

BACKGROUND PAPER FOR THE BOARD OF OPTOMETRY

Joint Oversight Hearing, March 11, 2013

**Senate Committee on Business, Professions and Economic Development
and
Assembly Committee on Business, Professions and Consumer Protection**

**IDENTIFIED ISSUES, BACKGROUND AND RECOMMENDATIONS
FOR THE BOARD OF OPTOMETRY**

BRIEF OVERVIEW OF THE BOARD OF OPTOMETRY

Function of the Board of Optometry

The Board of Optometry (Board) is one of the regulatory entities within the Department of Consumer Affairs (DCA). The Board licenses and regulates the profession of optometry. The Board is funded solely by the fees of applicants, licensees, certifications, business licenses, and other related fees.

The Board's mission, as stated in its 2010 Strategic Plan is as follows:

The mission of the California State Board of Optometry is to serve the public and optometrists by promoting and enforcing laws and regulations which protect the health and safety of California's consumers and to ensure high quality care.

In order to accomplish this mission, the Board performs the following duties and responsibilities:

- Promulgates regulations governing procedures of the Board, admission of applicants for examination for an optometric license; minimum standards of optometric services offered or performed, the equipment or sanitary conditions, in all locations where optometry is practiced.
- Investigates consumer complaints and criminal convictions which may include substance abuse and patient abuse, unprofessional conduct, incompetence, fraudulent action, and unlawful activity.
- Institutes disciplinary action for violations of laws and regulations governing the practice of optometry when warranted.
- Accredits schools and colleges of optometry.
- Establishes educational requirements to ensure the competence of candidates for licensure.
- Establishes examination requirements to ensure the competence of candidates for licensure.

- Develops and administers a laws and regulations examination.
- Sets and enforces standards for continued competency of existing licensees.
- Establishes educational and examination requirements for licensed optometrists seeking certification to use and prescribe certain pharmaceutical agents and other procedures.
- Licenses branch offices, issues statements of licensure and fictitious name permits.

The Board’s statutes and regulations require a license before an individual may engage in the practice of Optometry. These statutes and regulations set forth the requirements for registration and licensure and provide the Board the authority to discipline a licensee.

On March 20, 1903, California became the third state to pass a law recognizing the profession of optometry, and regulating its practice. In 1913, a new Optometry Practice Act was enacted creating the Board, defining its duties and powers, and prescribing a penalty for a violation of the Act. The Act of 1913 was later incorporated in the Business and Professions Code (BPC). Empowered with rulemaking authority, as outlined in BPC § 3025 and 3025.5, the Board promulgated the first rule for the practice of optometry in 1923. In that same year, the legislature passed a law requiring all applicants for licensure to meet certain educational requirements, e.g., graduate from an accredited school or college of optometry. The Board was charged with the responsibility of accrediting these schools.

Today, the Board is responsible for the regulatory oversight of approximately 9,000 optometrists, the largest population of optometrists in the United States. The Board is also responsible for issuing certifications for optometrists to use Diagnostic Pharmaceutical Agents (DPA), Therapeutic Pharmaceutical Agents (TPA), TPA with Lacrimal Irrigation and Dilation (TPL), TPA with Glaucoma Certification (TPG), and TPA with Lacrimal Irrigation and Dilation and Glaucoma Certification (TLG). The Board continues to issue licenses and fictitious name permits.

Current law provides for eleven board members; six licensees and five public members. Nine members are appointed by the Governor, one public member is appointed by the Speaker of the Assembly, and one public member is appointed by the Senate Rules Committee. All Board meetings are subject to the Bagley-Keene Open Meetings Act.

The following table lists all members of the Board including background on each member, appointment date, term expiration date and appointing authority.

Board Members	Appointment Date	Term Expiration Date	Appointing Authority
<p>Alejandro Arredondo, OD (professional member) has worked in private practice since 1992. He worked for John Hernandez, OD from 1989 to 1992 and Darlene Fujimoto, OD from 1988 to 1989. Arredondo was an optometrist intern for the Veterans Administration Outpatient Clinic and the Optometric Center of Los Angeles from 1987 to 1988. He served as an optometrist intern at the Silas B. Hayes Army Community Hospital Optometry Clinic from 1986 to 1987. Arredondo earned a Doctor of Optometry degree from the Southern California College of Optometry.</p>	June, 2012	June, 2015	Governor

<p>Alexander Kim (public member) is a Public Affairs Manager for the Southern California Gas Company in Orange County. Previously, he has been deputy director and community liaison to the Asian American community for Governor Schwarzenegger's Los Angeles Office and served as an economic development representative and liaison for the Asian-American community for Los Angeles Mayor Jim Hahn.</p>	December, 2010	June, 2014	Governor
<p>Bill Kysella (public member) is a Deputy City Attorney in Los Angeles, where he advises the Department of Water and Power. He has advised the City on elections and government ethics, served as General Counsel to the Department of General Services, and was a prosecutor in Hollywood. Prior to joining the City, Mr. Kysella was an attorney at the U.S. Department of Commerce in the Office of the General Counsel and was a law clerk in the Office of Counsel to the President during the Clinton Administration.</p>	July, 2012	June, 2015	Speaker of the Assembly
<p>Donna Burke (public member) was an Executive Director of External Affairs for AT&T. While there she maintained oversight of philanthropic contributions that promoted digital inclusion for the under-served. She also served as the liaison to local elected officials and their staffs in Sacramento County and the surrounding communities. Ms. Burke serves on several community boards, including Capital Public Radio, Folsom Lake Foundation, Leadership California and California Women Lead – Sacramento Region. Ms. Burke has an undergraduate degree in journalism from California State University, Fresno.</p>	October, 2010	June, 2015	Senate Rules Committee
<p>Fred Dubick, OD, MBA, FAOO (professional member) has been the owner of StudioEyes Optometry since 1980. He served as commissioner on the Public Safety Commission of Hidden Hills from 2000 to 2004. Dr. Dubick was the Chief of Eyecare Services for the 1984 Los Angeles Olympic Organizing Committee. Dubick earned a Doctor of Optometry degree from the Pennsylvania College of Optometry and a Master of Business Administration degree from the University of Redlands. Dr. Dubick is a Fellow of the American Academy of Optometry, Past President of the San Fernando Valley Optometric Society, and is currently the President of the California Optometric Association.</p>	August, 2012	June, 2013	Governor
<p>Glenn Kawaguchi, OD (professional member) has been a managing optometrist at Eyexam of California since 2011 and was an eye care director at Sears Optical from 2006 to 2011. He worked in multiple positions at Eyexam of California from 1993 to 2006, including regional optometric practices manager and managing optometrist. Kawaguchi was an associate optometrist for David Sherman OD from 1992 to 1993. He earned a Doctor of Optometry degree from the Southern California College of Optometry.</p>	August, 2012	June, 2015	Governor

