

# **BACKGROUND PAPER FOR THE California State Board of Optometry**

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

## **IDENTIFIED ISSUES, BACKGROUND, AND RECOMMENDATIONS REGARDING THE CALIFORNIA STATE BOARD OF OPTOMETRY**

### **BRIEF OVERVIEW OF THE CALIFORNIA STATE BOARD OF OPTOMETRY**

California first formally regulated optometrists in 1903 when the Legislature defined the practice of optometry and established the California State Board of Examiners in Optometry to grant certificates of registration to individuals who demonstrated competence in the profession.<sup>1</sup> In 1913, the Legislature repealed that act and replaced it with a new Optometry Law, which created a State Board of Optometry with expanded authority over optometrists, opticians, and schools of optometry.<sup>2</sup> Much of the language enacted in this 1913 legislation survives in statute today. Education requirements for optometrists were subsequently enacted in 1923.<sup>3</sup>

The current California State Board of Optometry (Board) is responsible for overseeing approximately 31,937 optometrists, opticians, and optical businesses, which as of FY 2019/20 includes 7,486 licensed optometrists, 1,121 registered dispensing opticians (RDOs), 2,846 registered spectacle lens dispensers (SLDs), and 1,127 registered contact lens dispensers (CLDs). The Board is also responsible for issuing certifications for optometrists to use Diagnostic Pharmaceutical Agents (DPA); Therapeutic Pharmaceutical Agents (TPA); TPA with Lacrimal Irrigation and Dilution (TPL); and TPA with Glaucoma Certification (TPG); and TPA with Lacrimal Irrigation and Dilution and Glaucoma Certification (TLG). The Board additionally issues statements of licensure and fictitious name permits.

Under the Optometry Practice Act, the practice of optometry “includes the prevention and diagnosis of disorders and dysfunctions of the visual system, and the treatment and management of certain disorders and dysfunctions of the visual system, as well as the provision of habilitative or rehabilitative optometric services.”<sup>4</sup> Statute establishes the scope of practice for optometrists by enumerating the examinations, procedures, and treatments that an optometrist may perform. No person may engage in the practice of optometry or advertise themselves as an optometrist in California without a valid license from the Board.

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<sup>1</sup> Chapter 234, Statutes of 1903

<sup>2</sup> Chapter 598, Statutes of 1913; formal regulation of opticians was later established within the Medical Board of California.

<sup>3</sup> Chapter 164, Statutes of 1923

<sup>4</sup> Bus. & Prof. Code, § 3041

The Board has also regulated RDOs since the Registered Dispensing Optician Program was transferred from the Medical Board of California to the Board through the enactment of AB 684 (Alejo/Bonilla, Chapter 405, Statutes of 2015). This transition significantly increased the regulatory and oversight responsibilities of the Board. No individual, corporation, or firm may engage in the business of filling prescriptions for lenses or perform other activities including “taking facial measurements, fitting and adjusting those lenses and fitting and adjusting spectacle frames” without a valid certificate of registration issued by the Board.<sup>5</sup>

As a healing arts board under the Department of Consumer Affairs (DCA), the Board is entirely special funded through the collection of licensing fees and other revenue collected as part of its regulatory activities. Like with other regulatory boards, statute provides that “protection of the public shall be the highest priority for the State Board of Optometry in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”<sup>6</sup>

According to the Board’s most recent Strategic Plan:

***“The Board’s mission is to protect the health and safety of California consumers through licensing, education, and regulation of optometry and opticianry.”***

The Board’s Strategic Plan states that it accomplishes this mission through the following responsibilities:

- Promulgating regulations governing Board procedures, examination for optometric licensure, minimum standards of optometric and dispensing services offered and performed, statements of licensure and fictitious name permits, and the equipment in all registered locations;
- Investigating consumer complaints and criminal convictions including, but not limited to, substance abuse, unprofessional conduct, incompetence, fraudulent action, and unlawful activity;
- Taking disciplinary action for violations of laws and regulations governing Optometry and Opticianry when warranted;
- Accrediting schools and colleges of optometry;
- Establishing educational and examination requirements to ensure the competence of candidates for licensure/registration;
- Setting and enforcing standards for continued competency of existing licensees;
- Communicating with licensees, registrants, and Californians to aid in the understanding of laws and regulations related to delivery of high-quality vision care in the state.

As stated in its Strategic Plan, the Board’s *vision* is “the highest quality optometric and optical care for the people of California.”

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<sup>5</sup> Bus. & Prof. Code, § 2550

<sup>6</sup> Bus. & Prof. Code, § 3010.1

## Board Membership and Committees

The Optometry Practice Act provides that the Board consists of eleven members, “five of whom shall be public members and one of the nonpublic members shall be an individual registered as a dispensing optician, spectacle lens dispenser, or contact lens dispenser.”<sup>7</sup> The remaining five members must all be “registered optometrists of the State of California and actually engaged in the practice of optometry at the time of appointment or who are members of the faculty of a school of optometry.”<sup>8</sup> The Board’s five public members may not be licensees of the Board or of any other healing arts board under the DCA.

With the exception of the RDO member, no member of the Board may be “financially interested, directly or indirectly, in any concern manufacturing or dealing in optical supplies at wholesale.” Similarly, no member of the Board except the RDO member may be a “stockholder in or owner of or a member of the board of trustees of any school of optometry.” While members of the faculty of a school of optometry may serve on the Board, “no more than two faculty members of schools of optometry may be on the board at any one time,” and faculty members may not serve as public members.<sup>9</sup>

The Governor is responsible for appointing each professional member of the Board, as well as three of the public members. The Speaker of the Assembly and the Senate Committee on Rules respectively are responsible for appointing an additional public member each. Board members each serve a term of four years, and a member may serve no more than two consecutive terms.<sup>10</sup> Each member of the Board receives a per diem of one hundred dollars for each day spent performing official board duties, as well as travel expenses.<sup>11</sup> The Board is required to hold regular meetings every calendar quarter. Special meetings may be held upon request of a majority of the members of the Board or upon the call of the president.<sup>12</sup>

The Dispensing Optician Committee (DOC) was established under the Board pursuant to AB 684, which also added the RDO member to the Board. Statute requires the DOC to consist of five members, including one RDO, one spectacle lens dispenser or contact lens dispenser, two public members, and one member of the Board. The Board made the initial appointments to the DOC in 2017; future appointments to the DOC will be made by the Governor. The DOC is required to submit a recommendation to the Board regarding which Board member should be appointed to serve on the DOC, whom the Board must then appoint. DOC member terms were initially staggered but will consist of four-year terms; no person shall serve as a DOC member for more than two consecutive terms.<sup>13</sup>

