



ISSUE MEMORANDUM

DATE	May 21, 2021
TO	Members, California State Board of Optometry (CSBO)
FROM	Shara Murphy, Executive Officer
SUBJECT	Agenda Item #4a - Review and Approval of Written Responses to the Legislative Sunset Oversight Background Report

Each year, the Assembly Business and Professions Committee and the Senate Business, Professions, and Economic Development Committee hold joint sunset review oversight hearings to review the boards and bureaus under the Department of Consumer Affairs (DCA).

The sunset review process provides an opportunity for the DCA, the Legislature, the boards, and interested parties and stakeholders to discuss the performance of the boards and make recommendations for improvements. The Board’s Sunset Review hearing in front of the committees took place on Friday, April 9, 2021. The Board’s Sunset Bill for 2021-22 is [Assembly Bill 1534](#) (Committee on Business and Professions).

Set out below are questions raised by the committee and staff’s proposed responses.

BACKGROUND PAPER FOR THE California State Board of Optometry

Joint Sunset Review Oversight Hearing, April 9, 2021
Assembly Committee on Business and Professions and the
Senate Committee on Business, Professions and Economic Development

BOARD RESPONSES TO CURRENT SUNSET REVIEW ISSUES FOR THE CALIFORNIA STATE BOARD OF OPTOMETRY

ADMINISTRATIVE ISSUES

ISSUE #1: Board Composition. *Does the current membership on the Board appropriately balance professional expertise and public objectivity, especially given current vacancies on the board?*

Background: Statute prescribes the composition of the Board, which includes both Board licensees (professional members) and individuals who are not regulated by the Board (public members). Statute provides for a total of thirteen board members. When all appointments to the Board have been made, there are a total of six professional members (five optometrists and one registered dispensing member) and five public members, resulting in a slight majority of members as active licenseholders or registrants. In 2015, the United States Supreme Court ruled in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* that when a state regulatory board features a majority share of active market participants, any allegedly anticompetitive decision-making may not be subject to *Parker* antitrust litigation immunity unless there is “active state supervision” to ensure that all delegated authority is being executed in the interest of the public and not the private commercial interests of the members.

To date, there has been no meaningful litigation against public bodies established under California law, and it is likely that the Board receives more than enough active state supervision to qualify for immunity. The Board is considered only semi-autonomous, with much of its rulemaking and disciplinary activity subject to involvement by multiple other governmental entities. Its current Executive Officer is not a licensee; however, there is no statutory prohibition against the appointment of a future Executive Officer who is also a market participant. Finally, the Department of Consumer Affairs has also worked to ensure that members are adequately trained in certain procedures to ensure an adequate record of deliberation for purposes of defense against any potential allegations of antitrust.

Notwithstanding the legal sensitivities accompanying boards with majority professional memberships, the disproportionality for the Board is arguably minor, with an advantage of only one additional member who is regulated by the Board, and one of the professional members being a dispensing registrant with distinct interests from the optometrist members. Considering the numerous benefits of having professional perspectives in deliberations by the Board regarding the practice of optometry, this technical imbalance is unlikely to be in need of any further statutory change. However, the Board should remain

mindful whenever it engages in formal decision-making that may appear to serve the economic interests of licensee populations represented on the Board.

This is particularly true in instances where vacancies on the Board result in a further imbalance of the professional and public perspectives. Currently, there are four vacancies on the Board, three of which are public members and the other of which is the registered dispensing member. This means that as of April 1, 2021, there were five optometrist members on the Board versus only two public members. This membership asymmetry is an example of why thoughtful statutory Board compositions could still result in outsized representation of the profession.

Staff Recommendation: *The Board should indicate whether it believes the current lack of public membership on the Board presents any risks or challenges in its decision-making and what efforts it has taken to ensure its decision-making is subject to state supervision so as to safeguard its members from antitrust allegations.*

Board Response: *In all matters, the Board centers the protection of the public and appropriately balances professional expertise and public protection. With the recent appointment of public members by the Governor and the Senate President Pro Tempore, the Board anticipates a greater diversity of consumer perspective and welcomes a more wide-ranging discussion that addresses the needs and experiences of more Californians.*

ISSUE #2: RDO Member. *Has the inclusion of an RDO member on the Board resulted in better regulation of the industry?*

Background: Prior to 2016, the Board's eleven members consisted of five members of the public and six optometrists. Subsequently, the enactment of AB 684 (Alejo/Bonilla) required that one of the optometrist members be replaced with a registered dispensing member. The bill provided that the registered dispensing member would replace the optometrist member whose term expired on June 1, 2015.

The Legislature's decision to require a permanent slot for a registered dispensing member on the Board was noteworthy. When the RDO Program was under the Medical Board of California, there was no optician member designated for that board. Similarly, while a number of other healing arts boards have councils or committees consisting of allied professionals under the board's jurisdiction, only a handful have representatives of those professions on the principle board.

While currently the registered dispensing member is vacant, there has previously been an optician on the Board. This presumably has resulted in the dispensing profession's perspective receiving more attention during meetings of the Board governing that program and the optical industry at large. As the Board is assessing its successes and challenges, it should speak to the benefit it has seen from the change to its composition as it assumed regulatory responsibility for dispensing professionals.

Staff Recommendation: *The Board should advise the Committees as to whether it believes there has been a substantial benefit to having a registered dispensing member on the Board and how that member has engaged on issues relating both to optometry and to opticianry.*

Board Response: *Since 2016, the Board has reviewed the various statutes impacting Opticians, developed Disciplinary Guidelines, reviewed the Code of Regulations for Opticianry, and performed two of three Occupational Analyses. In each of these endeavors, the Registered Dispensing Optician*

Committee and the CLD/SLD Board member have been guiding forces. They have helped staff and board members better understand the standard duties of the profession and the effect of the laws and regulations. We are awaiting appointment of a Registered Optician member to the Board, and have enlisted education professionals from throughout the state and different practice modalities to supplement discussions.

ISSUE #3: *Dispensing Optician Committee. Has the DOC functioned effectively since it was established?*

Background: In addition to placing a registered dispensing professional onto the Board, AB 684 (Alejo/Bonilla) created a Dispensing Optician Committee (DOC). The DOC consists of five members, including one RDO, one spectacle lens dispenser or contact lens dispenser, two public members, and one member of the Board. Following initial appointments to the DOC, all appointments to the DOC will be made by the Governor. Unlike the Board, no members of the DOC are appointed by either the Speaker of the Assembly or the Senate Rules Committee.

The role of the DOC is “to advise and make recommendations to the board regarding the regulation of dispensing opticians, spectacle lens dispensers, and contact lens dispensers.” The DOC is required to meet at least twice a year. Any recommendations made by the DOC regarding scope of practice or regulatory changes must be approved, modified, or rejected by the Board within 90 days. If the Board rejects or significantly modifies the intent or scope of a recommendation, the DOC may request that an explanation be provided in writing within thirty days.

During the Board’s prior sunset review, the Committees noted that there had been difficulty in finding individuals to appoint to the DOC and that the committee had not yet been fully established. Since then, the Board was successful in making appointments to the DOC and it has begun to meet; however, there are currently two vacancies out of the five designated members. As this is the first sunset review since the Board has had the DOC formally in place, it would be valuable to know whether the DOC has functioned well and what challenges the Board has experienced in utilizing the committee.

Staff Recommendation: *The Board should inform the Committees of how it believes the creation of the DOC has served to benefit consumers and the profession, and whether there are any recommended changes to how DOC members are appointed or selected that could allow it to be more effective.*

Board Response: *The Board recommends amending the statute which seeks representatives from registered dispensing optician businesses. It is believed that the intent of the Legislature was to obtain professional input from individual licensees rather than policy influenced by company-specific budgeting or strategy. If membership is predicated upon employment by a business, the member’s decisions can be unduly influenced by dismissal or other threat to livelihood. Any such influence would compromise the independence of the board member and subvert the Board’s mission of consumer protection. The Board believes that this appointment should be used to engage a professional in the growing educational space for Opticianry.*

ISSUE #4: *Board Attorney. Does the Board have sufficient legal counsel?*

Background: In original statute enacted in 1913 that first created the Board allowed it “to employ agents, attorneys, and inspectors.” Currently, however, there is no express language in the Optometry Practice

Act authorizing the Board to hire its own dedicated attorney. Legal representation in disciplinary prosecution is provided by the Attorney General's Licensing Section, and the DCA offers counsel as part of the centralized services it provides to boards, as needed to assist with rulemaking, address legal issues that arise, and support compliance with open meeting laws.

Dedicated board counsel is, however, considered to provide substantial value when questions of law occur regularly enough to warrant the presence of attorney who specializes in a board's practice act, and may help improve the Board's rulemaking timelines. It is under this line of thinking that the Legislature has explicitly authorized other boards to appoint their own lawyers. Particularly as the Attorney General's billing rate has increased substantially, these may each be factors in costlier and lengthier enforcement activities by the Board.

Staff Recommendation: *The Board should inform the Committees of whether it believes it would benefit from having its own dedicated attorney.*

Board Response: *No, the Board has effective legal representation through the Legal Unit of DCA. The Board accesses a team of attorneys—board counsel, regulations counsel, supervising Assistant Chief Counsel, and Deputy Director for Legal Affairs. These layers provide more effective advocacy with the Attorney General's Office and other executive branch departments than would be a solo attorney for the board. Our Board counsel draws on legal knowledge and prior experience of other attorneys, which is beneficial given the cross-cutting legal issues common to all DCA boards. Board counsel has easy access to historical opinions and advice related to the Board. We appreciate that Board counsel is supervised by senior attorneys to ensure the accuracy, consistency, and quality of the advice.*

FISCAL ISSUES

ISSUE #5: Fund Merger. What is the status of the merger of the Optometry and RDO funds?

