

SUNSET ADVISORY COMMISSION

STAFF REPORT WITH FINAL RESULTS

Texas Optometry Board



2016–2017

85TH LEGISLATURE

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SUNSET STAFF REPORT WITH FINAL RESULTS

2016-2017

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HOW TO READ SUNSET REPORTS

Each Sunset report is issued *three times*, at each of the three key phases of the Sunset process, to compile all recommendations and action into one, up-to-date document. Only the most recent version is posted to the website. (**The version in bold is the version you are reading.**)

1. SUNSET STAFF EVALUATION PHASE

Sunset staff performs extensive research and analysis to evaluate the need for, performance of, and improvements to the agency under review.

FIRST VERSION: The *Sunset Staff Report* identifies problem areas and makes specific recommendations for positive change, either to the laws governing an agency or in the form of management directives to agency leadership.

2. SUNSET COMMISSION DELIBERATION PHASE

The Sunset Commission conducts a public hearing to take testimony on the staff report and the agency overall. Later, the commission meets again to vote on which changes to recommend to the full Legislature.

SECOND VERSION: The *Sunset Staff Report with Commission Decisions*, issued after the decision meeting, documents the Sunset Commission's decisions on the original staff recommendations and any new issues raised during the hearing, forming the basis of the Sunset bills.

3. LEGISLATIVE ACTION PHASE

The full Legislature considers bills containing the Sunset Commission's recommendations on each agency and makes final determinations.

THIRD VERSION: The *Sunset Staff Report with Final Results*, published after the end of the legislative session, documents the ultimate outcome of the Sunset process for each agency, including the actions taken by the Legislature on each Sunset recommendation and any new provisions added to the Sunset bill.

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FINAL RESULTS

FINAL RESULTS

Senate Bill 314 — Sunset Bill

House Bill 2561 — Prescription Monitoring Program

Summary

The Sunset review found the optometry board to be generally well-run. As with other small agencies under review, certain licensing and enforcement practices need updating to be more consistent with standard best practices; Senate Bill 314 makes such process improvements. For example, the bill requires all optometrists to have a fingerprint-based criminal background check. Also, consistent with other health licensing agencies whose licensees have prescriptive authority, House Bill 2561 requires optometrists to search the Prescription Monitoring Program database and review a patient's prescription history before prescribing certain controlled substances. House Bill 2561 also requires the optometry board to periodically check the database for improper prescribing patterns among its licensees. Finally, Senate Bill 314 continues the agency for 12 years.

The following material summarizes results of the Sunset review of the Texas Optometry Board, including management actions directed to the agency that do not require legislative action.

ISSUE 1 — *Licensing and Enforcement*

Recommendation 1.1, Adopted — Require the agency to conduct fingerprint-based criminal background checks of all licensure applicants and licensees.

Recommendation 1.2, Adopted — Authorize the agency to provide biennial license renewal.

Recommendation 1.3, Adopted — Remove subjective qualification required of applicants for licensure.

Recommendation 1.4, Adopted — Remove the notarization requirement for individuals applying for licensure.

Recommendation 1.5, Adopted — Remove the statutory limitation currently restricting the agency's authority to lower fees.

Recommendation 1.6, Adopted — Require the agency to check for disciplinary or other legal actions in other states for license applications and renewals, and authorize the agency to pursue any necessary enforcement action.

Recommendation 1.7, Adopted — Eliminate the provision requiring five affirmative votes of the nine-member board to take an enforcement action.

Recommendation 1.8, Adopted — Replace archaic and subjective disciplinary provisions such as "habitual drunkard" with more specific disciplinary criteria, and authorize the agency to order physical and mental examinations if probable cause exists to do so.

Recommendation 1.9, Adopted — Direct the agency to accept all license applications and fee payments online. (Management action – nonstatutory)

Recommendation 1.10, Adopted — Direct the agency to update its website. (Management action – nonstatutory)

Recommendation 1.11, Adopted — Direct the agency to make all formal disciplinary orders easily accessible and readily available on its website. (Management action – nonstatutory)

Recommendation 1.12, Adopted — Direct the agency to report all letters of formal agreement to the National Practitioner Data Bank unless discussions with agency counsel and the federal administrator indicate otherwise. (Management action – nonstatutory)

Recommendation 1.13, Adopted — As a statutory instead of a management action:

- Require the board to protect the identity of the complainant to the extent possible.
- Prohibit the board from accepting anonymous complaints.
- Require the board to maintain confidentiality of investigative reports, adverse reports, complaints, the identity of a nontestifying complainant, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, license application, or criminal investigation or proceeding.
- Require complaints filed with the board by an insurance agent, insurer, pharmaceutical company, or third-party administrator against a licensee to include the name and address of the complainant.
- Require the board to notify, within 15 days of the complaint being filed, the licensee who is the subject of the complaint of the name and address of the insurance agent, insurer, pharmaceutical company, or third-party administrator who filed the complaint, unless the notice would jeopardize an investigation.

ISSUE 2 — *Continue*

Recommendation 2.1, Adopted — Continue the state’s regulation of optometrists and the Texas Optometry Board for 12 years.

Recommendation 2.2, Modified — Update the standard across-the-board requirement related to board member training, including the board’s rulemaking authority and anti-trust actions.

NEW ISSUES ADDED BY THE SUNSET COMMISSION

Prescription Monitoring Program, Modified — Beginning September 1, 2019, require optometrists to check the Prescription Monitoring Program database before prescribing certain controlled substances, with certain exemptions. (H.B. 2561)

Require the optometry board to develop guidelines for responsible prescribing of certain controlled substances and to monitor prescribing patterns of licensees, and allow the board to open investigations based on information obtained from the Prescription Monitoring Program. (H.B. 2561)

Provision Added by the Legislature

Automatic PMP registration — Require the optometry board to provide licensee information to the Pharmacy Board, and require the Pharmacy Board to use this information to automatically register practitioners to use the Prescription Monitoring Program. (H.B. 2561)

Fiscal Implication Summary

Senate Bill 314 will not have a fiscal impact to the state. Based on the contingency rider for Senate Bill 314, the optometry board is appropriated the amount necessary to cover the cost of searching the National Practitioner Data Bank, contingent upon the board collecting fees for that purpose.

———— **SUNSET COMMISSION DECISIONS**
JANUARY 2017

SUNSET COMMISSION DECISIONS

Summary

The following material summarizes the Sunset Commission's decisions on the staff recommendations for the Texas Optometry Board, as well as modifications and new issues raised during the public hearing.

The Sunset review found the optometry board to be generally well-run. Due in part to its small size and limited resources, the agency's approach to change is restrained and cautious. As with other small agencies under review, certain licensing and enforcement practices need updating to be more consistent with standard best practices; the commission's recommendations make such process improvements. For example, the commission recommends all optometrists have a fingerprint-based criminal background check. Further, the commission recommends the agency make better use of technology for license applications and put all formal disciplinary orders on the agency's website for greater transparency.

Consistent with the commission's recommendations on other health licensing agencies whose licensees have prescriptive authority, the commission recommends requiring optometrists to search the Prescription Monitoring Program database and review a patient's prescription history before prescribing certain controlled substances. The Sunset Commission recommends continuing the agency for 12 years.

ISSUE 1

Key Elements of the Agency's Licensing Functions Do Not Conform to Common Licensing Standards.

Recommendation 1.1, Adopted — Require the agency to conduct fingerprint-based criminal background checks of all licensure applicants and licensees.

Recommendation 1.2, Adopted — Authorize the agency to provide biennial license renewal.

Recommendation 1.3, Adopted — Remove subjective qualification required of applicants for licensure.

Recommendation 1.4, Adopted — Remove the notarization requirement for individuals applying for licensure.

Recommendation 1.5, Adopted — Remove the statutory limitation currently restricting the agency's authority to lower fees.

Recommendation 1.6, Adopted — Require the agency to check for disciplinary or other legal actions in other states for license applications and renewals, and authorize the agency to pursue any necessary enforcement action.

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Recommendation 1.13, Modified — As a statutory instead of a management action:

- Require the board to protect the identity of the complainant to the extent possible.
- Prohibit the board from accepting anonymous complaints.
- Require the board to maintain confidentiality of investigative reports, adverse reports, complaints, the identity of a nontestifying complainant, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, license application, or criminal investigation or proceeding.
- Require that complaints filed with the board by an insurance agent, insurer, pharmaceutical company, or third-party administrator against a licensee must include the name and address of the insurance agent, insurer, pharmaceutical company, or third-party administrator filing the complaint.
- Require the board to notify, within 15 days of the complaint being filed, the licensee who is the subject of the complaint of the name and address of the insurance agent, insurer, pharmaceutical company, or third-party administrator who filed the complaint, unless the notice would jeopardize an investigation.

