



CALIFORNIA STATE BOARD OF  
**OPTOMETRY**

# **Board Meeting**

Friday, August 10, 2012

Southern California College of Optometry  
Fullerton, CA





Governor Edmund G. Brown Jr.  
State of California

Denise D. Brown, Director  
Department of Consumer Affairs



Alejandro Arredondo, OD  
Vice President

Monica Johnson  
Secretary

Donna Burke  
Public Member

Madhu Chawla, OD  
Professional Member

Alexander Kim, MBA  
Public Member

William H. Kysella, Jr.  
Public Member

Kenneth Lawenda, OD  
Professional Member

Board Staff

Mona Maggio  
Executive Officer

Administration

Andrea Leiva  
Elizabeth Bradley  
Krista Eklund

Licensing

Jeff Robinson  
Nancy Day  
Elvia Melendrez

Enforcement

Lydia Bracco  
Cheree Kimball  
Jessica Siefertman

California State Board of Optometry  
2450 Del Paso Road, Suite 105  
Sacramento, Ca 95834  
(916) 575-7170 Office  
(916) 575-7292 Fax

California State Board of Optometry  
Board Meeting Notice  
Friday, August 10, 2012

Southern California College of Optometry  
TVCI Conference Room  
2575 Yorba Linda Boulevard  
Fullerton, CA 92831-1699  
(714) 870-7226

9:00 a.m.

**FULL BOARD OPEN SESSION**

1. Call to Order – Roll Call – Establishment of a Quorum
2. Welcome – President's Report
3. Election of Officers
  - A. Committee Appointments
  - B. Selection of Future Board Meeting Dates
4. Approval of Board Meeting Minutes
  - A. May 18, 2012
  - B. March 30, 2012
  - C. March 2, 2012
5. Executive Officer's Report
  - A. Budget
  - B. Personnel
  - C. Examination and Licensing Programs
  - D. Enforcement Program
6. Rulemaking Calendar
  - A. Update on California Code of Regulations (CCR) §1575, Uniform Standards Related to Substance Abuse & Disciplinary Guidelines
  - B. Update on CCR §1508, §1508.1, §1508.2 & §1508.3, Sponsored Free Health Care Events
  - C. Update On CCR §1514, Renting Space & Practicing on Premises of Commercial (Mercantile) Concern & §1525.1, Fingerprint Requirements
  - D. Discussion & Possible Action to Approve Draft Language & Commence a Rulemaking to Add & Amend Regulations Pertaining to the Department of Consumer Affairs' Consumer Protection Enforcement Initiative
  - E. Discussion & Possible Action to Amend §1566.1, Consumer Information to update the Board's Address
7. Legislation
  - A. Update on Legislation the Board is Following
  - B. Discussion & Possible Action to Amend Board Sponsored Bill SB 1215 Pertaining to Retired Licenses, Retired Licenses with a Volunteer Designation & Temporary Practice
8. Discussion and Possible Action Pertaining to the Board's 2012-13 Sunset Report
9. Public Comment for Items Not on the Agenda

*Note: The Board may not discuss or take action on any matter raised during this public comment section, except to decide whether to place the matter on the agenda of a future meeting [Government Code Sections 11125, 11125.7(a)]*
10. Suggestions for Future Agenda Items

## **FULL BOARD CLOSED SESSION**

11. Pursuant to Government Code Section 11126(c) (3), the Board Will Meet in Closed Session for Discussion & Possible Action on Disciplinary Matters

## **FULL BOARD OPEN SESSION**

12. Adjournment

### **Public Comments**

*Public comments will be taken on agenda items at the time the specific item is raised. Time limitations will be determined by the Chairperson. The Board may take action on any item listed on the agenda, unless listed as informational only. Agenda items may be taken out of order to accommodate speakers and to maintain a quorum.*

**NOTICE:** *The meeting is accessible to the physically disabled. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Krista Eklund at (916) 575-7170 or sending a written request to that person at the California State Board of Optometry 2450 Del Paso Road, Suite 105, Sacramento, CA 95834. Providing your request at least five (5) business days before the meeting will help ensure availability of the requested accommodation.*

***The Board of Optometry's mission 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.***

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**To:** Board Members

**Date:** August 10, 2012

**From:** Alejandro Arredondo O.D.  
Board Vice President

**Telephone:** (916) 575-7170

**Subject:** **Agenda Item 1 – Call to Order**

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Dr. Alejandro Arredondo, O.D., Board Vice President, will call the meeting to order and will call roll to establish a quorum of the Board.

Alejandro Arredondo, O.D., Board Vice President, Professional Member

Monica Johnson, Board Secretary, Public Member

Donna Burke, Public Member

Madhu Chawla, O.D., Professional Member

Alexander Kim, MBA, Public Member

Kenneth Lawenda, O.D., Professional Member

William Kysella, Public Member

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**To:** Board Members

**Date:** August 10, 2012

**From:** Dr. Alejandro Arredondo, O.D.  
Board Vice President

**Telephone:** (916) 575-7170

**Subject:** **Agenda Item 2– President’s Report**

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A. Welcome and Introductions

B. Other

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**To:** Board Members

**Date:** August 10, 2012

**From:** Mona Maggio  
Executive Officer

**Telephone:** (916) 575-7170

**Subject:** Agenda Item 3– Election of Officers

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### **Election of Officers**

Business and Professions Code (BPC) Section 3014, Officers. The board shall elect from its membership a president, a vice president, and a secretary who shall hold office for one year or until the election and qualification of a successor.

### **Committee Structure**

Boards often use committees, consists of smaller working groups, to focus and specialize on particular subject areas, such as fiscal, legislative and scope of practice and to provide consultation to Board staff. Because the Board was not at full quorum the last few years it has utilized the Legislative and Regulation Committee, the Education Committee and Public Relations Committee. It has also appointed workgroups that have included both board members and non-members (educators) as in the glaucoma certification process.

1. **Legislative and Regulation**

typically has four members.

Responsible for recommending legislative and regulatory priorities to the Board and assisting staff with drafting language for Board-sponsored legislation and recommending official positions on current legislation. The committee will also recommend to staff regulatory additions and amendments.

2. **Practice**

Typically has five members.

Advises Board staff on matters relating to optometric practice, including standards of practice and scope of practice issues. The committee also reviews staff responses to proposed regulatory changes that may affect optometric practice.

3. **Consumer Protection**

typically has three members.

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

4. **Education**

Typically has one to two members.

Reviews requests for approval of continuing education courses and offers guidance to Board staff

regarding continuing education issues.

5. Strategic Planning

Typically has two members.

Reviews the Board's progress towards achieving the objective and goals outlined in its Strategic Plan.

6. Fiscal

Typically has two members.

Serves as the liaison with staff and assists staff in monitoring and reporting the status of the Board's budget.

7. Public Relations – Outreach

Typically has two members.

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

**Selection of Future Board Meeting Dates:**

**Meeting Dates**

**Location**

September  
(Review Draft Sunset Report)

Conference - Call

October/November

Sacramento

January/February

Southern California

April/May

Southern California

August

Bay Area

# 2012

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[HTTP://WWW.PRINTFREE.COM](http://www.printfree.com)

# 2013

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**To:** Board Members

**Date:** August 10, 2012

**From:** Krista Eklund  
Office Technician

**Telephone:** (916) 575-7170

**Subject:** Agenda Item 4 – Approval of Board Meeting Minutes

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- A. May 18, 2012
- B. March 30, 2012
- C. March 2, 2012



**STATE BOARD OF OPTOMETRY**  
 2450 DEL PASO ROAD, SUITE 105, SACRAMENTO, CA 95834  
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## MEETING MINUTES

Friday, May 18, 2012  
 Department of Consumer Affairs – HQ 2  
 1747 N. Market Blvd  
 First Floor Hearing Room  
 Sacramento, CA 95834

### Members Present

Lee Goldstein, O.D., M.P.A.  
 Board President  
 Alex Arredondo, O.D.  
 Board Vice President  
 Ken Lawenda, O.D.  
 Fred Naranjo, M.B.A., Public Member  
 Alex Kim, M.B.A., Public Member  
 Donna Burke, Public Member  
 Ed Rendon, M.A., Public Member

### Staff Present

Mona Maggio, Executive Officer  
 Lydia Bracco, Fingerprint Coordinator  
 Jessica Sieferman, Probation Monitor  
 Cheree Kimball, Continuing Education Auditor  
 Dillon Christensen, Enforcement Office Technician  
 Christina Hasting, Enforcement Analyst  
 Michael Santiago, Senior Staff Counsel  
 Anahita Crawford, Deputy Attorney General

### Excused Absence

Monica Johnson, Public Member  
 Secretary

### Guest List

On File

9:00 a.m.

### **FULL BOARD OPEN SESSION**

#### **1. Call to Order – Roll Call – Establishment of a Quorum**

Board President, Lee Goldstein, O.D. called the meeting to order at 9:15 a.m. Public Member, Ed Rendon arrived at 9:20 a.m. Dr. Goldstein called roll and a quorum was established.

#### **2. Petition for Reinstatement of License**

**Dr. Larry Franklin Thornton, O.D.**

#### **3. Petition for Reduction of Penalty or Early Termination of Probation**

**Dr. Phillip Joseph McEldowney, O.D.**

Administrative Law Judge, Danette Brown presided over the hearings. Board members heard the following petitions:

- A. Dr. Larry Franklin Thornton, O.D., License Number OPT 6369  
 Agency Case Number: CC 2005-117
- B. Dr. Phillip Joseph McEldowney, O.D., License Number OPT 9742  
 Agency Case Number: CC 2003-181

### **FULL BOARD CLOSED SESSION**

#### **4. Pursuant to Government Code §11126(c)(3), the Board will Meet in Closed Session for Discussion and Possible Action on Disciplinary Matters.**

The Board convened into closed session at 10:40 a.m. to deliberate on the following petitions:

- A. Dr. Larry Franklin Thornton, O.D., License Number OPT 6369  
Agency Case Number: CC 2005-117
- B. Dr. Phillip Joseph McEldowney, O.D., License Number OPT 9742  
Agency Case Number: CC 2003-181

Closed session ended at 11:10 a.m. and the meeting adjourned for a 15 minute break.

### **FULL BOARD OPEN SESSION**

#### **5. President's Report**

The Board reconvened into open session at 11:30 a.m.

Dr. Goldstein acknowledged Public Member, Fred Naranjo who has served, with him on the Board, for nine years. He acknowledged Professional Member, Alex Arredondo and Public Member, Ed Rendon who are completing their terms with the Board. Dr. Goldstein thanked the Members for participation and time served. Dr. Goldstein reminisced of his experience serving this Board, stating key periods.

Dr. Goldstein announced that he will be representing the Southern California College of Optometry (SCCO) student graduation ceremony on May 19, 2012 on behalf of the Board. He will assist the new optometrists in the optometric oath as well as provide a speech.

Mr. Naranjo spoke words of praise regarding the accomplishments of Board and staff members during his tenure and of his pleasure and pride in serving this Board.

Dr. Arredondo who represented the Board at an accreditation meeting with the Western University of Health Sciences College of Optometry on April 23-24, 2012 provided an overview of his experience.

Dr. Arredondo reported that he was impressed with the accreditation process. He sat at the entrance interview with the College President, Dr. Philip Pumerantz, the Dean, Dr. Elizabeth Hoppe, and other Professors and Administrators.

Dr. Pumerantz provided a speech on his philosophy of health care (e.g. importance of health care, importance of providers, providers being the driving force to healthcare, etc.). Afterwards they were provided with a tour of the facilities (Zebra Fish Lab, Vision Science Lab, Ophthalmic Optics and Pre-Clinical Labs).

Dr. Arredondo reported that he was very impressed with the way the Pre-Clinical Lab was set up (very high tech, 13 to 20 students able to practice in one room, etc.). Next Dr. Arredondo visited the school's Eyewear Center where he was shown some of the Primary Care Modules (Clinical Research, Pediatrics, Vision Therapy, etc.). In each of these sections, a professor provided an overview of module education.

Dr. Arredondo then attended a Session on the Curriculum of the Optometry School, where members of the Accreditation Council on Optometric Education (ACOE) were present. He noted that the outreach and the enthusiasm of the students was exciting.

#### **6. Executive Officer's Report**

Executive Officer, Mona Maggio provided a report on the following:

##### **Department of Consumer Affairs – New Member to the Executive Team**

Ms. Maggio announced that Tracy Rhine was appointed as Deputy Director of the Legislative and Policy Review Division. Ms. Maggio spoke highly of Ms. Rhine.

### Board Members

Ms. Maggio met with Deputy Director of Appointments, Terry Hollowman, with the Office of the Governor on February 7, 2012 and with Deputy Director of Board/Bureau Relations, Department of Consumer Affairs, Reichel Everhart on February 21, 2012, to discuss the current and pending vacancies on the Board. On February 16, 2012, the Executive Officers met with the Agency Secretary and the Appointments Office to discuss upcoming appointments. Ms. Maggio was informed at the meeting that the Optometry Board would be coming up for appointments in the next week.

### Board Staffing

Ms. Maggio announced that Christina Hasting accepted the Staff Services Analyst (SSA) (General) position in the Board's Enforcement Program effective May 14, 2012. Christina has a Bachelor of Arts Degree in Communications from California State University, Sacramento. She previously served as an SSA with the Employment Development Department and most recently as a customer service specialist at Ameripride. Ms. Maggio introduced and welcomed Christina to the Board.

### Vacancies

Ms. Maggio reported that she has been working to fill a couple of vacancies. Currently the Board has a limited term office technician (OT) position filled by Dillon Christensen. This position expires on August 12, 2012. The Board's Budget Change Proposal (BCP) for Fiscal Year 2011/12 to authorize a permanent full-time OT Position was denied by the Department of Finance in July 2011. The OT position is essential to ensure that the Board addresses the increasing workload in the Enforcement Program in an efficient and timely manner. Therefore, justifications had to be written and submitted which has resulted in the possible authorization of a slightly less than full time OT position.

The manager position received last year will not be filled. The Board does not yet meet the allegation guidelines (criteria to hire) that Human Resources (HR) has in place.

### Budget

Budget Analyst, Wilbert Rumbaoa, from the Department of Consumer Affairs Budget Office presented an overview of the Board's budget.

To date (March 2012) the Board's budget is 1.5 million. Expenditures as of March 31 are roughly 1.1 million or 68% of the budget. Projected surplus for this fiscal year is \$73,000 or 4.7% of the budget. The fund condition in current year remains at 4.3 months of reserve. In this budget year it is at 3.91000.

Drs. Ken Lawenda and Alex Arredondo inquired about the average fund status of the Boards and if our reserve is considered financially sound. Mr. Rumbaoa responded that although the fund condition varies amongst the Boards, anything over three months is considered good. Mr. Rumbaoa assured the Members that the Board's budget is solid.

Drs. Arredondo and Lawenda inquired about the million dollar general fund loan. Mr. Rumbaoa explained that when there is a current need and/or the Board is raising fees, it is at that time when the loan would have to be repaid. Mr. Rumbaoa and Dr. Goldstein discussed that the loan would have to be repaid before fees could be raised. The Board would not be able to pursue regulations without repayment. Dr. Goldstein does not foresee the Board supporting any fee increases in the short term.

Dr. Lawenda inquired about the state's triple A credit rating at this time and if we should be concerned about it. Mr. Rumbaoa declined to answer (at this time) but stated that he would attempt to find the answer.

Mr. Alex Kim inquired if any further borrowing of the Board's funds is anticipated. Mr. Rumbaoa replied that due to the state's budget shortfall, the Governor just issued his May Revise. Although there will be reductions to the state and possibly more borrowing, the Board of Optometry's fund would not be able to support another General Fund (GF) loan at this time.

Ms. Maggio commented on Budget Letter (BL) 12-05 which provides guidance for submitting Out of State Travel (OST) Blanket requests. The OST Blanket requests Ms. Maggio has submitted over the last couple years have been declined due to the budget shortfall. However, Ms. Maggio announced that the Association of Regulatory Boards of Optometry (which is important because the Board belongs to this organization) will be holding their next meeting in San Diego. Therefore, she anticipates that some staff and Board members will be attending that meeting.

#### BreEZe

Ms. Maggio reported that the BreEZe Project is moving along as planned with some staff members involved (Jessica Siefertman, Cheree Kimball, and Andrea Leiva). The BreEZe team is working to make all of the different boards/bureaus forms as uniform as possible since these forms will be available for online use by licensees and applicants. Ms. Siefertman took a break from her full time work with the project to assist in the office. Ms. Maggio has been asked to send Ms. Siefertman back to the Department of Consumer Affairs Headquarters in preparation for the rollout of BreEZe early next year.

#### California E-mail Services

Ms. Maggio explained that DCA board/bureaus participated in the migration to California E-mail Services (CES). Unfortunately, department staff has experienced a number of problems with e-mails since the migration (e.g., missing e-mail, deletions of e-mail, e-mail not being delivered, etc.). Ms. Maggio requested that if a reply from her is not received within a day to two, to call her because e-mail issues are still occurring.

#### Licensing Statistics

Ms. Maggio provided licensing statistical handouts to the Members. Amongst the handouts was a table showing the number of optometrists becoming glaucoma certified per Dr. Goldstein's request. Ms. Maggio requested that Members advise her of any statistical data they may be specifically of interest so that she may request these types of analysis from Mr. Robinson.

Dr. Goldstein commented on the success of the increasing number of optometrists becoming glaucoma certified which is increasing at a rate of about 23 doctors per month.

Ms. Maggio announced that she is advertising to hire a high school student as a youth aid to assist Mr. Robinson.

Dr. Arredondo expressed his pride and gratitude in being a Member and "working with such fine people."

Dr. Lawenda requested that a licensing statistics table or chart be created showing any net increase or decrease of optometrists over the last few years. He also requested information regarding how many of California's optometrists are American Board of Optometry (ABO) certified.

Ms. Maggio reported on the issue of continued competency. Under the prior administration there had been discussion about the department holding a workgroup for the various healing arts boards who are interested in working on continued competency and having discussions as a group. Although Ms. Maggio has mentioned this to the new Executive Team, she does not see a decision forthcoming anytime soon. Therefore, Ms. Maggio stated that she will be initiating a workgroup for the Board. The plan is to hire a consultant or work with the department's Strategic Planning and Development Unit

for development of a workgroup and action plan. Dr. Goldstein agreed that this should be on the Board's work agenda.

### Sunset Review

The Board's sunset review is scheduled for 2012/2013.

Ms. Maggio provided to the Board Members a review explaining sunset review and a copy of the previous sunset report from 2002. Additionally, she provided a template which will be used for the upcoming sunset review (e.g. number of licensees, changes to Board, budget over last five years, history of the Board, etc.). There will also be specific questions which will be provided after the review.

Ms. Maggio has assigned staff certain portions to begin work on the report. DCA's Budget Office will assist with the budget portion of the report.

An important concern to note is that the issues discovered and described at the end of the 2002 report must be addressed and a responses provided. Ms. Maggio stated she would also like to consider the development of a subcommittee for in-depth insight on practice issues that staff would not have knowledge about. She announced that the report has to be submitted to the Legislature in September 2012. The Hearing will be held, most likely, in January or February.

Dr. Lawenda inquired and Ms. Maggio responded that the Association of Regulatory Boards of Optometry (ARBO) provides staff with a copy of their minutes. Ms. Maggio provides ARBO with state reports regarding Board activities which ARBO includes in their meeting packets. Occasionally ARBO provides updates regarding their activities. Maggio noted that one of ARBO's particularly beneficial services is sending out e-mail blasts in response to Board member questions. Dr. Goldstein and Ms. Maggio discussed attending ARBO meetings (e.g. whether or not it is worth the money spent).

## 7. Regulations

### ***A. Discussion and Possible Action Pertaining to the Comments Received During the 45-Day Comment Period of California Code of Regulations (CCR) §1575. Disciplinary Guidelines***

#### **Review of Legal Opinions**

Ms. Maggio reported that the Department of Consumer Affairs (Department) received a legal opinion from the Attorney General pertaining to the Uniform Standards Related to Substance Abuse. The Attorney General's legal opinion differed from the Legislative Counsel's legal opinion, so the Department requested that all Boards implementing SB 1441 hold off on taking anymore action until the opinions could be reviewed. At the March 2, 2012 meeting, the Board voted to take the Department's recommendation and moved to deal with this issue at a future meeting.

On April 5, 2012, the Department's review of the two legal options was completed and a memo was issued to advise the healing arts boards. The Department's findings are as follows:

1. The Department, the Attorney General and Legislative Counsel all agree that healing arts boards do not have the discretion to modify the content of specific terms or conditions of probation that make up the Uniform Standards.
2. The Department, the Attorney General and Legislative Counsel all agree that, unless the Uniform Standards specifically provide, all Uniform Standards must be applied to cases involving substance-abusing licensees, as it is their belief that the Legislative intent was to "provide the full implementation of the Uniform Standards."
3. The Department agreed with the Attorney General that the Substance Abuse Coordination Committee (SACC) is not the entity with rulemaking authority over the Uniform Standards. The entities with the rulemaking authority to implement the Uniform Standards are the individual boards. The SACC was limited to the creation of the Uniform Standards, but is not authorized to implement them.

Based on the findings above, the Department recommended that all healing arts boards move forward as soon as possible to implement the mandate of Business and Professions Code §315 (Uniform Standards), and to work with their legal counsel to 1) include a definition of what constitutes a "substance-abusing licensee,"; and to 2) determine if the Uniform Standards should be placed in a regulation separate from the Disciplinary Guidelines.

Ms. Maggio recommended that the Board take the Department's recommendation and move forward with the Uniform Standards Related to Substance Abuse and Disciplinary Guidelines as planned. There is already a definition of what constitutes a "substance-abusing licensee" in the Board's regulation, and it was decided at the September 16, 2011 Board meeting that the Uniform Standards should be incorporated by reference in the regulation together with the Disciplinary Guidelines.

Dr. Goldstein opened the floor for discussion. There were no further comments from the public or Board members.

**Dr. Lawenda moved to accept the recommendations from staff and the Department of Consumer Affairs. Donna Burke seconded. The Board voted unanimously (7-0) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Mr. Rendon	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

**Review of comments received during the 45-day comment period pertaining to text of CCR §1575, and vote to accept proposed modified text as a result of the comments received**

Ms. Maggio reported that The Department and the Center for Public Interest Law (CPIL) commented that the regulation as proposed allows the Board to diverge from the Uniform Standards if the licensee establishes that, in his or her particular case, appropriate public protection can be provided with modification or omission of a specific standard as a term of probation.

Pursuant to SB 1441, the uniform standards **shall** be used by all healing arts boards dealing with substance-abusing licensees, whether or not the board chooses to have a formal diversion program. Thus, the unambiguous language and intent of the statute are clear: the uniform standards are mandatory. Once a licensee is determined to be a substance-abusing licensee, the uniform standards must be applied. The first paragraph in CCR §1575 states that the Board must “comply” with the standards, which is correct. However, subsection (b) of CCR §1575 conflicts with that paragraph and renders the uniform standards discretionary, when they clearly are not.

The Department and CPIL both recommend that the Board strike all the language in subsection (b) after the word “apply” in the fourth line of the subsection. Ms. Maggio recommended that the Board accept these comments because the uniform standards are indeed mandatory, and move to amend the language as suggested to comply with SB 1441.

Dr. Goldstein opened the floor for discussion. He commented that the Board has already thoroughly talked about this for the last year. There were no further comments from the public or Board members.

**Donna Burke moved to accept the comments, and the proposed modified text to initiate a 15-day public comment period, and if no adverse comments are received to authorize the Executive Officer to make any non-substantive changes to the proposed regulations before completing the rulemaking process, and adopt the proposed amendments to the regulation. Dr. Lawenda seconded. The Board voted unanimously (7-0) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Mr. Rendon	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

**Review of additional proposed modified text within the Disciplinary Guidelines and vote to accept or reject proposed modified text**

Ms. Maggio reported that upon further review of the proposed changes being made to the Board's Disciplinary Guidelines and other boards' Disciplinary Guidelines, staff is recommending the following modifications. Minor changes have also been made throughout the document such as format change, grammar and, style, but are not relevant enough to be considered as they are non-substantive in nature.

- Quarterly Reports: Modified to incorporate by reference the Quarterly Report of Compliance form (DG-QR1(05/2012)). Ms. Siefertman provided the document to the members for review and discussion.
- Probation Monitoring Costs and Cost Recovery: Modified to delete the language requiring the Respondent to reimburse the Board for costs incurred even though the Respondent filed for bankruptcy. This language is not consistent with the Federal Bankruptcy Code, which allows for the discharge of certain debts, including cost recovery. Thus, since Federal Law overrides State Law, the Board cannot circumvent the Bankruptcy Code provisions, and this language must be removed.
- Take and Pass California Laws and Regulations Examination: Modified to re-add the language permitting two options (condition subsequent and condition precedent) when it comes to passing the exam. At the last Board meeting there was discussion to only keep

the condition precedent option where the probationer ceases practice until they pass the exam. Staff still believes the Board needs two options.

Dr. Goldstein commented that it all depends on the severity of the case. Some probationers see hundreds of patients, some don't. But he sees how re-writing the condition still give the Board the option to chose. Most of the time, the Board would want the probationer to pass the exam fairly quickly, considering that the Board does not let new licensees practice without passing the exam. It would not be a good idea to make an exception for probationers.

Ms. Maggio commented that staff believed it to be too punitive to restrict a probationer from practice until passage of the exam when their violation is not gross negligence or incompetence. If the probationer does not pass the exam the first time, they must wait 180 days to re-examine, and if they don't pass the second time, that's another 180 days for a total of one year that they will not be permitted to practice.

Dr. Goldstein commented that how can something like this be decided because each situation is different. Ms. Anahita Crawford commented that the Board has the option to use a petition to revoke if the probationer does not pass the exam, regardless of what option the Board chooses.

Mr. Santiago clarified that options are used only if the Board already has in place certain criteria, such as for violations a-d the Board uses Option #1, and for the rest of the violations the Board uses Option #2. There has to be a condition that is applicable, and then the Board can move to an option if some other situation applies, or if at the discretion of the Board, a stricter standard must be used. Thus the Board must decided what the general condition is before establishing options that fit different situations. This will be easier for staff.

Dr. Goldstein, Ms. Burke and Ms. Maggio agreed that the Condition Precedent was the appropriate language to keep. Ms. Anahita Crawford commented that if the Board chooses this option, then there will be less settlements because probationers are essentially suspended upon the start of their probationary period.

Dr. Goldstein commented that he did not want to do this if it would be a hardship on probationers. Mr. Santiago commented that the solution is to reduce the time period in which they need to take the exam from 12 months to six months. The Board agreed and made the change.

Mr. Santiago recommended the use of Option #1, Condition Subsequent. The Board agreed and made the change because it would require the probationer to cease practice until passage of the second exam.

- Community Services: Modified to re-format the text of this requirement to clarify that the Board has discretion to determine what community services are appropriate, depending on the violation.
- Abstention from Use of Controlled Substances/Alcohol: Modified to strengthen and clarifies the requirement pertaining to the Respondent's intake of lawfully prescribed drugs to prevent the Respondent from relapsing. Also adds a timeline for submission of quarterly reports and the required information that must be included in each report.
- Biological Fluid Testing: Modified to delete reference to a page number because it is incorrect.

- Worksite Monitor: Modified to clarify and re-format the condition. Modified to permit only an optometrist or an ophthalmologist to be worksite monitors and not other healthcare practitioners. Modified to permit the worksite monitor to disagree with the Board's monitoring plan and provide their own recommendation for approval. Modified to add language requiring that the worksite monitor begin monitoring the Respondent within 60 calendar days and requires Respondent to make all records available for the worksite monitor's review. Modified to add language permitting the Board to require the Respondent to cease practice if a worksite monitor is not obtained and approved within 60 calendar days of the effective date of the Decision. Deletes language pertaining to substance abusing licensees because the uniform standards already deal with such licensees. Adds language establishing guidelines in the event the worksite monitor resigns, or is no longer available, or if the Respondent fails to find a worksite monitor in the time allotted. Adds language describing the required information that must be included in each quarterly report.
- Direct Supervision: Modified to add language describing the required information that must be included in each quarterly report and when they must be submitted, and that an ophthalmologist can be a supervisor.
- Psychotherapy of Counseling Program: Modified to reduce the amount of time a Respondent has to submit to the Board for its approval the name of a psychotherapist from 60 calendar days to 30 calendar days. Also adds a timeline for submission of quarterly reports and the required information that must be included in each report.
- Mental Health Evaluation: Modified to add language to give the Board authority to suspend a Respondent from practice if the mental health evaluation establishes that the Respondent is unsafe to practice. Adds language that establishes guidelines if the mental health evaluation determines that the Respondent needs treatment, and what would occur if the Respondent continues having mental health issues even after treatment. Re-adds the optional language previously deleted that permits the Board to restrict the Respondent from practice until the Board has determined that he/she is mentally fit to practice safely. Also adds a timeline for submission of quarterly reports and the required information that must be included in each report.
- Medical Health Evaluation: Modified to add language giving the Board authority to require the Respondent to undergo medical treatment based on the medical evaluation results. Also adds a timeline for submission of quarterly reports and the required information that must be included in each report.
- Medical Treatment: Modified to reduce the amount of time a Respondent has to submit to the Board for its approval the name of a physician from 60 days to 30 days. Also adds a timeline for submission of quarterly reports and the required information that must be included in each report.
- Audit Required: Modified to reduce the amount of time a Respondent has to submit to the Board for its approval the name of three third party auditors from 60 days to 30 days. Requires the auditor to submit quarterly reports following format and schedule provided by the Board. Requires the auditor to review the Respondent's accusation and decision and create a monitoring plan if the auditor disagrees with the Board's plan. Requires the auditor to begin auditing the Respondent within 60 calendar days of the effective date of the decision, and requires the Respondent to provide all documentation. Establishes guidelines in the event the Respondent fails to find an auditor, or the auditor resigns or is no longer

available. Gives the Board the authority to suspend practice if the Respondent does not comply with the condition. Also changes the formatting of the condition to match the other condition in the document.

- Continuing Education: Modified to reduce the amount of time a Respondent has to submit to the Board for its approval educational programs or courses from 60 days to 30 days.
- Medical Record Keeping Course: Modified to add this course for cases where the Respondent is deficient in medical record keeping, and that deficiency is a cause for the violation(s). This course is necessary to ensure that after probation, the Respondent is ready to return to practice and apply what was learned in this remedial course to prevent future violations from occurring.

Ms. Maggio recommended the Board to accept all the changes. Dr. Goldstein opened the floor for further discussion by the public and the Board members. There was no further discussion.

**Donna Burke moved to accept the recommended modifications and other language as amended at today’s meeting; initiate a 15-day public comment period, and if no adverse comments are received, to authorize the Executive Officer to make any non-substantive changes to the proposed regulations before completing the rulemaking process, and adopt the proposed amendments to the regulation. Dr. Lawenda seconded. The Board voted unanimously (7-0) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Mr. Rendon	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

***B. Consideration and Possible Action to Delegate to the Department of Consumer Affairs Authority to Receive Sponsoring Entity Registration Forms and to Registering Sponsoring Entities for Sponsored Free Health Care Event that Utilize the Services of Optometrists.***

Ms. Maggio reported that at its March 2, 2012 meeting, the Board voted to begin a rulemaking to implement Business and Professions Code §901 which requires out-of-state optometrists to obtain authorization from the Board prior to participating in a sponsored free health-care event in California.

Prior to Noticing this regulatory action with Office of Administrative Law (OAL), the Department contacted all healing arts boards that have proposed regulations relevant to sponsored free health care events, advising that the boards may need to further clarify the Department’s role in receiving and registering sponsoring entities. The Medical Board of California (MBC), Board of Occupational Therapy (BOT), and the Board of Vocational Nursing and Psychiatric Technicians (BVNPT) had all submitted their final rulemaking files to OAL. On March 13, 2012, OAL issued a Decision to Disapproval of MBC’s proposed regulations due to failure to comply with clarity and necessity

OAL’s primary clarity concern related to the specific content of MBC’s Form 901-A in relation to the content of similar forms proposed by other healing arts boards within the Department, BVNPT and BOT used similar forms incorporated by reference, and each form contained language similar to

MBC’s form indicating that only one registration form per event should be completed and submitted to DCA. OAL was concerned what there was not one common form with a uniform set of regulatory requirements which would, with certainty, allow for the filing of a “single, common form” that meets the regulatory requirements of the three agencies. OAL could not easily understand how the “only one form per event” provision on each of the individual board’s form would work in practice. The differing forms from each board could create the potential for confusion and uncertainty among sponsoring entities legally required to comply with the regulations.

Ms. Maggio recommended that the Board adopt the Resolution to formally delegate authority to the Department to receive sponsored entity registration forms and to register sponsoring entities for sponsored free health care events that utilize the service of optometrists and to direct staff to add the adopted Resolution to the Board’s Sponsored Free Health Care Events rulemaking file.

By delegating authority to the Department, sponsoring entities will clearly understand that they should submit a single, common form that meets the regulatory requirements of multiple healing arts boards, rather than filing registration forms with each individual healing arts board.

Dr. Goldstein asked about the Board’s influence on these clinics (e.g. whether or not the Board would review them for correctness) and he asked if anyone could see any problems that may potentially arise from adopting the Resolution.

Regulations Coordinator, Katherine Demos addressed Dr. Goldstein’s questions. Ms. Demos clarified that the sponsoring entity form is the Department’s form and will be reviewed by the Department. The Board will have its own form for out-of-state professionals who wish to come for the event. It’s up the Board (according to the Board’s laws) whether or not the professional would be allowed to participate in the event. Ms. Demos and Dr. Goldstein discussed this and Dr. Goldstein was reassured that the Board would still have the same jurisdiction over optometrist professionals and optometry students as previously.

**Ed Rendon moved to adopt the language as proposed by the Department. Alex Kim seconded. The Board voted unanimously (7-0) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Mr. Rendon	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

**8. Legislation Update**

Ms. Maggio reported on the following bills:

**Assembly Bill 761 (R. Hernandez)**

This bill is sponsored by the California Optometric Association. Government and External Affairs Director of the California Optometric Association (COA), Kristine Shultz, provided an overview of Assembly Bill (AB) 761. AB 761 will allow optometrists to perform simple diagnostic tests in the office rather than having to order them from a laboratory.

Ms. Burke, Ms. Shultz and Dr. Goldstein discussed the technology changes that have made it possible to perform these more simple tests, which are called Clinical Laboratory Improvement Amendments (CLIA) tests. Dr. Lawenda commented that the COA will be offering a course at the

Monterey Symposium that will cover CLIA testing. Ms. Shultz added that optometrists will still have reporting requirements and will have to be licensed by the Department of Public Health to perform CLIA testing.

Ms. Maggio announced that the Board is in support of this bill.

**Assembly Bill 778 (Atkins)**

AB 778 is sponsored by LensCrafters and Californians for Healthy Vision. This bill is in the Senate Business, Professions and Economic Development Committee, and will probably go to hearing in June 2012. The Board continues to be in opposition of this bill. However, Dr. Goldstein and staff have taken the following steps in order to continue dialogue between the author, the Board and all interested parties.:

- *January 18, 2012* – Dr. Goldstein, Ms. Maggio, Mr. Santiago, Policy Analyst, Andrea Leiva, and Department of the Attorney General Liaison, Anahita Crawford, met with Assembly Member Atkins to discuss this bill and the reason the Board is in opposition.
- *April 5, 2012* – Dr. Goldstein, Ms. Maggio, Mr. Santiago, Ms. Leiva, Ms. Crawford, Senior Assistant Attorney General, Alfredo Terrazas, Supervising Deputy Attorney General (San Diego Office – Licensing Section), Linda K. Schneider, and Deputy Attorney General (San Diego Office), Sherry Ledakis, met with staff from the Department of Managed Health Care to learn more about their licensing and enforcement of Knox-Keene health plans.
- *May 3, 2012* – Ms. Maggio, Mr. Santiago, Ms. Leiva, Mr. Terrazas, Ms. Schneider, and Ms. Ledakis, representatives from the Legislative Unit of the Department of Consumer Affairs, and 22 other stakeholders met with Sean Henschel, Chief of Staff for Assembly Member Toni Atkins to discuss AB 778. Some of the stakeholders present included the COA, First Sight Vision Services, LensCrafters/Luxottica, the California Academy of Eye Physicians and Surgeons, and all these groups respective lobbying firms.

Ms. Maggio reported that there was not any real outcome from the meeting on May 3, 2012. The groups still have many concerns about enforcement. She explained that this bill would authorize a registered dispensing optician an optical company, a manufacturer or distributor of optical goods, or a non-optometric corporation to own a specialized health care service plan that provides or arranges for the provision of vision care services, share profits with the specialized health service plan, contract for specified business services with the specialized health care service plan, and jointly advertise vision care services with the specialized health care service plan. The bill would prohibit those persons or entities from engaging in conduct that would influence or interfere with the clinical decisions of an optometrist, as specified, and would set forth provisions that apply to medical records. This bill contains other related provisions and other existing laws.

Dr. Goldstein opened the floor to comment. There were no comments.

**Assembly Bill 1926 (J. Solorio)**

The sponsor for AB 1926 is NEW Asurion. It is currently in the Senate Business, Professions and Economic Development Committee. The Board does not have a position at this time. AB 1926 broadens the statutory definition of service contracts to include optical products, thereby enabling these types of service contracts to be sold.

Dr. Goldstein inquired and Ms. Shultz confirmed that this bill is a warranty issue. Under current law if an optometrist wanted to sell a warranty, it would be an insurance product regulated by the Department of Insurance. AB 1926 is a warranty. Additionally, it is much easier to complete in terms of regulation and registration.

**Assembly Bill 690 (E. Hernandez)**

AB 690 is sponsored by the COA. It has passed the Senate, and has been referred to the Assembly Committee on Health. The Board holds no position at this time.

Ms. Maggio asked Ms. Schultz to report on this bill. Ms. Shultz explained that AB 690 will implements a federal provision which makes it a violation for health plans to discriminate against classes of providers as it pertains to contracting issues. Currently, optometrists are oftentimes treated differently then ophthalmologists when contracting. Optometrists have additional requirements put upon them or they are excluded altogether from the health plan panel. The goal is that AB 690 will improve patient access to health care.

Dr. Goldstein opened the floor to comments.

Ms. Burke asked if there is any known opposition to the bill. Ms. Shultz responded that some concerns have been expressed by the health plans and technical amendments have been made which may eliminate their concerns. But there has not been any formal opposition received at this time. Additionally, the Medical Association has raised some questions but has not come out with a letter of opposition.

Mr. Naranjo asked and Ms. Schultz responded that the ophthalmologists have not taken a position on this bill. She reported that in the past the American Medical Association has been strongly opposed to the federal provision and has tried to get rid of it because the laws would open the door for other providers to equally compete with medical doctors for these patients. Therefore the purpose of AB 690 is to codify the provisions.

Dr. Goldstein clarified that a federal provision already exists, but the concern is that the provision may be revoked or replaced. AB 690 would keep California in the position of allowing optometrists and ophthalmologists parody in this regard.

Mr. Naranjo noted that the health plans may be considering that they pay optometrists and ophthalmologists differently. Ms. Shultz responded that the pay may or may not have anything to do with it but quality of care should be the only reason for any differentiation of treatment for the same service.

**Senate Bill 1575**

SB 1575 is an Omnibus Bill by the Senate Business, Professions & Economic Development Committee. This bill has passed the Senate Business, Professions & Economic Development and has been referred to the Senate Appropriations Committee. SB 1575 is for the Boards change and is just "clean up" language. The bill amends §3057.5 Eligibility of Graduates from Foreign Universities by switching the word "person" with "graduates of foreign universities." The Board wanted to ensure that it was clear this statute was referring to graduates of foreign universities and not just an individual.

Ms. Maggio provided handouts to the Members covering two additional bills.

**Assembly Bill 1932**

As amended AB 1932 will require that, by January 1, 2014 and annually thereafter, every healing arts board issue a specified written report to the Department of Veterans Affairs and the Legislature that clearly details the methods of evaluating the education, training, and experience obtained in military service, and whether that education training and experience is applicable to the Board's requirements for licensure.

Ms. Maggio explained that it would be very expensive to pull together an evaluation report of this nature (something close to \$100,000). Additionally, the Board has no data that suggests the Board has ever received a request from a veteran who has stated he/she has gained experience in the military that he/she would like to apply to my optometric education. Licensees who are currently in the military have to have an active current license with the state in which they hold a license to be able to provide services as an optometrist while in the military.

### **Assembly Bill 1976**

This bill requires those boards that approve the schools, to work with the schools to develop a process for the schools to evaluate this training. Ms. Maggio reported that she sent this information to the schools in California to see if they have taken a position or are familiar with this. She has not heard back from the schools and stated she will follow up with them regarding this.

Dr. Goldstein suggested we may want to take an oppose position.

Ms. Maggio stated that she responded back to the Department that AB1976 is not applicable to the California State Board of Optometry because our requirements for licensure require that the doctor have a degree from an accredited college, pass a national licensure exam, and pass a state exam. Regarding AB 1932 she focused on what it would take for this Board (and cost) to put together an evaluation of the veterans training and education.

Dr. Goldstein opened the floor to comment.

Ms. Burke suggested the Board watch AB 1932 as it could have an impact on the department with staff requirements. Dr. Goldstein agreed to watch AB 1932.

### **Senate Bill 1215 (Emmerson)**

The Board is sponsoring this bill. SB 1215 passed unanimously at the Senate on May 1, 2012 and will most likely be assigned to the Assembly Business, Professions and Consumer Protection Committee next. The bill will be heard between the dates of June 4 and July 6, 2012.

The purpose of this bill is to define temporary practice, and to create a retired license status and a retired volunteer status.

Ms. Maggio reported that two issues have surfaced that will require amendments.

- 1) Addition of language to ensure that it is clear that the Board retains jurisdiction over all licensees, regardless of the status of his or her license.

*Rational:* The Medical Board of California (MBC) recently lost a court of appeal case related to taking disciplinary action against a licensee that held a retired license. The retired licensee's attorney alleged the MBC lacked jurisdiction to impose discipline because, as the holder of a retired license status, the physician was not permitted to engage in the practice of medicine. MBC staff and legal counsel believed that MBC does have the jurisdiction to impose discipline on any license it issues because that license can opt to change their license status by meeting limited requirements. If the MBC lacked jurisdiction to impose discipline, it may create a non-practice status loophole that would insulate any licensee from discipline by transferring his or her license to an inactive status. However, the court ruled that the holder of a retired status license is not a licensee under the Board's jurisdiction and that the Board's disciplinary authority is relevant to the holder of a retired license, "only if and when the retired licensee seeks to return to the practice of medicine and files an application" with the Board for restoration of his or her license.

MBC is proposing to clarify their language via an omnibus bill this legislative session.

Staff is recommending that the Board amend the language of SB 1215 using MBC's proposed language as a model to ensure that it is clear that the Board retains jurisdiction over retired licenses and retired licensees with a volunteer designation. Business and Profession Code §3090 of the optometry practice act would be amended and added to SB 1215 as follows:

**3090. Action for Violation of Chapter or Regulations; Board Powers**

Except as otherwise provided by law, the board may take action against all persons guilty of violating this chapter or any of the regulations adopted by the board. The board shall enforce and administer this article as to licenseholders, including those who hold licenses that do not permit them to practice optometry, such as, but not limited to, retired, retired with a volunteer designation, or inactive, and the board shall have all the powers granted in this chapter for these purposes, including, but not limited to, investigating complaints from the public, other licensees, health care facilities, other licensing agencies, or any other source suggesting that an optometrist may be guilty of violating this chapter or any of the regulation adopted by the board.

Dr. Goldstein commented that he cannot see how the Board would have jurisdiction over someone who has been retired for a number of years. If such a person practiced, he or she would be practicing without a license which is a violation in any case. He further clarified that a license with volunteer status would be allowed to practice and it seems to him that the Board would hold jurisdiction over them anyway.

Ed Rendon left the meeting.

Mr. Naranjo asked and Dr. Goldstein defined the two retired categories this bill would create. One status is "retired". This retired optometrist would not be able to practice and would not be required to take continuing education (CE). Within three years if he/she wanted his/her license reinstated, he/she could take the required CE, pay the fee and have his/her license reinstated. If retired for longer than three years, he/she would be required to go through a testing procedure in addition to taking CE, and paying the fee.

The other category is "Retired with a volunteer designation. This optometrist would renew his/her license for less money (\$50), he/she is still licensed and must take CE and meet all the other requirements. But this optometrist pays a lower fee because he/she is not getting paid to practice.

Ms. Demos commented that she is not certain where the authority comes from to allow the Board to retain jurisdiction over all licensees for all time. For three years following the status change of licensure to "retired" the license can be reinstated. So for that three year time period, in which, simple reinstatement is possible, the Board may retain jurisdiction.

Dr. Goldstein argued that he is not sure an amendment is even necessary. His particular feeling is that "a nice piece of legislation has been written that has received a lot of support and the Board should go with it the way it is." He does not see this as a major issue.

Dr. Goldstein opened the floor to comment.

Dr. Lawenda inquired if accepting the amendments per staff recommendation, will it satisfy or just open the door for future trouble.

Ms. Demos, Mr. Santiago, and Dr. Lawenda discussed whether the purpose is to have jurisdiction over **all** licensees. If it is all licensees then how long does the Board retain jurisdiction over them? And does it even make sense if (for example) a licensee changes professions and later has a conviction, for the Board to go after him/her? If the purpose is to retain jurisdiction over **only** those licensees with retired status or retired with a volunteer designation, then Mr. Santiago and Dr. Lawenda agreed that the Board should take a closer look at this issue.

Board members and staff agreed to not amend.

2) Increasing the retired license fees.

Ms. Maggio explained her conversations with the DCA Budget Office about the proposed fee structure for the retired classification. The Board's budget analyst recommended raising the fee structure to avoid loss or revenue. She noted that it is difficult to determine how many optometrists currently in inactive status will want to retire. Ms. Maggio and Dr. Goldstein discussed the options of amending or not amending, letting the bill pass and then watching to see how many doctors will take advantage of the retired status option.

Dr. Goldstein's opinion is to leave the bill as it is. Dr. Lawenda and Ms. Burke expressed agreement about not making any changes.

## **9. Enforcement Report**

Ms. Siefertman reported on the following:

### **Analyst Certification Training (ACT)**

DCA's Strategic Organization, Leadership, and Individual Development (SOLID) recently designed the ACT Program. ACT consists of six courses that are designed to strengthen the skills of analysts in various areas (e.g. techniques for analyzing data, recording, project management, public speaking). All of the Board's Enforcement Unit will be attending this training. They should be certified within the calendar year.

### **Data Clean-Up Project**

As previously reported, Enforcement staff was preparing to clean up all of its data in the current CAS system in order to make the conversion to BreEZe as simple as possible. This project includes correcting action codes, Disciplinary Orders, Cost Recovery amounts, etc. Using the Board's retention schedule, staff will identify only the necessary data needed to convert to BreEZe. However, due to the necessity of the Exception Report Project, priorities have shifted and this project has been put on hold.

### **Fingerprint Program**

Ms. Maggio provided an overview of the fingerprint program.

The fingerprint regulations became effective June 21, 2010 and the first notification of the requirement was sent to licensees with their license renewal invoices in July of that year. To date, the Board has received 157 RAP sheets from the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI). Staff has worked diligently to investigate the allegations against the optometrists by contacting law enforcement agencies and courts to request documents.

Based on the statute of limitations, the Board has seven years from the date of conviction or three years from the date the Board discovers the conviction – whichever comes first – to file an accusation against an optometrist based on the conviction substantially related to the practice of optometry. For licensees with convictions outside the statute of limitations, the license application is reviewed to determine if it was signed after the conviction and, if so, did the licensee correctly answer the conviction statement question.

If a licensee failed to disclose a conviction, it would be a misrepresentation of fact on their application, for which there is no statute of limitations, and will be referred to the enforcement unit for further investigation.

As of May 14, 2012, there have been 406 rejected fingerprints for numerous reasons – mainly, the characteristics of their fingerprints are too low to be processed. In all rejection cases, a letter is sent information the optometrist that their fingerprints were rejected. If the fingerprints are rejected three consecutive times, staff sends a request to the DOJ and/or FBI to have a “name search” completed.

Dr. Goldstein asked and Ms. Siefertman explained that of the 406 rejections, there can be four for the same optometrist.

The last notification of the requirement will be sent with the renewal invoices in July 2012, and that will complete a 2-year renewal cycle. In January 2013, Board staff will audit the fingerprint program to ensure all licensees have been fingerprinted. Those licensees who have yet to be fingerprinted will be notified by the Board.

Ms. Maggio commented on the fingerprint process. As part of the fingerprint process staff discovered that sometimes the fingerprints results were not being matched up with the record. So staff met with the Applicant Tracking System (ATS) Team to question why this is occurring. Staff learned that when a licensee/applicant is fingerprinted, the fingerprint record contains pieces of data that are electronically sent through multiple data bases. Each time a record is sent, via interface, each database looks for specific pieces of data called “Key Identifiers” to match the fingerprint record to the database record. Those Key Identifiers include Last Name, First Name, Date of Birth (DOB), and Social Security Number (SSN). All Key Identifiers must be present and correct for records to match and complete the data transfer. Otherwise the fingerprint results just sit somewhere out in cyberspace and never match up with the database record.

The ATS team informed staff of an “Exception Report” that we should have been utilizing and would have informed us of the problem. Due to the lack of training on the data transfer process and the exception report, staff was unaware of the necessary steps to successfully transfer data from the exception report and into the correct record.

On March 19, 2012, Board staff, aware there was a problem with not receiving results, initiated a meeting with the Office of Information Services (OIS). During that meeting, OIS ran the Board’s exception report starting on March 19, 2010 through March 19, 2012. The report contained 651 pages of data exceptions. These exceptions included 144 rap sheet records and 95 rejected records.

Staff immediately took necessary steps to transfer the rap sheet records from the exception report. Eighty-five cases were opened, 61 closed, and 24 are pending (which means staff has ordered the records and the cases are in the investigation process). Those cases past the statute of limitations were cross referenced with the conviction statement on each licensee’s initial application and they were opened and closed as a complaint.

This issue is affecting the Board’s statistics. Ms. Maggio explained she does not want the Members to think that the Board is not meeting the Performance Measures set by the Department and adopted by the Board.

Ms. Maggio provided documents and explanations showing how the Board is meeting the Department’s Performance Measures of opening up a complaint with 5-7 days of receipt. Usually they are opened and assigned to an analyst within 4-5 days of receipt. However, because staff had to open all of these complaints using the dates they actually came to the Board, the statistics report is showing the average number of days to close or assign a case as 209 days instead of the typical 4-7 number of days. Ms. Maggio explained that relates only to those cases that were on the exception report and not relate to any of the consumer complaints staff receives.

As of May 14, 2012, the 651-page exception report is now down to 451 pages. A date to clear all of the exceptions on the report has been set for July 1, 2012. Ms. Maggio reported on the assignment of duties for clearing the exception report.

Ms. Burke inquired and Ms. Maggio responded that if the Governor's proposed four-day workweek is implemented, she still believes the exceptions will be cleared by July 1.

Dr. Lawenda commented on his surprise at the number of RAP sheets. He thought the number would be much lower. Dr. Lawenda asked and Ms. Maggio responded that staff looks at the age of the case and the circumstances surrounding the conviction. Regardless of the age of the conviction, the Board will still be informed about it. Factors the Board takes into consideration include: age of the case (how many years since the conviction occurred), circumstances surrounding incident, relevance to the practice of optometry (whether it substantially relates), nature of incident (seriousness criteria), and rehabilitation (what the individual has done to rehabilitate himself/herself).

Drs Lawenda & Goldstein, Ms. Maggio, and Mr. Santiago discussed the likelihood of having a level of consistency of criteria among the boards.

Mr. Naranjo inquired about the process for dealing with non-disclosure of a conviction. Ms. Maggio clarified procedures. If the Board lost jurisdiction because of the age of the crime then the license application is reviewed. If the conviction occurred prior to licensure, and they disclosed it on the application, nothing is done because they answered truthfully and it was probably investigated at the time. If the licensee marks "no" and information is later received that he/she was convicted of a crime, they will receive a letter informing them that non-disclosure of a crime has been discovered and they are directed to explain why they didn't disclose it. Ms. Maggio added that this type of situation is probably cause for a citation rather than revocation of licensure.

Ms. Burke inquired about the BreEZe project and the Sunset Review. Ms. Maggio reported on working with the Department to arrange time for Jessica to spend some time with the BreEZe team again. Also, Ms. Maggio is working on having Christina trained to assist with the project.

Ms. Maggio explained that the Sunset Review will be huge task requiring a great deal of work. A couple of Members will assist staff with completing the task, which includes testifying on the report with staff and answering any questions the Legislature has.

Dr. Goldstein commended Ms. Maggio and the staff for being up front about the problem with the exception report and dealing with it the best they can. He noted that probably everyone in the room has had some kind of similar experience at one time or another and the Board will make it through this.

#### **10. Public Comment for Items Not on the Agenda**

***Note: The Board may not discuss or take action on any matter raised during this public comment section, except to decide whether to place the matter on the agenda of a future meeting [Government Code Sections 11125, 11125.7 (a)]***

There were no public comments.

#### **11. Suggestions for Future Agenda Items**

There were no suggestions offered.

**12. Adjournment**

**Donna Burked moved to adjourn the meeting. Alex Arredondo seconded. The Board voted unanimously (6-0) to pass the motion.**

<b>Member</b>	<b>Aye</b>	<b>No</b>	<b>Abstention</b>
<b>Dr. Goldstein</b>	<b>X</b>		
<b>Dr. Arredondo</b>	<b>X</b>		
<b>Mr. Naranjo</b>	<b>X</b>		
<b>Dr. Lawenda</b>	<b>X</b>		
<b>Mr. Kim</b>	<b>X</b>		
<b>Ms. Burke</b>	<b>X</b>		

The meeting adjourned at 3:15 p.m.

\_\_\_\_\_  
Monica Johnson, Board Secretary

\_\_\_\_\_  
Date



**STATE BOARD OF OPTOMETRY**  
 2450 DEL PASO ROAD, SUITE 105, SACRAMENTO, CA 95834  
 P (916) 575-7170 F (916) 575-7292 www.optometry.ca.gov



## Meeting Minutes

Friday, March 30, 2012  
 Southern California College of Optometry  
 TVCI Conference Room  
 2575 Yorba Linda Boulevard, Fullerton, CA 92831

and via Teleconference at the

California State Board of Optometry  
 2450 Del Paso Road, Suite 105, Sacramento, CA 95834

### Members Present in Southern California

Lee Goldstein, OD, MPA  
 Board President  
 Alejandro (Alex) Arredondo, OD  
 Board Vice President  
 Monica Johnson, Secretary  
 Fred Naranjo, MBA, Public Member  
 Alexander (Alex) Kim, MBA, Public Member  
 Donna Burke, Public Member

### Staff Present in Sacramento

Mona Maggio, Executive Officer  
 Andrea Leiva, Policy Analyst

### Staff Present in Southern California

Jessica Sieferman, Probation Monitor  
 Michael Santiago, Senior Staff Counsel

### Excused Absence

Kenneth (Ken) Lawenda, OD

### Guest List

On File

**10:00 a.m.**

### **FULL BOARD OPEN SESSION**

#### **1. Call to Order – Establishment of a Quorum**

Board President, Lee Goldstein, O.D. called the meeting to order at 10:00 a.m. Dr. Goldstein called roll and a quorum was established.

#### **2. Petition for Reinstatement of License**

- A. Dr. Larry Franklin Thornton, O.D.
- B. Dr. Lawrence Edwin Young, O.D.

#### **3. Petition for Reduction of Penalty and Early Termination of Probation**

- A. Dr. Edward Rabb Nell, O.D., License Number OPT 6522

Administrative Law Judge, Mark Harman presided over the hearings for agenda items 2 and 3 above.

### **FULL BOARD CLOSED SESSION**

#### **4. Pursuant to Government Code §11126(c)(3), the Board will Meet in Closed Session for Discussion and Possible Action on Disciplinary Matters**

The Board convened to close session to deliberate on the petitions in agenda items 2 and 3 above.

**FULL BOARD OPEN SESSION**

**5. Discussion and Possible Action Pertaining to California Code of Regulations (CCR) §1513, §1514, and §1525.1.**

Andrea Leiva, Policy Analyst presented this item.

Dr. Goldstein introduced this item and summarized that this regulatory package has been up for discussion at multiple meetings due to the submission of comments focused on CCR §1513 at every public comment period. Again, after the 2<sup>nd</sup> modified text's 15-day comment period, two comments in opposition were received reiterating that the proposed changes to CCR §1513 are unnecessary and a financial burden to optometrists.

Ms. Leiva provided the members with an overview of the comments received from an individual optometrist and the California Optometric Association (COA). All commentors were concerned about the financial burden that would be placed on optometrists, and COA demonstrated that the Board already has authority in current law through Business and Professions Code §651 to prevent and discipline optometrists from using a completely different name in their advertising.

Ms. Leiva confirmed COA's observations regarding current law, and that the financial effects the proposed regulation would have on optometrists had been underestimated. She proposed to the members to remove CCR §1513 from the regulatory package for further evaluation, and to continue with CCR §1514 and CCR §1525.1, which were approved at the Board's December 2, 2012 meeting.

Ms. Leiva then discussed other options available to the Board to ensure optometrists are complying with advertising laws, such as creating advertising guidelines for optometrists and conducting outreach to consumers on how to best identify their optometrist. The Board could also possibly do a random review of optometrist websites and other public communication to ensure optometrists are complying with current law. She recommended that before another regulatory solution was considered, that the Board take some time to conduct its outreach efforts and work with all stakeholders to find a solution that will better serve consumers and licensees.

Dr. Goldstein and the members agreed that this action would be satisfactory.

**Donna Burke moved to accept the comments received during the 2<sup>nd</sup> 15-day comment period and to withdraw CCR §1513 from the regulatory package in order to permit staff to continue with CCR §1514 and CCR §1525.1. Alexander Kim seconded. The Board voted unanimously (6-0) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Ms. Johnson	X		
Mr. Naranjo	X		
Dr. Lawenda			Excused Absence
Mr. Kim	X		
Ms. Burke	X		

6. **Adjournment**

**Monica Johnson** moved to adjourn the meeting. **Donna Burke** seconded. The Board voted unanimously (6-0) to pass the motion.

<b>Member</b>	<b>Aye</b>	<b>No</b>	<b>Abstention</b>
<b>Dr. Goldstein</b>	X		
<b>Dr. Arredondo</b>	X		
<b>Ms. Johnson</b>	X		
<b>Mr. Naranjo</b>	X		
<b>Dr. Lawenda</b>			<b>Excused Absence</b>
<b>Mr. Kim</b>	X		
<b>Ms. Burke</b>	X		

The meeting was adjourned at 1:00 p.m.

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Monica Johnson, Board Secretary

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Date



STATE BOARD OF OPTOMETRY  
 2450 DEL PASO ROAD, SUITE 105, SACRAMENTO, CA 95834  
 P (916) 575-7170 F (916) 575-7292 www.optometry.ca.gov



**Meeting Minutes**  
 Friday, March 2, 2012  
 Western University of Health Sciences,  
 School of Optometry  
 309 E. Second Street  
 Pomona, CA 91766

Members Present

Lee Goldstein, OD, MPA  
 Board President  
 Alejandro (Alex) Arredondo, OD  
 Board Vice President  
 Monica Johnson, Secretary  
 Fred Naranjo, MBA, Public Member  
 Kenneth (Ken) Lawenda, OD  
 Alexander (Alex) Kim, MBA, Public Member  
 Donna Burke, Public Member

Staff Present

Mona Maggio, Executive Officer  
 Andrea Leiva, Policy Analyst  
 Jeff Robinson, Licensing Analyst  
 Jessica Sieferman, Probation Monitor  
 Michael Santiago, Senior Staff Counsel

Guest List

On File

**9:30 a.m.**

**FULL BOARD OPEN SESSION**

**1. Call to Order – Establishment of a Quorum**

Board President, Lee Goldstein, O.D. called the meeting to order at 9:12 a.m. Dr. Goldstein called roll and a quorum was established.

**2. Petition for Reinstatement of License**

- A. Dr. Larry Franklin Thornton, O.D.
- B. Dr. Lawrence Edwin Young, O.D.

**3. Petition for Reduction of Penalty and Early Termination of Probation**

- A. Dr. Edward Rabb Nell, O.D., License Number OPT 6522
- B. Dr. Huyen Nguyen, O.D. License Number OPT 10148

**FULL BOARD CLOSED SESSION**

**4. Pursuant to Government Code §11126(c)(3), the Board will Meet in Closed Session for Discussion and Possible Action on Disciplinary Matters**

The Board was unable to obtain an Administrative Law Judge (ALJ) for the hearings. Therefore, Agenda items 2, 3, and 4 were moved to a meeting scheduled on March 30, 2012.

Board and staff members discussed logistics, complications, and recommendations for rescheduling this hearing and scheduling future hearings.

**FULL BOARD OPEN SESSION**

**5. President's Report**

**A. Welcome and Introductions**

Dr. Goldstein welcomed everyone in attendance in Pomona.

**B. Other**

Dr. Goldstein announced the following activities:

- 1) Since the last meeting he has been in regular contact with staff on legislative matters appearing on this meeting's agenda;
- 2) He met with Assembly Member Atkins regarding Assembly Bill (AB) 778, Health Care Service Plans; Vision Care;
- 3) In February he presented a report on behalf of the State Board of Optometry at the California Optometric Association, House of Delegates; and
- 4) He and Executive Officer, Mona Maggio, are still working through the appointment process.

Dr. Goldstein opened the floor to Board members to report on recent activities. There were no reports.

**6. Approval of the December 2, 2011 Board Meeting Minutes**

Board members were asked to review and approve the draft minutes from the December 2, 2011 meeting.

**Ken Lawenda moved to approve the minutes. Donna Burke seconded. The Board voted unanimously (7-0) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Ms. Johnson	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

**7. Executive Officer's Report**

Executive Officer, Mona Maggio reported on the following:

**Board Member Appointments**

On February 7, 2012 Ms. Maggio met with Deputy Director of Appointments, Office of the Governor, Terry Holloman, to discuss the current and pending vacancies on the Board. Seventeen applications for appointment to the Board have been received and a number of first round interviews have been held. Second round interviews will be held at the end of February or first part of March.

Ms. Maggio announced that she also met with the Deputy Director to Boards and Bureaus within the Department of Consumer Affairs, Reichel Everhart, last week; in which, Ms. Maggio shared with Ms. Everhart her concerns about the Board's vacancies. Ms. Everhart informed Ms. Maggio that she's working with the Appointment's Secretary on filling the vacancies. The Appointments Office has been focusing on state departments/boards/commissions that are without a quorum. There hasn't been an urgency to fill our vacancies since the Board has a quorum and has been able to hold meetings.

**Board Staffing**

In November 2011, the Board was notified it was no longer subject to the provisions of the hiring freeze due to following all of the directives of the Governor. However, appointments at the analyst level and above must still be approved by the Department of Consumer Affairs and the Department of Personnel Administration.

Brianna Miller transferred to the Bureau of Automotive Repair. The Board is attempting to fill the Staff Services Manager 1 as well as Brianna's vacant position.

### **Budget**

The Board's budget for fiscal year 2011-12 is \$1,554,425. Expenditures as of January 31, 2012 total \$794,342, which amounts to 51% of the budget. There's an anticipated year-end surplus of \$121,248 or 7.8% of the budget.

