

## **RRC STAFF OPINION**

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0109

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☒ Lack of statutory authority
  - ☒ Unclear or ambiguous
  - ☒ Unnecessary
  - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

*In Paragraph (b), staff recommends objection for lack of statutory authority. The Rule states the Board will provide a ballot to "each North Carolina licensee eligible to vote." However, G.S. 90-238 requires the election to be "open to all licensees." Therefore, it appears the Board is attempting to restrict the voting rights granted in the statute, which is beyond its statutory authority. Additionally, the Rule language is ambiguous because it does not specify which licensees are "eligible to vote."*

*In Paragraph (d), staff recommends objection for ambiguity. Here, the Board proposes to delete the word "Board" at line 17. This renders the makeup of the Election Committee unclear. The Board Chair has the authority to appoint "three members" to the Election Committee. Given the deletion of the word "Board," it is unclear whether this refers to three Board members or three licensees.*

*In Paragraph (e), staff recommends objection for ambiguity, lack of statutory authority, and necessity. Paragraph (e) does not clarify whether the Board Chair submits a list of three nominees total, regardless of the number of vacancies, or a list of three nominees for each vacancy. Therefore, staff believes this Paragraph is ambiguous. If the Chair always submits a list of three names to the Governor, regardless of the number of vacancies, this does not comply with G.S. 90-238 which requires three nominees for each vacancy, thus exceeding the Board's statutory authority. If the Board intended to restate G.S. 90-238, then Paragraph (e) repeats statute and is therefore unnecessary.*

Ashley Snyder  
Commission Counsel

*Staff recommends objection for lack of statutory authority based upon the language in Paragraph (f) stating “The Governor shall complete the appointment process. . . .” The Board lacks authority to require the Governor to make appointments to Board vacancies. In the alternative, the language in (f) is unnecessary because it repeats a portion of G.S. 90-238 granting the Governor authority to make appointments to the Board.*

**§ 90-238. North Carolina State Board of Opticians created; appointment and qualification of members.**

The North Carolina State Board of Opticians is created. The Board's duty is to carry out the purposes and enforce the provisions of this Article. The Board shall consist of seven members appointed by the Governor as follows:

- (1) Five licensed dispensing opticians, each of whom shall serve three-year terms;
- (2) Two residents of North Carolina who are not licensed as dispensing opticians, physicians, or optometrists, who shall serve three-year terms.

Each member of the Board shall serve until the member's successor is appointed and qualifies. No person shall serve on this Board for more than two complete consecutive terms. Before beginning office, each member of the Board shall take all oaths prescribed for other State officers in the manner provided by law, which oaths shall be filed in the office of the Secretary of State. **The Governor may remove any member of the Board for good cause shown, may appoint members to fill unexpired terms, and must make optician appointments from a list of three nominees for each vacancy submitted by the Board as a result of an election conducted by the Board each year and open to all licensees.** In naming candidates for election, the Board must ensure that its candidates reflect the composition of the State with regards to gender, ethnic, racial, and age composition. If the Board fails to fulfill its requirements under this section, the Governor may appoint a licensed optician to fill a vacancy on the Board. (1951, c. 1089, s. 5; 1979, c. 533; 1981, c. 600, s. 3; 1997-424, s. 7; 2007-525, s. 13.)

21 NCAC 40 .0109 is amended as published in 33:23 NCR 2258-2262 as follows:

**21 NCAC 40 .0109            ELECTION OF MEMBERS**

(a) Optician/licensee appointments to the Board are selected by election and gubernatorial appointment. By April 1 of each year, any licensed optician desiring his or her name to be placed in nomination shall forward a petition endorsed by five licensees to the Board.

(b) By April 10 of each year, the Board of Opticians shall prepare and distribute by mail to each North Carolina licensee eligible to vote:

- (1) a notice of the election, its dates and method of ~~participation~~, participation;
- (2) the name of each ~~nominee~~, nominee;
- (3) biographical information on each ~~nominee~~, nominee;
- (4) a ~~ballot~~, ballot; and
- (5) a return envelope.

