

Sunset Advisory Commission



Texas Optometry Board

Staff Report
April 2004

TEXAS OPTOMETRY BOARD

**SUNSET STAFF REPORT
APRIL 2004**

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SUMMARY

Texas Optometry Board

Notable among health licensing agencies, the Texas Optometry Board plays a dual role of protecting public health and safety and protecting consumers in the eyewear marketplace.

The Board regulates optometrists to ensure the protection of patients receiving eye health services. In the last 13 years, optometrists' activities have expanded to where the more highly qualified therapeutic optometrists and optometric glaucoma specialists may prescribe certain drugs, while traditional optometrists may not. The Board's regulatory and enforcement practices need to keep pace with these changes in the optometry industry to ensure public protection, especially in light of these expanded responsibilities.

The Board also plays a role in protecting the interests of patients after the eye exam, when they enter the marketplace as consumers to serve their eyewear needs. To participate fully in the marketplace, these consumers must have access to their prescriptions. While access to eyeglass prescriptions is already required in Texas, recent changes in federal law require the release of contact lens prescriptions. Conforming the state law to these federal requirements would provide consumers a greater range of choices when purchasing contact lenses, and would provide a state forum for resolving complaints from consumers about access to their contact lens prescriptions.

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*The Board's approach
to regulation of
optometrists has not
kept pace with an
increasing scope of
practice, and consumer
demands.*

Finally, while the State should continue to regulate optometrists, the decision on the specific organizational structure for the agency should be made after the Sunset reviews of other health licensing agencies have been completed.

A summary of the recommendations in this report is provided in the following material.

Issues/Recommendations

Issue 1

The Texas Optometry Board Lacks Adequate Authority to Address Concerns About Contact Lens Prescriptions, as Currently Required by Federal Law.

Key Recommendation

- Conform the state's Contact Lens Prescription Act with federal regulations governing the release and verification of contact lens prescriptions.

Issue 2

Key Elements of the Board's Licensing and Regulatory Functions Do Not Conform to Commonly Applied Licensing Practices.

Key Recommendations

- Standardize the Board's licensing functions by changing the basis for assessing late renewal penalties and outsourcing the administration of its jurisprudence examination.
- Revise the Board's enforcement activities by improving the way the Board processes complaints, providing additional enforcement tools to increase public protection, and requiring the Board to coordinate with law enforcement agencies.

Issue 3

Decide on Continuation of the Texas Optometry Board After Completion of Sunset Reviews of Other Health Licensing Agencies.

Key Recommendation

- Decide on continuation of the Texas Optometry Board as a separate agency upon completion of upcoming Sunset reviews of other health licensing agencies.

Fiscal Implication Summary

This report contains one recommendation that would have a fiscal impact to the State, as summarized below.

- *Issue 2* – Changing the basis on which the Board assesses late renewal penalties would result in a revenue gain to the State of about \$12,700 annually. Applying other licensing and enforcement procedural improvements would require minor costs to update the agency's licensing database.

ISSUES

The Texas Optometry Board Lacks Adequate Authority to Address Concerns About Contact Lens Prescriptions, as Currently Required by Federal Law.

Summary

Key Recommendation

- Conform the state's Contact Lens Prescription Act with federal regulations governing the release and verification of contact lens prescriptions.

Key Findings

- Separate state and federal regulations govern consumer access to contact lens prescriptions.
- Contact lens consumers in Texas do not have a way to effectively address complaints regarding access to their prescriptions.
- Provisions of the state's Contact Lens Prescription Act may limit consumers' abilities to purchase contact lenses in a more competitive market.

Conclusion

State law governing consumer access to contact lens prescriptions has not kept up with federal law, just enacted and being implemented by the Federal Trade Commission. Federal law requires the release of contact lens prescriptions, superceding state requirements that prescriptions be released only upon request of the patient. Because the Optometry Board does not have clear authority to enforce the requirements of federal law, and because of the federal government's limited ability to address individual consumer complaints, consumers have little recourse when seeking to address their concerns about contact lens prescriptions. In addition, state laws governing the verification of these prescriptions may harm consumers' abilities to purchase lenses from a greater range of retail sellers.

Requiring optometrists to automatically release a patient's prescription under state law would provide the Board needed authority to adequately enforce consumer complaints. Requiring verification of prescriptions between optometrists and sellers would increase the range of consumer choices for purchasing lenses.

Support

Separate state and federal regulations govern consumer access to contact lens prescriptions.

- Two separate Acts, the state's Contact Lens Prescription Act, passed by the Legislature in 1997, and the federal Fairness to Contact Lens Consumers Act, effective February 4, 2004, govern the content, release, and verification of a contact lens prescriptions. Both Acts protect consumers' health and safety by specifying the contents and expiration of a prescription, allowing only valid prescriptions to be filled, and requiring sellers to fill them accurately. Additionally, the federal Act contains language not found in state law detailing a method for verifying prescriptions between prescribers and dispensers of lenses, while the state Act allows for a more stringent verification process. The federal verification provisions ensure that consumers have the ability to purchase lenses from a larger number of sellers, and promote greater competition in the contact lens market. The chart, *Key Provisions of State and Federal Acts Regulating Contact Lens Prescriptions*, compares provisions found in both Acts.


Federal law governing contact lens prescriptions allows consumers greater choices when purchasing their lenses.

Key Provisions of State and Federal Acts Regulating Contact Lens Prescriptions		
Provision	Federal Fairness to Contact Lens Consumers Act	State Contact Lens Prescription Act
Release of prescription	Requires releasing a copy of the prescription to the patient, or to a person designated by the patient to act on their behalf.	Requires releasing one original prescription only upon the patient's request. Allows release to a contact lens seller for an emergency refill.
Verification of prescription	"Passive" verification by direct communication between seller and prescriber through telephone, fax, or electronic means.	"Positive" verification by providing or faxing the original prescription from the prescriber to the seller.
Dispensing of lenses	A seller may only fill a valid and verified prescription.	A seller may only fill a valid original prescription.
Number of lenses prescribed	Not required on a prescription.	Required for prescriptions for disposable lenses.


The state's Contact Lens Prescription Act regulates both prescribers, and sellers, of contact lenses.

- The state Contact Lens Prescription Act applies to professional and business entities regulated by the Texas Optometry Board (the Board) and Texas Department of Health (TDH). The Act authorizes the Board to enforce provisions governing contact lens prescriptions written by optometrists, and patient access to the prescriptions. Recently, complaints to the Board regarding contact lens prescriptions have increased. In each of fiscal years 2002-03, approximately 60 percent of all complaints to the Board were for failure of an optometrist to release a contact lens prescription to a patient. The Board's enabling statute, the Texas Optometry Act, also addresses contact lens prescriptions by requiring any person dispensing contact lenses to provide lenses only from a valid prescription.

The Contact Lens Prescription Act authorizes TDH to administer a mandatory permitting program for contact lens dispensers, including those located out-of-state. Optometrists, ophthalmologists, and pharmacists are exempt from these permitting requirements. To receive a permit from TDH, a dispenser must agree to follow all state and federal laws and rules governing the selling and delivering of contact lenses. In fiscal year 2003, the state had 218 permitted contact lens dispensers. In the same year, TDH received 63 complaints, mostly regarding the dispensing of contact lenses without a proper permit.

- The federal Fairness to Contact Lens Consumers Act applies to all optometric practitioners prescribing contact lenses, and to all sellers of contact lenses, including mail order firms. The Federal Trade Commission (FTC) is authorized to enforce the requirements of the Act and to investigate potentially unfair or deceptive trade practices regarding the sale of contact lenses. Individuals can file complaints directly with the FTC by filling out a form on the agency's Web site, or calling a consumer help line.

Contact lens consumers in Texas do not have a way to effectively address complaints regarding access to their prescriptions.

- The Office of the Attorney General has indicated that the Board lacks the authority needed to enforce the provisions of the federal Fairness to Contact Lens Consumers Act. As a result, if a consumer complains to the Board that their optometrist did not automatically release their prescription as now required by federal law, the Board would not be able to take any action because it has no authority to require an optometrist to release a prescription without the customer requesting it.

Even before the passage of the federal Act, the Board's handling of complaints may have prompted the FTC to start an investigation, in August, 2003, to determine whether the Board's lack of enforcement authority or conduct may have contributed to illegally restraining trade in the sale of replacement contact lenses. Despite the change in federal law, the FTC investigation of the Board regarding contact lenses is continuing.

- Consumers' only recourse if they do not receive their contact lens prescription is to file a complaint with the FTC, which will not help them resolve their complaint, or obtain their prescription. While a person can file a complaint on the FTC's Web site, or call a help line, the FTC's Web site states that the agency does not resolve individual problems. Rather, the FTC would use these consumer complaints to potentially initiate an investigation or a broader enforcement action on behalf of consumers as a class.

Provisions of the state's Contact Lens Prescription Act may limit consumers' abilities to purchase contact lenses in a more competitive market.

- Selected provisions of the Contact Lens Prescription Act, that conflict with the federal Act, could deprive some consumers of their prescriptions and limit their ability to purchase lenses from a greater selection of



In the last two years, 60 percent of the Board's complaints have involved contact lens prescriptions.



The Board is currently under investigation by the FTC for potentially restricting free trade in the contact lens market.

sellers. For example, while most optometrists provide consumers their prescriptions as a matter of course, the state Act still requires optometrists to release a single original prescription only upon the patient's request. Some consumers may not get their prescription simply because they are not aware that they have to ask for it. Without a prescription, a consumer cannot shop for lenses outside of their optometrist's office.



State law makes it difficult for consumers to get their contact lens prescription, and to shop for the best price.

- Texas' process for verifying contact lens prescriptions, found by the FTC to be a "stricter regime"¹ compared to other states, makes it difficult for consumers to competitively shop and purchase lenses from remote locations, such as by mail-order or over the Internet. While Board rules allow an optometrist to fax or e-mail the prescription to a dispenser, this means of verification still relies solely on the optometrist to provide the prescription to the dispenser. This type of "positive" verification does not allow for a seller to verify prescription information provided by the customer, or to obtain the prescription on behalf of the customer.

In contrast, the federal Act allows for "passive" verification, meaning that a dispenser can request verification of the prescription from an optometrist through direct communication such as fax, e-mail, or the telephone. The federal Act requires an optometrist to respond to a verification request within eight business hours, or the prescription is presumed correct, and the dispenser may fill the customer's contact lens order.

