November 30, 2016

Mr. Ken Levine  
Director  
Texas Sunset Advisory Commission  
P.O. Box 13066  
Austin, TX 78711

Via email: sunset@sunset.texas.gov

RE: Texas Optometry Board

Dear Director Levine,

On behalf of the NAOO, I am pleased to present our comments concerning the Commission’s review of the Texas Optometry Board and law (see attachment).

We respectfully request that this comment be entered into the record concerning this agency and that we be informed of any hearings that may be scheduled on the matter. Please feel free to contact me directly at the address or number set forth below or via email at If it would be helpful for us to forward copies of this comment to other parties, please let us know that as well.

We appreciate the Commission’s time and attention to this matter and of course are available for any other information or assistance that we can provide.

Very truly yours,

Joseph B. Neville  
Joseph B. Neville  
Executive Director

cc: NAOO Members
Texas Optometry Board – Sunset Review

Position Statement of the National Association of Optometrists & Opticians

November 29, 2016

Introduction

The National Association of Optometrists and Opticians ("NAOO") submits this comment in response to the Texas Sunset Commission’s Full Staff Report. The NAOO agrees with each of the Issues and Recommendations of the staff, including the basis for the recommendation to the transfer of optometry regulation to the Health Professions Division of the Texas Department of Licensing and Regulation, however, it reserves judgment as to the need for an actual transfer. We also offer the following additional comments and recommendations.

The Basic Issues

The Texas Optometry Board ("Board") and the law which creates it (Texas Occupations Code, Chapter 351 – the “Texas Optometry Act” or “Act”) are scheduled for sunset review in the legislature in 2017. The National Association of Optometrists and Opticians ("NAOO") is a non-profit association of optical companies and their affiliated optometrists and opticians. NAOO members are affected by the Texas Optometry Act in many ways: (1) opticians (many of whom are employed by NAOO members) have some of their duties defined and their practices are limited by the Act and (2) NAOO members
lease space or franchise to optometrists and the ability to enter into these and other routine business relationships is affected and restricted by the Act.

The history of optometry in the U.S. and particularly in Texas has been replete with examples of efforts to restrict competition in the sale of examination services and optical goods.¹ This competition exists between dispensing optometrists who sell what they prescribe (and have a distinct economic advantage under the Optometry law) and non-dispensing optometrists who focus on the professional practice of optometry and enter into business relationships with our member companies and independent opticians.²

Economic restrictions that restrain competition, yet are not related to health care and safety, should be eliminated, or at least affirmatively stated as state policy and closely monitored and supervised by state officials who are not part of the affected market.³ The avoidance of or elimination of such restrictions has and continues to be the trend in the United States.⁴

The continuing issue for the NAOO in these proceedings is the reform of the Texas Optometry Act – its modernization – to take into account the routine business relationships between opticians and optometrists, eliminating burdensome economic regulation, all the while protecting the public health and welfare and enhancing access to quality eye care and eye wear at competitive prices.

¹ See the FTC rulemaking proceedings related to eye wear prescription release, advertising related to eye care and eye wear sales and state law restrictions on the form of practice by optometrists.
² The FTC has also brought cases related to restraint of trade by optometry associations and actions by regulatory boards.
³ See North Carolina State Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015)
The NAOO – Who We Are

The NAOO is an organization of optical companies, many of whose members conduct business in the State of Texas. They include:

Pearle Vision
Walmart
Sam's Clubs
Costco Optical
LensCrafters
Sears Optical
Eyemart Express
National Vision
Target Optical
Visionworks
JC Penney Optical

NAOO members have approximately 1,050 offices in Texas and employ over 7,300 Texas residents in such offices and laboratory facilities in the state. Each of those offices are associated with or have the capacity to be associated with optometrists or ophthalmologists who independently provide eye examination services to the public. There are approximately 1,500 such eye care providers affiliated with our member companies in Texas.

The NAOO member companies have sales in the state that exceed $875,000,000 on an annual basis. Taxes of all types paid to the state or other authorities are estimated to total over $250,000,000 in 2015. The NAOO member companies represent an important and significant part of the Texas economy and offer high quality jobs, products and services to the citizens of Texas.

