

WARBY PARKER

October 26, 2015

Submitted Electronically Via
<http://www.ftcpublishcommentworks.com/ftc/ophthalmicruleanprm>

Edith Ramirez,
Chairwoman
Federal Trade Commission
Attention: Project No. R51199
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580

**Re: Advance Notice of Proposed Rulemaking, Eyeglass Rule, 16 CFR Part 456
Project No. R51199**

Dear Chairwoman Ramirez:

Warby Parker greatly appreciates the opportunity to comment on the Ophthalmic Practice Rules (Eyeglass Rule) Advance Notice of Proposed Rulemaking (ANPR) (Project No. R51199). Warby Parker is a direct-to-consumer eyewear company dedicated to promoting access to high quality, affordable eyewear both online and through brick-and-mortar stores. The Eyeglass Rule was initially promulgated over 30 years ago in order to provide consumers with choice regarding prescription eyeglass purchases. At that time “consumers were being deterred from comparison shopping for eyeglasses because eye care practitioners refused to release prescriptions, even when requested to do so, or charged an additional fee for the release of a prescription.”¹ Accordingly, the Federal Trade Commission (Commission or FTC) promulgated the Eyeglass Rule, which requires eye care practitioners to provide a patient, immediately after completion of an eye examination, with a free copy of his or her eyeglass prescription. The Eyeglass Rule also prohibits eye care practitioners from conditioning the availability of an eye examination on a requirement that the patient agree to purchase ophthalmic goods from the practitioner. The FTC has reviewed the Eyeglass Rule several times, including in 2004, when the Contact Lens Rule was adopted pursuant to the Fairness to Contact Lens Consumers Act (FCLCA).²

The Eyeglass Rule has helped provide consumers with more choices and greater access to competition for their eyeglass needs, but the prescription eyewear market has changed fundamentally in recent years and the current Eyeglass Rule must be updated to

¹ 69 Fed. Reg. 5451, 5451 (Feb. 4, 2004).

² P.L. 108-164 (Dec. 6, 2003).

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ensure that going forward it meets its objectives – to protect consumers and promote competition in this rapidly changing commercial environment. The Rule as currently drafted is outdated and suffers from fundamental limitations that deter competition and harm consumers, particularly with respect to the rapidly growing online prescription eyeglass market. As detailed below, the Eyeglass Rule does not address certain basic and critical components of a competitive marketplace, such as requiring eye care professionals to provide prescription information (including pupillary distance measurements) necessary to produce eyeglasses or to provide or verify prescription information when requested by the patient or their agent. These shortcomings result in decreased choices and higher prices for consumers, by erecting barriers to discourage consumers from buying glasses at businesses other than where they receive their eye exam.³

By way of comparison, the Contact Lens Rule provides for more direct consumer and competitor access to relevant information and thus more effectively promotes competition. The Contact Lens Rule is better designed for the modern marketplace than is the Eyeglass Rule, and there is no commercial or medical justification for the different requirements. Indeed, even if there were any medical basis for allowing eye care professionals to continue to protect their market dominance in the sale of eyewear (and, as discussed in detail below, there is no such basis), such a rationale would surely apply more directly to the sale of contact lenses, which actually come into contact with the eyes of the patients, than to the sale of eyeglasses. It is an anomaly that the Contact Lens Rule is more comprehensive and protective of consumer freedom and competition than is the Eyeglass Rule.

Consumers are also harmed by the inconsistent and in some instances anticompetitive provisions of state laws. While some state laws have evolved over time to meet consumer demand for more choices and enhanced competition, others have been structured to serve the interests of entrenched prescriber interests. In particular, many state laws allow “short-dated” prescriptions, which force consumers to go back to their eye care professional each year if they want to obtain a valid prescription for new eyeglasses. These provisions are without justification. The vast majority of prescriptions do not change within one year, and there is no medical rationale for most patients to undergo annual eye exams. These short-term prescriptions create inconvenience and increase cost for patients, and serve only as a mechanism to make it more difficult for patients to choose to fill their prescriptions from an alternative provider of their choice. The Eyeglass Rule should address this problem and protect consumers by limiting short-dated prescriptions to those situations where they are justified by valid medical considerations.

³ Eye care is the only medical practice (outside of veterinary services) where the prescriber also sells the product they are prescribing. As discussed in greater detail below, this creates problematic incentives and possible conflicts for the prescriber, which in combination can limit prescription portability.

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Below, we set forth in detail our suggestions for updating the Eyeglass Rule based on the questions posed by the Commission in the ANPR. Section I provides an overview of the eyeglass market, highlighting changes in the preferences and needs of consumers. Section II discusses the growth of the online eyewear market and the benefits it generates for consumers. By way of example, we include background information about Warby Parker -- a clear example of the consumer benefits generated by the online eyewear market. Section III discusses why the current regulatory framework for eyeglasses is not meeting the needs of consumers and how it should be changed. Section IV addresses the Commission's Issues for Comment in the ANPR. Warby Parker recommends that the Commission: (1) amend the definition of "prescription" to include the pupillary distance (PD) measurements and explicitly require the inclusion of PD on each prescription; (2) mandate provision or verification of eyeglass prescriptions to authorized third parties within 8 business hours; (3) prohibit short-term prescriptions, i.e., prescriptions that are valid for less than three years, without documented medical justification; and (4) require ECPs to provide a duplicate copy of a prescription at no additional cost to consumers as needed.⁴

I. OVERVIEW OF THE EYEGLASS MARKET

Over 143 million U.S. adults (75.5% of all adults) use some form of vision correction, including 64% who use eyeglasses and an additional 11.2% who wear prescription sunglasses as well.⁵ Unsurprisingly, the U.S. eyewear market is vast (\$26B+ in revenue each year).⁶ It is also highly profitable, and has resisted innovation at the expense of consumers because it is highly concentrated, in particular in the market segments for frames and lenses. Although there are a large number of frame and lens brands offered, they provide consumers only an illusion of choice because they are almost entirely owned by the respective market leaders in the frame and lens segments. This high level of concentration allows those companies to generate markups of 10X to 20X on sales of lenses and frames, which is substantially higher than the markups in other consumer product categories.⁷ Accordingly, consumers suffer, often paying far too

⁴ In addition to these recommended substantive modifications to the Eyeglass Rule, Warby Parker recommends that the Commission take steps to ensure greater consumer awareness and understanding of the Rule and more active enforcement of the Rule. As discussed in greater detail below, such steps should include requiring prescribers to provide patients with a "Bill of Rights" that informs them of their rights under the Rule, making it clear that violation of the Rule is an "unfair act or practice" under Section 5 of the FTC Act, and more aggressive efforts to ensure prescriber compliance with the Rule.

⁵ VisionWatch, THE VISION COUNCIL, at 21, 24 (Dec. 2014).

⁶ VisionWatch, THE VISION COUNCIL, at 11 (Dec. 2014).

⁷ See, e.g., Maggie Zhang, [37 Products with Crazy-High Markups](http://www.businessinsider.com/products-high-markups-2014-7), BUSINESS INSIDER (Jul. 17, 2014) (<http://www.businessinsider.com/products-high-markups-2014-7>) (noting "the accepted retail markup for most items is around 100%" while the markup for eyeglass frames is 1,329 percent); Renee Morad, [20](#)

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much for a pair of prescription glasses⁸ due to the lack of competition in the eyewear market.