Recommendation

Change in Statute

1.1 Conform the state's Contact Lens Prescription Act with federal regulations governing the release and verification of contact lens prescriptions.

This recommendation would align state regulation of contact lens prescriptions with the federal Fairness to Contact Lens Consumers Act. Specifically, changes would include:

- eliminating requirements for an optometrist to release only one original prescription to the patient, and requirements for a patient to request their prescription;
- eliminating requirements for a contact lens dispenser to fill a prescription only upon receipt of a original prescription;
- authorizing verification of a contact lens prescription between a dispenser and a prescriber;
- requiring the development of rules to provide time frames for a prescriber to verify a prescription on request of a dispenser, and for a dispenser to maintain certain information when making such a request; and
- eliminating requirements for the number of contact lenses to be written on a prescription, and instead authorizing the Board to adopt rules specifying the contents of a contact lens prescription written by an optometrist, including the number of contact lenses.

These recommendations would authorize the Texas Optometry Board to enforce provisions regarding release and verification of a prescription by licensed optometrists, and provide the Board flexibility to modify the contents of a prescription by rule. The Texas Department of Health would enforce

provisions regarding verification requests from permitted contact lens dispensers. The Optometry Board would retain its authority to enforce regulations requiring that only valid contact lens prescriptions be filled. Because these recommendations affect ophthalmologists who prescribe lenses, and pharmacists who sell lenses, the Texas State Board of Medical Examiners and the Texas State Board of Pharmacy would be responsible for ensuring that their licensees comply with requirements of the Contact Lens Prescription Act, under their current regulatory authority prescribed by the Act.

Under these recommendations, a patient would no longer have to request their prescription in order to receive it. Eliminating references in the statute to “original” as it pertains to prescriptions, and eliminating references to release of a single prescription would allow sellers to fill prescriptions received through electronic means or direct communication. Authorizing verification of a prescription between dispensers and prescribers would also include providing a prescription to a person designated by the patient to act on that patient’s behalf, such as a dispenser. A prescriber would retain the ability to refuse to verify an invalid or expired prescription.

Removing the number of lenses to be dispensed from the prescription and authorizing the Board to adopt rules specifying the contents of a prescription would give the Board flexibility to modify prescription requirements as needed, to reflect changes in federal law or FTC regulations. Specifically, the Board could choose to retain, by rule, the requirement that a prescription for contact lenses include the number of lenses prescribed, if it does not conflict with federal requirements and is necessary to protect public health. Additionally, these recommendations would not change the length of time a prescription can be valid, and patients could still request a two-month extension of their prescription as currently allowed under state law.

Because the Board and TDH share regulatory authority over contact lens dispensers, they should work together to adopt consistent rules, and an inter-agency agreement as necessary, to implement these recommendations, and to clarify their respective roles in enforcing state regulations. The Board and TDH should develop these rules with input from the Medical and Pharmacy Boards. These rules could specify the type of information dispensers would provide to prescribers when requesting verification of a prescription, the type of information to be included on a prescription such as contact information for the prescriber, and time frames for the verification process. FTC rules for the federal Act could serve as a model for state rules.

Impact

Overall, these recommendations would bring state statutes into conformity with the intent of federal regulations governing contact lens prescriptions, provide greater patient access to prescriptions, and increase consumers choices for purchasing lenses. Consumers would have a state Optometry Board clearly authorized to investigate their complaints, which may also provide assurance to the FTC that the Board is able to appropriately investigate these complaints and take enforcement actions if needed. Additionally, the numbers of these complaints to the Board should decrease as optometrists satisfy consumers’ requests for their prescriptions. These recommendations would not negatively affect the health and safety of patients because optometrists would not be required to verify expired or inaccurate prescriptions, and sellers would still be required to accurately fill prescriptions.

Fiscal Implication

This recommendation would not have a fiscal impact to the State.

¹ Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, Washington D.C., March 2004, p. 25. Online. Available: <http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf>. Accessed: March 29, 2004.

Key Elements of the Board's Licensing and Regulatory Functions Do Not Conform to Commonly Applied Licensing Practices.

Summary

Key Recommendations

- Standardize the Board's licensing functions by changing the basis for assessing late renewal penalties and outsourcing the administration of its jurisprudence examination.
- Revise the Board's enforcement activities by improving the way the Board processes complaints, providing additional enforcement tools to increase public protection, and requiring the Board to coordinate with law enforcement agencies.

Key Findings

- Licensing provisions of the Board's statute do not follow model licensing practices and could potentially affect the fair treatment of licensees and the agency's ability to protect consumers.
- Nonstandard enforcement provisions of the Board's statute could reduce the agency's effectiveness in protecting consumers.

Conclusion

Various licensing and enforcement processes in the Texas Optometry Act do not match model licensing standards developed by Sunset staff from experience gained through more than 80 occupational licensing reviews over the last 25 years. The Sunset review compared the Board's statute, rules, and practices to the model licensing standards to identify variations. Based on these variations, staff identified the recommendations needed to bring the Board in line with the model standards.

Support

Regulating occupations, such as optometry, requires common activities that the Sunset Commission has observed and documented over more than 25 years of reviews.

- In its mission to protect the public by ensuring that those who provide optometry services are qualified, competent, and adhere to established professional standards, the Board performs several standard licensing and enforcement activities. Currently, the Board licenses more than 3,200 optometrists, including 1,472 therapeutic optometrists of which 1,096 are dually licensed as optometric glaucoma specialists. The Board enforces the Texas Optometry Act, the state's Contact Lens Prescription Act, and Board rules by investigating complaints against optometrists and taking disciplinary action when necessary.
- The Sunset Advisory Commission has a historic role in evaluating licensing agencies, as the increase of occupational licensing programs served as an impetus behind the creation of the Commission in 1977. Since then, the Sunset Commission has completed more than 80 licensing agency reviews.
- Sunset staff has documented standards in reviewing licensing programs to guide future reviews of licensing agencies. While these standards provide a guide for evaluating a licensing program's structure, they are not intended for blanket application. The following material highlights areas where the Board's statutes and rules differ from these model standards, and describes the potential benefits of bringing the statutes and rules into conformity with standard practices.



*The Board licenses
and oversees more
than 3,200
optometrists in Texas.*

Licensing provisions of the Board's statute do not follow model licensing practices and could potentially affect the fair treatment of licensees and the agency's ability to protect consumers.

- *Late renewal penalties.* Licensees who fail to renew their licenses on time should pay a penalty set at a level that is reasonable to ensure timely payment, and that provides comparable treatment for all licensees. The Board currently ties the late renewal fee to the fee for its jurisprudence exam. Requiring delinquent licensees to pay a penalty of 1-1/2 to two times the *renewal* fee, instead of the examination fee, would provide a better incentive to renew on time.
- *Oral exam.* Oral tests and interviews should not be required elements in a licensing examination because they introduce too much subjectivity in determining a person's qualifications for licensure. These procedures lend themselves to differences in interpretation and scoring among examiners, and also introduce the possibility of judging an examinee based on factors that are not skill-related, such as appearance or personality.

Contrary to the preferred approach, the Board's statute authorizes oral examinations, although the agency does not use this authority. Instead, the Board tests an applicant's knowledge about the state's optometry laws through a written exam and requires applicants to pass a national examination, administered by a national organization, that includes

written and practical – but not oral – testing. Eliminating statutory reference to an oral exam would remove this obsolete provision and ensure that the Board continues to use the current objective testing procedures.

- ***Jurisprudence exam.*** Applicants should have reasonable opportunities to take licensing examinations in enough geographic locations to accommodate demand, and reduce associated costs to applicants who must travel to take the exam. Currently, the Board offers its jurisprudence examination six times a year – twice a year in conjunction with the national optometry exam, and three times a year in Austin and once in Houston, with the agency’s staff administering the exam. Administering the exam only in Houston and Austin limits access to the exam, and increases costs for students who must travel potentially long distances to take the exam. In addition, using the agency’s staff consumes considerable staff time in putting on, proctoring, and grading the exam. Outsourcing the jurisprudence exam to a testing service with multiple test locations would result in greater access to the exam at less cost to students, as well as reduce staff’s workload.

Nonstandard enforcement provisions of the Board’s statute could reduce the agency’s effectiveness in protecting consumers.

- ***Inspections.*** Inspection authority. Agencies should have clear procedures, rules, and authority for conducting inspections that help ensure standard treatment of licensees and timely compliance of licensees in correcting problems. Though it lacks clearly defined inspection authority, the Board currently conducts unannounced inspections of its licensees’ offices and patient records to ensure compliance with sections of statute concerning the initial examination of patients, separation of retail optical stores and optometrists, professional identification, and consumer notices. Providing the Board with specific inspection authority will allow it to continue to ensure that optometrists comply with standard of care and other requirements, and to adequately investigate complaints in cases in which inspections may be necessary.

Inspection violation processing. Violations of statute and rule should be processed and treated the same way, regardless of whether a complaint originates from the public, a licensee, or the Board. Currently, staff informs licensees of any violations found during an inspection and schedules an informal settlement conference if needed, but does not open a complaint. As a result, inspection violations are not counted in any of the Board’s performance measures, such as the overall number of complaints received, complaints resolved, or the average number of days for complaint resolution. Also, the Board does not subject the resolution of inspection violations to the time constraints placed on other complaints. The Board does, however, include sanctions resulting from inspection violations when reporting disciplinary actions to the Legislature and other entities, as most of the Board’s disciplinary actions result from inspections. By using the same enforcement process for complaints and inspection violations, the Board can ensure a more accurate picture of its enforcement efforts.



The Board lacks clear authority to inspect optometrists’ records to ensure they are providing quality eye exams.



*Board complaint
processes may
concentrate too much
decisionmaking
authority in one
Board member.*

- ***Complaint filing.*** The public, an agency, or a licensee should be able to file a written complaint against a licensee on a simple form provided by the agency. Complaint forms should be available on an agency's Web site, through e-mail, or through regular mail. Currently, individuals wishing to file a complaint with the Board must request a complaint form by telephone, or in writing, through either regular mail or e-mail. In 2001, the Board provided access to a complaint form on its Web site for several months, but only for persons involved with a lawsuit the Board was engaged in at that time. Making its complaint form continuously available on its Web site would help the public and reduce the amount of staff time dedicated to handling consumer inquiries.
- ***Complaint prioritization.*** Complaints should be placed in priority order so that the most serious problems are handled first, to place the agency's attention where it is most needed. The Board currently investigates complaints on a first-come first-served basis, unless staff determines that the public's safety is endangered, in which case such complaints take priority. However, these procedures are neither specifically stated in statute nor have they been formally adopted through Board rules.
- ***Complaint evaluation.*** Agencies without licensed practitioners on staff sometimes must rely on licensee Board members to provide needed expertise in evaluating complaints. However, they must be careful not to concentrate too much decision making authority over individual complaints in the hands of a single person. The Optometry Board relies on its Investigation-Enforcement Committee members to review cases to determine whether the cases get dismissed or referred to an informal settlement conference. This complaint review process delegates considerable authority to a single Board member to decide the outcome of each complaint at one point in the process. Although Board members occasionally consult with each other on complex standard of care cases, one Board member ultimately makes the decision to dismiss or refer cases for further consideration. By not involving more Board members in the complaint review process, the Board loses an opportunity for having additional perspective and expertise in deciding whether a standard of care was met or violated.