ISSUE 2

Texas Should Continue Regulating the Practice of Optometry.

Recommendation 2.1, Modified — Continue the state’s regulation of optometrists. The commission modification recommends also continuing the Texas Optometry Board as an independent agency for 12 years.

Recommendation 2.2, Adopted — Update the standard across-the-board requirement related to board member training.

ADOPTED NEW ISSUES

Prescription Monitoring Program

Optometry Board requirements. Require the Texas Optometry Board to query the Prescription Monitoring Program on a periodic basis for potentially harmful prescribing patterns among its licensees. The Texas Optometry Board would work with the Pharmacy Board to establish potentially harmful

prescribing patterns that the Texas Optometry Board should monitor by querying the database for optometrists who meet those prescribing patterns. Based on the information obtained from the Prescription Monitoring Program, the Texas Optometry Board would be authorized to open a complaint for possible non-therapeutic prescribing.

Optometrist requirements. Beginning September 1, 2018, require optometrists to search the Prescription Monitoring Program and review a patient's prescription history before prescribing opioids, benzodiazepines, barbiturates, or carisoprodol. An optometrist who does not check the program before prescribing these drugs would be subject to disciplinary action by the Texas Optometry Board.

Fiscal Implication Summary

The Sunset Commission's recommendations would not have a fiscal impact to the state.

**SUMMARY OF SUNSET
STAFF RECOMMENDATIONS**

SUMMARY

The optometry profession has evolved over the 95 years since the Texas Optometry Board's creation, from a practice focused primarily on prescribing corrective lenses to one that additionally diagnoses and treats a wide variety of eye conditions and diseases. Much of the change occurred in Texas in the 1990s, with several significant amendments to the Texas Optometry Act. However, since the last Sunset review of the optometry board in 2005, the act remains relatively unchanged. The agency reflects the current stability of the profession.

The Sunset review found the optometry board to be generally well-run. Due in part to its small size and limited resources, the agency's approach to change is restrained and cautious. As with other small agencies under review, certain licensing practices need updating to be more consistent with standard best practices, such as online applications and fee payments, more thorough background checks, and a more modern website. In the area of enforcement, the agency has a light touch on practitioners compared to other agencies. The optometry board issues few tough sanctions, places a limited amount of information about a licensee's disciplinary history on the website, and does not report certain formal board actions to the National Practitioner Data Bank as would appear necessary. This pattern raises questions as to whether the board's regulation tilts more toward the profession than the public.

The agency takes a light touch on enforcement compared to other agencies.

Sunset staff considered whether an independent agency is the most appropriate structure to regulate the practice of optometry or if the benefits of consolidation with other health licensing agencies are significant enough to justify an organizational change. In a separate staff report, Sunset staff recommends transferring optometry regulation to the Health Professions Division of the Texas Department of Licensing and Regulation. Along with similar transfers of nine other health occupations licensing programs, this transfer will help improve efficiency of operations and customer service, reduce the potential of bias from a largely practitioner board, and reduce risk from the effects of possible staff turnover and potential lawsuits in such a small agency. Regardless of the organizational structure, the best practices outlined in this report should be implemented to gain efficiencies and better ensure fair and effective regulation of optometry services in Texas.

Issues and Recommendations

Issue 1

Key Elements of the Agency's Licensing Functions Do Not Conform to Common Licensing Standards.

Sunset staff found some of the board's licensing and enforcement processes do not match model standards or common practices observed in other regulatory agencies. Specifically, the agency has not conducted fingerprint-based criminal background checks on all licensees or checked the National Practitioner Data Bank (NPDB) on license applicants or optometrists holding licenses out of state. Unlike other agencies, the board's statute requires five affirmative votes to take enforcement action, a higher voting burden that favors licensees. The agency has not used technology fully to ease the burden on applicants when applying for a license, or to make disciplinary actions readily available on its website. Finally, the agency may not have reported formal board actions to NPDB as it should.

Key Recommendations

- Require the agency to conduct fingerprint-based criminal background checks of all licensure applicants and licensees over the next five years and to check NPDB for disciplinary actions in other states.
- Eliminate the statutory provision requiring five affirmative votes of the nine-member board to take enforcement action.
- Direct the agency to accept all license applications and fee payments online.
- Direct the agency to make all formal disciplinary orders easily accessible and readily available on its website.
- Direct the agency to report all letters of formal agreement to NPDB, if required.

Issue 2

Texas Should Continue Regulating the Practice of Optometry.

Texas has a continuing need to regulate the practice of optometry. Optometrists perform routine eye exams; prescribe corrective lenses; and diagnose, monitor, and treat conditions such as cataracts, macular degeneration, and glaucoma. Eye exams can detect systemic diseases including diabetes and hypertension, as well as diseases of the eye that could result in blindness if not treated. Some optometrists may prescribe drugs, including controlled substances.

However, as a small, independent agency with limited resources, the agency lags behind the larger health licensing agencies in adopting standard best practices to provide effective regulation and consistent service to the public. In a separate publication, Sunset staff has recommended the transfer of optometry regulation to the Health Professions Division of the Texas Department of Licensing and Regulation. The transfer would allow Texas to operate its system of numerous, inefficient small agencies as a unit to improve services while better controlling costs, and removing several risk factors that result from practice-controlled regulation.

Key Recommendation

- Continue the state's regulation of optometrists, regardless of organizational setting.

Fiscal Implication Summary

Overall, the recommendations in this report would not have a significant fiscal impact to the state, as most are designed to improve internal operations and efficiency at the agency in ways that have minimal impact on resources. Fiscal implications of a potential transfer of this agency are discussed in the Sunset Staff Report entitled Health Licensing Consolidation Project.

AGENCY AT A GLANCE

NOVEMBER 2016

AGENCY AT A GLANCE

The state began regulating optometrists in 1921. The mission of the Texas Optometry Board is to ensure optometry professionals are qualified, competent, and adhere to established professional standards. Key activities of the agency include

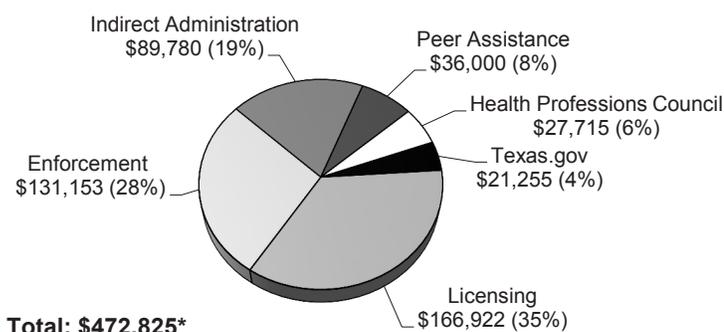
- licensing optometrists, therapeutic optometrists, and optometric glaucoma specialists, and approving continuing professional education programs;
- regulating separations between optometry practices and retail optical dispensing; and
- investigating and resolving complaints, and taking disciplinary action when necessary to enforce the agency's statute and rules.

Key Facts

- **Texas Optometry Board.** The board comprises nine governor-appointed members who serve staggered six-year terms. Six members are optometrists or therapeutic optometrists and three members represent the public. The board has appointed the following five subcommittees from among its membership: Administrative/Licensing, Continuing Education, Rules, Peer Assistance, and Investigation-Enforcement.
- **Funding.** In fiscal year 2016, the agency operated on expenditures of \$472,825, with about 90 percent of its funding coming from fees deposited to general revenue and the remainder from appropriated receipts and interagency contracts. The pie chart, *Texas Optometry Board Expenditures*, breaks down these expenditures.