Indeed some consumers are being priced out of the market entirely.⁹ Over 7% of adults not using vision correction are 1) aware they need it and 2) do not use it because they think it will cost too much.¹⁰ This means approximately 4 million adults in the United States need vision correction but do not seek out and obtain eyeglasses, and many children face the same problem. Of course, any individual who engages in ordinary day-to-day activities (such as driving) without properly corrected vision poses a severe risk to his or her self and others – allowing 4 million or more people to continue in such circumstances creates a significant public health risk.¹¹

In addition to lack of competition in the manufacture of frames and lenses, protectionism amongst eyeglass retailers compounds the problem. There are three professions associated with prescribing and dispensing prescription eyewear in the United States -- ophthalmologists, optometrists and opticians, collectively known as eye care professionals (ECPs). Among ECPs, only ophthalmologists are M.D.s, and they focus largely on treating diseases of the eye, performing surgery, and prescribing eyeglasses and contact lenses. However, to the extent they *sell* eyeglasses at all, it is at a far lower rate than optometrists and opticians. In contrast, optometrists administer eye exams, prescribe and fit eyeglasses and contact lenses, and are often affiliated with eyeglass retailers. Sales of eyewear, including contact lenses, typically account for 55-65% of

Products with Giant Markups, MoneyTalks News (Sept. 26, 2012), <http://www.moneytalksnews.com/20-overpriced-products/> (“Markups for eyeglass frames can reach 1,000 percent.”).

⁸ Meet the Four-Eye, Eight-Tentacled Monopoly That is Making Your Glasses So Expensive, FORBES, <http://www.forbes.com/sites/anaswanson/2014/09/10/meet-the-four-eyed-eight-tentacled-monopoly-that-is-making-your-glasses-so-expensive/> (“The fanciest frames at LensCrafters often sell for \$400-500.”).

⁹ See John Tozzi, *Obamacare Mystery: Why Can't You Buy Vision Coverage?* (The Affordable Care Act requires health exchange plans to provide eye exams and glasses for children but it does not require plans to provide glasses for adults.), BLOOMBERG BUSINESS (Sept. 30, 2014), <http://www.bloomberg.com/bw/articles/2014-09-30/obamacare-mystery-why-cant-you-buy-vision-insurance>.

¹⁰ See *Vision Watch*, THE VISION COUNCIL (March 2014).

¹¹ See Sam Collins, *Why It Makes Sense to Give The World's Poorest People Glasses That Cost Just \$2*, THINKPROGRESS (Nov. 3, 2014), <http://thinkprogress.org/health/2014/11/03/3587932/visually-impaired-low-income/>. (The lack of access to affordable glasses poses severe health consequences for the visually impaired, especially those in lower income brackets.); *The State of Vision, Aging, and Public Health in America*, CDC (2011), http://www.cdc.gov/visionhealth/pdf/vision_brief.pdf. (Studies have tied vision impairment to the prevalence of chronic health conditions, falls and injuries, depression, and social isolation.); William Moskowitz, MD, *Behavior Problems and Poor School Performance Linked to Vision*, NATURAL EYE CARE, <http://www.naturaleyecare.com/vis-ther-res-mo2.asp>. (Children with poor vision also stand a greater chance of not performing well in school and later entering the criminal justice system, according to data compiled by the National Parent-Teacher Association).

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revenue for the approximately 40,000 independent optometrists practicing in the U.S.¹² As a result, many optometrists have a conflict of interest -- a strong incentive to withhold information from consumers in order to prevent consumers from shopping elsewhere for their eyeglasses. (Opticians are commonly licensed only to dispense eyeglasses and take optical measurements, and thus do not have the same conflict of interest that optometrists have).

The current regulatory framework, which features protectionist state laws and insufficient federal rules, in effect allows the providers of vision care to tie the health care services that they provide to the purchase of prescription eyewear. This framework is an anomaly in the healthcare industry, and is widely recognized as harmful to consumers and a conflict of interest for medical professionals. The American Medical Association's (AMA's) code of ethics for physicians prohibits physicians from placing "their own financial interest above the welfare of their patients"¹³ and, accordingly, recognizes the conflict of interest inherent in a health care provider engaging in product sales to patients. Consistent with this principle, the code properly advises against physicians selling what they prescribe, and recognizes the importance of ensuring patients the freedom to choose from whom they purchase their medical products.¹⁴ Optometrists, however, are not bound by this code of ethics, leaving them free to serve a dual role -- as both the eyewear prescriber and eyewear retailer -- and to settle any conflicts of interest in their own favor. This limits patient choice and harms competition. Indeed, consumers often find they are left without the information, knowledge or ability to make independent decisions regarding their eye health and eyeglass needs.

II. BENEFITS OF THE ONLINE PRESCRIPTION EYEWEAR MARKET

The new online eyewear market allows for a better, more convenient consumer experience at lower cost to consumers, and online retailers/dispensers are already helping to address the unmet vision correction needs of many U.S. consumers. First, the online market provides better customer service. Online vendors offer consumers greater access to information and a broader selection of products. This is especially important for consumers in remote rural areas, but consumers in all locations value the convenience of buying eyeglasses without needing to make appointments or drive to brick and mortar

¹² *Challenges and Opportunities in the Future of Independent Optometry*, REVIEW OF OPTOMETRIC BUS., at 3 (April 2013), [http://www.reviewob.com/Data/Sites/1/PDFFile/paa_visionsource_0413\(1\).pdf](http://www.reviewob.com/Data/Sites/1/PDFFile/paa_visionsource_0413(1).pdf); Neil Gailmard, OD, *Pricing Optical Products to Maximize Gross Profit*, REVIEW OF OPTOMETRIC BUS. (Mar. 2012), at 1, http://www.reviewob.com/Data/Sites/1/webinarwhitepaper_ccpricing_lr.pdf ("Among independent optometric practices, retail sales of vision devices account for nearly two-thirds of gross revenue.").

¹³ AMA Opinion 8.03.

¹⁴ See AMA Opinions 8.063 and 8.06(4).

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shops. Second, online shopping provides consumers with a better value because of reduced overhead and increased competition created by easy comparison shopping.¹⁵ Finally, the availability of eyewear online improves eye health by increasing access to medically necessary and affordable eyewear to patients who otherwise might go without it.¹⁶ For example, according to the National Rural Health Association, only 20% of federally qualified community health centers provide optometry services;¹⁷ low income consumers need all the help they can get in obtaining eyewear,¹⁸ especially in these areas, and online eyeglass sales provide such consumers with a significant financial and health benefit.

¹⁵ Warby Parker Survey, October 2015 (n=1105), at p. 12 (~86% of consumers who purchased eyeglasses online in the last 3 years did so at least in part because of lower prices).