In response to California's budget shortfalls, the Board loaned the General Fund \$1 million dollars. Currently a repayment plan is not in place. In order to be repaid, the Board would have to request repayment and show a need for the funds to be repaid, as well as develop a repayment plan with the Department of Finance. Ms. Maggio is in discussions with the Department of Consumer Affairs Budget Office on the repayment process.

Ms. Maggio presented a detailed budget report for the Members.

### **Governor's Budget for 2012/2013**

The Governor has released his budget for the upcoming fiscal year. This year the budget was released on January 5, 2012. The proposed budget provides \$1,720,000 in authorized spending for the Board, a slight increase from the Board's current year spending.

The Governor's budget also includes a series of proposals for improving government efficiency and paying down California's debts. Additionally, there are proposals for the re-organization of state government to make it more efficient by the consolidation of functions.

It appears the Board will not be directly impacted by the re-organization proposals, however, changes proposed to the Department of Consumer Affairs and Consumer Services Agency could result in some indirect changes. Board staff will continue to monitor developments and will provide reports to the Board as more information is obtained.

Ms. Maggio provided the members with the Governor's plan for streamlining the California personnel system, as well as other department's.

### **BreEZe**

The BreEZe project is underway. There are three phases for bringing all the Boards and Bureaus under this new database. The Board is currently in phase two, which encompasses a lot of data clean up for a smooth transition.

All staff attended a Town Hall meeting for phase two participants. Staff was able to see how it will work (e.g., what end users will be using for online renewals, paying with credit cards, applications). BreEZe should streamline many of the processes for optometrists and applicants. On staff's end, it will be much more efficient to run reports and identify issues. Being that this system is brand new to everyone, it is expected that there will be a large learning curve. A five week training session will be held as the Board moves closer to its phase in. Not everyone will attend every training session (e.g., enforcement unit will go to the enforcement training; licensing unit will go to licensing training, etc.).

### **California Optometric Association**

Licensing Analyst, Jeff Robinson, Policy Analyst, Andrea Leiva, and Ms. Maggio attended the California Optometric Association's (COA) House of Delegates on February 10, 2012 at the Hyatt Hotel in Sacramento. The Board has a very strong working relationship with the COA, and this was a great opportunity for staff to interact with licensees and COA staff, and listen to the achievements of the association.

### **Department of Consumer Affairs (DCA)**

Denise Brown, 60, of Fair Oaks, has been appointed director of the California Department of Consumer Affairs. Ms. Brown was an advisor to the executive officer and staff of the California Air Resources Board from 2009 to 2011. She served in the DCA in multiple positions from 1977 to 2009, including chief deputy director.

Two new deputy directors have been appointed to DCA (Awet Kidane, and Reichel Everhart). Although Ms. Maggio has not yet met Mr. Kidane, she reported that she has heard many great things about him. Ms. Reichel and Ms. Maggio have met. Ms. Reichel is very open and willing to work with the Board. She will be attending some of the Board's meetings in the future.

Brian Stiger who was the director of DCA, resigned to accept the position of director of the Los Angeles County Department of Consumer Affairs. Ms. Maggio noted that Mr. Stiger was a positive influence on the department and a great mentor.

Dr. Goldstein opened the floor to questions.

Board Member, Alex Arredondo inquired and Ms. Maggio explained that in order for the Board to take any action to increase its fees, the million dollars that was loaned to the General Fund would have to be paid back.

Board Member, Fred Naranjo inquired and Ms. Maggio explained that this has lowered our reserves. The Board is down to four months of reserves.

Dr. Goldstein noted that the purpose of licensing fees isn't to balance the state budget but rather to fund the Boards. Therefore, he believes the Board should ask for the money back or at least set-up a schedule for repayment.

Mr. Naranjo agreed with Dr. Goldstein and noted that it is the doctor's money. We need to protect their money and their payments.

## **8. Regulations**

Ms. Leiva presented updates on regulatory issues.

### **A. *Discussion of Comments Received During the 45-day Comment Period of California Code of Regulations (CCR) §1575 Disciplinary Guidelines***

On February 22, 2012, staff learned that the DCA received a legal opinion from the Attorney General pertaining to the Uniform Standards Related to Substance Abuse pursuant to Senate Bill (SB) 1441 (Ridley-Thomas, Chapter 548, Statutes of 2008). The Attorney General's legal opinion defers from the Legislative Counsel's Legal opinion, thus DCA has requested that all Boards implementing SB 1441 hold off on taking anymore action until the opinions can be reviewed. Therefore, staff is requesting that the Board agree to move this regulatory package to the next Board meeting for further discussion. The Board has until October 21, 2012 to complete this regulatory package and submit it to the Office of Administrative Law (OAL).

Ms. Maggio explained that since the SB 1441 Uniform Standards are tied to the Disciplinary Guidelines, the Board cannot use the Disciplinary Guidelines at administrative hearings. The Board has to use the guidelines from 1999.

Legal Counsel, Michael Santiago reported that the Attorney General's Office hopes to get some guidance out to all of the Boards, in regards to the SB 1441 standards, in the next couple of weeks. Therefore the Board should receive some guidance on how to proceed before the next Board meeting.

**Ken Lawenda moved to continue this item to the next Board meeting. Monica Johnson seconded. The Board voted unanimously (7-0) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Ms. Johnson	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

***B. Discussion and Possible Action Pertaining to Comments Submitted During the 15-Day Comment Period of the Proposed Rulemaking for CCR §1513. Registered Name Only, §1514. Renting Space from the Practicing on Premises of Commercial (Mercantile) Concern, and §1525.1 Fingerprint Requirements***

Ms. Leiva announced that since there are no issues with §§ 1514 and 1525.1, they will not be discussed at this meeting. §1513 will be the sole discussion for this agenda item.

At the December 2, 2011 meeting, the Board considered the comment received during the 45-day comment period and approved the modified text in order to address the comment. Ms. Leiva provided a copy of the modified text as a handout for member's review.

The required 15-day comment period for the modified text began on December 8, 2011 and ended on December 23, 2011. Three comments in opposition and one comment in support were received.

Ms. Leiva provided the members with prepared proposed responses to the comments. The prepared comments were reviewed and deemed acceptable by the members.

Ms. Leiva inquired if the Members want to continue with the modified text that is being defended in the proposed responses, or if they want to consider a completely different option, which is including license numbers on all forms of advertising. Or do the Members wish to take more time to consider the options.

Ms. Leiva noted that some health professions, like psychologists, require license numbers on all forms of advertising, but other health professionals such as medical and dental doctors do not require license number on their advertising.

Dr. Goldstein opened the floor for comments by the members.

Dr. Goldstein stated that having license numbers accompany optometrist's names seems to be a rational idea, particularly from the standpoint of consumers and from the standpoint of the Board when similar names are in question.

Dr. Lawenda inquired and Ms. Leiva responded that she is not aware of any conversations about additional health boards being required to become completely uniform with one another in the future. However optometry does like to be uniform with the Medical and Dental Boards. These decisions are up to the various board's discretion.

Dr. Goldstein and Ms. Leiva discussed, what is considered to be a full name? Mr. Santiago was asked to clarify this issue.

Mr. Santiago explained that we have the general Business and Professions Code (BPC) provisions about advertisements and prohibition against false and misleading names. He clarified that whether they chose

to use their middle name spelled out, initial only, or omit their middle name, it's still in line as long as they use their real name.

**Ken Lawenda moved to table this item. Fred Naranjo seconded. The Board did not vote.**

Dr. Goldstein stated that he speaks against tabling this issue because staff is having a problem with licensees with common names and licensees practicing under different names that what is on their license. Dr. Goldstein recommends continuing this issue for improving the language.

**The motion and second to table this item were withdrawn.**

Ms. Leiva commented on her experiences with optometrists and her belief that most would rather come into compliance by using their registered name versus including their license number.

Board Member, Alex Arredondo inquired into the number of complaints which Ms. Leiva advised she's not at liberty to divulge that information, as it is not public.

Board Member, Alex Kim noted his former experiences with other professional groups in identifying similar names and the difficulty it presents. He stated he believes it would be good for the Board to be proactive and "forward thinking" about this issue.

Board Member, Monica Johnson asked and Dr. Goldstein clarified that members can make a motion to modify the text and send the language back out for comment. However, if moved to continue then this would not be possible.

**Ken Lawenda moved to continue this item. Fred Naranjo seconded. The Board did not vote.**

Ms. Leiva cautioned against moving to modify text because the package expires in May.

Dr. Goldstein clarified that by continuing this item the Board would be starting all over with this because it's due to expire.

**The motion and second to continue were withdrawn.**

Ms. Johnson shared her concern about a perceived loophole in the first modified text and clarified her proposed changes to the second modified text.

Ms. Leiva and Mr. Santiago provided additional suggestions to the second modified text.

**Monica Johnson moved to modify the first modified text as suggested and provide for a second 15-day comment period. Donna Burke seconded. The Board voted unanimously (7-0) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Ms. Johnson	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

Dr. Goldstein opened the floor to comments by the public.

The public commenters did not identify themselves but the comments received are as follows:

- A question about if just the optometrist’s name can be on the building signage but the license number on every other form of advertisement.
- If you have a fictitious name would that number have to be on the advertisements as well? Having license numbers on prescriptions and letterhead he understands, but changing signage may become burdensome.

Dr. Goldstein responded to the first commenter that you would have to put your real name on the building.

Ms. Leiva clarified, in response to the second public commenter, that the first modified language agreed upon keeps the two options of using your full name registered with the Board or your license number.

Dr. Goldstein stated that he doesn’t have a problem with the way the Board is adopting this. A registered fictitious name is a different issue. Making optometrist’s identifiable is what this is about.

Ms. Johnson inquired and Dr. Goldstein clarified that if the name on the sign is a fictitious name that is registered with the Board, the optometrist(s) license number is not required on the sign since it is a fictitious name.

Board Members discussed and agreed to strike the work “sign” from the language so that §1513 will read “cards, stationary, or other publications”.

Member of the public, Dr. David Turetsky requested clarification as to whether or not optometrists will have the option of putting their license numbers and using a different first name that sounds “Americanized” (e.g. Sandy Winn in lieu of Whey Tran Winn) or will the optometrists be required to have their full name and license number on their advertisement publications?

Dr. Goldstein and staff clarified that according to the second modified text agreed upon, optometrists will be required to use their full name and their license number.

Mr. Santiago noted that there’s a difference in interpretation between “full name” and “full name registered with the Board”. Just “full name” alone will allow optometrists more flexibility as in Dr. Turetsky’s example of using Sandy Winn in place Whey Tran Winn. But using “full name as registered with the Board” will not allow any options.

Ms. Leiva requested to read the second proposed modified text of §1513 aloud for confirmation of having captured it correctly. The text was read as follows:

“Any card, stationary, publication, other media or other advertisement must clearly and prominently identify the full name of the individual optometrist or optometrists and include each optometrist’s license number as issued by the Board”.

Mr. Santiago suggested striking the word “other” between media and publication.

**Donna Burke moved to approve the second modified text and approve the proposed responses to the comments received reflecting today’s discussion. Monica Johnson seconded. The Board voted unanimously (7-0) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Ms. Johnson	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

**Donna Burke moved to delegate authority to the Executive Officer to adopt the modified text at the expiration of the second 15-day comment period provided the Board does not receive any adverse comments directed at the modified text. Monica Johnson seconded. The Board voted unanimously (7-0) to pass the motion.**

<b>Member</b>	<b>Aye</b>	<b>No</b>	<b>Abstention</b>
<b>Dr. Goldstein</b>	<b>X</b>		
<b>Dr. Arredondo</b>	<b>X</b>		
<b>Ms. Johnson</b>	<b>X</b>		
<b>Mr. Naranjo</b>	<b>X</b>		
<b>Dr. Lawenda</b>	<b>X</b>		
<b>Mr. Kim</b>	<b>X</b>		
<b>Ms. Burke</b>	<b>X</b>		

***C. Discussion and Possible Action to Amend CCR §1536 to Allow Therapeutic Pharmaceutical Agent (TPA) Certified Optometrists to Earn 50% of their Continuing Optometric Education (CE) from Internet or Correspondence (Independent Study) Courses***

Licensing Analyst, Jeff Robinson reported on this issue.

This request has come about because optometrists who are not TPA certified (who have less certification than their TPA certified colleagues) are allowed to complete 50% if their CE credits through independent study sources.

Mr. Robinson initially introduced this subject to the Board at the September 16, 2011 meeting. Board members requested that staff do an analysis of the CE requirements of other states to provide them with a better sense of whether or not this matter should be considered.

Board staff completed an analysis of five states recognized as having the largest concentration of licensed optometrists outside of the State of California (New York, Illinois, Texas, Pennsylvania, and Florida) and learned that only one of the five states allowed the completion of 50% of the CE hours through independent study courses. However, almost all of DCA's other health boards allow their optometrists to obtain 50% or more of their CE through independent study courses as long as the courses are completed by providers they recognize and approve.

Mr. Robinson requested that the Board revisit CCR §1536(c) for discussion and possible action to amend CCR §1536 to allow TPA certified licensees (and above) to earn 50% of their CE through the completion of independent or self study courses.

Dr. Goldstein opened the floor to questions.

Dr. Lawenda inquired and Mr. Robinson responded that with regards to Continuing Medical Education (CME) courses (which are largely ophthalmology courses), there is nothing written in regulation that allows us to accept those hours directly. However, Mr. Robinson has found over the last several years that many optometrists like to take CME courses. Optometrists who wish to take a CME course for their CE credit must submit the course for approval, either to the Board, or the Counsel on Optometric Practitioner Education (COPE), or other organization that the Board recognizes.

Dr. Goldstein noted and Mr. Robinson confirmed that some CME courses are already COPE approved.

**Alex Arredondo moved to amend CCR §1536(c) to allow 50% of the course hours for Therapeutically Certified optometrists to be completed through correspondence and self study courses. Monica Johnson seconded. The Board voted unanimously (7-0) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Ms. Johnson	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

**D. Discussion and Possible Action to Initiate a Rulemaking to Adopt CCR, Article 2.1  
Sponsored Free Health Care Events – Requirements for Exemption:**

Andrea Leiva presented this agenda item.

These regulations were prompted by AB 2699 (Bass, Ch. 270, 2011). This bill permits out-of-state optometrists to come to California for a maximum of ten days to participate at a sponsored free healthcare event. The regulations establish a process for them to come in and participate. It also creates applications for the out-of-state licensee and for the free healthcare event sponsor.

Ms. Leiva provided members with the proposed language that needs to be reviewed and approved by the Board to initiate the regulatory process. She also provided the applications which need to be approved so they may be incorporated by reference into the regulations.

Ms. Leiva explained that the language was prepared with the assistance of DCA so that all of the health care boards will have uniform language.

Dr. Goldstein opened the floor to discussion of the proposed language.

Ms. Leiva inquired and Members discussed whether or not they want to restrict the number of times these practitioners can come for an event. The suggestion is three times. Dr. Goldstein noted that optometrists come all the time and we essentially have optometrists practicing in which the Board has no authority. Therefore, he believes a restriction is a good idea.

Mr. Santiago advised that §901 of the BPC Code states that sponsored events cannot exceed ten calendar days, so three times would be considered a fair amount.

**Donna Burke moved to adopt the proposed language and forms and open the comment period. Ken Lawenda seconded. The Board voted (4-Ayes; 1-No; 2 Abstentions) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein		X	
Dr. Arredondo			X
Ms. Johnson	X		
Mr. Naranjo			X
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

Mr. Naranjo was unavailable to vote.

**9. Legislation**

Ms. Leiva provided an overview.

**A. Discussion and Consideration of Pending Legislation that May Impact the Practice of Optometry**

**Assembly Bill 761 (R. Hernandez)**

This bill is sponsored by the California Optometric Association. This bill would authorize a licensed optometrist certified to use therapeutic pharmaceutical agents to additionally perform specified clinical laboratory tests or examinations classified as waived that are necessary for the diagnosis of conditions and diseases of the eye or adnexa, which the bill would define to mean ocular adnexa.

This bill has passed the Assembly and was referred to the Senate Business, Professions and Economic Development Committee. Amendments were accepted by Senator Hernandez from the California Academy of Eye Physicians and Surgeons (CAEPS) limiting the kinds of tests optometrists can perform to those that diagnose conditions related to the eye. CAEPS is now in support of this bill.

Dr. Arredondo inquired and Ms. Leiva explained that not all bills require a sponsor. Having a sponsor is the author's decision.

**Assembly Bill 778 (Atkins)**

This bill is referred to as the Lenscrafters' bill. This bill would affect the relationship between opticians and optometrists as it would authorize a registered dispensing optician, an optical company, a manufacturer or distributor of optical goods, or a non-optometric corporation to own a specialized health care service plan that provides or arranges for the provision of vision care services, shared profits with the specialized healthy care service plan, contract for specified business services with the specialized health care service, and jointly advertise vision care services with the specialized health care service plan. The bill would prohibit those person's or entities from engaging in conduct that would influence or interfere with the clinical decisions of an optometrist, as specified, and would set forth provisions that apply to medical records. This bill contains other existing laws.

The Board is opposed. Ms. Leiva, Dr. Goldstein, Ms. Maggio, Ms. Anahita Crawford, and Mr. Santiago met with Assembly Member Atkins and her Chief of Staff on January 18, 2012, to discuss the bill, answer questions and discuss the Board's current position, and concerns in general (which are largely around the enforcement model of the Department of Managed Health Care (DMHC)).

Dr. Goldstein opened the floor to questions and comments.

Kathryn Austin-Scott, with Capitol Partners, commented that in the past Board meetings, members asked for information on the DMHC, which she presented to the Board.

Ms. Scott used the materials she provided to show the members the extent to which EyeExam of California is regulated by the DMHC. Regular audits are performed every eighteen months and extensive audits every three years. The audits are an extensive regulatory process. At EyeExam's last audit there were six auditor's present for three to five days. The criteria evaluated are the quality of care, accessibility to care, financial oversight, and medical audits.

Dr. Goldstein announced that he and Ms. Maggio requested a meeting with the DMHC. At this point a date hasn't been established. It will probably occur in April.

Dr. Goldstein opened the floor to questions.

Dr. Lawenda inquired and Ms. Scott explained that if there was a problem, the DMHC would notify EyeExam of California of the issue(s). During the audit process, EyeExam is provided a period of time where they are given deficiencies. Those deficiencies are reviewed and addressed.

Dr. Goldstein explained the audit process (findings, presenting of the findings, debate of the findings etc.). Finally you obtain a final document. The time involved is so lengthy that it presents a problem in

management of systemic care of patients. He noted it's a problem potentially with other health plans as well and further discussion will be held regarding how to move forward.

### **Senate Bill 690 (E. Hernandez)**

This bill is sponsored by the California Optometric Association (COA).

This bill is for the purpose of preventing health insurance coverage discrimination.

SB 690 has passed the Senate, but was "held at the desk" in the Assembly. This means the bill has not had a committee referral or floor action.

Ms. Leiva inquired if there is any update from the COA.

A spokesperson for COA responded that the "intent" of the bill will move forward.

Dr. Goldstein agreed and stated that there are many other bills in the legislature regarding implementing health care reform and this bill's probably somewhere in the mix.

### **Assembly Bill 1926 (Solorio)**

This bill will make optical products fall under service contracts. If an optometrist provides a service contract for optical products he/she would be required to register with the Bureau of Electronic and Appliance Repair Home Furnishings and Thermal Insulation under the Dealer Registration Law.

Ms. Leiva reported that this bill is being watched and requires further analysis to determine if the Board will consider involvement.

### **Board Sponsored Bill**

Ms. Leiva reported on the Board of Optometry's bill.

The Board is sponsoring legislation for the following:

- *Retired License Status* – This would permit an optometrist to pay a one time \$25 fee; become exempt from the continuing education requirements and earn the designation of "retired" versus "inactive", "delinquent", or "cancelled" as is currently done.
- *Retired License Status With a Volunteer Designation* – This would permit an optometrist to pay an initial \$50 fee, renewable every two years to practice as a volunteer (only) who provides free services. Optometrists with this designation would still have continuing education requirements since they would be practicing optometry,
- *Temporary Practice* – The Board has been trying to define temporary practice for five years. The author of this bill will be Senator Bill Emerson. Ms. Leiva thanked Senator Ed Hernandez for assisting the Board with finding an author.

Ms. Leiva opened the floor to comments.

External Relations Manager, Jason Gabhart announced that COA has taken official support of this bill.

Dr. Goldstein commended Ms. Leiva for all of her hard work on finding authors and working on language. He noted this has been a major effort.

## **10. Revised Board Members Handbook with Administrative Procedures Manual**

Ms. Leiva provided a report.

The Board Member Handbook, which includes the Administrative Procedures Manual, has been updated, approved by the members at the December 2, 2011 Board meeting, and created into a spiral bound notebook by the DCA Office of Publications, Design & Editing (PDE).

This reference tool is for current and future Board members, and offers guidance on the general processes involved with their position on the Board of Optometry.

Ms. Maggio announced that the DCA liked it so much they're going to use it as a model for all of the boards.

## 11. Strategic Plan Update

Ms. Leiva highlighted the most important points as follows:

- The Board's strategic plan was approved in March 2010;
- Staff has been working on the goals established in the plan;
- Staff recommends that the development of a new plan begin after the implementation of the BreEZe project in June 2013. This will allow Board staff to complete the remaining items in the current plan, and evaluate the new possibilities that the BreEZe plan will bring to the Board; and
- Members should consider that the Board is up for Sunset Review January 1, 2014.

### Goal 1 – Licensing

- A process for auditing CE has been developed. Ms. Kimball and Ms. Eklund need to work on the CE audits more consistently;
- The Board's AB 2683, Practice of Optometry in Healthcare Facilities became effective January 1, 2011. Various omnibus bills also became effective;
- Whether or not the Board should offer Glaucoma Certification through reciprocity continues to be discussed;
- Ms. Kimball and Ms. Siefertman anticipate that the online license renewal will be implemented June, 2013 through the BreEZe project;
- Staff continues to work on establishing email address for all of its licensees. Emails will be added to all applications;
- Staff is updating all the forms to be more consistent, clear and user friendly;
- Mr. Robinson, Ms. Day, Ms. Melendrez, and Ms. Eklund continue to work on data clean up activities in preparation for BreEZe to make certain records match for a smooth transition; and
- Ms. Maggio, Ms. Leiva, and Mr. Robinson continue to monitor Accreditation Council of Optometric Education to ensure all schools and colleges of optometry currently accredited continue to be accredited, and apply accreditation processes for new schools of optometry and clinics.

### Goal 2 – Examination

- Ms. Leiva continues to monitor the contact with PSI and works with Jeff to troubleshoot any issues licensees may have with the vendor. Licensees continue to be pleased with PSI;
- Ms. Leiva and the Office of Professional Examination Services (OPES) continue to hold law exam workshops to ensure there are new questions for the law exam. Each year they are able to secure new Subject Matter Experts. Many have gone on to become Enforcement Matter Experts; and
- Ms. Leiva and Mr. Robinson continue outreach to optometry schools. Mr. Robinson has been working on presentations for the third year students.

### Goal 3 – Legal and Regulatory

- Ms. Maggio and Ms. Leiva are pursuing legislation necessary to implement strategic goals, pursuing changes to California Code of Regulations (CCR) to implement new laws affecting optometry, and monitoring and participating in legislation that affects the practice of optometry;
- The Board's Sunset Review process takes place January 1, 2014. Staff is working on compiling information and reviewing other board's Sunset reviews; and
- Ms. Maggio and members continue to monitor the issue of continuing competency until further development. If there is no news of further development by May 2012, Ms. Maggio plans to create a group of Executive Officers independent of DCA to explore this issue further.

#### Goal 4 – Enforcement

- Enforcement staff continues the outreach on illegal contact lenses with positive results. Undercover stings have been performed which resulted in violators being caught in the act of illegal sales; and Disciplinary actions are still being posted on our website.

Mr. Naranjo inquired and Ms. Siefertman responded that when it becomes known that a vendor is selling illegal contact lenses, they are first sent written communication informing them they must cease and desist selling the contacts. Enforcement follows up to determine if they have complied,

#### Goal 5 – Education and Outreach

- Staff plans to develop and disseminate a “Your State Board Starter Kit for New Optometrists”:
- Staff continues outreach to optometry students and to licensed optometrists at optometric events (e.g. Monterey Symposium, COA Society meetings, Association of Regulatory Boards in Optometry meetings, House of Delegates, etc.):
- Another plan is for staff and the Board Public Affairs Committee to develop regular public relations opportunities that highlight timely and pertinent optometric information. The Public Affairs Committee is composed of members Donna Burke and Alex Kim. Their first meeting was held on October 18, 2011: and
- A new law book will come out in 2013.

## **12. Review and Possible Approval of Revised Consumer Pamphlets**

Ms. Maggio presented the revised pamphlets for the Board. Former staff member, Brianna Miller had them made.

At the December 2, 2011 meeting, staff presented three pamphlets to the members (Cosmetic Contact Lenses, What to Expect at an Eye Examination, and Focus on Consumer Protection). The members requested several revisions to these pamphlets. Examples of such revisions include new text (e.g., What to Expect at an Eye Exam) and a new cover for the Cosmetic Contact Lenses pamphlet.

Dr. Goldstein and Ms. Johnson provided some suggested edits to a paragraph in one of the pamphlets.

Ms. Leiva announced that staff plans to distribute the pamphlets to various optometrists across the State. She explained that the idea is to create an order form (for a limited time).

Mr. Naranjo inquired and Ms. Leiva explained that the pamphlets will not only be made available to optometrists but the public as well. Electronic versions will be made available on the Board's website which can be printed and emailed. They will also be provided at any health fairs that the DCA participates in.

Dr. Arredondo inquired and Ms. Leiva answered that the photos were found by DCA staff.

Mr. Kim inquired and Ms. Leiva responded that printing the brochures in other language (e.g., Spanish, Chinese, Korean) would probably require a translation service. She explained that she will have to find out if DCA has a contract for such services or if the Board would have to contract out.

Mr. Naranjo asked and Ms. Leiva answered that the COA reviewed the pamphlets and provided their edits.

Board members, COA member(s), and staff discussed getting these out to the underserved areas, translations and participating with other organizations to share translation costs, the DCA's funding for translation, and translation software programs.

Mr. Gabhart advised that COA has a foundation that serves the underserved and his association would be happy to bring these to the various doctors that are a part of the foundation.

Dr. Arredondo stated that in the city where he resides they have several annual street fairs. Around three hundred thousand people go through these fairs during a weekend. He suggested that perhaps the COA and the Board would be open to participating in some of these type of events with a stand/booth.

Ms. Maggio replied that staff has done this before at the State Fair and would be open to participation in these street fair events. Mr. Gabhart also expressed openness to participation.

Mr. Naranjo reported that it's important for the Board to note that 50% of the Latino community will become a diabetic. Therefore it is very important to get the message out to the Latino community that if they could at least get regular eye exams perhaps early detection of diabetes can be identified.

Dr. Arredondo added that if he understand the statistics correctly, Hispanic females are more likely to purchase cosmetic contact lenses.

### **13. Examination/Licensing Programs Report**

Mr. Robinson presented an overview.

He reported that on January 24, 2012, per the request of Tamalon Littlefield, COA's Meeting and Event Planner, he and Ms. Maggio met with Ms. Littlefield and COA Executive Director, Bill Howe, and Education and Conference Coordinator, Brenda Stewart to discuss the provisions of CCR §1536 (Continuing Optometric Education; Purpose and Requirements).

COA was interested in learning about any limitations the regulation might have in regard to their interest in providing more self-study courses to their members.

Mr. Robinson reported that staff continues to certify optometrists to treat glaucoma. The number of certifications is now over a thousand.

Dr. Goldstein inquired and Mr. Robinson responded that this figure does not include optometrists who are recently licensed. These are optometrists who have become certified due to previous legislation and SB 1406 and were previously TPA or TPL certified.

Mr. Naranjo inquired and Mr. Robinson confirmed that there are currently 153 pending applications. Most of these are students who have not graduated yet and will later in 2012. Once they graduate and all required items are received they are usually licensed within a couple of days.

Mr. Robinson reported that Ms. Leiva has worked very hard with staff to get licensing applications updated and posted onto the Board website.

Dr. Lawenda inquired and Mr. Robinson explained the renewal license process.

### **14. Enforcement Program Report**

#### **Probation Program**

Ms. Siefertman provided an overview.

She reported that storeowner Najjar R. Sadeddin, was ordered to pay \$6,000 in fines, including nearly \$2,500 to the Board. These fines have been completely reimbursed.

#### **Expert Witnesses**

Four new Expert Witness contracts have been approved and all optometrists have had cases assigned to them. Thus far, four cases have been sent to experts and one has been completed. Ms. Siefertman has not yet seen any of the reports but she has been advised that it's going well.

### **Phamatech**

On February 4, 2012, Jessica Sieferman participated in a teleconference with representatives from DCA's BreEZe technical team, Accenture (BreEZe Vendor), and Phamatech (the Board's drug testing vendor) in order to design a Phamatech interface within BreEZe. The goal for this interface is to have all drug testing results automatically entered into BreEZe, rather than having staff manually enter in each result.

The Board recently experienced some complications with Phamatech's reporting system. Specifically, the Board received three notifications that probationers had failed to submit to drug testing when selected. After receiving evidence to the contrary, Phamatech informed the Board the errors were due to the dates being incorrectly entered into their system, and Phamatech assured the Board they will do everything in their power to prevent this from happening in the future.

### **California Laws and Regulations Exam (CLRE)**

The current pass rate for first time test takers remains at 33%. Currently, the Board is administering the CLRE via pencil and scantron method with the presence of Ms. Sieferman. After receiving objections from a probationer who made the argument they weren't being treated like regular candidates and were being discriminated against, Board staff contacted PSI in order to explore the possibility of probationers taking the CLRE through PSI with other licensing candidates. After successful completion of a PSI exam, the Board may wish to continue taking the exam in this manner.

Dr. Goldstein expressed agreement and questioned why we would want to administer the exam any other way.

Ms. Sieferman replied there is some question as to how this will work with the BreEZe system. This change will need to be discussed with Accenture (BreEZe Vendor) to ensure the records are converted properly and there is a distinction between licensing candidates and probationers taking the CLRE.

Dr. Goldstein inquired and Ms. Sieferman explained that the records should go into BreEZe in order to reflect the results and have them tied to the conditions of probation.

### **Completions**

After being granted their Petitions for Early Terminations, Doctors' Casey Finn, O.D. and Lisa Breen, O.D. returned to unrestricted practice on January 1, 2012. Dr. Breen remains in contact with Ms. Sieferman in order to participate in the Board presentations at SCCO and Berkeley.

### **Pending Petitions to Revoke Probation**

The Board has filed a Petition to Revoke Probation for Dr. Gregory Tom, O.D. on August 18, 2011. The hearing for this petition is scheduled for the end of May.

### **Probation Program Statistics**

Ms. Sieferman provided members with the Probation Program statistics as of February 14, 2012.

<b>Probation Date</b>	<b>As of 12/2/11*</b>	<b>Completed</b>	<b>New</b>	<b>Total</b>	<b>% of Total</b>
Male	25	1	0	24	92
Female	3	1	0	2	8
Pending AG	2	1	0	2	8
Active	13	2	0	11	42
Tolled	6	0	0	6	23
Surrendered	9	0	0	9	35
<b>Total</b>	<b>28</b>	<b>2</b>		<b>26</b>	<b>100%</b>

### **Statistic/Performance Measures**

Ms. Sieferman presented members with the Enforcement Statistical Overview, prepared by

Enforcement Analyst, Cheree Kimball. The results are as follows:

Intake & Investigation

Average cycle time from complaint receipt to closure of the investigation process. Does not include cases sent to the Attorney General or other forms of formal discipline.

Target: 90 days

Q2 Average: 136 days

Formal Discipline

Average number of days to complete the entire enforcement process for cases resulting in formal discipline. (Includes intake and investigation by the Board, and prosecution by the AG).

Target: 365 days

Q2 Average: 570 days

Probation Intake

Average number of days from monitor assignment, to the date the monitor makes first contact with the probationer.

Target: 6 days

Q2 Average: N/A – The Board did not receive any new disciplinary cases this quarter.

**15. Public Comment for Items Not on the Agenda**

There was no public comment.

**16. Suggestions for Future Agenda Items**

Mr. Goldstein advised that he believes our next agenda is set.

The next Board meeting was scheduled for May 18, 2012 in Sacramento.

**FULL BOARD OPEN SESSION**

**17. Adjournment**

**Alex Arredondo moved to adjourn the meeting. Donna Burke seconded. The Board voted unanimously (7-0) to pass the motion.**

Member	Aye	No	Abstention
Dr. Goldstein	X		
Dr. Arredondo	X		
Ms. Johnson	X		
Mr. Naranjo	X		
Dr. Lawenda	X		
Mr. Kim	X		
Ms. Burke	X		

The meeting was adjourned at 1:10 p.m.

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Monica Johnson, Board Secretary

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Date

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**To:** Board Members

**Date:** August 10, 2012

**From:** Mona Maggio,  
Executive Officer

**Telephone:** (916) 575-7176

**Subject:** Agenda Item 5 – Executive Officers Report

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## **A. BUDGET**

The Board's budget for fiscal year 2011-2012 was \$1,564,598. The year end report reveals expenditures as of June 30, 2012 as \$1,270,684, or 81% of the budget. The fiscal year end surplus is \$247,615 or 15.8%. The analysis of the Board's fund condition reveals 4.3 months reserve in the current year and 3.9 months in Fiscal Year 2012-13.

The Board's budget for fiscal year 2012-2012 is \$1,714,000. This amount is subject to change based on Governor's directives, budget letters and adjustments to the budget. Because of the increase in rent, and the costs of the implementation of BreEZe, the Board will have to watch it's spending very closely to ensure it does not overspend. The budget change proposals (BCPs) requesting position authority and funding for an associate governmental program analyst (AGPA) position to serve as the lead in the enforcement program and request for augmentation to the OE&E budget line cover the increase in rent due to office relocation were both denied by Department of Finance.

In response to California's budget shortfalls, loans from special fund agencies to the General Fund (GF) have been part of the solution. In 2010/2011 the Board loaned the GF \$1 million dollars. In order to be repaid, the Board would have to request repayment and show a need for the funds to be repaid.

On March 12, 2012, the Board received Budget Letter 12-03 which provided direction to departments to make necessary adjustments to accurately reflect budget expenditures and positions for a more transparent budget. Essentially, we were required to identify vacant positions to be eliminated for salary savings. In previous years, we were allowed to use funds to cover the costs of salary savings but now we are forced to eliminate the positions. For the Board this amounts to 0.6 of a position.

Budget Letter (BL) 12-05 provides guidance for submitting Out of State Travel (OST) Blanket requests. The OST blanket will now be submitted in two separate components. The first component of the OST blanket will include only those requests which meet specific mission critical criteria (referenced below). The second component will include those requests which are discretionary, but which our State and Consumer Services Agency (SCSA) believes represents a benefit to the state and should be considered for approval by the Governor's office. The Board did not submit OST requests for consideration. The Association of Regulatory Boards in Optometry (ARBO)'s 2013 Annual Meeting will be held in San Diego, California. With substantial justification, I am hopeful members and staff will be able to attend this meeting.

## **B. PERSONNEL**

### **Department of Consumer Affairs – New Member to the Executive Team**

Sonia Huestis has been appointed to serve as the Deputy Director, Bureau Relations for DCA, effective June 21, 2012. A resident of Courtland, Ms. Huestis has served in multiple positions at the California State Controller's Office since 2000, including Section Chief for the Operations Support Unit, Staff Services Manager II for the unclaimed property systems replacement project, Staff Services Manager I in the reporting services unit, and Staff Services Analyst. With this new appointment, Reichel Everhart's title will change to Deputy Director, Board Relations. Even though her title will change, Reichel will continue to assist bureaus during this transition period.

### **Board Members**

The Board consists of 11 members, five of whom shall be public members. (BPC section 3010.5)

<b>Name</b>	<b>Appointment Authority</b>	<b>Date(s) of Appointment Initial Reappointment</b>	<b>Expiration of Term</b>
Dr. Alejandro Arredondo, OD	Professional - Governor	11/01/2007 06/15/2012	06/01/2016
Donna Burke	Public - Senate Rules	10/07/2010 06/01/2011	06/01/2015
Dr. Madhu Chawla, OD	Professional - Governor	06/15/2012	06/01/2015
Monica Johnson	Public - Governor	12/2005 05/25/2010	06/01/2013
Alexander C. Kim	Public - Governor	12/27/2010	06/01/2014
William H. Kysella, Jr.	Public - Assembly	06/01/2012	06/01/2015
Dr. Kenneth Lawenda, OD	Professional - Governor	11/2007 12/22/2010	06/01/2014
Vacant (06/01/2011)	Public - Governor		
Vacant (06/01/2011)	Professional - Governor		
Vacant (06/01/2010)	Professional - Governor		
Vacant (06/01/2009)	Professional - Governor		

### **Board Staffing**

Staff has worked diligently with the Department of Consumer Affairs, Office of Human Resources in an effort to establish a full-time permanent office technician position in the Enforcement Program. The limited term office technician (OT) position expired on July 11, 2012 and we gave a sad farewell to Dillon Christensen. The Board's Budget Change Proposal (BCP) for Fiscal Year 2011/12 to authorize a permanent full-time OT position was denied by the Department of Finance in July 2011. Though the Board was authorized via BCP to establish a staff services manager position the Board was denied filling the position by the Department of Personnel Administration because the staffing level did not meet the criteria of the SSMI position. The SSMI position was reclassified to a .9 position and staff is currently recruiting to fill this position. Recruitment is underway to fill the vacant SSA position in the Enforcement Program. Interviews have been held and we are currently verifying eligibility of candidates.

Effective September 1, 2012, all agencies and departments are to eliminate all retired annuitant and student assistant positions as part of the agreement with the bargaining units. The Board employed a summer youth aid, Miguel Melendrez who has worked in the licensing unit assisting in creating license files and collating and matching license documents for the evaluation process to begin and has helped in organizing the file/supply room. He has been a great help to the office.

## **C. EXAMINATION AND LICENSING**

### **OPES**

The Office of Professional Examination Services has been working to obtain a new Computer Based Testing Vendor for the DCA Board's and Bureau's examination programs. The Board is participating in this effort and uses the current vendor Psychological Services LLC (PSI) for the California Laws and Regulations Examination, along with 18 different DCA Boards/Bureaus. On July 23, 2012, the Department

of General Services issued a Notification of Intent to Award a contract to PSI once more. While this is not a binding commitment yet until the contract is officially awarded at the end of August, there have been no protests received from other bidders. It is likely that PSI will continue working with DCA's Boards for the next few years.

### **Continuing Optometric Education (CE)**

Staff recently received an inquiry from a member of the Asian American Optometric Society (AAOS), a non-COA affiliated optometric society, about the Board's continuing participation in the review of continuing optometric education (CE) courses. It appears that federal government regulatory policies want to ensure that an effective oversight system is in place for approved CE courses. CE providers like the AAOS sometimes seek federal grants for the courses they provide and, apparently, are not being considered because the receipt of California State Board of Optometry approval does not meet the federal government's criteria they need to be considered for these grants.

Board staff is currently researching this matter and plans to bring it before the Board members at the next scheduled meeting for review and comment. A member of ARBO requested to appear at the next meeting to participate in this discussion.

## **D. ENFORCEMENT**

### **Exception Report Update:**

During the last Board meeting, staff explained data transfer complications resulting in a 651 page exception report. Staff worked diligently during normal business hours, nights, and weekends to clear the exception report and has completed this project. The only remaining exceptions (cannot be cleared) are not impeding the issuance of licenses or renewals. The exception report is now monitored and maintained daily.

### **Statistics and Performance Measures:**

The Board's Enforcement statistics and Performance Measures are attached. While some of the effects of the exception report can be seen in April 2012, they will continually be impacted until all pending cases are closed.

### **Caseload**

The Board's Enforcement Unit is currently operating with two vacant positions. As a result, the three remaining analysts, Jessica Siefertman, Cheree Kimball, and Lydia Bracco, have taken on additional workloads and are struggling to meet the standard performance measures set by DCA's Consumer Protection Initiative. It is predicted the Board may not meet the standards until the two vacant positions are filled and trained.

### **BreEZe**

While the building caseload is a priority, it is still crucial for the Board to participate in the development of BreEZe. Therefore, in addition to their current workload, two enforcement analysts continue to work with BreEZe: Jessica continues to work on the BreEZe project 3-4 days per week, and Cheree works with BreEZe 1-2 days per week.

### **Probation**

While the Disciplinary Guidelines have not been finalized through regulation process, many of the standards have been implemented through stipulated settlements. One of the standard conditions is community service. Depending on the violation, probationers are ordered to volunteer either free optometric or non-optometric services. Those ordered to volunteer free optometric services are struggling to find organizations willing to allow probationers to volunteer.

In an effort to assist those struggling, Jessica has contacted various health clinics and organizations, but has not been very successful. Most of those who have replied are not interested in allowing a probationer to volunteer their optometric services. The California Vision Foundation (CVF), part of the California Optometric Association, has agreed to allow probationers to volunteer optometric services, but they are limited to those areas that have a high patient population (e.g., Sacramento, LA, etc.) and

do not help those in smaller areas. The probationers have been recommended to contact the Lions Club, local homeless shelters, and local community college clinics.

If the Board members or members of the public have any additional suggestions for these probationers, please contact Jessica at (916) 575-7184 or Jessica.Sieferman@dca.ca.gov.

**California Laws and Regulations Examination**

The California Laws and Regulations Examination (CLRE) has been administered to seven probationers since the Board voted to add passing the CLRE as a standard probation condition. Of those, three have taken the exam twice. 43% of the probationers have passed the exam on their first attempt. 33% have passed on their second attempt.

**Probation Statistics\***

Active	Tolled	Total
10	6	16

**Pending Petitions**

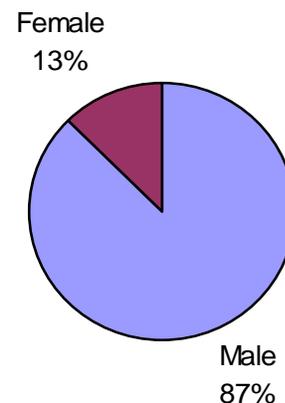
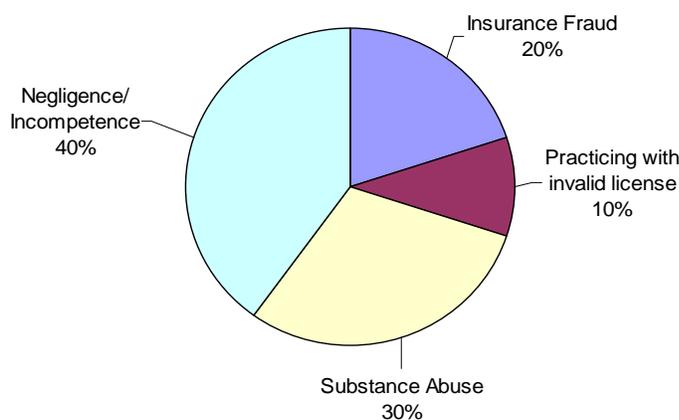
Rev.of Prob.	Reinstatement	Early Term/Mod.
1	2	2

**Since 2/14/12**

Completed	Surrendered	Revoked
0	0	0

\*Data subject to change upon completion of Data Clean-up Project

**Reasons for Active Probation**



**OTHER**

**DCA - Administration Liaison Quarterly Meeting**

The Executive Team has implemented a quarterly meeting for executive officers and bureau chiefs to provide information on the administrative aspect of our responsibilities. Topics of discussion at the first meeting included: fiscal, business services, training, examination and human resources. This smaller group environment provides an opportunity for boards to receive one-on-one service from the Executive Team.

## **Board Website**

The Board's website is in the process of being entirely re-designed. The design being implemented won first place in the 2010 Best of the Web and Digital Government Achievement Awards. The new website was designed by five webmasters from key departments in California (DCA was one of them). A usability study on the design was conducted to ensure the website continued to deliver citizens services despite tight fiscal constraints. This resulted in California beating all 50 states in the state portal category (Boston, Mass. won the city portal category, and Chesterfield County, Va. won the county portal category). The Board of Optometry is the second Board to have the new website.

## **BreEZe**

The BreEZe Project will allow DCA licensees to apply for, renew, pay, and track their licensing requests online. Additionally, it will dramatically increase the capabilities of the DCA boards, bureaus, and oversight programs to isolate unscrupulous practitioners and empower California consumers to make more informed decisions when they hire licensees.

Board staff is still very involved in the development of BreEZe discussions/pilots. Jeff Robinson and Nancy Day participated in the configuration meetings for the Board's licensing program.

Staff is also monitoring Phase I boards/bureaus and their configuration discussions to prepare for what actions we will need to take for our Board's transition.

## **Attachments**

- 1) Board of Optometry Expenditure Report – Month 13 Report
- 2) Board of Optometry Analysis of Fund Condition
- 3) Licensing Statistics
- 4) Complaint Intake
- 5) Performance Measures

**BOARD OF OPTOMETRY - 0763  
BUDGET REPORT  
FY 2011-12 EXPENDITURE PROJECTION**

June 30, 2012

OBJECT DESCRIPTION	FY 2010-11		FY 2011-12				UNENCUMBERED BALANCE
	ACTUAL EXPENDITURES	PRIOR YEAR EXPENDITURES	BUDGET STONE	CURRENT YEAR EXPENDITURES	PERCENT SPENT	PROJECTIONS TO YEAR END	
	(MONTH 13)		2011-12	FM 13			
<b>PERSONNEL SERVICES</b>							
Salary & Wages (Staff)	369,139		459,572	336,482	73%	336,482	123,090
Statutory Exempt (EO)	76,385		80,347	80,473	100%	80,473	(126)
Temp Help Reg (Seasonals)	53,541		3,628	44,410	1224%	44,410	(40,782)
Temp Help (Exam Proctors)							0
Board Member Per Diem	4,800		7,353	4,300	58%	4,300	3,053
Committee Members (DEC)							0
Overtime							0
Staff Benefits	203,802		255,446	188,222	74%	188,222	67,224
Salary Savings			(17,974)	0	0%		(17,974)
<b>TOTALS, PERSONNEL SVC</b>	<b>707,667</b>	<b>0</b>	<b>788,372</b>	<b>653,887</b>	<b>83%</b>	<b>653,887</b>	<b>134,485</b>
<b>OPERATING EXPENSE AND EQUIPMENT</b>							
General Expense	11,041		418	14,900	3565%	14,900	(14,482)
Fingerprint Reports	6,451		5,306	8,779	165%	8,779	(3,473)
Minor Equipment	707		1,800	311	17%	311	1,489
Printing	7,783		7,852	9,560	122%	9,560	(1,708)
Communication	5,016		6,116	5,136	84%	5,136	980
Postage	16,289		16,381	14,879	91%	14,879	1,502
Insurance			0				0
Travel In State	18,842		27,314	26,743	98%	26,743	571
Travel, Out-of-State			0				0
Training	1,210		1,099	1,790	163%	1,790	(691)
Facilities Operations	62,591		58,676	80,305	137%	80,305	(21,629)
Utilities			0				0
C & P Services - Interdept.	9,576		2,943	1,712	58%	1,712	1,231
C & P Services - External			0	21,608		21,608	(21,608)
<b>DEPARTMENTAL SERVICES:</b>							
OIS Pro Rata	78,415		98,284	96,935	99%	96,935	1,349
Admin/Exec	99,951		99,110	96,936	98%	96,936	2,174
Interagency Services	0		146	0	0%	0	146
IA w/ OER	21,864		0	27,720		27,720	(27,720)
DOI-ProRata Internal	3,397		4,017	3,267	81%	3,267	750
Public Affairs Office	7,221		6,821	6,525	96%	6,525	296
CCED	4,695		7,118	6,878	97%	6,878	240
<b>INTERAGENCY SERVICES:</b>							
Consolidated Data Center	1,356		31,486	791	3%	791	30,695
DP Maintenance & Supply	4,983		1,009	115	11%	115	894
Central Admin Svc-ProRata	60,194		77,237	77,237	100%	77,237	0
<b>EXAM EXPENSES:</b>							
Exam Supplies			0				0
Exam Freight	0		484	0	0%	0	484
Exam Site Rental							0
C/P Svcs-External Expert Administrative				1,050		1,050	(1,050)
C/P Svcs-External Expert Examiners	0		25,703	0	0%	0	25,703
C/P Svcs-External Subject Matter	15,354			16,429		16,429	(16,429)
<b>ENFORCEMENT:</b>							
Attorney General	209,968		229,055	108,693	47%	108,693	120,363
Office Admin. Hearings	27,050		37,930	36,324	96%	36,324	1,606
Court Reporters	1,158			2,296		2,296	(2,296)
Evidence/Witness Fees	17,234		35,921	2,178	6%	2,178	33,743
DOI - Investigations			0			0	0
Major Equipment	0		0			0	0
Special Items of Expense							0
Other (Vehicle Operations)							0
<b>TOTALS, OE&amp;E</b>	<b>692,346</b>	<b>0</b>	<b>782,226</b>	<b>669,097</b>	<b>86%</b>	<b>669,097</b>	<b>113,130</b>
<b>TOTAL EXPENSE</b>	<b>1,400,013</b>	<b>0</b>	<b>1,570,598</b>	<b>1,322,984</b>	<b>168%</b>	<b>1,322,984</b>	<b>247,615</b>
Reimb. - State Optometry Fund				(2,400)			0
Sched. Reimb. - Fingerprints	(6,834)		(6,000)	(9,115)	152%	(6,000)	0
Sched. Reimb. - Other	(4,780)			(4,505)			0
Unsched. Reimb. - Investigative Cost Recover	(31,332)			(35,033)			0
Unsched. Reimb. - ICR - Prob Monitor	(100)			(1,247)			0
<b>NET APPROPRIATION</b>	<b>1,356,967</b>	<b>0</b>	<b>1,564,598</b>	<b>1,270,684</b>	<b>81%</b>	<b>1,316,984</b>	<b>247,615</b>
<b>SURPLUS/(DEFICIT):</b>							<b>15.8%</b>

# 0763 - State Board of Optometry Analysis of Fund Condition

Prepared 7/25/12

(Dollars in Thousands)

NOTE: \$1 Million Dollar General Fund Repayment Outstanding

BY 12-13 Governor's Budget

	Actual 2010-11	CY 2011-12	Governor's Budget BY 2012-13
<b>BEGINNING BALANCE</b>	\$ 1,218	\$ 1,514	\$ 617
Prior Year Adjustment	\$ 8	\$ -	
Adjusted Beginning Balance	\$ 1,226	\$ 1,514	\$ 617
<b>REVENUES AND TRANSFERS</b>			
Revenues:			
125600 Other regulatory fees	\$ 17	\$ 20	\$ 20
125700 Other regulatory licenses and permits	\$ 115	\$ 120	\$ 131
125800 Renewal fees	\$ 1,497	\$ 1,496	\$ 1,501
125900 Delinquent fees	\$ 9	\$ 9	\$ 10
141200 Sales of documents	\$ -	\$ -	\$ -
142500 Miscellaneous services to the public	\$ -	\$ -	\$ -
150300 Income from surplus money investments	\$ 7	\$ 16	\$ 6
160400 Sale of fixed assets	\$ -	\$ -	\$ -
161000 Escheat of unclaimed checks and warrants	\$ -	\$ -	\$ -
161400 Miscellaneous revenues	\$ 3	\$ 3	\$ 3
Totals, Revenues	\$ 1,648	\$ 1,664	\$ 1,671
Transfers from Other Funds			
Proposed GF Loan Repayment	\$ -	\$ -	\$ -
Transfers to Other Funds			
Proposed GF Loan	\$ -	\$ -1,000	\$ -
Totals, Revenues and Transfers	\$ 1,648	\$ 664	\$ 1,671
Totals, Resources	\$ 2,874	\$ 2,178	\$ 2,288
<b>EXPENDITURES</b>			
Disbursements:			
0840 State Controller (State Operations)	\$ 2	\$ 2	\$ 2
8880 Financial Information System for CA (State Operations)	\$ 1	\$ 5	\$ 1
1110 Program Expenditures (State Operations)	\$ 1,357	\$ 1,554	\$ 1,714
Total Disbursements	\$ 1,360	\$ 1,561	\$ 1,717
<b>FUND BALANCE</b>			
Reserve for economic uncertainties	\$ 1,514	\$ 617	\$ 571
<b>Months in Reserve</b>	11.6	4.3	3.9

NOTES:

- A. ASSUMES WORKLOAD AND REVENUE PROJECTIONS ARE REALIZED
- B. INTEREST ON FUND ESTIMATED AT 1%
- C. ASSUMES APPROPRIATION GROWTH OF 2% IN FY12-13 AND ONGOING

## Licensing Statistics

License Type	Total Number of Licenses	Therapeutic Pharmaceutical Agent Certifications (Optometrists <u>only</u> )	Lacrimal Irrigation and Dilation Certifications (Optometrists <u>only</u> )	Glaucoma Certifications (Optometrists <u>only</u> )	New Applications Received (05/12/12 – 07/17/12)	New Applications Pending (As of 07-17-12)	Licenses/ Permits Issued (05/11/12 - 07/17/12)
OPTOMETRIST	7,119	5,068	#	1,530*	54	166	131
Statements of Licensure	946	N/A	N/A	N/A	61	73	30
BRANCH OFFICE LICENSES	423	N/A	N/A	N/A	16	18	16
FICTITIOUS NAME PERMITS	1,305	N/A	N/A	N/A	22	37	32

# This number was unavailable at the time this document was printed.

\* The glaucoma certified optometrist breakdown is as follows:

1. **206** of the certifications were earned under SB 929 which required licensed optometrists to co-manage 50 patients over a two-year period with a Medical Board of California-certified ophthalmologist as preceptor
2. **439** the certifications have been obtained under SB 1406 which provides licensed optometrists with various options which include co-management or course completion at one of the three (3) California schools/colleges of optometry
3. The remaining **885** certificate holders are those who graduated from an accredited school/college of optometry on or after May 1, 2008

## Complaint Intake Enforcement Measures

<b>COMPLAINTS</b>	<b>11-Jul</b>	<b>11-Aug</b>	<b>11-Sep</b>	<b>11-Oct</b>	<b>11-Nov</b>	<b>11-Dec</b>	<b>12-Jan</b>	<b>12-Feb</b>	<b>12-Mar</b>	<b>12-Apr</b>	<b>12-May</b>
<b>RECEIVED</b>	41	24	13	11	12	14	15	16	17	25	20
<b>CLOSED W/O INV ASSIGNMENT</b>	6	2	2	2	2	0	2	0	2	1	2
<b>ASSIGNED FOR INVESTIGATION</b>	27	28	10	8	11	10	18	14	17	23	16
<b>AVG DAYS TO CLOSE OR ASSIGN</b>	8	7	5	4	5	8	10	9	8	19	30
<b>PENDING</b>	9	3	4	5	4	8	3	5	3	4	6

<b>CONVICTIONS/ARREST REPORTS</b>	<b>11-Jul</b>	<b>11-Aug</b>	<b>11-Sep</b>	<b>11-Oct</b>	<b>11-Nov</b>	<b>11-Dec</b>	<b>12-Jan</b>	<b>12-Feb</b>	<b>12-Mar</b>	<b>12-Apr</b>	<b>12-May</b>
<b>RECEIVED</b>	12	5	7	7	5	7	6	5	3	18	11
<b>CLSD/ASSGND FOR INVESTIGATION</b>	5	1	3	0	0	5	1	4	2	88	11
<b>AVG DAYS TO CLOSE OR ASSIGN</b>	5	1	4	0	0	5	3	3	3	270	8
<b>PENDING</b>	45	49	53	60	65	67	72	73	74	4	4

<b>TOTAL INTAKE</b>	<b>11-Jul</b>	<b>11-Aug</b>	<b>11-Sep</b>	<b>11-Oct</b>	<b>11-Nov</b>	<b>11-Dec</b>	<b>12-Jan</b>	<b>12-Feb</b>	<b>12-Mar</b>	<b>12-Apr</b>	<b>12-May</b>
<b>RECEIVED</b>	53	29	20	18	17	21	21	21	20	43	31
<b>CLOSED W/O INV ASSIGNMENT</b>	6	2	2	2	2	0	2	0	2	1	2
<b>ASSIGNED FOR INVESTIGATION</b>	32	29	13	8	11	15	19	18	19	111	27
<b>AVG DAYS TO CLOSE OR ASSIGN</b>	7	7	5	4	5	7	10	7	8	216	22
<b>PENDING</b>	54	52	57	65	69	75	75	78	77	8	10

\*Outside of the Exception Report Project, the Board's Enforcement Measures are and have been at or under DCA's CPEI 7 day standard.

## Complaint Intake Enforcement Measures

12-Jun YTD	
16	224
1	22
19	201
7	10
2	2

12-Jun YTD	
5	91
8	128
33	189
1	1

12-Jun YTD	
21	315
1	22
27	329
15	75
3	3

## Performance Measures

### Q4 Report (April - June 2012)

To ensure stakeholders can review the Board's progress toward meeting its enforcement goals and targets, we have developed a transparent system of performance measurement. These measures will be posted publicly on a quarterly basis.

#### Volume

Number of complaints and convictions received.

**Q4 Total: 95**

*Complaints: 61 Convictions: 34*

**Q4 Monthly Average: 32**



#### Intake

Average cycle time from complaint receipt, to the date the complaint was assigned to an investigator.

**Target: 7 Days**

**Q4 Average: 84 Days**



## Intake & Investigation

Average cycle time from complaint receipt to closure of the investigation process. Does not include cases sent to the Attorney General or other forms of formal discipline.

**Target: 90 Days**

**Q4 Average: 215 Days**

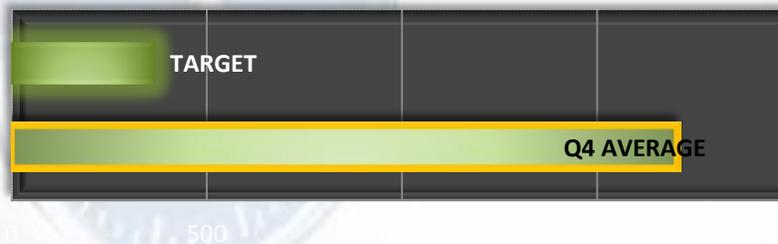


## Formal Discipline

Average number of days to complete the entire enforcement process for cases resulting in formal discipline. (Includes intake and investigation by the Board, and prosecution by the AG)

**Target: 365 Days**

**Q4 Average: 1705 Days**

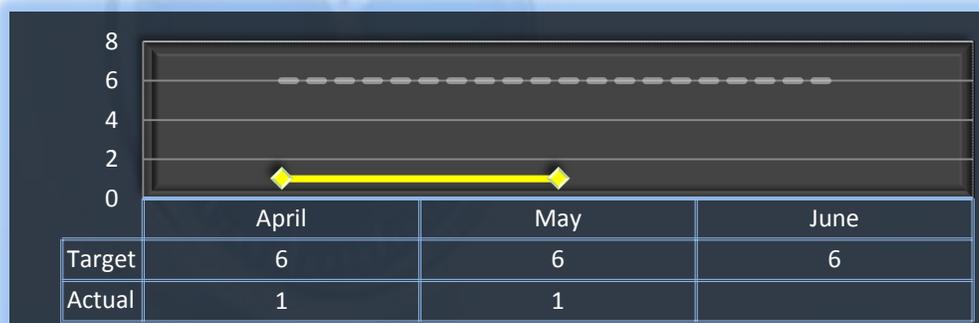


## Probation Intake

Average number of days from monitor assignment, to the date the monitor makes first contact with the probationer.

**Target: 6 Days**

**Q4 Average: 1 Days**



## **Probation Violation Response**

Average number of days from the date a violation of probation is reported, to the date the assigned monitor initiates appropriate action.

**Target: 8 Days**

**Q4 Average: N/A**

*The Board did not report any probation violations this quarter.*

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**To:** Board Members

**Date:** August 10, 2012

**From:** Andrea Leiva  
Policy Analyst

**Telephone:** (916) 575-7182

**Subject:** Agenda Item 6 – Rulemaking Calendar

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## **A. Update on California Code of Regulations (CCR) §1575, Uniform Standards Related to Substance Abuse and Disciplinary Guidelines**

### **Background:**

This rulemaking package updates the Board's disciplinary guidelines to reflect the current enforcement and probationary environment, and adds the mandatory Uniform Standards Related to Substance Abuse pursuant to Senate Bill 1441 (Ridley-Thomas, Chapter 548, Statutes of 2008). These two documents are incorporated by reference in CCR §1575. The Board approved proposed regulatory language at its September 16, 2011 meeting. The proposed regulatory language was noticed on the Board's website and mailed to interested parties on October 21, 2011, initiating the 45-day public comment period. The comment period began on October 21, 2011 and ended on December 6, 2011. The Board received two comments at the regulatory hearing held on December 6, 2011 for this rulemaking package and accepted them.

Modified text and a 15-day comment period began on June 27, 2012 and ended on July 12, 2012 to allow the public to comment on the changes prompted by the comments received. No further comments were received and staff submitted the package for final review to the Department of Consumers Affairs (DCA) on July 31, 2012. The package will be reviewed by the DCA's Director, the State and Consumer Services Agency, and the Department of Finance before it will be returned to staff for submission to the Office of Administrative Law (OAL).

Attachment 1 is the Board approved draft of the Uniform Standards Related to Substance Abuse and Disciplinary Guidelines. This draft document will be effective 30 days after OAL approves the rulemaking package. The final review process takes about five months if there are no issues found with the rulemaking package.

## **B. Update on CCR §1508, §1508.1, §1508.2 and 1508.3, Sponsored Free Health Care Events**

### **Background:**

At its May 18, 2012 meeting, the Board approved proposed regulatory language to implement Business and Professions Code §901 which requires out-of-state optometrists to obtain authorization from the Board prior to participating in a sponsored free health-care event in California. The proposed regulatory language was noticed on the Board's website and mailed to interested parties on June 29, 2012, initiating the 45-day public comment period. The comment period began on October 21, 2011 and will end on August 13, 2012.

No comments have been received so far.

See Attachment 2 for draft language, Attachment 3 for the Notice of Proposed Action, and Attachment 4 for the Initial Statement of Reasons.

### **C. Update on CCR §1514, Renting Space and Practicing on Premises of Commercial (Mercantile) Concern and §1525.1, Fingerprint Requirements**

#### **Background:**

At its April 11, 2011 meeting, the Board approved proposed regulatory language. The proposed regulatory language was noticed on the Board's website and mailed to interested parties on May 27, 2011 initiating the 45-day public comment period. The comment period began on May 27, 2011 and ended on July 11, 2011. A regulatory hearing was held on July 11, 2011. One comment of opposition was received pertaining to CCR §1513 and §1514.

At its December 2, 2011 meeting, the Board considered the comment received during the 45-day comment period and approved modified text in order to address the comment. The required 15-day comment period for the modified text began on December 8, 2011 and ended on December 23, 2011. Three comments in opposition and one comment in support were received pertaining to CCR §1513. At its March 2, 2012 meeting, the Board considered the comments received during the 1<sup>st</sup> 15-day comment period and approved modified text in order to address the comments. The 2<sup>nd</sup> modified text period began on March 7, 2012 and ended on March 22, 2012. Two more comments in opposition were received, which the Board accepted at its March 30, 2012 Board meeting. These final comments resulted in the removal of CCR §1513 so that the Board could continue the other two regulations in this rulemaking package.

