

Stay for the effective date was filed October 2 2014. The new effective date for the rule is anuary 15 2015. See attached stay on page 12 to review the stay. The Government Operations Committee filed notice that .17 will not be included in the 2015 Omnibus Bill when adopted by the 109th General Assembly. See attached page 14.

| | |
|---|--|
| Department of State Division of Publications 312 Rosa L. Parks Avenue, 8th Floor Snodgrass/TN Tower Nashville, TN 37243 Phone: 615-741-2650 Fax: 615-741-5133 Email: register.information@tn.gov | For Department of State Use Only Sequence Number: <u>08-22-14</u> Rule ID(s): <u>5790</u> File Date: <u>8/18/14</u> Effective Date: <u>11/16/14</u> |
|---|--|

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing. T.C.A. § 4-5-205

| | |
|---------------------------------|---|
| Agency/Board/Commission: | Tennessee Department of Health/Board of Optometry |
| Division: | Health Related Boards |
| Contact Person: | John Scott Gentry, O.D. |
| Address: | 665 Mainstream Drive, Poplar Room, Nashville, TN |
| Zip: | 37243 |
| Phone: | (615) 532-5100 |
| Email: | drsgod@aol.com |

Revision Type (check all that apply):

- Amendment
 New
 Repeal

Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please enter only ONE Rule Number/Rule Title per row)

| Chapter Number | Chapter Title |
|----------------|--|
| 1045-02 | General Rules Governing the Practice of Optometry |
| Rule Number | Rule Title |
| 1045-02-.17 | Prohibition Upon the Practice of Optometry In Or In Conjunction With Any Retail Store or Other Commercial Establishment Where Merchandise Is Displayed Or Offered for Sale |
| | |
| | |

| Chapter Number | Chapter Title |
|----------------|---------------|
| | |
| Rule Number | Rule Title |
| | |
| | |
| | |

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to <http://state.tn.us/sos/rules/1360/1360.htm>)

Rule 1045-02-.17 Prohibition Upon the Practice of Optometry In Or In Conjunction With Any Retail Store or Other Commercial Establishment Where Merchandise Is Displayed Or Offered for Sale is created pursuant to the following language:

- (1) Pursuant to T.C.A. §§ 63-8-113(c)(6) and 63-8-125, a licensed optometrist shall practice in a location that is independently operated and is physically separate from a retailer of ophthalmic materials or other commercial establishment pursuant to the following requirements:
 - (a) After July 1, 2015, there shall be a permanent structural separation between a licensed optometrist's office and any retailer of ophthalmic materials or other commercial establishment;
 - (b) The permanent structural separation, such as a wall, shall not contain a door or any other opening that leads directly to a retailer of ophthalmic materials or other commercial establishment;
 - (c) The licensed optometrist's office shall have an entrance for patients that opens directly onto a public street, lobby, corridor, or other public thoroughfare; and
 - (d) A retailer of ophthalmic materials or other commercial establishment shall not, either directly or indirectly, control or attempt to control the professional judgment or practice of the licensed optometrist.
- (2) A lease between a licensed optometrist and a retailer of ophthalmic materials or other commercial establishment shall not be deemed a violation of T.C.A. §§ 63-8-113(c)(6) and/or 63-8-125 solely on the basis that the rental payments are based, in whole or in part, on the revenue earned by the licensed optometrist from his/her practice.
- (3) Violation of this rule may subject a licensee to disciplinary action pursuant to Rule 1045-02-.10.

Authority: T.C.A. §§ 63-8-113 and 63-8-125

* If a roll-call vote was necessary, the vote by the Agency on these rulemaking hearing rules was as follows:

| Board Member | Aye | No | Abstain | Absent | Signature (if required) |
|-----------------|-----|----|---------|--------|-------------------------|
| David Talley | X | | | | |
| Jeff Foster | X | | | | |
| John Gentry | X | | | | |
| Richard Orgain | X | | | | |
| Dennis Mathews | X | | | | |
| Kimberly Button | | | | X | |

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Board of Optometry on February 26, 2014, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 12/11/2013

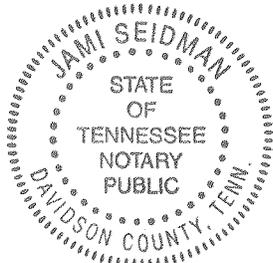
Rulemaking Hearing(s) Conducted on: (add more dates). 02/26/2014

Date: 06/11/2014

Signature: *John Scott Gentry, O.D.*

Name of Officer: John Scott Gentry, O.D.

