

## **Consumers, 1 800 Contacts and Costco Support SB 933**

### **UPP in the Contact Lens market**

In the past year, ALL FOUR major contact lens manufacturers launched what they call a Unilateral Pricing Policy (UPP), which sets a minimum resale price that all retailers must comply with when selling *their* products. As one of the largest non-prescribing retailers, we are forced in many cases to raise our prices to the new “minimum” or be cut off from supply. The effect has been a significant price increase to consumers and the elimination of price competition among retailers. We propose legislation that prohibits Unilateral Pricing Policy (UPP) and other restraints on trade in the sale of contact lenses.

### **Contact lenses are unique in the medical device world**

1. Under federal law, contact lenses are prescribed by brand and 90% of the time the eye care provider selects the brand.
2. Once prescribed, a patient cannot switch brands without paying for another fitting.
3. Vision care covers a dollar amount, unlike typical health insurance that covers a percentage. This means that increased costs are paid entirely by the patient.
4. UPP removes the choice for consumers when purchasing contact lenses. Prior to UPP, price sensitive consumers were able to seek discounts and other added value, such as convenience and service, when purchasing their contact lenses.

The proposed legislation would prohibit Contact Lens Manufacturers from engaging in UPP or any other practice that limits consumer choice or retail competition. There are currently 12 federal class action lawsuits alleging damages to consumers across the country.

We are asking you to support SB 933 to clarify that UPP has no place in the prescription contact lens market, where consumers already have few choices in the contact lens marketplace.

**BUSINESS DAY**

# Contact Lens Makers and Discounters Tussle Over Price Setting

By **KATIE THOMAS** MARCH 26, 2015

Anthony D. Morrow had been wearing the same brand of contact lenses for years, so when he saw the bill for his latest order last November, he did a double take.

Rather than \$169 for a one-year supply — the price he had paid, more or less, for the previous three years — the new bill for his Acuvue Oasys lenses was \$270, a 60 percent price increase.

Mr. Morrow, a marketing consultant in the Los Angeles area who describes himself as a “savvier-than-usual consumer,” started digging around. What he learned upset him even more: The \$100 price increase resulted from a new policy by Johnson & Johnson, the maker of Acuvue lenses, which prohibited retailers from charging less than a minimum price set by the company. That meant online dealers like the one he used, Vision Direct, could no longer offer lenses such as the Acuvue Oasys at rock-bottom prices.

One by one over the last year and a half, all four of the major contact lens manufacturers have enacted pricing policies that seek to limit what contact lens discounters can charge for certain products, setting minimum retail prices and threatening to cut off supply if dealers do not comply. The manufacturers say the policies are intended to simplify the market and shift conversations between patients and optometrists away from the topic of pricing and toward the clinical benefits of their contact lenses. In addition to Johnson & Johnson, the other manufacturers are Alcon, Bausch & Lomb and Cooper Vision.

But opponents, which include big discounters such as Costco and 1-800 Contacts as well as the nonprofit group Consumers Union, say the policies amount to illegal price-fixing and are restricting consumer choice in an industry that has

long been accused of anticompetitive practices.

Earlier this month, Costco sued Johnson & Johnson, the industry's biggest player, for what it says are antitrust violations, and a consumer class action has also been filed. 1-800 Contacts and Costco are lobbying state legislatures around the country in an effort to outlaw the practice, which is known as unilateral pricing. The Federal Trade Commission, which declined to comment, and several states' attorneys general are investigating the issue, according to Christopher L. Lebsack, a lawyer representing consumers in the class action.

How the issue is decided could affect the buying choices of millions of Americans: Nearly 39 million consumers in the United States wear contact lenses, spending \$4.2 billion annually, according to 1-800 Contacts. About 20 percent of the products sold by the four biggest manufacturers — who make up about 98 percent of the market — fall under such pricing policies, the company said. Because some of the products are best sellers, 1-800 Contacts said that about 46 percent of its sales in January and February involved products whose pricing was restricted by the new policies.