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

The current composition of the Board is as follows, including four vacancies:

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<sup>7</sup> Bus. & Prof. Code, § 3010.5

<sup>8</sup> Bus. & Prof. Code, § 3011

<sup>9</sup> *Id.*

<sup>10</sup> Bus. & Prof. Code, § 3013

<sup>11</sup> Bus. & Prof. Code, § 3016

<sup>12</sup> Bus. & Prof. Code, § 3017

<sup>13</sup> Bus. & Prof. Code, § 3020

Name and Bio	Original Appointment	Expiration of Current Term	Appointing Authority
<p style="text-align: center;"><b>Mark Morodomi (<i>President</i>) Public Member</b></p> <p>Mark Morodomi was appointed by the Governor to the Board as a public member on April 7, 2015. Mr. Morodomi has served as senior counsel at the University of California, Office of General Counsel since 2013. He served as supervising deputy city attorney at the Oakland City Attorney's Office from 2001 to 2013 and as a policy advisor to the Undersecretary of the Treasury, Law Enforcement at the U.S. Department of the Treasury in 2000. Mr. Morodomi served as senior counsel and acting chief of enforcement at the California Fair Political Practices Commission from 1990 to 2000 and was an attorney at Teraoka and Associates from 1989 to 1990. He was a litigation associate at McCutchen, Doyle, Brown and Enersen from 1985 to 1988 and was an extern for the Honorable Stanley Weigel at the U.S. District Court, Northern District of California in 1983. He earned a Juris Doctor degree from the New York University School of Law.</p>	04/07/2015	06/01/2022	Governor
<p style="text-align: center;"><b>Glenn Kawaguchi, O.D. (<i>Vice President</i>) Professional Member</b></p> <p>Glenn Kawaguchi, O.D. was reappointed by Governor Brown to the State Board of Optometry, where he has served since 2012. Kawaguchi has been a managing optometrist at EyeXam of California since 2011. He was an eye care director at Sears Optical from 2006 to 2011 and a regional optometric practices manager at EyeXam of California from 2000 to 2006, where he was a managing optometrist from 1993 to 2000. Kawaguchi was an associate optometrist at the Office of David Sherman, O.D. from 1992 to 1993. He earned a Doctor of Optometry degree from the Marshall B. Ketchum University, Southern California College of Optometry.</p>	08/09/2012	06/01/2022	Governor
<p style="text-align: center;"><b>Debra McIntyre, O.D. (<i>Secretary</i>) Professional Member</b></p> <p>Debra McIntyre, O.D. was reappointed by Governor Brown to the Board as a professional member, where she has served since 2016. McIntyre has been managing doctor at Regency Eye Care since 2016. She was an optometrist at West Coast Eyecare from 2013 to 2016 and from 2002 to 2003. She was chief executive officer and an optometrist at Accent on Eyes Optometry from 2003 to 2013 and at Paradise Optical from 1999 to 2002. McIntyre is a member of the Escondido Sunrise Rotary. She earned a Doctor of Optometry degree from the Marshall B. Ketchum University, Southern California College of Optometry.</p>	03/15/2016	06/01/2021	Governor

<p style="text-align: center;"><b>Cyd Brandvein Public Member</b></p> <p>Cyd Brandvein has been director of enterprise resilience services at Google since 2017. She held several positions at AECOM Technology Corporation from 1989 to 2017, including corporate vice president and senior vice president. Brandvein is a member of the International Institute for Strategic Studies, Pacific Council on International Policy, Women Corporate Directors, National Association of Corporate Directors, Girl Scouts of Orange County, University of California, Los Angeles Alumni Association Scholarship Committee and California Women Lead. She received a B.A. in political science from the University of California, Los Angeles, Executive Certificate in Global Negotiations from Thunderbird School of Global Management, and Governance Fellow distinction from the National Association of Corporate Directors.</p>	10/25/2013	06/01/2021	Governor
<p style="text-align: center;"><b>Jeffrey Garcia, O.D. Professional Member</b></p> <p>Jeffrey Garcia is an optometrist and has been owner of Family Eye Care Optometry since 1996. He was department head and an optometrist for the U.S. Navy from 1993 to 1996 and an O6 active reserve from 1985 to 2018. Garcia is a member of the American Optometric Association. He earned a Doctor of Optometry degree from the Southern California College of Optometry.</p>	08/10/2020	06/01/2023	Governor
<p style="text-align: center;"><b>David Turetsky, O.D. Professional Member</b></p> <p>David Turetsky, O.D. has been vice president, optometrist and partner at Advanced Eyecare since 2008. He was optometrist and coordinator at Physicians Network Services from 2005 to 2008 and held several positions at Pearle VisionCare Inc. from 1993 to 2005, including clinical director, director of doctor relations, and area optometric coordinator. Turetsky was managing optometrist at EyeXam 2000 from 1987 to 1993 and an optometrist at Ronald Joelson, O.D. from 1981 to 1987. He is a member of the California Optometric Association and the American Optometric Association. Turetsky earned a Doctor of Optometry degree from the University of California, Berkeley School of Optometry.</p>	12/18/2013	06/01/2021	Governor
<p style="text-align: center;"><b>Lillian Wang, O.D. Professional Member</b></p> <p>Lillian Wang, O.D. has been an optometrist at the Lafayette Optometric Group since 2004 and an assistant clinical professor at the University of California, Berkeley School of Optometry since 2000. She did her residency in Pediatric Optometry at the College of Optometry in Houston, TX from 1997 to 1998 and was an assistant clinical professor at the State University of New York School of Optometry from 1998 to 2000. Dr. Wang is a member of the American Academy of Optometry, California Optometric Association and the New England College of Optometry Alumni Association. She earned a Doctor of Optometry degree from the New England College of Optometry.</p>	03/27/2015	06/01/2022	Governor

<b><i>Vacant</i> Public Member</b>	--	--	Governor
<b><i>Vacant</i> Professional Member Registered Dispensing Member</b>	--	--	Governor
<b><i>Vacant</i> Public Member</b>	--	--	Assembly Speaker
<b><i>Vacant</i> Public Member</b>	--	--	Senate Rules

The current composition of the DOC is as follows, including two vacancies:

<b>Name</b>	<b>Original Appointment</b>	<b>Expiration of Current Term</b>	<b>Appointing Authority</b>
<b>Glenn Kawaguchi, O.D. Board Member</b>	08/14/2020	08/14/2021	Board
<b>William Kysella Public Member</b>	04/21/2017	04/21/2021	Board
<b>Anna Watts, SLD/CLD Professional Member</b>	04/21/2017	04/21/2021	Board
<b><i>Vacant</i> Professional Member</b>	--	--	Board
<b><i>Vacant</i> Public Member</b>	--	--	Governor

In addition to the DOC, the Board has four committees and three workgroups, which meet on an “as needed” basis, effectively once or more per fiscal year quarter. The Board has previously created workgroups that are no longer active aimed at discussing specific pieces of legislation or pressing issues before the Board. Members of the optometry profession and the public have the opportunity to engage with these committees and workgroups during meetings; dates, agendas, and materials are posted online in advance of each meeting. Additionally, all committee and workgroup recommendations are presented to the Board for consideration during a publicly noticed Board meeting.

