reason whatsoever why such lenses should be sold only by ECPs. Contact lenses are akin to pharmaceuticals, which (except for on rare occasions) are not dispensed by prescribers. Despite the dramatic change in technology which has made the soft, mass produced lens the product of choice for the vast majority of Americans who wear lenses, the means of marketing lenses has not changed to reflect the current technology.

Making matters worse for consumers is the fact that optometrists are not bound by a code of ethics addressing the conflict of interest that they face as both prescriber and retailer. Unlike physicians,³ optometrists are not bound to settle this conflict of interest to the patient’s benefit – they are free to prescribe the lenses that make them the most money as opposed to the lenses that fit their patient’s economic and health care needs best. Unfortunately, as discussed in these comments, optometrists

¹ 69 Fed. Reg. 21833 (Apr. 22, 2004).

² Fairness to Contact Lens Consumers Act, P.L. 108-164, § 10, 117 Stat. 2026-27 (2003).

³ See American Medical Association, E-8.063, Sale of Health-Related Products from Physicians’ Offices ([Att. 1](#)).

frequently do prescribe the lenses most profitable to their practices, and some lens manufacturers promote their lenses to ECPs based on profitability.

Moreover, ECPs can prescribe brands that are available only through them – effectively leaving the patient with the Hobson’s choice of purchasing replacement lenses from the prescriber at whatever price the prescriber decides, or having to pay for a new exam from another ECP.

Because of the anomalies in this marketplace created by this conflict of interest, only one in four visually corrected Americans chooses contact lenses. Moreover, those who do wear lenses, on average, wear them twice as long as their ECPs recommend, a practice which can be detrimental to ocular health.

Given that ECPs generally make the brand decisions, manufacturers invest relatively little in consumer advertising. To the extent manufacturers do market, it is largely directed at prescribers. In many cases, such marketing focuses on the lenses’ impact on prescriber revenues. Indeed, manufacturers have reason to fear that prescribers will retaliate against them for any price-based advertising. It is not surprising, then, that consumers have little brand loyalty for a brand they did not choose.

The emphasis in the marketplace on ECP profitability also gives manufacturers little incentive to invest in product development. Despite the \$3.6 billion spent by consumers on contact lenses, the fundamental materials used in the manufacture of disposable lenses has not changed in 20 years.

The irony is that if the anomalies in the marketplace were remedied – if the role of prescriber and seller were separated as is the case with pharmaceuticals – all involved in this marketplace would stand to benefit. Competition between manufacturers would flourish as direct to consumer advertising kicked in. Incentives would be created for manufacturers to invest in product development. Contact lens prices would drop, and lenses would be easier to obtain. More Americans would wear lenses, and they would replace them more frequently.

Getting from “here to there” will not occur on its own. ECPs have a legally-protected right to prescribe lenses by brand, and thus make purchasing decisions for their patients. These same ECPs can then sell the very lenses they prescribe. Complicating matters, the eye care profession is regulated in the states by regulatory boards commonly comprised of, and dominated by, ECPs. Because of these factors, the operations of the marketplace are artificially impeded.

As long as these factors are present, competition (and all the benefits it brings to consumers) will necessarily be restricted – unless the federal government takes affirmative action to protect the interests of contact lens consumers.

Many of the issues raised by the FTC’s call for comments on the Contact Lens Study have already been addressed by 1-800 in the comments it submitted to the FTC regarding the proposed rule under the Fairness Act (the “Rule Comments”),⁴ which are attached hereto. Accordingly, the Rule Comments are referenced throughout these comments.

⁴ See The Comments of 1-800 CONTACTS, Inc., Contact Lens Rule, Project No. R411002 (“Rule Comments”) (Att. 2).

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?

There are two common types of exclusive manufacturer-prescriber relationships in the contact lens industry. These relationships are based upon the sale by manufacturers to prescribers (*i.e.*, ECPs)⁵ of “private label” lenses and “doctor exclusive” lenses. 1-800 discussed the prevalence of “private label” lenses and “doctor exclusive” lenses (collectively “custom labeled lenses”) in detail in its Rule Comments.⁶

Notably, these exclusive manufacturer-distributor relationships have greater anti-competitive effects in the contact lens industry than in others because contact lenses are prescription devices. In other industries, the luxury shampoo industry for example, if manufacturers sell exclusively to salons, consumers still have the ability to choose their brand of shampoo. In the contact lens industry, consumers have no such option when ECPs can write prescriptions for brands of lens that cannot be bought elsewhere – leaving consumers with no choice of brand and no choice of vendor. Indeed, the very purpose of “private label” and “doctor exclusive” contact lenses is to compel consumers into buying contact lenses from the ECP that prescribed them.

As mentioned in the Rule Comments, the incidence of anti-competitive exclusive arrangements has afflicted the contact lens industry for years. In 1997, several of the major contact lens manufacturers, Johnson & Johnson Vision Care (Vistakon) (“J&J Vision Care”), Ciba Vision, and Bausch & Lomb, were sued by 32 state attorneys general (“State AGs”) and a national class of consumers in *In re: Disposable Contact Lens Antitrust Litigation*, MDL 1030 (M. D. Fla.) for engaging in exclusive manufacturer-prescriber relationships. J&J Vision Care, Ciba Vision, and Bausch & Lomb all settled the case by agreeing to pay approximately \$80 million collectively in compensation and consenting to sell replacement contact lenses to alternative sellers (*i.e.*, pharmacies, mail-order, Internet, and discount sellers) on a non-discriminatory basis. Despite this settlement, the use by manufacturers not parties to that litigation of “private label” lenses and “doctor exclusive” lenses for anti-competitive purposes is still exceedingly prevalent in the industry.⁷

“Private label” contact lenses are simply lenses sold under multiple private names, often under the name of a specific ECP or specific eye care company. Regardless of the brand on the box, they are made by the same manufacturer, produced and packaged on the same production line, and are identical to each other. The use of “private label” lenses for anti-competitive purposes has been heavily promoted in trade journals:

- *Contact Lens Spectrum*: In January 2002, the *Contact Lens Spectrum* included a supplement, “Using a Soft Contact Lens for Patient Retention.” The supplement featured a section entitled, “Using Private Label Lenses to Keep Patients in the Practice.” That section quoted an ECP stating:

⁵ Throughout these comments, 1-800 uses the terms “prescriber” and “ECP” interchangeably.

⁶ See Rule Comments, at 1-5, 33-34, 50-54 (Att. 2).

⁷ For a detailed discussion of *In re: Disposable Contact Lens Antitrust Litigation*, MDL 1030 (M. D. Fla.), see *id.* at 20-26.

“We use private labeling a lot, and I think that originally we were fitting lenses like those from CIBA and Bausch & Lomb, and we would get calls from patients and 1-800 Contacts asking us for their contact lens prescriptions. I wanted to use another strategy to prevent that from happening. One of the strategies was private labeling. . . . Now when patients want to order a lens, they like the particular lens that we provide. It’s a private label, so they can’t get it anywhere else. It makes it a lot easier for them to come back to us. If they go down to Wal-Mart or Costco or someplace like that and ask, ‘Do you have this lens?’ Costco or Wal-Mart or 1-800 would say ‘Yes, we do, but it’s a different name on the box.’ That creates the problem within the patient’s mind about whether or not it’s the same lens I often do not give my patients a choice. I don’t say this is a private label lens. I just say, ‘This is the best lens for you. It’s the one you should be wearing.’”⁸

- *Review of Optometry*: “As more contact lens wearers purchase replacements from Internet and direct mail retailers, and in the aftermath of lawsuits that have forced major manufacturers to sell lenses to those retailers, independent O.D.s are looking for new weapons in what can appear to be a losing battle. Some practitioners say they’ve found a way to win the war, or at least hold the line: private-label contact lenses.”⁹

In providing for “private label” substitution under Section 4(f) of the Fairness Act,¹⁰ Congress assumed that alternative sellers could easily obtain equivalent national brands for private label lenses. As discussed fully in 1-800’s Rule Comments,¹¹ this is not the case. “Private label” manufacturers refuse to sell equivalent lenses to sellers who are not ECPs. These manufacturers have stepped up their efforts to cut off those who supply alternative sellers with “private label” lenses or their equivalents (*i.e.*, the gray market).

1-800 goes to great lengths to obtain products equivalent to “private label” lenses, often paying grossly inflated prices. In some cases, 1-800 cannot get all the lenses it needs. Thus, despite Congress’ clear intent to remedy the “private label” problem, “private label” substitution is only a first step to eliminating the problem. 1-800 believes that the FTC also should require ECPs that prescribe “private label” lenses to include in the prescription the name of an equivalent brand not subject to exclusive distribution (and thus, widely available to the patient).

In contrast, “doctor exclusive” lenses are the product of overt manufacturer restricted distribution policies. Manufacturers of “doctor exclusive” lenses distribute lenses to ECPs only, and *no* substitutes are available to alternative sellers or their consumers. As with “private label” lenses, ECPs have used “doctor exclusive” lenses for anti-competitive purposes by prescribing brands that only they sell.

The “doctor exclusive” program has an insidious impact on consumers prescribed such lenses. Consumers requiring a refill of their prescription – or replacement lenses – are left with a Hobson’s

⁸ *Using Private Label Lenses to Keep Patients in the Practice*, Contact Lens Spectrum (Jan. 2002) ([Att. 3](#)).

⁹ *Can Private-Label Save Private Practice?*, *Review of Optometry* (May 2002) ([Att. 4](#)).

¹⁰ Fairness to Contact Lens Consumers Act, P.L. 108-164, § 4(f), 117 Stat. 2025 (2003).

¹¹ See Rule Comments, at 1-5, 33-34, 50-54 ([Att. 2](#)).

choice: (1) purchase the lenses directly from the prescribing ECP – often at an inflated price, or (2) pay to be re-examined by another ECP who does not prescribe “doctor exclusive” lenses.

