

December 17, 2019

Office of the Assistant Attorney General
Antitrust Division
Department of Justice
Main Justice Building
Room 3109
950 Pennsylvania Ave NW
Washington, DC 20530

Re: Request for a Business Review Letter

Dear Sir or Madam:

Pursuant to the regulations set forth in 28 C.F.R. §50.6, this letter requests a business review letter on behalf of the American Optometric Association ("AOA") and AOAExcel GPO, LLC ("AOAExcel GPO"), the American Optometric Association's group purchasing organization, (collectively the "Requesting Parties"). Specifically, the Requesting Parties request a business review on whether expanding the activities of the existing group purchasing organization to include a new category of products, products for resale to consumers, as described herein would violate any federal antitrust law enforced by the United States Department of Justice ("DOJ").

Section I of this business review request provides background information on the Requesting Parties. Section II details the additional activities proposed by the Group Purchasing Organization. Section III explains why the terms of the proposed expansion of activities do not violate federal antitrust laws. Section IV formally requests a business review letter.

I. Background Information on Requesting Parties

The Association is a trade association that, as of February 2019, represents approximately 46,000 members across the United States, including approximately 27,000 independent and private practice doctors of optometry who pay member fees to be part of the Association. (As of December 2019, there are approximately 24,000 members; the membership numbers fluctuate throughout the year and from year to year.) The remaining members of the Association are approximately 12,000 employees of optometric practices, such as staff or paraoptometric, and 7,000 students. Approximately 23,000 of these doctors serving patients in a private practice setting. AOA is a leading advocate for improving healthcare. Individual members of the AOA compete with one another, non-member optometrists, and

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ophthalmologists to provide optometric services, including diagnosing eye disease and prescribing and selling optometric products. The Association member optometrists compete in the sale of optometric products with those other healthcare providers, and with retail and online stores, such as Walmart, Costco, 1-800-contacts, Warby Parker, and vertically integrated manufacturers such as EssilorLuxottica. Association members today generally pay more for optometric products than many of their competitors, such as vertically-integrated manufacturers and retailers, internet-only retailers, and big-box stores. The parties anticipate that the GPO will lower prices for many Association members who choose to participate in purchasing optometric products for resale to consumers.

The AOA, through its subsidiary AOAExcel®, supports its members in managing the business side of the optometry profession. These services include credit card processing, insurance, practice financing, retirement planning, IT solutions, and educational webinars on various topics such as HIPAA compliance. Like many professional associations, the Association—through its subsidiary, AOAExcel, AOAExcel GPO LLC (“GPO”)—operates a group purchasing organization. The GPO today only offers Association members the ability to purchase non-optometric products and products that are not for resale to patients, such as professional liability insurance, credit card processing, life insurance, general office supplies, general medical supplies, and optical testing equipment. The GPO uses Intalere, a third-party healthcare group purchasing organization, as its agent to negotiate discounts on products and services.. These discounts allow AOA to provide better prices to their patients. Intalere provides hundreds of vendor contracts including office supplies, cell phone discounts, overnight shipping, paint, medical equipment, shredding services, and more that are available through the AOAExcel GPO. Currently AOAExcel GPO participants are able to access purchasing discounts on an array of general office supplies and services, as well as medical/surgical supplies and equipment. AOAExcel GPO was formed in 2017. All items acquired through the GPO today are used by each member’s practice and are not for resale. As of February 22, 2019, 1,011 Association member optometric practices had signed up to participate in the GPO, and 251 practices had made at least one purchase through the GPO. These practices are generally comprised of either solo-practitioners or small numbers of practicing doctors within one practicing group. The GPO members also compete with large retail stores, online channels, other healthcare providers, and vertically integrated manufacturers in the sale of optometric products.

II. Terms of the Proposed Group Purchasing Arrangement

The Association proposes to expand the types of products available through the GPO to include optometric products for resale to consumers. Intalere will negotiate discounts on optometric products from multiple manufacturers so that Association members can purchase these products for their patients’ needs. These optometric specific products include contact lenses, glasses frames, and lenses. Currently items for resale to consumers have not been offered through the AOAExcel GPO. Other GPOs already exist for the purchase of optometric products, and optometric products are also sold through distributors, for example, ABB Optical, and Vision Source.

Sales of products for resale to consumers can be a significant source of revenue for a number of optometry practices. The GPO will use only Intalere, an independent third party, to negotiate prices with suppliers. The intent is to include products for resale to consumers, such as contact lenses, from numerous manufacturers so that the optometrists can provide the product most suited for the patient's medical needs, while still obtaining lower costs. The agreement will not require the members of the GPO to purchase the products included in the GPO exclusively through the GPO, although members that choose to participate may be required to commit that they will purchase a particular volume of product by vendors who would offer contracts through Intalere. The Association members' participation in the GPO is optional.

