



MEMORANDUM

To: Regulatory Compliance Division Director
From: Janice McCoy, Executive Director
Date: January 10, 2024
RE: 22 TAC §§279.1 & 279.3

The rules in the Chapter 279 were reviewed as a result of the Board's general rule review under Texas Government Code §2001.039. Notice of the review was published in the June 10, 2022, issue of the Texas Register (47 TexReg 3487). No comments were received regarding the Board's notice of review.

The Board has determined that there continues to be a need for the rules in Chapter 279. The Board has also determined that changes to §§279.1 and 279.3 as currently in effect are necessary.

The Board proposed amendments published in the May 26, 2023, issue of the Texas Register (48 TexReg 2654-2657) and submitted those rules to the Office of Regulatory Compliance for review. The Board withdrew those rules on August 29, 2023.

At its November 2023 meeting, the Board again voted to propose amendments to §§279.1 and 279.3. Those rules were published in the January 5, 2024, issue of the Texas Register (49 TexReg 7-10).

To facilitate the Regulatory Compliance Division's review of the proposed rule, the Texas Optometry Board respectfully provides answers to the following questions:

1. Briefly describe the proposed rule.

For both rules, the Board proposes to require the optometrist or therapeutic optometrist to "examine in-person" instead of "personally make" certain findings during an initial visit. The Board proposes that the findings must be made unless prohibited by the patient's unique condition instead of "if possible." The Board proposes to require the optometrist or therapeutic optometrist to personally notate why it is not possible to record the required findings. For discipline purposes, the Board proposes that charges must state the specific instances in which it is alleged that the optometrist or therapeutic optometrist did not comply with the rule.

2. What is the purpose of the proposed rule?

The Board would like to better clarify what is required by optometrists under §§351.353 and 351.453 of the Texas Optometry Act (Act). The Board determined it was necessary to update the rule to clarify the existing Board interpretation that personally means the three tests required to be done by a licensed optometrist during the initial patient visit are done in-person by the licensed optometrist. According to the Board, this interpretation furthers its mission to protect the public health and safety by ensuring that the eyes of Texas patients are being examined by licensed optometrists and not by unlicensed and possibly untrained staff.

These rules clarify the Board's long-standing interpretation of §351.353 of the Act which requires ten specific findings to be made and recorded during an initial examination of a patient in which a prescription is to be made. As outlined in statute, these ten findings are to ensure the adequate examination of a patient. Neither the statute or the rule sets guidance for medical or routine refraction visits between a patient and an optometrist – only the initial visit for a prescription for contacts. As currently written, the rule sets out that three of the ten findings during an initial visit must be performed by the licensed optometrist while the other seven findings may be delegated to an assistant with oversight by the licensed optometrist.

Additionally, §351.453 of the Act states “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.”

3. Describe any relevant factual background to the proposed rule and the impetus for the state agency to consider rulemaking.

As mentioned above, the Board considered updating the rules after its quadrennial rule review. Additionally, in the course of inspections and complaint review, the Board has noticed that some optometrists are not in compliance with §351.353, for both in-person and telehealth exams, and with §351.453 which requires an optometrist to personally examine the eyes of a person for whom a prescription is made.

4. Describe the legal authority for the proposed rule.

The amendments to §§279.1 and 279.3 are proposed under the Texas Occupations Code, §§351.151, 351.353 and 351.453. The Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession.

5. Describe the process that the state agency followed in developing the proposed rule, including any public hearings held, public comments invited, studies conducted, and data collected or analyzed.

The Board delegated the development of the amendments to the Rules Committee. The Rules Committee has met several times to consider information and proposed amendments to this rule. The Rules Committee has consulted with legal counsel from the Office of the Attorney General's Office regarding authority and interpretation. The agency has held two stakeholder meetings (2022 and 2023) regarding changes to Chapter 279. Finally, the agency has received public comment from the previous publications that have been withdrawn.

6. Describe the harm that the proposed rule is intended to address and how the proposed rule will address the harm.

In the course of inspections and complaint review, the Board has noticed that some optometrists are not compliant with §§351.353 and 351.453 of the Act, for both in-person and telehealth exams. The Board is attempting to ensure that Texas patients receive high quality health care from licensed Texas optometrists in compliance with the Act.