Many companies have built entire marketing programs around “doctor exclusive” lenses, and these companies regularly boast about the anti-competitive effects of their products in their advertisements, on their websites, and in the training materials that they send to ECPs. 1-800 cited several examples of these advertisements in its Rule Comments,¹² and a further sampling of these anti-competitive tactics follow:

- Ocular Sciences/ Hydrogenics 60 - Ocular Sciences specifically markets its “doctor exclusive” lens, “Hydrogenics 60,” as “a lens available only to authorized independent private practitioners.”¹³
- Hydrogel Vision Corporation (a division of Benz Research and Development) (“Hydrogel”)/ Extreme H2O - Hydrogel markets its “doctor exclusive” lens, “Extreme H2O,” to ECPs as “protect[ing] end-of-year profit” because it is “distributed exclusively via an intellectual property licensing agreement to qualified independent eye care providers.”¹⁴
- Cooper Vision/ Proclear – Cooper Vision markets its “doctor exclusive” lens, “Proclear,” with scare tactics, telling the ECP that he or she has “worked hard to build your practice one patient at a time. Don’t let your hard work slip away.” Cooper Vision then promises ECPs that Proclear will help protect their practice “from eroding margins and keep contact lens patients coming back to see you instead of a website, 800 number or a discount store.”¹⁵

Notably, in Europe, Cooper Vision does not have an incentive to market “doctor exclusive” lenses because of prescription laws that provide for over-the-counter treatment of contact lenses. Therefore, the company’s restricted distribution policies do not apply, even though the product sold in the United States and in Europe is identical. Nonetheless, to further prevent alternative sellers in the United States from obtaining the product, European packaging reads “not for sale in the USA.”

- Sauflon Pharmaceuticals (“Sauflon”) – Sauflon has taken “doctor exclusive” lenses to the next level, recently unveiling a “doctor exclusive” patient registration program.¹⁶ Under the program, the ECP: (1) fits the patient with Sauflon lenses, (2) registers the patient in the program, (3) establishes a price for the lenses, (4) has the patient preauthorize his credit card for future contact lens charges, and (5) collects a portion of the manufacturer’s profits. When the patient is ready for a refill of his or her prescription, the manufacturer ships the lenses directly to the patient. According to Sauflon, the anticompetitive nature of the patient registration program is beneficial to the ECP because “[w]ith the added value of low regular payments conveniently charged to [patients’] credit cards there is no need for patients to shop around looking for the

¹² See *id.* at 1-5, 33-34, 50-54.

¹³ Hydrogenics 60 Advertisement Insert, Ocular Sciences (Att. 5).

¹⁴ Extreme H2O Advertisement, Hydrogel Vision Corporation (Att. 6).

¹⁵ Proclear Advertisement, Cooper Vision (Att. 7).

¹⁶ *A Business Proposal Power Point*, Sauflon Pharmaceuticals (Att. 8).

best deal, they simply register in the program and forget about it.”¹⁷ Of course, even if patients knew they could “shop around” for replacement lenses, they would have great difficulty doing so because Sauflon lenses are not made available to non-ECP sellers.

The Sauflon system is ruthlessly efficient in denying consumers the benefits of competition by eliminating alternative sellers from the market. Unlike the more traditional exclusive manufacturer-ECP relationships for custom labeled lenses – where the manufacturer ships the contact lenses to the ECP, who delivers the contact lenses to the patient – the Sauflon system eliminates this step, completely preventing diversions to alternative sellers and leaving consumers effectively at the mercy of their ECPs.

The Sauflon program exemplifies the anti-consumer behavior that naturally stems from the fundamental conflict of interest afflicting this industry – ECPs have the power to prescribe lenses, specify the brand of lenses, and then sell the lenses that they prescribe.¹⁸

Notably, Sauflon’s marketing of its program is not based on the health needs of patients. The lenses are not marketed based on any new, or particular patented attribute which benefits patients. Rather, the company suggests that ECPs should prescribe Sauflon for the purpose of patient retention. According to the company, “[b]y prescribing the Sauflon 55UV contact lens to a patient, the doctor is indicating that the patient should be enrolled in the program.”¹⁹ Sauflon even provides a script for the ECP to use when fitting this contact lens product:

“I have prescribed a new contact lens, from Sauflon. I feel that it is the best choice for you’ In this way the patient will be in no doubt that their doctor has approved the change to this lens and that the solutions and home delivery service element of the program is simply a bonus from being a Sauflon lens user and not a separate decision.”²⁰

In addition, ECPs also regularly promote among themselves the use of “doctor exclusive” lenses, as a means of preventing competition from alternative sellers. Such “internal marketing” can be seen in their online electronic mail (“e-mail”) forums. For example, one ECP made the following comment:

“Extreme-H2o [sic] and Definition lenses are my bread and butter 2 week disposable lenses Here is an instance where two companies have gone out of their way to support private ODs by offering a superior product at reasonable costs [to ECPs] that’s not available [through] mail order. So let’s show them support and appreciation for supporting us.”²¹

The practice of using “doctor exclusive” lenses to undermine competition from alternative sellers takes advantage of consumers who assume they are being prescribed lenses based on their health needs – not the prescriber’s financial interest. Many consumers may not even know that they should

¹⁷ *Contact Lens and Solution: Patient Retention Program*, Sauflon Pharmaceuticals (Att. 9).

¹⁸ See Rule Comments, at 13-15 (discussing the conflict of interest in detail) (Att. 2).

¹⁹ *Contact Lens and Solution: Patient Retention Program*, Sauflon Pharmaceuticals (Att. 9).

²⁰ ECP Manual, Part 9 (Implementation), Sauflon Pharmaceuticals (Att. 10).

²¹ John Leeth O.D., *Optcom - Extreme H2O Contact Lens*, ECP E-mail Forum, Nov. 10, 2003 (Att. 11).

be able to purchase replacement lenses from a source other than their ECP. This practice also has had a significant impact on 1-800's sales. For example, 1-800 frequently receives consumer requests to fill prescriptions for "doctor exclusive" lenses that are not available to any alternative seller. Although 1-800 does not track website requests for contact lens brands that it does not supply, it received 148 requests for "doctor exclusive" lenses from individuals through the call center alone from May 9, 2004 through May 16, 2004. Given that 1-800 receives approximately 50% of its orders through the call center and 50% through its website, it is safe to assume that it actually lost approximately 296 sales due to "doctor exclusive" lenses that week, and that the same number of consumers were frustrated by 1-800's inability to provide those brands to them.

- b. How common is it for a contact lens manufacturer to sell only to sellers, to the exclusion of prescribers?

To the best of its knowledge, 1-800 is unaware of any exclusive relationships between contact lens manufacturers and sellers. In recent months, manufacturers have begun to offer rebates and cooperative marketing opportunities to alternative sellers. It is important to keep in mind, however, that these deals have long been available to prescribers.²²

- c. If a contact lens manufacturer sells only to prescribers or sellers, what type of limitations and restrictions on re-sale typically are found in such agreements?

Custom labeled (*i.e.*, "private label" and "doctor exclusive") contact lens manufacturers have gone to great lengths to prevent non-ECPs from obtaining their lenses and to make ECPs aware of these efforts in the hope that ECPs will prescribe their brands.

Manufacturers that sell "doctor exclusive" lenses typically require ECPs to sign distribution agreements agreeing to sell the lenses only to their own patients. For example, ECPs selling Extreme H2O lenses must sign an "Authorized Practitioner Distribution Agreement" that, in part, requires them to "[p]rovide or sell Extreme H2O contact lenses only to their own patients."²³ If the manufacturer²⁴ determines that the ECP has violated this provision, it will cancel any pending orders and will terminate the ECP contract.

The contract also requires ECPs not to "engage in marketing in which price-based advertising is utilized for the purpose of enticing patients to be fit with the Extreme H2O lens."²⁵ Hydrogel, in turn, promises that it will not sell "to retail chains that would be in direct competition with the Private Independent Practitioner that we have established as our core client."²⁶ They additionally agree to manufacture the lens under the Extreme H2O brand only, "and not under any other brand or label."²⁷

²² See, e.g., ECP Rebates (*i.e.*, Sauflon Coupon; Extreme H2O Rebate Offer; Acuvue Patient Rebate Program) (Att. 12).

²³ Authorized Practitioner Distribution Agreement, Benz Research & Development (Att. 13).

²⁴ Hydrogel is a division of Benz Research & Development.

²⁵ Authorized Practitioner Distribution Agreement, Benz Research & Development (Att. 13).

²⁶ *Id.*

²⁷ *Id.*

Ocular Sciences imposes similar limitations on ECPs that prescribe its “doctor exclusive” lens, Hydrogenics 60. Ocular Sciences’ advertisements make it clear that: “[t]o better control lens distribution, we require Hydrogenics 60 UV dispensers to sign an agreement and pledge to sell these lenses only to their own patients.”²⁸ In addition, the Ocular Sciences’ Customer Agreement states that “resale or redistribution of these contact lenses in any way to other [ECPs]; retail optical chains; mail-order or internet-based lens replacement services; or any other reseller of contact lens products is expressly prohibited.”²⁹ If an ECP violates this agreement, his or her ability to order Ocular Sciences contact lenses is suspended.³⁰

Notably, Sauflon, with its patient registration program, can control access to its product without requiring ECPs to sign an agreement restricting the resale of its lenses. Because Sauflon generally ships directly to the patient (or ships an individual’s order to an ECP for pick up), there is no excess product, and therefore no opportunity for resale to an alternative seller.³¹

d. How common is it for prescribers to agree to prescribe only certain manufacturers’ contact lenses?

1-800 has no information with regard to whether, as part of the exclusive manufacturer-prescriber relationship, ECPs commonly agree to prescribe *only* one manufacturer’s contact lenses. However, as discussed in response to question 14(b), given that Ocular Sciences, which only sells custom labeled lenses, is now the second largest player in the spherical lens market, with 23% of the market, and that Cooper Vision, another custom labeled lens manufacturer, is the leader in the toric lens market, with 34% the market, it is clear that prescriptions for custom labeled lenses are exceedingly prevalent.³²

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)?

Although 1-800 does not have evidence of agreements whereby ECPs exclusively prescribe a single manufacturer’s contact lenses, 1-800 does know that manufacturers of “private label” and “doctor exclusive” lenses refuse to sell their lenses to 1-800, or to other alternative sellers. As described in response to question 1(c), efforts by such manufacturers to prevent alternative sellers from obtaining their lenses include such tactics as terminating or suspending sales contracts with ECPs that divert sales to alternative sellers.

²⁸ Hydrogenics 60 Advertisement Insert, Ocular Sciences (Att. 5).

²⁹ Letter to Optometrist (Name Redacted), from Brad Jones, Ocular Sciences, Vice President of U.S. Sales, dated Jan. 30, 2004 (citing the Customer Agreement) (Att. 14).

³⁰ *See id.*

³¹ *Contact Lens and Solution: Patient Retention Program*, Sauflon Pharmaceuticals (Att. 9); ECP Manual, Part 9 (Implementation), Sauflon Pharmaceuticals (Att. 10).

³² *See infra*, discussion in response to question 14(b).

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?

