

TEXAS OPTOMETRY BOARD

Staff Report  
to the  
Sunset Advisory Commission

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## FOREWORD

The Texas Sunset Act (Article 5429k V.A.C.S.) terminates named agencies on specific dates unless continued. The Act also requires an evaluation of the operations of each agency be conducted prior to the year in which it terminates to assist the Sunset Commission in developing recommendations to the legislature on the need for continuing the agency or its functions.

To satisfy the evaluation report requirements of Section 1.07, Subsection (3) of the Texas Sunset Act, the Program Evaluation section of the Legislative Budget Board has evaluated the operations of the Texas Optometry Board, which will terminate on September 1, 1981 unless continued by law.

Based on the criteria set out in the Sunset Act, the evaluation report assesses the need to continue the agency or its function and provides alternative approaches to the current method of state regulation. The material contained in the report is divided into seven sections: Summary and Conclusions, Background, Review of Operations, Alternatives and Constraints, Compliance, Public Participation, and Statutory Changes. The Summary and Conclusions section summarizes the material developed in the report from the standpoint of whether or not Sunset criteria are being met, assesses the need for the agency or the agency's functions relative to the findings under the various criteria and develops alternative approaches for continued state regulatory activities. The Background section provides a brief history of legislative intent and a discussion of the original need for the agency. The Review of Operations section combines, for the purposes of review, the sunset criteria of efficiency, effectiveness, and the manner in which complaints are handled. The Alternatives and Constraints section combines the sunset criteria of overlap and duplication, potential for consolidation, less restrictive means of performing the regulation, and federal impact if the agency were modified or discontinued. The Compliance Section combines the Sunset criteria relating to conflicts of interest, compliance with the Open Meetings Act and the Open Records Act, and the equality of employment opportunities. The Public Participation section covers the sunset criterion which calls for an evaluation of the extent to which the public participates in agency activities. The final section, Statutory Changes, deals with legislation adopted which affected the agency, proposed legislation which was not adopted and statutory changes suggested by the agency in its self-evaluation report.

This report is intended to provide an objective view of agency operations based on the evaluation techniques utilized to date, thus providing a factual base for the final recommendations of the Sunset Commission as to the need to continue, abolish or restructure the agency.

## I. SUMMARY AND CONCLUSIONS

In the early periods of the nation's history, optometrists, then called refracting opticians, sold prefabricated spectacles by several methods that offered little potential harm to the public welfare. Over time, however, advances in the field of optometry permitted the correction of individual disorders through the application of sophisticated techniques. Without the proper degree of skill to apply these techniques, the potential for harm to the patient's welfare was increased as a result of improper visual correction. The increased potential for public harm created a concern that optometry be practiced by qualified individuals and public dissatisfaction had also increased with the quality of service provided by prefabricated spectacles sellers.

In response to these conditions, the Thirty-seventh Legislature in 1921 established the Texas State Board of Examiners in Optometry to regulate optometrists. The board and other provisions of the original legislation were restructured in 1969 with the adoption of the present Texas Optometry Act. The current law was intended to mediate between two separate groups of optometrists: the "professional" and "commercial" practitioners. A "professional" optometrist both practices optometry and dispenses optical goods under his own name. A "commercial" optometrist locates his optometry practice adjacent to an opticianry with a trade or corporate name. Certain provisions of the current law were intended to incorporate both approaches into the Act and balance the interests of the two opposing groups.

The board, composed of six optometrists, at present regulates 1,376 licensees through its licensing and enforcement functions. Responsibilities include determining qualifications of applicants for licensure and enforcing provisions against

the unauthorized practice of optometry. Fees collected by the board and appropriated for its use from the Optometry Fund in the State Treasury by the legislature support the operations of the board.

Review of board operations shows that its regulatory activities generally serve to protect the public against incompetent optometrists. In the area of administration, activities are generally conducted in an efficient and effective manner. Licensee and accounting records are generally well organized and licenses are renewed without substantial backlogs. Two concerns were noted, however, in regard to agency administration. First, the board has a bank account (the balance was \$1,706 in December 1979) outside the State Treasury and appropriations process. Expenditures from the fund are therefore not subject to the standard controls applied to almost all state funds through this process. Second, the executive secretary is not authorized to receive reimbursement for actual travel expenses. However, this position carries out essentially the same responsibilities as those performed by other executive heads who, as a general policy, do receive such reimbursement.

With respect to licensing, the review indicated that the licensing process generally functions in a satisfactory manner. However, several aspects of the licensing activity can be improved. First, the board's statute concerning grounds for disqualification of a person seeking to be examined for licensure and grounds for revocation of license or other penalties contain grounds which are vague, have been declared unconstitutional, or are inappropriate. The statute should be revised to meet two criteria 1) that the grounds are such that they can be easily determined, and 2) that the condition expressed by the particular disqualifier be a current condition. Third, the board is not authorized to recognize an optometrist's license from any other state as grounds for waiving any of Texas' licensing

requirements. Lack of authority in this area creates the possibility of restrictive costs and delays for qualified licensees from other states. Lack of such authority is unusual and most other Texas licensing agencies can waive requirements for licensees from states whose licensing standards provide a level of public protection at least equal to that provided through the Texas system. Also, nearly two-thirds of the states have a mechanism to accept optometrists licensed in other states and the board should be granted the authority. Fourth, the present duplicate license fee of \$2.50 generates substantially less revenue than the costs of issuance. This situation is contrary to the generally accepted standard that fees should cover costs. Finally, candidates are admitted to the written portion of the board's examination without the candidate's name being matched against some type of identification bearing his photograph. This approach unnecessarily decreases the security that should be present in an examination setting.

With regard to the agency's enforcement activities, the review indicated that the board is generally active in following up on complaints and that complaint files are maintained properly. Several areas of the enforcement process can be improved.

Currently each board member is responsible for investigations that are conducted in an assigned area of the state. The operation of this process gives individual members an unusual degree of authority in determining whether investigations should be undertaken and who should be investigated in their areas. Analysis of the results produced from this process indicates that the level of investigative activity varies widely and that all areas of the state may not be protected equally against incompetent practitioners.

Second, the authority to promulgate substantive rules was removed from the agency in 1969 as part of a compromise to balance the interests of the two

separate groups of optometrists represented on the six-member board. However, in removing such authority, significant benefits available to virtually all state agencies and the public through the rule-making process were eliminated. Given the safeguards against rule-making abuse that have come into effect since 1969, as well as other safeguards which could be developed, the need to continue this old rule-making limitation today is questionable. Such safeguards include the public hearing procedure for rules laid out in the Administrative Procedures Act in 1975 and the state's rule-making review process by the legislature, as well as possible modifications to the board's statute concerning the inclusion of three public members on the board.

Third, while certain violations of the board's act warrant the use of a formal or informal reprimand, the board has no authority to apply such a penalty. Such authority should be expressly granted to the agency in its enabling statute.

Fourth, the law requires dispensing opticians who advertise price to obtain an advertising permit as well as file other detailed price information with the agency. These provisions appear to restrict advertising beyond the point recommended by the Sunset Commission and should be deleted. As a final concern in the area of enforcement, language in the law prohibits price advertising by optometrists. This language has been ruled to be unconstitutional and as a result is no longer enforced and this provision should be stricken from the statute.