On the other hand, the ability of staff to resolve cases that do not require professional expertise helps expedite the complaint process while providing proper safeguards for its actions. Currently, Board staff resolves some complaints not related to patient care, although the statute does not provide clear authority to do so. Allowing staff to resolve these complaints, including the authority to dismiss complaints, report to the Board, and to recommend sanctions against violators, would save Board members time in considering each complaint, while ensuring that Board members are aware of staff actions.

- ***Informal settlement conferences.*** Agreed orders. The Legislature, through legislation regarding alternative dispute resolution, has encouraged boards to settle enforcement cases using informal proceedings. Structured informal settlement conferences allow an agency to explore resolution without resorting to contested case hearings at the State Office of Administrative Hearings (SOAH), thus saving

time and resources. While the Optometry Board holds informal settlement conferences to provide licensees with the opportunity to comply with Board laws and rules, it does not take full advantage of the conference to develop an agreed order. Instead, the licensee is informed of the proposed order but has limited opportunity to discuss its acceptability before it is presented to the Board, typically the day after the settlement conference. The Board subsequently accepts, rejects, or amends the proposed order. If the licensee refuses to sign the Board order, the case gets forwarded to SOAH. By using its informal settlement conferences as a venue for negotiating agreed orders, the Board could more easily and fairly resolve complaints.



The Board does not take full advantage of its informal settlement conferences.

Public members. If a licensing board chooses to use a panel of its members to conduct informal settlement conferences, the panel should include a public member to help ensure a balance between occupational and public interests. While the Optometry Board does ask for volunteers from among its public members to participate in informal settlement conferences, it is not statutorily required to do so, and therefore does not ensure public membership at all conferences.

- ***Administrative penalties.*** The ability to impose a fine in an administrative process gives agencies a powerful tool to encourage compliance without having to revoke a license. In determining the amount of administrative penalties, agencies should base their decision on a variety of factors including a licensee's compliance history, seriousness of the violation, and a violation's threat to the public's health and safety. Agencies should use a penalty matrix to ensure that penalties are determined in a systematic way.

The Board's rules provide guidance for applying administrative penalties to lesser violations, such as the failure to properly display the optometrist's name, advertising violations, and practicing in an office not properly separated from an optical retailer. However, the rules do not provide guidance for applying penalties to more serious violations, such as the failure to detect eye disease, the failure to perform all required eye exam steps, or prescribing drugs outside optometry's scope of practice. Requiring the Board to adopt a more complete penalty matrix in rule would help ensure appropriate and consistent treatment of all violators.

- ***Restitution authority.*** The goal of restitution is to allow a complainant to receive a refund for some or all of what was lost as a result of the act that caused the complaint. Refunds can be granted when a consumer has been defrauded or subjected to a loss that can be quantified, such as the cost of an eye exam or contact lenses. The Board's enforcement tools are designed to correct licensee behavior, but do not allow for repayment to the aggrieved party.
- ***Probation.*** Probation is a way for a licensing agency to discipline licensees who violate statute or rules, while allowing them to continue to practice. To ensure that probation is not abused, the licensing agency should have authority to impose appropriate conditions on probation, including additional continuing education and limitations on practice,

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The Board's probation process appears to reward licensees who violate its statutes and rules.

that imply punishment for wrongdoing. The Optometry Board's use of probation authority seems to reverse this standard by requiring violators to obtain additional practice authority as a condition of probation. While the Board sees the requirement to complete the education and exam necessary to obtain a therapeutic license as punishment, the practice appears to reward licensees who violate its statute and rules.

For example, the Board has required optometrists who illegally prescribed drugs to obtain a therapeutic license, which provides prescription authority, as a condition of probation. The textbox, *Selected Enforcement Cases*, details several of the Board's prescription drug cases. A more reasonable practice would be for the Board to require additional remedial continuing education, or to restrict practice until the probation term ends.

Selected Enforcement Cases FY 1995 – FY 2002	
Case Details	Board Action
Licensee ordered drugs from a pharmacy using another optometrist's name and license number.	<ul style="list-style-type: none"> ● One year probated suspension ● Requirement to get a therapeutic license ● \$2,500 fine
Licensee wrote unauthorized prescriptions 17 times, one time using a physician's prescription pad.	<ul style="list-style-type: none"> ● Five year suspension, probated except for 60 days ● Requirement to get a therapeutic license ● \$5,000 fine
Licensee administered unauthorized drugs to a patient.	<ul style="list-style-type: none"> ● One year probated suspension ● Requirement to get a therapeutic license ● \$2,500 fine

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The Board lacks needed authority to quickly suspend the license of an optometrist who is threatening the public's health and safety.

- **Temporary suspension.** Granting an agency authority to summarily suspend a license without an initial hearing is useful in situations, such as an optometrist impaired by drug or alcohol use, where substantial harm can result if an activity is not stopped immediately. Currently, the Board can only suspend a license through a vote at a public Board meeting, even if a dangerous situation arises concerning an optometrist that constitutes a threat to the public. Authorizing a panel or committee of the Board to temporarily suspend an optometrist's license, and to meet by telephone conference call under certain circumstances, would allow the Board to better protect the public in situations where the continued practice constitutes a threat to public welfare.
- **Cease and desist authority.** A licensing agency should have enforcement authority not only over its licensees, but over those who engage in the unlicensed activity of the profession. However, the standard range of sanctions against licensees do not apply to such unlicensed activity. While injunctive authority allows agencies to take legal action to stop unlicensed activity, cease and desist orders provide an interim step that agencies may take on their own to stop unlicensed activity.

Currently, the Board lacks authority to issue cease and desist orders. The agency's current process of issuing a warning letter to stop unlicensed practice is ineffective and lacks real enforcement, while seeking injunctions through the Attorney General is cumbersome and time consuming. Cease and desist orders provide for faster action by regulatory agencies, especially when violators of these orders are subject to additional sanctions, such as administrative penalties. In addition, violations of cease and desist orders may help the agency obtain injunctive relief more easily.

- ***Sharing enforcement information.*** Sharing complaint information with other agencies involved with a licensee group helps protect the public by ensuring that enforcement information gets to where it is most needed to take action against violators of state law. Almost 80 percent of the Board's licensees have authority to prescribe a limited number of drugs, and may maintain registration numbers with both the Controlled Substance Registration Program at the Texas Department of Public Safety (DPS) and the federal Drug Enforcement Administration (DEA). The Board sanctions licensees who prescribe outside of their scope of practice, but does not share information regarding these cases with DPS or DEA. These enforcement agencies need to know about *any* disciplinary action the Optometry Board takes concerning controlled substances or dangerous drugs, whether or not the licensee has DPS or DEA registration numbers. Public safety would be greatly enhanced if the Board shared enforcement information with these law enforcement agencies, like the Medical, Pharmacy, and Dental Boards do routinely. DPS and DEA can conduct investigations, restrict controlled substance registrations, and take civil or criminal action against the Board's licensees. Subsequently, the Board may take further disciplinary action against any licensee who ends up with a prescription-related misdemeanor or felony conviction.



The Board does not share prescription related enforcement information with DPS or DEA.

Recommendations

Licensing

Change in Statute

2.1 Require the Board to change its method for calculating late renewal penalties.

This recommendation would require the Board to use the standard renewal fee as the basis for its late renewal penalties, rather than the cost of its jurisprudence exam. For example, the Board would charge a person whose license has been expired for 90 days or less the standard renewal fee plus a penalty equal to one and a half times the renewal fee. For those whose licenses have been expired for more than 90 days, but less than one year, the Board would charge the standard renewal fee plus a penalty of twice the renewal fee. In calculating the late penalty, the Board would not include the \$200 professional fee assessed on optometrists.

2.2 Eliminate the statutory authority for oral exams in the Board's statute.

This recommendation would remove the authority to use oral exams from its statute, since this language is obsolete and does not conform to model examination procedures.

Management Action

2.3 The Board should contract with an external entity for jurisprudence examination administration, if found to be cost effective.

The Board would develop a request for proposal to determine whether an external entity could administer its jurisprudence examination more efficiently and cost effectively than staff. In determining whether to contract for exam administration, the Board should consider advantages and disadvantages to licensees, such as more frequent testing opportunities and exam locations.

Enforcement

Change in Statute

2.4 Authorize the Board to conduct inspections for compliance purposes, and as part of the complaint investigation process.

This recommendation would authorize the Board to inspect the premises of a licensee on an unannounced basis during reasonable business hours, as part of the Board's compliance audits and complaint investigations. The Board would be able to inspect facilities and review patient records as necessary.

2.5 Require the Board to process as complaints all violations found during inspections.

This recommendation would require the Board to open formal complaints for any violation of its statutes or rules found during an onsite inspection of an optometrist's patient records and office. The Board would then process and track each inspection complaint in the same manner that it processes all other complaints received from the public, licensees, and the Board. Finally, the Board would include the inspection complaint data in the performance measures concerning the Board's enforcement process. Integrating the agency's inspection complaints into the same process as all other complaints would provide a more accurate portrayal of the Board's overall enforcement performance.

2.6 Require the Board to investigate complaints according to risk.

This recommendation would require the Board to handle complaints according to a more relevant priority system than currently used by the agency. Addressing complaints based on seriousness would ensure that the agency places attention on its most serious cases first and makes more effective use of its investigative resources.

2.7 Authorize staff to process complaints that do not require professional expertise.

This recommendation would expand the authority of the Board's staff to dismiss cases or to recommend enforcement action on cases that do not require professional expertise or are not directly related to patient care. Staff would be able to dismiss cases, for example, if the investigation shows that no violation occurred, or if the complaint does not fall under the Board's jurisdiction. Additionally, staff would be able to recommend enforcement action, including administrative fines, which the licensee may accept or reject, and have the matter considered by an informal settlement conference.