Central to this question is the fact that to a large extent the contact lens market is insulated from traditional market forces because of the unique position of the ECP – a professional who can sell mass produced products that are only available through prescriptions. 1-800 is not aware of any ECPs who are using as a selling point the fact that they are willing to prescribe contact lenses that are widely available, as opposed to custom labeled lenses. As both a seller and a prescriber, ECPs have little incentive to promote the portability of prescriptions that they issue. Indeed, as discussed in response to question 2(d) below, ECPs would be prohibited from advertising prescription portability under some state laws.

ECPs are primarily retailers. Today, ECPs generally make more money off of the sales of ophthalmic goods, such as glasses and contact lenses, than ophthalmic services, with goods accounting for up to 65% of the average practice.³³ As a result, ECPs have a powerful economic motivation to ensure that patients buy lenses from them.

For an ECP to engage in the advertising campaign contemplated by question 2(a) profitably, the ECP would have to be sure that: (1) consumers are fully aware that custom labeled lenses limit consumer ability to shop around and tend to be more expensive and less convenient, and (2) such advertising would draw enough new patients into his or her practice to more than compensate for losses in contact lens sales.

However, 1-800 has not seen any evidence suggesting that consumers are aware of the problems raised by custom labeled lenses. Indeed, the fact that 92% of consumers purchase contact lenses directly from their prescriber and the prescriber affiliated retail location indicates that public awareness of one's ability to obtain lenses from alternative sellers and consumer awareness of consumers' rights are fairly limited.

Furthermore, because it is the ECP rather than the patient who determines the brand of contact lens prescribed, manufacturers of freely-traded lenses have a disincentive for educating the public on the distinction between their brand and custom labeled lenses. Any manufacturer who engages in such a campaign risks retaliation from ECPs. Indeed, certain manufacturers boast in trade journals that they do not engage in consumer advertising.³⁴

Even if an advertising campaign educated consumers about these problems, there is no way to guarantee that patients would actually purchase the lenses from the advertising ECP – particularly given that the campaign itself would have made it clear that the lenses were widely available.

In addition, there is no reason to believe that the ECP engaged in advertising would see an increase in patients sufficient to offset the advertising costs and lost contact lens sales – ECPs who prescribe custom labeled lenses are often trained to tell their patients that the lenses are special lenses, which

³³ See Jennifer Goodwin, *Mail Order: Public Benefit or Public Health Threat*, *Optometric Management* (Att. 15).

³⁴ Hydrogenics 60 Advertisement Insert, *Ocular Sciences* (Att. 5).

the patient needs.³⁵ To be susceptible to this kind of advertising, patients who have been told that their lenses are special would have to reject the professional advice of a health care professional – something many patients would be reluctant to do.

Moreover such an advertising campaign would be contrary to traditional ECP practices. As detailed in 1-800's Rule Comments, ECPs historically have done everything they could to prevent patient knowledge of prescription portability, including refusing to release prescriptions.³⁶

- b. How prevalent is consumer awareness of prescribers' willingness to prescribe contact lenses available from alternative prescribers and sellers?

As mentioned in response to question 2(a) herein, 1-800 is not aware of any evidence suggesting that consumers are aware of this issue at all. There is no incentive for manufacturers or ECPs to make consumers aware.

- c. Are consumers able to shop for prescribers that will prescribe contact lenses available from alternative prescribers and sellers?

As mentioned in response to question 2(a) herein, 1-800 is not aware of any evidence indicating that ECPs attempt to distinguish among themselves by advertising that they sell widely available contact lenses, as opposed to custom labeled lenses. Nor is 1-800 aware of any evidence suggesting that consumers are aware that custom labeled lenses are often more expensive and less convenient than standard lenses because custom labeled lenses limit consumer ability to shop around. Accordingly, 1-800 does not believe that consumers have any meaningful opportunity to shop for ECPs based on whether they prescribe standard or custom labeled contact lenses.

If consumers were educated about the rights they have under the Fairness Act, as well as the limits imposed on prescription portability by custom labeled lenses, then consumers would have a better opportunity to ask relevant questions about prescribing practices prior to scheduling an eye exam (although many would still presumably defer to what they believe is the medical judgment of the prescriber). Because of this unique situation in which ECPs find themselves – as both prescribers and sellers of a mass produced product that is available only by prescription – ECPs are insulated from traditional market forces, and no private party has sufficient incentive to engage in the considerable expense entailed in so educating consumers.

Furthermore, if consumers learn about the limits imposed on prescription portability by custom labeled lenses only after they have been fitted into a custom labeled lens, then their only options are to purchase the lenses from the ECP or to pay for a second eye exam by a different ECP. (Please refer to the Rule Comments for a more detailed discussion of the need for consumer education).³⁷

³⁵ See, e.g., ECP Manual, Part 9 (Implementation), Sauflon Pharmaceuticals (Att. 10); see also *supra*, discussion in response to question 1(a).

³⁶ See, e.g., Rule Comments, at 15-34, 83-84 (Att. 2).

³⁷ See *id.* at 63-67, 83-84.

- 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?

1-800 is not aware of any state law or regulation that specifically addresses an ECP's willingness to advertise that he or she prescribes contact lenses that are widely available. However, some states have broader contact lens advertising prohibitions. For example, in Arkansas, it is unlawful for any "optometrist" or "retailer" to:

"Solicit the sale of . . . contact lenses . . . or any other optical appliances or devices, eye examinations, or visual services . . . by radio, window display, television, telephone directory display advertisement, newspaper advertisement, handbills, circulars . . . or any other printed publication or medium or by means other than advertisement" or to "[u]se any method or means of baiting, persuading, or enticing the public into buying . . . contact lenses . . . or other optical appliances or devices."³⁸

Similarly, in South Dakota it is unlawful for an optometrist to advertise "the quotation of prices for a discount on or any specific amount of payment for . . . ophthalmic lenses . . . or [use] the phrases 'free examinations,' 'moderate prices,' 'low prices,' . . . 'satisfaction guaranteed,' or any variations thereof, or words of similar import."³⁹ It is also unlawful for an optometrist to advertise "by means of handbills, posters, circulars, newspapers, radio or periodicals," if the advertisement includes anything more than "the name, profession, title, location, phone number and office hours of the optometrist."⁴⁰ Notably, such laws and regulations are not surprising given the custom of most professionals not to advertise and the cultural bias among professionals against advertising.

In addition, some contractual agreements between contact lens manufacturers and ECPs place further restrictions on ECP advertising. For example, as mentioned in response to question 1(c), the "Authorized Practitioner Distribution Agreement" for Extreme H2O lenses requires ECPs not to engage in price-based advertising for the product.⁴¹

These broad state proscriptions would likely prohibit ECPs from advertising their willingness to prescribe lenses that can be sold by alternative sellers as well as ECPs. Notably, these state advertising proscriptions, the contractual restrictions, and the customary attitudes of professionals towards advertising, prevent advertising from correcting the effect of anti-competitive behavior in the contact lens market, insulating ECPs from traditional market forces.

Although it would not be a panacea, 1-800 believes that ECPs who sell custom labeled lenses should be required to: (1) display an in-store sign telling patients that the lenses are difficult to obtain from other sellers, and (2) include in the prescription the name(s) of equivalent lenses that are sold directly to alternative sellers. 1-800 believes that these requirements would best be addressed by the federal

³⁸ Arkansas State Code, ACA § 17-90-104(10) (Att. 16).

³⁹ South Dakota State Code, S.D. Codified Laws § 36-7-25(8) (Att. 17).

⁴⁰ *See id.* § 36-7-25(9).

⁴¹ Authorized Practitioner Distribution Agreement, Benz Research & Development (Att. 13).

government, to ensure uniformity and appropriate enforcement.⁴² A federal requirement to display an in-store sign also would preempt broad advertising proscriptions, such as those in Arkansas and South Dakota, where necessary.

- e. Do manufacturers advertise directly to consumers that their contact lenses are available both from sellers and prescribers?

No. 1-800 is not aware of any manufacturer that advertises directly to consumers that its contact lenses are sold by both sellers and ECPs. Because brand decisions are left primarily to the ECP, and ECPs are not limited by law or ethical considerations from prescribing the lenses that are the most profitable to their practices, most manufacturer advertising is directed toward ECPs. Manufacturers whose advertisements could be seen by ECPs as potentially reducing their profits risk retaliation from ECPs. Indeed, certain manufacturers advertise in trade journals promoting the fact that they do not engage in direct to consumer advertising.⁴³

- f. Do sellers advertise that lenses may be purchased from sellers that are not prescribers?

Yes. 1-800 advertises that it sells replacement contact lenses and that it does not prescribe the lenses. The 1-800 website encourages consumers to visit an ECP, noting that the “first step to wearing contacts is visiting an optometrist or ophthalmologist for a contact lens fitting.”⁴⁴ However, because alternative sellers, such as 1-800, only have 8% of the contact lens replacement lens market, such sellers do not have the resources to make the vast majority of consumers aware of their ability to purchase lenses from non-ECPs. Of course, no amount of advertisement would help consumers who are prescribed custom labeled lenses because they are effectively forced to buy lenses from their ECP.

3. Are there instances where exclusive relationships have prevented market entry by a manufacturer, seller, or prescriber?

Yes. Exclusive relationships between manufacturers and ECPs have negatively impacted alternative sellers, such that despite the additional convenience and cost savings offered by alternative sellers, non-ECPs only have 8% of the contact lens market.

As discussed in more detail in the Rule Comments,⁴⁵ the State AGs, in *In re: Disposable Contact Lens Antitrust Litigation*, MDL 1030 (M. D. Fla.), compiled an overwhelming amount of evidence demonstrating that the defendant ECPs and ECP trade associations conspired to prevent competition from alternative sellers. The ECP and ECP trade association tactics included: (1) coercing “manufacturers into adopting and more actively enforcing ECP-only distribution policies

⁴² See, e.g., Rule Comments, at 29-35 (noting that state optometry boards have often promulgated regulations that give advantages to independent ECPs, at the expense of alternative sellers, and that boards have failed to bring enforcement actions against independent ECPs because state boards are generally dominated by independent ECPs) (Att. 2).

⁴³ Hydrogenics 60 Advertisement Insert, Ocular Sciences (Att. 5).

⁴⁴ 1-800 Website, *The Rx*, http://www.1800contacts.com/doc.AndRx/docrx_prescription.shtml (Att. 18).