The Board currently has the following committees:

- **Legislation and Regulation:** Responsible for recommending legislative and regulatory priorities to the Board and assisting staff with drafting language for Board-sponsored legislation and recommending official positions on current legislation. The committee also recommends regulatory additions and amendments.
- **Practice and Education:** Advises Board staff on matters relating to optometric practice, including standards of practice and scope of practice issues, and reviews staff responses to proposed regulatory changes that may affect optometric practice. Also approves continuing education courses and offers guidance to Board staff regarding continuing education issues.
- **Consumer Protection:** Oversees the development and administration of legally defensible licensing examinations and consulting on enhancements to licensing and enforcement policies and procedures.
- **Public Relations – Outreach:** Assists with the development of educational materials and outreach to the Board’s Stakeholders.

The Board currently has the following active workgroups:

- **Telemedicine Workgroup:** As telemedicine is an emerging delivery model for optometry, especially in light of the COVID-19 pandemic, the Board has been at the forefront of discussing these issues by creating a telemedicine workgroup. Beginning in fall 2019, throughout two public meetings and multiple workgroup meetings in 2020, Board staff presented research on various telemedicine scenarios, technologies, and best practices within the optometry profession. The Board has provided direction to staff for further research to develop a comprehensive telemedicine policy in 2021-22.
- **Strategic Plan Workgroup:** In conjunction with Board staff, this workgroup is responsible for refining and finalizing the Board’s 2021-2025 Strategic Plan.
- **Sunset Review Workgroup:** In conjunction with Board staff, this workgroup is responsible for refining and finalizing the Board’s 2021 Sunset Review.

## Staff

Statute authorizes the Board to appoint a person to serve as Executive Officer.<sup>14</sup> The Executive Officer is prohibited from being a member of the Board and is required to “perform the duties delegated by the board and shall be responsible to it for the accomplishment of those duties.”<sup>15</sup> The Board’s current Executive Officer is Shara Perkins Murphy, who joined the Board in November 2018. The Board also has an Assistant Executive Officer, Cheree Kimball, who was appointed in November 2019.

In addition to an Executive Officer, statute authorizes the Board to employ “other necessary assistance in the carrying out of the provisions of” the Optometry Practice Act.<sup>16</sup> The Board currently has a staff of 12.4 civil servant positions. The Board is not expressly authorized to hire its own attorney, and instead currently utilizes the services of attorneys within the DCA and the Office of the Attorney General.

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<sup>14</sup> Bus. & Prof. Code, § 3014.6.

<sup>15</sup> Bus. & Prof. Code, § 3027

<sup>16</sup> *Id.*

The Board notes that it has continued to experience staff turnover in every unit, with some key positions turning over multiple times, which has caused challenges. This issue persisted during the Board’s prior sunset review as well. More than half of the Board’s positions have been refilled at least once since the prior sunset review, with licensing and clerical support staff experiencing almost complete turnover. The Board has explained that “the Board’s small staff size and personnel budget mean that options for career advancement within the Board are limited, causing the Board to lose staff members with valuable skills and institutional knowledge to agencies with more room for advancement.”

**Fiscal and Fund Analysis**

As a regulatory board under the Department of Consumer Affairs, the Board is entirely special funded and receives the majority of its funding through license fees. Fees are currently deposited into one of two separate funds based on the source of the revenue: the Optometry Fund and the Dispensing Opticians Fund. However, Assembly Bill 896 (Low, Chapter 121, Statutes of 2020) was signed into law and became effective September 23, 2020. This bill abolishes the Dispensing Opticians Fund by July 1, 2022, and requires that any amounts of money in that fund be transferred to the Optometry Fund, effectively merging the two funds.

Statute prohibits the Board from maintaining a reserve balance that exceeds six months of appropriated operating expenses in any single fiscal year.<sup>17</sup> Currently, the Board is operating at a projected reserve of 6.2 months, or \$2 million, at the end of FY 2020-21, and 4.2 months, or \$1.3 million, in FY 2021-22. The following is an overview of the condition of the Board’s funds, with dollars in thousands:

<b>Optometry Fund Condition</b>	<b>FY 2017/18</b>	<b>FY 2018/19</b>	<b>FY 2019/20</b>	<b>FY 2020/21</b>	<b>FY 2021/22</b>
Fund Balance	\$3,055	\$2,766	\$2,081	\$1,550	\$1,300
Months in Reserve	17.5	13.8	10.2	6.2	4.2
<b>RDO Fund Condition</b>	<b>FY 2017/18</b>	<b>FY 2018/19</b>	<b>FY 2019/20</b>	<b>FY 2020/21</b>	<b>FY 2021/22</b>
Fund Balance	\$426	\$864	\$952	\$1,119	\$1,119
Months in Reserve	12.1	17.5	22.7	26.5	26.5

The Board is projecting that it will have a deficit by FY 2022-23, which will likely result in fee increases. A number of fees currently charged by the Board are not yet at their statutory limit, including license and registration fees representing the majority of the Board’s revenue. While the Board will likely need statutory changes in the future, it may be able to address its current structural imbalance through fee increases achieved through regulation. The following is some of the fees currently charged by the Board:

- **Optometrist Application:** \$275 (*statutory limit: \$275*)
- **Optometrist Renewal:** \$425 (*statutory limit: \$500*)
- **RDO Application:** \$150 (*statutory limit: \$200*)
- **RDO Renewal:** \$200 (*statutory limit: \$300*)
- **CLD Initial License:** \$200 (*statutory limit: \$300*)
- **CLD Renewal:** \$200 (*statutory limit: \$300*)
- **SLD Initial License:** \$200 (*statutory limit: \$300*)
- **SLD Renewal:** \$200 (*statutory limit: \$300*)

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<sup>17</sup> Bus. & Prof. Code, § 3145



The majority of the Board’s expenditures have continued to be driven by enforcement costs with licensing expenditures also representing a large share of costs to the RDO Fund. Administration expenses including costs for executive staff, administrative support, and fiscal services are charged to the Optometry Fund. The following is an overview of expenditures by program component for each of the Board’s funds, with dollars in thousands:

<b>Optometry Fund Expenditures by Program Component</b>								
	<b>FY 2016/17</b>		<b>FY 2017/18</b>		<b>FY 2018/19</b>		<b>FY 2019/20</b>	
	Personnel Services	OE&E	Personnel Services	OE&E	Personnel Services	OE&E	Personnel Services	OE&E
<b>Enforcement</b>	\$309	\$228	\$316	\$323	\$371	\$373	\$382	\$390
<b>Licensing</b>	\$119	\$40	\$122	\$49	\$143	\$34	\$147	\$46
<b>Administration</b>	\$396	\$118	\$405	\$162	\$476	\$112	\$490	\$153
<b>DCA Pro Rata</b>	NA	\$417	NA	\$653	NA	\$492	NA	\$660

<b>RDO Fund Expenditures by Program Component</b>								
	<b>FY 2016/17</b>		<b>FY 2017/18</b>		<b>FY 2018/19</b>		<b>FY 2019/20</b>	
	Personnel Services	OE&E	Personnel Services	OE&E	Personnel Services	OE&E	Personnel Services	OE&E
<b>Enforcement</b>	\$19	\$3	\$37	\$11	\$79	\$93	\$88	\$78
<b>Licensing</b>	\$19	\$48	\$37	\$85	\$79	\$65	\$88	\$53
<b>DCA Pro Rata</b>	N/A	\$417	N/A	\$653	N/A	\$492	N/A	\$660

## **Licensing**

The majority of the Board’s licensee population continues to be optometrists. For FY 2019/20, the Board estimates that 7,486 optometrists were actively licensed in California. This represents a continued increase compared to during the Board’s prior sunset review, when it estimated 6,936 licensed optometrists. Also for FY 2019/20, the Board estimates that 303 optometrists were listed as inactive, 792 as delinquent, 98 as retired, and 396 out-of-state or out-of-country. Additionally, the Board also issued 1,351 Statements of Licensure and 1,524 Fictitious Name Permits. The Board previously issued Branch Office Licenses; however, this license was eliminated beginning in 2019.

In addition to its licensing program for optometrists, the Board has been responsible for registering dispensing professionals since 2016. For FY 2019/20, the Board estimates that it approximately 1,121 RDOs were registered with the Board. The Board additionally registered 2,846 SLDs, 1,127 CLDs, and fifteen nonresident contact lens sellers.

<b>Licensee Population–Optometry Program</b>		<b>FY 2016/17</b>	<b>FY 2017/18</b>	<b>FY 2018/19</b>	<b>FY 2019/20</b>
<b>Optometrist</b>	Active	7236	7178	7319	7486
	Current Inactive	507	479	397	303
	Delinquent	575	577	984	792
	Retired	N/A	85	100	98
	Out of State	397	408	392	381
	Out of Country	16	18	15	15
<b>Branch Office License</b>	Active	374	385	N/A	N/A
	Delinquent	69	75	N/A	N/A
<b>Statement of Licensure</b>	Active	1023	1014	1365	1351
	Delinquent	264	404	501	660
<b>Fictitious Name Permit</b>	Active	1462	1499	1469	1524
	Delinquent	93	159	227	202

<b>Licensee Population – Active RDOs</b>			
<b>FY 2016/17</b>	<b>FY 2017/18</b>	<b>FY 2018/19</b>	<b>FY 2019/20</b>
1119	1149	1215	1121
<b>Licensee Population – Active SLDs</b>			
<b>FY 2016/17</b>	<b>FY 2017/18</b>	<b>FY 2018/19</b>	<b>FY 2019/20</b>
2852	2365	2653	2846
<b>Licensee Population – Active CLDs</b>			
<b>FY 2016/17</b>	<b>FY 2017/18</b>	<b>FY 2018/19</b>	<b>FY 2019/20</b>
1126	999	1125	1127

On average, the Board issues nearly 1,800 new licenses and registrations and renews over 12,000 licenses and registrations every year. For optometrists, the Board has set a goal of six to eight weeks to complete the application review process; for opticians, the Board has set a goal of four to six weeks. The Board states that recently it has been successful in meeting each of these targets, in large part by switching exclusively to online applications processed through the BreZE system. However, the Board believes staff turnover and vacancies have threatened its ability to continue meeting these processing timelines.

Applications for licensure in optometry require payment of a fee and proof that the applicant graduated from an accredited school of optometry, passed the required examinations for licensure, and has not been convicted of a crime or disciplined for acts substantially related to the profession. School transcripts, examination score reports, letters of good standing from other states or licensing entities (when applicable), and LiveScan fingerprint results are sent directly to the Board from the agency of origin. The Board queries the National Practitioner Data Bank to identify whether the applicant has been disciplined by a regulatory board in another state.

Over the last four fiscal years, the Board denied 24 applicants for licensure or registration based on an applicant’s criminal history. Following the enactment of Assembly Bill 2138 (Chiu/Low, Chapter 995, Statutes of 2018), the Board’s process for denying applications based on criminal history was substantively modified. The Board may no longer deny an applicant for a nonviolent, nonsexual, or nonserious conviction that occurred more than seven years preceding the application. The bill also prohibited the Board from issuing a denial based on offenses that have been dismissed or expunged. . The Board’s regulations implementing AB 2138 were placed into law on February 25, 2021.

Statute requires the Board to inquire in each license application whether the applicant is serving in, or has previously served in, the military.<sup>18</sup> As required by statute, the Board waived renewal fees for one active duty optometrist during the past four years.<sup>19</sup> The Board also expedited the processing of four optometry applications from military spouses and partners, as required by statute.<sup>20</sup>

## **Education**

Statute requires the Board to establish educational and examination requirements for licensure “to ensure the competence of optometrists to practice.”<sup>21</sup> The Board is required to “accredit schools, colleges, and universities in or out of this state providing optometric education, that it finds giving a sufficient program of study for the preparation of optometrists.”<sup>22</sup> The Board accepts accreditations from the Accreditation Council on Optometric Education, which is the only accrediting body for professional optometric degree (O.D.) programs, optometric residency programs, and optometric technician programs in the United States and Canada. The Board does not approve or accredit optician schools or programs in California, nor does it approve or certify any optometric or optician schools based outside the United States.

