

RULEMAKING HEARINGS

BOARD OF OPTOMETRY - 1045

There will be a hearing before the Tennessee Board of Optometry to consider the promulgation of amendments to rules and a new rule pursuant to T.C.A. §§ 4-5-202, 4-5-204, and 63-8-112. The hearing will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, Tennessee Code Annotated, Section 4-5-204 and will take place in the Division of Health Related Board's Conference Room on the Third Floor of the Heritage Place Building located at 227 French Landing, Nashville, TN at 3:30 p.m. (CDT) on the 25th day of August, 2006.

Any individuals with disabilities who wish to participate in these proceedings (review these filings) should contact the Department of Health, Division of Health Related Boards to discuss any auxiliary aids or services needed to facilitate such participation or review. Such initial contact may be made no less than ten (10) days prior to the scheduled meeting date (the date such party intends to review such filings), to allow time for the Division to determine how it may reasonably provide such aid or service. Initial contact may be made with the ADA Coordinator at the Division of Health Related Boards, 227 French Landing, Suite 300, Heritage Place, MetroCenter, Nashville, TN 37243, (615) 532-4397.

For a copy of the entire text of this notice of rulemaking hearing contact:

Jerry Kosten, Regulations Manager, Division of Health Related Boards, 227 French Landing, Suite 300, Heritage Place, MetroCenter, Nashville, TN 37243, (615) 532-4397.

SUBSTANCE OF PROPOSED RULES

AMENDMENTS

Rule 1045-2-.05, Continuing Education, is amended by deleting subparagraph (1) (a) in its entirety and substituting instead the following language, and is further amended by deleting paragraph (2) but not its subparagraphs, and substituting instead the following language, and is further amended by deleting subparagraphs (2) (a) and (2) (c) in their entirety and substituting instead the following language, and is further amended by deleting part (2) (d) 3. in its entirety, so that as amended, the new subparagraph (1) (a), the new paragraph (2) but not its subparagraphs, and the new subparagraphs (2) (a) and (2) (c) shall read:

- (1) (a) For those who are therapeutically certified, a minimum of twenty (20) of the thirty (30) hours of continuing education is required in courses pertaining to ocular disease and related systemic disease, as described in subparagraph (2) (c).
- (2) Approval of Continuing Education
 - (2) (a) Except for grand clinical rounds and courses provided by the Tennessee Academy of Optometry, all continuing education courses shall be approved by the Association of Regulatory Boards of Optometry's Council on Optometric Practitioner Education (COPE).
 1. Providers of grand clinical rounds and the Tennessee Academy of Optometry shall submit the information required by subparagraph (2) (b) at least thirty (30) days prior to the actual date of the grand clinical rounds or course.
 2. Licensees who attend grand clinical rounds performed in clinical treatment facilities and/or courses provided by the Tennessee Academy of Optometry that are not approved by COPE shall receive one (1) hour of continuing education credit for each two (2) hours of attendance.

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3. No more than six (6) hours of continuing education credit during the two (2) year period described in paragraph (1) shall be granted to a licensee for attending grand clinical rounds.
- (2) (c) Courses will be classified by the Board as one (1) of the following categories:
1. Clinical Optometry – These courses shall pertain to general optometry, functional vision/pediatrics, and contact lenses;
 2. Ocular Disease – These courses shall pertain to the treatment and management of ocular disease (anterior and posterior), refractive surgery management, peri-operative management of ophthalmic surgery, and glaucoma;
 3. Related Systemic Disease – These courses shall pertain to systemic/ocular disease, principles of diagnosis, pharmacology, and neuro-optometry;
 4. (Optometric) Business Management – These courses shall pertain to practice management and/or ethics/jurisprudence. The total number of (Optometric) Business Management hours that will be accepted is six (6) hours of the thirty (30) hour requirement.

Authority: T.C.A. § 4-5-202, 4-5-204, 63-8-112, and 63-8-119.

Rule 1045-2-.06, Board Meetings, Members' Authority and Records, is amended by inserting the following language as new paragraph (6) and renumbering the remaining paragraphs accordingly:

- (6) Reconsiderations and Stays - The Board authorizes the member who chaired the Board for a contested case to be the agency member to make the decisions authorized pursuant to rule 1360-4-1-.18 regarding petitions for reconsiderations and stays in that case.

Authority: T.C.A. § 4-5-202, 4-5-204, 63-8-112, 63-8-120, and 63-8-121.

NEW RULE

1045-2-.16 PRACTICING OPTOMETRY IN OR IN CONJUNCTION WITH A RETAIL STORE OR OTHER COMMERCIAL ESTABLISHMENT.