¹⁶ See, e.g., Consumer Benefits of Receiving Medication Through the Mail, WASHINGTON POST, Mar. 17, 2014, available at <http://www.washingtonpost.com/sf/brand-connect/wp/2014/03/17/consumer-benefits-of-receiving-medication-through-the-mail/>; Need to Buy Glasses? Follow These 3 Money-Saving Tips, ABC NEWS, Oct. 24, 2013, available at <http://abcnews.go.com/blogs/health/2013/10/24/need-to-buy-eyeglasses-follow-these-3-money-saving-tips/> (reporting on a woman named Kemi Ajayi who delayed getting glasses because of the “steep prices,” but who would “squint when I’m not at the computer” and “can’t see very clearly.” One of the tips for Ajayi was to shop online “for an inexpensive pair of glasses.”); Linda Roach, How to Help Patients Who Can’t Pay, EYENET MAGAZINE (2010), <http://www.aoa.org/eyenet/article/how-to-help-patients-who-can-t-pay?7-1-2010> (listing low-cost online eyeglasses as one of 21 sources that can help patients who can’t pay: “Patients can obtain single-vision prescription eyeglasses for as little as \$8 (plus shipping) from online optical dispensaries.”). In a recent survey, 30% of rural consumers indicated that they had to travel more than 25 minutes one way to purchase glasses; that same survey showed that of urban and suburban consumers only 13% and 9% (respectively) had to travel that far. Warby Parker Survey, October 2015, at p. 14.

¹⁷ See Workforce Series: Primary Eye Care, NAT’L RURAL HEALTH ASSOC. POLICY BRIEF (Oct. 2009) at 1, available at <http://www.ruralhealthweb.org/index.cfm?objectid=F758794B-3048-651A-FE38A500ED447724>.

¹⁸ Xinzhi Zhang et al., Vision Health Disparities in the United States by Race/Ethnicity, Education, and Economic Status: Findings From Two Nationally Representative Surveys, 154 AM. J. OPHTHALMOL. S53, S58, (Dec. 2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4169111/> (finding that “individuals with less education and lower income . . . were less able to afford eyeglasses when needed” and that “increasing trends of inability to afford eyeglasses among those with a highschool education . . . suggest that public health interventions to improve vision and eye health should focus more on those are at the relatively lower end of the socioeconomic spectrum.”); Workforce Series: Primary Eye Care, NAT’L RURAL HEALTH ASSOC. POLICY BRIEF, available at <http://www.ruralhealthweb.org/index.cfm?objectid=F758794B-3048-651A-FE38A500ED447724>; American Optometric Association Community Health Center Committee, The Role of Community Health Centers in Responding to Disparities in Visual Health, 79 OPTOMETRY 564 (2008), available at http://www.aoa.org/documents/advocacy/role_of_chcs.pdf (“Lack of access to affordable eyeglasses is also a significant unmet need in the United States. A recent study found that 14 million people in the United States age 12 and older suffer from vision impairment. Of these, 11 million could have a significant vision improvement just by wearing corrective lenses. For many low-income individuals, the cost of eyeglasses may be prohibitive. [One study] found that 1 in 12 high-risk individuals could not afford eyeglasses when needed. In this study, individuals that had a diagnosed vision problem or diabetes were even less able to afford eyeglasses. Thus, those individuals who most needed eyeglasses were the least likely to be able to afford them.”).

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A. The Warby Parker Story

Warby Parker launched in 2010 with a mission to transform the optical industry and rethink how consumers purchase prescription eyewear. Warby Parker believes eyeglasses should be affordable and accessible to those who need them. To accomplish this, the company has broken the eyeglass industry mold; rather than license traditional brands and charge exorbitant mark-ups, Warby Parker instead uses its own vintage-inspired designs and manufactures eyeglasses with high-quality, custom materials on dedicated production lines. A standard pair of Warby Parker glasses includes prescription lenses made from UV-protective, impact resistant, ultra-thin polycarbonate, with anti-reflective and anti-scratch coatings at no additional cost. These are considered add-on features by most brick and mortar retailers, but Warby Parker believes they are indispensable.

In addition to designing and manufacturing its own brand of eyeglasses, Warby Parker eliminates the “middleman” by selling direct to consumers via its exclusive e-commerce boutique and through company-owned stores. In total, Warby Parker’s sales model reduces the cost of eyeglasses dramatically, offering a savings of approximately 75% as compared to the price of glasses sold in traditional retail stores, with comparable or superior quality and features. A prescription pair of Warby Parker eyeglasses (including prescription lenses) starts at a cost of \$95 (with free shipping and free returns); consumers will often pay \$400+ elsewhere for glasses of comparable quality.

One of the perceived risks of purchasing eyeglasses online is the inability to try on the glasses to judge aesthetics and comfort. Warby Parker eliminates this concern by offering options for consumers to try glasses on, free of charge. Many online customers use Warby Parker’s “home try-on” service, which allows consumers to choose five different frames to be shipped directly to the consumer’s house for no charge; the consumer then has five days to try on the frames and send them back to Warby Parker. Warby Parker pays for the return shipping, even if the consumer decides not to purchase any of the eyeglasses. In addition, consumers have the option to purchase their glasses in one of Warby Parker’s 20 showrooms or stores located throughout the country. And, whether the consumer purchases eyeglasses online or in person, if a consumer is not fully satisfied with their glasses, for any reason, they can return their frames to Warby Parker, with no charge, for a full refund.

Warby Parker has been recognized for its best in class customer service, including receiving a 81 net promoter score (NPS).¹⁹ NPS measures the likelihood that a customer will refer a company to a friend, and is widely recognized as a highly accurate measure of

¹⁹ Warby Parker NPS Survey, January 2014 to October 2015 (surveying 36,178 Warby Parker users).

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consumer satisfaction.²⁰ By way of comparison, this score is higher than that awarded to other companies that are considered to have excellent customer service: Zappos has an NPS of 60 and Apple has an NPS of 72.²¹ Not only is the general public increasingly comfortable buying online, they have far superior experience shopping at Warby Parker than elsewhere. Warby Parker's customer satisfaction is approximately 3x better than that of eye care professionals (NPS of 33) and retail chains like LensCrafters (NPS of 24.) The dramatically higher NPS score that Warby Parker has relative to the NPS of eye care professionals and incumbent retail chains indicates that customers are much more satisfied with both the product and service that Warby Parker offers.

Finally, Warby Parker has always believed that providing a superior product, with best in class service at a competitive price, is not enough. In addition to offering benefits to paying customers, the Warby Parker model also helps those in need. Since its founding, Warby Parker has held to a philanthropic mission to distribute one pair of eyeglasses to someone in need for every pair sold. The company has partnered with renowned and socially conscious non-profit organizations to implement this worldwide program, through which well over 1 million prescription eyeglasses have been distributed to date. Warby Parker has also recently initiated a partnership with New York City to provide free eyeglasses and assessments to students at low-income “community schools,” which is expected to result in approximately 65,000 vision screenings and 20,000 eyeglass donations to needy students over the next four years.²²

Warby Parker is just one online retailer of prescription eyewear helping to modernize the eyeglass market. Warby Parker’s sales model offers consumers greater choice in how to engage in the eyeglass buying experience without compromising quality or comfort, and at a much lower cost. The strong consumer demand for Warby Parker products, despite a less-than-ideal regulatory environment, demonstrates the benefits of online sales of prescription eyewear.

III. THE NEED FOR REGULATORY CHANGE

Warby Parker’s success and customer satisfaction ratings are clear evidence that alternative models of prescription eyeglass sales are beneficial to consumers and that

²⁰ The Net Promoter Score, NET PROMOTER NETWORK, <http://www.netpromoter.com/why-net-promoter/know/> (last visited Oct. 13, 2015).