<p>Kenneth Lawenda, OD (professional member) obtained his Optometry degree at the Southern California College of Optometry in 1970 and was in private practice for 37 years and is presently associated with a group practice in Beverly Hills. He has been a member of the California Optometric Association (COA) since 1970 and has served on numerous committees including COA's Health Services, Legislative and Finance Committee. Dr. Lawenda was President of the Los Angeles County Optometric Society and was elected President of the Association in 2006 for the term 2006-2007. He also served in the LA community by being the founding eye Doctor of the LA Free Clinic in 1971. In addition, he was on the Cedars-Sinai Hospital Optometric Staff from 1971-2007, serving as Clinical Chief of Optometry and then Chief of Optometry from 2001-2006. Dr. Lawenda also served the American Optometric Association as Political Action Committee Director for Region 1 (California) from 2006-2010.</p>	December, 2010	June, 2014	Governor
<p>Madhu Chawla, OD (professional member) has been an optometrist at Kaiser Permanente since 2008. She was a managing optometrist at Eye Exam of California from 2005 to 2008 and an optometrist at South Bay Eye Institute from 2004 to 2005. Chawla worked as an optometrist at the Office of Glenn P. Kimball from 2000 to 2004, Pearl Vision Center from 2001 to 2004, the Office of Lisa Travies from 1999 to 2000, the Office of Frederick Rose from 1999 to 2000 and the Dimock Community Health Center from 1997 to 1999. Chawla earned a Doctor of Optometry degree from the New England College of Optometry.</p>	June, 2012	June, 2015	Governor
<p>Monica Johnson (public member) currently serves as Vice President of the Board and as Assistant General Counsel for Ventura Foods, a national manufacturer and marketer of branded and custom made shortenings, oils, dressings, mayonnaises, sauces, margarines, culinary bases and pan coatings for the foodservice, retail and ingredient manufacturing industries. She has been a Senior Counsel with Western Digital, a global provider of products and services that empower people to create, manage, experience and preserve digital content. Previously, Johnson was Corporate Counsel with BAX Global, a worldwide supply chain management and transportation solutions company.</p>	May, 2010	June, 2013	Governor

The Board has organized three committees which serve as an essential component to help the Board deal with specific policy and/or administrative issues. The committees research policy issues and concerns, referred by the Board staff, the public, or licensees. Legislation and Regulation issues are handled by the entire Board and a temporary committee may be created to focus on specific issues. The entire Board assists staff with drafting language for Board-sponsored legislation and recommends official positions on current legislation. The Board also recommends regulatory additions and amendments.

1. Practice and Education

Advises Board staff on matters relating to optometric practice, including standards of practice and scope of practice issues. Reviews staff responses to proposed regulatory changes that may affect optometric practice. Also reviews requests for approval of continuing education courses, and offers guidance to Board staff regarding continuing education issues.

2. Consumer Protection

Oversees the development and administration of legally defensible licensing examinations and consulting on improvements/enhancements to licensing and enforcement policies and procedures.

3. Public Relations – Outreach

Assists with the development of outreach and development of educational materials to the Board's stakeholders.

The committees meet on an “as needed” basis pursuant to the Board's Administrative Procedure Manual. The current committee structure provides multiple opportunities for consumers, licensees, professional organizations, and educational institutions to actively participate and comment on topics before the Board. All Committee recommendations are presented to the Board for consideration.

The Board is a current member of the Association of Regulatory Boards of Optometry. This membership includes voting privileges. To date, despite Board member interest, the Board has not participated in any committees, workshops, work groups, or task forces related to its membership in this national association. This is due to restrictions on travel associated with California's ongoing budget shortfalls.

Although not a member, the Board does have a good working relationship with the California Optometric Association (COA), which is an affiliate of the American Optometric Association. Board staff is invited to three events held by the COA yearly:

- Monterey Symposium – Optometrists have the opportunity to obtain continuing optometric education, network with colleagues, and explore an exhibit hall filled with optometry's latest products and services. The Board is given a table in the exhibit area to distribute information about the licensing and enforcement of the profession, and answer questions. Historically, two staff members were permitted to attend, but in the last few years, budget constraints have precluded staff from attending.
- Legislative Day – More than 180 optometrists from around the state rally at the State Capitol to meet legislators and promote the practice of optometry. The Board is represented and has the opportunity to share projects they are working on, statistics pertaining to licensure and enforcement, and answer questions. Since this is held in Sacramento, two staff members attend.
- House of Delegates – The COA House of Delegates and a ten member board of trustees govern the COA and consist of COA members from each of the local optometric societies, California optometry schools and colleges, and COA sections. Delegates meet once a year to debate and vote on COA policy resolutions and bylaws amendments, adopt the COA budget, and elect COA's trustees and officers. Historically two Board staff members are permitted to attend. In

the past few years, staff has not attended due to budget restraints. This event is held in a different part of the state each year.

(For more detailed information regarding the responsibilities, operation, and functions of the Board please refer to the Board's *2012 Oversight Report*)

PRIOR SUNSET REVIEW: CHANGES AND IMPROVEMENTS

The Board was last reviewed in 2002 by the Joint Legislative Sunset Review Committee (JLSRC). During the previous sunset review, the JLSRC raised 10 issues and included a set of recommendations to address those issues. Below are actions which the Board and Legislature addressed over the past 11 years. Those which were not addressed and which may still be of concern to this Committee are addressed more fully under the "Current Sunset Review Issues" section.

In November of 2012, the Board submitted its required sunset report to this Committee. In the report, the Board described actions it has taken since its prior review to address the recommendations of the JCBCCP. According to the Board, the following are some of the more important programmatic and operational changes, enhancements, and other important policy decisions or regulatory changes made:

Reorganization

Since the last sunset review in 2002, the Board has attempted to restructure its organization to meet its operational needs more efficiently.