“We want consumers to have meaningful choice — to be able to bargain, to be able to get the lowest price they can and the best quality they can,” said George Slover, a senior policy counsel at Consumers Union.

The manufacturers' real motive, opponents say, is to curry favor with a key interest group: the optometrists who decide the brand that their patients will use. Unlike medical doctors who prescribe a drug and then send their patients to a pharmacy to fill it, many optometrists make money on both the eye exam and the glasses and contact lenses they sell in-house. But ever since a 2003 law required optometrists to give patients their contact lens prescriptions free of charge, many of those sales have moved to online sellers and discounters like Costco, who often charge less.

Some company executives have been clear about the ways that the new policies will benefit eye doctors.

In July, an executive for Johnson & Johnson told a trade publication, Vision Monday, “This gives the optometrist the ability to improve his or her capture rate in the office.” The executive, Laura Angelini, president of Johnson & Johnson

Vision Care, added, “Now the patient has no incentive to shop around.”

The optometric community, in turn, has reacted with delight. Gary Gerber, an industry consultant who hosts the industry podcast “The Power Hour,” said in an episode last fall that the policies were “the coolest thing to happen in contact lenses in the last 20 years.” He added, “It allows the doctors to compete and be profitable.”

The impact on consumers, by contrast, is less clear. Johnson & Johnson, which claims about 40 percent of the global contact lens market, said its pricing policy simplified the buying experience for consumers by setting a minimum price and getting rid of rebates. In doing so, the company said, about 60 percent are paying lower prices for their lenses. Company officials also said that some discount retailers, including Vision Direct and 1-800 Contacts, were selling the lenses at prices that exceeded the minimum pricing.

“Customers still have a reason to shop around,” said Eric Helms, the senior manager for pricing strategy for Johnson & Johnson Vision Care.

But 1-800 Contacts, the nation’s largest seller of contact lenses, said its research showed that prices on many products had increased substantially. Close to 56 percent of contact lens wearers saw their prices increase after unilateral pricing policies went into effect; some customers saw price increases of 100 percent.

Costco said its customers who use contact lenses affected by the new policies had seen their prices rise by a weighted average of 26 percent, with the increases ranging from about 6 to 50 percent.

Richard Chavez, a senior vice president at Costco, said the company eventually negotiated a deal where it can offer customers a 10 percent discount — primarily in the form of a cash card that can be used only for products other than contact lenses — but they are not permitted to advertise the deal. “We just said, ‘It’s wrong,’ ” Mr. Chavez, “And not only is it wrong, but it attacks the very nature of our business.”

Opponents of the pricing policies say the manufacturers’ recent actions are reminiscent of the industry’s practices in the late 1990s, when dozens of state attorneys general, along with consumers, sued the major manufacturers, claiming that the companies were conspiring with the American Optometric Association to

prevent competition from sellers like 1-800 Contacts. The suits were eventually settled, and the manufacturers agreed to allow more competition from outside retailers.

Optometrists who support the new pricing policies say the manufacturers are simply leveling the playing field for independent practitioners; by selling contact lenses directly to consumers, they can ensure that patients are using them appropriately. “The industry has to stay vibrant and it has to stay profitable, and the direction that things were going, that really wasn’t the case,” said Dr. Gerber.

Minimum-pricing policies were considered illegal until 2007, when the Supreme Court ruled that manufacturers should be allowed to have more leeway in setting prices. In that case, *Leegin Creative Leather Products v. PSKS Inc.*, the court ruled that some discounters could gain an unfair advantage by offering low prices without investing in showrooms or other product demonstrations. The court instructed judges to use a case-by-case approach to assess the policies’ impact on competition.

But what sets the contact lens market apart, opponents of minimum pricing say, is that customers have little or no choice in the brand they select. In addition, optometrists are paid for the time they spend testing and educating patients.

