



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6700

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

October 3, 2019

Sue Hodgins, Rulemaking Coordinator
North Carolina State Board of Opticians
Sent via email only: shodgin@ncopticiansboard.org

Re: Extension of the Period of Review for Rules 21 NCAC 40 .0104, .0209, .0314, .0319, and .0325 and Objection to Rules 21 NCAC 40 .0109, .0321, and .0323

Dear Ms. Hodgins:

At its September meeting, the Rules Review Commission extended the period of review for Rules 21 NCAC 40 .0104, .0209, .0314, .0319, and .0325 at the request of the agency. Pursuant to G.S. 150B-21.13, when the Commission extends the period of review, it is required to approve or object to the rules or call a public hearing on the same within 70 days.

In addition, the Commission objected to Rules 21 NCAC 40 .0109, .0321, and .0323 in accordance with G.S. 150B-21.12 as follows:

- The Commission objected to Rule .0109 for lack of statutory authority, ambiguity, and necessity. Specifically, the Commission objected to Paragraph (b) for lack of statutory authority for use of the language “eligible to vote;” Paragraph (d) for ambiguity related to the make-up of the Election Committee; Paragraph (e) for ambiguity, lack of statutory authority, and necessity related to the nomination process; and Paragraph (f) for lack of statutory authority and necessity for requiring the governor to make appointments to Board vacancies.
- The Commission objected to Rule .0321 for lack of statutory authority and ambiguity. Specifically, the Commission objected to ambiguity for failure to 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,” “any test required by the Board,” and for failure to delineate the scope or purpose of the on-site inspection requirement. The Commission objected for lack of statutory authority for failure to limit the Board’s inspections to ensuring compliance with a training program.

Administration
919/431-3000
fax: 919/431-3100

Rules Division
919/431-3000
fax: 919/431-3104

Judges and
Assistants
919/431-3000
fax: 919/431-3100

Clerk’s Office
919/431-3000
fax: 919/431-3100

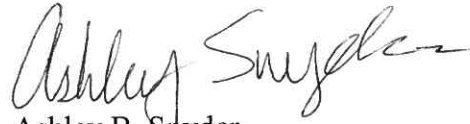
Rules Review
Commission
919/431-3000
fax: 919/431-3104

Civil Rights
Division
919/431-3036
fax: 919/431-3103

- The Commission objected to Rule .0323 for ambiguity. Specifically, the Rule is unclear because it does not provide any guidance regarding under what circumstances the Board will conduct a background check. Additionally, the use of the term “applicants” is ambiguous.

Please respond to these objections in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission’s actions, please let me know.

Sincerely,

A handwritten signature in cursive script that reads "Ashley Snyder".

Ashley B. Snyder
Commission Counsel

cc: Catherine Lee; Nichols, Choi & Lee, PLLC

Burgos, Alexander N

Subject: FW: [External] RRC Request for Technical Changes
Attachments: 21 NCAC 40 .0101.docx; 21 NCAC 40 .0109.docx; 21 NCAC 40 .0212.docx; 21 NCAC 40 .0302.docx; 21 NCAC 40 .0303.docx; 21 NCAC 40 .0320.docx; Response to Request for Technical Changes 9.10.19.docx
Importance: High

From: Sue Hodgin <shodgin@ncopticiansboard.org>
Sent: Tuesday, September 10, 2019 4:18 PM
To: Snyder, Ashley B <ashley.snyder@oah.nc.gov>
Cc: 'Catherine Lee' <Catherine@ncl-law.com>; 'Debbie Nowell' <Debbie@ncl-law.com>; 'Neet James' <njames@ncopticiansboard.org>
Subject: [External] RRC Request for Technical Changes
Importance: High

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Attached are 21 NCAC 40 .0101, .0109, .0212, .0302, .0303 and .0320, reviewed as specified in the Request for Technical Change for each, and the Request for Technical Change pages with answers to additional questions regarding these 6 rules.

