



**National Association of
Optometrists and Opticians**

Professionalism Consumerism Education

May 14, 2020

California State Board of Optometry
c/o Shara Murphy, Executive Officer

Sent via email: optometry@dca.ca.gov

Dear Executive Officer Murphy and Members of the Board:

On behalf of the National Association of Optometrists and Opticians (NAOO), a national organization representing the retail optical industry and its thousands of employed and affiliated optometrists and opticians, I write today to express NAOO's suggestions and concerns about the draft of the proposed re-write of the optician statutory sections to the B&P Code and the Board's thoughts on telemedicine regulation.

The NAOO is consumer-service oriented, dedicated to the proposition the consumer's visual care needs are met most completely and economically by the free market, in the tradition of the American business system. NAOO members collectively represent nearly 9000 co-located eye care offices and optical dispensaries throughout the United States, serving millions of patients and eyewear customers each year, and over 800 location in the state of California.

Thank you for the opportunity to comment on the proposed changes to the optician sections of the B&P Code and ideas relating to telemedicine regulations.

Addressing, first, the Board's consideration of the Optician statutory language, while we would prefer to meet with Board staff to identify and discuss our areas of interest and concern, we know that is not possible to do so in person at this time. If arranging a conference or video call to get into more detail than we can present here makes sense, we will be happy to do that. In the meantime, however, we have charted some of our concerns (attached at end of letter) and would like to make to the following summary observations:

We recognize that part of the effort here is to reorganize sections of the law for clarity and organization, but we are concerned that the flow of the proposed draft is not logical. As one begins reading the new draft there are terms and phrases that are not yet defined, and the reader will be confused as to what applies to them as individuals or as a business. For example, applications, certificates and registrations are mentioned but there is nothing that sets forth the requirement to obtain such...until one gets to the end of the document.

We recommend that the new Article 3.5 sections of the statute be retained at the beginning of the optician sections with the necessary definitions and stated requirements for registration. This will provide a more logical flow and better advise applicants and registrants of the basic requirements.

Please note that we are in opposition to some of the changes being proposed relating to unregistered assistants, online dispensers of eyeglasses being required to register and what we perceive to be discriminatory intent regarding the imposition of fines on larger companies. We also would ask that the Board clarify whether the term "unregistered assistants" includes the

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assistants that are working for optometrists as well as those who work for registered dispensing opticians, and if not, why not.

We also suggest that any form of business entity be allowed to register as a dispensing ophthalmic business, including LLCs. Again, there is more detail in the attached chart, all of which we are happy to discuss.

Relating to Agenda item #11 and telemedicine, we offer the following:

We agree that refraction (and relatedly, prescribing corrective eyewear) should be seen as a separate issue versus performing a comprehensive eye exam. In fact, a comprehensive eye exam by definition in the CPT codes does not include a refraction. The two can be performed independently, and ODs should be allowed to use independent professional judgment as to what elements of a comprehensive eye exam should be performed, if any, when a person's eyewear prescription is updated.

The Board should evaluate the frequency of the need for correction of visual acuity as well as the frequency and demographic distribution of eye health risks and problems.

There is little if any evidence that patients can't understand the need for a comprehensive eye exam or recognize that as a separate issue from how they benefit from improved visual acuity by using corrective eyewear. If a patient needs education, it's incumbent on the professionals with the support of the Board to educate, rather than to deny refractive services in order to force a patient to get a comprehensive eye exam.

Similarly, there is no evidence to support a requirement that a patient-provider relationship must begin with an in-person encounter. There are multiple methods to ensure patient understanding and consent to beginning a patient-provider relationship remotely.

There is plenty of evidence that most if not all elements of a comprehensive eye exam can be performed by a remote interactive (synchronous) exam by a licensed OD or physician. Additionally, it is almost always simple and easy to schedule an in-person visit should the examining practitioner determine that additional information is needed that can't be gathered in a telemedicine encounter. A patient's health is not protected, much less improved, by denying access to some forms of testing or examination by telemedicine that meets the standard of care.

It would be helpful for the Board to be more forthcoming about the nature of the "low, but rising" number of complaints related to telemedicine. Is the basis of the complaint related to the patient's health and safety or economic? Is the source of the complaint a competitor or a consumer? Exactly how many have occurred over what period of time?

The Board would benefit from a more comprehensive review of the policies and consumer health and safety issues related to ocular telemedicine (both with optometry and with medical boards and professional associations) in other states, and with federal sources including the VA & the Indian Health Services.