Background: When AB 684 (Alejo/Bonilla) transferred the RDO Program from the Medical Board of California to the Board, it also transferred the RDO Fund, in which registration fees collected from registered dispensing professionals are collected. As a result, the Board was responsible for operating two separate funds. The Board's prior sunset review background paper noted that because the Board was administering two separate funds, there may be duplicate administrative work, such as reviewing two separate fund expenditure and revenue reports, and separating each application, audit report, or fine to make sure it was charged to the appropriate fund.

The enactment of AB 896 (Low) signed into law as an urgency measure on September 23, 2020, required the Department of Finance to merge the Optometry and RDO funds. The bill abolishes the Dispensing Optician Fund on July 1, 2022, and will require that any sums of money in that fund be transferred to the Optometry Fund before July 1, 2022. Board management and the DCA Fiscal Unit have stated that they believe that the merger will occur without adverse impacts, as the RDO Fund has fully funded operations and maintained the mandated reserve balance.

Prior to the merger of the two funds, the Board reported that no enforcement-related costs for the RDO program were charged to that program, meaning any enforcement-related costs for RDOs were attributed to the Optometry Fund. Presumably this will be rectified with the fund merger. Additionally, the Board should benefit from accounting efficiencies and administrative clarity as it moves forward with a single

special fund for its operational costs.

Staff Recommendation: *The Board should provide the Committees with an update on the status of its fund merger and describe what future benefit it expects to derive from the consolidation of its special funds.*

Board Response: *The Governor approved the fund merger in late 2020. By no later than July 1, 2022 the funds will transfer from the Registered Dispensing Optician Fund. At the start of 2021, the Board began receiving merged budgeting documents for long-term planning across programs. Through the merger, we are realizing long-term stability in the Board's fund condition and improved calculation for months of operations in reserves.*

Most importantly, the Board will restructure our staff to increase cross-training and minimize disruptions in service and processing. Through shared program resources, we will provide relief to the lone enforcement analyst for the Opticianry program, who carries a case load more than double that of our Optometry analysts.

Our Board statistics show that the programs have an almost equal number of licensees—but Optometry applications are received all at once around professional school graduations. The fund merger will allow Licensing staff flexibility to consistently process Opticianry Program applications (which are steadily increasing) while surging staff resources to handle graduation season and other cyclical renewals in Optometry. With the merger, we anticipate decreased processing times, thus better consumer protection.

ISSUE #6: Attorney General Billing Rate. Will the abrupt increase in the Attorney General's client billing rate for hours spent representing the Board in disciplinary matters result in cost pressures for the Board's special fund?

Background: In July of 2019, the California Department of Justice announced that it was utilizing language included in the Governor's Budget authorizing it to increase the amount it billed to client agencies for legal services. The change was substantial: the attorney rate increased by nearly 30% from \$170 to \$220, the paralegal rate increased over 70% from \$120 to \$205, and the analyst rate increased 97% from \$99 to \$195. While justification was provided for why an adjustment to the rates was needed, the rate hike occurred almost immediately and without any meaningful notice to any client agencies. For special funded entities such as the Board, unexpected cost pressures can be devastating. As the Board anticipates the need for future fee increases, the Committees should be informed of whether the Attorney General's Office or the Administration has informed the Board of any efforts to provide assistance with ensuring that the Board is able to maintain a healthy fund condition going forward.

Staff Recommendation: *The Board should discuss with the committees the impact of the Attorney General's rate increase and whether any action is needed by the Administration or the Legislature to safeguard the health of its special fund.*

Board Response: *The increase to Attorney General fees occurred simultaneously with the Board's*

defense of 21 citations against Stanton Optical, which has created a separate and distinct cost pressure. In FY 2018-2019 the Board requested a budget augmentation of \$40,000 to off-set these costs. The Board anticipated making additional budget augmentation requests for 2019-2020 and 2020-2021, but reduced practice during the pandemic resulted in fewer complaints. We are scrutinizing billings and on a case-by-case basis, analysts are requesting legal aid labor for simple document revisions rather than paying the higher fees of an attorney; we are also fast tracking stipulations that do not require the use of a Deputy Attorney General. We have not had to explicitly weigh the severity of cases against cost of discipline, but cost pressures are preventing investments in technology, human resources and organizational improvement.

LICENSING ISSUES

ISSUE #7: *Fair Chance Licensing Act. What is the status of the Board's implementation of Assembly Bill 2138 (Chiu/Low) and are any statutory changes needed to enable the Board to better carry out the intent of the Act?*

Background: In 2018, Assembly Bill 2138 (Chiu/Low, Chapter 995, Statutes of 2018) was signed into law, making substantial reforms to the license application process for individuals with criminal records. Under AB 2138, an application may only be denied on the basis of prior misconduct if the applicant was formally convicted of a substantially related crime or was subject to formal discipline by a licensing board. Further, prior conviction and discipline histories are ineligible for disqualification of applications after seven years, with the exception of serious and registerable felonies, as well as financial crimes for certain boards. Among other provisions, the bill additionally requires each board to report data on license denials, publish its criteria on determining if a prior offense is substantially related to licensure, and provide denied applicants with information about how to appeal the decision and how to request a copy of their conviction history. These provisions were scheduled to go into effect on July 1, 2020.

Because AB 2138 significantly modifies current practice for boards in their review of applications for licensure, it was presumed that its implementation would require changes to current regulations for every board impacted by the bill. Recently, the Board was in the process of finalizing its regulations to revise its denial criteria to incorporate the changes from the bill. It is also likely that the Board has identified changes to the law that it believes may be advisable to better enable it to protect consumers from license applicants who pose a substantial risk to the public.

Staff Recommendation: *The Board should provide an update in regards to its implementation of the Fair Chance Licensing Act, as well as relay any recommendations it has for statutory changes.*

Board Response: The Board has fully implemented Assembly Bill 2138 for both the optometrist and optician programs. Regulations to implement the bill became effective on February 25, 2021. The Board worked closely with Department of Consumer Affairs and collaborated with other DCA consumer protection boards on this implementation.

These regulatory changes adopt criteria used in determining whether a crime, act, or professional misconduct is substantially related to the qualifications, functions, and duties of a licensee, or when an applicant or licensee has made a showing of rehabilitation related to a crime, act, or professional misconduct when considering denial, suspension, or revocation of a license or registration. The Board is in the process of training staff to apply these criteria to any optometry licensure and optician registration applicants who might qualify.

The Board projects the actual number of optometrist and optician applicants who may qualify under this criteria to be low. Although the Board believes no statutory changes are needed at this current time, staff will continue to identify potential changes to the law which may be advisable in order to enhance consumer protection.

ISSUE #8: Statutory Consolidation. Should chapters establishing and governing the RDO Program be merged into the Optometry Practice Act?

Background: In addition to discussing whether a merger of the RDO and Optometry Funds was advisable, the Board’s prior sunset review background paper suggested that there may be benefit to merging the RDO Program into the Optometry Practice Act. The Committees have noted that merging practice acts would not be unique and that there is precedent with other boards and bureaus. The Board has suggested that merging the practice acts may improve consumer protection and enhance administrative efficiencies by providing clarity in the statutes and regulations and removing duplicative administrative work as mentioned in the above background section.

The Board discussed a potential merger of the optometry and optician practice acts at the August 2, 2019, public meeting. Stakeholders cautioned that such a merger should be performed with care to ensure that it does not result in unintentionally removing any enforcement authority from other code sections. The Board has stated that it is currently performing a detailed review of opticianry statutes with a goal of clarifying and better organizing statute and regulations. The Board states that this statutory review is projected to be complete in 2021 before the fund merger completion date in 2022.

Staff Recommendation: *The Board should update the Committees on its discussions regarding whether merging the RDO Program into the Optometry Practice Act is advisable and feasible and when it would anticipate having any proposed language to accomplish this goal.*

Board Response: *The Board does not currently recommend including Opticianry statutes in the Optometry Practice Act. Beginning in 2019, the Dispensing Optician Committee recommended approval of a draft practice act for Opticianry that better defines the practice of each license type and sets supervision standards for retail workers. These professional recommendations have been reviewed multiple times by the Board and other committees. The legislative proposal was approved during the May 21, 2021 Board meeting. That proposal will be included in the suggested clean-up language detailed in Issue #21 of this response paper.*

ISSUE #9: Licensure of Foreign Graduates. Have there been adequate pathways for internationally trained optometrists to become licensed in California since the Board has ceased awarding Letters of Sponsorship to foreign graduates?

