

SUNSET EVALUATION REPORT
OPTOMETRY
Chapter 459, Hawaii Revised Statutes

A Report to the Governor and the Legislature of the State of Hawaii

Submitted by the
Legislative Auditor of the State of Hawaii
Honolulu, Hawaii

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FOREWORD

Under the "Sunset Law," licensing boards and commissions and regulated programs are terminated at specific times unless they are reestablished by the Legislature. Hawaii's Sunset Law, or the Hawaii Regulatory Licensing Reform Act of 1977, scheduled for termination 38 licensing programs over a six-year period. These programs are repealed unless they are specifically reestablished by the Legislature. In 1979, the Legislature assigned the Office of the Legislative Auditor responsibility for evaluating each program prior to its repeal.

This report evaluates the regulation of the practice of optometry under Chapter 459, Hawaii Revised Statutes. It presents our findings as to whether the program complies with the Sunset Law and whether there is a reasonable need to regulate the practice of optometry to protect public health, safety, or welfare. It includes our recommendation on whether the program should be continued, modified, or repealed. In accordance with Act 136, SLH 1986, draft legislation intended to improve the regulatory program is incorporated in this report as Appendix C.

We acknowledge the cooperation and assistance extended to our staff by the Board of Examiners in Optometry, the Department of Commerce and Consumer Affairs, and other officials contacted during the course of our examination. We also appreciate the assistance of the Legislative Reference Bureau which drafted the recommended legislation.

Clinton T. Tanimura
Legislative Auditor
State of Hawaii

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Chapter 1

INTRODUCTION

The Hawaii Regulatory Licensing Reform Act of 1977, or Sunset Law, repeals statutes concerning 38 occupational licensing programs over a six-year period. Each year, six to eight licensing statutes are scheduled to be repealed unless specifically reenacted by the Legislature.

In 1979, the Legislature amended the law to make the Legislative Auditor responsible for evaluating each licensing program prior to its repeal and to recommend to the Legislature whether the statute should be reenacted, modified, or permitted to expire as scheduled. In 1980, the Legislature further amended the law to require the Legislative Auditor to evaluate the effectiveness and efficiency of the licensing program, even if he determines that the program should not be reenacted.

Objective of the Evaluation

The objective of the evaluation is: To determine whether, in light of the policies set forth in the Sunset Law, the public interest is best served by reenactment, modification, or repeal of Chapter 459, Hawaii Revised Statutes.

Scope of the Evaluation

This report examines the history of the statute on the regulation of optometry and the public health, safety, or welfare that the statute was designed to protect. It then assesses the effectiveness of the statute in preventing public injury and the continuing need for the statute.

Organization of the Report

This report consists of three chapters: Chapter 1, this introduction and the framework for evaluating the licensing program; Chapter 2, background information on the regulated industry and the enabling legislation; and Chapter 3, our evaluation and recommendations.

Framework for Evaluation

Hawaii's Regulatory Licensing Reform Act of 1977, or Sunset Law, reflects rising public antipathy toward what is seen as unwarranted government interference in citizens' lives. The Sunset Law sets up a timetable terminating various occupational licensing programs. Unless reestablished, the programs disappear or "sunset" on a prescribed date.

In the Sunset Law, the Legislature established policies on the regulation of professions and vocations. The law requires each occupational licensing program to be assessed against these policies in determining whether the program should be reestablished or permitted to expire as scheduled. These policies, as amended in 1980, are:

1. The regulation and licensing of professions and vocations by the State shall be undertaken only where reasonably necessary to protect the health, safety, or welfare of consumers of the services; the purpose of regulation shall be the protection of the public welfare and not that of the regulated profession or vocation.
2. Where regulation of professions and vocations is reasonably necessary to protect consumers, government regulation in the form of full licensure or other restrictions on the professions or vocations should be retained or adopted.

Chapter 2

BACKGROUND

Chapter 459, Hawaii Revised Statutes, regulates the practice of optometry. This chapter provides some background on the practice of optometry and its regulation, summarizes the information contained in our 1981 sunset report,¹ and reports on developments since 1981.

Background on the Practice of Optometry

The clinical practice of optometry began around the end of the thirteenth century when lenses were adapted to aid sight.² It was not until 1620 that the first pair of spectacles was brought to the United States.³ Originally, spectacle-making was the vocation of opticians who sold their wares through their own spectacle shops or worked in jewelry stores. Spectacles were also sold by peddlers and by some physicians.⁴

1. Hawaii, Legislative Auditor, *Sunset Evaluation Report, Optometrists, Chapter 459, Hawaii Revised Statutes*, Report No. 81-7, Honolulu, February 1981.

2. James R. Gregg, O.D., *The Story of Optometry*, New York, Ronald Press, 1965, p. 179.

3. *Ibid.*, p. 159.

4. James W. Begun and Roger D. Feldman, *A Social and Economic Analysis of Professional Regulation in Optometry*, National Center for Health Services Research (NCHSR), Research Report Series, DHHS Publication No. (PHS) 81-3295, April 1981, p. 7.

The mid-nineteenth century saw the emergence of refracting opticians who corrected vision deficiencies by giving eye examinations and fabricating lenses tailored to the individualized needs of their customers.⁵ Eventually, to identify their expanded scope of practice and to separate themselves from ordinary lens-grinding opticians, refracting opticians adopted the name "optometrist."⁶

Nationally, there has been only a moderate increase in the number of active optometrists. In 1970, there were 18,400 active optometrists; by 1982, the total rose to 23,000.⁷ Up until 1980, the number of optometrists in Hawaii also increased gradually. However, the count multiplied dramatically after 1980. Starting with 64 active optometrists in 1970,⁸ the total climbed to 98 optometrists in March 1980,⁹ and shot up to 139 optometrists in July 1986.¹⁰ These figures do not include licensees residing out-of-state who numbered 16 in March 1980 and 47 in July 1986.

5. Alex R. Maurizi et al., "Competing for Professional Control: Professional Mix in the Eyeglasses Industry," *The Journal of Law & Economics*, Vol. XXIV, No. 2, October 1981, pp. 354-355.

6. Begun and Feldman, *A Social and Economic Analysis*, p. 8.

7. U.S., Department of Health and Human Services, *Report to the President and Congress on the Status of Health Personnel in the United States*, DHHS Publication No. HRS-P-OD 94-4, Vol. 1, May 1984, Table B-4-2.

8. *Ibid.*

9. Hawaii, Department of Regulatory Agencies, *Alphabetic Roster By Board*, Honolulu, March 5, 1980.

10. Hawaii, Department of Commerce and Consumer Affairs, *Summary Counts of Notices by LOC*, Honolulu, July 1, 1986.

Over a decade ago, the American Optometric Association established an optimum ratio of optometrists to population of 14 to 100,000.¹¹ Using 1985 population figures, there are about 13.1 optometrists per 100,000 resident population in Hawaii, which surpasses not only the national average of 10.4 optometrists per 100,000 population that had been estimated for 1985 but the average of 10.8 optometrists per 100,000 population projected for 1990.¹²

The regulation of optometrists. Regulation of the practice of optometry was sought to ensure that practitioners had the necessary competencies for the developing field of visual science. The first bill attempting to regulate the practice of optometry was introduced in New York in 1896. Minnesota adopted the first regulatory statute in 1901. By 1924, every state and the District of Columbia had enacted such laws.¹³

Upon enactment of Act 187 by the Hawaii Territorial Legislature in 1917, Hawaii became the forty-second jurisdiction to regulate the profession. The law defines the practice of optometry as:

11. David V. Shaver, Jr., B.S.E.E., "Opticianry, Optometry, and Ophthalmology: An Overview," *Medical Care*, Vol. XII, No. 9, September 1974, pp. 756-757.

12. U.S., Department of Health and Human Services, *Report to the President and Congress on the Status of Health Personnel in the United States*, Table B-4-3.

13. Gregg, *The Story of Optometry*, p. 194.

". . . the recognition and analysis of visual dysfunction of the human eye; the employment of trial frame or trial lenses, and any objective or subjective means or methods, other than the use of medicine or surgery, but including the use of topically applied pharmaceutical agents known as topical anesthetics, cycloplegics, and mydriatics, for nontherapeutic purposes only, for the purpose of determining the refractive powers, visual, muscular, or other anomalies of human eyes; or the prescribing, fitting or adaptation of any ophthalmic lenses, contact lenses, prisms, frames, mountings, or orthoptic exercises for the correction or relief of the visual or muscular anomalies of human eyes."¹⁴

The practice of optometry is regulated under Chapter 459 by a board of examiners comprised of three licensed optometrists with five years of experience and two public members. The law empowers the board to: (1) prescribe rules; (2) refuse a person admission to its examination or to issue, suspend, or revoke licenses for cause; (3) administer examinations for licensure; (4) sanction continuing education courses to comply with the board's continuing education requirements; and (5) issue certificates of registration authorizing the use of pharmaceutical agents.

The scope of practice is regulated in the following ways. *First*, the statute requires a person to hold an unrevoked and unsuspended license to practice optometry. This requirement, however, does not apply to or prohibit licensed physicians from practicing optometry. Nor does it preclude licensed opticians from replacing, duplicating, or repairing ophthalmic lenses, contact lenses, frames, or fittings. *Second*, orthoptists, or specialists in the treatment of eye muscles and

14. Section 459-1, HRS. Besides optometrists, two other professional occupations are involved in providing vision care. *Ophthalmologists* are physicians specializing in the diagnosis and treatment of eye diseases and other abnormal conditions. They may prescribe drugs, lenses or other treatment, or perform surgery. *Opticians* prepare and dispense lenses, spectacles, and eyeglasses according to prescriptions written by physicians and optometrists to correct a patient's optical defects.

fusion anomalies, are allowed to give visual training, including exercises, while under the supervision of a physician or optometrist. *Third*, the use of topically applied pharmaceutical agents is limited to optometrists who have been duly certified.

Licensing requirements. To qualify for licensure, an applicant must be a graduate of an American optometric college, school, or university that is approved by the board, accredited by a regional or professional accreditation organization, and recognized by the Council on Post-Secondary Accreditation or by the U.S. Office of Education.

A candidate applying for licensure before January 1, 1987, must pass either the written examination given by the National Board of Examiners in Optometry (NBEO) or a written examination administered by the board. A candidate applying on or after January 1, 1987, will be required to pass the written examination given by the NBEO. In addition, candidates applying before or after 1987 must pass any practical and any written examination required by the board. The board, through its rules, determines which parts of the NBEO examination and the passing scores it will accept. Prior to 1985, the passing score (average of 70 percent in all subject areas tested) was prescribed by law.

In 1985, Act 294 authorized optometrists to use diagnostic pharmaceutical agents (DPAs). The use of DPAs in optometric practice is restricted to optometrists who have been certified to do so by the board. To be certified, optometrists must satisfy certain instructional requirements in general and clinical pharmacology taken at suitably accredited and recognized institutions. They must also pass an examination.

The issue of DPA evoked much controversy and considerable opposition by members of the medical community. In response to some of the concerns raised, the Legislature amended Chapter 459 to require optometrists to refer patients to appropriate, licensed physicians when visual abnormalities demand medical attention, and also, to make it mandatory for the board to promulgate rules requiring optometrists to report adverse effects experienced by any of their patients from the use of DPAs.

Grounds for refusal to permit examination or for the issuance, suspension, or revocation of licenses. Under Section 459-9, the board may refuse to admit candidates to its examination or may deny, suspend, or revoke licenses for a variety of reasons including fraud in the application or examination; dishonest conduct; habits of intemperance or drug addiction which affect an optometrist's work; professional misconduct, gross carelessness or negligence, or manifest incapacity in the practice of optometry; advertising in several specific ways; accepting employment with a nonlicensed person or from any company or corporation; making house-to-house sales or peddling on the streets; locating a practice on the premises of a commercial concern; accepting commissions or kickbacks from dispensing opticians; and using any name other than the name the optometrist is licensed to practice under. Act 294, SLH 1985, added the unauthorized use of pharmaceutical agents and the failure to refer a patient to a physician when needed as reasons for suspending or revoking licenses.

Contents of advertising. The statute also contains guidelines on what information must be disclosed in the advertising of ophthalmic goods.

**Findings and Recommendations in
the 1981 Sunset Evaluation Report**

When the regulation of optometrists was evaluated in 1981, we concluded that:

- "1. There is sufficient potential harm to the public health, safety, and welfare to justify regulating the practice of optometry.
- "2. While regulation to ensure competency is justifiable, a number of statutory restrictions imposed on the practice of optometry are questionable, particularly in view of recent findings reported in the Federal Trade Commission (FTC) studies. . . .
- "3. Difficulties in keeping the state optometry written examination current and valid could probably be alleviated by using the examination developed by the National Board of Examiners in Optometry (NBEO)."¹⁵

The need for regulation. We determined that Chapter 459 sought to protect the public from two forms of potential harm. The first was the potential harm that could be inflicted by incompetent practitioners. Hence, the statute established licensing requirements to ensure competency. The second form of potential harm was that of economic loss suffered by consumers from unethical and unscrupulous business practices. Hence, the statute regulated certain commercial advertising practices. The two forms of potential harm were then examined in greater detail with the following results.