Prior to 2002, the management composition consisted of one Executive Officer (EO), with the assistance of two Associate Governmental Program Analysts (AGPA), managing the daily activities related to program administration, licensing, examination, and enforcement, in addition to policy decisions and implementing the direction of the Board's members. Following a change in the EO in 2008, and an informal evaluation of the Board's operational needs and desire to improve efficiency, the Board gained three Staff Services Analysts (SSA) and a Limited Term Office Technician (LT OT) for its enforcement unit to implement legislatively mandated fingerprint requirements, and a probation monitoring program. These positions were obtained through various Budget Change Proposals (BCP), and promotion and/or re-classification of positions (e.g., blanket, interchangeable positions). An SSA in the licensing unit was promoted to an AGPA and transferred to the administration unit to directly assist the EO with policy decisions, legislation, and regulation. This allowed the EO to focus on implementing the direction of the board members, take on personnel responsibilities, and provide oversight and management of the daily activities of the Board's licensing, enforcement, and administrative units.

A 30% increase in licensees and business licenses, the addition of an improved glaucoma certification process, and a push from DCA to improve enforcement processes in 2009, initially resulted in a 50% increase in total staffing since 2002. Also, as a result of these changes, the EO attempted to obtain through a BCP a Staff Services Manager I (SSMI) to serve as the Assistant Executive Officer to assist the EO with the oversight and management of the daily activities of the Board's units, and further improve efficiency. Although this BCP was approved by the Department of Finance (DOF), it was

later rejected by DCA because it did not meet the Department of Personnel Administration's allocation criteria for required positions.

Starting in 2010, the Board has lost almost all the much needed positions it gained throughout the years (six positions total) due to expiration of limited term positions, DCA policy changes, and directives from the State and Consumer Services Agency and Governor. The current management and staff structure does not provide for ongoing review of processes to identify areas for process improvements and staff development.

The composition of the Board's staff since 2002 is noted in the chart below.

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Total Authorized Staff Positions	7	7	7	7	7	7	8	9	13	14	10.4
Total Staff	6	6	6	6	6	6	7	8	11	16*	11.4**
Managers	0	0	0	0	0	0	0	0	0	1	0
AEO	0	0	0	0	0	0	0	0	0	0	0
EO	1	1	1	1	1	1	1	1	1	1	1

* This figure includes authorized position approved through BCPs but not filled, and two positions paid from blanket funds.

** This figure includes one position paid from blanket funds.

Relocation

In 2011, the Board relocated from 2420 Del Paso Road, Sacramento, California to its current location at 2450 Del Paso Road, Sacramento, California.

Change in Leadership

During the 2002 Sunset Review hearing, the JLSRC recommended that the composition of the Board's membership be changed. Prior to 2002, the Board consisted of nine members. Six were professional members and three were public members. This composition of a two-to-one ratio of professional to public members was argued, by the JLSRC, to result in professional bias, and less focus on consumer protection. In order to ensure a balanced approach to decision-making, ensure the Board was in line with other DCA Boards, and enhance public protection, the JLSRC recommended adding two additional public members. This recommendation was implemented in 2002 through sunset review legislation when the Board was sunsetted and reconstituted with entirely new members. This change became effective January 1, 2003.

Since 2002, the Board has had two Executive Officers. The previous incumbent served from 2002-2008. The current Executive Officer was appointed in 2008.

Strategic Plan

The Board revised its Strategic Plan in 2004, at which time the Board's mission statement read:

The mission of the California Board of Optometry is to assure that Californians have access to appropriate high quality eye and vision care and to implement and promote fair and just laws and regulations protecting the health and safety of consumers.

The goals were very general in this plan. Thus, the 2004 Strategic Plan was updated in 2007, at which time the Board's mission statement was changed to read:

The mission of the California State Board of Optometry is to implement and promote just laws and regulations protecting the health and safety of consumers and to assure that Californians have access to appropriate high quality eye and vision care.

The 2007 Strategic Plan was most recently updated in 2010. This revision further defined the Board's goals with the inclusion of objectives which included tasks and projects to be completed. The Board's current mission statement was changed to read:

To serve the public and optometrists by promoting and enforcing laws and regulations which protect the health and safety of California's consumers and to ensure high quality care.

The Board is currently working on completion of all objectives before the next update slated for 2013-2014.

Department of Finance (DOF) Audit

During the 2002 Sunset Review hearing, the DOF's audit of the Board was discussed. The DOF audit identified several areas needing improvement. These included the need to submit monthly bank statements on a timely basis, take physical inventories of and tag board property, process purchased invoices in a timely manner, and maintain an independent leave balance report. The Board has taken the following corrective actions:

- The monthly bank statement related to the Cal Card is paid timely each month upon receipt.
- In fiscal year 2008-2009, the Board implemented a purchasing tracking system to monitor its purchases and for comparison to the monthly statement.
- In July 2012, a physical inventory of all Board equipment, furniture, and storage was completed.
- Each month, the Executive Officer receives the Leave Activity & Balance Report from the DCA Office of Human Resources. The report is used by the Executive Officer to compare the monthly leave usage against the leave balances for each employee.
- Annually, staff are given an accounting of their leave balances from DCA and asked to compare these data against their own tracking. Additionally, employees direct deposit and pay check notifications from the State Controller's Office shows the employee his/her leave balance from the previous month, including credits/usage and the beginning balance for the month.

Supervision and Training Standards for Optometric Assistants

During the 2002 Sunset Review hearing, the JLSRC recommended that the Board conduct an occupational analysis for optometric assistants to identify the tasks they will perform, and the attendant training and skill level required. The JLSRC also requested that regulations clarifying the level of training and supervision of Optometric Assistants be promulgated.

The Board indicated that they submitted a BCP in 2003 to obtain spending authority to conduct and occupational analysis, but it was denied. Despite this, the Executive Officer presented proposed regulatory language and the Board voted to approve it. Unfortunately, due to issues with the timing of the proposed rulemaking package, the regulations were not enacted.

Legislation Affecting or Sponsored by the Board

A number of legislative changes relevant to the Board's duties have been enacted since the last sunset review in 2002. These changes are listed below in chronological order.

Senate Bill 1955 – Sunset Legislation to Sunset and Reconstitute the Board of Optometry (Figueroa, Chapter 1150, Statutes of 2002)

Terminated the existence of the Board and the executive officer on January 1, 2003, and, as of that date, provided for the formation of a new board and employment of a new executive officer both of which would be terminated on July 1, 2005. Granted the new Board certain authority parallel with the authority of the previous Board. Provided for the appointment and staggering of terms of Board members. Also authorized the Board to adopt regulations clarifying the level of training and supervision of assistants to optometrists.