In 2009, Germany’s federal cartel office fined Ciba Vision, which later merged with Alcon, 11.5 million euros (\$12.5 million) for imposing similar policies on retailers in that country. And last year, Chinese authorities fined several contact lens and eyeglass manufacturers — including Johnson & Johnson and Bausch & Lomb — a combined \$3 million for retail-pricing policies.

Mr. Morrow, the marketing consultant, fumed for a while about the higher prices, even posting an angry missive on Twitter. “Call it what you will, but at the end of the day, it just means it’s more expensive for me,” he said. Then, he gave in. “I just took it and paid for it,” he said.

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## **Frequently Asked Questions About the Effect of Resale Price Maintenance on the Contact Lens Industry**

### **How does the contact lens market currently work?**

A contact lens wearer visits his/her eye care provider, pays an exam and fitting fee, and receives a prescription for a brand that will work best for him/her, based on lifestyle habits. The contact lens wearer (under 2003's Fairness in Contact Lens Consumers Act [FCLCA]) receives a copy of his/her prescription that s/he can take to the retailer of his/her choice to purchase contact lenses; this retailer can be the contact lens wearer's eye care provider (who is also the prescriber) or an alternative contact lens retailer. Once prescribed, a patient cannot switch brands without paying for another eye exam. The status quo favors competition and consumer choice. It allows contact lens wearers to shop around for their lenses based on price, convenience and service.

### **What is UPP?**

Unilateral Pricing Policy (UPP) is a euphemism for artificial market manipulation and price floors – a practice by which manufacturers control retail pricing. Under UPP the four largest contact lens manufacturers are mandating a minimum price for their products, thus preventing retailers from offering these products at a lower price. This policy primarily serves the interests of manufacturers, who stand to increase their margins, at the expense of contact lens wearers. We anticipate that by the end of 2015, 80 percent of contact lenses will be priced above their natural market levels as a result of UPP.

### **How does UPP impact consumers?**

UPP will sharply limit the ability of contact lens wearers to shop for the best price. It will benefit the four largest contact lens manufacturers by guaranteeing greater profits.

### **Why does UPP affect the contact lens industry in this way?**

The contact lens market is uniquely saddled with anti-competitive structures and conflicts of interest. Contact lens wearers can't choose the brand of contact lenses they wish to wear (their eye care providers prescribe the brand); their prescriptions are brand-specific, so wearers can't shop around for the brand they prefer. Moreover, many eye doctors are also retailers of contact lenses. They enjoy business relationships with contact lens manufacturers, who may incentivize them to prescribe certain products by discounting their wholesale prices. The only choice that customers have is where to fill their prescriptions. UPP is an attempt by manufacturers to limit the ability of wearers to shop for the best pricing.

### **Which manufacturers have implemented UPP?**

Four of the major U.S. contact lens makers (Alcon, Bausch & Lomb, CooperVision and Johnson & Johnson) have implemented UPP.

### **How much of the contact lens market is under UPP?**

As of January 2015, UPP covers approximately 40% percent of the contact lens market.

### **How has the price of contact lenses changed with UPP?**

Nationwide, contact lens prices have increased by nearly 6%, with some customers seeing prices for certain brands increase nearly 200%. If contact lens manufacturers continue to expand UPP, prices could climb roughly 16% in the near future.

### **When did contact lens manufacturers start doing this?**

In June 2013, Alcon announced it was implementing a UPP program for its Dailies Total 1s, and then in January 2014, expanded this UPP to two more products: AquaComfort Plus multifocal and AquaComfort Plus toric. In February 2014, Bausch & Lomb announced that it will be implementing an UPP program for its Ultra monthly lenses and then in May 2014, Alcon expanded this to its Air Optix Colors lenses. In July 2014, Johnson & Johnson Vision care (J&J) instituted a UPP for all new and established products except for Acuvue 2.

**Does this mean that contact lens retailers are no longer able to pass savings onto consumers?**

Yes, under UPP, online and big-box retailers will be required to sell lenses at prices that are artificially above market levels.