As for 21 NCAC 40 .0104, .0209, .0314, .0319, .0321, .0323 and .0325, the NC State Board of Opticians requests an EXTENSION of time to continue working on those technical changes.

It's our understanding that we're to wait for you to let us know that we can deliver the rules' hard copies to OAH.

Please let us know if you have any questions regarding our submissions or our request for an extension. Thank you for your assistance in this matter.

Sue M. Hodgin, Executive Director
NC State Board of Opticians
PO Box 6758
Raleigh, NC 27628
919-420-1390 office
919-420-1361 fax
910-477-1808 cell

Continuous effort – not strength or intelligence – is the key to unlocking our potential. – Winston Churchill

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Burgos, Alexander N

Subject: FW: [External] RRC Request for Technical Changes

From: Sue Hodgkin <shodgin@ncopticiansboard.org>

Sent: Friday, September 13, 2019 10:50 AM

To: Snyder, Ashley B <ashley.snyder@oah.nc.gov>

Cc: 'Catherine Lee' <Catherine@ncl-law.com>; 'Debbie Nowell' <Debbie@ncl-law.com>; 'Neet James' <njames@ncopticiansboard.org>

Subject: RE: [External] RRC Request for Technical Changes

CAUTION: External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to report.spam@nc.gov

Thank you for your email on the procedures for the Rules noted in your discussion below, Ashley. I understand what you've explained insofar as .0109; I'm not counter-objecting to your objection, and am not intending to speak at the Sept 19th RRC meeting on the Staff opinion. I will be available at the meeting for any questions that may come up.

Reference .0321 and .0323, we are not seeking an extension on these two Rules – the Board does want the objections heard at the meeting next week.

Sue M. Hodgkin, Executive Director
NC State Board of Opticians
PO Box 6758
Raleigh, NC 27628
919-420-1390 office
919-420-1361 fax
910-477-1808 cell

Continuous effort – not strength or intelligence – is the key to unlocking our potential. – Winston Churchill

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0104

DEADLINE FOR RECEIPT: September 10, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (a), what do you mean by “may obtain information on licensure?” Is this necessary?

In (a), please provide a link to the Board’s website.

In (b), are the training and renewal applications different than the application form? If so, are the contents or substantive requirements of those forms in rule in accordance with G.S. 150B-2(8a)(d)?

At line 8, please delete the word “subsequently” because it is unnecessary.

In (c), are you referring to any specific subsections of 90-246?

At line 13, please refer to the citation in the Code as follows: “21 NCAC 40”

In (c)(2), is there a reason for the semicolon after “misrepresentation?” If not, please make this one complete list by deleting “or” before “misrepresentation” and deleting the semicolon.

Why is (d) a separate Paragraph when it continues to list application information? Please delete “(d)” and re-number these Subparagraphs (4) and (5).

In (d)(1), are you referring to G.S. 90-237(3)? If yes, please say so in the rule.

Do you require applicants to submit information related to G.S. 90-237(4)?

In (e), what is the application deadline? Do you have a set deadline or timeline for applying after meeting all necessary criteria?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: August 27, 2019

1 21 NCAC 40 .0104 is amended as published in 33:23 NCR 2258-2262 as follows:

2
3 **21 NCAC 40 .0104 INFORMATION AND APPLICATION**

4 (a) Any person desiring to become a North Carolina licensed optician may obtain information on licensure and an
5 application form by download from the Board webpage. Application forms must be completed in order to be
6 considered for licensure by waiver of the examination, or to sit for the licensure examination.

7 (b) Any person not able to download licensure information, or the licensure or examination application, or training
8 or renewal application, may request that the Board office mail the materials which the Board will subsequently mail
9 to the requesting person.