Historically, the agency generates revenue through fees well in excess of that needed to cover agency expenditures. As shown in the chart on the following page, *Flow of Texas Optometry Board Revenue and Expenditures*, the agency generated revenue of \$1,036,628 in fiscal year 2016, mainly from fees. The agency expended \$494,627 on basic agency operations of licensing, enforcement, indirect administration, and employee benefits. The agency spent another \$84,970 for Texas.gov, peer assistance for individuals with substance dependencies, and the services of the Health Professions Council. Finally, the agency passed through \$132,631 to support the University of Houston's College of Optometry as required by the Texas Optometry Act.¹ After these budgeted expenditures, excess revenue of \$324,400 was

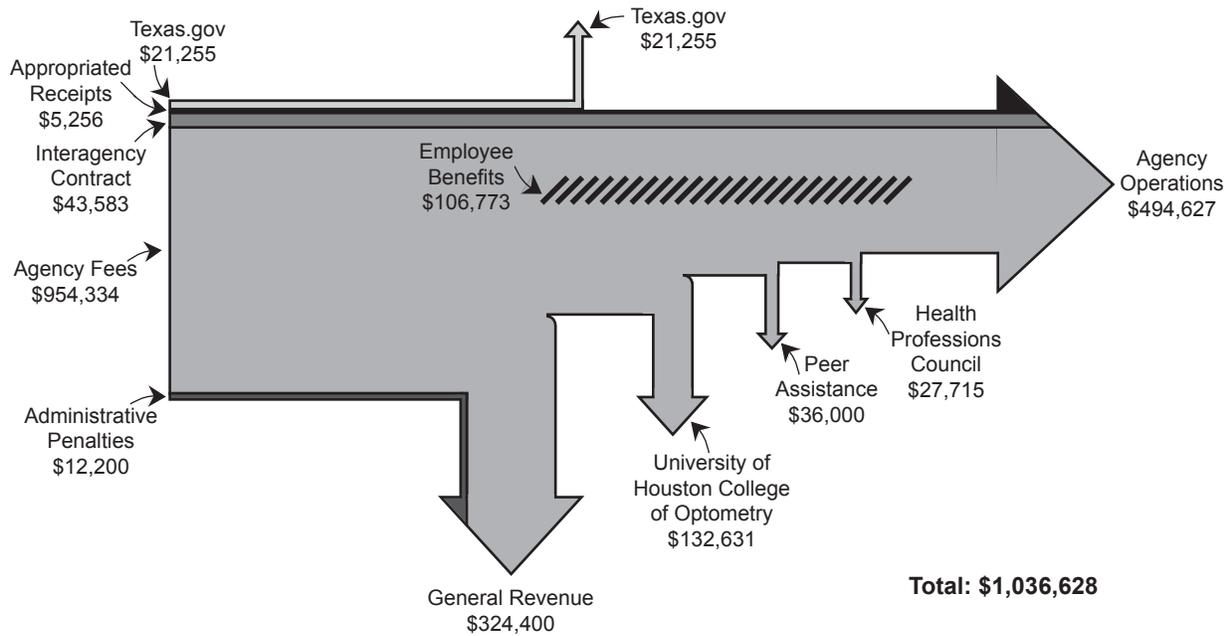
**Texas Optometry Board Expenditures
FY 2016**



* Expenditures for employee benefits and the University of Houston College of Optometry are not included in this amount.

deposited to the General Revenue Fund. Appendix A, *Historically Underutilized Businesses Statistics*, describes the agency’s use of historically underutilized businesses in purchasing goods and services for fiscal years 2013–2015.

**Flow of the Texas Optometry Board Revenue and Expenditures
FY 2016**



- **Staffing.** In fiscal year 2016, the agency employed seven staff, all of whom work in Austin. The agency is also a member of the Health Professions Council, described in Appendix B. The agency’s executive director currently serves as the vice chair of the council.
- **Licensing and examination.** The agency determines eligibility and processes applications and renewals for optometrists, known as Doctors of Optometry. Candidates for licensure must be at least 21 years of age and receive four years of graduate study from one of the 21 colleges of optometry in the United States and Canada accredited by the Association of Schools and Colleges of Optometry. These colleges set their own entry requirements, including undergraduate hours or degrees required of their students. Candidates for Texas licensure also must pass the National Board of Examiners in Optometry examinations, including the Texas jurisprudence examination.

The textbox on the following page, *Practice of Optometry*, describes the various types of optometry licenses and active licensees. Since 1991, all applicants for initial licensure must be licensed as therapeutic optometrists to practice in Texas; however, the agency continues to renew regular optometry licenses, as these practitioners are not required to become therapeutic optometrists. Therapeutic optometrists may upgrade to become optometric glaucoma specialists by getting 30 hours of training, passing a board approved exam, and submitting a certification from an ophthalmologist or optometric glaucoma specialist that the applicant has adequate clinical skills.

Once licensed, optometrists must renew their licenses each year for \$209, or \$217 for optometric glaucoma specialists, and complete 16 hours of approved continuing education annually. The agency reviews continuing education courses developed by providers to determine their acceptability.

- **Related professions.** Ophthalmologists and opticians directly deal with eye care and are sometimes confused with optometrists. Ophthalmologists are physicians trained in eye surgery and eye disease and licensed by the Texas Medical Board. They can perform all the services of optometrists as well as other services such as major eye surgery, including, for example, cataract surgery or laser vision correction surgery. Ophthalmologists have full prescriptive authority. In comparison, optometrists licensed since 1991 may prescribe only topical medicine or, after receiving the certification for optometric glaucoma specialist, prescribe a limited number of oral prescription drugs.

Opticians are eyewear providers who are not licensed. They manufacture and sell glasses, and sell or deliver contact lenses. Opticians cannot dispense glasses or contacts without a prescription from an optometrist or ophthalmologist.

- **Relationship with optical dispensers.** The Texas Optometry Act authorizes the agency to oversee aspects of the relationship between optical dispensers and optometrists in Texas. These requirements are complicated; however, the main thrust of these provisions is to eliminate control by retail dispensers over the optometrists' professional judgment and practice. For example, the Act prohibits a retail optical dispenser from employing an optometrist. Further, if an optometrist occupies space in a facility where retail optical sales occur, the Act requires a separate patient entrance and a solid wall between the retail space and the optometrist's practice.
- **Enforcement.** The agency regulates the profession of optometry by conducting office 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.

Sanctions available for formal disciplinary action include letters of formal agreement, administrative penalties, probated suspension, suspension, and revocation. For less serious violations, the agency may issue a remedial plan that does not remain on the licensee's record and may assess a plan administration fee of \$1,000 to recover the cost of the plan. The agency also may issue compliance letters, which are similar to warning letters in other licensing agencies and do not go on the permanent record of the licensee.

Practice of Optometry FY 2016

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

Optometrist — 103 licensees

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

Therapeutic Optometrist — 864 licensees

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

Optometric Glaucoma Specialist — 3,016 licensees

- conduct the same practices as a therapeutic optometrist
- administer and prescribe certain oral prescription medications and antiglaucoma drugs
- co-manage treatment of glaucoma with an ophthalmologist

In fiscal year 2016, the agency averaged 160 days to resolve a total of 136 complaints. The table, *Texas Optometry Board Enforcement Data*, breaks down these 136 complaints by category and disposition. The agency ordered administrative penalties of \$4,400, not counting administrative penalties that were combined in a board order with other sanctions, which together total \$16,400.

***Texas Optometry Board
Enforcement Data — FY 2016***

Complaints Resolved by Category	
Standard of care	33
Criminal charges	25
Patient records incomplete	15
Office requirements ²	13
Professional identification ³	10
Prescription or record release ⁴	9
Fraud	6
Advertising	3
Unlicensed practice	3
Professional misconduct	2
Other ⁵	17
<i>Total</i>	<i>136</i>
Disposition of Complaints	
<i>Formal Disciplinary Action</i>	
Administrative penalty ⁶	13
Probated suspension	2
Letter of formal agreement ⁷	2
<i>Subtotal</i>	<i>17</i>
<i>No Formal Disciplinary Action</i>	
Compliance letter ⁸	26
No violation	88
No jurisdiction ⁹	3
Student loan defaults ¹⁰	2
<i>Subtotal</i>	<i>119</i>
<i>Total</i>	<i>136</i>

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- 1 All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov>. Section 351.154(b), Texas Occupations Code.
- 2 Includes failure to note optometrist's name on door, no sign directing clients to consumer information, improper physical setup with an optical business, etc.
- 3 Includes failure to display optometrist's name and title on prescriptions, business cards, and postings according to statute or rule.
- 4 Failure to release prescriptions or records upon proper request.
- 5 Miscellaneous issues of a minor nature, usually resulting in a determination of no violation.
- 6 These administrative penalties are not combined with other sanctions.
- 7 A letter of formal agreement is similar or the same thing as a reprimand and was called a reprimand until about 15 years ago.
- 8 Compliance letters, similar to warning letters in other agencies, are advisory in nature and do not go on the permanent record of the licensee.
- 9 Nonjurisdictional complaints counted here are typically minor complaints related to optometry, including minor billing disputes, rude behavior, dissatisfaction with service, etc. The agency attempts to resolve these as a service to the public. Not included, for example, would be complaints about ophthalmologists, which are forwarded to the Texas Medical Board; or opticians, which are returned to the complainant.
- 10 The agency opens a complaint against optometrists whose Texas-guaranteed student loans are in default and who have not entered into a repayment agreement. Statute does not allow these individuals to renew their licenses.