Open Business Model and Resulting Opportunities

The ophthalmic industry in the United States is thriving and growing. It is one with over $40 billion in sales for both eye care services, refractive surgery and optical goods.
The industry suffers, however, from ongoing economic turf wars and unnecessary regulations having little to do with consumer health and safety but instead with attempting to protect certain segments of providers. For example, three-quarters of the states (plus D.C. and Puerto Rico) allow for easy business relationships between opticians and optometrists, including single entrance locations where both the optical store and the independent optometrist occupy space. This allows for the ease and convenience of patients in obtaining their eye care and eyewear and promotes cooperation between the two in meeting the patients’ needs. Texas does not provide such convenience for its citizens unless the optometrist owns both the examination and optical sales components, i.e., only a segment of the providers – those who sell what they prescribe – can offer such convenience. The vast majority of the states (plus D.C. and Puerto Rico) allow for routine real estate business operational decisions to be negotiated and agreed upon by the optical and the optometrist. Not so for Texas where vague wording about manner of practice decisions, agreed upon hours of operation for a location and other business decisions have been the subject of Optometry Board prohibitions and private litigation resulting in anti-consumer decisions. As such, Texas is one of the most restrictive optical business climates in North America.

**Current Restrictions – Effects on Consumers and Competition**

Throughout the struggle for business-market share, the members of the NAOO have confined their consumer-focused reform efforts solely to business regulation issues. The list of such restrictions is long. In addition to store layout issues ("two-door store entrance requirement as discussed below), there are also restrictions on (i) verbal referrals between the side-by-side businesses, (ii) including office hours agreements in
the lease, (iii) partnerships between optometrists and opticians, (iv) referencing the name of the optometrist next door to the optician in advertising (and *vice versa*) – even putting each other’s business cards in the respective offices has been deemed illegal by the Board, (v) assisting optical customers with making appointments with the optometrist next door and (vi) contracting for support services between the optical and the optometrist – to name but a few. All of this is despite the fact that dispensing optometrists – those who sell what they prescribe – can do all of these things in their own office/ dispensary and even though such unnecessary regulation can be avoided by alternative approaches that protect the clinical judgment of the optometrist in these relationships. Our disputes with the dispensing optometrists have been limited to business issues and not included practice issues such as: licensure qualifications, examination standards, equipment requirements, scope of practice, continuing education standards, etc. It is precisely these standards that make all optometrists equal in that they apply equally to all Texas licensed optometrists - no matter what the form of practice. The real issue is turf and whether those optometrists who dispense should have an economic advantage over those who do not and the opticians – both large and small - who are their competition.

The “Two-Door” rule – The Texas Optometry Act continues in its requirement for the complete separation between an optometrist and an optician/mercantile establishment. Why is it necessary or of any public benefit to maintain a complete separation (wall) between an optician and the leasing optometrist’s office but not between the dispensing optometrist and his directly owned dispensary? Not only is there no empirical evidence to justify this discriminatory provision, but 85% of jurisdictions in North America do not contain any such restriction. Other than maintaining an unequal business playing field, in order to facilitate the dispensing optometrist’s sale of eye wear
to his patient and to hinder the ability of a patient of a non-dispensing optometrist to buy eye wear from a conveniently co-located optical dispensary that is not owned by the prescriber, there is no good answer.

Sections 351.363 and 351.364 of the Act deal with leasing relationships between optometrists and Mercantile Establishments and Dispensing Opticians respectively. These sections of the law require solid walls between the mercantile establishment (e.g. Sears or Costco) or optician and the leasing optometrist’s office with absolutely no opening or connection between the two. Separate doors for public use from the street or a common area into each office are required. This law has been interpreted to prohibit shared restrooms between the two offices. Such arrangement is typically called a “two-door” requirement.

Dispensing Opticians and Mercantile Establishments are permitted by Texas law to lease space next door to an optometrist. An opening or common walkway between the two offices would provide greater convenience, safety and access to the public (as is permitted to the dispensing optometrist’s patients) in seeking optical services and goods in a “one-stop” shopping environment. Because the majority of the dispensing optometrist’s business is from product and there are no real health care justifications to the discrimination in the law as it relates to optometrist/optician relationships, those unnecessary discriminations should be eliminated. Just in the last two years, two states have specifically rejected the two-door approach. California, in opening up its law to allow for increased business relationships between optometrists and opticians, including leasing, has allowed for one-door operations and provided for appropriate signage so that

---

5 Tex. Occ. Code Section 351.363(e) and Section 351.364(b).
consumers know which party is responsible for what services at the location. In
Tennessee, the optometry board attempted to impose a two-door requirement via
rulemaking, which rulemaking was rejected by the legislature. The relevant Senate
committee chair explained as the committee struck down the proposed rule that the
committee was not going to allow this outmoded, anti-consumer rule be adopted in
Tennessee. The full legislature and Governor’s office agreed.