10 (c) When submitting an application for licensure or examination, the applicant shall submit all applicable fees as set
11 ~~out in 21 NCAC 40 .0108.~~ forth in G.S. 90-246. Additionally, the applicant shall provide:

12 (1) information, including an affirmation regarding whether the applicant has violated G.S. 90, Article
13 17, or Title 21, Chapter 40, of the North Carolina Administrative Code, or been convicted of a felony
14 or ~~misdemeanor~~, misdemeanor;

15 (2) information as to whether the applicant has been named as a defendant or respondent to a lawsuit
16 involving fraud, deceit, or misrepresentation; malpractice, unethical conduct, gross negligence, or
17 gross ~~misconduct~~, misconduct; and

18 (3) the applicant's age.

19 (d) Additionally, the applicant shall include the following when submitting the application:

20 (1) evidence of qualifications to comply with G.S. 90-237 or G.S. 90-241, whichever ~~applicable~~,
21 applicable; and

22 (2) a passport-size photograph taken within six months of the date the application is submitted to the
23 Board.

24 (e) Applications of any type must be received by the Board on or before any stated or printed deadline.

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26 *History Note: Authority G.S. 90-237; 90-239; 90-240; 90-249(6); 90-249.1(a)(8);*

27 *Eff. February 1, 1976;*

28 *Readopted Eff. September 29, 1977;*

29 *Amended Eff. September 1, 2012; August 1, 1998; February 1, 1989; February 1, 1988; November*
30 *1, 1981;*

31 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December*
32 *22, ~~2018-2018~~;*

33 *Amended Eff. October 1, 2019.*

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.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0109

DEADLINE FOR RECEIPT: September 10, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (a), why is the first sentence necessary? It repeats a requirement set forth in G.S. 90-238.

In (a), for the second sentence, consider the following: "By April 1 of each year, any licensed optician desiring his or her name to be placed in nomination nominated for the Board shall forward a petition endorsed by five licensees to the Board."

In (b), are ballots still distributed and returned via mail or has the Board switched to email?

In (b), line 8, which licensees are "eligible to vote?" Please review the language in G.S. 90-238 which says the election shall be "open to all licensees."

In (b)(1), what do you mean by "method of participation?"

In (c), line 14, please change "will" to "shall."

In (d), by "three members" do you still mean "three Board members?" Did the deletion of the word "Board" expand the meaning of the word "members?"

In (d), you say "The Election Committee shall review all ballots that have been determined valid based on this Rule . . ." Who determines whether a ballot is valid and whether it should be reviewed by the Election Committee?

In (e), does the Chair provide a list of three nominees total or three nominees for each vacancy? Please review G.S. 90-238.

In (e), does the Chair always provide the top three based upon vote? Please review G.S. 90-238.

In (f), why is this necessary because it repeats a requirement in G.S. 90-238? Also, where is your statutory authority to require the Governor to make an appointment?

In your history note, please add 90-239.

Ashley Snyder
Commission Counsel

Date submitted to agency: August 27, 2019

How does this Rule comply with the requirement in 90-238 for the Board to “ensure that its candidates reflect the composition of the State with regards to gender, ethnic, racial, and age composition?”

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: August 27, 2019

1 21 NCAC 40 .0109 is amended as published in 33:23 NCR 2258-2262 as follows:

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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.*

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0209

DEADLINE FOR RECEIPT: September 10, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (b), what is an "optician in charge?"

In (b), where is your statutory authority to regulate the display of licenses for opticians in charge? G.S. 90-244 only grants rulemaking authority for registrations of places of business and of apprentices and interns.

Why is (d) necessary? It restates G.S. 90-244(a).

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: August 27, 2019

1 21 NCAC 40 .0209 is amended as published in 33:23 NCR 2258-2262 as follows:

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3 **21 NCAC 40 .0209 DISPLAY OF REGISTRATION AND LICENSE**

4 (a) Each registered optical place of business or training establishment shall display its registration certificate in a
5 conspicuous and public area of the principal place of business.

6 (b) Each optician in charge shall display his or her registration certificate in a conspicuous and public part of the
7 optical place of business for which he or she accepts responsibility.

8 ~~(c)~~ (c) Each apprentice and intern shall display his or her registration certificate in a conspicuous and public part of
9 the training establishment wherein he or she is engaged as a trainee.