Because this rulemaking package expired on May 27, 2012, staff submitted the rulemaking package to DCA on April 13, 2012 and worked to obtain an extension. Typically rulemaking packages must be completed and submitted to OAL in one year from the Notice date, or else agencies must start the regulatory process over. In this case, the Board falls under an exception that if the rulemaking file has been submitted to the DCA Director for review and the one-year period expires during that review, the one-year period may be extended for a maximum of 90 days. The rulemaking package is currently in the Department of Finance and the Board has until August 21, 2012 to submit it to OAL.

See Attachment 5 for the Order of Adoption, and Attachment 6 for the Final Statement of Reasons.

### **D. Discussion and Possible Action to Approve Draft Language and Commence a Rulemaking to Add & Amend Regulations Pertaining to the Department of Consumer Affairs' Consumer Protection Initiative**

#### **Background:**

DCA sponsored Senate Bill 1111 to provide health boards with the necessary tools to implement the Consumer Protection Enforcement Initiative (CPEI) and streamline the enforcement and disciplinary process. The bill failed in the Senate Business, Professions and Economic Development Committee on April 19, 2010. Despite this outcome, DCA identified nine provisions from Senate Bill 1111 that could be implemented via regulation to meet DCA's goal of completing cases in 12-18 months. Staff was able to find the statutory authority to implement all nine provisions and worked with DCA and legal counsel to draft proposed language. The Board initially decided to initiate a rulemaking package that contained the CPEI regulations along with the Uniforms Standards Related to Substance Abuse and the Disciplinary Guidelines (Guidelines).

On April 11, 2011 the Board voted to separate the Guidelines from the CPEI regulations in order to better focus on the Guidelines. The rulemaking package would have been too massive and difficult to develop if the two sets of regulations would have remained together. It was decided to continue work on the CPEI regulations upon the completion of the Guidelines rulemaking package.

Now that the Guidelines rulemaking package is in the final stages of review, staff would like to reintroduce this issue to the Board for consideration. About 13 DCA boards have either completed rulemaking packages implementing some of the CPEI regulations or are in the process of working on rulemaking packages.

In late 2010 and early 2011, the CPEI regulations were a priority for DCA, but now that there is a new administration, it has been left to the boards to decide what CPEI provisions are appropriate for implementation. DCA believes the regulations would be helpful, and are not deeming them mandatory.

Attachment 7 contains the nine provisions identified by DCA.

**Action Requested:** Staff requests that the Board review the nine provisions and chose the most appropriate for the Board of Optometry, if any. Since it has been over a year since the Board has discussed this issue, staff would like to develop updated regulations to be presented at a future Board meeting.

### **E. Discussion and Possible Action to Amend §1566.1, Consumer Information to Update the Board's Address**

#### **Background:**

Board staff moved to their new office in August 2011. CCR §1566.1 includes language that requires a Consumer Notice to contain the address of the Board in the event a consumer needs to contact the Board to file a complaint. The current address in the regulation is the old address, so it must be updated.

This is a non-substantive change without regulatory effect and is known as a Section 100 change (1 CCR 100). Section 100 changes do not materially change any requirement, right, responsibility, or any other regulatory element of a regulation.

**Action Requested:** No action is needed as this is just an update of a minor regulatory change that will be made by staff using the Section 100 procedure. Section 100 changes do not require a regulatory package, only a brief justification why the change is non-substantive. Staff can directly submit this change to OAL for review.



CALIFORNIA STATE BOARD OF  
**OPTOMETRY**

**UNIFORM STANDARDS RELATED TO SUBSTANCE ABUSE**

**&**

**DISCIPLINARY GUIDELINES**

**(DG 4, 05-2012)**

***“Protection of the Public Shall be the Highest Priority”  
Business and Professions Code, §3010.1***

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## **INTRODUCTION**

The California State Board of Optometry's (hereafter Board) mission 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 keeping with its mandate to protect the consumer of optometric services from the unsafe, incompetent and/or negligent optometrists, the Board has adopted the following recommended guidelines for disciplinary orders and conditions of probation for violations of the Optometry Practice Act.

The Board's disciplinary guidelines were designed for use by Administrative Law Judges, attorneys from the Office of the Attorney General, licensees, Board staff and others involved in the Board's disciplinary process and are to be followed in all disciplinary actions involving the Board. The Board has the final authority over the disposition of its cases, and to complete its work, it utilizes the Office of the Attorney General and the Office of Administrative Hearings.

This manual includes factors to be considered in aggravation or mitigation, guidelines to be used by Administrative Law Judges for a violation(s) of specific statutes, and standard and specialty probationary terms and conditions.

If, at the time of hearing, the Administrative Law Judge finds that the Respondent for any reason is not capable of safe practice, the Board favors outright revocation of the license. If, however, the Respondent has demonstrated a capacity to practice optometry safely, a stayed revocation order with probation is recommended.

Suspension of a license may also be appropriate where the public may be better protected if the practice of the optometrist is suspended in order to correct deficiencies in skills, education, or personal rehabilitation.

The Board recognizes that these recommended penalties and conditions of probation are merely guidelines and that aggravating or mitigating circumstances and other factors may necessitate deviation from these guidelines in particular cases.

## **PUBLIC RECORD**

It is the Board's policy that all letters of license denial, citations issued and final decisions will be published as a matter of public record and shall be available on the Internet, pursuant to Business and Professions Code, section 27.

## **COST RECOVERY**

The Board seeks recovery of all investigative and prosecution costs in all disciplinary cases. The costs include all charges incurred from the Office of the Attorney General, the Division of Investigation, and Board services, including, but not limited to, expert consultant opinions and services, pursuant to Business and Professions Code, section 125.3. The Board seeks recovery of these costs because the burden for payment of the costs of investigation and prosecution of disciplinary cases should fall upon those whose proven conduct required investigation and prosecution, not upon the profession as a whole.

## **PROBATION MONITORING PURPOSE**

The purpose of the probation monitoring program is to maintain public protection by proactively monitoring probationers to ensure terms and conditions are met. The Board will work to:

- 1) Allow for the probationer's rehabilitation if that is his/her choice;
- 2) Allow the probationer an opportunity to practice in a professional manner with restrictions and guidance from a community support system and designated probation monitor to prevent future occurrences; and
- 3) Allow for education of the individual as to the responsibilities, requirements and professionalism mandated of an optometrist.

It is the policy of the Board that if a probationer is found to be in violation of any term of probation at any time during the probation period, the Board shall immediately be notified of the violation so that disciplinary action may be considered.

## **CITATIONS**

The Board has the authority to issue citations and fines for violations of several sections of the Board of Optometry Practice Act and its regulations. Citations issued may include an order for abatement, a fine, or both. Citations are issued at the discretion of the Board. The issuance of a citation is separate from and may be in addition to any other administrative discipline, civil remedies, or criminal penalties. (California Code of Regulations section 1399.380(h)). Any prior citation may be used in future actions as aggravating evidence.

## **STIPULATED SETTLEMENTS**

The Board will consider stipulated settlements to promote cost effectiveness and to expedite disciplinary decisions if such agreements are consistent with the Board's mandate.

# **DISCIPLINARY GUIDELINES**

## **2012 EDITION**

### **EVIDENCE IN AGGRAVATION/MITIGATION OF DISCIPLINE**

The following are examples of aggravating and mitigating circumstances which may be considered by Administrative Law Judges in providing for discipline in their proposed decisions:

#### **EVIDENCE IN AGGRAVATION OF DISCIPLINE**

1. Patient's trust, health, safety or well-being was jeopardized.
2. Patient's or employer's trust violated (e.g., theft, embezzlement, fraud).
3. History of prior discipline.
4. Patterned behavior: Respondent has a history of one or more violations or convictions related to the current violation(s).
5. Perjury on official Board forms.
6. Violent nature of crime or act.
7. Violation of Board Probation.
8. Failure to provide a specimen for testing in violation of terms and conditions of probation.
9. Commission of any crime against a minor, or while knowingly in the presence of, or while caring for, a minor.

#### **EVIDENCE IN MITIGATION OF DISCIPLINE**

1. Recognition by Respondent of his or her wrongdoing and demonstration of corrective action to prevent recurrence.
2. Respondent was forthcoming and reported violation or conviction to the Board.
3. A substantial amount of time since the violation or conviction occurred.
4. No prior criminal or disciplinary history.

**DISCIPLINARY GUIDELINES SUMMARY FOR USE BY  
ADMINISTRATIVE LAW JUDGES**

To establish consistency in discipline for similar offenses on a statewide basis, the Board of Optometry has adopted these uniform disciplinary guidelines for particular violations. This document, designed for use by administrative law judges, attorneys, optometrists and ultimately the Board, shall be revised from time to time following public hearing by the Board and will be disseminated to interested parties upon request.

Additional copies of this document may be obtained by contacting the Board of Optometry at its offices in Sacramento, California. There may be a charge assessed sufficient to cover the cost of production and dissemination of copies. In determining the appropriate discipline, consideration should be given to any mitigating or aggravating circumstances. All decisions shall include cost recovery in accordance with Business and Professions Code section 125.3.

The Board recognizes that these penalties and conditions of probation are merely guidelines and that mitigating or aggravating circumstances may necessitate deviations. If there are deviations or omissions from the guidelines, the Board would request that the Administrative Law Judge hearing the matter include some statement of this in the proposed decision so that the circumstances can be better understood and evaluated by the Board upon review of the proposed decision and before its ultimate action is taken.

***These guidelines are incorporated by reference in §1575 of Division 15 of Title 16  
of the California Code of Regulations.***

**§1575. UNIFORM STANDARDS RELATED TO SUBSTANCE ABUSE AND  
DISCIPLINARY GUIDELINES**

In reaching a decision on a disciplinary action under the Administrative Procedures Act (Government Code Section 11400 et seq.), the Board of Optometry shall comply with the "Uniform Standards Related to Substance Abuse" and consider the "Disciplinary Guidelines"(DG-4, 5-2012) which are hereby incorporated by reference. The Disciplinary Guidelines apply to all disciplinary matters; Uniform Standards apply to a substance abusing licensee.

- (a) Notwithstanding subdivision (b), deviation from these disciplinary guidelines and orders, including the standard terms of probation, is appropriate where the Board in its sole discretion determines that the facts of the particular case warrant such a deviation for example: the presence of mitigating factors; the age of the case; evidentiary problems.
- (b) If the conduct found to be a violation involves drugs and/or alcohol, the licensee shall be presumed to be a substance-abusing licensee for purposes of Section 315 of the Code. If the licensee does not rebut that presumption, then the Uniform Standards for substance abusing licensees shall apply.

Note: Authority cited: Sections 3025 and 3090, Business and Professions Code; and Sections 11400.20, Government Code. Reference: Sections 315, 315.2, 315.4, 480, 3090, 3091 and 3110, Business and Professions Code; and Sections 11400.20, and 11425.50(e), Government Code.

## **UNIFORM STANDARDS FOR SUBSTANCE ABUSING LICENSEES**

Pursuant to Business and Professions Code §315, the following standards shall be adhered to in all cases in which an optometrist's license is placed on probation because the optometrist is a substance abusing licensee. These standards are not guidelines and shall be followed in all instances, except that the Board may impose more restrictive conditions if necessary to protect the public.

### **1. CLINICAL DIAGNOSTIC EVALUATION**

If a clinical diagnostic evaluation is ordered, the following applies:

The clinical diagnostic evaluation shall be conducted by a licensed practitioner who:

- holds a valid, unrestricted license, which includes scope of practice to conduct a clinical diagnostic evaluation;
- has three (3) years experience in providing evaluations of health professionals with substance abuse disorders; and,
- is approved by the Board.

The clinical diagnostic evaluation shall be conducted in accordance with acceptable professional standards for conducting substance abuse clinical diagnostic evaluations. The clinical diagnostic evaluation report shall:

- set forth, in the evaluator's opinion, whether the licensee has a substance abuse problem;
- set forth, in the evaluator's opinion, whether the licensee is a threat to himself/herself or others; and,
- set forth, in the evaluator's opinion, recommendations for substance abuse treatment, practice restrictions, or other recommendations related to the licensee's rehabilitation and safe practice.

The evaluator shall not have a financial relationship, personal relationship, or business relationship with the licensee within the last five years. The evaluator shall provide an objective, unbiased, and independent evaluation.

If the evaluator determines during the evaluation process that a licensee is a threat to himself/herself or others, the evaluator shall notify the Board within 24 hours of such a determination.

For all evaluations, a final written report shall be provided to the Board no later than ten (10) days from the date the evaluator is assigned the matter unless the evaluator requests additional information to complete the evaluation, not to exceed 30 days.

### **2. REMOVAL FROM PRACTICE PENDING CLINICAL DIAGNOSTIC EVALUATION**

The Board shall order the licensee to cease practice during the clinical diagnostic evaluation pending the results of the clinical diagnostic evaluation and review by Board staff.

While awaiting the results of the clinical diagnostic evaluation required in Uniform Standard #1, the licensee shall be randomly drug tested at least two (2) times per week.

After reviewing the results of the clinical diagnostic evaluation, and the criteria below, a probation manager shall determine, whether or not the licensee is safe to return to either part-time or full-time practice. However, no licensee shall return to practice until he or she has at least 30 days of negative drug tests.

- the license type;

- the documented length of sobriety/time that has elapsed since substance use;
- the scope, pattern of use, and history of drug/alcohol use;
- the treatment history;
- the licensee's medical history and current medical condition;
- the nature, duration and severity of substance abuse, and
- whether the licensee is a threat to himself/herself or the public.

### **3. BOARD COMMUNICATION WITH PROBATIONER'S EMPLOYER**

The licensee shall provide to the Board the names, physical addresses, mailing addresses, and telephone numbers of all employers and supervisors and shall give specific written consent that the licensee authorizes the Board and the employers and supervisors to communicate regarding the licensee's work status, performance, and monitoring.

### **4. DRUG TESTING STANDARDS**

The following standards shall govern all aspects of testing required to determine abstinence from alcohol and drugs for any person whose license is placed on probation due to substance use:

#### **Testing Frequency Schedule**

A Board may order a licensee to drug test at anytime. Additionally, each licensee shall be tested RANDOMLY in accordance with the schedule below:

<b>Level</b>	<b>Segment of Probation/Diversion</b>	<b>Minimum Range of Number of Random Tests</b>
I	Year 1	52-104 per year
II*	Year 2+	36-104 per year

\*The minimum range of 36-104 tests identified in level II is for the second year of probation and each year thereafter.

Nothing precludes the Board from increasing the number of random tests for any reason. If the Board finds or suspects that a licensee has committed a violation of the Board's testing program or committed a Major Violation, as identified in Uniform Standard 10, the Board may reestablish the testing cycle by placing that licensee at the beginning of level I in addition to any other disciplinary action that may be pursued.

#### **Exception to Testing Frequency Schedule**

##### **I. PREVIOUS TESTING/SOBRIETY**

In cases where the Board has evidence that a licensee has participated in a treatment or monitoring program requiring random testing, prior to being subject to testing by the Board, the Board may give consideration to that testing in altering the testing frequency schedule so that it is equivalent to this standard.

##### **II. VIOLATION(S) OUTSIDE OF EMPLOYMENT**

An individual whose license is placed on probation for a single conviction or incident or two convictions or incidents, spanning greater than seven years from each other, where those violations did not occur at work or while on the licensee's way to work, where alcohol or drugs were a contributing factor, may bypass Level I and participate in Level II of the testing frequency schedule.

##### **III. NOT EMPLOYED IN HEALTH CARE FIELD**

The Board may reduce testing frequency to a minimum of 12 times per year for any person who is not practicing OR working in any health care field. If a reduced testing frequency schedule is established for this reason, a licensee shall notify and secure the approval of the Board. Prior to

returning to any healthcare employment, the licensee shall be subject to Level I testing frequency for at least 60 days. At such time the person returns to employment, if the licensee has not previously met the standard, the licensee shall be subject to completing a full year at Level I of the testing frequency schedule, otherwise Level II testing shall be in effect.

#### IV. TOLLING

A Board may postpone all testing for any person whose probation is placed in a tolling status if the overall length of the probationary period is also tolled. A licensee shall notify the Board upon the licensee's return to California and shall be subject to testing as provided in this standard. If the licensee returns to employment in a health care field, and has not previously met the standard, the licensee shall be subject to completing a full year at Level I of the testing frequency schedule, otherwise Level II testing shall be in effect.

#### V. SUBSTANCE USE DISORDER NOT DIAGNOSED

In cases where no current substance use disorder diagnosis is made, a lesser period of monitoring and toxicology screening may be adopted by the Board, but no less than 24 times per year.

#### OTHER DRUG STANDARDS

Drug testing may be required on any day, including weekends and holidays.

The scheduling of drug tests shall be done on a random basis, preferably by a computer program, so that a licensee can make no reasonable assumption of when he/she will be tested again. The Board should be prepared to report data to support back-to-back testing as well as, numerous different intervals of testing.

Licensees shall be required to make daily contact with the Board to determine if drug testing is required.

Licensees shall be drug tested on the date of notification as directed by the Board.

Specimen collectors must either be certified by the Drug and Alcohol Testing Industry Association or have completed the training required to serve as a collector for the U.S. Department of Transportation. Specimen collectors must adhere to the current U.S. Department of Transportation Specimen Collection Guidelines.

Testing locations shall comply with the Urine Specimen Collection Guidelines published by the U.S. Department of Transportation, regardless of the type of test administered.

Collection of specimens shall be observed.

Prior to vacation or absence, alternative drug testing location(s) must be approved by the Board.

Laboratories shall be certified and accredited by the U.S. Department of Health and Human Services.

A collection site must submit a specimen to the laboratory within one (1) business day of receipt. A chain of custody shall be used on all specimens. The laboratory shall process results and provide legally defensible test results within seven (7) days of receipt of the specimen. The Board will be notified of non-negative test results within one (1) business day and will be notified of negative test results within seven (7) business days.

The Board may use other testing methods in place of, or to supplement biological fluid testing, if the alternate testing method is appropriate.

## **5. PARTICIPATION IN GROUP SUPPORT MEETINGS**

When determining the frequency of required group meeting attendance, the Board shall give consideration to the following:

- recommendation of the clinical diagnostic evaluation pursuant to Uniform Standard #1;
- the licensee's history;
- the documented length of sobriety/time that has elapsed since substance use;
- the recommendation of the clinical evaluator;
- the scope and pattern of use;
- the licensee's treatment history; and,
- the nature, duration, and severity of substance abuse.

Group Meeting Facilitator Qualifications and Requirements:

1. The meeting facilitator must have a minimum of three (3) years experience in the treatment and rehabilitation of substance abuse, and shall be licensed or certified by the state or other nationally certified organizations.
2. The meeting facilitator must not have had a financial relationship, personal relationship, or business relationship with the licensee in the last five (5) years.
3. The group meeting facilitator shall provide to the Board a signed document showing the licensee's name, the group name, the date and location of the meeting, the licensee's attendance, and the licensee's level of participation and progress.
4. The facilitator shall report any unexcused absence within 24 hours.

## **6. DETERMINING WHAT TREATMENT IS NECESSARY**

In determining whether inpatient, outpatient, or other type of treatment is necessary, the Board shall consider the following criteria:

- license type;
- licensee's history;
- documented length of sobriety/time that has elapsed since substance abuse;
- scope and pattern of substance use;
- licensee's treatment history;
- licensee's medical history and current medical condition;
- nature, duration, severity of substance abuse, and
- threat to self or the public.

## **7. WORKSITE MONITOR REQUIREMENTS**

If the Board determines that a worksite monitor is necessary for a particular licensee, the worksite monitor shall meet the following requirements to be considered for approval by the Board.

1. The worksite monitor shall not have any financial, personal, or a familial relationship with the licensee, or any other relationship that could reasonably be expected to compromise the ability of the monitor to render impartial and unbiased reports to the Board. If it is impractical for anyone but the licensee's employer to serve as the worksite monitor, this requirement may be waived by the Board; however, under no circumstances shall a licensee's worksite monitor be an employee of the licensee.
2. The worksite monitor's license shall include the scope of practice of the licensee that is being monitored or be another health care professional if no monitor with like practice is available.

3. The worksite monitor shall have an active unrestricted license, with no disciplinary action within the last five (5) years.
4. The worksite monitor shall sign an affirmation that he or she has reviewed the terms and conditions of the licensee's disciplinary order and/or contract and agrees to monitor the licensee as set forth by the Board.
5. The worksite monitor must adhere to the following required methods of monitoring the licensee:
  - a. Have face-to-face contact with the licensee in the work environment on a frequent basis as determined by the Board, at least once per week.
  - b. Interview other staff in the office regarding the licensee's behavior, if applicable.
  - c. Review the licensee's work attendance.

Reporting by the worksite monitor to the Board shall be as follows:

1. Any suspected substance abuse must be verbally reported to the Board and the licensee's employer within one (1) business day of occurrence. If occurrence is not during the Board's normal business hours the verbal report must be within one (1) hour of the next business day. A written report shall be submitted to the Board within 48 hours of occurrence.
2. The worksite monitor shall complete and submit a written report monthly or as directed by the Board. The report shall include:
  - the licensee's name;
  - license number;
  - worksite monitor's name and signature;
  - worksite monitor's license number;
  - worksite location(s);
  - dates licensee had face-to-face contact with monitor;
  - staff interviewed, if applicable;
  - attendance report;
  - any change in behavior and/or personal habits;
  - any indicators that can lead to suspected substance abuse.

The licensee shall complete the required consent forms and sign an agreement with the worksite monitor and the Board to allow the Board to communicate with the worksite monitor.

## **8. PROCEDURE FOR POSITIVE TESTING**

When a licensee tests positive for a banned substance:

1. The Board shall order the licensee to cease practice;
2. The Board shall contact the licensee and instruct the licensee to leave work; and
3. The Board shall notify the licensee's employer, if any, and worksite monitor, if any, that the licensee may not practice.

Thereafter, the Board will determine whether the positive drug test is in fact evidence of prohibited use. If so, proceed to Standard #9. If not, the Board shall immediately lift the cease practice order. In determining whether the positive test is evidence of prohibited use, the Board will engage in the following, as applicable:

1. Consult the specimen collector and the laboratory;
2. Communicate with the licensee and/or any physician who is treating the licensee; and
3. Communicate with any treatment provider, including group facilitator(s).

## **9-10. MAJOR/MINOR VIOLATIONS & CONSEQUENCES**

**Major violations** include, but are not limited to the following:

1. Failure to complete a Board-ordered program or evaluation;
2. Committing two or more minor violations of probation;
3. Treating a patient while under the influence of drugs or alcohol;
4. Committing any drug or alcohol offense, or any other offense that may or may not be related to drugs or alcohol, that is a violation of the Business and Professions Code or state or federal law;
5. Failure to appear or provide a sample in accordance with the “biological fluid testing” term and condition;
6. Testing positive for a banned substance;
7. Knowingly using, making, altering or possessing any object or product in such a way as to defraud a drug test designed to detect the presence of alcohol or a controlled substance.
8. Failure to adhere to any suspension or restriction in practice.

**Consequences** of a major violations include, but are not limited to the following:

1. Licensee will be ordered to cease practice.
  - a) the licensee must undergo a new clinical diagnostic evaluation (if applicable);
  - b) the licensee must test *negative* for a least a month of continuous drug testing before being allowed to practice.
2. Termination of a contract/agreement.
3. Referral for disciplinary action, such as suspension, revocation, or other action as determined by the Board.

**Minor violations** include, but are not limited to the following:

1. Failure to submit complete and required documentation in a timely manner;
2. Unexcused absence at required meetings;
3. Failure to contact a monitor as required;
4. Failure to submit cost recovery or monthly probation monitoring costs timely.
5. Any other violation that does not present a threat to the licensee or public.

**Consequences** of minor violations include, but are not limited to the following:

1. Removal from practice;
2. Practice limitations;
3. Required supervision;
4. Increased documentation;
5. Issuance of citation and fine or a warning notice;
6. Required re-evaluation/testing;
7. Other action as determined by the Board.

## **11. PETITION FOR RETURN TO PRACTICE**

“Petition” as used in this standard is an informal request as opposed to a “Petition for Modification” under the Administrative Procedure Act.

The licensee shall meet the following criteria before submitting a request (petition) to return to full time practice:

1. Sustained compliance with current recovery program;
2. The ability to practice safely as evidenced by current work site reports, evaluations, and any other information relating to the licensee’s substance abuse; and
3. Negative drug screening reports for at least six (6) months, two (2) positive worksite monitor reports, and complete compliance with other terms and conditions of the program.

## **12. PETITION FOR REINSTATEMENT**

“Petition for Reinstatement” as used in this standard is an informal request as opposed to a “Petition for Reinstatement” under the Administrative Procedure Act.

The licensee must meet the following criteria to request (petition) for a full and unrestricted license:

1. Sustained compliance with the terms of the disciplinary order, if applicable;
2. Successful completion of recovery program, if required;
3. A consistent and sustained participation in activities that promote and support recovery including, but not limited to, ongoing support meetings, therapy, counseling, relapse prevention plan, and community activities;
4. Ability to practice safely; and
5. Continuous sobriety for three (3) to five (5) years.

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## **PROBATIONARY TERMS AND CONDITIONS**

### **MODEL DISCIPLINARY ORDERS**

#### **Revocation-Single Cause**

Certificate No. (Ex.: 12345) issued to Respondent (Ex: John Smith. O.D.) is revoked. Cost Recovery in the amount of (Ex: 5,000) is due within 90 calendar days of the effective date of this decision or within a Board approved payment plan.

#### **Revocation - Multiple Causes**

Certificate No. \_\_\_\_ issued to Respondent \_\_\_\_ is revoked pursuant to Determination of Issues (Ex: II. and III) separately and for all of them. Cost Recovery (if any) in the amount of (Ex: 5,000) is due within 90 calendar days of the effective date of this decision or within a Board approved payment plan.

#### **Suspension - Single Cause**

Certificate No. \_\_ issued to Respondent \_\_\_\_ is suspended for a period of (Ex: 30 calendar days/one year).

#### **Suspension - Multiple Causes (run concurrently)**

Certificate No. issued to Respondent \_\_\_\_ is suspended pursuant to Determination of Issues \_\_\_\_\_, separately and for all of them. All suspensions shall run concurrently.

#### **Suspension - Multiple Causes (run consecutively)**

Certificate No. issued to Respondent \_\_\_\_ is suspended (Ex: 30 calendar days) pursuant to Determination of Issues . These suspensions shall run consecutively, for a total period of (Ex: 90 calendar days).

#### **Standard Stay Order**

However (revocation/suspension) is stayed and Respondent is placed on probation for (Ex: three) years upon the following terms and conditions:

### **MODEL PROBATIONARY ORDERS**

The following introductory language is to be included in decisions that place the Respondent's license on probation.

**IT IS HEREBY ORDERED** that (INSERT APPROPRIATE LICENSE CATEGORY) Number (INSERT LICENSE NUMBER) issued to Respondent is revoked. However, the revocation is stayed and Respondent's (INSERT LICENSE CATEGORY) is placed on probation for (INSERT NUMBER OF YEARS) years on the following conditions.

In order to provide clarity and consistency in its decisions, the following language should be used in proposed decisions or stipulated agreements for applicants, and for petitioners for reinstatement who are issued a license that is placed on probation.

#### **Applicants who are placed on probation:**

The application of Respondent \_\_\_\_\_ for licensure is hereby granted. Upon successful completion of the licensure examination and all other licensing requirements including payment of all fees and evaluation of the application, a license shall be issued to Respondent. Said license shall immediately be revoked, the order of revocation stayed and Respondent's license placed on probation for a period of \_\_\_\_\_ years on the following conditions:

**Reinstatement of licensure with conditions of probation:**

The application of Respondent \_\_\_\_\_ for reinstatement of licensure is hereby granted. A license shall be issued to Respondent. Said license shall immediately be revoked, the order of revocation stayed and Respondent's license placed on probation for a period of \_\_\_\_\_ years on the following conditions:

**NOTE:** If cost recovery was ordered in the revocation or surrender of a license and the cost recovery has not been paid in full by a petitioner, a probation condition requiring payment of the original cost recovery on a payment plan must be included in the reinstatement and decision.

**STANDARD TERMS AND CONDITIONS**

A probationary term is generally issued for a period between three (3) and five (5) years, dependent upon whether any aggravating or mitigating factors exist. Standard conditions are imposed on each and every probationer regardless of cause for discipline. For applicants, Condition 8, Cost Recovery, does not apply.

1. Obey all laws
2. Submit Quarterly Reports
3. Cooperate With Probation Monitoring Program
4. Probation Monitoring Costs
5. Function as an Optometrist
6. Notice to Employer
7. Changes of Employment or Residence
8. Cost Recovery
9. Take and Pass California Laws and Regulations Examination
10. Community Service
11. Valid License Status
12. Tolling for Out-Of-State Residence or Practice
13. License Surrender
14. Violation of Probation
15. Completion of Probation
16. Sale or Closure of an Office and/or Practice

**SEVERABILITY CLAUSE**

Each condition of probation contained herein is a separate and distinct condition. If any condition of this Order, or any application thereof, is declared unenforceable in whole, in part, or to any extent, the remainder of this Order and all other applicants thereof, shall not be affected. Each condition of this Order shall separately be valid and enforceable to the fullest extent permitted by law.

**1. OBEY ALL LAWS**

Respondent shall obey all federal, state, and local laws, governing the practice of optometry in California.

Respondent shall notify the Board in writing within 72 hours of any incident resulting in his/her arrest, or charges filed against, or a citation issued against Respondent.

**CRIMINAL COURT ORDERS:** If Respondent is under criminal court orders by any governmental agency, including probation or parole, and the orders are violated, this shall be

deemed a violation of probation and may result in the filing of an accusation or petition to revoke probation or both.

**OTHER BOARD OR REGULATORY AGENCY ORDERS:** If Respondent is subject to any other disciplinary order from any other health-care related board or any professional licensing or certification regulatory agency in California or elsewhere, and violates any of the orders or conditions imposed by other agencies, this shall be deemed a violation of probation and may result in the filing of an accusation or petition to revoke probation or both.

## **2. QUARTERLY REPORTS**

Respondent shall file quarterly reports of compliance under penalty of perjury to the probation monitor assigned by the Board. Quarterly report forms will be provided by the Board (DG-QR1 (05/2012)). Omission or falsification in any manner of any information on these reports shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's optometrist license. Respondent is responsible for contacting the Board to obtain additional forms if needed. Quarterly reports are due for each year of probation throughout the entire length of probation as follows:

- For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.
- For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.
- For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.
- For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

Failure to submit complete and timely reports shall constitute a violation of probation.

## **3. COOPERATE WITH PROBATION MONITORING PROGRAM**

Respondent shall comply with the requirements of the Board's probation monitoring program, and shall, upon reasonable request, report or personally appear as directed.

Respondent shall claim all certified mail issued by the Board, respond to all notices of reasonable requests timely, and submit Reports, Identification Update reports or other reports similar in nature, as requested and directed by the Board or its representative.

Respondent is encouraged to contact the Board's probation monitoring program representative at any time he/she has a question or concern regarding his/her terms and conditions of probation.

Failure to appear for any scheduled meeting or examination, or cooperate with the requirements of the program, including timely submission of requested information, shall constitute a violation of probation and may result in the filing of an accusation and/or a petition to revoke probation against Respondent's Optometrist license.

## **4. PROBATION MONITORING COSTS**

All costs incurred for probation monitoring during the entire probation shall be paid by the Respondent. The monthly cost may be adjusted as expenses are reduced or increased. Respondent's failure to comply with all terms and conditions may also cause this amount to be increased. The fee for probation monitoring shall start at a minimum of \$100 per month.

All payments for costs are to be sent directly to the Board of Optometry and must be received by the date(s) specified. (Periods of tolling will not toll the probation monitoring costs incurred.)

If Respondent is unable to submit costs for any month, he/she shall be required, instead, to submit an explanation of why he/she is unable to submit the costs, and the date(s) he/she will be able to submit the costs, including payment amount(s). Supporting documentation and evidence of why the Respondent is unable to make such payment(s) must accompany this submission.

Respondent understands that failure to submit costs timely is a violation of probation and submission of evidence demonstrating financial hardship does not preclude the Board from pursuing further disciplinary action. However, Respondent understands that by providing evidence and supporting documentation of financial hardship it may delay further disciplinary action.

In addition to any other disciplinary action taken by the Board, an unrestricted license will not be issued at the end of the probationary period and the optometrist license will not be renewed, until such time as all probation monitoring costs have been paid.

#### **5. FUNCTION AS AN OPTOMETRIST**

Respondent shall function as an optometrist for a minimum of 60 hours per month for the entire term of his/her probation period.

#### **6. NOTICE TO EMPLOYER**

Respondent shall provide to the Board the names, physical addresses, mailing addresses, and telephone number of all employers and supervisors and shall give specific, written consent that the licensee authorizes the Board and the employers and supervisors to communicate regarding the licensee's work status, performance, and monitoring. Monitoring includes, but is not limited to, any violation of any probationary term and condition.

Respondent shall be required to inform his/her employer, and each subsequent employer during the probation period, of the discipline imposed by this decision by providing his/her supervisor and director and all subsequent supervisors and directors with a copy of the decision and order, and the accusation in this matter prior to the beginning of or returning to employment or within 14 calendar days from each change in a supervisor or director.

The Respondent must ensure that the Board receives written confirmation from the employer that he/she is aware of the Discipline, on forms to be provided to the Respondent (DG-Form 1 (05/2012)). The Respondent must ensure that all reports completed by the employer are submitted from the employer directly to the Board. Respondent is responsible for contacting the Board to obtain additional forms if needed.

#### **7. CHANGES OF EMPLOYMENT OR RESIDENCE**

Respondent shall notify the Board, and appointed probation monitor in writing, of any and all changes of employment, location, and address within 14 calendar days of such change. This includes but is not limited to applying for employment, termination or resignation from employment, change in employment status, and change in supervisors, administrators or directors.

Respondent shall also notify his/her probation monitor AND the Board IN WRITING of any changes of residence or mailing address within 14 calendar days. P.O. Boxes are accepted for

mailing purposes; however the Respondent must also provide his/her physical residence address as well.

### **8. COST RECOVERY**

Respondent shall pay to the Board a sum not to exceed the costs of the investigation and prosecution of this case. That sum shall be \$ \_\_\_\_\_ and shall be paid in full directly to the Board, in a Board approved payment plan, within 6 months from the end of the Probation term. Cost recovery will not be tolled.

If Respondent is unable to submit costs timely, he/she shall be required instead to submit an explanation of why he/she is unable to submit these costs in part or in entirety, and the date(s) he/she will be able to submit the costs, including payment amount(s). Supporting documentation and evidence of why the Respondent is unable to make such payment(s) must accompany this submission.

Respondent understands that failure to submit costs timely is a violation of probation and submission of evidence demonstrating financial hardship does not preclude the Board from pursuing further disciplinary action. However, Respondent understands that by providing evidence and supporting documentation of financial hardship may delay further disciplinary action.

Consideration to financial hardship will not be given should Respondent violate this term and condition, unless an unexpected AND unavoidable hardship is established from the date of this order to the date payment(s) is due.

### **9. TAKE AND PASS CALIFORNIA LAWS AND REGULATIONS EXAMINATION**

Within 60 calendar days of the effective date of this decision, or within some other time as prescribed in writing by the Board, Respondent shall take and pass the California Laws and Regulations Examination (CLRE). If Respondent fails this examination, Respondent must take and pass a re-examination as approved by the Board. The waiting period between repeat examinations shall be at six-month intervals until success is achieved. Respondent shall pay the established fees.

If Respondent fails the first examination, Respondent shall immediately cease the practice of optometry until the re-examination has been successfully passed; as evidenced by written notice to Respondent from the Board.

If Respondent has not taken and passed the examination within six months from the effective date of this decision, Respondent shall be considered to be in violation of probation.

### **10. COMMUNITY SERVICES**

All types of community services shall be at the Board's discretion, depending on the violation. Within 30 calendar days of the effective date of this decision, Respondent shall submit to the Board, for its prior approval, a community service program in which Respondent provides free non-optometric or professional optometric services on a regular basis to a community or charitable facility or agency, amounting to a minimum of \_\_\_\_\_ (Ex: 20) hours per month of probation. Such services shall begin no later than 15 calendar days after Respondent is notified of the approved program.

### **11. VALID LICENSE STATUS**

Respondent shall maintain a current, active and valid license for the length of the probation period. Failure to pay all fees and meet CE requirements prior to his/her license expiration date shall constitute a violation of probation.

### **12. TOLLING FOR OUT-OF-STATE RESIDENCE OR PRACTICE**

Periods of residency or practice outside California, whether the periods of residency or practice are temporary or permanent, will toll the probation period but will not toll the cost recovery requirement, nor the probation monitoring costs incurred. Travel outside of California for more than 30 calendar days must be reported to the Board in writing prior to departure. Respondent shall notify the Board, in writing, within 14 calendar days, upon his/her return to California and prior to the commencement of any employment where representation as an optometrist is/was provided.

Respondent's license shall be automatically cancelled if Respondent's periods of temporary or permanent residence or practice outside California total two years. However, Respondent's license shall not be cancelled as long as Respondent is residing and practicing in another state of the United States and is on active probation with the licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

### **13. LICENSE SURRENDER**

During Respondent's term of probation, if he/she ceases practicing due to retirement, health reasons, or is otherwise unable to satisfy any condition of probation, Respondent may surrender his/her license to the Board. The Board reserves the right to evaluate Respondent's request and exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances, without further hearing. Upon formal acceptance of the tendered license and wall certificate, Respondent will no longer be subject to the conditions of probation. All costs incurred (i.e., Cost Recovery and Probation Monitoring) are due upon reinstatement.

Surrender of Respondent's license shall be considered a Disciplinary Action and shall become a part of Respondent's license history with the Board.

### **14. VIOLATION OF PROBATION**

If Respondent violates any term of the probation in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or a petition to revoke probation is filed against Respondent during probation, the Board shall have continuing jurisdiction and the period of probation shall be extended until the matter is final. No petition for modification of discipline shall be considered while there is an accusation or petition to revoke probation or other discipline pending against Respondent.

### **15. COMPLETION OF PROBATION**

Upon successful completion of probation, Respondent's license shall be fully restored.

### **16. SALE OR CLOSURE OF AN OFFICE AND/OR PRACTICE**

If Respondent sells or closes his or her office after the imposition of administrative discipline, Respondent shall ensure the continuity of patient care and the transfer of patient records. Respondent shall also ensure that patients are refunded money for work/services not completed

or provided, and shall not misrepresent to anyone the reason for the sale or closure of the office and/or practice. The provisions of this condition in no way authorize the practice of optometry by the Respondent during any period of license suspension.

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## **STANDARD ALCOHOL/DRUG CONDITIONS**

The following standards are in addition to standards 1-16 and apply to every licensee who is on probation for substance abuse, pursuant to Business and Professions Code §315 Uniform Standards.

17. Abstention From Use of Controlled Substances/Alcohol
18. Biological Fluid Testing

### **17. ABSTENTION FROM USE OF CONTROLLED SUBSTANCES/ALCOHOL**

Respondent shall abstain completely from the use or possession of alcohol, any and all other mood altering drugs, substances and their associated paraphernalia. Respondent shall identify for the Board, a single physician, nurse practitioner or physician assistant who shall be aware of Respondent's history of substance abuse and will coordinate and monitor any prescriptions for Respondent for dangerous drugs, controlled substances, or mood altering drugs. The coordinating physician, nurse practitioner, or physician assistant shall report to the Board on a quarterly basis. Quarterly reports are due for each year of probation throughout the entire length of probation as follows:

- For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.
- For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.
- For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.
- For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

The quarterly report shall include, but not be limited to:

1. the Respondent's name;
2. license number;
3. physician, nurse practitioner, or physician assistant's name and signature;
4. physician, nurse practitioner, or physician assistant's license number;
5. dates Respondent had face-to-face contact or correspondence (written and verbal) with physician, nurse practitioner, or physician assistant;
6. the Respondent's compliance with this condition;
7. if any substances have been prescribed, identification of a program for the time-limited use of any substances;
8. any change in behavior and/or personal habits;
9. assessment of the Respondent's ability to practice safely;
10. recommendation dependant on Respondent's progress and compliance with this condition on whether to continue with current prescription plan and/or treatment, modify plan and/or treatment, or require Respondent to cease practice;
11. other relevant information deemed necessary by the physician, nurse practitioner, physician, or the Board.

Respondent is ultimately responsible for ensuring his/her physician, nurse practitioner or physician assistant submits complete and timely reports. Failure to ensure each submission of complete and timely reports shall constitute a violation of probation.

The Board may require a single coordinating physician, nurse practitioner, or physician assistant to be a specialist in addictive medicine, or to consult with a specialist in addictive medicine.

Respondent shall execute a release authorizing the release of pharmacy and prescribing records as well as physical and mental health medical records. Respondent shall also provide information of treating physicians, counselors or any other treating professional as requested by the Board.

Respondent shall ensure that he/she is not in the presence of or in the same physical location as individuals who are using illegal substances, even if Respondent is not personally ingesting the drug(s). Any positive result that registers over the established laboratory cut off level shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's optometric license.

Respondent also understands and agrees that any positive result that registers over the established laboratory cut off level shall be reported to each of Respondent's employers.

#### **18. BIOLOGICAL FLUID TESTING**

Respondent, at his/her expense, shall participate in random testing, including but not limited to biological fluid testing (i.e. urine, blood, saliva), breathalyzer, hair follicle testing, or any drug screening program approved by the Board. The length of time shall be for the entire probation period. The Respondent will be randomly drug tested at the frequency outlined in Uniform Standards for Substance Abuse #4.

Respondent shall make daily contact to determine if he/she is required to submit a specimen for testing, including weekends and holidays, at a lab approved by the Board. Board representatives may also appear unannounced, at any time to collect a specimen. All collections will be observed.

At all times Respondent shall fully cooperate with the Board or any of its representatives, and shall, when directed, appear for testing as requested and submit to such tests and samples for the detection of alcohol, narcotics, hypnotic, dangerous drugs or other controlled substances. All alternative testing sites, due to vacation or travel outside of California, must be approved by the Board prior to the vacation or travel.

If Respondent is unable to provide a specimen in a reasonable amount of time from the request, Respondent understands that, while at the work site, any Board representative may request from the supervisor, manager or director on duty to observe Respondent in a manner that does not interrupt or jeopardize patient care in any manner until such time Respondent provides a specimen acceptable to the Board.

If Respondent tests positive for a prohibited substance per his/her probationary order, Respondent's license shall be automatically suspended. The Board will contact the Respondent and his/her employers, supervisors, managers, work site monitors, and contractors and notify them that Respondent's license has been suspended as a result of a positive test. Thereafter, the Board may contact the specimen collector, laboratory, Respondent, treating physician, treatment provider and support group facilitators to determine whether the positive test is in fact evidence of prohibited use. If the Board determines the positive test is not evidence of prohibited use, the Board shall immediately reinstate the license and inform the Respondent and others previously contacted, that the license is no longer suspended.

Failure to submit to testing on the day requested, or appear as requested by any Board representative for testing, as directed, shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's optometrist license.

## **OPTIONAL CONDITIONS**

The conditions imposed are dependent upon the violation(s) committed.

19. Participate in Group Support Meeting
20. Notice to Patients
21. Alcohol and Drug Treatment
22. Worksite Monitor
23. Direct Supervision
24. Remedial Education
25. Suspension
26. Employment Limitations
27. Psychotherapy or Counseling Program
28. Mental Health Evaluation
29. Medical Health Evaluation
30. Medical Treatment
31. Restitution
32. Audit Required
33. Lens Prescriptions – Maintain Records
34. Restricted Practice
35. Restrictions as to Branch Offices
36. Restrictions as to Advertisement
37. Take and Pass NBE0 Exams
38. Continuing Education
39. Medical Record Keeping Course

### **19. PARTICIPATE IN GROUP SUPPORT MEETING**

Respondent shall attend at least one (1), 12-step recovery meeting or equivalent during each week of probation, as approved or directed by the Board. Respondent shall submit dated and signed documentation confirming such attendance to the Board during the entire period of probation

### **20. NOTICE TO PATIENTS**

During the period of probation, Respondent shall post a notice in a prominent place in his/her office that is conspicuous and readable to the public. The notice shall state the Respondent's Optometric license is on probation and shall contain the telephone number of the State Board of Optometry. Respondent shall also post a notice containing this information prominently on any website related to his/her practice of Optometry. The notice described above shall be approved by the Board within 30 calendar days of the effective date of this decision.

### **21. ALCOHOL AND DRUG TREATMENT**

Respondent, at his/her expense, shall successfully complete a treatment regime at a recognized and established program in California of at least six months duration and approved by the Board. The treatment program shall be successfully completed within the first nine months of probation. The program director, psychiatrist, or psychologist shall confirm that Respondent has complied with the requirement of this decision and shall notify the Board immediately if he/she believes the Respondent cannot safely practice. Respondent shall sign a release allowing the program to release to the Board all information the Board deems relevant.

Respondent shall inform the program director, psychiatrist or psychologist, of his/her probationary status with the Board, and shall cause that individual to submit monthly reports to the Board providing information concerning Respondent's progress and prognosis. Such reports shall include results of biological fluid testing.

Positive results shall be reported immediately to the Board and may be used in administrative discipline.

## **22. WORKSITE MONITOR**

Within 30 calendar days of the effective date of this decision, Respondent shall submit to the Board or its designee for prior approval as a worksite monitor, the name and qualifications of an optometrist or board certified ophthalmologist, and a plan of practice in which Respondent's practice shall be monitored by the approved worksite monitor. The worksite monitor's license scope of practice shall include the scope of practice of the Respondent that is being monitored. The worksite monitor shall have an active unrestricted license, with no disciplinary action within the last five (5) years. The worksite monitor shall not have any financial, personal, or familial relationship with the Respondent, or other relationship that could reasonably be expected to compromise the ability of the monitor to render impartial and unbiased reports to the Board. If it is impractical for anyone but the licensee's employer to serve as the worksite monitor, this requirement may be waived by the Board; however, under no circumstances shall a licensee's worksite monitor be an employee of the licensee. Any cost for such monitoring shall be paid by Respondent.

The Board or its designee shall provide the approved worksite monitor with copies of the decision(s) and accusation(s), and a proposed monitoring plan. Within 15 calendar days of receipt of the decision(s), accusation(s), and proposed monitoring plan, the worksite monitor shall sign an affirmation that he or she has reviewed the terms and conditions of the licensee's disciplinary order, fully understands the role of worksite monitor, and agrees or disagrees with the proposed monitoring plan set forth by the Board. If the worksite monitor disagrees with the proposed monitoring plan, the worksite monitor shall submit a revised worksite monitoring plan with the signed affirmation for approval by the Board or its designee.

Within 60 calendar days of the effective date of this decision, and continuing throughout probation, Respondent's practice shall be monitored by the approved worksite monitor. Respondent shall make all records available for immediate inspection and copying on the premises by the worksite monitor at all times during business hours and shall retain the records for the entire term of probation.

If Respondent fails to obtain approval of a monitor within 60 calendar days of the effective date of this decision, Respondent shall receive a notification from the Board or its designees to cease the practice of optometry within three (3) calendar days after being so notified. Respondent shall cease practice until a worksite monitor is approved to provide worksite monitoring responsibility.

The worksite monitor must adhere at a minimum, to the following required methods of monitoring the Respondent:

- a) Have face-to-face contact with the Respondent in the work environment on a frequent basis as determined by the Board, at least once per week.
- b) Interview other staff in the office regarding the Respondent's behavior, if applicable.
- c) Review the Respondent's work attendance.

The Respondent shall complete the required consent forms and sign an agreement with the worksite monitor and the Board to allow the Board to communicate with the worksite monitor.

The worksite monitor must submit quarterly reports documenting the Respondent's work performance. Reports are due for each year of probation and the entire length of probation from the worksite monitor as follows:

- For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.
- For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.
- For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.
- For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

The quarterly report shall include, but not be limited to:

1. the Respondent's name;
2. license number;
3. worksite monitor's name and signature;
4. worksite monitor's license number;
5. worksite location(s);
6. dates Respondent had face-to-face contact or correspondence (written and verbal) with monitor;
7. staff interviewed, if applicable;
8. attendance report;
9. any change in behavior and/or personal habits;
10. assessment of the Respondent's ability to practice safely;
11. recommendation dependant on Respondent's performance on whether to continue with current worksite monitor plan or modify the plan;
12. other relevant information deemed necessary by the worksite monitor or the Board.

Respondent is ultimately responsible for ensuring his/her worksite monitor submits complete and timely reports. Failure to ensure his/her worksite monitor submits complete and timely reports shall constitute a violation of probation.

If the monitor resigns or is no longer available, Respondent shall, within five (5) calendar days of such resignation or unavailability, submit in writing to the Board or its designee, for prior approval, the name and qualifications of a replacement worksite monitor who will be assuming that responsibility within 15 calendar days. If Respondent fails to obtain approval of a replacement monitor within 60 calendar days of the resignation or unavailability of the monitor, Respondent shall receive a notification from the Board or its designee to cease the practice of optometry within three (3) calendar days. After being so notified, Respondent shall cease practice until a replacement monitor is approved and assumes monitoring responsibility.

### **23. DIRECT SUPERVISION**

During the period of probation, Respondent shall be under the direct supervision of an optometrist or ophthalmologist holding a current and valid un-restricted Board-issued license. "Direct supervision" means assigned to an optometrist who is on duty and immediately available in the assigned patient area. The Board shall be informed in writing of and approve the level of supervision provided to the Respondent while he/she is functioning as a licensed optometrist. The appropriate level of supervision must be approved by the Board prior to engaging in practice.

Supervisor Quarterly Reports of Performance are due for each year of probation and the entire length of probation from each employer, as follows:

- For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.
- For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.
- For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.
- For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

The quarterly report shall include, but not be limited to:

1. the Respondent's name;
2. license number;
3. direct supervisor's name and signature;
4. direct supervisor's license number;
5. worksite location(s);
6. dates Respondent had face-to-face contact or correspondence (written and verbal) with direct supervisor;
7. staff interviewed, if applicable;
8. attendance report;
9. any change in behavior and/or personal habits;
10. assessment of the Respondent's ability to practice safely;
11. recommendation dependant on Respondent's performance on whether to continue with current direct supervisor plan or modify the plan;
12. other relevant information deemed necessary by the direct supervisor or the Board.

Respondent is ultimately responsible for ensuring his/her supervisor submits complete and timely reports. Failure to ensure each supervisor submits complete and timely reports shall constitute a violation of probation.

#### **24. REMEDIAL EDUCATION**

Respondent shall take and successfully complete the equivalency of (Ex: 16) semester units in each of the following areas **pertaining to the practice of Optometry**: (Ex: eye disease, when to refer, contact lenses). All course work shall be taken at the graduate level at an accredited or approved educational institution that offers a qualifying degree for licensure as an optometrist, or through a course approved by the Board. Classroom attendance must be specifically required. Course content shall be pertinent to the violation and all course work must be completed within one year from the effective date of this decision. Successful completion is a grade of "C" or "70%" or better for any completed course.

Within 90 calendar days of the effective date of the decision Respondent shall submit a plan for prior Board approval for meeting these educational requirements. All costs of the course work shall be paid by the Respondent. Units obtained for an approved course shall not be used for continuing education units required for renewal of licensure.

#### **25. SUSPENSION**

As part of probation, Respondent shall be suspended from the practice of optometry for a period of \_\_\_\_\_ (Ex: 90 calendar days) beginning the effective date of this decision. If not employed as an optometrist or if currently on any other type of leave from employment, the suspension shall be served once employment has been established or reestablished and prior to the end of

the probationary period. Respondent shall ensure that each employer informs the Board, in writing, that it is aware of the dates of suspension.

## **26. EMPLOYMENT LIMITATIONS**

Respondent shall not work in any health care setting as a supervisor of optometrists. The Board may additionally restrict Respondent from supervising technicians and/or unlicensed assistive personnel on a case-by-case basis.

Respondent shall not work as a faculty member in an approved school of optometry or as an instructor in a Board approved continuing education program.

Respondent shall work only in a regularly assigned, identified and predetermined worksite(s) and shall not work in a "float" capacity.

## **27. PSYCHOTHERAPY OR COUNSELING PROGRAM**

Within 30 calendar days of the effective date of this decision, Respondent shall submit to the Board for its prior approval the name and qualifications of a psychotherapist, or counselor of Respondent's choice. Upon approval, Respondent shall undergo and continue treatment, at Respondent's cost, until such time as the Board releases him/her from this requirement and only upon the recommendation of the treating psychotherapist or counselor.

The treating psychotherapist or counselor must submit quarterly reports. Reports are due each year of probation and the entire length of probation from the treating psychotherapist or counselor as follows:

- For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.
- For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.
- For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.
- For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

The quarterly report shall include, but not be limited to:

1. the Respondent's name;
2. license number;
3. psychotherapist or counselor's name and signature;
4. psychotherapist or counselor's license number;
5. dates Respondent had face-to-face contact or correspondence (written and verbal) with psychotherapist or counselor;
6. the Respondent's compliance with this condition;
7. the Respondent's diagnosis, prognosis, and progress;
8. if any substances have been prescribed, identification of a program for the time-limited use of any substances;
9. any change in behavior and/or personal habits;
10. assessment of the Respondent's ability to practice safely;
11. recommendation dependant on Respondent's progress and compliance with this condition on whether to continue with current treatment plan, modify plan treatment plan, or require Respondent to cease practice;

12. other relevant information deemed necessary by the psychotherapist, counselor or the Board.

Respondent is ultimately responsible for ensuring his/her treating psychotherapist or counselor submits complete and timely reports. Failure to ensure each submission of complete and timely reports shall constitute a violation of probation.

The Board may require Respondent to undergo psychiatric or psychological evaluations by a Board approved psychiatrist or psychologist.

NOTE: This condition is for those cases where the evidence demonstrates that the Respondent has had impairment (mental illness, alcohol abuse and drug abuse) related to the violations but is not at present a danger to patients.

### **28. MENTAL HEALTH EVALUATION**

Respondent shall, within 30 calendar days of the effective date of this decision, and on a periodic basis thereafter as may be required by the Board or its designee, to submit to a mental health evaluation, including psychological testing as appropriate, to determine his/her capability to perform the duties of an optometrist. The evaluation will be performed by a psychiatrist, psychologist or other licensed mental health practitioner approved by the Board. An immediate suspension may be imposed by the Board until further notification if the results from the mental health evaluation prove the Respondent is unsafe to practice.

If Respondent fails to have the above evaluation submitted to the Board within the 30 calendar day requirement, Respondent shall immediately cease practice and shall not resume practice until notified by the Board. This period of suspension will not apply to the reduction of this probationary time period. The Board may waive or postpone this suspension only if significant, documented evidence of mitigation is provided. Such evidence must establish good faith efforts by Respondent to obtain the evaluation, and a specific date for compliance must be provided. Only one such waiver or extension may be permitted.

Following the evaluation, Respondent shall comply with all restrictions or conditions recommended by the evaluator within 15 calendar days after being notified by the Board or its designee. If Respondent is required by the Board or its designee to undergo treatment, Respondent shall, within 30 calendar days of the requirement notice, submit to the Board or its designee for prior approval the name and qualifications of a licensed psychiatrist, psychologist or other licensed mental health practitioner of Respondent's choice. Upon approval of the treating psychiatrist, psychologist or other licensed health practitioner, Respondent shall within 15 calendar days undergo treatment and shall continue such treatment until further notice from the Board or its designee.

The treating psychiatrist psychologist or other licensed mental health practitioner shall consider the information provided by the Board or its designee or any other information the treating psychiatrist, psychologist or other mental health practitioner may deem pertinent prior to the commencement of treatment. Respondent shall have the psychiatrist, psychologist or other health practitioner submit quarterly reports to the Board or its designee indicating whether or not the Respondent is capable of practicing optometry safely. The quarterly reports are due each year of probation and the entire length of probation from the psychiatrist, psychologist or other licensed mental health practitioner as follows:

- For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.

- For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.
- For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.
- For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

The quarterly report shall include, but not be limited to:

1. the Respondent's name;
2. license number;
3. treating psychiatrist, psychologist or other licensed mental health practitioner's name and signature;
4. treating psychiatrist, psychologist or other licensed mental health practitioner's license number;
5. dates Respondent had face-to-face contact or correspondence (written and verbal) with treating psychiatrist, psychologist or other licensed mental health practitioner;
6. the Respondent's compliance with this condition;
7. the Respondent's diagnosis, prognosis, and progress;
8. if any substances have been prescribed, identification of a program for the time-limited use of any substances;
9. any change in behavior and/or personal habits;
10. assessment of the Respondent's ability to practice safely;
11. recommendation dependant on Respondent's evaluation, progress and compliance with this condition on whether to continue with current treatment plan, modify treatment plan, or require Respondent to cease practice;
12. other relevant information deemed necessary by the treating psychiatrist, psychologist, other licensed mental health practitioner, or the Board.

Respondent is ultimately responsible for ensuring his/her psychiatrist, psychologist or other licensed mental health practitioner submits complete and timely reports. Failure to ensure each submission of complete and timely reports shall constitute a violation of probation.

Respondent shall provide the Board or its designee with any and all medical records pertaining to treatment deemed necessary by the Board or its designee.

If, prior to the completion of probation, Respondent is found to be mentally incapable of resuming the practice of optometry without restrictions, the Board shall retain continuing jurisdiction of Respondent's license and the period of probation shall be extended until the Board determines that Respondent is mentally capable of resuming practice of optometry without restrictions. Respondents shall pay the cost of the evaluation(s) and treatment.

(OPTIONAL) Respondent shall not engage in the practice of optometry until notified by the Board of its determination that Respondent is mentally fit to practice safely.

NOTE: This condition is for those cases where the evidence demonstrates that mental illness or disability was a contributing cause of the violations.

## **29. MEDICAL HEALTH EVALUATION**

Within 30 calendar days of the effective date of this decision, and on a periodic basis thereafter as may be required by the Board or its designee, Respondent shall undergo a medical evaluation, at Respondent 's cost, by a Board- appointed physician who shall furnish a medical

report to the Board or its designee. Based on the medical evaluation, the Board may require Respondent to undergo medical treatment.

If Respondent is required by the Board or its designee to undergo medical treatment, Respondent shall within 30 calendar days of the requirement notice submit to the Board for its prior approval the name and qualification of a physician of Respondent's choice. Upon approval of the treating physician, Respondent shall undergo and continue medical treatment, at Respondent's cost, until further notice from the Board. Respondent shall have the treating physician submit quarterly reports to the Board. Quarterly reports are due each year of probation and the entire length of probation from the treating physician as follows:

- For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.
- For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.
- For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.
- For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

The quarterly report shall include, but not be limited to:

1. the Respondent's name;
2. license number;
3. treating physician's name and signature;
4. treating physician's license number;
5. dates Respondent had face-to-face contact or correspondence (written and verbal) with treating physician;
6. the Respondent's compliance with this condition;
7. the Respondent's diagnosis, prognosis, and progress;
8. if any substances have been prescribed, identification of a program for the time-limited use of any substances;
9. any change in behavior and/or personal habits;
10. assessment of the Respondent's ability to practice safely;
11. recommendation dependant on Respondent's evaluation results, progress and compliance with this condition on whether to continue with current treatment plan or modify the treatment plan;
12. other relevant information deemed necessary by the treating physician, or the Board.

Respondent is ultimately responsible for ensuring his/her physician submits complete and timely reports. Failure to ensure each submission of complete and timely reports shall constitute a violation of probation.

(OPTIONAL)

Respondent shall not engage in the practice of optometry until notified by the Board of its determination that Respondent is medically fit to practice safely.

NOTE: This condition is for those cases where the evidence demonstrates that medical illness or disability was a contributing cause of the violations.

### **30. MEDICAL TREATMENT**

Within 30 calendar days of the effective date of this decision, Respondent shall submit to the Board for its prior approval the name and qualifications of a physician of Respondent's choice. Upon approval, Respondent shall undergo and continue treatment, at Respondent's cost, until the Board deems that no further medical treatment is necessary. Respondent shall have the treating physician submit quarterly status reports to the Board. Quarterly status reports are due each year of probation and the entire length of probation from the treating physician as follows:

- For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.
- For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.
- For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.
- For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

The quarterly report shall include, but not be limited to:

1. the Respondent's name;
2. license number;
3. treating physician's name and signature;
4. treating physician's license number;
5. dates Respondent had face-to-face contact or correspondence (written and verbal) with treating physician;
6. the Respondent's compliance with this condition;
7. the Respondent's diagnosis, prognosis, and progress;
8. if any substances have been prescribed, identification of a program for the time-limited use of any substances;
9. any change in behavior and/or personal habits;
10. assessment of the Respondent's ability to practice safely;
11. recommendation dependant on Respondent's progress and compliance with this condition on whether to continue with current treatment plan or modify the treatment plan;
12. other relevant information deemed necessary by the treating physician, or the Board.

Respondent is ultimately responsible for ensuring his/her physician submits complete and timely reports. Failure to ensure each submission of complete and timely reports shall constitute a violation of probation.

The Board may require Respondent to undergo periodic medical evaluations by a Board-approved physician.

### **31. RESTITUTION**

Within 90 calendar days of the effective date of this decision, Respondent shall provide to the Board or its designee proof of restitution in the amount of \$\_\_\_\_\_ paid to \_\_\_\_\_.

### **32. AUDIT REQUIRED**

The Board shall require quarterly audits of patient visits, billings, and payments as a condition of probation.

Within 30 calendar days of the effective date of this decision, Respondent shall provide to the Board or its designee the names and qualifications of three third party auditors. The Board or its designee shall select one of the three auditors to audit Respondent's billings. During said audit, randomly selected client billing records shall be reviewed in accordance with accepted auditing/accounting standards and practices.

The Board or its designee shall provide the approved auditor with copies of the decision(s) and accusation(s), and a proposed auditing plan. Within 15 calendar days of receipt of the decision(s), accusation(s), and proposed monitoring plan, the auditor shall sign an affirmation that he or she has reviewed the terms and conditions of the Respondent's disciplinary order, fully understands the role of auditor, and agrees or disagrees with the proposed auditing plan set forth by the Board. If the auditor disagrees with the proposed auditing plan, the auditor shall submit a revised auditing plan with the signed affirmation for approval by the Board or its designee.

Within 60 calendar days of the effective date of this decision, and continuing throughout probation, Respondent's patient visits, billings and payments shall be audited by the approved auditor. Respondent shall make all records available for immediate inspection and copying on the premises by the auditor at all times during business hours and shall retain the records for the entire term of probation.

If Respondent fails to obtain approval of an auditor within 60 calendar days of the effective date of this decision, Respondent shall receive a notification from the Board or its designee to cease the practice of optometry within three (3) calendar days after being so notified. Respondent shall cease practice until an auditor is approved to provide auditing responsibility.

The Board shall be advised of the results of the audit, and may obtain any and all copies of any documents audited or the results of the audit. The cost of the audits shall be borne by Respondent. Failure to pay for the audits in a timely fashion within ten (10) calendar days from audit completion shall constitute a violation of probation.

Quarterly reports of the audit results are due each year of probation and the entire length of probation from the auditor as follows:

- For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.
- For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.
- For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.
- For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

The quarterly report shall include, but not be limited to:

1. the Respondent's name;
2. license number;
3. auditor's name and signature;
4. auditor's license number;
5. dates Respondent had face-to-face contact or correspondence (written and verbal) with auditor;
6. the Respondent's compliance with this condition;
7. the Respondent's compliance with accepted auditing/accounting standards and practices;

8. any change in behavior and/or personal habits;
9. assessment of the Respondent's ability to practice safely;
10. recommendation dependant on Respondent's audit results and compliance with this condition on whether to continue with current audit plan or modify the plan;
11. other relevant information deemed necessary by the auditor, or the Board.

