



GOVERNOR GREG ABBOTT

To: Ron Hopping, Chair
Janice McCoy, Executive Director
Texas Optometry Board

From: Caleb Gunnels, Counsel
Regulatory Compliance Division, Office of the Governor

Date: April 9, 2024

Subject: Proposed Title 22 Texas Administrative Code Sections 279.1 and 279.3 (RCD Rule Review #2024-002)

I. Syllabus

The Texas Optometry Board (“board”) proposed amended 22 TAC §§279.1 and 279.3, which generally require optometrists or therapeutic optometrists to conduct in-person initial examinations of patients for whom contact lenses or ophthalmic lenses (“spectacles”) are to be prescribed.¹ The board submitted the proposed rules to the Regulatory Compliance Division (“division”) for review on January 10, 2024. The division invited public comments on the proposed rules for a 30-day period ending on February 16, 2024, and the division received several comments expressing concerns about the potential effect of the proposed in-person examination requirements on optometrists utilizing telehealth services as well as limitations on patient access to care.²

Based on the following analysis, the division has determined that the requirement for optometrists to conduct an in-person initial examination of patients for whom contact lenses or spectacles are to be prescribed is inconsistent with state policy, and, thus, the proposed rules are disapproved for final adoption.

¹ 49 Tex. Reg. 7 (2024) (to be codified at 22 TAC §§279.1 and 279.3) (proposed Jan. 5, 2024) (Tex. Optometry Bd.); Rule Submission Memorandum from the Texas Optometry Board (Jan. 10, 2024) (on file with the Regulatory Compliance Division of the Office of the Governor). Hereinafter, all references to “optometrists” include both optometrists and therapeutic optometrists, as defined in Section 351.002(4) and (9), Texas Occupations Code.

² Public Comment from ATA Action (Feb. 1, 2024), at 1-2 (on file with the Regulatory Compliance Division of the Office of the Governor); Public Comment from National Association of Retail Optical Companies (Feb. 2, 2024), at 2 (on file with the Regulatory Compliance Division of the Office of the Governor); Public Comment from Access Eyecare Services, LLC (Feb. 7, 2024), at 1 (on file with the Regulatory Compliance Division of the Office of the Governor).

II. Analysis

In 2021, the board proposed amendments to 22 TAC §279.16, to implement changes to Chapter 111, Texas Occupations Code, which updated requirements and expanded opportunities for health professionals providing telehealth services.³ The amendments to §279.16 allowed optometrists to remotely treat and examine patients, and established standards of care for optometric telehealth services, which are generally in line with the same standards of care for in-person settings. The proposed amendments were submitted to the division for review and were ultimately approved.⁴ While the board asserted then, and asserts the same today, that optometrists are required to make and record certain patient findings during an initial in-person examination to prescribe contact lenses or spectacles, the division determined that no such requirement existed under §279.16 as it was proposed.⁵ The division also noted that nothing else in the rule barred those findings from being made or recorded in alternative settings, including through telehealth services, to the extent allowed by Chapter 351 and other law.⁶

However, after an initial 5-4 board vote, the board approved proposed amendments to 22 TAC §§279.1 and 279.3, which would have required optometrists to perform initial in-person examinations, and they were later published in the *Texas Register* on May 26, 2023.⁷ The proposed rules were submitted to the division for review on July 3, 2023, but were ultimately withdrawn by the board on August 29, 2023.⁸ As a result, the division withdrew its review of the rules on August 31, 2023. At a subsequent board meeting in November 2023, the board, again, approved proposing similar changes to the aforementioned rules.⁹ Leading up to the rule proposal, the board received recommendations from its Rules Committee and also held two stakeholder meetings.¹⁰ In support of the current rule proposal, the board notes that in-person,

³ 46 Tex. Reg. 1454 (2021) (codified at 22 TAC §279.16) (proposed Mar. 5, 2021) (Tex. Optometry Bd.); Acts of 2017, 85th Leg., R.S., ch. 205 (S.B. 1107).

⁴ Rule Submission Memorandum from the Texas Optometry Board (Mar. 9, 2021) (on file with the Regulatory Compliance Division of the Office of the Governor); Regulatory Compliance Division Determination Letter for Proposed Title 22 Texas Administrative Code Section 279.16 (RCD Rule Review #2021-004) (Apr. 30, 2021) (on file with the Regulatory Compliance Division of the Office of the Governor).

⁵ Rule Submission Memorandum from the Texas Optometry Board (Mar. 9, 2021), at 2; 46 Tex. Reg. 1454 (2021) (preamble to proposed amendments to 22 TAC §279.16) (proposed Mar. 5, 2021) (Tex. Optometry Bd.); Rule Submission Memorandum from the Texas Optometry Board (Jan. 10, 2024), at 2; Regulatory Compliance Division Determination Letter for Proposed Title 22 Texas Administrative Code Section 279.16 (RCD Rule Review #2021-004), at 2-3.

⁶ Regulatory Compliance Division Determination Letter for Proposed Title 22 Texas Administrative Code Section 279.16 (RCD Rule Review #2021-004), at 3.