Potential harm of physical injury. We found that incompetent prescriptions for eyeglasses or contact lenses could produce nausea, headaches, poor vision, or needless additional expenses to the consumer. Also, the inability of optometrists to recognize eye symptoms requiring medical attention could lead to potentially serious vision and health problems if appropriate referrals to physicians were not

15. Hawaii, Legislative Auditor, *Sunset Evaluation Report, Optometrists*, p. 13.

made. Consequently, we concluded that regulation was necessary to: (1) ensure the competency of optometrists, and (2) protect the public from the potential harm of physical injury.

Potential harm of economic loss. While the need to protect the public from incompetent optometrists was clear, we found that statutory prohibitions against commercial practices were considerably more difficult to justify in terms of protecting the public welfare. Our report noted that the statute: (1) banned the employment of optometrists by any nonlicensed person or by any company or corporation; (2) precluded optometrists from locating their practices on the premises of commercial concerns; and (3) prohibited the use of trade names. Advertising was also restricted by a provision prohibiting optometrists from advertising optometric goods and services at a discount or as a premium.

The FTC had conducted two staff studies on commercial prohibitions and suggested that such restrictions did not serve the public welfare.¹⁶ Following the staff studies, the FTC had provided formal advance notice of proposed rulemaking in December 1980 to determine whether the commercial prohibitions found in state statutes constituted unfair acts or practices under the Federal Trade Commission Act and had asked for public comment on its staff studies. In light of the federal findings and the likelihood that some form of action was forthcoming, we recommended that the Legislature review the appropriateness of prohibiting commercial practices.

16. U.S., Federal Trade Commission, *State Restrictions on Vision Care Providers: The Effects on Consumers ("Eyeglasses II")*, Report of the Staff to the Federal Trade Commission, Bureau of Consumer Protection, July 1980, and U.S., Federal Trade Commission, Bureau of Economics, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry*, September 1980.

Licensing and examination. We found that the board had difficulty keeping its written examination current. Until 1978, the board wrote most of the test questions prompting some applicants to question the validity of the test and whether the local examination tested prevailing teachings and practices. To remedy such deficiencies, the board used test questions purchased from schools of optometry in its January 1979 examination and purchased additional questions for its January 1980 examination. We recommended that in lieu of trying to keep up with a changing profession, the board replace the local written examination with the NBEO examination.

Board response. The Board of Examiners in Optometry responded that it supported our recommendation that Chapter 459 be reenacted. However, the board had mixed feelings about our finding that a number of statutory restrictions imposed on the practice of optometry were questionable. Concerns were expressed over "professionalism, competitive fees, an open marketplace, and good quality vision care." The board also found our recommendation to utilize the written examination developed by the NBEO "totally unsatisfactory" explaining that the NBEO was an "unstable entity."¹⁷

Subsequent Developments

In 1981, the Legislature held hearings to determine whether Chapter 459 should be extended or allowed to expire. The Legislature concurred with our

17. Letter from Ronald R. Reynolds, O.D., President, Board of Examiners in Optometry, to Clinton Tanimura, Legislative Auditor, February 12, 1981.

recommendation that the potential harm to the public health, safety, and welfare justified continued regulation and reenacted Chapter 459.

The Legislature elected not to remove the commercial restrictions in Chapter 459. The Hawaii Optometric Association (HOA) strongly opposed the removal of any prohibitions, saying that restraints were necessary to protect the public from low quality vision care. The HOA testified that optometrists who were employed by unlicensed persons, companies, or corporations or those practicing on the premises of commercial concerns made the selling of eyewear to patients their top priority. The apparent inference was that such optometrists were more concerned about profits and less about their professional responsibilities.

With respect to our recommendation that the board adopt NBEO's written examination, HOA testified that it hesitated to endorse such an amendment based on unfavorable critiques of the national examination by applicants who had taken both the NBEO examination and the local examination and because the NBEO had announced that it was planning to review the test.

The Legislature decided to retain the board's examination with the stipulation that it cover the same body of knowledge and be at least equivalent to the national examination. However, in 1985, Act 224 included new examination requirements. Effective January 1, 1987, all applicants must now pass the national examination given by the NBEO.

Chapter 3

EVALUATION OF THE REGULATION OF OPTOMETRY

This chapter contains our evaluation of the regulation of optometry under Chapter 459, Hawaii Revised Statutes. It includes our assessment of the need to continue to regulate the occupation, the adequacy of current regulatory operations, and our recommendations.

Summary of Findings

We find the following:

1. The potential harm to the public health, safety, and welfare justifies continued regulation of the practice of optometry.

2. Board operations have been hampered by the lack of a formalized orientation or training program for board members and the absence of neighbor island representation on the board.

3. Several of the current licensing standards are restrictive or unnecessary, including the requirement limiting acceptance of national board scores to five years from the date of application, graduation from an American college, continuing education, and criminal history reporting.

4. Some of the practices and procedures used by the examination branch in the Department of Commerce and Consumer Affairs (DCCA) continue to be questionable and inconsistent.

5. Statutory restrictions on advertising and commercial practices appear to be unnecessarily restrictive and, in the view of the Federal Trade Commission (FTC), costly to consumers.

The Need for Regulation

We find that the practice of optometry continues to pose a significant potential for public harm. The absence of regulation would endanger the health and safety of the public.

Optometrists are primary providers of vision care. A nationwide survey reported that 32 percent of all visits for eye care were made to optometrists.¹ In addition, optometrists dispensed 39 percent of all eyeglasses sold.² The types of potential harm that our evaluation identified in 1981 (reiterated in Chapter 2) which could result from the incompetent practice of optometry remain relevant. Incompetent prescriptions for vision correction can cause headaches, nausea, or other health problems.

Recent amendments to the law have increased the potential danger. In 1985, the Legislature broadened the optometrists' scope of practice to include the use of pharmaceutical agents for diagnostic purposes. In conjunction with this, optometrists are required to refer patients to physicians when they recognize any

1. National Center for Health Statistics, G. S. Poe: "Eye Care Visits and Use of Eyeglasses or Contact Lenses, United States, 1979 and 1980," *Vital and Health Statistics*, Series 10, No. 145, DHHS Pub. No. (PHS) 84-1573, Public Health Service, Washington, D.C., U.S. Government Printing Office, February 1984, p. 6.

2. James R. Scholles, O.D., "Ophthalmic Marketplace—Urban Review," *Journal of the American Optometric Association*, Vol. 51, No. 12, December 1980, p. 1063.

ocular abnormalities or evidence of systemic diseases. Accordingly, serious vision and health problems could result if optometrists are not knowledgeable or trained in pharmaceutical drugs or if they are not qualified to detect eye pathology and make the appropriate referrals to physicians.

The serious potential for harm is reflected by the marked increase in the number of malpractice suits against optometrists. According to the Hawaii Ophthalmological Society, malpractice suits have risen five-fold in seven years.³ Whereas only one optometrist in 100 was sued in 1978, one in 20 was sued for malpractice in 1985.

Without regulation, consumers would be at a disadvantage in attempting to judge the quality of optometric services. In view of the complex and technical nature of the profession and the potential for harm, we believe that the practice of optometry should continue to be regulated to ensure that optometrists meet certain qualification and competency requirements.

Regulatory Operations

Regulatory operations could be improved if changes were made in the following areas:

- . board operations,
- . licensing standards,
- . examinations, and
- . advertising and practice restrictions.

3. Testimony on Senate Bill No. 1144 presented by Dr. Shigemi Sugiki, Hawaii Ophthalmological Society, to the Honorable Steve Cobb, Chairman, Senate Committee on Consumer Protection and Commerce, February 20, 1985.

Board operations. The board could be more effective if its members were given a better orientation to their duties and responsibilities, if it had representation from the neighbor islands, and if it received some feedback on the disposition of complaints.

Board training. Those appointed to the Board of Examiners in Optometry receive no formal orientation from DCCA. Their training involves being handed the board's operational manual which contains an overview of the profession, its legislative history, a description of the licensing requirements, and a copy of the law and rules. Such a limited approach to orientation and training was identified by all board members as a significant inadequacy.

A conference of state legislators, licensing administrators, attorneys general, staff, and consumer officials on occupational regulation agreed on the following:

"Board members need to be oriented to their duties and responsibilities in a systematic manner. For example, they need to understand the regulatory statute under which they operate, the rules and regulations of the board, the administrative procedures act, and other general acts that govern their conduct and procedures. To increase the effectiveness of board members, they should be given a clear understanding of hearing procedures and other practices related to regulation and discipline. A background in relevant court decisions and opinions issued by the attorney general's office was also deemed to be helpful."⁴

A 1979 study of Maryland's public member training program, a program which has been adopted by a number of states, reported, "Training substantially increased the consumers' awareness of their responsibility on the boards, their preparation,

4. Benjamin Shimberg, *Improving Occupational Regulation*, Final Report to Employment and Training Administration, U.S. Department of Labor under Grant No. 21-34-75-12, Cooperative Planning to Improve Occupational Regulation, Princeton, N.J., Educational Testing Service, July 1976, p. 28.

self-confidence, and assertiveness at board meetings, and their influence on board decisions."⁵

In view of the voluminous and changing nature of the information that must be assimilated, the department should devise a well thought out, ongoing training program that would ensure that board members have an adequate understanding of their duties and responsibilities.

Board composition. There is no requirement for neighbor island representation on the board. No one can remember when a member from the neighbor islands last sat on the board. Board members generally agreed it was not necessary to appoint a neighbor island representative to the board. In their view, optometrists in Hawaii share common problems. However, it is likely that the interests of optometrists on the neighbor islands may be different from those of optometrists on Oahu.

There are occasions when the special needs or interests of these neighbor island practitioners are not given full consideration. For example, in May 1983, the board disapproved all continuing education courses by correspondence, stating that there was a sufficient number of courses offered locally by the Hawaii Optometric Association. Since most of the courses are offered on Oahu, the board's decision tended to deny neighbor island optometrists a cost effective way of satisfying their continuing education requirements. A representative from the neighbor islands may have been able to point out the drawbacks to the board's decision in terms of lost time, travel expenses, food and lodging, etc.

5. Benjamin Shimberg, *Occupational Licensing: A Public Perspective*, Princeton, N.J., Educational Testing Service, 1982, p. 172.

Information on disposition of complaints. Prior to May 1986, the board and its executive secretary were not informed about the disposition of complaints relating to optometry. In May, an agreement was reached with the Regulated Industries Complaints Office (RICO) that the executive secretaries of the various licensing programs would be informed of the disposition of complaints that are initiated either by the boards or by their staff.

While this is a step in the right direction, it does not go far enough. The board still receives no information about the disposition of complaints that are made by members of the general public or other licensees.

The board needs to know what kinds of issues and problems are occurring in the industry that it is responsible for regulating. The number and nature of complaints may point to inadequacies in the law or in the rules. The board could then take steps to correct these problems. Finally, precedents may be set in settling certain kinds of complaints. The board and its staff must be informed of this. RICO should notify the executive secretary and the board about the disposition of all significant complaints, not only those initiated by the board or the staff.

Licensing requirements. There are several licensing requirements that should be clarified or removed. They are discussed below.

Graduation from an American school. The law requires applicants for licensure to be graduates of an *American* optometric college, school, or university approved by the board and "accredited by a regional or professional accreditation organization."⁶ The Council on Optometric Education (COE) is the officially recognized accreditation body for schools and colleges in optometry. The COE has

6. Section 459-7, HRS.

accredited 15 schools and colleges of optometry in the continental United States and 1 in Puerto Rico. In addition, two schools in Canada, the University of Waterloo and the University of Montreal, are accredited by the COE.

It is not clear whether all of the COE accredited schools are considered *American* schools. Although DCCA personnel define American schools as meaning only those in the United States, they did accept an applicant from an accredited Canadian college. To clarify the issue, the statute should be amended to delete the term "American."

Five-year limitation on national board scores. Beginning January 1987 the law requires applicants to pass the written examination given by the National Board of Examiners in Optometry (NBEO). This will replace a portion of the board's written examination. To be accepted by the board, the NBEO examination must have been taken no more than five years before the date the application is received by the board. There are two problems with this provision: (1) limiting the validity of NBEO test scores to five years is arbitrary and restrictive, and (2) it discriminates against out-of-state licensees who wish to practice in Hawaii. Also, the status of applicants who have yet to pass the board's written examination but whose NBEO examinations are within the five years of their application needs to be clarified.

Arbitrary limitation. There are no grounds for limiting the validity of NBEO test scores to a five-year period. The limitation contradicts the policy of the NBEO which developed and administers the national board examinations. The NBEO considers the scores to be good forever. In explaining this policy, an official of the NBEO said that it is not logical to require a person to retake the national examination unless that person is also required to obtain another optometric degree.

Limitation discriminates against out-of-state licensees. Currently, there is no reciprocity or endorsement for out-of-state licensees who wish to practice in Hawaii. These licensees are treated like unlicensed candidates and must comply with all licensing requirements including passing the State's examination requirements.