ISSUES

ISSUE 1

Key Elements of the Agency's Licensing Functions Do Not Conform to Common Licensing Standards.

Background

The mission of the Texas Optometry Board is to protect the public's health, safety, and welfare by licensing qualified applicants to practice optometry and ensuring they comply with the requirements of the Texas Optometry Act, the Contact Lens Prescription Act, and agency rules. To achieve this purpose, the agency reviews initial license applications, renews licenses annually, and investigates complaints against optometrists, taking disciplinary action when necessary.

The Sunset Commission has a long history in evaluating licensing agencies, as the increase of occupational licensing programs set in motion the creation of the Commission in 1977. Since then, the Sunset Commission has completed more than 100 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 agency's statute and rules differ from these model standards and describes the potential benefits of conforming to standard practices.

Findings

Statutory licensing provisions and agency procedures do not follow model licensing practices, presenting unnecessary hurdles to applicants and reducing efficiency of agency operations.

- **Missing fingerprint background checks.** To help protect the public's safety, licensing agencies commonly conduct criminal background checks using the Department of Public Safety's (DPS) fingerprint system, which accurately identifies the individual, provides automatic updates of criminal history, and uncovers criminal history on applicants and licensees nationwide. The agency began conducting fingerprint background checks on new license applicants in 2008 in place of the less reliable name-based system. However, the agency never required the approximately 70 percent of optometrists licensed before 2008 to undergo a fingerprint background check. Instead, the agency relies on these licensees to self-disclose any criminal history when renewing their licenses. Directing the agency to require licensees who were not fingerprinted for initial licensure to get a fingerprint-based criminal background check at an upcoming renewal would help the agency comprehensively assess each licensee's criminal history to better protect the public.
- **Burdensome license renewal process.** A regulatory agency should have a renewal process that helps ensure adequate oversight of persons or activities regulated. Statute requires optometrists to renew their licenses

About 70 percent of optometrists have not had a fingerprint background check.

annually, which adds to the administrative burdens of the small agency staff. Several health professionals who engage in similar types of activity, including doctors, nurses, and pharmacists, renew their licenses every two years. Changing the optometry license renewal to every two years would ease the administrative burden on agency staff without compromising oversight of licensees.

Renewing licenses every two years would ease staff's workload.

- **Subjective qualification for licensure.** Qualifications for licensure should not overburden applicants or unreasonably restrict entry into practice. Currently, statute requires applicants for licensure to be of “good moral character,” a subjective, vague requirement that may be determined inconsistently. Agency rule requires applicants to submit two references from people attesting to their good moral character, which has never been the basis for denying a license. Instead, the agency relies on several provisions in statute and rule that set out guidelines for denying a license based on criminal history.¹ Removing the statutory requirement that applicants be of good moral character would be in line with the agency’s current practice of reviewing an applicant’s criminal history and denying licenses based on criminal history related to the practice of optometry. Eliminating the letters of reference would remove an unused burdensome requirement that wastes time and resources.

The agency does not accept applications and related payments online, reducing convenience to applicants.

- **Unnecessary and cumbersome application requirements.** Application forms should be simple and straightforward, and only require information necessary for the agency to determine the applicant’s eligibility for a license. The agency’s license application requires notarization, an unnecessary requirement on the applicant that adds little value to the process. The primary purpose of notarization is to verify identity, not truthfulness, and state law already prohibits a person from knowingly making a false entry in a government record.² Furthermore, applicants must submit all license applications in hard copy and pay related fees by money order or certified check.

Other state licensing agencies including the State Board of Dental Examiners and the State Board of Pharmacy accept license applications and fees online, which is easier for the applicant and adds little cost to the licensee. The cost to the licensee for online fee payments varies from \$2 to \$5, depending on the amount of the licensing fee. For example, an applicant for examination would pay \$4 in addition to the \$150 examination fee, a small amount when compared to the fee itself and the convenience of online payment. Removing the requirement that applications be notarized and allowing applications and fees to be submitted online would lessen filing hurdles on applicants without reducing the agency’s ability to determine an applicant’s eligibility for licensure. Accepting online license applications and fees would also be easier and more efficient for agency staff.

- **Restrictive fee authority.** A licensing agency should have authority to set its own licensing and renewal fees. Setting a fee floor in statute limits the agency’s ability to lower fees in line with the agency’s actual cost to

adequately regulate a program. The board's statute currently includes a fee floor, which requires the board to set fees at or above amounts established in 1993.³ The floor requires a minimum license renewal fee for optometrists of \$125. Removing the statutory fee floor would improve the agency's fee management authority to ensure a funding structure that funds needed operations while also being fair to licensees.

- **Inadequate review of license sanction data.** Licensing agencies should consult enforcement information compiled by national or federal data banks to monitor disciplinary actions against practitioners licensed or seeking licensure in Texas who are also licensed in other states. Federal law requires each state optometry board to report disciplinary actions to the National Practitioner Data Bank (NPDB).⁴ The data bank provides agencies the information necessary to decide if licensees disciplined in other states should be allowed to practice in Texas or if enforcement action is warranted based on violations that reflect a practitioner's inability to safely perform his or her job. The intent is to ensure a licensee's mobility cannot be used to evade discipline.

Currently, the agency checks with other state optometry boards for disciplinary actions before awarding an initial license if the optometrist has been licensed in another state; however, the agency does not consult the NPDB. About one-fourth of Texas optometrists hold a license in another state. By not checking the data bank upon initial licensure or at renewal for optometrists with licenses in other states, the board may be licensing optometrists who have faced enforcement or other legal action outside Texas, potentially putting Texans at risk. The agency also does not have clear legal authority to sanction a licensee based on actions taken by other states.

- **Outdated and cumbersome website.** Regulatory agencies exist to protect the public, and the public should have access to general information about the profession and the operation of the agency. The agency's website design is outdated and not user friendly for either the public or licensees. The website falls short of meeting basic standards for good government websites, such as simple navigation, quick and obvious access to disciplinary actions taken against a licensee, a prominent search function, and emphasis on use of images to help convey messages instead of text-dense web pages. Absence of these attributes diminishes the public's ability to readily look up disciplinary actions to help make informed choices or search the website for other important information about the regulation of optometry. Although the agency receives information technology support from the Health Professions Council, as one of the smallest agencies in the council, it must wait its turn for services, such as needed upgrades to its website.

Checking the federal databank helps ensure licensee's mobility is not used to evade discipline.

The agency's website is outdated and not user friendly.

Nonstandard enforcement practices could reduce the agency's effectiveness in protecting the public.

- **Opaque disciplinary orders.** Licensing agencies should make enforcement information such as final disciplinary orders and sanctions readily available to the public. This transparency allows the public to make more informed healthcare provider choices. The Texas Optometry Board's primary means of making the general public aware of disciplinary action is through its website, a good way to share information. However, the result is not as useful as it should be.

Disciplinary action against an optometrist is hard to find on the website.

Although notice of disciplinary action against a licensee is available on the agency's website, that information is hard to find. After locating the search page and finding the particular licensee of interest, a "disciplinary actions" field simply notes whether the agency has taken disciplinary action against the individual. A person wanting to know more about the severity and type of infraction and sanction must go through several steps to get that information. The person must figure out from the website or the agency that such information can be requested in writing, often by email. The agency then sends back copies of formal board actions against the licensee.

The agency also has an inconsistent approach to noting formal actions on its website. The agency flags all licensees with suspensions, probated suspensions, and revocations, but chooses to flag practitioners receiving letters of formal agreement on a case-by-case basis. Although these agreements involve less serious issues, the information could still inform the public in selecting an optometrist. The procedure also lends itself to potential inconsistency and unfairness as to which licensees the agency flags online.