In addition to the concerns relating to agency operations and procedures discussed above, a concern was identified relating to the composition of the agency's board. The present statute is unusual in two respects. First, the board composition is divided along the lines of "professional" and "commercial" approaches to optometry. Second, there are no public members on the board. The composition should be changed to reflect all groups on the board and each group

should be ensured of participation in the board's activities.

### **Need to Regulate**

As in the case of other regulated activities, regulation of optometrists should be undertaken by the state only when there is a continuing need to protect the public health, safety, or welfare. Prior to the initiation of regulation of optometrists in 1921, technological advances in optical sciences had dramatically changed the nature of eye care. These advances made it possible to prescribe corrective lenses on an individual basis through the application of sophisticated techniques.

Given these changes in the nature of optometry, it appears reasonable that the state undertook regulation aimed at ensuring the competency of its practitioners. First, because of the highly technical nature of the skills involved not all persons would have sufficient knowledge to make the proper judgments as to a patient's corrective needs. Second, without an accurate assessment of these needs and proper visual correction, significant harm could result to the welfare of an individual. This potential for harm stems from the dependence placed upon sight as one of the essential elements in carrying out day-to-day functions. Finally, the number of persons requiring visual correction -- over 50 percent of the population -- makes the potential for harm widespread. Recognition of the need to regulate optometrists to protect against significant harm to the public is reflected through the adoption of regulatory legislation by all states.

Since the establishment of the board, the need to regulate the practice of optometry has grown. The increasing complexity of eye care techniques and the sophistication of merchandise such as the variety of contact lenses now available has increased the level of competency required in the practice of optometry. Furthermore, the potential for harm resulting from improper practice is greater



today since, with the development of contact lenses, physical damage to the eye can result. It can, therefore, be concluded that some form of continuing regulation is warranted.

The need for regulation of optometrists can be met through means other than an independent board. While the current organizational structure appears to work satisfactorily, a potential exists for increased efficiency if the board's functions were consolidated with another agency performing related operations. Although several states other than Texas have created agencies with the exclusive purpose of regulating optometrists, most states have placed responsibility for such regulation in agencies with other responsibilities such as an "umbrella" department of occupational licensing or a department of health.

### Alternatives

If the legislature determines that the state's current regulatory method and/or the board should be continued, the following alternatives could be considered:

1. **CONTINUE THE BOARD AND ITS FUNCTIONS WITH MODIFICATIONS.**

This approach would maintain an independent board to perform licensing and enforcement activities. The review indicated that the following modifications would result in more effective regulation of the profession of optometry:

- a) modify the composition of the board to explicitly provide for four members from the Texas Optometric Association, two members from the Texas Association of Optometrists, and three members from the general public. The chairmanship of the board would rotate every two years among the three groups represented (page 42).

As an alternative to this approach, modify the board's statute to provide for six licensed optometrists with no stated affiliation and three public members (page 43);

- b) eliminate the old operating fund maintained by the board outside the State Treasury and transfer its contents to the board's current operating fund (page 16);
- c) amend the statute to authorize the agency's top executive position to receive actual travel reimbursement (page 17);
- d) remove the statutory requirement that applicants be citizens of the United States (page 19);
- e) restructure the statute so that grounds for an applicant disqualification for examination or removal of license are: 1) easily determined and 2) are currently existing conditions (page 20);
- f) amend the statute to authorize the board to adopt a system of endorsement for out-of-state licensees (page 21);
- g) increase the present duplicate license fee of \$2.50 to a level generally equivalent to the cost of issuing this type of license (page 22);
- h) develop a process where names of persons taking the licensing examination are matched against some appropriate type of identification bearing a photograph (page 22);
- i) develop an investigations process which reduces the independent authority of separate board members and provides for a systematic and consistent approach to agency investigations (page 24);
- j) amend the board's statute to provide for substantive rulemaking authority (page 26);
- k) authorize the board to impose formal and informal reprimands (page 27);
- l) remove the restrictive advertising provisions regarding price advertising by opticians and replace this language with the Sunset Commission's approach which prohibits false or misleading advertising (page 28); and
- m) remove the unconstitutional statutory language that prohibits price advertising by optometrists (page 28).

2. **TRANSFER THE FUNCTIONS CURRENTLY PERFORMED BY THE TEXAS OPTOMETRY BOARD TO THE DEPARTMENT OF HEALTH (page 34).**

This approach would combine the regulation of optometrists into a state agency with generally compatible goals and functions. Both the board and the Department of Health perform health-related functions and are involved in regulatory activities.

A number of benefits could be produced through this merger alternative. The Department of Health's regional offices could be used for enforcement functions. Board records could be kept on the department's computer and savings in board expenditures for travel and per diem would be realized. In addition, the department's public health education staff could provide informational services on the regulation of the optometry profession. Legal services currently purchased could be performed by the legal staff of the department.

## II. BACKGROUND

### Historical Perspective

Regulation of optometry began in the United States in 1901, with all states and the District of Columbia having enacted such laws by 1924. Texas became one of the last states to undertake regulation of this group, with the establishment of the Texas Board of Examiners in Optometry in 1921.

The reasons underlying the establishment of the board stem from the evolution of optometry as an occupation. Throughout the early nineteenth century, optometrists (then called refracting opticians) relied on correcting vision problems by selling prefabricated spectacles in a variety of ways, including door-to-door peddling and general merchandise stores. This practice offered little potential for harm to the public health. Over time, however, advances in physiological optics and the science of refraction allowed individuals to fabricate lenses to correct vision problems based on the specific needs of individual patients. The correction of individual vision disorders through the use of these newly developed scientific techniques required a degree of skill that could best be obtained through specific educational curricula in courses relating to the practice of optometry. Without such skill the potential for harm to the welfare of the patient was increased due to the greater probability of improper visual correction.

This increased potential for public harm created a concern that only qualified individuals be allowed to practice optometry. In addition, there was increased public dissatisfaction with the quality of service rendered by sellers of prefabricated spectacles. In response to these conditions the Thirty-seventh Legislature, in 1921, established the Texas State Board of Examiners in Optometry.

The enabling statute of the agency required all persons who practiced optometry to obtain and display a license and prohibited optometrists from

dispensing drugs of any kind. In response to the problems with door-to-door peddlers, the law also required that each person who was fitted with spectacles be presented with a bill of sale that included the name and address of the optometrist.

The original statute regulating optometry was repealed in 1969 with the passage of a bill that substantially altered the structure of optometric regulation in Texas. This bill was intended to strike a balance between two separate groups of optometrists: the "professional" and "commercial" practitioners. The distinction between these groups arises over the fact that a "professional" optometrist not only practices optometry under his own name, but dispenses optical goods under his own name as well. A "commercial" optometrist, on the other hand, generally locates his optometry practice adjacent to a trade or corporate name opticianry. Over time, these distinct approaches came to represent widely differing views in the relationship between the practice of optometry and the dispensing of optical goods. Prior to 1967, each of these groups struggled for control of the board in order to promote its own position.

Specific provisions included in the law passed in 1969 were aimed at incorporating both approaches into the law and balancing the interests of the two opposing groups. These provisions provided that 1) at least four members of the six-member board be associated with the "professional" optometrists; 2) the board be given procedural rule-making authority only; 3) the separation between an optometrist and a trade name dispensing opticianry be complete and total; and 4) specific conditions be placed on the advertising done by trade name dispensing opticianries. In addition, many of the board's rules that were adopted under the original legislation passed in 1921 were incorporated into the law enacted in 1969.