Title of Officer: Chairman, Tennessee Board of Optometry



My Commission Expires JUNE 21, 2016

Subscribed and sworn to before me on: 6/11/14

Notary Public Signature: *J Seidman*

My commission expires on: 6/21/16

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Robert E. Cooper, Jr.

Robert E. Cooper, Jr.
Attorney General and Reporter

8-15-14
Date

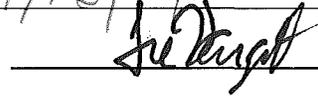
Department of State Use Only

Filed with the Department of State on:

8/18/14

Effective on:

11/16/14



Tre Hargett
Secretary of State

RECEIVED
2014 AUG 18 PM 12:47
OFFICE OF
SECRETARY OF STATE

Public Hearing Comments

The Board received the following written and oral comments concerning the proposed rule:

1. Comment: The Tennessee Association of Optometric Physicians continues to receive reports of optometrists being controlled by or treated as if they were employees of retail-establishments. The proposed rule is necessary to protect the independence and personal professional judgment of optometrists leasing space from retail establishments.
2. Comment: The proposed rule should be rejected or revised for the following reasons: 1) 2003 Public Chapter 246 (currently codified at Tenn. Code Ann. § 63-8-125) terminated any authority on the part of the board to mandate complete separation between an optometrist's office and a lessor's retail establishment by codifying a list of requirements for lease agreements between optometrists and retailers that did not include a complete-separation provision; 2) no meaningful relationship exists between the proposed complete-separation requirement and the independence of an optometrist's professional judgment; 3) mechanisms available under the current regulatory regime, as well as less onerous alternative new regulations, including rules or practices related to disclaimers and notices, would suffice to implement Section 63-8-113(c)(6); and 4) the complete-separation requirement deviated from the Board's own prior practice in enforcing Section 63-8-113(c)(6) against Jeffery Rothman in 1997 and would be, consequently, beyond the Board's statutory rule-making authority.
3. Comment: Optometrists who lease space from retail establishments have experienced frequent efforts to interfere with their professional judgment and onerous scheduling and business-practice requirements placed upon them by retail lessors. One retail lessor had required an optometrist lessee to participate in "transitioning" patients from the exam space to the retail space in an express effort to circumvent the existing two-door policy. The permanent separation required by the proposed rule is less onerous than the enforcement of patient-privacy rules against retail establishments that were not positioned to comply with them.
4. Comment: A complete separation between an optometrist's office and a retailer of ophthalmic materials interferes with an optometrist's ability to ensure that the retailer's dispensing opticians provide patients with the lenses and care they require.
5. Comment: The requirement of a permanent separation would require expensive, extensive and at times impractical renovations to the office space an optometrist lease from a retail establishment.
6. Comment: The proposed rule will inconvenience optometric patients who wish to purchase ophthalmic materials at an adjacent retailer because a permanent structural separation of the optometrist's office from the retail store will, in some cases, require that they walk outside and be exposed to the elements.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

Board of Optometry Rule 1045-02-.17 Statement of Economic Impact

Types of small businesses that will be directly affected by the proposed rules:

The proposed rule will directly affect licensed optometrists, who – properly considered – are healthcare providers, not small businesses.

Types of small businesses that will bear the cost of the proposed rules:

Licensed optometrists will bear the costs of the proposed rule..

Types of small businesses that will directly benefit from the proposed rules:

Licensed optometrists will benefit from the proposed rule.

Description of how small business will be adversely impacted by the proposed rules:

There is no foreseeable adverse impact from this rule.

Alternatives to the proposed rule that will accomplish the same objectives but are less burdensome, and why they are not being proposed:

The Board of Optometry does not believe there are less burdensome alternatives to the proposed rule.

Comparison of the proposed rule with federal or state counterparts:

Federal: The Board of Optometry is not aware of any federal counterparts.

State: The proposed rule does not conflict with any state counterpart.

Effect of possible exemption of small businesses from all or any part of the requirements contained in the proposed rule:

If an exemption were provided to the licensed optometrist affected by the proposed rule, such optometrists and their patients would be deprived of all the benefits resulting from the rule.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 “any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments.” (See Public Chapter Number 1070 (<http://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

The proposed rule will not have an impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

The rule carries out and enforces the prohibition in T.C.A. §63-8-113(c)(6) that no licensed optometrist practice in, or in conjunction with, a retail store or other commercial establishment by requiring (1) that each licensed optometrist's office have an entrance for patients that opens directly onto a public street, lobby or corridor and (2) that there be a permanent structural separation between an optometrist's office and any retail store or other commercial establishment. The rule does not effect any change in any prior regulation.