(c) The return envelope containing the ballot shall be postmarked no later than April 30. The enclosed ballot will not be valid unless the optician's signature, license number, and correct mailing address are on the left top corner of the return envelope.

(d) The Board Chair shall appoint an Election Committee of at least three ~~Board~~ members, who shall not be nominees. The Election Committee shall review all ballots that have been determined valid based on this Rule, and count all the valid ballots.

(e) Based upon the canvass by the Election Committee, the Board Chair shall submit to the Governor a list of three nominees which shall be listed from highest to lowest votes and percentages received for each nominee.

(f) The Governor shall complete the appointment process based on G.S. 90-238.

*History Note:    Authority G.S. 90-238;*

*Eff. November 1, 1981;*

*Amended Eff. September 1, 2012; April 1, 2011; February 1, 1989; January 1, 1986;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 22, ~~2018~~, 2018;*

*Amended Eff. October 1, 2019.*

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AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0321

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☒ Lack of statutory authority
  - ☒ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

*Staff recommends objection for ambiguity because the Rule does not list the Board's factors for determining or provide a list of the "minimum equipment specified by the Board," the "curriculum approved by the Board", or "any test required by the Board." In Subparagraph (3), at line 12, the Rule does not define "periodic." In Subparagraph (4), the Board does not delineate the scope or purpose of the on-site inspection of training establishments, making the inspection requirement ambiguous.*

*Staff also recommends objection for lack of statutory authority. Pursuant to G.S. 90-237(4) and 90-240(a)(3), an optician, optometrist, or ophthalmologist may train apprentices or interns training to become opticians. The Board has rulemaking authority over the registration of apprentices and interns working under opticians and rulemaking authority over the registration and training of interns.*

### **§ 90-243. Registration of places of business, apprentices.**

**The Board may adopt rules** requiring, as a condition of dispensing, the registration of places of business where ophthalmic dispensing is engaged in, and for **registration of apprentices and interns who are working under direct supervision of a licensed optician.** The Board may also require that any information furnished to it as required by law or regulation be furnished under oath. (1951, c. 1089, s. 10; 1967, c. 691, s. 49; 1979, c. 166, s. 1; 1981, c. 600, s. 11.)

Ashley Snyder  
Commission Counsel

**§ 90-249. Powers of the Board.**

(a) The Board shall have the power to make rules, not inconsistent with this Article and the laws of the State of North Carolina, with respect to the following areas of the business of opticianry in North Carolina:

- (1) Misrepresentation to the public.
- (2) Baiting or deceptive advertising.
- (3) Continuing education of licensees.
- (4) Location of registrants in the State.
- (5) Registration of established optical places of business, but no rule restricting type or location of a business may be enacted.
- (6) Requiring photographs for purposes of identification of persons subject to this Article.
- (7) Content of licensure examination and reexamination.
- (8) Revocation, suspension, and reinstatement of licenses, probation, and reprimands of licensees, and other penalties.
- (9) Fees within the limits of G.S. 90-246.
- (10) Accreditation of schools of opticianry.
- (10a) Designation of accredited colleges, universities, and coursework that satisfy the qualifications for examination pursuant to G.S. 90-240(a1).
- (11) Registration and training of apprentices and interns.
- (12) Licenses and examinations pursuant to G.S. 90-241.

(b) through (d) Repealed by Session Laws 1997-424, s. 5. (1951, c. 1089, s. 16; 1953, c. 1041, s. 19; 1973, c. 1331, s. 3; 1977, c. 755, s. 6; 1981, c. 600, s. 16; 1987, c. 827, s. 1; 1997-424, s. 5; 2016-117, s. 3(d).)

*The Board's authority to regulate optometrists and ophthalmologists training apprentices and interns is limited by the following statute:*

**§ 90-253. Exemptions from Article.**

Nothing in this Article shall be construed to apply to optometrists, or physicians trained in ophthalmology who are authorized to practice under the laws of this State, or to an unlicensed person working within the practice and under the direct supervision of the optometrist or physician trained in ophthalmology. An apprentice or intern registered with the Board and working under direct supervision of a licensed optician, optometrist or physician trained in ophthalmology will not be deemed to have engaged in opticianry by reason of performing acts defined as preparation and dispensing, provided the apprentice is in compliance with the rules of the Board respecting the training of apprentices.