- (1) Tennessee law (T.C.A. § 63-8-113 (c)(6)) prohibits a licensed optometrist from practicing or offering to practice optometry in, or in conjunction with, any retail store or other commercial establishment where merchandise is displayed or offered for sale.
 - (a) As used in T.C.A. § 63-8-113 (c)(6) and this rule, “retail store or other commercial establishment where merchandise is displayed or offered for sale” shall include all retail stores, commercial establishments and non-health care entities where ophthalmic materials, including but not limited to lens, frames, eyeglasses, contact lens, and other optical products, are displayed and/or offered for sale and the primary business of the store or establishment is not the practice of optometry.
 - (b) As used in T.C.A. § 63-8-113(c)(6) and this rule, “practice or offer to practice optometry in, or in conjunction with” shall mean that:

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1. A licensed optometrist is performing acts which constitute the practice of optometry in or on the physical premises of the retail store or other commercial establishment; and/or
 2. A licensed optometrist is not operating his/her practice independently from the retail store or other commercial establishment.
- (c) To avoid violating T.C.A. § 63-8-113(c)(6), a licensed optometrist must practice in a location that is both physically separate and independently operated from the retail store or other commercial establishment. The location must be divided from the retail store or other commercial establishment by a wall or other permanent division. The location must have an entrance for patients that is separate from the retail store or commercial establishment and opens directly onto a public street, lobby, corridor, or other public thoroughfare. The retail store or other commercial establishment may not, either directly or indirectly, control or attempt to control the professional judgment or practice of the licensed optometrist.
- (2) A licensed optometrist shall be deemed to be practicing in conjunction with a retail store or other commercial establishment where merchandise is displayed or offered for sale if the optometrist enters into a lease that purports to, either indirectly or directly, control or attempt to control the professional judgment or practice of an optometrist through:
- (a) A provision by which the commercial entity sets or attempts to set the professional fees or office hours of the optometrist or number of patients to be seen by the optometrist;
 - (b) A provision by which the commercial entity restricts or attempts to restrict the optometrist's discretion to schedule appointments at times convenient to the optometrist's patients;
 - (c) A provision by which the commercial entity may terminate or threaten to terminate the lease or other agreement for the primary purpose of controlling or attempting to control the professional judgment or manner of practice of the optometrist;
 - (d) A provision by which the commercial entity provides to or shares with the optometrist employees or communication services or equipment;
 - (e) A provision by which the commercial entity employs or contracts for the services of the optometrist if part of the optometrist's duties involve the practice of optometry (except that an optometrist may legally provide optometric services to the employees of the commercial entity);
 - (f) A provision by which the commercial entity pays the optometrist for a service not provided;
 - (g) A provision by which the commercial entity restricts an optometrist's access to leased office space at times when the optometrist needs such access to provide emergency care to a patient;
 - (h) A provision by which the optometrist agrees to split or share fees with the commercial entity in return for the solicitation of patients for the optometrist by the commercial entity;
 - (i) A provision by which the commercial entity restricts or attempts to restrict the scope of practice of the optometrist in a way that prevents the optometrist from engaging in the full

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scope of practice allowed under state law;

- (j) A provision which links the name of the optometrist to the commercial entity;
 - (k) A provision which in any way limits or attempts to limit the optometrist's exercise of independent professional judgment and responsibility; and
 - (l) A provision which limits or attempts to limit the optometric services and ophthalmic materials that the optometrist may provide to his or her patients or the information which may be disseminated to the public by the optometrist.
 - (m) A provision that would in any way violate or compromise the optometrist's duty to protect the privacy of patients under the federal Health Insurance Portability and Accountability Act (HIPAA) and the rules adopted thereunder.
 - (n) A provision by which the leased space is not large enough to include a secure location for storage of confidential patient records.
 - (o) Any other lease provision through which the retail store or other commercial establishment purports to, either indirectly or directly, control or attempt to control the professional judgment or practice of a licensed optometrist.
- (3) T.C.A. § 63-8-113(c)(6) does not prohibit an optometrist from leasing space from, or entering into agreements with, a retail store or other commercial establishment where ophthalmic materials are displayed or sold, so long as the space which is leased by the optometrist is physically separate from the retail store or other commercial establishment and so long as the lease or agreement does not contain any of the provisions described in paragraph (5) of this rule. A bona fide lease between an optometrist and a commercial entity shall not be deemed to violate T.C.A. § 63-8-113(c)(6) solely on the basis that the rental payments are based, in whole or in part, on the revenue earned by the optometrist from his or her practice.
- (4) The provisions of T.C.A. § 63-8-113 (c)(6) and this rule do not apply to a licensed optometrist who was practicing in a retail store or other commercial establishment where ophthalmic materials are displayed or offered for sale prior to April 17, 1967, so long as that optometrist has continued to practice in that same location (or a relocated location if the retail store or other commercial establishment moved). However, this "grandfather" provision shall not continue to apply after that optometrist vacates the premises of that retail store or other commercial establishment and shall not apply to a new optometrist who comes to work at that retail or other commercial establishment after April 17, 1967.
- (5) Violation of this rule may subject a licensee to disciplinary action pursuant to Rule 1045-2-.10.

Authority: T.C.A. § 4-5-202, 4-5-204, 63-8-112, 63-8-113, 63-8-120, and 63-8-125.

The notice of rulemaking set out herein was properly filed in the Department of State on the 28th day of June, 2006. (06-36)