The five-year limitation would make it virtually impossible for out-of-state optometrists to practice without having to retake the NBEO examination. Generally, students are eligible to take the first part of the NBEO examination in their second year in optometry school. The final part of the examination can be taken in the fourth year. Therefore, by the time they graduate, they will be close to the five-year limit. Those who have been practicing for some time would certainly be over the five-year limit. This means that optometrists with perhaps years of experience would be required to recertify their competence by taking the NBEO examination again.

One advantage in moving to a national examination is that it opens the door to reciprocity agreements with other states since the NBEO examination would serve as a common qualification and standard of competency. However, this benefit would be lost if the five-year limitation were to be retained.

Status of current applicants needs clarification. It is not clear what will happen to applicants who applied some time ago but who have not yet been licensed because they have not passed the local written examination. All those who applied prior to January 1987 are allowed two opportunities to retake portions of the board's written examination that they failed before they have to file a new application. There is no time limit on when they must retake the failed portions of the examination.

As of July 1986, there were 21 unsuccessful candidates who had not exhausted their right to retake parts of the examination which they had failed. In all likelihood, some of these candidates passed NBEO examinations within five years of the time they submitted their application to the board. The question is whether they must still retake the failed portions of the board's written examination. If they were to reapply as new applicants, this would not be necessary.

Criminal history. In the application form, applicants are asked to report whether they have had any convictions resulting in a jail sentence during a 20-year period preceding the application.

Section 831-3.1, HRS, specifically prohibits the State from using criminal records in connection with any application for licensure, unless the offense relates directly to the applicant's possible performance in the occupation for which the applicant is seeking licensure.

Currently, the board has no guidelines that delineate the types of criminal convictions that might be cause for refusal to issue a license. The absence of guidelines leaves the door open to the very kinds of discriminatory or arbitrary actions that the Legislature sought to prohibit.

Moreover, the 20-year period seems to be unreasonably long and groundless. One authority suggested that a criminal record should be expunged once a sentence is served. Otherwise, "rehabilitated offenders may be forever prevented from seeking employment in a licensed occupation."⁷

7. Benjamin Shimberg et al., *Occupational Licensing: Practices and Policies*, Washington, D.C., Public Affairs Press, 1973, p. 226.

Unless the need for criminal history information can be shown to apply specifically to possible performance in optometry, the requirement should be deleted. Even if such a relationship can be established, the board should seek statutory authority for requesting the information and develop guidelines on the types of offenses that would be grounds for denying a license. Any inquiry on criminal convictions should then be limited to these types of offenses.

Unnecessary photograph. The statute requires applicants to submit a recent photograph with the application. According to some, the purpose of the photograph is to assist RICO in investigations in the event of complaints.

This type of requirement has been misused by other jurisdictions to restrict entry into the occupation, and it may be contrary to equal employment provisions. It has no bearing on determining the qualifications of an applicant for licensure. To avoid any appearance or possibility of impropriety in reviewing applications, the requirement for a photograph should be removed. Should photographic identification be found necessary for subsequent investigation of complaints, a photograph can be required at the time the license is issued.

Continuing education. The law requires optometrists to complete 16 hours of board approved continuing education biennially in order for their licenses to be renewed. The board has developed guidelines identifying the types of courses that it will accept.

The board has approved professional education courses offered by regional or national organizations or associations or courses offered at accredited schools of optometry. It will not accept business management courses covering such aspects as tax strategies, marketing/advertising, investments, or financial planning. The

board's position is that continuing education courses should be directly related to and contribute to the competency of licensees.

Despite the board's efforts, the continuing education program is unlikely to meet this objective. There is no way of knowing whether those who take courses actually learn anything or if what they learn will improve their ability to provide quality care. Another goal of the program is for optometrists to remain current and up-to-date in new techniques and procedures. Yet, there is no requirement for practitioners to take continuing education courses on new techniques and developments.

While the objective of continuing education in seeking to maintain the competency of practitioners is worthwhile, the preponderance of evidence casts serious doubt over whether it actually ensures continued competency. Not only is there little supportable evidence of any correlation between continuing education and competency, various studies have shown that mandatory continuing education *increases* the cost of optometric services. A further disadvantage is the numerous problems in administering the program.

No demonstrated relationship to competency. Colorado's Department of Regulatory Agencies evaluated continuing education and found that the program has not worked. The department explained that continuing education was enacted "in good faith, with high expectations for success and now . . . it has become instead a classic form of unnecessary government regulation, and we have been urging very vigorously its repeal."⁸

8. Letter from Bruce M. Douglas, State of Colorado, Department of Regulatory Agencies, Division of Registrations, to Owen H. Yamasaki, Office of the Auditor, July 1, 1986.

Oregon's Executive Department reviewed the subject in connection with a study of its health-related licensing boards and found "little data to support the practice of requiring continuing education for all in order to try to raise the competency of a few. . . ."⁹

A California Department of Consumer Affairs study reached a similar conclusion. The study found that while professionals support continuing education, the majority of "board staffs find little or no benefit to the public or the licensees deriving from the mandatory requirements. . . . The government's role in regulating, organizing, or administering to these requirements is minimal. The economic consequences to licensees, consumers and tax collectors is significant."¹⁰

Many other studies challenge the merits of continuing education in general. A Canadian study evaluating continuing medical education found that there was minimal effect on the overall quality of care.¹¹ A report on occupational licensing noted a study on practicing physicians which found no consistent or significant documentation of benefits.¹²

Increased cost of care. At the same time, studies have shown that the cost of eye examinations is higher in those states that require continuing education. One study found that, of the various forms of restrictions, including advertising and

9. Oregon, Executive Department, *An Operations Review of the Health-Related Licensing Boards*, Salem, January 1983, p. 3.

10. California, Department of Consumer Affairs, *Evaluation of the Effectiveness, Costs and Benefits of Continuing Education Requirements*, Sacramento, December 1982, pp. 5-6.

11. John C. Sibley, M.D., et al., "A Randomized Trial of Continuing Medical Education," *The New England Journal of Medicine*, Vol. 306, No. 9, March 4, 1982.

12. Shimberg, *Occupational Licensing: A Public Perspective*, pp. 133-134.

commercial prohibitions, the requirement for continuing education was the most expensive.¹³ A report from the National Center for Health Services Research found that continuing education requirements increased the price of eye examinations by 13 percent.¹⁴

The earlier California study found the annual cost per optometrist for a voluntary continuing education program to be \$1016 which included registration costs, travel expenses, food, lodging, and lost time. These figures approximate the estimates given by one Hawaii board member. Annual expenses for continuing education for Hawaii optometrists were estimated to be between \$600 and \$1100.

Problems in administering the program. The mandatory continuing education program necessitates the review of a substantial amount of documentation which is submitted by the licensees biennially. Considering the already heavy workload of those administering the program, inevitably, errors are made in reviewing the documents. An examination of the documents submitted in 1984 and 1985 illustrates the shortcomings in reviewing compliance with a biennial 16-hour continuing education requirement:

- . Individual A had only 14 hours of credit.
- . Eight of individual B's 22 hours were for a cardiopulmonary resuscitation class which is not a board approved course.

13. James W. Begun, *Professionalism and the Public Interest: Price and Quality in Optometry*, Cambridge, MIT Press, 1981, p. 83.

14. James W. Begun and Roger D. Feldman, *A Social and Economic Analysis of Professional Regulation in Optometry*, National Center for Health Services Research (NCHSR), Research Report Series, DHHS Publication No. (PHS) 81-3295, April 1981, p. 45.

- . Three of individual C's 17 hours were for a seminar entitled "Reaching Your Market."
- . Six of individual D's 16 hours were for seminars entitled "How to Double Your Practice and Enjoy it More" and "Accelerating Practice Growth."

These were some of the individuals who were relicensed even though it is questionable whether they met the 16-hour requirement or were in compliance with the board's guidelines. Given the evidence on the lack of effectiveness of mandatory continuing education in ensuring continued competency, its cost to the public, and the problems in administration, we believe that the requirement should be repealed.

Examinations. Beginning January 1, 1987, applicants for licensure will have to pass: (1) the NBEO examination, (2) a state written examination on optometry law and rules, and (3) a practical examination. The NBEO examination will replace a state written examination on the practice of optometry. The shift to the NBEO will remove many of the problems associated with the locally developed written examination on optometry practice.

While some of the past problems may appear to be moot with the change in requirements, we believe that it is important to call attention to them because they may occur in examinations for other occupational licensing programs. This includes procedural problems with revisions of examinations and their security and procedures for scoring examinations. These procedural problems will also continue to carry over to the written examination on state law and rules and the practical examination which will still be required. In addition, there are more basic problems with the examination on state law and the practical examination used to test competency in administering pharmaceutical drugs.

Faulty revisions. In September 1985, a candidate who had failed one portion of the written examination in July 1985 filed legal action in the courts challenging the validity of the test results. In the process of settling the case, the candidate was given a copy of the examination booklet covering the contested portion of the examination. As this compromised the security of the examination, this portion of the examination was reportedly completely revised.

However, a comparison of the July 1985 examination with the July 1986 examination showed that many of the questions remained essentially unchanged. We found at least 16 percent of the questions to be merely rephrased.

Deficient grading and scoring. The department's examination branch lacks clear policies and procedures on the scoring methodology to be used and procedures to be followed. This raises questions about the fairness and accuracy of examination scores. The written examination consists of 11 parts. Each part is scored separately and applicants must retake the parts that they fail. For at least the past two years, the scoring methodology used on the written examination has been inconsistently applied, prompting questions of equity. The July 1984 and the July 1986 examinations were scored one way, and the July 1985 examination was scored in another way.

In each of those years, the board conducted an item analysis of test questions to delete those questions which were ambiguous, misleading, or otherwise defective. When questions were deleted, the examinations had to be rescored and the results were affected.

The rescoring was done in one of two ways. In one method, the responses to questions discarded by the board were counted as correct and applicants were given credit for the questions. In the second method, no credit was given for discarded

questions. Instead, an applicant's score was computed by multiplying the total number of correct responses by a weighted factor determined by dividing the total possible score by the number of remaining, undiscarded questions. Thus, if 3 out of 50 questions were discarded, an applicant's score is calculated by multiplying each correct response by a factor of 2.13 or the total possible score of 100 divided by 47 questions.

Applicant scores would differ depending on the methodology used. The first method, crediting discarded questions, generally results in a higher score than the second method. If the July 1985 applicants had been scored by the first method instead of the second, three additional candidates would have passed the entire examination and four candidates would have passed additional parts of the examination. Conversely, if the second weighted method had been used to score the July 1986 examination, one candidate who passed the entire examination would have failed and five candidates who failed certain parts of the examination would have failed additional parts of the examination.

The scoring methodology used has the greatest impact on those with scores close to the passing score of 70 percent. It could mean the difference between passing or failing the examination. Generally, the variance between the two methods is small, between 2 to 3 percent. However, in one case, a candidate's weighted score was 58 percent. If the first approach had been used, his score would have been a passing 70 percent for that part of the examination.

Inconsistencies in rounding off scores. The examination branch is supposed to have a policy that test scores based on percentages are to be rounded off. However, the policy is confusing. The general instruction sheet for the 1986 examination states:

"A passing grade is attained by answering a total of 70% or more of the items correctly. Each candidate's score shall be weighted and computed to 3 decimal places and rounded up to 2 decimal places."

The instructions say that the score shall be weighted and computed to three decimal places before being rounded. However, the scores are not always weighted. They are only weighted if questions are discarded.

Based on this policy, the scores in the optometry examination should be rounded off. However, the scores in the July 1985 examination were not. One person who failed would have passed if the score had been rounded off.

Errors in scoring. To ensure the accuracy of computer graded test scores, the examination branch procedures call for running a failing candidate's examination through the computer twice. As an added check, a failing candidate whose score is within 5 percent of the passing score is to be manually graded twice. A spot check of answer sheets revealed one case where a candidate with a score of 69 percent on one part of the July 1985 examination actually had two more correct answers than those picked up by the computer. If the candidate's examination had been manually scored, the oversight should have been easily detected. Instead of receiving a passing score, the candidate had to retake this part of the examination in July 1986.

Problems with state law examination. The written examination on Hawaii optometry law and rules consists of 20 multiple choice questions drawn from a pool of 21 questions. The small pool of questions limits the usefulness of the examination. Since there are only 21 questions, it is likely that the same questions are reused virtually year after year. At the same time, the subject matter to be tested, the law and the rules, is limited in scope and does not support developing an extensive pool of questions.

The test is also poorly constructed. For example, the answers to several items can be deduced from other questions. One question is so ambiguous that the correct response has differed from one year to the next. Other questions, although in the law or rules, are primarily procedural questions that have no bearing on the practice of optometry. Finally, the examination cutoff score of 70 percent is meaningless.

Since the examination on the law and the rules is so limited, consideration should be given to dropping the requirement.

The practical examination. The practical examination is used to assess clinical skills in optometry. Practical examinations are particularly subject to questions of subjectivity, bias, and reliability. Testing experts emphasize the importance of having clear, well-defined, and unambiguous performance criteria. This would serve two purposes. *First*, the graders will have guidelines for determining acceptable and unacceptable performance, and *second*, the establishment of standards guards against subjectivity, unintentional rater bias, and any differences in the criteria used by examiners.