Respondent is ultimately responsible for ensuring his/her auditor submits complete and timely reports. Failure to ensure each auditor submits complete and timely reports shall constitute a violation of probation.

If the auditor resigns or is no longer available, Respondent shall, within five (5) days of such resignation or unavailability, submit to the Board or its designee, for prior approval, the names and qualifications of a replacement third party auditor who will be assuming that responsibility within 15 calendar days. If Respondent fails to obtain approval of a replacement auditor within 60 calendar days of the resignation or unavailability of the auditor, Respondent shall receive a notification from the Board or its designee to cease the practice of optometry within three (3) calendar days. After being so notified, Respondent shall cease practice until a replacement auditor is approved and assumes auditing responsibility.

### **33. LENS PRESCRIPTIONS - MAINTAIN RECORDS**

Respondent shall maintain patient records of all lens prescriptions dispensed or administered by Respondent during probation, showing all the following:

1. name and address of the patient;
2. date;
3. price of the services and goods involved in the prescription;
4. visual impairment identified for which the prescription was furnished.

Respondent shall keep these patient records in a separate file, in chronological order, and shall make them available for inspection and copying by the Board or its designee, upon request.

### **34. RESTRICTED PRACTICE**

During probation, Respondent is prohibited from practicing (Ex. Specified optometric procedures).

### **35. RESTRICTION ON BRANCH OFFICES**

During the period of probation, Respondent shall be restricted as to the number and location of branch offices that the Respondent may operate or in which the Respondent may have any proprietary interest as designated and approved in writing by the Board.

### **36. RESTRICTIONS ON ADVERTISEMENTS**

During the entire period of probation, the Respondent shall, prior to any publication or public dissemination, submit any and all advertisement of professional services in the field of optometry to the Board for its prior approval. Such advertisement may be published or disseminated to the public only after written approval by the Board.

### **37. TAKE AND PASS NBEO EXAM**

Respondent shall take and pass part(s) \_\_\_\_\_ of the National Board of Examiners of Optometry (NBEO). Respondent shall pay the established examination fees. If Respondent has not taken

and passed the examination within twelve months from the effective date of this decision, Respondent shall be considered to be in violation of probation.

### **38. CONTINUING EDUCATION**

Within 30 calendar days of the effective date of this decision, Respondent shall submit to the Board for its prior approval an educational program or course to be in areas of (E.g., practice management, retinal disease, drug/alcohol addiction). The education program or course(s) shall consist of a minimum of four (4) hours for each practice area.

This program or course shall be in addition to the Continuing Optometric Education requirements for renewal, and shall be obtained with all costs being paid by the Respondent. Following completion of each course, the Board or its designee may administer an examination to test Respondent's knowledge of the course. Respondent shall provide written proof of attendance in such course or courses approved by the Board.

### **39. MEDICAL RECORD KEEPING COURSE**

Within 60 calendar days of the effective date of this decision, Respondent shall enroll in a course in medical record keeping equivalent to the Medical Record Keeping Course offered by the Physician Assessment and Clinical Education Program, University of California, San Diego School of Medicine (Program), approved in advance by the Board or its designee. Respondent shall provide the program with any information and documents that the Program may deem pertinent. Respondent shall participate in and successfully complete the classroom component of the course not later than six (6) months after Respondent's initial enrollment. Respondent shall successfully complete any other component of the course within one (1) year of enrollment. The medical record keeping course shall be at Respondent's expense and shall be in addition to the continuing optometric education requirements for renewal of licensure.

A medical record keeping course taken after the acts that gave rise to the charges in the accusation, but prior to the effective date of the decision may, in the sole discretion of the Board or its designee, be accepted towards the fulfillment of this condition if the course would have been approved by the Board or its designee had the course been taken after the effective date of this decision.

Respondent shall submit a certification of successful completion to the Board or its designee not later than 15 calendar days after the effective date of the decision, whichever is later.

## **RECOMMENDED DISCIPLINE BASED ON VIOLATION**

The following is an attempt to provide information regarding violations of statutes and regulations under the jurisdiction of the California State Board of Optometry and the appropriate range of penalties for each violation. Each discipline listed corresponds with a number under the chapters:

- Probationary Terms and Condition – Standard Terms and Conditions;
- Standard Alcohol/Drug Conditions; and
- Optional Conditions

Examples are given for illustrative purposes, but no attempt is made to list all possible violations. Optional conditions listed are those the Board deems most appropriate for the particular violation.

**Excessive Prescribing** (B&P Code sec. 725).

**Maximum Discipline: Revocation and Cost Recovery**

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 33. Lens Prescription- Maintain Records
- 39. Medical Record Keeping Course

**If Warranted:**

- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 24. Remedial Education
- 38. Continuing Education

**Violation of Prescription Standards:** Information Required (B&P Code sec. 3025.5; 3041; Title 16 CCR sec. 1565)

**Maximum Discipline: Revocation and Cost Recovery**

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 33. Maintain Records
- 39. Medical Record Keeping Course

**If Warranted:**

- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 24. Remedial Education
- 38. Continuing Education

**Excessive Prescribing or Treatments** (B&P Code sec. 725; 3110(n); 3110 (o))

**Maximum Discipline: Revocation and Cost Recovery**

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 33. Lens Prescriptions – Maintain Records
- 38. Continuing Education
- 39. Medical Record Keeping Course

**If Warranted:**

- 24. Remedial Education
- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 34. Restricted Practice

**Sexual Misconduct** (B&P Code sec. 726)

**Maximum Discipline: Revocation and Cost Recovery**

**Minimum Discipline:** Revocation

**Mental or Physical Fitness** (B&P Code sec. 820)

**Maximum Discipline: Revocation and Cost Recovery**

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 28. Mental Health Evaluation

**If Warranted:**

- 25. Suspension
- 34. Restricted Practice
- 22. Worksite Monitor
- 27. Psychotherapy or Counseling Program
- 29. Medical Evaluation
- 30. Medical Treatment

**Gross Negligence** (B&P Code sec. 3110 (b); Title 16 CCR sec. 1510)

**Maximum Discipline: Revocation and Cost Recovery**

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 24. Remedial Education
- 22. Worksite Monitor

**If Warranted:**

- 23. Direct Supervision
- 25. Suspension of 30 days or more
- 26. Employment Limitations
- 34. Restricted Practice
- 31. Restitution
- 36. Restrictions on Advertisements
- 37. Take and Pass NBEO Exam
- 39. Medical Record Keeping Course

**Failure to Refer Patient** (B&P Code sec. 3110(y); 3041)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 38. Continuing Education

**If Warranted:**

- 24. Remedial Education
- 34. Restricted Practice
- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 26. Employment Limitations
- 39. Medical Record Keeping Course

**Violation of Quality Standards for Prescription Ophthalmic Devices** (B&P Code sec. 2541.3; Title 16 CCR sec. 1519)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions

24. Remedial Education

**If Warranted:**

34. Restricted Practice

25. Suspension of 30 days or more

22. Worksite Monitor

37. Take and Pass NBEO Exam

39. Medical Record Keeping Course

**Violation of Health and Safety Standards** (B&P Code sec. 3025.5; Title 16 CCR sec. 1520)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions

38. Continuing Education

**If Warranted:**

24. Remedial Education

34. Restricted Practice

25. Suspension of 30 days or more

22. Worksite Monitor

39. Medical Record Keeping Course

**Failure to Follow Infection Control Guidelines** (B&P Code sec. 3110(w))

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions

22. Worksite Monitor

38. Continuing Education

**If Warranted:**

23. Direct Supervision

24. Remedial Education

25. Suspension

**Violations Regarding Topical Pharmaceutical Agents** (B&P Code sec. 3041.2; Title 16 CCR sec. 1560; 1561; 1562; 1563)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions

38. Continuing Education

**If Warranted:**

24. Remedial Education

34. Restricted Practice

25. Suspension of 30 days or more

22. Worksite Monitor

**Fraud, Misrepresentation or Dishonesty** (B&P Code sec. 810; 3101; 3110 (e))

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions

24. Remedial Education

32. Audit Required

39. Medical Record Keeping Course

**If Warranted:**

- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 23. Direct Supervision
- 26. Employment Limitations
- 31. Restitution
- 36. Restrictions on Advertisements
- 38. Continuing Education

**Procuring a License by Fraud** (B&P Code sec. 123; 496; 3110(i))

**Maximum Discipline:** Denial or Revocation

**Minimum Discipline:** Denial or Revocation

**Practicing without Valid License** (B&P Code sec. 3110(s); 3110(i))

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions

**If Warranted:**

- 22. Worksite Monitor
- 25. Suspension
- 36. Restrictions on Advertisements
- 38. Continuing Education

**Using Controlled Substances or Alcohol** (B&P Code sec. 3110 (l))

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 17-18. Standard Alcohol/Drug Conditions

**If Warranted:**

- 21. Alcohol and Drug Treatment
- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 22. Direct Supervision
- 34. Restricted Practice
- 26. Employment Limitations
- 27. Psychotherapy or Counseling Program
- 28. Mental Health Evaluation
- 29. Medical Health Evaluation
- 30. Medical Treatment
- 38. Continuing Education

**Employing Suspended or Unlicensed Optometrist** (B&P Code sec. 3110 (t); 3106)

**Permitting Another to Use License**(B&P Code sec. 3110 (u); 3106)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions

**If Warranted:**

- 35. Restrictions on Branch Offices
- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 34. Restricted Practice
- 26. Employment Limitations

38. Continuing Education

**Accepting Employment By Unlicensed Person** (B&P Code sec. 3109)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 38. Continuing Education

**If Warranted:**

- 25. Suspension of 30 days or more

**Unlawful Location for Practice** (B&P Code sec. 3070; 3075; 3076; 3077; Title 16 CCR sec. 1505; 1506; 1507)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 38. Continuing Education

**If Warranted:**

- 35. Restrictions on Branch Offices
- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 34. Restricted Practice

**Deceptive Advertising** (B&P Code sec 651; 651.3; 3099 ; 3100; 3102; 3103; 3110(g); 17500; Title 16 CCR sec. 1512; 1513; 1514; 1515)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 38. Continuing Education

**If Warranted:**

- 25. Suspension of 30 days or more
- 36. Restrictions on Advertisements

**Prohibited Arrangements by Optometrists** (B&P Code sec 655; Title 16 CCR sec. 1514)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 38. Continuing Education

**If Warranted:**

- 25. Suspension of 30 days or more
- 36. Restrictions on Advertisements

**Advertising While Not Holding Valid License** (B&P Code sec. 3101)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 38. Continuing Education

**If Warranted:**

- 25. Suspension of 30 days or more
- 36. Restrictions on Advertisements

**Misuse of Professional Titles or Abbreviations** (B&P Code sec. 3098; Title 16 CCR sec. 1512)

**Maximum Discipline:** 6-month suspension. Revocation for successive violation

**Minimum Discipline:** 30 days suspension, and at least one-year probation

**Required:**

- 1-16. Standard Conditions
- 38. Continuing Education

**If Warranted:**

- 25. Suspension of 30 days or more
- 36. Restrictions on Advertisements

**Unlawful Solicitation** (B&P Code sec. 3097)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 38. Continuing Education

**If Warranted:**

- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 34. Restricted practice

**Unlawful Referrals** (B&P Code sec. 650; 650.01)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions

**If Warranted:**

- 38. Continuing Education
- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 34. Restricted practice
- 36. Restrictions on Advertisements

**Employing Cappers or Steerers** (B&P Code sec. 3104)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions
- 38. Continuing Education

**If Warranted:**

- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 34. Restricted practice
- 36. Restrictions on Advertisements

**Criminal Conviction** (B&P Code sec. 3094; 3107; Title 16 CCR sec. 1517)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions

**If Warranted:**

- 24. Remedial Education
- 25. Suspension of 30 days or more

- 22. Worksite Monitor
- 34. Restricted practice
- 17-18. Standard Alcohol/ Drug Conditions
- 38. Continuing Education

**Fictitious Name Violation** (B&P Code sec. 3078; Title 16 CCR sec. 1513; 1518)

**Maximum Penalty:** 6 month Suspension. Revocation and Cost Recovery for successive violations

**Minimum Discipline:** Stayed Revocation, 3 years probation

**Required:**

- 1-16. Standard Conditions
- 38. Continuing Education

**If Warranted:**

- 36. Restrictions on Advertisements

**Violation of Probation**

**Maximum Discipline:** Impose discipline that was stayed

**Minimum Penalty Discipline:** Impose an actual period of suspension

The maximum discipline should be given for repeated similar offenses or for probation violations revealing a cavalier or recalcitrant attitude. Other violations of probation should draw at least a period of actual suspension.

**Violations by Professional Corporations** (B&P Code sec. 3160; 3161; 3162; 3163; 3164; 3165; 3166; Title 16 CCR sec. 1544; 1546; 1547; 1548; 1549; 1550)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions

**If Warranted:**

- 24. Remedial Education Course for corporate principals involved
- 25. Suspension of 30 days or more
- 22. Worksite Monitor
- 34. Restricted practice
- 31. Restitution
- 36. Restrictions on Advertisements
- 38. Continuing Education

**Fraudulently Altering Medical Records** (B&P Code sec. 3105)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions.
- 38. Continuing Education
- 39. Medical Record Keeping Course

**If Warranted:**

- 22. Worksite Monitor
- 23. Direct Supervision
- 25. Suspension
- 32. Audit Required

**False Representation of Fact** (B&P Code sec. 3106)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions

**If Warranted:**

- 23. Direct Supervision
- 24. Remedial Education
- 25. Suspension
- 26. Employment Limitations
- 31. Restitution
- 32. Audit Required
- 34. Restricted Practice
- 35. Restrictions on Branch Offices
- 36. Restrictions on Advertisements
- 38. Continuing Education
- 39. Medical Record Keeping Course

**Unprofessional Conduct (B&P code sec. 3110)**

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 5 years probation

**Required:**

- 1-16. Standard Conditions
- 22. Worksite Monitor
- 24. Remedial Education

**If Warranted:**

- 23. Direct Supervision
- 25. Suspension
- 26. Employment Limitations
- 38. Continuing Education
- 39. Medical Record Keeping Course

**Violating or abetting violation of any section of Optometry Practice Act (B&P Code sec. 3110(a))**

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 5 years probation

**Required:**

- 1-16. Standard Conditions
- 24. Remedial Education

**If Warranted:**

- 22. Worksite Monitor
- 23. Direct Supervision
- 25. Suspension
- 26. Employment Limitations
- 31. Restitution
- 32. Audit Required
- 36. Restrictions on Advertisements
- 38. Continuing Education
- 39. Medical Record Keeping Course

**Repeated Negligent Acts (B&P Code sec. 3110 (c))**

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Revocation and Cost Recovery

**Incompetence (B&P Code sec. 3110 (d))**

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**If Required:**

- 1-16. Standard Conditions
- 22. Worksite Monitor

23. Direct Supervision
24. Remedial Education
25. Suspension
26. Employment Limitations

**If Warranted:**

37. Take and Pass NBEO Exam
39. Medical Record Keeping Course

**Conduct Warranting License Denial (B&P Code sec. 3110 (f))**

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions

**If Warranted:**

- 17-18. Standard Alcohol/ Drug Conditions
21. Alcohol or Drug Treatment
22. Worksite Monitor
23. Direct Supervision
24. Remedial Education
25. Suspension
26. Employment Limitations
27. Psychotherapy or Counseling Program
28. Mental Health Evaluation
31. Restitution
32. Audit Required
33. Lens Prescription – Maintain Records
36. Restrictions on Advertisements
37. Take and Pass NBEO Exam
38. Continuing Education
39. Medical Record Keeping Course

**License Discipline by Other State or Agency (B&P Code sec. 3110 (h))**

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

- 1-16. Standard Conditions

**If Warranted:**

- 17-18. Standard Alcohol/ Drug Conditions
21. Alcohol or Drug Treatment
22. Worksite Monitor
23. Direct Supervision
24. Remedial Education
25. Suspension
26. Employment Limitations
27. Psychotherapy or Counseling Program
28. Mental Health Evaluation
32. Audit Required
33. Lens Prescription – Maintain Records
37. Take and Pass NBEO Exam
38. Continuing Education
39. Medical Record Keeping Course

**Making False Statement on Application (B&P Code sec. 3110 (j))**

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions

**If Warranted:**

22. Worksite Monitor  
24. Remedial Education  
25. Suspension  
26. Employment Limitations  
38. Continuing Education

**Prescribing, Furnishing, or Administering Drugs without Good Faith Examination (B&P Code sec. 3110 (p))**

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions  
24. Remedial Education  
25. Suspension

**If Warranted:**

22. Worksite Monitor  
23. Direct Supervision  
38. Continuing Education  
39. Medical Record Keeping Course

**Failure to Maintain Adequate Records(B&P Code sec. 3110 (g))**

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions  
39. Medical Record Keeping Course

**If Warranted:**

22. Worksite Monitor  
24. Remedial Education  
25. Suspension  
32. Audit Required  
38. Continuing Education

**Altering or Using Altered License (B&P Code sec. 3110 (v))**

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions  
22. Worksite Monitor  
25. Suspension

**If Warranted**

38. Continuing Education

**Professional Services Beyond the Scope of the License (B&P Code sec. 3110 (r))**

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions

**If Warranted:**

22. Worksite Monitor  
24. Remedial Education  
25. Suspension  
26. Employment Limitations

38. Continuing Education

**Failure to Comply with Patient Records Request** (B&P Code sec. 3110 (x))

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions

39. Medical Record Keeping Course

**If Warranted:**

24. Remedial Education

38. Continuing Education

**Use of Fraudulently issued, counterfeited, etc., Certificate** (B&P Code 3107)

**Maximum Discipline:** Revocation and Cost Recovery

**Minimum Discipline:** Stayed Revocation, 3-5 years probation

**Required:**

1-16. Standard Conditions

**If Warranted:**

22. Worksite Monitor

24. Remedial Education

25. Suspension

26. Employment Limitations

38. Continuing Education

DRAFT

**2450 Del Paso Rd., Suite 105**  
**Sacramento, CA 95834**  
**T: 916.575.7170 F: 916.575.7292**  
**E:optometry@dca.ca.gov**

## BOARD OF OPTOMETRY PROPOSED LANGUAGE

Add Article 2.5 and Sections 1508, 1508.1, 1508.2 and 1508.3 to Division 15 of Title 16 of the California Code of Regulations to read as follows:

### **Article 2.5 Sponsored Free Health-Care Events - Requirements for Exemption**

#### **§1508. Definitions**

For the purposes of Section 901 of the Code:

(a) “Community-based organization” means a public or private nonprofit organization that is representative of a community or a significant segment of a community, and is engaged in meeting human, educational, environmental, or public safety community needs.

(b) “Out-of-state practitioner” means a person who is not licensed in California to engage in the practice of optometry but who holds a current, active and valid license or certificate in good standing in another state, district, or territory of the United States to practice optometry.

(c) “In good standing” means that a person:

- (1) Is not currently the subject of any investigation by any governmental entity or has not been charged with an offense for any act substantially related to the practice of optometry by any public agency.
- (2) Has not entered into any consent agreement or been subject to an administrative decision that contains conditions placed by an agency upon the person’s professional conduct or practice, including any voluntary surrender of license; or,
- (3) Has not been the subject of an adverse judgment resulting from the practice of optometry that the Board determines constitutes evidence of a pattern of incompetence or negligence.

Note: Authority cited: Sections 901 and 3025, Business and Professions Code. Reference: Section 901, Business and Professions Code.

#### **§1508.1. Sponsoring Entity Registration and Recordkeeping Requirements.**

(a) Registration. A sponsoring entity that wishes to provide, or arrange for the provision of, health-care services at a sponsored event under section 901 of the Code shall register with the Board not later than 90 calendar days prior to the date on which the sponsored event is scheduled to begin. A sponsoring entity shall register with the Board by submitting to the Board a completed “Registration of Sponsoring Entity under Business and Professions Code Section 901,” Form 901-A (DCA/2011), which is hereby incorporated by reference.

(b) Determination of Completeness of Form. The Board may, by resolution, delegate to the Department of Consumer Affairs the authority to receive and process “Registration of Sponsoring Entity under Business and Professions Code Section 901,” Form 901-A (DCA/2011) on behalf of the Board. The Board or its delegatee shall inform the sponsoring entity in writing within 15 calendar days of receipt of Form 901-A (DCA/2011) that the form is either complete and the sponsoring entity is registered or that the form is deficient and what specific information or documentation is required to complete the form and be registered. The Board or its delegatee shall reject the registration if all of the identified deficiencies have not been corrected at least 30 days prior to the commencement of the sponsored event.

(c) Recordkeeping Requirements. Regardless of where it is located, a sponsoring entity shall maintain at a physical location in California a copy of all records required by Section 901 as well as a copy of the authorization for participation issued by the Board to an out-of-state practitioner. The sponsoring entity

shall maintain these records for a period of at least five (5) years following the provision of health-care services. The records may be maintained in either paper or electronic form. The sponsoring entity shall notify the Board at the time of registration as to the form in which it will maintain the records. In addition, the sponsoring entity shall keep a copy of all records required by Section 901(g) of the Code at the physical location of the sponsored event until that event has ended. These records shall be available for inspection and copying during the operating hours of the sponsored event upon request of any representative of the Board. In addition, the sponsoring entity shall provide copies of any record required to be maintained by Section 901 of the Code to any representative of the Board within 15 calendar days of the request.

(d) Notice. A sponsoring entity shall place a notice visible to patients at every station where patients are being seen by an optometrist. The notice shall be in at least 48-point type in Arial font and shall include the following statement and information:

#### **NOTICE**

Optometrists providing health-care services at this health fair are either licensed and regulated by the California State Board of Optometry or hold a current valid license from another state and have been authorized to provide health-care services in California only at this specific health fair.

For more information, or if you have a complaint or concern please contact the California State Board of Optometry at 1-916-575-7170; [www.optometry.ca.gov](http://www.optometry.ca.gov).

(e) Requirement for Prior Board Approval of Out-of-State Practitioner. A sponsoring entity shall not permit an out-of-state practitioner to participate in a sponsored event unless and until the sponsoring entity has received written approval of such practitioner from the Board.

(f) Report. Within 15 calendar days following the provision of health-care services, the sponsoring entity shall file a report with the Board summarizing the details of the sponsored event. This report may be in a form of the sponsoring entity's choosing, but shall include, at a minimum, the following information:

- (1) The date(s) of the sponsored event;
- (2) The location(s) of the sponsored event;
- (3) The type(s) and general description of all health-care services provided at the sponsored event; and
- (4) A list of each out-of-state practitioner granted authorization pursuant to this article who participated in the sponsored event, along with the license number of that practitioner.

Note: Authority cited: Sections 901 and 3025, Business and Professions Code. Reference: Section 901, Business and Professions Code.

#### **§1508.2. Out-of-State Practitioner Authorization to Participate in Sponsored Event**

(a) Request for Authorization to Participate. An out-of-state practitioner ("applicant") may request authorization from the Board to participate in a sponsored event and provide such health-care services at the sponsored event as would be permitted if the applicant were licensed by the Board to provide those services. Authorization shall be obtained for each sponsored event in which the applicant seeks to participate.

- (1) An applicant shall request authorization by submitting to the Board a completed "Request for Authorization to Practice Without a California License at a Sponsored Free Health-Care Event," Form 901-B (OPT/2011), which is hereby incorporated by reference, accompanied by a non-

refundable and non-transferable processing fee of \$40.00.

(2) The applicant shall also furnish either a full set of fingerprints or submit a Live Scan inquiry to establish the identity of the applicant and to permit the Board to conduct a criminal history record check. The applicant shall pay any costs for furnishing the fingerprints and conducting the criminal history check. This requirement shall apply only to the first application for authorization that is submitted by the applicant.

(b) Response to Request for Authorization to Participate. Within 20 calendar days of receiving a completed request for authorization, the Board shall notify the sponsoring entity or local government entity and the applicant whether that request is approved or denied.

(c) Denial of Request for Authorization to Participate.

(1) The Board shall deny a request for authorization to participate if:

(A) The submitted Form 901-B (OPT/2011) is incomplete and the applicant has not responded within seven (7) calendar days to the Board's request for additional information; or

(B) The applicant has not graduated from an accredited school or college of optometry approved or recognized by the Board; or

(C) The applicant does not possess a current, active and valid license in good standing as defined in Section 1508; or

(D) The applicant has failed to comply with a requirement of this article or has committed any act that would constitute grounds for denial under Section 480 of the Code of an application for licensure by the Board; or

(E) The Board has been unable to obtain a timely report of the results of the criminal history check.

(2) The Board may deny a request for authorization to participate if:

(A) The request is received less than 20 calendars days before the date on which the sponsored event will begin; or

(B) The applicant has been previously denied a request for authorization by the Board to participate in a sponsored event; or

(C) The applicant has previously had an authorization to participate in a sponsored event terminated by the Board.

(D) The applicant has participated in three (3) or more sponsored events during the 12 month period immediately preceding the current application.

(d) Appeal of Denial. An applicant requesting authorization to participate in a sponsored event may appeal the denial of such request by following the procedures set forth in section 1508.3.

(e) Notice. An out-of-state practitioner who receives authorization to practice optometry at a sponsored event shall place a notice visible to patients at every station at which that person will be seeing patients. The notice shall be in at least 48-point type in Arial font and shall include the following statement and information:

### **NOTICE**

I hold a current valid license to practice optometry in a state other than California. I have been authorized by the California State Board of Optometry to provide health-care services in California only at this specific health fair.

California State Board of Optometry  
916-575-7170  
[www.optometry.ca.gov](http://www.optometry.ca.gov)

Note: Authority cited: Sections 144, 901, and 3025, Business and Professions Code. Reference: Sections 144, 480 and 901, Business and Professions Code.

### **§1508.3. Termination of Authorization and Appeal.**

(a) Grounds for Termination. The Board may terminate an out-of-state practitioner's authorization to participate in a sponsored event for any of the following reasons:

(1) The out-of-state practitioner has failed to comply with any applicable provision of this article, or any applicable practice requirement or regulation of the Board.

(2) The out-of-state practitioner has committed an act that would constitute grounds for discipline if done by a licensee of the Board.

(3) The Board has received a credible complaint indicating that the out-of-state practitioner is unfit to practice at the sponsored event or has otherwise endangered consumers of the practitioner's services.

(b) Notice of Termination. The Board shall provide both the sponsoring entity or local government entity and the out-of-state practitioner with a written notice of the termination, including the basis for the termination. If the written notice is provided during a sponsored event, the Board may provide the notice to any representative of the sponsored event on the premises of the event.

(c) Consequences of Termination. An out-of-state practitioner shall immediately cease his or her participation in a sponsored event upon receipt of the written notice of termination.

Termination of authority to participate in a sponsored event shall be deemed a disciplinary measure reportable to the national practitioner data banks. In addition, the Board shall provide a copy of the written notice of termination to the licensing authority of each jurisdiction in which the out-of-state practitioner is licensed.

(d) Appeal of Termination. An out-of-state practitioner may appeal the Board's decision to terminate an authorization in the manner provided by section 901(j)(2) of the code. The request for an appeal shall be considered a request for an informal hearing under the Administrative Procedure Act.

(e) Informal Conference Option. In addition to requesting a hearing, the out-of-state practitioner may request an informal conference with the Executive Officer regarding the reasons for the termination of authorization to participate. The Executive Officer shall, within 30 days from receipt of the request, hold an informal conference with the out-of-state practitioner. At the conclusion of the informal conference, the Executive Officer or his or her designee may affirm or dismiss the termination of authorization to participate. The Executive Officer shall state in writing the reasons for his or her action and mail a copy of his or her findings and decision to the out-of-state practitioner within 10 days from the date of the informal conference. The out-of-state practitioner does not waive his or her request for a hearing to contest a termination of authorization by requesting an informal conference. If the termination is dismissed after the informal conference, the request for a hearing shall be deemed to be withdrawn.

Note: Authority cited: Sections 901, and 3025, Business and Professions Code. Reference: Section 901, Business and Professions Code.

## TITLE 16. CALIFORNIA STATE BOARD OF OPTOMETRY

**NOTICE IS HEREBY GIVEN** that the California State Board of Optometry (hereafter "Board") is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at:

**Department of Consumer Affairs  
2420 Del Paso Road, Yosemite Room  
Sacramento, California 95834  
Monday, August 13, 2012  
10:00 a.m.**

Written comments, including those sent by mail, facsimile, or e-mail to the addresses listed under Contact Person in this Notice, must be received by the Board at its office not later than 5:00 p.m. on Monday, August 13, 2012 or must be received by the Board at the hearing. The Board, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by Section 3025 of the Business and Professions Code, and to implement, interpret or make specific Sections 144, 480 and 901 of said Code, the Board is considering changes to Division 15 of Title 16 of the California Code of Regulations as follows:

### **INFORMATIVE DIGEST**

#### Informative Digest:

The Board currently regulates about 8,000 licensees. The Board's highest priority is the protection of the public when exercising its licensing, regulatory, and disciplinary functions. The primary methods by which the Board achieves this goal are: issuing licenses to eligible applicants, investigating complaints against licensees and disciplining licensees for violating the Optometry Practice Act; and monitoring licensees whose licenses have been placed on probation.

Business and Professions Code (BPC) Section 3025 authorizes the Board to adopt, amend, or repeal, such rules and regulations as may be reasonably necessary to enable the Board to carry into effect the provisions of the Optometry Practice Act.

This proposal requires the Board to implement legislation, AB 2699 (Bass, Chapter 270, Statutes of 2010), enacting BPC Section 901. BPC Section 901 provides an exemption, except for what the Board may require, for a health-care practitioner, licensed or certified in another state, from all the licensing and regulatory requirements of the applicable California healing arts board. To be exempted from California licensure requirements, an out-of-state health-care practitioner must be providing services at a sponsored health-care event to uninsured or underinsured people on a short-term, voluntary basis. BPC Section 901 requires the out-of-state health-care provider to meet certain requirements, and seek authorization from the applicable healing arts board in California. BPC Section 901 provides the regulatory framework for the approval of an out-of-state health-care practitioner and a sponsoring entity to seek approval from the applicable healing arts boards. However, each individual healing arts board is responsible for promulgating regulations to prescribe the specific requirements for the approval of an out-of-state practitioner and a sponsoring entity.

The primary purpose of these proposed regulations is to implement, interpret, and make specific the provisions of BPC Section 901, as it pertains to licensed optometrists, including the application and registration requirements, disciplinary actions, recordkeeping requirements, and provisions for termination

for the exemption of an out-of-state licensed optometrist who wishes to participate in a sponsored free health-care event. The Registration of Sponsoring Entity Form 901-A (DCA/2011) and the Request for Authorization to Practice without a California License Form 901-B (OPT/2011) are incorporated by reference. The Board's highest priority is the protection of the public, and these proposed regulations are intended to implement BPC Section 901 in a manner that will provide the greatest protection for the people of California.

Policy Statement Overview/Anticipated Benefits of Proposal:

The implementation of AB 2699 by these proposed regulations will ensure that sponsored free health-care events will not be hampered by shortages of health-care practitioners, and will allow more of these individuals to volunteer.

According to the author of AB 2699, "Thousands of low-income children, families, and individuals in California are uninsured or underinsured and do not receive basic health, vision, and dental care and screenings. Lack of basic services and preventive care may lead to more serious and costly health, dental, and vision problems. In August 2009, the Remote Area Medical (RAM) Volunteer Corps conducted an eight-day health event in Los Angeles County. Volunteer medical, dental and other health-care practitioners provided \$2.9 million in free services to over 14,000 individuals during the event.

While the event was extremely successful, RAM experienced a shortage of volunteer medical, dental, and vision providers because of restrictions in state laws which prohibit volunteer out-of-state licensed medical personnel from providing short-term services. As a result, thousands of residents needing services were turned away."

To prevent future volunteer shortages at sponsored free health-care events such as RAM, AB 2699 was introduced to permit health-care providers licensed in other states, who are willing to help to practice in California for a limited time.

Consistency and Compatibility with Existing State Regulations:

This Board has evaluated this regulatory proposal, and it is not inconsistent nor incompatible with existing state regulations.

**INCORPORATION BY REFERENCE**

- Registration of Sponsoring Entity Under Business and Professions Code Section 901 Form 901-A (DCA/2011)
- Request for Authorization to Practice Without a California License At a Sponsored Free Health-Care Event Form 901-B (OPT/2011)

**FISCAL IMPACT ESTIMATES**

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: It is unknown how many sponsors of free health-care events and how many volunteer out-of-state optometrists may apply to the Board as a result of these regulations. However, the Board estimates that it will receive at least 50 applications per year from out-of-state optometrists seeking authorization to provide services at sponsored free health-care events. In order for the Board to absorb the workload associated with processing the requests for authorization from the out-of-state optometrists, the Board will need to charge a \$40.00 non-refundable processing fee (\$89.00 for individuals who have to submit fingerprints on hard cards and not via Live Scan). This fee will offset the costs associated with staff's processing of the application.

Nondiscretionary Costs/Savings to Local Agencies: None

Local Mandate: None

Cost to Any Local Agency or School District for Which Government Code Sections 17500 - 17630 Require Reimbursement: None

Business Impact:

The Board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

**AND**

The following studies/relevant data were relied upon in making the above determination:

These proposed regulations will provide the Board with the means to implement, interpret, and make specific BPC Section 901, as it pertains to licensed optometrists, including application and registration requirements, disciplinary actions, recordkeeping requirements, and provisions for termination of authorization for an out-of-state licensed optometrist who wishes to participate in a sponsored free health-care event.

Sponsoring entities may incur nominal expenses associated with submitting the registration form to the Board, and complying with recordkeeping requirements, and reporting requirements. Sponsoring entities shall be responsible for submitting the registration Form 901-A (DCA/2011) to the Board. Expenses associated with submitting the registration form include printing and mailing; these expenses are minimal, and should not have a significant fiscal impact on sponsoring entities. Additionally, sponsoring entities shall be responsible for maintaining copies of all records required by BPC Section 901, as well as the copy of the authorization for participation issued by the Board to an out-of-state practitioner at a physical location in California. The records must be maintained for a period of at least five (5) years after the date the sponsored event ended; the records may be kept in electronic or paper form. The sponsoring entity shall also be responsible for maintaining copies of all records required by BPC Section 901(g) at the physical location of the sponsored event. Expenses associated with these recordkeeping requirements are nominal and include storage and transportation of the required records; these expenses are minimal and should not have a significant fiscal impact on sponsoring entities. Finally, the sponsoring entity shall be responsible for providing a report to the Board summarizing the details of the sponsored event within 15 days after the conclusion of such event. The report may be provided to the Board on a form of the sponsoring entity's choosing. Expenses associated with these reporting requirements are nominal and include printing and postage; these expenses are minimal and should not have a significant fiscal impact on sponsoring entities.

Out-of-state optometrists seeking authorization from the Board to participate in a sponsored event will incur a \$40.00 fee for application processing. Additionally, applicants will incur costs associated with furnishing fingerprints for the purpose of the Board conducting a criminal history check. These costs are necessary for the protection of the public, and to provide staff time and resources for registration of sponsored events and volunteer out-of-state practitioners in the short timeframes set in the statute.

This regulation will have a positive impact on the health of uninsured or under-insured Californians that are currently unable to receive vision-care due to lack of funding and resources.

There may also be benefits to private businesses that are not able to provide vision-care to their employees. Many small businesses are legally required to provide health-care, but are not required to provide vision-care. Their employees could attend these free health-care events to meet their vision needs. This helps the businesses maintain employees with healthy vision so they can continue to work. Poor health in vision can impact the total health of an individual. These regulations will benefit the health of Californians who attend sponsored events, in addition to providing public protection through registration of out-of-state volunteer optometrists.

Cost Impact on Representative Private Person or Business:

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Sponsors of free health-care events and out-of-state practitioners will incur minimal costs to apply and

register with the Board in compliance with the statute and these regulations. Out-of-state optometrists seeking authorization from the Board to participate in a sponsored event will incur a \$40.00 fee for application processing. Additionally, applicants will incur costs associated with furnishing fingerprints for the purpose of the Board conducting a criminal history check. The cost for a person to get fingerprinted is \$49.00. Of this fee, \$32.00 goes to the Department of Justice for conducting the background check and providing criminal record reports to the Board. The vendor's fee ranges from \$5.00 to \$45.00. For those who are not able to submit fingerprints electronically via Live Scan, the fee for the Board to process "hard cards" fingerprints is \$49.00. These fees will have to be factored into the cost of the individual's volunteered services. The fees may be covered by sponsoring entities.

Effect on Housing Costs: None

### **EFFECT ON SMALL BUSINESS**

The Board has determined that the proposed regulations would not have a significant economic impact on small businesses. Instead, the impact of this rulemaking is to offer free health-care to uninsured or under-insured Californians by volunteer health-care practitioners coming from out of state to provide optometric services. These services may benefit small businesses that do not provide vision-care to their employees.

### **RESULTS OF ECONOMIC IMPACT ASSESSMENT/ANALYSIS**

#### Impact on Jobs/Businesses:

The Board has determined that this regulatory proposal will not have any impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

The proposed regulations impact those out-of-state health-care practitioners applying to the Board to participate in community-based organizations that provide sponsored free health-care events in California. The proposed regulations may provide an opportunity for out-of-state licensed volunteers to participate in community sponsored free health-care events.

#### Benefits of Regulation:

The Board has determined that this regulatory proposal will have the following benefits to health and welfare of California residents, worker safety, and the state's environment:

- This regulatory proposal benefits the health and welfare of California residents, specifically, uninsured or under-insured Californians that are currently unable to receive optometric care due to lack of funding and resources. These proposed regulations will permit sponsoring entities to have access to out-of-state optometrists as an additional resource for volunteer recruitment purposes. This will prevent a shortage of optometrists at sponsored free health-care events, in turn increasing access to care.

There may also be benefits to private businesses that are not able to provide vision care to their employees. Many small businesses are legally required to provide health-care, but are not required to provide vision-care. Poor health in vision can impact the total health of an individual, such as a diagnosis of glaucoma, which could lead to blindness if left undetected. These regulations will benefit the health of Californians who attend sponsored events, in addition to providing public protection through registration of out-of-state volunteer optometrists.

- This regulatory proposal benefits worker safety because as Californians, they will be able to attend sponsored events to obtain health-care, improving their overall health. Studies have shown that healthy vision improves productivity, thus keeping employees safe to continue to work

### **CONSIDERATION OF ALTERNATIVES**

The Board must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose

for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposal described in this Notice, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above-mentioned hearing.

**INITIAL STATEMENT OF REASONS AND INFORMATION**

The Board has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

**TEXT OF PROPOSAL**

Copies of the exact language of the proposed regulations, and any document incorporated by reference, and of the initial statement of reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the Board at 2450 Del Paso Road, Suite 105, Sacramento, California 95834.

**AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE**

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below.

**CONTACT PERSON**

Inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name: Andrea Leiva, Policy Analyst  
Address: 2450 Del Paso Road, Suite 105  
Sacramento, CA 95834  
Telephone No.: 916-575-7182  
Fax No.: 916-575-7292  
E-Mail Address: [andrea.leiva@dca.ca.gov](mailto:andrea.leiva@dca.ca.gov)

The backup contact person is:

Name: Mona Maggio, Executive Officer  
Address: 2450 Del Paso Road, Suite 105  
Sacramento, CA 95834  
Telephone No.: 916-575-7170  
Fax No.: 916-575-7292  
E-Mail Address: [mona.maggio@dca.ca.gov](mailto:mona.maggio@dca.ca.gov)

Website Access: Materials regarding this proposal can be found at <http://www.optometry.ca.gov/lawsregs/propregs.shtml>.

**BOARD OF OPTOMETRY  
INITIAL STATEMENT OF REASONS**

**Hearing Date:** August 13, 2012

**Subject Matter of Proposed Regulations:** Sponsored Free Health-Care Events

**Section(s) Affected:** Add Article 2.5 and Adopt Sections 1508, 1508.1, 1508.2 and 1508.3 to Division 15 of Title 16 of the California Code of Regulations (CCR).

**Introduction:**

On September 23, 2010, Governor Arnold Schwarzenegger signed AB 2699 (Bass, Chapter 270, Statutes of 2010), enacting Business and Professions Code (BPC) Section 901, which took effect January 1, 2011. This statute provides a regulatory framework for certain health-care events at which free care is offered to uninsured or under-insured individuals by volunteer health-care practitioners where those practitioners may include individuals who may be licensed in one or more states but are not licensed in California. Prior to this enactment, licensing laws precluded the participation of volunteers licensed outside of California. BPC Section 901 defines "sponsoring entities," "sponsored events," and "health-care practitioners," and sets forth requirements for registration of sponsoring entities and authorization for participation by practitioners licensed in other states by the various boards responsible for licensure and regulation of healing arts.

**Specific Purpose of each adoption, amendment, or repeal:**

1. Problem being addressed:

These proposed regulations would implement, interpret, and make specific the provisions of BPC Section 901 by specifying procedures and forms to be used by sponsoring entities and out-of-state practitioners who desire to participate in sponsored events. The California State Board of Optometry's (hereafter "Board") highest priority is the protection of the public, and these proposed regulations are intended to implement BPC Section 901 in a manner that will provide the greatest protection for the people of California.

According to the author of AB 2699, "Thousands of low-income children, families, and individuals in California are uninsured or underinsured and do not receive basic health, vision, and dental care and screenings. Lack of basic services and preventive care may lead to more serious and costly health, dental, and vision problems. In August 2009, the Remote Area Medical (RAM) Volunteer Corps conducted an eight-day health event in Los Angeles County. Volunteer medical, dental and other health-care practitioners provided \$2.9 million in free services to over 14,000 individuals during the event.

While the event was extremely successful, RAM experienced a shortage of volunteer medical, dental, and vision providers because of restrictions in state laws which prohibit volunteer out-of-state licensed medical personnel from providing short-term services. As a result, thousands of residents needing services were turned away."

To prevent future volunteer shortages at sponsored free health-care events such as RAM, AB 2699 was introduced to permit health-care providers licensed in other states who are willing to help the ability to practice in California for a limited time.

2. Anticipated benefits from this regulatory action:

The implementation of AB 2699 by these proposed regulations will ensure that sponsored free health-care events will not be hampered by shortages of health-care practitioners, and will allow more of these individuals to volunteer.

**Factual Basis/Rationale:**

Adopt Article 2.5 of Division 15 of Title 16 of the California Code of Regulations (Sponsored Free Health-Care Events – Requirements for Exemption) – The new article, Article 2.5 of Division 15 of Title 16 of the California Code of Regulations specific to “Sponsored Free Health-Care Events – Requirements for Exemption” is being added in order to implement AB 2699.

Adopt Section 1508 (Definitions) – This section is being added to clarify the language of the statute.

Section 1508(a) – Defines “community-based organization” because there is no statutory definition at this time.

*Factual Basis/Rationale:*

“Community-based organization” is listed in the statute as one type of sponsoring entity. There is no definition of such an entity in state statute. The proposed definition of this term therefore is derived from a federal law (Title 20 USCA section 7801 related to education law) that does contain a definition of “community-based organization.” This definition provides much needed clarity to the term and guidance to applicants regarding qualifications for registration.

Section 1508(b) – Defines “out-of-state practitioner” for the purposes of these regulations to provide clarification as to which practitioners the proposed regulations are intended to affect.

*Factual Basis/Rationale:*

The statute defines “health-care practitioner” as any person who engages in acts subject to licensure under Division 2 of the BPC. The proposed regulations, along with the operative provisions of BPC Section 901, however, concern specific health-care practitioners licensed to practice optometry in other states and territories. Therefore, in order to provide clarity for the purposes of the text of the regulations, the definition of “out-of-state practitioner” is proposed. The definition is based upon the criteria set forth in BPC Section 901(b).

Section 1508(c) – Defines “in good standing”, which is listed as a requirement in BPC Section 901(b).

*Factual Basis/ Rationale:*

BPC Section 901 requires that a practitioner be licensed or certified “in good standing” in another state or territory to qualify for an exemption from the licensing requirements, but does not provide a definition or specifics as to what is meant by this term. This section provides specificity regarding eligibility criteria for authorizations granted by the Board per BPC Section 901 for both applicants and staff affected by the proposed regulations.

Section 1508(c)(1) - Specifies that “in good standing” means that a practitioner is not currently the subject of any investigation by a governmental entity or has not been charged with an offense for any act substantially related to the practice of optometry by any public agency.

*Factual Basis/ Rationale:*

This proposed section provides that specificity, which is lacking as well as public protection from practitioners who may be under investigation but not yet charged with an offense. This provision is also consistent with the Board’s current authority in BPC Section 480 to deny an applicant for licensure who has committed any act substantially related to the qualifications or functions of an optometrist.

Section 1508(c)(2) - Specifies that a practitioner may not have entered into any consent agreement or been subject to an administrative decision that contains conditions placed by an agency upon the person’s professional conduct or practice in order to be considered “in good standing”.

*Factual Basis/ Rationale:*

This text provides specificity for applicants, sponsors of events governed by BPC Section 901, and staff regarding eligibility criteria for authorizations granted by the Board per BPC Section 901.

An applicant may hold a current and active license that contains restrictions or conditions that might place patients at risk or limit the care that they may receive. This text provides public

protection by stating that those conditions or restrictions would preclude the applicant from volunteering to practice upon patients at sponsored events.

Section 1508(c)(3) – Specifies that to be considered “in good standing”, an applicant may not have been the subject of an adverse judgment resulting from the practice of optometry that constitutes evidence of a pattern of incompetence or negligence, as determined by the Board.

*Factual Basis/ Rationale:*

This proposed text provides public protection against practitioners who may have numerous incidents resulting in an adverse judgment that do not result in disciplinary action against the optometrist license.

It is possible for a practitioner to hold a license “in good standing”, but be the subject of an adverse judgment or judgments that reflect a pattern of practice that the Board determines to be incompetent or negligent. The Board intends to protect the public from these practitioners by including this prohibition in the regulatory proposal.

Adopt Section 1508.1 (Sponsoring Entity Registration and Recordkeeping Requirements) – This section is being added to specify the registration and recordkeeping requirements of sponsoring entities.

Section 1508.1(a) – Registration - Establishes a timeframe for submission of a sponsoring entity’s registration form and prescribes the registration form to be used and incorporates the form by reference.

*Factual Basis/Rationale:*

Sponsoring entities are required under BPC Section 901(d) to register with the Board if they will have out-of-state practitioners participating in their sponsored event. The proposed regulation implements the statute by providing a form that a sponsoring entity can use to meet this requirement, Form 901-A (DCA/2011). The form includes space for all of the required information to be submitted under the statute. Form 901-A would include the following:

- Provide filing requirements and disclosures regarding qualifications for registration as well as deadlines for filing a completed application 90 days in advance of the event.
- Part 1 – Requires the applicant to disclose organization name, organization contact information, type of organization, the organization’s tax identification number and if the organization is community-based, disclose its mission, goals and activities.
- Part 2 – Requires the applicant to provide a list of responsible organization officials that includes the name, address, title, phone number, and email address of each responsible official.
- Part 3 – Requires the applicant to disclose event details including: name of the event, date(s) of the event, location(s) of the event, a description of the intended event, a list of all out-of-state health-care practitioners the organization currently intends to apply for the event (name, profession and state of licensure required), and disclose each licensing authority that will have jurisdiction over an out-of-state licensed health-care practitioner.
- Provide notice regarding requirements for each out-of-state practitioner practicing at the event, including submission of the required Form OPT-901-B in advance of the event.
- Provide a notice regarding how the organization will be notified if an individual out-of-state practitioner has been granted authorization to practice.
- Provide notice of the requirements for the maintenance of records for five (5) years in California and for filing a report with the Board within 15 calendar days of the completion of the event.

- Require the applicant to certify their statements under penalty of perjury and attest that the individual is authorized to sign on behalf of the organization.

The foregoing form is necessary to create a process for the Board for review of sponsoring entities, to implement the requirements of BPC Section 901, and to assist with providing detailed information to sponsoring entity applicants regarding the requirements for seeking and maintaining registration. The certification and disclosure requirements also assist in ensuring accurate, timely and complete information is being provided to the Board prior to making a decision to grant or deny registration.

The proposed text also requires that sponsoring entities submit the registration form no later than 90 days prior to the date of the sponsored event. This will allow for sufficient time for staff review of the registration information and to have the registration in place prior to receipt of participation authorization requests from out-of-state practitioners.

Section 1508.1(b) – Determination of Completeness of Form - Allows the Board to, by resolution, delegate to the Department of Consumer Affairs the authority to receive and process a sponsoring entity form, Form 901-A (DCA/2011), on behalf of the Board. This proposed text also specifies that the Board shall inform the sponsoring entity within 15 days of receipt that the form is either complete and the entity is registered, or that the form is deficient, and what specific information or documentation is required to complete the form and be registered. The proposed section allows the Board or its delegatee to reject the form if all of the identified deficiencies have not been corrected at least 30 days prior to the event.

*Factual Basis/Rationale:*

Because sponsoring entities may be required to register with multiple boards under BPC Section 901(d), the proposed regulation allows the Board to delegate the authority to receive and process the registration form to the Department of Consumer Affairs, the umbrella agency of all healing arts boards. Since some applicable boards will be making this delegation and incorporating the same Form 901-A (DCA/2011) by reference, the sponsoring entity need only file one registration form and the Department will notify the boards that the sponsoring entity submitted a complete form. This will streamline the process for approval of such health fairs under the Department of Consumer Affairs, the umbrella agency over all healing arts boards.

The proposed regulation also sets out specific timelines for written notification to the sponsoring entity that their application was received and whether the application is deemed complete and the entity becomes registered, or of the specific deficiencies and means of correction. This provides the sponsoring entity with clear timelines and requires the Department or the Board to give adequate notice to the entity and specific information as to how to correct any deficiencies in a timely manner. The proposed regulation specifies 30 days prior to the event as the date of rejection if all identified deficiencies have not been corrected, so the event sponsor is informed of the final date that deficiencies must be corrected before rejection of the application. The regulation allows for staff time to process completed applications, while giving event sponsors written notification of deficiencies and a deadline.

Section 1508.1(c) – Record Keeping Requirements – Implements and makes specific the recordkeeping requirements of sponsoring entities set forth in BPC Section 901(g).

*Factual Basis/Rationale:*

BPC Section 901(g) specifies certain records that sponsoring entities must maintain and requires entities to furnish these records upon request to the Board. In order to implement these requirements, the proposed regulation specifies that these records must be kept both at the physical premises of the sponsoring event and at a location in California for the statutorily required five (5)-year period. Having these records available at the event and thereafter, at a location in California, is necessary in order to provide the Board with the ability to inspect and have easier access to the records. The proposed regulation specifies that the records may be kept in either paper or electronic form and that the sponsoring entity shall notify the Board at the time of registration as to the form in which it will maintain its records. This provision makes it clear that the Board will accept either paper or electronic records.

Section 1508.1(d) – Notice Requirement – Specifies that the sponsoring entity shall place a notice visible to patients at every station where patients are being seen by the optometrist and designates what the notice will state and the font size to be used on the notice.

*Factual Basis/Rationale:*

Statutory law makes no provision for notifying the affected public that out-of-state practitioners are not California licensed optometrists in good standing. A member of the public would assume, unless this notice is provided, that optometrists providing optometric services in California would be duly licensed and regulated by the California State Board of Optometry. The requirement of written notification provides transparency to the public that individuals practicing optometry at the sponsored event are licensed in good standing either in California or by another state, district or territory. This proposed regulation further specifies a statement of disclosure that the California State Board of Optometry has only authorized the practitioner to provide services at the sponsored event and provides the Board's contact information if a concern or complaint needs to be filed.

Section 1508.1(e) – Requirement for Prior Board Approval of Out-of-State Practitioner - Clarifies that the Board's authorization must be provided before a sponsoring entity may allow an out-of-state practitioner to participate in a sponsored event.

*Factual Basis/Rationale:*

BPC Section 901 provides for authorization requirements for out-of-state practitioners and for registration requirements of sponsoring entities. This proposed regulation connects the two (2) requirements by clarifying that a sponsoring entity may not permit an out-of-state practitioner to participate in its event unless and until it receives authorization from the Board.

Section 1508.1(f) – Report - Specifies the information to be provided in the report required under BPC Section 901(f).

*Factual Basis/Rationale:*

BPC Section 901(f) requires a report to be filed with the Board by a sponsoring entity within 15 days after a sponsored event and sets forth the minimum information to be included. The statute provides no information as to the form of the report. The proposed regulation makes clear that the report may be in a form of the entity's choosing, and must contain certain specific information to ensure compliance with registration requirements. This information would include: the date(s) of the sponsored event, the location(s) of the sponsored event, the type(s) and general description of all health-care services provided at the sponsored event; and a list of each out-of-state practitioner granted authorization who participated in the sponsored event. The proposed regulation would also include a requirement that the license number for each participating out-of-state practitioner be included in the report. This information is necessary for the Board to identify the participants involved and verify compliance with the minimum standards adopted by the Board.

Adopt Section 1508.2 (Out-of-State Practitioner Authorization to Participate in Sponsored Event) – This section is being added to specify the requirements for an out-of-state practitioner to participate in sponsored events.

Adopt Section 1508.2(a)(1)-(2) – Request for Authorization to Participate – Provides the mechanism by which an out-of-state practitioner may request authorization to participate in a sponsored event, which would include submission of fingerprint clearances, a completed application and \$40.00 processing fee to the Board.

*Factual Basis/Rationale:*

BPC Section 901(b) requires an out-of-state practitioner to request authorization from the Board in order to participate in a sponsored event. The statute specifically requires the Board to prescribe a form and set a processing fee for this purpose. The proposed regulations implements BPC Section 901(b) by incorporating proposed Form 901-B (OPT/2011) to be submitted by the out-of-state practitioner to the Board to request authorization to participate in a

sponsored event. The form provides space for the applicant to include all of the information required by the statute. Form 901-B (OPT/2011) would include the following:

- Part 1 – Requires the applicant to provide: a completed application, a \$40.00 processing fee to the Board (or \$89.00 fee if using fingerprint cards (FD-258) provided by the Board), a copy of valid and active license and/or certificates authorizing the applicant to engage in the practice of optometry in another jurisdiction, a letter of verification of license status from each state's Board of Optometry where the applicant is currently practicing, a copy of a valid photo identification issued from another jurisdiction, a copy of a valid transcript to prove graduation from an accredited school or college of optometry, any documents or statements requested on the application, and fingerprints.
- Part 2 – Requires the applicant to disclose: name, social security number, contact information, employer, employer's contact information, and name and location of school/college of optometry from which the applicant graduated.
- Part 3 – Requires the applicant to respond regarding: current licensure in another state, district or territory of the United States; revocation or suspension of an optometric license; disciplinary actions taken by applicable licensing bodies; expiration of an optometric license; and additional room to provide an explanation if the applicant responded "yes" to any of the questions above.
- Part 4 – Requires the applicant to provide: name of non-profit or community-based organization hosting the event, name of event, date(s) and location(s) of the event, date(s) and location(s) applicant will be performing health-care services, the health-care services the applicant intends to provide, and the name and phone number of the contact person with the sponsoring entity.
- Part 5 – Requires the applicant to acknowledge and certify the following: (1) certify that the applicant has not committed or been convicted of a crime; (2) certify that the applicant is in good standing with the licensing authorities of all jurisdictions in which they hold a license to practice optometry; (3) agree to know and comply with applicable practice requirements and regulations of the Board; (4) agree to practice only within the scope of his/her licensure; (5) agree to provide services only to uninsured or underinsured persons at no cost; (6) agree to provide services only in association with the sponsoring entity and the event(s); (7) acknowledge that practice without proper licensure may subject the applicant to administrative, civil and/or criminal penalties; (8) agree to permit the Board to notify the licensing authority of the applicant's home jurisdiction of any potential grounds for discipline associated with the event; and, (9) certify that the applicant has read the questions in the application and that all information is true and complete to the best of the applicant's knowledge.
- Notification that completion and submission of the application grants permission to the Board to verify and investigate any information provided.
- Notification regarding collection and use of personal information given on the application.
- Notification that the applicant's signature on the application authorizes the National Practitioner Data Bank (NPDB) and the Drug Enforcement Administration (DEA) to release any and all information required by the Board.
- Notification that authorization will not be issued until clearance has been received from the California Department of Justice and the Federal Bureau of Investigation.

The Board has determined that the processing fee of \$40.00 is sufficient to cover the cost of developing the authorization process and processing the request of the health-care practitioner (See *STD. 399, Table A*). Additionally, the regulation's form requires the applicant to submit additional material not specifically listed in the statute. First, the applicant must submit personal

identifying information including contact information, the individual's social security number, employer's contact information and either a full set of fingerprints or a Live Scan Inquiry. These requirements are reasonably necessary in order for the Board to verify that an applicant is "in good standing" as required by BPC Section 901, including the requirement of BPC Section 901(b)(1)(B)(i) that the applicant has "not committed any act or been convicted of a crime constituting grounds for denial of licensure or registration under BPC Section 480." BPC Section 480 authorizes a Board to deny licensure based on an applicant's conviction of a substantially-related crime or the commission of an act substantially-related to the qualifications, functions or duties of a licensed optometrist. A criminal background check cannot be effectuated if the Board does not have the appropriate personal identifying information. Further, the Board is authorized to require applicants to furnish fingerprints for criminal background checks under BPC Section 144 and to require disclosure of Social Security Numbers for all other applicants under Section 30 of the BPC. Further, BPC Section 901(b)(1)(B)(iii) requires a health-care practitioner to agree to comply with all applicable practice requirements set forth in BPC Section 901 and the Board's applicable regulations. This form, with its accompanying attestation provisions, would provide the mechanism to effectuate such an agreement.

BPC Section 901(b) also provides that applicants seeking authorization to participate must meet the educational and experience requirements determined by the Board. The Board has determined that the applicant must have a current valid license to engage in the practice of optometry issued by a state, district or territory of the United States and submit a valid transcript to prove graduation from an accredited school or college of optometry recognized by the Board. It is the opinion of the Board that these are the minimum requirements necessary to protect the public from inexperienced or unqualified practitioners who have not met the Board's full requirements for licensure.

Section 1508.2(b) – Response to Request for Authorization to Participate - Sets forth the standard timeframe in which the Board shall grant or deny the authorization request.

*Factual Basis/Rationale:*

BPC Section 901(b)(1)(A) provides that the Board shall notify the sponsoring entity within 20 days of receiving a request for authorization to participate whether that request is approved or denied. The proposed regulation sets forth this statutory requirement and clarifies that such a response is due only after a "completed" request is received and requires the Board to notify both the applicant and the sponsoring entity. These additional requirements are necessary to ensure a seamless processing of the application and to provide proper notice to all affected parties.

Section 1508.2(c)(1)-(2) – Denial of Request for Authorization to Participate - Sets forth the criteria under which the Board must or may deny a request for authorization to participate in a sponsored free health-care event.

*Factual Basis/Rationale:*

BPC Section 901 provides that the Board must authorize the participation of out-of-state practitioners in sponsored events, but does not list specific criteria for denial of authorization other than if a practitioner "fails to comply with the requirements of this section or for any act that would be grounds for denial of an application for licensure." Therefore it is necessary to provide some specific detail of the criteria the Board will use beyond the general authorization to deny an application.

The Board has determined that the failure of an applicant to respond to a request for additional information within seven (7) days will result in an automatic denial of a request. Because the Board has only 20 days in which to grant or deny a request, timing is critical and the Board's opinion is that failure of an applicant to respond within seven (7) calendar days will sufficiently jeopardize the Board's ability to effectively review a completed application within the allotted time.

Further, a failure to meet any of the specified requirements determined by the Board and discussed under Section 1508.2(a) of these proposed regulations will constitute an automatic denial of the application. The Board has determined that these criteria are necessary to protect

the public from inexperienced or unqualified practitioners who have not met the Board's full requirements for licensure.

The proposed regulation also sets forth discretionary reasons for denying a request. The first of these is that the application is not received within 20 days prior to the event. BPC Section 901(b)(1)(A) provides that the Board shall use reasonable efforts to notify the sponsoring entity within this time. The proposed regulation provides needed clarity to the statute that if the statutorily required reasonable efforts are not sufficient to review the application in advance of the event, the Board may deny the request. It would be contrary to the Board's mission of consumer protection to require it to grant authorization to an individual whose request is submitted in such a short time-frame prior to the scheduled event that it cannot adequately be reviewed.

The other discretionary reasons for denial are based upon the past actions of the Board with respect to that particular individual. The Board believes that if an applicant has previously had a request denied or an authorization terminated, this alone may be cause for a subsequent denial. Because the time for review of the authorization is only 20 days, the Board may not have time to revisit the case of an individual who has already been determined by the Board as unfit to participate. The Board feels that it is reasonable to consider this a discretionary decision that may be used on a case-by-case basis to re-evaluate a particular individual's circumstances as appropriate, if sufficient time exists to do so without compromising public protection. The Board has also determined that it would be against the public interest to permit an applicant to practice, even temporarily for a limited purpose, in this State without a license for more than three (3) sponsored events per year (maximum of 30 calendar days per year). As a result, the Board has specified that grounds for denial of authorization to practice to an out-of-state practitioner would include that an applicant had participated in three (3) sponsored events during the 12-month period immediately preceding the current application.

Section 1508.2(d) – Appeal of Denial - Provides an appeal procedure for an applicant who has had a request for authorization to participate denied by the Board.

*Factual Basis/Rationale:*

BPC Section 901 allows for the denial of a request for authorization to participate, but does not provide any appeal procedure for the denied individual. In order to provide adequate due process, the Board feels that applicants should have access to the same appeal procedure available for an out-of-state practitioner who has had his or her authorization terminated. The proposed regulation references the appeal procedure in Section 1508.3 of these proposed regulations, discussed below. This provides consistency in the two appeal processes.

Section 1508.2(e) – Notice Requirement – Specifies that each out-of-state practitioner authorized to participate in a sponsored event must place a written notification at every station at which that person will be seeing patients regarding the practitioner's license status, the scope of authorization to practice in California, and font size to be used in the notification.

*Factual Basis/Rationale:*

Statutory law makes no provision for notifying the affected public that out-of-state practitioners are not California licensed optometrists in good standing. A member of the public would assume, unless this notice is provided, that optometrists providing optometric services in California would be duly licensed and regulated by the California State Board of Optometry. The requirement of written notification provides transparency to the public that individuals practicing optometry at the sponsored event are licensed and in good standing by another state, district or territory.

This proposed regulation further specifies a statement of disclosure that the California State Board of Optometry has only authorized the practitioner to provide services at the sponsored event and provides the Board's contact information if a concern or complaint needs to be filed.

Adopt Section 1508.3 - Termination of Authorization and Appeal

This section is being added to specify the procedures for termination.

Section 1508.3(a) – Grounds for Termination - Provides the grounds upon which the Board may terminate the authorization to participate in a sponsored free health-care event previously granted to an out-of-state practitioner.

*Factual Basis/Rationale:*

The first two grounds for termination in the proposed regulation are consistent with Section 901(j)(1), but are also necessary to provide guidance to the regulated practitioner that failure to comply with the Board's requirements or commission of an act that would constitute grounds for discipline against a California licensee would similarly be grounds for disciplining the out-of-state practitioner. As an additional ground for termination, this proposed regulation adds the receipt of a credible complaint indicating that the practitioner is unfit to practice at the sponsored event or has otherwise endangered consumers of the practitioner's services. This provision is necessary in order for the Board to act consistently with its mandate that protection of the public is its highest priority. Because of the permissive and temporary nature of the licensure exemption granted under BPC Section 901 and the limited time in which the Board has to review and verify the qualifications of the out-of-state practitioner, the Board feels that it is essential to act immediately to terminate the authorization to participate when a credible complaint of endangerment is received.