²¹ See Satmetrix Net Promoter Benchmarks, March 2014, <http://www.prnewswire.com/news-releases/usaa-kaiser-permanente-amazoncom-pandora-costco-wegmans-apple-tracfone-southwest-and-westin-among-the-highest-in-customer-loyalty-in-the-2014-satmetrix-net-promoter-benchmarks-248541161.html>.

²² See Mayor de Blasio Announces Partnership with Warby Parker to Provide Free Eyeglasses to Students at Community Schools, NYC.gov (June 24, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/436-15/mayor-de-blasio-partnership-warby-parker-provide-free-eyeglasses-students-at#/0>.

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federal regulations should be updated to remove the barriers to new and innovative ways of meeting consumer demand. The current regime does not adequately serve consumers and is uniquely susceptible to anti-competitive practices because of the conflict of interest inherent in the daily practice of most optometrists.

Additionally, the problems created by a patchwork of often protectionist state laws, the withholding of prescription information by certain ECPs (in contravention of the current rule), and the other reasons cited above necessitate regulatory change. For example, even though the Eyeglass Rule already prohibits the withholding of prescription information, recent survey evidence indicates that at least 31% of consumers who have purchased glasses in the last 3 years from ophthalmologists, and at least 47% of consumers who have purchased glasses in the last 3 years from optometrists, were not offered a physical copy of their prescription. Furthermore, of those consumers who had to request a replacement copy of their prescription from their ECP, 14% actually had to pay for it.²³ Under the current rule, all of these numbers should be 0%.

The benefits of more robust and up-to-date regulations are demonstrated by success of the Contact Lens Rule and the FCLCA. The FCLCA successfully enhanced consumers' ability to buy contact lenses from sellers other than ECPs. A 2005 study by the FTC showed that two years after implementation of the FCLCA, "consumers ha[d] the ability to choose between several retail options, other than their prescribing ECP, when purchasing contact lenses, due in part to the standardization of disposable soft contact lenses, along with the FCLCA-required prescription portability."²⁴ In spite of the FCLCA, the study also found that "state licensing requirements that restrict consumers' ability to buy contact lenses from out-of-state sellers or non-ECP sellers may limit competition and harm public health."²⁵ As discussed herein, restrictive state laws are also limiting consumer eyeglass choice, despite the provisions of the current Eyeglass Rule.

Changing the regulatory regime to allow greater consumer choice will lead to lower prices and improved quality. Existing federal and state laws are sufficient to ensure that new business models will not adversely impact patient health. First, the Food and Drug Administration (FDA) closely regulates eyewear products to ensure their safety.²⁶ For example, eyewear manufacturers must comply with Quality Systems

²³ Warby Parker Survey, October 2015. As discussed in greater detail below, these statistics are evidence that consumers need more information about their rights under the Rule and that the Commission must more aggressively enforce the Rule to ensure greater compliance by ECPs.

²⁴ FTC Issues Study on Competition in Contact Lens Market, FTC (Feb. 15, 2005), <https://www.ftc.gov/news-events/press-releases/2005/02/ftc-issues-study-competition-contact-lens-market>.

²⁵ *Id.*

²⁶ See *Sunglasses, Spectacle Frames, Spectacle Lens and Magnifying Spectacles*, FDA, <http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/ucm150001.htm>.

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Requirements,²⁷ including strict standards for impact resistance.²⁸ The FDA also has authority to take action against anyone dispensing a prescription device without a valid prescription.²⁹

A variety of other laws and regulations help protect consumers and ensure that customers purchasing prescription eyewear receive the lenses that they order and which are specified in the prescription. The Commission itself has authority under Section 5 of the FTC Act to bring an enforcement action against any seller who makes false or misleading claims about the products or services it provides.³⁰ The Commission also has authority under its unfairness jurisdiction to regulate marketing practices that cause or are likely to cause substantial consumer injury.³¹ States also have their own consumer protection statutes in place.

IV. ISSUES FOR COMMENT

The Commission is charged under the FTC Act with preventing unfair methods of competition and unfair acts or practices in or affecting commerce.³² It has long been recognized that competition drives the American economy³³ and that robust competition among sellers in an open marketplace benefits consumers in the form of higher quality products and services, lower prices, increased choices and greater innovation. Because of the great importance of healthcare to consumer welfare, anticompetitive conduct in healthcare markets has long been a key target of Commission enforcement.³⁴ Warby Parker asks the Commission to continue this effort by implementing several important

²⁷ See *id.*; see also 21 C.F.R. § 820.

²⁸ 21 C.F.R. § 801.410.

²⁹ See 21 U.S.C. §§ 353(b)(1), 331(a) and 333.

³⁰ For example, the FTC entered a settlement with operators of a group of online pharmacies that falsely claimed to be a full service clinic with a national network of physicians. The settlement prohibited such false claims and required them to disclose the name and location of the dispensing pharmacies and physicians. See *International Outsourcing Group, Inc.* (File No. 992 3245) (July 12, 2000). The Commission has also brought numerous cases challenging claims for medical devices. See, e.g., *London International Group, Inc.*, C-3800 (Apr. 7, 1998) (consent order) (challenging claims that Ramses condoms are 30% stronger than leading brand and break 30% less often); *United States v. Lifestyle Fascination, Inc.*, No. 97-1487 (CSF) (D.N.J. Mar. 27, 1997) (stipulated permanent injunction and \$60,000 civil penalty) (challenging representations for pain relief device and other products).

³¹ 15 U.S.C. § 45(n); see also *Unfairness Policy Statement*, appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

³² Federal Trade Commission Act, 15 U.S.C. § 45.

³³ See, e.g., *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (“The heart of our national economic policy long has been faith in the value of competition.”) (internal citations omitted).

³⁴ See, e.g., *Competition in the Health Care Marketplace*, FTC, <https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care>.

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updates to the Eyeglass Rule that will help ensure an open and competitive marketplace. The Commission has the authority to do so: it may “prescribe rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of . . . Section 5(a)(1)).”³⁵ Rules under Section 5(a)(1) of the FTC Act “may include requirements prescribed for the purpose of preventing such acts or practices.”³⁶

A. General Issues

1. Continuing Need for the Eyeglass Rule

Before the Commission issued the Eyeglass Rule, many ECPs either refused to release prescriptions to their patients, even if the patient requested it, or charged an additional fee to do so.³⁷ Without their prescriptions, consumers were unable to purchase eyeglasses from sellers other than their ECPs. The Eyeglass Rule was passed to ensure that consumers had full access to the eyewear market and its variety of eyewear providers.

In particular, the Eyeglass Rule requires an optometrist or ophthalmologist to automatically provide a patient, without a request and at no extra cost, a copy of the patient’s eyeglass prescription after completion of an eye exam.³⁸ The Eyeglass Rule also prohibits optometrists and ophthalmologists from conditioning the availability of an eye examination on a requirement that the patient agree to purchase ophthalmic goods (defined as eyeglasses and contact lenses) from the practitioner.³⁹ It also prohibits optometrists and ophthalmologists from placing on the prescription, or delivering to the patient, certain disclaimers or waivers of liability.⁴⁰

Despite the Eyeglass Rule, anti-competitive practices continue. ECPs often do not comply with the Eyeglass Rule prescription release requirements.⁴¹ It is well known

³⁵ Federal Trade Commission Act Section 18(a)(1)(B), 15 U.S.C. § 57a (1976). Section 5(a)(1) provides: Unfair methods of competition in or affecting commerce and unfair acts or practices in or affecting commerce are hereby declared unlawful. Federal Trade Commission Act Section 5(a)(1), 15 U.S.C. § 45 (1976); *see also* 43 Fed. Reg. 23,992, 24,000 (June 2, 1978).