Finally, the COVID-19 pandemic has led many states to loosen old restrictions on telemedicine. It will be useful to evaluate what has happened as a result. As many have pointed out in the numerous writings on this topic, the use of telemedicine going forward will be of great use to optometrists and benefit to patients. We recommend that the Board have an open mind about

its use and allow the licensed optometrist to use their professional judgment (as medical boards typically allow physicians to do) in deciding what forms of telemedicine to use and on what patients.

Again, thank you for the opportunity to comment. We look forward to further discussion on these matters. Best wishes for continued safety and good health.

Very truly yours,

Joseph B. Neville

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Executive Director
National Association of Optometrists & Opticians

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CA Proposed Statutory Changes – Opticians

| <p style="text-align: center;">DOC proposed changes</p> <p>strike through = deletion from current law <u>underline</u> = addition to current law</p> | <p style="text-align: center;">NAOO comments</p> |
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| <p>2545. (a) Whenever any person has engaged, or is about to engage, in any acts or practices which constitute, or will constitute, an offense against this chapter, the superior court in and for the county wherein the acts or practices take place, or are about to take place, may issue an injunction, or other appropriate order, restraining the conduct on application of the State Board of Optometry, the Medical Board of California, the Osteopathic Medical Board of California, the Attorney General, or the district attorney of the county.</p> <p>The proceedings under this section shall be governed by Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure.</p> <p>(b) (1) Any person who violates any of the provisions of this chapter shall be subject to a fine of not less than <u>two hundred fifty dollars (\$250)</u> one thousand dollars (\$1,000) nor more than <u>two thousand five hundred dollars (\$2,500)</u> fifty thousand dollars (\$50,000) per violation. The fines collected pursuant to this section from licensed physicians and surgeons shall be available upon appropriation to the Medical Board of California for the purposes of administration and enforcement. The fines collected pursuant to this section from licensed optometrists and registered dispensing opticians shall be deposited into the Optometry Fund and the Dispensing Opticians Fund, respectively, and shall be available upon appropriation to the State Board of Optometry for the purposes of administration and enforcement.</p> <p>(2) The Medical Board of California and the State Board of Optometry shall adopt regulations implementing this section and shall consider the following factors, including, but not limited to, applicable enforcement penalties, prior conduct, gravity of the offense, and the manner in which complaints will be processed.</p> <p>(3) The proceedings under this section shall be conducted in accordance with the provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.</p> <p>(Amended by Stats. 2016, Ch. 489, Sec. 12. (SB 1478) Effective January 1, 2017.)</p> | <p>Increase in fines –</p> <p>Arguably, this was done in order to be able to hit “large” business harder than small optical business for the same alleged transgression. We object to this discrimination and will oppose it vigorously if it is part of a legislative proposal. All opticians and registered dispensing opticians should be subject to the same level of fine for the same transgression or number of repeat offenses.</p> |
| <p>2550.1(c). <u>“Fit” and “fitting” means doing any or all of the following acts prior to the act of adjusting, either singly or in combination with others, designing, the taking of measurements to determine the size or shape or specifications, or replacing the prescribed optical aids, pursuant and incidental to the filling of any prescription for lenses, spectacles, eyeglasses, contact lens, plano contact lens and other ophthalmic devices as specified in Section 2541, and prescriptions.</u></p> | <p>This does not make sense as written. It suggests that certain acts will be listed, but no such list of acts is included.</p> <p>Perhaps it should be reworded to read the same as 2551.1(d).</p> |