Assembly Bill 2020 – Prescriptions (Correa, Chapter 814, Statutes of 2002)

Prohibited the expiration date of a contact lens prescription from being less than one to two years from the date of issuance, with certain exceptions. Required a prescriber or registered dispensing optician to provide the patient with a copy of his or her prescription, subject to certain exceptions. Prohibited the prescriber or optician from conditioning the release of the prescription on the patient paying a fee or purchasing contact lenses. Made the prescriber's willful violation of these requirements unprofessional conduct. Provided that it is a deceptive marketing practice to represent by advertisement or sales presentation that contact lenses may be obtained without confirmation of a prescription. Provided that a violation of the laws regulating prescription lenses is punishable by a fine, not to exceed \$2,500.

Assembly Bill 269 – Protection of the Public is the Highest Priority (Correa, Chapter 107, Statutes of 2002)

Made consumer protection the highest priority of licensing boards, commissions, and bureaus, in performing their licensing, regulatory, and disciplinary functions.

Assembly Bill 2464 - CE Requirements and Lens Dispensing Receipts (Pacheco, Chapter 426, Statutes of 2004)

Revised the authority of the Board to adopt regulations. Deleted the prohibition on a Board member having a financial interest in a prospective board purchase or contract. Revised the recordkeeping requirements of the Board. Deleted the provisions authorizing the payment of expenses for the Board secretary and requiring the Board to publish and distribute certain information. Required the Board to publish its notices on its Internet Website. Deleted the Board's authority to visit and examine optometric educational institutions. Revised the application requirements and the standards for examination and licensure as an optometrist. Required an optometrist to post specified information at each place of practice. Revised the continuing education requirements for optometrists performing certain functions. Revised the information that must be provided on a receipt and would require any licensed optometrist who fits or supplies a patient with lenses to provide the patient with a receipt.

Assembly Bill 370 - Changes in the Board's Enforcement Program (Aghazarian, Chapter 186, Statutes of 2005)

Required the Board to file an accusation against a licensee within three years after the Board discovers the act or omission that is the subject of the proceeding, or within seven years after the act or omission occurred, whichever comes first, subject to certain exceptions.

Assembly Bill 488 - Repeal of the 30 day grace period & payment receipt requirements (Bermudez, Chapter 393, Statutes of 2005)

Required optometrists to provide a receipt to patients making a specified payment to them and also revised the information that is required on the receipt. Authorized the Board to issue a probationary license to an applicant, subject to specified terms and conditions. Revised and recasted provisions relating to unprofessional conduct. Authorized the Attorney General to prosecute a licensee for unprofessional conduct under the Administrative Procedure Act. Deleted reporting requirements when the Board raises a fee to certain committees in the Legislature. Made various fee changes.

Senate Bill 231 - Reporting of Settlements or Arbitration Awards Over \$3,000 (Figueroa, Chapter 674, Statutes of 2005)

Required that any judgment in a malpractice action against a licensee to be reported to the appropriate licensing board by the licensee or the claimant, or their counsel, and would make a failure to comply with this requirement a crime.

Senate Bill 579 - Elimination of CPR Requirement, Advertising Free Eye Exam and Licensure by Endorsement (Aanestad, Chapter 302, Statutes of 2006)

Authorized the Board to issue a license to a person that, among other things, has passed a licensing examination for an optometric license in another state. Eliminated the Board's authority to adopt regulations requiring licensees to maintain current certification in cardiopulmonary resuscitation. Made it unlawful to advertise as being free or without cost the furnishing of optometric services where the services are contingent upon payment or other exchange of consideration unless the contingency is fully disclosed.

Assembly Bill 2256 - Certificate of Registration for Optometric Corporation Repealed (Chapter 564, Statutes of 2006)

Deleted the provisions requiring an optometric corporation to obtain this certificate from the Board and file these reports with it. Deleted the provisions that give the Board the powers of suspension, revocation, and discipline against an optometric corporation as it has against individuals. Also deleted the requirement that the Board comply with Administrative Procedure Act as they pertain to optometric corporations.

Assembly Bill 1382 - Deceptive Marketing Practices (Nakanishi, Chapter 148, Statutes of 2006)

Prohibited a person, other than a physician, surgeon or optometrist from measuring the powers or range of human vision or determining the accommodative and refractive status of the human eye or scope of its functions in general or prescribe ophthalmic devices, as defined. Made it a deceptive marketing practice for any individual or entity who offer for sale plano contact lenses to represent by any means that those lenses may be lawfully obtained without an eye examination or confirmation of a valid prescription, or may be dispensed or furnished to a purchaser without complying with prescribed requirements.

Senate Bill 1406 - Changes in Scope of Practice (Correa and Aanestad, Chapter 352, Statutes of 2009)
Revised and recast the Optometry Practice Act to further allow an optometrist who is certified to use therapeutic pharmaceutical agents to, among other things, treat glaucoma, as defined, under specified certification standards, order X-rays necessary for the diagnosis of conditions or diseases of the eye or adnexa, perform venipuncture for testing patients suspected of having diabetes, administer oral fluorescein to patients suspected of having retinopathy, prescribe lenses or devices that incorporate a medication or therapy the optometrist is certified to prescribe or provide, and use specified instruments within the central three millimeters of the cornea. Allowed an optometrist to perform lacrimal irrigation and dilation if they meet certain criteria and changes referral requirements. Also created the Glaucoma Diagnosis Advisory Committee for the creation of regulations to establish the training required to obtain glaucoma certification.

Assembly Bill 2683 - The Practice of Optometry in Health Facilities and Optometric Assistants (Hernandez, Chapter 604, Statutes of 2010)

Established guidelines for the practice of optometry at a health facility or residential care facility provided the optometrist meets certain requirements. Authorized an assistant to fit prescription lenses and perform additional duties in any setting where optometry or ophthalmology is practiced, under the direct responsibility and supervision of a physician and surgeon, optometrist, or ophthalmologist, respectively. Defined "setting" for purposes of this provision to include, without limitation, any facility licensed by the State Department of Public Health or the State Department of Social Services.