In accordance with The Fairness to Contact Lens Consumers Act of 2003, patients have a choice whether to purchase their contact lenses from their eye care provider or to use their prescription to purchase contact lenses from other vendors that sell directly to the public. The GPO does not affect the application of the Fairness to Contact Lens Consumers Act of 2003. AOA members need to obtain better pricing on contact lenses so that they can be more competitive with other dispensing outlets. The AOA respectfully submits that what it seeks to do is inherently procompetitive because it will enable members to obtain discounts that can be passed on to patients. Association members today generally pay more for optometric products than many of their competitors, such as vertically-integrated manufacturers and retailers, internet-only retailers, and big-box stores. The parties anticipate that the GPO will lower prices for most many Association members who choose to participate in purchasing optometric products for resale to consumers. The proposed GPO expansion likely will result in discounts, better pricing, and reduced transaction costs for the Association members who purchase optometric products through the GPO. Discounts and cost reductions will enable GPO participants to better compete against large retail stores, online channels, other healthcare providers, and vertically integrated manufacturers in the sale of optometric products. By obtaining lower prices on optometric products, the GPO members will be able to charge less for these goods when the members resell them to consumers. The proposed GPO expansion likely will result in discounts, better pricing, and reduced transaction costs for the Association members who purchase optometric products through the GPO. GPO members would not be required to buy any products through the GPO. In short, expansion of the GPO to include products for resale to consumers will allow members to better compete with the large commercial stores. That way the members can give better prices to patients, but at the same time provide the quality health care that they believe is essential.

No GPO participant will be involved in negotiations. The communications between the GPO and an individual participant regarding prices for optometric products will be kept confidential from other GPO participants. In addition, Intalere is contractually obligated to maintain the confidentiality of information about individual members of the GPO. Further, no optometric product manufacturer maintains any financial stake, makes any financial contributions, or holds any ownership or board positions in Intalere. If an optometric product manufacturer were to take an ownership stake in Intalere, or any future third party agent negotiating on behalf of Association or the GPO, the Association or the GPO would seek to engage a different, unaffiliated, negotiating agent. If no such negotiating agent existed at

that time, the Association or the GPO would insist that any such tie between the product manufacturer and negotiating agent would have no impact on negotiations on behalf of Association or the GPO. The Association and the GPO are opposed to any optometric product manufacturers maintaining a financial stake, holding any common ownership, or having any board membership positions with the Association or the GPO.

Additionally, Optometric product manufacturers do not maintain any financial stake, make any financial contributions, other than sponsorships for AOA meetings or payment for advertising in AOA publications, or hold any ownership or board positions in the Association or the GPO. No product manufacturer would be permitted to maintain any financial stake, make any financial contributions, other than sponsorships for AOA meetings or payment for advertising in AOA publications, or hold any ownership or board positions in the Association or the GPO going forward.

The AOA will follow the three safeguards discussed in Statement 7 of the Statements of Antitrust Enforcement Policy in Health Care. Those safeguards are that (1) GPO participants will not be required to make any of their optometric-product purchases through the GPO, (2) a third party will negotiate prices with the GPO's suppliers, and (3) communications between the GPO and each individual participant regarding prices will be kept confidential from other GPO participants.

III. Analysis of the proposed expansion of the activities of the GPO to include Optometric Specific Products

Section 1 of the Sherman act declares illegal, "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. Although group purchasing organizations may affect commerce, they are generally regarded as procompetitive. See e.g. *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.*, 472 U.S. 284, 295 (1985). Group purchasing arrangements are designed to increase economic efficiency and increase competition by lowering prices for goods purchased by members of the group and by ensuring supplies of needed goods. *Id.* The proposed addition of optometric supplies to the AOAExcel GPO has significant procompetitive benefits, including discounts and reduced transaction costs, and, therefore should be approved by the DOJ.

In 1996, the Department of Justice and the Federal Trade Commission issued "Statements of Antitrust Enforcement Policy in Health Care" ("Health Care Statements") regarding various joint activities of health care providers. Health Care Statement 7 provides that joint purchasing arrangements between health care providers are unlikely to raise antitrust concerns unless "(1) the arrangement accounts for so large a portion of the purchase of a product or a service that it can effectively exercise market power in the purchase of the product or service, or (2) the products or services being purchased jointly account for so large a proportion of the total cost of the services being sold by the participants that the joint purchasing arrangement may facilitate price fixing or otherwise reduce competition. If neither factor is present, the joint purchasing arrangement will not present competitive concerns."