The six-member board is composed entirely of licensed optometrists appointed to overlapping six-year terms by the governor with the advice and consent of

the senate. The board has a full-time executive secretary and one part-time employee; it has no classified positions. Operations of the board are supported entirely from fees collected and appropriated for its use from the Optometry Fund No. 34 in the State Treasury. Ten dollars of each license renewal fee is deposited in the Trust and Suspense fund (Fund No. 900). Revenues from this fund are used by the University of Houston College of Optometry for items such as scholarships and additions to the optometry library. In fiscal year 1979, the board collected \$78,230 and its operating expenses were \$79, 580.

### Comparative Analysis

To determine the pattern of regulation of the occupation of optometry within the United States a survey of the fifty states was conducted.

The need to regulate the occupation of optometry is currently recognized through licensing requirements imposed by all fifty states. From the standpoint of organizational patterns, seventeen states, including Texas, meet this expressed need through an independent board or commission. In the remaining states, the regulation of optometrists is carried out through a board associated with a state agency charged with multiple regulatory functions. Board members are appointed by the chief executive in forty-six states.

Licensing boards composed entirely of optometrists administer optometry laws in twenty-three states, including Texas. In twenty-six states, the regulation of optometry is achieved through a board consisting of optometrists as well as public members. While fees are collected by all fifty boards, funding patterns vary across the states. Boards in thirty-nine states, including Texas, are supported at least partially by the fees they collect. About half of the boards, including Texas, are funded through the legislative appropriations process. Unlike Texas, nineteen

of the optometry boards receive general revenue funds. In seven states, not including Texas, optometry boards have advisory functions only.

In thirty-six states, including Texas, optometry boards conduct investigations in response to consumer complaints. Complaint inquiries are conducted by an investigative unit of a centralized regulatory agency in ten states. Peer reviews are held in two states and one state, Florida, maintains a toll-free consumer complaint number. In all states except Vermont, optometry boards have responsibility for conducting disciplinary hearings.

In thirty-two states, not including Texas, licensure by some form of endorsement or reciprocity is authorized. Applicants for licensure through such methods are required to pass state-administered clinical exams in some states.

All optometry boards surveyed indicate the need to perform the basic regulatory functions of administration, testing, license issuance, and enforcement.

### III. REVIEW OF OPERATIONS

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are the efficiency with which the agency operates; the objectives of the agency and the manner in which these objectives have been achieved; and the promptness and effectiveness with which the agency disposes of complaints concerning persons affected by the agency.

#### Organization and Objectives

In the enactment of the Texas Optometry Act the legislature mandated the Texas Optometry Board to regulate persons who practice or attempt to practice optometry and all persons who hold themselves out to the public as optometrists. Exempted under the Act are persons who sell non-prescription or ready-to-wear spectacles and eyeglasses as merchandise at retail, and officers or agents of the United States or the State of Texas in the discharge of their official duties. The law also exempts licensed physicians and persons under their direct supervision from the provisions of the Act. Implementation of the statutory mandate to regulate the practice of optometry is accomplished through examination and licensure of qualified individuals and relicensure of qualified, competent optometrists, and through the board's enforcement efforts.

The Texas Optometry Board consists of six optometrists appointed by the governor with the advice and consent of the senate. To be qualified for appointment to the board, a person must be a licensed optometrist and a Texas resident who has been in the practice of optometry for five years immediately prior to appointment. A person is disqualified from appointment if the person is on the faculty of a college of optometry, is a wholesale optical company agent or has



a financial interest in any such college or company. The Act also states that no more than two-thirds of the board shall be members of a state optometric association recognized by and affiliated with the American Optometric Association. Board duties required or authorized by statute include promulgation of procedural rules and regulations only, reviewing qualifications of applicants, issuing licenses, conducting license suspension, cancellation or revocation hearings, approval of continuing education courses, initiating actions to enjoin violations of the Act and generally administering the enforcement of the statute.

Staff of the board consists of a full-time executive secretary and a part-time secretary. Other part-time secretarial-clerical personnel are employed as needed during peak workload periods. Activities generally performed by the staff in the traditional areas of administration, licensing and enforcement include checking license applications for completeness, processing license renewals and continuing education reports from licensees, maintaining records, providing secretarial services to the board and assisting the board in the administration of examinations and investigations of violations of the Act.

Funding for the board is provided exclusively from fees collected by the board. From each license renewal fee \$10 is dedicated to the University of Houston Development Fund to be utilized for scholarships and improvements in the physical facilities, including library, of the university's College of Optometry. All other fees collected by the board are deposited in the State Treasury in the Optometry Fund (No. 034). Although all money in this fund is designated for use by the board, amounts available for board expenditure from this fund are limited to those specifically appropriated to the board by the legislature.

### Evaluation of Agency Activities

As with most other licensing agencies, the operations of the Texas Optometry Board can be broken down into three basic activities: administration, licensing and enforcement. Below, each of these activities were reviewed to determine the degree to which agency objectives have been met. To make this determination, the evaluation focused on whether the board has complied with statutory provisions, whether these provisions facilitate accomplishment of the objectives, whether agency organization, rules, and procedures are structured in a manner that contributes to cost-effective accomplishment of the agency's task, and whether procedures provide for fair and unbiased decision-making.

#### Administration

The general objective of any administration activity is to provide for the efficient operation of all agency functions. The review of these activities indicated that administration is generally conducted in an efficient and effective manner. Licensee and accounting records are generally thorough and well organized. The agency has microfilmed many of its records as an efficiency measure. Licenses are renewed without substantial backlogs. Board activities and staff duties are clearly defined, and agency procedures related to record maintenance, mail processing and funds management were also adequate. Finally, board member per diem and travel expenses did not appear to be excessive in comparison to other health-related licensing agencies. While agency management is generally efficient, two aspects of the current process can be improved.

First, the board maintains a small fund (\$1,706 as of December 1979) outside the State Treasury and the state's appropriations process. Historically, this fund was the principal operating fund of the board prior to its restructuring in 1969.

When the board was brought into the appropriations process in that year the disposition of this fund was inadvertently omitted from consideration and the statute should be modified to eliminate the fund. Placement of all funds in the State Treasury is consistent with the Sunset Commission's across-the-board position that agency funds, where feasible, should be included in the appropriations process.

Second, the executive secretary is not authorized to receive reimbursement for actual travel expenses on official state business. In reviewing the responsibilities of the executive secretary, it was seen that this full-time position is the highest administrative office in the agency. The duties of this position are similar to those performed by the executive heads of other state licensing agencies. Executive heads of these agencies are, as a general rule, reimbursed for their actual expenses as authorized in their enabling legislation or the appropriations act. To provide for the consistent treatment of persons performing the same general tasks, the enabling legislation of the board should be modified to authorize actual travel reimbursement to the top executive position of the agency.

### Licensing

The general objective of the licensing activity of the Texas Optometry Board is to ensure the minimum competency of optometrists through an efficient licensing process. To accomplish this purpose, the board is directed by statute to administer an examination to applicants for licensure. The board has also adopted examination guidelines, based on requirements in the law. As illustrated in Exhibit III-1, the number of persons licensed by the board is increasing, with the agency experiencing a 13 percent growth rate since 1976.