Restrictions on lease clauses – Since the last Sunset review there has been a rash
of lawsuits concerning business agreements in leases between optometrists and optical
companies/opticians. These are not lawsuits involving the Optometry Board, but suits
brought by private plaintiff’s counsel purportedly on behalf of optometrists in Texas. The
issues raised are based upon outdated wording in the Texas Optometry Act relating to
business issues in lease agreements. Specifically, section 351.408 of the Act has been
interpreted to prohibit agreements relating to the office hours of an optometrist or the
optometric office that is the subject of the lease between the parties under the guise that
such agreements somehow “control” the judgment or practice of the optometrist. The
prohibitive language in the statute is ripe for revision. Its interpretation is absurd and
leads to the conclusion – and reality - that an optometrist can lease office space next to
an optical shop but never, or only occasionally, occupy the premises, thus denying the
customers of the optical shop the optometric service that they have come to expect at such
a location. A court has gone so far as to interpret this section as prohibiting the optical
shop from ever discussing with the leasing optometrist questions of service availability,
failure to offer services during posted hours or customer-driven complaints expressed to
the optical about the lack of hours at the optometric office.
The clear majority of states do not regulate business agreements in this fashion because these are straightforward business decisions, negotiated by the parties, and no harm results from the parties agreeing to specified hours. Indeed, the optometrists in the litigation mentioned above testified and the court found that the existence of agreements regarding the hours of operation of the optometric space resulted in no harm to the complaining optometrists and posed no harm to patients. With no detriment to the optometrist or harm to the public, the only result of these laws is wasteful spending on unnecessary litigation, an uneven playing field for competitors and inconvenience for consumers.

Restrictions on free speech/sharing truthful information – The Optometry Board has frequently taken the position that retail optical firms may not lawfully advertise to prospective customers the availability of eye examinations by independent optometrists or the names of the independent optometrists that offer such services at or near the optical establishment. The Board alleges that such advertisements violate sections 351.364 (anti-solicitation) and 351.408 (no shared services) of the Act. (We propose below that these provisions be eliminated or revised to a less restrictive alternative.) Retail optical firms, however, may lawfully contract with optometrists through lease

---

7 Wal-Mart Stores, Incorporated v. Doris Forte, O.D., et al (Tex., 2016) “But the Optometrists also testified that the hours they included in their leases were appropriate and acceptable to them.” “There was no evidence that including office hours in the leases injured customers.” “The district court instructed the jury that the Optometrists “do not claim that they have suffered any physical or economic damages...”

8 e.g., Texas Optometry Board Newsletters: (i) August 2016 – Disciplinary Matters – Advertising – violation because doctor “allowed the leasing optical to post signs in the optical advertising the doctor” and vice versa; (ii) February 2012 – “Leasing Space from an optical” – “examples of Prohibited Acts: • Allowing a sign referring to the doctor or doctor’s practice to be displayed in a mercantile (or on property controlled by the mercantile), • Mention of an optometrist’s office (including the optometrist’s name and telephone number) in an advertisement by a retailer, • Reference to a retailer of optical goods in an advertisement by an optometrist, even as a location landmark (prohibited example: “Next door to YYYY Optical”), • Manufacturers, wholesalers and retailers may not place an advertisement for an optometrist.” (iii) Similar admonishments appear in “almost every newsletter.” August 2015 Newsletter.
agreements. If our members may lawfully contract with optometrists to provide their customers with convenient access to optometric care, the first amendment protects the right to communicate that information to prospective customers. The Board simply may not prohibit truthful speech. We agree that the state may impose requirements on such advertising to ensure that the independence of the optometrist from the retail optical is conveyed to the public, but the Board may not ban such truthful advertising.