Background: To become licensed as an optometrist in California, applicants are required to have completed a four-year Doctor of Optometry degree program meeting California educational requirements. Previously, the Board was authorized to sponsor “foreign graduates,” or individuals who obtained their education from institutions outside of the United States, to sit for the NBEO examination. The Board noted that these individuals would request a Letter of Sponsorship (LOS) from the Board to allow the foreign graduate to take the NBEO. The Board would determine if the applicant’s education

obtained through the foreign university was equivalent to the education earned at a school of optometry within the United States

However, while receiving an LOS from the Board would allow a foreign graduate to take the national NBEO examination, it did not mean that the foreign graduate would actually be eligible for licensure in California, as the applicant would still not have met the California educational requirements. This meant that there was no real pathway for a license to practice even upon passing the NBEO. In response to these issues, AB 1708 (Low) eliminated the Board's LOS program beginning January 1, 2018 and the Board no longer sponsors foreign graduates. Instead, the Board states that when it receives inquiries from foreign graduates looking to obtain licensure in California, it directs these applicants to three colleges on the East Coast that offer an accelerated two-year program. There, foreign graduates can obtain certification to practice in the United States.

Staff Recommendation: *The Board should indicate to the Committees whether it believes there could be a statutory solution to allow foreign graduates to achieve licensure within California without having to attend an accelerated two-year program on the East Coast.*

Board Response: *The Board does not currently foresee a statutory solution to this issue. Research and policy development is on-going.*

EDUCATION AND EXAMINATION ISSUES

ISSUE #10: *NBEO Examination. Has the requirement that optometry students travel to North Carolina to complete a portion of the NBEO examination presented a greater challenge due to the COVID-19 pandemic, and are there any proposed solutions to resolve this ongoing issue?*

Background: To become licensed as an optometrist in California, applicants must pass a three-part national examination developed by the National Board of Examiners in Optometry (NBEO). Part III of the NBEO is administered in person, with a testing site exclusively located in North Carolina. Prior to 2010, the Part III exam was given at each school of optometry. However, due to lack of consistency in staff training and administration of the test, NBEO consolidated all testing into one location in North Carolina.

Since then, the NBEO has since considered opening of an additional location. The NBEO initially considered where most schools and candidates are located, with approximately two-thirds of applicants educated on the East Coast. The NBEO then analyzed lodging and transportation costs, city safety, real estate costs, and the cost and quality of living for its staff. The result of this analysis was a proposal to open testing locations in either Denver or Las Vegas. However, the NBEO has since announced that it is not pursuing opening another location at this time, as it believes that a significant increase in per-student testing fees would be necessary to fund the expansion.

Without a testing site closer to California, applicants educated on the West Coast have had to travel to North Carolina to complete their examination requirements. This issue became particularly challenging during the COVID-19 pandemic when air travel was strongly discouraged and restricted by health officials. However, the Board is limited in terms of its ability to address the problem. The NBEO is a private organization that can choose where to offer its examinations. Currently, all 50 states, the District of Columbia, and Puerto Rico all use the NBEO Exam for licensure, so an elimination of the requirement would significantly impact license portability options for California optometrists. As the Legislature

continues solutions to this ongoing issue it would be helpful to hear the perspective of the Board.

Staff Recommendation: *The Board should update the Committees regarding the likelihood that the NBEO will add new testing sites in the future and whether it has recommendations to allow applicants to become licensed optometrists without jeopardizing their health through travel to North Carolina.*

Board Response: *The Board agendaized the testing site four times in the last year, including a special hearing specific to this issue on Friday, September 18, 2020. NBEO has indicated that it does not intend to create a Western United States testing center in the next five to seven years.*

Despite the threat of COVID-19, all 2020 California graduates completed the test and were licensed timely. California's 2021 graduating classes are scheduled to complete examinations before the end of May. We can report that no COVID-19 infections have been linked to the North Carolina Testing Center or travel to/from the examination site.

But we recognize that having a single testing site is inconsistent with contingency planning for the next pandemic, natural disaster, cyber-attack, or domestic terrorism. Earlier this year, we formed a task force to develop a blueprint for action. We are reviewing contracts, researching technical support and content delivery models, and engaging resources in international risk management. Additionally, the adoption of a board-specific state-of-emergency statute could be needed in the event of a disruption to testing.

ISSUE #11: Continuing Education. Has the Board successfully enhanced its process for auditing compliance with CE requirements?

Background: Under Board regulations, optometrists must complete 40 hours of continuing education (CE) every two years in order to renew their license. Optometrists are allowed to complete 20 of their required hours through alternative methods, including, but not limited to, self-study through an electronic medium. Optometrists who are certified to use therapeutic pharmaceutical agents must complete 50 hours of CE, including 35 hours in the diagnosis, treatment, and management of ocular disease.

During the Board's prior sunset review, it was noted that due to staffing issues and time constraints, CE audits were not consistently conducted. The Board stated in its Sunset Review Report 2016 that "as a result of the Board restructuring, additional resources are now available to conduct more audits. The Board is also researching more efficient ways to increase the number of CE audits, strengthening consumer protection."

Subsequently, the Board continued conducting CE audits into 2018 and has a record of conducting 321 audits over the past four fiscal years. During that time, 101 audits resulted in a fail for not having the required number of CE hours or being deficient in completing specific CE requirements respective to license certifications. The overall percentage of CE failure was 31 percent. This would indicate that the Board is now more effectively auditing CE compliance; however, the failure rate still appears to be high, suggesting that optometrist compliance has not yet increased accordingly.

Staff Recommendation: *The Board should provide the Committees with an update on its efforts to*

increase CE compliance audits and state whether it believes that the current fail rate is unacceptably high and whether any changes to how it enforces CE compliance could improve compliance.

Board Response: The Board has a robust process that evaluates presenters, potential conflicts of interest, and the presence of marketing or sales content within every course. Before a CE course is approved, providers submit a curriculum vitae for each speaker, PowerPoint slides and training materials. The Board recently approved new regulations, which will allow greater oversight of continuing education course content and providers. The Board's Practice and Education Committee will now develop protocols for provider audits and adopt a written policy regarding sales content and conflicts of interest.

ENFORCEMENT ISSUES

ISSUE #12: Teleoptometry and Emerging Technologies. Does the availability and use of new and emerging technologies, including those allowing for the remote eye examinations, effectively balance concerns for patient health and safety with expanded access to optometric services?

Background: As advancing technologies have sought to modernize health care delivery and improve patient access to care, policy discussions have persisted around how disruptions to traditional practice may result in the weakening of consumer protections. The optometric profession has been no exception. In particular, several companies have been involved in the development of products aimed at increasing the convenience of renewing a prescription for corrective lenses and contacts, which would allow patients to receive that prescription through the use of a smartphone or computer without having to visit an optometrist's office.

These so-termed remote eye assessment products have been the topic of debate within the optometric practice and have received substantial scrutiny by regulators. In April of 2016, the American Optometric Association (AOA) filed a formal complaint with the federal Food and Drug Administration (FDA), alleging that a platform marketed by a tech company called Opternative posed significant health risks to the public, including the potential for inaccurate prescriptions, missed diagnosis of serious eye conditions, and the creation of a prescription without significant input from an eye doctor.

In February of 2018, the Federal Trade Commission (FTC)'s Office of Policy Planning weighed in on proposed legislation in the State of Washington that would require licensed ophthalmologists and optometrists to conduct an in-person, comprehensive eye examination before providing prescriptions for eyeglass and contact lenses. The FTC argued against the bill, stating that "we are concerned that the Bill may reduce competition, access, and consumer choice in eye care and might also raise costs for consumers." This stance was supported by various companies actively working to innovate within the remote eye assessment technology space.

Subsequently, in August of 2019, the FDA issued a medical device recall for the Opternative product (now marketed under the name Visibly) for failure to submit a marketing application and receive clearance from the FDA. Meanwhile, other companies continue to market remote eye assessment products, with myriad distinctions making it difficult to tell whether there will be the same issues with those platforms as well. One technology solution, currently utilized by both a major online retailer as well as a prominent pharmacy chain, utilizes a web platform to renew expired prescriptions through a

vision exam conducted over a smartphone or computer using a “digital eye chart.” The resulting prescription is then reviewed and approved by an ophthalmologist.

The dialogue about how to appropriately balance patient access and convenience against perceived circumvention of traditional consumer protection safeguards continues. The most immediate concern is arguably that when consumers are able to renew their lens prescriptions online without a visit to the optometrist, they are missing the opportunity to ensure that they have received a comprehensive eye exam. However, the previously mentioned technology solution does feature frequently asked questions stating explicitly that the product is *not* a comprehensive eye exam and that patients should still see their eye care provider regularly. This may be an appropriate approach to cases where a patient simply needs or desires a quick and convenient way to update their prescription but who needs additional confirmation that in-person visits to an optometrist are still required to sustain their ocular health.

In addition to online refraction and prescription renewals, there have been ongoing discussions around how to properly utilize telehealth platforms to allow for optometrists to examine patients remotely using video conference technology, which would potentially increase access in rural areas with fewer available practitioners. A teleoptometry model that has been proposed would involve a patient visiting an office where trained technicians take scans or images for review by an optometrist, who would then review the information and consult with the patient over video technology. One unresolved question regarding this proposal would be whether the interaction between the patient and the optometrist must be in real-time, or whether asynchronous video transmissions would be allowed.

As technologies continue to emerge and debate persists, it may be premature to determine what teleoptometry policies are in the best interest of patients. In the meantime, the Board has continued to meet and discuss what sort of telemedicine laws would be effective for its regulatory and enforcement efforts. The topic will continue to be of interest to the Committees as the Legislature seeks to balance patient safety and convenient access to care.