In addition to performance criteria, it is critical that examiners are trained to apply the standards correctly and consistently. The International Association of Boards of Examiners in Optometry (IAB) says in its manual that "in order to maximize inter-rater reliability . . . *each* examiner must complete a training and orientation program before the actual examination begins." The IAB explains that the training session teaches examiners how to maximize their effectiveness, how to use evaluation scales, and the definition of "entry level" competence.¹⁵

15. International Association of Boards of Examiners in Optometry, *A Manual for the Assessment of Entry-Level Clinical Skills in Optometry*, Washington, D.C., June 1985, p. 8.

Two of the four parts of the practical examination, the visual training and the contact lens parts, are graded by staff from the examination branch. The remaining two, visual analysis and dispensing, are graded by board members or designated members of the optometry profession. In observing the July 1986 practical examinations on visual analysis, we found that the examiners had no specific standards for evaluating performance nor did they receive any training or orientation before the examination.

The IAB manual contains evaluation scales for several clinical areas. These scales are in the form of checklists that pinpoint for examiners exactly what they should look for. Construction of a performance rating scale adapted from those of the IAB would help to remedy the existing weakness in the practical examination.

The IAB is currently working on formulating a standardized clinical skills assessment examination covering 82 clinical areas. Field tests are scheduled for the summer of 1987. Once completed, it would be advisable for the board to consider replacing its practical examination with the IAB examination.

Ten-point deduct system. In grading the visual analysis portion of the practical examination, it is reported that examiners have the prerogative of deducting up to ten additional points from a candidate's score for miscellaneous reasons, such as harming a patient or unprofessional conduct. However, the written guidelines on when or why points are to be deducted are unclear. The system is ambiguous and open to abuse.

Reportedly, the deduct system was used only once in the case of a candidate whose dress and professional demeanor were considered to be unprofessional. The arbitrary and questionable nature of imposing such a penalty makes it vulnerable to legal challenge. The deduct system should be deleted.

The diagnostic pharmaceutical agent (DPA) practical examination. The law was amended in 1985 to allow optometrists to administer certain pharmaceutical agents for optometric examination purposes. In general, these drugs are used to expand the ability of optometrists to see into a patient's eyes. Optometrists may not use DPAs unless they have been certified to do so.

To be certified, applicants must demonstrate proficiency in the use of a procedure called Goldman Tonometry which measures the intraocular tension or pressure within the eyeball for diagnosis of glaucoma. This consists of instilling drops of "fluress" (benoxinate hydrochloride) on the eye, aligning the Goldman Tonometric instrument with the eye, and taking a reading for eye pressure.

During the July 1986 examination, candidates performed the procedure in pairs on each other. There were two shortcomings with the DPA examination. *First*, there are no standards or guidelines for determining acceptable performance, and *second*, having the candidates work on each other gives the second candidate an unfair advantage.

The practice of candidates performing on each other has obvious flaws. This is a carryover from the February 1986 examination in which over 100 optometrists were tested in Goldman Tonometry. Because of the large number involved, it may have been necessary to work in pairs. However, that was the first DPA test given after the law was amended. Now, the number of candidates should no longer be that large.

The IAB has developed an evaluation scale for the Goldman Tonometry which includes candidate instructions and is divided into sections to test pre-examination skills, examination and administration skills, and post-examination skills. We

believe that the board should adopt the performance standards developed by the IAB for the DPA examination.

Restrictions on advertising and commercial practices. Chapter 459 contains extensive provisions regulating optometric advertising and business practices. These restraints do not appear to benefit consumers. Instead, they primarily serve the economic self-interests of the profession and increase the cost of services. There have been numerous, independent studies that indicate that advertising and commercial price restrictions result in higher consumer prices.

A 1972 study using 1963 data found the average price of eyeglasses in states with advertising restrictions to be \$33.04, or 25 percent higher than the \$26.34 in states with no restrictions. The average price difference between the most and the least restrictive states was \$19.50.¹⁶ Researchers have contended that professional control limits the commercial flow of information, decreases competition, and raises prices.¹⁷

In another study, a survey was conducted of 1,195 optometrists throughout the United States. It was found that consumers in states with certain advertising and commercial restrictions could expect to pay about 25 percent more than consumers

16. Lee Benham, "The Effect of Advertising on the Price of Eyeglasses," in Lee Benham and Yale Brozen, *Advertising, Competition, and the Price of Eyeglasses*, Reprint No. 36, Washington, D.C., American Enterprise Institute, October 1975, pp. 342-344.

17. Summarization of study performed by Lee Benham and Alexandra Benham, "Regulating Through the Professions: A Perspective on Information Control," in State of California, Department of Consumer Affairs, Division of Consumer Services, Research and Special Projects Unit, *Commercial Practice Restrictions in Optometry*, Sacramento, December 1982, pp. B-2 to B-3.

in states without these restrictions.¹⁸ Using the same data, another study found that professional regulations increased prices by almost 32 percent.¹⁹

A report from the California Department of Consumer Affairs showed that commercial practice restrictions cost California consumers \$102 million in 1983.²⁰ If we use the California methodology to estimate the cost of commercial practice restrictions in Hawaii, the cost of such restrictions to Hawaii consumers would be \$4.3 million in 1983 and \$5.1 million in 1985.

In our 1981 sunset evaluation report, we referred to two FTC studies that had focused directly on the effects of state advertising and commercial practice restrictions on consumers. The two studies had found that not restricting advertising and commercial practice did not lower the quality of services to consumers but they did result in lower prices.

While some of these studies have been criticized for varying reasons, all have reached the same basic conclusion that prices are lower where there are no restrictions on advertising and commercial practice.

We did find one study that had completely different findings from the above. It was conducted by Robert R. Nathan Associates, Inc., for the American Optometric Association. The Nathan study stated that the study by the FTC Bureau of Economics had fundamental methodological and design flaws that invalidated the

18. Begun, *Professionalism and the Public Interest*, p. 83.

19. Begun and Feldman, *A Social and Economic Analysis*, p. 45.

20. California, Department of Consumer Affairs, *Commercial Practice Restrictions in Optometry*, p. i.

conclusions reached.²¹ Nathan said that state restrictions are justified because they ensure high quality care and that preemption of commercial restrictions would be likely to decrease the quality of care and increase the price of eye care.²² In response, the FTC staff stated that the criticisms were groundless and the conclusions reached by Nathan were based on faulty reasoning, defective analysis, flawed data, and inappropriate comparisons.²³

Advertising restrictions. The law currently contains the following advertising restrictions:

- . prohibits optometrists from advertising optometric goods at a discount;
- . forbids claims of superiority by optometrists;
- . precludes optometrists from advertising in conjunction with any nonlicensed person or groups of individuals;
- . bans house-to-house canvassing;
- . requires advertising to identify the individual optometrist involved; and
- . requires all advertising that contains a price to also disclose what specifically the price includes; e.g., whether it includes frames and lenses, single vision or multifocal lenses, hard or soft contacts, etc.

21. The Federal Trade Commission, Bureau of Economics study, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry*, September 1980, p. 26, generally suggests that commercial practice restrictions do not protect consumers from lower quality care.

22. Ophthalmic Practice Rulemaking Statement in the Matter of Ophthalmic Practice Rules; Proposed Trade Regulation Rule (Eyeglasses II): Notice of Proposed Rulemaking (50 Fed. Reg. 598, January 4, 1985), submitted by Robert R. Nathan Associates, Inc., before the Federal Trade Commission, June 7, 1985, pp. D-115 to D-116.

23. Rebuttal Statement of Ronald S. Bond, Deputy Director, Federal Trade Commission, Bureau of Economics, in the Matter of the Ophthalmic Practice Trade Regulation Rule, 16 C.F.R. Part 456, File No. 215-63, October 9, 1985.

These kinds of prohibitions have a historical basis. Well over half a century ago the American Optometric Association declared that "all advertising of price in connection with furnishing of optometric service and materials is fundamentally fraudulent" and is "the method of charlatans, whose only purpose is mercenary, and therefore, a sinister practice, in that the public is deceived, which results in injury to vision and health."²⁴

The current prohibitions were all enacted between 1949 and 1957. At the time, they were deemed necessary to protect the public. Discount advertising and claims of superiority were seen as potentially deceptive and misleading. For example, the offering of discounts was viewed as a possible setup for a "bait and switch" scheme and other unscrupulous practices to attract the unwary. These restrictions may have been appropriate at the time, but they are no longer needed. There are general state laws that protect consumers from deceptive business practices. In addition, Section 459-9(B), HRS, specifically prohibits false and deceptive optometric advertising.

The American Association of Retired Persons (AARP) recently released a report criticizing restrictions in certain occupations, including optometry. It noted that these restrictions have little to do with the qualifications or competence of providers and are anti-consumer. The AARP found that state-imposed advertising restrictions on Massachusetts optometrists added \$2 million annually to consumers by denying price information which would allow comparison shopping.²⁵

24. Begun and Feldman, *A Social and Economic Analysis*, p. 9.

25. "Unreasonable Regulation = Unreasonable Prices," *Professional Regulation News*, Vol. 6, No. 1, Washington, D.C., September 1986, p. 7.

Recently, the FTC brought suit against the Massachusetts Board of Optometry. The administrative law judge ruled that the board shall desist from prohibiting: (1) the advertising or offering of discounts; (2) advertising the availability of optometrists' services by a nonlicensed person or organization; and (3) advertising that uses testimonials or advertising that the board feels is sensational or flamboyant.²⁶

Since the FTC has conducted several important studies on the effects of advertising and commercial restrictions, we asked the FTC to comment on Hawaii's law. These comments are reproduced in their entirety in Appendix A. The FTC's observations on the advertising restrictions are summarized here as follows.

The FTC found that the State's restrictions were injurious to consumers as they "tend to raise prices above the levels that would otherwise prevail but do not seem to raise the quality of care in the vision care market."

According to the FTC, prohibiting discount advertising causes consumers' search costs to rise unnecessarily and clearly deprives consumers of information central to their purchasing decisions.

The ban on claims of superiority may be harmful to competition and consumers if it precluded optometrists from making truthful claims about their qualifications, experience, or performance. The FTC pointed out that almost any truthful statement about the qualifications, experience, and performance of an optometrist could be construed as a claim of superiority. It is also questionable whether

26. United States of America before the Federal Trade Commission, in the Matter of Massachusetts Board of Registration in Optometry, Docket No. 9195, (Initial Decision), June 20, 1986.

enforcement actions against claims of superiority (unless clearly fraudulent or false) would withstand legal challenge.

Prohibiting the advertising of lawful affiliations between optometrists and nonlicensed persons, such as retail optical dispensers, may deny consumers information about nontraditional methods of providing eye care products and services and may discourage the entry of large optical establishments.

Forbidding house-to-house canvassing may obstruct the dissemination of information from optometrists to potential clients. Lastly, the provision requiring individual optometrists to be identified in all advertising may increase advertising costs and thereby inhibit advertising. The FTC noted that the advertising disclosure requirements are not necessary to prevent deception and recommended that all the foregoing restrictions be eliminated from Chapter 459.

Optometrists are concerned about abuse if advertising bans are removed, but we believe their fears about flagrant abuse are unfounded. Physicians, dentists, and dispensing opticians are allowed all forms of advertising. There is no reason why such a special ban is needed for optometrists.

Commercial restrictions. While advertising restrictions have had a negative impact on consumers, some contend that it will be necessary to lift commercial restrictions before consumers will truly benefit from competitive market forces.

In January 1985, the FTC proposed a trade regulation rule which, if adopted, would totally remove bans on certain kinds of practice restrictions. The proposed rule is the culmination of a process that began in 1980 when the FTC requested public comment on its advance notice of public rulemaking.

Currently, Chapter 459 contains the following commercial practice restrictions which would be prohibited under the FTC's proposed rule:

- . prevents the employment of optometrists by laypersons or corporations;
- . prohibits the practice of optometry on the premises of a commercial (mercantile) concern and restricts ownership of optometric practices to licensed optometrists; and
- . enjoins the use of trade names by optometrists.

At public hearings on the proposed FTC rule, the chairman of the Hawaii Board of Examiners in Optometry testified against the proposed rule stating that the passage of the rule would have potentially grave effects on the quality of service and products and, therefore, would not be in the public's best interest. There is little evidence to support these concerns.

Employment by laypersons or corporations. It is said that there might be interference in the doctor-patient relationship if optometrists were employed by laypersons. There is also a concern that remuneration of optometrists in these kinds of situations would be based on volume or other practices that would reward high volume practices to the detriment of patients.