The Accreditation Council on Optometric Education has accredited or pre-accredited 25 schools and colleges of optometry. The Board accepts courses offered by these schools of optometry to be equivalent to those within California. There are currently three fully accredited schools located in California:

- University of California, Berkeley, School of Optometry
- Marshall B. Ketchum University, Fullerton
- Western University of Health Sciences, College of Optometry, Pomona

## **Continuing Education**

The Optometry Practice Act requires the Board to “adopt regulations that require ... that all holders of licenses submit proof satisfactory to the board that they have informed themselves of the developments in the practice of optometry occurring since the original issuance of their licenses by pursuing one or more courses of study satisfactory to the board.”<sup>23</sup> Under the Board’s regulations, optometrists are required to complete 40 hours of continuing education (CE) every two years in order to renew their license. Optometrists are allowed to complete 20 of their required hours through alternative methods, including, but not limited to, self-study through an electronic medium. Registered dispensing professionals are currently not required to take CE.

Optometrists who are certified to use therapeutic pharmaceutical agents must complete 50 hours of CE, and of those 50 hours, 35 hours must be in the diagnosis, treatment, and management of ocular disease in any combination of the following areas: glaucoma, ocular infection, ocular inflammation, topical steroids, systemic medication, and pain medication. Glaucoma certified licensees must complete ten (of the 35) hours of glaucoma specific CE.

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<sup>18</sup> Bus. & Prof. Code, § 114.5

<sup>19</sup> Bus. & Prof. Code, § 114.3

<sup>20</sup> Bus. & Prof. Code, § 115.5

<sup>21</sup> Bus. & Prof. Code, § 3041.2

<sup>22</sup> Bus. & Prof. Code, § 3023

<sup>23</sup> Bus. & Prof. Code, § 3059

Statute requires the Board to “encourage every optometrist to take a course or courses in pharmacology and pharmaceuticals as part of his or her continuing education.” Statute also requires the Board to “consider requiring courses in child abuse detection to be taken by those licensees whose practices are such that there is a likelihood of contact with abused or neglected children,” and to “consider requiring courses in elder abuse detection to be taken by those licensees whose practices are such that there is a likelihood of contact with abused or neglected elder persons.”<sup>24</sup> The Board does not currently impose either of these requirements.

Optometrists are required to certify that they have met their CE requirements each license renewal cycle under penalty of perjury. The Board conducts random CE audits, with an average of five to fifteen percent of licensees required to prove their compliance upon renewal. The Board uses the Association of Regulatory Boards in Optometry’s Online Optometric Education Tracker system as proof of CE course attendance. A total of 321 audits were conducted by the Board over the past four years, during which time 101 audits revealed a failure to comply with CE requirements, or a failure rate of 31 percent. Optometrists who fail to complete their CE requirements are subject to a citation or formal discipline.

The Board approves CE courses through its Practice and Education Committee. Providers apply for CE course approval and pay a \$50 application fee. The application must be accompanied by any course presentation materials and the curriculum vitae of all instructors and lecturers involved. The courses are then approved at a public meeting of the committee on an as-needed basis. Over the past four years, the Board received 938 applications from CE providers and approved 909 courses.

The Board will consider a course pre-approved if the course is any of the following:

- Officially sponsored or recognized by any accredited US school or college of optometry;
- Provided by any national or state affiliate of the American Optometric Association, the American Academy of Optometry, or the Optometric Extension Program;
- Approved by the Association of Regulatory Boards of Examiners in Optometry committee known as COPE; or
- Any continuing education course approved for category 1 of the American Medical Association or category 1A of the American Osteopathic Association Continued Medical Education credits that contribute to the advancement of professional skill and knowledge in the practice of optometry.

## **Examination**

The Optometry Practice Act requires that “all examinations shall be practical in character, designed to ascertain applicants’ fitness to practice the profession of optometry and conducted in the English language.”<sup>25</sup> Statute further requires that “the passing grades for the licensure examination shall be based on psychometrically sound principles of establishing minimum qualifications and levels of competency.”<sup>26</sup> To become licensed as an optometrist in California, applicants must pass the California Laws and Regulations Exam (CLRE) and the national examination developed by the National Board of Examiners in Optometry (NBEO).

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<sup>24</sup> Bus. & Prof. Code, § 3059

<sup>25</sup> Bus. & Prof. Code, § 3053

<sup>26</sup> Bus. & Prof. Code, § 3054

The CLRE is a jurisprudence examination that tests an applicant's knowledge and understanding of laws and regulations specifically applicable to the practice of optometry in California. As required by law, the Board works with the DCA's Office of Professional Evaluation Services (OPES) to develop the CLRE and ensure that it is psychometrically sound and appropriate for the profession.<sup>27</sup> The CLRE is a computer-based exam administered through an examination vendor, PSI, Inc., nearly every day of the year. Applicants who fail the exam must wait 180 days to retake it.

The Board has required the NBEO Parts I, II, and III examinations for licensure since 2001. Parts I and II of the NBEO Exam must be taken while still in optometry school and are computer-based. Part III of the examination is administered in person exclusively in North Carolina. Currently, all 50 states, the District of Columbia, and Puerto Rico all use the NBEO Exam for licensure. In 2020, the Board conducted a regular assessment of the NBEO Exam in partnership with the OPES and found that the examination meets the prevailing standards for validation and use of licensure examination in California.

SLD applicants must pass the American Board of Opticianry Examination, and CLD applicants are required to take and pass the National Contact Lens Examination. Both these national examinations are developed and administered by the American Board of Opticianry. Both examinations are computer-based and are proctored by Prometric, a third-party testing vendor, in sites across the country.

In FY 2019/20, the pass rate for the CLRE was approximately 93 percent, with an average of 89 percent over the prior four years. The California pass rate for the NBEO in FY 2019/20 was 91 percent and has averaged slightly over 90 percent during the prior four years. The California pass rate for the American Board of Optician Examination for SLD applicants in FY 2019/20 was 47 percent, and the National Contact Lens Examination for CLD applicants in FY 2019/20 was 35 percent.

## Enforcement

As a healing arts board under the DCA, the Board is responsible for determining its performance measure targets under of the Consumer Protection Enforcement Initiative (CPEI). The goal of the CPEI is to reduce the average enforcement completion timeline from 36 months to between twelve and eighteen months. The Board's targets are as follows:

	Target: Average Days
Intake	7
Investigations	90
Disciplinary Action	540
Probationer Intake	14
Probationer Violation	14

Since these targets were established, the Board states that it has consistently struggled to meet the performance targets for investigations and disciplinary actions. The Board states that to reduce the length of investigations and disciplinary actions, Board staff have worked to establish a standard method of prioritizing workload processing based on the anticipated processing time and the task's priority within the overall investigation process. However, the Board believes that its ability to reduce investigation times to meet performance goals is ultimately hampered by a lack of staff resources and the inability of partner agencies to significantly reduce the time spent performing investigatory or disciplinary tasks.