³⁶ *Id.*

³⁷ *See* Advertising of Ophthalmic Goods and Services, Statement of Basis and Purpose and Final Trade Regulation Eyeglass Rule, 43 Fed. Reg. 23,992, 23,998 (June 2, 1978).

³⁸ 16 C.F.R. § 456.

³⁹ 16 C.F.R. §§ 456.1(c), 456.2(b).

⁴⁰ 16 C.F.R. § 456.2(d) (It is an unfair act or practice to “[p]lace on the prescription, or require the patient to sign, or deliver to the patient a form or notice waiving or disclaiming the liability or responsibility of the ophthalmologist or optometrist for the accuracy of the eye examination or the accuracy of the ophthalmic goods and services dispensed by another seller.”).

⁴¹ *See* FN 23 above.

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in the industry that many ECPs refuse to give patients prescriptions unless they specifically request it, and some ECPs place intimidating and unnecessary warnings or waivers of responsibility on the prescriptions they do release.⁴²

Moreover, it is common for some ECPs to violate the spirit of the Rule as well. For example, online and other sellers cannot legally sell eyeglasses unless they can first verify the accuracy and legitimacy of a prescription. Certain ECPs routinely attempt to frustrate consumer choice by refusing to respond to verification requests when patients attempt to purchase eyeglasses from other sellers. Similarly, some ECPs refuse to provide customers with measurements such as PD, which is necessary to appropriately fill an eyeglass prescription. Such tactics add days to the time needed for Warby Parker to provide the desired eyeglasses, and sometimes entirely prevent Warby Parker from serving consumers. For example, one Warby Parker consumer lamented that the ECP was “claiming emphatically that I [the patient] need to show up in person to get the PD included.”⁴³ This is just one example of a story WP has heard time and time again.⁴⁴

⁴² See Opticians Association of America, Issues and Legislation: The Prescription Release Rule, <http://www.affordableeyewear.net/eyeglass2.htm> (last visited Oct. 13, 2015) (“Despite the Rule, however, many eye doctors have refused to give the patient a prescription unless the patient requested it specifically, and often the doctor has placed intimidating and unnecessary warnings or waivers of responsibility on the prescription. Many patients have been required to request the prescription in writing.”); see also The Optician Won’t Give Me My Prescription!, METAFILTER FORUM, Apr. 24, 2013, <http://ask.metafilter.com/239742/The-optician-wont-give-me-my-prescription> (“My vision insurance covers one eye exam per year, and I went in for it around the beginning of December. I didn’t have the money to pay for new lenses . . . so I told them I’d come back to place my order when I could afford it. I went back today, and they informed me that I would need a new exam [which] would need to be paid for out-of-pocket. I’d like to take my business elsewhere. The catch? They won’t release my prescription.”).

⁴³ Email from Customer to Warby Parker, May 12, 2015.

⁴⁴ See, e.g., Ordering RX Sunglasses Online. Help in Getting PD Measurement, REDDIT FORUM, June 19, 2015, https://www.reddit.com/r/Frugal/comments/3ag1m3/ordering_rx_sunglasses_online_help_in_getting_pd/ (“They won’t give you your PD because they want you to buy glasses from them.”; “Trying to save money and order sunglasses online. I called my eye doctor for my pd measurement and they won’t give it to me.”); Online Eyeglasses?, YOU NEED A BUDGET FORUM, Mar. 10, 2015, <http://forum.youneedabudget.com/discussion/38237/online-eyeglasses> (“All the optometrists I encounter work for eyeglass stores, and they generally won’t give you your prescription and definitely refuse to give you your pupillary distance if you’re not ordering glasses from them, because they know if you have that info you can order glasses online.”); Vision Works Eye Exam, Won’t Give Me PD Measurement, HOMESCHOOLREVIEWS.COM FORUM, Nov. 9, 2013, <http://www.homeschoolreviews.com/forums/4/thread.aspx?id=116596> (“I just had an eye exam yesterday at Vision Works, but they refuse to release to me the PD measurement. They said I can sue them if I buy my glasses from somewhere else . . . I have to buy glasses through them in order for them to release the PD to me. With my husband’s job being cut, I can’t afford their glasses . . .”); Where Can I Get My Pupillary Distance Measured By a Professional?, REDDIT FORUM, Dec. 12, 2014, https://www.reddit.com/r/Seattle/comments/2p3nfl/where_can_i_get_my_pupillary_distance_measured_by/ (“I’ve asked a few optometrists . . . the general response is an indignant ‘no’ followed by a patronizing explanation of how terrible it is that I’d consider ordering glasses online.”).

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These practices undermine the very principle underlying the Eyeglass Rule -- that consumers should have the right to choose to purchase their eyewear from a retailer other than their prescriber. Thus, there is a clear and continuing need for the Eyeglass Rule, but it must be enforced, expanded and improved.

2. What modifications if any should be made to the Eyeglass Rule to increase its benefits to consumers? What modifications should be made to the Eyeglass Rule to reduce any costs imposed on consumers? What modifications should be made to increase benefits to businesses?

Warby Parker has four substantive recommendations to increase consumer welfare and foster a competitive marketplace for eyewear. The Commission should make the following modifications to the Eyeglass Rule: (1) amend the definition of “prescription” to include the PD measurements and explicitly require the inclusion of PD on each prescription; (2) mandate provision or verification of eyeglass prescriptions to authorized third parties within 8 business hours; (3) prohibit short-term prescriptions, *i.e.*, prescriptions that are valid for less than three years, without documented medical justification; and (4) require ECPs to provide a duplicate copy of a prescription at no additional cost to consumers as needed. These recommendations are discussed in detail at Section IV(B) *infra*. In addition, as noted previously, Warby Parker recommends that the Commission take steps to ensure greater consumer awareness and understanding of the Rule and more active enforcement of the Rule.

3. What impact has the Eyeglass Rule had on the flow of truthful information to consumers and on the flow of deceptive information to consumers?

The Eyeglass Rule has increased the flow of prescription information to consumers as compared to when it was first enacted. Some ECPs comply with the spirit of the Eyeglass Rule and provide prescription information without hesitation or provide prescription verifications upon request by other retailers. If not for the willingness of some ECPs to follow the rules and compete fairly, consumers would not have their choice of where to purchase their eyeglasses, and it would be difficult for online suppliers such as Warby Parker to meet consumer demand.

However, a disappointingly large number of ECPs do not comply with terms of the Eyeglass Rule and even more take advantage of gaps in the Eyeglass Rule and refuse to provide full prescription information, such as PD measurements, or refuse to verify prescriptions. These tactics make it very difficult and sometimes impossible for consumers to purchase eyeglasses from anyone other than the ECP. Furthermore, some

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ECPs have resorted to including deceptive disclaimers or warnings on the bottom of prescriptions, which violates the current provisions of the Eyeglass Rule.