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| <p><u>2551.1(e) “Dispensing Optician”, “Registered Dispensing Optician” and “Registrant” means any individual, corporation or firm who is registered with the board as follows:</u></p> <p><u>(1) “Spectacle Lens Dispenser” means any individual who is registered with the board pursuant to Article 1.5 (commencing with Section 2559.1) of this chapter.</u></p> <p><u>(2) “Contact Lens Dispenser” means any individual who is registered with the board pursuant to Article 2 (commencing with Section 2560) of this chapter.</u></p> <p><u>(3) “Nonresident Ophthalmic Lens Dispenser” means a business who is registered with the board pursuant to Article 2.5 (commencing with Section 2564.70) which offers, advertises and performs optical services to the general public.</u></p> <p><u>(4) “Registered Dispensing Ophthalmic Business” means a business who is registered with the board pursuant to Article 3.5 (commencing with Section 2568.1) which offers, advertises and performs optical services to the general public.</u></p> | <p>In light of the definitions provided in (1)-(4), the use of the terms “Registered Optician” and “Registered Dispensing Optician” will be confusing. It is recommended that these terms be removed from the statute, throughout, and the newly defined terms be used in their place.</p> |
| <p><u>2555 – Relates to Unprofessional Conduct. Note the following:</u></p> <p><u>(q) The employing, directly or indirectly, of any suspended or unregistered optician to perform any work for which an optician registration is required.</u></p> <p><u>(u) Failure to refer a patient to an appropriate optometrist or physician and surgeon if an examination of the eyes indicates a substantial likelihood of any pathology that requires the attention of that optometrist or physician and surgeon.</u></p> | <p>(q) – how will the employer know this is the case? Seems that it will be difficult to fairly enforce</p> <p>(u) - What standard is used here? How would an optician know this? May be imposing an unmeetable standard on opticians that will pull them into many med-mal cases. Can an optician even conduct “an examination of the eyes?” Strongly recommend this be removed.</p> |
| <p><u>2559.15. On and after January 1, 1988, no individual may fit and adjust spectacle lenses unless the registration requirement of Section 2550 is complied with, and unless (1) the individual is a duly registered spectacle lens dispenser as provided in Section 2559.2 or (2) the individual unregistered assistant performs the fitting and adjusting under the direct responsibility and supervision of a duly registered spectacle lens dispenser whose certificate of registration is then conspicuously and prominently displayed on the premises. A supervising registered dispenser shall be physically present on the registered premises when an unregistered technician assistant fits and adjusts spectacle lenses, allowing for usual and customary absences including illness and vacation, and shall not supervise more than three unregistered assistants at a time.</u></p> | <p>Note the continuing reference to §2550, which has been removed above.</p> <p>This section adds that a registered dispenser must be on the premises for an unregistered assistant to undertake duties, eliminating the “customary absences” permission that has existed for decades. There has been no harm identified by the long-standing practice of temporary absences (what complaints have been received?) and, therefore, no evidence of the need for this change. This change will likely severely impact small providers</p> |

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| <p>2559.15 – cont’d.</p> | <p>who rely on this provision from time-to-time. It should be removed.</p> <p>This section also adds a supervision limitation of three unregistered assistants per registrant, which has never existed up to this point. What demonstrable issues have arisen over the years with the lack of this limitation? The NAOO is not aware of any issues or complaints. Both of these proposed changes are regulation for regulation sake and unnecessary for public protection.</p> |
| <p>2559.2. (a) An individual shall apply for registration as a registered spectacle lens dispenser on forms prescribed by the board. The board shall register an individual as a registered spectacle lens dispenser upon satisfactory proof that the individual has passed the registry examination of the American Board of Opticianry or any successor agency to that board. In the event the board should determine, after hearing, that the registry examination is not appropriate to determine entry level competence as a spectacle lens dispenser or is not designed to measure specific job performance requirements, the board may thereafter prescribe or administer a written examination that meets those specifications. If an applicant for renewal has not engaged in the full-time or substantial part-time practice of fitting and adjusting spectacle lenses within the last five <u>three</u> years then the board may require the applicant to take and pass the examination referred to in this section as a condition of registration. Any examination prescribed or administered by the board shall be given at least twice each year on dates publicly announced at least 90 days before the examination dates. The board is authorized to contract for administration of an examination.</p> <p>(e) A registered spectacle lens dispenser is authorized to fit and adjust spectacle lenses at any place of business holding a certificate of registration under Section 2553, <u>a licensed ophthalmologist, or a licensed optometrist</u> provided that the certificate of the registered spectacle lens dispenser is displayed in a conspicuous place at the place of business where he or she is fitting and adjusting. <u>The registered spectacle lens dispenser must report this location to the board within 14 days.</u></p> | <p>In (a) - What is the basis for this change from 5 years down to 3 years? Any problems to date with the 5-year time frame? There have been no issues with this provision over the years of which the NAOO is aware. The mere opinion that it is being done for “consumer protection,” without evidence of need is not sufficient to make this provision more restrictive and exclusionary.</p> <p>In (e) - Not sure this phrasing re the ophthalmologist and optometrist makes sense. Is the intent to say that such fitting can be performed in an ophthalmologist’s <u>office</u> or an optometrist’s <u>office</u>? If so, that word should be added for clarity.</p> <p>In the last sentence of (e) - Why 14 days? Suggest making this 30 days.</p> |
| <p>2564.5. A registered dispensing optician fitting contact lenses shall maintain accessible handwashing facilities on the premises and those facilities shall be used before each fitting of contact lenses. <u>For purposes of this section, “accessible handwashing facilities” means a clean and sanitary sink with hot and cold running water, disinfectant soap, and adequate drying devices such as a towel or electric hand dryer, which is physically separate from a lavatory or bathroom and is accessible to all relevant persons.</u></p> | <p>Some small locations may have an issue with the hot water requirement in that they may only have portable hand-washing facilities in the contact lens room. Under CDC guidelines, cold water is sufficient. Cost to add hot water plumbing would be significant.</p> |