Staff Recommendation: *The Board should inform the Committees of whether it has seen any adverse patient impacts resulting from the use of teleoptometry and technology platforms, and whether it intends to recommend any changes to statute or its practices to better protect consumers.*

Board Response: *Even before the pandemic hit, through two public meetings and multiple telemedicine workgroup meetings in 2019 and 2020, Board staff presented research on various telemedicine scenarios, technologies, and best practices. Workgroup conclusions: While we have heard from stakeholders that optometry is not a field that traditionally lends itself to telemedicine, there has been an increase in online retailers allowing vision refractions using app-based technology. These apps use self-refraction testing rather than autorefraction tests employed by optometrists and assistants. Once the patient generates measurements, the results are transmitted to a doctor who is licensed to write corrective lens prescriptions in California. Almost always, this doctor is an ophthalmologist who is licensed by the Medical Board of California and outside the jurisdiction of the Board of Optometry. Some are done by assistant. These online refractions can provide a reasonably accurate corrective lens prescription, but cannot assess the health of the patient's eye, monitor for potential vision problems, evaluate the functioning of the patient's eyes and vision, diagnose or treat eye disease, or provide consultation on the patient's eye and vision health. The Board has provided direction to staff for further research to develop a comprehensive telemedicine policy in FY 2021-22.*

There are a variety of Opticianry services offered online. Opticianry is the sale of contact lenses and spectacles, as opposed to the testing for prescriptions and examinations for eye health. The most common online opticianry services are the delivery of prescription contact lenses, the fabrication of prescription spectacle lenses, and the delivery of prescription spectacles. While contact lens sellers must register with the Board (no matter where they are based), spectacle lens sellers must register with the Board if based in California only. During the May 21, 2021 meeting, the Board approved a legislative proposal to extend the licensure requirement to include online spectacle sellers based outside of California (Nonresident Spectacle Lens Sellers) and create an intelligible Opticianry Practice Act. The Board respectfully submits these changes by attachment to ISSUE #21: Technical Cleanup.

ISSUE #13: RDO Regulation Enforcement. Does the Board need its authority to compel compliance with the laws governing RDOs clarified or enhanced to ensure robust enforcement?

Background: AB 684 (Alejo/Bonilla) entrusted the Board with responsibility to enforce laws and regulations governing the business relationships between optometrists and RDOs. The bill additionally made a number of changes to the requirements for optical retailers to make eye exams available to customers and enacted myriad new consumer protections in exchange for clarifying what types of relationships between optometrists and retailers would be lawful. As a result, the majority of optical retailers in California have now been able to offer eye exams without inappropriately intermingling an optometrist's professional judgment with a retailer's financial interest.

However, the Board has informed the Committees that one major eyewear retailer has refused to comply. The Board states that this is despite multiple efforts to communicate with the retailer to bring them into compliance. It would arguably appear as though the retailer is deliberately flouting California law. The Board has issued a total of 21 citations to individual locations of the retailer in California for various violations of the law, including failure to obtain or maintain a registration to practice as an RDO as well as advertising violations. Fine amounts for individual citations are \$5,000 or \$55,000, with a total for all citations of \$655,000. According to the Board, the citations themselves stem from ongoing issues with the retailer and their refusal to comply with the law. The Board states that the retailer has repeatedly opened new locations without obtaining proper registration, despite being repeatedly warned to do so.

To date, the Board has spent nearly \$250,000 on the investigation and legal defense of the above citations. In two prior budget years, the Board has had to request emergency budget augmentations to have the funds to continue the legal defense of the citations. In the meantime, the retailer has not corrected any of the cited violations.

The Board argues that allowing the retailer to employ misleading advertising disadvantages the public, who believe that the stores provide eye exams and optometric services when they are not licensed to do so. The Board asserts that the retailer diminishes California's labor market by failing to abide by California law, creating an unfair advantage and encouraging non-compliance by other companies. The Board believes that allowing a corporation to schedule and control appointments places business efficiency above patient health.

As the Board cannot expend more funds in this particular appeal or possible infractions by other vendors within opticianry, it has indicated that it is seeking legislative clarification to ensure the provisions of AB 684 are enforceable. The Board has requested language stating the Board's authority to take action when an optical business has undue control over an Optometric practice. Given the importance of

ensuring that the intent of AB 684 is fulfilled, the Committees may indeed wish to consider empowering the Board with greater authority to take action against bad actors.

Staff Recommendation: *The Board should provide the Committees with any recommendations to ensure it has sufficient authority to compel compliance with California’s laws in regards to opticianry.*

Board Response: *In the defense of twenty-one citations against Stanton Optical, the Board has revealed the following loopholes that allow Stanton Optical undue influence over the practice of optometry.*

- **According to BPC Section 655, subdivision (f), an ophthalmologist may employ an optometrist and may enter a landlord-tenant relationship with a dispensing optician business. Therefore, current law enables Stanton Optical to contract with an out-of-state, ophthalmological shell company to appear separate from the optometrists providing services. The ophthalmologist does not manage its employees; management of its optometrists is unlawfully performed by the registered dispensing optician.**
- **In contracting with an ophthalmologist, Stanton Optical is not required to adhere to or produce documentation of a lease agreement subject to the conditions of BPC Section 655, subdivision (d). Additionally, the terms “direct landlord-tenant relationship” and “indirect landlord-tenant relationship” have no definition.**

The Board respectfully submits applicable changes by attachment to ISSUE #21: Technical Cleanup.

ISSUE #14: Standard of Care Model for RDOs. Should the Board treat RDOs more like trained professionals in its enforcement and licensing activities?

Background: Since the transition of the RDO Program, the Board now has oversight and enforcement responsibilities for both optometrists and opticians. However, the two regulated professions are arguably treated very differently in regards to enforcement. While optometrists are considered trained professionals whose judgement and competence are considered when being held to a California standard for purposes of licensing and discipline, RDOs are arguably not regarded with the same perspective. Considering that California has chosen to place limitations on who can lawfully engage in activities regulated under the RDO Program and considering that the practice of opticianry is a skilled professional service within the greater landscape of vision health, the Board may consider pursuing ways to utilize something resembling a standard of care model in its regulation of RDOs and dispensing professionals.

Staff Recommendation: *The Board should provide its perspective on whether dispensing registrants should be treated more like trained professionals similarly to optometrists and how that paradigm shift could be effectuated in Board policy and in statute.*

Board Response: *Though physical harm may not be the result, poorly executed spectacle and contact lens dispensing does impact the consumer. Consumer protection includes ensuring that Californians receive the care they need with a reasonable guarantee of the accuracy of that care. The Board receives several complaints each month claiming optometrists have written an incorrect prescription or that the materials they received cause side effects or do not work. Extensive committee discussion indicates that refabrications and mild physical effects are common outcomes of poorly executed spectacle and contact lens dispensing. These complications often result in lost time and money for the consumer. According to the experience of professional opticians serving on the committee—consumer outcomes improve with*

on-site supervision conducted by opticians, who have proven a higher understanding of the mathematical concepts and fabrications behind spectacles and contacts.

The Dispensing Optician Committee has completed a clean-up of the disparate statutes that govern Opticianry and enacted nascent disciplinary guidelines. Concurrently, the committee has closely monitored the development of educational programs and the effect of training on national exam pass rates. The Board is completing occupation analyses for Spectacle Lens Dispensers, Contact Lens Dispensers, and unlicensed assistants to optometrists. The Board is working to develop a comparison of these research reports. Beginning in 2023 the Board plans to complete a data-driven analysis of the profession. Though opticians are not rigorously trained and tested like optometrists, the Board recognizes an opportunity to improve consumer protection through standardization and education.

PRACTICE ISSUES

ISSUE #15: *Independent Contractors. Does the new test for determining employment status, as prescribed in the court decision *Dynamex Operations West Inc. v. Superior Court*, have any unresolved implications for licensees working in the optometry profession as independent contractors?*

Background: In the spring of 2018, the California Supreme Court issued a decision in *Dynamex Operations West, Inc. v. Superior Court* (4 Cal.5th 903) that significantly confounded prior assumptions about whether a worker is legally an employee or an independent contractor. In a case involving the classification of delivery drivers, the California Supreme Court adopted a new test for determining if a worker is an independent contractor, which is comprised of three necessary elements:

- A. That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- B. That the worker performs work that is outside the usual course of the hiring entity’s business; and
- C. That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Commonly referred to as the “ABC test,” the implications of the *Dynamex* decision are potentially wide-reaching into numerous fields and industries utilizing workers previously believed to be independent contractors. Occupations regulated by entities under the Department of Consumer Affairs have been no exception to this unresolved question of which workers should now be afforded employee status under the law. In the wake of *Dynamex*, the new ABC test must be applied and interpreted for licensed professionals and those they work with to determine the rights and obligations of employees.

In 2019, the enactment of Assembly Bill 5 (Gonzalez, Chapter 296, Statutes of 2019) effectively codified the *Dynamex* decision’s ABC test while providing for clarifications and carve-outs for certain professions. Specifically, physicians and surgeons, dentists, podiatrists, psychologists, and veterinarians were among those professions that were allowed to continue operating under the previous framework for independent contractors. However, optometrists were not included in the bill, and some have suggested that they should be afforded an exemption to prevent unnecessary disruption to the optometry profession.

Staff Recommendation: *The Board should inform the committees of any discussions it has had about the *Dynamex* decision and AB 5, and whether there is potential to impact the current landscape of*

the optometry profession unless an exemption is enacted.

The Board has not engaged in discussions regarding an exemption from AB5 for licensed optometrists.