Senate Bill 1489 Omnibus - Strengthening of Licensing Laws (Senate Business, Professions and Economic Development Committee, Chapter 653, Statutes of 2010)

Amended various licensing provisions for clarity purposes only.

Assembly Bill 2699 - Exemption for Out-of-State Provider Participating in Sponsored Event Where Free Services Provided (Bass, Chapter 270, Statutes of 2010)

Provided an exemption from licensure and regulation requirements to optometrists, licensed or certified in good standing in another state or states, which offer or provide eye care services through sponsored free health care events.

Assembly Bill 2500- Reinstatement of Optometry for Licensees in Military Service (Hagman, Chapter 389, Statutes of 2010)

Authorized a licensee whose license expired while the licensee was on active duty as a member of the California National Guard or the United States Armed Forces to, upon application, reinstate his or her license without a penalty and without examination, if those requirements are satisfied, unless the Board determines that the applicant has not actively engaged in the practice of optometry while on active duty, as specified.

Assembly Bill 2783 - Military Personnel (Committee on Veterans Affairs, Chapter 214, Statutes of 2010)

Required the Board to develop rules and regulations that provide methods of evaluating education, training, and experience obtained in the armed services, if applicable, to the requirements of the practice of optometry. These rules and regulations also specified how this education, training and experience may be used to meet the licensure requirements for optometrists. The Board must consult with the Department of Veterans Affairs and the Military Department before adopting any rules and regulations.

Senate Bill 850 - Electronic Medical Records: Confidential Information (Leno, Chapter 714, Statutes of 2011)

Required an electronic health or medical record system to automatically record and preserve any change or deletion of electronically stored medical information, and would require that record to include, among other things, the identity of the person who accessed and changed the medical information and the change that was made to the medical information.

Assembly Bill 1424 - Franchise Tax Board: Delinquent Tax Debt (Perea, Chapter 455, Statutes of 2011)

Authorized all State licensing entities, including boards and bureaus under DCA other than the Contractor's State License Board (CSLB), to deny, suspend, or revoke a license if the licensee or applicant appeared on the Franchise Tax Board or the State Board of Equalization's certified lists of top 500 largest tax delinquencies over \$100,000. This bill also authorized the Department to suspend a license in the event that the Board fails to take action.

Adopted Regulations

A number of regulatory changes have been enacted since the last sunset review in 2002. The changes are listed below in chronological order.

National Board of Examiners in Optometry: Effective January 28, 2002, California Code of Regulations (CCR) § 1531 of Title 16 of Division 15 was amended to adopt the licensure examination developed by the National Board of Examiners in Optometry.

Continuing Education Requirements: Effective January 21, 2005, 16 CCR § 1536 was amended to reflect the change in the license renewal cycle from annual to biennial, amends the self-study continuing education requirements, and the initial licensure exemptions.

Therapeutic Pharmaceutical Agents: Effective January 19, 2005, 16 CCR § 1567, 1568 and 1569 were amended to incorporate language from the BPC to increase clarity regarding what optometrists can and can't prescribe. Language also deletes outdated protocols for certain conditions.

Deletion of Advertising Violations: Effective March 13, 2006, 16 CCR § 1515 was repealed. This regulation provided that optometrists who violated BPC § 651, 651.3, or 17500 were subject to revocation or suspension of their certificate or registration. The impetus for this section was eliminated by Assembly Bill 488 (Bermudez, Chapter 393, Statutes of 2005), which provided specific statutory authority.

Deletion of 75% Passing Score - Change Without Regulatory Effect (technical or editorial changes): Effective March 14, 2006, 16 CCR § 1530 was repealed. This regulation required candidates for optometric licensure to obtain a passing score of at least 75% in each required examination section listed in CCR § 1531. The need for this section was eliminated via Assembly Bill 2464 (Pacheco, Chapter 426, Statutes of 2004) which replaced the 75% passing score criteria with language requiring that passing grades for California licensure exams be based on "psychometrically sound principles for establishing minimum qualifications and levels of competency."

Release of Prescriptions: Effective April 9, 2006, 16 CCR § 1566 and 1566.1 were amended to make it clear that optometrists must release both spectacle prescriptions and contact lens prescriptions

following either an exam or fitting. The amendment also corrected the title of the consumer notice and the physical address, e-mail address and internet address of the Board.

Citable Offenses: Effective October 26, 2006, 16 CCR § 1579 was amended to update the fines the Board could issue for citable offenses. Also, this amendment eliminated the specificity of the old language and created categories of violations, thus eliminating the need for ongoing amendments in response to future changes in optometry law.

Out-of-State Optometrists – 18 Years of Age Requirement to Apply: Effective November 7, 2007, 16 CCR § 1523 was amended to add a provision regarding applications from out-of-state optometrists who must be at least 18 years of age and apply for California licensure on two forms which are incorporated by reference.

Out-of-State Optometrists – Waiver of 65 Hour Preceptorship Requirement: Effective July 3, 2008, 16 CCR § 1568 added a subsection on Therapeutic Pharmaceutical Agents (TPAs). This new subsection enabled out-of-state licensed optometrists, who wish to be licensed in California and to use topical TPAs on patients to obtain a waiver of the BPC § 3041.3(b) 65-hour preceptorship requirement.

Fee Increase: Effective April 28, 2009, 16 CCR § 1524, was amended to increase various application, renewal and penalty fees collected by the Board to fund its administration of the optometry licensing program. Fees had not been raised since 1993.

Notification to Engage in Practice: Change Without Regulatory Effect (technical or editorial changes): Effective January 6, 2010, 16 CCR § 1505 was amended to replace the words “certificate holder” with “licensee.” Referring to an optometrist licensed by the Board as a licensee is a more appropriate term used by staff and throughout the Board’s laws and regulations.

Fingerprinting Requirements: Effective June 21, 2010, Article 5.1 with 16 CCR § 1525, 1525.1, 1525.2 were adopted to require licensees who had not previously submitted fingerprints to the Department of Justice (DOJ) to complete a state and federal level criminal offender recording information search through the DOJ before renewal of a license. Also clarifies that prior to renewal, a licensee has to disclose whether there has been any disciplinary action against them and if they have any criminal convictions during the renewal cycle.

Scope of Practice Repeal: Effective August 20, 2010, 16 CCR § 1569 was repealed because the regulation duplicates BPC § 3041.