Exhibit III-1

**NUMBER OF LICENSES ISSUED**

	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
By Examination	62	72	86	83
By Renewal	<u>1,153</u>	<u>1,199</u>	<u>1,233</u>	<u>1,293</u>
Total	1,215	1,271	1,319	1,376
Percent Increase		5	4	4

The review showed that the licensing process generally functions in a satisfactory manner. Computerization of many functions has increased the overall efficiency of the process. The board has also developed thorough procedures for receiving and reviewing applications and examining applicants. The agency develops its examinations using, in part, questions purchased from faculty members of accredited colleges of optometry. The pass-fail rates shown in Exhibit III-2 indicate that the test is neither overly restrictive nor overly permissive.

Exhibit III-2

**LICENSING EXAMINATION PASS/FAIL RATES  
CALENDAR YEARS 1976 - 1979**

<u>Year</u>	<u>Total Examined</u>	<u>Number Passed</u>	<u>Percent Passed</u>	<u>Number Failed</u>	<u>Percent Failed</u>
1976	76	62	82	14	18
1977	96	72	75	24	25
1978	119	86	72	33	28
1979	106	83	78	23	22

Analysis of licensing requirements in other states indicated that licensing and fee requirements in Texas are generally similar to those of other states. Applicants for examination in Texas are required to provide satisfactory sworn evidence that the applicant has attained the age of 21 years, is of good moral character, is a citizen of the United States, has been graduated from high school, and is a graduate of an accredited college of optometry. The Act further authorizes the board to require such other information from applicants as the board deems necessary to enforce the statute. Fees authorized by the state and collected by the board are set forth in Exhibit III-3 below.

Exhibit III-3

**FEES**

<u>Type of Fee</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
<u>Examination</u>				
First Examination	\$ 35.00	\$ 35.00	\$ 35.00	\$ 35.00
Second Examination	12.50	12.50	12.50	12.50
Third & Subsequent Examinations	35.00	35.00	35.00	35.00
<u>Licenses</u>				
Lost or Destroyed License	2.50	2.50	2.50	2.50

License Renewals

<u>1976</u>		<u>1977</u>		<u>1978</u>		<u>1979</u>	
<u>Stat. Limit</u>	<u>Actual Fee</u>	<u>Stat. Limit</u>	<u>Actual Fee</u>	<u>Stat. Limit</u>	<u>Actual Fee</u>	<u>Stat. Limit</u>	<u>Actual Fee</u>
\$ 60	\$ 60	\$ 60	\$ 60	\$ 75	\$ 67	\$ 75	\$ 67

While the licensing function generally operates well to ensure a minimum acceptable level of competency, several aspects of the licensing activity could be improved. The first of these areas deals with the requirement in the board's statute that applicants be citizens of the United States. The Attorney General's Office has stated in several opinions that such a requirement for licensure is unconstitutional under the equal protection clause of the 14th Amendment to the United States Constitution. While this citizenship provision has not been applied by the agency since the issuance of these opinions the unconstitutional language should be removed.

As a second general area of concern, the statutory framework developed for this agency concerning grounds for refusal to allow an individual to sit for an examination and the grounds for removal of a license once issued contains the same confusion of thought and vagueness of terminology found in the statutes of many other licensing agencies.

The statute erroneously requires the licensing board in many cases to act essentially as a court of competent jurisdiction in determining the legal status of an individual and requires the board to define and apply terms which may have no legal basis. To correct this situation and to place the licensing board in an appropriate setting the statute dealing with the grounds for disqualification should be structured in such a manner that each of the grounds meet a two-part test. First, the grounds for disqualification should be clear and related to the practice of the profession. As a second part of the test, the grounds for disqualification should be stated in terms of a currently existing condition rather than an absolute condition which exists throughout the lifetime of the individual.

Review of the grounds for disqualification to sit for examination set out in the board's statute shows that several fail to meet the test stated above. For example, the applicant is required to be of "good moral character" to be licensed. In addition, the board may refuse to issue a license or may cancel, revoke, or suspend a license for: gross immorality; a felony or misdemeanor which involves moral turpitude; or habitual drunkenness, addiction to certain drugs, or becoming insane. The statute should be restructured so that such provisions comply with the two criteria.

With respect to a third area of concern, the board's act does not recognize an optometrist's license from any other state as grounds for waiving any of Texas' licensing requirements. Thus, out-of-state optometrists must obtain a license in the same manner as all other unlicensed persons. Lack of any authority in this area causes restrictive costs and delays for qualified licensees from other states. In recognition of this circumstance, most other Texas licensing agencies are authorized in some manner to accept licensees from other states whose standards for licensure provide a satisfactory level of public protection. Further, almost two-thirds of the states provide some form of licensing dispensation for optometrists licensed in other jurisdictions.

Following the example set by other Texas agencies as well as other states, the board should be authorized to implement a system recognizing out-of-state licenses as grounds for potentially waiving certain licensing requirements. However, such requirements should be waived only where the licensing standards of other states are determined by the agency to provide an adequate level of protection to the public. This type of approach is consistent with the "endorsement" recommendation developed by the Sunset Commission for application in agencies under review.

A fourth area for improvement relates to the \$2.50 duplicate license fee charged by the agency. Revenue derived from this fee, which has not been increased since its authorization in 1939, is substantially less than costs of issuing this type of license. As a general principle of appropriate funding and effective financial management, revenue from license fees should be generally equivalent to the costs of issuing licenses. Estimates made by the board indicate that a reasonable charge for the services and materials involved in issuing a duplicate license would be approximately \$15. The board's statute should therefore be changed to authorize collection of a fee of this amount.

A final area to be considered in the licensing function concerns examination security. While examinees must verbally identify themselves before taking the board's test, the name given by the candidate is not matched against any form of identification that includes a photograph. Lack of such a check unnecessarily adds to the possibility that a person other than the actual candidate is admitted to the examination. To address this concern, the agency should adopt some means of identification through documentation which bears both a name and a photograph. Interviews with board personnel indicate that the agency is taking steps to implement such a system which will provide for identification.

### Enforcement

The basic objective of the board's enforcement activity is to take action against persons who are not complying with the provisions of the Act. The board's primary enforcement efforts are aimed at possible violations reported by consumers and other licensees. The board takes action on such complaints and also conducts agency-initiated random investigations in defined geographical areas of the state. Exhibit III-4 shows the number of complaints originated by consumers and other licensed optometrists (referred to as "non-agency initiated complaints") and the number of agency-initiated random investigations for fiscal years 1976-1979.



Exhibit III-4

NUMBER OF COMPLAINTS AND  
RANDOM INVESTIGATIONS, 1976-1979

<u>Category</u>	<u>Fiscal Year</u>				<u>Total</u>
	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>	
Number of Complaints by Consumers and Licensees	48	50	70	117	285
Number of Random Investigations	10	22	86	116	234

Review of the board's enforcement activities indicated that the agency is generally active in pursuing complaints and that complaint files are properly maintained. The board has computerized its random investigation logs, thus contributing to efficient enforcement operations. However, the review revealed several areas of concern that hamper the effectiveness of the board's enforcement activities.