Healthcare licensing agencies that make all formal board orders and, in some cases, additional enforcement information available online include the Texas Medical Board, the Texas State Board of Podiatric Medical Examiners, and the Texas State Board of Pharmacy. The Texas Optometry Board should follow these examples, posting the type of formal disciplinary action with its formal order online. These changes would improve the transparency of the agency's disciplinary decisions and its efforts to carry out its primary mission of protecting the public.

- **Questionable reporting to the National Practitioner Data Bank.** By federal law, various entities must report to the National Practitioner Data Bank (NPDB), a repository of actions taken against healthcare practitioners and certain entities maintained by the U.S. Department of Health and Human Services. The data bank was created in part as a result of congressional efforts to identify incompetent health care practitioners moving from state to state without disclosure of poor performance.⁵

The Texas Optometry Board, as well as other state licensing agencies for healthcare practitioners, must report certain kinds of information to NPDB, including a revocation or suspension of a license, reprimand, censure, or probation.⁶ Currently, board practice is to report all suspensions, probated suspensions, and revocations to NPDB. However, the board reports “letters of formal agreement,” another formal action against licensees for more minor infractions, only on a case-by-case basis depending on the board’s view of severity. The board issued eight letters of formal agreement in fiscal years 2014–2016, reporting none to NPDB.

Letters of formal agreement appear to be the same as reportable reprimands. In fact, agency staff indicate these agreements used to be called reprimands until about 2000. An action must be reported to NPDB based on “whether it satisfies NPDB reporting requirements and not based on the name affixed to the action by a reporting entity.”⁷ The agency should report all of these formal actions to ensure compliance with federal law unless discussions with the agency’s legal counsel and NPDB indicate the actions do not meet reporting definitions.

- **Unusual statutory voting requirement favoring licensees.** An agency’s enforcement process should not make it overly difficult to take disciplinary action. The Optometry Act stipulates the board may take disciplinary action or refuse a license only on a vote of five or more of its nine members.⁸ This statutory provision of the Optometry Act sets a higher voting burden than the majority-of-the-board requirement typically followed in other licensing agencies.

Requiring five affirmative votes to bring an enforcement outcome favors the licensee. Typically, three of the board’s nine members who participated in an informal settlement agreement must recuse themselves at a full board meeting when a vote is called on a disciplinary issue. Assuming full attendance at the board meeting, five of the six remaining members must agree before bringing a formal disciplinary action. For most other health licensing agencies with nine board members, a majority of four out of six, one less vote than required in the Optometry Act, would sustain an enforcement action.

This burdensome voting requirement could aggravate an enforcement effort that already yields fewer disciplinary actions per licensee in revocations, suspensions, and probated suspensions than most other health licensing agencies under review. As an additional concern, the high voting threshold may cause board members to feel more pressure to reach five votes among those able to vote, distorting the voting pattern from the more normal majority of board members present. Removing the current voting requirement would strengthen the agency’s enforcement framework to improve the regulatory balance between licensees and the public.

Requiring five affirmative votes to bring an enforcement action favors optometrists.

“Habitual drunkard” is a subjective and outdated term in statute.

- **Outdated provisions related to physical or mental impairments.** Statute should contain clear and definable provisions using modern terminology better enabling an agency to take action against physically or mentally impaired licensees or applicants who pose a danger to their patients. Statute also should incorporate ways to evaluate any alleged impairment to promote objective and informed decision making.

Provisions in the Optometry Act dating to 1939 authorize the agency to discipline a licensee or refuse to grant a license to a person who is an “habitual drunkard” or has “become insane,” subjective and outdated terms given to various interpretations. Another provision authorizes discipline for a licensee who is “addicted to the use of morphine, cocaine, or other drugs having similar effect.”⁹ Drugs that can be abused and with different effects from morphine and cocaine exist today. In addition, the agency’s statute does not include a mechanism to evaluate claims of impairment.

Several health licensing agencies have statutes addressing these concerns. The Texas State Board of Pharmacy’s statute authorizes the agency to apply discipline when an apparent incapacity has developed “that prevents or could prevent the applicant or license holder from practicing pharmacy with reasonable skill, competence, and safety to the public.”¹⁰ The statute also authorizes the agency to request a pharmacist to submit to a mental or physical examination on probable cause, and, after appropriate due process steps, require this examination if the licensee refuses.¹¹ Other health licensing agencies whose statutes include elements of such provisions include the Texas Medical Board, the Texas State Board of Podiatric Medical Examiners, and the Texas Board of Nursing.¹²

Unlike this agency, many other licensing agencies protect a complainants’ identity for as long as possible.

Modifying the agency’s statute to replace outdated terms related to physical and mental impairment and substance use disorders would offer clearer and more defensible grounds for taking action to protect the public when necessary. Adding provisions to authorize the agency to seek evaluation of an applicant or licensee to assess any impairment of danger to optometry patients would protect applicants and licensees while informing agency decision making.

- **Limited maintenance of complainants’ confidentiality.** When investigating complaints, the agency generally sends an unredacted photocopy of the complaint directly to the optometrist for response, potentially discouraging people from filing legitimate complaints. For complaints that relate to optometric services or care, the agency’s actions risk potential retaliation against complainants, who could include patients, optometric office staff, or other healthcare practitioners. While optometrists may ultimately find out the identity of the complainant as the investigation process proceeds, many other health licensing agencies do their best to protect the identity of complainants for as long as possible.

Recommendations

In a separate publication, Sunset staff has recommended transfer of optometry regulation to the Health Professions Division of the Texas Department of Licensing and Regulation (TDLR) to achieve administrative efficiencies and greater coordination in the organization of the state's small, separate health occupational licensing agencies. The recommendations that follow have been written assuming continuation of the Texas Optometry Board; however, all apply in concept if the regulation is carried out by TDLR.

Change in Statute

1.1 Require the agency to conduct fingerprint-based criminal background checks of all licensure applicants and licensees.

New licensees already undergo a fingerprint-based background check. This change would require existing licensees who did not undergo a fingerprint-based criminal background check upon initial licensure to undergo the checks. Licensees would pay the approximately \$40 cost to do so at a renewal cycle specified by the agency. Due to the large number of optometrists who have not undergone fingerprint background checks, the recommendation would allow for a five-year, staggered implementation timeframe, which must be complete by September 1, 2022. To ensure compliance, this recommendation would authorize the board to administratively suspend an optometrist's license for failing to comply with the background check requirement. This recommendation would ensure the agency could effectively monitor all licensees for criminal conduct and take disciplinary action to protect the public when warranted.

1.2 Authorize the agency to provide biennial license renewal.

This recommendation would allow the board to adopt biennial renewal for licensees. The board would determine when to start and how to implement biennial renewals. This recommendation would reduce time spent on processing renewals and alleviate burden on staff without compromising agency oversight of licensees.

1.3 Remove subjective qualification required of applicants for licensure.

This recommendation would remove the requirement for applicants to be of "good moral character," which is vague and subjective. The agency already adheres to Chapter 53 of the Occupations Code and would continue to receive and review criminal history information to determine applicants' eligibility for licensure. The recommendation would also direct the agency to remove the same requirement in rule as well as the requirement that applicants provide two references as to good moral character.

1.4 Remove the notarization requirement for individuals applying for licensure.

This recommendation would remove the statutory requirement for licensure applicants to submit notarized applications. Current provisions of the Penal Code that make falsifying a government record a crime would continue to apply to these applications. This recommendation would remove an unnecessary step in the application process and an obstacle to putting applications online, making the process less burdensome for applicants and more efficient for agency staff.

1.5 Remove the statutory limitation currently restricting the agency's authority to lower fees.

This recommendation would remove the fee floor currently listed in statute. The agency would have greater discretion to lower its fees if warranted.

1.6 Require the agency to check for disciplinary or other legal actions in other states for license applications and renewals, and authorize the agency to pursue any necessary enforcement action.

This recommendation would require the agency to verify licensees are not subject to disciplinary or other legal actions taken in other states that warrant similar action in Texas. Under this recommendation, the agency should check the National Practitioner Data Bank when processing all initial license applications and renewals for optometrists licensed in other states to facilitate safe optometric care for the public. Applicants and affected licensees would pay \$2 or \$4 to cover the cost of querying the data bank, depending on the type of query. This recommendation would also authorize the agency to take any necessary enforcement action based on actions taken by other states so long as the conduct is also a violation of Texas law.