**[If asked directly asked] How does UPP impact 1-800 CONTACTS?**

For some products, it means that we are limited in the discount we can extend to the customer. However, we are still dedicated to providing our customers with exceptional service they have come to know and trust. If we were to offer contacts at a lower price than the manufacturer's retail price, the manufacturer would terminate the supply of their contact lenses to 1-800 CONTACTS for one year. We will continue to focus on customer service and convenience by offering exchanges on all boxes of contact lenses if a prescription changes, providing a torn lens replacement – with no questions asked – and extending fast, easy ordering via our mobile application.

**Why are contact lens manufactures claiming UPP saves consumers money?**

This is the industry's attempt to spin reality, and it is completely contradicted by the facts. The fact is, prices of certain contact lenses have increased nearly 200% because of UPP. Furthermore, UPP goes against the free-market principles on which our economy is based. We happen to believe that putting consumer interests first is the right thing to do, rather than trying to bolster the bottom line at the expense of customers, as contact lens manufacturers are doing.

No company should be able to artificially restrict the prices at which products are sold. Period.

**What's being done to counter this effort?**

A number of states, including Arizona, California, Florida, Idaho, Illinois, Louisiana, Minnesota, Mississippi, New York, Oregon, Rhode Island, Tennessee, Utah and Washington, are currently considering legislation that would ban the practice of UPP in the contact lens market. These are smart, commonsense bills that anyone with any interest in consumer protection should support.

On the federal level, the U.S. Senate Judiciary Committee's antitrust panel recently met to consider whether implementation of UPP constitutes anticompetitive behavior on the part of the country's largest contact lens manufacturers.

**I don't wear contact lenses. Why should I care?**

When pharmaceutical companies manipulate markets, keep prices artificially high, and limit patient choice, consumers lose. Any American can see that a policy that is inherently anti-competitive and unfair is just plain wrong – especially one that takes millions of dollars out of consumers' pockets at a time when many are still struggling to make ends meet.

## Price Study Comparison

	1-800 CONTACTS <sup>1</sup>	JOHNSON & JOHNSON <sup>2</sup>
<b>Independent Optometric Offices</b>		
<b>SURVEY SAMPLE</b>	846 Eye Care Practitioners <sup>3</sup>	450 ABB Eye Care Practitioners <sup>4</sup>
<b>NET PRICE VS. SINGLE BOX</b>	Net Price After Discounts	Single Box Price Ignoring Discounts
<b>RETAILER MIX</b>	17% Internet 28% Retailers 55% Eye Care Practitioners	13% Internet 32% Retailers 55% Eye Care Practitioners
<b>PRICING SOURCE</b>	Secret Shopping	ABB Doctor Survey
<b>QUALITY</b>	Weighted, Unbiased, Reliable	Skewed, Biased, Unreliable