Thus, while the Eyeglass Rule has had a positive impact, it should be expanded to close loopholes, such as the ones identified here, that have been exploited to the detriment of consumers, and must be more actively enforced by the Commission.

4. What evidence is available concerning the degree of industry compliance with the Eyeglass Rule?

It is difficult to quantify the level of industry compliance; it varies from ECP to ECP. As noted above, some ECPs abide by the letter and spirit of the Eyeglass Rule, some only comply with its explicit terms, and some do not comply at all. For example, with regard to prescription verification, Warby Parker is forced to expend substantial resources in an effort to track down recalcitrant ECPs and persuade them to provide the information required to fill a consumer order. Despite its best efforts, Warby Parker is only sometimes successful -- Warby Parker is forced to send between 50 and 100 e-mails to customers per day informing the customer that it was unable to verify their prescription (even after 48 hours and repeated phone calls and emails). Those customers are then forced to re-engage with their ECP, against the customer's wishes, or give up their choice of purchasing eyeglasses online.

5. What modifications, if any, should be made to the Eyeglass Rule to account for changes in relevant technology or economic conditions? What evidence supports the proposed modifications?

When the Eyeglass Rule was first promulgated, the Internet did not exist as an online retail network; all shopping was done in person and usually locally. The Eyeglass Rule was subsequently revisited in the Commission's proposed rulemaking in 1998 and final rulemaking in 2004.⁴⁵ It was not until the mid-2000s that e-Commerce began to flourish.⁴⁶ The economic advantages of online commerce are well documented. It gives consumers the ability to gather more easily information on prices, quality, and availability, and this reduction in search costs leads to more efficient transactions and reduced transaction costs.⁴⁷ Non-traditional eyewear sellers, such as online and mail order providers, represent important alternative distribution channels and offer consumers a combination of lower price and increased convenience that many consumers value

⁴⁵ The major change to the Eyeglass Rule in 2004 was to add the Contact Lens Rule.

⁴⁶ See Kayla Webley, *A Brief History of Online Shopping*, TIME (July 16, 2010), <http://content.time.com/time/business/article/0,8599,2004089,00.html>.

⁴⁷ See Fiona Scott Morton, *Consumer Benefit from Use of the Internet*, 6 INNOVATION POLICY AND THE ECONOMY at 68 (Aug. 2006), available at <http://www.nber.org/chapters/c0205.pdf>.

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highly. Indeed, research shows that consumers can often achieve significant savings by purchasing replacement lenses from sellers other than their eye care providers. For example, the Vision Council reports that the industry average for prescription lenses is \$146.25 and the average for frames is \$127.95.⁴⁸ As Warby Parker demonstrates, a complete set of high-quality eyeglasses (frames and prescription lenses) can be priced far more affordably using an online sales model distinct from an ECP practice.⁴⁹

Online sales have a significant convenience advantage for many consumers, especially those who live in remote communities where access and choice is limited. The online marketplace eliminates the need to physically drive to an optical shop, and avoids the risk of multiple long trips if the store does not have the particular lenses in stock and must order them. Consumers who opt for an online vendor, on the other hand, can have eyeglasses delivered directly to their home simply by visiting a web site. Thus, the advent of e-Commerce and the potential savings in time and money that it offers further increase the consumer benefits that may be generated by updating the Eyeglass Rule to further enhance competition and consumer choice.

6. Does the Eyeglass Rule overlap or conflict with other federal, state, or local laws or regulations?

The Eyeglass Rule does not directly overlap or conflict with other federal, state, or local laws or regulations. However, it does leave open many issues and with regard to some of those issues certain states have filled the void by enacting protectionist laws, or state boards have adopted anti-competitive requirements, which collectively have the effect of frustrating the consumer protection goals of the Eyeglass Rule. For example, a few states have enacted laws and regulations making the maximum effective date for prescription lenses one or two years (Iowa,⁵⁰ Mississippi,⁵¹ Pennsylvania,⁵² and the

⁴⁸ VisionWatch, THE VISION COUNCIL at 70, 89 (Dec. 2014).

⁴⁹ *See, e.g.*, Claire Miller and Stephanie Clifford, E-Commerce Companies Bypass the Middlemen, N.Y. TIMES, Mar. 31, 2013, http://www.nytimes.com/2013/04/01/business/e-commerce-companies-bypass-middlemen-to-build-premium-brand.html?_r=0 (“Warby Parker is part of a wave of e-commerce companies that are trying to build premium brands at discount prices by cutting out middlemen and going straight to manufacturers The result is generally cheaper products for consumers”); Eyeglasses Can Be Expensive, Discounters and online Merchants May Be a Good Option, WASHINGTON POST, Jan. 12, 2015, https://www.washingtonpost.com/national/health-science/eyeglasses-can-be-expensive-discounters-and-online-merchants-may-be-a-good-option/2015/01/12/c3aa1bec-70c9-11e4-893f-86bd390a3340_story.html (“Most Web shoppers said they would buy glasses online again. Consumer Reports found a women’s Vogue frame for \$160 at one national bricks-and-mortar retailer that was just \$96 at SimplyEyeglasses.com and \$80 at LensesRx.com.”).

⁵⁰ Iowa Admin Code § 645, 182 (2 years).

⁵¹ 30-2901 Miss. Code R. § 6.2(c) (“A spectacle prescription is valid for no more than two (2) years.”).

⁵² Pa. Code § 23.72 (2 years).

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District of Columbia⁵³ have such laws); New York does not have a statutorily prescribed limit, but the New York Office of the Professions of Ophthalmic Dispensing generally recommends two years as an outer limit.⁵⁴

B. Specific Issues

1. Should the definition of “prescription” be modified to include pupillary distance? Include evidence.

Yes. The principal purpose of the Commission’s Eyeglass Rule is to provide consumers a greater range of choices when buying ophthalmic goods and services. The current Eyeglass Rule does not mandate the inclusion in the prescription of PD measurements -- the distance between the center of each pupil -- which is an indispensable measurement for fabricating eyeglasses. This is an oversight that must be remedied for the Rule to work as contemplated. Many ECPs refuse to provide PD measurements to consumers or charge for it, because it is not a prescription parameter mandated for release under the Eyeglass Rule.⁵⁵ ECPs know that customers who ask for the PD measurement are likely going to order their glasses online or go to another eyeglass seller,⁵⁶ and the ECPs have no incentive to help consumers make that choice.

⁵³ DC Eyeglass Rule 17-6416.

⁵⁴ Frequently Asked Questions, New York State Ophthalmic Dispensing, <http://www.op.nysed.gov/prof/od/odfaq.htm> (last visited Sept. 11, 2015).

