

## 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: Board of Examiners in Optometry

RULE CITATION: 21 NCAC 42J .0101

### RECOMMENDED ACTION:

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

### COMMENT:

*Staff recommends objection to this Rule because the Board does not cite to and staff cannot find statutory authority to charge the fees in Items 10 and 11 for limited liability companies ("LLCs").*

*The fees for LLCs appear to have been allowed by G.S. 57C-2-01. However, that statute was repealed by S.L. 2013-157. That Session Law created a new Chapter for LLCs in G.S. 57D. Staff cannot find within Chapter 57D any authority for boards to charge LLCs these fees. Staff is not aware of any other statutory authority that would allow the Board to charge LLCs these fees.*

*Staff notes that the fees in these Items to be assessed against professional corporations are authorized by G.S. 55B-10 and 11, as cited by the Board in the History Note. Therefore, staff is not recommending objection to the fees for professional corporations.*

*Therefore, staff recommends objection to this Rule as written for lack of statutory authority regarding the fees in Items 10 and 11 related to LLCs.*

Amanda J. Reeder  
Commission Counsel

**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2013**

**SESSION LAW 2013-157  
SENATE BILL 439**

AN ACT TO AMEND AND RESTATE THE NORTH CAROLINA LIMITED LIABILITY  
COMPANY ACT AND TO MAKE OTHER CONFORMING CHANGES.

The General Assembly of North Carolina enacts:

**SECTION 1.** Chapter 57C of the General Statutes is repealed.

**SECTION 34.** Except as otherwise provided, this act becomes effective January 1,  
2014.  
In the General Assembly read three times and ratified this the 13<sup>th</sup> day of June, 2013.

s/ Daniel J. Forest  
President of the Senate

s/ Thom Tillis  
Speaker of the House of Representatives

s/ Pat McCrory  
Governor

Approved 4:27 p.m. this 19<sup>th</sup> day of June, 2013

Amanda J. Reeder  
Commission Counsel

## **Chapter 55B.**

### **Professional Corporation Act.**

#### **§ 55B-10. Registration with licensing board.**

No professional corporation shall open, operate, or maintain an establishment for any of the purposes set forth in this Chapter without first having obtained a certificate of registration from the licensing board or boards. Applications for such registration shall be made to the licensing board or boards in writing and shall contain the name and address of the corporation and such other information as may be required by the licensing board or boards. If the board finds that no disciplinary action is pending before the board against any of the licensed incorporators, officers, directors, shareholders or employees of such corporation, and if it appears that such corporation will be conducted in compliance with the law and the regulations of the board, the board shall issue, upon the payment of a registration fee, not to exceed fifty dollars (\$50.00), a certificate of registration which shall remain effective until January 1 following the date of such registration or until such other expiration or renewal date as may be established by law or by the regulations of the licensing board. (1969, c. 718, s. 10.)

#### **§ 55B-11. Renewal of certificate of registration.**

Upon written application of the holder, accompanied by a fee not to exceed the sum of twenty-five dollars (\$25.00), the licensing board shall renew the certificate of registration of a professional corporation as required by law or the regulations of the licensing board if the board finds that the corporation has complied with its regulations and the provisions of this section. If the corporation does not apply for renewal of its certificate of registration within 30 days after the date of the expiration of such certificate, the certificate of registration shall be automatically suspended and may be reinstated within the calendar year upon the payment of the required renewal fee plus a penalty of ten dollars (\$10.00), if such corporation is then otherwise qualified and entitled to a renewal of its certificate of registration. (1969, c. 718, s. 11.)

**§ 90-123. Fees.**

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties of devolving upon the North Carolina State Board of Examiners in Optometry, the Board is authorized to charge and collect the following fees:

- (1) Each application for general optometry examination ..... \$800.00
- (2) Each general optometry license renewal, which fee shall  
be annually fixed by the Board, and not later than December 15  
of each year written notice of the amount of the renewal fee  
shall be given to each optometrist licensed to practice in this  
State by mailing the notice to the last address of record with  
the Board of each such optometrist ..... 300.00
- (3) Each certificate of license to a resident optometrist desiring to  
change to another state or territory ..... 300.00
- (4) Each license issued to a practitioner of another state or  
territory to practice in this State ..... 350.00
- (5) Each license to resume practice issued to an optometrist who  
has retired from the practice of optometry or who has  
removed from and returned to this State ..... 350.00
- (6) Each application for registration as an optometric assistant  
or renewal thereof ..... 100.00
- (7) Each application for registration as an optometric technician  
or renewal thereof ..... 100.00
- (8) Each duplicate license or renewal thereof for each branch  
office ..... 100.00.