Section 1508.3(b) – Notice of Termination - Specifies that written notice of termination, including the basis for the termination, shall be given to both the sponsoring entity and the out-of-state practitioner. If the written notice is provided during the sponsoring event, then this proposal would permit the Board to provide notice to any representative of the sponsored event on the premises of the event.

*Factual Basis/Rationale:*

The statute provides that written notice of termination shall be given both to the sponsoring entity as well as to the individual practitioner. This proposed regulation is necessary to clarify that in the event that a termination is issued during the course of a sponsored event, the Board may provide the written termination notice to any representative of the sponsoring entity on the premises of the event. This provision is necessary because the most effective way to notify the entity in a manner that protects the public is at the event itself so that the practitioner will be instructed to cease practice immediately. Further, satisfaction of the Board's notice obligations through service upon any representative at an event would more easily ensure rapid notification to the sponsoring entity of the termination and prevent possible avoidance of service of this notice by the sponsoring entity if service on a specific contact person were required.

Section 1508.3(c) – Consequences of Termination - Sets forth the consequences of a termination of authorization to participate and how the Board will report the fact of such termination to the national practitioner data banks and the licensing authority of each jurisdiction in which the out-of-state practitioner is licensed.

*Factual Basis/Rationale:*

BPC Section 901(j)(3) provides that out-of-state practitioners shall not provide services under this statute following a termination of authorization. The proposed regulation specifies that the practitioner shall "immediately" cease participation in the event. The Board believes that this clarification is necessary in the event that a termination is issued during the course of an event. This section prevents any confusion as to when the termination becomes effective and removes any doubt that the practitioner must immediately cease his or her participation as soon as the termination is received.

The proposed regulation also provides that the Board will consider a termination a disciplinary measure that is reportable to the national practitioner data banks and the individual's out-of-state licensing authorities. The Board views these provisions as necessary and logical for public protection. The grounds for termination are those that the Board would consider as disciplinary measures for its own licensees – BPC Sections 475, 480 and violations of the Act. Because the Board does not have licensing authority over the out-of-state practitioner, its only disciplinary remedy is to report the conduct to the individual's home jurisdiction and applicable national practitioner data banks. If the conduct is such that it would lead to action against the practitioner's out-of-state license, then the Board would have that information available to it in

the event that the individual applied for either a subsequent authorization to participate in a future sponsored event or a license to practice in California.

Section 1508.3(d) – Appeal of Termination - Provides the procedure for appealing denials of authorizations to participate in sponsored events and terminations of authorizations to participate in sponsored events.

*Factual Basis/Rationale:*

The statute allows for an out-of-state practitioner who has had his or her authorization to participate terminated by the Board to file a written appeal to the Board within 30 days of receipt of the termination notice. The proposed regulation specifies that this request for appeal shall be considered a request for an informal hearing under the Administrative Procedure Act (APA) (Government Code Sections 11445.10 et seq.). This informal appeals process is a potentially less costly system than the formal APA hearing procedure and is warranted for removal or denial of this type of authorization. Formal APA appeals can take an average of one (1) year or more, based upon the complexity of the case, to prosecute from the time an appeal is requested. The Board does not anticipate that the issues for a potential appeal of these denials or terminations would be complex (whether requirements of the application had been met or compliance maintained), and there would be a greater need to have such appeals resolved in a fairly short time-frame given the needs of the sponsoring entity. As a result, the Board believes that affording appellants with this informal process provides a simpler and more expeditious alternative to address their appeals while satisfying due process concerns.

Section 1508.3(e) – Informal Conference Option - Provides an alternative to a hearing under the APA for appeals submitted by out-of-state practitioners.

*Factual Basis/Rationale:*

BPC Section 901(j) allows for the filing of an appeal by an out-of-state practitioner. In addition to the APA procedure set forth in proposed Section 1508.3(d) above, this proposed regulation also offers the appealing out-of-state practitioner the option of an informal conference with the Board's Executive Officer to try and resolve the appeal. This proposed regulation is consistent with the Board's practice for its own licensees who have been issued a citation (BPC Sections 125.9, 148, and California Code of Regulations Title 16, Section 1581) and provides an inexpensive option to ensure the efficient resolution of appeals when possible.

The Registration of Sponsoring Entity Form 901-A (DCA/2011) and the Request for Authorization to Practice without a California License Form 901-B (OPT/2011) are incorporated by reference in these proposed regulations. It would be cumbersome, unduly expensive and otherwise impractical to publish the documents in the California Code of Regulations. These forms are available on the Board's website and from the Board upon request.

**Underlying Data:**

1. Assembly Bill 2699 (Chapter 270, Statutes of 2010)
2. Title 20 USC Section 7801
3. Form 901-A (DCA/2011)
4. Form 901-B (OPT/2011)
5. May 18, 2012 Board of Optometry Meeting Minutes

**Business Impact:**

This regulation will not have a significant adverse economic impact on businesses. This initial determination is based on the following:

Sponsoring entities may incur nominal expenses associated with submitting the registration form to the Board, and complying with recordkeeping requirements, and reporting requirements. Sponsoring entities shall be responsible for submitting the registration Form 901-A (DCA/2011) to the Board. Expenses associated with submitting the registration form include printing and mailing; these expenses are minimal and should not have a significant impact on sponsoring entities. Additionally, sponsoring entities shall be responsible for maintaining copies of all records required by BPC Section 901, as well as the copy of the

authorization for participation issued by the Board to an out-of-state practitioner at a physical location in California. The records must be maintained for a period of at least five (5) years after the date the sponsored event ended; the records may be kept in electronic or paper form. The sponsoring entity shall also be responsible for maintaining copies of all records required by BPC Section 901(g) at the physical location of the sponsored event. Expenses associated with these recordkeeping requirements are nominal and include storage and transportation of the required records; these expenses are minimal and should not have a significant impact on sponsoring entities. Finally, the sponsoring entity shall be responsible for providing a report to the Board summarizing the details of the sponsored event within fifteen days after the conclusion of such event. The report may be provided to the Board on a form of the sponsoring entity's choosing. Expenses associated with these reporting requirements are nominal and include printing and postage; these expenses are minimal and should not have a significant impact on sponsoring entities.

Out-of-state optometrists seeking authorization from the Board to participate in a sponsored event will incur a \$40.00 fee for application processing. Additionally, applicants will incur costs associated with furnishing fingerprints for the purpose of the Board conducting a criminal history check. The cost for a person to get fingerprinted is \$49.00. Of this fee, \$32.00 goes to the Department of Justice for conducting the background check and providing criminal record reports to the Board. The vendor's fee ranges from \$5.00 to \$45.00. For those who are not able to submit fingerprints electronically via Live Scan, the fee for the Board to process "hard cards" fingerprints is \$49.00. These fees will have to be factored into the cost of the individual's volunteered services. The fees may be covered by sponsoring entities.

All the costs described above are necessary for the protection of the public and to provide staff time and resources for registration of sponsored events and volunteer out-of-state practitioners in the short time-frames set in the statute.

These proposed regulations may affect a federally funded State agency or program if that State agency or program is a nonprofit who conducts health fairs in California. It would impose the reporting, recording keeping, and other compliance requirements specified in these proposed regulations and BPC section 901.

The only possible alternative which would lessen any significant adverse impact on business (which includes small business) is to use electronic communication as much as logically possible throughout the authorization process for sponsoring entities and out-of-state optometrists.

#### **Economic Impact Assessment:**

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because out-of-state practitioners who volunteer at sponsored free health-care events are only authorized to practice in California for a limit of 10 business days per event, three (3) or more times a year. The services these out-of-state practitioners will be restricted to are free, volunteer services for the uninsured or underserved at Board-authorized sponsored free health-care events.
- It will not create new business or eliminate existing businesses within the State of California because businesses operated by California licensees do not normally provide services at no cost. Businesses owned by small business owners may benefit from these regulations if their employees attend sponsored events and are thus provided vision-care at no cost.
- It may affect the expansion of businesses currently doing business within the State of California if they are a sponsoring entity since these proposed regulations provide for the recruitment of out-of-state practitioners as volunteers, it may encourage other sponsoring entities to coordinate health fairs of their own.
- This regulatory proposal benefits the health and welfare of California residents, specifically, uninsured or under-insured Californians that are currently unable to receive optometric care due

to lack of funding and resources. These proposed regulations will permit sponsoring entities to have access to out-of-state optometrists as an additional resource for volunteer recruitment purposes. This will prevent a shortage of optometrists at sponsored free health-care events, in turn increasing access to care.

There may also be benefits to private businesses that are not able to provide vision-care to their employees. Many small businesses are legally required to provide health-care, but are not required to provide vision-care. Their employees could attend these free health-care events to meet their vision needs. This helps the businesses maintain employees with healthy vision so they can continue to work. Poor health in vision can impact the total health of an individual. These regulations will benefit the health of Californians who attend sponsored events, in addition to providing public protection through registration of out-of-state volunteer optometrists.

- This regulatory proposal benefits worker safety because as Californians, they will be able to attend sponsored events to obtain health-care, improving their overall health. Studies have shown that healthy vision improves productivity, thus keeping employees safe to continue to work.
- This regulatory proposal does not affect the state's environment because the focus is increasing access to appropriate vision-care to uninsured or under-insured Californians, not the environment.

**Specific Technologies or Equipment:**

This regulation does not mandate the use of specific technologies or equipment.

**Consideration of Alternatives:**

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific. The Board is directed by statute to develop these regulations and there is no other method of developing the forms and procedure for registration of sponsoring entities and granting authorization requests by out-of-state practitioners to participate in sponsored events.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

- Delay or not promulgate these regulations. This is not reasonable because the statute provides a registration and fee process to be developed by the Board to implement the statute. Failure to create a procedure would defeat the purpose of the statute, which intends to provide an opportunity for out-of-state licensed practitioners to participate in certain free health-care events. A delay is unreasonable due to the statute's sunset date of January 1, 2014. Because this statute is effective for only three (3) years, the Board must act to implement the required process as soon as possible.

## BOARD OF OPTOMETRY

### ORDER OF ADOPTION

Amend sections 1514 and 1525.1 in Division 15 of Title 16 of the California Code of Regulations to read as follows:

#### **§1514. RENTING SPACE FROM AND PRACTICING ON PREMISES OF COMMERCIAL (MERCANTILE) CONCERN**

Where an optometrist rents or leases space from and practices optometry on the premises of a commercial (mercantile) concern, all of the following conditions shall be met:

(a) The practice shall be owned by the optometrist and in every phase be under his/her exclusive control. The patient records shall be the sole property of the optometrist and free from any involvement with a person unlicensed to practice optometry. The optometrist shall make every effort to provide for emergency referrals.

(b) The rented space shall be definite and apart from space occupied by other occupants of the premises and shall have a sign designating that the rented space is occupied by an optometrist or optometrists.

(c) All signs, advertising, and display shall likewise be separate and distinct from that of the other occupants and have the optometrist's name and the word "optometrist" prominently displayed in connection therewith.

(d) There shall be no legends as "Optical Department," "Optometrical Department," "Optical Shoppe," or others of similar import, displayed on any part of the premises or in any advertising.

(e) There shall be no linking of the optometrist's name, or practice, in advertising or in any other manner with that of the commercial (mercantile) concern from whom he/she is leasing space.

Note: Authority cited: Sections 3025 and 3025.5, Business and Professions Code.

Reference: Sections 651 and 3025, Business and Professions Code.

#### **§ 1525.1, FINGERPRINT REQUIREMENTS**

(a) As a condition of renewal for a licensee who was initially licensed prior to ~~January~~ April 1, 1998 2007, ~~or for whom an electronic record of the submission of fingerprints no longer exists,~~ such licensee shall furnish to the Department of Justice a full set of fingerprints for the purpose of conducting a criminal history record check and to undergo a state and federal criminal offender record information search conducted through the Department of Justice.

(1) The licensee shall pay any costs for furnishing the fingerprints to the Department of Justice and conducting the searches.

(2) A licensee shall certify when applying for renewal whether his or her fingerprints have been furnished to the Department of Justice in compliance with this section.

(3) This requirement is waived if the license is renewed in an inactive status, or if the licensee is actively serving in the military outside the country. The board shall not return a license to active status until the licensee has complied with subsection (a).

(4) A licensee shall retain, for at least three years from the renewal date, either a receipt showing the electronic transmission of his or her fingerprints to the Department of Justice or a receipt evidencing that the licensee's fingerprints were taken.

(b) As a condition of renewal, a licensee shall disclose whether, since the licensee last applied for renewal, he or she has been convicted of any violation of the law in this or any other state and, the United States, and its territories, military court, or other country, omitting traffic infractions under \$300 not involving alcohol, dangerous drugs, or controlled substances.

(c) As a condition of renewal, a licensee shall disclose whether, since the licensee last applied for renewal, he or she has been denied a license or had a license disciplined by another licensing authority of this state, of another state, of any agency of the federal government, or of another country.

(d) Failure to comply with the requirements of this section renders any application for renewal incomplete and the license will not be renewed until the licensee demonstrates compliance with all requirements.

(e) Failure to furnish a full set of fingerprints to the Department of Justice as required by this section on or before the date required for renewal of a license is grounds for discipline by the Board.

(f) As a condition of petitioning the board for reinstatement of a revoked or surrendered license or registration, an applicant shall comply with subsection (a).

Note: Authority cited: Sections 144, 3010.1, 3010.5, 3024 and 3025, Business and Professions Code.

Reference: Section 3110, Business and Professions Code; and Section 11105, Penal Code.

**BOARD OF OPTOMETRY  
FINAL STATEMENT OF REASONS**

**Hearing Date:** July 11, 2011

**Subject Matter of Proposed Regulations:** Renting Space & Fingerprints

**Section(s) Affected:** California Code of Regulations (CCR) sections 1514, 1525.1. CCR section 1513 has been removed from this regulatory package. See below for more detail.

**Updated Information:**

A) The Initial Statement of Reasons (ISR) is included in the file. The information contained therein is updated as follows:

- 1) At its March 30, 2012 meeting, the Board withdrew the proposed changes to CCR section 1513 due to the comments received during the 45-day comment period and the 15-day comment periods. Proposed changes to CCR 1513 will be re-noticed in the future. The Board issued two 15-day notices of Modified Text. In the first Modified Text, CCR section 1513 and 1514 were both modified. In the second Modified Text, only CCR section 1513 was further modified. ISR. CCR section 1525.1 was never modified and remains as initially proposed. Below is a summary of the modifications made to CCR sections 1513 and 1514:

*Modified Text 1 (December 8, 2011 – December 23, 2011)*

CCR section 1513

In response to comments that the proposed changes to CCR section 1513 are unnecessary and would be financially burdensome to optometrists, the Board withdrew the proposed changes to this section at its March 30, 2012 Board meeting.

CCR section 1514

In response to comments that the proposed changes to CCR section 1514 made it appear compulsory to advertise, 1514(c) was returned to its original form and language was added to 1514(b) to reflect the true intent of the Board. The intent of the Board was to clarify that there must be a sign designating the rented space is occupied by an optometrist or optometrists in addition to the requirement that the rented space must be definite and apart from space occupied by other occupants on the premises.

*Modified Text 2 (March 7, 2012 – March 22, 2012)*

CCR section 1513

In response to continued comments that proposed changes to CCR section 1513 are unnecessary and would be financially burdensome to optometrists, the Board withdrew the proposed changes to this section at its March 30, 2012 Board meeting

- 2) On page 2, under *Factual Basis/Necessity*, Section 1525.1. Fingerprint Requirements, further justification is added to explain the removal of the language in subsection (a) that reads "... or for whom an electronic record of the submission of fingerprints no longer exists...":

Another reason that it would be beneficial to remove this language is that even if an optometrist does not fall within the April 1, 2007 cut-off date, all optometrists must be fingerprinted in order to be licensed by the Board. The DOJ and/or the FBI will always have a record of who was fingerprinted and whether the prints cleared or were rejected, thus, the Board can confirm the status of an optometrist's fingerprints with these agencies if necessary.

- 3) On page 2, under *Factual Basis/Necessity*, Section 1525.1. Fingerprint Requirements, the following statement can be found:

After a random review of approximately 100 licensee files, the Board of Optometry (hereafter "Board") found that most of them dated prior to 2007 did not have fingerprints sent to the FBI, only to the DOJ.

The statement is clarified as follows:

After a random review of approximately 100 licensee files, the Board of Optometry (hereafter "Board") found that most of them dated prior to April 1, 2007 did not have fingerprints sent to the FBI, only to the DOJ. Therefore, the April 1, 2007 date was chosen because optometrists licensed as late as the end of March 30, 2007 also do not have electronic records of submitted fingerprints on file.

- 4) On page 3, under *Business Impact*, it was found that this regulatory package would have an impact on business, thus the following information is being added:

The Board has made an initial determination that the proposed regulatory actions will have an impact on businesses that are found to be noncompliant with CCR section 1514. Optometry businesses who are in violation of CCR section 1514 will be fined by the Board in amounts ranging from \$250 to \$2,500 per violation. If an optometrist is found to have a history of similar violations, or multiple violations demonstrating willful disregard of the law, additional fines of up to \$5,000 may be attributed to the initial fine.

Businesses in noncompliance will have to create signage that designates the rented space is occupied by an optometrist or optometrists to avoid discipline by the Board. Creating signage may be costly and ranges from \$100 to \$40,000.

In regards to CCR section 1525.1 the Board also made the initial determination that the proposed regulatory action may have an impact on businesses that pay for their employed optometrist's renewal and fingerprinting fees. They may incur a business impact of a one time \$49 fingerprinting fee, as well as an additional fee from the fingerprinting operator in the range of \$5 to \$45.

- 5) On page 3, under *Consideration of Alternatives* the following alternatives were considered and rejected:

Alternative 1: Make a statutory change to further clarify signage and fingerprinting requirements. This alternative was rejected because it would have required a proposal to go through the legislature. That would have been more time consuming and required much staff time. To name a few of the tasks required to successfully navigate a proposal through the legislature, staff would have needed to find an author for the proposal; would have to attend meet and greets with committee members voting on the proposal; would have to attend hearings; write multiple letters of support and get other stakeholders to support the proposal as well, and more. A regulatory solution was more reasonable and permits the Board to have more control over the clarifying changes being made.

Alternative 2: Take no action.

This alternative was rejected because clarity in the law is needed so that the Board can enforce its laws and regulations. The proposed changes to CCR section 1514 and 1525.1 are for clarity purposes only, and are not imposing completely new requirements, just expanding on what is already in law. Taking no action would require the Board to interpret the law, and that puts the Board at risk of enforcing underground regulations.

B) The Notice is included in the file. The information contained therein is updated as follows:

- 1) On page 2, under FISCAL IMPACT ESTIMATES the following changes were made:

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: Yes

There will be a fiscal impact to the Board because if an optometrist who owns a business or small business does not comply with CCR section 1514, they may be fined by the Board. Noncompliance with CCR section 1514 is considered a "Class C" violation with fine amounts ranging from \$250 to \$2,500 per violation.

In some instances, in addition to the fine for the violation(s) of the law, an optometrist could be fined up to

\$5,000 per violation if the optometrist has a history of similar violations, or if there are multiple violations demonstrating willful disregard of the law.

Business Impact: Yes

There are costs associated with the proposed regulatory action.

CCR section 1514

If an optometrist who owns a business is found to be in violation of this section of law, they will be fined by the Board. Fine amounts range from \$250 to \$2,500 per violation. If it is found that the optometrist has a history of similar violations or demonstrates willful disregard of the law, then an additional fine of up to \$5,000 will be added to the initial fine.

CCR section 1525.1

If an optometrist's employer chooses to pay their fingerprinting fees in addition to the renewal fee, it will cost the business a one time fee of \$49. This fee covers the Department of Justice and FBI costs. There may also be an additional fee required by the fingerprint operator that varies by location (between \$5 and \$25). The Board does not track the amount of optometrists who have their employers pay for their renewal and fingerprinting fees.

Cost Impact on Representative Private Person or Business:

CCR section 1514

If a private optometrist or optometry business is found to be in violation of these sections of law, they will be fined. Fine amounts range from \$250 to \$2,500 per violation. If it is found that the optometrists has a history of similar violations or demonstrates willful disregard of the law, then an additional fine of up to \$5,000 will be added to the initial fine.

Also, if an optometrist or business must create signage to comply with section 1514, getting the sign made may be costly. The cost of signage depends on many factors such as size, style, location, material, and length of optometrist or business name. A sign can cost from \$100 to \$40,000.

Simple and Affordable: An average 4' by 8' sign (vinyl banner, aluminum) is in the \$500 to \$650 range with posts, mountings and installation. (Source: [www.thesignchef.com](http://www.thesignchef.com))

Custom: An average 7' by 7' sign including manufacturing costs, installation, design work (e.g., internally and externally illuminated surfaces, channel letters illuminated with neon and LEDs), city permitting process, and inspection is in the \$18,000 to \$40,000 range. (Source: [www.encoreimage.com](http://www.encoreimage.com))

CCR section 1525.1

There will be a one time fee of \$49 to obtain fingerprints for the Department of Justice and the FBI. There may be an additional fee of about between \$5 and \$25 required by the fingerprint operator, but this varies by location.

- 2) On page 2, under EFFECT ON SMALL BUSINESS, the following changes were made:

Although the amendments to the regulations are only clarifying what is required of optometrists in order to remain in compliance with the Board, the Board has determined that the proposed regulations would have an effect on small businesses. Any optometrists found to be in noncompliance with CCR section 1514 may need to create signage in order to avoid fines from the Board.

- 3) On page 3, under CONTACT PERSON, the address for both contacts has changed. The new address is 2450 Del Paso Road, Suite 105, Sacramento, CA 95834. Phone numbers and e-mails remain the same.

**Local Mandate:**

A mandate is not imposed on local agencies or school districts.

**Small Business Impact:**

This action does not have a significant adverse economic impact on small businesses. The anticipated benefits of

this regulatory proposal are:

- 1) Clarifies what is required of optometrists in order to stay in compliance with the Board.
- 2) Specifically, the proposed changes to CCR section 1514 will ensure that consumers know that their optometrist's business is separate and apart from other businesses in a commercial (mercantile) concern.
- 3) Specifically, the proposed changes to CCR section 1525.1 will ensure that all optometrists who need to get their fingerprints taken by the DOJ and FBI will do so, resulting in added consumer protection.

**Consideration of Alternatives:**

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which it was proposed or would be as effective and less burdensome to affected private persons than the adopted regulations or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

**Objections or Recommendations Received During the 45-Day Comment Period Pertaining to CCR section 1514 and Responses:**

The Board received one comment in opposition of the proposed regulatory action during the 45-day comment period, which is contained in Tab 7 of this rulemaking file, and summarized below with the responses from the Board.

**Craig Steinberg, OD:**

**Comment (1):** The proposed amendments to subsection (c) changes the wording of the regulation, and in so doing appears to make signs and advertising compulsory. Under the new language, it appears to be a violation of the rule to not advertise.

**Response:** The Board accepts this recommendation. The Board's intent with the proposed changes is not meant to make signs and advertising compulsory. The purposes of the changes is to inform the public regarding the location of the optometrist treating them. Modified Text is being provided to address this issue as it was intended.

**Objections or Recommendations Received During the 45-Day Comment Period and 15-Day Comment Period Pertaining to CCR section 1513 and Responses:**

The Board received comments pertaining to the proposed changes to CCR section 1513, resulting in the withdrawal of this section from the rulemaking package. The Board withdrew this section at its March 30, 2012 Board meeting and did not address the comments received because the section was withdrawn. Proposed changes to CCR 1513 will be possibly re-noticed in the future. Below is a summary of the comments. The full comments can be found in Tab 7 of this rulemaking file.

**45-Day Comment Period, Craig Steinberg, OD:**

**Comment (1):** What is to be achieved by creating another regulation that even the most prominent and well-meaning optometrists are likely to be in violation of?

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**Comment (2):** This proposal would "mean doctors who never use their middle name or middle initial, for instance, or those who have long foreign middle names or hyphenated names, would have to change every single advertisement, business card, stationary, and, importantly, office signs to include a name they do not use and are not generally known by (e.g., WYDEVEN ANTHONY JOHN VANDE). This would cost many thousands of dollars to recreate sometimes very expensive signs and stationary for no real purpose.

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**Comment (3):** Indeed, the rule could be construed to also preclude the addition of professional or academic designations. Would doctors be violating this regulation by including F.A.A.O after their name?

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**Comment (4):** Every doctor is already required to display his or her license, or Statement of Licensure in the office where patients can see it. That is sufficient to inform the public.

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**Comment (5):** This proposal is intrusive and will create a bureaucratic nightmare for all involved (Board/enforcement; Licensees/compliance). Making it a criminal act or unprofessional conduct to put one's middle initial on their business card instead of their full middle name is ludicrous.

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**15-Day Comment Period (December 8, 2011 – December 23, 2011):**

The Board received four comments during the 15-day comment period, which are contained in Tab 7 of this rulemaking file. Three comments were in opposition of the proposed action and one comment was in support. The comments are summarized below.

**Adolphus Lages, OD Comment of Support Related to CCR section 1513:**

**Comment (1):** Dr. Lages comments that as an individual who has worked as Medical Director of Vision Plan of America, and someone who has audited hundreds of optometrists, he agrees with the Board's proposed CCR section 1513 as written. He agrees that all items that contain an optometrist's name should contain the full name, including business/appointment cards, receipts, etc. He also comments that many Fictitious Name Permits that he has seen are almost always altered, and this should be restricted as well.

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**Donald Wes Wheadon, O.D., Alexander Lyle Baker, O.D., and Scott Phillip Feldman, O.D. Comments of Opposition Related to CCR section 1513:**

**Comment (1):** All commentors believe the regulation would present a great personal and professional problem because optometrists would have to change all their professional identification to long, registered names. For example, Dr. Wheadon has been using the alternate name of D. Wes Wheadon for his entire life for all purposes, including optometric advertising.

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**Comment (2):** All commentors believe the regulation as written would be a huge expense and an unbelievable burden, especially in a down economy.

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**Comment (3):** All opposed commentors believe that the purpose of this regulation is to standardize the Board's business procedures so they are easier to manage. They also believe that this regulation is unnecessary, does not make sense, would force optometrists to jump through more hoops, and would make more work for the Board.

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**Comment (4):** Dr. Wheadon and Dr. Baker propose a solution, so that those under the Board's jurisdiction will be allowed to keep their listings as they are. Their solution would require that upon renewal of a license, the Board ask optometrists to list the alternate names they use so they can be included in a database. Once on file, they assume the Board will be able to easily find the alternate name and match it to the optometrist.

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**Comment (5):** Dr. Baker and Dr. Feldman ask how many cases of mistaken identity have occurred during past complaints over a five year period? They cannot believe there are that many confusing issues. Dr. Baker inquires how many of these mistaken complaints could not be sorted out relatively easily? Presumably, if someone is filing a complaint they have been to the doctor's office and can easily provide an address or phone number. Even if they have not been to the doctor's office and are basing a complaint solely on an advertisement, it would be very poor advertising to not include contact information for the doctor's office, which again would provide an easy means of accurate identification. Dr. Baker cannot imagine many instances where a valid complaint would not be supported by other identification besides the name or nickname of a doctor.

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**Comment (6):** A vague definition of advertising can result in new penalties where none should exist, e.g., if Dr.

Baker were to write a letter to an editor extolling his participation in a recent vision screening and the paper did not print his full name or license number, would he be penalized for improper advertising?

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**15-Day Comment Period and Responses (March 7, 2012 – March 22, 2012):**

The Board received two comments during the 15-day comment period, which is contained in Tab 7 of this rulemaking file. Both comments were in opposition. The comments are summarized below.

**Blair M. Ball, OD Comment of Opposition and Recommendation Related to CCR section 1513:**

**Comment (1):** The proposed regulatory changes represent a large financial burden on each individual optometrist as far as set-up fees and print costs are concerned. He comments that a consumer would only be interested in an optometrist's license number if they had an unpleasant experience and wanted to file a complaint. Other than for that reason, a consumer would not have an interest to view an optometrist's license number on a business card or other advertisement. Dr. Ball recommends that a more cost effective solution would be to change the format of a license certificate by increasing the size of the license number and placing it in a more prominent area on the certificate (e.g., next to the optometrist's name).

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**California Optometric Association (COA) Comment of Opposition Related to CCR section 1513:**

**Comment (1):** Current law is sufficient to address the Board's concerns. Current law already requires advertisements to "clearly and prominently identify the individual optometrist." Anyone who uses a completely different name is already in violation of current law, and the Board has the authority to enforce action against them.

**Comment (2):** The new proposed modified text provides an added expense to optometrists who are complying with current law. Requiring both an optometrist's full name and license number in advertising goes well beyond solving the narrow problem the regulation originally intended to address.

**Comment (3):** The proposed regulation would be overly burdensome on optometrists even with the removal of the word "signs". While the word "signs" was deleted, the phrase "publication, media or other" was added when referring to types of advertisement that would require an optometrist's full name and license number. Eliminating the word "signs" is of no benefit, since "signs" would still be included under the phrase "or other". Additionally the words "media" and "publication" is also a concern because that may include e-mails sent to patients, social media such as Facebook or Twitter, and COA's publications and website. Adding these words not only creates a burden, but also uncertainty as to the regulation's requirements.

**Response:** No response. Proposed changes to CCR 1513 were withdrawn.

**Finding of Necessity:**

N/A

**SB 1111 (4/12/2010 version) Proposed Changes through Regulations****Business and Professions Code:**

1. **§720.2(b) – Board delegation to the Executive Officer regarding stipulated settlements to revoke or surrender license:** Permits the Board to delegate to the Executive Officer the authority to adopt a “stipulated settlement” if an action to revoke a license has been filed and the licensee agrees to surrender the license, without requiring the Board to vote to adopt the settlement.

According to the Attorney General’s Office (AG), when a filed case settles, the receipt of a Notice of Defense from the licensee will trigger either settlement discussions or adoption of a Default Decision. Stipulated settlements are a more expeditious and less costly method of case resolution. The Executive Officer of the Board can provide summary reports of all settlements to the Board and the Board can provide constant review and feedback to the Executive Officer so that policies can be established and adjusted as necessary. There have been instances of undue delays between when a fully-signed settlement has been forwarded to the Board’s headquarters and when it has been placed on the Board’s agenda for a vote. Delegating this authority to the Executive Officer will result in a faster final disposition of these matters. For example, the fact that the Board of Registered Nursing, has reduced the number of its annual meetings has only increased the need for this.

Furthermore, according to the Center of Public Interest Law (CPIL), it is taking the Attorney General (AG) too long to prepare a proposed default decision. In 2004-2005, it took the AG almost six months to file a proposed default decision. In 2008-2009 it took about 2.5 months. As argued by CPIL, filing a proposed default decision is “not rocket science” and should only take a matter of hours.

**Recommend: Amend 16 CCR 1403.**

2. **§720.10 – Revocation for sexual misconduct:** Require an Administrative Law Judge (ALJ) who has issued a decision finding that a licensee engaged in any act of sexual contact with a patient or who has committed or been convicted of sexual misconduct to order revocation which may not be stayed.

This provision is similar to language which currently exists for physicians (B&P §2246), psychologists (B&P §2960.1), respiratory care therapists (B&P §3752.7), marriage/family therapists (B&P §4982.26), and clinical social workers (B&P §4992.33). According to DCA, there is no reason why other health professionals should not be subject to the same requirements for revoking a license for acts of sexual exploitation or conviction of a sex offense, or denying or revoking of a license of a person who is a registered sex offender. **Recommend: Amend regulations/disciplinary guidelines.**

3. **§720.12 – Denial of application for registered sex offender:** Require the Board to deny a license to an applicant or revoke the license of a licensee who is registered as a sex offender. This provision is similar to language which currently exists for physicians (B&P §2221(d) and Section §2232), dentists (B&P §1687), physical therapists (B&P §2660.5) and psychologists (B&P §2964.3). According to DCA, there is no reason why other health professionals should not be subject to the same requirements for revoking a license for acts of sexual exploitation or conviction of a sex offense, or denying or revoking a license of a person who is a registered sex offender.

**Recommend: Amend the regulations pertaining to the applicant requirements and disciplinary guidelines.**

4. **§720.14 – Confidentiality agreements regarding settlements:** Confidentiality agreements regarding settlement can cause delay and thwart the Board’s effort to investigate possible cases of misconduct, thereby preventing the Board from performing its most basic function – protection of the public. This provision is similar to language which currently exists for physicians (B&P §2220.7). Assembly Bill 249 (Eng, 2007) would have extended this prohibition to all healing arts professionals but was vetoed by the Governor. According to DCA, there is no reason why other health professionals should not be subject to the same prohibition which would prevent them from including a “gag clause” in a malpractice settlement, thus preventing a board from receiving information about a practitioner who may have violated the law. The use of gag clauses still persists and are sometimes used to intimidate injured victims so they won’t testify against a licensee in investigations. Gag clauses can cause delays and thwart a board’s efforts to investigate possible cases of misconduct, thereby preventing the board from protecting the public. Gag clauses increase costs to taxpayers, delay action by regulators, and tarnish the reputation of competent and reputable licensed health professionals. California should not allow repeat offenders who injure patients to hide their illegal acts from the authority that grants them their license to practice as a healthcare professional. **Recommend: Define in regulation that participating in confidentiality agreements regarding settlements is unprofessional conduct.**

5. **§720.16(d) and (f) – Failure to provide documents and §718(d) – Failure to comply with court order:** Require a licensee to comply with a request for medical records or a court order issued in enforcement of a subpoena for medical records.

§720.16(d) and (f) uses similar language which currently exists for physicians and surgeons, and podiatrists (B&P §2225 and §2225.5), and §720.18 is also similar to language which currently exists for dentists and psychologists (B&P §1684.5 and §2969). When a board or the AG is trying to obtain important documents and medical records pursuant to a disciplinary action on a licensee, requirements for obtaining these documents and records should be consistent with those of other health practitioners. Language has been included which protects those licensees who may not be responsible for medical records or have no access or control over these records. Also, medical records can only be obtained under two circumstances: (1) The patient has given written authorization for release of the records to the board; and, (2) the board or the AG have sought a court order and the court has issued a subpoena mandating the release of the records. Under both circumstances, penalties would apply if the records are not supplied by those who have both possession and control over the records. **Recommend: Define in regulation that failure to provide documents and noncompliance with a court order is unprofessional conduct.**

6. **§720.32 – Psychological or medical evaluation of applicant:** Authorize the Board to order an applicant for licensure to be examined by a physician or psychologist if it appears that the applicant may be unable to safely practice the licensed profession due to a physical or mental illness; authorize the Board to deny the application if the applicant refuses to comply with the order; and prohibit the Board from issuing a license until it receives evidence of the applicant’s ability to safely practice.

Boards lack the authority to deny a license application or compel an applicant to submit to a psychological or physical examination when the applicant’s fitness to practice is compromised based on suspected mental illness or chemical dependency. Boards have the authority to deny an applicant a license for criminal convictions, dishonesty, fraud or deceit, or any act if committed by a licensee would be grounds for disciplinary action. This proposed language would solidify the Board’s authority to protect the public, given the potential harm/damage to public safety of a substance abusing licensee or one of mental illness or other physical illness.

**Recommend: Amend regulations pertaining to applicant requirements that a psychological or medical evaluation may be required.**

7. **§726(a) and (b) – Sexual misconduct:** Currently defined in B&P Code §726.

According to DCA, there is no reason why other health professionals who have been convicted of sexual misconduct, or have been required to register as a sex offender pursuant to a felony conviction, should not be subject to the same standard and finding that such a crime is substantially related to the qualifications, functions, or duties of a board licensee. **Recommend: Define in regulation that sexual misconduct is unprofessional conduct.**

8. **§737 – Failure to provide information or cooperate in an investigation:** Make it unprofessional conduct for a licensee to fail to furnish information in a timely manner or cooperate in a disciplinary investigation.

This section is similar to other state statutes and to B&P §6068(i). This statutory requirement was recommended by the AG because a significant factor preventing the timely completion of investigations is the refusal of some health care practitioners to cooperate with an investigation of the board. This refusal to cooperate routinely results in undue scheduling problems and delays, countless hours wasted serving and enforcing subpoenas, and delays resulting from the refusal to produce documents or answer questions during interviews. Other states have long required licensees to cooperate with investigations being conducted by disciplinary authorities. The AG argues that the enactment of a statutory requirement in California would significantly reduce the substantial delays that result from a practitioner's failure to cooperate during a board's investigation. **Recommend: Define in regulation that failure to provide information or cooperate in an investigation is unprofessional conduct.**

9. **§802.1 – Failure to report an arrest, conviction, etc.:** Require a licensee to report to the Board any felony indictment or charge or any felony or misdemeanor conviction. According to DCA, there is no reason why all health professionals should not be subject to the same reporting requirements as some of the other health professionals. **Recommend: Define in regulation that failure to report an arrest, conviction, etc. is unprofessional conduct.**

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**To:** Board Members

**Date:** August 10, 2012

**From:** Andrea Leiva  
Policy Analyst

**Telephone:** (916) 575-7182

**Subject:** Agenda Item 7 - Legislation Update and Possible Board Action

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## **A. Bills that May Impact the Practice of Optometry**

### **Discussion:**

Below is a summary of bills that staff is monitoring, and a summary of actions taken so far. All the bills below are in the final stages of the legislative process.

### **Assembly Bill 761 (R. Hernández) (Attachment 1)**

Sponsored by the California Optometric Association (COA), this bill allows optometrists to perform clinical laboratory tests classified as waived in the office rather than having to order the test from a lab. This bill was amended to make technical changes to remove all opposition. It has passed the Assembly and Senate, and should be on its way to the Governor when the Legislature returns from summer recess on August 6. The Board is currently in support of the bill and a support letter was sent to the Assembly on December 16, 2011, and to the Senate on June 4, 2012.

### **Assembly Bill 778 (Atkins) (Attachment 2)**

Sponsored by LensCrafters and Californians for Healthy Vision, this bill would legitimize the LensCrafters "co-location" business model in California where optometrists are employed, and work in the same location as registered dispensing opticians. This bill was amended June 21, 2012 to add language that would prevent LensCrafters from interfering in patient care, and exercising inappropriate control over an optometrist's independent clinical judgment. Despite these efforts, the Board and others in opposition, are in agreement that this is not sufficient to ensure patient care, and that the new provisions are difficult to enforce. This bill did not earn enough votes to make it out of the Senate, but it may be possible that the author will try to find another bill to continue forward with this legislation. It may also be possible that the author will re-introduce this bill in the next legislative session.

The Board continues to be in opposition of this bill and sent a letter of opposition in June 2011. On June 13, 2012, after almost 11 years of litigation between the National Association of Optometrists and Opticians, LensCrafters, Eye Care Centers of America (Plaintiffs), and the Department of Consumer Affairs (Defendants), the Ninth Circuit affirmed the constitutionality of California statutes that prohibit licensed opticians from offering prescription eyewear at the same location in which eye examinations are provided, and from advertising that eyewear and eye examinations are available in the same location (See Attachment 3 for the full opinion).

Staff has learned that LensCrafters is working with the Attorney General's Office to develop a bill for the 2013-2014 legislative cycle that is in compliance with state law. Staff is working to make sure that the Board has a seat in the discussions to ensure that the protection of patients is a primary focus.

**Assembly Bill 1588 (Atkins) (Attachment 4)**

This bill would require boards under DCA to waive professional license renewal fees and continuing education requirements for military reservists called to active duty. This bill has passed the Assembly and is in the Senate Appropriations Committee and will be heard August 6, 2012. The Board does not have a position on this bill at this time.

**Assembly Bill 1733 (Logue) (Attachment 5 – excerpt of bill)**

This bill changes the name of "telemedicine" to "telehealth" in the optometry practice act. This bill also prohibits health care service plans, specifically Medi-cal managed care programs and the California Program of All-Inclusive Care for the Elderly (PACE), from requiring in-person contact between a health care provider and a patient before payment is made for covered services appropriately provided through telehealth. This bill has passed the Assembly and is in the Senate Appropriations Committee. It is likely that this bill will make it to the Governor for signature in August. The Board has no position on this bill at this time.

**Assembly Bill 1896 (Chesbro) (Attachment 6)**

This bill conforms state law with federal law to further clarify that persons licensed in other states as health practitioners are exempt from any state licensing requirements if they are employed by a tribal health program. This bill was approved by the Governor on July 13, 2012. Although this bill will become law January 1, 2013, staff learned that a couple of DCA boards opposed the bill because tribal health programs were found to be seeking to treat individuals that were not of tribal descent in order to remedy the shortage of health care providers in rural areas. Staff will continue to monitor the implementation of this bill.

**Assembly Bill 1904 (Block) (Attachment 7)**

This bill would authorize DCA boards to issue temporary licenses to individuals licensed in other states, and married to an active duty member of the Armed Forces assigned to a duty station in California. Boards would have to expedite requests for temporary licenses and possibly create regulations to implement this bill. This bill has passed the Assembly and is in the Senate Appropriations Committee waiting to be heard on August 6, 2012. The Board does not have a position on this bill at this time.

For consideration: Board staff estimates that 0 to ten individuals would want to obtain a temporary optometric license. The Board would have to create a new "temporary" license category that may delay the implementation of BreZE because time will be needed to configure such a license (i.e., the bill requires these temporary licenses to expire in 180 days whereas a regular license expires biennially). For this particular Board, it may be unreasonable to incur an expense of about \$150,000 for a license category that will be used by 0 to ten individuals per year.

**Senate Bill 690 (E. Hernandez) (Attachment 8)**

Sponsored by the California Optometric Association, this bill prohibits provider discrimination in contracting with health plans. This bill has passed the Senate, and is currently in the Assembly Appropriations Committee. A hearing will be scheduled sometime in August. The Board does not have a position on this bill at this time.

**Senate Bill 1575 (Attachment 9 – excerpt of bill)**

This is an Omnibus Bill by the Senate Business, Professions & Economic Development Committee (An omnibus bill contains various measures from different boards/bureaus that are typically non-controversial and for clean-up purposes only). This bill amends §3057.5. Eligibility of Graduates from Foreign Universities by switching the word "person" with "graduates of foreign universities." The Board wanted to ensure that it was clear this statute was referring to graduates of foreign universities. This bill has passed

the Senate and is currently in the Assembly Appropriations Committee. A hearing will be scheduled sometime in August. The Board is in support of this bill.

**Action Requested:**

Staff requests that the Board members review the above legislation that may impact the Board and the practice of optometry. If the members would like to participate in the legislative process, staff requests that the members authorize staff to send either letters of support, or opposition. Members can also choose to remain neutral, and no action will be taken by staff.

**B. Discussion and Possible Action to Amend Board Sponsored SB 1215 – Pertaining to Retired Licenses, Retired Licensees with a Volunteer Designation, and Temporary Practice**

**Background:**

The Board is sponsoring SB 1215 (Emmerson) (Attachment 10) which will do the following:

Create a Retired License Status: Would permit an optometrist to obtain a retired license status.

- \$25 one time fee;
- No continuing education; and
- Optometrist earns the designation of “retired” versus “inactive”, “cancelled” or “delinquent.”

Create a Retired License Status with a Volunteer Designation: Would permit an optometrist to obtain a retired license status with a volunteer designation.

- \$50 initial fee; \$50 renewal fee biennially;
- Continuing education, dependant on their certification type, required with renewal;
- Can only practice optometry as a volunteer who provides free services;
- Optometrist earns the designation of “retired volunteer” versus “inactive”, “cancelled” or “delinquent.”

Define Temporary Practice: Would define temporary practice for optometrists and clarify when an optometrist needs to notify the board of their practice location.

- Defines temporary practice; and
- Clarifies when an optometrist needs to notify the board of their practice location in order to increase consumer protection.

SB 1215 has passed the Senate and is in the Assembly Appropriations Committee awaiting to be heard on August 8, 2012. Emmerson’s office plans to continue forward with the hearing and will make the amendments, if approved, in the discussion below on the floor of the Assembly in the subsequent final readings of this bill.

**Discussion:**

The Board must consider to amend this bill to ensure that it is clear that the Board retains jurisdiction over all licensees, regardless of the status of his or her license. This concern was brought to the Board at the May 18, 2012 Board meeting, but was rejected by the Board for the following reasons:

- This language is not needed because if retired licensees practice, they will be considered unlicensed practitioners, and that’s how the Board can take action against them; and
- This a non-issue. There is already enough support for the bill and amending it would be too difficult.

Since then, staff learned from the DCA Division of Legislative and Policy Review (LPR) that they met with the Governor’s Office, and the Governor’s Office strongly recommended that the Board adopt language to ensure the Board retains jurisdiction of licensees with retired licenses. The Governor’s Office believes that not making this amendment will make the Board subject to a loophole, similar to what occurred with the Medical Board of California (MBC). MBC recently lost a court of appeal case related to taking

disciplinary action against a licensee that held a retired license. The retired licensee's attorney alleged the MBC lacked jurisdiction to impose discipline because, as the holder of a retired license, the physician was not permitted to engage in the practice of medicine. MBC staff and legal counsel believed that MBC does have the jurisdiction to impose discipline on any license it issues because that licensee can opt to change their license status by meeting limited requirements. If the MBC lacked jurisdiction to impose discipline, it may create a non-practice status loophole that would insulate any licensee from discipline by transferring his or her license to an inactive status. However, the court ruled that the holder of a retired status license is not a licensee under the Board's jurisdiction and that the Board's disciplinary authority is relevant to the holder of a retired license, "only if and when the retired licensee seeks to return to the practice of medicine and files an application" with the Board for restoration of his or her license. Thus, MBC is proposing to clarify their language via an omnibus bill this legislative session.

LPR pointed out that this is not an issue of unlicensed activity, but retaining jurisdiction over retired licensees when it comes to other provisions of enforcement as well, such as cite and fine, misdemeanors, etc. While the Board works to take action (which could take up to 18 months) the licensee could switch to a retired license and then the Board would lose jurisdiction.

Staff also discussed these potential changes with the COA, and they did not see any issues that would prompt them to change their support position on this bill.

**Staff Recommendation:** Amend the language of SB 1215 using MBC's proposed language as a model to ensure that it is clear that the Board retains jurisdiction over retired licenses and retired licenses with a volunteer designation (Attachment 11). In order to expedite the process, staff already submitted proposed language to legislative counsel, and Attachment 11 is the resulting final language that will be added to SB 1215 upon the Board's approval.

**Action Requested:**

Staff requests that the Board take one of the following actions after discussing the possible amendment to SB 1215:

- 1) Direct staff to work with the author to amend SB 1215 to ensure that the Board retains jurisdiction over all license types; or
- 2) Reject the amendment and direct staff to continue with the bill as currently written.

AMENDED IN SENATE JUNE 4, 2012  
AMENDED IN ASSEMBLY JANUARY 23, 2012  
AMENDED IN ASSEMBLY JANUARY 12, 2012  
AMENDED IN ASSEMBLY JANUARY 4, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

**ASSEMBLY BILL**

**No. 761**

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**Introduced by Assembly Member Roger Hernández**

February 17, 2011

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An act to amend Sections 1206.5, 1209, and 3041 of the Business and Professions Code, relating to optometrists.

LEGISLATIVE COUNSEL'S DIGEST

AB 761, as amended, Roger Hernández. Optometrists.

Existing law provides for the regulation and licensure of clinical laboratories and clinical laboratory personnel by the State Department of Public Health. Existing law prohibits the performance of a clinical laboratory test or examination classified as waived under the federal Clinical Laboratory Improvement Amendments of 1988 unless the test or examination is performed under the overall operation and administration of a laboratory director, as defined, and is performed by specified persons, including certain health care personnel. Existing law provides for the licensure and regulation of optometrists by the State Board of Optometry, and requires certification by the board for a licensed optometrist to use therapeutic pharmaceutical agents. Existing law authorizes a licensed optometrist certified to use therapeutic pharmaceutical agents to diagnose and treat specified conditions.

This bill would expand the category of persons who may perform clinical laboratory tests or examinations that are classified as waived to include licensed optometrists if the results of the tests can be lawfully utilized within their practice, and would provide that a laboratory director may include a licensed optometrist serving as the director of a laboratory which only performs specified clinical laboratory testing, for purposes of waived examinations. The bill would authorize a licensed optometrist certified to use therapeutic pharmaceutical agents to additionally perform specified clinical laboratory tests or examinations classified as waived that are necessary for the diagnosis of conditions and diseases of the eye or adnexa, which the bill would define to mean ocular adnexa.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 1206.5 of the Business and Professions
- 2 Code is amended to read:
- 3 1206.5. (a) Notwithstanding subdivision (b) of Section 1206
- 4 and except as otherwise provided in Section 1241, no person shall
- 5 perform a clinical laboratory test or examination classified as
- 6 waived under CLIA unless the clinical laboratory test or
- 7 examination is performed under the overall operation and
- 8 administration of the laboratory director, as described in Section
- 9 1209, including, but not limited to, documentation by the laboratory
- 10 director of the adequacy of the qualifications and competency of
- 11 the personnel, and the test is performed by any of the following
- 12 persons:
- 13 (1) A licensed physician and surgeon holding a M.D. or D.O.
- 14 degree.
- 15 (2) A licensed podiatrist, a licensed dentist, or a licensed
- 16 naturopathic doctor, if the results of the tests can be lawfully
- 17 utilized within his or her practice.
- 18 (3) A person licensed under this chapter to engage in clinical
- 19 laboratory practice or to direct a clinical laboratory.
- 20 (4) A person authorized to perform tests pursuant to a certificate
- 21 issued under Article 5 (commencing with Section 101150) of
- 22 Chapter 2 of Part 3 of Division 101 of the Health and Safety Code.

- 1 (5) A licensed physician assistant if authorized by a supervising  
2 physician and surgeon in accordance with Section 3502 or 3535.
- 3 (6) A person licensed under Chapter 6 (commencing with  
4 Section 2700).
- 5 (7) A person licensed under Chapter 6.5 (commencing with  
6 Section 2840).
- 7 (8) A perfusionist if authorized by and performed in compliance  
8 with Section 2590.
- 9 (9) A respiratory care practitioner if authorized by and  
10 performed in compliance with Chapter 8.3 (commencing with  
11 Section 3700).
- 12 (10) A medical assistant, as defined in Section 2069, if the  
13 waived test is performed pursuant to a specific authorization  
14 meeting the requirements of Section 2069.
- 15 (11) A pharmacist, as defined in Section 4036, if ordering drug  
16 therapy-related laboratory tests in compliance with clause (ii) of  
17 subparagraph (A) of paragraph (5) of, or subparagraph (B) of  
18 paragraph (4) of, subdivision (a) of Section 4052, or if performing  
19 skin puncture in the course of performing routine patient  
20 assessment procedures in compliance with Section 4052.1.
- 21 (12) A naturopathic assistant, as defined in Sections 3613 and  
22 3640.2, if the waived test is performed pursuant to a specific  
23 authorization meeting the requirements of Sections 3613 and  
24 3640.2.
- 25 (13) A licensed optometrist as authorized under Chapter 7  
26 (commencing with Section 3000).
- 27 (14) Other health care personnel providing direct patient care.
- 28 (15) Any other person performing nondiagnostic testing pursuant  
29 to Section 1244.
- 30 (b) Notwithstanding subdivision (b) of Section 1206, no person  
31 shall perform clinical laboratory tests or examinations classified  
32 as of moderate complexity under CLIA unless the clinical  
33 laboratory test or examination is performed under the overall  
34 operation and administration of the laboratory director, as described  
35 in Section 1209, including, but not limited to, documentation by  
36 the laboratory director of the adequacy of the qualifications and  
37 competency of the personnel, and the test is performed by any of  
38 the following persons:
  - 39 (1) A licensed physician and surgeon holding a M.D. or D.O.  
40 degree.

- 1 (2) A licensed podiatrist or a licensed dentist if the results of  
2 the tests can be lawfully utilized within his or her practice.
- 3 (3) A person licensed under this chapter to engage in clinical  
4 laboratory practice or to direct a clinical laboratory.
- 5 (4) A person authorized to perform tests pursuant to a certificate  
6 issued under Article 5 (commencing with Section 101150) of  
7 Chapter 2 of Part 3 of Division 101 of the Health and Safety Code.
- 8 (5) A licensed physician assistant if authorized by a supervising  
9 physician and surgeon in accordance with Section 3502 or 3535.
- 10 (6) A person licensed under Chapter 6 (commencing with  
11 Section 2700).
- 12 (7) A perfusionist if authorized by and performed in compliance  
13 with Section 2590.
- 14 (8) A respiratory care practitioner if authorized by and  
15 performed in compliance with Chapter 8.3 (commencing with  
16 Section 3700).
- 17 (9) A person performing nuclear medicine technology if  
18 authorized by and performed in compliance with Article 6  
19 (commencing with Section 107150) of Chapter 4 of Part 1 of  
20 Division 104 of the Health and Safety Code.
- 21 (10) Any person if performing blood gas analysis in compliance  
22 with Section 1245.
- 23 (11) (A) A person certified or licensed as an “Emergency  
24 Medical Technician II” or paramedic pursuant to Division 2.5  
25 (commencing with Section 1797) of the Health and Safety Code  
26 while providing prehospital medical care, a person licensed as a  
27 psychiatric technician under Chapter 10 (commencing with Section  
28 4500) of Division 2, as a vocational nurse pursuant to Chapter 6.5  
29 (commencing with Section 2840), or as a midwife licensed pursuant  
30 to Article 24 (commencing with Section 2505) of Chapter 5, or  
31 certified by the department pursuant to Division 5 (commencing  
32 with Section 70001) of Title 22 of the California Code of  
33 Regulations as a nurse assistant or a home health aide, who  
34 provides direct patient care, if the person is performing the test as  
35 an adjunct to the provision of direct patient care by the person, is  
36 utilizing a point-of-care laboratory testing device at a site for which  
37 a laboratory license or registration has been issued, meets the  
38 minimum clinical laboratory education, training, and experience  
39 requirements set forth in regulations adopted by the department,  
40 and has demonstrated to the satisfaction of the laboratory director

1 that he or she is competent in the operation of the point-of-care  
2 laboratory testing device for each analyte to be reported.

3 (B) Prior to being authorized by the laboratory director to  
4 perform laboratory tests or examinations, testing personnel  
5 identified in subparagraph (A) shall participate in a preceptor  
6 program until they are able to perform the clinical laboratory tests  
7 or examinations authorized in this section with results that are  
8 deemed accurate and skills that are deemed competent by the  
9 preceptor. For the purposes of this section, a “preceptor program”  
10 means an organized system that meets regulatory requirements in  
11 which a preceptor provides and documents personal observation  
12 and critical evaluation, including review of accuracy, reliability,  
13 and validity, of laboratory testing performed.

14 (12) Any other person within a physician office laboratory if  
15 the test is performed under the supervision of the patient’s  
16 physician and surgeon or podiatrist who shall be accessible to the  
17 laboratory to provide onsite, telephone, or electronic consultation  
18 as needed, and shall: (A) ensure that the person is performing test  
19 methods as required for accurate and reliable tests; and (B) have  
20 personal knowledge of the results of the clinical laboratory testing  
21 or examination performed by that person before the test results are  
22 reported from the laboratory.

23 (13) A pharmacist, if ordering drug therapy-related laboratory  
24 tests in compliance with clause (ii) of subparagraph (A) of  
25 paragraph (5) of, or subparagraph (B) of paragraph (4) of,  
26 subdivision (a) of Section 4052.

27 (c) Notwithstanding subdivision (b) of Section 1206, no person  
28 shall perform clinical laboratory tests or examinations classified  
29 as of high complexity under CLIA unless the clinical laboratory  
30 test or examination is performed under the overall operation and  
31 administration of the laboratory director, as described in Section  
32 1209, including, but not limited to, documentation by the laboratory  
33 director of the adequacy of the qualifications and competency of  
34 the personnel, and the test is performed by any of the following  
35 persons:

36 (1) A licensed physician and surgeon holding a M.D. or D.O.  
37 degree.

38 (2) A licensed podiatrist or a licensed dentist if the results of  
39 the tests can be lawfully utilized within his or her practice.

1 (3) A person licensed under this chapter to engage in clinical  
2 laboratory practice or to direct a clinical laboratory if the test or  
3 examination is within a specialty or subspecialty authorized by  
4 the person's licensure.

5 (4) A person authorized to perform tests pursuant to a certificate  
6 issued under Article 5 (commencing with Section 101150) of  
7 Chapter 2 of Part 3 of Division 101 of the Health and Safety Code  
8 if the test or examination is within a specialty or subspecialty  
9 authorized by the person's certification.

10 (5) A licensed physician assistant if authorized by a supervising  
11 physician and surgeon in accordance with Section 3502 or 3535.

12 (6) A perfusionist if authorized by and performed in compliance  
13 with Section 2590.

14 (7) A respiratory care practitioner if authorized by and  
15 performed in compliance with Chapter 8.3 (commencing with  
16 Section 3700).

17 (8) A person performing nuclear medicine technology if  
18 authorized by and performed in compliance with Article 6  
19 (commencing with Section 107150) of Chapter 4 of Part 1 of  
20 Division 104 of the Health and Safety Code.

21 (9) Any person if performing blood gas analysis in compliance  
22 with Section 1245.

23 (10) Any other person within a physician office laboratory if  
24 the test is performed under the onsite supervision of the patient's  
25 physician and surgeon or podiatrist who shall: (A) ensure that the  
26 person is performing test methods as required for accurate and  
27 reliable tests; and (B) have personal knowledge of the results of  
28 clinical laboratory testing or examination performed by that person  
29 before the test results are reported from the laboratory.

30 (d) Clinical laboratory examinations classified as  
31 provider-performed microscopy under CLIA may be personally  
32 performed using a brightfield or phase/contrast microscope by one  
33 of the following practitioners:

34 (1) A licensed physician and surgeon using the microscope  
35 during the patient's visit on a specimen obtained from his or her  
36 own patient or from a patient of a group medical practice of which  
37 the physician is a member or employee.

38 (2) A nurse midwife holding a certificate as specified by Section  
39 2746.5, a licensed nurse practitioner as specified in Section 2835.5,  
40 or a licensed physician assistant acting under the supervision of a

1 physician pursuant to Section 3502 using the microscope during  
2 the patient’s visit on a specimen obtained from his or her own  
3 patient or from the patient of a clinic, group medical practice, or  
4 other health care provider of which the certified nurse midwife,  
5 licensed nurse practitioner, or licensed physician assistant is an  
6 employee.

7 (3) A licensed dentist using the microscope during the patient’s  
8 visit on a specimen obtained from his or her own patient or from  
9 a patient of a group dental practice of which the dentist is a member  
10 or an employee.

11 SEC. 2. Section 1209 of the Business and Professions Code is  
12 amended to read:

13 1209. (a) As used in this chapter, “laboratory director” means  
14 any person who is a duly licensed physician and surgeon, or, only  
15 for purposes of a clinical laboratory test or examination classified  
16 as waived, is a duly licensed naturopathic doctor, or a duly licensed  
17 optometrist serving as the director of a laboratory which only  
18 performs clinical laboratory testing authorized in paragraph (10)  
19 of subdivision (e) of Section 3041, or is licensed to direct a clinical  
20 laboratory under this chapter and who substantially meets the  
21 laboratory director qualifications under CLIA for the type and  
22 complexity of tests being offered by the laboratory. The laboratory  
23 director, if qualified under CLIA, may perform the duties of the  
24 technical consultant, technical supervisor, clinical consultant,  
25 general supervisor, and testing personnel, or delegate these  
26 responsibilities to persons qualified under CLIA. If the laboratory  
27 director reappoints performance of those responsibilities or  
28 duties, he or she shall remain responsible for ensuring that all those  
29 duties and responsibilities are properly performed.

30 (b) (1) The laboratory director is responsible for the overall  
31 operation and administration of the clinical laboratory, including  
32 administering the technical and scientific operation of a clinical  
33 laboratory, the selection and supervision of procedures, the  
34 reporting of results, and active participation in its operations to  
35 the extent necessary to ensure compliance with this act and CLIA.  
36 He or she shall be responsible for the proper performance of all  
37 laboratory work of all subordinates and shall employ a sufficient  
38 number of laboratory personnel with the appropriate education  
39 and either experience or training to provide appropriate  
40 consultation, properly supervise and accurately perform tests, and

1 report test results in accordance with the personnel qualifications,  
2 duties, and responsibilities described in CLIA and this chapter.

3 (2) Where a point-of-care laboratory testing device is utilized  
4 and provides results for more than one analyte, the testing  
5 personnel may perform and report the results of all tests ordered  
6 for each analyte for which he or she has been found by the  
7 laboratory director to be competent to perform and report.

8 (c) As part of the overall operation and administration, the  
9 laboratory director of a registered laboratory shall document the  
10 adequacy of the qualifications (educational background, training,  
11 and experience) of the personnel directing and supervising the  
12 laboratory and performing the laboratory test procedures and  
13 examinations. In determining the adequacy of qualifications, the  
14 laboratory director shall comply with any regulations adopted by  
15 the department that specify the minimum qualifications for  
16 personnel, in addition to any CLIA requirements relative to the  
17 education or training of personnel.

18 (d) As part of the overall operation and administration, the  
19 laboratory director of a licensed laboratory shall do all of the  
20 following:

21 (1) Ensure that all personnel, prior to testing biological  
22 specimens, have the appropriate education and experience, receive  
23 the appropriate training for the type and complexity of the services  
24 offered, and have demonstrated that they can perform all testing  
25 operations reliably to provide and report accurate results. In  
26 determining the adequacy of qualifications, the laboratory director  
27 shall comply with any regulations adopted by the department that  
28 specify the minimum qualifications for, and the type of procedures  
29 that may be performed by, personnel in addition to any CLIA  
30 requirements relative to the education or training of personnel.  
31 Any regulations adopted pursuant to this section that specify the  
32 type of procedure that may be performed by testing personnel shall  
33 be based on the skills, knowledge, and tasks required to perform  
34 the type of procedure in question.

35 (2) Ensure that policies and procedures are established for  
36 monitoring individuals who conduct preanalytical, analytical, and  
37 postanalytical phases of testing to ensure that they are competent  
38 and maintain their competency to process biological specimens,  
39 perform test procedures, and report test results promptly and

1 proficiently, and, whenever necessary, identify needs for remedial  
2 training or continuing education to improve skills.

3 (3) Specify in writing the responsibilities and duties of each  
4 individual engaged in the performance of the preanalytic, analytic,  
5 and postanalytic phases of clinical laboratory tests or examinations,  
6 including which clinical laboratory tests or examinations the  
7 individual is authorized to perform, whether supervision is required  
8 for the individual to perform specimen processing, test  
9 performance, or results reporting, and whether consultant,  
10 supervisor, or director review is required prior to the individual  
11 reporting patient test results.

12 (e) The competency and performance of staff of a licensed  
13 laboratory shall be evaluated and documented by the laboratory  
14 director, or by a person who qualifies as a technical consultant or  
15 a technical supervisor under CLIA depending on the type and  
16 complexity of tests being offered by the laboratory.

17 (1) The procedures for evaluating the competency of the staff  
18 shall include, but are not limited to, all of the following:

19 (A) Direct observations of routine patient test performance,  
20 including patient preparation, if applicable, and specimen handling,  
21 processing, and testing.