- (B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

The rule is promulgated pursuant to T.C.A. §63-8-113(c)(6), which prohibits a licensed optometrist from practicing "in, or in conjunction with" a retail store and T.C.A. §63-8-125, which provides that a manufacturer or retailer of ophthalmic materials shall not control or attempt to control the professional judgment of practice of an optometrist.

- (C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

The rule most directly affects licensed optometrists. The Tennessee Association of Optometric Physicians strongly supports the rule. The majority of the oral and written comments the Board received in connection with the February 26, 2014, Rulemaking hearing were in support of the rule.

- (D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

The Attorney General and Reporter reviewed the proposed rule prior to the filing of the Rulemaking Hearing to confirm its legality. The Supreme Court of Tennessee recognized the constitutionality of T.C.A. §63-8-113(c)(6) in *LensCrafters v. Sundquist*, 33 S.W. 3d 772, 778 (Tenn. 2000) and further held that "allowing optometrists to practice in conjunction with businesses... may involve a compromise of the optometrist's professional autonomy." The Supreme Court also held that "By allowing such business associations, we would risk subordinating the standards of the optometry profession to the influence of commercial interests." Federal courts in *LensCrafters v. Wadley*, 248 F. Supp. 2d 705 (M. D. Tenn. 2003) and *LensCrafters v. Robinson*, 403 F. 3d 798 (6th Cir. 2005) have also upheld the validity of § 63-8-113(c)(6), finding that in all respects it constitutes an appropriate exercise of the Tennessee's police power and does not discriminate against interstate commerce.

- (E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

The Board estimates that the new rule will not affect state or local government revenues. The cost to enforce the new rule is not expected to exceed \$10,000 per year.

- (F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

John Scott Gentry, O.D., Chairman of the Tennessee Board of Optometry; and Gino Bulso, counsel to the Tennessee Board of Optometry and counsel for the State of Tennessee in the *LensCrafters v. Wadley* and *LensCrafters v. Robinson* litigation.

- (G)** Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

John Scott Gentry, O.D., Chairman of the Tennessee Board of Optometry; and Gino Bulso, counsel to the Tennessee Board of Optometry and counsel for the State of Tennessee in the LensCrafters v. Wadley and LensCrafters v. Robinson litigation.

- (H)** Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

John Scott Gentry, O.D., Suite 5, 301 Montgomery Street, Johnson City, TN 37604; 423-926-2642 (o); drsgod@aol.com
Gino Bulso, Leader, Bulso & Nolan, PLC, 414 Union Street, Suite 1740, Nashville, TN 37219; 615-780-4110(O); gbulso@leaderbulso.com

- (I)** Any additional information relevant to the rule proposed for continuation that the committee requests.

None

Board Responses to Public Hearing Comments.

1. Comment: The Tennessee Association of Optometric Physicians continues to receive reports of optometrists being controlled by or treated as if they were employees of retail-establishments. The proposed rule is necessary to protect the independence and personal professional judgment of optometrists leasing space from retail establishments.

Response: The Board agrees with these comments.

2. Comment: The proposed rule should be rejected or revised for the following reasons: 1) 2003 Public Chapter 246 (currently codified at T.C.A. § 63-8-125) terminated any authority on the part of the board to mandate complete separation between an optometrist's office and a lessor's retail establishment by codifying a list of requirements for lease agreements between optometrists and retailers that did not include a complete-separation provision; 2) no meaningful relationship exists between the proposed complete-separation requirement and the independence of an optometrist's professional judgment; 3) mechanisms available under the current regulatory regime, as well as less onerous alternative new regulations, including rules or practices related to disclaimers and notices, would suffice to implement Section 63-8-113(c)(6); and 4) the complete-separation requirement deviated from the Board's own prior practice in enforcing Section 63-8-113(c)(6) against Jeffery Rothman in 1997 and would be, consequently, beyond the Board's statutory rule-making authority.