⁵⁵ *See, e.g.*, Where Can I Get My Pupillary Distance Measured By a Professional?, REDDIT FORUM, Dec. 12, 2014, https://www.reddit.com/r/Seattle/comments/2p3nfl/where_can_i_get_my_pupillary_distance_measured_by/ (“I was buying a pair of \$300+ glasses and asked if I could get my pupillary distance measurement (I’ll admit, I was hoping to get some sunglasses for under \$30). The lady said they would charge me \$75 for it.”; “Broadway vision source will do it for \$30 as part of an online package.”); Vision Works Eye Exam, Won’t Give Me PD Measurement, HOMESCHOOLREVIEWS.COM FORUM, Nov. 9, 2013, <http://www.homeschoolreviews.com/forums/4/thread.aspx?id=116596> (“I just had an eye exam yesterday at Vision Works, but they refuse to release to me the PD measurement. They said I can sue them if I buy my glasses from somewhere else I have to buy glasses through them in order for them to release the PD to me. With my husband’s job being cut, I can’t afford their glasses”); Eye Dr. Won’t Give PD, IMAMOTHER FORUM, May 30, 2012, <http://www.imamother.com/forum/viewtopic.php?t=185810> (“[T]he eye doctor/glasses store refuse to tell me my PD. They claim that they don’t have to by law.”); Ordering RX Sunglasses Online. Help in Getting PD Measurement, REDDIT FORUM, June 19, 2015, https://www.reddit.com/r/Frugal/comments/3ag1m3/ordering_rx_sunglasses_online_help_in_getting_pd/ (“The last optometrist I saw charged 20 or 30 for the PPD. I would’ve bought glasses at the store if my insurance covered frames but my joke of insurance only covers the exam So there I was, \$30 poorer.”).

⁵⁶ *See, e.g.*, Ordering RX Sunglasses Online. Help in Getting PD Measurement, REDDIT FORUM, June 19, 2015, https://www.reddit.com/r/Frugal/comments/3ag1m3/ordering_rx_sunglasses_online_help_in_getting_pd/ (“They won’t give you your PD because they want you to buy glasses from them.”; “Trying to save money and order sunglasses online. I called my eye doctor for my pd measurement and they won’t give it to me.”);

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Thus, withholding PD information is a tactic that many ECPs use to limit consumer choice. Only by having access to both the prescription and the PD measurement may consumers freely shop the eyewear market, and only modifying the Eyeglass Rule can ensure that consumers will get that information.

In fact, the Commission has in the past objected to state regulatory provisions designed to withhold the information and measurements necessary to fill an eyeglass prescription. On January 13, 2011, the Commission sent a letter to the North Carolina State Board of Opticians commenting on the Board’s proposed rules, one of which proposed to redefine the meaning of “prescription” for eyeglasses, contact lenses, or other ophthalmic appliances, so that “[m]easurements taken by opticians are not considered part of the patient’s prescription, and are not required to be released as part of a prescription.”⁵⁷ The Commission stated:

On its face, the Proposed Rule conflicts with the definition of “contact lens prescription” in the FCLCA. That statute defines “contact lens prescription” to “mean[] a prescription, issued in accordance with State and Federal law, that contains sufficient information for the complete and accurate filling of a prescription.” Information on contact lens fitting is required for the “complete and accurate filling” of a prescription. Even the Proposed Rule acknowledges this by stating that “the optician shall take the measurements necessary to fill the prescription.”⁵⁸

The Commission extended the analysis to the Eyeglass Rule, stating that “the same analysis reveals an apparent conflict with the Eyeglass Rule, which defines ‘prescription’ to mean ‘the written specifications for lenses for eyeglasses which are derived from an eye examination, including all of the information specified by state law, if any, *necessary to obtain lenses for eyeglasses* (emphasis added).’ 16 C.F.R. § 456.1(g).”⁵⁹ Accordingly, the Commission should amend the definition of “prescription” in the Eyeglass Rule to explicitly include the PD measurement. This will help to

Online Eyeglasses?, YOU NEED A BUDGET FORUM, Mar. 10, 2015, <http://forum.youneedabudget.com/discussion/38237/online-eyeglasses> (“All the optometrists I encounter work for eyeglass stores, and they generally won’t give you your prescription and definitely refuse to give you your pupillary distance if you’re not ordering glasses from them, because they know if you have that info you can order glasses online.”); Where Can I Get My Pupillary Distance Measured By a Professional?, REDDIT FORUM, Dec. 12, 2014, https://www.reddit.com/r/Seattle/comments/2p3nfl/where_can_i_get_my_pupillary_distance_measured_by/ (“I’ve asked a few optometrists . . . the general response is an indignant ‘no’ followed by a patronizing explanation of how terrible it is that I’d consider ordering glasses online.”).

⁵⁷ FTC Letter to Sue M. Kornegay, NC State Board of Opticians (Jan. 13, 2011), available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-north-carolina-state-board-opticians-concerning-proposed-regulations-optical-goods/1101ncopticiansletter.pdf.

⁵⁸ *Id.* at 7.

⁵⁹ *Id.* at 7, FN 44 (emphasis in original).

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eliminate the anticompetitive practice of withholding essential PD measurements and frustrating consumer efforts to comparison shop for affordable eyeglasses.

2. Should the Eyeglass Rule be extended to require that prescribers provide a duplicate copy of a prescription to a patient who does not currently have access to the original?

Yes. The Eyeglass Rule should be extended to require that prescribers provide a duplicate copy of a prescription to a patient or their representative -- including an authorized online seller -- who does not currently have access to the original. Although the current Eyeglass Rule requires prescribers to provide patients with a copy of their prescription, it does not require them to provide additional copies should the patient request it. Some providers refuse to provide such copies,⁶⁰ and others charge patients for it.⁶¹ The Commission should require that prescribers provide a duplicate copy of a prescription, free of charge, at the patient's request, or that of their representative, such as an online eyewear company, within the expiration date of the prescription. This will further the goal of the Eyeglass Rule -- to provide patients freedom to choose where to purchase their prescription eyeglasses. That goal is no less applicable to a patient who happens to have misplaced his or her prescription. The Commission should close the loophole that enables ECPs to charge for or withhold duplicate prescriptions.

3. Should the Eyeglass Rule be extended to require that a prescriber provide a copy to or verify a prescription with third parties authorized by the patient?

Yes. While ECPs are required by the existing Eyeglass Rule to provide eyeglass prescriptions to consumers, as discussed in detail previously, there is no specific obligation for ECPs to provide or confirm eyeglass prescriptions filled by third parties. ECPs are able to take advantage of this loophole by refusing to verify prescriptions, thus delaying or even precluding sales by online seller. This harms all third party sellers, and in particular undermines the ability of online sellers to compete, because a key aspect of the value-proposition offered by such sellers is convenience and efficiency.

In contrast to the Eyeglass Rule, the Contact Lens Rule already requires prescribers to verify prescription information to a seller within 8 business hours of

⁶⁰ Warby Parker Survey, October 2015, at p. 6 (30% of optometry patients were not offered their prescriptions).

⁶¹ Eye Doctor Won't Give Me My Prescription, YAHOO ANSWERS FORUM, March 2015, <https://answers.yahoo.com/question/index?qid=20150310164400AAyW7An> (“[A] couple of years ago a private optical outlet . . . refused one of their patients and said if they wanted a copy they would have to pay \$40.00 for the copy.”); Warby Parker Survey, October 2015, at p. 8 (14% of patients who requested their prescriptions were charged for it).

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receiving the verification request.⁶² Imposing a mandatory verification period would comport with the overall spirit and intent of the Eyeglass Rule -- to spur robust competition in the marketplace while providing consumers greater choice, quality and convenience. Warby Parker recommends that the Commission draft language in this regard that allows the prescriber to choose the mode of verification or provision of a prescription -- e.g., telephone, email, fax, etc. This would allow prescribers to select the most convenient option and ensure that the process works as smoothly as possible for all parties, provided they comply with the rule.

