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Before the U.S. House of Representatives
Subcommittee on Commerce, Trade, and Consumer Protection
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Mr. Chairman and Distinguished Members of the Subcommittee:

My name is Gregory Fryling. I am Chief Operating Officer of CooperVision, Inc., which is a manufacturer of soft contact lenses based in Fairport, New York. CooperVision sells contact lenses throughout the United States and in many other countries. Thank you for this opportunity to discuss possible federal regulation of contact lens distribution.

The Contact Lens Industry

Let me begin by making four central points about the nature of competition in our industry. First, the contact lens industry is one of the most competitive, pro-consumer industries in the country. Quality has steadily gone up and overall wholesale prices have gone down over the past decade. There are literally hundreds of different lenses available to consumers, and the technology for correcting all kinds of vision problems with comfortable, long-wearing lenses has continued to improve.

Second, contact lens sales at the manufacturing level is characterized by extremely vigorous competition. We regularly negotiate distribution contracts under intense pressure from our competitors. These negotiations take place, as they should, behind closed doors so that there is no opportunity for collusion. The result is a wide variety of practices that benefit competition and consumers, such as private labels, discounts, special promotions, and other common practices that economists and antitrust lawyers will recognize are the signposts of a vigorously competitive market. For example, the major proponent of legislation to regulate contact lens distribution, 1-800 Contacts, has recognized the values of private labels and uses them widely in its sales in Europe. That is good for consumers in Europe, but it seems 1-800 Contacts wants to restrict these practices in the United States.

Third, there are four major contact lens manufacturers in the United States and a number of smaller ones, including some foreign firms that sell into the U.S. We started as a small company competing against the large companies. CooperVision has been successful because of our high-quality products and our policy of choosing distributors carefully. The other major manufacturers spend significant amounts on national advertising to consumers. CooperVision does not. Consequently, we sell many of our products at lower prices. Our private label program also allows us to compete against the branded competitors, and these lenses are usually sold at lower prices than the branded products. This competitive dynamic is good for consumers.

Fourth, we want to sell as many lenses as possible, but we also want to ensure that our distributors provide high quality service, comply with all federal and state laws, and preserve the reputation of our lenses for excellent quality at a great price. Like other manufacturers, we choose distributors that preserve the reputation and image of our product for consumers. A federal law that attempts to force CooperVision to sell to all persons in several broad categories would destroy this ability to control quality and ensure service. It will hurt consumers, not help them.

Finally, some have argued that legal, modest restrictions on distribution have somehow undercut Congress's goals in passing the Fairness to Contact Lens Consumers Act. That claim is far off the mark. The FCLCA and the FTC's rule implementing it are good for consumers and CooperVision strongly supports them. But there is no indication in the text of the law or the legislative history that Congress intended to force manufacturers to distribute lenses to anyone who wants to be a distributor. That kind of intrusive regulation is completely unprecedented in federal or state law, with the sole exception of Utah, which coincidentally happens to be the home state of 1-800 Contacts.

The question is whether restrictions on distribution so limit choice that consumers are hurt. The answer to that is clearly no. In response to the claim by 1-800 Contacts that these restrictions harm consumers, the FTC conducted an exhaustive study of contact lens distribution. It expressly rejected this argument in a study released in February 2005. The FTC found that the evidence does "not support the conclusion that these restrictions on distribution harm competition and consumers."¹

¹ *The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study*, Federal Trade Commission, February 2005, available at <http://www.ftc.gov/opa/2005/02/contactlens.htm> (the "FTC Study").

CooperVision's Distribution Practices

A number of claims have been made about CooperVision's distribution practices, particularly the claim that one popular family of CooperVision's lenses, Proclear, is sold only to doctors. The suggestion is that consumers have nowhere to go after they get a prescription for Proclear and, consequently, the prescribing optometrist or ophthalmologist can jack up the price. This is supposed to be a "loophole" in the FCLCA.