ISSUE #16: *Relationship with the Ophthalmology Profession. Does the distribution of shared scope of practice between ophthalmologists and optometrists adequately benefit and protect consumers?*

Background: Optometry and ophthalmology are two distinct professions that share a great deal of practice scope and interest. Whereas optometrists are often considered mid-level practitioners with a narrow focus on diagnosing and treating specific eye conditions, ophthalmologists are physicians and surgeons working within a specialty that also places an emphasis on conditions of the eye. As a result, ophthalmologists may engage in virtually any activity within the practice of optometry, while also being authorized to perform a greater number of treatments and procedures than optometrists.

One potential concern with two categories of licensed professional is that enforcement of laws governing the practice of vision care falls to either the Board or the Medical Board of California depending on whether the practitioner is an optometrist or an ophthalmologist. In cases here one board has prioritized certain enforcement efforts, similar attention may not be paid by the other and there may be inconsistent enforcement. This may be the reason why ophthalmologists are often used to perform relatively minor services such as approving prescription renewals.

Additionally, there will continue to be discussions regarding where the line should be drawn between optometry scope of practice and ophthalmology. While as physicians and surgeons, ophthalmologists doubtlessly have more education and training in most cases than optometrists, there would be greater access to care for services that optometrists are authorized to perform. The Legislature likely will and should continue to engage in conversations about how optometrists can safely and effectively engage in more health care practices currently reserved for ophthalmologists.

Staff Recommendation: *The Board should inform the Committees of any perspectives it has regarding the relationship between optometry and ophthalmology.*

Board Response: *The relationship between the optometrist and ophthalmologist relates to “ISSUE #13: RDO Regulation Enforcement. Does the Board need its authority to compel compliance with the laws governing RDOs clarified or enhanced to ensure robust enforcement?” In the defense of twenty-one citations against Stanton Optical, the Board has revealed the following relationship with an ophthalmologist that allows Stanton Optical undue influence over the practice of optometry.*

- *According to BPC Section 655, subdivision (f), an ophthalmologist may employ an optometrist and may enter a landlord-tenant relationship with a dispensing optician business. Therefore, current law enables Stanton Optical to contract with an out-of-state, ophthalmological shell company to appear separate from the optometrists providing services. The ophthalmologist does not manage its employees; management of its optometrists is unlawfully performed by the registered dispensing optician.*
- *In contracting with an ophthalmologist, Stanton Optical is not required to adhere to or produce documentation of a lease agreement subject to the conditions of BPC Section 655, subdivision (d). Additionally, the terms “direct landlord-tenant relationship” and “indirect landlord-tenant*

relationship” have no definition.

Additionally, the exclusion of employment of optometrists to only ophthalmologists inhibits the integration of eye health into preventative care, and federally-qualified health clinic operations. The Board respectfully submits this change by attachment to ISSUE #21: Technical Cleanup.

ISSUE #17: Childhood Vision Screenings. Are there opportunities for the Board to contribute to national efforts to increase the rates of early pediatric eye exams?

Background: According to data published by the National Center for Health Statistics within the Centers for Disease Control and Prevention, childhood vision screenings may provide early detection of vision disorders and opportunities for subsequent treatment. The United States Preventive Service Task Force recommends that children aged three to five years receive a vision screening at least once to detect amblyopia (lazy eye) or its risk factors. Key findings from a National Health Interview Survey revealed that during 2016/17, only 63.5 percent of children within this age group had ever had their vision tested by a doctor or other health professional, and that race, socioeconomic status, and access to insurance all significantly impacted the likelihood of a child receiving a vision screening by the age of five.

In 2015, SB 402 (Mitchell) was proposed to address the need for comprehensive eye examinations for school-age children; when the bill failed to pass, the Board created a Children’s Vision Workgroup. Throughout 2017 and 2018, the Children’s Vision Workgroup held a number of meetings dedicated to supporting AB 1110 (Burke), which similarly aimed to increase student access while maintaining the expected standard of care for examinations conducted in brick and mortar medical offices. However, AB 1110 also did not pass, and the workgroup was effectively dissolved.

Given the great importance of ensuring that children receive an early vision screening to identify potential vision disorders, the Board should continue to engage on this topic regardless of whether there is a bill currently moving through the Legislature.

Staff Recommendation: *The Board should advise the Committees as to what work it is continuing to do to promote childhood vision screenings and whether it has any recommendations for how to incrementally enhance the state’s efforts to ensure that all children have their vision tested by the age of five regardless of demographic or income.*

Board response: *The Board continues to prioritize the importance of childhood vision screenings in its Consumer Protection and Outreach efforts. The Board believes that expanding eligible employers of optometrists (beyond ophthalmologists to all physicians and surgeons) could create differentiation for early-childhood medical practices and federally-qualified health centers that co-locate pediatricians and optometrists. The removal of this barrier is requested in ISSUE #21: Technical Cleanup.*

IMPLEMENTATION ISSUES

ISSUE #18: Mobile Optometric Offices. Has the Board commenced implementation of its registration program for nonprofits offering optometric services to patients regardless of the patient’s ability to pay, and have any needed statutory changes been identified?

Background: Statute generally allows for healing arts licensees to deliver services through the use of mobile health care units to the extent authorized by written policies established by the governing body

or regulatory board of the licensee. Previously, Board regulations allowed for the provision of optometry services through registered “extended optometric clinical facilities.” This registration program was restricted to clinical facilities employed by an approved school of optometry where optometry services were rendered outside or beyond the walls, boundaries, or precincts of the primary campus of the school. Mobile optometric facilities were only allowed to function as a part of a school teaching program as approved by the Board.

While the extended optometric clinical facility program was historically used to provide mobile optometry services to low-access communities, optometrists seeking to provide these services were limited to the extent that they were affiliated with a school of optometry. Nevertheless, the widely recognized need for expanded access to optometric care for patients who are uninsured and unable to pay out of pocket led to the establishment of charitable organizations and nonprofits dedicated to providing care through mobile clinics. One reputable nonprofit, Vision to Learn, has provided more than 186,500 eye exams and more than 148,500 pairs of glasses to students and other Californians, regardless of income, since it was established in 2012.

Despite the success of these programs, their operation was technically unsupported by statute or Board regulation to the extent that the provision of services was unaffiliated with a school of optometry. This lack of clarity led to concerns relating to the possibility of enforcement action by the Board against nonprofit optometry service providers. In response, AB 896 (Low) was enacted in 2020 to rectify that apprehension by creating a new registration program to formalize the presence of mobile optometric offices operated by nonprofits and charitable organizations.

Organizations authorized under the bill are required to submit information to the Board regarding services provided and any complaints received by the organization. Further, all medical operations of a mobile optometric office must be directed by a licensed optometrist. Finally, the bill created a safe harbor for charitable organizations and nonprofits currently providing services while the Board promulgates regulations to implement the new registration program, providing peace of mind to those already working to expand access to optometry services for low-income communities in California. The Board is required to adopt regulations implementing the bill no later than January 1, 2022.

Staff Recommendation: *The Board should provide the Committees with an update on its rulemaking to implement the provisions of AB 896 and identify any suggested revisions to that law to ensure an effective registration program for mobile optometric offices.*

Board Response: *Proposed regulation text was finalized with assistance of legal counsel within the DCA Regulations Unit and presented to the Board during the May 21, 2021 meeting. The approved package will be submitted to the Office of Administrative Law to initiate the 45-day public comment period.*

During the May 21, 2021 meeting, the Board also approved proposed amendments to statute that will ensure an effective registration program for charitable organizations and the mobile offices they intend to operate. Within this legislative clean-up proposal, the Board respectfully requests an extension to the deadline for implement of regulations to 2023.

The entire legislative proposal is included in this document by attachment and respectfully presented to the Chairs and Committees for inclusion in the final Optometry Reauthorization Bill. Any changes to the regulatory package, resulting from newly passed legislation, will be implemented within the

public comment periods and subsequent board approvals customary to the approval process. The Board is scheduled to submit the final regulation to approval before the end of the year.

COVID-19 PANDEMIC ISSUES

ISSUE #19: Emergency Waivers. How have the Board and the profession utilized the Governor's emergency process for obtaining waivers of the law during the COVID-19 pandemic?

Background: Since the onset of the COVID-19 pandemic, state health experts have continued to highlight the ongoing need to bolster the California's capacity to respond to a surge in patient needs across the state's health care system. On March 30, 2020, Governor Newsom announced his an initiative to "expand California's health care workforce and recruit health care professionals to address the COVID-19 surge" and signed Executive Order N-39-20. This executive order established the waiver request process under the DCA and included other provisions authorizing the waiver of licensing, certification, and credentialing requirements for health care providers.

To date, there have been two successful waivers dealing with the practice of optometry. First, the Board worked with Marshall B. Ketchum University, Southern California College of Optometry to sponsor a waiver request for the school's Glaucoma Grand Rounds Certification Program. This waiver removed the requirement that patients must be evaluated in person from the requirement in regulations for Glaucoma Certification.

Subsequently, on February 11, 2021, the Director of DCA issued a waiver of Business and Professions Code § 3041 "to the extent it prohibits licensed optometrists from independently ordering and administering COVID-19 vaccines that are approved or authorized by the federal Food and Drug Administration (FDA) to persons 16 years of age or older and, in cases involving a severe allergic reaction, epinephrine or diphenhydramine by injection," subject to certain conditions. This waiver essentially expanded the scope of practice for optometrists to allow them to administer the COVID-19 vaccine. Optometrists are required to complete an immunization training program and the COVID-19 training programs prescribed by the California Department of Public Health.