⁴⁵ See Rule Comments, at 24-25 (Att. 2).

for their replacement lenses,”⁴⁶ and (2) making an “effort to sanction those ECPs that supplied lenses to alternative channels.”⁴⁷

The activities documented by the State AGs, as well as the exclusive relationships that continue today with custom labeled contact lenses, have prevented alternative sellers from competing. Indeed, these activities have also likely hampered alternative sellers’ ability to obtain the inventory necessary for market entry. Even though alternative sellers generally offer greater convenience than ECPs and prices that are almost 20% lower,⁴⁸ ECPs still dominate the market. 1-800’s marketing records show that optometrists currently have 64.3% of the market; ophthalmologists have 4.3% of the market; mass merchandisers⁴⁹ have 13.9% of the market; retail chains⁵⁰ have 9.5% of the market; and mail-order/Internet sellers (*e.g.*, 1-800) have 8.0% of the market.⁵¹ Notably, mass merchandisers and retail chains generally have at least one ECP at each location, so non-ECP competitors have an extremely small percentage of the overall market. These numbers attest to the effectiveness of the anti-competitive behavior that has characterized this industry.

Please refer to 1-800’s Rule Comments for a more detailed overview of the contact lens industry.⁵²

4. Please comment on the market shares of prescribers, sellers, and manufacturers.

a. What are the national and local market shares of contact lens manufacturers?

1-800 does not compile for publication any of its own data regarding the national or local market share of contact lens manufacturers. However, OptiStock MarketWatch, a newsletter for investors who track the vision care industry recently reported that Johnson & Johnson has approximately 48% of the spherical lens market, followed by Ocular Sciences with approximately 23% of the market, and Bausch & Lomb and Cooper Vision with smaller shares. The newsletter also reported that Cooper Vision is the leader in the toric contact lens market with approximately 34% of that market, followed by CIBA Vision, with approximately 30%. Finally, according to the newsletter, although Johnson & Johnson and CIBA Vision previously monopolized the multifocal contact lens market, with 80% and 20% of the market, respectively, Cooper Vision and Bausch & Lomb have recently become key players in that market.⁵³

⁴⁶ See *In re: Disposable Contact Lens Antitrust Litigation*, Case No. MDL 1030 (M.D. Fla.), Order of Feb. 26, 2001, at 6 (Att. 19).

⁴⁷ *Id.*

⁴⁸ See, *e.g.*, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, a Report from the Staff of the FTC (Mar. 2004), at 13 (finding a 19% difference).

⁴⁹ The term “mass merchandisers” includes stores such as: Wal-Mart Vision Center, Target Optical, Sam’s Club Optical, Costco Optical, and Shopko Optical.

⁵⁰ The term “retail chains” includes store such as: JCPenney Optical, Pearle Vision, Lenscrafters, Sears Optical, America’s Best, BJ’s Optical, Eyemasters, and Cohen Optical.

⁵¹ All numbers are approximate as of April 2004.

⁵² See Rule Comments, at 9-15 (Att. 2).

⁵³ See *OptiStock MarketWatch*, optistock.com (Oct. 2003) (Att. 20).

b. What are the national and local market shares of sellers?

As mentioned in response to question 3 herein, 1-800's records regarding the national contact lens market show that optometrists currently have 64.3% of the market; ophthalmologists have 4.3% of the market; mass merchandisers have 13.9% of the market; retail chains have 9.5% of the market; and mail-order/Internet sellers (e.g., 1-800) have 8.0% of the market.⁵⁴ Notably, mass merchandisers and retail chains generally have at least one ECP at each location, so non-ECP competitors have an extremely small percentage of the overall market.

1-800 does not maintain records regarding local market shares. Please refer to 1-800's Rule Comments for a more detailed overview of the contact lens industry.⁵⁵

c. What are the local market shares of contact lens sales by prescribers?

1-800 does not maintain records regarding the local contact lens market shares of ECPs, however, it does maintain records regarding the national contact lens market shares of ECPs and sellers. (See Response to Question 3 and Question 4(b), herein).

d. Are there instances where a specific prescriber (including different eye care practitioners associated with the same chain or retailer) issues a substantial share of contact lens prescriptions at a local level?

1-800 does not maintain records regarding the local market shares of specific individual ECPs or companies that employ ECPs.

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?

Exclusive manufacturer-ECP relationships lower costs for manufacturers because manufacturers of "doctor exclusive" lenses have no need for mass marketing. Therefore, by manufacturing "doctor exclusive" lenses, they have higher profits. With regard to ECPs, there are too many different products to make generalizations about whether the exclusive relationships in and of themselves lower costs. For example, ECP prices on Ocular Sciences products are generally less expensive than standard products, such as Acuvue. However, Proclear is generally more expensive for ECPs because it has unique characteristics.

Regardless of whether exclusive manufacturer-prescriber relationships lower costs for manufacturers or ECPs, it is doubtful that the savings are passed onto consumers. The fact that such lenses are generally not made directly available to alternative sellers reduces (if not eliminates) effective price-based competition. As mentioned, the FTC itself has found that consumers that buy contact lenses

⁵⁴ All numbers are approximate. 1-800 does not have any figures for the percentage of the market held by optometrists who are associated with ophthalmologists.

⁵⁵ See Rule Comments, at 9-15 (Att. 2).

from alternative sellers, rather than ECPs, generally can save approximately 20%.⁵⁶ Moreover, according to a Consumers Union Southwest Regional Office Report, comparison shopping for lenses and services “saves money,”⁵⁷ and exclusive manufacturer-prescriber relationships do not allow for comparison shopping.

b. What role do exclusive relationships play in assuring that sellers or prescribers give a manufacturer’s contact lenses the desired level of promotion?

A fundamental issue raised by this question is the propriety of allowing ECPs to promote a prescription product that they themselves sell. This is especially of concern given that when it comes to prescribing contact lenses, most ECPs are free to settle in their own favor, the conflict between their interest in maximizing profits, and the patient’s interest in saving money.

Given that contact lenses are a prescription medical device, they should be prescribed based on the benefits they provide to the patient rather than on the promotional activities engaged in by manufacturers. Promotional activities engaged in by manufacturers of pharmaceuticals are closely monitored to assure that physicians receive no pecuniary benefit by prescribing such products. Contact lenses should be treated no differently.

As an alternative seller, 1-800 itself cannot purchase custom labeled lenses directly from the manufacturers. As a result, 1-800 does not know what role the exclusive agreements generally play in ECP promotion of the products. However, manufacturers certainly do not need exclusive distribution relationships to ensure that their products are adequately promoted. Cooperative marketing agreements can be separately negotiated, and manufacturers of widely available lenses frequently enter into these types of agreements with ECPs and alternative sellers alike.

Regardless of the role of exclusive agreements in product promotion, 1-800 believes that its representation in the “private label” lens market is about 50% of what it should be. For example, Johnson & Johnson, a non-ECP exclusive manufacturer, represents about 37% of the overall market,⁵⁸ and 35% to 40% of 1-800’s sales. In contrast, Ocular Sciences has 13% of the overall market,⁵⁹ but the “private label” Ocular Sciences lenses that 1-800 obtains on the gray market represent only 6% of 1-800’s sales.⁶⁰ This indicates exclusive relationships between ECPs and manufacturers are having the desired effect - the patient purchases “private label” lenses directly from the ECP at least twice as often as from alternative sellers.

⁵⁶ See, e.g., *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, a Report from the Staff of the FTC (Mar. 2004), at 13 (finding a 19% difference).

⁵⁷ *The Eyes Don’t Have It. Yet. Update to Access to Contact Lens Prescriptions in Texas*, Consumers Union Southwest Regional Office, Jan. 2001, <http://www.consumersunion.org/health/contact/summary.htm> (Att. 21).

⁵⁸ Jason Copley, Purchasing Manager, 1-800, Verbal Conversation with Third Party on or about June 1, 2004 (regarding a market report from Health Products Research, Inc.). This market share estimate is consistent with the estimate in 1-800’s response to question 4(a) because it concerns the overall contact lens market, rather than just the spherical lens market.

⁵⁹ See *id.* This market share estimate is consistent with the estimate in 1-800’s response to question 4(a) because it concerns the overall contact lens market, rather than just the spherical lens market.

⁶⁰ *About Us*, Health Products Research Inc, <http://www.hprintl.com/about.html> (using Dec. 2003 data) (Att. 22).

- c. What role do exclusive relationships play in assuring that sellers or prescribers provide customers with the level of service that manufacturers desire to accompany their contact lenses?

1-800 is unaware of any evidence that suggests that exclusive manufacturer-prescriber relationships in and of themselves benefit prescriber-consumer service. Although home delivery is a consumer benefit of Sauflon's exclusive ECP registration program, home delivery is not dependent upon the exclusive relationship. Sauflon could also offer home delivery if it supplied its lenses to alternative sellers that regularly offer mail-order and Internet services.

Indeed, any argument that exclusive relationships in and of themselves improve consumer service overall is dubious, given that the very purpose of these exclusive relationships is to eliminate competition and consumer choice.

- d. What role do exclusive relationships play in discouraging sellers and prescribers from "free-riding" off the promotional or customer service efforts provided by other sellers or prescribers?

1-800 is unaware of any evidence suggesting that exclusive manufacturer-prescriber relationships keep certain ECPs from "free-riding" off the promotional or customer service efforts of other ECPs.

6. Please comment on how, if at all, current patterns of exclusive relationships may change in response to the Act.

1-800 does not believe that the current patterns of exclusive relationships will change in response to the Fairness Act. Since the Fairness Act was enacted, ECPs are still profiting from using custom labeled lenses for anti-competitive purposes. As explained in response to question 1(a) herein, in providing for "private label" substitution under Section 4(f) of the Fairness Act,⁶¹ Congress assumed that alternative sellers could easily obtain equivalent national brands for "private label" lenses. However, that is not the case. Manufacturers of "private label" lenses go to great lengths to prevent 1-800 from obtaining such lenses, and boast about these efforts in marketing to ECPs, with the hope that ECPs will respond by prescribing their lenses. In some cases, 1-800 cannot get the equivalent lenses it needs. Moreover, the Fairness Act does not address the problem of "doctor exclusive" lenses, for which no substitutes are available to alternative sellers at all.

7. Please provide any other information regarding the impact of the exclusive relationships on competition.

1-800 urges the FTC to keep in mind as it considers the whole area of "exclusive relationships" the distinction between contact lenses and other consumer products. Unlike the case with general consumer products, contact lens consumers cannot, by shopping around, avoid the higher prices and restricted availability of exclusive products. The prescription "locks in" contact lens consumers to a particular brand, limiting their ability to make purchasing decisions based on price and convenience.

⁶¹ Fairness to Contact Lens Consumers Act, P.L. 108-164, § 4(f), 117 Stat. 2025 (2003).