10 ~~(d)~~ (d) Each optician to whom a license has been granted shall display his or her license and current renewal seal in a
11 conspicuous and public part of the office or establishment wherein he or she is engaged as a dispensing optician.

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13 *History Note: Authority G.S. 90-244;*

14 *Eff. November 1, 1981;*

15 *Amended Eff. September 1, 2012; February 1, 1989; July 1, 1983;*

16 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December*
17 *22, ~~2018.~~ 2018.*

18 *Amended Eff. October 1, 2019.*

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0314

DEADLINE FOR RECEIPT: September 10, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In your history note, why do you cite G.S. 90-240?

In (a), how does an apprentice or intern register with the Board?

In (a), how does the optometrist or ophthalmologist submit this statement?

At lines 7-9, the rule is requiring action by the ophthalmologist or optometrist, not the apprentice or intern. Just to be clear, you are only requiring consent to training the apprentice or intern in accordance with these Rules, correct?

At line 8, please say "he or she" instead of "he."

Is (b) necessary since (c) requires full-time work?

In (d)(1), please refer to "Rule .0312 of this Section."

In (d)(3), just to be clear, since this requires registration pursuant to 21 NCAC 40 .0202, only opticians may offer this type of apprenticeship program, not optometrists or ophthalmologists, correct?

In (d)(3), under what circumstances does the Board approve an apprenticeship program? What factors are considered?

At lines 26-28, is this sentence still necessary since it applies to apprentices registered on or before March 1, 1996?

In (f), line 32, do you mean "may" or "shall?"

In (f), line 32 did you intend to say "a" instead of "the" before "time?"

What is the difference between an "apprenticeship" and an "internship?"

Ashley Snyder
Commission Counsel

Date submitted to agency: August 27, 2019

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: August 27, 2019

1 21 NCAC 40 .0314 is amended as published in 33:23 NCR 2258-2262 as follows:

2
3 **21 NCAC 40 .0314 APPRENTICESHIP AND INTERNSHIP REQUIREMENTS: REGISTRATION**

4 (a) Each apprentice or intern entering the apprenticeship or internship shall register with the Board and be issued a
5 certificate of registration. Registration of the apprenticeship automatically expires on the first day of July of each year,
6 and, in order for the apprenticeship to continue, registration must be renewed each succeeding July 1 until the
7 apprenticeship is completed. If the apprenticeship or internship is to be supervised by an ophthalmologist or
8 optometrist, the supervisor shall provide a statement in which he agrees to abide by the same requirements as would
9 an optician providing the same training.

10 (b) Part-time work or work as an optical salesman or consultant shall not apply toward completion of apprenticeship
11 or internship.

12 (c) The work as an apprentice or intern shall be full time, defined as a minimum of ~~35~~ 32 hours per week, under the
13 supervision of a licensed optician, ophthalmologist, or optometrist.

14 (d) In addition to the work specified in Paragraph (c) of this Rule, the curriculum for the apprentice shall include one
15 of the following, as chosen by the apprentice:

- 16 (1) an optical curriculum certificate program presented by a school of opticianry approved pursuant to
17 ~~21 NCAC 40 .0312~~, Rule .0312 of this Chapter; or
18 (2) the National Academy of Opticianry's home study career progression ~~program~~, program; or
19 (3) any apprenticeship program, approved by the Board, which is offered by an optical place of business
20 registered with the Board pursuant to ~~21 NCAC 40 .0202~~, Rule .0202 of this Chapter. The Board
21 shall approve such apprenticeship program if the program's curriculum summary contains subject
22 matter similar to the curriculum summary of the National Academy of Opticianry's home study
23 career progression program.

24 The classroom and laboratory time spent in the optical curriculum certificate program shall be credited as part of the
25 apprenticeship period and its minimum of ~~35~~ 32 hours per week. Certification that the apprentice has completed and
26 passed one of the programs shall be required. Apprentices registered with the Board on or before March 1, 1996, shall
27 not be subject to the provisions of this Paragraph and may satisfy the apprenticeship requirement by completing the
28 training program in which they are then registered.