Texas patients should be able to receive care from a licensed optometrist at all times. The Board believes that in-person, comprehensive eye exams will continue to be the appropriate standard for patient care. However, the Board, recognizing the value of telehealth, adopted a rule (22 TAC §279.16) to allow optometrists and optometry practices to embrace the use of telehealth services in order to ensure continuity of care and access to care for all patients. The Board does not believe the proposal impacts telehealth for routine (subsequent) or medical visits.

7. Do any less restrictive alternatives to the proposed rule exist for addressing the same harm? If so, include a comparison of the proposed rule to the alternatives and a justification for not pursuing a less restrictive alternative. If no less restrictive alternatives exist, explain why.

Some providers argue that the proposed language limits the ability to offer synchronous telehealth initial exams. Given its long-standing interpretation and accessible current technology, the Board does not believe synchronous eye exams allow the optometrist to fully examine the eye for health issues – which is a key part of an initial visit for a prescription and allows the optometrist to set a baseline for a patient's eye health. Additionally, the changes do not limit or impede any subsequent care or routine visits being done via telehealth.

8. Indicate how the proposed rule affects market competition (See Section 57.105(d), Texas Occupations Code).

The Board does not feel that the proposal creates a barrier to market competition as the amendment is a clarification of the Board's long-standing interpretation of statute regarding an initial visit for a prescription. The ten findings required during an initial visit ensure the adequate examination of a patient. The rule does not set guidance for medical or routine refraction visits between a patient and an optometrist – only the initial visit for a prescription

Some telehealth providers would argue that it limits their ability to compete against traditional face to face providers. Given its long-standing interpretation, the Board does not believe a synchronous eye exam allows the optometrist to fully examine the eye for health issues – which is a key part of an initial visit for a prescription and allows the optometrist to set a baseline for a patient's eye health. Additionally, the changes do not limit or impede any subsequent care or routine visits being done via telehealth.

9. Describe the specific impact that the proposed rule will have on market competition and how that effect is consistent with state policy as established by the Legislature in state statute.

See Response 8.

10. Did the state agency self-determine that the proposed rule affects market competition or did the Regulatory Compliance Division identify the proposed rule as possibly affecting market competition?

The Board does not think the rule affects market competition, but is seeking the Division's advice.

11. Does the proposed rule relate to a question that is the subject of an opinion request pending before the Office of the Attorney General? Does the proposed rule relate to an opinion previously issued by the Office of the Attorney General?

Partially – see KP-047

12. Does the proposed rule relate to a matter on which there is pending litigation or a final court order?

Partially – the Board has a dozen cases pending at SOAH regarding violation of §351.353, but those deal more with the optometrist not complying with statute as a direct result of working for an ophthalmologist. However, in August 2023, the Board affirmed an Administrative Law Judge (ALJ) decision that an optometrist is not excused from the requirements to make the findings required in §351.353 even in a virtual setting by claiming that those findings are impossible to accomplish with a remote exam. The Board's action in adopting the ALJ decision has been appealed to district court. A hearing will occur in January on the timeliness of the filing. See attached.

13. Is there anything else that the state agency would like the Regulatory Compliance Division to know about the proposed rule?

These sections of the Board's rules clarify §351.353 of the Act which requires ten specific findings to be made and recorded during an initial examination of a patient in which an ophthalmic prescription (contact lens and/or spectacle) is to be made. As outlined in statute, these ten findings are to ensure the adequate examination of a patient. The rule as currently written sets out that three of the ten findings during an initial visit must be performed by the licensed optometrist while the other seven findings may be delegated to an assistant with oversight by the licensed optometrist.