22 (B) Monitoring the recording and reporting of test results.

23 (C) Review of intermediate test results or worksheets, quality  
24 control records, proficiency testing results, and preventive  
25 maintenance records.

26 (D) Direct observation of performance of instrument  
27 maintenance and function checks.

28 (E) Assessment of test performance through testing previously  
29 analyzed specimens, internal blind testing samples, or external  
30 proficiency testing samples.

31 (F) Assessment of problem solving skills.

32 (2) Evaluation and documentation of staff competency and  
33 performance shall occur at least semiannually during the first year  
34 an individual tests biological specimens. Thereafter, evaluations  
35 shall be performed at least annually unless test methodology or  
36 instrumentation changes, in which case, prior to reporting patient  
37 test results, the individual's performance shall be reevaluated to  
38 include the use of the new test methodology or instrumentation.

1 (f) The laboratory director of each clinical laboratory of an acute  
2 care hospital shall be a physician and surgeon who is a qualified  
3 pathologist, except as follows:

4 (1) If a qualified pathologist is not available, a physician and  
5 surgeon or a clinical laboratory bioanalyst qualified as a laboratory  
6 director under subdivision (a) may direct the laboratory. However,  
7 a qualified pathologist shall be available for consultation at suitable  
8 intervals to ensure high quality service.

9 (2) If there are two or more clinical laboratories of an acute care  
10 hospital, those additional clinical laboratories that are limited to  
11 the performance of blood gas analysis, blood electrolyte analysis,  
12 or both, may be directed by a physician and surgeon qualified as  
13 a laboratory director under subdivision (a), irrespective of whether  
14 a pathologist is available.

15 As used in this subdivision, a qualified pathologist is a physician  
16 and surgeon certified or eligible for certification in clinical or  
17 anatomical pathology by the American Board of Pathology or the  
18 American Osteopathic Board of Pathology.

19 (g) Subdivision (f) does not apply to any director of a clinical  
20 laboratory of an acute care hospital acting in that capacity on or  
21 before January 1, 1988.

22 (h) A laboratory director may serve as the director of up to the  
23 maximum number of laboratories stipulated by CLIA, as defined  
24 under Section 1202.5.

25 SEC. 3. Section 3041 of the Business and Professions Code is  
26 amended to read:

27 3041. (a) The practice of optometry includes the prevention  
28 and diagnosis of disorders and dysfunctions of the visual system,  
29 and the treatment and management of certain disorders and  
30 dysfunctions of the visual system, as well as the provision of  
31 rehabilitative optometric services, and is the doing of any or all of  
32 the following:

33 (1) The examination of the human eye or eyes, or its or their  
34 appendages, and the analysis of the human vision system, either  
35 subjectively or objectively.

36 (2) The determination of the powers or range of human vision  
37 and the accommodative and refractive states of the human eye or  
38 eyes, including the scope of its or their functions and general  
39 condition.

1 (3) The prescribing or directing the use of, or using, any optical  
2 device in connection with ocular exercises, visual training, vision  
3 training, or orthoptics.

4 (4) The prescribing of contact and spectacle lenses for, or the  
5 fitting or adaptation of contact and spectacle lenses to, the human  
6 eye, including lenses that may be classified as drugs or devices by  
7 any law of the United States or of this state.

8 (5) The use of topical pharmaceutical agents for the purpose of  
9 the examination of the human eye or eyes for any disease or  
10 pathological condition.

11 (b) (1) An optometrist who is certified to use therapeutic  
12 pharmaceutical agents, pursuant to Section 3041.3, may also  
13 diagnose and treat the human eye or eyes, or any of its or their  
14 appendages, for all of the following conditions:

15 (A) Through medical treatment, infections of the anterior  
16 segment and adnexa, excluding the lacrimal gland, the lacrimal  
17 drainage system, and the sclera in patients under 12 years of age.

18 (B) Ocular allergies of the anterior segment and adnexa.

19 (C) Ocular inflammation, nonsurgical in cause except when  
20 comanaged with the treating physician and surgeon, limited to  
21 inflammation resulting from traumatic iritis, peripheral corneal  
22 inflammatory keratitis, episcleritis, and unilateral nonrecurrent  
23 nongranulomatous idiopathic iritis in patients over 18 years of age.  
24 Unilateral nongranulomatous idiopathic iritis recurring within one  
25 year of the initial occurrence shall be referred to an  
26 ophthalmologist. An optometrist shall consult with an  
27 ophthalmologist or appropriate physician and surgeon if a patient  
28 has a recurrent case of episcleritis within one year of the initial  
29 occurrence. An optometrist shall consult with an ophthalmologist  
30 or appropriate physician and surgeon if a patient has a recurrent  
31 case of peripheral corneal inflammatory keratitis within one year  
32 of the initial occurrence.

33 (D) Traumatic or recurrent conjunctival or corneal abrasions  
34 and erosions.

35 (E) Corneal surface disease and dry eyes.

36 (F) Ocular pain, nonsurgical in cause except when comanaged  
37 with the treating physician and surgeon, associated with conditions  
38 optometrists are authorized to treat.

39 (G) Pursuant to subdivision (f), glaucoma in patients over 18  
40 years of age, as described in subdivision (j).

1 (2) For purposes of this section, “treat” means the use of  
2 therapeutic pharmaceutical agents, as described in subdivision (c),  
3 and the procedures described in subdivision (e).

4 (c) In diagnosing and treating the conditions listed in subdivision  
5 (b), an optometrist certified to use therapeutic pharmaceutical  
6 agents pursuant to Section 3041.3 may use all of the following  
7 therapeutic pharmaceutical agents:

8 (1) Pharmaceutical agents as described in paragraph (5) of  
9 subdivision (a), as well as topical miotics.

10 (2) Topical lubricants.

11 (3) Antiallergy agents. In using topical steroid medication for  
12 the treatment of ocular allergies, an optometrist shall consult with  
13 an ophthalmologist if the patient’s condition worsens 21 days after  
14 diagnosis.

15 (4) Topical and oral anti-inflammatories. In using steroid  
16 medication for:

17 (A) Unilateral nonrecurrent nongranulomatous idiopathic iritis  
18 or episcleritis, an optometrist shall consult with an ophthalmologist  
19 or appropriate physician and surgeon if the patient’s condition  
20 worsens 72 hours after the diagnosis, or if the patient’s condition  
21 has not resolved three weeks after diagnosis. If the patient is still  
22 receiving medication for these conditions six weeks after diagnosis,  
23 the optometrist shall refer the patient to an ophthalmologist or  
24 appropriate physician and surgeon.

25 (B) Peripheral corneal inflammatory keratitis, excluding  
26 Moorens and Terriens diseases, an optometrist shall consult with  
27 an ophthalmologist or appropriate physician and surgeon if the  
28 patient’s condition worsens 72 hours after diagnosis.

29 (C) Traumatic iritis, an optometrist shall consult with an  
30 ophthalmologist or appropriate physician and surgeon if the  
31 patient’s condition worsens 72 hours after diagnosis and shall refer  
32 the patient to an ophthalmologist or appropriate physician and  
33 surgeon if the patient’s condition has not resolved one week after  
34 diagnosis.

35 (5) Topical antibiotic agents.

36 (6) Topical hyperosmotics.

37 (7) Topical and oral antiglaucoma agents pursuant to the  
38 certification process defined in subdivision (f).

39 (A) The optometrist shall refer the patient to an ophthalmologist  
40 if requested by the patient or if angle closure glaucoma develops.

1 (B) If the glaucoma patient also has diabetes, the optometrist  
2 shall consult with the physician treating the patient's diabetes in  
3 developing the glaucoma treatment plan and shall inform the  
4 physician in writing of any changes in the patient's glaucoma  
5 medication.

6 (8) Nonprescription medications used for the rational treatment  
7 of an ocular disorder.

8 (9) Oral antihistamines.

9 (10) Prescription oral nonsteroidal anti-inflammatory agents.

10 (11) Oral antibiotics for medical treatment of ocular disease.

11 (A) If the patient has been diagnosed with a central corneal ulcer  
12 and the central corneal ulcer has not improved 48 hours after  
13 diagnosis, the optometrist shall refer the patient to an  
14 ophthalmologist.

15 (B) If the patient has been diagnosed with preseptal cellulitis  
16 or dacryocystitis and the condition has not improved 48 hours after  
17 diagnosis, the optometrist shall refer the patient to an  
18 ophthalmologist.

19 (12) Topical and oral antiviral medication for the medical  
20 treatment of the following: herpes simplex viral keratitis, herpes  
21 simplex viral conjunctivitis, and periocular herpes simplex viral  
22 dermatitis; and varicella zoster viral keratitis, varicella zoster viral  
23 conjunctivitis, and periocular varicella zoster viral dermatitis.

24 (A) If the patient has been diagnosed with herpes simplex  
25 keratitis or varicella zoster viral keratitis and the patient's condition  
26 has not improved seven days after diagnosis, the optometrist shall  
27 refer the patient to an ophthalmologist. If a patient's condition has  
28 not resolved three weeks after diagnosis, the optometrist shall refer  
29 the patient to an ophthalmologist.

30 (B) If the patient has been diagnosed with herpes simplex viral  
31 conjunctivitis, herpes simplex viral dermatitis, varicella zoster  
32 viral conjunctivitis, or varicella zoster viral dermatitis, and if the  
33 patient's condition worsens seven days after diagnosis, the  
34 optometrist shall consult with an ophthalmologist. If the patient's  
35 condition has not resolved three weeks after diagnosis, the  
36 optometrist shall refer the patient to an ophthalmologist.

37 (13) Oral analgesics that are not controlled substances.

38 (14) Codeine with compounds and hydrocodone with  
39 compounds as listed in the California Uniform Controlled  
40 Substances Act (Division 10 (commencing with Section 11000))

1 of the Health and Safety Code) and the United States Uniform  
2 Controlled Substances Act (21 U.S.C. Sec. 801 et seq.). The use  
3 of these agents shall be limited to three days, with a referral to an  
4 ophthalmologist if the pain persists.

5 (d) In any case where this chapter requires that an optometrist  
6 consult with an ophthalmologist, the optometrist shall maintain a  
7 written record in the patient's file of the information provided to  
8 the ophthalmologist, the ophthalmologist's response, and any other  
9 relevant information. Upon the consulting ophthalmologist's  
10 request and with the patient's consent, the optometrist shall furnish  
11 a copy of the record to the ophthalmologist.

12 (e) An optometrist who is certified to use therapeutic  
13 pharmaceutical agents pursuant to Section 3041.3 may also perform  
14 all of the following:

- 15 (1) Corneal scraping with cultures.
- 16 (2) Debridement of corneal epithelia.
- 17 (3) Mechanical epilation.
- 18 (4) Venipuncture for testing patients suspected of having  
19 diabetes.
- 20 (5) Suture removal, with prior consultation with the treating  
21 physician and surgeon.
- 22 (6) Treatment or removal of sebaceous cysts by expression.
- 23 (7) Administration of oral fluorescein to patients suspected as  
24 having diabetic retinopathy.
- 25 (8) Use of an auto-injector to counter anaphylaxis.
- 26 (9) Ordering of smears, cultures, sensitivities, complete blood  
27 count, mycobacterial culture, acid fast stain, urinalysis, *tear fluid*  
28 *analysis*, and X-rays necessary for the diagnosis of conditions or  
29 diseases of the eye or adnexa. An optometrist may order other  
30 types of images subject to prior consultation with an  
31 ophthalmologist or appropriate physician and surgeon.
- 32 (10) A clinical laboratory test or examination classified as  
33 waived under CLIA and as designated in paragraph (9) necessary  
34 for the diagnosis of conditions and diseases of the eye or adnexa,  
35 or if otherwise specifically authorized by this chapter.
- 36 (11) Punctal occlusion by plugs, excluding laser, diathermy,  
37 cryotherapy, or other means constituting surgery as defined in this  
38 chapter.

1 (12) The prescription of therapeutic contact lenses, including  
2 lenses or devices that incorporate a medication or therapy the  
3 optometrist is certified to prescribe or provide.

4 (13) Removal of foreign bodies from the cornea, eyelid, and  
5 conjunctiva with any appropriate instrument other than a scalpel  
6 or needle. Corneal foreign bodies shall be nonperforating, be no  
7 deeper than the midstroma, and require no surgical repair upon  
8 removal.

9 (14) For patients over 12 years of age, lacrimal irrigation and  
10 dilation, excluding probing of the nasal lacrimal tract. The board  
11 shall certify any optometrist who graduated from an accredited  
12 school of optometry before May 1, 2000, to perform this procedure  
13 after submitting proof of satisfactory completion of 10 procedures  
14 under the supervision of an ophthalmologist as confirmed by the  
15 ophthalmologist. Any optometrist who graduated from an  
16 accredited school of optometry on or after May 1, 2000, shall be  
17 exempt from the certification requirement contained in this  
18 paragraph.

19 (f) The board shall grant a certificate to an optometrist certified  
20 pursuant to Section 3041.3 for the treatment of glaucoma, as  
21 described in subdivision (j), in patients over 18 years of age after  
22 the optometrist meets the following applicable requirements:

23 (1) For licensees who graduated from an accredited school of  
24 optometry on or after May 1, 2008, submission of proof of  
25 graduation from that institution.

26 (2) For licensees who were certified to treat glaucoma under  
27 this section prior to January 1, 2009, submission of proof of  
28 completion of that certification program.

29 (3) For licensees who have substantially completed the  
30 certification requirements pursuant to this section in effect between  
31 January 1, 2001, and December 31, 2008, submission of proof of  
32 completion of those requirements on or before December 31, 2009.  
33 “Substantially completed” means both of the following:

34 (A) Satisfactory completion of a didactic course of not less than  
35 24 hours in the diagnosis, pharmacological, and other treatment  
36 and management of glaucoma.

37 (B) Treatment of 50 glaucoma patients with a collaborating  
38 ophthalmologist for a period of two years for each patient that will  
39 conclude on or before December 31, 2009.

1 (4) For licensees who completed a didactic course of not less  
2 than 24 hours in the diagnosis, pharmacological, and other  
3 treatment and management of glaucoma, submission of proof of  
4 satisfactory completion of the case management requirements for  
5 certification established by the board pursuant to Section 3041.10.

6 (5) For licensees who graduated from an accredited school of  
7 optometry on or before May 1, 2008, and not described in  
8 paragraph (2), (3), or (4), submission of proof of satisfactory  
9 completion of the requirements for certification established by the  
10 board pursuant to Section 3041.10.

11 (g) Other than for prescription ophthalmic devices described in  
12 subdivision (b) of Section 2541, any dispensing of a therapeutic  
13 pharmaceutical agent by an optometrist shall be without charge.

14 (h) The practice of optometry does not include performing  
15 surgery. "Surgery" means any procedure in which human tissue  
16 is cut, altered, or otherwise infiltrated by mechanical or laser  
17 means. "Surgery" does not include those procedures specified in  
18 subdivision (e). Nothing in this section shall limit an optometrist's  
19 authority to utilize diagnostic laser and ultrasound technology  
20 within his or her scope of practice.

21 (i) An optometrist licensed under this chapter is subject to the  
22 provisions of Section 2290.5 for purposes of practicing  
23 telemedicine.

24 (j) For purposes of this chapter, "glaucoma" means either of the  
25 following:

26 (1) All primary open-angle glaucoma.

27 (2) Exfoliation and pigmentary glaucoma.

28 (k) For purposes of this chapter, "adnexa" means ocular adnexa.

29 (l) In an emergency, an optometrist shall stabilize, if possible,  
30 and immediately refer any patient who has an acute attack of angle  
31 closure to an ophthalmologist.

AMENDED IN SENATE JUNE 21, 2011

AMENDED IN ASSEMBLY APRIL 27, 2011

AMENDED IN ASSEMBLY APRIL 12, 2011

AMENDED IN ASSEMBLY MARCH 31, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

**ASSEMBLY BILL**

**No. 778**

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**Introduced by Assembly Member Atkins**

February 17, 2011

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An act to ~~add Sections 1395.3 and 1395.4 to amend Section 1380 of, and to add Sections 1395.3, 1395.4, and 1395.45 to,~~ the Health and Safety Code, relating to health care service plans.

LEGISLATIVE COUNSEL'S DIGEST

AB 778, as amended, Atkins. Health care service plans: vision care.

Existing law, the Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene Act), provides for the regulation of health care service plans by the Department of Managed Health Care and makes a willful violation of the act a crime. Existing law provides that health care service plans shall not be deemed to be engaged in the practice of a profession, and may employ, or contract with, any licensed health care professional to deliver professional services, and may directly own, and may directly operate through its professional employees or contracted licensed professionals, offices and subsidiary corporations. Existing law provides that those professionals may not own or control offices or branch offices unless otherwise expressly authorized.

This bill would authorize a registered dispensing optician, an optical company, a manufacturer or distributor of optical goods, or a

nonoptometric corporation to own a *specialized* health care service plan that provides *or arranges for the provision of* vision care services, share profits with the *specialized* health care service plan, contract for specified business services with the *specialized* health care service plan, and jointly advertise vision care services with the *specialized* health care service plan. The bill would prohibit those persons or entities from engaging in conduct ~~designed to~~ *that would* influence or interfere with the clinical decisions of an optometrist, as specified, *and would set forth provisions that apply to medical records*. Because a willful violation of ~~that provision~~ *these provisions* would be a crime under the Knox-Keene Act, the bill would impose a state-mandated local program.

*Existing law requires the Department of Managed Health Care to conduct periodic onsite medical surveys of the health delivery system of each health care service plan. Survey results are publicly reported and subject to public inspection. Existing law requires the Director of the Department of Managed Health Care to notify a health care service plan of any deficiencies found by a survey.*

*This bill would require the director to provide to a health care service plan and to the executive officer of the State Board of Optometry or the Medical Board of California a copy of information relating to the quality of care of any licensed optometrist or optician contained in any survey report that, in the judgment of the director, indicates incompetent or negligent treatment, as specified.*

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. The Legislature hereby finds and declares the
- 2 following:
- 3 (a) Health care service plans, including specialized health care
- 4 service plans, are regulated by the Department of Managed Health
- 5 Care.

1 (b) To ensure that quality care and coverage are provided to  
2 enrollees, a health care service plan, including a specialized health  
3 care service plan, is required to do all of the following:

4 (1) Establish a department-approved quality assurance program  
5 to ensure that enrollees are continuously provided the appropriate  
6 level of services covered by the health care service plan.

7 (2) Ensure that a separation of fiscal and administrative  
8 management from medical services exists within the health care  
9 service plan.

10 (3) Periodically submit information to the department to  
11 demonstrate delivery of quality care, accessibility of services to  
12 enrollees, and prompt resolution of complaints.

13 (4) Establish procedures meeting specified requirements for  
14 reviewing the utilization of services and facilities.

15 (5) Participate in comprehensive medical and financial audits  
16 conducted by the department.

17 (c) Existing law prohibits an optometrist from engaging in  
18 certain business relationships with a registered optical dispenser.

19 (d) Existing law allows a health care service plan to hire and  
20 contract with licensed professionals and to engage in a business  
21 relationship with any entity. However, existing law is unclear about  
22 the relationships between *specialized* health care service plans that  
23 provide ~~vision~~ or *arrange for the provision of vision care* services  
24 and optical companies.

25 (e) Providing statutory clarity regarding permissible business  
26 relationships between a *specialized* health care service plan  
27 providing ~~vision~~ or *arranging for the provision of vision care*  
28 services and optical companies will provide certainty and allow  
29 regulating entities to ensure that health care service plans are  
30 engaged in appropriate business relationships.

31 *SEC. 2. Section 1380 of the Health and Safety Code is amended*  
32 *to read:*

33 1380. (a) The department shall conduct periodically an onsite  
34 medical survey of the health delivery system of each plan. The  
35 survey shall include a review of the procedures for obtaining health  
36 services, the procedures for regulating utilization, peer review  
37 mechanisms, internal procedures for assuring quality of care, and  
38 the overall performance of the plan in providing health care benefits  
39 and meeting the health needs of the subscribers and enrollees.

1 (b) The survey shall be conducted by a panel of qualified health  
2 professionals experienced in evaluating the delivery of prepaid  
3 health care. The department shall be authorized to contract with  
4 professional organizations or outside personnel to conduct medical  
5 surveys and these contracts shall be on a noncompetitive bid basis  
6 and shall be exempt from Chapter 2 (commencing with Section  
7 10290) of Part 2 of Division 2 of the Public Contract Code. These  
8 organizations or personnel shall have demonstrated the ability to  
9 objectively evaluate the delivery of health care by plans or health  
10 maintenance organizations.

11 (c) Surveys performed pursuant to this section shall be  
12 conducted as often as deemed necessary by the director to assure  
13 the protection of subscribers and enrollees, but not less frequently  
14 than once every three years. Nothing in this section shall be  
15 construed to require the survey team to visit each clinic, hospital  
16 office, or facility of the plan. To avoid duplication, the director  
17 shall employ, but is not bound by, the following:

18 (1) For hospital-based health care service plans, to the extent  
19 necessary to satisfy the requirements of this section, the findings  
20 of inspections conducted pursuant to Section 1279.

21 (2) For health care service plans contracting with the State  
22 Department of Health Services pursuant to the Waxman-Duffy  
23 Prepaid Health Plan Act, the findings of reviews conducted  
24 pursuant to Section 14456 of the Welfare and Institutions Code.

25 (3) To the extent feasible, reviews of providers conducted by  
26 professional standards review organizations, and surveys and audits  
27 conducted by other governmental entities.

28 (d) Nothing in this section shall be construed to require the  
29 medical survey team to review peer review proceedings and records  
30 conducted and compiled under Section 1370 or medical records.  
31 However, the director shall be authorized to require onsite review  
32 of these peer review proceedings and records or medical records  
33 where necessary to determine that quality health care is being  
34 delivered to subscribers and enrollees. Where medical record  
35 review is authorized, the survey team shall insure that the  
36 confidentiality of physician-patient relationship is safeguarded in  
37 accordance with existing law and neither the survey team nor the  
38 director or the director's staff may be compelled to disclose this  
39 information except in accordance with the physician-patient  
40 relationship. The director shall ensure that the confidentiality of

1 the peer review proceedings and records is maintained. The  
2 disclosure of the peer review proceedings and records to the  
3 director or the medical survey team shall not alter the status of the  
4 proceedings or records as privileged and confidential  
5 communications pursuant to Sections 1370 and 1370.1.

6 (e) The procedures and standards utilized by the survey team  
7 shall be made available to the plans prior to the conducting of  
8 medical surveys.

9 (f) During the survey the members of the survey team shall  
10 examine the complaint files kept by the plan pursuant to Section  
11 1368. The survey report issued pursuant to subdivision (i) shall  
12 include a discussion of the plan's record for handling complaints.

13 (g) During the survey the members of the survey team shall  
14 offer such advice and assistance to the plan as deemed appropriate.

15 (h) (1) Survey results shall be publicly reported by the director  
16 as quickly as possible but no later than 180 days following the  
17 completion of the survey unless the director determines, in his or  
18 her discretion, that additional time is reasonably necessary to fully  
19 and fairly report the survey results. The director shall provide the  
20 plan with an overview of survey findings and notify the plan of  
21 deficiencies found by the survey team at least 90 days prior to the  
22 release of the public report.

23 (2) Reports on all surveys, deficiencies, and correction plans  
24 shall be open to public inspection except that no surveys,  
25 deficiencies, or correction plans shall be made public unless the  
26 plan has had an opportunity to review the report and file a response  
27 within 45 days of the date that the department provided the report  
28 to the plan. After reviewing the plan's response, the director shall  
29 issue a final report that excludes any survey information and legal  
30 findings and conclusions determined by the director to be in error,  
31 describes compliance efforts, identifies deficiencies that have been  
32 corrected by the plan by the time of the director's receipt of the  
33 plan's 45-day response, and describes remedial actions for  
34 deficiencies requiring longer periods to the remedy required by  
35 the director or proposed by the plan.

36 (3) The final report shall not include a description of  
37 "acceptable" or of "compliance" for any uncorrected deficiency.

38 (4) Upon making the final report available to the public, a single  
39 copy of a summary of the final report's findings shall be made  
40 available free of charge by the department to members of the

1 public, upon request. Additional copies of the summary may be  
2 provided at the department's cost. The summary shall include a  
3 discussion of compliance efforts, corrected deficiencies, and  
4 proposed remedial actions.

5 (5) If requested by the plan, the director shall append the plan's  
6 response to the final report issued pursuant to paragraph (2), and  
7 shall append to the summary issued pursuant to paragraph (4) a  
8 brief statement provided by the plan summarizing its response to  
9 the report. The plan may modify its response or statement at any  
10 time and provide modified copies to the department for public  
11 distribution no later than 10 days from the date of notification from  
12 the department that the final report will be made available to the  
13 public. The plan may file an addendum to its response or statement  
14 at any time after the final report has been made available to the  
15 public. The addendum to the response or statement shall also be  
16 made available to the public.

17 (6) Any information determined by the director to be  
18 confidential pursuant to statutes relating to the disclosure of  
19 records, including the California Public Records Act (Chapter 3.5  
20 (commencing with Section 6250) of Division 7 of Title 1 of the  
21 Government Code), shall not be made public.

22 (i) (1) The director shall give the plan a reasonable time to  
23 correct deficiencies. Failure on the part of the plan to comply to  
24 the director's satisfaction shall constitute cause for disciplinary  
25 action against the plan.

26 (2) No later than 18 months following release of the final report  
27 required by subdivision (h), the department shall conduct a  
28 follow-up review to determine and report on the status of the plan's  
29 efforts to correct deficiencies. The department's follow-up report  
30 shall identify any deficiencies reported pursuant to subdivision (h)  
31 that have not been corrected to the satisfaction of the director.

32 (3) If requested by the plan, the director shall append the plan's  
33 response to the follow-up report issued pursuant to paragraph (2).  
34 The plan may modify its response at any time and provide modified  
35 copies to the department for public distribution no later than 10  
36 days from the date of notification from the department that the  
37 follow-up report will be made available to the public. The plan  
38 may file an addendum to its response at any time after the  
39 follow-up report has been made available to the public. The

1 addendum to the response or statement shall also be made available  
2 to the public.

3 (j) The director shall provide to the plan and to the executive  
4 officer of the Board of Dental Examiners a copy of information  
5 relating to the quality of care of any licensed dental provider  
6 contained in any report described in subdivisions (h) and (i) that,  
7 in the judgment of the director, indicates clearly excessive  
8 treatment, incompetent treatment, grossly negligent treatment,  
9 repeated negligent acts, or unnecessary treatment. Any confidential  
10 information provided by the director shall not be made public  
11 pursuant to this subdivision. Notwithstanding any other provision  
12 of law, the disclosure of this information to the plan and to the  
13 executive officer shall not operate as a waiver of confidentiality.  
14 There shall be no liability on the part of, and no cause of action of  
15 any nature shall arise against, the State of California, the  
16 Department of Managed Health Care, the Director of the  
17 Department of Managed Health Care, the Board of Dental  
18 Examiners, or any officer, agent, employee, consultant, or  
19 contractor of the state or the department or the board for the release  
20 of any false or unauthorized information pursuant to this section,  
21 unless the release of that information is made with knowledge and  
22 malice.

23 (k) *The director shall provide to the plan and to the executive*  
24 *officer of the State Board of Optometry or the Medical Board of*  
25 *California a copy of information relating to the quality of care of*  
26 *any licensed optometrist or optician contained in any report*  
27 *described in subdivisions (h) and (i) that, in the judgment of the*  
28 *director, indicates clearly excessive treatment, incompetent*  
29 *treatment, grossly negligent treatment, repeated negligent acts,*  
30 *or unnecessary treatment. Any confidential information provided*  
31 *by the director shall not be made public pursuant to this*  
32 *subdivision. Notwithstanding any other provision of law, the*  
33 *disclosure of this information to the plan and to the executive*  
34 *officer shall not operate as a waiver of confidentiality. There shall*  
35 *be no liability on the part of, and no cause of action of any nature*  
36 *shall arise against, the State of California, the Department of*  
37 *Managed Health Care, the Director of the Department of Managed*  
38 *Health Care, the State Board of Optometry, the Medical Board of*  
39 *California, or any officer, agent, employee, consultant, or*  
40 *contractor of the state or the department or the boards for the*

1 *release of any false or unauthorized information pursuant to this*  
2 *section, unless the release of that information is made with*  
3 *knowledge and malice.*

4 ~~(k)~~

5 *(l) Nothing in this section shall be construed as affecting the*  
6 *director’s authority pursuant to Article 7 (commencing with Section*  
7 *1386) or Article 8 (commencing with Section 1390) of this chapter.*

8 ~~SEC. 2.~~

9 *SEC. 3.* Section 1395.3 is added to the Health and Safety Code,  
10 to read:

11 1395.3. Notwithstanding any other provision of law, a  
12 registered dispensing optician, an optical company, a manufacturer  
13 or distributor of optical goods, or a nonoptometric corporation  
14 may do all of the following:

15 (a) Own a *specialized* health care service plan that provides *or*  
16 *arranges for the provision of* vision care services and share its  
17 profits.

18 (b) Contract for business services with, lease office space or  
19 equipment to or from, or share office space with, a *specialized*  
20 health care service plan that provides *or arranges for the provision*  
21 *of* vision care services.

22 (c) Jointly advertise vision care services with a *specialized* health  
23 care service plan that provides *or arranges for the provision of*  
24 vision care services.

25 ~~SEC. 3.~~

26 *SEC. 4.* Section 1395.4 is added to the Health and Safety Code,  
27 to read:

28 1395.4. (a) A registered dispensing optician, an optical  
29 company, a manufacturer or distributor of optical goods, or a  
30 nonoptometric corporation shall not engage in conduct ~~designed~~  
31 ~~to~~ *that would* influence or interfere with the clinical decisions of  
32 an optometrist employed by, or who has contracted with, a  
33 specialized vision care ~~service~~ plan for fiscal or administrative  
34 reasons, *including, but not limited to, the following:*

35 (1) *Holding an optometrist responsible for the sale of, or*  
36 *requiring an optometrist to sell, the eyewear of a registered*  
37 *dispensing optician affiliated with the specialized vision care plan.*

38 (2) *Providing compensation to an optometrist for the sale of*  
39 *the eyewear of a registered dispensing optician affiliated with the*  
40 *specialized vision care plan.*

1 ~~(b) Pursuant to subdivision (g) of Section 1367, the~~

2 *(b) The clinical decisions of an optometrist who is employed*  
3 *by, or who has contracted with, a specialized vision care service*  
4 *plan shall be unhindered by fiscal and administrative management*  
5 *of the plan and any affiliate of the plan.*

6 *(c) An optometrist who has contracted with, or is employed by,*  
7 *a specialized vision care plan shall not be required by the plan to*  
8 *sell the eyewear of a registered dispensing optician affiliated with*  
9 *the specialized vision care plan.*

10 *(d) An optometrist who has contracted with, or is employed by,*  
11 *a specialized vision care plan shall not receive any compensation*  
12 *from the sale of eyewear by a registered dispensing optician*  
13 *affiliated with the specialized vision care plan.*

14 *(e) Notwithstanding any protocol established by a specialized*  
15 *vision care plan to meet patient and network access requirements,*  
16 *the specialized vision care plan may not set fixed quotas for the*  
17 *number of patients that a practitioner must treat in a particular*  
18 *time period.*

19 *(f) Any violation of this section shall subject the specialized*  
20 *vision care plan to the penalties that apply to health care service*  
21 *plans under this article.*

22 *(g) For purposes of this section, a “specialized vision care plan”*  
23 *shall mean a specialized health care service plan that provides or*  
24 *arranges for the provision of vision care services and that operates*  
25 *pursuant to Section 1395.3.*

26 *SEC. 5. Section 1395.45 is added to the Health and Safety*  
27 *Code, to read:*

28 *1395.45. (a) A specialized vision care plan affiliated with a*  
29 *registered dispensing optician shall not provide the registered*  
30 *dispensing optician with a copy of the patient record of any patient,*  
31 *except as permitted by applicable law.*

32 *(b) A specialized vision care plan affiliated with a registered*  
33 *dispensing optician shall, following receipt of the written*  
34 *authorization of a patient to release medical records, provide to*  
35 *a requesting optometrist formerly employed by the specialized*  
36 *vision care plan a copy of the medical record of the patient within*  
37 *15 days of the request.*

38 *(c) A specialized vision care plan in violation of this section*  
39 *shall be subject to the fines and penalties set forth in Sections*  
40 *56.35 and 56.36 of the Civil Code.*

1 (d) For purposes of this section, a “specialized vision care plan”  
2 shall mean a specialized health care service plan that provides or  
3 arranges for the provision of vision care services and that operates  
4 pursuant to Section 1395.3.

5 ~~SEC. 4.~~

6 SEC. 6. No reimbursement is required by this act pursuant to  
7 Section 6 of Article XIII B of the California Constitution because  
8 the only costs that may be incurred by a local agency or school  
9 district will be incurred because this act creates a new crime or  
10 infraction, eliminates a crime or infraction, or changes the penalty  
11 for a crime or infraction, within the meaning of Section 17556 of  
12 the Government Code, or changes the definition of a crime within  
13 the meaning of Section 6 of Article XIII B of the California  
14 Constitution.

**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

NATIONAL ASSOCIATION OF  
OPTOMETRISTS & OPTICIANS;  
LENSCRAFTERS, INC.; EYE CARE  
CENTERS OF AMERICA, INC.,  
*Plaintiffs-Appellants,*

v.

KAMALA D. HARRIS, Attorney  
General; DENISE BROWN, Case  
Manager, in his official capacity  
as Director of the Department of  
Consumer Affairs,  
*Defendants-Appellees.*

No. 10-16233  
D.C. No.  
2:02-cv-01464-  
LKK-DAD  
OPINION

Appeal from the United States District Court  
for the Eastern District of California  
Lawrence K. Karlton, Senior District Judge, Presiding

Argued and Submitted  
January 23, 2012—Pasadena, California

Filed June 13, 2012

Before: Procter Hug, Jr., Richard A. Paez, and  
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Hug

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**COUNSEL**

Lois A. Schechter, Morrison & Foerster LLP, San Francisco, California, Deanne E. Maynard, Morrison & Foerster LLP, Washington, D.C., for the appellants.

Sherry L. Ledakis, Deputy Attorney General, San Diego, California, for the appellees.

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**OPINION**

HUG, Senior Circuit Judge:

**I. INTRODUCTION**

This case concerns the constitutionality of certain California statutes and regulations. These statutes and regulations prohibit licensed opticians<sup>1</sup> from offering prescription eye-

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<sup>1</sup>Individuals and optical companies, such as LensCrafters, Inc., that fill prescriptions and perform related services in selling eyewear, fit within the

wear at the same location in which eye examinations are provided and from advertising that eyewear and eye examinations are available in the same location. The National Association of Optometrists and Opticians, LensCrafters, Inc., and Eye Care Centers of America, Inc. (collectively “Plaintiffs”) maintain that these California statutes and regulations violate the dormant Commerce Clause.<sup>2</sup> On remand from this Court, Plaintiffs filed a motion for summary judgment, contending that the statutes and regulations place a burden on interstate commerce that excessively outweighs the local benefits of the law. California’s Attorney General and Department of Consumer Affairs (collectively “the State”) filed a cross-motion for summary judgment. The district court denied Plaintiffs’ motion for summary judgment and granted the State’s motion for summary judgment. Plaintiffs timely appealed. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed a complaint alleging that California’s Business & Professions Code sections 655, 2556 and 3103, and two companion regulations, 16 Cal. Code of Regs, Title 16 sections 1399.251 and 1514 (collectively “challenged laws”) violate the dormant Commerce Clause. Plaintiffs challenge these laws to the extent they prohibit opticians and optical companies from offering prescription eyewear at the same location in which eye examinations are provided and from advertising that eyewear and eye examinations are available in the same location. Section 655 prohibits opticians and opti-

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definition of “dispensing opticians” under California law. *See* Cal. Bus. & Prof. Code § 2550. We will refer to these “dispensing opticians” simply as “opticians” or “optical companies” in this opinion.

<sup>2</sup>LenCrafters, Inc. is incorporated in Ohio and owns and operates retail stores in California. Eye Care Centers of America, Inc. is a Texas corporation that owns and operates retail stores in California. These California stores employ opticians and sell eyewear.

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cal companies from having “any membership, proprietary interest, co-ownership, landlord-tenant relationship, or any profitsharing arrangement in any form, directly or indirectly” with ophthalmologists or optometrists.<sup>3</sup> Cal. Bus. & Prof. Code § 655. Section 2556 prohibits optical companies from furnishing, employing, or maintaining optometrists and ophthalmologists on their premises. Cal. Bus. & Prof. Code § 2556. In addition, opticians may not advertise the services of optometrists or ophthalmologists. Cal. Bus. & Prof. Code § 3103; Cal. Code Regs. tit. 16, §§ 1399.251, 1514.

Plaintiffs challenged these California laws primarily because optometrists and ophthalmologists may set up a practice where patients may receive both eye examinations and prescription eyewear, but opticians may offer only the sale of eyewear, not eye examinations, and therefore are unable to offer the convenience of “one-stop shopping” in California. The restrictions on one-stop shopping apply to all opticians and optical companies when they sell eyewear in California, regardless of whether their stores are entirely owned by California entities or are owned by companies incorporated outside of California.

Plaintiffs moved for summary judgment, and the State opposed the motion. The district court granted Plaintiffs’ motion for summary judgment on the grounds that the challenged laws discriminate against interstate commerce and that the State failed to provide sufficient evidence that there are no other means to address its legitimate interest in protecting public health. *Nat’l Ass’n of Optometrists & Opticians v. Lockyer*, 463 F. Supp. 2d 1116 (E.D. Cal. 2006). The State appealed.

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<sup>3</sup>Optometrists and ophthalmologists are health care providers who have met specified educational requirements and must comply with certain ethical and professional responsibilities. See *Nat’l Ass’n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 526-27 (9th Cir. 2009). Many optometrists and ophthalmologists sell eyewear to their patients. *Id.* at 527.

We reversed, holding that the challenged laws were not discriminatory on their face, in their purpose, or in their effect.<sup>4</sup> See *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 524-28 (9th Cir. 2009). Although we concluded that the challenged laws were not discriminatory, we recognized that this holding was not necessarily the end of the dormant Commerce Clause analysis and remanded to the district court to determine whether the challenged laws violate the dormant Commerce Clause even though they are not discriminatory. *Id.* at 528.

On remand, the parties filed cross-motions for summary judgment. The district court denied Plaintiffs' motion for summary judgment and granted the State's motion for summary judgment. *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 709 F. Supp. 2d 968 (E.D. Cal. 2010). The court effectively concluded that, based on the facts and the law, there were no genuine issues of material fact. Plaintiffs argued that the challenged laws impermissibly burdened interstate commerce because: 1) the challenged laws preclude an interstate company from offering one-stop shopping, which is the dominant form of eyewear retailing; and 2) interstate firms would incur a great financial loss as a result of the challenged laws. *Id.* at 974-78. The district court concluded that it need not consider the evidence supporting these theories because both theories failed as a matter of law. *Id.* In reaching this conclusion, the court reasoned that, because there was no cognizable burden on interstate commerce, it need not attempt to balance the "non-burden" against the putative local interests under the test derived from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *Id.* at 975. Plaintiffs timely appealed, and that appeal is now before us.

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<sup>4</sup>In our opinion, we concluded that these laws are "designed to prevent health care providers from being unduly affected by commercial interests." 567 F.3d at 526. We did not reach the issue of whether these laws were successful in achieving the State's goals.

### III. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001). Therefore, our review is governed by the same standard used by the district court under Federal Rule of Civil Procedure 56(a). *Id.* Rule 56(a) provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The substantive law determines which facts are material; only disputes over facts that might affect the outcome of the suit under the governing law properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We may affirm a grant of summary judgment on any ground supported by the record. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009).

### IV. ANALYSIS

#### A. The Dormant Commerce Clause and *Pike*

[1] An understanding of *Pike* and of the purpose and scope of the dormant Commerce Clause informs our determination of whether, as a matter of law, Plaintiffs have provided sufficient evidence of a violation of the dormant Commerce Clause. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984); see also *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality of State of Or.*, 511 U.S. 93, 98 (1994) ("Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate

against or burden the interstate flow of articles of commerce.”). This limitation on state power has come to be known as the dormant Commerce Clause. *See Dep’t of Revenue v. Davis*, 553 U.S. 328, 337 (2008).

Modern dormant Commerce Clause jurisprudence primarily “is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Id.* at 337-38 (internal quotation marks and citations omitted). “The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce.” *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987). “The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism,” because these are the “laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.” *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). Thus, a corollary concern of the dormant Commerce Clause is that “this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods.” *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976).

[2] Given the purposes of the dormant Commerce Clause, it is not surprising that a state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce. *See S. Pac. Co. v. State of Ariz.*, 325 U.S. 761, 767 (1945). A critical requirement for proving a violation of the dormant Commerce Clause is that there must be a *substantial burden* on *interstate commerce*. *See South-Central Timber Dev.*, 467 U.S. at 87. Most regulations that run afoul of the dormant Commerce Clause do so because of discrimination, but in a small number of dormant Commerce Clause cases courts also have invalidated statutes that imposed other significant burdens on interstate commerce. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997). These other significant burdens on interstate

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commerce generally result from inconsistent regulation of activities that are inherently national or require a uniform system of regulation. *Id.*; *CTS Corp.*, 481 U.S. at 88; *see also Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128 (1978) (recognizing that, on rare occasions, the Supreme Court has held that the Commerce Clause precludes state regulation in a particular field because “a lack of national uniformity would impede the flow of interstate goods”). A classic example of this type of regulation is one that imposes significant burdens on interstate transportation. *See Tracy*, 519 U.S. at 298 n.12; *CTS Corp.*, 481 U.S. at 88.

Although dormant Commerce Clause jurisprudence protects against burdens on interstate commerce, it also respects federalism by protecting local autonomy. *Davis*, 553 U.S. at 338. Thus, the Supreme Court has recognized that “under our constitutional scheme the States retain broad power to legislate protection for their citizens in matters of local concern such as public health” and has held that “not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States.” *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) (internal quotations and citations omitted); *see also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443-44 (1960) (recognizing that the Constitution “never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country”); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949) (noting that the Supreme Court generally has supported the rights of states to “impose even burdensome regulations in the interest of local health and safety”).

In a long line of dormant Commerce Clause cases, the Supreme Court has sought to reconcile these competing interests of local autonomy and burdens on interstate commerce. In one of those cases, *Pike v. Bruce Church, Inc.*, the Supreme

Court set forth the following summary of dormant Commerce Clause law, stating:

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted).

Unfortunately, the *Pike* test has not turned out to be easy to apply. As the Supreme Court has acknowledged, there is “no clear line” in Supreme Court cases between cases involving discrimination and cases subject to *Pike*’s “clearly excessive” burden test. *See Tracy*, 519 U.S. at 298 n.12. Justice Scalia has candidly observed that “once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a quagmire.” *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring) (internal quotation marks omitted).

Much of the confusion stems from the fact that *Pike* does not define the term “even-handedly” and combines the test for discriminatory laws with the test for non-discriminatory laws. The cases therefore are not clear or consistent in terms of when a regulation is considered discriminatory and virtually

*per se* invalid and when and how a regulation is subjected to *Pike*'s "clearly excessive" burden test.<sup>5</sup> In *Tracy*, the Supreme Court recognized that a number of its cases purporting to apply the *Pike* undue burden balancing test really turned on the discriminatory character of the challenged regulations. *Tracy*, 519 U.S. at 298 n.12. According to the Supreme Court, only a small number of its cases invalidating laws under the dormant Commerce Clause have involved laws that were "genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated in-state and out-of-state interests." *Id.*

[3] In the instant case, we previously held that the challenged laws are not discriminatory on their face, in their purpose, or in their effect. *See Nat'l Ass'n of Optometrists*, 567 F.3d at 524-28. Nevertheless, because it is possible for non-discriminatory regulations to place a significant burden on interstate commerce and thereby violate the dormant Commerce Clause, we remanded to the district court for a determination of whether the challenged laws, though non-

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<sup>5</sup>In some cases, *facial* discrimination draws the line, explicitly or in application, between: 1) laws that are considered discriminatory (*e.g.* not "even-handed" in the words of *Pike*) and therefore subject to stricter scrutiny and virtual *per se* invalidity; and 2) other laws imposing a burden on interstate commerce (including laws that are discriminatory in purpose and effect), which are subject to the *Pike* "clearly excessive" burden test. *See, e.g., Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 375-76, 380-81 (1976) (recognizing that, although Mississippi statute did not discriminate on its face, by its terms the statute's *effect* was to exclude Louisiana milk from Mississippi, and that such a burden on interstate commerce was clearly excessive in relation to the putative local benefits and could not be justified by protectionist goals); *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991). In other cases, the determination of whether a law is subject to strict scrutiny depends on whether there is any kind of discrimination, including facial discrimination, discriminatory purpose, and discriminatory effect. *See, e.g., Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 524-25 (9th Cir. 2009); *LensCrafters, Inc. v. Robinson*, 403 F.3d 798, 802 (6th Cir. 2005); *see also W. Lynn Creamery*, 512 U.S. at 193-96, 201-02 (holding that statute was clearly unconstitutional because of its discriminatory purpose and effect).

discriminatory, nevertheless violate the dormant Commerce Clause. *Id.* at 528. The threshold issue in this appeal is whether Plaintiffs have produced sufficient evidence that the challenged laws, though non-discriminatory, impose a significant burden on interstate commerce. As discussed below, we hold that Plaintiffs have not produced such evidence.

### **B. Significant Burden on Interstate Commerce**

On remand, Plaintiffs argued that, under *Pike*, the challenged laws impermissibly burdened interstate commerce. *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 709 F. Supp. 2d 968, 974-78 (E.D. Cal. 2010). The district court, relying in large part on *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978), rejected those arguments. *Id.* On appeal, Plaintiffs contend that the district court misinterpreted *Exxon*, and they argue that the challenged laws impose a significant burden on interstate commerce because the restrictions on one-stop-shopping result in a transfer of market share and income from “out-of-state”<sup>6</sup> eyewear sellers to in-state optometrists and ophthalmologists who sell eyewear.<sup>7</sup>

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<sup>6</sup>Plaintiffs use the term “out-of-state” in reference to their own case to refer to corporations that are incorporated out-of-state, but own stores that are located in California and are selling eyewear in California. They use the term “in-state” to refer to eyewear sellers who are located in California and selling eyewear in California, but are not owned by a company incorporated out-of-state. These terms are used differently, however, in the cases relied upon by Plaintiffs. Those cases generally use the term “out-of-state” to refer to the origin of goods and materials produced outside of the state or to refer to entities producing those goods and materials outside the state. Here, as far as the record shows, the eyewear sold by opticians is no more likely to have been produced outside of California than the eyewear sold by optometrists and ophthalmologists.

<sup>7</sup>To the extent Plaintiffs again raise arguments concerning alleged discriminatory costs, barriers to entry, or other discriminatory effects and discriminatory purposes, we will not revisit those issues. We already have rejected those arguments and held that the challenged laws are not discriminatory.

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[4] In *Exxon*, the Supreme Court considered a Maryland law that prohibited petroleum producers and refiners from owning retail service stations in Maryland. *Exxon*, 437 U.S. 117. Because no petroleum products were produced or refined in Maryland, all the producers and refiners affected by the regulation were out-of-state companies. *Id.* at 123. The Supreme Court first rejected Exxon’s argument that the statute was discriminatory. *Id.* at 124-25. The Court then rejected Exxon’s argument that the statute, even if not discriminatory, still impermissibly burdened interstate commerce by placing all the adverse effects of the regulation on interstate companies. *Id.* at 126-27. In the course of explaining why there was not a burden on interstate commerce, the Court made it clear that the Commerce Clause does not protect “the particular structure or methods of operation in a retail market.” *Id.* at 127.

[5] The reasoning of *Exxon* applies to the instant case. Plaintiffs want opticians to be able to offer one-stop shopping. The challenged laws regulating one-stop shopping are generally applicable regulations of a method of operating in a retail market. Under the reasoning of *Exxon*, the dormant Commerce Clause does not protect this method of operation, nor guarantee Plaintiffs their preferred method of operation, in the eyewear retail market.

Plaintiffs argue that *Exxon* does not preclude relief here because the challenged laws have the effect of shifting market share and profits from “out-of-state” entities to “in-state” ones.<sup>8</sup>

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<sup>8</sup>Plaintiffs appear to make a related argument that the challenged laws burden interstate commerce because the elimination of one-stop shopping interferes with their ability to compete. This argument does not appear to be materially different from Plaintiffs’ arguments regarding “out-of-state” market share and essentially is another way for Plaintiffs to argue that they should be able to engage in their preferred method of operation. Countless non-discriminatory regulations affect the ability of some out-of-state entities to compete, but that does not necessarily mean that those regulations

This argument is unavailing. Plaintiffs focus on some of the Supreme Court's language in *Exxon* to argue that the Supreme Court's decision in that case turned on the fact that the statute being challenged would not affect the market share of interstate refiners. In particular, Plaintiffs direct us to the Supreme Court's response to Exxon's argument that some refiners would stop selling petroleum in Maryland as a result of the Maryland statute:

Some refiners may choose to withdraw entirely from the Maryland market, but there is no reason to assume that their share of the entire supply will not be promptly replaced by *other interstate refiners*. The source of the consumers' supply may switch from company-operated stations to independent dealers, but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from *one interstate supplier to another*.

*Id.* at 127 (emphasis added).

Plaintiffs make much of the fact that the *Exxon* Court wrote of a shift from one "interstate supplier to another," and they argue that this explains why the Supreme Court upheld the statute. Plaintiffs distinguish their own case on the grounds that here the challenged laws will cause a shift in market share from eyewear sellers owned by companies that are

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impose a significant burden on interstate commerce. *Cf. Exxon*, 437 U.S. at 133 ("[I]f an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed."). If we were to create an exception to *Exxon*'s rule regarding methods of operation for those cases in which competition was affected, such an exception would swallow the rule. Moreover, such an exception would be contrary to the reasoning and result in *Exxon*, where the statute unquestionably affected competition.

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incorporated outside of California to entirely *in-state* eyewear sellers. It is true that, in *Exxon*, all of the shift in supply necessarily would have been from one out-of-state supplier to another because there were no in-state suppliers. In contrast, here we may assume that there will be a shift in market share from optical stores owned by companies incorporated out-of-state<sup>9</sup> to in-state optometrists or ophthalmologists.

[6] But the *Exxon* Court’s own analysis shows that the fact that the change in supply would be from one interstate petroleum supplier to another interstate petroleum supplier had no bearing on the Court’s decision, especially once the Court determined that the statute was not discriminatory.<sup>10</sup> After ruling that the Maryland statute was not discriminatory, the Court addressed the argument that the statute nevertheless burdened interstate commerce. The Court focused its concern on the free flow of petroleum into the state, not on who ultimately profited. The Court noted: “The crux of appellants’ claim is that, *regardless of whether the State has interfered with the movement of goods in interstate commerce*, it has interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.”

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<sup>9</sup>The restrictions on one-stop shopping apply to all opticians and optical stores, including those owned by California companies. Thus, we will assume that there also will be a transfer of eyewear sales and income from optical companies owned by Californians to California optometrists and ophthalmologists. We also understand that there are methods of operation that may impact market share to the benefit of the chain optical stores owned by interstate companies. However, for purposes of this appeal, we assume that the challenged laws will result in an overall shift in the market share of eyewear sales and profits from optical stores owned by out-of state corporations to entities that are entirely owned by Californians.

<sup>10</sup>Even in its statements regarding discriminatory effects, the Court was discussing the free flow of goods, not who owned those goods, stating: “[I]f the effect of a state regulation is to cause local *goods* to constitute a larger share, and *goods* with an out-of-state source to constitute a smaller share, of the total sales in the market . . . the regulation may have a discriminatory effect on interstate commerce.” *Id.* at 126 n.16 (emphasis added).

*Exxon*, 437 U.S. at 127 (internal quotation marks omitted) (emphasis added). It was in the course of rejecting this argument that the Court stated: “We cannot . . . accept appellants’ underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market.” *Id.* The Court went on to explain that the dormant Commerce Clause “protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”<sup>11</sup> *Id.* at 127-28. Furthermore, the Court concluded, if the statute caused the loss of stations owned by some refiners and therefore caused harm to the consuming public, such a result would be related to the wisdom of the statute, not to a burden on interstate commerce. *Id.* at 127-28.

The *Exxon* Court determined that the challenged statute had no impact on the interstate flow of goods, pointing out that the sales by independent retailers (who necessarily obtained their petroleum products from outside Maryland) were just as much a part of the flow of interstate commerce as sales made by the stations operated by interstate refiners. *Exxon*, 437 U.S. at 126 n.16. As part of its analysis, the Court held that the case did not involve a situation in which there would be a lack of national uniformity that would impede the flow of interstate goods. *Id.* at 128. Having determined that there was no discrimination or other burden on interstate commerce, the Court

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<sup>11</sup>Plaintiffs concede that there would not be a burden on interstate commerce if business shifted from one set of interstate firms to another set of interstate firms. Thus, Plaintiffs do not appear to be maintaining the argument that mere loss of profits demonstrates a burden on interstate commerce. Rather, their argument rests on the theory that the challenged laws will result in a shift in the share of sales and profits from companies that are incorporated out-of-state. To the extent Plaintiffs *are* arguing that a mere loss of profits constitutes a burden on interstate commerce, that argument has no merit. As *Exxon* makes clear, the dormant Commerce Clause does not protect a particular company’s profits. *Exxon*, 437 U.S. at 127; *see also Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1013-17 (9th Cir. 1994) (holding that dormant Commerce Clause did not protect plaintiffs’ economic investment against legitimate state regulations protecting native wildlife).

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concluded its Commerce Clause inquiry and upheld the statute. *Id.* at 128-29, 134. Thus, in deciding whether there was a non-discriminatory burden on interstate commerce and a violation of the dormant Commerce Clause, the *Exxon* Court's decision turned on the interstate *flow of goods*, not on where the retailers were incorporated, what the out-of-state market shares of sales and profits were, or whether competition would be affected by the statute. *Exxon* thus undercuts, rather than supports, Plaintiffs' claim.

Plaintiffs next argue that *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456 (1981), supports their claim that there is a significant burden on interstate commerce when non-discriminatory regulations result in *income* shifting from out-of-state corporations to in-state businesses.<sup>12</sup> We find this argument unconvincing. The Minnesota statute at issue in *Clover Leaf* prohibited all milk retailers in Minnesota from selling their products in plastic, non-returnable milk containers. *Id.* at 472. The likely result of the statute was that many milk retailers would switch from plastic milk containers to paperboard milk containers. *Id.*

After rejecting the argument that the statute was discriminatory,<sup>13</sup> the Court concluded that the controlling question was

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<sup>12</sup>Plaintiffs similarly claim that *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007), supports its conclusion that there is a burden on interstate commerce if income is shifted out of state, arguing that the *United Haulers* Court's "chief finding" in its *Pike* analysis was that the Court had not detected any disparate impact between in-state and out-of-state businesses. This part of *United Haulers* is of no import here because it is not the opinion of the Court, because it does not state if or why this fact had any significance, because it appears to relate to discriminatory effects, and because it made no determination of whether there even was a burden on interstate commerce. *See id.* at 346.

<sup>13</sup>The *Clover Leaf* Court's assessment of whether the statute was "discriminatory" did not include an analysis of whether the statute had discriminatory effects. *See Clover Leaf*, 449 U.S. at 471-72. The Court arguably was discussing discriminatory effects as part of its application of *Pike*'s "clearly excessive" burden test. *Id.* at 473-74.

whether, under *Pike*, there was a burden on interstate commerce that was clearly excessive in relationship to the putative local interests. *Id.* at 472. In its analysis of the burden on interstate commerce, the Court's discussion centered on the flow of goods and raw materials into Minnesota. The Court began by noting that the statute would permit milk to continue to move freely across the Minnesota border. *Id.* The Court nevertheless found a "relatively minor" burden on interstate commerce because the statute would result in some benefits to Minnesota's pulpwood industry at the expense of non-Minnesota industries. *Id.* at 473. This effect was due to the fact that the plastic resin used in non-returnable milk jugs was produced by non-Minnesota firms, while pulpwood was a major Minnesota product. *Id.*

Although the Supreme Court found the burden to be relatively minor and upheld the statute, Plaintiffs argue that this part of *Clover Leaf* shows that a shift in *income* from "out-of-state" to "in-state" businesses is a burden on interstate commerce that must be weighed against the benefits of a statute causing such a shift in income. In *Clover Leaf*, however, the Court made no mention of "income" and instead discussed manufacturing and exporting materials or goods into another state. The Court used terms such as "Minnesota *product*," "out-of-state *pulpwood producers*," "Minnesota pulpwood *industry*," and "out-of-state *plastics industry*," and it addressed the issue of whether there would be a change in the importation into Minnesota of materials and goods produced outside of Minnesota. *Id.* at 472-73 (emphasis added). Thus, the Court's determination of whether there was a burden on interstate commerce turned on a change in the flow of goods into the state, not on profits.

[7] We conclude that Supreme Court precedent<sup>14</sup> estab-

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<sup>14</sup>In addition to *Exxon* and *Clover Leaf*, Plaintiffs cite a number of other Supreme Court cases for the proposition that, under the *Pike* test, courts consider lost profits and the transfer of revenue or market share from out-

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lishes that there is not a significant burden on interstate commerce merely because a non-discriminatory<sup>15</sup> regulation precludes a preferred, more profitable method of operating in a retail market. Where such a regulation does not regulate activities that inherently require a uniform system of regulation and does not otherwise impair the free flow of materials

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of-state firms to in-state firms to constitute an injury under the dormant Commerce Clause. However, these cases are discrimination cases, and they reinforce our conclusion that dormant Commerce Clause jurisprudence is concerned with burdens resulting from discrimination and interference with the interstate flow of goods, not the share of profits obtained by entities owned by interstate corporations. For example, in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 196 (1994), the Supreme Court concluded that the purpose and effect of the state's thinly disguised tariff on out-of-state milk was to cause local goods to be a larger share of the market at the expense of goods coming from out-of-state. The Court determined that the statute was discriminatory and a violation of the dormant Commerce Clause. *Id.* at 194-97. Similarly, *Pike* itself is a case in which the challenged order prohibited interstate transfer of cantaloupes for packing, and the Supreme Court has indicated that the decision in *Pike* was about discrimination. *See Pike*, 397 U.S. at 138, 146 (holding that state's interest was not compelling and that Court would not permit state to require that cantaloupe grower take its packing business to a local packing company instead of to a packing company in another state); *see also Tracy*, 519 U.S. at 298 n.12 (classifying *Pike* as a case that purported to apply the *Pike* undue burden test, but turned largely on the discriminatory character of the challenged state regulations). *C&A Carbone* is yet another discrimination case that discussed concerns about the flow of goods and services. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90 (1994) (holding ordinance that had effect of prohibiting out-of-state businesses from providing certain waste services was discriminatory and applying strict scrutiny instead of "clearly excessive" burden test); *see also Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429, 445 (1978) (holding that Wisconsin statute barring trucks of certain lengths imposed a "substantial burden on the interstate movement of goods"); *S.D. Myers, Inc. v. City and Cnty. of San Francisco*, 253 F.3d 461, 471(9th Cir. 2001) (upholding non-discriminatory ordinance that adversely impacted plaintiff and emphasizing that the "Commerce Clause is concerned with the free flow of goods and services through the several states").

<sup>15</sup>By "non-discriminatory," we mean a regulation that does not discriminate on its face, in its purpose, or in its effects.

and products across state borders, there is not a significant burden on interstate commerce. We find no support in the law for Plaintiffs' proposition that there is a significant burden on interstate commerce whenever, as a result of non-discriminatory retailer regulations, there is an incidental shift in sales and profits to in-state entities from retailers that operate in-state but are owned by companies incorporated out-of-state.<sup>16</sup>

[8] In light of this law, it is apparent that, in the case before us, there is no material issue of fact regarding whether the challenged laws place a significant burden on interstate commerce. Plaintiffs have not produced evidence that the challenged laws interfere with the flow of eyewear into California; any optician, optometrist, or ophthalmologist remains free to import eyewear originating anywhere into California and sell it there. In addition, we are not concerned here with activities that require a uniform system of regulation. Thus, Plaintiffs have failed to raise a material issue of fact concerning whether there is a significant burden on interstate commerce.

### C. Benefits of the Challenged Laws

Relying on *Pike*, Plaintiffs argue that, in determining whether a regulation violates the dormant Commerce Clause, courts are required to examine the actual benefits of non-discriminatory regulations. However, *Pike* discusses whether

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<sup>16</sup>Plaintiffs' interpretation of the law is not only incorrect, but would lead to unworkable and illogical results. If an interstate company suddenly purchased all a state's retailers that were adversely affected by that state's regulations, under Plaintiffs' interpretation of the law, a regulation that previously was constitutional might immediately be rendered unconstitutional if the regulations then had the effect of shifting profits from "out-of-state" entities to "in-state" entities. In such situations, out-of-state corporate headquarters effectively could determine the policies and laws of another state. This situation would not be consistent with the purposes of the dormant Commerce Clause.

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the burden on interstate commerce is “clearly excessive in relation to the *putative* local benefits.” See *Pike*, 397 U.S. at 142 (emphasis added). It does not mention actual benefits as part of the test for determining when a regulation violates the dormant Commerce Clause.

[9] Even if *Pike*’s “clearly excessive” burden test were concerned with weighing actual benefits rather than “putative benefits,” we need not examine the benefits of the challenged laws because, as discussed above, the challenged laws do not impose a significant burden on interstate commerce. If a regulation merely has an effect on interstate commerce, but does not impose a significant burden on interstate commerce, it follows that there cannot be a burden on interstate commerce that is “clearly excessive in relation to the putative local benefits” under *Pike*. Accordingly, where, as here, there is no discrimination and there is no significant burden on interstate commerce, we need not examine the actual or putative benefits of the challenged statutes. This is the implicit lesson of *Exxon*. Once the *Exxon* Court determined that there was no discrimination and no significant burden on interstate commerce, it ended its dormant Commerce Clause analysis without assessing the value of the statute’s purported benefits or actual benefits. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 125-29 (1978).

[10] Plaintiffs ask us to determine whether the benefits of the challenged laws are illusory. Occasionally, when determining whether a non-discriminatory health and safety regulation violates the dormant Commerce Clause, courts will consider evidence related to a regulation’s actual benefits to determine if the purported benefits of the regulation are illusory.<sup>17</sup> However, the issue of whether a regulation is illusory is

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<sup>17</sup>In order for a regulation to be deemed “illusory,” the state must fail to make even a colorable showing that the regulations contribute to health and safety, resulting in overwhelmingly one-sided evidence that there are no real benefits to the challenged law. See, e.g., *Raymond Motor Transp.*

relevant only in very limited circumstances that are not present here. In the absence of discrimination or another substantial burden on interstate commerce, we need not determine if the benefits of a statute are illusory. *See, e.g., Raymond*, 434 U.S. at 445 (holding that regulations violated the dormant Commerce Clause where they imposed a substantial burden on the interstate movement of goods and interfered with the flow and speed of interstate truck transportation, and the state failed to make even a colorable showing that the regulations contributed to safety); *see also Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 670-71 (1981) (plurality) (recognizing that some burdens associated with state safety regulations must be tolerated, but holding that where “the State’s safety interest has been found to be illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation,” the state law violates the dormant Commerce Clause).