As used in this section, "supervision" means the provision of general direction and control through immediate personal on-site inspection and evaluation of all work constituting the practice of opticianry and the provision of consultation and instruction by a licensed dispensing optician, except that on-site supervision is not required for minor adjustments or repairs to eyeglasses. (1951, c. 1089, s. 20; 1981, c. 600, s. 18.)

*The Board has statutory authority over the training of apprentices and interns but does not have statutory authority over optometrists and ophthalmologists. As written, the Rule does not limit the Board's authority to ensuring compliance with a training program. The Rule imposes limitations on the businesses of optometrists and ophthalmologists used as training establishments. Staff recommends objection to Subparagraphs (1) and (4) for lack of statutory authority to require businesses of optometrists and ophthalmologists used as training establishments to have an unspecified list of equipment and be subject to inspections by the Board not limited in scope.*

21 NCAC 40 .0321 is amended as published in 33:23 NCR 2258-2262 as follows:

**21 NCAC 40 .0321            TRAINING ESTABLISHMENT REQUIREMENTS**

Any North Carolina licensed optician, ophthalmologist, or optometrist as provided in G.S. 90-237 (4) and G.S. 90-240(a)(2) and (3) who proposes to train an apprentice or intern to become an optician shall fill out and sign ~~under oath~~ an application to do so. In addition, the training establishment must meet the requirements of the Board to train an apprentice or intern in opticianry. These requirements are:

- (1) providing the list of minimum equipment specified by the Board;
- (2) submitting a schedule of work processes and indicating the number of hours to be devoted to each work process for the apprentice and/or intern as outlined in the curriculum approved by the Board;
- (3) administering and returning any test required by the Board for trainees and submitting requested periodic statements regarding compliance; and
- (4) allowing on-site inspection of the training establishment by the Board.

*History Note: Authority G.S. 90-237(4); 90-240(3); 90-243; 90-249;*

*Eff. November 1, 1981;*

*Amended Eff. February 1, 1989;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 22, ~~2018~~; 2018;*

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AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0323

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☐ Lack of statutory authority
  - ☒ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

*Paragraph (b) of this Rule states: "The Board may decide to conduct a criminal background check as a part of its application review." The Rule is unclear because it does not contain any guidance regarding under what circumstances the Board will conduct a background check.*

*Further, it is unclear whether "applicants" as used in line eight means individuals submitting a licensure application or "applicants" as listed in Paragraph (a). If "applicants" refers to the list in Paragraph (a), staff notes existing language in 21 NCAC 40 .0321 requires opticians, optometrists, and ophthalmologists to submit an application to the Board to train apprentices or interns. As written, it is unclear whether the Board subjects optometrists or ophthalmologists training apprentices or interns to background checks. Therefore, staff thinks this Rule is ambiguous as written.*

21 NCAC 40 .0323 is amended as published in 33:23 NCR 2258-2262 as follows:

**21 NCAC 40 .0323           AFFIDAVIT OF APPLICANT**

(a) Applicants for any Board process (training, examination, and licensure application) shall attest ~~under oath~~ to the completeness and accuracy of the information contained in applications.

(b) The Board may decide to conduct a criminal background check as a part of its application review. Application fees are inclusive of costs involved for such investigations, and no additional charges shall be assessed against the applicant.

(c) If an applicant submits incomplete, false, or misleading information, the Board shall bar any applicant from admission to examination, apprenticeship, internship, ~~business~~ business, or training establishment registrations or licensure.

(d) If any optician, optometrist, or ophthalmologist submits incomplete, ~~false~~ false, or misleading information, then the Board shall bar them from training.

*History Note:     Authority G.S. 90-243; 90-249;*

*Eff. November 1, 1981;*

*Amended Eff. September 1, 2012; February 1, 1989;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December 22, ~~2018~~; 2018;*

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