

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1331

Contact Lens Consumer Protection

**SPONSOR(S):** Zapata

**TIED BILLS:**

**IDEN./SIM. BILLS:** SB 2638

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| REFERENCE                               | ACTION  | ANALYST       | STAFF DIRECTOR   |
|---|---------|---------------|------------------|
| 1) <u>Business Regulation Committee</u> | <u></u> | <u>Watson</u> | <u>Liepshutz</u> |
| 2) <u>Health Care General Committee</u> | <u></u> | <u></u>       | <u></u>          |
| 3) <u>Commerce Council</u>              | <u></u> | <u></u>       | <u></u>          |
| 4) <u></u>                              | <u></u> | <u></u>       | <u></u>          |
| 5) <u></u>                              | <u></u> | <u></u>       | <u></u>          |

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### SUMMARY ANALYSIS

The bill prohibits eye care providers from prescribing a contact lens that is not “certified as available to, and generally within, all alternative channels of distribution”. The bill defines alternative channels of distribution to include “any mail order company, internet retailer, pharmacy, buying club, department store, or mass merchandise outlet, without regard to any association with a prescriber.”

This bill requires contact lens manufacturers to certify the extent to which their brands are available in the state of Florida to the Attorney General.

This bill requires the Board of Optometry and Board of Medicine to publish a list of all contact lens brands certified as “being made available in a commercially reasonable and nondiscriminatory manner directly to, and generally within, all alternative channels of distribution.”

This bill prohibits individuals from providing or offering kickbacks to individuals authorized to sell or prescribe contact lenses.

The bill provides that any violation of this Act is subject to monetary or other penalties prescribed by the Attorney General.

This bill has an effective date of July 1, 2006.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Reduced Government: This bill increases the regulatory restraints on contact lens prescribers.

Expand Individual Freedom: This bill would either expand the selection of retailers available to contact lens wearers or restrict the number of brands that are available to said wearer.

#### B. EFFECT OF PROPOSED CHANGES:

##### Current Situation

When soft contact lenses were first developed replacement lenses did not always fit the patient's the same as the original. Modern manufacturing methods have eliminated this standardization problem. Today, replacement soft contact lenses received pursuant to a prescription specifying brand and power will be identical, regardless of whether the patient gets lenses from an eye care professional or non-traditional seller.<sup>1</sup>

In 1994, Attorneys General of 31 states, including Florida, filed suit alleging that eye care professionals engaged in organized effort to prevent or hinder consumers from obtaining their lens prescriptions.<sup>2</sup> As part of a 2001 settlement the defendant manufacturers agreed to sell lenses to alternative distribution channels. Certain manufacturers were not a party to that lawsuit and are not bound by the settlement terms.

In 2003, Congress passed the Fairness to Contact Lens Consumer Act (FCLCA) requiring Eye Care Providers to automatically release contact lens prescriptions to consumers.<sup>3</sup> The Act also permits contact lens sellers to substitute the same lens made by the same manufacturer as the prescribed lens if it is sold under a different label.<sup>4</sup> However, substitution requires availability of the substitute lens.

The Federal Trade Commission recently issued a report on competition in the contact lens market. It concluded:

“Regarding relationships between contact lens manufacturers and sellers, the FTC found that exclusive relationships – such as a manufacturer agreeing to supply only one seller, or a seller agreeing to sell only one manufacturer's contact lenses – appear to be rare. Private label and limited distribution strategies, although also rare, appear to be more common than exclusive relationships. The study concludes that the available data do not indicate that either of these strategies poses a threat to competition or consumer welfare.”<sup>5</sup>

The FCLCA requires prescription lengths to be not less than one year unless the prescriber specifies a shorter length based on his or her medical judgment with respect to the health of an individual patient.<sup>6</sup>

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<sup>1</sup> See Federal Trade Commission Study: *Possible Barriers to E-Commerce: Contact Lenses* at 5 (2004). Available at <<http://www.ftc.gov/opa/2004/03/clrreport.htm>>

<sup>2</sup> *In Re: Disposable Contact Lens Antitrust Litigation*, No. MDL 1030, (complaints filed M.D. Fla. 1994).

