



February 16, 2022

California State Board of Optometry
2450 Del Paso Road, Suite 105
Sacramento, CA 95834

Members of the Legislation and Regulation Committee:

- David Turetsky, O.D., Chair
- Glenn Kawaguchi, O.D.
- Eunie Linden, J.D.
- Mark Morodomi, J.D.
- Sandra Sims, J.D.

Members of the Consumer Protection and Outreach Committee:

- Cyd Brandvein, Chair
- David Turetsky, O.D.
- Jeffrey Garcia, O.D.

Sent via email: optometry@dca.ca.gov

Dear Honorable Members:

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 concerns about several provisions of the Board’s proposed re-write of the B&P Code as discussed below.

The NAOO is consumer-service oriented, dedicated to the consumer’s visual care needs in accessible settings, providing high quality products and services. Its membership comes from nearly every type of enterprise engaged in the practice of optometry and opticianry. 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 locations in the state of California.

We understand that on February 18, 2022, the Board of Optometry’s (“Board”) Legislation and Regulation Committee (“LR Committee”) may consider legislation proposed by Board members and the Executive Director, which would amend Section 655 of the Business and Professions Code. Some of the changes were initially mentioned at the November 19, 2021 Board meeting and by Dr. Turetsky in his memorandum of December 3, 2021. The changes to Section 655 have been referred to as “Stanton Optical-related Changes...”¹ However, the

¹ Memorandum from David Turetsky to Members, California State Board of Optometry, dated December 3, 2021. In the memorandum, Dr. Turetsky states that the Stanton Optical decision made clear that all parties involved in the delivery of optometric services must enter into an agreement to ensure the independence of the practice of optometry. The corporate practice of medicine laws (“CPOM”) already ensure that a nonprofessional cannot control a physician’s or an optometrist’s practice. By

proposed legislative changes are unnecessary to enforce the Board's charges against Stanton Optical² and are proposed without any consideration of the actual public interest need for the changes.

The proposed Section 655 restrictions target non-dispensing optometrists and their employer physicians and the registered dispensing opticians ("RDOs") or optical companies with whom they co-locate – all of whom compete with dispensing optometrists. The proposed changes impose restrictions on one class of optometrists – the co-located non-dispensing optometrists – while benefitting and protecting the interests of dispensing optometrists.

With this proposed legislation and last year's changes to Section 655, the Board has not considered, much less produced, any evidence of any consumer harm or other health and safety concern that might justify such unprecedented restrictions on relationships between health care practitioners. Both the Federal Trade Commission and the California Department of Consumer Affairs have noted a corresponding potential for overprescribing and unnecessary clinical care by dispensing optometrists who sell the goods they prescribe (unlike most other healthcare practitioners, who are prohibited from selling what they prescribe); therefore, it is reasonable to assume that the unnecessary restrictions that the proposed legislation would place on competition negatively affect consumer vision care prices, quality of care, and access to vision care services – just because some optometrists choose to practice in different service delivery models.³ We believe it is each Board member's obligation, particularly the LR Committee members' obligations, to consider these factors when determining whether to impose further restrictions on one class of optometrists and the physicians who employ them. We also believe the LR Committee and the Board should thoughtfully consider this proposed legislation in a public forum (pursuant to California's Administrative Procedure Act) -- it is much more than "technical cleanup" as it has been described in previous Board meetings because it substantively and fundamentally changes the spirit and intent of the current law.

We respectfully request that the LR Committee and the Board inquire into and consider the following questions before rushing in to propose these and other material legislative changes:

- What are the specific public interests and consumer harm that the Board's proposed action seeks to protect, which would warrant the proposed changes?
- What documented and material evidence did the Board rely on in considering whether consumers are actually harmed by the co-location physician business model it seeks to

including physicians in the changes proposed in the memorandum, the Board would extend CPOM to relationships among professionals (physicians and optometrists). Currently, CPOM only applies to health professionals and nonprofessional relationships.

² A table outlining the BPC Section 655 allegations against Stanton Optical, the Judge's findings, and proposed legislative changes needed are set forth in [Attachment A](#). It demonstrates that the changes proposed are not needed.

³ The Federal Trade Commission has repeatedly recognized that measures such as those imposed on optical companies in California lead to higher prices and restricted access to affordable health care for consumers: "Competition in health care markets benefits consumers by helping to control costs and prices, improve quality of care, promote innovative products, services, and service delivery models, and expand access to health care services and goods....even well intentioned laws and regulations may impose unnecessary, unintended, or overbroad restrictions on competition, thereby depriving health care consumers of the benefits of vigorous competition. Policy Perspectives, Competition and the Regulation of Advanced Practice Nurses, Executive Summary, p. 1 (March 2014).

substantially modify, which would deviate from the standard for all other relationships between/among healthcare providers?