The three tests required to be done in person by a licensed optometrist during an initial visit for glasses or contacts include:

- **Biomicroscopy** – In this test, the optometrist should examine the front of the patient's eyes with a special microscope and light. This allows the doctor to closely examine the area around the eyes, as well as the surface and deeper areas of the eye. Usually this requires the patient to place his/her chin on a chinrest and lean forward. The doctor will then use a moveable light as the doctor looks through a microscope at the patient's eyes. *Using direct observation, reflections, or contrast allows the doctor to detect anything unusual on the front surface of the eye and surrounding tissues.* Texas Optometry Board rules require the doctor to physically perform this test themselves to ensure the health of the patient's eye.
- **Internal Examination** – The doctor must use an instrument(s) to look into the deeper areas inside of the eye. This may be done by the doctor using a strong magnifying lens with the biomicroscope (see above) or with an apparatus that they would hold up to the doctor's own eye(s) as they shine a light into the patient's eyes. By using these tools, the doctor can see the deeper inside areas of the globe of the eye that include the optic nerve and retina in the back of the eye. There are also many blood vessels, nerves, and ocular tissues that need

to be evaluated in this area of the eye. *These findings are critical to help protect the patient's general health and eye health as well as to good vision and reduce the chance of the patient losing vision. Also, they may alert the doctor to other health problems that may need attention.* Texas Optometry Board rules require the doctor to physically perform this test themselves to ensure the health of not only the patient's eye but the general health of the patient.

- Subjective findings – This part of the exam is when the doctor asks the patient how he/she sees through different lenses. The doctor will measure and interpret the information for each eye individually and also both eyes together. These findings should be done for close range vision and for distance vision. While a technician may assist with a portion of this exam, Texas Optometry Board rules also require the doctor to physically perform this test themselves.

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to

submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. ~~[Square brackets and strikethrough]~~ indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 22. EXAMINING BOARDS

PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 279. INTERPRETATIONS

22 TAC §279.1

The Texas Optometry Board proposes amendments to 22 TAC Title 14 Chapter 279, §279.1 - Contact Lens Examination.

The rules in the Chapter 279 were reviewed as a result of the Board's general rule review under Texas Government Code §2001.039. Notice of the review was published in the June 10, 2022, issue of the *Texas Register* (47 TexReg 3487). No comments were received regarding the Board's notice of review.

The Board has determined that there continues to be a need for the rules in Chapter 279. The Board has also determined that changes to §279.1 as currently in effect are necessary to clarify the statute.

Overview and Explanation of the Proposed Rule. This section of the Board's rules clarifies Texas Optometry Act §351.353 which requires ten specific findings to be made and recorded during an initial examination of a patient in which an ophthalmic contact lens prescription is to be made. As outlined in statute, these ten findings are to ensure the adequate examination of a patient. The rule does not set guidance for medical or routine refraction visits between a patient and an optometrist - only the initial visit for a prescription for contacts. The rule as currently written sets out that three of the ten findings during an initial visit must be performed by the licensed optometrist while the other seven findings may be delegated to an assistant with oversight by the licensed optometrist. Additionally, Texas Optometry Act §351.453 states "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."

On November 3, 2023, the Board proposed clarifications to the rules as follows:

- The proposal will clarify that the optometrist or therapeutic optometrist is to "examine in-person" instead of "personally make" three of the ten findings during an initial visit for a contact lens prescription. The other seven required findings may continue to be delegated to an assistant.

- It states that the findings must be made unless prohibited by the patient's unique condition instead of "if possible." It requires the optometrist or therapeutic optometrist to personally notate why it is not possible to record the required findings. This language is affirmed in a recent decision from the State Office of Administrative Hearings.

- It clarifies that for discipline purposes, the charges must state the specific instances in which it is alleged that the optometrist or therapeutic optometrist did not comply with the rule.

- Finally, the amendment makes non-substantive capitalization changes to ensure consistency across the Board's rules.

Government Growth Impact Statement. The rule clarifies the Board's long-standing interpretation of statute (see Tex. Occ. Code §§351.353 and 351.453) to ensure the public health is protected. Therefore, for the first five-year period the proposed rule is in effect, the Board estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Small Business, Micro-Business, and Rural Community Impact Statement. Ms. McCoy has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities as the amendment is a clarification of the Board's long-standing interpretation of statute and does not positively or adversely impact the state's economy.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. The proposed rule clarifies the Board's long-standing interpretation of statute (see Tex. Occ. Code §§351.353 and 351.453) to ensure the public health is protected. Therefore, Ms. McCoy has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities as the amendment is a clarification of the Board's long-standing interpretation of statute and does not positively or adversely impact the state's economy. Thus, the Board is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Takings Impact Assessment. Ms. McCoy has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Local Employment Impact Statement. Ms. McCoy has determined that the proposed rule will have no impact on local employment or a local economy as the amendment is a clarification of the Board's long-standing interpretation of statute. Thus, the Board is not required to prepare a local employment impact statement pursuant to §2001.024 of the Tex. Gov't Code.