One area that could be improved is the agency's investigations process. Review of this process showed that each board member has a great deal of independent authority in determining how to proceed with investigations. Each board member is responsible for initiating both random investigations and investigations made on consumer complaints in a specific area of the state. Individual board members hire University of Houston College of Optometry students who have completed their clinical education on a part-time, "as needed" basis to conduct the unannounced random investigations on licensed optometrists. The board has developed guidelines that should be followed when a board member selects licensees to be investigated. However, the decision to undertake these random investigations is totally at the discretion of the individual board member. Additionally, the decision whether to investigate complaints made by consumers is also made independently by individual board members without any formal guidelines to follow.

Compared to other state agencies, this investigations process concentrates a substantial amount of power in the hands of each individual board member. The review showed that this process has significant drawbacks in that the level of investigations depends on the initiative of the particular board member. Consequently, there can be inconsistencies in the board's treatment of its licensees with respect to its enforcement powers. For example, the review showed that agency-initiated random investigations conducted in each geographical area varied from zero to twenty-five in fiscal year 1979. This variation is not necessarily associated with licensee concentration or other relevant factors. This inconsistency weakens the board's enforcement activity in that all areas of the state are not protected equally from incompetent practitioners.

The agency should revise its investigations process so that it can continue to use board members in the investigations, but at the same time, ensure that investigations are carried out consistently. With respect to random investigations, the executive secretary should be given the responsibility to determine which licensees should be investigated and to cause the investigation to be done. When the investigation is completed, the results can be forwarded to the board member who is responsible for that particular geographic area. If the board member does not take appropriate action, then the case should be reassigned to another board member by the chairman of the Investigations Committee.

As for investigations initiated on the basis of consumer complaints, the agency should develop a standard procedure for determining when such investigations should be conducted. The actual investigation and result would follow that set out for random investigations.

A second area for consideration in the enforcement area regards the rule-making authority of the board. When the agency's statute was restructured in

1969, the new provisions of the Act expressly precluded the board from adopting rules of a substantive nature. This approach was adopted to prevent the four-member majority of "professional" optometrists that was provided for in the statute from increasing their advantage.

The removal of an agency's rule-making power in this fashion is an action which is highly unusual in Texas state government. As a general policy state agencies are granted the broad authority to promulgate both procedural and substantive rules. The reason underlying this grant of authority stems from the general recognition of the importance of this process to efficient and accountable operations of an agency. The rule-making process provides an agency with a necessary means for working out details to implement the generally broad policies and directions adopted by the legislature. Furthermore, the rule-making process under the Administrative Procedures Act helps ensure accountability to the legislature and the public by providing for dissemination of these rules and public involvement in their development.

The practical need for an agency to have a means of clarifying or defining the law can be seen in the actions taken by the board. Since the removal of its substantive rule-making power in 1969 the board has adopted through its own process eleven "interpretations" of the law as well as two "memorandum opinions" concerning its statute. It is questionable whether these clarifying statements are "rules" in a strict legal sense; however, the substance of the statements appears to be similar in nature to rules adopted by other agencies.

Given the importance of the rule-making process to the operations of an agency and the state as well as the eleven-year period that has passed since the removal of the board's substantive rule-making authority, the need to continue this

restrictive prohibition should be reassessed. This reassessment should take into account any changes in state policy or possible approaches which would guard against possible board abuses of the substantive rule-making process.

The review indicated that several safeguards have either been implemented since 1969 or could be developed for the board. First, at the time the board's statute was restructured in 1969 there was no hearing provision in the law to ensure that interested parties be given an opportunity to testify on proposed rules. This additional safeguard against arbitrary rule-making by agencies was added in 1975 with the passage of the Administrative Procedures Act.

Second, another protection against possible abuse is present in that agencies must refer proposed rules to legislative committees for comment. This gives one additional forum from which viewpoints on proposed rules can be expressed.

Finally, as detailed in the Section VI, "Public Participation," three public members could be added to the present structure of the board. Such a change would provide direct input for the public's point of view and help guard against domination of the majority group in rule-making decisions.

It would appear that, with the existence of these safeguards, the remaining potential for abuse of substantive rule-making authority is outweighed by the benefits to be gained from the state's rule-making process. The board should therefore be granted such authority, and the above-mentioned safeguards that are not currently in effect should be implemented.

An additional concern with the board's enforcement effort is its use of informal and formal reprimands without specific statutory authority. Since fiscal year 1976, the board has issued seventy-five letters of reprimand and three formal reprimands to optometrists who allegedly failed to perform all of the steps

required by its statute in an initial examination of a patient.

The Supreme Court of Texas in Stauffer vs. City of San Antonio, 344 S.W. 2d 158, 16 (Texas Supreme, 1961) declared that:

...an administration agency...has only such powers as are expressly granted to it by statute together with those necessarily implied from the authority conferred or duties imposed.

In addition, Attorney General Opinion Number H-1199 (1978) stated that the absence of any expressed authority in a board or agency's enabling statute indicates legislative intent that a specific enforcement sanction is not an alternative available for use by a board or agency.

As a general principle, an agency's range of enforcement sanctions should be able to conform to the seriousness of the violations presented to it. The review indicated that situations arise in which the use of reprimands is appropriate. The board's enforcement powers should therefore be expanded by statute to authorize the issuance of formal and informal reprimands.

Another area of concern relates to a provision in the board's statute requiring dispensing opticians that advertise price to obtain an Advertising Permit from the board. The provision requires opticianries to submit to the board price lists of optical goods that they sell and notify the board each time a price change for optical goods is made. In addition, the statute requires any person or corporation that holds a permit to submit annually the percentage of total unit sales broken down by several categories of optical goods for each office owned by the person or corporation.

In its consideration of other licensing agencies, the Sunset Commission, through an across-the-board approach, has determined that board and agency provisions regarding advertising should be constructed so as to prohibit only such

practices that are false, misleading, or deceptive. While the board's provision does not prohibit price advertising, it does impose potentially burdensome requirements on opticianries that advertise price.

These requirements could serve to deter dispensing opticianries from engaging in price advertising. Testimony presented to the Senate Public Health Committee on May 9, 1969 indicated that compliance with the annual reporting requirement would impose serious accounting problems.

Thus, the board's Advertising Permit should be removed and replaced with language derived from the Sunset Commission's provision. This provision makes no reporting or other restriction on advertising except to prohibit false or misleading advertising.

The final area of concern under the general area of enforcement relates to the provision that prohibits price advertising by optometrists. This provision is no longer enforced by the board since it was judged to be an unconstitutional violation of commercial free speech by the United States District Court in Beaumont, Texas on September 12, 1977 and was not appealed. As a result, this provision should also be deleted and replaced by language which prohibits only false and misleading advertising.

### Summary

The Texas Optometry Board consists of six members appointed by the governor with the advice and consent of the senate for six-year terms. The board is directed by statute to regulate optometrists through the licensure of qualified applicants and the enforcement of provisions of the Act.

Board operations can be divided into three activities: administration, licensing, and enforcement. With respect to administration, the board generally meets the objective of efficient management. However, two concerns were identified in the review. First, the board has a savings account in a bank outside the State Treasury and the appropriations process. The account should be eliminated and balances transferred to the board's fund in the State Treasury, thereby subjecting such funds to the standard controls of the state which are applied through the appropriations process. This approach is consistent with the across-the-board recommendation of the Sunset Commission. Second, the executive secretary of the board is not reimbursed for actual travel expenses while on official state business. However, the review indicated that the executive secretary performs the duties of the executive head of a state agency, and that other executive heads generally receive reimbursement for actual travel expenses on official state business. To be consistent with these other positions, the board's statute should be changed to authorize actual travel reimbursement for the agency's executive secretary.