1-800 hopes that the FTC will fully consider the propriety of ECPs who sell the products that they prescribe, locking patients into brands for which the ECPs have an “exclusive relationship” with the manufacturer. 1-800 also urges the FTC to take action to promote competition and the benefits it provides consumers by promulgating a rule barring ECPs from prescribing brands of contact lenses that are not freely available to alternative sellers, unless the prescription also includes the name of a freely available alternative brand, or the ECP makes a documented determination that the custom labeled brand is required by the patient for medical reasons.

Online and Offline Sellers

8. Are there differences in the prices charged for similar contacts lenses by online and offline merchants?

Yes. As mentioned, the FTC, in its March 2004 report entitled, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, found that consumers that buy contact lenses from alternative sellers, rather than ECPs, generally can save approximately 20%.⁶² The FTC’s findings are a good proxy for the price differential between online and offline sellers because: (1) the term “alternative sellers,” as used herein, includes online sellers, and (2) ECPs generally operate in brick-and-mortar, or offline, settings.

In addition, Synovate’s March 2004 Retail Contact Lens Price Study (“Synovate Price Study”)⁶³ provides information regarding the average price of contact lenses sold by ECPs. Comparing the prices in the study to 1-800’s prices is a good proxy for the price differential between offline and online sellers because 1-800 is an online seller that has approximately 70% of the mail-order/Internet contact lens market.

As Table 1 shows, 1-800’s prices are lower across the board than those of its ECP competitors, when the ECPs’ prices are averaged together. Moreover, 1-800’s prices are lower across the board than the prices of optometrists, ophthalmologists, and optical retail chains individually, and 1-800’s prices are lower than even mass merchandisers⁷ in one of three categories.

Table 1 – Average Price of Contact Lenses

	Focus Toric	FreshLook Colorblends	Acuvue 2 (Standard)
Mass Merchandisers (Wal-Mart, Target, Costco)	\$53.21	\$35.40	\$18.05
Optical Retail Chains (LensCrafters, Pearle Vision)	\$66.69	\$42.09	\$22.85
Independent Optometrists	\$70.91	\$46.67	\$24.39
Ophthalmologists	\$73.18	\$46.54	\$25.74

⁶² See, e.g., *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, a Report from the Staff of the FTC (Mar. 2004), at 13 (finding a 19% difference).

⁶³ See *Retail Contact Lens Price Study*, Synovate (Mar. 2004) (Att. 23). Synovate is one of the world’s top research firms, and it is the market research arm of global communications specialist, Aegis Group plc.

Average Price of All ECPs	\$67.87	\$44.43	\$23.31
1-800 CONTACTS	\$59.00	\$34.95	\$19.95

9. Are there any cost advantages associated with selling contact lenses online versus offline?

1-800 has no specific information regarding cost advantages associated with selling contact lenses online, as opposed to selling them from traditional brick-and-mortar facilities.

10. Please comment whether consumers find it more convenient to purchase contact lenses online or offline.

- a. Do consumers save time by purchasing their contacts online rather than at an offline store, or vice-versa?

Yes. Online sales are more convenient. Notably, 1-800's Rule Comments include a detailed discussion regarding the convenience of buying lenses from 1-800, as opposed to its brick-and-mortar ECP competitors.⁶⁴ Moreover FTC's own March 2004 report entitled, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, found that:

[A]lthough there is not a significant difference in price between mass merchandisers and Internet lens sellers, online sales may have a significant convenience advantage for some consumers. To enjoy the price savings at a mass merchandiser, a consumer has to make a trip to the store and often wait in a line. Multiple trips may be necessary if the store does not have the particular lenses in stock and must order them. Consumers who opt for an Internet seller, on the other hand, can have replacement lenses delivered simply by visiting a web site. The convenience of shopping online for replacement contact lenses could be substantial for consumers who attach high value to their time, must make a special trip to the store just to obtain replacement lenses, or live in areas distant from mass merchandisers.⁶⁵

- b. What is the value consumers place on any time savings?

As mentioned in 1-800's Rule Comments, convenience is an extremely valuable component of the contact lens business. Convenience is particularly important to consumers who wait until the last minute to replace their lenses, consumers who may lose or tear lenses, and consumers who travel. Notably, many consumers are willing to pay a premium for convenience. For example, approximately 33% of 1-800's customers choose express mail services, despite the additional fee of \$15-18 per order.⁶⁶

⁶⁴ See Rule Comments, at 12-13 (Att. 2).

⁶⁵ See *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, a Report from the Staff of the FTC (Mar. 2004), at 13.

⁶⁶ See Rule Comments, at 12 (Att. 2).

1-800 takes pride in its exemplary customer service and its ability to deliver contact lenses to consumers quickly. 1-800 has received thousands of comments from its customers over the last ten years, thanking 1-800 for its fast and convenient delivery. Several representative comments were included in the Rule Comments, and a few additional comments follow:⁶⁷

- “I am extremely pleased with my first purchase from you. WOW! What great service. You were faster and less expensive than the time and prices quoted by my optometrist. I’ll be doing business with you again in the future.”⁶⁸
- “I just wanted to take a minute to write in and tell you how great I think you are! Dealing with 1-800contacts has always been such a pleasant experience for me. Everyone I have ever dealt with when calling customer service has been very professional and upbeat, I have never had a problem when ordering over the internet, and the free shipping and lightening fast shipments are all reasons I love dealing with you. I refer all my friends and family and they too are just amazed at how easy it is to order. I just could not let another order go by without emailing you to express my thanks for the wonderful professional service you provide! I would never even think about purchasing my contacts anywhere else.”⁶⁹
- “I am a contact lens wearer. I have had, on occasion, the need to have a shipment of contact lenses “overnighted” to me [sic]. Here is why: I was traveling on bussness [sic] and had left my contacts at home. When I realized this, I called 1-800-CONTACTS, they have my current prescription, and told them that I needed them to send out a box (6) lenses to my hotel. They did this for me and I was able to continue what I was sent out to do. If I would have had to wait two or three days, can you imagine the cost of sitting there without them??? I know it was my fault for forgetting them, but it sure was nice to be able to get replacements, next day.”⁷⁰
- “I don’t have time to go to the doctor just to order contacts because I work two jobs. 1-800-contact helps me when I have ten minutes or so to order contacts online.”⁷¹

The FTC’s March 2002 staff comments before the Connecticut Board of Examiners for Opticians corroborate 1-800’s experience that consumers place extreme value on time savings and convenience. According to the staff comments, the value of travel time saved can be quantified, and individuals generally value an hour of travel time saved at 75-178% of their own hourly wage. Given that the “average private hourly wage [is] \$14.61 (December 2001),” the FTC staff concluded that:

“[A]n hour-long trip to Wal-Mart to buy replacement lenses has an implicit time cost of between \$10.96 and \$26.00. That figure represents a markup of between 50 and 130 percent over the price of a multipack.”⁷²

⁶⁷ See *id.* at 12-13.

⁶⁸ 1-800 Customer E-mail Correspondence (Cheri) (Att. 24).

⁶⁹ *Id.* (Melony) (Att. 24).

⁷⁰ *Id.* (Brian) (Att. 24).

⁷¹ *Id.* (Carrie) (Att. 24).

⁷² Comments of the Staff of the FTC, Intervenor before the Connecticut Board of Examiners for Opticians, Mar. 27, 2002, at 10 (Att. 25).

Moreover, the Independent Women's Forum, in its response to the FTC's proposed rule under the Fairness Act, noted that women (65% of contact lens wearers) place a particularly high value on convenience. According to the Forum, convenience is particularly important to women because 72.3% of women are juggling job responsibilities with child rearing and household responsibilities and find it increasingly difficult to run errands when traditional brick-and-mortar contact lens stores are open.⁷³

c. Do consumers find greater lens availability online or offline?

Consumers find greater availability online. 1-800, for example, carries 95% of the types of contact lenses that consumers purchase, and has the inventory of approximately 3,000 average ECP offices combined, with over 40,000 different SKUs.

d. Irrespective of any time savings, do consumers find it more convenient to purchase contact lenses online rather than at an offline store, or vice-versa?

In addition to saving time, online contact lens shopping provides consumers with easier opportunities to: (1) compare prices, (2) obtain product information,⁷⁴ (3) obtain general information about vision and eye care,⁷⁵ (4) ask vendors questions via e-mail or telephone,⁷⁶ and (5) track orders.⁷⁷

c. Do consumers who purchase contact lenses from online sellers differ from consumers who purchase from brick-and-mortar sellers and prescribers with regard to income, education, geographic location, or any other attribute?

As mentioned, the response of the Independent Women's Forum to the FTC's proposed rule under the Fairness Act indicates that working women who are juggling work and family responsibilities have a particular need for online contact lens sellers. Online sellers are particularly convenient for such women because online sellers save time and are open longer than traditional brick-and-mortar ECPs.⁷⁸

f. What is the cost to consumers of home delivery of contact lenses?

1-800 offers free shipping to its customers who order online. Moreover, as mentioned, the FTC has observed that contact lens consumers who purchase lenses from alternative sellers (which includes online sellers), rather than ECPs, save approximately 20%.⁷⁹

⁷³ See generally, Letter from the Independent Women's Forum to the FTC's Contact Lens Rule, Project No. R411002 (Comment 1236), dated Apr. 2, 2004 (Att. 26).

⁷⁴ See, e.g., 1-800's Website, <http://www.1800contacts.com/productlist.aspx> (Att. 27).

⁷⁵ See, e.g., 1-800's Vision 101 Website, http://www.1800contacts.com/vision101/ch_1.html (Att. 28).

⁷⁶ See, e.g., 1-800's Website, <http://www.1800contacts.com/CoInfo/coinfo-contactus.shtml> (Att. 29).

⁷⁷ See, e.g., 1-800's Website, <http://www.1800contacts.com/Login.aspx?s=y> (Att. 30).

⁷⁸ Letter from the Independent Women's Forum to the FTC's Contact Lens Rule, Project No. R411002 (Comment 1236), dated Apr. 2, 2004 (Att. 26).

⁷⁹ See, e.g., *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, a Report from the Staff of the FTC (Mar. 2004), at 13 (finding a 19% difference).

11. Do consumers who purchase contact lenses from offline sellers have any differing concerns with regard to the quality of the lenses they receive from those who purchase contact lenses online?

To try to squelch competition, ECPs have made unsubstantiated health risk claims regarding contact lenses sold by alternative sellers (which includes online sellers). As summarized in detail in 1-800's Rule Comments, these claims have been repeatedly discredited.⁸⁰ ECPs are endowed by the government with the right to prescribe contact lenses by virtue of their position as health care professionals. As such, they should have an obligation to always place a priority on the patient's interest. The fact that ECPs are using their cloak of authority to make unsubstantiated health risk claims aimed at promoting their own profits is just another consequence of the fundamental anomaly afflicting this industry – prescribers are able to sell what they prescribe.