In the present case, the AOAExcel GPO will provide efficiencies that will benefit consumers by virtue of the opportunity for discounted products and reduced transaction costs. The DOJ and FTC have noted such efficiencies in evaluating hospital purchasing arrangements in the Statements. Commentators and courts have also recognized such efficiencies, which benefit consumers. See Hovencamp, *Competitive Effects of Group Purchasing Organizations' (GPO) Purchasing and Product Selection in the Health Care Industry* (April 2002); *Addamax Corp v. Open Software Foundation, Inc.*, 888 F. Supp. 274 (D. Mass. 1993) (holding because joint purchasing agreements often produce legitimate economies of scale, courts have generally refused to find these agreements illegal under the *per se* standard).

Statement 7 also provides an "antitrust safety zone" under which, absent extraordinary circumstances, the Agencies will not challenge such a joint purchasing arrangement. The requirements for the safety zone are the following: "(1) the purchases [of any product covered by the arrangement] account for less than 35 percent of the total sales of the purchased product or service in the relevant market; and (2) the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement."

Additionally, as stated in Statement 7, even if the safety zone is not met, "there are several safeguards that joint purchasing arrangements can adopt to mitigate concerns that might otherwise arise." Antitrust concerns are lessened when: (1) "members are not required to use the arrangement for all their purchases of a particular product or service," although members can "be asked to commit to purchase a voluntarily specified amount through the arrangement so that a volume discount or other favorable contract can be negotiated;" (2) "where negotiations are conducted on behalf of the joint purchasing arrangement by an independent employee or agent who is not also an employee of a participant;" and (3) "the likelihood of anticompetitive communications is lessened where communications between the purchasing group and each individual participant are kept confidential, and not discussed with, or disseminated to, other participants." As stated in the guidelines, "[t]hese safeguards will reduce substantially, if not completely eliminate, use of the purchasing arrangement as a vehicle for discussing and coordinating the prices of health care services offered by the participants." (footnote omitted). Further, the guidelines also state that the adoption of these safeguards also "help demonstrate that the joint purchasing arrangement is intended to achieve economic efficiencies rather than to serve an anticompetitive purpose. Where there appear to be significant efficiencies from a joint purchasing arrangement, the Agencies will not challenge the arrangement absent substantial risk of anticompetitive effects."

For the purpose of the analysis of this business review request, the relevant market is defined as a product or group of products and geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm that was the only present and future producer or seller of those products in that area likely would impose at least a small but significant and nontransitory increase in price, assuming the terms of sale of all other products are held constant. See U.S. Dep't of Justice & Fed. Trade Comm'n *Merger Guidelines* (2010). In the

present case, the purchase and dispensing of optometric specific goods, including contact lenses, frames, and lenses, is a nationwide market. From the point of view of the GPO purchasing these products, the manufacturers of these items supply their goods nationwide, similar to the example in the Statements at 7.C.

Individual consumers have the choice to purchase contact lenses from individual optometrists and ophthalmologists, big box stores such as Walmart or Costco, or from distributors that sell through 800 telephone numbers or over the internet, such as 1-800-contacts. Glasses and frames may also be purchased by consumers from an individual optometrist, through big box stores such as Walmart or Costco, websites such as Warby Parker, or vertically integrated firms such as EssilorLuxottica. The proposed GPO is unlikely to have a 35% or greater share of purchasing the relevant products. First, it has been estimated that independent optometrists' share of eyecare revenue is 46%, the rest being done by chains, mass merchandisers, and vertically integrated providers that would not likely participate in the GPO because they already have the ability to get favorable pricing from suppliers.¹ Second, the AOA members account for about 50% of optometrists,² in all likelihood reducing the maximum purchases by the GPO to about 23%. Third, as discussed below, the GPO would not require members to buy all of their purchases through the GPO. Although we do not have an estimate of the number of AOA members who would participate in the GPO or the percentage of their purchases, it certainly would be below 100%. Accordingly, the expanded GPO will purchase significantly less than 35 percent of the total sales of each type of optometric product sold in the United States.

Moreover, the supply of contact lenses, frames, and lenses is highly concentrated in a few large players.³ For example, EssilorLuxottica, the result of a merger between Luxottica and Essilor in 2018, is not only the major supplier of eyecare products to retailers, but it also is the largest retailer of eyecare products. It owns over 155 lens laboratories in the U.S. that supply retailers, 33 major frame brands, lens brands such as Transitions and Cristal, and has a significant research and development group that produced over 140 new patents in 2017.⁴ Prior to the merger, Luxottica reported a revenue in North America of \$1.7 billion in manufacturing and wholesale distribution, and Essilor reported revenue in North America of \$3.1 billion from their equipment, lenses, and optical instruments sales.⁵ Prior to the merger,

¹ Special Report by the Editors of Review of Optometric Business, "Challenges and Opportunities in the Future of Independent Optometry," April/May 2013, at 3.