All proposed orders must still receive final approval by the full Board. Staff would regularly report administratively dismissed complaints to Board members at the Board's public meetings.

2.8 Require that at least two optometrist members of the Board review complaints requiring professional expertise.

This recommendation would require the Board to provide for at least two optometrist members of the Board to review all complaints requiring optometric expertise, and to decide whether to dismiss a case or refer it to an informal settlement conference. If the two members differ on how to proceed, the complaint would automatically be referred to a settlement conference. Board members who review a complaint would also conduct any subsequent settlement conference, and recuse themselves from voting on disciplinary action concerning that case at a full Board meeting.

2.9 Require the Board to include one of its public members in the informal settlement process.

This recommendation would ensure that the Board includes at least one public member in its informal settlement conferences. These conferences help the Board determine whether a violation occurred and what action to take, and therefore should always include public membership to ensure consumer interests are properly represented in the enforcement process.

2.10 Require the Board to adopt an administrative penalty matrix in agency procedures or rules.

This recommendation would ensure that the Board develops administrative penalty amounts that relate appropriately to different violations of the Texas Optometry Act, the state's Contact Lens Prescription Act, and Board rules. In developing this matrix, the Board should take into account the licensee's compliance history, seriousness of the violation, or the threat to the public's health and safety. The agency may develop these amounts in procedures and not in formal rules; however, the procedures should be adopted by the Board and published in the Texas Register, after giving the public the opportunity to comment.

2.11 Authorize the Board to require restitution as part of the settlement process.

Under this recommendation, the Board would be allowed to include restitution as a part of an agreed order reached in an informal settlement conference on a complaint. Restitution authority would be limited to ordering a refund not to exceed the amount the complainant paid for their eye exam, eyeglasses, or contacts lenses. Any restitution order would not include an estimation of other damages or harm. The refund may be in lieu of or in addition to other sanctions against a licensee.

2.12 Prohibit the Board from requiring additional practice authority as part of a sanction.

The Board would no longer be able to allow licensees to obtain additional practice authority as part of a disciplinary action. Instead, continued practice would have to be conditioned on satisfactory completion of remedial continuing education, or appropriate practice restrictions, before the licensee would be eligible for expanded authority.

2.13 Authorize the Board to temporarily suspend a license.

Under this recommendation, the Board would be authorized to temporarily suspend an optometrist's license upon determination by a committee of the Board that continued practice by the optometrist threatens the public welfare. A panel of three Board members would be required to temporarily suspend an optometry license. In addition, the disciplinary panel would be authorized to hold a meeting by telephone conference call under the provisions in the Open Meetings Act if threat to public health and safety is imminent, and convening of the panel at one location is impossible for the

timely action required. The Board would also need to ensure due process to the license holder through subsequent proceedings to resolve issues that are the basis of the temporary suspension.

2.14 Authorize the Board to issue cease and desist orders.

Providing the Board with cease and desist authority would enable the Board to move more quickly to stop unlicensed activity that threatens the public's health and safety. The recommendation would also authorize the Board to assess administrative penalties against persons who violate cease and desist orders.

Management Action

2.15 The Board should make its complaint form available on its Web site in an easily accessible format.

Making a complaint form available on the Board's Web site will assist licensees and the public to more easily prepare and file complaints.

2.16 The Board should use its informal settlement process to develop agreed orders.

The Board should provide sufficient opportunity for a respondent to indicate whether the terms of a proposed order are acceptable, rather than simply stating its recommended disciplinary action. If a respondent does not agree to a proposed order, the participants in an informal settlement conference should attempt to negotiate for terms that both the Board and the respondent can agree to.

2.17 The Board should share prescription-related enforcement cases with appropriate law enforcement agencies.

The Board should share its disciplinary actions resulting from prescription drug violations with the Controlled Substance Registration Program at the Texas Department of Public Safety, and the federal Drug Enforcement Administration. Information should be shared for *any* Board actions for violations involving either controlled substances or dangerous drugs. The Board should also coordinate its complaints investigations with these law enforcement agencies to take advantage of the assistance they can provide.

Impact

The application of these recommendations to the Board would result in efficiency and consistency from fairer processes for licensees, additional protection for consumers, and standardization of Board procedures. The chart, *Benefits of Recommendations*, characterizes the recommendations according to benefit.

Fiscal Implication

These recommendations would not have a significant fiscal impact to the State. The recommendations are procedural improvements that should require only minor costs to update the agency's licensing database. The recommendation to change the basis of the Board's late renewal penalty would result in a revenue gain to the State of about \$12,700 annually.

Fiscal Year	Gain to the General Revenue Fund
2006	\$12,700
2007	\$12,700
2008	\$12,700
2009	\$12,700
2010	\$12,700

Benefits of Recommendations				
Recommendations	Efficiency of Operations	Administrative Flexibility	Fairness to Licensee	Public Protection
Licensing				
2.1 Require the Board to change its method for calculating late renewal penalties.	✓			
2.2 Eliminate the statutory authority for oral exams in the Board's statute.	✓	✓	✓	
2.3 The Board should contract with an external entity for jurisprudence examination administration, if found cost effective.	✓	✓	✓	
Enforcement				
2.4 Authorize the Board to conduct inspections for compliance purposes, and as part of the complaint investigation process.	✓			✓
2.5 Require the Board to process as complaints all violations found during inspections.	✓			✓
2.6 Require the Board to investigate complaints according to risk.	✓			✓
2.7 Authorize staff to process complaints that do not require professional expertise.	✓	✓		
2.8 Require that at least two optometrist members of the Board review complaints requiring professional expertise.			✓	✓
2.9 Require the Board to include one of its public members in the informal settlement process.				✓
2.10 Require the Board to adopt an administrative penalty matrix in agency procedures or rules.		✓		✓
2.11 Authorize the Board to require restitution as part of the settlement process.		✓		✓
2.12 Prohibit the Board from requiring additional practice authority as part of a sanction.				✓
2.13 Authorize the Board to temporarily suspend a license.		✓		✓
2.14 Authorize the Board to issue cease and desist orders.		✓		✓
2.15 The Board should make its complaint form available on its Web site in an easily accessible format.	✓			✓
2.16 The Board should use its informal settlement process to develop agreed orders.	✓	✓	✓	✓
2.17 The Board should share prescription-related enforcement cases with appropriate law enforcement agencies.				✓

Decide on Continuation of the Texas Optometry Board After Completion of Sunset Reviews of Other Health Licensing Agencies.

Summary

Key Recommendation

- Decide on continuation of the Texas Optometry Board as a separate agency upon completion of upcoming Sunset reviews of other health licensing agencies.

Key Findings

- The mission of the Texas Optometry Board is to protect the public by ensuring that optometry professionals are qualified, competent, and adhere to professional standards.
- The regulation of optometry is part of the overall regulation of eyecare specialists and retail optical dispensing, which is spread among three licensing agencies.
- Texas has a continuing need for regulating the practice of optometry.
- Different organizational options for regulating optometrists offer advantages and disadvantages.
- All 50 states regulate optometrists, generally within umbrella licensing agencies.
- A complete study of organizational alternatives should consider the results of the Sunset Commission's reviews of other health licensing agencies this review cycle.

Conclusion

The Sunset review evaluated the continuing need for regulating optometrists in Texas, as well as the need for the Texas Optometry Board as the agency to provide these functions. Although the State should continue to regulate the optometry profession, Sunset staff recommends that the Sunset Commission delay its decision on continuation of the Board as a separate agency until the Sunset reviews of other health licensing agencies are completed this year, as these reviews may show that efficiencies could be achieved in the consolidation or re-organization of the State's health licensing agencies.

Support

The mission of the Texas Optometry Board is to protect the public by ensuring that optometry professionals are qualified, competent, and adhere to professional standards.

- Texas has licensed optometrists since 1921 to protect patients by setting and enforcing standards for the profession. The Legislature expanded the scope of practice for optometry by creating the therapeutic optometrist license in 1991, and creating the optometric glaucoma specialist certification in 1999. Additionally, the Board regulates the separation of business interests between optometrists and retail optical dispensing.
- The Board seeks to protect the public by ensuring that only qualified optometrists practice in Texas. To achieve this goal, the Board regulates 3,207 individuals practicing optometry, of which 639 are regular optometrists, 1,472 are therapeutic optometrists, and 1,096 are dually licensed as therapeutic optometrists and glaucoma specialists.
- The Board also seeks to ensure compliance with the Texas Optometry Act and the state's Contact Lens Prescription Act by investigating and resolving complaints regarding its licensees. In fiscal year 2003, the Board resolved 164 complaints, initiated mostly by consumers. Of these complaints the most common are for failure to provide a contact lens prescription, failure to diagnose a disease, and an incorrect prescription. The Board, composed of a majority of practitioners, operates with an annual budget of \$342,127 and a staff of seven.


*Over the last 13 years
optometrists' scope of
practice has expanded
to include the
prescription of limited
drugs.*

The regulation of optometrists is part of the overall regulation of eyecare specialists and retail dispensing, which is spread among three licensing agencies.

- Texas regulates three eye health-care related professions – ophthalmologists, optometrists, and opticians – as well as retail dispensing of contact lenses, at three separate licensing agencies. The chart, *Comparison of Ophthalmologists, Optometrists, Opticians, and Contact Lens Dispensers* shows the agencies regulating these professions, and differences in their scopes of practice.
- To be licensed as an optometrist in Texas, a person must graduate from an accredited four-year college of optometry, and pass the national optometry examination administered by the National Board of Examiners in Optometry. In addition, applicants for licensure must pass the Optometry Board's jurisprudence examination which tests applicants' knowledge of the Texas Optometry Act, the Contact Lens Prescription Act, and Board rules.
- The Texas State Board of Medical Examiners regulates physicians, including approximately 1,100 ophthalmologists practicing in Texas. To become an ophthalmologist, a person must graduate from an accredited medical school, and complete a one-year internship in general medicine. Additionally, a person must complete a three-year residency as an ophthalmologist, after which they may practice as a general ophthalmologist or specialize in areas such as the muscles around the eye, or treatment of certain conditions such as glaucoma.