29 (e) No more than two persons, whether apprentices or interns or a combination, may be trained by an optician,
30 ophthalmologist, or optometrist at the same time.

31 (f) An apprentice or intern shall be credited with training time only from the date of registration with the Board as an
32 apprentice or intern. The apprenticeship or internship may not be interrupted for more than 12 months at the time.

33 (g) When registering to serve a six month internship, the applicant must have completed the ~~three~~ two and one-half
34 years of apprenticeship as required by G.S. 90-240(a)(2) and (3) or have completed the course of training required by
35 G.S. 90-240(a)(1).

36
37 *History Note: Authority G.S. 90-239; 90-240; 90-243; 90-249;*

1 *Eff. February 1, 1976;*
2 *Amended Eff. September 6, 1977;*
3 *Readopted Eff. September 29, 1977;*
4 *Amended Eff. February 1, 1996; January 1, 1994; July 1, 1991; February 1, 1989;*
5 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December*
6 *22, ~~2018~~, 2018;*
7 *Amended Eff. October 1, 2019.*

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0319

DEADLINE FOR RECEIPT: September 10, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (a) and (b), are the applications referenced the same as the application in .0104? If so, please add a cross reference.

At line 7, delete or define "immediately."

In (a), line 8, please change "must" to "shall."

At line 8 before "90 days," would "within" be clearer to your regulated public than "not more than?"

In (b), what are the contents or substantive requirements of the application form? Are these in rule in accordance with G.S. 150B-2(8a)(d)?

At line 11, delete or define "lawfully."

In (c), line 16, please change "must" to "shall."

At line 16, please spell out the number six. See 26 NCAC 02C .0108.

In (c), line 19, please delete or define "fully."

At line 19, by "required timeframe" do you mean "the timeframe established in Paragraph (a) of this Rule?"

In (c), where is your statutory authority to require an applicant seeking licensure pursuant to G.S. 90-241 to complete a six month internship? Please note 90-241 uses the language "shall grant a license" and does not mention the completion of an internship. Further, G.S. 90-241(b) requires an applicant to meet the requirements of G.S. 90-237(1)-(3). G.S. 90-237(4) requires the completion of an internship.

§ 90-241. Waiver of written examination requirements.

- (a) The Board shall grant a license without examination to any applicant who:

Ashley Snyder
Commission Counsel

Date submitted to agency: August 27, 2019

- (1) Is at least 18 years of age.
- (2) Is of good moral character.
- (3) Holds a license in good standing as a dispensing optician in another state.
- (4) Has engaged in the practice of opticianry in the other state for four years immediately preceding the application to the Board.
- (5) Has not violated this Article or the rules of the Board.

(b) The Board shall grant admission to the next examination and grant license upon attainment of a passing score on the examination to a person who has worked, in a state that does not license opticians, in opticianry for four years immediately preceding the application to the Board performing tasks and taking the curriculum equivalent to the North Carolina apprenticeship, and who meets the requirements of G.S. 90-237(1) through (3).

(c) Any person desiring to secure a license under this section shall make application therefor in the manner and form prescribed by the rules of the Board and shall pay the fee prescribed in G.S. 90-246.

(d) Repealed by Session Laws 1997-424, s. 2. (1951, c. 1089, s. 8; 1977, c. 755, s. 4; 1979, c. 166, ss. 2, 3; 1981, c. 600, s. 9; 1997-424, s. 2.)

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

1 21 NCAC 40 .0319 is amended as published in 33:23 NCR 2258-2262 as follows:

2

3 **21 NCAC 40 .0319 APPLICANTS FROM OTHER STATES**

4 (a) An applicant seeking licensure in North Carolina under G.S. 90-241(a) shall tender an application to the Board
5 accompanied by affidavits from two persons with whom the applicant worked as an optician for the previous four
6 years. In addition, the applicant shall furnish affidavits from two licensed refractionists, either ophthalmologists or
7 optometrists, that the applicant has practiced the profession of opticianry for four years in another state immediately
8 prior to the application. An application under G.S. 90-241(a) must be filed with the Board not more than 90 days
9 following the termination of the applicant's out-of-state opticianry work for which the applicant claims credit.