⁷ Texas Optometry Board, *Board Meeting Minutes*, (Apr. 28, 2023), at 5, (on file with the Regulatory Compliance Division of the Office of the Governor); 48 Tex. Reg. 2654 (2023) (to be codified at 22 TAC §§279.1 and 279.3) (proposed May 26, 2023) (Tex. Optometry Bd.).

⁸ Rule Submission Memorandum from the Texas Optometry Board (July 3, 2023) (on file with the Regulatory Compliance Division of the Office of the Governor); 48 Tex. Reg. 5135 (2023) (amendments to 22 TAC §§279.1 and 279.3) (withdrawn Aug. 29, 2023) (Tex. Optometry Bd.).

⁹ Rule Submission Memorandum from the Texas Optometry Board (Jan. 10, 2024), at 1.

¹⁰ *Id.* at 2.

comprehensive eye exams are the appropriate standard for patient care.¹¹ Because the proposed amended rules may impact competition for certain optometric services, the board submitted proposed §§279.1 and 279.3 to the division for review.¹²

A. The in-person initial examination requirements in proposed amended §§279.1 and 279.3 are inconsistent with state policy.

To begin, proposed amended §§279.1(a)(1) and 279.3(a)(1) would require optometrists, during an initial examination of a patient for whom contact lenses or spectacles, respectively, are to be prescribed, to examine the individual in-person and to make and record certain findings related to the individual's eyes and vision, unless prohibited by a patient's unique condition. The current rules require only that an optometrist personally make and record such findings, if possible. The impetus for this proposal was the board finding, in the course of inspections and complaint review, that some optometrists, for both in-person and telehealth exams, were not compliant with Sections 351.353 and 351.453, Occupations Code.¹³ Section 351.353 generally requires an optometrist, during an initial examination for an ophthalmic lens prescription, to make and record, if possible, certain findings concerning the patient's condition. Section 351.453, in part, prohibits optometrists from signing, or causing to be signed, an ophthalmic lens prescription without personally examining the eyes of the person for whom the prescription is made.

While statute does not expressly require in-person examinations, the board wishes to clarify its interpretation that the statutory requirement to personally examine a patient means to do so in-person.¹⁴ Yet, when the board proposed amendments to 22 TAC §279.16(b), (e), and (f), which the division subsequently approved, it allowed optometrists to establish a practitioner-patient relationship utilizing telehealth services and also set the standards of care for telehealth services and the issuance of prescriptions to the same standards of care for in-person settings.¹⁵ Current §279.16(e)(3) specifically requires optometrists providing a telehealth service to meet the minimum standard of care for the initial examination of a patient for whom an ophthalmic lens prescription is signed under Section 351.353, Occupations Code. The division determined during its review of proposed amended §279.16, and the same is true today, that nothing in the rule bars initial examination findings from being made and recorded by an optometrist in alternative settings, including through telehealth services, to the extent allowed by Chapter 351 and other law.¹⁶ As such, the proposed rules appear to conflict with the board's telehealth rules under §279.16, and industry comments received by the division also raised this concern.¹⁷ One

¹¹ *Id.* at 3.

¹² *Id.*; The board does not believe the proposed amended rules create a barrier to competition, but noted industry concerns related to potential limitations on utilizing synchronous eye exams.

¹³ *Id.*

¹⁴ *Id.* at 2-3.

¹⁵ Determination Letter for Proposed Title 22 Texas Administrative Code Section 279.16 (RCD Rule Review #2021-004).

¹⁶ *Id.* at 3.

¹⁷ Public Comment from ATA Action (Feb. 1, 2024), at 2; Public Comment from National Association of Retail Optical Companies (Feb. 2, 2024), at 3; Public Comment from Access Eyecare Services, LLC (Feb. 7, 2024), at 4.

commenter noted that while §279.16 permits synchronous telehealth to establish the practitioner-patient relationship and to perform initial eye exams in a way that meets the same standard of care for in-person settings, the proposed amended rules would prohibit the same synchronous telehealth option for the initial examination at which the practitioner-patient relationship is typically established.¹⁸

In the course of reviewing the proposed rules, the division is tasked, in part, with determining whether a proposed rule promotes a clearly articulated and affirmatively expressed policy as established by the legislature to displace competition with government action pursuant to Section 57.106(a)(2), Occupations Code. The board asserts that its proposed interpretation does not create a barrier to market competition.¹⁹ However, a number of public comments submitted both to the board and the division have highlighted that the proposed rules would displace or limit numerous businesses that have either incorporated the use of telehealth services into their practices or that rely solely on utilizing telehealth methods to treat patients from doing so, regardless of whether such services meet or exceed the standard of care required for in-person examinations.²⁰ The change would also limit the public's access to the optometric services of their choice, may raise prices, and may burden citizens in areas of the state where such services are scarce from receiving needed treatment. The board does not cite any alleged harms that the proposed rules are intended to address, only that the board has found, during the course of inspections and complaint review, that some optometrists "for both in-person and telehealth exams" are not compliant with Sections 351.353 and 351.453, Occupations Code.²¹

Again, Section 351.353 only specifies that an optometrist who signs or causes to be signed an ophthalmic lens prescription to make and record the patient's findings during the initial examination.²² And, Section 351.453 requires an optometrist to have personally examined the eyes of a person for whom an ophthalmic lens prescription is made.²³ Statute does not expressly require such examinations or findings to be made in-person, only that they be made personally by the optometrist signing or causing a prescription to be signed. The division has already noted

¹⁸ Public Comment from Access Eyecare Services, LLC (Feb. 7, 2024), at 4.