Comparison of Ophthalmologists, Optometrists, Opticians, and Contact Lens Dispensers				
Scope of Practice	Ophthalmologists Regulated by the Board of Medical Examiners	Optometrists Regulated by the Optometry Board	Opticians Regulated by the Department of Health	Lens Dispensers Regulated by the Department of Health
Conduct eye examinations	Yes	Yes	No	No
Diagnose eye conditions	Yes	Yes	No	No
Prescribe corrective lenses	Yes	Yes	No	No
Fit contact lenses	Yes	Yes	No	No
Prescribe medications	Yes	Limited*	No	No
Treat glaucoma	Yes	Yes**	No	No
Perform surgery	Yes	No	No	No
Correct vision using laser treatments	Yes	No	No	No
Dispense eyeglasses and/or contact lenses	Yes	Yes	Yes	Yes

* Only therapeutic optometrists and optometric glaucoma specialists may prescribe medications.

** Only optometric glaucoma specialists may treat glaucoma and must co-manage patient treatment with an ophthalmologist.

- The Texas Department of Health (TDH) regulates opticians by administering a voluntary optician’s registry, which allows participating opticians to represent themselves to the public as qualified practitioners. An optician fills prescriptions for corrective lenses by providing eyeglasses and contact lenses to consumers. Opticians may register with TDH as an eyeglass dispensing optician or dually register as an eyeglass and contact lens optician. Currently, about 400 opticians participate in TDH’s registry. To qualify, an optician must complete up to 10 classroom hours of optician-related education and pass national examinations. Upon registration, an optician must complete at least five hours of continuing education annually to maintain registration. While TDH has authority to investigate and enforce complaints against opticians, the Optometry Board has authority under the Texas Optometry Act to regulate the advertising practices of opticians or businesses entities selling eyeglasses and contact lenses, and to regulate the separation of business practices between optometrists and opticians.
- The Department also regulates contact lens dispensers under the state’s Contact Lens Prescription Act, by requiring any business selling or delivering contact lenses in Texas to hold a permit from TDH. The Act requires that a permit holder dispense contact lenses only upon receipt of an original, valid prescription and fill the prescription accurately. However optometrists, ophthalmologists, and pharmacists are exempt from TDH permitting requirements. Currently, Texas has approximately 218 permitted contact lens dispensers, including several headquartered out-of-state. Each permit may cover multiple business locations operated in Texas by the permit holder.


The state’s Contact Lens Prescription Act applies to optometrists, ophthalmologists, contact lens sellers, and pharmacists that sell lenses.

Texas has a continuing need to regulate the optometry profession.

- Optometrists play a vital role in ensuring that Texans can see. Texans rely on optometrists for routine eye exams, prescriptions for corrective lenses, monitoring of conditions such as cataracts and macular

degeneration, and for treatment of specific conditions such as glaucoma. In addition to diagnosing and treating patients, certain optometrists may prescribe drugs, including controlled substances. Such services can potentially harm the public's health and safety, and should be regulated by the State.

- The Board's statute is designed to protect the public by establishing standards for the practice of optometry, ensuring patient access to prescriptions, and providing a recourse for violations of these standards and requirements. To ensure the protection of the public, the State needs an entity that can receive and investigate complaints about optometrists, and if necessary, discipline those who violate the law to bring them into compliance.



The regulation of optometrists could be consolidated with opticians and contact lens dispensers currently regulated at TDH.

Different organizational options for regulating optometrists offer advantages and disadvantages.

- The regulation of optometrists could occur through one of three basic organizational structures – an independent agency, a coordinating council similar to the Health Professions Council, or a consolidation. The chart, *Organizational Structure Options*, describes the advantages and disadvantages of each of the three organization types.
- Texas has approached the regulation of most health-care professions, including optometry, through an independent agency that pays for itself through licensing and professional fees, focuses on customer service, and provides expertise for the regulation of its licensees. The Board currently operates as an independent agency, with seven employees to handle the regulation of more than 3,200 optometrists.
- The Health Professions Council (HPC) currently functions as a coordinating council for 15 agencies representing 35 health professions licensing boards and programs. Many of the member agencies, including the Optometry Board, collocate in one state office building to facilitate resource sharing, including shared board and conference rooms, an imaging system, courier services, and information technology staff. HPC is currently making plans to coordinate human resources and financial activities among member agencies. The Legislature augmented the activities of HPC in 2003, by establishing the Office of Patient Protection, which will assist consumers with complaints about HPC member agencies. HPC could be given additional authority to coordinate all of the agencies' administrative functions, leaving member agencies to perform only licensing and enforcement functions.
- The regulation of optometrists could be transferred to TDH, which already has 20 regulatory programs administratively attached to it, including opticians and contact lens dispensers. A separate policy board for optometrists could be attached to TDH with responsibility for licensing and enforcement of optometry. This transfer would consolidate regulation of optometrists, opticians, and contact lens dispensers in one place, potentially improving economies of scale with regard to licensing, investigations, and enforcement, and better coordinating the overlapping statutory authority between the Texas Optometry Act and the Contact Lens Prescription Act, as they apply to optometrists and contact lens dispensers.

Organizational Structure Options			
Type of Organization	Description	Advantages	Disadvantages
Independent Agency	Board appointed by Governor to represent optometrists and make final decisions for regulation with its own staff and budget.	<ul style="list-style-type: none"> ● Expertise in optometry, applied to regulation of licensees. ● Better accountability for licensing and enforcement decisions. ● Improved customer service by Board and staff dedicated to single profession. 	<ul style="list-style-type: none"> ● Duplication of effort with other licensing agencies performing common functions. ● Limited resources for administrative and enforcement functions, information technology, and staff ● Lack of coordination with agencies with similar responsibilities.
Coordinating Council	Board appointed by Governor to make final decisions for regulation with its own staff for licensing and enforcement. Receives some or all administrative support from coordinating council composed of comparable agencies, such as the Health Professions Council, which may rely on staff from member agencies or may employ its own staff.	<ul style="list-style-type: none"> ● Administrative efficiency from standardizing functions among member agencies. ● Better focus of limited resources on core licensing and enforcement functions. ● Better access to equipment and staff not afforded with small appropriations. 	<ul style="list-style-type: none"> ● Less autonomy for Board in meeting administrative program needs. ● Fracturing of administrative services among agencies, with some favored more than others. ● Duplication of effort with other licensing agencies performing common functions.
Consolidation of Similar Agencies	Board with final policymaking authority, or advisory committee that makes recommendations to a consolidated licensing oversight board, either for regulation of optometrists at the Texas Department of Health, or as part of unified regulation of all health professions.	<ul style="list-style-type: none"> ● Single point of contact for consumers to obtain information or lodge complaints. ● Improved coordination and standardization of rules and policies, especially among similar professions. ● Improved economies of scale for administrative, licensing, and enforcement functions. ● Reduced potential for regulated profession to dominate regulations. 	<ul style="list-style-type: none"> ● Neglect of individual professions in favor of larger, more powerful groups. ● Diminished customer service and accountability, resulting in increased response times for licensing and enforcement actions. ● Lack of staff expertise in a specific profession.

Finally, a single umbrella agency could regulate *all* of the health professions currently regulated under 35 separate boards and programs. Under this configuration, the regulation of optometrists could be overseen by a board with final policymaking authority, or by an advisory committee that could provide expertise to a public board that would oversee all regulation. The structure of the agency could be modeled after the Texas Department of Licensing Regulation (TDLR), which has a structure for occupational and professional examination, licensing, and enforcement for more than 20 regulatory programs. The agency's public board receives assistance from statutorily created advisory

committees composed of regulated trades, businesses, industries, and occupations.

All 50 states regulate optometrists, generally within umbrella licensing agencies.

- The chart, *Regulation of Optometrists in the United States*, describes the structure of optometric regulatory agencies in other states. Only 16 states other than Texas use a separate, stand-alone agency.

Regulation of Optometrists in the United States		
Structure	Number of States	States
Independent	17	AL, AR, AZ, CA, CT, KS, KY, NC, ND, NH, NV, OH, OK, OR, TX, WV, WY
Health Professions Umbrella Agency	13	FL, IA, IN, LA, MD, MN, MS, NE, RI, SD, TN, VA, WA
General Umbrella Licensing Agency	20	AK, CO, DE, GA, HI, ID, IL, MA, ME, MI, MO, MT, NJ, NM, NY, PA, SC, UT, VT, WI

16 states other than Texas use a separate, stand-alone agency. Instead, 33 states place regulation of optometry services within an umbrella agency, although the organizational structure of such agencies varies. Of these states, 20 use a general umbrella licensing agency that is analogous to TDLR. The other 13 states regulate optometrists through a health professions umbrella agency which also regulates physicians.

A complete study of the organizational alternatives should consider the results of the Sunset Commission’s reviews of other health licensing agencies this review cycle

- Sunset reviews of the other health licensing agencies are scheduled for completion in the fall of 2004, after the completion of this agency’s review. The textbox, *Health Licensing Agencies Under Sunset Review*, lists the professional licensing agencies that will undergo Sunset review by the fall of 2004.

★

Only 16 states, other than Texas, regulate optometrists in a stand-alone agency.

- The results of these reviews may indicate that further administrative efficiencies can be gained among these agencies. Additionally, opportunities may exist to provide for greater coordination and consistent regulation across Texas’ health licensing agencies. Delaying decisions on continuation of the Board until that time will allow Sunset staff to finish its work on all the professional licensing agencies and base its recommendations on the most complete information.

Health Licensing Agencies Under Sunset Review 2003 – 2005*

State Board of Acupuncture Examiners
 Texas Board of Chiropractic Examiners
 Texas State Board of Examiners of Dietitians
 Texas State Board of Examiners of Marriage and Family Therapists
 Texas State Board of Medical Examiners
 Texas Midwifery Board
 Texas Optometry Board
 Texas State Board of Examiners of Perfusionists
 Texas State Board of Pharmacy
 State Board of Physician Assistant Examiners
 State Board of Podiatric Medical Examiners
 Texas State Board of Examiners of Professional Counselors
 Texas State Board of Examiners of Psychologists
 State Board of Social Work Examiners
 State Board of Veterinary Medical Examiners

* All the above boards are members of HPC or are attached to the Texas Department of Health, which is an HPC member.

Recommendation

Change in Statute

3.1 Decide on continuation of the Texas Optometry Board as a separate agency upon completion of upcoming Sunset reviews of other health licensing agencies.

This recommendation would postpone the Sunset Commission's decision on the status of the Board as a separate agency until completion of the Sunset reviews of other health licensing agencies being reviewed this biennium.