In addition to these two actions, other waivers have been requested by representatives of the optometry profession that have not been granted. The Board has also indicated that it may have sponsored waiver requests that have not yet been approved by the DCA. Finally, the Board does not currently have its own authority to waive provisions of the Optometry Practice Act during a declared emergency. This authority may be useful in the future to enable the Board to respond quickly to similar events without having to go through a waiver process administered by the DCA.

Staff Recommendation: *The Board should update the Committees on any pending waiver requests, describe the overall effectiveness of the waiver process in acting quickly to respond to the pandemic, and advise the Committees as to whether it may be appropriate for the Board to have its own state-of-emergency statute.*

Board Response: *There are currently no pending waiver requests initiated by the Board. Despite the threat of COVID-19, all 2020 California graduates completed the test and were licensed timely. California's 2021 graduating classes are scheduled to complete examinations before the end of May. We can report that no COVID-19 infections have been linked to the North Carolina Testing Center*

or travel to/from the examination site. But we recognize that having a single testing site is inconsistent with contingency planning for the next pandemic, natural disaster, cyber-attack, or domestic terrorism. The adoption of a board-specific state-of-emergency statute could be needed in the event of a disruption to testing.

ISSUE #20: *Immunization and Testing. How does the Board intend to engage in oversight and enforcement of optometrists participating in COVID-19 screenings and vaccinations?*

Background: As discussed in the previous issue, DCA Waiver DCA-21-114 authorized optometrists to independently order and administer FDA-approved COVID-19 vaccines under certain conditions. This waiver is part of an effort to maximize the availability of COVID-19 vaccinations and utilize all available health professionals in immunization efforts. Additionally, proposals have been introduced in the Legislature to enable optometrists to screen patients for COVID-19 using clinical laboratory tests.

Because this waiver authority is not formally included in an optometrist’s scope of practice under the Optometry Practice Act, it is unclear how the Board would be expected to validate or track optometrists using waiver authority. The Board may assist its licensees with complying with requirements set by the California Department of Public Health to perform COVID-19 vaccinations; however, much of the relevant information may be with that department rather than the Board. As the Board’s licensees become more actively engaged in the state’s efforts to immunize its population, there may be questions as to whether the Board is equipped or empowered to oversee those activities.

Staff Recommendation: *The Board should advise the Committees as to whether it believes it as a defined role and sufficient authority in the oversight of optometrists administering COVID-19 vaccinations.*

Board Response: During the May 21, 2021 meeting, the Board voted to adopt a “support with amendments” position for Assembly Bill 691 (Chau) Optometry: SARS-CoV-2 vaccinations: SARS-CoV-2 clinical laboratory tests or examinations. With technical amendments and additional staff appropriation the Board believes this legislative proposal will provide sufficient authority in the oversight of optometrists administering COVID-19 vaccinations.

TECHNICAL CLEANUP

ISSUE #21: *Technical Cleanup. Is there a need for technical cleanup?*

Background: As the profession continues to evolve and new laws are enacted, many provisions of the Business and Professions Code relating to optometry become outmoded or superfluous. The Board should recommend cleanup amendments for statute.

Staff Recommendation: *The Board should work with the committees to enact any technical changes to the Business and Professions Code needed to add clarity and remove unnecessary language.*

Board Response: The Board respectfully submits applicable changes by attachment.

CONTINUED REGULATION OF THE OPTOMETRY PROFESSION

BY THE CALIFORNIA STATE BOARD OF OPTOMETRY

ISSUE #22: *Continued Regulation. Should the licensing of optometrists and the registration of dispensing professionals be continued and be regulated by the California State Board of Optometry?*

Background: In consideration of the Board's critical public protection mission in its regulation of the optometry and opticianry professions in California, it is likely that the Committees will ultimately determine that the Board's repeal date should be extended for an additional term.

Staff Recommendation: *The Board's current regulation of the optometry and opticianry professions should be continued, to be reviewed again on a future date to be determined.*

California State Board of Optometry - Proposed Amendments to the Text of Business and Professions Code Section 655.

(a) For the purposes of this section, the following terms have the following meanings:

(1) "Health plan" means a health care service plan licensed pursuant to the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

(2) "Optical company" means a person or entity that is engaged in the manufacture, sale, or distribution to physicians and surgeons, optometrists, health plans, or dispensing opticians of lenses, frames, optical supplies, or optometric appliances or devices or kindred products.

(3) "Optometrist" means a person licensed pursuant to Chapter 7 (commencing with Section 3000) or an optometric corporation, as described in Section 3160.

(4) "Registered dispensing optician" means a **n entity** ~~person~~ licensed pursuant to Chapter 5.5 (commencing with Section 2550).

(5) "Physician and surgeon" means a person licensed under Chapter 5 (commencing with Section 2000) or a medical corporation that is authorized to render professional services, as defined in Section 13401 of the Corporations Code.

(56) "Therapeutic ophthalmic product" means lenses or other products that provide direct treatment of eye disease or visual rehabilitation for diseased eyes.

(b) No optometrist may have any membership, proprietary interest, coownership, or any profit-sharing arrangement, either by stock ownership, interlocking directors, trusteeship, mortgage, or trust deed, with any registered dispensing optician or any optical company, except as otherwise permitted under this section.

(c) (1) A registered dispensing optician or an optical company may operate, own, or have an ownership interest in a health plan so long as the health plan does not directly employ optometrists to provide optometric services directly to enrollees of the health plan, and may directly or indirectly provide products and services to the health plan or its contracted providers or enrollees or to other optometrists. For purposes of this section, an optometrist may be employed by a health plan as a clinical director for the health plan pursuant to Section 1367.01 of the Health and Safety Code or to perform services related to utilization management or quality assurance or other similar related services that do not require the optometrist to directly provide health care services to enrollees. In addition, an optometrist serving as a clinical director may not employ optometrists to provide health care services to enrollees of the health plan for which the optometrist is serving as clinical director. For the purposes of this section, the health plan's utilization management and quality assurance programs that are consistent with the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code) do not constitute providing health care services to enrollees.

(2) The registered dispensing optician or optical company shall not interfere with the professional judgment of the optometrist.

(3) The Department of Managed Health Care shall forward to the State Board of Optometry any complaints received from consumers that allege that an optometrist violated the Optometry Practice Act (Chapter 7 (commencing with Section 3000)). The Department of Managed Health Care and the State Board of Optometry shall enter into an Inter-Agency Agreement regarding the sharing of information related to the services provided by an optometrist that may be in violation of the Optometry Practice Act that the Department of Managed Health Care encounters in the course of the administration of the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

(d) An optometrist, a registered dispensing optician, **a physician or surgeon**, an optical company, or a health plan may execute a lease, **sublease** or other written agreement ~~giving rise to a direct or indirect landlord-tenant relationship~~ with an optometrist, if all of the following conditions are contained in a written agreement establishing the landlord-tenant relationship:

(1) (A) The practice shall be owned by the optometrist and in every phase be under the optometrist's exclusive control, including the selection and supervision of optometric staff, the scheduling of patients, the amount of time the optometrist spends with patients, fees charged for optometric products and services, the examination procedures and treatment provided to patients and the optometrist's contracting with managed care organizations.

(B) Subparagraph (A) shall not preclude a lease from including commercially reasonable terms that: (i) require the provision of optometric services at the leased space during certain days and hours, (ii) restrict the leased space from being used for the sale or offer for sale of spectacles, frames, lenses, contact lenses, or other ophthalmic products, except that the optometrist shall be permitted to sell therapeutic ophthalmic products if the registered dispensing optician, **physician or surgeon**, health plan, or optical company located on or adjacent to the optometrist's leased space does not offer any substantially similar therapeutic ophthalmic products for sale, (iii) require the optometrist to contract with a health plan network, health plan, or health insurer, or (iv) permit the landlord to directly or indirectly provide furnishings and equipment in the leased space.

(2) The optometrist's records shall be the sole property of the optometrist. Only the optometrist and those persons with written authorization from the optometrist shall have access to the patient records and the examination room, except as otherwise provided by law.

(3) The optometrist's leased space shall be definite and distinct from space occupied by other occupants of the premises, have a sign designating that the leased space is occupied by an independent optometrist or optometrists and be accessible to the optometrist after hours or in the case of an emergency, subject to the facility's general accessibility. This paragraph shall not require a separate entrance to the optometrist's leased space.

(4) All signs and displays shall be separate and distinct from that of the other occupants and shall have the optometrist's name and the word "optometrist" prominently displayed in connection therewith. This paragraph shall not prohibit the optometrist from advertising the optometrist's practice location with reference to other occupants or prohibit the optometrist or registered dispensing optician from advertising their participation in any health plan's network or the health plan's products in which the optometrist or registered dispensing optician participates.

(5) There shall be no signs displayed on any part of the premises or in any advertising indicating that the optometrist is employed or controlled by the registered dispensing optician, health plan or optical company.

(6) Except for a statement that an independent doctor of optometry is located in the leased space, in-store pricing signs and as otherwise permitted by this subdivision, the registered dispensing optician or optical company shall not link its advertising with the optometrist's name, practice, or fees.