Glaucoma Certification Requirements: Effective January 8, 2011, 16 CCR § 1571 was adopted to implement Senate Bill 1406, Chapter 352, Statutes of 2008, by establishing the requirement for the certification of optometrists to treat all primary open-angle glaucoma and exfoliation and pigmentary glaucoma. Continuing education requirements for glaucoma certified-optometrists are also specified, and the exemption of didactic instruction and case management requirements for certification for optometrists who completed their education from accredited schools and colleges of optometry on or after May 1, 2008. In February 2011, this regulation was challenged in court by the California Academy of Eye Physicians and Surgeons (CAEPS) and the California Medical Association (CMA). The parties claimed that the regulation did not afford the appropriate training needed for California optometrists to treat glaucoma. The courts upheld that the regulation was valid and that the Board acted within its rulemaking authority under BPC § 3025, and no abuse of discretion was shown. The ruling also stated that CAEPS and CMA did not demonstrate adequate standing that their claims were

correct. This ruling ended the case and this regulation continues to be implemented without further issues.

Infection Control Guidelines: Effective January 19, 2011, 16 CCR § 1520 was amended to set forth “Infection Control Guidelines” for optometrists. The principal provisions of the regulation pertain to: proper hand hygiene, use of personal protective equipment, handling of sharp instruments, and disinfection requirements.

Fictitious Name Permits and Licensing Requirements: Effective March 10, 2011, 16 CCR § 1518, 1523, 1531, 1532, 1533, 1561 were amended to clarify information for requirements regarding licensure and examination, permit fees for creating a fictitious business names, and usage of topical pharmaceutical agents.

Continuing Education: Effective June 17, 2011, 16 CCR § 1536 was amended to add new continuing optometric education opportunities, including credit for attending a Board meeting, earning certification in cardiopulmonary resuscitation (CPR) and completing course work in the ethical practice of optometry. This amendment also provides for utilization of the Association of Regulatory Boards in Optometry’s Optometric Education Tracker system as proof of course attendance.

Renting Space and Fingerprints: Effective October 25, 2012, 16 CCR § 1514 and 1525.1 further clarify that signage is required at commercial/mercantile locations to indicate that it is owned by an optometrist and the practice is separate and distinct from other occupants. This proposal also clarifies that fingerprints are to be submitted upon renewal of an optometric license if the licensee has not had their fingerprints taken by the Department of Justice and the Federal Bureau of Investigation.

Pending Regulations

Uniform Standards Related to Substance Abuse and Disciplinary Guidelines: (CCR § 1575) This proposal adds the Uniform Standards Related to Substance Abuse pursuant to Senate Bill 1441 (Ridley-Thomas, Chapter 548, Statutes of 2008) to the Board’s disciplinary guidelines. Also updates the Board’s disciplinary guidelines, which have not been revised since 1999, to be in line with the current probationary environment. This rulemaking file will be effective April 1, 2013.

Sponsored Free Health Care Events: (CCR § 1508, 1508.1, 1508.2, 1508.3) This proposal provides exemption from licensure and requirements to optometrists, licensed or certified in good standing in another state or states, that offer or provide eye care services through a sponsored event. Requirements are also established for the sponsoring entity, and registration forms are incorporated by reference. This proposal was initiated pursuant to Assembly Bill 2699 (Bass, Chapter 2070, Statutes of 2010). This rulemaking package will be submitted to OAL for final review early 2013.

Consumer Information Change without Regulatory Effect (technical or editorial changes): (CCR § 1566.1) This proposal updates the Board’s address because the current language in the Consumer Notice regulation contains the old address. This change became effective January 1, 2013.

Consumer Protection Initiative Regulations: (CCR § TBD) This proposal stems from an effort by the DCA to implement certain provisions of its legislation, Senate Bill 1111, that do not require statutory authority. Senate Bill 1111 failed to pass the Legislature in 2010. These regulations will propose delegation of certain functions to the Executive Officer, required actions against registered sex offenders, and additional professional conduct provisions to aid in streamlining the Board’s

enforcement process. The Board anticipated meeting in December 2012 to discuss these regulations and possibly submit them for notice to OAL in 2013.

Major Studies

2009 – Comprehensive Audit of the National Boards of Examiners in Optometry:

As part of the Board’s responsibility to ensure that examination programs being used in the California licensure process comply with psychometric and legal standards, the Board contracted with the DCA, Office of Professional Examination Services (OPES) to complete a comprehensive review of the NBEO licensing examinations for continued use in California. The purpose of the review was to determine if the NBEO examinations assess competencies relevant to practice in California and whether the examinations meet professional guidelines and technical standards outlined in the “Standards for Educational and Psychology Testing” (APA Standards) and BPC § 139. OPES found that the procedures used to establish and support the validity and defensibility of the NBEO examination meet the professional guidelines and technical standards outlined above.

Occupational Analysis – Office of Professional Examination Services:

An occupational analysis (survey) is a required component in the examination development process. Professional guidelines and testing standards recommend conducting an occupational analysis every five to seven years. This survey of licensees is conducted to determine the current practice of the profession. The survey becomes the foundation for the examination plan which is utilized to develop the laws and regulation examination for optometrists. This process ensures the Board’s laws and regulations examination is fair, job-related, and legally defensible. Since the last sunset review, the Board conducted an occupational analysis in 2009 with the assistance of OPES.

CURRENT SUNSET REVIEW ISSUES

The following are areas of concern for the Board to consider along with background information regarding the particular issue. There are also recommendations the Committee staff have made regarding particular issues or problem areas which need to be addressed. The Board and other interested parties, including the professions, have been provided with this Background Paper and are asked to respond to both the issues identified and the recommendations of the Committee staff.

OCCUPATIONAL ANALYSIS

ISSUE #1: What is the status of the occupational analysis for optometric assistants?

Background: During the 2002 Sunset Review hearing, the JLSRC recommended that the Board conduct an occupational analysis for optometric assistants to identify the tasks they will perform, and the attendant training and skill level required. The JLSRC also requested that regulations clarifying the level of training and supervision of Optometric Assistants be promulgated.

The Board indicated that they submitted a BCP in 2003 to obtain spending authority to conduct an occupational analysis, but it was denied. Despite this, the Executive Officer presented proposed

regulatory language and the Board voted to approve it. Unfortunately, due to issues with the timing of the proposed rulemaking package, the regulations were not enacted.