Moreover, the FTC itself has found that there is “no systematic evidence that sales through alternative channels, such as Internet or mail-order, pose any additional health risk as long as the retailer sells in accordance with a valid prescription.”⁸¹

To the contrary, State AGs have found that competition from alternative sellers actually increased consumer safety. With alternative sellers, consumers were apt to replace their contact lenses more frequently because the lenses were cheaper and more accessible.⁸²

ECP scare tactics are one reason that alternative sellers are still limited to only approximately 8% of the entire replacement contact lens market, even though experts have determined that mail-order companies should have closer to 40% of the market.⁸³ Despite the complete absence of evidence of increased health risks associated with contact lenses purchased from alternative sellers, alternative sellers are still struggling to educate consumers that contact lenses purchased from alternative sellers are just as safe as those purchased from ECPs.

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

- a. To what extent are offline contact lens sellers' pricing decisions affected by prices offered by online sellers?

1-800, which is an online seller, believes that its presence in the contact lens market over the last decade has contributed somewhat to the overall reduction in contact lens costs to consumers. However, 1-800 believes that the average price of contact lenses sold by ECPs, who are generally

⁸⁰ See Rule Comments, at 15-17 ([Att. 2](#)).

⁸¹ Comments of the Staff of the FTC, Intervenor before the Connecticut Board of Examiners for Opticians, Mar. 27, 2002, at 4 ([Att. 25](#)).

⁸² Comments of the Attorneys General of Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Iowa, Maryland, Michigan, Minnesota, New York, Ohio, Pennsylvania, West Virginia, and Wisconsin Concerning the Ophthalmic Practice Rules (“FTC Comments of the AGs”), dated Sept. 2, 1997, at 7 ([Att. 31](#)); see also Letter to FDA Docket No. 2003P-0291, from 1-800, dated Jan. 13, 2004 (with attachments) ([Att. 32](#)).

⁸³ See Declaration of Douglas F. Greer on Behalf of the Thirty-One Plaintiff States, *In re: Disposable Contact Lens Antitrust Litigation*, Case No. MDL 1030 (M.D. Fla.), May 1999, at 31 (estimating that, absent restraints, alternative sellers should have approximately 39% of the overall contact lens market) ([Att. 33](#)); see also Douglas F. Greer, Ph.D., Supplemental Declaration on Damages in the Contact Lens Case, March 2001 ([Att. 34](#)).

offline sellers, would be even lower if ECPs had not systematically engaged in anti-competitive practices over the last 30 to 40 years.⁸⁴

When 1-800 first entered the market, it offered standard contact lenses for an average price of approximately \$19.95 per box – almost \$10.00 less than the average price offered by ECPs. Today, despite inflation, 1-800 still offers standard contact lenses, such as Acuvue 2, at an average price of \$19.95 per box, in addition to free shipping and other conveniences and rebates. Although in response to 1-800's pricing, traditional brick-and-mortar ECPs have dropped their prices a little, they still charge more than 1-800. (See Table 1).⁸⁵

b. To what extent are online contact lens sellers' pricing decisions affected by prices offered by offline sellers?

Although 1-800 constantly monitors prices charged by both online and offline sellers, its pricing decisions are based on a myriad of factors. Among the factors are costs incurred by the company's inability to obtain "private label" and "doctor exclusive" lenses directly from manufacturers, and costs related to providing an optimal level of customer service. Other components in 1-800's pricing are the costs entailed in complying with anti-competitive barriers erected by state regulatory regimes established by ECP-dominated boards, and costs related to sales lost when ECPs use the verification period under the Fairness Act to contact 1-800 customers.

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 among online sellers for identical contact lenses do vary, but the price variances are generally connected to quantity discounts and/or the absence or presence of shipping fees. 1-800, for example, charges \$19.95 per box for a six month supply (four boxes) of Biomedics 55 lenses and \$18.70 per box for a year supply (eight boxes), whereas VisionDirect charges \$16.95 per box for the same product, regardless of the quantity. 1-800, however, offers free shipping for online orders, making the price roughly the same.

d. Are some online sellers perceived by customers as preferable to other online sellers in terms of customer service, ease of shopping, trustworthiness, or any other non-price characteristic?

1-800 believes that customers have more confidence in 1-800 than other online sellers. As mentioned in 1-800's Rule Comments,⁸⁶ 1-800 has worked hard to establish itself as the "gold standard." To accommodate customers, 1-800 has made the ordering and delivery of contact lenses as convenient and as reliable as possible. Customers can order from 1-800's website 24 hours a day, seven days a week, and 1-800's call center is open every day except Christmas, Easter Sunday, the 4th of July, and Thanksgiving, Monday through Saturday, from 6 a.m. to 11 p.m. MST, and Sunday, from 8 a.m. to 8 p.m. MST. 1-800 also stocks approximately 40,000 different SKUs – giving the company the ability to fill orders for 95% of the types of lenses requested in the same day (although

⁸⁴ See Rule Comments, at 15-35 (Att. 2).

⁸⁵ *Retail Contact Lens Price Study*, Synovate (Mar. 2004), at 3 (Att. 23).

⁸⁶ See Rule Comments, at 12 (Att. 2).

lengthy prescription verification delays now cause many customers to wait, even though their lenses are in stock and ready to ship). 1-800 takes pride in its exemplary customer service.

1-800 also provides more versatility for customers. With 1-800, customers can order over the telephone or over the Internet, whereas with 1-800's largest competitor, consumers can only order over the Internet.

In addition, 1-800 has invested over \$100 million to educate consumers about its brand name and to ensure that its name is associated with convenience and cost savings. In contrast, 1-800's largest online competitor is fairly new to the industry and only advertises online.

- e. Are some offline sellers perceived by customers as preferable to other offline sellers in terms of customer service, ease of shopping, trustworthiness, or any other non-price characteristic?

1-800's focus group data indicates that, with regard to brick-and-mortar ECPs, customers generally prefer independent ECPs first, then chains, and then mass merchandisers.

- f. Do contact lens manufacturers charge different prices to online and offline sellers?

It is well-established that manufacturers historically have engaged in disparate treatment of ECPs and alternative sellers. For example, as documented by the State AGs in *In re: Disposable Contact Lens Antitrust Litigation*, MDL 1030 (M. D. Fla.), ECPs have conspired amongst themselves and with contact lens manufacturers to protect ECPs from competition from alternative sellers by restricting the sale of replacement lenses from manufacturers or diverters to alternative sellers (*i.e.*, the supply), in violation of antitrust laws.⁸⁷

Notably, as mentioned in response to question 1(a), the manufacturers that were party to that case, J&J Vision Care, Ciba Vision, and Bausch & Lomb, all settled the case by consenting to sell replacement contact lenses to alternative sellers on a non-discriminatory basis. However, many other contact lens manufacturers that are major players in today's market were not privy to that case, and therefore, are not bound by those settlements.⁸⁸ Indeed, manufacturers of "private label" and "doctor exclusive" lenses, like the manufacturer defendants in *In re: Disposable Contact Lens Antitrust Litigation*, MDL 1030 (M. D. Fla.) are still selling their contact lenses only to ECPs to the exclusion of alternative sellers.

Moreover, because consumer purchasing decisions are effectively made by ECPs, normal manufacturer-pricing practices do not apply to this industry. For example, despite the fact that online sellers generally sell considerably more lenses than do traditional offline sellers, contact lens manufacturers have traditionally offered offline sellers additional perks, such as rebates and cooperative marketing, which have only recently become available to online sellers. Accordingly, it would not surprise 1-800 if other manufacturers were also offering ECPs more favorable prices than alternative sellers. However, 1-800 is not privy to price agreements between ECPs and manufacturers.

⁸⁷ See *id.* at 20-26.

⁸⁸ For a detailed discussion of *In re: Disposable Contact Lens Antitrust Litigation*, MDL 1030 (M. D. Fla.), see *id.* at 20-26.

- g. If there are differences in the prices manufacturers charge to online and offline sellers, to what extent do they reflect differences in the cost of serving online and offline sellers, and/or different levels of customer service and promotion provided by online and offline sellers?

Manufacturers should offer online sellers better pricing because online sellers generally have high volume sales, and they are easy to service. However, given the historical relationships between manufacturers and ECPs, and the prevalence of exclusive contractual relationships between them today, this is unlikely the case. Manufacturer pricing policies towards ECPs and online sellers vary, but manufacturers often give ECPs an advantage by offering rebates and coupons on custom labeled lenses, which are only available through ECPs.⁸⁹

13. Please provide any other information regarding the difference between online and offline sellers of contact lenses.

1-800 has no further comments at this time regarding the differences between online and offline sellers.

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?

Presently, approximately 20 states require contact lens prescriptions to specify a brand name. However, it is 1-800's experience, based on the prescriptions that it receives, that the brand is included on prescriptions almost 100% of the time, regardless of whether it is mandated by the given state.

- b. What is the incidence of contact lens prescriptions for custom labeled contact lenses?

As the response to question 1(a) herein suggests, the prevalence of custom labeled lenses is adversely affecting 1-800's business. However, based on its own records, there is no way for 1-800 to determine the overall incidence of prescribing "doctor exclusive" and "private label" lenses. It is unlikely that the number of orders that 1-800 receives for custom labeled lenses is representative of their prevalence in the industry. Many consumers may assume automatically that "private label" lenses are only sold by ECPs because "private label" lenses frequently are sold under the name of an individual ECP or ECP company. Therefore, the consumers would not call 1-800 for replacement lenses. Moreover, some ECPs selling "private label" and "doctor exclusive" lenses may explicitly tell their patients that the lenses cannot be obtained elsewhere.

Although a large-scale ECP survey would be the best indicator of the prevalence of prescriptions for custom labeled contact lenses, a look at the market share of custom label manufacturers in the overall contact lens market would also be instructive. The OptiStock MarketWatch newsletter issued in October 2003 indicated that Ocular Sciences and Cooper Vision, two of the primary manufacturers of custom labeled lenses have grown to become major players in the industry. Ocular

⁸⁹ ECP Rebates (*i.e.*, Sauflon Coupon; Extreme H2O Rebate Offer; Acuvue Patient Rebate Program) (Att. 12).

Sciences is the second largest player in the spherical lens market, with 23%, and Cooper Vision is the leader in the toric lens market, with approximately 34%, and a major player in the spherical lens and multifocal lens markets.⁹⁰

The sizable market share of manufacturers of custom labeled lenses is not surprising. The large number of advertisements placed by manufacturers in ocular health-related trade journals promoting the positive impact their lenses will have on ECP profits suggests that the conflict of interest ECPs face as both prescribers and retailers impacts many ECPs' prescribing decision.