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| <p>Article 2.5. Non-Resident Ophthalmic Device Dispensers (New article; contains provisions from Chapter 5.45)</p> | <p>Expands online contact lens seller registration to online sellers of any prescription optical devices, including eyeglasses.</p> <p>What is the demonstrated need for expansion into eyeglasses? What is the demonstrable proof of a problem with the unregulated sale of glasses online? The NAOO is aware of no such issues. There has been no evidence supplied that harm has resulted from unregistered sales of eyeglasses. To date, only one state has imposed such a requirement. The NAOO opposes this unnecessary added regulation.</p> |
| <p>2564.74. (a) Application for registration as a nonresident contact <u>ophthalmic lens seller</u> shall be made on forms prescribed by the <u>State Board of Optometry</u>, accompanied by the fee prescribed by this chapter, and shall bear the signature of the individual, or individuals if a co-partnership, or the president or secretary if a corporation, and shall contain the name <u>or fictitious or assumed name, if applicable</u>, under which the person proposes to do business, location of the business, <u>registration number as issued by the board</u> and the designation of an agent for service of process in California.</p> <p>(b) The board shall be notified <u>in writing</u> within 30 days of any change of name, <u>fictitious or assumed name</u>, location of business, corporate officer, or agent of service.</p> <p><u>(c) Advertising, including but not limited to U.S. Mail, websites, electronic communications such as email, facsimile transmissions, directories, and newspaper and magazine ads must contain the following:</u> (1) <u>The registration number issued by the board, along with text identifying the registration number as being issued by the board.</u> (2) <u>Any other information the board deems necessary.</u></p> | <p>Suggest it be the company's designated signatory as opposed to these specific officers.</p> <p>What registration # does this refer to? How can the company have a registration # if they are just making application?</p> <p>Does "in writing" include email?</p> <p>Suggest this be limited to advertising directed to California. Much too onerous if applied to national, regional or websites.</p> |
| <p>New Article 3.5</p> | <p>The NAOO recommends that these sections be moved back to the beginning of the optician sections in the 2550 area. This will provide needed basic information to applicants and registrants and provide a more logical flow.</p> |
| <p>2568.1 - (relocated from 2550). Individuals, corporations, and firms engaged in the business of filling prescriptions of physicians and surgeons licensed by the Medical Board of California or optometrists licensed by the State Board of Optometry for prescription lenses and kindred products shall be known as dispensing ophthalmic businesses and shall not engage in that business unless registered with the State Board of Optometry.</p> | <p>Before the word "and", add in "limited liability companies" to solve the problem the board created by not recognizing these as appropriate business entities for registration (but which it had done for many years before).</p> |

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| <p>2568.2. (relocated from 2551) (a) Individuals, corporations, and firms shall make application for registration and shall not engage in that business defined in Section 2550 or 2550.1 prior to being issued a certificate of registration.</p> <p>(b) Application for that registration shall be on forms prescribed by the board, shall bear the signature of the individual, or general partners if a partnership, or the president or secretary if a corporation or firm, and shall contain specify the name under which he or she, they or it proposes to do business and the business address.</p> <p>(c) Corporations and firms shall be <u>organized and exist pursuant to the general corporation law and shall be a professional corporation within the meaning of Part 4, Division 3, Title 1 of the Corporations Code.</u></p> <p>(d) If applicable, the application shall include a list of officers in the corporation, firm or partnership and a copy of the articles of incorporation as submitted to the Secretary of State.</p> <p>(e) Separate applications shall be made for each place of business and each application must be accompanied by the application fee prescribed by Section 2565.</p> | <p>Same as above re adding LLCs.</p> <p>Suggest it be the company's designated signatory as opposed to these specific officers.</p> <p>Remove requirement for a professional corporation as most opticians are not organized that way and also allow for LLCs.</p> |
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