- Has the Board identified and considered the anticompetitive effects of the legislation it is proposing (e.g., price, access to care, innovation, level playing field)?
- Is the proposed legislation taken pursuant to a state-articulated policy to displace competition?
- Has the Board considered whether the proposed changes and the public interest, if any, that the Board seeks to protect are sufficient to justify the potential harmful effects the legislation would have on competition and consumer access and choice?
- Has the Board considered less restrictive alternatives that will protect consumer safety, preserve professional decision-making, and promote competition, and that would not favor one practice model over another?

Background

For years, dispensing optometrists⁴ have steadily reduced the ability of (i) retail dispensing opticians (“RDOs”) and their co-located non-dispensing optometrists to compete actively and effectively against the dispensing optometrists in the sale of eyewear, and (ii) non-dispensing optometrists to compete against the dispensing optometrists and to provide low-cost eye exams.⁵ It was only in 2015 at the behest of a Governor who was frustrated with the battles between dispensing optometrists and RDOs and optical companies, that his office facilitated a compromise where all stakeholders could compete fairly in the marketplace.⁶ Last year, the Board sponsored legislation that changed that compromise legislation and imposed more regulation on RDOs, which was reportedly aimed at enhancing the Board’s ability to seek enforcement against Stanton Optical for alleged violations that were later found not to exist because the Board’s interpretation of the law was incorrect.⁷ The language added to Section 655(d) as part of Assembly Bill 1534 (2021) was hastily drafted and not vetted by affected stakeholders, which led to confusion in the new law’s application and intention and most likely is why the Board feels it is necessary to redraft Section 655 yet again, even though the changes to Section 655 have not yet gone into effect (will be effective January 1, 2023).

⁴ We are using the term “dispensing optometrists” to refer to the optometrists who sell eyeglasses as part of their practices, to distinguish them from the “non-dispensing optometrists” who “co-locate” next to RDOs and focus on the delivery of eye exams and who do not sell eyeglasses.

⁵ See, e.g., the 1982 Report from the California Department of Consumer Affairs to the California State Assembly warning about the costs associated with optometry and RDO restrictions and noting that there was no evidence that the quality of eye examinations varied greatly between chain optometrists and other practitioners. See also the 1985 review by the California Office of the Auditor General regarding the Board’s enforcement of laws against a large optometric corporation where no consumer harm was alleged, which resulted in the Board’s inability to bring enforcement actions against cases against optometrists, which alleged serious health and safety issues for consumers and illegal conditions.

⁶ AB 684, passed in 2015, became law on January 1, 2016. Prior to that, optometrists could not enter into leases with RDOs. With AB 684, vision plans owned by optical companies gave up their right to employ optometrists, among other things, and oversight of the RDO program was transferred from the Medical Board of California to the California State Board of Optometry.

⁷ Already, co-located non-dispensing optometrists and RDOs are required to comply with certain requirements that are not imposed on dispensing-optometrists, including for example, lease requirements, advertising restrictions, the employment of registered spectacle lens dispensers and contact lens fitter registrations (dispensing optometrists can use optometric assistants with no training or certification requirements, who can dispense and fit eyewear without an optometrist being on-site to supervise); RDO registration; posting of citations issued for an order of abatement on the front of the place of business for certain infractions (versus posting of citations on dispensing optometrists’ offices for unprofessional conduct, impaired license, malpractice or health and safety violations, which are more pertinent to public health and safety, rather than “behind-the-scenes” violations that are not visible to, and have no material effect on, public health or safety).

The Current Proposed Legislation

This year's proposed legislation appears to be an attempt to further limit and disrupt another business model available to RDOs and non-dispensing optometrists. The legislation would increase the obstacles and costs incurred by a distinct group of entities (RDOs, non-dispensing optometrists, and physicians) that compete with dispensing optometrists and who typically provide goods and services to consumers at lower prices. This action appears, (intentional or not) to protect the business interests of dispensing optometrists by limiting the legitimate business models available to those entities that "co-locate" – RDOs, non-dispensing optometrists and physicians. The proposed language in Section 655 imposes new and distinct requirements upon any RDO, physician or optical company, which shares a location with an optometrist and is involved in the delivery of the optometrist's services. In light of the many new and different business models that dispensing optometrists take advantage of today, we see no reason why RDOs, non-dispensing optometrists, and physicians are singled out.

The proposed legislation even goes so far as to delete Section 655(d)(16) (that was part of the 2015 compromise legislation), which excluded medical groups and their employed optometrists and health plans who have exclusive relationships with medical groups, from the Section 655(d) requirements. In its place is a proposed provision that instead, expressly exempts dispensing optometrists and their optometric staff from the requirements, despite the fact that optometrists have the same potential for prioritizing economic gain over professional judgment as the other healthcare practitioners targeted in this proposed language.⁸

Targeting co-located entities as proposed is particularly suspect since there has been no consideration of, or any evidence presented into the record or otherwise, any consumer injury or interference with clinical judgment resulting from existing co-location relationships between an RDO or optical company, and a non-dispensing optometrist or physician who employs optometrists.⁹ Rather, there seems to be an undocumented and unwarranted assumption of harmful effects with these relationships. On the contrary, consumers benefit from the lower prices and access to eye care that these co-locating entities typically provide.