[11] Because the challenged laws are not discriminatory and do not impose a significant burden on interstate commerce, it would be inappropriate for us to determine the constitutionality of the challenged laws based on our assessment of the benefits of those laws and the State’s wisdom in adopting them. *See CTS Corp.*, 481 U.S. at 92 (noting that the Supreme Court is not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation); *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983, 984 (9th Cir. 1991) (holding that it was inappropriate for the district court to make a quasi-legislative judgment by

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*Inc. v. Rice*, 434 U.S. 429, 437-38, 447-48 (1978). But, if the state produces some evidence showing the purported benefits exist, the challenged statute will not be considered illusory even if there is strong countervailing evidence. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987) (rejecting contention that state’s concern with prospect of coercive tender offers was illusory because, even though there was support for the notion that tender offers generally should be favored, there was some evidence showing that state’s concern was not groundless).

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weighing community concerns about noise against the need for safe and efficient national transportation system); *cf. Davis*, 553 U.S. at 355 (recognizing that the judicial process is generally unsuited to answering many of the cost-benefit questions raised in dormant Commerce Clause challenges).

Accordingly, we express no opinion regarding the value of the putative benefits or the actual benefits of the challenged laws.

#### **D. Alternatives To the Challenged Laws**

Plaintiffs contend that the district court erred by failing to determine whether there is a genuine issue of material fact concerning whether the purposes of the challenged laws could be served as well with less restrictive alternatives. As an initial matter, it is not clear what role possible alternative regulations play when, as here, the challenged laws are not discriminatory. In most dormant Commerce Clause cases, it is not the role of the courts to determine the best legislative solution to a problem. *See S. Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190 (1938) (holding that “a court is not called upon, as are state Legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected”). During the course of simultaneously discussing both discriminatory and non-discriminatory regulations, *Pike* does refer to whether a local interest “could be promoted as well with a lesser impact on interstate activities.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). However, in one of the Supreme Court’s most recent discussions of the *Pike* test, the Court distinguished between discriminatory laws and non-discriminatory laws, requiring an examination of alternatives for discriminatory laws,<sup>18</sup> but not for other laws. *See Dep't of*

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<sup>18</sup>This dichotomy is consistent with prior Supreme Court precedent. *See, e.g., Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 894

*Revenue v. Davis*, 553 U.S. 328, 338-39 (2008). This distinction is consistent with case law requiring the consideration of less restrictive alternatives only when heightened scrutiny is required.

[12] Even assuming that, in the wake of *Davis*, overwhelming and conclusive evidence of equally effective alternative regulations is relevant to the analysis of non-discriminatory regulations, in order for us to invalidate a statute based on the availability of less burdensome alternatives, the statute would have to impose a significant burden on interstate commerce. See *Pac. Nw. Venison Prods. v. Smitch*, 20 F.3d 1008, 1016 (9th Cir. 1994). Because the challenged laws do not impose a significant burden on interstate commerce, it would be inappropriate for us to set them aside based on a conclusion that the State's purposes could be served as well with alternative laws. We therefore will not consider any evidence regarding alternative means for the State to achieve its goals.

## V. CONCLUSION

For the foregoing reasons, the district court's order granting the State's motion for summary judgment and denying Plaintiffs' motion for summary judgment is AFFIRMED.

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(1988) (recognizing that a state law applying a statute of limitations only to those present in the state had the discriminatory effect of subjecting foreign and domestic corporations to different regulations, and the state could not justify the statute as a means of ensuring that foreign corporations would be liable for acts done within the state because a long-arm statute would permit service on such corporations); *Great Atl. & Pac. Tea Co v. Cottrell*, 424 U.S. 366, 375-77 (1976) (discussing obvious alternative to a Mississippi statute that had both a questionable purpose and the discriminatory effect of excluding all milk from Louisiana even if the milk met Mississippi health standards).

AMENDED IN SENATE JUNE 25, 2012

AMENDED IN ASSEMBLY MARCH 5, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1588**

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**Introduced by Assembly Member Atkins**  
**(Principal coauthors: Assembly Members Cook and Nielsen)**  
**(Coauthors: Assembly Members *Allen, Bill Berryhill, Block, Butler,***  
***Beth Gaines, Pan, V. Manuel Pérez, Williams, and Yamada*)**

February 6, 2012

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An act to add Section 114.3 to the Business and Professions Code, relating to professions and vocations.

LEGISLATIVE COUNSEL'S DIGEST

AB 1588, as amended, Atkins. Professions and vocations: reservist licensees: fees and continuing education.

Existing law provides for the regulation of various professions and vocations by boards, ~~commissions, or bureaus~~ within the Department of Consumer Affairs and for the licensure or registration of individuals in that regard. Existing law authorizes any licensee whose license expired while he or she was on active duty as a member of the California National Guard or the United States Armed Forces to reinstate his or her license without examination or penalty if certain requirements are met.

This bill would require the boards, ~~commissions, or bureaus~~ described above to waive the renewal fees ~~and~~, continuing education requirements, ~~if either is applicable~~ *and other renewal requirements as determined by the board, if any are applicable*, of any licensee or registrant who is a reservist called to active duty as a member of the United States

Military Reserve or the California National Guard if certain requirements are met. *The bill would require a licensee or registrant to meet certain renewal requirements within a specified time period after being discharged from active duty service prior to engaging in any activity requiring a license.*

Vote: majority. Appropriation: no. Fiscal committee: yes.  
 State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 114.3 is added to the Business and  
 2 Professions Code, to read:  
 3 114.3. (a) Notwithstanding any other provision of law, every  
 4 board, ~~commission, or bureau~~ *as defined in Section 22*, within the  
 5 department shall waive the renewal fees ~~and~~, continuing education  
 6 requirements, ~~if either is applicable~~ *and other renewal requirements*  
 7 *as determined by the board, if any are applicable*, for any licensee  
 8 or registrant who is a reservist called to active duty as a member  
 9 of the United States Military Reserve or the California National  
 10 Guard if all of the following requirements are met:  
 11 (a)  
 12 (1) The licensee or registrant ~~was in good standing~~ *possessed*  
 13 *a current and valid license* with the board, ~~commission, or bureau~~  
 14 ~~at the time the reservist he or she was called to active duty.~~  
 15 (b)  
 16 (2) The renewal fees ~~or continuing education~~ requirements are  
 17 waived only for the period during which the ~~reservist licensee or~~  
 18 ~~registrant~~ *is on active duty service.*  
 19 (c) ~~The active duty reservist, or the active duty reservist's spouse~~  
 20 ~~or registered domestic partner, provides written notice satisfactory~~  
 21 ~~to the board, commission, or bureau that substantiates the~~  
 22 ~~reservist's active duty service.~~  
 23 (3) *Written documentation that substantiates the licensee or*  
 24 *registrant's active duty service is provided to the board.*  
 25 (b) *The licensee or registrant shall not engage in any activities*  
 26 *requiring a license during the period that the waivers provided by*  
 27 *this section are in effect. In order to engage in any activities for*  
 28 *which he or she is licensed, the licensee or registrant shall meet*  
 29 *all necessary renewal requirements as determined by the board*

- 1 *within one year from the reservist's date of discharge from active*
- 2 *duty service.*
- 3 *(c) A board may adopt regulations to carry out the provisions*
- 4 *of this section.*

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AMENDED IN SENATE JUNE 20, 2012

AMENDED IN ASSEMBLY APRIL 26, 2012

AMENDED IN ASSEMBLY APRIL 16, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1733**

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**Introduced by Assembly Member Logue**

February 16, 2012

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An act to amend ~~Section 1374.13~~ Sections 2028.5, 3041, and 4999.90 of, and to add Section 686 to, the Business and Professions Code, to amend Sections 78910.10 and 101041 of the Education Code, to amend Sections 1367, 1374.13, 1375.1, 123149.5, and 127620 of the Health and Safety Code, to amend Sections 10123.13 and 10123.147 of the Insurance Code, and to amend Sections 14132.725 and 14132.73 of, and to add Section 14594 to, the Welfare and Institutions Code, relating to telehealth.

LEGISLATIVE COUNSEL'S DIGEST

AB 1733, as amended, Logue. Telehealth.

Existing law, the Knox-Keene Health Care Service Plan Act of 1975, provides for the licensure and regulation of health care service plans by the Department of Managed Health Care and makes a willful violation of the act a crime. Existing law prohibits a health care service plan from requiring in-person contact between a health care provider and a patient before payment is made for covered services appropriately provided through telehealth, as specified. Existing law specifies that this requirement applies to certain Medi-Cal managed care plans, including county organized health systems and entities contracting with

the department to provide services pursuant to 2-plan models and geographic managed care.

Existing law establishes the California Program of All-Inclusive Care for the Elderly (PACE) and provides that the State Department of Health Care Services may enter into contracts with public or private nonprofit organizations for implementation of the PACE program.

This bill would specify that the prohibition on requiring in-person contact also applies to other health care service plan contracts with the State Department of Health Care Services for services under the Medi-Cal program, and publicly supported programs other than Medi-Cal, as well as to the organizations implementing the PACE program. By expanding the scope of a crime, the bill would impose a state-mandated local program. *The bill would also make various related conforming changes, including requiring health care practitioners providing telehealth services to practice according to the regulations regarding their profession.*

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1     *SECTION 1. Section 686 is added to the Business and*
- 2     *Professions Code, to read:*
- 3     686. A health care practitioner licensed under Division 2
- 4     (commencing with Section 500) providing services via telehealth
- 5     shall be subject to the requirements and definitions set forth in
- 6     Section 2290.5, to the practice act relating to his or her licensed
- 7     profession, and to the regulations adopted by a board pursuant to
- 8     that practice act.
- 9     SEC. 2. Section 2028.5 of the Business and Professions Code
- 10    is amended to read:
- 11    2028.5. (a) The board may establish a pilot program to expand
- 12    the practice of ~~telemedicine~~ telehealth in this state.
- 13    (b) To implement this pilot program, the board may convene a
- 14    working group of interested parties from the public and private

1 sectors, including, but not limited to, state health-related agencies,  
2 health care providers, health plan administrators, information  
3 technology groups, and groups representing health care consumers.

4 (c) The purpose of the pilot program shall be to develop  
5 methods, using a ~~telemedicine~~ *telehealth* model, to deliver  
6 throughout the state health care to persons with chronic diseases  
7 as well as information on the best practices for chronic disease  
8 management services and techniques and other health care  
9 information as deemed appropriate.

10 (d) The board shall make a report with its recommendations  
11 regarding its findings to the Legislature within one calendar year  
12 of the commencement date of the pilot program. The report shall  
13 include an evaluation of the improvement and affordability of  
14 health care services and the reduction in the number of  
15 complications achieved by the pilot program.

16 *SEC. 3. Section 3041 of the Business and Professions Code is*  
17 *amended to read:*

18 3041. (a) The practice of optometry includes the prevention  
19 and diagnosis of disorders and dysfunctions of the visual system,  
20 and the treatment and management of certain disorders and  
21 dysfunctions of the visual system, as well as the provision of  
22 rehabilitative optometric services, and is the doing of any or all of  
23 the following:

24 (1) The examination of the human eye or eyes, or its or their  
25 appendages, and the analysis of the human vision system, either  
26 subjectively or objectively.

27 (2) The determination of the powers or range of human vision  
28 and the accommodative and refractive states of the human eye or  
29 eyes, including the scope of its or their functions and general  
30 condition.

31 (3) The prescribing or directing the use of, or using, any optical  
32 device in connection with ocular exercises, visual training, vision  
33 training, or orthoptics.

34 (4) The prescribing of contact and spectacle lenses for, or the  
35 fitting or adaptation of contact and spectacle lenses to, the human  
36 eye, including lenses that may be classified as drugs or devices by  
37 any law of the United States or of this state.

38 (5) The use of topical pharmaceutical agents for the purpose of  
39 the examination of the human eye or eyes for any disease or  
40 pathological condition.

1 (b) (1) An optometrist who is certified to use therapeutic  
2 pharmaceutical agents, pursuant to Section 3041.3, may also  
3 diagnose and treat the human eye or eyes, or any of its or their  
4 appendages, for all of the following conditions:

5 (A) Through medical treatment, infections of the anterior  
6 segment and adnexa, excluding the lacrimal gland, the lacrimal  
7 drainage system, and the sclera in patients under 12 years of age.

8 (B) Ocular allergies of the anterior segment and adnexa.

9 (C) Ocular inflammation, nonsurgical in cause except when  
10 comanaged with the treating physician and surgeon, limited to  
11 inflammation resulting from traumatic iritis, peripheral corneal  
12 inflammatory keratitis, episcleritis, and unilateral nonrecurrent  
13 nongranulomatous idiopathic iritis in patients over 18 years of age.  
14 Unilateral nongranulomatous idiopathic iritis recurring within one  
15 year of the initial occurrence shall be referred to an  
16 ophthalmologist. An optometrist shall consult with an  
17 ophthalmologist or appropriate physician and surgeon if a patient  
18 has a recurrent case of episcleritis within one year of the initial  
19 occurrence. An optometrist shall consult with an ophthalmologist  
20 or appropriate physician and surgeon if a patient has a recurrent  
21 case of peripheral corneal inflammatory keratitis within one year  
22 of the initial occurrence.

23 (D) Traumatic or recurrent conjunctival or corneal abrasions  
24 and erosions.

25 (E) Corneal surface disease and dry eyes.

26 (F) Ocular pain, nonsurgical in cause except when comanaged  
27 with the treating physician and surgeon, associated with conditions  
28 optometrists are authorized to treat.

29 (G) Pursuant to subdivision (f), glaucoma in patients over 18  
30 years of age, as described in subdivision (j).

31 (2) For purposes of this section, “treat” means the use of  
32 therapeutic pharmaceutical agents, as described in subdivision (c),  
33 and the procedures described in subdivision (e).

34 (c) In diagnosing and treating the conditions listed in subdivision  
35 (b), an optometrist certified to use therapeutic pharmaceutical  
36 agents pursuant to Section 3041.3 may use all of the following  
37 therapeutic pharmaceutical agents:

38 (1) Pharmaceutical agents as described in paragraph (5) of  
39 subdivision (a), as well as topical miotics.

40 (2) Topical lubricants.

1 (3) Antiallergy agents. In using topical steroid medication for  
2 the treatment of ocular allergies, an optometrist shall consult with  
3 an ophthalmologist if the patient's condition worsens 21 days after  
4 diagnosis.

5 (4) Topical and oral antiinflammatories. In using steroid  
6 medication for:

7 (A) Unilateral nonrecurrent nongranulomatous idiopathic iritis  
8 or episcleritis, an optometrist shall consult with an ophthalmologist  
9 or appropriate physician and surgeon if the patient's condition  
10 worsens 72 hours after the diagnosis, or if the patient's condition  
11 has not resolved three weeks after diagnosis. If the patient is still  
12 receiving medication for these conditions six weeks after diagnosis,  
13 the optometrist shall refer the patient to an ophthalmologist or  
14 appropriate physician and surgeon.

15 (B) Peripheral corneal inflammatory keratitis, excluding  
16 Moorens and Terriens diseases, an optometrist shall consult with  
17 an ophthalmologist or appropriate physician and surgeon if the  
18 patient's condition worsens 72 hours after diagnosis.

19 (C) Traumatic iritis, an optometrist shall consult with an  
20 ophthalmologist or appropriate physician and surgeon if the  
21 patient's condition worsens 72 hours after diagnosis and shall refer  
22 the patient to an ophthalmologist or appropriate physician and  
23 surgeon if the patient's condition has not resolved one week after  
24 diagnosis.

25 (5) Topical antibiotic agents.

26 (6) Topical hyperosmotics.

27 (7) Topical and oral antiglaucoma agents pursuant to the  
28 certification process defined in subdivision (f).

29 (A) The optometrist shall refer the patient to an ophthalmologist  
30 if requested by the patient or if angle closure glaucoma develops.

31 (B) If the glaucoma patient also has diabetes, the optometrist  
32 shall consult with the physician treating the patient's diabetes in  
33 developing the glaucoma treatment plan and shall inform the  
34 physician in writing of any changes in the patient's glaucoma  
35 medication.

36 (8) Nonprescription medications used for the rational treatment  
37 of an ocular disorder.

38 (9) Oral antihistamines.

39 (10) Prescription oral nonsteroidal antiinflammatory agents.

40 (11) Oral antibiotics for medical treatment of ocular disease.

1 (A) If the patient has been diagnosed with a central corneal ulcer  
2 and the central corneal ulcer has not improved 48 hours after  
3 diagnosis, the optometrist shall refer the patient to an  
4 ophthalmologist.

5 (B) If the patient has been diagnosed with preseptal cellulitis  
6 or dacryocystitis and the condition has not improved 48 hours after  
7 diagnosis, the optometrist shall refer the patient to an  
8 ophthalmologist.

9 (12) Topical and oral antiviral medication for the medical  
10 treatment of the following: herpes simplex viral keratitis, herpes  
11 simplex viral conjunctivitis, and periocular herpes simplex viral  
12 dermatitis; and varicella zoster viral keratitis, varicella zoster viral  
13 conjunctivitis, and periocular varicella zoster viral dermatitis.

14 (A) If the patient has been diagnosed with herpes simplex  
15 keratitis or varicella zoster viral keratitis and the patient's condition  
16 has not improved seven days after diagnosis, the optometrist shall  
17 refer the patient to an ophthalmologist. If a patient's condition has  
18 not resolved three weeks after diagnosis, the optometrist shall refer  
19 the patient to an ophthalmologist.

20 (B) If the patient has been diagnosed with herpes simplex viral  
21 conjunctivitis, herpes simplex viral dermatitis, varicella zoster  
22 viral conjunctivitis, or varicella zoster viral dermatitis, and if the  
23 patient's condition worsens seven days after diagnosis, the  
24 optometrist shall consult with an ophthalmologist. If the patient's  
25 condition has not resolved three weeks after diagnosis, the  
26 optometrist shall refer the patient to an ophthalmologist.

27 (13) Oral analgesics that are not controlled substances.

28 (14) Codeine with compounds and hydrocodone with  
29 compounds as listed in the California Uniform Controlled  
30 Substances Act (Division 10 (commencing with Section 11000)  
31 of the Health and Safety Code) and the United States Uniform  
32 Controlled Substances Act (21 U.S.C. Sec. 801 et seq.). The use  
33 of these agents shall be limited to three days, with a referral to an  
34 ophthalmologist if the pain persists.

35 (d) In any case where this chapter requires that an optometrist  
36 consult with an ophthalmologist, the optometrist shall maintain a  
37 written record in the patient's file of the information provided to  
38 the ophthalmologist, the ophthalmologist's response, and any other  
39 relevant information. Upon the consulting ophthalmologist's

1 request and with the patient's consent, the optometrist shall furnish  
2 a copy of the record to the ophthalmologist.

3 (e) An optometrist who is certified to use therapeutic  
4 pharmaceutical agents pursuant to Section 3041.3 may also perform  
5 all of the following:

6 (1) Corneal scraping with cultures.

7 (2) Debridement of corneal epithelia.

8 (3) Mechanical epilation.

9 (4) Venipuncture for testing patients suspected of having  
10 diabetes.

11 (5) Suture removal, with prior consultation with the treating  
12 physician and surgeon.

13 (6) Treatment or removal of sebaceous cysts by expression.

14 (7) Administration of oral fluorescein to patients suspected as  
15 having diabetic retinopathy.

16 (8) Use of an auto-injector to counter anaphylaxis.

17 (9) Ordering of smears, cultures, sensitivities, complete blood  
18 count, mycobacterial culture, acid fast stain, urinalysis, and X-rays  
19 necessary for the diagnosis of conditions or diseases of the eye or  
20 adnexa. An optometrist may order other types of images subject  
21 to prior consultation with an ophthalmologist or appropriate  
22 physician and surgeon.

23 (10) Punctal occlusion by plugs, excluding laser, diathermy,  
24 cryotherapy, or other means constituting surgery as defined in this  
25 chapter.

26 (11) The prescription of therapeutic contact lenses, including  
27 lenses or devices that incorporate a medication or therapy the  
28 optometrist is certified to prescribe or provide.

29 (12) Removal of foreign bodies from the cornea, eyelid, and  
30 conjunctiva with any appropriate instrument other than a scalpel  
31 or needle. Corneal foreign bodies shall be nonperforating, be no  
32 deeper than the midstroma, and require no surgical repair upon  
33 removal.

34 (13) For patients over 12 years of age, lacrimal irrigation and  
35 dilation, excluding probing of the nasal lacrimal tract. The board  
36 shall certify any optometrist who graduated from an accredited  
37 school of optometry before May 1, 2000, to perform this procedure  
38 after submitting proof of satisfactory completion of 10 procedures  
39 under the supervision of an ophthalmologist as confirmed by the  
40 ophthalmologist. Any optometrist who graduated from an

1 accredited school of optometry on or after May 1, 2000, shall be  
2 exempt from the certification requirement contained in this  
3 paragraph.

4 (f) The board shall grant a certificate to an optometrist certified  
5 pursuant to Section 3041.3 for the treatment of glaucoma, as  
6 described in subdivision (j), in patients over 18 years of age after  
7 the optometrist meets the following applicable requirements:

8 (1) For licensees who graduated from an accredited school of  
9 optometry on or after May 1, 2008, submission of proof of  
10 graduation from that institution.

11 (2) For licensees who were certified to treat glaucoma under  
12 this section prior to January 1, 2009, submission of proof of  
13 completion of that certification program.

14 (3) For licensees who have substantially completed the  
15 certification requirements pursuant to this section in effect between  
16 January 1, 2001, and December 31, 2008, submission of proof of  
17 completion of those requirements on or before December 31, 2009.  
18 “Substantially completed” means both of the following:

19 (A) Satisfactory completion of a didactic course of not less than  
20 24 hours in the diagnosis, pharmacological, and other treatment  
21 and management of glaucoma.

22 (B) Treatment of 50 glaucoma patients with a collaborating  
23 ophthalmologist for a period of two years for each patient that will  
24 conclude on or before December 31, 2009.

25 (4) For licensees who completed a didactic course of not less  
26 than 24 hours in the diagnosis, pharmacological, and other  
27 treatment and management of glaucoma, submission of proof of  
28 satisfactory completion of the case management requirements for  
29 certification established by the board pursuant to Section 3041.10.

30 (5) For licensees who graduated from an accredited school of  
31 optometry on or before May 1, 2008, and not described in  
32 paragraph (2), (3), or (4), submission of proof of satisfactory  
33 completion of the requirements for certification established by the  
34 board pursuant to Section 3041.10.

35 (g) Other than for prescription ophthalmic devices described in  
36 subdivision (b) of Section 2541, any dispensing of a therapeutic  
37 pharmaceutical agent by an optometrist shall be without charge.

38 (h) The practice of optometry does not include performing  
39 surgery. “Surgery” means any procedure in which human tissue  
40 is cut, altered, or otherwise infiltrated by mechanical or laser

1 means. “Surgery” does not include those procedures specified in  
2 subdivision (e). Nothing in this section shall limit an optometrist’s  
3 authority to utilize diagnostic laser and ultrasound technology  
4 within his or her scope of practice.

5 (i) An optometrist licensed under this chapter is subject to the  
6 provisions of Section 2290.5 for purposes of practicing  
7 ~~telemedicine~~ *telehealth*.

8 (j) For purposes of this chapter, “glaucoma” means either of the  
9 following:

10 (1) All primary open-angle glaucoma.

11 (2) Exfoliation and pigmentary glaucoma.

12 (k) In an emergency, an optometrist shall stabilize, if possible,  
13 and immediately refer any patient who has an acute attack of angle  
14 closure to an ophthalmologist.

15 *SEC. 4. Section 4999.90 of the Business and Professions Code*  
16 *is amended to read:*

17 4999.90. The board may refuse to issue any registration or  
18 license, or may suspend or revoke the registration or license of  
19 any intern or licensed professional clinical counselor, if the  
20 applicant, licensee, or registrant has been guilty of unprofessional  
21 conduct. Unprofessional conduct includes, but is not limited to,  
22 the following:

23 (a) The conviction of a crime substantially related to the  
24 qualifications, functions, or duties of a licensee or registrant under  
25 this chapter. The record of conviction shall be conclusive evidence  
26 only of the fact that the conviction occurred. The board may inquire  
27 into the circumstances surrounding the commission of the crime  
28 in order to fix the degree of discipline or to determine if the  
29 conviction is substantially related to the qualifications, functions,  
30 or duties of a licensee or registrant under this chapter. A plea or  
31 verdict of guilty or a conviction following a plea of nolo contendere  
32 made to a charge substantially related to the qualifications,  
33 functions, or duties of a licensee or registrant under this chapter  
34 shall be deemed to be a conviction within the meaning of this  
35 section. The board may order any license or registration suspended  
36 or revoked, or may decline to issue a license or registration when  
37 the time for appeal has elapsed, or the judgment of conviction has  
38 been affirmed on appeal, or, when an order granting probation is  
39 made suspending the imposition of sentence, irrespective of a  
40 subsequent order under Section 1203.4 of the Penal Code allowing

## Assembly Bill No. 1896

### CHAPTER 119

An act to amend the heading of Article 10 (commencing with Section 710) of Chapter 1 of Division 2 of, and to add Section 719 to, the Business and Professions Code, relating to healing arts.

[Approved by Governor July 13, 2012. Filed with  
Secretary of State July 13, 2012.]

#### LEGISLATIVE COUNSEL'S DIGEST

AB 1896, Chesbro. Tribal health programs: health care practitioners.

Under existing federal law, licensed health professionals employed by a tribal health program are required to be exempt, if licensed in any state, from the licensing requirements of the state in which the tribal health program performs specified services. A tribal health program is defined as an Indian tribe or tribal organization that operates any health program, service, function, activity, or facility funded, in whole or part, by the Indian Health Service.

Existing law provides for the licensure and regulation of health care practitioners by various healing arts boards within the Department of Consumer Affairs.

This bill would codify that federal requirement by specifying that a person who is licensed as a health care practitioner in any other state and is employed by a tribal health program is exempt from this state's licensing requirements with respect to acts authorized under the person's license where the tribal health program performs specified services.

*The people of the State of California do enact as follows:*

SECTION 1. The heading of Article 10 (commencing with Section 710) of Chapter 1 of Division 2 of the Business and Professions Code is amended to read:

#### Article 10. Federal Personnel and Tribal Health Programs

SEC. 2. Section 719 is added to the Business and Professions Code, to read:

719. (a) A person who is licensed as a health care practitioner in any other state and is employed by a tribal health program, as defined in Section 1603 of Title 25 of the United States Code, shall be exempt from any licensing requirement described in this division with respect to acts authorized under the person's license where the tribal health program

performs the services described in the contract or compact of the tribal health program under the Indian Self-Determination and Education Assistance Act (25 U.S.C. Sec. 450 et seq.).

(b) For purposes of this section, “health care practitioner” means any person who engages in acts that are the subject of licensure or regulation under the law of any other state.

AMENDED IN SENATE JUNE 12, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1904**

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**Introduced by Assembly Members Block, Butler, and Cook**

February 22, 2012

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An act to add Section 115.5 to the Business and Professions Code, relating to professions and vocations, ~~and making an appropriation therefor.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 1904, as amended, Block. Professions and vocations: military spouses: ~~temporary licenses:~~ *expedited licensure.*

Existing law provides for the licensure and regulation of various professions and vocations by boards within the Department of Consumer Affairs. Existing law provides for the issuance of reciprocal licenses in certain fields where the applicant, among other requirements, has a license to practice within that field in another jurisdiction, as specified. ~~Under existing law, licensing fees imposed by certain boards within the department are deposited in funds that are continuously appropriated. Existing law authorizes a licensee to reinstate an expired license without examination or penalty if, among other requirements, the license expired while the licensee was on active duty as a member of the California National Guard or the United States Armed Forces.~~

This bill would ~~authorize~~ *require* a board within the department to ~~issue a temporary license to expedite the licensure process for~~ an applicant who, ~~among other requirements,~~ holds an equivalent *a* license ~~in the same profession or vocation~~ in another jurisdiction, ~~as specified,~~ and is married to, or in a legal union with, an active duty member of the Armed Forces of the United States who is assigned to a duty station

in California under official active duty military orders. ~~The bill would require a board to expedite the process for issuing these temporary licenses. The bill would require the applicant to pay any fees required by the board and would require that those fees be deposited in the fund used by the board to administer its licensing program. To the extent that the bill would increase the amount of money deposited into a continuously appropriated fund, the bill would make an appropriation.~~

Vote: majority. Appropriation: *yes-no*. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 115.5 is added to the Business and  
2 Professions Code, to read:  
3 115.5. (a) A board within the department ~~may issue a~~  
4 ~~temporary license to~~ *shall expedite the licensure process for an*  
5 applicant who meets ~~all~~ *both* of the following requirements:  
6 (1) ~~Submits an application in the manner prescribed by the~~  
7 ~~board.~~  
8 (2)  
9 (1) Supplies evidence satisfactory to the board that the applicant  
10 is married to, or in a domestic partnership or other legal union  
11 with, an active duty member of the Armed Forces of the United  
12 States who is assigned to a duty station in this state under official  
13 active duty military orders.  
14 (3)  
15 (2) Holds a current license in another state, district, or territory  
16 of the United States ~~with the requirements that the board determines~~  
17 ~~are substantially equivalent to those established under this code~~  
18 ~~for that occupation~~ *in the profession or vocation for which he or*  
19 *she seeks a license from the board.*  
20 (4) ~~Has not committed an act in any jurisdiction that would have~~  
21 ~~constituted grounds for denial, suspension, or revocation of the~~  
22 ~~license under this code at the time the act was committed.~~  
23 (5) ~~Has not been disciplined by a licensing entity in another~~  
24 ~~jurisdiction and is not the subject of an unresolved complaint,~~  
25 ~~review procedure, or disciplinary proceeding conducted by a~~  
26 ~~licensing entity in another jurisdiction.~~

1     ~~(6) Pays any fees required by the board. Those fees shall be~~  
2     ~~deposited in the applicable fund or account used by the board to~~  
3     ~~administer its licensing program.~~

4     ~~(7) Submits fingerprints and any applicable fingerprinting fee~~  
5     ~~in the manner required of an applicant for a regular license.~~

6     ~~(b) A board shall expedite the procedure for issuing a temporary~~  
7     ~~license pursuant to this section.~~

8     ~~(c) A temporary license issued under this section shall be valid~~  
9     ~~for 180 days, except that the license may, at the discretion of the~~  
10    ~~board, be extended for an additional 180-day period on application~~  
11    ~~of the license holder.~~

12    ~~(d)~~

13    ~~(b) A board may adopt regulations necessary to administer this~~  
14    ~~section.~~

BILL NUMBER: SB 690      AMENDED  
BILL TEXT

AMENDED IN ASSEMBLY    JUNE 18, 2012  
AMENDED IN SENATE      JANUARY 10, 2012  
AMENDED IN SENATE      MAY 10, 2011

INTRODUCED BY    Senator Hernandez

FEBRUARY 18, 2011

An act to add Section 1373.15 to the Health and Safety Code, and to add Section 10177.15 to the Insurance Code, relating to health care coverage.

LEGISLATIVE COUNSEL'S DIGEST

SB 690, as amended, Hernandez. Health care coverage: discrimination.

Existing law, the Knox-Keene Health Care Service Plan Act of 1975, provides for the regulation of health care service plans by the Department of Managed Health Care and makes a willful violation of the act a crime. Existing law provides for the regulation of health insurers by the Department of Insurance. Existing law prohibits certain discriminatory acts by health care service plans and health insurers. Existing federal law, beginning January 1, 2014, prohibits a group health plan and a health insurance issuer offering group or individual health insurance coverage from discriminating with respect to participation under the plan or coverage against any health care provider who is acting within the scope of that provider's license or certification under applicable state law.

Beginning January 1, 2014, this bill would prohibit a health care service plan or health insurer from discriminating against any health care provider who is acting within the scope of that provider's license, as specified.

Because a willful violation of the bill's provisions relative to health care service plans would be a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1373.15 is added to the Health and Safety Code, to read:

1373.15. (a) Beginning January 1, 2014, no health care service plan shall discriminate with respect to provider participation or

coverage under the plan against any health care provider who is acting within the scope of that provider's license or certification *under applicable state law including initiative act* .

(b) Notwithstanding subdivision (a), this section shall not be construed to require that a health care service plan contract with any health care provider willing to abide by the terms and conditions for participation established by the plan or issuer.

(c) Nothing in this section shall be construed as preventing a health care service plan from establishing varying reimbursement rates based on quality or performance measures.

(d) This section shall be implemented only to the extent required by the provider nondiscrimination provisions established in Section 2706 of the federal Public Health Service Act (42 U.S.C. Sec. 300gg-5), and any federal rules or regulations issued under that section.

SEC. 2. Section 10177.15 is added to the Insurance Code, to read:

10177.15. (a) Beginning January 1, 2014, no health insurer shall discriminate with respect to provider participation or coverage under the policy against any health care provider who is acting within the scope of that provider's license or certification *under applicable state law including initiative act* .

(b) Notwithstanding subdivision (a), this section shall not be construed to require that a health insurer contract with any health care provider willing to abide by the terms and conditions for participation established by the insurer or issuer.

(c) Nothing in this section shall be construed as preventing a health insurer from establishing varying reimbursement rates based on quality or performance measures.

(d) This section shall be implemented only to the extent required by the provider nondiscrimination provisions established in Section 2706 of the federal Public Health Service Act (42 U.S.C. Sec. 300gg-5), and any federal rules or regulations issued under that section.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

AMENDED IN ASSEMBLY JUNE 28, 2012

AMENDED IN ASSEMBLY JUNE 20, 2012

AMENDED IN ASSEMBLY JUNE 12, 2012

AMENDED IN SENATE APRIL 16, 2012

**SENATE BILL**

**No. 1575**

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**Introduced by Committee on Business, Professions and Economic Development (Senators Price (Chair), Corbett, Correa, Emmerson, Hernandez, Negrete McLeod, Strickland, Vargas, and Wyland)**

March 12, 2012

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An act to amend Sections 1640, 1715.5, 1934, 1950.5, 2021, 2064, 2184, 2220, 2424, 2516, 2518, 2570.13, 2904.5, 3057.5, 3742, 3750, 3750.5, 4209, 4980.04, 4980.34, 4980.397, 4980.398, 4980.399, 4980.40, 4980.43, 4980.44, 4980.48, 4980.50, 4980.78, 4980.80, 4984.01, 4984.4, 4984.7, 4984.72, 4989.16, 4989.42, 4992.05, 4992.07, 4992.09, 4992.1, 4996.1, 4996.3, 4996.4, 4996.6, 4996.28, 4999.22, 4999.32, 4999.45, 4999.46, 4999.50, 4999.52, 4999.53, 4999.55, 4999.57, 4999.58, 4999.59, 4999.62, 4999.63, 4999.64, 4999.76, 4999.90, 4999.100, 4999.106, and 4999.120 of, to add Sections 1902.2, 1942, 1958.1, and 4300.1 to, and to repeal Section 1909.5 of, the Business and Professions Code, relating to professions and vocations.

LEGISLATIVE COUNSEL'S DIGEST

SB 1575, as amended, Committee on Business, Professions and Economic Development. Professions and vocations.

Existing law provides for the licensure and regulation of various professions and vocations by boards within the Department of Consumer Affairs.

1 2904.5. A psychologist licensed under this chapter is a licentiate  
2 for purposes of paragraph (2) of subdivision (a) of Section 805,  
3 and thus is a health care provider subject to the provisions of  
4 Section 2290.5.

5 ~~SEC. 17.~~

6 *SEC. 18.* Section 3057.5 of the Business and Professions Code  
7 is amended to read:

8 3057.5. Notwithstanding any other provision of this chapter,  
9 the board shall permit a graduate of a foreign university who meets  
10 all of the following requirements to take the examinations for a  
11 certificate of registration as an optometrist:

- 12 (a) Is over the age of 18 years.
- 13 (b) Is not subject to denial of a certificate under Section 480.
- 14 (c) Has a degree as a doctor of optometry issued by a university  
15 located outside of the United States.

16 ~~SEC. 18.~~

17 *SEC. 19.* Section 3742 of the Business and Professions Code  
18 is amended to read:

19 3742. During the period of any clinical training, a student  
20 respiratory care practitioner shall be under the direct supervision  
21 of a person holding a valid, current, and unrestricted license issued  
22 under this chapter. “Under the direct supervision” means assigned  
23 to a respiratory care practitioner who is on duty and immediately  
24 available in the assigned patient care area.

25 ~~SEC. 19.~~

26 *SEC. 20.* Section 3750 of the Business and Professions Code  
27 is amended to read:

28 3750. The board may order the denial, suspension, or revocation  
29 of, or the imposition of probationary conditions upon, a license  
30 issued under this chapter, for any of the following causes:

- 31 (a) Advertising in violation of Section 651 or Section 17500.
- 32 (b) Fraud in the procurement of any license under this chapter.
- 33 (c) Knowingly employing unlicensed persons who present  
34 themselves as licensed respiratory care practitioners.
- 35 (d) Conviction of a crime that substantially relates to the  
36 qualifications, functions, or duties of a respiratory care practitioner.  
37 The record of conviction or a certified copy thereof shall be  
38 conclusive evidence of the conviction.
- 39 (e) Impersonating or acting as a proxy for an applicant in any  
40 examination given under this chapter.

AMENDED IN SENATE APRIL 12, 2012

**SENATE BILL**

**No. 1215**

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**Introduced by Senator Emmerson**

February 22, 2012

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An act to amend Sections 3070, 3147, 3147.6, and 3152 of, and to add Sections 3151 and 3151.1 to, the Business and Professions Code, relating to healing arts, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

SB 1215, as amended, Emmerson. Optometry.

Existing law, the Optometry Practice Act, provides for the licensure and regulation of the practice of optometry by the State Board of Optometry. A violation of the act is a crime.

This bill would require the board to issue, upon application and payment of a specified fee not to exceed \$25, a retired license to an optometrist with a current and active license. The bill would prohibit the holder of a retired license from engaging in the practice of optometry. The bill would authorize the holder of a retired license to use only certain titles and would also authorize the holder of such a license to reactivate the license to active status if certain requirements have been met, including the payment of a reactivation fee to be determined by the board. The bill would also require the board to issue, upon application certifying the completion of specified continuing education hours and the payment of a fee not to exceed \$50, a retired license with a volunteer service designation to an optometrist with a retired or current and active license. The bill would make a retired license with a volunteer service designation subject to biennial renewal requirements including the payment of a fee not to exceed \$50 and the certification of, among other things, completion of the required

continuing education hours. Because the bill would direct the deposit of these fees into the Optometry Fund, a continuously appropriated fund, the bill would make an appropriation.

Under existing law, a licensed optometrist is required to notify the board of, among other things, the address or addresses where he or she is to engage or intends to engage in the practice of optometry. Existing law imposes specified issuance, biennial renewal, and delinquency fees concerning a statement of licensure. Existing law exempts a licensed optometrist from this address notification requirement if he or she engages in the temporary practice of optometry, as defined by the board, in certain specified settings.

This bill would eliminate the requirement that a licensed optometrist provide that notification with respect to where he or she intends to engage in the practice of optometry. The bill would also require a licensed optometrist, except as specified, to obtain a statement of licensure from the board to be placed in specified practice locations. The bill would define temporary practice as the practice of optometry at locations other than the optometrist's principal place of practice for limited periods, as specified, and would require a licensed optometrist in temporary practice to submit an application for a statement of licensure if the time period for that practice needs to be extended, as specified.

The bill would make other nonsubstantive, technical and conforming changes.

Because the bill would specify additional requirements under the Optometry Practice Act, the violation of which would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: yes. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 3070 of the Business and Professions
- 2 Code is amended to read:

1 3070. (a) Before engaging in the practice of optometry, each  
2 licensed optometrist shall notify the board in writing of the address  
3 or addresses where he or she is to engage in the practice of  
4 optometry and, also, of any changes in his or her place of practice.  
5 After providing ~~this~~ *the address or addresses* and place of practice  
6 information to the board, a licensed optometrist shall obtain a  
7 statement of licensure from the board to be placed in all practice  
8 locations other than an optometrist’s principal place of practice.  
9 Any licensed optometrist who holds a branch office license is not  
10 required to obtain a statement of licensure to practice at that branch  
11 office. The practice of optometry is the performing or the  
12 controlling of any of the acts set forth in Section 3041.

13 (b) A licensed optometrist is not required to provide the  
14 notification described in subdivision (a) if he or she engages in  
15 the temporary practice of optometry. “Temporary practice” is  
16 defined as the practice of optometry at locations other than the  
17 optometrist’s principal place of practice for not more than five  
18 calendar days during a 30-day period, and not more than 36 days  
19 within a calendar year. This limitation shall apply to all practice  
20 locations where the licensed optometrist is engaging in temporary  
21 practice, not to each practice location individually. If the time  
22 period of the temporary practice needs to be extended for any  
23 reason, the licensed optometrist shall submit an application for a  
24 statement of licensure to the board pursuant to Section 1506 of  
25 Title 16 of the California Code of Regulations.

26 (c) Notwithstanding Section 3075, an optometrist engaging in  
27 the temporary practice of optometry at a location described in  
28 subdivision (b) shall carry and present upon demand evidence of  
29 his or her licensure but shall not be required to post his or her  
30 current license or other evidence of current license status issued  
31 by the board.

32 (d) In addition to the information required by Section 3076, a  
33 receipt issued to a patient by an optometrist engaging in the  
34 temporary practice of optometry at a location described in  
35 subdivision (b) shall contain the address of the optometrist’s  
36 primary practice location and the temporary practice location where  
37 the services were provided.

38 SEC. 2. Section 3147 of the Business and Professions Code is  
39 amended to read:

1 3147. Except as otherwise provided by Section 114, an expired  
2 license may be renewed at any time within three years after its  
3 expiration, and a retired license issued for less than three years  
4 may be reactivated to active status, by filing an application for  
5 renewal or reactivation on a form prescribed by the board, paying  
6 all accrued and unpaid renewal fees or reactivation fees determined  
7 by the board, paying any delinquency fees prescribed by the board,  
8 and submitting proof of completion of the required number of  
9 hours of continuing education for the last two years, as prescribed  
10 by the board pursuant to Section 3059. Renewal or reactivation to  
11 active status under this section shall be effective on the date on  
12 which all of those requirements are satisfied. If so renewed or  
13 reactivated to active status, the license shall continue as provided  
14 in Sections 3146 and 3147.5.

15 SEC. 3. Section 3147.6 of the Business and Professions Code  
16 is amended to read:

17 3147.6. Except as otherwise provided by Section 114, a license  
18 that is not renewed within three years after its expiration may be  
19 restored, and a retired license issued for more than three years may  
20 be reactivated to active status, if no fact, circumstance, or condition  
21 exists that, if the license were restored, would justify its revocation  
22 or suspension, provided all of the following conditions are met:

23 (a) The holder of the expired license or retired license is not  
24 subject to denial of a license under Section 480.

25 (b) The holder of the expired license or retired license applies  
26 in writing for its restoration or reactivation on a form prescribed  
27 by the board.

28 (c) The holder of the expired license or retired license pays the  
29 fee or fees as would be required of him or her if he or she were  
30 then applying for a license for the first time.

31 (d) The holder of the expired license or retired license  
32 satisfactorily passes both of the following examinations:

33 (1) The National Board of Examiners in Optometry's Clinical  
34 Skills examination or other clinical examination approved by the  
35 board.

36 (2) The board's jurisprudence examination.

37 (e) After taking and satisfactorily passing the examinations  
38 identified in subdivision (d), the holder of the expired license or  
39 retired license pays a restoration fee equal to the sum of the license  
40 renewal fee in effect on the last regular renewal date for licenses

1 or a reactivation fee determined by the board, and any delinquency  
2 fees prescribed by the board.

3 SEC. 4. Section 3151 is added to the Business and Professions  
4 Code, to read:

5 3151. (a) The board shall issue, upon application and payment  
6 of the fee described in Section 3152, a retired license to an  
7 optometrist who holds a license that is current and active.

8 (b) A licensee who has been issued a retired license is exempt  
9 from continuing education requirements pursuant to Section 3059.  
10 The holder of a retired license shall not be required to renew that  
11 license.

12 (c) The holder of a retired license shall not engage in the practice  
13 of optometry.

14 (d) An optometrist holding a retired license shall only be  
15 permitted to use the titles “retired optometrist” or “optometrist,  
16 retired.”

17 (e) The holder of a retired license issued for less than three years  
18 may reactivate the license to active status if he or she meets the  
19 requirements of Section 3147.

20 (f) The holder of a retired license issued for more than three  
21 years may ~~reactive~~ *reactivate* the license to active status if he or  
22 she satisfies the requirements in Section 3147.6.

23 SEC. 5. Section 3151.1 is added to the Business and Professions  
24 Code, to read:

25 3151.1. (a) The board shall issue, upon application and  
26 payment of the fee described in Section 3152, a license with retired  
27 volunteer service designation to an optometrist who holds a retired  
28 license or a license that is current and active.

29 (b) The applicant shall certify on the application that he or she  
30 has completed the required number of continuing education hours  
31 pursuant to Section 3059.

32 (c) The applicant shall certify on the application that the sole  
33 purpose of the license with retired volunteer service designation  
34 is to provide voluntary, unpaid optometric services at health fairs,  
35 vision screenings, and public service eye programs.

36 (d) The holder of the retired license with volunteer service  
37 designation shall submit a biennial renewal application, with a fee  
38 fixed by this chapter and certify on each renewal that the required  
39 number of continuing education hours pursuant to Section 3059  
40 were completed, and certify that the sole purpose of the retired

1 license with volunteer service designation is to provide voluntary,  
2 unpaid services as described in subdivision (c).

3 SEC. 6. Section 3152 of the Business and Professions Code is  
4 amended to read:

5 3152. The amounts of fees and penalties prescribed by this  
6 chapter shall be established by the board in amounts not greater  
7 than those specified in the following schedule:

8 (a) The fee for applicants applying for a license shall not exceed  
9 two hundred seventy-five dollars (\$275).

10 (b) The fee for renewal of an optometric license shall not exceed  
11 five hundred dollars (\$500).

12 (c) The annual fee for the renewal of a branch office license  
13 shall not exceed seventy-five dollars (\$75).

14 (d) The fee for a branch office license shall not exceed  
15 seventy-five dollars (\$75).

16 (e) The penalty for failure to pay the annual fee for renewal of  
17 a branch office license shall not exceed twenty-five dollars (\$25).

18 (f) The fee for issuance of a license or upon change of name  
19 authorized by law of a person holding a license under this chapter  
20 shall not exceed twenty-five dollars (\$25).

21 (g) The delinquency fee for renewal of an optometric license  
22 shall not exceed fifty dollars (\$50).

23 (h) The application fee for a certificate to perform lacrimal  
24 irrigation and dilation shall not exceed fifty dollars (\$50).

25 (i) The application fee for a certificate to treat glaucoma shall  
26 not exceed fifty dollars (\$50).

27 (j) The fee for approval of a continuing education course shall  
28 not exceed one hundred dollars (\$100).

29 (k) The fee for issuance of a statement of licensure shall not  
30 exceed forty dollars (\$40).

31 (l) The fee for biennial renewal of a statement of licensure shall  
32 not exceed forty dollars (\$40).

33 (m) The delinquency fee for renewal of a statement of licensure  
34 shall not exceed twenty dollars (\$20).

35 (n) The application fee for a fictitious name permit shall not  
36 exceed fifty dollars (\$50).

37 (o) The renewal fee for a fictitious name permit shall not exceed  
38 fifty dollars (\$50).

39 (p) The delinquency fee for renewal of a fictitious name permit  
40 shall not exceed twenty-five dollars (\$25).

1 (q) The fee for a retired license shall not exceed twenty-five  
2 dollars (\$25).

3 (r) The fee for a retired license with volunteer designation shall  
4 not exceed fifty dollars (\$50).

5 (s) The biennial renewal fee for a retired license with volunteer  
6 designation shall not exceed fifty dollars (\$50).

7 SEC. 7. No reimbursement is required by this act pursuant to  
8 Section 6 of Article XIII B of the California Constitution because  
9 the only costs that may be incurred by a local agency or school  
10 district will be incurred because this act creates a new crime or  
11 infraction, eliminates a crime or infraction, or changes the penalty  
12 for a crime or infraction, within the meaning of Section 17556 of  
13 the Government Code, or changes the definition of a crime within  
14 the meaning of Section 6 of Article XIII B of the California  
15 Constitution.

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AMENDMENTS TO SENATE BILL NO. 1215  
AS AMENDED IN SENATE APRIL 12, 2012

Amendment 1

In the title, in line 1, after "3070," insert:

3090,

Amendment 2

On page 3, between lines 37 and 38, insert:

SEC. 2. Section 3090 of the Business and Professions Code is amended to read:  
3090. Except as otherwise provided by law, the board may take action against all persons guilty of violating this chapter or any of the regulations adopted by the board. The board shall enforce and administer this article as to licenseholders, including those who hold a retired license, a license with a retired volunteer designation, or an inactive license issued pursuant to Article 9 (commencing with Section 700) of Chapter 1, and the board shall have all the powers granted in this chapter for these purposes, including, but not limited to, investigating complaints from the public, other licensees, health care facilities, other licensing agencies, or any other source suggesting that an optometrist may be guilty of violating this chapter or any of the regulations adopted by the board.

Amendment 3

On page 3, in line 38, strike out "SEC. 2." and insert:

SEC. 3.

Amendment 4

On page 4, in line 15, strike out "SEC. 3." and insert:

SEC. 4.

Amendment 5

On page 5, in line 3, strike out "SEC. 4." and insert:

SEC. 5.



Amendment 6

On page 5, in line 23, strike out "SEC. 5." and insert:

SEC. 6.

Amendment 7

On page 6, in line 3, strike out "SEC. 6." and insert:

SEC. 7.

Amendment 8

On page 7, in line 7, strike out "SEC. 7." and insert:

SEC. 8.

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**To:** Board Members **Date:** August 10, 2012

**From:** Andrea Leiva and Mona Maggio **Telephone:** (916) 575-7182  
Policy Analyst Executive Officer

**Subject: Agenda Item 8 – Discussion and Possible Action Pertaining to the Board’s  
2012-13 Sunset Report**

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**Background:**

The Board is up for Sunset Review in the 2012/13 cycle, with a Sunset date of January 1, 2014, (Business and Professions Code Sections 3010.5, 3014.6). Sunset Review is conducted by the Joint Sunset Review Committee (Committee). This Committee was created to identify and eliminate waste, duplication, and inefficiency in government agencies. The Committee will conduct a comprehensive analysis of every eligible agency to determine if it is still necessary and cost effective. The Board must complete and submit a report for their analysis on November 1, 2012. The Board has not been reviewed for Sunset by the Committee since 2002.

Staff has started completing the report template provided by the Committee (Attachment 1). At this time, Attachment 1 is not yet considered a draft, only a listing of what is to be included in each section. Prior to beginning a draft of the report, input from the Board will be necessary.

In addition to completion of the report template, the Board must address issues from the 2002 Sunset Review that were identified by the Committee as problems that must be resolved. It is the expectation of the Committee that the Board has addressed these issues by this Sunset Review cycle (See Attachment 2 and 3 for a list of the issues).

**Action Requested:**

- 1) Review Attachment 1 and provide input so that staff may begin the first draft of the report.
- 2) Review and discuss Attachments 2 and 3.
- 3) Appoint a Sunset Review Committee made up of Members of the Board to assist staff in the development of the report, and to be available to review the report as each section is completed. This will make approval of the report more streamlined once it is brought before the Board again for final discussion.

# BOARD OF OPTOMETRY

## BACKGROUND INFORMATION AND OVERVIEW OF THE CURRENT REGULATORY PROGRAM

### As of November 1, 2012

#### Section 1 –

#### Background and Description of the Board and Regulated Profession

##### *History and Function of the Board*

**Provide a short explanation of the history and function of the board. Describe the occupations/profession that are licensed and/or regulated by the board (Practice Acts vs. Title Acts).**

The Board of Optometry (Board) is one of the forty regulatory entities within the Department of Consumer Affairs (DCA). The Board licenses and regulates Optometrists.

The Board's mission 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 optometric services. In order to accomplish this mission, the Board performs the following duties and responsibilities:

- Accredit schools and colleges of optometry;
- Establish educational requirements to ensure the competence of candidates for licensure;
- Establish examination requirements to ensure the competence of candidates for licensure and develop and administer a laws and regulations examination;
- Set and enforce standards for continued competency of existing licensees;
- Establish educational and examination requirements for licensed optometrists seeking certification to use and prescribe certain pharmaceutical agents and other procedures;
- License branch offices, issue statements of licensure and fictitious name permits;
- Promulgate 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;
- Investigate consumer complaints and criminal convictions which may include substance and patient abuse, unprofessional conduct, incompetence, fraudulent action, and unlawful activity;
- Institute disciplinary action for violations of laws and regulations governing the practice of optometry when warranted.

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 prove the Board the authority to discipline a license.

On March 20, 1903, California became the third state to pass a law recognizing the profession of Optometry, and regulating the practice<sup>1</sup>. In 1913, a new Optometry Practice Act<sup>2</sup> 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<sup>3</sup>. Empowered with rulemaking authority<sup>4</sup>, the Board promulgated the first rule for practice of optometry

<sup>1</sup> Optometry Act of 1903 (California Statutes of 1903, Chapter CCXXXIV) later repealed by Statutes of 1913, Chapter 598.

<sup>2</sup> Statutes of 1913, Chapter 598 (derived from the 1903 Act as amended by enactments of 1907 and 1908)

<sup>3</sup> Chapter 7, Division 2 (healing arts), Business and Professions Code (BPC)

<sup>4</sup> BPC Sections 3025 and 3025.5

in 1923. In the same year, the legislature passed a law<sup>5</sup> requiring all applicants for licensure to meet certain educational requirements, i.e., graduate of an accredited school or college of optometry. The Board was charged with the responsibility of accrediting these schools. Prior to this time, individuals desiring to practice were not required to have any specific formal education.

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), since 2009 TPA with Lacrimal Irrigation and Dilation (TPL), and since 2011 TPA with Glaucoma Certification (TPG), and TPA with Lacrimal Irrigation and Dilation and Glaucoma Certification (TLG). The Board continues to license branch office licenses, and issue statements of licensure and fictitious name permits. In 2007, the Board enacted legislation to remove its jurisdiction over the licensure of optometric corporations.

Current law provides for eleven board members; six licensees and five public members. Nine members are appointed by the Governor, one public member appointed by the Speaker of the Assembly, and one public member is appointed by the Senate Rules Committee.

## ***Board Committees***

### **Describe the make-up and functions of each of the board's committees.**

The Board currently has seven committees all composed of professional and public members:

1. Legislative and Regulation  
Typically has four members.  
Responsible for recommending legislative and regulatory priorities to the Board and assisting staff with drafting language for Board-sponsored legislation and recommending official positions on current legislation. The committee will also recommend to staff regulatory additions and amendments.
2. Practice  
Typically has five members.  
Advises Board staff on matters relating to optometric practice, including standards of practice and scope of practice issues. The committee also reviews staff responses to proposed regulatory changes that may affect optometric practice.
3. Consumer Protection  
Typically has three members.  
Oversees the development and administration of legally defensible licensing examinations and consulting on improvements/enhancements to licensing and enforcement policies and procedures.
4. Education  
Typically has one to two members.  
Reviews requests for approval of continuing education courses and offers guidance to Board staff regarding continuing education issues.
5. Strategic Planning  
Typically has two members.  
Reviews the Board's progress towards achieving the objective and goals outlined in its Strategic Plan.
6. Fiscal  
Typically has two members.  
Serves as the liaison with staff and assists staff in monitoring and reporting the status of the Board's budget.
7. Public Relations – Outreach  
Typically has two members.  
Assists with the development of outreach and development of educational materials to the Board's stakeholders.

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<sup>5</sup> Chapter 164, Statutes of 1923

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.

**Board Member Meeting and Committee Attendance**

**Table 1a. Attendance**

**CURRENT MEMBERS**

<b>Alejandro Arredondo, O.D., Professional Member, Vice President</b>			
Date Appointed:	November 1, 2007		
Date Reappointed:	June 15, 2012		
Term Expires:	June 1, 2015		
<b>Meeting Type</b>	<b>Meeting Date</b>	<b>Meeting Location</b>	<b>Attended?</b>
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Monica Johnson, Public Member, Secretary</b>			
Date Appointed:	December 20, 2005		
Date Reappointed:	May 5, 2010		
Term Expires:	June 1, 2013		
<b>Meeting Type</b>	<b>Meeting Date</b>	<b>Meeting Location</b>	<b>Attended?</b>
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Kenneth Lawenda, O.D., Professional Member</b>			
Date Appointed:	November 1, 2007		
Date Reappointed:	December 2, 2010		
Term Expires:	June 1, 2014		
<b>Meeting Type</b>	<b>Meeting Date</b>	<b>Meeting Location</b>	<b>Attended?</b>
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Donna Burke, Public Member</b>			
Date Appointed:	October 11, 2010		
Term Expires:	June 1, 2015		
<b>Meeting Type</b>	<b>Meeting Date</b>	<b>Meeting Location</b>	<b>Attended?</b>

Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Alexander Kim, Public Member</b>			
Date Appointed:	December 27, 2010		
Term Expires:	June 1, 2014		
Meeting Type	Meeting Date	Meeting Location	Attended?
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Madhu Chawla, O.D., Professional Member</b>			
Date Appointed:	June 15, 2012		
Term Expires:	June 1, 2015		
Meeting Type	Meeting Date	Meeting Location	Attended?
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>William H. Kysella Jr., Public Member</b>			
Date Appointed:	July 25, 2012		
Term Expires:	June 1, 2015		
Meeting Type	Meeting Date	Meeting Location	Attended?
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

**Two more members pending appointment...**

### PREVIOUS MEMBERS

<b>Lee A. Goldstein, O.D., Professional Member, Past President</b>			
Date Appointed:	October 9, 2003		
Date Reappointed:	November 1, 2007		
Term Expired:	June 1, 2011		
Meeting Type	Meeting Date	Meeting Location	Attended?
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]

Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Fred Naranjo, Public Member</b>			
Date Appointed:	October 3, 2003		
Date Reappointed:	November 1, 2007		
Term Expires:	June 1, 2011		
Meeting Type	Meeting Date	Meeting Location	Attended?
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Katrina Semmes, Public Member</b>			
Date Appointed:	May 16, 2007		
Term Expires:	June 1, 2010		
Meeting Type	Meeting Date	Meeting Location	Attended?
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Ed Rendon, Public Member</b>			
Date Appointed:	January 6, 2009		
Term Expires:	June 1, 2011		
Meeting Type	Meeting Date	Meeting Location	Attended?
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Susy Yu, O.D., Professional Member, Past Vice President</b>			
Date Appointed:	October 3, 2003		
Date Reappointed:	November 1, 2007		
Term Expires:	June 1, 2011		
Meeting Type	Meeting Date	Meeting Location	Attended?
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Martha Burnett-Collins, O.D., Professional Member</b>			
Date Appointed:	October 3, 2003		
Date Reappointed:	November 1, 2007		
Term Expires:	June 1, 2011		
Meeting Type	Meeting Date	Meeting Location	Attended?
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Richard Simmonds, O.D., Professional Member</b>			
Date Appointed:	December 1, 2005		
Term Expires:	June 1, 2009		
Meeting Type	Meeting Date	Meeting Location	Attended?
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Mary Galvan Rosas, Public Member</b>			
Date Appointed:	April 10, 2003		
Date Reappointed:	June 6, 2007		
Term Expires:	June 1, 2011 – Resigned June 25, 2008		
Meeting Type	Meeting Date	Meeting Location	Attended?
Meeting 1	[Enter Date]	[Enter Location]	[Y/N]
Meeting 2	[Enter Date]	[Enter Location]	[Y/N]
Meeting 3	[Enter Date]	[Enter Location]	[Y/N]
Meeting 4	[Enter Date]	[Enter Location]	[Y/N]

<b>Table 1b. Board/Committee Member Roster</b>					
Member Name (Include Vacancies)	Date First Appointed	Date Re- appointed	Date Term Expires	Appointing Authority	Type (public or professional)

In the past four years, was the board unable to hold any meetings due to lack of quorum? If so, please describe. Why? When? How did it impact operations?

- ?

## ***Major Changes since the Last Sunset Review***

**Describe any major changes to the board since the last Sunset Review, including: Internal changes (i.e., reorganization, relocation, change in leadership, strategic planning)**

### **Reorganization**

Since the last Sunset Review in 2002, the Board...

- Doubled amount of employee positions from six to twelve due to the Consumer Protection Enforcement Initiative and implementation of Fingerprint Program.
- Created a fingerprint monitoring position (fingerprint program).
- Created a probation monitoring position (CPEI).
- Created an administrative policy analyst position to focus on regulations, legislation and outreach.
- Attempted to create a Staff Services Manager position to serve as the Assistant Executive Officer and assist the Executive Officer in managing staff. The position was lost due to a lack of sufficient employees to warrant this position.

### **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**

- Dr. Lee A. Goldstein's term ended June 1, 2011. The Board has to vote for a new President.
- Dr. Susy Yu's term ended June 1, 2010 and Dr. Alejandro Arredondo was elected to replace her as Vice-President.
- Board Members elect a President and Vice President annually. Current Board policy provides that in the even the President of the Board is unable to continue his/her role as President, the Vice President shall immediately assume the duties of the President until the next election of officers.
- Since 2002, the Board has had two Executive Officers. The previous incumbent served from X-2009. The current Executive Officer was appointed in 2009.

### **Strategic Planning**

- Revised in 2010.

### **Legislative Activity**

#### **Legislation Sponsored by or Affecting the Board of Optometry**

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.

Assembly Bill 2464 - CE Requirements and Lens Dispensing Receipts (Pacheco, Ch. 426, Stats 2004)

Assembly Bill 370 - Changes in the Board's enforcement program (Aghazarian, Ch. 186, Stats. 2005)

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

Senate Bill 231 Reporting of settlements or arbitration awards over \$3,000 (Figueroa, Ch. 674, Stats. 2005)

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

Assembly Bill 2256 - Certificate of Registration for Optometric Corporation Repealed (Ch. 564, Stats 2006)

Assembly Bill 1382 - Deceptive Marketing Practices (Nakanishi, Ch. 148, Stats 2006)

Senate Bill 1406 - Changes in Scope of Practice (Correa and Aanestad, Ch. 352, Stats 2009)

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

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

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

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

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

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

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

## **Regulation Activity**

### **Regulations Initiate by the Board**

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

Fees: 1524

Notification to Engage in Practice (Section 100): 1505

Fingerprinting Requirements: 1525, 1525.1, 1525.2

Scope of Practice Repeal: 1569

Glaucoma Certification Requirements: 1571

Infection Control Guidelines: 1520

Fictitious Name Permits and Licensing Requirements: 1518, 1523, 1531, 1532, 1533, 1561

Continuing Education: 1536

### **Pending Regulations**

Renting Space and Fingerprints: 1514, 1525.1

Uniform Standards Related to Substance Abuse and Disciplinary Guidelines: 1575

Sponsored Free Health Care Events: 1508, 1508.1, 1508.2, 1508.3

Consumer Information (Section 100): 1566.1

Consumer Protection Initiative Regulations

## **Major Studies**

## **Describe any major studies conducted by the board.**

2009 – Comprehensive Review of the National Boards of Examiners in Optometry – Office of Professional Examination Services

2009 - Occupational Analysis – Office of Professional Examination Services

## **National Association Activity**

### **List the status of all national associations to which the board belongs.**

The Board is a current member of the Association of Regulatory Boards of Optometry. This membership includes voting privileges.