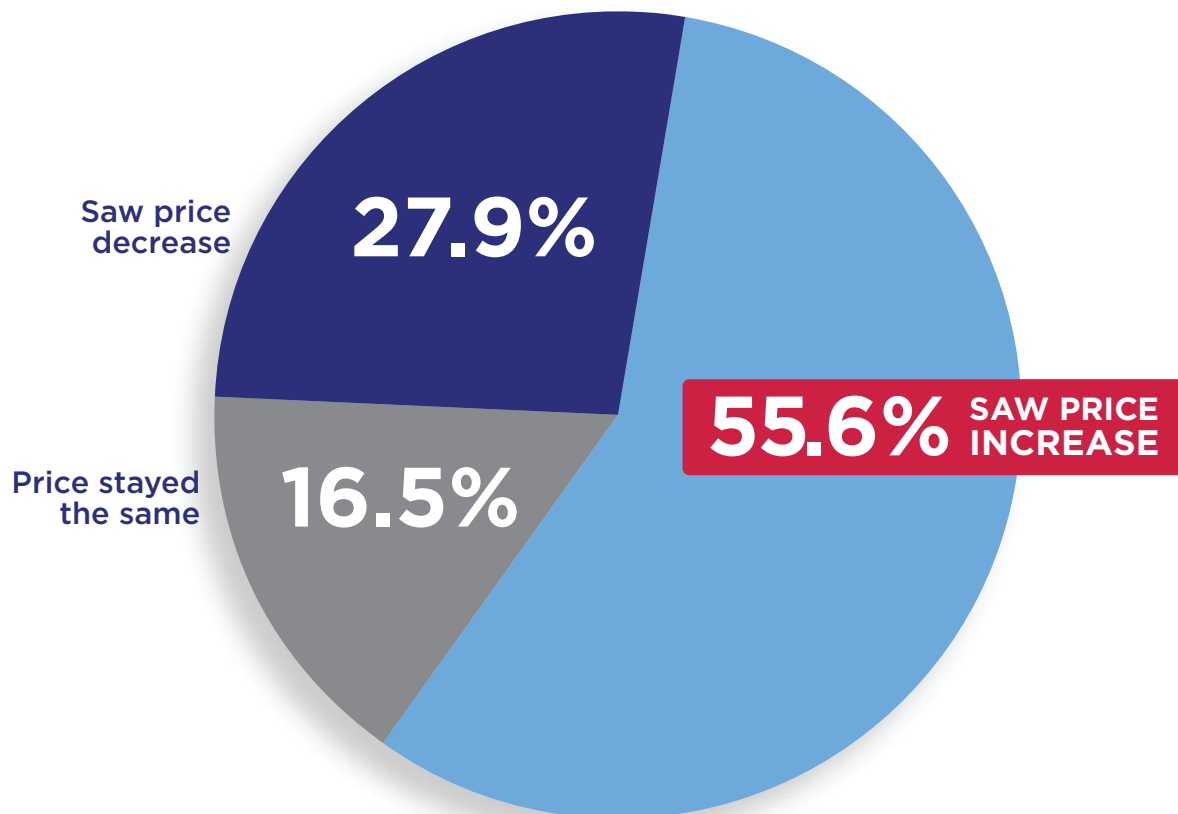
PRICES: **UP 56%** 

PRICES: **DOWN 58%** 

1) Based on live calls to obtain actual price available to customers.  
 2) Based on data from ABB Soft Lens Retail Price Monitor of self-reported pricing.  
 3) Sample taken from all independent optometric offices.  
 4) Sample taken from just ABB serviced optometric offices.



## Contact Lens Market Retail Change Summary Pre/Post UPP



### AVERAGE % OF CL CUSTOMERS WITH PRICE INCREASE

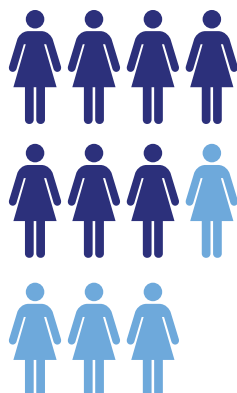
Market Segment	Decrease	No change	Increase
Independent Optometric Offices	38.4%	27.4%	34.2%
Large Retail	7.0%	4.6%	88.4%
1-800 CONTACTS	42.3%	0.0%	57.7%
Other Internet	0.0%	0.0%	100.0%
<b>WEIGHTED AVERAGE</b>	<b>27.9%</b>	<b>16.5%</b>	<b>55.6%</b>

## 55.6% of Consumers Have Experienced A Real Net Price Increase

Just how many consumers have been hurt?