10 (b) An applicant seeking admission to an examination under G.S. 90-241(b) shall tender an application to the Board
11 accompanied by affidavits from two persons under whom or with whom the applicant lawfully worked in the practice
12 of opticianry in the other state, either in one or multiple places of business. The application and the affidavits shall
13 describe the tasks performed by the applicant in the other state and the dates the tasks were performed.

14 ~~(c) An application under G.S. 90-241(a) must be filed with the Board not more than 90 days following the termination~~
15 ~~of the applicant's out-of-state opticianry work for which the applicant claims credit.~~

16 (c) An applicant seeking licensure in North Carolina under G.S. 90-241 must register with the Board to serve a 6
17 month internship pursuant to Rule .0314 of this Chapter not more than 12 months following the date of notification
18 from the Board concerning the applicant's licensure eligibility. The applicant shall reapply for licensure with the
19 Board if the fully executed internship registration is not received in the Board office within the required timeframe.

20

21 *History Note: Authority G.S. 90-237; 90-239; 90-241; 90-249(12);*

22 *Eff. November 1, 1981;*

23 *Amended Eff. August 1, 1998; December 1, 1994; July 1, 1991; February 1, 1989;*

24 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December*
25 *22, 2018, 2018;*

26 *Amended Eff. October 1, 2019.*

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 .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.

Ashley Snyder
Commission Counsel

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0321

DEADLINE FOR RECEIPT: September 10, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

At line 4, please delete the space between 90-237 and (4).

What are the contents or substantive requirements of the application referenced in this Rule? Are the contents or substantive requirements of the application form in rule in accordance with G.S. 150B-2(8a)(d)?

At line 6, please change "must" to "shall."

In (1), what is included in the "minimum equipment specified by the Board?"

At line 10, please change "and/or" to either "and" or "or."

In (2), what is the "curriculum approved by the Board?" Is it in rule?

In (3), what tests are required by the Board?

In (3), line 12, define "periodic."

In (4), when will inspections occur? Upon application?

In (4), who conducts the inspections? Board staff?

In (4), what is the purpose of the inspection? What are you looking for? Compliance with these Rules or something else?

In (4), where is your statutory authority to conduct inspections of training establishments, specifically those run by optometrists and ophthalmologists?

In your history note, please reference 90-240(a)(3) instead of 90-240(3).

Ashley Snyder
Commission Counsel
Date submitted to agency: August 27, 2019

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: August 27, 2019

1 21 NCAC 40 .0321 is amended as published in 33:23 NCR 2258-2262 as follows:

2

3 **21 NCAC 40 .0321 TRAINING ESTABLISHMENT REQUIREMENTS**

4 Any North Carolina licensed optician, ophthalmologist, or optometrist as provided in G.S. 90-237 (4) and G.S.
5 90-240(a)(2) and (3) who proposes to train an apprentice or intern to become an optician shall fill out and sign ~~under~~
6 ~~oath~~ an application to do so. In addition, the training establishment must meet the requirements of the Board to train
7 an apprentice or intern in opticianry. These requirements are:

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

14

15 *History Note: Authority G.S. 90-237(4); 90-240(3); 90-243; 90-249;*
16 *Eff. November 1, 1981;*
17 *Amended Eff. February 1, 1989;*
18 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December*
19 *22, ~~2018~~, 2018;*
20 *Amended Eff. October 1, 2019.*

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 .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.

Ashley Snyder
Commission Counsel

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0323

DEADLINE FOR RECEIPT: September 10, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Please remove the parentheses in (a). Consider: "Applicants for any Board ~~process (training, training,~~ examination, and licensure ~~application application)~~ shall attest . . ."

In (b), under what circumstances does the Board decide to conduct a criminal background check?