Public Benefit. Ms. McCoy has determined for the first five-year period the proposed rule is in effect there will be a benefit to the general public because the proposed rule will provide greater clarity, consistency, and efficiency in how licensed optometrists and therapeutic optometrists fully comply with §351.353 of the Act during an initial patient visit for a contact lens prescription. The Board determined it was necessary to update the rule to clarify the existing Board interpretation that personally means the three tests during the initial patient visit are done in person by the optometrist. According to the Board, this interpretation furthers its mission to protect the public health and safety by ensuring that the eyes of Texas patients during an initial visit are being examined by licensed optometrists and not by unlicensed staff.

Fiscal Note. Janice McCoy, Executive Director of the Board, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Ms. McCoy has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Board on licensees is not expected to increase.

Even without the clarifying amendment, long-standing Board actions and policy assumes compliance with Tex. Occ. Code §351.353 that all initial patient visits must contain the ten findings and with Tex. Occ. Code §351.453 that states "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."

PUBLIC COMMENTS: Comments on the amended rule may be submitted electronically to: janice.mccoy@tob.texas.gov or in writing to Janice McCoy, Executive Director, Texas Optometry Board, 1801 N. Congress, Suite 9.300, Austin, Texas 78701. The deadline for furnishing comments is thirty days after publication in the *Texas Register*. The Board requests that if you have previously submitted comments on similar rules that have been withdrawn to resubmit your comments.

Statutory Authority. The Board proposes this rule pursuant to the authority found in §351.151 of the Tex. Occ. Code which vests the Board with the authority to adopt rules necessary to perform its duties and implement Chapter 351 of the Tex. Occ. Code.

The Board also proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Lastly, the Board proposes this rule pursuant to Texas Occupations Code §351.353 and §351.453.

No other sections are affected by the amendments.

§279.1. Contact Lens Examination.

(a) The optometrist or therapeutic optometrist shall, in the initial examination of the patient for whom contact lenses are prescribed:

(1) Examine in-person [~~Personally make~~] and record, unless prohibited by the patient's unique condition [~~if possible~~], the following findings of the conditions of the patient as required by §351.353 of the Act:

(A) biomicroscopy examination (lids, cornea, sclera, etc.), using a binocular microscope;

(B) internal ophthalmoscopic examination (media, fundus, etc.), using an ophthalmoscope or biomicroscope with fundus condensing lenses; videos and photographs may be used only for documentation and consultation purposes but do not fulfill the internal ophthalmoscopic examination requirement; and

(C) subjective findings: [] far point and near point;

(2) Either personally make and record or authorize an assistant present in the same office with the optometrist or therapeutic optometrist to make and record the following findings required by §351.353 of the Act. The authorization for assistants to make and record the following findings does not relieve the optometrist or therapeutic optometrist of professional responsibility for the proper examination and recording of each finding required by §351.353 of the Act:

(A) case history (ocular, physical, occupational, and other pertinent information);

(B) visual acuity;

(C) static retinoscopy O.D., O.S., or autorefractor;

(D) assessment of binocular function;

(E) amplitude or range of accommodation;

(F) tonometry; and

(G) angle of vision: [] to right and to left; []

(3) The optometrist or therapeutic optometrist shall personally [~~Personally~~] notate in the patient's record the reasons why it is not possible to make and record the findings required in subsection (a) of this section;

(4) When a follow-up visit is medically indicated, schedule the follow-up visit within 30 days of the contact lens fitting, and inform the patient on the initial visit regarding the necessity for the follow-up care; and

(5) Personally or authorize an assistant to instruct the patient in the proper care of lenses.