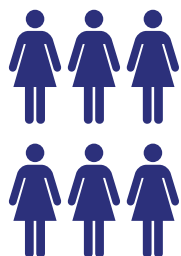
CONSUMER PRICES:  DECREASED  UNCHANGED  INCREASED

**1-800 CONTACTS**  
- 11% of market



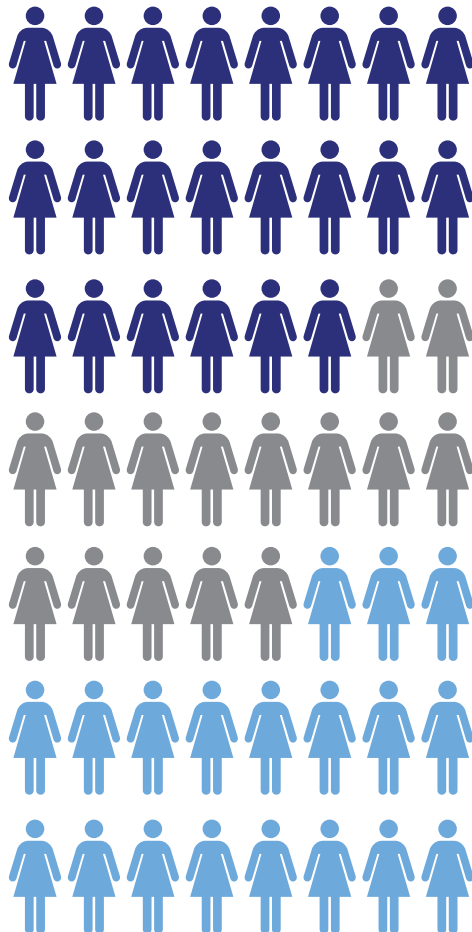
58 out of 100

**Other Internet -**  
6% of market



100 out of 100

**Independent Optometric Offices & Regional Chains** - 55% of market



34 out of 100

**Large Retail**  
- 28% of market



88 out of 100

1800 contacts®

## 1-800 Customers Have Been Harmed In 7 Out Of 8 UPP Products<sup>1</sup>

	NET PRICE BEFORE UPP	NET PRICE AFTER UPP	PRICE INCREASE	PERCENTAGE INCREASE
1-Day ACUVUE® MOIST® for Astigmatism 30p	\$25.82	\$34.50	<b>\$8.68</b>	<b>34%</b>
ACUVUE® OASYS® 6p/12p (6 mos)	\$51.73	\$67.50	<b>\$15.77</b>	<b>30%</b>
1-Day ACUVUE® MOIST® 30p	\$25.82	\$33.00	<b>\$7.18</b>	<b>28%</b>
1-Day TrueEye®	\$67.49	\$82.50	<b>\$15.01</b>	<b>22%</b>
1-Day ACUVUE® MOIST® 90p	\$57.49	\$63.50	<b>\$6.01</b>	<b>10%</b>
ACUVUE® OASYS® 24p (12 mos)	\$103.46	\$110.00	<b>\$6.54</b>	<b>6%</b>
ACUVUE® OASYS® for Astigmatism	\$39.87	\$40.00	<b>\$0.13</b>	<b>0%</b>
ACUVUE® OASYS® for Presbyopia	\$41.87	\$40.00	-\$1.86	-4%

## 1-800 Net Prices Are At UPP Minimum<sup>1</sup>

	UPP PRICE	CURRENT PER-BOX NET PRICE	AT UPP MINIMUM
1-Day ACUVUE® MOIST® for Astigmatism 30p	\$34.50	\$34.50	✓
ACUVUE® OASYS® 6p/12p (6 mos)	\$67.50	\$67.50	✓
1-Day ACUVUE® MOIST® 30p	\$33.00	\$33.00	✓
1-Day TrueEye®	\$82.50	\$82.50	✓
1-Day ACUVUE® MOIST® 90p	\$63.50	\$63.50	✓
ACUVUE® OASYS® 24p (12 mos)	\$110.00	\$110.00	✓
ACUVUE® OASYS® for Astigmatism	\$40.00	\$40.00	✓
ACUVUE® OASYS® for Presbyopia	\$40.00	\$40.00	✓

<sup>1</sup>) Net price includes the annual rebate available.