This claim bears no relationship to the facts. Proclear is sold to over 30 retail chains, including Wal-Mart, Sears, Costco and many others, which make up over 10,000 retail outlets. These retail chains are shown in the Attachment to my testimony. These chains are convenient to consumers, offer low prices, and have the ability to drive hard bargains with manufacturers.

In response to complaints from 1-800 Contacts, the FTC looked specifically at Proclear Compatibles, the CooperVision contact lens that 1-800 Contacts has repeatedly identified as a "limited distribution lens." The FTC report found that CooperVision or its authorized distributors sell Proclear Compatibles to retailers ranging from independent eye care professionals, to optical chains, to wholesale clubs, and to mass merchandisers.² An FTC sample found these lenses were available to consumers in 86 percent of offline outlets sampled and 88 percent of pure online outlets sampled.³ Most importantly, the FTC found that whatever modest restrictions are placed on the distribution of these lenses do not harm competition or consumers. The FTC found that the data "do not support an inference that the manufacturer's limited distribution strategy affects the pricing of Proclear Compatibles."⁴

It is true that CooperVision has historically been hesitant to sell Proclear lenses to Internet suppliers and to retail outlets that have no relationship with prescribers. Proclear has a special FDA approval for late-day dryness, which is a medical condition that requires identification by qualified eye care professional when the prescription is written, and we are very anxious to preserve the reputation of these lenses for high quality. Internet suppliers present potential concerns since they may have no optician on staff for any consultation and there has been a record of some Internet companies failing to actively review prescriptions. In

² FTC Report at 16.

³ FTC Report at 26.

⁴ FTC Report at 14.

addition, we have had an unfortunate experience of counterfeit sales of Proclear by at least one major Internet supplier, 1-800 Contacts. I am not saying that 1-800 Contacts knew these lenses were counterfeit, but these sales endangered patients' eye health and had the potential to harm drastically the reputation of both Proclear and CooperVision itself. We have recently reviewed our policy of selling Proclear to Internet suppliers and are considering providing these lenses to approved Internet suppliers, provided that certain conditions can be met, including assurances of quality and service. For example, we have made an offer to 1-800 Contacts to begin selling Proclear lenses to them in the near future and we are currently in negotiations over a contract.

Patient Safety

It is essential that contact lens manufacturers, like manufacturers in other industries, retain the ability to choose reputable distributors that have ethical, efficient, and safe business practices. This allows manufacturers to protect and promote quality and insure the reputation of their products. It is important to remember that contact lenses are medical devices regulated by the Food and Drug Administration, and manufacturers must monitor sales and take action if a patient safety issue arises. For example, Bausch & Lomb recently recalled a contact lens solution brand due to a risk of fungal infection. And recently in France, CooperVision and Johnson & Johnson worked together with health and legal authorities to stop the sale of counterfeit contact lenses and to trace their source. Therefore, the ability to choose high-quality distributors is critical to preventing patient safety problems and to effectively remedying problems that might arise.

The Problems with H.R. 5762

I understand that this hearing does not specifically focus on H.R. 5762, as introduced by Congressman Terry. However, since that is the only bill addressing contact lens distribution that has been introduced in the House, I would like to discuss briefly some of the problems with this undoubtedly well-intentioned bill.

The fundamental flaw in the bill is its attempt to impose intrusive regulation on distribution decisions that have historically been left to the free market. The antitrust laws bar manufacturers from *colluding* in their choice of distributors. However, neither the federal government nor state governments have *required* manufacturers to sell to anyone who wants to

buy their product. For example, there is no law requiring automobile manufacturers to sell their cars to anyone who wants to own a car dealership even though many consumers would like to have a dealership near their home or purchase a car on the Internet. Taking away the right of manufacturers to choose distributors would represent a drastic and harmful change in the legal environment.

Second, H.R. 5762 will undercut competition. The bill requires manufacturers to sell to everyone in several distribution categories and to treat them in a “commercially reasonable” and “nondiscriminatory manner.” I cannot stress enough that a law barring “discrimination” in sales is harmful to competition by potentially foreclosing competitive practices that are now followed widely in our industry and many others, including volume discounts, private label arrangements, special promotions, individually negotiated discounts, and so on.