In (b), what types of applications are you referring to at line 6?

In (b), does the Board conduct background checks on optometrists or ophthalmologists if they are applying to train apprentices or interns?

In (c), just to be clear, are you barring the applicant from registration or licensure forever?

In (d), bar them from what training? Do you mean "bar them from training apprentices or interns?"

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: August 27, 2019

1 21 NCAC 40 .0323 is amended as published in 33:23 NCR 2258-2262 as follows:

2

3 **21 NCAC 40 .0323 AFFIDAVIT OF APPLICANT**

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

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

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

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

14

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

16 *Eff. November 1, 1981;*

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

18 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. December*
19 *22, ~~2018.~~ 2018.*

20 *Amended Eff. October 1, 2019.*

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Opticians

RULE CITATION: 21 NCAC 40 .0325

DEADLINE FOR RECEIPT: September 10, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

21 NCAC 28B .0203 may serve as a helpful example of how another licensing board handled the same type of rule.

In (a)(1), are the contents or substantive requirements of this application form in rule in accordance with G.S. 150B-2(8a)(d)?

In (a)(2), please specifically reference G.S. 90-246(4).

In (a)(4), why is this necessary because it repeats 93B-15.1(a)(3)? Instead, consider deleting (a)(4) and amending (a)(3) to list 93B-15.1(a)(1) through (3).

In (b)(1), are the contents or substantive requirements of this application form in rule in accordance with G.S. 150B-2(8a)(d)?

In (b)(2), please specifically reference G.S. 90-246(4).

Why are (b)(5) and (6) necessary because they repeat 93B-15.1(b)(3) and (4)? Instead, consider deleting (a)(5) and (6) and amending (a)(4) to list 93B-15.1(b)(1) through (4).

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: August 27, 2019

1 21 NCAC 40 .0325 is adopted as published in 33:23 NCR 2258-2262 as follows:

2
3 **21 NCAC 40 .0325 LICENSURE FOR MILITARY-TRAINED APPLICANT; LICENSURE FOR**
4 **MILITARY SPOUSE**

5 (a) Licensure for a military-trained applicant. Upon receipt of a request for licensure pursuant to G.S. 93B-15.1 from
6 a military-trained applicant, the Board shall issue a license to the applicant who satisfies the following conditions:

- 7 (1) submission of a complete Application for License to Practice Ophthalmic Dispensing, pursuant to
8 G.S. 93B-15.1, Military Training/Experience or Spouse of Military Personnel;
9 (2) submission of a license fee as set forth in G.S. 90-246;
10 (3) providing documentation to satisfy conditions set out in G.S. 93B-15.1(a)(1) and (2); and
11 (4) providing documentation that the applicant has not committed any act in any jurisdiction that would
12 constitute grounds for refusal, suspension, or revocation of a license in North Carolina at the time
13 the act was committed.

14 (b) Licensure for a military spouse. Upon receipt of a request for licensure pursuant to G.S. 93B-15.1 from a military
15 spouse, the Board shall issue a license to the applicant who satisfies the following conditions:

- 16 (1) submission of a complete Application for License to Practice Ophthalmic Dispensing, pursuant to
17 G.S. 93B-15.1, Military Training/Experience or Spouse of Military Personnel;
18 (2) submission of a license fee as set forth in G.S. 90-246;
19 (3) submission of written documentation demonstrating that the applicant is married to an active
20 member of the U.S. military;
21 (4) providing documentation to satisfy conditions set out in G.S. 93B-15.1(b)(1) and (2);
22 (5) providing documentation that the applicant has not committed any act in any jurisdiction that would
23 constitute grounds for refusal, suspension, or revocation of a license in North Carolina at the time
24 the act was committed; and
25 (6) is in good standing and has not been disciplined by the agency that had jurisdiction to issue the
26 license, certification, or permit.

27
28 *History Note: Authority G.S. 90-234; 90-239; 93B-15.1;*
29 *Eff. October 1, 2019.*