These kinds of concerns can be resolved in ways other than prohibiting the employment of optometrists by corporations, such as amending the law to prevent high volume approaches. For example, a bill was introduced in the California Legislature in 1985 permitting business relationships among eye care providers with the stipulation that payment to optometrists may not be based upon the number or

volume of prescriptions written and optometrists may not be prohibited from seeing patients on a scheduled basis or be limited in the time spent with patients.²⁷

Prohibitions on practice in mercantile establishments. The danger seen in allowing optometrists to locate in a commercial concern is the loss of independence. Under a typical scenario, optometrists would be subject to the control of the commercial concern with regard to office hours, decor, promotions, and perhaps, the fees that are charged. To counter any potentially harmful effects, the leasing arrangements could be regulated. For example, Rhode Island's Optometry Practice Act prohibits optometrists from leasing space where the rent is tied to gross receipts, net profits, and/or volume of patients examined.

Trade names. The argument is that trade names foster deception because consumers may be misled about the identity of the optometrist practicing under the trade name. However, there is little evidence to support this contention.

Physicians, dentists, and opticians are all allowed to have trade names. Trade names provide consumers with information about price, quality, and service which is not easily available in other ways. If needed, measures could be enacted to protect consumers from deception in the use of trade names, such as requiring those using a trade name to disclose ownership identity.

Conclusion

Our evaluation of the regulation of the practice of optometry finds that it continues to pose a potential danger to the health and safety of the public and

27. Roland Koncan, "The Practice of Corporate Optometry: Do the Eyes Have It?," *The California Regulatory Law Reporter*, Vol. 5, No. 4, Fall 1985, p. 3.

should be regulated. This finding is in agreement with our prior 1981 sunset evaluation report. However, changes are needed in the statute and the operations of both the board and DCCA to make regulation more effective.

Recommendations

We recommend that:

1. Chapter 459, Hawaii Revised Statutes, be reenacted. In reenacting the statute, we recommend that the following amendments be made:

- . require that one of the licensed optometrists on the board be from a neighbor island;*
- . delete the requirement that an applicant must graduate from an accredited American optometric college, school, or university;*
- . remove the requirement that the national board examination must have been taken no more than five years before the date the application is submitted to the board;*
- . delete the requirement for a photograph to be submitted with the application;*
- . remove continuing education requirements as a condition for license renewal;*
- . provide for reciprocity by licensing qualified and licensed optometrists from other jurisdictions whose licensing requirements are equivalent to or more stringent than Hawaii's; and*
- . repeal restrictions on advertising and the commercial practice of optometry.*

2. *The Board of Examiners in Optometry make the following improvements:*
 - . *delete the requirements for applicants to answer the question on criminal history unless it can be clearly shown that such information relates directly to the applicants' performance in optometry;*
 - . *clarify the status of previously unsuccessful candidates whose National Board of Examiners in Optometry examination scores are within five years of their application;*
 - . *delete the requirement for a written examination on optometry law or incorporate it into the practical examination;*
 - . *discard the 10–point deduct system from the visual analysis portion of the practical examination;*
 - . *develop performance criteria for the practical examination and conduct training sessions for examiners; and*
 - . *devise new testing procedures for the diagnostic pharmaceutical agents practical examination.*
3. *We recommend that the Department of Commerce and Consumer Affairs initiate the following changes:*
 - . *develop a training program for board members;*
 - . *have the Regulated Industries Complaints Office routinely inform the board of the disposition of all significant complaint cases; and*
 - . *establish procedures to ensure that revisions made to examinations are thorough and complete; develop clear, explicit, and uniform guidelines for the scoring of examinations; and formulate safeguards to ensure examinations are scored correctly.*

APPENDICES



FEDERAL TRADE COMMISSION

San Francisco Regional Office

Box 36005
450 Golden Gate Ave.
San Francisco, CA 94102
(415) 556-1270

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OFF. OF THE AUDITOR
STATE OF HAWAII

AUG 21 1986

Mr. Owen H. Yamasaki
Office of the Auditor
465 S. King Street Room 500
Honolulu, HA 96813

Dear Mr. Yamasaki:

You recently requested comments in connection with your sunset review of statutory provisions prohibiting certain business practices by members of the optometric profession.¹ The Federal Trade Commission's Bureaus of Competition, Consumer Protection and Economics, and its San Francisco Regional Office, are pleased to respond to this request.² As discussed below, we strongly recommend the repeal of statutory restrictions on truthful advertising, such as the laws that ban the advertising of discounts or claims of superiority. We also recommend the repeal of laws that unduly limit the commercial formats open to optometrists, such as the laws banning trade names or affiliations with lay corporations. Studies conducted by the staff of the Federal Trade Commission and others indicate that such restrictions are likely to raise the price of optometric goods and services without providing any countervailing benefits to consumers.

The Federal Trade Commission is empowered under 15 U.S.C. §§ 41 et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to this statutory mandate the Commission has attempted to encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years the Commission has been investigating the competitive effects of restrictions on the business practices of state-licensed professionals, including

¹ Hawaii Rev. Stat. Ann. §§ 459 et seq. (1984).

² These comments represent the views of the Commission's Bureaus of Competition, Consumer Protection and Economics, and those of its San Francisco Regional Office, and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

optometrists, dentists, lawyers, physicians, and others. Our goal has been to identify and seek the removal of those restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.

Advertising Restrictions

As a part of the Commission's efforts to encourage competition among licensed professions, it has examined the effects of public and private restrictions that limit the ability of professionals to engage in nondeceptive advertising.³ Studies have shown that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.⁴ Studies have also provided evidence that restrictions on advertising raise prices but do not increase the

³ See, e.g., American Medical Association, 94 F.T.C. 701 (1979), aff'd 638 F. 2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982). The thrust of the AMA decision--"that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011)--is consistent with the reasoning of recent Supreme Court decisions involving professional regulations. See, e.g. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, ___ U.S. ___, 105 S. Ct. 2265 (1985) (holding that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients or using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding state supreme court prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); and Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976) (holding Virginia prohibition on advertising by pharmacists invalid).

⁴ Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

quality of goods and services.⁵ Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may result.

The Commission has examined various justifications that have been offered for restrictions on advertising and has concluded, as have the courts, that these arguments do not justify restrictions on truthful advertising. For this reason, only false or deceptive advertising should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and may contribute to an increase in prices.

Section 459-9(3A) prohibits optometrists from advertising optometric goods at discount. We urge the elimination of this provision.⁶ This section's ban on an important form of price advertising clearly deprives consumers of information central to their purchasing decision. Because it makes comparison shopping on price very difficult, the restriction limits significant and meaningful competition among optometrists. In economic terms, the existing ban unnecessarily increases the "search costs" to optometric patients of identifying those practitioners who offer the price, quality and kind of care suited to the patients' specific needs and desires.

The elimination of the present ban on discount advertising will not inhibit Hawaii from vigorously protecting consumers from false or misleading advertising. We note that § 459-9(3B) condemns false and deceptive advertising. Should a discount advertisement be found deceptive, this section could be successfully invoked to prohibit it. A total proscription on all discount advertising, however, has the effect of prohibiting truthful advertising about a vital subject and is likely to result in a significant reduction in consumer welfare.

We also recommend the elimination of that part of § 459-9(3B) which prohibits claims of superiority by optometrists. This restriction clearly lessens rivalry among competing sellers. The effects of the restriction will depend on how it is interpreted and applied. At a minimum, a prohibition on

⁵ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979). See also Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

⁶ A similar ban on discount advertising was held to be an unconstitutional infringement of First Amendment rights in Terry v. California State Board of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975), affirmed, 426 U.S. 913 (1976).

advertisements that contain claims of superiority restricts comparative advertising, which can be a highly effective means of informing and attracting customers and an important competitive force. When a seller cannot truthfully compare the attributes of his service to those of his competitors, the incentive to improve or offer different products, services, or prices is likely to be reduced.

A ban on claims of superiority is likely to be even more injurious to competition and consumers if interpreted to prohibit a wider range of truthful claims. Virtually all statements about a seller's qualifications, experience, or performance can be considered to be implicit claims of superiority. A ban on all such claims would make it very difficult for a seller to provide consumers with truthful information about the differences between his services and those of his competitors.

We also recommend the repeal of § 459-9(3C) which prohibits advertising that identifies an optometrist in conjunction with any "nonlicensed person or groups of individuals." A ban on advertising of lawful affiliations between optometrists and retail sellers of optical goods denies consumers information about "non-traditional" and potentially efficient forms of providing eye care goods and services. It can pose a barrier to entry by large optical establishments and reduce the pressure on other sellers of eye wear to compete, not only with respect to price, but also as to convenience of service. It can thereby injure consumers through higher prices and reduce consumer choice.

We further recommend the elimination of § 459-9(5), which bans the use of house-to-house canvassing. This prohibition may in some instances impede the flow of truthful commercial information from practitioners to potential clients. Such restrictions on the dissemination of information may make it more difficult for buyers to learn about the availability of goods and services and differences in price and quality, thereby insulating competitors from direct competition and reducing the incentive to compete on the merits. Although Hawaii may have a legitimate interest in preventing over-reaching by canvassers in general, we believe that an absolute ban on house-to-house canvassing, singling out optometric goods and services, is unjustified.

Finally, we recommend the repeal of that part of § 459-9(8) which requires that all advertising identify the individual optometrist involved.⁷ This provision is likely to raise the

⁷ Section 459-9(8) also seems to prohibit the use of trade names by optometrists. As discussed more fully in the "Commercial Practice Restrictions" section of this letter, we recommend that optometrists be permitted to use trade names. The use of such names can be critical to the establishment of large

Footnote continued

costs of advertising for optometric practices involving many members, and therefore to inhibit advertising by such practices. As a consequence, consumers would be deprived of the benefits of that advertising. Consumers can learn the identity of the optometrist who is responsible for their care in a number of less burdensome ways. For example, a provision could be enacted to require that the names of all optometrists practicing at a particular facility be clearly posted at that location. This alternative would more directly inform patients of the identity of their optometrist without the attendant costs imposed by § 459-9(8).

You have asked whether the Commission has modified its position on advertising restrictions after the decision in American Optometric Association v. FTC,⁸ which remanded §§ 456.2 through 456.6 of the Advertising of Ophthalmic Goods and Services Trade Regulation Rule ("Eyeglasses Rule") for further study. In the American Optometric Association case, the court determined, among other things, that the remanded portions of the rule were unnecessary in light of the Supreme Court's decision in Bates v. State of Arizona.⁹ The Commission has not altered its position that restrictions on truthful, non-deceptive advertising diminish consumer welfare and should be vigorously opposed. In harmony with this position, the Commission has proceeded on a case-by-case basis to review and, in certain instances, challenge rules affecting ophthalmic advertising.¹⁰

You also ask whether the advertising disclosure requirements mandated by § 459-10 are "necessary to protect the public's welfare or do they serve to discourage advertising." Section 459-10 is adapted from § 456.5 of the "Eyeglasses Rule." That rule authorized certain permissible state restrictions that did not appear to be unreasonably burdensome limitations on advertising. We do not believe, however, that such restrictions are necessary to prevent deception. Therefore, we recommend the repeal of § 459-10.

group practices and chain operations, which often offer lower prices to consumers.

⁸ 626 F. 2d 896 (D.C. Cir. 1980).

⁹ 433 U.S. 350 (1977).

¹⁰ The most recent example of this effort is the Commission's case against the Massachusetts Board of Optometry (Docket No. 9195). On June 23, 1986, the administrative law judge ruled that the board may not prohibit the advertising or offering of discounts, or advertising that optometrists' services are available in commercial establishments; or restrict advertising that uses testimonials or advertising that the board considers sensational or flamboyant. Both parties have appealed this decision to the Commission.

Commercial Practice Restrictions

We also take this opportunity to comment on several current statutory provisions that limit the manner in which optometrists may do business. Section 459-9(4) prohibits the employment of optometrists by lay persons or corporations. Section 459-9(6) prohibits the practice of optometry on the premises of a commercial firm, and restricts ownership of optometric practices to licensed optometrists. Section 459-9(8) prohibits the use of trade names by optometrists.

We are concerned that these provisions may unnecessarily hamper optometrists who wish to market their services in a cost-efficient manner.¹¹ For example, banning the practice of optometry on the premises of a commercial concern prevents optometrists from locating their practices inside retail drug or department stores where they can establish and maintain a high volume of patients because of the convenience of such locations and a high number of "walk-in" patients. This higher volume may, in turn, allow professional firms to realize economies of scale that may be passed on to consumers in the form of lower prices. This restriction may also increase costs for chain optical firms by requiring optometrists associated with such firms to locate in separate offices or to establish separate entrances. Such higher costs may decrease the number of chain firms, resulting in higher prices for consumers.

¹¹ On January 4, 1985, the Commission proposed an Ophthalmic Practices Trade Regulation Rule that would prohibit, among other things, state-imposed bans on trade name usage and bans on employment or other relationships between optometrists and non-optometrists. The Commission stated in its Notice of Proposed Rulemaking that public restraints on the permissible forms of ophthalmic practice appear to increase consumer prices for ophthalmic goods and services, but do not appear to protect the public health or safety. See 50 Fed. Reg. 598, 599-600 (1985).