(7) Notwithstanding paragraphs (4) and (6), this subdivision shall not preclude a health plan from advertising its health plan products and associated premium costs and any copayments, coinsurance, deductibles, or other forms of cost sharing, or the names and locations of the health plan's providers, including any optometrists or registered dispensing opticians that provide professional services, in compliance with the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

(8) A health plan that advertises its products and services in accordance with paragraph (7) shall not advertise the optometrist's fees for products and services that are not included in the health plan's contract with the optometrist.

(9) The optometrist shall not be precluded from collecting fees for services that are not included in a health plan's products and services, subject to any patient disclosure requirements contained in the health plan's provider agreement with the optometrist or that are not otherwise prohibited by the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

(10) The term of the lease shall be no less than one year and shall not require the optometrist to contract exclusively with a health plan. The optometrist may terminate the lease according to the terms of the lease. The landlord may terminate the lease for the following reasons:

(A) The optometrist's failure to maintain a license to practice optometry or the imposition of restrictions, suspension or revocation of the optometrist's license or if the optometrist or the optometrist's employee is or becomes ineligible to participate in state or federal government-funded programs.

(B) Termination of any underlying lease where the optometrist has subleased space, or the optometrist's failure to comply with the underlying lease provisions that are made applicable to the optometrist.

(C) If the health plan is the landlord, the termination of the provider agreement between the health plan and the optometrist, in accordance with the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

(D) Other reasons pursuant to the terms of the lease or permitted under the Civil Code.

(11) The landlord shall act in good faith in terminating the lease and in no case shall the landlord terminate the lease for reasons that constitute interference with the practice of optometry.

(12) Lease or rent terms and payments shall not be based on number of eye exams performed, prescriptions written, patient referrals or the sale or promotion of the products of a registered dispensing optician or an optical company.

(13) The landlord shall not terminate the lease solely because of a report, complaint, or allegation filed by the optometrist against the landlord, a registered dispensing optician or a health plan, to the State Board of Optometry or the Department of Managed Health Care or any law enforcement or regulatory agency.

(14) The landlord shall provide the optometrist with written notice of the scheduled expiration date of a lease at least 60 days prior to the scheduled expiration date. This notice obligation shall not affect the ability of either party to terminate the lease pursuant to this section. The landlord may not interfere with an outgoing optometrist's efforts to inform the optometrist's patients, in accordance with customary practice and professional obligations, of the relocation of the optometrist's practice.

(15) The State Board of Optometry may inspect, upon request, an individual lease agreement pursuant to its investigational authority, and if such a request is made, the landlord or tenant, as applicable, shall promptly comply with the request. Failure or refusal to comply with the request for lease agreements within 30 days of receiving the request constitutes unprofessional conduct and is grounds for disciplinary action by the appropriate regulatory agency. This section shall not affect the Department of Managed Health Care's authority to inspect all books and records of a health plan pursuant to Section 1381 of the Health and Safety Code.

Any financial information contained in the lease submitted to a regulatory entity, pursuant to this paragraph, shall be considered confidential trade secret information that is exempt from disclosure under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).

(16) This subdivision shall not be applicable to the relationship between any optometrist employee and the employer medical group, or the relationship between a medical group exclusively contracted with a health plan regulated by the Department of Managed Health Care and that health plan.

(e) No registered dispensing optician may have any membership, proprietary interest, coownership, or profit-sharing arrangement either by stock ownership, interlocking directors, trusteeship, mortgage, or trust deed, with an optometrist, except as permitted under this section.

~~(f) Nothing in this section shall prohibit a person licensed under Chapter 5 (commencing with Section 2000) or its professional corporation from contracting with or employing optometrists, ophthalmologists, or optometric assistants and entering into a contract or landlord-tenant relationship with a health plan, an optical company, or a registered dispensing optician, in accordance with Sections 650 and 654 of this code.~~

(g) Any violation of this section constitutes a misdemeanor as to such person licensed under Chapter 7 (commencing with Section 3000) of this division and as to any and all persons, whether or not so licensed under this division, who participate with such licensed person in a violation of any provision of this section.

(h) (1) Notwithstanding any other law and in addition to any action available to the State Board of Optometry, the State Board of Optometry may issue a citation containing an order of abatement, an order to pay an administrative fine, or both, to an optical company, an optometrist, or a registered dispensing optician for a violation of this section. **Notwithstanding any other law and in addition to any action available to the Medical Board of California, the Medical Board of California may issue a citation containing an order of abatement, an order to pay an administrative fine, or both, to a physician or surgeon for a violation of this section.** The administrative fine shall not exceed fifty thousand dollars (\$50,000) per investigation. In assessing the amount of the fine, the board shall give due consideration to all of the following:

(A) The gravity of the violation.

(B) The good faith of the cited person or entity.

(C) The history of previous violations of the same or similar nature.

(D) Evidence that the violation was or was not willful.

(E) The extent to which the cited person or entity has cooperated with the board's investigation.

(F) The extent to which the cited person or entity has mitigated or attempted to mitigate any damage or injury caused by the violation.

(G) Any other factors as justice may require.

(2) A citation or fine assessment issued pursuant to a citation shall inform the cited person or entity that if a hearing is desired to contest the finding of a violation, that hearing shall be requested by written notice to the board within 30 days of the date of issuance of the citation or assessment. If a hearing is not requested pursuant to this section, payment of any fine shall not constitute an admission of the violation charged. Hearings shall be held pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(3) The board shall adopt regulations to implement a system for the issuance of citations, administrative fines, and orders of abatement authorized by this section. The regulations shall include provisions for both of the following:

(A) The issuance of a citation without an administrative fine.

(B) The opportunity for a cited person or entity to have an informal conference with the executive officer of the board in addition to the hearing described in paragraph (2).

(4) The failure of a licensee to pay a fine within 30 days of the date of assessment, unless the citation is being appealed, may result in disciplinary action being taken by the board. Where a citation is not contested and a fine is not paid, the full amount of the assessed fine shall be added to the fee for renewal of the license. A license shall not be renewed without payment of the renewal fee and fine.

(5) Notwithstanding any other law, if a fine is paid to satisfy an assessment based on the finding of a violation, payment of the fine shall be represented as satisfactory resolution of the matter for purposes of public disclosure.

(i) Administrative fines collected pursuant to this section shall be deposited in the ~~Optometry Fund~~ **fund of the board that has issued the fine**. It is the intent of the Legislature that moneys collected as fines and deposited in the fund be used by the board primarily for enforcement purposes.

(Amended by Stats. 2020, Ch. 121, Sec. 3. (AB 896) Effective September 24, 2020.)

California State Board of Optometry - Proposed Amendments to the Text of Business and Professions Code Section 3070.2

(a) As used in this section, "mobile optometric office" means a trailer, van, or other means of transportation in which the practice of optometry, as defined in Section 3041, is performed and which is not affiliated with an approved optometry school in California.

(b) This section shall not apply to any of the following:

(1) Optometric services provided remotely by an approved optometry school in California that meets the requirements of Section 1507 of Title 16 of the California Code of Regulations.

(2) A licensee engaged in the practice of optometry at a facility defined in paragraph (1), (2), or (3) of subdivision (a) of Section 3070.1.

(3) A federally qualified health center, as defined in Section 1396d(l)(2)(B) of Title 42 of the United States Code.

(4) A nonprofit or charitable organization exempt from taxation pursuant to Section 501(c)(3), 501(c)(4), or 501(c)(6) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3), 501(c)(4), or 501(c)(6)), which utilizes the volunteer services of licensees engaging in the temporary practice of optometry pursuant to subdivision (b) of Section 3070.

(5) A free clinic, as defined in subparagraph (B) of paragraph (1) of subdivision (a) of Section 1204 of the Health and Safety Code, which is operated by a clinic corporation, as defined in paragraph (3) of subdivision (b) of Section 1200 of the Health and Safety Code.

(6) A specialized vision health care service plan, as defined in subdivision (f) of Section 1345 of the Health and Safety Code, formed and existing pursuant to the provisions of the Nonprofit Corporation Law (Division 2 (commencing with Section 5000) of Title 1 of the Corporations Code).

(c) The ownership and operation of a mobile optometric office shall be limited to a nonprofit or charitable organization that is exempt from taxation pursuant to Section 501(c)(3) or Section 501(c)(4) of the United States Internal Revenue Code that provides optometric services to patients regardless of the patient's ability to pay.

(1) The owner and operator of a mobile optometric office shall register with the board and obtain a permit for each mobile optometric office pursuant (d). The owner and operator of a mobile optometric office and the optometrist providing services shall not accept payment for services other than those provided to Medi-Cal beneficiaries.

(2) The medical operations of the mobile optometric office shall be directed by a licensed optometrist and in every phase shall be under the exclusive control of the licensed optometrist, including the selection and supervision of optometric staff, the scheduling of patients, the amount of time the optometrist or optician spends with patients, the fees charged for optometric products and services, the examination procedures, the treatment provided to patients, and the follow-up care pursuant to this section.

(3) The owner and operator of a mobile optometric office shall not operate more than twelve

May 21, 2021 Board Meeting
Agenda Item #4C - CSBO proposed changes to BPC 3070.2

mobile optometric offices within the first renewal period of two years, but may operate more than twelve offices after the first renewal period is complete.

(d) An owner and operator, who has obtained approval from the board pursuant to subdivision (c)(1) and wishes to operate a mobile optometric office, shall apply for a permit from the board prior to beginning operation of each mobile optometric office. The application shall be made on a board prescribed form which requests any information the board deems appropriate to register a mobile optometric office pursuant to this section. The form shall be accompanied by a non-refundable fee of \$472. The board may increase the fee to not more than \$600 dollars.