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<sup>27</sup> Bus. & Prof. Code, § 139

In FY 2019, investigations took 200 days to close for complaints against optometrists and 93 days for complaints against RDOs, contrasted against the Board's 90-day CPEI target. Disciplinary actions took 626 days to complete for complaints against optometrists and 561 days for complaints against opticians, with a CPEI target of 540 days. These metrics fall significantly short of the Board's targets.

The Board received a total of 224 complaints against optometrists and 61 complaints against opticians in FY 2019/20. While disciplinary actions involving optometrists remained steady at twenty actions over the three years, disciplinary actions involving opticians rose 55 percent since the last review. The Board follows the DCA's Complaint Prioritization Guidelines for Health Care Agencies and prioritizes the following as the most urgent complaints:

- Patient harm
- Potential patient harm
- Fraud
- Convictions
- Unlicensed Practice

Statute requires that insurers providing professional liability insurance to licensees report any settlement or arbitration award over \$3,000 of a claim or action for damages that resulted in death or personal injury caused by that person's negligence, error, or omission in practice, or by the licensee's rendering of unauthorized professional services.<sup>28</sup> Additionally, statute requires optometrists or their attorneys to report any settlement, judgment, or arbitration award over \$3,000 of a similar claim.<sup>29</sup> The Board states that it has received settlement reports ranging from \$4,500 to \$500,000, with an average dollar amount of \$180,750.

The Board is authorized to take disciplinary action against any optometrist who violates a provision of the Optometry Practice Act or who is charged with any of a number of acts constituting unprofessional conduct pursuant to statute.<sup>30</sup> Discipline can include a license suspension or revocation, the imposition of probation, or the issuance of a citation or fine. Since the prior sunset review, the Board issued 54 citations totaling \$692,000 in associated fines for violations of the law.

The Board is authorized to enter into a settlement agreement after an accusation has been filed against a licensee. Settlement terms are based on the Board's Disciplinary Guidelines. The following factors are considered when settlement terms are proposed:

- Nature and severity of the alleged violations
- Actual or potential harm
- Overall Discipline or conviction history
- Rehabilitation
- Mitigating evidence
- Compliance with court orders
- Cooperation with the Board's investigation
- Time elapsed since the alleged violations occurred
- Work Respondent has done to prevent recurrence of the alleged violations

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<sup>28</sup> Bus. & Prof. Code, § 801

<sup>29</sup> Bus. & Prof. Code, § 802

<sup>30</sup> Bus. & Prof. Code, § 3110

Settlements are drafted by the Board’s enforcement staff and must be voted on by the Board once accepted by the licensee. In the last four years, the Board has settled twenty cases post-accusation, and had fifteen cases result in a hearing after the proposed settlement was rejected by the Board. In total, the Board settled 57 percent of post-accusation cases and sent 43 percent to a hearing before an Administrative Law Judge.

For cases resulting in successful disciplinary action against a licensee, the Board is entitled to seek cost recovery. Cost recovery can be ordered as a reinstatement condition of a surrendered or revoked license or as a condition of probation. The Board accepts payment plans; however, it requires that any outstanding balance is paid in full six months before the completion of probation. Cost recovery is ordered for probationers who were licensed before the disciplinary action and in revocations or surrenders when ordered by an Administrative Law Judge after a hearing or when included in settlement terms. The cost recovery amount ordered is based on the amount the Board spent investigating and prosecuting the case. When the cost recovery order is due upon reinstatement of a revoked or surrendered license, the Board considers the cost recovery order unlikely to be collected.

<b>Cost Recovery</b> (dollars in thousands)								
	FY 2016/17		FY 2017/18		FY 2018/19		FY 2019/20	
	OPT	OPN	OPT	OPN	OPT	OPN	OPT	OPN
Total Enforcement Expenditures	\$537,000	\$22,000	\$639,000	\$48,000	\$308,334	\$42,427	\$536,175	\$60,491
Potential Cases for Recovery	4	3	6	4	6	0	4	0
Cases Recovery Ordered	2	2	6	1	3	0	3	0
Amount of Cost Recovery Ordered	\$7,605	\$9,997	\$36,754	\$5,950	\$30,056	\$0	\$17,206	\$0
Amount Collected	\$15,045	\$4,629	\$36,407	\$9,587	\$11,363	\$11,716	\$22,421	\$3,629

**Public Information Policies**

The Board’s website is its primary means of communicating with the public. The website features links to the Board’s laws and regulations, forms and publications, the BreZE system, disciplinary actions against licensees, Board activities, newsletters, and links to related professions and associations. The website also offers a feature for individuals to enroll in a Subscriber List, which provides an e-mail notification to subscribers when new information is added to the website.

The Board has significantly increased its use of social media since its prior sunset report. The Board maintains active accounts on Facebook, Twitter, LinkedIn, and Instagram, and posts several times a week. According to the Board, these outlets provide useful information to consumers and licensees and keep them apprised of the Board’s actions. In addition, the Board has recently increased its outreach to interested parties email list via the ListServ system. This system allows the Board to email over 10,000 subscribers and to inform them of regulatory hearings, meetings, surveys, and other information.

Board and committee meeting materials are posted at least five business days before each meeting and these materials remain on the Board’s website indefinitely. Board meeting minutes are posted after they are approved at a Board meeting. As a result of the Governor’s Executive Order following the COVID-19 pandemic, the Board now conducts all meetings online via WebEx. Prior to the COVID-19 pandemic, all Board meetings were webcast, and committee meetings were webcast as DCA resources allowed. The webcasts are available on DCA’s YouTube account, linked from the Board’s website. Audio is available via the Board’s website for all Board and committee meetings.

## **Online Practice Issues**

Opticianry services are frequently offered online through a variety of platforms. The Board states that the most common of these are the delivery of prescription contact lenses, the fabrication of prescription spectacle lenses, and the delivery of prescription spectacles. While contact lens sellers must register with the Board regardless of where they are based, spectacle lens sellers are only required to be registered with the Board if based in California.

Recently, teleoptometry platforms providing automated vision refractions using app-based technology. These apps use some of the same autorefractive tests employed by optometrists and assistants. Once completed, the results are transmitted to a doctor who is licensed to write corrective lens prescriptions in California. Most often, this doctor is an ophthalmologist who is licensed by the Medical Board of California. These online refractions can provide a reasonably accurate corrective lens prescription, but cannot assess the health of the patient's eye, monitor for potential vision problems, evaluate the functioning of the patient's eyes and vision, diagnose or treat eye disease, or provide consultation on the patient's eye and vision health. These technologies are further discussed in this paper under "Current Sunset Review Issues."