Furthermore, any advertising by our member firms of the availability of optometric services are not, as the Board has stated, the providing of a service to the optometrist in violation of the prohibition on shared services. Such advertisements are placed on behalf of our members’ businesses, to inform their customers of the services that are conveniently accessible to the members’ shops. An eye examination is a prerequisite to obtaining the dispensing services of a retail optical firm. Members’ advertisements ensure that their prospective customers are aware that such services are conveniently available. As such, we are requesting that the Commission recommend the removal of the so-called anti-solicitation provision of section 351.364 of the Act.

The Board has also gone so far as to prohibit optical firms or optometrists from referring customers or patients to one another or, indeed, any similar complimentary service provider. Note that the optometry statute specifically allows the optometrist to refer the patient to the doctor’s own dispensary⁹, but not to one conveniently located nearby. It is important to note that we do not contest any rule that would prohibit the

⁹ Texas Optometry Act Section 351.365(b): “The optometrist or therapeutic optometrist shall expressly indicate verbally or by other means that the patient has the following alternatives for the preparation of the lenses according to the prescription: (1) the optometrist or therapeutic optometrist will prepare or have the lenses prepared;”
making of payments or the giving of other consideration in exchange for referrals. The Board, however, goes well beyond this. It seeks to prohibit retail optical firms from referring their customers to any optometrist, without consideration or any form of payment therefor. It also prohibits non-dispensing optometrists from referring their patients to any optical firm. The act of referring a customer, without consideration for such referral does not constitute the providing of a business service or amount to solicitation within the meaning of the statute\textsuperscript{10}. The service provided is to our members’ customers, who have requested a recommendation on where to obtain optometric services. The same can be said for the situation where the non-dispensing optometrist is asked for a recommendation as to where the doctor’s prescription for eye wear can be filled.

Once again, the discrimination that exists between the different forms of practice needs to be eliminated. Less restrictive regulations can be put in place to properly inform the public of any business relationships that may exist, allowing the optical firm or the optometrist to decide what information they wish to share about complimentary services.

**The Balance of the Country (and recent changes)**

Most states impose no business restrictions on the relationship between optometrists and opticians. Business decisions such as hours of operation of the office, whether or not to make referrals, contracting for shared business services, etc., are left to the parties to discuss and determine. Decisions concerning these aspects of the

---

\textsuperscript{10} The Board confuses advertising (giving notice of, informing or notifying) with solicitation (asking, enticing, earnest or urgent request). Only the latter is prohibited under the Act today (and we are asking that it be removed entirely). As such, and by its pronouncements in Board newsletters, it had created an unlawful rule [See Teladoc, Inc. v. Texas Medical Board, 453 S.W.3d 606 (Tex.App.-Austin 2014)]
relationship are subject to regular negotiation. Legislatures recognize that unnecessary restrictions add to the cost of care and often impede access to such care. With entry to the profession, renewal, minimum examination and treatment requirements carefully designed and defined in the Act to meet safety and true health care requirements, legislators and administrators have realized that such care needs to be more accessible and affordable. Modes of operation that many call nontraditional, such as those of NAOO members, have proven to be more cost effective and yet provide the same level of care to the patient. In optometry, many states – the vast majority in fact – allow easy business relationships between optometrists and opticians yet preserve the optometrist’s clinical judgment. It is again time for Texas to make this move.

**Optometry Board Self Evaluation**

The Texas Optometry Board has submitted to the Commission a self-evaluation report dated September 2015. It is very clear from this report that the issue of leases between opticians and optometrists is front and center in the mind of the Board. Although no specific legal issues or problems are raised in the report, the Board spends significant time focusing on this issue and it is clear that the physical layout of the side-by-side arrangement is the focus of office inspections.

The cost of inspections of offices is not detailed in the report. It is perhaps more than curious that the number of investigations conducted by the Board for FY 2013 (63) and 2014 (64) equals the number of inspections by the Board. This is despite the fact that

---

11 All states except three allow for landlord / tenant relationships between optometrists and opticians/optical companies. Of those, only eight, including Texas, require a complete separation. Texas is the only state that prohibits agreement regarding office hours of operation.
the number of complaints against licensees is much higher than these numbers. The focus, it would seem, is on the office layout of co-located offices.\textsuperscript{12}

While additional reasons for inspections are mentioned such as inspection of records and observance of signage, records can be obtained via mail or other delivery methods and signage observed by emailed photographs, thereby avoiding the need for travel and its associated costs. Elimination of the outmoded two-door rule thereby could save the agency significant funds.