Warby Parker also recommends that the prescriber should be required to maintain a log recording the date and time a patient's prescription was requested and released to the authorized agent. The log should be required to be maintained for a period of three years and be available for inspection by the FTC, its employees, and its representatives. These accountability measures would make FTC enforcement easier and more effective, and thus create greater incentives for ECPs to abide by the verification requirements of the Rule.

To that end, the FTC should also include language in the Rule stating that it is a violation of the Rule to: (1) interfere, in any way, with a seller's effort to verify a prescription; (2) respond to a verification request by fraudulently stating that prescription information is incorrect (when in fact it is not); and (3) respond to a verification request by stating that prescription information is inaccurate or invalid without providing the basis for the inaccuracy or invalidity of the prescription, and the correct information.

4. Other Issues: Short-term Prescriptions

Finally, Warby Parker recommends that the Commission modify the Eyeglass Rule to limit the use of short-term prescriptions to situations of documented medical need. As noted above, several states actually require ECPs to issue short-term prescriptions, and the majority of states permit ECPs to issue short-term prescriptions that are valid for less than 3 years. In fact, Florida is the only state that mandates ECPs issue long-term eyeglass prescriptions.⁶³ The practical effect of this is to allow ECPs to write prescriptions with expiration dates as short as one year, without any medical justification to do so. Shorter prescriptions require patients to return to their ECP more frequently, giving the ECP additional opportunities to sell eyeglasses patients -- even if those patients would prefer to purchase elsewhere. Indeed, some patients who have already decided to purchase elsewhere will be forced to return to their ECP only to get a new prescription -- an awkward visit that most consumers would strongly like to avoid.

⁶² 16 C.F.R. § 315.5(c)(3).

⁶³ Fla. Stat. 463.012(2)(a) (5 years).

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The notion of mandating prescription periods to promote competition is not new. The FCLCA requires that contact lens prescriptions be valid for *at least* one year, unless, in the prescriber’s medical judgment, the patient requires a shorter prescription length. Congress and the Commission recognize that short prescription lengths can be misused by certain ECPs to benefit themselves to the detriment of consumers.

Moreover, absent a documented medical justification, short-term prescriptions unnecessarily increase health-care costs by forcing consumers to spend time and money on unneeded annual or bi-annual eye exams. There is simply no evidence that most consumers need eye exams more than once every three years.⁶⁴ In fact, unnecessarily short prescriptions have become yet another way to discourage competition and limit consumer choice.

We recommend that the Commission adopt a three-year minimum prescription expiration timeframe, absent a documented medical basis for any particular short term prescription. Years of experience with contact lens regulations has shown that minimum prescription periods are good public policy and the substantially lower risk associated with eyeglasses as compared to contact lenses justifies a longer time period.

5. Enhanced Consumer Notification and Improved Enforcement

As discussed in detail above, ECPs do not always abide by the current requirements of the Rule. It is not uncommon for ECPs to violate the Rule by failing to offer consumers their prescription, and some ECPs actively seek to discourage patients even when those patients affirmatively request their prescriptions. Neither the current provisions of the Rule, nor the recommended improvements to the Rule, will be of any value to consumers unless consumers understand their rights and the FTC protects those rights. The FTC should take several steps to address these issues.

First, the Commission should require prescribers to provide patients with a written “Bill of Rights” at the time of an appointment, and should have signs including the same information posted prominently in their offices. The Bill of Rights should notify patients about their rights under the Eyeglass Rule, including their right to receive their prescription automatically and free of charge, their right to a PD measurement as part of

⁶⁴ See, e.g., Recommended Frequency of Eye Examinations, The California Eye Institute, http://www.same.com/documents/Patient_Information/EyeExam_Frequency.pdf (recommending 1 exam *in total* for patients up to age 39 and exams every 2-4 years for patients up to age 64); American Academy of Optometry, David B. Elliott, Blurred Vision, Spectacle Correction, and Falls in Older Adults, 91 OPTOMETRY AND VISION SCIENCE 593, 599 (June 2014), *available at* file:///C:/Users/ns4452/Downloads/The_Glenn_A_Fry_Award_Lecture_2013_Blurred.3.pdf (“[I]f a patient reports no problems with his or her vision, but simply requests a new frame, ‘if it ain’t broke don’t fix it’ is an appropriate clinical maxim and the refractive correction is best not changed.”).

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the prescription, and their right to purchase glasses from a provider of their own choosing.

Next, the FTC should clarify that any violation of the Eyeglass Rule -- either by prescribers or sellers -- constitutes an unfair act or practice in violation of Section 5 of the Federal Trade Commission Act, and is enforceable under the same standards and subject to the same fines and penalties as any other violation of the Act.

Finally Warby Parker also encourages the FTC to investigate prescriber practices and take enforcement action, where necessary, against prescribers who violate the Rule. To this point, prescribers have been able to violate the Rule with little risk of consequences. Many consumers are not aware of their rights and enforcement actions have been virtually non-existent.⁶⁵ More aggressive enforcement would quickly change this dynamic and lead to more frequent compliance with the Rule.

To assist the FTC in this effort, Warby Parker suggests that the FTC create a more user-friendly online complaint process for consumers, and that the FTC allow complaints regarding any violation of the rule, not just whether the prescription was withheld.

Greater consumer awareness and aggressive FTC enforcement will greatly enhance the value of the Rule.

V. CONCLUSION

When first promulgated, the Eyeglass Rule made progress in tempering anti-competitive practices by ECPs that limited consumer options for eyeglass purchases. However, the eyeglass industry has changed substantially since 1978. The Internet revolutionized how individuals purchase eyeglasses and provides competitive opportunities that did not exist over 30 years ago. Furthermore, long periods of time without significant regulatory change has bred abusive and anticompetitive marketplace behavior. The FTC should revise the Eyeglass Rule to breathe life into its original purpose once again. To do this, the FTC should: (1) require complete prescription information, including pupillary distance measurements, on all prescriptions; (2) require verification or provision of a prescription requested by an authorized third party within eight business hours; (3) prohibit short-term prescriptions that are valid for less than three years without documented medical justification; and (4) require ECPs to provide a

⁶⁵ A brief online search turned up only one instance of an enforcement action, a press release from 1996 reflecting an FTC settlement with an eye-care center that had failed to provide patients with prescriptions. See Press Release, FTC, [Dallas Eyecare Center Agrees To Settle Charges that They Failed to Give Consumers Copies of Their Eyeglass Prescriptions](https://www.ftc.gov/news-events/press-releases/1996/05/dallas-eyecare-center-agrees-settle-charges-they-failed-give) (May 3, 1996), <https://www.ftc.gov/news-events/press-releases/1996/05/dallas-eyecare-center-agrees-settle-charges-they-failed-give>.

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duplicate copy of a prescription at no additional cost to patients as needed. The FTC should also take steps to enhance consumer awareness and increase enforcement against prescribers who violate the Rule.

Warby Parker appreciates the Commission's consideration of these comments, and we would be happy to answer any questions.

Respectfully submitted,



Anjali Kumar
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