With regard to the licensing activity, several areas could be improved. First, the statutory requirement that licensees be United States citizens is unconstitutional in light of past Supreme Court decisions. This requirement should therefore be removed from the Act.

Review of the board's statutory authority concerning grounds for refusal to allow an individual to sit for an examination and grounds for removal of a license after issuance indicated that the statute erroneously requires the board to act essentially as a court of competent jurisdiction and apply terms of vague definition. The statute should be restructured so that disqualification provisions

meet a two-part test: 1) the grounds should be clear and related to the practice of the profession, and 2) the condition stated by the expressed disqualifier should be currently existing before a license can be denied or some other action taken. Examples of conditions set out in the statute which may not meet these tests are provisions relating to good moral character, gross immorality, a felony or misdemeanor which involves moral turpitude, habitual drunkenness, and addiction to certain drugs or becoming insane.

Also in the area of licensing, the board is not authorized to recognize an optometrist's license from any other state as grounds for waiving any licensing requirement in Texas. Lack of this authority causes restrictive costs and delays for qualified licensees from other states who must currently obtain a Texas license in the same manner as all other unlicensed persons. The board should be given authority to accept licenses from other states as grounds for waiving certain Texas licensing requirements if standards in other states are determined by the board to be substantially equivalent to, or more stringent than, Texas' requirements. This approach is consistent with the Sunset Commission's "endorsement" recommendation for application in agencies under review.

With regard to duplicate license fees, the present fee of \$2.50 produces substantially less revenue than costs of issuing this type of license. In order to be consistent with the state's general funding approach in this area, the duplicate license fee should be increased so that revenues from the fee pay for the cost of issuance of duplicate licenses.

As a final concern in the area of licensing, candidates are admitted to the written portion of the board's examination by a check of names, with no



photographic identification being required. This system unnecessarily increases the possibility for a person other than the candidate to sit for an examination. Thus, a procedure should be developed that enables the agency to match a candidate's name to some type of appropriate identification bearing his photograph.

With respect to the enforcement activity, the review indicated that the board is generally active in pursuing complaints. However, the review revealed several areas of concern that hamper the effectiveness of enforcement activities.

The first concern relates to the general structure of the investigations process. Under this process each board member is delegated a substantial amount of authority to initiate random investigations and to act on complaints made by consumers in specific areas of the state. The result is an inconsistent exercise of the board's enforcement authority from one area of the state to another. Procedures should be implemented by the board which authorize administrative staff to initiate investigations; and which provide for a systematic and consistent investigations approach.

The second concern relates to the board's rule-making authority. In order to prevent the four-member board majority from abusing their advantage, the board was not given substantive rule-making authority when the current law was passed in 1969. Authority to implement substantive rules permits an agency to clarify legislative intent of various provisions of its statute as well as to provide members of the general public an opportunity to comment on the potential impact of a proposed rule.

As a result of safeguards that have been or could be implemented, the potential abuse by the present board majority could be diminished. First, the passage of the Administrative Procedure Act ensures that interested parties be

given the opportunity to testify on the impact of proposed rules. Second, the review of rules by legislative committees is a potential safeguard against abuse. Finally, the addition of public members to the board would diminish the potential of domination by any one group. The implementation of these safeguards would appear to justify granting substantive rule-making authority to the board.

The third enforcement concern relates to the board's use of informal and formal reprimands without specific statutory authority. A Supreme Court of Texas decision and an Attorney General's Opinion hold an administrative agency has only such powers as are expressly granted and absence of expressed authority indicates legislative intent that a specific enforcement sanction is not an alternative available for use by a board or agency. The review showed situations arise in which use of reprimands is appropriate. Board enforcement powers should therefore be increased by statute to authorize issuance of formal and informal reprimands.

The fourth concern relates to the provision in the statute requiring dispensing opticians who advertise price to obtain an Advertising Permit from the board and to make periodic reports to the board concerning their sales activities. Although this provision does not prohibit price advertising, it imposes potentially burdensome requirements that could deter dispensing opticianries from engaging in price advertising. This provision is considerably more restrictive than the Sunset Commission's approach on advertising which prohibits only false, misleading, or deceptive advertising.

The final concern in the area of enforcement relates to the provision in the Act that prohibits price advertising by optometrists. This provision was declared to be an unconstitutional violation of commercial free speech by a United States District Court in 1977. Thus, it should be removed from the Act and replaced by language which prohibits only false and misleading advertising.

#### IV. ALTERNATIVES AND CONSTRAINTS

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are the extent of overlap and duplication with other agencies and the potential for consolidation with other agencies; an assessment of less restrictive or alternative methods of performing any regulation that could adequately protect the public; and the impact in terms of federal intervention or the loss of federal funds if the agency is abolished.

##### Consolidation Alternatives

Organizational structures in other states were reviewed to identify consolidation alternatives with potential for use in Texas. The review indicated that all fifty states provide regulation of optometrists. Of these states, thirty-three consolidate such regulation with agencies having other regulatory or functional responsibilities. The consolidation alternatives identified for the regulation of optometrists in these thirty-three states are as follows: fifteen states use an "umbrella" department of professional or occupational licensing, eight states regulate through the state health department, five states employ a consumer affairs agency, two states use the state department of education, and one state regulates through its secretary of state's office.

Among the consolidation alternatives identified in other states, neither a department of professional and occupational licensing nor a department of consumer affairs is a feasible option for Texas since these organizational forms do not exist in Texas. The state does, however, have a secretary of state's office as well as departments of education and health. Apart from the options identified from other states, no other organizational alternatives for consolidation were identified

for consideration.

To determine the feasibility of the remaining three options set out above, each agency was reviewed to determine whether its goals and functions were reasonably compatible with those of the Texas Optometry Board. The alternatives were also considered from the standpoint of whether consolidation of functions would result in identifiable benefits.

Analysis of organizational alternatives available in Texas shows that the Department of Health best satisfies the requirements of closely related operations with identifiable benefits resulting from consolidation. Both the department and the Optometry Board carry out health-related functions. In addition, the department regulates certain health-related occupations through administration, examination, licensing, and enforcement functions. Benefits to be derived from combining regulation of optometrists with the Department of Health can be identified through a review of the functions performed by the agency. The department has regional offices over the state which could provide a mechanism for handling optometrist-related complaints and enforcement duties. These offices are currently staffed with personnel who perform health-related inspections in certain regulated areas. In addition, the department has a data processing division which could provide computer services necessary for regulation of optometrists, as well as a public health education unit which could provide informational material to optometrists and the public. Finally, a savings in board member per diem and travel expenses (\$11,962 in fiscal year 1979) would be realized as a result of eliminating the board through consolidation of its functions in the Health Department.

### Regulatory Alternatives

All fifty states were reviewed in order to identify alternatives to the licensure method used to regulate optometrists in Texas. However, no alternative to the licensing approach was found to be used in the other states.

While licensure is the only approach used in other states, two additional regulatory methods, certification and registration, are in common use in the regulation of other occupations and could therefore be considered as possible alternatives for the regulation of optometrists. Under the certification option the ability to practice optometry would be contingent on an applicant taking and passing a one-time "certifying" examination and meeting other licensure qualifications. In the registration option, any person wishing to practice optometry would be required to be "registered" with the state without regard to qualifications. Neither of these options generally include an enforcement component.

