



GOVERNOR GREG ABBOTT

To: Dr. Mario Gutierrez, Chair
Kelly Parker, Executive Director
Texas Optometry Board

From: Erin Bennett, Director
Regulatory Compliance Division, Office of the Governor

Date: April 30, 2021

Subject: Proposed Title 22 Texas Administrative Code Section 279.16 (RCD Rule Review #2021-004)

I. Syllabus

The Texas Optometry Board (“board”) proposed amended 22 TAC §279.16, which allows optometrists and therapeutic optometrists to remotely treat and examine patients, and establishes standards of care for optometric telehealth services.¹ The board submitted the proposed rule to the Regulatory Compliance Division (“division”) for review on March 9, 2021. The division invited public comments on the proposed rule for a 30-day period ending April 9, 2021, but received no comments. The division has determined that proposed §279.16 appropriately reflects state policy regarding telehealth services and, thus, the proposed rule is approved for final adoption.

II. Analysis

The board proposed amendments to §279.16 to implement recent changes to Chapter 111, Texas Occupations Code, which updated requirements and expanded opportunities for health professionals providing telehealth services.² Section 351.151, Texas Occupations Code, authorizes the board to adopt substantive rules, and, consistent with that section, a committee of the board consulted with the Office of the Attorney General in the development of the proposed

¹ Rule Submission Memorandum from the Texas Optometry Board (Mar. 9, 2021), at 2 (on file with the Regulatory Compliance Division of the Office of the Governor); 46 Tex. Reg. 1454 (2021) (to be codified at 22 TAC §279.16) (proposed Mar. 5, 2021) (Tex. Optometry Bd.). Hereinafter, all references to “optometrists” include both optometrists and therapeutic optometrists, as defined in Section 351.002(4) and (9), Texas Occupations Code.

² Rule Submission Memorandum from the Texas Optometry Board (Mar. 9, 2021), at 2; Acts of 2017, 85th Leg., R.S., ch. 205 (S.B. 1107).

rule.³ Because of the potential for telehealth services to impact competition and prices for optometric services, the board submitted proposed §279.16 to the division for review.⁴

Proposed §279.16(a) adds new definitions from Sections 111.001(2) and (3) for “store and forward technology” and “telehealth services,” references licensure requirements for optometrists and therapeutic optometrists in Section 351.251, and eliminates definitions that are no longer used. Proposed §279.16(b) recognizes both preexisting practitioner-patient relationships and those established through the provision of telehealth services, and requires appropriate follow-up procedures, following the approach in Sections 111.005(a) and (b). Although Section 111.005 specifically addresses telemedicine medical services, the board’s deference to this approach is appropriate in the absence of more applicable statutory direction for telehealth or optometric services. Next, proposed §279.16(c) maintains the requirement that optometrists providing telehealth services adopt protocols to prevent fraud and abuse through the use of those services, consistent with the board’s authority in Sections 351.501(a)(1) and (11). The proposed changes to Subsection (c) also remove a reference to a repealed statute and prescriptive written protocols required of optometrists providing telehealth services. Because these changes align with statute and remove extraneous, outdated regulations, proposed §279.16(a), (b), and (c) are consistent with state policy.

Standards of care for optometrists providing telehealth services are also updated in the proposed rule. Proposed §279.16(d) maintains the requirements for optometrists to provide notices of privacy practices and complaint information, and adds instruction for optometrists to obtain informed consent prior to the provision of telehealth services, consistent with Sections 111.002, 111.003, and 351.203. However, requirements to specifically counsel a patient on the limitations of telehealth services and the necessity of an in-person evaluation have been removed. Instead, proposed §279.16(e) broadly holds optometrists providing telehealth services to the same standards of care for in-person settings, as required by Section 111.007, and applies the board’s existing rules for recordkeeping and examinations to the provision of services in telehealth settings. Proposed §279.16(e) also eliminates the limitation that telehealth services may only be provided to patients at established medical sites, with an optometrist or physician on-site, currently required in §279.16(d). This restriction is not mandated by statute and may limit the accessibility of telehealth services.⁵

Similar to proposed §279.16(e), proposed §279.16(f) ensures that the standards for issuing, dispensing, delivering, and administering prescription medications and for prescribing and fitting lenses and prisms as a result of telehealth services are the same as for prescriptions issued pursuant to in-person services. Again, this alignment of standards is required by Section 111.007. While the board asserts that optometrists are required to make and record certain findings in

³ Rule Submission Memorandum from the Texas Optometry Board (Mar. 9, 2021), at 3.

⁴ *Id.* at 4.

⁵ As of the issuance of this determination letter, the provisions in current 22 TAC §279.16(a)-(g) have been temporarily suspended pursuant to Section 418.016, Texas Government Code. Rule Submission Memorandum from the Texas Optometry Board (Mar. 9, 2021), at 1 and 2.

person to prescribe ophthalmic lenses, no such requirement appears in proposed §279.16.⁶ Further, nothing else in the proposed rule bars those findings from being made and recorded in alternative settings, including through telehealth services, to the extent allowed by Chapter 351 and other law. Because the changes in proposed §279.16(d), (e), and (f) better align the board's approach to telehealth services with existing regulations for the in-person practice of optometry, those subsections are consistent with state policy.

Finally, proposed §279.16(g) removes prescriptive requirements for communication technology and related policies, and simply requires practitioners to ensure patient communications and records are protected consistent with applicable federal and state privacy laws, which aligns with Section 111.003. Additionally, the board intends for the duplicative recordkeeping requirements in current §279.16(g) to be repealed entirely, as proposed §279.16(e)(2) already clarifies the application of existing recordkeeping rules to optometrists providing telehealth services.⁷ By deferring to existing standards, proposed §279.16(g) and the repeal of current §279.16(g) avoid introducing additional restrictions on optometrists providing telehealth services and are consistent with state statute.

III. Determination

Based on the reasoning above, proposed amended 22 TAC §279.16 is approved by the division and may be finally adopted.

⁶ Rule Submission Memorandum from the Texas Optometry Board (Mar. 9, 2021), at 2; 46 Tex. Reg. 1454 (2021) (preamble to proposed amendments to 22 TAC §279.16) (proposed Mar. 5, 2021) (Tex. Optometry Bd.).

⁷ Agency Response to Request for Additional Information (Mar. 25, 2021) (on file with the Regulatory Compliance Division of the Office of the Governor).