In a case challenging various ethical code provisions enforced by the American Medical Association ("AMA"), the Commission found that AMA rules prohibiting physicians from working on a salaried basis for a hospital or other lay institution, and from entering into partnerships or similar relationships with non-physicians, unreasonably restrained competition and thereby violated the antitrust laws. *American Medical Association*, 94 F.T.C. 701 (1979), *aff'd*, 638 F.2d. 443 (2d Cir. 1980), *aff'd mem. by an equally divided court*, 455 U.S. 676 (1982). The Commission concluded that the AMA's prohibitions kept physicians from adopting more economically efficient business formats and that, in particular, these restrictions precluded competition by organizations not directly and completely under the control of physicians. The Commission also found that there were no countervailing procompetitive justifications for these restrictions.

Similarly, the use of trade names by optometrists can be essential to the establishment of large group practices and chain operations that are able to exploit economies of scale and, consequently, to offer lower prices. Trade names are chosen because they are easy to remember and may also identify the location or other characteristics of a practice. Over time, a trade name ordinarily comes to be associated with a certain level of quality, service and price, which facilitates consumer search.

Proponents of such restrictions say that the restrictions help to maintain a high level of quality in the professional services market. They claim, for example, that employer-employee and other business relationships between professionals and non-professionals will diminish the overall quality of care because of lay interference with the professional judgment of licensees. They also allege that, while lay firms might offer lower prices, such firms might also encourage their professional employees to cut corners to maintain profits. Similarly, it could be argued, that professionals who practice in traditional, non-commercial settings would be forced to lower the price and quality of their services in order to meet the prices of their commercial competitors.

The Federal Trade Commission's Bureau of Economics and Consumer Protection have issued two studies that provide evidence that restrictions on commercial practice by optometrists -- including restrictions on business relationships between optometrists and non-optometrists, on commercial locations and on trade name usage -- are, in fact, harmful to consumers.

The first study¹², conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, compared the price and quality of eye examinations and eyeglasses provided by optometrists in cities with a variety of regulatory environments. The study found that eye examinations and eyeglasses cost significantly more in cities without chains and advertising than in cities where advertising and chain optical firms were present. The average price charged by optometrists in the cities without chains and advertising was 33.6% higher than in the cities with advertising and chains. Estimates based on further analysis of the study data showed that prices were 17.9% higher due to the absence of chains; the remaining price difference was attributable to the absence of advertising.

This study also provides evidence that commercial practice restrictions do not result in higher quality eye care. The

¹² Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

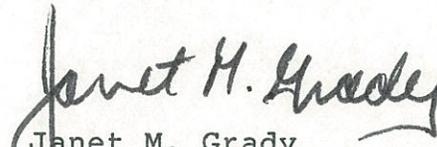
thoroughness of eye exams, the accuracy of eyeglass prescriptions, the accuracy and workmanship of eyeglasses, and the extent of unnecessary prescribing were, on average, the same in restrictive and non-restrictive markets.

A more recent study¹³ of cosmetic contact lens fitting conducted by the Commission's Bureaus of Economics and Consumer Protection concluded that, on average, "commercial" optometrists -- that is, optometrists who were associated with chain optical firms, used trade names, or practiced in commercial locations -- fitted cosmetic contact lenses at least as well as other fitters, but charged significantly lower prices.

In sum, restrictions on commercial practice and prohibitions on the use of trade names by professionals all tend to raise prices above the levels that would otherwise prevail, but do not seem to raise the quality of care in the vision care market. We suggest, therefore, that you consider repeal of §§ 459-9(4), 459-9(6), and 459-9(8), as well as the advertising restrictions discussed above.

Thank you for considering our comments. We have referred to a number of studies, cases and other materials. We would be happy to supply copies of these if you so desire. Please let us know if we may be of any further assistance.

Very truly yours,


Janet M. Grady
Regional Director

¹³ Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists and Opticians (1983). This study was designed and conducted with the assistance of the major national professional associations representing ophthalmology, optometry and opticianry.

APPENDIX B

COMMENTS ON AGENCY RESPONSES

A preliminary draft of this Sunset Evaluation Report was transmitted on December 10, 1986, to the Board of Examiners in Optometry and the Department of Commerce and Consumer Affairs for their review and comments. A copy of the transmittal letter to the board is included as Attachment 1 of this Appendix. A similar letter was sent to the department. The responses from the board and the department are included as Attachments 2 and 3.

For the most part, the board disagrees with our recommendations. However, with respect to what we consider to be the most important recommendation in our report, the board appears to be somewhat receptive or resigned. At least, it has not expressed disagreement. This concerns our recommendation for the Legislature to repeal the statutory restrictions on advertising and the commercial practice of optometry, a recommendation which has also been made by the Federal Trade Commission (FTC) after having reviewed Hawaii's optometry law.

On this matter, the board states the following:

"The recommendation to repeal the restrictions on advertising and the commercial practice of optometry may be moot if the decision to allow the FTC to overrule state law (via EYEGASSES II) is made. The board does however believe that it should retain the general authority to address fraudulent, unfair and deceptive advertising and trade practices because of their potential harm to the consumers."

The proposed FTC rule has been in the making since 1980. Our view is that the Legislature should not wait to see what happens to the FTC rule but that it should repeal the restrictive Hawaii provisions, regardless of what happens at the federal level. As to the board's desire to retain authority over "fraudulent, unfair

and deceptive advertising," we are *not* proposing that the statutory provision covering this aspect be repealed.

The board is open to a few of the other recommendations made in the report such as having a neighbor island member on the board and deleting the requirement that a licensing applicant be a graduate of an "American" institution. However, it does not agree that requirements should be removed for applicants to submit a photograph, answer questions on criminal history, or to comply with continuing education for relicensure.

The board also rejects our recommendation to remove the five-year limitation on the validity of the national examination. It says that the limitation does not create a hardship because the clock does not start to run for an applicant until *after* the candidate has passed *all parts* of the examination. However, according to the board's rules, the board does not accept *any part* of the National Board of Examiners in Optometry (NBEO) examination that is more than five years before the date the application is received by the board. If the board has changed its position, it should amend its rules accordingly. In addition, it is the policy of the NBEO that the national board examinations remain valid without a time limit. As noted in our report, the limitation serves primarily to restrict out-of-state optometrists from practicing in Hawaii by requiring them to retake the examination if they had been taken more than five years ago.

The board does not agree with our recommendations to improve its examinations and to delete the written examination on state laws. It agrees that performance criteria should be developed for the practical examination, but it says that the examiners already have written guidelines and instruction sheets. However, these guidelines merely list the procedures to be performed without any

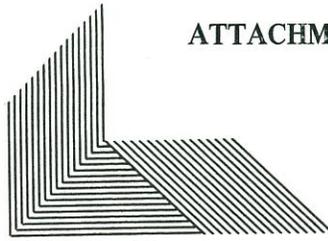
performance standards to assist examiners in assessing how well the procedure was performed. The board also rejects our recommendation to devise new testing procedures for the diagnostic pharmaceutical agents practical test. It claims that its current test is foolproof because candidates must get a proper reading to perform it correctly. However, we found that the accuracy of readings was not used as a criterion by examiners. Finally, it does not agree to discard the 10-point deduct system.

With respect to our recommendation that the Department of Commerce and Consumer Affairs develop a training program for board members, the board says that each board member has received manuals from the department which are sufficient and that a formal training program would be impractical.

The Department of Commerce and Consumer Affairs responds that it would like to have an ongoing training program for board members but that there are limitations in resources. Meanwhile, it has prepared two operational manuals which are used for the purpose of orienting board members. As to our recommendation that the Regulated Industries Complaints Office should inform the board of the disposition of all significant complaint cases, the department says that it does so in cases that involve administrative hearings and settlement actions. The department also says it has "taken steps" to provide information on the disposition of other kinds of cases.

ATTACHMENT 1

THE OFFICE OF THE AUDITOR
STATE OF HAWAII
465 S. KING STREET, RM. 500
HONOLULU, HAWAII 96813



CLINTON T. TANIMURA
AUDITOR

December 10, 1986

COPY

Dr. Dennis M. Kuwabara, Chairperson
Board of Examiners in Optometry
Department of Commerce and Consumer Affairs
State of Hawaii
1010 Richards Street
Honolulu, Hawaii 96813

Dear Dr. Kuwabara:

Enclosed are four preliminary copies, numbered 4 through 9, of our *Sunset Evaluation Report, Optometry, Chapter 459, Hawaii Revised Statutes*. These copies are for review by you, other members of the board, and your executive secretary. This preliminary report has also been transmitted to Robert Alm, Director of the Department of Commerce and Consumer Affairs.

The report contains our recommendations relating to the regulation of optometry. If you have any comments on our recommendations, we would appreciate receiving them by January 9, 1987. Any comments we receive will be included as part of the final report which will be submitted to the Legislature.

Since the report is not in final form and changes may possibly be made to it, we request that you limit access to the report to those officials whom you wish to call upon for assistance in your response. Please do not reproduce the report. Should you require additional copies, please contact our office. Public release of the report will be made solely by our office and only after the report is published in its final form.

We appreciate the assistance and cooperation extended to us.

Sincerely,


Clinton T. Tanimura
Legislative Auditor

Enclosures

ATTACHMENT 2



John Waihee
GOVERNOR

Robert A. Alm
DIRECTOR

NOE NOE TOM
LICENSING ADMINISTRATOR

BOARD OF EXAMINERS IN OPTOMETRY

STATE OF HAWAII
PROFESSIONAL & VOCATIONAL LICENSING DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
P. O. BOX 3469
HONOLULU, HAWAII 96801

January 8, 1987

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OFF. OF THE AUDITOR
STATE OF HAWAII

Mr. Clinton T. Tanimura
Legislative Auditor
Office of the Legislative Auditor
465 S. King Street, Room 500
Honolulu, HI 96813

Dear Mr. Tanimura:

Thank you for the opportunity to comment on the Sunset Evaluation Report on Optometry. We commend your office for a thorough report and our board offers the following comments:

The recommendation that one of the licensed optometrists on the board be from a neighbor island would meet no major opposition, but a number of factors should be weighed before the law is changed. First, we recognize that the State would have to absorb costs to fly the neighbor island board member in to attend meetings. Secondly, there is concern that in situations where a board meeting needed to be cancelled at the last minute due to lack of quorum, or because the neighbor island member was not able to get a flight out or would be delayed for several hours, all members would unnecessarily expend valuable time. Also, on special projects, such as exam revision, or discussion of rule or statute amendments, implementation may be difficult, time consuming and costly, if the neighbor island board member needed to fly in more frequently for these projects, or if unable to do so, cause staff to communicate by phone over matters which would be better handled in person. Further, we respectfully disagree with what appears to be your concern that the board may not be sensitive to the needs or interests of neighbor island practitioners. With reference to CE courses, the Hawaii Optometric Association (HOA) provides CE courses to the neighbor islands and sets up some Oahu courses for their convenience. HOA also has directors from the neighbor islands

Mr. Clinton T. Tanimura
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who input their needs and inform the board as well. The board has always maintained that its policies should be equally beneficial to all licensees within the State.

The recommendation to delete the word "American" is accepted by the board. The emphasis, instead, should be on "accredited"; provided it is by COE. There are a number of "off shore" schools that have questionable curricula and the board does not have the means to differentiate whether such an institution provided a competent practitioner.

The recommendation to remove the five-year limitation on the NBEO exam is not substantiated with convincing arguments and shows a lack of understanding of the NBEO program. Hawaii is not the only state utilizing the five-year limitation. There are five others. Limiting the validity of the NBEO test scores is not arbitrary or restrictive. It was done based on the fact that the NBEO is always in the process of changing its emphasis and area of testing. For example, the report discusses a three-part examination. As of 1987, there will be five parts and there are provisions to allow this number to increase in the near future. This is being done to keep up with the rapid changes in the scope of optometric practice. Almost all of the 50 states now use DPAs and the number of states using TPAs is nearing 20 percent. All this has occurred within less than 15 years. The statement suggesting that the NBEO is sufficient for a lifetime is erroneous. Passing an NBEO in 1970 and in 1986 is vastly different in the subject matter being tested. In its 1987 Candidate's Guide, the NBEO, in offering the candidate strategies for optimal test performance, advises against using old exams which are widely available, because "the test question formats and scope of content have changed significantly since 1980, and therefore, excessive reference to these old items may not be very useful and indeed, may be non-representative." Recognition of the five-year limitation on the NBEO examination is considered to be valid.

The implication that the board discriminates against out-of-state licensees is illogical since the report itself points out that switching to a national examination (which the board has) opens the door to reciprocity agreements with other states since the NBEO examination would serve as a common qualification and standard of competency. Just as a recent graduate must take the exam, so do Hawaii and out-of-state

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candidates for licensing, since the NBEO exam replaces the board's written in January 1987. The report also shows a lack of understanding of another aspect of the five-year limitation, specifically, when the clock begins to run for recognition of the examination. While it is correct that a student may be eligible to take the first part of the exam in the second year and the final part in the fourth year of optometry school, it is only after the candidate has passed all parts that the actual countdown begins.

The recommendation to delete the requirement for a photograph to be submitted with the application is one which the board and the department have reservations with since the reasons for this recommendation (as stated in your report) do not point to an actual problem with the current system. Inferences that the board or department could or would use the photograph in a discriminatory manner is untrue and unfair.