1.7 Eliminate the provision requiring five affirmative votes of the nine-member board to take an enforcement action.

Eliminating this requirement would return the voting practice to a majority of a quorum present and voting rather than a majority of the board. This change would remove from statute the regulatory bias favoring the licensee and bring voting procedures in line with other health profession licensing agencies.

1.8 Replace archaic and subjective disciplinary provisions such as "habitual drunkard" with more specific disciplinary criteria, and authorize the agency to order physical and mental examinations if probable cause exists to do so.

Modifying the agency's statute to include more modern provisions would offer clearer, less subjective, and more defensible grounds for taking action related to physical or mental incapacity or substance abuse while better protecting licensees and applicants from decisions made on incomplete information. Ultimately, the public benefits from better decision making in applying discipline.

Management Action**1.9 Direct the agency to accept all license applications and fee payments online.**

The agency should work with the Health Professions Council and Texas.gov to enable receipt of all license applications online, as well as the associated fee payments. This recommendation would reduce the burden on applicants by eliminating the requirement to submit hard copy application forms and mail in checks, while also reducing the administrative burden on agency staff to process payments.

1.10 Direct the agency to update its website.

The agency should work with the Health Professions Council to develop a more user-friendly website for the public and licensees.

1.11 Direct the agency to make all formal disciplinary orders easily accessible and readily available on its website.

This provision would greatly improve the transparency of the board's operations and give the public more access to information potentially important to their decisions on health providers.

1.12 Direct the agency to report all letters of formal agreement to the National Practitioner Data Bank unless discussions with agency counsel and the federal administrator indicate otherwise.

The agency should discuss with NPDB and agency counsel its current approach to reporting and ways to bring future and past efforts into compliance, as necessary. This action would ensure the agency is meeting federal reporting requirements.

1.13 Direct the agency to maintain complainants' confidentiality when possible.

This recommendation would direct the agency to protect the identity of complainants to the extent possible, while ensuring that licensees still have access to all necessary information to fully respond to complaints. To accomplish this recommendation, the agency could consider summarizing the complaint allegations or redacting complainants' names from copies of complaints when providing notice of a complaint to respondents. By better protecting complainants' identities, this recommendation would make the public more comfortable filing complaints without fear of retaliation.

Fiscal Implication

Overall, while several recommendations would reduce administrative burdens on agency staff, the recommendations would not have a significant fiscal impact to the state. Recommendation 1.1 would not have a fiscal impact to the agency, but would require many licensed optometrists to pay about \$40 for a fingerprint background check through DPS. The board could handle any increased workload related to background checks within current resources. Recommendation 1.6 would not have a fiscal impact to the agency, but would require licensure applicants and about 25 percent of licensed optometrists upon annual renewal to pay \$2 or \$4 for a query of the National Practitioner Data Bank, depending on how the agency implements this recommendation.

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- ¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov>. Chapter 53 and Section 351.501, Texas Occupations Code; 22 T.A.C. Section 277.5.
- ² Section 37.10, Texas Penal Code.
- ³ Section 351.152, Texas Occupations Code.
- ⁴ Health Care Quality Improvement Act of 1986 (42 U.S.C. Section 11101 et seq.).
- ⁵ “NPDB e-Guidebook,” Chapter A: Introduction and General Information, Background section, U.S. Department of Health and Human Services, updated April 2015, <https://www.npdb.hrsa.gov/guidebook/ABackground.jsp>.
- ⁶ Ibid., Chapter E., Reports, Reporting State Licensure and Certification Actions section; “National Practitioner Data Bank: Reportable Actions,” <https://www.npdb.hrsa.gov/hcorg/whatYouMustReportToTheDataBank.jsp>; and 45 C.F.R. Part 60, Section 60.9(a), http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=3c4c30734eeeca807b04d7d51aca5f58&mc=true&n=pt45.1.60&cr=PART&ty=HTML#se45.1.60_19.
- ⁷ Ibid., Terminology Differences, U.S. Department of Health and Human Services, updated April 2015, <https://www.npdb.hrsa.gov/guidebook/EOverview.jsp#TerminologyDifferences>.
- ⁸ Section 351.501(a), Texas Occupations Code.
- ⁹ Section 351.501(a)(4), Texas Occupations Code.
- ¹⁰ Section 565.001(a)(4), Texas Occupations Code.
- ¹¹ Section 565.052(a), Texas Occupations Code.
- ¹² Sections 164.051 and 164.056, Texas Occupations Code (Texas Medical Board); Sections 202.253(a)(3), 202.253(a)(15), and 202.253(b)–(c), Texas Occupations Code (Texas State Board of Podiatric Medical Examiners); and Section 301.4521(b), Texas Occupations Code (Texas Board of Nursing).

ISSUE 2

Texas Should Continue Regulating the Practice of Optometry.

Background

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, creating the therapeutic optometrist license in 1991, and creating the optometric glaucoma specialist certification in 1999. The agency also regulates the separation of business interests between optometrists and retail optical dispensing.

The agency seeks to protect the public by ensuring only qualified optometrists practice in Texas. To achieve this goal, the agency regulates 4,541 individuals licensed to practice optometry with a staff of seven employees. The agency enforces the Texas Optometry Act and the state's Contact Lens Prescription Act, investigating and resolving complaints regarding its licensees. In fiscal year 2016, the agency received 151 jurisdictional and non-jurisdictional complaints, and resolved 136 complaints. Of these complaints, the most common related to standard of care, which can include complaints about corrective lens prescriptions, improper diagnosis of an eye disease, or failure to refer a patient to an ophthalmologist to treat a more serious condition.

Findings

Texas has a continued interest in regulating the practice of optometry, regardless of the agency carrying out that role.

Sunset staff has recommended in a separate publication transferring the regulatory responsibilities of the Texas Optometry Board, as well as that of another nine health occupational licensing agencies, to the Health Professions Division of the Texas Department of Licensing and Regulation (TDLR). Staff determined that administrative efficiencies and greater coordination could be achieved in the consolidation of the state's separate health licensing agencies, including optometry. Further, consolidation would allow for a focus on the implementation of best practices and more robust regulation designed to better protect the public. However, regulation of optometry should continue, regardless of the administering agency.

A primary role of state regulation of occupations is to protect the public from harm. 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. A properly performed eye exam can detect systemic diseases, such as diabetes and hypertension, as well as defects and diseases of the eye. If treated early, these conditions may be cured or controlled; if not treated, they could result in severe injury or even blindness. 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 through licensing optometrists and imposing discipline when necessary.

Optometrists' services can cause serious harm and should be regulated, regardless of the administering agency.

As a small, independent agency with limited resources, the agency could benefit from an umbrella agency structure to improve certain operations.

While the small agency operates efficiently in processing license applications and pursuing enforcement cases, an umbrella structure such as TDLR that consolidates multiple regulatory programs can offer distinct advantages compared to the current independent agency structure.

- **Increased efficiency.** A benefit of consolidation is not having to replicate similar licensing, enforcement, and administrative functions in a series of small agencies. Instead, consolidating regulation of several professions into a larger agency allows staff to specialize along functional lines, such as license issuance and renewal, investigations, and accounting, increasing the long-term efficiency of both the regulatory and administrative functions being performed by the smaller independent agencies.

The optometry board must fulfill the basic administrative requirements of typical state agencies such as budgeting, accounting, information technology, human resources, and reporting, a drain on the small staff's limited time and resources. The agency receives some administrative support services, including information technology, from the Health Professions Council (HPC) as one of its 13 member agencies. Use of HPC's services requires collaboration and good working relationships among all member agencies, each of which has its own mission and priorities. This sharing arrangement introduces the potential for member conflict over HPC's limited seven-member staff, a challenge absent in a larger agency structure with a single director and mission.

Even with technology support from HPC, the agency does not have sufficient staff or resources to develop services typically seen at larger regulatory boards, particularly in the use of technology to improve services. Licensees at larger boards, such as physicians and nurses, have access to a sophisticated online portal for accepting license applications and complaints; user-friendly systems for licensees to input continuing education and other information; and websites featuring easier navigation and intuitive browsing. While the optometry board's website provides useful information to consumers and licensees, its capabilities are limited.

- **Insulation from practitioner bias.** TDLR's umbrella structure creates the opportunity to minimize or eliminate market participants' involvement as decision makers on enforcement or policy issues related to their profession. Practice-controlled regulation could produce bias because of the practitioner board members' involvement in the profession.