¹⁹ Rule Submission Memorandum from the Texas Optometry Board (Jan. 10, 2024), at 3.

²⁰ Public Comment from ATA Action (Feb. 1, 2024), at 4; Public Comment from National Association of Retail Optical Companies (Feb. 2, 2024), at 4; Public Comment from Access Eyecare Services, LLC (Feb. 7, 2024), at 1 and 5; Agency Submission of Administrative Record for the Proposed Rules, Public Comment Submitted from Brad Brocwell, O.D., Vice President of Clinical Operations, Now Optics, Kari Cline, O.D., Director for Clinical Operations, VisionWorks, Howard Fried, O.D., President, Digital Optometrics, Ross Gouker, O.D., Vice President, EyeCare and Vision Services, Warby Parker, Chad Overman, O.D., Chief Operating Officer, 20/20 Now (Dec. 23, 2022), at 6 (on file with the Regulatory Compliance Division of the Office of the Governor); Public Comment from NowOptics, LLC (Aug. 2, 2023), at 1, (on file with the Regulatory Compliance Division of the Office of the Governor).

²¹ Rule Submission Memorandum from the Texas Optometry Board (Jan. 10, 2024), at 3.

²² Tex. Occ. Code § 351.353 ("To ensure adequate examination of a patient for whom an optometrist or therapeutic optometrist signs or causes to be signed an ophthalmic lens prescription, in the initial examination of the patient the optometrist or therapeutic optometrist shall make and record, if possible . . . [specified findings].").

²³ *Id.* § 351.453 ("An optometrist or therapeutic optometrist may not sign, or cause to be signed, an ophthalmic lens prescription without first personally examining the eyes of the person for whom the prescription is made.").

that §279.16 appropriately reflects state policy regarding telehealth services, in part, because nothing in the rule barred an optometrist from making and recording patient health findings in alternative settings.²⁴ Should the board find that an optometrist has not otherwise met an appropriate practice standard through the course of its inspections and complaint review process, then the board can and should use its disciplinary procedures against such a provider pursuant to Chapter 351, Subchapter K, Occupations Code. Here, however, the proposed rules would impose a blanket ban on telehealth services for certain initial examinations, without regard to whether such services may meet or exceed the same standard of care required for in-person settings. The imposition of such a requirement presents a clear barrier to market participation, and one that the legislature did not clearly articulate or affirmatively express in statute.²⁵ Thus, proposed amended §§279.1(a)(1) and 279.3(a)(1) are inconsistent with state policy.

The remainder of the proposed amendments make minor changes, such as clarifying that an optometrist must personally notate in the patient's record the reasons why it was not possible to make and record patient examination findings, that any disciplinary charges brought against an optometrist must state the specific instances in which it is alleged that such an individual did not comply with board rules, and makes grammatical corrections to ensure consistency with board rules.²⁶ The proposed changes do little to effect the substance of the rules and are a reasonable exercise of the board's rulemaking authority pursuant to Section 351.151, Occupations Code. As such, they are consistent with state policy.

III. Determination

The division has determined that parts of proposed §§279.1 and 279.3 are inconsistent with state policy, as set forth above, and are consequently disapproved by the division as written. Consistent with the above analysis, the board could ensure that an optometrist personally makes and records patient examination findings via alternative settings, so long as such an examination follows the appropriate standards of care for in-person settings. However, if the board decides to alter the standards for optometrists to utilize telehealth services for an initial examination to prescribe contact lenses or spectacles, it may not do so by banning such services in their entirety.

²⁴ Determination Letter for Proposed Title 22 Texas Administrative Code Section 279.16 (RCD Rule Review #2021-004), at 1 and 3.

²⁵ Public Comment from National Association of Retail Optical Companies (citing that its association members have performed more than eight million ocular telehealth exams in the U.S.) (Feb. 2, 2024), at 6; Public Comment from ATA Action (citing that telehealth business models that rely solely on telehealth modalities would be required to alter their business models, establish brick-and-mortar locations, or exit the market place entirely) (Feb. 1, 2024), at 4; Public Comment from Access Eyecare Services, LLC (citing that it employs optometrists to provide optometric telehealth services who have provided more than 150,000 synchronous comprehensive telehealth eye examinations to patients at more than 100 locations across 17 states) (Feb. 7, 2024), at 1 and 3.

²⁶ 49 Tex. Reg. 7 and 9 (2024) (preamble to proposed §§ 279.1 and 279.3) (Jan. 5, 2024) (Tex. Optometry Bd.).