(b) The optometrist or therapeutic optometrist and assistants shall observe proper hygiene in the handling and dispensing of the contact lenses and in the conduct of the examination. Proper hygiene includes sanitary office conditions, running water in the office where contact lenses are dispensed, and proper sterilization of diagnostic lenses and instruments.

(c) The fitting of contact lenses may be performed only by a licensed physician, optometrist, or therapeutic optometrist. Ophthalmic dispensers may make mechanical adjustments to contact lenses and dispense contact lenses only after receipt of a fully written contact lens prescription from a licensed optometrist, therapeutic optometrist, or a licensed physician. An ophthalmic dispenser shall make no measurement of the eye or the cornea or evaluate the physical fit of the contact lenses, by any means whatever, subject solely and only to the exception contained in the §351.005 of the Act.

(d) The willful or repeated failure or refusal of an optometrist or therapeutic optometrist to comply with any of the requirements in the Act, §351.353 and §351.359, shall be considered by the Board [~~board~~] to constitute prima facie evidence that the licensee is unfit or

incompetent by reason of negligence within the meaning of the Act, §351.501(a)(2), and shall be sufficient ground for the filing of charges to cancel, revoke, or suspend the license. The charges shall state the specific instances in which it is alleged that the optometrist or therapeutic optometrist did not comply with the rule [was not complied with]. After the Board [board] has produced evidence of the omission of a finding required by §351.353, the burden shifts to the licensee to establish that the making and recording of the findings was not possible.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2023.

TRD-202304877

Janice McCoy

Executive Director

Texas Optometry Board

Earliest possible date of adoption: February 4, 2024

For further information, please call: (512) 305-8500



22 TAC §279.3

The Texas Optometry Board proposes amendments to 22 TAC Title 14 Chapter 279, §279.3 - Spectacle Examination.

The rules in the Chapter 279 were reviewed as a result of the Board's general rule review under Texas Government Code §2001.039. Notice of the review was published in the June 10, 2022, issue of the *Texas Register* (47 TexReg 3487). No comments were received regarding the Board's notice of review.

The Board has determined that there continues to be a need for the rules in Chapter 279. The Board has also determined that changes to §279.3 as currently in effect are necessary to clarify the statute.

Overview and Explanation of the Proposed Rule. This section of the Board's rules clarifies Texas Optometry Act §351.353 which requires ten specific findings to be made and recorded during an initial examination of a patient in which an ophthalmic spectacle prescription is to be made. As outlined in statute, these ten findings are to ensure the adequate examination of a patient. The rule does not set guidance for medical or routine refraction visits between a patient and an optometrist - only the initial visit for a prescription for spectacles (glasses). The rule as currently written sets out that three of the ten findings during an initial visit must be performed by the licensed optometrist while the other seven findings may be delegated to an assistant with oversight by the licensed optometrist. Additionally, Texas Optometry Act §351.453 states "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."

On November 3, 2023, the Board proposed changes to the rules as follows:

- The proposal will clarify that the optometrist or therapeutic optometrist is to "examine in-person" instead of "personally make" three of the ten findings during an initial visit for a spectacle prescription. The other seven required findings may continue to be delegated to an assistant.

- It states that the findings must be made unless prohibited by the patient's unique condition instead of "if possible." It requires the optometrist or therapeutic optometrist to personally notate why it is not possible to record the required findings. This language is affirmed in a recent decision from the State Office of Administrative Hearings.

- It clarifies that for discipline purposes, the charges must state the specific instances in which it is alleged that the optometrist or therapeutic optometrist did not comply with the rule.

- Finally, the amendment makes non-substantive capitalization changes to ensure consistency across the Board's rules.

Government Growth Impact Statement. The rule clarifies the Board's long-standing interpretation of statute (see Tex. Occ. Code §§351.353 and 351.453) to ensure the public health is protected. Therefore, for the first five-year period the proposed rule is in effect, the Board estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to this agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule's applicability; and it does not positively or adversely affect the state's economy.