Notably, an informal survey conducted by a leading ECP supports this conclusion. In an article written for the May 2003 edition of *Contact Lens Spectrum*, entitled "The Contact Lens Epidemic: Trends in the contact lens industry lead one practitioner to rethink conventional wisdom,"⁹¹ the ECP conducting the survey asked other ECPs "What is your workhorse contact lens and why?" The ECP found that J&J Vision Care's Acuvue 2 and Ocular Sciences Biomedics 55 were the most frequently prescribed lenses for the following reasons: (1) "Good pricing on contact lenses;" (2) "Rebates and perks from manufacturers;" (3) "If patients are happy, why change lenses?"; and (4) "All lenses are pretty much the same."⁹² These responses make it clear that the determining factors behind prescribing one lens over others are largely related to the impact on the practice of the prescriber.

- c. Is the incidence of the prescribing practices in (a) and/or (b) increasing or decreasing?

As mentioned, 1-800 has observed, based on the prescriptions that it receives, that ECPs specify a name brand in contact lens prescriptions almost 100% of the time. The incidence of brand specification that 1-800 has observed has remained steady over time.

- d. Please comment on how, if at all, current patterns of prescriptions requiring brand name or custom-labeled contact lenses may change in response to the Act.

1-800 anticipates that ECPs, in response to the Fairness Act's prescription release requirement, will increasingly specify brands and prescribe "private label" and "doctor exclusive" lenses to protect their sales. As explained in response to question 1(a), Congress, in enacting the Fairness Act, attempted to prevent ECPs from using "private label" lenses for anti-competitive purposes by providing for "private label" substitution. However, the "private label" substitution provision falls short of providing a level playing field because it can be exceedingly difficult to obtain "private label" substitutes. In addition, the Fairness Act did not address the issue of "doctor exclusive" lenses (which have no available substitutes) at all, leaving a huge loophole that permits ECPs to prescribe contact lenses that alternative sellers cannot access. Thus, even with the passage of the Fairness Act, prescribing custom labeled lenses is likely to remain profitable for ECPs.

⁹⁰ See OptiStock MarketWatch, *optistock.com* (Oct. 2003) (Att. 20).

⁹¹ Irwin Azman, O.D., *The Contact Lens Epidemic: Trends in the contact lens industry lead one practitioner to rethink conventional wisdom*, *Contact Lens Spectrum* (May 2003) (Att. 35).

⁹² *Id.*

Recent ECP comments in ECP e-mail forums reflect strategies to prescribe “private label” and “doctor exclusive” lenses to prevent competition from alternative sellers. For example, in a May 2004 discussion in the Optcom e-mail forum, one ECP stated:

“Have you tried out the Extreme H2O web site. You sign your patients up for a log on number and they can go directly to the site and order lenses. You set the price, limit the number of boxes, and they send the lenses to your patients and the money to you. Great way to beat out 1-800.”⁹³

In addition, ECPs who are concerned that the Fairness Act will reduce their ability to use “private label” lenses to prevent competition from alternative sellers, have already begun to adapt their anti-competitive strategies. For example, one article in the June 2004 edition of *Contact Lens Spectrum* advised ECPs to prescribe custom designed gas permeable lenses, which “alternative distributors have difficulty reproducing.”⁹⁴

15. What are the benefits of contact lens prescriptions that specify a brand name or custom labeled contact lenses? What are the costs of contact lens prescriptions that specify a brand name or custom labeled contact lenses?

Generally, there is no benefit to brand specification, whether it be for a standard, “private label,” or “doctor exclusive” lens. Ocular Sciences’ ECP-only lenses, for example, have no ostensible or unique benefits. However, there are a few “doctor exclusive” lenses that have unique benefits, such as Proclear, which is designed for dry eye sufferers (although there is no way to know whether this lens is being prescribed only for patients needing or desiring this benefit. Nevertheless, consumers should be able to choose whether they want to pay extra for such added benefits. Accordingly, as 1-800 recommended in the Rule Comments, the FTC should require ECPs that prescribe “doctor exclusive” contact lenses to issue a second prescription for a patient-appropriate lens that is sold directly to alternative sellers.⁹⁵

The primary cost of brand specification, whether it be for a standard, “private label,” or “doctor exclusive” lens, is lack of prescription portability and consumer choice.

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?

As mentioned in response to question 14(a), approximately 20 states require contact lens prescriptions to specify a brand name. However, it is 1-800’s experience, based on the prescriptions that it receives, that the brand is included on prescriptions almost 100% of the time, regardless of whether it is mandated by a given state.

⁹³ Pauline Buck, O.D., *Optcom – Extreme H2O and NeD*, ECP E-mail Forum, May 14, 2004 ([Att. 36](#)).

⁹⁴ Edward S. Bennett, O.D., M.S.E.D., *How Should We Handle FCLCA? Prescribe GP Lenses*, *Contact Lens Spectrum* (June 2004) ([Att. 37](#)).

⁹⁵ See Rule Comments, at 4, 50-54 ([Att. 2](#)).

17. What is the incidence of brand name or custom labeled contact lenses being available only through the prescriber?

The overall incidence of availability is difficult to determine without a comprehensive survey of the industry. As mentioned in response to question 1(a), even though “private label” lenses ostensibly have available substitutes, alternative sellers often have difficulty obtaining the substitutes. Moreover, alternative sellers cannot access “doctor exclusive” lenses.

Please refer to 1-800’s Rule Comments⁹⁶ for a detailed discussion of the difficulties presented by “private label” and “doctor exclusive” lenses for alternative sellers. (*See also* Response to Question 14(b)).

18. How prevalent is consumer awareness that a prescriber may prescribe custom labeled or brand name lenses that are available only from the prescriber?

The prevalence of consumer awareness is difficult for alternative sellers to ascertain, without a large scale survey. As mentioned, 1-800 receives many orders for “private label” and “doctor exclusive” lenses from consumers, which suggests that those consumers are unaware that certain lenses can only be obtained from an ECP. However, 1-800 believes that the use of “private label” and “doctor exclusive” lenses prevents some consumers from ever even attempting to use alternative sellers. For example, many consumers who purchase “private label” lenses with the name of an individual ECP or an ECP company, may assume that the lenses are only available from the prescriber and never attempt to contact alternative sellers. Although those consumers may, at minimum, understand that certain lenses may only be purchased from ECPs, it is unclear whether they understand ECP motives for selling custom labeled lenses or that other lenses may be appropriate.

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?

1-800 has no information with regard to the prevalence of ECP advertisements for custom labeled lenses (*i.e.*, “private label” and “doctor exclusive” lenses), as opposed to the prevalence of advertisements for standard lenses that are available from a variety of sellers.

However, 1-800 believes that the prevalence of each type of advertisement is less important than the issue of whether advertisements for custom labeled lenses and standard lenses are educating consumers about their ability to shop around. 1-800 believes that ECPs who sell custom labeled lenses have no incentive to explain to consumers that equivalent lenses, or other appropriate lenses, are available from alternative sellers, and indeed, 1-800 has not encountered any such advertising. Rather, as mentioned in response to question 1(a), it is 1-800’s experience that ECPs market custom labeled lenses in the manner suggested by the *Contact Lens Spectrum* article, which was aptly entitled “*Using Private Label Lenses to Keep Patients in the Practice*.”⁹⁷ The ECP quoted in the article advised: “I

⁹⁶ *See id.* at 1-5, 33-34, 50-54.

⁹⁷ *Using Private Label Lenses to Keep Patients in the Practice*, *Contact Lens Spectrum* (Jan. 2002) (Att. 3).

often do not give my patients a choice. I do not say this is a private label lens. I just say, ‘This is the best lens for you. It’s the one you should be wearing.’”⁹⁸

This is not surprising given that: (1) the ECP trade journals and the manufacturer advertising, discussed in response to question 1(a), tout custom labeled lenses as a way to protect ECP profits, and (2) ECPs are primarily retailers and have a powerful economic motivation to prevent alternative sellers from selling competing products.

In addition, as fully discussed in response to question 2(a), 1-800 is not aware of any ECPs who are using as a selling point the fact that they are willing to prescribe contact lenses that are widely available, as opposed to custom labeled lenses, and 1-800 believes that ECPs would have little incentive to do so.

- 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?

As mentioned in response to question 19(a) herein, 1-800 is not aware of any evidence indicating that ECPs attempt to distinguish themselves from other ECPs by advertising that they sell contact lenses that are widely available, as opposed to custom labeled lenses. Nor is 1-800 aware of any evidence suggesting that consumers are aware of the fact that custom labeled lenses are often more expensive and less convenient than standard lenses because they limit consumer ability to shop around. Indeed, as the *Contact Lens Spectrum* and *Review of Optometry* articles discussed in response to questions 1(a) and 19(a) suggest, ECPs who sell custom lenses have every incentive to keep consumers ignorant about the lens choices available and ignorant about ECP motives for selling the lenses. Accordingly, 1-800 does not believe that consumers have any meaningful opportunity to shop for ECPs based on whether they prescribe custom labeled or standard lenses.

- 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?

1-800 is not aware of any state law or regulation that specifically addresses an ECP’s ability to advertise that he or she sells custom labeled lenses and/or widely available standard lenses. However, as discussed in response to question 2(d), some states have broader contact lens advertising proscriptions that would likely prohibit ECPs from advertising the types of lenses that they generally prescribe. Notably, such laws and regulations are not surprising given the custom of most professionals not to advertise and the cultural bias among professionals against advertising.

In addition, some contractual agreements between contact lens manufacturers and ECPs place further restrictions on ECP advertising. These advertising proscriptions, restrictions, and cultural biases prevent advertising from correcting the effect of anti-competitive behavior in the contact lens market, insulating ECPs from traditional market forces.

As mentioned in response to question 2(d), 1-800 believes that ECPs who sell custom labeled lenses should be required to: (1) display an in-store sign telling patients that the lenses are difficult to obtain from other sellers, and (2) include in the prescription the name(s) of equivalent lenses that are sold directly to alternative sellers. 1-800 believes that these requirements would best be addressed by

⁹⁸ *Id.*

the federal government, to ensure uniformity and appropriate enforcement.⁹⁹ A federal requirement to display an in-store sign also would preempt broad advertising proscriptions, where necessary.

20. Please provide any other information regarding the impact on competition of prescriptions that specify brand name or custom labeled contact lenses.