Response: The Board responds (1) that T.C.A. § 63-8-125 does not explicitly or implicitly terminate the Board's authority to promulgate the proposed rule; (2) that the requirement of a permanent structural separation of a licensee's optometric practice and any commercial establishment is necessary to enforce the prohibition contained in Section 63-8-113(c)(6) that an optometrist not practice "in or in conjunction with" a retail store or other commercial establishment, to maintain the confidentiality of patient medical records, to address the persistent problem of patient confusion concerning the independence and separateness of the professional optometric practice from the adjacent retail establishment, and to protect the independence of the optometrist; (3) that merely posting a disclaimer or notice concerning the separateness of the optometric practice from the retail establishment would neither carry out the statutory prohibition in Section 63-8-113(c)(6) that an optometrist not practice "in or in conjunction with" a retail store or other commercial establishment nor curb the abusive practices or confusion reported to the Board; and (4) that the Board's rulemaking authority is no way limited by the Rothman case, which preceded the Supreme Court of Tennessee's decision in *LensCrafters v. Sundquist*, the U.S. District Court for the Middle District of Tennessee's decision in *LensCrafters v. Wadley*, and the U.S. Court of Appeals for the Sixth Circuit's decision in *LensCrafters v. Robinson*.

3. Comment: Optometrists who lease space from retail establishments have experienced frequent efforts to interfere with their professional judgment and onerous scheduling and business-practice requirements placed upon them by retail lessors. One retail lessor had required an optometrist lessee to participate in "transitioning" patients from the exam space to the retail space in an express effort to circumvent the existing two-door policy. The permanent separation required by the proposed rule is less onerous than the enforcement of patient-privacy rules against retail establishments that were not positioned to comply with them.

Response: The Board agrees with these comments.

4. Comment: A complete separation between an optometrist's office and a retailer of ophthalmic materials interferes with an optometrist's ability to ensure that the retailer's dispensing opticians provide patients with the lenses and care they require.

Response: Any such alleged interference is minimal in that (1) it is a concern that applies only to patients who happen to visit a retail store next to the optometrist's office, (2) applies only to in-person (as distinct from telephonic or electronic) communications, and (3) where applicable, simply involves an optometrist walking next door to consult with a dispensing optician.

5. Comment: The requirement of a permanent separation would require expensive, extensive and at times impractical renovations to the office space an optometrist lease from a retail establishment.

Response: The Board's primary concern in promulgating the proposed rule is to carry out the mandate of T.C.A. §§63-8-113(c)(6) and 63-8-125 and to protect the health and safety of the patients of optometrists licensed

to practice in Tennessee. Licensees who are currently in compliance with Section 63-8-113(c)(6) will incur minimal, if any, renovations costs. The fact that some licensees who currently practice inside of a retail store or other commercial establishment in violation of Section 63-8-113(c)(6) will have to modify their existing professional office space to comply with the proposed rule in no way alters the Board's responsibility to enforce the Optometry law or protect the health and safety of optometric patients.

6. Comment: The proposed rule will inconvenience optometric patients who wish to purchase ophthalmic materials at an adjacent retailer because a permanent structural separation of the optometrist's office from the retail store will, in some case require that they walk outside and be exposed to the elements.

Response: The Board is committed to protection of patient health and safety. Although in some instances the structural separation of an optometrist's office and an adjacent retail store will require patients to walk out into the lobby of a shopping mall or to go outside, such a slight inconvenience does not counsel against enforcement of a statute requiring that an optometrist not practice inside of a retail store. The proposed rule does not place the safety of any patient at risk. Patients should only enter or leave a professional office or a retail store when it is safe to do so.

Department of State
Division of Publications
 312 Rosa L. Parks Avenue, 8th Floor Snodgrass/TN Tower
 Nashville, TN 37243
 Phone: 615-741-2650
 Email: publications.information@tn.gov

For Department of State Use Only

Sequence Number: 10-13-14
 Rule ID(s): _____
 File Date: 10-23-14
 Effective Date: 10-23-14

Filing Form for Stay of Effective Date on Rules, Withdrawal of Stay, and Withdrawal of Rules

| | |
|---------------------------------|--|
| Agency/Board/Commission: | <u>Tennessee Department of Health/Board of Optometry</u> |
| Division: | <u>Health Related Boards</u> |
| Contact Person: | <u>Sean McMinn</u> |
| Address: | <u>G-16 War Memorial Building</u> |
| Zip: | <u>37243</u> |
| Phone: | <u>(615) 741-3056</u> |
| Email: | <u>Sean.mcminn@capitol.tn.gov</u> |

Type of Action on Rule:

Stay of Effective Date of Rules

| | |
|---|----------------------------|
| Rule Filing Date: | <u>(mm/dd/yy) 08/18/14</u> |
| Rule Original Effective Date: | <u>(mm/dd/yy) 11/16/14</u> |
| Length of Stay (not to exceed 75 days): | <u>60 days</u> |
| New Effective Date of Rule Filing: | <u>(mm/dd/yy) 01/15/15</u> |

Notice of Withdrawal of Stay

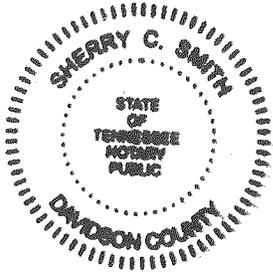
| | |
|------------------------------------|-------------------|
| Stay Filing Date: | <u>(mm/dd/yy)</u> |
| Stay Effective Date: | <u>(mm/dd/yy)</u> |
| New Effective Date of Rule Filing: | <u>(mm/dd/yy)</u> |

Notice of Withdrawal of Rules

| | |
|----------------------|-------------------|
| Rule Filing Date: | <u>(mm/dd/yy)</u> |
| Rule Effective Date: | <u>(mm/dd/yy)</u> |

Rule(s) (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please enter only **ONE** Rule Number/RuleTitle per row)

| Chapter Number | Chapter Title |
|--------------------|---|
| <u>1045-02</u> | <u>General Rules Governing the Practice of Optometry</u> |
| Rule Number | Rule Title |
| <u>1045-02-.17</u> | <u>Prohibition Upon the Practice of Optometry In Or In Conjunction With Any Retail Store or Other Commercial Establishment Where Merchandise Is Displayed Or Offered for Sale</u> |
| | |
| | |



Date: October 23, 2014

Signature: *Sean McMinn*

Name of Officer: Sean McMinn

Title of Officer: Legislative Attorney

Subscribed and sworn to before me on: October 23, 2014

Notary Public Signature: *Sherry C. Smith*

My commission expires on: June 21, 2016

Department of State Use Only

Filed with the Department of State on: 10-23-14

Tre Hargett
Tre Hargett
Secretary of State

2014 OCT 23 PM 1:05
SECRETARY OF STATE

12-27-14

JUDD MATHENY
STATE REPRESENTATIVE
47TH LEGISLATIVE DISTRICT
COFFEE & WARREN COUNTIES



COMMITTEE MEMBERSHIP

CHAIRMAN, GOVERNMENT
OPERATIONS

AGRICULTURE & NATURAL
RESOURCES

CALENDAR & RULES

CHAIRMAN, JOINT LEGISLATIVE
ADVISORY COMMITTEE

LEGISLATIVE OFFICE
215 WAR MEMORIAL BUILDING
NASHVILLE, TN 37243
(615) 741-7448
rep.judd.matheny@capitol.state.tn.us

House of Representatives State of Tennessee

HOME OFFICE
398 VANGUARD LANE
TULLAHOMA, TN 37388
(931) 390-8314

NASHVILLE

December 22, 2014

Tre Hargett, Secretary of State
Department of State
Division of Publications
312 Rosa Parks Avenue, 8th Floor Tennessee Tower
Nashville, Tennessee 37243

2014 DEC 26 AM 9:27
SECRETARY OF STATE
TRE HARGETT

Re: Tennessee Board of Optometry Rule Number 1045-02-.17

Secretary Hargett,

This letter serves as notice that on Wednesday December 17, 2014, the Joint Government Operations Committee of the Tennessee General Assembly exercised the authority conferred by Tennessee Code Annotated Section 4-5-226(j)(1) and expressed its disapproval of Tennessee Board of Optometry Rule Number 1045-02-.17 by voting to allow the Rule to expire upon its established expiration date. Tennessee Board of Optometry Rule Number 1045-02-.17 is currently subject to a 60-day stay and will take effect on January 15, 2015. Pursuant to Tennessee Code Annotated Section 4-5-226(a) and passage of the 2015 Rules Omnibus Bill, the established expiration date of Tennessee Board of Optometry Rule Number 1045-02-.17 is June 30, 2015. You are requested to assist the committee in complying with the requirements of Tennessee Code Annotated Section 4-5-226(j)(1) by posting notice on the Administrative Register web site of the Committee's disapproval of Tennessee Board of Optometry Rule Number 1045-02-.17 by a vote to allow the rule to expire on its scheduled termination date of June 30, 2015.

Sincerely,

Judd Matheny