Before any of the regulatory alternatives reviewed can be considered as a reasonable alternative to current regulation in Texas, the option should offer at least the same degree of public protection as the current method and should be less restrictive than the present system.

Review of the certification and registration options indicates that both methods are less restrictive than the current licensing approach. Neither option subjects optometrists to an ongoing enforcement effort. In addition, registration imposes no educational, experience, or other requirements to ensure competency, while certification does not require the annual payment of renewal fees or the submission of any updated information that may be needed in the annual licensing process. However, while registration and certification alternatives are less restrictive than licensing, both options offer less protection to the public than the current method of regulation. This reduced level of protection results from

eliminating current licensing and enforcement restrictions which are aimed at ensuring licensee competency. Given this reduced level of public protection, neither certification nor registration offer feasible regulatory alternatives.

### Summary

With respect to consolidation alternatives, the review showed that, of the fifty states which license optometrists, thirty-three consolidate such regulation in agencies having other functional responsibilities. Almost half of these states use a department of occupational licensing. While Texas has no such department, the state does have other agencies which are used in various states for the regulation of optometrists. These are the Department of Health, the Texas Education Agency, and the Office of the Secretary of State.

Of these alternatives, the Department of Health is the most reasonable alternative for consolidation. Both the department and the board carry out health-related functions and are involved in regulatory activities. Benefits could also result from the use of the department's regional offices for enforcement functions; the availability of computer and informational services, and savings in board expenditures for travel and per diem.

With regard to regulatory alternatives, all states regulate optometrists through a licensing approach generally similar to that used in Texas. However, the methods of certification and registration are frequently used to regulate other occupations. While less restrictive than licensing, these two options provide less protection to the public than the current system and therefore do not constitute suitable alternatives.

## V. COMPLIANCE

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are the extent to which the agency issues and enforces rules relating to potential conflict of interest of its employees; the extent to which the agency complies with the Open Records Act and the Open Meetings Act; and the extent to which the agency has complied with necessary requirements concerning equality of employment opportunities and the rights and privacy of individuals. In its efforts to protect the public, the agency's operations should be structured in a manner that is fair and impartial to all interests. The degree to which this objective is met can be partially judged on the basis of potential conflicts of interest in agency organization and operation.

### Conflict of Interest

Board members, as appointed state officers, are subject to statutory standards of conduct and conflict-of-interest provisions (Article 6252-9b, V.A.C.S.). A review of the documents filed with the Office of the Secretary of State indicates that board members and the executive secretary have complied with the filing requirements set out in the state's general statutes concerning conflict of interest.

With respect to the provision that requires board members to disqualify themselves from participating in matters in which they have a personal or financial interest, the board's minutes from 1976 to the present show that such a disqualification occurred in one instance.

The review also indicated that a question involving the application of this disqualification provision was raised in 1978. In this instance, a board member did not withdraw from participating in disciplinary proceedings against licensed

optometrists with whom he had a contractual relationship. In considering this question, the Attorney General stated in Opinion No. H-1319 (1978) that contractual relationships could "constitute a personal or private interest which would require the board member to excuse himself." However, the opinion further held that "the decision on whether to participate must be made by the board member himself, and the remainder of the board may not unilaterally prohibit his participation if it disagrees with his determination..." Apart from this instance, no other questions involving potential conflict with the disqualification provision were noted in board minutes.

In addition to the conflict-of-interest provision in the Ethics and Financial Disclosure Act, the board's enabling legislation states that a person is not eligible for appointment to the board if he is an agent of or has a financial interest in any wholesale optical company. The board's minutes show that in December 1976, one board member disposed of his stock in a wholesale optical company in an effort to comply with this provision. As a result of this action, the question as to eligibility was removed.

The executive secretary informs newly appointed board members of their obligations under the Ethics and Financial Disclosure Act by providing them with a copy of the "Standards of Conduct for State Officers and Employees" provision of the Act.

#### Open Meetings - Open Records

Meetings and activities conducted by the Texas Optometry Board show general compliance with the requirements of the Open Meetings Act and the Open Records Act. Board minutes, notices published in the Texas Register and interviews with the board's attorney general representative demonstrate that the



board generally follows proper procedures relating to executive sessions. During the period under review, the board held one executive session without publishing prior notice in the Texas Register. A board member challenged the legality of the meeting, contending that it was in violation of the Open Meetings Act. The 98th District Court, however, ruled in the board's favor in December 1979, holding that the executive session was not held illegally.

With respect to the release of information under the Open Records Act, the board's self-evaluation report lists three types of information as confidential: personnel files, enforcement cases under investigation and pending or contemplated litigation files. The board has not denied a formal request for information during the period under review.

### Employment Policies

The board has one exempt position, no classified positions and one part-time clerical employee. It does not have an affirmative action plan or a formal grievance procedure. The Governor's EEO Office indicated that this is characteristic of other agencies of similar size. The board does, however, file all notices for job openings with the Texas Employment Commission and the Governor's Equal Employment Office.

### Summary

The board is in general compliance with the statutory requirements relating to conflict of interest, open meetings and open records. With respect to the board's employment policies, the board does not have an affirmative action plan or a formal grievance procedure. This policy is consistent with other boards and agencies that have very small staffs.

## VI. PUBLIC PARTICIPATION

The review under this section covers the sunset criterion which calls for an evaluation of the extent to which the agency has encouraged participation by the public in making its rules and decisions as opposed to participation solely by those it regulates and the extent to which the public participation has resulted in rules compatible with the objectives of the agency.

The extent to which the agency has involved the public in agency rules and decisions can be judged on the basis of agency compliance with statutory provisions regarding public participation, the nature of rule changes adopted, the availability of information concerning rules and agency operations, and the existence of public members on the board.

### Agency Activities

With regard to public participation in the rules and decisions of the agency, the board has no authority to promulgate substantive rules. As a result, the public is limited to participating in the development of only the procedural policies of the board under the formal public hearing mechanism set up in the Administrative Procedure and Texas Register Act (APA).

In the procedural area, the board has adopted one rule change since the enactment of the APA in 1975. This change related to the procedure for the filing of formal charges in enforcement proceedings. Although the board complied with public notification requirements before adoption of the rule, public participation was minimal.

With respect to other board efforts to inform the public as to its operations, the agency makes available to the public, on request and at no charge, copies of the board's act, interpretations, and memorandum opinions. A roster of agency

licensees is also available to the public at a nominal charge. The board does not publish a newsletter, nor does it conduct any seminars concerning the requirements of the Texas Optometry Act.

### **Board Membership**

Under amendments made to the law in 1969 board membership was designed as one element of an overall compromise between "professional" and "commercial" optometrists which was frozen in statute. Thus the provision requires that four of the six members must be "professional" optometrists affiliated with the American Optometric Association. The "commercial" optometrist group is not specifically designated in the statute but members of this group have filled the remaining two slots since 1969. There are no public members on the board.

The inclusion of public members on this board would serve two purposes. First, the viewpoint of the public could be represented in the deliberations of the board. Second, the public members can serve as a mediating force between the two groups of optometrists and serve the interests of the general public in this fashion. If public members are added to the board, additional elements should be added to ensure that all three groups are given meaningful representation. In order not to have representation of "commercial" optometrists diluted in some fashion, two members should be designated to be members of the Texas Association of Optometrists and the current requirement that four members be from the Texas Optometric Association should be retained. To ensure that the groups to be included on the board have a direct role in the operations of the board, the board chairmanship should be rotated every two years among the three groups.