The optometry board, as well as smaller health licensing agencies, depends on practitioner board members for expertise in certain complaint investigations and informal settlement conferences where recommendations on disciplinary

Administrative tasks typical of all state agencies drain the optometry board's limited time and resources.

TDLR's structure eliminates market participants' role as final decision makers on rules and enforcement.

actions are made. The optometry board, like various other licensing boards, comprises two-thirds practitioners who participate in decision making on enforcement and policy matters.

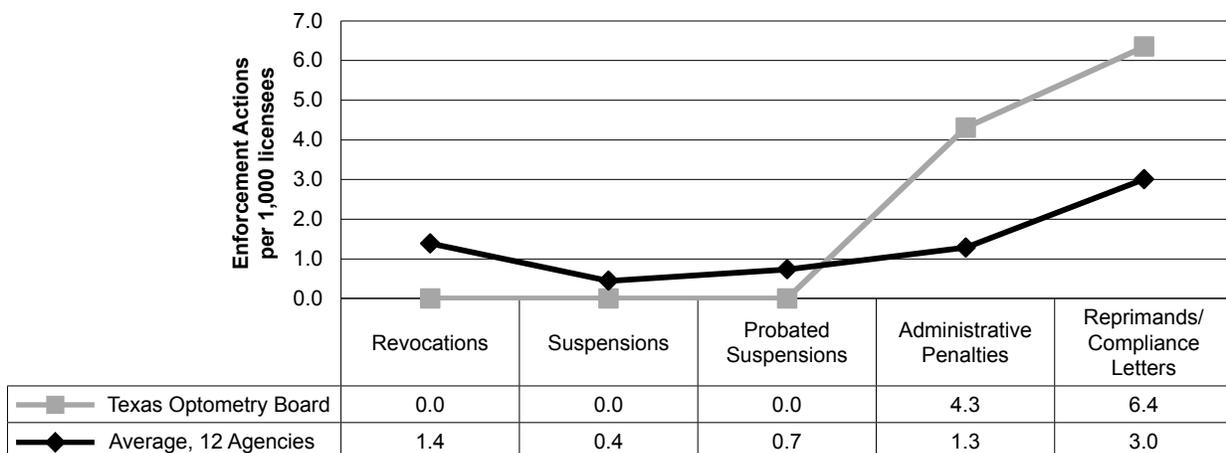
In contrast, TDLR’s umbrella model uses regulated professionals not as decision makers but as advisors to the agency’s public member commission and staff. Under this more objective regulatory approach and with the advice of the advisory board, staff carry out complaint investigations and settlement conferences, not members of the regulated community, a best practice for licensing agencies. While the advisory board generates all practice-related rules, the public commission ultimately makes final decisions on enforcement and rulemaking.

The agency’s enforcement approach raises questions as to whether regulation tilts toward favoring the optometrist.

The character of optometry, while certainly having potentially serious consequences if not practiced appropriately, probably does not produce as many serious complaints as some other health licensing professions. Still, when taken together, elements of the optometry board’s enforcement approach raise questions as to whether regulation of the profession tilts toward favoring the optometrist more than the general public. Enforcement would benefit from placement in an organization less reliant on practitioners for investigations and final enforcement decisions.

The graph, *Comparison of Enforcement Action*, compares the optometry board’s enforcement actions to the average number of enforcement actions taken by the 12 other health licensing agencies under review this biennium.¹

**Comparison of Enforcement Action
Texas Optometry Board vs. Health Licensing Agencies Under Review
FY 2015**



The graph shows that the board ordered no revocations, suspensions, or probations in fiscal year 2015, falling below the average actions of these types per thousand licensees for the other 12 agencies. The optometry board was the only agency ordering no revocations and was one of four agencies ordering no suspensions or probations in that fiscal year. The optometry board exceeded the average of other agencies for reprimands, compliance

letters (also called warning letters in some agencies), and administrative penalties not levied with other sanctions, all actions the agency typically takes for minor infractions. A review of data from fiscal years 2014 and 2016 also shows no revocations or suspensions, although two probated suspensions were finalized in fiscal year 2016.

Important disciplinary information is not available online.

In addition, the agency does not make information about a licensee with a disciplinary history readily available to the public through its website as various other health licensing agencies do. As pointed out in Issue 1, the agency notes on its website simply “disciplinary action” for revocations, suspensions, or probated suspensions against a licensee, but typically does not note formal reprimands, called “letters of formal agreement” by the agency. Finding out what a disciplinary action entails, such as the type of sanction or conditions put on a licensee, requires a written request for the corresponding board order and the requestor’s understanding of that requirement. Additionally, the board does not report letters of formal agreement to the National Practitioner Data Bank, unlike most other licensing agencies under review.

- **Reduced risk.** Having a large, highly trained staff with greater resources at an umbrella agency like TDLR reduces some of the risks inherent in a smaller independent licensing agency. At the optometry board, the seven member staff typically perform discreet tasks to support the licensing, enforcement, or administrative functions of the agency. With such a lean staff, if one person resigned or took extended sick leave, the agency would be challenged to carry out its mission. The limited number of positions and career paths at the optometry board also makes it hard to implement succession planning. The existing staff may not have the same experience or qualifications as the executive director and may not be qualified to fill that role. Consequently, if the executive director leaves, the board may have to look to other agencies for a replacement.

Litigation is another area of vulnerability. If the optometry board became involved in litigation, either an appeal from an enforcement action by the board or a suit brought against the board directly, the lawsuit would drain staff time and resources away from the agency’s mission. Health licensing agencies have increasingly been involved in lawsuits. Agency staff have expressed concern over this very issue, given their experience with previous lawsuits and federal investigations.

Only 17 states regulate optometry through a stand-alone agency.

All other states regulate the practice of optometry, but through various regulatory models.

The chart on the following page, *Regulation of Optometry in the United States*, describes the structure of optometry regulatory agencies in the country. A minority of states uses a separate, stand-alone agency, as Texas does. Eleven states regulate optometry through their department of health or a health licensing agency, while another 22 regulate the profession through a general umbrella licensing agency.

Regulation of Optometry in the United States

Independent Agency	AL, AZ, AR, CA, KS, KY, MN, MS, NV, NC, ND, OH, OK, OR, TX, WV, WY	17
Department of Health or Health Licensing Agency	CT, FL, IA, LA, MD, NE, RI, SD, TN, VA, WA	11
General Umbrella Licensing Agency	AK, CO, DE, GA, HI, ID, IL, IN, ME, MA, MI, MO, MT, NH, NJ, NM, NY, PA, SC, UT, VT, WI	22

The board's statute does not reflect standard language typically applied across-the-board during Sunset reviews.

The Sunset Commission has developed a set of standard recommendations that it applies to all state agencies reviewed. These standards are “good government” provisions designed to ensure open, responsive, and effective government. One such standard in the board’s statute requires board members to receive training and information necessary for them to properly discharge their duties. The agency has developed an extensive training manual for all new board members. However, statute does not require such a manual, or specify training must include a discussion of the scope of and limitations on the board’s rulemaking authority. Such a provision would not be needed if optometry regulation is transferred to TDLR, but should be added to statute if regulation remains at the Texas Optometry Board.

Recommendations

Change in Statute

2.1 Continue the state’s regulation of optometrists, regardless of organizational setting.

Sunset staff has recommended the transfer of optometry regulation to the Health Professions Division of the Texas Department of Licensing and Regulation in a separate staff publication. The transfer would help improve efficiency of operations, reduce the potential of bias from a largely practitioner board, and reduce risk from the effects of possible staff turnover and potential law suits in an agency the small size of the Texas Optometry Board. Regardless of organizational setting, regulation should be continued to protect the public from harm that could be caused from the improper practice of optometry.

2.2 If regulation of optometry is not transferred to the Texas Department of Licensing and Regulation, update the standard across-the-board requirement related to board member training.

If continued as a separate agency, this recommendation would require the agency to develop a training manual that each board member attests to receiving annually. The recommendation also would require existing board member training to include information about the scope and limitations of the board’s rulemaking authority.

Fiscal Implication

These recommendations have no fiscal impact. Fiscal implications of transferring regulation from the Texas Optometry Board and nine other health licensing agencies to the Texas Department of Licensing and Regulation are addressed in a separate staff publication. If the optometry board is continued as an independent agency, the agency’s appropriation of about \$480,000 a year would continue to be needed.