\textbf{Sunset Criteria}

The Texas Sunset Act as codified in Tex. Government Code Section 325.001, \textit{et seq.} sets forth specific criteria for review in Sections 325.011 and 325.0115. Several of the criteria are particularly important to a review of the Optometry Board's performance of its functions and the law itself. As the Board has stated in its self-evaluation report to the Commission, its primary focus is to protect the health and welfare of the public. The practice of optometry is defined in technical, health care terms, yet once one goes beyond the general administrative parts of the law, one finds that a great deal of the remainder is dedicated to economic regulation.

Paragraphs 325.011(5) and 325.0115(b)(1)(B) of the criteria deal with less restrictive methods and whether the Agency is needed to regulate in all areas. The law and this Board's authority should not be in terms to regulate business practices or relationships. The law can be structured to protect the clinical judgment of the optometrist without limiting the kind of lease and place where such relationship occurs.

\textsuperscript{12} See page 16, Board Report, section VII. B. Guide to Agency Programs – “Offices are inspected to determine compliance...prohibited control of licensees by retailers...” Also see page 22, Board Report, section VII. O. – “The inspector inspects the office layout...”
These changes will be a benefit to the public as suggested in criteria paragraph 325.0115(b)(1)(A) as will the other changes suggested in this paper.\textsuperscript{13}

The “Sunset Occupational Licensing Model: New Format”\textsuperscript{14} in dealing with Enforcement/Practice states that “The rules of licensing agencies can be used to restrict competition by limiting advertising and competitive bidding by licensees. Such restrictions can affect public access to information regarding professional services.”

It goes on to state that “Rules should only address deceptive or misleading practices. This affords all licensees the opportunity to inform the public of their services and to bid on projects. Through this information, the public has greater knowledge of the range of individuals offering a service and a range of pricing for that service. The provision discourages a closed system where entrenched interests act to dominate the field in part by limiting awareness about competitors.” This model item is of particular import to the competitive discrimination that exists in the Act and its associated regulations as the issues discussed above relating to the Act continue in the Board’s rules.

\textbf{Summary}

In summary, the NAOO agrees with the Issues and Recommendations found in the Full Staff Report. The Optometry Law, however, should also be otherwise modified. While

\textsuperscript{13} Assuming that one of the legislature’s concerns is that optometrists’ patients not be prescribed or sold unnecessary or inappropriate eyewear as a result of the optometrist’s desire to profit from the sale of eyeglasses to a patient, there should be some evidence or logical reason to believe that the feared behavior is happening or is likely to occur. If regulation is needed, it should apply directly and clearly to prescribing optometrists who profit significantly from selling the eyewear that they prescribe. Given that payments for referrals, fee splitting and profit sharing between ODs and optical dispensers are prohibited, the non-dispensing optometrist has no financial incentive to over-prescribe or to push the sale of unnecessary or inappropriate eyewear. A less restrictive alternative can also be devised to ensure leases are not based on the number of patients seen or prescriptions written. Non-dispensing ODs are just as likely as dispensing ODs (if not more so) to maintain appropriate standards of conduct, including avoiding any financial and/or material incentive that creates an inappropriate influence on his or her clinical judgment.

\textsuperscript{14} \url{https://www.sunset.texas.gov/public/uploads/files/Ch_9_Sunset_Licensing_Model_for_the_web.pdf}
the law should be strong when dealing with issues of training, licensing and health care/safety, economic regulation/favoritism is not needed. The implication that all optometrists are not professional should be eliminated, as well as the bias that optometrists in some practice situations are less well-equipped to exercise their own clinical judgment than others.

We respectfully request for the Commission’s consideration the following:

(a) Elimination of the two-door requirement in mercantile and optician side-by-side leasing arrangements as found in the Optometry Act sections 351.363 and .364, with appropriate signage requirements to adequately inform the public of the business relationship.

(b) Elimination of business relationship prohibitions as found in the Act.

(c) Use of alternative provisions to protect the optometrist’s clinical judgment while allowing for easier and less discriminatory business relationships.

Proposed changes to accomplish these recommendations are included with this paper as Attachment 1.

We appreciate our opportunity to present our views to the Commission and will be available to provide any answers, other information or assistance that may be required by the Commission.

Respectfully submitted,

The National Association of Optometrists and Opticians