The Board indicated that in 2009, it conducted an occupational analysis for the Board's California Laws and Regulations Examination and the National Board of Examiners in Optometry Examination included data related to the knowledge that an optometrist must have pertaining to what tasks an optometric assistant can perform.

The Committee maintains the recommendation made by the JLSRC in 2002. Despite the occupational analysis for the national and state examinations in 2009, the Committee agrees that a specific occupational analysis for optometric assistants is necessary.

Staff Recommendation: *In line with the recommendations made during the 2002 Sunset Review hearing, the Committee recommends that the Board take immediate action to conduct the occupational analysis.*

ENFORCEMENT

ISSUE #2: Should the Board check the Health Integrity and Protection Databank (HIPDB) and the National Practitioner Databank (NPDB)?

Background: There are two national databanks related to disciplinary actions:

1. **NPDB:** In 1987 Congress passed Public Law (PL) 100-93, § 5 of the Medicare and Medicaid Patient and Program Protection Act of 1987, authorizing the Government to collect information concerning sanctions taken by State licensing authorities against all health care practitioners and entities. Congress later passed the Omnibus Budget Reconciliation Act of 1990, Public Law 101-508, to add "any negative action or finding by such authority, organization, or entity regarding the practitioner or entity." Title IV is intended to improve the quality of health care by encouraging State licensing boards, hospitals, professional societies, and other health care organizations to identify and discipline those who engage in unprofessional behavior; to report medical malpractice payments; and to restrict the ability of incompetent physicians, dentists, and other health care practitioners to move from State to State without disclosure or discovery of previous medical malpractice payment and adverse action history. Adverse actions can involve licensure, clinical privileges, professional society membership, and exclusions from Medicare and Medicaid.
2. **HIPDB:** The Secretary of Health and Human Services, acting through the Office of Inspector General and the U.S. Attorney General, was directed by the Health Insurance Portability and Accountability Act of 1996 to create the HIPDB to combat fraud and abuse in health insurance and health care delivery. The HIPDB is a national data collection program for the reporting and disclosure of certain final adverse actions taken against health care practitioners, providers, and suppliers. The HIPDB collects information regarding licensure and certification actions, exclusions from participation in Federal and State health care programs, health care-related criminal convictions and civil judgments, and other adjudicated actions or decisions as specified in regulation.

In its recent report, the Board indicated that it does not check HIPDB and NPDB prior to issuing or renewing a license. The Board indicated the following reasons for not checking the databanks:

1. **Cost:** “In order to initiate and maintain continuous queries when issuing and renewing licenses, the Board would need to raise the licensing fee. It is estimated that it would cost \$6.50 per licensee per year.”
2. **Staffing:** “It is estimated that the Board would need an additional full time, limited term staff person to manually enter licensees and applicants into the databanks.”

The Committee is concerned with the protection of the public and the effective operation of the profession. As such, it is imperative that methods, such as utilizing the NPDB and HIPDB, be employed to thoroughly examine a potential licensee’s professional background and criminal history.

Staff Recommendation: *The Board should work with DCA to ensure that they are provided the funds to apply for the NPDB and HIPDB.*

ISSUE #3: What has led to the time lag in cases referred to the Attorney General?

Background: According to the Board’s recent report to the Committee, the Board’s performance targets/expectations for its enforcement cases have extended considerably beyond the target time frames.

Despite the target of 90 days, for fiscal year 2010-2011, the average time required to complete the intake and investigation was 89 days. For fiscal year 2011-2012, the average time required to complete the intake and investigation was 184 days.

Despite the target of 365 days for 2010-2011, the average time required to complete the entire enforcement process for cases resulting in formal discipline was 685 days. For the 2011-2012 fiscal year, the average number of days was 879.

The Board noted that the enforcement unit recently created internal timelines for each phase of a complaint and participated in a training course with emphasis on effective time management. They indicate that the Board continues to request additional enforcement staff to help manage the caseload, but their requests “...continue to be denied by [DCA].”

The Committee is encouraged by the recent efforts of the Board, but remains concerned that the Board’s target timeframes are still being exceeded by a significant quantity. The Committee is also concerned with the potential harm to the public that may be incurred if an unscrupulous licensee continues to practice during a lengthy disciplinary case review by the Attorney General.

Staff Recommendation: *The Committee recommends that the Board specify what additional measures can be taken to expedite processing of enforcement cases.*

ISSUE #4: Should the Board be granted the authority to inspect an optometrist’s practice location?

Background: The Board’s enforcement unit is charged with investigating and ensuring compliance of the laws and regulations regarding optometry. However, these laws and regulations do not include the authority to audit and inspect an optometrist’s practice location.

Currently, if an inspection is required, the Board must enlist the assistance of the Division of Investigation, who as peace officers, have inspection authority. These investigators may enter an optometric office and require the inspection of the premises including patient records, financial and billing information, infection control procedures, etc. However, the investigators often are not aware of the specifics in regards to optometric offices, and may overlook important information, critical to the investigation. The Board of Pharmacy, Board of Barbering and Cosmetology, Board of Respiratory Care, Dental Board, and the Board of Physical Therapy are several of the health boards within DCA that have the authority to inspect the facilities in which their licensees practice. These inspections are to ensure the compliance of the laws and regulations of these boards, which in turn, protect California consumers.

Inspection authority will allow the Board the ability to inspect and ensure compliance in the following areas:

- Licensure - ensure that practicing optometrists have notified the Board of each practice location.
- License postings (usually posted in examination rooms, not visible to the general public).
- Infection Control -use of proper hand washing and other infection control procedures.
- Therapeutic and Ophthalmic Solutions -ensure expiration dates are being adhered to.
- Patient Charting -complete documentation, billing, and financial information.
- Business and Financial information - ensuring proper ownership, fictitious name and branch office licensure.

The Committee is committed to public safety and enforcement of the profession. As such, the Committee agrees that the Board’s enforcement unit should be granted the authority to inspect an optometrist’s practice location. However, the Committee also notes the Board’s inability to carry out its current enforcement duties due to budget constraints and a lack of staff.

Staff Recommendation: *The Committee requests that the Board provide a plan for increasing the workload of its enforcement officers considering the existing budget and staffing constraints.*

STAFFING

ISSUE #5: Why was the Board’s budget change proposal (BCP) denied?