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¹ Agencies included among the 12 health licensing agencies are the following: Texas Board of Chiropractic Examiners, State Board of Dental Examiners, Texas State Board of Examiners of Marriage and Family Therapists, Texas Medical Board, Texas Board of Nursing, Texas Board of Occupational Therapy Examiners, Texas Board of Physical Therapy Examiners, Texas State Board of Pharmacy, Texas State Board of Podiatric Medical Examiners, Texas State Board of Examiners of Professional Counselors, Texas State Board of Examiners of Psychologists, and Texas State Board of Social Worker Examiners.

APPENDICES

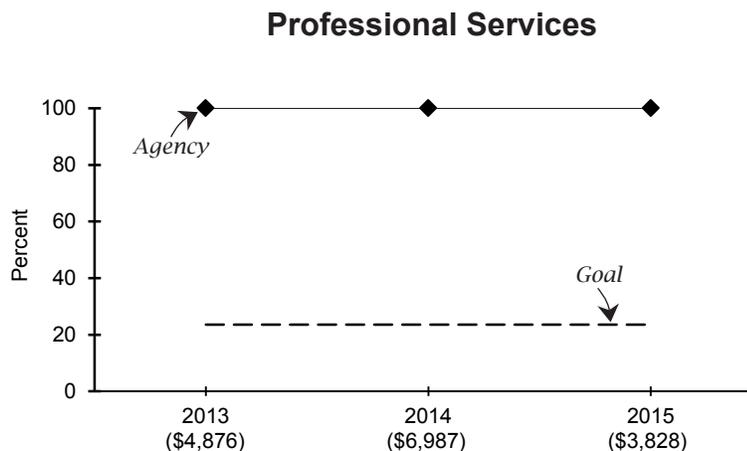
APPENDIX A

Historically Underutilized Businesses Statistics 2013 to 2015

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's use of HUBs in purchasing goods and services. The agency maintains and reports this information under guidelines in statute.² In the charts, the dashed lines represent the goal for HUB purchasing in each category, as established by the comptroller's office. The diamond lines represent the percentage of agency spending with HUBs in each purchasing category from 2013 to 2015. Finally, the number in parentheses under each year shows the total amount the agency spent in each purchasing category.

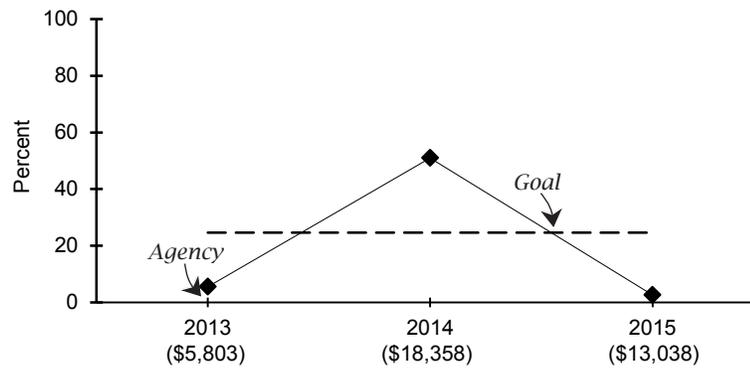
The agency well exceeded statewide purchasing goals for professional services and commodities in fiscal years 2013–2015, but fell short of such goals for other services. The agency has neither biennial appropriations nor contracts large enough to mandate other HUB-related requirements such as creating HUB subcontracting plans for large contracts, appointing a HUB coordinator, creating a HUB forum program, and developing a mentor protégé program.



The agency far exceeded the statewide purchasing goal for professional services in fiscal years 2013–2015, with 100 percent of the board's purchases in this category going to HUB vendors in all three fiscal years.

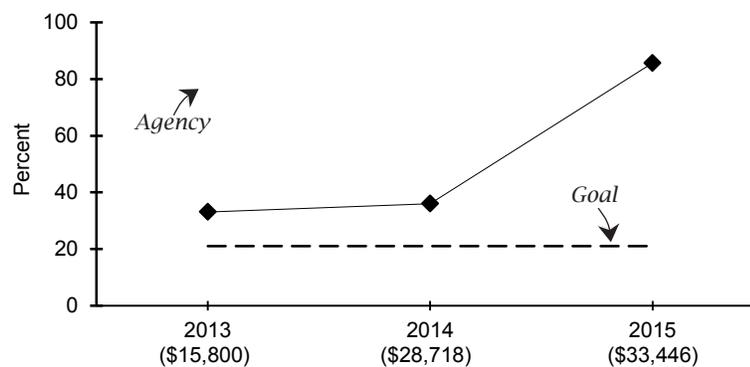
Appendix A

Other Services



The agency fell well short of meeting the statewide purchasing goal for other services during fiscal years 2013–2015. The agency’s major expenditure in this category is for a contract to provide peer assistance to licensees and optometry school students with chemical or mental health issues that would affect the practice of optometry. A HUB vendor has not bid for this contract.

Commodities



The agency far exceeded the statewide purchasing goal in this category in all three fiscal years.

¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 325.011(9)(B), Texas Government Code.

² Chapter 2161, Texas Government Code.

APPENDIX B

Health Professions Council

In 1993, the 73rd Legislature created the Health Professions Council (HPC) to increase efficiency across member agencies by providing administrative support services. The council consists of representatives from 12 independent licensing boards and the Department of State Health Services Professional Licensing and Certification Unit (PLCU), as reflected in the table, *HPC Member Agencies*.

HPC Member Agencies – FY 2016

Agency	Licenses (at start of FY16)	Funds Transferred to HPC in FY16
Texas Board of Chiropractic Examiners	6,537	\$20,361
State Board of Dental Examiners	31,280	\$257,118
Texas Funeral Service Commission	4,811	\$43,845
Texas Medical Board	85,244*	\$32,378
Texas Board of Nursing	419,685	\$71,651
Texas Board of Occupational Therapy Examiners	13,985	\$33,527
Texas Board of Physical Therapy Examiners	24,412	
Texas Optometry Board	4,409	\$27,715
Texas State Board of Pharmacy	113,806	\$331,400
Texas State Board of Podiatric Medical Examiners	1,162	\$13,401
Texas State Board of Examiners of Psychologists	9,512	\$52,774
Department of State Health Services – PLCU	175,140	\$11,846
State Board of Veterinary Medical Examiners	9,770	\$31,038
Non-Member Agencies Receiving Limited Services		
Texas Board of Professional Geoscientists receives information technology support services		\$13,000
Texas Board of Professional Land Surveying receives database administration and support		\$11,808
Texas State Board of Plumbing Examiners receives database administration and support		\$130,658
Office of Public Insurance Counsel receives information technology support services		\$6,641
Total		\$1,089,161

* As of August 31, 2015

- **Funding and staffing.** The council's funding comes from transferred appropriations from member agencies, with each agency paying for services it receives. Council members elect a chair and vice chair to preside over the council for two-year terms. The council has seven employees to perform its

Appendix B

main functions and occasionally uses staff from member agencies to carry out specific programs. For example, an Optometry Board staff member provides added technology support to the eight smallest member agencies, and a Board of Nursing staff member offers new employee Equal Employment Opportunity (EEO) training to all member agencies.

- **Services.** HPC offers the following services to member agencies:
 - Website, information technology, and document imaging software support
 - Shared regulatory database and database administration
 - Purchasing, payroll, and human resources support
 - Trainings relating to state finance, accounting, auditing, and EEO guidelines
 - Shared toll-free telephone line for consumer complaints

APPENDIX C

Staff Review Activities

During the review of the Texas Optometry Board, Sunset staff engaged in the following activities that are standard to all Sunset reviews. Sunset staff worked extensively with agency personnel; met with various board members; conducted interviews and solicited written comments from interest groups, stakeholders, and the public; reviewed agency documents and reports, state statutes, previous legislation, and literature; researched the organization and functions of similar agencies in other states; and performed background and comparative research.

In addition, Sunset staff performed the following activities unique to this agency:

- Toured an optometrist's office
- Observed informal settlement conferences considering agency enforcement actions
- Attended an agency board meeting and subcommittee meetings
- Attended a meeting of the Health Professions Council
- Interviewed staff at the Texas Department of Licensing and Regulation and the National Practitioner Data Bank

Sunset Staff Review of the *Texas Optometry Board*

————— *Report Prepared By* —————

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