(1909, c. 444, s. 12; C.S., s. 6696; 1923, c. 42, s. 5; 1933, c. 492; 1937, c. 362, s. 1; 1959, c. 477; 1969, c. 624; 1973, c. 1092, s. 2; 1979, c. 771, ss. 1, 2; 1981, c. 909; 1987, c. 645, s. 1; 2001-493, s. 2.)

## REQUEST FOR TECHNICAL CHANGE

AGENCY: Board of Examiners in Optometry

RULE CITATION: 21 NCAC 42J .0101

**DEADLINE FOR RECEIPT: Tuesday, August 9, 2016**

**NOTE WELL:** *This request when viewed on computer extends 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 this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

*Please note, on the Submission for Permanent Rule Form 7, you state that while the Rule increases fees, it is not subject to consultation of the Joint Legislative Commission on Governmental Operations. To support this, the Board cites to G.S. 90-123, which sets the maximum fees. The Board stated in its explanation of the amendment that the Board is going to adhere to those statutory maximums.*

*However, G.S. 12-3.1 states, in relevant part:*

### **§ 12-3.1. Fees and charges by agencies.**

(a) Authority. – Only the General Assembly has the power to authorize an agency to establish or increase a fee or charge for the rendering of any service or fulfilling of any duty to the public. In the construction of a statute, unless that construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute, the legislative grant of authority to an agency to adopt rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge for the rendering of any service or fulfilling of any duty to the public, unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service. **Notwithstanding any other law, a rule adopted by an agency to establish or increase a fee or charge shall not go into effect until the agency has consulted with the Joint Legislative Commission on Governmental Operations on the amount and purpose of the fee or charge to be established or increased.** Where a rule provides for a periodic automatic adjustment to a fee, the agency that adopts the rule is not required to consult with the Commission every time the fee automatically adjusts. The agency shall submit a request for consultation to all members of the Commission, the Commission Assistant, and the Fiscal Research Division of the General Assembly on the same date the notice of text of the rule is published. The

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: July 26, 2016

request for consultation shall consist of a written report stating (i) the amount of the current fee or charge, if applicable, (ii) the amount of the proposed new or increased fee or charge, (iii) the statutory authority for the fee or charge, and (iv) a detailed explanation of the need for the establishment or increase of the fee or charge.

*G.S. 90-123 does not contain any language to indicate that increasing the fees within the statutory limits is not subject to this consultation.*

*Please note, this required consultation does not form the basis for an objection. However, G.S. 150B-21.3(c1) states:*

(c1) Fees. – Notwithstanding any other provision of this section, a rule that establishes a new fee or increases an existing fee shall not become effective until the agency has complied with the requirements of G.S. 12-3.1.

*Therefore, if the Board did not seek the consultation required by G.S. 12-3.1, once the Rule is approved, it will not be entered into the Code until the requirements of G.S. 12-3.1 has been met.*

*In the Rule, line 6, I suggest deleting “hereby” In fact, you may wish to state “The Board charges the following amounts for fees:”*

*In Items (4), line 11, and (5), line 14, please capitalize “State”*

*In the History Note, G.S. 57C-2-01 was repealed by S.L. 2013-157.*

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

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: July 26, 2016

21 NCAC 42J .0101 is amended as proposed in 30:03 NCR 298 as follows:

#### SUBCHAPTER 42J - FEE SCHEDULE

##### 21 NCAC 42J .0101 FEES

The Board hereby establishes the following fees:

- (1) Each application for general optometry examinations ~~\$400.00~~\$800.00
- (2) Each general optometry license renewal ~~\$245.00~~\$300.00
- (3) Each certificate of license to a resident optometrist desiring to change to another state or territory  
~~\$200.00~~\$300.00
- (4) Each license issued to a practitioner of another state or territory to practice in this state  
~~\$250.00~~\$350.00
- (5) Each license to resume practice issued to an optometrist who has retired from the practice of  
optometry or who has moved from and returned to this state ~~\$250.00~~\$350.00
- (6) Each application for registration as an optometric assistant or renewal thereof ~~\$50.00~~\$100.00
- (7) Each application for registration as an optometric technician or renewal thereof ~~\$50.00~~\$100.00
- (8) Each duplicate license ~~\$ 50.00~~\$100.00
- (9) Each renewal license for each branch office ~~\$ 45.00~~\$100.00
- (10) Each certificate of registration for a professional corporation or limited liability company \$50.00
- (11) Each renewal certificate of registration for a professional corporation or limited liability  
company \$25.00

*History Note: Authority G.S. 55B-10; 55B-11; 57C-2-01; 90-117.5; 90-123;*

*Eff. June 1, 1989;*

*Amended Eff. October 1, 1994; March 1, 1992;*

*Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23,  
2015;*

*Amended Eff. September 1, 2016.*