The Robinson-Patman Act already prohibits certain types of price discrimination, but it has a number of defenses and exceptions, including, for example, a meeting competition defense. Most antitrust lawyers and economists will tell you that Congress did no favors for consumers by passing the Robinson-Patman Act, but at least manufacturers can live with it because of the available defenses. H.R. 5762 contains none of these. The result is one the most highly regulatory and intrusive proposals one can imagine. If a manufacturer refuses to sell to anyone in these categories, it is subject to civil penalties. If a manufacturer tries to negotiate a discount with a customer, other retailers can claim “discrimination.” If a manufacturer tries to sell a lens under a private label to a discount chain — a common industry practice that lowers prices to consumers — other potential distributors can also claim “discrimination.” As I discussed earlier, these practices greatly benefit consumers and competition.

Third, the bill is a recipe for regulatory chaos. Manufacturers are required to sell to every “mail order company, Internet retailer, pharmacy, buying club, department store, or mass merchandise outlet.” None of these terms is defined. Wal-Mart is certainly covered by the bill as a “mass merchandise outlet,” but it is not clear whether a small convenience store qualifies. Similarly, does a “buying club” that is set up by a few friends qualify for protection under the bill? Does everyone who sets up an Internet website and wants to sell lenses qualify as an “Internet retailer”? If Congress mandates this intrusive, poorly thought-out regulatory program, confusion and arbitrary enforcement are the inevitable result.

Finally, H.R. 5762 will promote litigation. If a manufacturer turns down a retailer who wants to sell its lenses, the retailer can demand that the FTC enforce these provisions by bringing an action against a manufacturer. The FTC will then have to decide whether to investigate these charges. In states where state law allows a private action based on an alleged violation of FTC standards, a disappointed retailer may file a lawsuit alleging that a manufacturer has failed to sell lenses to it. The courts will then have to police distribution decisions that have historically been left to manufacturers' business judgment. Ultimately, this confusion and potential litigation could prevent some lenses from being available to consumers.

Conclusion

In conclusion, this bill is bad for consumers and competition by reducing the quality of service, by reducing price competition, and by creating a regulatory nightmare that will promote litigation. It would force the FTC to implement a burdensome and costly regulatory program and to become involved in policing decisions that have historically been left to the free market.

Ultimately, H.R. 5762 represents a solution to a problem that does not exist. It is no surprise that of all the states to have considered similar legislation at 1-800's urging, only Utah—1-800's home state—passed the bill. The FTC has already rejected 1-800's arguments. Former senior FTC officials and economic experts have concluded that the legislation pushed by 1-800 at the federal level would “likely lead to lower quality service and less promotional activity and potentially higher prices.”⁵ And the House already rejected 1-800's proposed legislation in 2005 when it was included in a Senate Appropriations measure. We urge the House to do the same this year.

Thank you for holding this important hearing and allowing CooperVision to participate.

⁵ Froeb & Zywicki Analysis at 3.

Attachment. Retail Chains Selling Proclear

Chain	Number of Outlets
Cohens Optical	68
Eye Masters	67
EyeMart Express	65
GVS	42
Lenscrafters	823
National Vision Inc	400
Novamed	100
Pearle Vision Centers	802
Site for Sore Eyes	21
Sterling Optical	105
Vision Source LP	1500
Wal-Mart	2246
ABC	110
Cole	Duplicate as Sears
Costco	345
Doctors Optical Center	125
Doctors Vision Center	80
ECCA	320
Empire Vision	89
Eye Glass World	60
For Eyes	120
Nationwide	55
Nephew's Group	12
Sears	880
OECC	50
BJ's Optical	143
Group Health	9
Henry Ford Optimeyes	20
Kaiser	110
Moresi/Blum	35
Sam's Club	475
Shopko	140
Target	240
United Optical	60
US Vision	550