To date, the Board has not participated in any committees, workshops, working groups, or task forces related to its membership in this national association due to state-wide travel restrictions pursuant to Governor mandates.

### **Does the board's membership include voting privileges?**

**List committees, workshops, working groups, task forces, etc., on which board participates.**

**How many meetings did board representative(s) attend? When and where?**

### **If the board is using a national exam, how is the board involved in its development, scoring, analysis, and administration?**

- The Board uses the National Board of Examiners in Optometry Examination for licensure.
- Located in North Carolina
- Conducted an assessment with the Office of Professional Examination Services
- NBEO provides transcripts electronically to Board staff

## **Section 2 – Performance Measures and Customer Satisfaction Surveys**

1. Provide each quarterly and annual performance measure report as published on the DCA website
  - Providing print outs
2. Provide results for each question in the customer satisfaction survey broken down by fiscal year. Discuss the results of the customer satisfaction surveys.
  - Providing print outs
  - Discussion points:
    - In 2010, the Board implemented a licensing and enforcement survey
    - In 2011, DCA created an enforcement satisfaction survey and the Board's enforcement unit began using this survey instead of the 2010 survey
    - Since implementation, six people viewed the enforcement survey

## **Section 3 – Fiscal and Staff**

### **Fiscal Issues**

3. Describe the board's current reserve level, spending, and if a statutory reserve level exists.
4. Describe if/when a deficit is projected to occur and if/when fee increase or reduction is anticipated. Describe the fee changes (increases or decreases) anticipated by the board.

<b>Table 2. Fund Condition</b>						
(Dollars in Thousands)	FY 2008/09	FY 2009/10	FY 2009/10	FY 2011/12	FY 2012/13	FY 2013/14
Beginning Balance						
Revenues and Transfers						
<b>Total Revenue</b>	\$	\$	\$	\$	\$	\$
Budget Authority						
Expenditures						
Loans to General Fund						
Accrued Interest, Loans to General Fund						
Loans Repaid From General Fund						
<b>Fund Balance</b>	\$	\$	\$	\$	\$	\$
<b>Months in Reserve</b>						

- Describe history of general fund loans. When were the loans made? When were payments made? What is the remaining balance?
- Describe the amounts and percentages of expenditures by program component. Use *Table 3. Expenditures by Program Component* to provide a breakdown of the expenditures by the board in each program area. Expenditures by each component (except for pro rata) should be broken out by personnel expenditures and other expenditures.

<b>Table 3. Expenditures by Program Component</b>								
	FY 2008/09		FY 2009/10		FY 2010/11		FY 2011/12	
	Personnel Services	OE&E						
Enforcement								
Examination								
Licensing								
Administration *								
DCA Pro Rata								
Diversion (if applicable)								
<b>TOTALS</b>	\$	\$	\$	\$	\$	\$	\$	\$

\*Administration includes costs for executive staff, board, administrative support, and fiscal services.

- Describe license renewal cycles and history of fee changes in the last 10 years. Give the fee authority (Business and Professions Code and California Code of Regulations citation) for each fee charged by the board.

<b>Table 4. Fee Schedule and Revenue</b>							
Fee	Current Fee Amount	Statutory Limit	FY 2008/09 Revenue	FY 2009/10 Revenue	FY 2010/11 Revenue	FY 2011/12 Revenue	% of Total Revenue


8. Describe Budget Change Proposals (BCPs) submitted by the board in the past four fiscal years.

Table 5. Budget Change Proposals (BCPs)								
BCP ID #	Fiscal Year	Description of Purpose of BCP	Personnel Services				OE&E	
			# Staff Requested (include classification)	# Staff Approved (include classification)	\$ Requested	\$ Approved	\$ Requested	\$ Approved

**Staffing Issues**

- 9. Describe any staffing issues/challenges, i.e., vacancy rates, efforts to reclassify positions, staff turnover, recruitment and retention efforts, succession planning.
- 10. Describe the board's staff development efforts and how much is spent annually on staff development (cf., Section 12, Attachment D).

**Section 4 – Licensing Program**

- 11. What are the board's performance targets/expectations for its licensing<sup>6</sup> program? Is the board meeting those expectations? If not, what is the board doing to improve performance?
  - Beginning in 2013, it is expected that we will add, on average, anywhere from 50-80 newly licensed optometrists due to the expected accreditation of new schools/colleges of optometry. Currently, the Board is continuing to license 225-250 new optometrists each year.
- 12. Describe any increase or decrease in average time to process applications, administer exams and/or issue licenses. Have pending applications grown at a rate that exceeds completed applications? If so, what has been done to address them? What are the performance barriers and what improvement plans are in place? What has the board done and what is the board going to do to address any performance issues, i.e., process efficiencies, regulations, BCP, legislation?
  - With the hiring of a vendor to provide California Laws and Regulations examination (CLRE) service, the application process has changed which assisted greatly in the decrease of the average time needed to process applications and issue licenses. This has allowed the Board to help get newly-licensed optometrists out into the work force in a swifter manner. It has also afforded optometrist license applicants with the convenience to take the CLRE on almost any weekday at exam sites located across the country.
- 13. How many licenses or registrations does the board issue each year? How many renewals does the board issue each year?

<sup>6</sup> The term "license" in this document includes a license certificate or registration.

- The Board issues approximately 225-250 new optometrist licenses and renews approximately 3500 licensees each year.

Table 6. Licensee Population					
		FY 2008/09	FY 2009/10	FY 2010/11	FY 2011/12
[Enter License Type]	Active				
	Out-of-State				
	Out-of-Country				
	Delinquent				
[Enter License Type]	Active				
	Out-of-State				
	Out-of-Country				
	Delinquent				
[Enter License Type]	Active				
	Out-of-State				
	Out-of-Country				
	Delinquent				
[Enter License Type]	Active				
	Out-of-State				
	Out-of-Country				
	Delinquent				

Table 7a. Licensing Data by Type											
Application Type		Received	Approved	Closed	Issued	Pending Applications			Cycle Times		
						Total (Close of FY)	Outside Board control*	Within Board control*	Complete Apps	Incomplete Apps	combined, IF unable to separate out
FY 2009/10	(Exam)					-	-	-	-	-	-
	(License)					-	-	-	-	-	-
	(Renewal)			n/a		-	-	-	-	-	-
FY 2010/11	(Exam)										
	(License)										
	(Renewal)			n/a							
FY 2011/12	(Exam)										
	(License)										
	(Renewal)			n/a							

\* Optional. List if tracked by the board.

Table 7b. Total Licensing Data				
		FY 2009/10	FY 2010/11	FY 2011/12
<b>Initial Licensing Data:</b>				
Initial License/Initial Exam Applications Received				
Initial License/Initial Exam Applications Approved				
Initial License/Initial Exam Applications Closed				

License Issued			
<b>Initial License/Initial Exam Pending Application Data:</b>			
Pending Applications (total at close of FY)			
Pending Applications (outside of board control)*			
Pending Applications (within the board control)*			
<b>Initial License/Initial Exam Cycle Time Data (WEIGHTED AVERAGE):</b>			
Average Days to Application Approval (All - Complete/Incomplete)			
Average Days to Application Approval (incomplete applications)*			
Average Days to Application Approval (complete applications)*			
<b>License Renewal Data:</b>			
License Renewed			
* Optional. List if tracked by the board.			

14. How does the board verify information provided by the applicant?

a. What process is used to check prior criminal history information, prior disciplinary actions, or other unlawful acts of the applicant?

- Automated Tracking System (ATS); RAP sheets & Subsequent Arrest Reports (SAR)

- Applicants for optometrist licensure are required to be fingerprinted and have their prints reviewed and cleared by the California State Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI). If the applicant was licensed in another State, they are required to have that State submit a letter of verification of their license status and history directly to the Board. If the applicant's fingerprints or license history are "flagged" because of unlawful acts, their applications are forwarded to our Enforcement Unit for further review.

b. Does the board fingerprint all applicants?

Yes.

c. Have all current licensees been fingerprinted? If not, explain.

No. misunderstanding the law; thinking they are already compliant; unaware of the fingerprint law, etc. Staff will run a report at the end of the next renewal cycle to find those that have not complied and notify them.

d. Is there a national databank relating to disciplinary actions? Does the board check the national databank prior to issuing a license? Renewing a license?

- Yes, there are two databanks related to disciplinary actions: HIPDB and NPDB

Brief description of each from web site

- No, the Board does not check HIPDB and NPDB prior to issuing or renewing a license due to:

Time involved – provide estimations

Staffing needed – provide estimations

Cost involved – provide estimations

e. Does the board require primary source documentation?

- Yes. Optometrist license applicants are required to submit proof of education prior to being issued a license.

15. Describe the board's legal requirement and process for out-of-state and out-of-country applicants to obtain licensure.

- Optometrist license applicants from out-of-state and out-of-country must meet the same requirements as those that are in-state. The differences for out-of-state applicants not considered to be recent graduates of schools/colleges of optometry are that they must meet the experience requirements desired by the Board. Out-of-country applicants must meet the educational requirements desired by the Board which, in many cases, are incomparable to in-state and out-of-state applicants. Out-of-country applicants are required to prove that they have a similar, if not more advanced, degree for a provider of eye care and must request sponsorship from the Board that will allow them to apply for and take the national examinations.

16. Does the board send No Longer Interested notifications to DOJ on a regular and ongoing basis?

- No, not on a regular basis.

Is this done electronically?

- Yes, the form must be completed on-line and mailed/faxed to DOJ

Is there a backlog? If so, describe the extent and efforts to address the backlog.

- No, there is no backlog.

## Examinations

<b>Table 8. Examination Data</b>			
<b>California Examination (include multiple language) if any:</b>			
	License Type		
	Exam Title		
FY 2008/09	# of 1 <sup>st</sup> Time Candidates		
	Pass %		
FY 2009/10	# of 1 <sup>st</sup> Time Candidates		
	Pass %		
FY 2010/11	# of 1 <sup>st</sup> Time Candidates		
	Pass %		
FY 2011/12	# of 1 <sup>st</sup> time Candidates		
	Pass %		
	Date of Last OA		
	Name of OA Developer		
	Target OA Date		
<b>National Examination (include multiple language) if any:</b>			
	License Type		
	Exam Title		
FY 2008/09	# of 1 <sup>st</sup> Time Candidates		
	Pass %		
FY 2009/10	# of 1 <sup>st</sup> Time Candidates		
	Pass %		
FY 2010/11	# of 1 <sup>st</sup> Time Candidates		
	Pass %		
FY 2011/12	# of 1 <sup>st</sup> time Candidates		
	Pass %		
	Date of Last OA		
	Name of OA Developer		

17. Describe the examinations required for licensure. Is a national examination used? Is a California specific examination required?

- All applicants for licensure must take and pass the National Board of Examiners in Optometry's (NBEO) Applied Basic Science (Part I), Patient Assessment and Management and Treatment and Management of Ocular Disease (Part II), and Clinical Skills (Part III) examinations. In addition, they must also take and pass the California Laws and Regulations examination (CLRE). Part I of the NBEO examination measures the fundamental knowledge and understanding of the scientific principles upon which optometric practice is based. Part II provides cases of patients that challenge the examinee to properly manage them. Part III provides the examinee with a "real" patient on which to assess. The Treatment and Management of Ocular Disease (TMOD) component of the examination is comprised of cases extracted from the Patient Assessment and Management (PAM) section. The CLRE is a 50-question, multiple-choice examination based on jurisprudence.

18. What are pass rates for first time vs. retakes in the past 4 fiscal years? (Refer to Table 8: Examination Data)

- Pass rates for first time takes are in the 85% to 90%.
- Re-takers pass rates are in the 95%.

19. Is the board using computer based testing? If so, for which tests? Describe how it works. Where is it available? How often are tests administered?

- Yes. PSI for California Laws and Regulations Examination (CLRE).
- Computer Based Testing
- Available in 13 sites in CA, and 10 sites state-wide.
- Must apply with the Board first and then will receive an invitation from PSI to schedule.
- Can then register online, phone, or mail.
- Can take the exam M-F, between 8-5 p.m. and sometimes on the weekends.
- If fail need to wait 180 days to re-examine.

20. Are there existing statutes that hinder the efficient and effective processing of applications and/or examinations? If so, please describe.

None at this time.

## School approvals

21. Describe legal requirements regarding school approval. Who approves your schools? What role does BPPE have in approving schools? How does the board work with BPPE in the school approval process?

22. How many schools are approved by the board? How often are schools reviewed?

23. What are the board's legal requirements regarding approval of international schools?

## Continuing Education/Competency Requirements

24. Describe the board's continuing education/competency requirements, if any. Describe any changes made by the board since the last review.

- How does the board verify CE or other competency requirements?
  - Random CE audits
- Does the board conduct CE audits on its licensees? Describe the board's policy on CE audits.
  - Yes, the Board conducts random CE audits. The Board audits approximately 15% of each months' actively renewed licensees to verify compliance with the CE requirements.

- c. What are consequences for failing a CE audit?
  - A citation with fine is issued to licensees who are not in compliance with the CE requirements
- d. How many CE audits were conducted in the past four fiscal years? How many fails?
  - Provide statistics from CE audits
- e. What is the board's course approval policy?
  - CE course approval criteria is based on whether the course is likely to contribute to the advancement of professional skill and knowledge in the practice of optometry; whether the speakers, lecturers, and others participating in the presentation of the course are recognized by the Board as being qualified in their field; and whether the proposed course is open to all California-licensed optometrists.
- f. Who approves CE providers? Who approves CE courses? If the board approves them, what is the board application review process?
  - CE providers and courses are reviewed by Board licensing staff and finalized by the Board member's CE Committee. Providers must submit their course on an application provided by the Board. The provider must submit a processing fee, their name, course title, date the course is scheduled to be offered, topical outline of the course subject matter, any announcements, notices, or advertisements about the course, and the curriculum vitae of all instructors and/or lecturers involved.
- g. How many applications for CE providers and CE courses were received? How many were approved?
- h. Does the board audit CE providers? If so, describe the board's policy and process.
- i. Describe the board's effort, if any, to review its CE policy for purpose of moving toward performance based assessments of the licensees' continuing competence.

## Section 5 – Enforcement Program

What are the board's performance targets/expectations for its enforcement program? Is the board meeting those expectations? If not, what is the board doing to improve performance?

- CPEI Performance Measures
- Some are met, some aren't
- Training, prioritizing, BCPs for more staffing, promoting accountability in meetings

25. Explain trends in enforcement data and the board's efforts to address any increase in volume, timeframes, ratio of closure to pending, or other challenges. What are the performance barriers? What improvement plans are in place? What has the board done and what is the board going to do to address these issues, i.e., process efficiencies, regulations, BCP, legislation?

- Analyze data trends
- Increase in volume due to fingerprint program; criminal rap sheets received
- Performance barriers: lack of staff

Improvement plans:

1. BreZE will help with tracking and staffing accountability
2. BCPs for more staffing

<b>Table 9a. Enforcement Statistics</b>			
	FY 2009/10	FY 2010/11	FY 2011/12
<b>COMPLAINT</b>			
Intake (Use CAS Report EM 10)			
Received			
Closed			
Referred to INV			
Average Time to Close	-		
Pending (close of FY)			
Source of Complaint (Use CAS Report 091)			
Public			
Licensee/Professional Groups			
Governmental Agencies			
Other			
Conviction / Arrest (Use CAS Report EM 10)			
CONV Received			
CONV Closed			
Average Time to Close	-		
CONV Pending (close of FY)			
<b>LICENSE DENIAL (Use CAS Reports EM 10 and 095)</b>			
License Applications Denied			
SOIs Filed			
SOIs Withdrawn			
SOIs Dismissed			
SOIs Declined			
Average Days SOI	-		
<b>ACCUSATION (Use CAS Report EM 10)</b>			
Accusations Filed			
Accusations Withdrawn			
Accusations Dismissed			
Accusations Declined			
Average Days Accusations	-		
Pending (close of FY)			

<b>Table 9b. Enforcement Statistics (continued)</b>			
	FY 2009/10	FY 2010/11	FY 2011/12
<b>DISCIPLINE</b>			
Disciplinary Actions (Use CAS Report EM 10)			
Proposed/Default Decisions			
Stipulations			
Average Days to Complete	-		
AG Cases Initiated			
AG Cases Pending (close of FY)			
Disciplinary Outcomes (Use CAS Report 096)			
Revocation			
Voluntary Surrender			
Suspension			
Probation with Suspension			
Probation			
Probationary License Issued			
Other			
<b>PROBATION</b>			
New Probationers			
Probations Successfully Completed			
Probationers (close of FY)			
Petitions to Revoke Probation			
Probations Revoked			
Probations Modified			
Probations Extended			
Probationers Subject to Drug Testing			
Drug Tests Ordered			
Positive Drug Tests			
Petition for Reinstatement Granted			
<b>DIVERSION</b>			
New Participants			
Successful Completions			
Participants (close of FY)			
Terminations			
Terminations for Public Threat			
Drug Tests Ordered			
Positive Drug Tests			

<b>Table 9c. Enforcement Statistics (continued)</b>			
	FY 2009/10	FY 2010/11	FY 2011/12
<b>INVESTIGATION</b>			
All Investigations (Use CAS Report EM 10)			
First Assigned			
Closed			
Average days to close	-		
Pending (close of FY)			
Desk Investigations (Use CAS Report EM 10)			
Closed	-		
Average days to close	-		
Pending (close of FY)	-		
Non-Sworn Investigation (Use CAS Report EM 10)			
Closed	-		
Average days to close	-		
Pending (close of FY)	-		
Sworn Investigation			
Closed (Use CAS Report EM 10)			
Average days to close	-		
Pending (close of FY)			
<b>COMPLIANCE ACTION (Use CAS Report 096)</b>			
ISO & TRO Issued			
PC 23 Orders Requested			
Other Suspension Orders			
Public Letter of Reprimand			
Cease & Desist/Warning			
Referred for Diversion			
Compel Examination			
<b>CITATION AND FINE (Use CAS Report EM 10 and 095)</b>			
Citations Issued			
Average Days to Complete	-		
Amount of Fines Assessed			
Reduced, Withdrawn, Dismissed			
Amount Collected			
<b>CRIMINAL ACTION</b>			
Referred for Criminal Prosecution			

<b>Table 10. Enforcement Aging</b>						
	FY 2008/09	FY 2009/10	FY 2010/11	FY 2011/12	Cases Closed	Average %
<b>Attorney General Cases (Average %)</b>						
Closed Within:						
1 Year						
2 Years						
3 Years						
4 Years						
Over 4 Years						
Total Cases Closed						
<b>Investigations (Average %)</b>						
Closed Within:						
90 Days						
180 Days						
1 Year						
2 Years						
3 Years						
Over 3 Years						
Total Cases Closed						

26. What do overall statistics show as to increases or decreases in disciplinary action since last review.
- Analyze statistics
27. How are cases prioritized? What is the board's compliant prioritization policy? Is it different from DCA's *Complaint Prioritization Guidelines for Health Care Agencies* (August 31, 2009)? If so, explain why.
- Through our CAS database, the cases are prioritized based on the guide, but many of the Board may not see any of the highest priority cases; therefore, we prioritize based on the following
    - i. Patient harm
    - ii. Potential patient harm
    - iii. Fraud
    - iv. Convictions
    - v. advertising
28. Are there mandatory reporting requirements? For example, requiring local officials or organizations, or other professionals to report violations, or for civil courts to report actions taken against a licensee. Are there problems with receiving the required reports? If so, what could be done to correct the problems?
- Yes, there are mandatory reporting requirements
    - i. BCP 800 et. al. mandates our reporting requirements
    - ii. Problems: we aren't receiving reports timely; some are received 1 to 2 years after the event occurred Possible solution: outreach to insurance providers such as VSP, courts, and local officials
29. Does the board operate with a statute of limitations? If so, please describe and provide citation. If so, how many cases were lost due to statute of limitations? If not, what is the board's policy on statute of limitations?
- BCP section 3137
  - Provide statute of limitations report
30. Describe the board's efforts to address unlicensed activity and the underground economy.
- Working with DOI to perform undercover stings, investigate companies outside of CA providing services to California consumers

## Cite and Fine

31. Discuss the extent to which the board has used its cite and fine authority. Discuss any changes from last review and last time regulations were updated. Has the board increased its maximum fines to the \$5,000 statutory limit?
- Provide raw data of cite and fines, compare to old report
  - Board uses citations when there are violations of regulations that does not require disciplinary action
  - Yes, in 2006, the regulation to increase fine amounts became effective
32. How is cite and fine used? What types of violations are the basis for citation and fine?
- Board uses citations when there are violations of regulations that does not require disciplinary action
  - Types: advertising, failure to post license, failure to provide records, disciplinary actions in other states, using name other than registered name
33. How many informal office conferences, Disciplinary Review Committees reviews and/or Administrative Procedure Act appeals in the last 4 fiscal years?
- See statistics
34. What are the 5 most common violations for which citations are issued?
- See statistics
35. What is average fine pre and post appeal?
- See statistics
36. Describe the board's use of Franchise Tax Board intercepts to collect outstanding fines.
- The Board sent one case to FTB to collect outstanding fines; due to the low volume of fines issued, FTB has not been necessary; for those who are licensed, the Board will hold renewal until the fines are paid.

## Cost Recovery and Restitution

37. Describe the board's efforts to obtain cost recovery. Discuss any changes from the last review.
- With anyone on probation, payment plans are implemented unless the probationer can pay the amount in one lump sum; probationers are not allowed to complete probation until all cost recovery is received
  - Compare to previous report
38. How many and how much is ordered for revocations, surrenders and probationers? How much do you believe is uncollectable? Explain.
- See statistics
  - Subtract current probationers from total ordered cost recovery – the rest is believed to be uncollectible because they are only forced to pay the cost recovery if they reinstate their license in CA. Most stop practicing in CA and never return to practice; therefore, they have no desire or requirement to pay
39. Are there cases for which the board does not seek cost recovery? Why?
- The Board asks for cost recovery in every case. We may use this as a negotiating tool in stip
40. Describe the board's use of Franchise Tax Board intercepts to collect cost recovery.
- The Board has not used FTB for cost recovery in the past, but will be using it where appropriate in the future depending order language
41. Describe the board's efforts to obtain restitution for individual consumers, any formal or informal board restitution policy, and the types of restitution that the board attempts to collect, i.e., monetary, services, etc. Describe the situation in which the board may seek restitution from the licensee to a harmed consumer.
- The Board has no jurisdiction to order restitution unless written into an disciplinary order
  - The Board seeks restitution in cases such as insurance fraud

<b>Table 11. Cost Recovery</b>				
	FY 2009/10	FY 2010/11	FY 2011/12	FY 2012/13
Total Enforcement Expenditures				
Potential Cases for Recovery *				
Cases Recovery Ordered				
Amount of Cost Recovery Ordered				
Amount Collected				
* "Potential Cases for Recovery" are those cases in which disciplinary action has been taken based on violation of the license practice act.				

<b>Table 12. Restitution</b>				
	FY 2008/09	FY 2009/10	FY 2010/11	FY 2011/12
Amount Ordered				
Amount Collected				

## Section 6 – Public Information Policies

42. How does the board use the internet to keep the public informed of board activities?  
Does the board post board meeting materials online?  
Yes.
- When are they posted?  
About a week before the meeting date.
- How long do they remain on the website?  
Some items indefinitely such as fact sheets forms, but they are updated when needed.  
Some items until the issue is no longer relevant.
- When are draft meeting minutes posted online?  
They are not posted.
- When does the board post final meeting minutes?  
After they approved at Board meetings. About two to three months from the meeting date.
- How long do meeting minutes remain available online?  
At this time, Indefinitely.
43. Does the board webcast its meetings? What is the board's plan to webcast future board and committee meetings?  
Only meeting at the Department of Consumer Affairs in Sacramento. It is too expensive for the Board to pay for the travel and attendance of a DCA representative to web cast the meeting at off-site locations.
44. Does the board establish an annual meeting calendar, and post it on the board's web site?  
Yes, but not in 2012.
45. Is the board's complaint disclosure policy consistent with DCA's *Recommended Minimum Standards for Consumer Complaint Disclosure*? Does the board post accusations and disciplinary actions consistent with DCA's *Web Site Posting of Accusations and Disciplinary Actions* (May 21, 2010)? Yes.

46. What information does the board provide to the public regarding its licensees (i.e., education completed, awards, certificates, certification, specialty areas, disciplinary action, etc.)?

The licensee's name, address, optometrist license information (renewed, issued, expired), the certification the optometrist holds (i.e., TPA, TPG, etc.). The licensee's disciplinary status. Other licenses the licensee holds (BOL, FNP, SOL).

47. What methods are used by the board to provide consumer outreach and education?

- Website, brochures, press conference to inform the public about the dangers of cosmetic contact lenses sold illegally at flea markets/jewelry stores. Provide brochures to DCA outreach unit to provide them at health fairs.
- The Board has sought to provide consumer outreach and education for California's schools, senior citizen organizations, and low income health programs. Our consumer outreach and education has been limited, however, due to staff and financial constraints.

## Section 7 – Online Practice Issues

48. Discuss the prevalence of online practice and whether there are issues with unlicensed activity. How does the board regulate online practice? Does the board have any plans to regulate Internet business practices or believe there is a need to do so?

- Online practice is prevalent when it comes to selling plano contact lenses without a prescription
- The Board is working with DOI to investigate companies and distributors who are selling plano contact lenses to California consumers

## Section 8 – Workforce Development and Job Creation

49. What actions has the board taken in terms of workforce development?

50. Describe any assessment the board has conducted on the impact of licensing delays.

- Licensing delays can adversely affect the profession of optometry's workforce, the optometrist's ability to make a living, and the public's ability to have their eye care needs met in a swift and professional manner by a competent eye care professional. Board staff constantly seeks licensing measures that diminish and often prevent licensing delays.

51. Describe the board's efforts to work with schools to inform potential licensees of the licensing requirements and licensing process.

- Part of the Board's outreach and education include visits to California's schools/colleges of optometry to provide 3rd and 4th year students with an introduction to the Board's role and commitment to its stakeholders.

52. Provide any workforce development data collected by the board, such as:

- a. Workforce shortages
- b. Successful training programs.

## Section 9 – Current Issues

53. What is the status of the board's implementation of the Uniform Standards for Substance Abusing Licensees?

Submitted to DCA for final review. Upon its return, it will be submitted to the Office of Administrative Law.

54. What is the status of the board's implementation of the Consumer Protection Enforcement Initiative (CPEI) regulations?

As part of CPEI, the Board posts quarterly performance measures on our website

55. Describe how the board is participating in development of BreEZe and any other secondary IT issues affecting the board.

- The Board currently has two employees working part time on the BreEZe project as subject matter experts; another employee has contributed to a forms and correspondence work group as part of BreEZe

## Section 10 – Board Action and Response to Prior Sunset Issues

Include the following:

1. Background information concerning the issue as it pertains to the board.
2. Short discussion of recommendations made by the Committee/Joint Committee during prior sunset review.
3. What action the board took in response to the recommendation or findings made under prior sunset review.
4. Any recommendations the board has for dealing with the issue, if appropriate.

## Section 11 – New Issues

This is the opportunity for the board to inform the Committee of solutions to issues identified by the board and by the Committee. Provide a short discussion of each of the outstanding issues, and the board's recommendation for action that could be taken by the board, by DCA or by the Legislature to resolve these issues (i.e., legislative changes, policy direction, budget changes) for each of the following:

1. Issues that were raised under prior Sunset Review that have not been addressed.
2. New issues that are identified by the board in this report.
3. New issues not previously discussed in this report.
4. New issues raised by the Committee.

### **NOTES:**

Staffing, budget, continued competency, ability to travel at a national level to participate, RDO program, inspection authority, scope expansion, increase outreach opportunities

## Section 12 – Attachments

Please provide the following attachments:

- A. Board's administrative manual.
- B. Current organizational chart showing relationship of committees to the board and membership of each committee (cf., Section 1, Question 1).
- C. Major studies, if any (cf., Section 1, Question 4).
- D. Year-end organization charts for last four fiscal years. Each chart should include number of staff by classifications assigned to each major program area (licensing, enforcement, administration, etc.) (cf., Section 3, Question 15).

**Section 13 –  
Board Specific Issues**

**DOES NOT APPLY**

**Diversion**

Discuss the board's diversion program, the extent to which it is used, the outcomes of those who participate, the overall costs of the program compared with its successes

**Diversion Evaluation Committees (DEC) (for BRN, Dental, Osteo and VET only)**

1. DCA contracts with a vendor to perform probation monitoring services for licensees with substance abuse problems, why does the board use DEC? What is the value of a DEC?
2. What is the membership/makeup composition?
3. Did the board have any difficulties with scheduling DEC meetings? If so, describe why and how the difficulties were addressed.
4. Does the DEC comply with the Open Meetings Act?
5. How many meetings held in each of the last three fiscal years?
6. Who appoints the members?
7. How many cases (average) at each meeting?
8. How many pending? Are there backlogs?
9. What is the cost per meeting? Annual cost?
10. How is DEC used? What types of cases are seen by the DEC?
11. How many DEC recommendations have been rejected by the board in the past four fiscal years (broken down by year)?

**Disciplinary Review Committees (Board of Barbering and Cosmetology and BSIS only)**

1. What is a DRC and how is a DRC used? What types of cases are seen by the DRCs?
2. What is the membership/makeup composition?
3. Does the DRC comply with the Open Meetings Act?
4. How many meeting held in last three fiscal years?
5. Did the board have any difficulties with scheduling DRC meetings? If so, describe why and how the difficulties were addressed.
6. Who appoints the members?
7. How many cases (average) at each meeting?
8. How many pending? Are there backlogs?
9. What is the cost per meeting? Annual cost?
10. Provide statistics on DRC actions/outcomes.

## BOARD POWERS, DUTIES and COMPOSITION ISSUES

**ISSUE #1: The Board has been unable to hold one regular business meeting in the past year, and problems and concerns regarding the management of the have been raised by the Board's three public members.**

**Question #1 for the Board:** *Why has the Board had problems this past year in obtaining the necessary quorum to fulfill its statutory responsibility to conduct business and administer the optometry licensing laws? What business items or responsibilities has the Board been unable to perform as a result of its inability to hold regular business meetings (e.g., licensee reinstatements, examinations, promulgation of regulations, enforcement)? Is the Board capable, in the foreseeable future, of holding regularly scheduled meetings on a quarterly basis to conduct its normal business? If not, why? If not, what can be done so that the Board can properly function? How many committees does the Board have, who appoints their chair and members, how many members are on each committee, and how often did they meet during the past year? Can other Board members participate on committees to which they have not been appointed?*

*What is the response to the concerns and problems raised by the Board's three public members in their Sunset Review Minority Report? Given the explicit dissatisfaction of the Board's three public members with the operation of the Board – what actions has the Board taken or recommended be taken to address the concerns raised by the public members? Has the Board, its members or its executive officer contacted the Department of Consumer Affairs or the Governor's Office to request that the vacancies on the Board be filled by appointment? If so, when and what has been the response to date? What should be done if the Board continues to be unable to perform its statutory administrative responsibilities?*

**Background:** The Board's last regular business meeting was held over a year ago, on December 11 & 12 in 2000. A schedule sent to all Board members in January listed the proposed schedule of dates for four regular Board meetings in 2001 (March, June, September, and November), as well as one special hearing on a proposed regulation to adopt Part III of the National Board of Examiners in Optometry (NBEO or national exam) in lieu of the Board-administered practical exam in optometry. However, during 2001, the only meetings at which the Board could obtain the necessary attendance of sufficient members to meet its 6-member quorum requirement was its February 15 regulatory hearing on adoption of the national exam and one special meeting on August 29, brokered by the Department of Consumer Affairs, just to deal with submission of the Board's Sunset Review Report and to approve the Psychometric Audit of the national exam so that it could be used for the Board's next licensing examination scheduled for January 2002. [Note: The terms of two licensee members of the Board expired in June of 2001, leaving the 9-member Board with a bare quorum of 6 members - 3 licensee & 3 public members.]

A meeting of Board members held in July was only a committee meeting since there was an absence of a quorum. The Board's November 16-17 meeting was rescheduled to November 30 – December 1 to accommodate conflicts in Board members' schedules. However, that meeting had to be cancelled last week following notification by the Board's three public members that they would not attend, citing an absence of an opportunity to have input to the meeting agenda or to have reviewed a preliminary agenda prior to it being sent out.

The Board's "official" Sunset Review Report was adopted by a majority board vote at its August 29 special meeting and submitted to the JLSRC on September 1. However, citing disagreement with the manner in which the August meeting was conducted, the Board's three public members submitted a Sunset Review Minority Report dated September 17, 2001, in which they expressed their concerns both with the August meeting and with problems they believe have occurred with the management and operation of the Board over the past several years. A summary of their concerns or problems with the Board were:

- Board members are not provided with accurate or sufficient information in a timely manner on which to make their decisions.
- No board meetings were conducted for approximately 10 months in 1999.
- Public members' repeated requests for a board newsletter received no response until the August 2001 board meeting, and public board members' work on newsletters was never published.
- The board has failed to promulgate regulations to implement the provisions of SB 929 (Polanco, Chapter 676 – Statutes of 2000) which significantly expanded the scope of practice of optometrists and optometric assistants.
- It took many board meetings and memos to overcome the objections of licensee board members and the Executive Officer to set up a toll-free telephone number for the board.
- The board's committees are run by the board's Executive Officer and staff, not the committee's board members, and public board members are not appointed to nor allowed to provide input to meaningful board committees.
- Board business (e.g., meeting minutes, agendas, expense reimbursement claims) is not conducted in a timely fashion.
- Board members are not provided with adequate information about nor included in the Board's enforcement responsibility or its Enforcement Committee, and there has been no closure regarding recommendations that have been made by the public members.
- Board decisions (e.g., re adoption of the national licensing exam) are not based on all the necessary information but rather based on the personal interests and opinions of particular licensee board members.
- Board decisions only reflect the interests of the Board's licensee member majority; board composition should be changed to eliminate the licensee member majority.
- Board meetings and hearings are not adequately publicized, are not held in convenient or publicly accessible locations, are scheduled for longer than is necessary, and the agendas inaccurately reflect the timing and length of agenda items.

While the Board's staff has continued to conduct the day-to-day business of the Board, the Board itself has been confronting an apparent stalemate between its licensee and public members in being able to meet and decide on policies, regulations, petitions for license reinstatements, or recommended decisions in disciplinary cases.

## **ISSUE #2: Should the composition or membership qualifications of the Board be changed?**

**Question #2 for the Board:** *Should the ratio of licensee to public member be changed to increase the representation by public members? If the public member representation is increased, should it be done by replacing a licensee member or members (perhaps through attrition as a position becomes vacant) or by increasing the size of the Board? What are the Board's conflict of interests provisions for the selection and participation of its licensee and its public Board members? Are these adequate to insure that the Board operates in the public's interest rather than being influenced by their own personal interests? Should they be made more stringent to avoid either the appearance or reality of improper self-interest?*

**Background:** During the Board's prior Sunset Review in 1997-98, the Department of Consumer Affairs recommended increasing the public membership on the Board to improve its balance consistent with the Department's general recommendations that its regulatory boards should have an odd number of members and a public member majority. The staff of the JLSRC staff concurred with the Department and recommended adding one more public member and removing one of the optometrist members – retaining a 9-member Board with 5 public and 4 licensed optometrist members. However, neither the Board nor the JLSRC itself agreed with that staff recommendation and the JLSRC decided not to adopt that recommendation on a vote of 2-3.

In support of its recommendation in 1997/98, the JLSRC staff wrote:

“The Department and Committee staff believe the current composition of the nine-member Board of Optometry, 6 optometrists and 3 public members, is overbalanced toward optometrist members. The Joint Committee may wish to consider converting one of the optometrist positions to a public member.

This recommendation is based on the belief that a regulatory board dominated by professional members (a 2-to-1 majority in this instance), may tend to place greater emphasis on issues of competence (e.g., examinations, continuing education, expanded scope of practice) and correspondingly less emphasis and resources on consumer education/information, and enforcement. And, while it generally functions efficiently, the Board of Optometry may be a case in point.”

This year the Board’s three public members have recommended that the composition of the Board be changed to reduce the number of licensed optometrist members, and to add either a licensed ophthalmologist or public members. The public members believe that the Board’s actions are controlled by the interests of its licensee member majority, rather than the public interest.

Further, the Board of Optometry is required to hold at least one meeting a year at which its licensing exam must be given. However, the Board generally schedules four meetings a year to be held in both Northern and Southern California. The nine-member Board (six licensee and three public members) has a statutory quorum requirement of six members, currently has three licensee-member vacancies (one since June 2000 & two more since June 2001), and has had difficulty in the past year obtaining a quorum to conduct its meetings.

Based upon the apparent stalemate between the Board’s public and licensee members, the JLSRC may want to consider changing the composition of the Board and the qualifications for its members. Some state regulatory boards within the Department of Consumer Affairs have additional requirements or limitations on the qualifications of its members. These can include that licensees represent particular backgrounds within the profession or types of practice, that conflict of interest provisions be more far reaching, and in an exceptional case that licensees of another profession be included on a Board (e.g., Respiratory Care Board.) The purpose of these additional requirements is to assure that the Board has the benefit of a broad cross-section of professionals involved in a board’s regulation, that professionals working in different circumstances are represented, and that members are free of even apparent personal sources of conflict of interest. For this board, such additional requirements might include assuring that its licensed optometrist members represent both licensees working in private practice as well as those working as employees in corporate settings.

Regarding the Board’s efforts to protect consumers since its last sunset review, the Board has adopted a regulation to require that optometrists post a conspicuous notice in their offices that federal law requires that patients be given a copy of their spectacle (eyeglasses) prescription, but that the law does not require the optometrist to release a contact lens prescription. Board staff have recommended that the Board go further and adopt a state regulation to provide patients with the right to obtain their contact lens prescription upon request, unless there are significant medical reasons not to do so. The Board’s attorney has advised that the Board has the necessary statutory authority to adopt such a regulation. This regulatory proposal is pending before the Board for action. Also, the Board has instituted a toll-free “800” public telephone number for the Board.

In the area of enforcement, the Board’s statistics show that 46% of its complaints come from consumers and that “unprofessional conduct” is the most often alleged violation. “Unprofessional conduct” includes allegations of patient abandonment, breach of confidentiality, failure to release records, unethical practices, theft, or rendering of unauthorized professional services. The Board’s report did not breakdown its enforcement statistics by type, but show that while the number of complaints have been declining over the past four years (from 308 to 240), the number referred for investigation have increased (from 44 to 66 in 2000/2001), the number of accusations filed has varied from 2 in 1997/98 to 12 in 1998/99 and back down to 3 in 2000/01, and the number of formal disciplinary actions taken have declined from 12 in 1997/98 to 7 in 2000/01.

# BUDGETARY ISSUES

**ISSUE #3: The August 2001 Department of Finance fiscal controls audit of the Board found several deficiencies in the Board's internal fiscal controls and made recommendations to correct them.**

**Question #3 for the Board:** *What deficiencies did the audit reveal and what was the Board's response? Does the board foresee any problems with rectifying the deficiencies disclosed by the DOF audit and carrying out the recommendations with which it has concurred? Will the DOF respond to the Board's written response to the audit, for example, in its final audit report? Is the Board required to provide subsequent reports to the DOF regarding the implementation of the recommendations? Have there been any discussions between the Board and the Department of Consumer Affairs regarding whether a "program audit" will be conducted? Over the past few years, what information has been provided to board members regarding the Board's budget, expenditures and revenues? In what form has this information been provided and at what frequency?*

**Background:** All three public Board members have expressed concerns regarding the management of the Board and inability to obtain regular information regarding the Board's budget, expenditures, and revenue.

At the request of the Department of Consumer Affairs, the Department of Finance (DOF) pursuant to an interagency agreement recently conducted an audit review of the Board's internal fiscal controls. The DOF's draft audit report made several findings and recommendations pertaining to the Board's need to take physical inventories of and tag board property, maintain subsidiary property ledgers, submit monthly bank statements on a timely basis, process purchase invoices in a timely manner, and maintain independent leave balance reports. In its response to the DOF, the Board agreed with the audit findings and committed to taking corrective actions steps to comply with the audit recommendations. The audit did not review programmatic controls over the Board's service quality and operational efficiency – including management's effectiveness to accomplish desired performance through effective strategic planning, program budgeting, supervision, and fiscal discipline.

**ISSUE #4: The Board's reported fund reserve exceeds its statutory maximum. Is the Board satisfactorily responding to this situation?**

**Question #4 for the Board:** *Has the Board reconciled its fund analysis figures with those of the department? Are the amounts reflected in the Board's report accurate and, if not, what are the actual figures? When will the Board's reserve meet the statutory six-month limit? Is there a need to decrease licensing fees or increase the Board's base budget for any items?*

**Background:** The Board reports that it had a fund reserve at the end of the 2000/2001 fiscal year equaling 11.6 months operating expenses and has a statutory limit of six months reserve. The Board reported that the Department of Consumer Affairs' fund analysis reflected a reserve level of only 6.5 months at the end of the 2000/2001 fiscal year, and that the Board would. The Board indicated that it will do an additional analysis, given the expenditure and revenue patterns, to determine whether a decrease in renewal fees is warranted.

# LICENSURE ISSUES

**ISSUE #5: Has the Board satisfactorily responded to the recent legislative expansion in the scope of practice for both optometrists and unlicensed optometry assistants?**

**Question #5 for the Board:** *What was the Board's involvement in developing the provisions of SB 929 (Polanco, Chapter 676 – Statutes of 2000) prior to its enactment? What actions has the board taken in order to implement SB 929? Is the board proposing to adopt regulations regarding the glaucoma certification provisions of the bill? If so, what is being proposed? If not, why, and is the board proposing any less formal action (e.g., newsletter article, notice to licensees, etc.) regarding the bill's implementation? How did SB 929 expand the duties that unlicensed optometric and unlicensed medical assistants are allowed to perform? What specific tasks are involved in those duties? Why does the board believe that its proposed regulation on this will assure that those duties are performed in a safe and competent manner? What are the chronology and the status of that regulation? What process did the board use to determine whether regulations are necessary to implement this statute? What is the board's response to arguments that further clarification or specificity by the board is required to properly implement this statute with respect to either its glaucoma or optometric assistant provisions?*

**Background:** The three public members in their Minority Report contend that the board has failed to propose adopting regulations that are necessary regarding the provisions of SB 929 (Polanco – Chapter 676 of 2000) that provided for the board's certification of optometrists to independently treat glaucoma following collaboration with ophthalmologists in the treatment of 50 glaucoma patients. Regulations regarding the expanded scope of practice of unlicensed optometric assistants have also been proposed but the Board has not taken any formal action to promulgate such regulations. (Note: The Board has not been able to hold a regular Board meeting to do so since December of 2000.)

One public board member has expressed that her request to be appointed to the regulation committee was not approved by the Board's President who makes the appointments to the Board's various committees. Only one licensee member was appointed to the Board's standing Regulations Committee for 2001. However, a special committee composed of that public member, the licensee member of the standing regulations committee and staffed by the Board's Executive Officer, was appointed by the Board's President on November 7, 2000 to discuss the implementation of SB 929 and develop recommendations for its implementation. That special committee's recommendations were presented at the Board's December 1, 2000. In response to those recommendations, the Board decided to have its staff develop of form for the glaucoma collaboration provision of the bill, have staff draft proposed language re performance of duties by an unlicensed optometric assistant and bring it back to the Board for consideration, have staff research the issue of the definition of "consultation" as used in the bill, and took no action on two other items. Except for development of the form by staff, the Board has not been able to meet to pursue the other implementation actions it had decided it would pursue.

# EXAMINATION ISSUES

**ISSUE #6: The Board has voted to eliminate using its own licensing examination in favor of using the National Board of Examiners in Optometry (NBEO) examination.**

**Questions #6 for the Board:** *What assessment or review did the Board do that led to its decision to accept passage of all portions of the National Board of Examiners in Optometry examination (NBEO or national exam) in lieu of requiring license applicants to pass a California developed and administered practical licensing exam? Prior to its vote to adopt the national exam, how did the Board establish that the NBEO exam properly tested California's license applicants to assure their minimum competency to practice within their scope of practice in California? What was the chronology of events involved with the Board's adoption of a proposed regulation to use the national exam? What prompted the recent audit of the national exam by the Board, what were the findings of that exam audit? What is the current status of that regulation? When is the Board's next licensing exam and when is adoption of the national exam expected to occur? Will a change in the examination fee paid by license applicants be necessary as a result of adoption of the national exam?*

**Background:** The public board members, in their Minority Report, have expressed concerns that the Board's decision to move to adopt the national exam was prompted by the licensee member of the Board who has been in charge of California's exam but will be leaving the Board in the near future and is involved with the administration of the national exam. Following a formal regulatory hearing last February, the Board adopted a regulation – now pending approval – which would accept all parts of the NBEO exam in lieu of the Board-administered exam, as is currently done by 37 other states. Currently the Board requires passage of Parts I, II, and the Clinical Skills portion of Part III of the national exam plus passage of the Board's own patient management and laws and regulations exams. In essence, the proposed exam would now add passage of the remainder of Part III of the national exam instead of the Board's Patient Management exam – but still require license applicants to pass the California laws and regulations exam.

Following submittal of the Board's proposed regulation to the DCA, the DCA pointed out that an audit should be performed on the national exam to determine if it met California's standards for exam administration. That Board's regulatory proposal was held back pending the completion of the audit. The Board contracted to have the audit performed and the audit report was submitted on November 19. The audit concluded, with reservations, that the national exams are valid measures of optometric competencies, but made recommendations that were believed would enhance the validity of the examinations. The Board's sunset report states that the Board will consider moving in the direction of online license renewal if a pilot project in which the Board of Registered Nursing is involved proves successful.

## CONTINUING COMPETENCY ISSUES

**ISSUE #7: Should the criteria and process for approving mandatory continuing education courses and providers be changed. In particular, should all courses and course providers that are approved by the Medical Board of California for mandatory continuing medical education also qualify for mandatory continuing education for licensed optometrists?**

**Question #7 for the Board:** *What criteria does the Board use for its approval of education courses and providers for mandatory continuing education? Why are continuing education courses officially sponsored or accredited by any accredited school or college of optometry given blanket pre-approval? What assurances are there that such courses will in fact meet the criteria for continuing education courses approved by the Board (but not made applicable in regulation to courses by schools/colleges of optometry?) Will coursework on subject areas that are studied as part of the curriculum of an approved school of optometry (e.g., general human diseases or conditions not specifically involving the eyes or related structures) also qualify for approval as continuing optometric education?*

**Background:** The optometry licensing laws require the Board to adopt regulations that require, as a condition of renewal, that all licensees submit proof satisfactory to the Board that they have informed themselves of the developments in the practice of optometry occurring since the original issuance of their licenses by pursuing one or more courses of study satisfactory to the Board or by other means deemed equivalent by the Board. Concerns have been raised that the quality of CE courses has declined since completion of CE became mandatory – essentially insuring a “captive audience” of persons who must take approved CE. And it has been proposed by at least one licensee that all mandatory CE that has been approved by the Medical Board of California for physicians should also be accepted as qualifying for the mandatory CE requirements in optometry – the contention being that medically-related coursework is relevant to the practice of optometry and constitutes a required part of the approved educational coursework for obtaining an initial license.

To renew a license, an optometrist must pass 40 hours of continuing optometric education (CE) every two years or 50 hours if the optometrist is certified to use therapeutic pharmaceutical agents (TPAs). TPA-certified optometrists must fulfill 35 of their required 50 hours on the diagnosis, treatment and management of ocular disease as follows: 12 hours on glaucoma, 10 hours on ocular infections, 5 hours on inflammation and topical steroids, 6 hours on systemic medications, and 2 hours on the use of pain medications. Apart from the above mandatory CE requirements, the Board may adopt regulations to require licensees to maintain current certification in cardiopulmonary resuscitation.

In addition, Board regulations require each licensee to complete 20 hours of formal CE course work approved by the Board within the year immediately preceding the renewal deadline. No more than 4 hours of course work can be in the area of patient care management, and courses in business management shall not be approved. The regulations limit use of specified alternative methods for meeting the CE requirements to one half of the 20 hours of required course work. The regulations require that all licensees maintain current certification in cardiopulmonary resuscitation (CPR) from approved providers

CE programs that have been approved by regulation as meeting the Board’s required standards include: (1) CE sponsored or accredited by any accredited school or college of optometry, (2) CE offered by any national or state affiliate of the American Optometric Association, the American Academy of Optometry, or the Optometric Extension Program, or (3) CE approved by the International Association of Boards of Examiners in Optometry known as COPE (Council on Optometric Practitioner Education). Further, CE meeting the criteria specified below may be approved by the Board after submission of a program, schedule, topical outline of subject matter, and curriculum vitae of all instructors to the Board’s Executive Officer at least 45 days prior to the date of the program. The criteria for Board approval are: (1) Whether the program is likely to contribute to the advancement of professional skill and knowledge in the practice of optometry, (2) Whether the speakers, lecturers and others participating in presentation are recognized by the Board as being qualified in their field, (3) Whether the proposed course is open to all licensees, and (4) Whether the CE provider agrees to maintain and furnish records of course content and attendance as the Board requires for a period of at least three years from the date of the course.

## ENFORCEMENT ISSUES

**ISSUE #8: The Board reports an increase in its enforcement activity and related expenditures since its last sunset report in 1997, but also reports an increase in the amount of time it takes to complete a disciplinary case. Further, the Board has had to seek deficiency funding for enforcement purposes over the past two fiscal years.**

**Question #8 for the Board:** *What accounts for the increase in both enforcement activity and delays in completion of the pre-accusation and post-accusation time frames? Does the pre-accusation time frame include time that the case is still at the Board as well as after it has been referred from the Board to the AG but before an accusation is filed? If so, does the Board have data that breaks out the time cases are at each stage? What does the Board believe can be done to reduce these increases in the time it takes to complete its disciplinary cases? In what years since its last sunset review have the Board's expenditures for enforcement exceeded its budgeted appropriation? If so, in which areas of enforcement did this occur? In what years did the Board submit a deficiency request for additional expenditure authority (appropriation) and what was the cause of the deficiency (ies)? Does the Board anticipate the need for a deficiency request this year? Has the Board's budget for enforcement been increased? Does the Board need an increase in its base budget, particularly for enforcement? If so, what would those additional monies be used for?*

**Background:** The three public board members in their Minority Report expressed concerns that they are not satisfactorily informed, or are misinformed, regarding the Board's enforcement program and related budget – which led to their decision to drop further investigation in one particular disciplinary case.

The Board's report shows a decline in complaints made to the Board, an increase in the number of investigations initiated, an increase in the average number of cases referred to the Attorney General's Office (AG) for initiation of formal disciplinary action, and a slight increase in the average number of disciplinary actions taken. The Board reports that it has increased its expenditures for enforcement by 15%, from an average of 41% in 1997 to 56% in 2001. However, during that same period the average amount of time it takes to process complaints, investigate and process complaints has increased from 805 days (1997/98) to 914 days (2000/01), or an increase of 109 days. The bulk of that increase appears to occur after the investigation is completed and either prior to the filing of an accusation by the AG or following the filing of the accusation but before the conclusion of the case ("post-accusation").

The Board has experienced increased disciplinary workload that resulted in the Board filing Deficiency Requests to obtain deficiency funding (additional funds appropriated beyond amount initially budgeted) over the past two fiscal years (1998/99 & 1999/2000.) In particular, as has been the case with some of the other licensing boards in the Department of Consumer Affairs, the deficiency resulted in part due to unanticipated Attorney General enforcement costs that had led to expenditure of all the funds that had been budgeted and appropriated for that purpose in those two fiscal years.

# CONSUMER EDUCATION/INFORMATION AND SATISFACTION

**ISSUE #9: There is still relatively high dissatisfaction with the Board by those who file complaints, but the Board has made significant improvements in making its existence known to and communicating with complainants.**

**Question #9 for the Board:** *Please explain what efforts the Board has made to improve communication with complainants, why it believes that dissatisfaction with the outcome of the consumers' complaints is still relatively high, and what other improvements the Board intends to make to provide better overall service to complainants.*

**Background:** The satisfaction survey of complainants conducted by the Board for its prior 1997/98 sunset review indicated that 26% of respondents were satisfied that the Board's existence was well known, 79% were satisfied with knowing where to file a complaint, 55% were satisfied with the outcome of their complaint case, and 72% were satisfied with the Board's overall service or effectiveness. The complainant survey conducted by the Board as a part of this year's sunset review process shows that for 1999 & 2000, 100% of respondents were satisfied with knowing where to file a complaint and whom to contact, 60% (1999) & 75% (2000) were satisfied with the final outcome of their complaint, and 80% (1999) and 66% (2000) were satisfied with the overall service provided by the Board.

**ISSUE #10: Should the Board be doing more to publicize its existence and regulatory role, and should it be doing more to educate and inform the public regarding the services provided by optometrists?**

**Question #10 for the Board:** *How does the Board publicize its existence, its regulatory role over optometrists, and its public board meetings. What process is used to select board meeting locations and sites? Could the Board select locations or sites that are more accessible to the public, particularly the disabled? What is the status of the Board's newsletter? What information does the Board provide the public and how does it provide that information? What are the most frequent sources of consumer complaints to the Board? Does the Board plan to provide information, in pamphlet form and on its website, regarding subjects such as what constitutes a thorough eye examination and what they should know in buying spectacle or contact lenses?*

**Background:** The three public members in their Minority Report contend that the Board has failed to adequately publicize the Board's meetings, make those meetings easily accessible, or provided newsletters to its licensees and others on the Board's mailing lists. The Board maintains a website on the Internet that provides information about the Board, the requirements of the optometry licensing laws, licensees, and optometry. The Board's sunset report states that the Board will consider moving in the direction of online license renewal if a pilot project in which the Board of Registered Nursing is involved proves successful. The Board does note that the Internet could be further utilized to improve Board service to consumers by including information on consumer interest subjects such as purchasing contact lenses and spectacles (eyeglasses), and what constitutes a comprehensive eye examination. The Board has produced a consumer information pamphlet in the past but it has not been updated in recent years to include changes in the law or additional relevant information.

## FINAL RECOMMENDATIONS OF THE JOINT LEGISLATIVE SUNSET REVIEW COMMITTEE AND THE DEPARTMENT OF CONSUMER AFFAIRS

**ISSUE #1. (CONTINUE REGULATION OF THE PROFESSION?)** Should the licensing and regulation of optometrists be continued?

**Recommendation #1:** *The Joint Committee and the Department recommend that profession of optometry continue to be regulated.*

**Comments:** Due to the highly technical procedures performed by optometrists and the health and safety implications for consumers, the Department and the JLSRC recommend continued regulation of the optometric profession.

**ISSUE #2. (CHANGE BOARD COMPOSITION?)** Should the composition or membership qualifications of the Board be changed?

**Recommendation #2:** *The Joint Committee and the Department recommend two additional public members added to the Board.*

**Comments:** The Board currently consists of nine members, six professional members and three public members. The majority of the boards under the purview of the Department have a balanced composition with an equitable number of professional and public members. Unlike these other boards, the Board of Optometry has a two-to-one ratio of professional to public members. It has been argued that this professional super majority necessarily results in professional bias, and less focus on consumer protection.

Public participation on regulatory boards ensures a balanced approach to decision-making, and enhances public protection. In recent years, the JLSRC has expanded the number of public members on DCA regulatory boards. Public members have been added to the Accountancy, Contractors, Pharmacy, Podiatry, Psychology, Respiratory Care, and Veterinary Medical Boards through sunset review legislation.<sup>1</sup>

If the Board is sustained, the Department and the JLSRC recommend adding two additional public members, appointed by the Governor, for a total of eleven members (six professional, five public). This new composition would provide more consumer representation while continuing to maintain the expertise needed for technical regulatory and enforcement issues. Two additional Board members would not substantially increase a Board's operational costs.<sup>2</sup>

**ISSUE #3: (RESOLVE CONFLICTS BETWEEN PROFESSIONAL AND PUBLIC MEMBERS?)** What actions should the Board take to resolve some of the ongoing problems between professional members and public members?

**Recommendation #3:** *The Joint Committee and the Department recommend that the Board needs to continue its efforts to reconcile conflicts between professional and public members.*

**Comments:** As reported to the Department and the JLSRC and detailed in the "Minority Report", the Board's public members argue that they are treated differently than the professional members, suggesting the potential for a two-tiered approach by the Board staff in addressing the concerns of the public members.

<sup>1</sup> SB 133 (Chapter 718, Statutes of 2001), SB 2029 (Chapter 1005, Statutes of 2000), SB 827 (Chapter 759, Statutes of 1997), SB 1981 (Chapter 736, Statutes of 1998), SB 1983 (Chapter 589, Statutes of 1998), SB 827 (Chapter 759, Statutes of 1997), respectively.

<sup>2</sup> Average annual travel and per diem costs per member are approximately \$2,500.

As evidenced by the sunset review “minority report” submitted to the JLSRC by the Board’s public members (who constitute one-half of the Board), significant conflict exists between the professional and public members of the Board of Optometry. Further evidence of this conflict is the Board’s inability to meet due to the unwillingness of the public members to attend meetings under current conditions. Although the Board has been making disciplinary decisions via mail ballot, the inability of Board leadership to address and resolve the issues precipitating the impasse is a matter of concern. The absence of Board meetings undermines the purpose of the Board—which in part is to engage in regular public discourse.

This impasse and consistent inability to resolve differences is unprecedented. The Department has been asked on more than one occasion to facilitate conversations between the Board’s two factions so that a Board meeting may be convened. The Department believes that this is the responsibility of Board leadership – its presiding chair and executive officer. Nonetheless, the Department has provided guidance and recommendations on how to overcome the intransigency of the Board members.

It was recommended that professional facilitators or conflict mediation experts be brought in to resolve the conflict so that the Board can carry out its business. While the Department was encouraged by the Board’s recent decision to do so, it is disappointed by the plan engaged to effectuate conflict mediation. The Department’s profound concerns about Board leadership remain.

**ISSUE #4: (COMPLY WITH RECENT AUDIT?) What corrective steps should the Board take to comply with deficiencies found during a recent audit conducted by the Department of Finance?**

**Recommendation #4: *The Joint Committee and the Department recommend the Board should comply with corrective steps recommended in the Board’s recent audit.***

**Comments:** The Department and JLSRC recommend that the Board continue to take the corrective steps needed to comply with the Board’s recent audit, conducted by the Department of Finance (DOF). At the request of the Department, the DOF, through an interagency agreement, conducted an audit review of the Board’s internal fiscal controls. The DOF’s draft audit identified several areas needing improvement. These included the need to submit monthly bank statements on a timely basis and process purchase invoices in a timely manner, among others. The Board agreed with the audit findings and recommendations for remedial behavior in its response to the DOF. The Department would like to underscore the importance of these corrective steps and the need to have sound internal fiscal controls in place prior to the next sunset review cycle.

**ISSUE #5: (DEVELOP STANDARDS FOR UNLICENSED ASSISTANTS?) Should the Board adopt supervision and training standards for unlicensed optometric assistants?**

**Recommendation #5: *The Joint Committee and the Department recommend that the Board should conduct an occupational analysis for optometric assistants to identify the tasks they will perform, and the attendant training and skill level required. An occupational analysis should be developed before unlicensed assistants are permitted to engage in practices that until now required licensure as an optometrist. Following the occupational analysis, regulations clarifying the level of training and supervision of assistants should be promulgated.***

**Comments:** Senate Bill 929 (Chapter 676, Statutes of 2000) expanded the scope of practice for optometrists and expanded the duties that an unlicensed assistant may perform under the direct responsibility and supervision of an optometrist. This is a dramatic change in the delivery of optometric services. The provisions of SB 929 reclassified technicians, who previously were only authorized to fit contact lenses, to assistants who can perform various testing procedures including glaucoma testing, visual perception testing, measurement of the thickness of the cornea, screening of the corneal curvature, administering topical agents, and performing sonograms to measure the length of the eye and structures of the eye, generally used for surgical procedures and may involve direct contact with the eye. Clearly, this is a significant expansion of the tasks that unlicensed assistants were able to perform prior to the passage of SB 929, and consumers should not be placed at risk until duties of these assistants are clarified and regulations are adopted clarifying the level of training and supervision. Specifically, the

Board needs to establish standards to ensure that unlicensed assistants demonstrate adequate knowledge and skill. In the absence of clarifying regulations, individual practitioners in the field could interpret the law in a variety of ways. To protect consumers, the Board should expedite the adoption of clarifying regulations.

**ISSUE #6: (CONTINUE WITH THE CURRENT BOARD?) Should the profession of optometry continue to be regulated by the current Board, or should the Board be reconstituted, or become a bureau under the Department of Consumer Affairs?**

**Recommendation #6:** *The Joint Committee recommends that current membership of the Board should be allowed to sunset.*

**Comments:** Since the last sunset review this Board has struggled with scope of practice issues, criticism of its enforcement efforts, an impasse between Board members that has effectively rendered the Board impotent, and a persistent perception that the profession exercises inordinate control of the Board. The Department's Deputy Director for Board Relations was called in to mediate Board Member conflict and facilitated the Board's September meeting. In 1999 the Director intervened in a Board dispute with the Department of Justice which has severely impaired the Board's relationship with the Department of Justice's licensing division. The Department is troubled by the lack of leadership exhibited at the Board and has shared those concerns with Board Members and the Executive Officer.

Following criticism that the Board was unlawfully permitting optometric exams to be conducted by unlicensed assistant personnel, the Board originally responded that this was common practice, and there was no intention to discipline optometrists delegating this function. When the Department suggested legislation to review this practice, the Board indicated previous legislative efforts had not been successful, and legislation would not be pursued to clarify the permission of this practice. Nonetheless, and fully aware of the Department's interest in resolving the matter, the optometry scope of practice bill, Senate Bill 929 (Chapter 676, Statutes of 2000), was amended late in the session to permit unlicensed assistant personnel to perform optometric exams. While this may well be an appropriate contemporization of the practice act, it was achieved with virtually no public discussion, and without even cursory notification to the Department.

In 2001, the Department worked with the Board and the Office of Examination Resources (OER) to evaluate the national exam and its appropriateness for use in California. However, the Board did not conduct an independent audit of the national exam, in spite of the significant changes in their scope of practice that occurred as a result of SB 929, until the Department intervened.

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**To:** Board Members

**Date:** August 10, 2012

**From:** Alejandro Arredondo O.D.  
Board Vice President

**Telephone:** (916) 575-7170

**Subject: Agenda Item 9 – Public Comment for Items Not on the Agenda**

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The Board may not discuss or take action on any matter raised during this public comment section, except to decide whether to place the matter on the agenda of a future meeting [Government Code Sections 11125, 11125.7(a)].

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**To:** Board Members

**Date:** August 10, 2012

**From:** Alejandro Arredondo O.D.  
Board Vice President

**Telephone:** (916) 575-7170

**Subject: Agenda Item 10– Suggestions for Future Agenda Items**

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Members of the Board and the public may suggest items for staff research and discussion at future meetings.

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**To:** Board Members

**Date:** August 10, 2012

**From:** Enforcement Staff

**Telephone:** (916) 575-7170

**Subject: Agenda Item 11 – Full Board Closed Session**

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Pursuant to Government Code Section 11126(c) (3), the Board Will Meet in Closed Session for Discussion & Possible Action on Disciplinary Matters

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**To:** Board Members

**Date:** August 10, 2012

**From:** Alejandro Arredondo O.D.  
Board Vice President

**Telephone:** (916) 575-7170

**Subject:** Agenda Item 12 - Adjournment

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