Background: The Optometry Act provides authority for the Board to regulate the profession of optometry. The Board is charged with protecting its licensees and the consumers of optometric services. Included in the Board’s basic authority is the ability for the Board to approve or deny licenses, take enforcement actions, pursue legislation, and conduct administrative duties.

In its recent report to the Committee, the Board indicated that there have been various constraints that have affected its ability to carry out its mandates. Specifically, the following deficiencies were noted:

1. No participation in national organizations such as the ARBO and the COA.
2. Inability to process licenses and fictitious name permits in a timely manner.
3. Inefficiency processing and renewing applications.
4. The Board does not check NPDB and HIPDB prior to issuing or renewing licenses.
5. CE audits have not been consistently conducted.
6. Performance targets for the enforcement program are not being met.
7. No workforce development data has been collected.
8. The Board is barely meeting its mandatory reporting requirements. During the last four fiscal years, the Board only received a total of eight reports (BPC § 801(a), 802, and 803)

The Board reported that these deficiencies are directly related to a lack of staff that would be responsible for completing these salient tasks. Since 2010, the Board has lost almost all the much needed positions it gained throughout the years (six positions total) due to expiration of limited term positions, DCA policy changes, and directives from the State and Consumer Services Agency and Governor. The current management and staff structure does not provide for ongoing review of processes to identify areas for process improvements and staff development. The Board noted in their recent report: “The Board is mandated to use its resources on the licensure, examination, and regulation of the profession of optometry. This also includes educating and protecting consumers. Without sufficient staff, funds and resources, this may result in the Board failing to meet its mandate, and inadequately giving California consumers the protection they deserve...with a limited staff and a growing profession, there are concerns as to whether staff can continue its current pace.”

The composition of the Board’s staff since 2002 is noted in the chart below.

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Total Authorized Staff Positions	7	7	7	7	7	7	8	9	13	14	10.4
Total Staff	6	6	6	6	6	6	7	8	11	16*	11.4**
Managers	0	0	0	0	0	0	0	0	0	1	0
AEO	0	0	0	0	0	0	0	0	0	0	0
EO	1	1	1	1	1	1	1	1	1	1	1

* This figure includes authorized position approved through BCPs but not filled, and two positions paid from blanket funds.

** This figure includes one position paid from blanket funds.

The Committee is concerned about the Board’s ability to regulate the profession as they have limited staff which prevents them from performing essential tasks that will help ensure consumer protection.

Staff Recommendation: *The Board should inform the Committee of its plan to continue carrying out its various duties if no additional staff is allocated for the Board. The Board may want to explore the possibility of hiring temporary or part-time staff to assist with completing critical tasks.*

LICENSE PORTABILITY

ISSUE #6: License portability for military personnel and their spouses.

First Lady Michelle Obama and Dr. Jill Biden launched the Joining Forces campaign in order to assist military veterans and their spouses in accessing the workforce. In response to this campaign, Governors in over 20 states signed pro-military spouse license portability laws. Additionally, on January 24, 2011, U.S. President Barack Obama presented “Strengthening Our Military Families: Meeting America’s Commitment,” a document urging agencies to support and improve the lives of military families.

As a result of the Joining Forces campaign and the President’s directive, the Department of Transportation and the Department of Defense issued a joint report to highlight the impact of state occupational licensing requirements on the careers of military spouses, who frequently move across state lines. Released in February 2012, the report, “Supporting our Military Families: Best Practices for Streamlining Occupational Licensing Across State Lines” revealed that approximately 35% of military spouses work in professions that require state licenses or certification and that military spouses are ten times more likely to have moved to another state in the last year compared to their civilian counterparts. In a 2008 Defense Manpower Data Center survey of active duty military spouses, participants were asked what would have helped them with their employment search after their last military move. Nearly 40% of those respondents who have moved indicated that ‘easier state-to-state transfer of certification’ would have helped them.”

As a result of the survey, the Department of Transportation and the Department of Defense issued several recommendations, including the authorization of temporary licenses for military spouses if the applicant met state requirements. The report’s recommendation specified:

Temporary licenses allow applicants to be employed while they fulfill all of the requirements for a permanent license, including examinations or endorsement, applications and additional fees. In developing expedited approaches that save military spouses time and money, DOD does not want to make licensure easier for military spouses to achieve at the expense of degrading their perceived value in their profession.

Several bills have been presented to the Legislature across the past few years that deal with providing expedited licenses to military veterans and spouses, exempting active duty military personnel from continuing education requirements and licensing fees. In 2012, AB 1904 (Block, Chapter 399, Statutes of 2012) was signed and requires a Board under the DCA to expedite the licensure process for military spouses and domestic partners of a military member who is on active duty in California.

As part of the 2012-2013 Budget Package, the California Legislature directed the DCA to prepare a report on the implementation of BPC § 35 relating to military experience and licensure. The law indicates:

It is the policy of this state that, consistent with the provision of high-quality services, persons with skills, knowledge, and experience obtained in the armed services of the United States should be permitted to apply this learning and contribute to the employment needs of the state at the maximum level of responsibility and skill for which they are

qualified. To this end, rules and regulations of boards provided for in their code shall provide for methods of evaluation education, training and experience obtained in the armed services, if applicable to the requirements of the business, occupation or profession regulated... Each board shall consult with the Department of Veterans Affairs and the Military Department before adopting these rules and regulations. (BPC §35)

The DCA provided a list of boards that accept military experience and those who do not. The California Board of Optometry was included in the list of boards that do not have specific statutes or regulations authorizing the acceptance of military experience towards licensure.

The Committee is supportive of the Federal and State efforts to assist licensed military personnel and their family members enjoy better license portability. The Committee encourages licensing boards to examine their ability to exempt licensees from CE and licensing fee requirements during duty as well as waiving any licensing fees that have accrued upon the end of their duty term. The Committee is also supportive of standards for granting temporary licenses or expediting the licensing process for military spouses.

Staff Recommendation: *The Board should make every attempt to comply with BPC § 115.5 in order to expedite licensure for military spouses. The Board should also consider waiving the fees for reinstating the license of an active duty military licensee.*

Continued Regulation of the Profession by the Current Members of the Board

ISSUE #7: Should the current Board continue to license and regulate ODs?

Background: The health and safety of consumers is protected by well-regulated professions. The Board is charged with protecting the consumer from unprofessional and unsafe licensees.

Staff Recommendation: *The Committee recommends that ODs continue to be regulated by the current Board and be renewed again in four years.*