Small Business, Micro-Business, and Rural Community Impact Statement. Ms. McCoy has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities as the amendment is a clarification of the Board's long-standing interpretation of statute and does not positively or adversely impact the state's economy.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. The proposed rule clarifies the Board's long-standing interpretation of statute (see Tex. Occ. Code §§351.353 and 351.453) to ensure the public health is protected. Therefore, Ms. McCoy has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities as the amendment is a clarification of the Board's long-standing interpretation of statute and does not positively or adversely impact the state's economy. Thus, the Board is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

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Local Employment Impact Statement. Ms. McCoy has determined that the proposed rule will have no impact on local employment or a local economy as the amendment is a clarification of the Board's long-standing interpretation of statute. Thus, the Board is not required to prepare a local employment impact statement pursuant to §2001.024 of the Tex. Gov't Code.

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Act during an initial patient visit for a spectacles (glasses) prescription. The Board determined it was necessary to update the rule to clarify the existing Board interpretation that personally means the three tests during the initial patient visit are done in person by the optometrist. According to the Board, this interpretation furthers its mission to protect the public health and safety by ensuring that the eyes of Texas patients during an initial visit are being examined by licensed optometrists and not by unlicensed staff.

Fiscal Note. Janice McCoy, Executive Director of the Board, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Ms. McCoy has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Board on licensees is not expected to increase.

Even without the clarifying amendment, long-standing Board actions and policy assumes compliance with Tex. Occ. Code §351.353 that all initial patient visits must contain the ten findings and with Tex. Occ. Code §351.453 that states "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."

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Statutory Authority. The Board proposes this rule pursuant to the authority found in §351.151 of the Tex. Occ. Code which vests the Board with the authority to adopt rules necessary to perform its duties and implement Chapter 351 of the Tex. Occ. Code.

The Board also proposes this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Lastly, the Board proposes this rule pursuant to Texas Occupations Code §351.353 and §351.453.

No other sections are affected by the amendments.

§279.3. *Spectacle Examination.*

(a) The optometrist or therapeutic optometrist shall, in the initial examination of the patient for whom ophthalmic lenses are prescribed:

(1) Examine in-person [Personally make] and record, unless prohibited by the patient's unique condition [if possible], the

following findings of the conditions of the patient as required by §351.353 of the Act:

(A) biomicroscopy examination (lids, cornea, sclera, etc.), using a binocular microscope;

(B) internal ophthalmoscopic examination (media, fundus, etc.), using an ophthalmoscope or biomicroscope with fundus condensing lenses; videos and photographs may be used only for documentation and consultation purposes but do not fulfill the internal ophthalmoscopic examination requirement; and

(C) subjective findings: [·] far point and near point; [·]

(2) Either personally make and record or authorize an assistant present in the same office with the optometrist or therapeutic optometrist to make and record the following findings required by §351.353 of the Act. The authorization for assistants to make and record the following findings does not relieve the optometrist or therapeutic optometrist of professional responsibility for the proper examination and recording of each finding required by §351.353 of the Act:

(A) case history (ocular, physical, occupational, and other pertinent information);

(B) visual acuity;

(C) static retinoscopy O.D., O.S., or autorefractor;

(D) assessment of binocular function;

(E) amplitude or range of accommodation;

(F) tonometry; and

(G) angle of vision: [·] to right and to left; and [·]

(3) The optometrist or therapeutic optometrist shall personally [Personally] notate in the patient's record the reasons why it is not possible to make and record the findings required in this section.

(b) The willful or repeated failure or refusal of an optometrist or therapeutic optometrist to comply with any of the requirements in the Act, §351.353 and §351.359, shall be considered by the Board [board] to constitute prima facie evidence that the licensee is unfit or incompetent by reason of negligence within the meaning of the Act, §351.501(a)(2), and shall be sufficient ground for the filing of charges to cancel, revoke, or suspend the license. The charges shall state the specific instances in which it is alleged that optometrist or therapeutic optometrist did not comply with the rule [was not complied with]. After the Board [board] has produced evidence of the omission of a finding required by §351.353, the burden shifts to the licensee to establish that the making and recording of the findings was not possible.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2023.

TRD-202304878

Janice McCoy

Executive Director

Texas Optometry Board

Earliest possible date of adoption: February 4, 2024

For further information, please call: (512) 305-8500



TITLE 34. PUBLIC FINANCE