## **COVID-19 Pandemic Response**

On March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency as a result of the impacts of the COVID-19 public health crisis. Prior to the Governor's Shelter in Place order in March 2020, the Board transitioned to teleworking for its staff. Currently, staff work in the office in shifts to provide live phone support and process paper documents and payments received by mail. The Board reports that transitioning to telework has increased staff productivity, reduced absenteeism, and encouraged more collaboration among staff.

The Board does not have a state-of-emergency statute and does not have the authority to waive provisions of the Optometry Practice Act during an emergency. On March 30, 2020, the Governor signed an executive order that created a new process for boards and the public to request waivers of requirements related to healing arts professional licensing through the Department of Consumer Affairs.<sup>31</sup> The Board has sponsored one waiver through this process. The waiver removed the requirement that patients must be evaluated in person from the requirement in regulations for Glaucoma Certification. The Board worked with Marshall B. Ketchum University, Southern California College of Optometry to submit this waiver request for its Glaucoma Grand Rounds Certification Program.

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

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<sup>31</sup> Executive Order N-39-20



## **PRIOR SUNSET REVIEW: CHANGES AND IMPROVEMENTS**

The Board last underwent a sunset review by the Legislature in 2017. During the prior sunset review, committee staff raised a number of issues provided recommendations. Below is a summary of actions which have been taken over the last four years to address these issues. Previous issues that were not completely addressed or may otherwise still be of concern they are further discussed under “Current Sunset Review Issues.”

**Prior Issue #1: Long-Term Fund Condition.** The previous sunset background paper noted that the Board was anticipating a structural deficit due to increased expenditures. Since then, the Board states that it has been closely monitoring its fund condition and receiving quarterly briefings on the Optometry and Optician Fund conditions at public Board meetings; in addition, staff continues to work closely with DCA Budget Office.

**Prior Issue #2: Fund Merger.** The Committees asked whether there had been any discussion about consolidating the Board’s separate funds in an effort to streamline administrative costs and reduce administrative burdens. The Committees also inquired of the Board how merging the practice acts would improve consumer protection and enhance administrative efficiencies for the Board. The Department of Finance will merge the Optometry and RDO funds in 2020 as a result of Assembly Bill 896 (Low, Chapter 121, Statutes of 2020). In regards to the merging of the two practice acts, the Board has discussed the potential proposal and approved clarifying regulatory changes, and will continue to discuss the cohesive practice act. After revision to existing statutes, the Board believes it may be determined that a single practice act will reduce confusion for consumers and licensees. This statutory review is projected to be complete in 2021 before the fund merger completion date in 2022.

**Prior Issue #3: NPDB Queries.** The Committees asked the Board to provide information regarding what it needed in order to fully utilize the resources offered by the NPBD to help protect consumers and more thoroughly examine a potential licensee's professional background and criminal history. As of July 12, 2018, all applicants and registrants are enrolled in the NPDB and are charged a fee as authorized by Assembly Bill 1708 (Low, Chapter 564, Statutes of 2017).

**Prior Issue #4: Examination Passage Rates.** The prior sunset background paper raised concerns regarding perceived low passage rates for the National Spectacle Examination and the National Contact Lens Examination. The Board continues to note low test scores with the ABO and NCLE exams. The DOC continues to advocate for education requirements at licensure. Following the completion of three Occupational Analyses (Contact Lens Dispenser, Spectacle Lens Dispenser and unregulated assistants to optometrists) in 2022, the committee will further discuss passage rates and potential education requirements for the Board’s consideration.

**Prior Issue #5: Pathways to Licensure.** The Board was asked to advise the Committees on the progress of the foreign graduate workgroup and any recommendations for changes to the acceptance of foreign graduates for licensure purposes. The Board was also asked to inform the Committee on the time and resources that are expended to sponsor foreign graduates and whether or not there should be a fee charged for such services. As a result of AB 1708 (Low, Chapter 564, Statutes of 2017), the Board no longer offers sponsorships for foreign graduates to optometry schools. However, the Board continues to receive periodic inquiries from foreign graduates looking to obtain licensure in California. To accommodate foreign-trained optometrists and medical doctors, a pathway has been created. This issue is further discussed under “Current Sunset Review Issues.”

**Prior Issue #6: Continuing Education.** The Board was asked to update the Committees on its plan and timeline to increase the number of CE audits conducted annually. The Board was also asked to advise the Committees on any plans to transition to an electronic tracking system and any potential impact on licensees. The Board states that it continued conducting CE audits into 2018 and has a record of conducting 321 audits over the past four fiscal years. During that time, 101 audits were resulting in a fail for not having the required number of CE hours or being deficient in completing specific CE requirements respective to license certifications (such as TLG). The percentage of CE failure was 31%.

**Prior Issue #7: Different License Types.** The prior sunset background paper questioned whether there was any continued usefulness of the Branch Office License issued by the Board to optometrists wishing to have an ownership in more than one office. As a result of SB 1386 (McGuire, Chapter 334, Statutes of 2018), optometrists may now have up to 11 offices with ownership status in the practice. Additionally, the Branch Office License requirement was removed as a result of SB 1386.

**Prior Issue #8: Regulations.** The Board was asked to advise the Committees on the current status of its outstanding regulations and when it anticipates the regulations to take effect. In addition, the Board was asked to update the Committees on how these regulations will improve Board operations. The Board states that it has progressed a multitude of outstanding rulemaking packages and prioritizes issues as directed by the Board. In 2019 and 2020, paramount has been the implementation of Assembly Bill 2138, implementation of Assembly Bill 443, proposed disciplinary guidelines for both the optometry and optician programs, and changes to the board's continuing education policies as a result of COVID-19.

**Prior Issue #9: Enforcement Timeframes.** The Board was asked to advise the Committees about where it believes the bottlenecks are in its investigation processes and disciplinary actions, which have continued to fail to meet the Board's CPEI targets. The Board states that it continues work to reduce timeframes of enforcement cases. The amount of work required has increased steadily over the last few years, but the number of positions has remained the same. Additionally, the Board states that staff turnover decreased the staff resources available during this time.

**Prior Issue #10: Inspection Program.** The Board was asked to advise the Committees on its plans to implement an inspection program and if the Board could begin inspections prior to any proposed legislation as recommended at a meeting of the Board. The Board's inspection program was implemented into law as a result of SB 1386 (McGuire, Chapter 334, Statutes of 2018). The Board's Consumer Protection Committee (CPC) met three times throughout 2018 and discussed the inspection program. Ultimately, the CPC brought the matter back to the full Board for discussion on the merits of the two types of inspection programs: a reactive, complaint-driven program or a proactive program based on random inspections. Currently, Board enforcement staff meets once per month to discuss current cases and investigation strategies and to weigh the potential usefulness of an inspection program for individual enforcement cases. A report of their findings will be presented to the CPC in Spring 2021.