Impact

Though the State should continue to regulate optometrists, Sunset staff recommends that the Sunset Commission delay its decision on continuation of the Board as a separate agency until the Sunset reviews of other health licensing agencies are completed. At that time, Sunset staff will make recommendations to the Commission regarding the continuation of the Board. The results of each agency review should be used to determine if administrative efficiencies and greater coordination can be achieved in the organization of the State's separate health licensing agencies.

Fiscal Implication

This recommendation would not have a fiscal impact to the State.

ACROSS-THE-BOARD RECOMMENDATIONS

Texas Optometry Board	
Recommendations	Across-the-Board Provisions
Already in Statute	1. Require public membership on the agency's policymaking body.
Update	2. Require provisions relating to conflicts of interest.
Already in Statute	3. Require unbiased appointments to the agency's policymaking body.
Apply	4. Provide that the Governor designate the presiding officer of the policymaking body.
Update	5. Specify grounds for removal of a member of the policymaking body.
Update	6. Require training for members of the policymaking body.
Update	7. Require separation of policymaking and agency staff functions.
Already in Statute	8. Provide for public testimony at meetings of the policymaking body.
Update	9. Require information to be maintained on complaints.
Apply	10. Require the agency to use technology to increase public access.
Apply	11. Develop and use appropriate alternative rulemaking and dispute resolution procedures.

AGENCY INFORMATION

Agency Information

Agency at a Glance

The Texas Optometry Boards' mission is to protect the public's health, safety, and economic welfare by ensuring that optometry professionals are qualified and competent, and adhere to established professional standards. The State began regulating optometrists in 1921 when the Legislature created the Texas State Board of Examiners in Optometry, later re-named the Texas Optometry Board in 1969, to protect patients by setting and enforcing standards for the profession. In addition, the Board enforces key provisions of the state's Contact Lens Prescription Act. To accomplish its mission, the Board:

- licenses optometrists, therapeutic optometrists, glaucoma specialists, and approves continuing professional education programs;
- regulates separations between optometry practices and retail optical dispensing; and
- investigates and resolves complaints, taking disciplinary action when necessary to enforce the Board's statute and rules.


*Visit the Texas
Optometry Board's
Web site at
www.tob.state.tx.us*

Key Facts

- **Funding.** In fiscal year 2003, the agency operated on a \$342,127 budget and collected about \$1.1 million in revenue from professional and licensing fees and fines. The Board also passed through \$82,277 in licensing fee revenues to support the University of Houston's College of Optometry.
- **Staffing.** The agency employs seven people, all of whom work in Austin.
- **Licensing.** In fiscal year 2003, the Board licensed 3,207 individuals to practice optometry. Of these individuals, 1,096 are also dually licensed as therapeutic optometrists and optometric glaucoma specialists.
- **Inspections.** Board staff inspect optometry practices to check patient exam records, ensure availability of complaint information, and to check separation of patient services from optical dispensing. In fiscal year 2003, the Board conducted 60 of these inspections.
- **Enforcement.** The Board received 196 complaints in fiscal year 2003, and resolved 164, with 167 initiated by consumers. Of the complaints submitted by the public, the most common are for failure to provide a contact lens prescription, incorrect prescription, or failure to diagnose a disease.

Organization

Policy Body

The Texas Optometry Board consists of nine members appointed by the Governor. The Board is composed of six licensed optometrists who have engaged in the practice of optometry for at least five years, and three public members. Every two years, the Board elects a Chair and Vice Chair. The chart, *Texas Optometry Board*, identifies current Board members.

The Board sets policies and rules to regulate the practice of optometry, approves continuing education courses, and participates in the disciplinary proceedings of licensees. In addition, the Board appoints the agency's Executive Director, and Board members participate in committees to work directly with staff on licensing and enforcement issues. The Board receives assistance from one statutorily created advisory committee – the Optometric Health Care Advisory Committee. The Board typically meets four times a year.

Texas Optometry Board			
Member	City	Qualification	Term Expiration
Joe W. DeLoach, O.D., Chair	Plano	Optometrist	2005
Mark A. Latta, O.D., Vice Chair	Amarillo	Optometrist	2005
Ann Appling Bradford	Midland	Public Member	2005
Judy McClendon Eidson	San Antonio	Public Member	2007
Fred Farias, III, O.D.	McAllen	Optometrist	2007
D. Dixon Golden, O.D.	Center	Optometrist	2009
Sharon L. Johnson, O.D.	Arlington	Optometrist	2007
Randall Reichle, O.D.	Houston	Optometrist	2009
Elsa Silva	El Paso	Public Member	2009

Staff

The Board has seven employees, all based in Austin, who perform the Board's two main functions – licensing and enforcement. The Executive Director, under the direction of the Board, manages the agency's day-to-day operations and implements Board policy. Generally, the Board's staff administer a jurisprudence exam; process license applications, renewals, and fees; oversee continuing education requirements; and investigate complaints. The Board is a member of the Health Professions Council, which coordinates functions among various health-care licensing agencies. The Council provides the Board and other health licensing agencies with a toll-free telephone complaint system and centralized administrative services, such as access to imaging equipment. In addition, the Optometry Board and the Veterinary Medical Board each share a full-time employee to provide information technology services to the smaller Council agencies.



The Board shares an employee to provide information technology services to smaller Health Professions Council agencies.

Funding

Revenues

In fiscal year 2003, the regulation of the optometry profession generated total revenues of more than \$1.1 million through various fees and assessments. As a licensing agency, the Board covers its administrative costs through licensing, renewal, and examination fees; and through appropriated receipts for services, such as license verifications and Open Record requests. The table, *Optometry Board Application and License Fees*, illustrates the fees charged by the Board. The agency also assesses administrative penalties against licensees for violations of the Board's statute and rules, totaling \$1,375 in fiscal year 2003. In addition, from each licensed optometrist, the Board collects a \$200 annual professional fee which goes to the General Revenue Fund, and the Foundation School Fund, and a \$5 fee for the Texas Online system. Revenue from these administrative penalties and professional fees is not used to cover the agency's operating costs, but goes to these Funds to be spent for other state purposes.

Optometry Board Application and License Fees				
Type of Application or License	Board Fee	Professional Fee	Texas Online Project	Total Fee
Therapeutic Optometrist Application	\$80	\$0	\$0	\$80
Optometric Glaucoma Specialist Application	\$50	\$0	\$0	\$50
Clinical Facility (College Instructor) Application	\$50	\$0	\$0	\$50
Provisional License Application	\$75	\$0	\$0	\$75
License Without Examination Application	\$300	\$0	\$0	\$300
Examination Application	\$150	\$0	\$0	\$150
Initial License	\$50	\$200	\$0	\$250
License Renewal	\$170	\$200	\$5	\$375

Expenditures

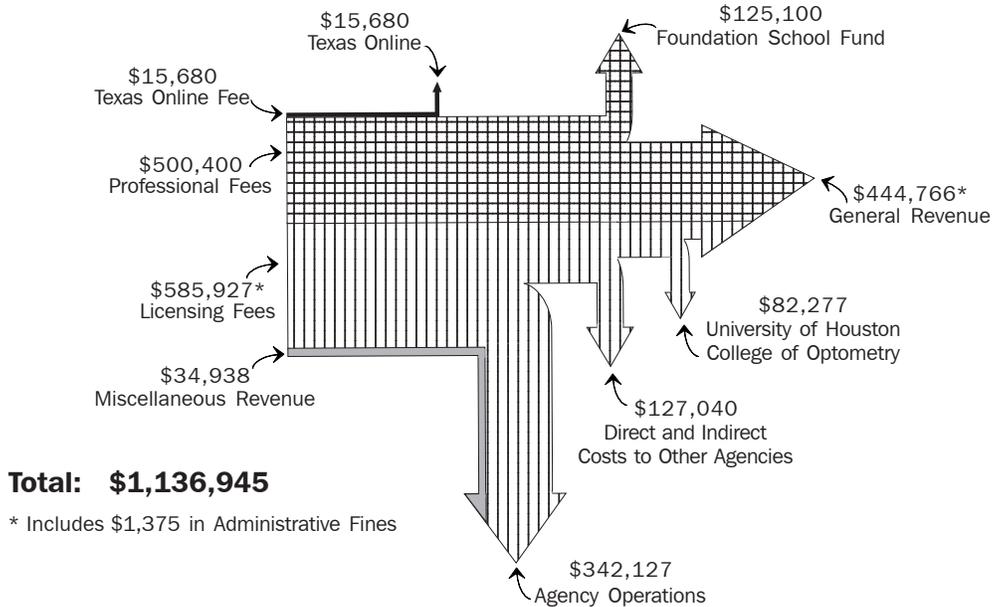
In fiscal year 2003, the Board spent \$342,127 in two areas: licensing and enforcement. Of this amount, \$249,753 or 73 percent, was spent on licensing, while \$92,374 or 27 percent, was spent on enforcement. In addition, the Legislature has directed the Board and other licensing agencies that are funded by fees to cover direct and indirect costs incurred by other agencies that provide services to the Board. Examples of these costs include employee benefits paid by the Employees Retirement System, and accounting services provided by the Comptroller of Public Accounts. In 2003, these indirect costs totaled about \$127,000 for the Board. The Optometry Act also requires the Board to transfer 15 percent of all license renewal fees, \$82,277 in fiscal year 2003, to the University of Houston's College of Optometry, to fund scholarships and facility improvements.

The chart, *Flow of Agency Revenues and Expenditures*, shows the overall impact of the agency's revenues and expenditures on the General Revenue Fund, and the Foundation School Fund. Subtracting the agency's operating expenditures, direct and indirect costs, and transfer to the University of


The Board transferred \$82,277 in licensing fees to the University of Houston's College of Optometry in fiscal year 2003.

Houston from total revenues generated \$444,766 to the General Revenue Fund, and \$125,100 to the Foundation School Fund in fiscal year 2003, to be used for state purposes other than regulating the optometry industry.

**Flow of Agency Revenues and Expenditures
FY 2003**



Appendix A describes the Board’s use of Historically Underutilized Businesses (HUBs) in purchasing goods and services for fiscal years 2000 to 2003. The Board uses HUBs in the categories of professional services, commodities, and other services. While the Board has fallen short of the state goal for other services, the Board has consistently surpassed the goal for commodities. The majority of the Board’s spending in the other services category is for its sole source contract for information services through the Department of Information Resources.