The above described alternative to the present board composition is a proposal that would maintain the compromise between the "professional" and "commercial" approaches to the practice of optometry that was achieved with the

passage of the current optometry law in 1969 and also include public membership.

The statutory requirement that board members be affiliated with a particular professional association is unique in Texas and was not identified in a review of optometry boards in other states. The requirement that board members belong to a particular professional association effectively precludes certain members of the profession from being eligible for board service. Consequently a possible alternative to making eligibility for board service conditional on membership in a professional association would be to allow any licensed optometrist practicing in Texas to be eligible to serve on the board. Under a framework of this nature, the board could be expanded to nine members, three representing the public and six members coming from the licensee population without regard to association membership.

#### Summary

The board has complied with the public participation requirements in general state law. However, beyond this, public involvement in these processes has been limited. Lack of public involvement in board deliberations and policymaking is hampered because the board's statute does not provide for public members and to a lesser extent by the fact that the board does not have substantive rulemaking authority.

In order to increase public involvement in optometry regulation in Texas there are two potentially viable alternatives. The first approach would clarify the conditions that were part of the compromise legislation passed in 1969. This would call for a nine-member board, four of which would be "professional" optometrists affiliated with the Texas Optometric Association, two "commercial" optometrists affiliated with the Texas Association of Optometrists, and three public members.

The second approach would not make reference to any professional association. Thus, it would call for six licensed optometrists practicing in Texas and three public members. This proposal would not exclude an optometrist who chose not to affiliate with a professional association.

## VII. STATUTORY CHANGES

The material presented in this section combines several sunset criteria for the purpose of evaluating the activities of the agency. The specific criteria covered are whether statutory changes recommended by the agency or others were calculated to be of benefit to the public rather than to an occupation, business, or institution the agency regulates; and statutory changes recommended by the agency for the improvement of the regulatory function performed.

### Past Legislative Action

The statutory history of the Board of Optometric Examiners covers two distinct periods: from the passage of its original enabling legislation in 1921 until the repeal of that Act in 1969, and from the enactment of new legislation in 1969 to the present. In the 48-year span of the first period, the original Act was amended six times with the enactment of the following bills: House Bill No. 295, Thirty-ninth Legislature, 1925; Senate Bill No. 105, Forty-first Legislature, 1929; Senate Bill No. 52, Forty-second Legislature, 1931; House Bill No. 410, Forty-sixth Legislature, 1939; House Bill No. 187, Forty-ninth Legislature, 1945; and House Bill No. 18, Fifty-second Legislature, 1951. These bills provided for the following general changes:

1. The fee structure of the agency was periodically modified to authorize an annual renewal fee of \$10.00, to raise the examination fee from \$15.00 to \$35.00, to raise the license issuance fee from \$5.00 to \$25.00, to authorize a fee of \$12.50 for the second examination and to charge a duplicate license fee of \$2.50.
2. The definition of optometry underwent minor changes.
3. The membership of the board was increased from five to six.
4. United States citizenship was added as a licensing requirement.

5. The board was given injunctive and subpoena powers.
6. Provisions were deleted which permitted licensure by reciprocity and which allowed the study of optometry in the office of a licensed optometrist as a substitute for a degree from a college of optometry.

The second period in the board's statutory history began in 1969 when the original Act was repealed and replaced by the provisions of Senate Bill No. 781, Sixty-first Legislature. Provisions in this Act substantially changed the structure of optometry regulation in Texas. Board membership was reconstituted so that at least four of the six members would be members of the Texas Optometric Association. The board's rulemaking authority was limited to procedural rules only. As a result, many of the board's rules that were adopted prior to 1969 were incorporated into the Act. Among these were the prohibition against practicing optometry under a trade or corporate name and the inclusion of steps that an optometrist must perform when conducting an initial eye examination. The relationship between optometrists and dispensing opticians was defined and any optician who advertised prices for eyeglasses was required to obtain an Advertising Permit from the board.

The legislation enacted in 1969 has been amended five times with the enactment of the following bills: Senate Bill No. 559, Sixty-second Legislature, 1971; Senate Bill No. 972, Sixty-second Legislature, 1971; Senate Bill No. 831, Sixty-third Legislature, 1973; House Bill No. 1550, Sixty-fourth Legislature, 1975; Senate Bill No. 258, Sixty-fifth Legislature, 1977; and Senate Bill No. 54, Sixty-fifth Legislature, 1977. These bills provided for the following general changes:

1. Any school of optometry faculty member who filed a declaration of intention to become a United States citizen became eligible for an optometry license.
2. The board was given the authority to spend funds that were held outside the State Treasury and collected prior to the legislation enacted in 1969.

3. The board was given the authority to stagger its license renewal process.
4. Continuing education became a requirement for license renewal.
5. The license renewal fee was changed to a "not to exceed \$75.00" provision.
6. The board was made subject to the provision of the Texas Sunset Act.

### Proposed Legislative Action

Several bills relating to the board's operations were introduced during the last three legislative sessions, but were defeated. In the Sixty-fourth Legislative Session, House Bill No. 1087 would have permitted licensure by reciprocity. In the same session, House Bill No. 1448 would have required that the board's membership be composed of three members from the Texas Association of Optometrists and three members from the Texas Optometric Association. Further, the bill would have required that all board interpretations be adopted by at least five board members and would have permitted any board member to request an attorney general's opinion.

Senate Bill No. 878 of the Sixty-fifth Legislative session would have broadened the exemption provision of the Act. In the same session, House Bill No. 21 would have broadened the practice of optometry by permitting optometrists to dispense pharmaceutical agents for diagnostic purposes. Senate Bill No. 870, on the other hand, would have restricted the practice of optometry by requiring an optometrist to refer a patient to an ophthalmologist under specified conditions.

Senate Bill No. 1016 of the Sixty-sixth Legislature would have made general "housecleaning" changes such as specifying the board's authority to hire an executive director and removing provisions of the Act that have been declared



unconstitutional.

In its self-evaluation report, the agency made no recommendations as to changes in its enabling statute. The agency has decided to defer such recommendations pending completion of the evaluation by the Sunset Commission.

### Summary

The board's enabling legislation has been amended several times since its adoption in 1921. Between 1921 and 1969, major changes to the original bill increased fees, deleted the reciprocity provision, gave the board injunctive and subpoena powers and exempted physicians from the Act. In 1969, the original bill was repealed and new enabling legislation passed that made several significant changes in the agency's operations. Of particular significance were modifications that 1) restricted the board so that at least four of its six members be members of the Texas Optometric Association and 2) prohibited the board from making substantive rules. Important changes since 1969 include requiring continuing education as a condition for license renewal and subjecting the board to the provisions of the Texas Sunset Act.

Several bills that relate to the board's operation were introduced but did not pass during the previous three legislative sessions. These bills included provisions that would have permitted licensure by reciprocity, broadened the exemption clause, and made general housecleaning changes. Separate bills that would have either expanded or restricted the practice of optometry were also introduced. A final proposal would have altered the composition of the board and would have changed the procedure for adopting board interpretations.

In its self-evaluation report, the agency made no recommendation as to changes in its enabling statute.