(1) Upon approval of the permit, the board shall issue a unique identifying number for each mobile optometric office which will be used in all reporting by the owner and operator to the board.

(2) Upon approval, the permit shall be valid until the next renewal date of the owner and operator registration.

(3) Mobile Optometric Office permits are specific to the vehicle registered with the board. Permits are not transferrable.

(5) An owner and operator may apply for renewal of the mobile optometric office permit by attesting to compliance with the requirements of this section and payment of the biennial renewal fee as prescribed by the board.

(e) The owner and operator of the mobile optometric office registering with the board pursuant to subdivision (c) shall provide the following information to the board:

(1) The description of services to be rendered within the mobile optometric office.

(2) The names and optometry license numbers of optometrists, names and registration numbers of opticians, and names of any persons who are providing patient care, as described in section 2544.

(3) The dates of operation and cities or counties served.

(4) A description of how follow-up care will be provided.

(5) A catalog of complaints, if any.

(6) Articles of incorporation or acknowledgment of intent to operate and employee identification number demonstrating the owner and operator is a nonprofit or charitable organization that is exempt from taxation pursuant to Section 501(c)(3) or Section 501(c)(4) of the United States Internal Revenue Code.

(7) Any other information the board deems appropriate to safeguard the public from substandard optometric care, fraud, or other violation of this chapter.

Commented [JM1]: Change to (2) allows the board to request info about opticians, which is not currently in statute. Also allows names of unregistered individuals who may be operating directly under an optometrist via BPC 2544. As both classes have close direct patient contact, and most mobile units will be testing children, this change will increase public protection.

Commented [JM2]: Addition of (6) and (7) allows additional information to be collected at the Board's discretion

May 21, 2021 Board Meeting
Agenda Item #4C - CSBO proposed changes to BPC 3070.2

~~(e)~~ (f) The owner and operator of the mobile optometric office, on a form prescribed by the board, shall file a quarterly report containing the following information:

(1) A list of all visits made by ~~the~~ each mobile optometric office, including dates of operation, address, care provided, and names and license numbers of optometrists and opticians who provided care.

(2) A summary of all complaints received by ~~the~~ each mobile optometric office, the disposition of those complaints, and referral information.

(3) An updated and current list of licensed optometrists, registered opticians, and names of any persons who have provided care within ~~the~~ each mobile optometric office since the last reporting period.

(4) An updated and current list of licensed optometrists who are available for follow-up care as a result of a complaint on a volunteer basis or who accept Medi-Cal payments.

(5) Any other information the board deems appropriate to safeguard the public from substandard optometric care, fraud, or other violation of this chapter.

~~(f)~~ (g) The owner and operator of the mobile optometric office shall notify the board of any change to the information provided to the board pursuant to subdivision (d) within 14 days.

~~(h)~~ (g)(1) The owner and operator of the mobile optometric office shall provide each patient and, if applicable, the patient's caregiver or guardian, a consumer notice prescribed by the board that includes the following:

(A) The name, license number, and contact information for the optometrist.

(B) Optometrists providing services at a mobile optometric office are regulated by the board and the contact information for filing a complaint with the board.

(C) Information on how to obtain a copy of the patient's medical information.

(D) Information on follow up care available for the patient, including a list of available Medi-Cal or volunteer optometrists. This list shall be updated every six months and is subject to the inspection by the board.

(E) Any other information the board deems appropriate to safeguard the public from substandard optometric care, fraud, or other violation of this chapter.

(2) The optometrist shall maintain a copy of the consumer notice described in paragraph (1) in the patient's medical record.

(3) Upon request by the patient's caregiver or guardian, a copy of the prescription made for the patient shall be provided.

May 21, 2021 Board Meeting
Agenda Item #4C - CSBO proposed changes to BPC 3070.2

~~(h)~~ (i) Any person who is employed by the owner and operator of the mobile optometric office to drive or transport the vehicle shall possess a valid driver's license.

~~(i)~~ (j) By January 1, ~~2022~~ 2023, the board shall adopt regulations establishing a registry for the owners and operators of mobile optometric offices and shall set a registration fee at an amount not to exceed the reasonable regulatory costs of administration.

Commented [JM3]: Legislative staff has indicated openness to an extension to complete regulations, as current process takes 12-16 months to complete.

~~(j)~~ (k) The board may adopt regulations to conduct quality assurance reviews for the owner and operator of a mobile optometric office and optometrists engaging in the practice of optometry at a mobile optometric office.

~~(k)~~ (l) The board shall not bring an enforcement action against an owner and operator of a mobile optometric office based solely on its affiliation status with an approved optometry school in California for remotely providing optometric service before January 1, 2022.

~~(l)~~ (m) The owner and operator of a mobile optometric office shall maintain records in the following manner, which shall be made available to the board upon request for inspection:

(1) Records are maintained and made available to the patient in such a way that the type and extent of services provided to the patient are conspicuously disclosed. The disclosure of records shall be made at or near the time services are rendered and shall be maintained at the primary business office specified.

(2) The owner and operator of a mobile optometric office complies with all federal and state laws and regulations regarding the maintenance and protection of medical records, including, but not limited to, the federal Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. Sec. 300gg).

(3) Pursuant to Section 3007, the owner and operator of the mobile optometric office keeps all necessary records for a minimum of seven years from the date of service in order to disclose fully the extent of services furnished to a patient. Any information included on a printed copy of an original document to a patient shall be certified by the owner and operator of the mobile optometric office as being true, accurate, and complete.

(4) If a prescription is issued to a patient, records shall be maintained for each prescription as part of the patient's chart, including all of the following information about the optometrist:

(A) Name.

(B) Optometrist license number.

(C) The place of practice and the primary business office.

(D) Description of the goods and services for which the patient is charged and the amount charged. If no charge was made to the patient, a description of the goods and services provided.

May 21, 2021 Board Meeting
Agenda Item #4C - CSBO proposed changes to BPC 3070.2

(5) The owners and operators of a mobile optometric offices shall maintain accurate records of the mobile optometric offices, including vehicle registration numbers and the year, make, and model of each trailer or van.

~~(m)~~ (n) Any licensed optometrist who provides patient care in conjunction with a mobile optometric office shall obtain a statement of licensure pursuant to subdivision (a) of Section 3070 with the mobile optometric office's address as registered with the board. If the licensee is not practicing optometry at a location other than with the owner and operator of the mobile optometric office, then the licensee shall list as their primary address of record the owner and operator of the mobile optometric office's address as registered with the board.

~~(n)~~ (o) All examinations performed at the mobile optometric office shall be performed by a licensed optometrist who is certified to use therapeutic pharmaceutical agents pursuant to Section 3041.3.

~~(e)~~ (p) This section does not apply to optometry services defined in Section 3070.1.

~~(p)~~ (q) This section shall remain in effect only until July 1, ~~2024~~ 2025, and as of that date is repealed.

Commented [MJ4]: Extension to allow additional time for regs to be implemented by 2023.

California State Board of Optometry – Proposed Technical Clean Up

1. Endorsement Fee – Amend BPC 3152

Staff has identified the need for a fee for completion of license endorsements (also known as license verifications) to other states and jurisdictions for optometry licenses and optician registrations. The Board currently does not charge such a fee since it is not authorized in statute, but such a fee is very common with other DCA Boards. According to the Board's Licensing Unit, approximately 80 requests for license or registrant endorsement are made per month. The endorsements require an office technician to review a licensee history, verify the current license or registration and check for any enforcement actions. The endorsement is then completed via a letter from the Board or a form from another state or jurisdiction. This letter then must be sent to the requesting party and also uploaded to BreEZe. Staff estimates each endorsement takes 15 minutes to complete, totaling 1,200 minutes or 20 hours of staff work per month. Staff is proposing a fee of \$40, ultimately not to exceed \$60, per endorsement, which would cover the costs of staff time, BreEZe usage and mailing. With a fee of \$40.00, staff estimates revenue of approximately \$38,000 for the optometry fund.

3152.

(u) The endorsement fee is forty dollars (\$40). The board may increase the fee to not more than sixty dollars (\$60).

2. Employment by Physician/Surgeon – Amend BPC 3109

Currently, BPC Section 3109 allows an optometrist to accept employment from a physician and surgeon who practices in the specialty of ophthalmology only. Optometrists commonly have areas of interest beyond refracting, fitting contacts and diagnosing and treating eye disease. However, BPC Section 3109 allows an optometrist to accept employment from a physician and surgeon who practices in the specialty of ophthalmology only. This language may be limiting to an optometry license and several examples exist where removing the "specialty" requirement would benefit consumers and licensees. The LRC reviewed this proposal and recommended the full Board endorse the change.

3109.

Directly or indirectly accepting employment to practice optometry from any person not having a valid, unrevoked license as an optometrist or from any company or corporation constitutes unprofessional conduct. Except as provided in this chapter, no optometrist may, singly or jointly with others, be incorporated or become incorporated when the purpose or a purpose of the corporation is to practice optometry or to conduct the practice of optometry.

The terms "accepting employment to practice optometry" as used in this section shall not be construed so as to prevent a licensed optometrist from practicing optometry upon an individual patient. Notwithstanding the provisions of this section or the provisions of any other law, a licensed optometrist may be employed to practice optometry by a

physician and surgeon who holds a license under this division ~~and who practices in the specialty of ophthalmology~~ or by a health care service plan pursuant to the provisions of Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code.