The Texas Optometry Board seeks to protect the public by ensuring that qualified individuals provide eye health care in Texas, and by sanctioning individuals who violate the law and Board rules. To achieve this goal, the Board examines and licenses optometrists, oversees the continuing education of optometrists, enforces the Texas Optometry Act and sections of the State’s Contact Lens Prescription Act, and Board rules. The textbox, *Practice of Optometry*, describes the three different types of optometrists and the key eye health care services these optometrists provide.

Agency Operations

The Texas Optometry Board seeks to protect the public by ensuring that qualified individuals provide eye health care in Texas, and by sanctioning individuals who violate the law and Board rules. To achieve this goal, the Board examines and licenses optometrists, oversees the continuing education of optometrists, enforces the Texas Optometry Act and sections of the State’s Contact Lens Prescription Act, and Board rules. The textbox, *Practice of Optometry*, describes the three different types of optometrists and the key eye health care services these optometrists provide.

Practice of Optometry

Texas licenses two types of optometrists, and one specialty practice, to provide the following eye health care services.

Optometrist

- conduct eye examinations
- diagnose defects of the eye or abnormal vision
- determine prescriptions for corrective lenses
- perform vision therapy
- evaluate vision-related disabilities
- fit and dispense eye wear and contact lenses
- may not perform surgery or laser vision correction

Therapeutic Optometrist

- conduct the same practices as an optometrist
- treat defects of the eye
- administer topical prescription medication and oral non-prescription medication

Optometric Glaucoma Specialist

- conduct the same practices as a therapeutic optometrist
- administer and prescribe medications for treatment of glaucoma
- co-manage treatment with an ophthalmologist

Licensing and Examinations

A person may become an optometrist, known as a Doctor of Optometry, by meeting criteria listed in the textbox, *Eligibility Requirements*, and submitting an application. The Board licenses 3,207 individuals, of which 639 are regular optometrists, 1,472 are therapeutic optometrists, and 1,096 are both therapeutic optometrists and glaucoma specialists. The chart, *Number of Optometrists in Texas*, shows the expanding scope of optometry practice during the last 13 years as the number of regular optometrists has declined, and these practitioners have upgraded their qualifications to become therapeutic optometrists, and glaucoma specialists.

Eligibility Requirements

To qualify to be licensed as a optometrist, a person must:

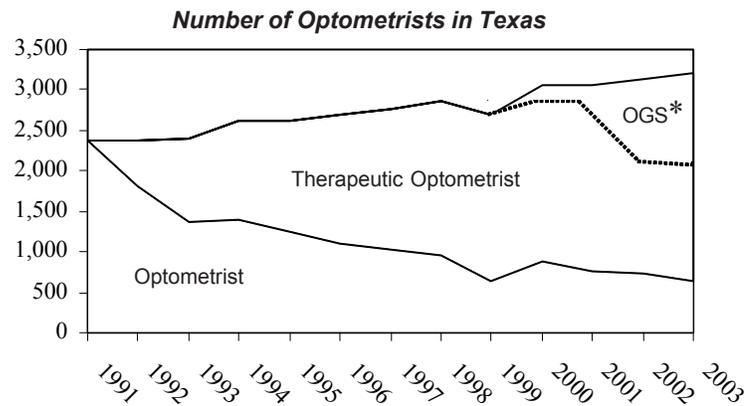
- be at least 21 years of age;
- be of good moral character;
- be a graduate of an accredited college of optometry; and
- have passed the National Board of Examiners in Optometry examinations.

Optometrists can perform eye examinations, prescribe corrective lenses such as eyeglasses and contact lenses, and fit contact lenses. Optometrists may also sell eyeglasses and contact lenses. However, optometrists are prohibited from conducting any type of surgery or providing laser treatments to correct vision. As of 1992, all applicants for initial licensure must be licensed as a therapeutic optometrist to practice in Texas. However, the Board continues to renew regular optometry licenses, as these practitioners are not required to become therapeutic optometrists.

Most applicants come from the single accredited optometry college in Texas: the University of Houston College of Optometry. While in optometry college, students must take and pass all three parts of the national examination administered by the National Board of Examiners in Optometry (NBEO), which tests a person's knowledge of basic science, clinical science, and patient care.

Upon qualifying, applicants must pass the Board's jurisprudence examination, which tests the applicants' knowledge of the Optometry Act and Board rules. The Board offers the exam in Austin three times a year, once a year at the University of Houston, and the NBEO offers it twice a year during the national exams at other locations in the country. Optometrists licensed before 1992, who wish to practice as a therapeutic optometrist, must take 90 classroom hours of post-graduate work in ocular pharmacology; and pass the Treatment and Management of Ocular Disease examination, administered by the NBEO. Therapeutic optometrists who wish to practice as glaucoma specialists must take an additional 30 classroom hours of post-graduate work in glaucoma diagnosis and pharmacology, pass a Board approved examination, and submit a certification from an ophthalmologist that the applicant has adequate clinical skills.

Once licensed, optometrists must renew their licenses and complete 16 hours of approved continuing education each year and file evidence of completion



*Optometric Glaucoma Specialists

with the agency. The agency reviews continuing education courses developed by providers to determine their acceptability. Trade associations and optometry schools offer most continuing education seminars and courses.

The Board also verifies the qualifications of licensed applicants from other states seeking to practice in Texas, and issues qualified applicants a provisional license to practice in Texas. Applicants licensed as therapeutic optometrists in other states before 1994 may be licensed to practice in Texas without taking the national exam if they have passed an equivalent exam, have practiced for five of the last seven years, and are in good standing. However, these applicants must take and pass the Texas jurisprudence exam to practice in the state. All out-of-state applicants licensed after 1994 must meet all Board licensing eligibility requirements, including passing the national written and the Board's jurisprudence exams.

Regulation of Optical Dispensing

The Optometry Act authorizes the Board to oversee aspects of retail optical dispensing in Texas. The Act limits, in some situations, the ability of optometrists to both provide eye exams and sell eyeglasses and contact lenses in the same facility. Optometrists must maintain optometric and optical business records separately, and may own up to three locations where both eye exams and retail sales occur in the same facility. Any optometrist owning more than three such locations must physically separate optometric and retail optical spaces. In addition, the Act prohibits a retail optical dispenser from employing any optometrists.

The Board also enforces sections of the State's Contact Lens Prescription Act, which is jointly administered by the Board and the Texas Department of Health (TDH). The Board enforces provisions of the Act requiring contact lens prescriptions to contain certain information, and requiring optometrists to provide patients with their contact lens prescription upon request. The Act requires TDH to issue a permit authorizing a business entity in Texas to sell contact lenses to the public. Optometrists who sell contact lenses are exempted from permitting requirements.

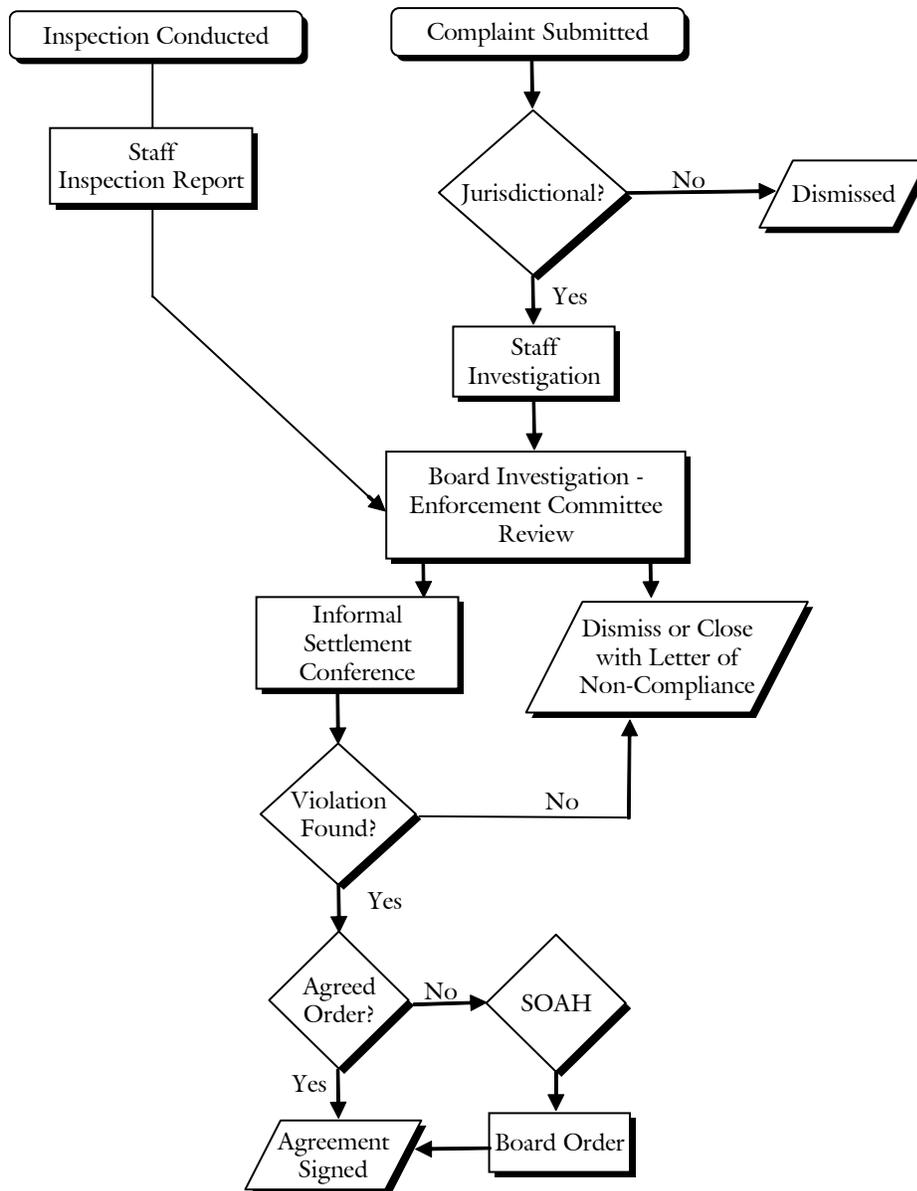
Enforcement

The Board regulates the profession of optometry by conducting inspections, investigating complaints against licensed and unlicensed individuals, and, if necessary, taking enforcement action against those who violate the Texas Optometry Act, the Contact Lens Prescription Act, or Board rules. The chart, *Texas Optometry Board Enforcement Process*, shows how the Board processes its complaints administratively. Complaints are either received from the public or initiated by the agency. Common complaints received by the Board include incorrect prescriptions that failed to improve vision, advertising violations, and the failure of an optometrist to release a contact lens prescription.