**Prior Issue #11: BreEZe.** The Board was asked to update the Committee about when it estimated that the RDO program would be accessible through the BreEZe program. In addition, the Board was asked to advise the Committees on the implementation of the Board's BreEZe program and whether or not it has provided administrative efficiencies for the Board. The Board has since fully integrated on BreEZe, but continues to work with DCA's Office of Information Services to increase usability and improve the functioning of the BreEZe program for Board stakeholders.

**Prior Issue #12: Newsletters and Consumer Information.** The Board was asked to advise the Committees on its plan to update its website with more current consumer information and when it anticipates reinstating a newsletter. The Board states that it was unsuccessful in obtaining the authority to hire an RA to serve as the Board’s outreach coordinator. Due to a lack of funding and staff resources, outreach duties continue to be split between the policy analyst and an office technician. However, in 2019, Board staff completed a minor revamp of the Board’s website, removing outdated information, consolidating related pages, and updating links. Comprehensive Frequently Asked Questions (FAQs) for the optometry and optician program have also been added to the website. Additionally, since the last sunset report in 2016, the Board has vastly expanded its social media presence through Facebook, Twitter, LinkedIn, and Instagram, averaging three posts a week on each platform with a high level of engagement.

**Prior Issue #13: RDO Committee.** During the time that the previous the sunset review background paper was published, the Board had not yet fully established the RDO Committee. The Board was asked to advise the Committees on its proposed timeframe for formally appointing the RDO Committee membership and when it anticipated the first RDO Committee meeting. After reviewing additional applications in 2017 for the Dispensing Optician Committee, the Board seated the five statutorily required members and began meeting regularly. Dispensing Optician Committee meetings are held quarterly or as needed.

**Prior Issue #14: North Carolina State Board of Dental Examiners v. FTC.** The Board was asked to advise the Committees on any concerns it has relative to the then-recent *North Carolina* decision and operations of the Board, and whether it believed there were proactive actions that it should take to prevent anti-competitive behavior. The Board tracked AB 2483 (Voepel) in 2018 which would have removed a public entity’s discretion and require it to pay any judgment or settlement for treble damage antitrust awards against a member of a regulatory board within the Department of Consumer Affairs for an act or omission occurring within the scope of the member’s official capacity as a member of that regulatory board. As the bill did not pass out of the committee, Board staff continues to monitor the issue closely and work with DCA staff to determine any next steps.

**Prior Issue #15: New and Emerging Technologies.** The Board was asked to advise the Committees on whether or not there is a method to verify that the online examinations are valid for what they purport to be. The Board states that as telemedicine is an emerging delivery model for optometry, especially in light of the COVID-19 pandemic, the Board has been at the forefront of the discussion of these issues by creating a telemedicine workgroup. This issue is further discussed under “Current Sunset Review Issues.”

**Prior Issue #16: Technical Cleanup.** The Board was encouraged to recommend cleanup language to the Committees. As a result, the prior sunset review legislation included a number of technical changes and technical amendments.

**Prior Issue #17: Continued Regulation of the Profession by the Board.** The sunset repeal date for the Board was extended by four years following the most recent sunset review.

# CURRENT SUNSET REVIEW ISSUES FOR THE CALIFORNIA STATE BOARD OF OPTOMETRY

## ADMINISTRATIVE ISSUES

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

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

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

Notwithstanding the legal sensitivities accompanying boards with majority professional memberships, the disproportionality for the Board is arguably minor, with an advantage of only one additional member who is regulated by the Board, and one of the professional members being a dispensing registrant with distinct interests from the optometrist members. Considering the numerous benefits of having professional perspectives in deliberations by the Board regarding the practice of optometry, this technical imbalance is unlikely to be in need of any further statutory change. However, the Board should remain mindful whenever it engages in formal decision-making that may appear to serve the economic interests of licensee populations represented on the Board.

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

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

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

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

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

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

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

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

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

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

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

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

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

**Background:** In original statute enacted in 1913 that first created the Board allowed it “to employ agents, attorneys, and inspectors.” Currently, however, there is no express language in the Optometry Practice Act authorizing the Board to hire its own dedicated attorney. Legal representation in disciplinary prosecution is provided by the Attorney General’s Licensing Section, and the DCA offers counsel as part of the centralized services it provides to boards, as needed to assist with rulemaking, address legal issues that arise, and support compliance with open meeting laws.

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

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

**FISCAL ISSUES**

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

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

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

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

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

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

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

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

## **LICENSING ISSUES**

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

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

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

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

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

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

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

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

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

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

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



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

## **EDUCATION AND EXAMINATION ISSUES**

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

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

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

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

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

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

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

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

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

***Staff Recommendation:*** *The Board should provide the Committees with an update on its efforts to increase CE compliance audits and state whether it believes that the current fail rate is unacceptably high and whether any changes to how it enforces CE compliance could improve compliance.*

### **ENFORCEMENT ISSUES**

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

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

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

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

Subsequently, in August of 2019, the FDA issued a medical device recall for the Opternative product (now marketed under the name Visibly) for failure to submit a marketing application and receive clearance from the FDA. Meanwhile, other companies continue to market remote eye assessment products, with myriad distinctions making it difficult to tell whether there will be the same issues with those platforms as well. One technology solution, currently utilized by both a major online retailer as well as a prominent pharmacy chain, utilizes a web platform to renew expired prescriptions through a vision exam conducted over a smartphone or computer using a “digital eye chart.” The resulting prescription is then reviewed and approved by an ophthalmologist.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## PRACTICE ISSUES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## IMPLEMENTATION ISSUES

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

**Background:** Statute generally allows for healing arts licensees to deliver services through the use of mobile health care units to the extent authorized by written policies established by the governing body or regulatory board of the licensee. Previously, Board regulations allowed for the provision of optometry services through registered "extended optometric clinical facilities." This registration program was restricted to clinical facilities employed by an approved school of optometry where optometry services were rendered outside or beyond the walls, boundaries, or precincts of the primary campus of the school. Mobile optometric facilities were only allowed to function as a part of a school teaching program as approved by the Board.

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

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

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

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

## COVID-19 PANDEMIC ISSUES

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

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

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

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

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

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

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

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



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

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

### **TECHNICAL CLEANUP**

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

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

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

### **CONTINUED REGULATION OF THE OPTOMETRY PROFESSION BY THE CALIFORNIA STATE BOARD OF OPTOMETRY**

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

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

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