According to the department, the requirement for a photograph prior to licensure was implemented many years back for two reasons: (1) For comparison and verification purposes at the time of administration of an examination, and/or (2) For identification purposes to assist with investigations in the event of complaints against applicants/licensees. It was appropriate to require the photograph with the application since this document is the one time notarized filing by the prospective licensee, and becomes the personal record of licensure.

We understand from the department that while other procedures have been implemented which no longer necessitates the photograph for the purposes in (1) above, there is still the need for the photograph as a source of information for the investigation division. Very recently, the investigation division was able to rely on photographs of applicants to investigate a possible breach of confidentiality of an examination. Had the photographs not been available, the investigation would have been severely handicapped.

We find justification with the department that the current practice is proper and reasonable and that to delete the requirement or to require the photograph at a later point in the licensure process would unduly limit a valuable source of information to the investigation division and would unnecessarily expend time, resources and money of the department to revise and reprint all of its application forms in a different format.

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The board believes that the recommendation to remove the required 16 continuing education hours is like taking a "giant step backward". As an island state, optometrists in Hawaii are unfortunately removed from the higher learning centers that are readily available to the optometrists on the mainland. While the cost of keeping abreast with changes in the practice is high, it is not as exorbitant as facing a malpractice suit for performing below the national standard of competency. The practice of optometry changes rapidly. By dropping the CE requirement, the quality of vision care being provided in Hawaii would be reduced. While possibly not the only reason that there has not been a single case of malpractice by an optometrist in the state, CE is certainly a contributing factor.

The recommendation to provide for reciprocity is one to which the board is opened to for consideration in the future. It would be prudent to await the NBEO to develop its regional testing centers since it would be virtually impossible for the board to accurately measure whether one state's licensing requirements are equal to, more, or less stringent than Hawaii's. Each state's statutes governing the scope of practice have a great degree of variance. Hawaii's laws are in itself unique in many respects. Absent the expertise in evaluating other state's licensing requirements the board cannot see at this time, providing for licensure by reciprocity.

The recommendation to repeal the restrictions on advertising and the commercial practice of optometry may be moot if the decision to allow the FTC to overrule state law (via EYEGASSES II) is made. The board does however believe that it should retain the general authority to address fraudulent, unfair and deceptive advertising and trade practices because of their potential harm to the consumers.

The recommendation to clarify the status of previously unsuccessful candidates whose NBEO examination scores are within five years of their application has already been refuted by the board in response to the removal of the five-year limitation. It is only when a candidate has passed all parts of the exam, that the five-year countdown begins. All applicants who failed the written were contacted by letter to offer October 1986 and December 1986 as deadline dates to retake the exam. All who took the exam were successful. Beginning January 1987 only the NBEO would be needed. Those who opted to wait for the NBEO could do so.

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The recommendation to delete the requirement for a written examination on optometry law or incorporate into the practical examination is one which the board respectfully disagrees. First, as in all states, an optometrist must know the laws and rules of the state in which he resides. The most practical method is through a written examination. To delete the written optometry law exam would be dangerous to the public in that it would delete the need for the candidate to ever study up on it. Secondly, the recommendation to incorporate the written into the practical shows a lack of understanding of the individual testing formats and the scope of their contents. The time involved to have both tests set up and administered would be too lengthy. The space and equipment used for the practical are different from that used in the written. The members of the board need to be present for the practical and personnel from the exam branch would need to step in to administer the written. The logistics involved would make both exams more vulnerable to error due to the confusion.

We understand from the department that the recommendation to delete the requirements for applicants to answer questions on criminal history is one which your office has raised before in other sunset reports and which the department has taken issue with since it has a legal opinion that the question on criminal history is permissible and fully complies with the limitations contained in Section 831-3.1 HRS.

Based on the legal opinion provided, we respectfully differ with your interpretations that the question is in violation of Section 831-3.1 HRS.

Further, while we acknowledge that written guidelines are needed on the types of offenses that would be grounds for denying a license, we do not believe it would be in the consumers interests to delete the question until guidelines are established. Until guidelines are in place, we have and will continue to seek legal advice if the criminal history question is answered by the applicant in the affirmative. Inferences to the potential for discriminatory or arbitrary actions is untrue and unfair.

The recommendation to discard the 10-point deduct system from the visual analysis portion of the practical examination shows a lack of understanding of the system. First, it was instituted as a result of the individual mentioned in the report. Secondly, on subsequent examinations, each candidate was informed in writing that up to 10 points could be deducted

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if there was a demonstration of harm or a potential to hurt the patient. Third, not a single candidate has failed because of this provision. The 10-point deduct system is considered to be a valid criteria to be used for candidate performance and patient safety.

The recommendation to develop performance criteria for the practical examination and conduct training sessions for examiners is one with which the board has been and continues to be in agreement. The lack of funding is the only factor which prevents the board from conducting formal training sessions. The examiners currently being utilized are former and current board members who are willing to donate their time. By continuously assisting with examinations such examiners have achieved a level of consistency and reliability whereby formal training sessions become less necessary. Should a non-board member volunteer, the board ensures that person is always teamed with an experienced examiner. Further the board does utilize written guidelines and instruction sheets, provided to each examiner prior to the examination. It covers what needs to be tested, such as proficiency with the biomicroscope or demonstration of the six basic illuminations. It also instructs the examiner on what to look for, as in damage done to instruments by the applicants, excessive roughness on patient or when the candidate should begin working on his case analysis. Such guidelines and instruction sheets were available for inspection.

The recommendation to devise new testing procedures for the DPA practical examination is not cost efficient or sound. The cost to the State for having a patient sit for this portion would be astronomical. The current method of testing is the best means to ascertain competency with the Goldmann tonometer. Further, this procedure is used by many states. The current test procedure is fool proof in that if a proper reading is not obtained, the candidate is not performing the test properly. The IAB examination is to be administered for the first time in April or August 1987, therefore, to recommend it as a better procedure when it has not even proven its effectiveness shows a lack of understanding in determining the value of examinations.

Lastly, we would like to comment on the recommendation for the Department of Commerce and Consumer Affairs to develop a training program for board members. To date, each member has been given two manuals. One is the operational manual referenced in your report. The other, which was not identified, is a manual which covers the role of the

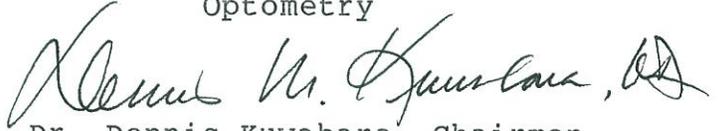
Mr. Clinton T. Tanimura
January 8, 1987
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department, info on the various support service groups to the boards, Chapters 26, 26H, 91, 92, 92E HRS, and Chapter 201, Administrative Rules on Practice and Procedure. Further, there are memorandums from the Attorney General's Office included in this manual. The members of the board feel that the manuals are sufficient to give one background, and the rest must be learned through experience. A formal orientation from DCCA would be idealistic, but impractical.

Again, we thank you for the opportunity to respond to your comments and recommendations. The support you and your staff have given the Board in seeking its continuance is greatly appreciated.

Sincerely,

State Board of Examiners in
Optometry


Dr. Dennis Kuwabara, Chairman

ATTACHMENT 3

John Waihee
GOVERNOR



Robert A. Alm
DIRECTOR
COMMISSIONER OF SECURITIES

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
1010 RICHARDS STREET
P. O. BOX 541
HONOLULU, HAWAII 96809

January 8, 1987

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OFF. OF THE AUDITOR
STATE OF HAWAII

Mr. Clinton T. Tanimura
Legislative Auditor
Office of the Auditor
465 S. King Street, Suite 500
Honolulu, HI 96813

Dear Mr. Tanimura:

Thank you for the opportunity to comment on your "Sunset Evaluation Report Optometry".

We would like to address the recommendations to the Department of Commerce and Consumer Affairs as follows:

"develop a training program for board members"

We too acknowledge the desire for a formal, well thought out, ongoing training program for board members, provided resources are there for us to carry out this mission. From a practical standpoint, money, manpower, and board members availability to participate in such activity is necessary for execution. Until we are able to reach this level, we have and will continue to orientate board members through operational manuals and sharing of information by staff (including other division personnel with whom the board has contacted).

There are currently two manuals available to board members: (1) the manual which is referenced in your report, and (2) a manual which contains the exact information as recommended by your quotation on page 20. It would appear this second manual was not recognized and would therefore cause you to assume we only had the one manual in place.

"have the Regulated Industries Complaints Office routinely inform the board of the disposition of significant complaint cases"

To ensure that there is no misunderstanding, we would like to clarify that the Board of Optometry is informed

Mr. Clinton T. Tanimura
January 8, 1987
Page 2

and takes part in the disposition of complaints which involve the Administration Hearing Process. The Board receives copies of the hearings officer's "Findings of Fact and Conclusions of Law," as well as reviews any exceptions filed in these cases. Final decision in these matters may only be made by the Board.

Further, complaints involving settlements with disciplinary action against licensees require that the Board approve the settlement agreement. Once again the board must be aware of the disposition since they are directly involved with the sanctions.

Assuming that your recommendation is meant to include the disposition of complaints other than those described above, the department has, as noted, taken steps in this direction and will continue to make strides in this area.

"establish procedures to ensure that revisions made to examinations are thorough and complete; develop clear, explicit, and uniform guidelines for the scoring of examinations; and formulate safeguards to ensure examinations are scored correctly."

While we appreciate your comments in this area, we would like to note that we disagree with the negative conclusions made of past practices and procedures regarding examination scoring. We believe that there has been no compromise to the fairness and equity of scoring. We will, as always, continue to give our attention to the continued improvement of policies and procedures in the area of examinations.

We would like to extend our appreciation for the constructive comments rendered in your report and of the time spent by you and your staff in this evaluation.

Very truly yours,



Robert A. Alm
Director

APPENDIX C

DIGEST

A BILL FOR AN ACT RELATING TO OPTOMETRY

Extends repeal of the Board of Examiners in Optometry from December 31, 1987 to December 31, 1993. Requires that one of the three licensed optometrist members of the board of examiners be from a county other than the City and County of Honolulu. Deletes the requirement that an applicant for examination submit a photograph. Deletes the requirement that the accredited optometric college, school, or university that an applicant must graduate from be American. Deletes the requirement for continuing education as a condition for license renewal. Deletes the requirement that the national board examination must have been taken no more than five years before the date the application is submitted to the board. Provides for reciprocity by licensing qualified and licensed optometrists from other states or territories whose licensing requirements are equivalent to or more stringent than Hawaii's requirements. Repeals limitations on advertising and the commercial practice of optometry.

Effective upon approval.

A BILL FOR AN ACT

RELATING TO OPTOMETRY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 26H-4, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§26H-4 Repeal dates. (a) The following chapters are
4 hereby repealed effective December 31, 1987:

- 5 (1) Chapter 458 (Board of Dispensing Opticians)
6 [(2) Chapter 459 (Board of Examiners in Optometry)
7 (3)] (2) Chapter 452 (Board of Massage)
8 [(4)] (3) Chapter 471 (Board of Veterinary Examiners)
9 [(5)] (4) Chapter 441 (Cemeteries and Mortuaries)
10 [(6)] (5) Chapter 463 (Board of Detectives and Guards)
11 [(7)] (6) Chapter 455 (Board of Examiners in Naturopathy)

12 (b) The following chapters are hereby repealed effective
13 December 31, 1988:

- 14 (1) Chapter 465 (Board of Psychology)
15 (2) Chapter 468E (Board of Speech Pathology and Audiology)
16 (3) Chapter 468K (Travel Agencies)
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1 (4) Chapter 373 (Commercial Employment Agencies)

2 (5) Chapter 442 (Board of Chiropractic Examiners)

3 (6) Chapter 448 (Board of Dental Examiners)

4 (7) Chapter 436E (Board of Acupuncture)

5 (c) The following chapters are hereby repealed effective
6 December 31, 1989:

7 (1) Chapter 444 (Contractors License Board)

8 (2) Chapter 448E (Board of Electricians and Plumbers)

9 (3) Chapter 464 (Board of Registration of Professional
10 Engineers, Architects, Surveyors and Landscape
11 Architects)

12 (4) Chapter 466 (Board of Public Accountancy)

13 (5) Chapter 467 (Real Estate Commission)

14 (6) Chapter 439 (Board of Cosmetology)

15 (7) Chapter 454 (Mortgage Brokers and Solicitors)

16 (8) Chapter 454D (Mortgage and Collection Servicing Agents)

17 (d) The following chapters are hereby repealed effective
18 December 31, 1990:

19 (1) Chapter 447 (Dental Hygienists)

20 (2) Chapter 453 (Board of Medical Examiners)

21 (3) Chapter 457 (Board of Nursing)

22 (4) Chapter 460J (Pest Control Board)



1 (5) Chapter 462A (Pilotage)
 2 (6) Chapter 438 (Board of Barbers)
 3 (e) The following chapters are hereby repealed effective
 4 December 31, 1991:

- 5 (1) Chapter 448H (Elevator Mechanics Licensing Board)
- 6 (2) Chapter 451A (Board of Hearing Aid Dealers and Fitters)
- 7 (3) Chapter 457B (Board of Examiners of Nursing Home
- 8 Administrators)
- 9 (4) Chapter 460 (Board of Osteopathic Examiners)
- 10 (5) Chapter 461 (Board of Pharmacy)
- 11 (6) Chapter 461J (Board of Physical Therapy)
- 12 (7) Chapter 463E (Podiatry)

13 (f) The following chapters are hereby repealed effective
 14 December 31, 1992:

- 15 (1) Chapter 437 (Motor Vehicle Industry Licensing Board)
- 16 (2) Chapter 437B (Motor Vehicle Repair Industry Board)
- 17 (3) Chapter 440 (Boxing Commission) [.]