At this time, 1-800 has no further comments regarding the impact on competition of prescriptions that specify brand name or custom labeled contact lenses.

Impact of the FTC Eyeglass Rule on Competition

Questions 21-28 ask interested parties to assess the impact of the Eyeglass Rule, which mandated release of eyeglass prescriptions, on competition in the eye care industry. Please refer to the Rule Comments, in which 1-800 discussed the impact of the Eyeglass Rule on competition in detail.¹⁰⁰

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. As mentioned in 1-800's Rule Comments,¹⁰¹ a number of state laws or regulations purport to require anyone selling contact lenses to hold a valid ECP license issued by their state (*i.e.*, to be an ECP). States arguably falling within this category include, among others, North Carolina,¹⁰² Tennessee,¹⁰³ Mississippi,¹⁰⁴ and Washington,¹⁰⁵ (with similar laws pending in Alaska¹⁰⁶ and Georgia¹⁰⁷).¹⁰⁸ Moreover, other states have licensure or registration requirements that attempt to impose residency requirements or otherwise restrict the ability of nonresidents (*i.e.*, primarily alternative sellers) from competing with residents (*i.e.*, primarily ECPs) in the retail of contact lenses.

As mentioned in response to question 11, there is no health justification for these state licensing requirements. As the FTC itself recently concluded, there is "no systematic evidence that sales

⁹⁹ See, e.g., Rule Comments, at 29-35 (noting that state optometry boards have often promulgated regulations that give advantages to independent ECPs, at the expense of alternative sellers, and that boards have failed to bring enforcement actions against independent ECPs because state boards are generally dominated by independent ECPs) (Att. 2).

¹⁰⁰ See *id.* at 1-5, 19-20, 63-67, and 83-84.

¹⁰¹ See *id.* at 1-5, 29-35, and 58-60.

¹⁰² See N.C. Gen. Stat. §§ 90-235, 90-236.1, 90.252 (Att. 38).

¹⁰³ Tennessee Optometry Practice Act, Tenn. Code Ann. §§ 63-8-102, 63-8-113 (Att. 39); Tennessee Dispensing Opticians, § 63-14-102 (Att. 40).

¹⁰⁴ Mississippi Optometry Statutes, Miss. Code Ann. § 73-19-61 (Att. 41); Mississippi State Board of Optometry Board Rule 8.1(a) (Att. 42).

¹⁰⁵ Washington Consumer Access to Vision Care Act, ARWC § 18.195.020 (Att. 43); The Dispensing Opticians Act, ARWC § 18.34.141 (Att. 44).

¹⁰⁶ Alaska House Bill 502, "An Act relating to dispensing opticians and dispensing optician apprentices," introduced Feb. 16, 2004 (legislation pending) (Att. 45).

¹⁰⁷ Georgia, S.B. 513, dated Feb. 13, 2004 (Att. 46).

¹⁰⁸ 1-800 continues to dispute the applicability and enforceability of these and other state laws to nonresident sellers of replacement contact lenses.

through alternative channels, such as Internet or mail order, pose any additional health risk as long as the retailer sells in accordance with a valid prescription.”¹⁰⁹ Similarly, 17 State AGs conducted a multi-state investigation into allegations of increased health risks associated with alternative channel sales and concluded that “[p]urchasers from alternative channels have had no greater ocular health problems than purchasers from [ECPs]” and that their investigation “failed to reveal any study showing any correlation between compromised ocular health and receipt of lenses through alternative channels.”¹¹⁰

The State AGs also have repeatedly asked the leading optometric trade association, the American Optometric Association (“AOA”), to produce any valid clinical or scientific data of increased health complications associated with alternative channel sales, but no such data has ever been produced.¹¹¹ Indeed, the AOA and other ECP defendants in *In re: Disposable Contact Lens Antitrust Litigation*, MDL 1030 (M. D. Fla.) were accused of making unsubstantiated health claims regarding alternative channel sales and are now under injunctions that prevent them from even representing directly or indirectly that ocular health may be compromised by purchasing contact lenses from an alternative seller rather than a licensed ECP.¹¹²

Given that there is no evidence that it is safer for an ECP to sell a sealed box of contact lenses than for a non-ECP to do so, these state laws have no real purpose other than to shield ECPs from competition by alternative sellers. As the FTC recently announced, policymakers can best advance both consumer health and consumer choice by rescinding or refraining from adopting such professional licensure requirements.¹¹³

Besides having no legitimate purpose, such state licensing requirements are preempted by the Fairness Act. As discussed more fully in 1-800’s Rule Comments, the primary purpose of the Fairness Act is to promote consumer choice and competition from alternative sellers by, among other things, requiring ECPs to release prescriptions needed to purchase replacement lenses from alternative sellers, requiring ECPs to respond to prescription verification requests by alternative sellers, and providing that a consumer’s prescription may be deemed verified where the ECP fails to respond to the alternative seller’s prescription verification request within the required time period. Local rules or regulations that purport to impose an outright prohibition on sales by alternative sellers (*e.g.*, that purport to permit only licensed ECPs to sell) directly conflict with this primary purpose of the Fairness Act and would render many of its principal protections meaningless. For this reason, such local rules or regulations are preempted.¹¹⁴

¹⁰⁹ See, *e.g.*, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, a Report from the Staff of the FTC (Mar. 2004), at 12.

¹¹⁰ FTC Comments of the AGs, at 8 (Att. 31).

¹¹¹ See Testimony of Robert L. Hubbard, Director of Litigation, Antitrust Bureau, New York State Department of Law, on H.R. 2221, before the Subcommittee on Commerce, Trade, and Consumer Protection, Energy and Commerce Committee, United States House of Representatives, Sept. 9, 2003, at 7-10 (Att. 47).

¹¹² See *In re: Disposable Contact Lens Antitrust Litigation*, MDL 1030 (M.D. Fla.), AOA Settlement Agreement, dated May 22, 2001 (Att. 48).

¹¹³ See, *e.g.*, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, a Report from the Staff of the FTC (Mar. 2004), at 31.

¹¹⁴ See, *e.g.*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (state laws or regulations are preempted where they conflict with the purpose of a federal enactment); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (state law is preempted where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

Likewise, such state licensing requirements run afoul of the Dormant Commerce Clause to the extent they discriminate against nonresident businesses or otherwise impose an undue burden on interstate commerce.¹¹⁵ Indeed, the FTC itself has repeatedly recognized that imposition of professional licensure requirements on alternative sellers who provide no such professional services (e.g., do not fit or prescribe lenses) but are engaged in a purely retail function (i.e., selling replacement lenses) creates substantial costs and wholly unnecessary burdens on alternative sellers.¹¹⁶

For a more detailed discussion of these issues, please refer to the Rule Comments.¹¹⁷

30. What role do state licensing requirements applicable to sellers of contact lenses play in protecting consumers?

As mentioned in response to question 29, state licensing requirements applicable to contact lens sellers have no beneficial impact on consumers' health. For a more detailed discussion of this issue, please refer to 1-800's Rule Comments.¹¹⁸

31. Please provide any other information regarding issues that affect competition in the sale of prescription contact lenses.

As discussed in detail in the Rule Comments, 1-800 is also concerned that ECPs have been increasingly using prescription verification requests from alternative sellers as an opportunity to interfere with the alternative seller's transaction and make the sale himself. 1-800 believes that this practice is tantamount to tortious interference under state law.¹¹⁹ ECPs typically accomplish this either by: (1) contacting consumers directly to persuade them to cancel their contracts with the alternative seller, a practice that arguably amounts to tortious interference with contract, or (2) causing the alternative seller to cancel the order by improperly refusing to release or verify the prescription and then contacting the consumer to make the sale.¹²⁰ Recently, ECPs have been

¹¹⁵ See Const. Art. 1, § 8, cl. 3; see also *West Lynn Creamery Inc. v. Healy*, 512 U.S. 186, 192 (1994) ("The Commerce Clause also limits the power of the [states] to adopt regulations that discriminate against interstate commerce. This negative aspect of the Commerce Clause prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism") (quotations and citations omitted).

¹¹⁶ See, e.g., *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, a Report from the Staff of the FTC (Mar. 2004), at 16-23, 31; Comments of the Staff of the FTC, Intervenor before the Connecticut Board of Examiners for Opticians, Mar. 27, 2002 ([Att. 25](#)).

¹¹⁷ See Rule Comments, at 1-5, 29-35, and 58-60 ([Att. 2](#)).

¹¹⁸ See *id.* at 1-5, 29-35, and 58-60.

¹¹⁹ The Restatement (Second) of Torts provides that "one who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." *The Restatement (Second) of Torts* § 766 (1979) ([Att. 49](#)).

¹²⁰ Ronald P. Snyder, O.D., F.A.A.O., *Winning the War Against Mail-Order Contact Lenses*, *Optometry Today* (Jan./Feb. 1993) ([Att. 50](#)); see also Gary Gerber, OD, *Patient "Cheapskate" and The New Law*, *Review of Contact Lenses* (Jan. 2004) ([Att. 51](#)); Michelle Boyles, *Cole to Give Exams to 1-800 Customers*, 140 *Review of Optometry* 4 (Aug. 15, 2003) ([Att. 52](#)); Joseph Barr, O.D., M.S., F.A.A.O., *Annual Report: 2003*, *Contact Lens Spectrum* (Jan. 2004) ([Att. 53](#)).

advising each other to engage in these practices in trade journals. For example, in one article an ECP noted:

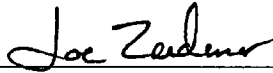
“We’ll call the patient and tell him we’re not going to release this information without his permission. Then we say, ‘Actually, we’re a little surprised because we can get you contact lenses more competitively than you can get them there.’”¹²¹

Similarly, another ECP, in a trade journal article, advised:

If a direct-to-consumer service calls to verify a prescription, contact the patient about your own website. Patients can order any time, night or day, and they do not have to *wait* for your approval as they would with services such as 1-800 Contacts. (You can control which options are available to them).¹²²

Given that this conduct is occurring in the context of a communication that the Fairness Act and its implementing regulations compel alternative sellers to make for an entirely different purpose (*i.e.*, prescription verification), Congress and the FTC should consider declaring that ECP misuse of this required communication shall constitute a violation of the Fairness Act or an unfair trade practice.

Respectfully submitted,



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General Counsel
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¹²¹ Rich Kirkner, *Can You Survive the Ultimate Challenge*, Review of Optometry, Apr. 15, 2001 (Att. 54).

¹²² Christopher Kent, *Strategic Dispensing*, Ophthalmology Management (Feb. 2003) (quotations omitted, emphasis added) (Att. 55).