<sup>3</sup> 15 U.S.C. §§7601-7610.

<sup>4</sup> 15 U.S.C. §7603(f). The act further requires that prescriptions expire not less than one year unless a prescriber specifies a shorter length based on his or her medical judgment with respect to the health of an individual patient. 15 U.S.C. §7604

<sup>5</sup> See *The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study* (Feb. 2005). Available at <http://www.ftc.gov/opa/2005/02/contactlens.htm> (last visited April 3, 2006)

<sup>6</sup> 15 U.S.C. §7604

Florida law specifies that contact lens prescriptions for daily wear soft contact lenses are valid for a period of two years.<sup>7</sup>

### Effect of Proposed Changes

This bill would require contact lens manufacturers doing business in Florida to certify to the Attorney General any time a brand they manufacture becomes available or ceases to be available through all alternative channels of distribution. The bill defines “alternative channels of distribution” to be “any mail order company, Internet retailer, pharmacy, buying club, department store, or mass merchandise outlet, without regard to any association with a prescriber.”

The bill prevents contact prescribers from knowingly and intentionally selling a brand of contact lens unless the brand is certified as being available in a commercially reasonable and nondiscriminatory manner directly to, and generally within, all alternative channels of distribution.

The bill requires manufacturer certifications to be copied to the Board of Optometry and the Board of Medicine. The bill also requires each board to make a list of all brands properly certified as available to its licensees.

The bill contains an anti-kickback provision that prohibits individuals from directly or indirectly providing any item or service of monetary value to contact lens prescribers. The definition also prohibits actions or agreements intended to or having the effect of prohibiting or inhibiting competition in the sale of contact lenses.

The bill provides that violations of the Act constitute unfair business practices on the part of the prescriber and manufacturer and subjects violators to monetary or other penalties prescribed by the Attorney General.

The bill does not affect what lenses a contact lens seller can offer.

## C. SECTION DIRECTORY:

### Section 1

Provides short title “Contact Lens Consumer Protection Act.”

### Section 2

Provides state policy.

### Section 3

Provides definitions.

### Section 4

Prohibits the sale of contact lenses that are not certified as available under this Act.

### Section 5

Requires manufacturers to certify availability of contact lenses.

### Section 6

Requires the Board of Medicine and Board of Optometry to publish a list of certified brands.

### Section 7

Prohibits kickbacks to those authorized to sell or prescribe contact lenses.

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<sup>7</sup> s. 463.012(b), F.S. The Florida Administrative code provides, except as provided in 463.012, contact lens prescriptions length shall be left to the professional judgment of the practitioner. F.A.C. 64B13-3.012.

Section 8

Provides enforcement.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

Indeterminate. The state may collect monetary penalties through enforcement against violators.

2. Expenditures:

Indeterminate. The state may expend resources prosecuting or otherwise enforcing this law.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Indeterminate. This bill may alter existing business models of those who prescribe and/or sell contact lenses.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

As a condition of certification this bill requires that a contact lens brand be "made available in a commercially reasonable and nondiscriminatory manner directly to, and generally within, all alternative channels of distribution." (Emphasis added). This provision could be read to disallow the sale of a brand of contact that a particular 'channel' chooses not to sell. For example, if no 'mass merchandise outlet' decided to carry a particular brand then it would not be available within all alternative channels of distribution as defined by this bill.

Subsection (4) of Section 1 of this bill prohibits the sale of contact lenses that are not certified as available. Subsection (6) references the bill as prohibiting the prescription of non-certified brands. This conflict creates ambiguity that could lead to litigation.

This bill does not make any exceptions for contact lenses that may not be mass marketed, for example, contact lenses custom made for a patient.

Two anti-kickback provisions already exist in Florida statutes which address providers of healthcare services or goods.<sup>8</sup>

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

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<sup>8</sup> s. 456.054, F.S. (providing punishment as patient brokering under s. 817.505, F.S.) and s. 458.331, F.S. (providing for denial of a license or disciplinary action)