18 (g) The following chapter is hereby repealed effective
 19 December 31, 1993:

- 20 (1) Chapter 459 (Board of Examiners in Optometry)."

21 SECTION 2. Chapter 459, Hawaii Revised Statutes, is amended
 22 by adding two new sections to be appropriately designated and to
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1 read as follows:

2 "§459- Reciprocity. Any optometrist who is registered or
3 licensed under the laws of any state or territory of the United
4 States or any other jurisdiction with qualifications for
5 licensure which equal or exceed those of this State, shall be
6 eligible for licensure provided that: (1) the optometrist
7 possesses a current, valid license; (2) there is no disciplinary
8 action pending or other unresolved complaint against the
9 optometrist in any state or territory of the United States or in
10 any other jurisdiction; and (3) the laws of the other state,
11 territory or jurisdiction grant reciprocal treatment to licensees
12 of this State. The board may examine such licensees only as to
13 knowledge of this State's statutes and rules.

14 §459- Definitions. As used in this chapter:

15 "Board" means the board of examiners in optometry.

16 "Director" means the director of commerce and consumer
17 affairs."

18 SECTION 3. Section 459-3, Hawaii Revised Statutes, is
19 amended to read as follows:

20 "§459-3 Board of examiners; members, appointment,
21 qualifications. There shall be a board to be known as the board
22 of examiners in optometry, for the State. The board shall
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1 consist of five members, three of whom shall be licensed
2 optometrists who have actually engaged in the practice of
3 optometry for at least five years and two of whom shall be public
4 members. One of the three licensed optometrist members shall be
5 from a county other than the city and county of Honolulu. The
6 board shall be appointed by the governor in accordance with
7 section 26-34. No member of the board shall be a stockholder,
8 member of the faculty, or on a board of trustees of any school of
9 optometry."

10 SECTION 4. Section 459-7, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "§459-7 Application; examination; reexamination; appeal;
13 renewal; [continuing education;] license. (a) Except as
14 otherwise provided in this chapter, every person desiring to
15 begin or to continue the practice of optometry, before beginning
16 or continuing practice, upon presentation of satisfactory
17 evidence, verified by oath, that the applicant is a graduate of
18 an [American] optometric college, school, or university approved
19 by the board of examiners in optometry and accredited by a
20 regional or professional accreditation organization and
21 recognized by the council on post-secondary accreditation or by
22 the United States Office of Education, shall take an examination
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1 before the board upon complying with the following requirements:

2 (1) Applications for examination shall be made out and
3 filed in writing with the executive secretary of the
4 board; and

5 (2) Each application shall be accompanied by an application
6 fee, which shall be retained by the board, and an
7 examination fee.

8 (b) Each applicant shall file, in writing, with the
9 executive secretary [at least] not less than forty-five days, but
10 not more than one hundred eighty days, prior to the date selected
11 by the board for the examination, [the following credentials:]

12 [(1) A] a copy of the applicant's diploma or certificate of
13 graduation from an [American] optometric college,
14 school, or university approved in accordance with
15 subsection (a)[; and

16 (2) An unretouched, unmounted, passport sized, recent
17 photograph of the applicant.].

18 (c) The applicants for examination shall be given due
19 notice of the date and place of each examination. An applicant
20 who fails to pass an examination on the applicant's first
21 attempt, shall be permitted upon payment of a reexamination fee,
22 to take a second or third examination covering only those parts
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1 of the examination which the applicant failed to pass. An
2 applicant who fails to pass the examination on the third attempt
3 or any subsequent attempt shall be required in each instance to
4 file a new application, pay the application and examination fees,
5 and take a complete examination.

6 An appeal to the circuit court of the circuit within which
7 the applicant resides may be taken from any decision of the board
8 by any applicant who is refused or denied a license.

9 Every candidate who passes an examination shall be licensed
10 as possessing the qualifications required by this chapter, and
11 shall receive from the board a proper license upon payment of a
12 license fee.

13 (d) Each licensee shall pay a biennial license fee to the
14 board on or before December 31 of each odd-numbered year for a
15 renewal of the license for the biennium. The failure of any
16 licensee to pay the biennial license fee [and submit proof of
17 satisfying the continuing education program requirements] on or
18 before December 31 of each odd-numbered year shall automatically
19 constitute a forfeiture of the license. Any license which is so
20 forfeited may be restored upon payment of a penalty fee and all
21 delinquent fees as provided in rules adopted by the director
22 pursuant to chapter 91[, and upon submission of proof that the
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1 person whose license has been forfeited has satisfied all
2 continuing education requirements for the period of time the
3 license has been forfeited.

4 (e) Each licensee shall submit proof to the board of
5 examiners that the licensee did, on or before December 31 of each
6 odd-numbered year, meet the requirement of continuing education
7 in programs as set and approved by the board. The board shall
8 adopt rules for the certification of the administration of the
9 continuing education program].

10 [(f)] (e) Certificates of registration shall be endorsed
11 authorizing licensed optometrists to use pharmaceutical agents
12 for examination purposes. A certificate shall certify that an
13 optometrist has complied with the following requirements:

- 14 (1) Successful completion of instruction in general and
15 clinical pharmacology as it relates to the practice of
16 optometry, with particular emphasis on ocular
17 pharmacology. The systemic effects and reactions to
18 topical pharmaceutical agents used for examinations
19 shall be studied, as well as the emergency management
20 and referral of any adverse reactions that may occur.
21 Instruction shall also include review of systemic and
22 ocular diseases and clinical techniques and instruments
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1 used with these pharmaceutical agents for examination
2 purposes. The course of study shall be approved by the
3 board, and shall be offered by an institution which is
4 accredited by a regional or professional accreditation
5 organization and is recognized by the council on
6 post-secondary accreditation or by the United States
7 Office of Education; and

- 8 (2) Successful completion of an examination approved by the
9 board which tests for those subjects outlined in the
10 course of instruction in paragraph (1) [above]."

11 SECTION 5. Section 459-8, Hawaii Revised Statutes, is
12 amended to read as follows:

13 "§459-8 Conduct of examinations. Each applicant whose
14 application is received by the board before January 1, 1987,
15 shall pass either the written examination given by the National
16 Board of Examiners in Optometry or a written examination given by
17 the board.

18 Each applicant whose application is received by the board on
19 or after January 1, 1987, shall pass the written examination
20 given by the National Board of Examiners in Optometry. If a
21 written examination is no longer given by the National Board of
22 Examiners in Optometry, the applicant shall pass either another
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1 national examination selected by the board, or if no other
2 examination is selected by the board, a written examination
3 prepared by the board.

4 In addition to satisfying the applicable requirement above,
5 the applicant shall also pass any practical and any written
6 examinations given by the board.

7 The board shall provide in its rules which parts of the
8 National Board of Examiners examination and the passing scores
9 that the board will accept. [The board shall not accept the
10 scores of any National Board of Examiners examination if the
11 examination was taken by the applicant more than five years
12 before the date the application is received by the board.] The
13 board shall also provide in its rules the passing scores for any
14 examination (practical or written) given by the board."

15 SECTION 6. Section 459-9, Hawaii Revised Statutes, is
16 amended to read as follows:

17 "§459-9 Refusal to permit examination or issue license;
18 revocation and suspension of license; grounds for. The board of
19 examiners in optometry may refuse to admit persons to its
20 examinations or to issue a license or may revoke or suspend, for
21 the period of time as may be determined by the board, a license
22 previously issued, or may impose a penalty as shall be
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1 established by the board, for any of the following causes:

- 2 (1) Presentation to the board of any certificate or
3 testimony or information which was untrue in any
4 material respect or illegally or fraudulently obtained,
5 or when fraud or deceit has been practiced in obtaining
6 any license under this chapter or in passing an
7 examination;
- 8 (2) Conduct of a character likely to deceive or defraud the
9 public, or habits of intemperance or drug addiction
10 calculated to destroy the accuracy of the work of an
11 optometrist, or professional misconduct, or gross
12 carelessness or negligence, or manifest incapacity in
13 the practice of optometry;
- 14 (3) Advertising [in the following manner:
- 15 (A) By any means whatsoever, directly or indirectly,
16 to offer ophthalmic lenses, contact lenses,
17 glasses, or frames or fittings thereof at a
18 discount or as a premium for the purchase of any
19 article of merchandise;
- 20 (B) By] by means of false and deceptive statements or
21 by statements which tend to deceive or defraud;
22 [or to claim superiority over fellow optometrists;
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1 or to publish reports of cases or certificates of
2 same in any public advertising media;

3 (C) In conjunction with any nonlicensed person or
4 groups of individuals by permitting the use of the
5 licensee's name, professional title, or
6 profession;

7 (4) Directly or indirectly accepting or offering employment
8 to practice optometry from, or to any person not having
9 a valid, unrevoked and unsuspended license or from any
10 company or corporation;

11 (5) Making of a house-to-house canvass either in person or
12 through solicitors or associates for the purpose of
13 selling, advertising, or soliciting the sale of
14 eyeglasses, spectacles, ophthalmic lenses, contact
15 lenses, frames, mountings, eye examinations, or
16 optometric services; peddling of eyeglasses,
17 spectacles, ophthalmic lenses, or contact lenses from
18 house-to-house or on the streets or highways
19 notwithstanding any law for the licensing of peddlers;

20 (6) Renting space, subleasing departments, or otherwise
21 occupying space to practice optometry on the premises
22 of a commercial (mercantile) concern. Optometric
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1 practices shall be under the licensee's ownership and
2 under the licensee's exclusive control. It shall not
3 be in conjunction with a scheme or plan with a
4 commercial (mercantile) concern. The prescription
5 files shall be the sole property of the licensee. The
6 office shall be definite and apart from the space
7 occupied by any commercial (mercantile) concern so that
8 all signs are separate and distinct from the commercial
9 (mercantile) concern and all entrances to the premises
10 shall be separate and definite in character so that
11 there could be no misleading interpretation that the
12 licensee's practice is in any way associated with a
13 commercial (mercantile) concern;

14 (7)] (4) Soliciting or receiving, directly or indirectly,
15 any price differential, rebate, refund, discount,
16 commission, credit, kickback, or other allowance,
17 whether in the form of money or otherwise, from a
18 dispensing optician for or on account of referring or
19 sending to the dispensing optician of any intended or
20 prospective wearer or user of any article or appliance
21 prepared or furnished by a dispensing optician, or for
22 or on account of any service or article furnished by
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1 the dispensing optician to any intended or prospective
2 wearer or user;

3 [(8)] Using any name in connection with the licensee's
4 practice other than the name under which the licensee
5 is licensed to practice, or using any advertising which
6 fails to clearly identify the individual licensee or
7 which is ambiguous or misleading as to the licensee's
8 identity;

9 (9)] (5) Employing or utilizing any unlicensed individual
10 to perform optometric services in connection with
11 refraction or visual training without directly and
12 personally supervising the individuals in the
13 performances of the services;

14 [(10)] (6) Violating this chapter or the rules [promulgated]
15 adopted by the board;

16 [(11)] (7) Utilizing pharmaceutical agents without first
17 being certified as provided in section 459-7 or
18 utilizing pharmaceutical agents for purposes other than
19 those specified in section 459-1; or

20 [(12)] (8) Failure to refer a patient to an appropriate
21 licensed physician upon discovery, by history or
22 examination, that the patient evidences an ocular
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1 abnormality or symptoms of systemic disease requiring
2 further diagnosis and possible treatment by a licensed
3 physician."

4 SECTION 7. Section 459-10, Hawaii Revised Statutes, is
5 repealed.

6 ["§459-10 Advertising, contents of. All advertising by a
7 licensee which contains a price for specified ophthalmic goods or
8 services shall contain the following information when
9 appropriate:

- 10 (1) Whether an advertised price includes single vision or
11 multifocal lenses;
12 (2) Whether an advertised price for contact lenses refers
13 to soft or hard lenses;
14 (3) Whether an advertised price for ophthalmic goods
15 includes an eye examination;
16 (4) Whether an advertised price for ophthalmic goods
17 includes all dispensing fees; and
18 (5) Whether an advertised price for eyeglasses includes
19 both frames and lenses."]

20 SECTION 8. Statutory material to be repealed is bracketed.
21 New statutory material is underscored.



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SECTION 9. This Act shall take effect upon its approval.

INTRODUCED BY: _____