² AOA estimates there are 46,521 O.D.s, and that 23,400 of them are AOA members.

³ See Harris Williams & Co., "Vision Industry Overview," February 2015, at 1, and <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjNztnD1M3WAhVLiVQKHS5gCOkQFggpMAA&url=https%3A%2F%2Fwww.princeton.edu%2F~ota%2Fdisk3%2F1984%2F8409%2F840907.PDF&usg=AOvVaw04EDuPDJABkF5ZiU46xLud> (contact lens).

⁴ Essilor – 2017 Registration Document, https://www.essilor.com/essilor-content/uploads/2018/04/2017_Registration_Document_Essilor.pdf

⁵ Essilor – 2017 Registration Document, Essilor reported 46% of their revenue came from North America in 2017. That percentage was taken of Essilor's Equipment, Lenses and Optical Instruments revenue in 2017. Luxottica Annual Report 2017. The revenue figures were determined by applying 57% of the company's total revenue from North America to Luxottica's reported revenue from Manufacturing and Wholesale distribution in 2017.

Luxottica reported \$3.7 billion in retail distribution. Post-merger EssilorLuxottica has a retail presence that encompasses over 9,000 stores, including the retail chains Lenscrafters, Pearle Vision, Target Optical, and a growing online presence with 8 dedicated E-commerce sites. EssilorLuxottica continues to expand, with two US companies acquired in Q3 2018.⁶ EssilorLuxottica also has its own buying groups, including Vision Source.⁷ It and similar firms already provide the benefits of a GPO and would not be likely to participate in an AOA sponsored GPO primarily composed of independent providers. As such, it is highly unlikely that the proposed GPO would have sufficient market power to force monopsonic pricing on its suppliers.

At this time, we cannot state whether the cost of the contact lenses or glasses frames that will be purchased through the joint purchasing agreement will account for less than 20 percent of the total revenues from all products or services sold by each individual optometrist participant in the joint purchasing arrangement. In general, the sale of contact lenses and prescription eyewear is estimated to account for approximately 59% of optometric services.⁸ It is not clear what proportion of the products would be purchased through the GPO, but presumably it would be less than 100%. Given the substantial presence of vertically integrated corporate competitors and the many small independent competitors providing optometry services and products, there is no likelihood that the GPO would result in standardized costs that would facilitate price fixing or otherwise have anticompetitive effects.

In addition, the GPO is being structured, in accordance with Statement No 7, to provide safeguards to minimize any antitrust issues. The GPO members are not required to buy all of their requirements of optometric specific supplies through the GPO. Further, AOAEExcel GPO is using Intalere, a third party, to perform the price negotiations with suppliers; thus no member of the AOA will be involved in the negotiations. Finally, the communications between AOAEExcel GPO and individual participants regarding pricing will be kept confidential from other participants in the AOAEExcel GPO. By enacting these safeguards, use of the GPO as a vehicle for discussing and coordinating the prices offered by the participants should be eliminated, and demonstrates that the GPO is intended to achieve economic efficiencies and will not serve an anticompetitive purpose.

Any discounts negotiated by AOAEExcel GPO ultimately will permit the individual optometrists to level the playing field to better compete in providing overall services to their patients and will not raise prices to consumers. Thus, if the agreement is evaluated under the rule of reason, there can be no harm to competition or the ultimate consumer.

⁶ EssilorLuxottica Third-Quarter 2018 report, https://www.essilorluxottica.com/sites/default/files/documents/2018-10/NewsRelease_Third-Quarter_2018_Report_EssilorLuxottica_1.pdf

⁷ Essilor Agrees to Acquire Vision Source to Further Support Independent Eye Care Professionals at <https://visionsource.com/about/news-media/press-releases/essilor-agrees-to-acquire-vision-source-to-further-support-independent-eye-care-professionals/>.

⁸ Harris Williams & Co., "Vision Industry Overview," February 2015, at 3.

IV. Business Review Letter Request

The Requesting Parties hereby request a business review letter confirming that the activity of including Optometric specific supplies into AOAExcel GPO described herein do not raise antitrust concerns under the federal antitrust laws enforced by the DOJ.

Should you have any questions or would like to discuss this matter in further detail, please to not hesitate to contact me.

Very truly yours,

Stinson LLP



Victoria L. Smith

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