*The Board regulates
the separation of
optometric practices
and retail optical
sales.*

**Texas Optometry Board
Enforcement Process**



Inspections

To ensure compliance with Board statutes and rule, staff conduct unannounced office inspections to review patient records and tour licensee offices, checking for the thoroughness of eye exams. In fiscal year 2003, staff conducted 60 inspections. Staff choose a region of the state to visit based on the length of time since a region's last inspection, or the number of complaints against licensees in a region. Staff randomly select licensees to inspect within a region, but may also visit licensees against whom complaints have been filed. Optometrists cooperate with inspections

Compliance Inspections

Enforcement staff check for licensee compliance with the following requirements, set by law and rule.

- The records of five new patients must show that the optometrist has performed and properly documented the 10-step examination for new patients, as prescribed by law.
- The optometrist's name, or the practice name, as displayed on an entrance door, must exactly match the name as it appears in Board records. Fee receipts and prescription pads must also properly display the licensee's name and license number.
- The prominent display of a sign informing consumers how to file a complaint with the Board, or readily available consumer pamphlets.
- If the office is located next door to an optical retailer, the retailer and the doctor's office must be separated by a wall, and have separate entrances.

voluntarily, but the Board may subpoena patient records from any licensee who fails to provide them. The textbox, *Compliance Inspections*, details the activities performed by staff during an inspection. After completion of inspections, staff write summary reports, and may take action against licensees who are found to be in violation of Board regulations. The most common violations include the failure to properly document patient exams or display the consumer complaint information.

Investigations

Once the Board receives or opens a complaint, staff determine if it is jurisdictional, and may refer complaints not within the Board's jurisdiction, such as those against individuals licensed by other Boards, to the appropriate regulatory body. Complaints involving the unlicensed practice of optometry may be referred to the Attorney General's office or local law enforcement for enforcement action. All other complaints receive an investigation that includes a review of materials submitted with a complaint, the licensee's statement, and any other follow-up needed

to assess an allegation. Staff may seek assistance from Board members for the review of complex complaints. After the investigation, staff write and forward a report of findings to an optometrist member of the Board's Investigation-Enforcement Committee, who reviews the complaint and determines whether to close it or pursue further enforcement action through an informal settlement conference.

Informal Settlement Conferences and Formal Hearings

For more serious cases, the Board holds informal settlement conferences in which a panel – consisting of the Executive Director, enforcement staff, an Attorney General office representative, two Investigation-Enforcement Committee members, and a public Board member – offers the licensee an opportunity to show compliance with the law. The panel proposes a settlement offer to the licensee, taking into consideration information discussed during the conference. The offer is drafted into an order and presented to the full Board, which may reject, approve, or amend the offer. If the licensee does not agree with the proposed order, the Board may reconsider the case at a future Board meeting, or refer the case to the State Office of Administrative Hearings (SOAH) for a formal hearing before an administrative law judge. In fiscal year 2003, the Board resolved five, or about two percent, of its complaints through settlement conferences. The Board currently has one case pending at SOAH.

Sanctions

The Board can apply a variety of sanctions through its agreed orders, including reprimand, probation, administrative penalties, suspension, and

revocation of a person's license. The most commonly applied sanctions are administrative penalties and probated suspensions, in which the Board develops a plan for remedial action or probationary terms for the licensee. For example, under probation, the Board could require a licensee to take additional continuing education hours or retake the Board's jurisprudence exam.

The table, *Complaint Activity*, details the number of complaints received by the public and initiated by the Board, and shows the disposition of all complaints resolved by the Board in fiscal year 2003. For that year, the Board resolved complaints in an average of 67 days.

Complaint Activity¹ FY 2003										
Type of Allegation/ Violation	Total Complaints Received	Total Complaints Resolved	Type of Action							
			Dismissed		Sanction Type					
			<i>Closed: Compliance Letter</i>	<i>No Violation</i>	<i>Written Reprimand</i>	<i>Suspension/Probation</i>	<i>Administrative Penalties</i>	<i>Revocation</i>		
Standard of Care ²	33	16	0	15		0	0	1	0	
Contact Lens Prescription ³	112	105	4	99		0	0	2	0	
Unlicensed Activity	7	5	2	3		0	0	0	0	
Criminal Convictions	2	2	0	2		0	0	0	0	
Other ⁴	11	8	0	8		0	0	0	0	
Advertising	9	6	5	1		0	0	0	0	
Conduct ⁵	14	11	3	6		0	0	1	0	
Control of Optometry ⁶	5	8	6	2		0	0	0	0	
Inspections ⁷	3	3	0	0		2	1	1	0	
TOTAL	196	164	20	136		2	1	5	0	

¹ Sunset staff included violations resulting from inspections, although the Board does not formally report them. Complaints Resolved includes cases initiated in FY 2001 and FY 2002.
² Complaints include incorrect prescription and failure to diagnose disease.
³ Complaints that optometrist failed to release a contact lens prescription after patient request.
⁴ Complaints include billing and insurance issues, doctor/staff behavior, and defective lenses.
⁵ Complaints include unprofessional conduct, release of records, improperly filled out prescriptions, deceptive practices, and prescribing drugs outside scope of practice.
⁶ Violation of statutes requiring separation of optical retailers from optometrists practices.
⁷ Violations found during inspections, including failure to perform required steps in patient exams.

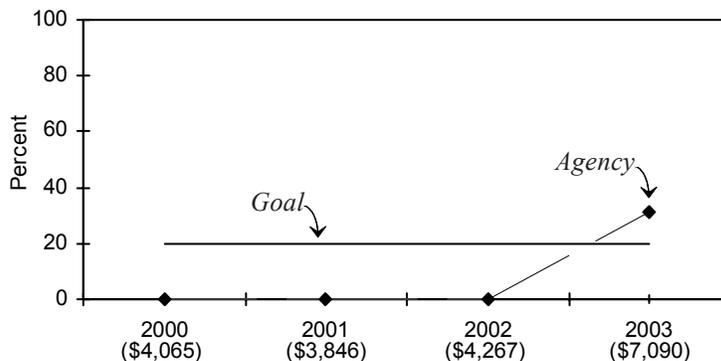
APPENDICES

Historically Underutilized Businesses Statistics 2000 to 2003

The Legislature has encouraged state agencies to increase their use of Historically Underutilized Businesses (HUBs) to promote full and equal opportunities for all businesses in state procurement. The Legislature also requires the Sunset Commission to consider agencies' compliance with laws and rules regarding HUB use in its reviews.¹

The following material shows trend information for the Texas Optometry Board use of HUBs in purchasing goods and services. The agency maintains and reports this information under guidelines in the Texas Building and Procurement Commission's statute.² In the charts, the flat lines represent the goal for HUB purchasing in each category, as established by the Texas Building and Procurement Commission. The diamond-dashed lines represent the percentage of agency spending with HUBs in each purchasing category from 2000 to 2003. Finally, the number in parentheses under each year shows the total amount the agency spent in each purchasing category. The Board recently met the goal for professional services, fallen short of the state goal for other services, and has consistently surpassed the goal for commodities.

Professional Services

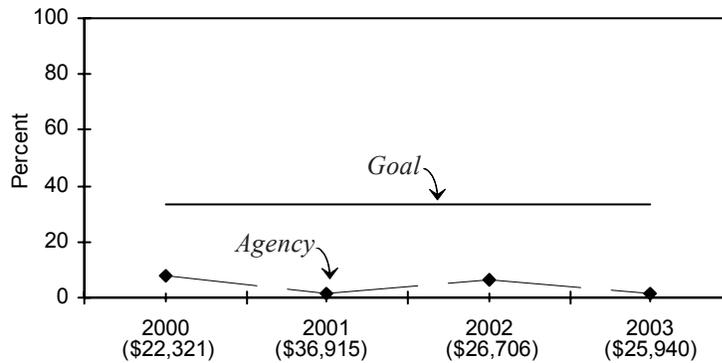


The Board fell below the State goal for HUB purchasing of professional services from 2000 to 2002, although expenditures in this category were not significant.

Appendix A

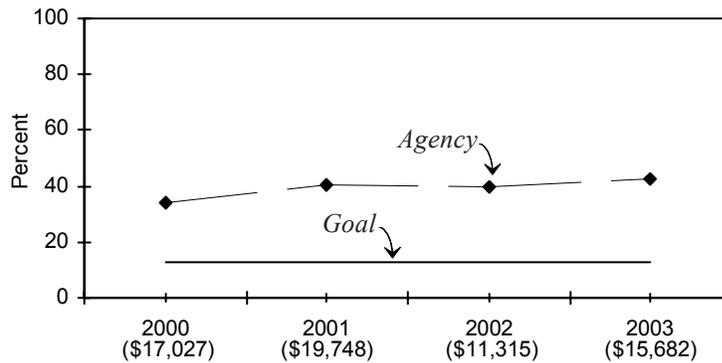
Historically Underutilized Businesses Statistics

Other Services



The Board has consistently fallen short of the State goal for other types of services because most of the Board's spending in this category is for its sole source contract for information services through the Department of Information Resources.

Commodities



The Board has consistently exceeded the State goal for HUB purchasing of commodities from 2000 to 2003.

¹ Texas Government Code, sec. 325.011(9)(B).

² Texas Government Code, ch. 2161.

Staff Review Activities

The Sunset staff engaged in the following activities during the review of the Texas Optometry Board.

- Worked extensively with agency staff.
- Attended a Board meeting, reviewed audiotapes and minutes of Board meetings, and interviewed Board members.
- Attended a meeting of the Board's Enforcement Committee.
- Met with in person, or interviewed by phone, staff from the Texas Department of Health, Texas State Board of Medical Examiners, Texas State Board of Pharmacy, Office of the Attorney General, Texas Department of Public Safety, Texas Board of Nursing Examiners, Texas Department of Insurance, Drug Enforcement Administration, and the Federal Trade Commission.
- Met with staff from the Governor's office, Speaker's office, legislative committees, and the Legislative Budget Board.
- Conducted interviews and solicited written comments from state and local interest groups.
- Observed inspections of optometry practices conducted by the Board inspector.
- Reviewed agency documents and reports, complaint files, state statutes, federal statutes, previous legislation, and literature on the practice of optometry.
- Researched the organizational structure of agencies regulating optometry in other states.
- Performed background and comparative research using the Internet.

**SUNSET REVIEW OF THE
TEXAS OPTOMETRY BOARD**

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