We have heard statements about creating a "level playing field" through the proposed legislation. It appears, however, that those statements really refer to a level playing field among optical companies and RDOs rather than a level playing field across all entities that dispense prescription eyewear, including all optometrists. The laws should be aimed at protecting consumers and assuring that they have affordable eye care options rather than protecting dispensing optometrists.

⁸ See, e.g., the 1982 Report from the California Department of Consumer Affairs to the California State Assembly, which noted in restrictive locations like California, 32% of all prescriptions were deemed unnecessary by optometrists from two colleges of optometry, compared to 12% in less-restrictive locations. As the report noted, "This large and striking difference raises serious questions about the ethics of practitioners in California."

⁹ The assumption seems to be that dispensing optometrists, who own their own businesses, would not apply pressure to their employees to overprescribe or unnecessarily prescribe certain goods. Optometrists are one of the few healthcare professions who can still sell the goods they prescribe; most other doctors are subject to doctor self-referral restrictions. Dispensing optometrists derive 35% of revenue from professional fees and 65% from product sales, including eyewear and contact lens sales. Key Metrics: Assessing Optometric Practice Performance & Best Practices of Spectacle Lens Management Report. Essilor ECP University. March 22, 2018. https://ecpu.com/media/wysiwyg/docs/ECPU_MBA_KeyMetricsReport_2018.pdf (last accessed February 11, 2022).

We respectfully request that LR Committee members determine in an open forum and documented in the public record the specific public interest that justifies a legislative intrusion into legitimate, existing employment relationships between physicians and the non-dispensing optometrists they employ, in “co-located” offices. If such an analysis is undertaken, we believe the result will be a recognition that the proposed legislative changes have no public interest justification and should not be supported by the Board or any legislator.

We appreciate the LR Committee’s attention to these issues.

Sincerely,

Joseph B. Neville

Joseph B. Neville
Executive Director
National Association of Optometrists and Opticians
director@NAOOvision.org

Attachment: Stanton Optical citation allegation

ALLEGATIONS IN THE AMENDED CITATIONS AGAINST MACARIUS, MAX & DANIEL, LLC, DBA STANTON OPTICAL REGARDING BPC SECTION 655; DECISION ADOPTED BY THE BOARD OF OPTOMETRY ON SEPTEMBER 23, 2021

ALLEGATION/CODE VIOLATION	JUDGE ASPINWALL'S CONCLUSIONS	CORRESPONDING PROVISION OF PROPOSED LAWS	COMMENTS
An RDO linking its advertising with the name, practice or fees of an optometrist leasing space from the RDO violated BPC § 655(d)(6)	No violation as there is no legal basis to support a conclusion that the RDOs had an indirect landlord-tenant relationship with the tenant medical group's employed optometrists. Therefore BPC § 655(d) does not apply.	No change needed.	The Medical Board has jurisdiction over physicians. Proposed changes are contrary to BCP § 2557. The proposed changes are contrary to the Medical Practice Act, particularly BPC § 654, which governs physician relationships and leases with RDOs.
Stanton violated BCP § 655(d) by not complying with its requirements. An indirect landlord tenant relationship exists between an RDO and the employees of a tenant medical practice		Any change would be contrary to employment law principles	Allegation is contrary to employment law and real estate law principles and would impose tenant obligations upon employees of a tenant medical practice.
The MSA between the optical company and the medical practice violates BPC § 655 and the CPOM	The violations were not specifically alleged in the amended citations or made in a timely manner	No material change needed; BPC § 655(c)(2) prohibits RDOs or optical companies from interfering with the optometrist's professional judgment.	Changes to BPC § 655(d) disregard the Medical Board's jurisdiction and the prohibition already contained in BPC § 655(c)(2). The CPOM does not apply to relationships between licensed professionals like physicians and their employed professionals. The intent is to protect the optometrists from

		<p>The Medical Board already has jurisdiction over medical practices and CPOM violations</p>	<p>interference with their professional judgment by nonprofessionals. Physicians are professionals. Any change to a physician's ability to control its own practice is contrary to existing CPOM law and the professional standards of physicians. Proposed changes would interfere with the physician-employee relationship and impose the 655(d) requirements in each agreement between a co-located optometrist and any party involved in the delivery of the optometrist's (which could include provider agreements, and other supplier agreements). Physicians would need to cede control to its employed optometrist over the practice records and clinical protocols, put up signs that would state that the optometrists is independent (even though a part of the medical practice), have the medical practice's landlord provide notice of lease termination to the employed optometrists, among other things.</p>
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