1800 contacts™

## 1-800 Was Forced To Reduce Rebate Value Because Of UPP

	PRE-UPP	CURRENT	CHANGE
1-Day ACUVUE® MOIST® for Astigmatism 30p	\$100	\$0	<b>\$100</b>
ACUVUE® OASYS® 6p/12p (6 mos)	\$100	\$50	<b>\$50</b>
1-Day ACUVUE® MOIST® 30p	\$100	\$0	<b>\$100</b>
1-Day TrueEye®	\$100	\$0	<b>\$100</b>
1-Day ACUVUE® MOIST® 90p	\$65	\$50	<b>\$15</b>
ACUVUE® OASYS® 24p (12 mos)	\$65	\$0	<b>\$65</b>
ACUVUE® OASYS® for Astigmatism	\$65	\$64	<b>\$1</b>
ACUVUE® OASYS® for Presbyopia	\$65	\$80	<b>\$15</b>

### 1-800 CUSTOMERS VALUE REBATES & DISCOUNTS

- Up to **74.8%** qualify for bulk discounts
- Up to **61.6%** redemption rate

## UPP Required 1-800 To Abandon Critical Discount Programs<sup>1</sup>

	PRE-UPP	AFTER UPP
Mobile App Orders	10%	<del>10%</del>
Affiliate Offers	5-25%	<del>5-25%</del>
Back-to-School Offer	20%	<del>20%</del>
Cyber Monday Offer	25%	<del>25%</del>
New Customer Offer	\$40	<del>\$40</del>
Repeat Customer Offer	\$20	<del>\$20</del>
Web Search Offers	\$25	<del>\$25</del>
“Lowest Price Guarantee”	2% OFF LOWEST PRICE	<del>2% OFF LOWEST PRICE</del>
Email Offers	10-20%	<del>10-20%</del>
Product Bundle Offers	PRODUCT-SPECIFIC	<del>PRODUCT-SPECIFIC</del>
Gift Cards	\$50	<del>\$50</del>

<sup>1</sup>) Typical discount programs 1-800 rotates as part of marketing campaigns.

<u>Source</u>	<u>Brand of Lens</u>	<u>2014 (Pre-UPP)</u> <u>Annual Supply</u>	<u>2015 (Post-UPP)</u> <u>Annual Supply</u>	<u>Increase</u>
Eye Care Providers	Acuvue Oasys 12pk	\$248.48	\$280.43	<b>12.9%</b>
1-800Contacts	Acuvue Oasys 12pk	\$206.92	\$270.00	<b>30.5%</b>
Walmart	Acuvue Oasys 12pk	\$251.84	\$270.00	<b>7.2%</b>
Sam's Club	Acuvue Oasys 12pk	\$206.72	\$270.00	<b>30.6%</b>
Walgreens	Acuvue Oasys 12pk	\$223.92	\$270.00	<b>20.6%</b>
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Eye Care Providers	1-Day Acuvue Moist 30pk	\$697.08	\$808.75	<b>16.0%</b>
1-800Contacts	1-Day Acuvue Moist 30pk	\$619.76	\$792.00	<b>27.8%</b>
Walmart	1-Day Acuvue Moist 30pk	\$597.12	\$792.00	<b>32.6%</b>
Sam's Club	1-Day Acuvue Moist 30pk	\$525.12	\$792.00	<b>50.8%</b>
Walgreens	1-Day Acuvue Moist 30pk	\$695.76	\$792.00	<b>12.8%</b>
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Eye Care Providers	1-Day Acuvue Moist Astig 30pk	\$757.07	\$888.91	<b>17.4%</b>
1-800Contacts	1-Day Acuvue Moist Astig 30pk	\$619.76	\$828.00	<b>33.6%</b>
Walmart	1-Day Acuvue Moist Astig 30pk	\$694.08	\$828.00	<b>19.3%</b>
Sam's Club	1-Day Acuvue Moist Astig 30pk	\$669.12	\$828.00	<b>23.7%</b>
Walgreens	1-Day Acuvue Moist Astig 30pk	\$719.76	\$828.00	<b>15.0%</b>