

FEDERAL TRADE COMMISSION  
WASHINGTON, D. C. 20580

COMMISSION  
APPROVED

P854663

BUREAU OF  
CONSUMER PROTECTION

June 21, 1985

The Honorable Phillip Isenberg  
California State Assembly  
State Capitol  
Sacramento, CA 95814

Dear Mr. Isenberg:

The Federal Trade Commission's Bureaus of Consumer Protection, Economics, and Competition<sup>1</sup> are pleased to respond to your request for comments on Assembly Bill 1217. The Bill would repeal existing restrictions on the number of branch offices that an optometrist or group of optometrists practicing in California may permissibly operate; remove existing restrictions on the ability of optometrists and opticians to develop and use brand names; and remove many of the existing restrictions on business relationships between optometrists and opticians.<sup>2</sup> As explained in more detail in our attached comments, our analysis of the bill indicates that consumers of optometric services in California would benefit substantially from the removal of existing commercial practice restrictions.<sup>3</sup>

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1 These comments represent the views of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

2 The bill would amend Sections 2556, 3041, and 3070 of the Business and Professions Code, would repeal and add Sections 655, 3077, 3125, and would repeal Section 3163. Our comments are restricted to the issues of branch offices, the format of business relationships between optometrists and opticians, and development of brand names.

3 The Commission recently issued a Notice of Proposed Rulemaking for a Trade Regulation Rule that would remove state laws and regulations that place total bans on trade names, professional relationships between optometrists and non-optometrists, locating in mercantile establishments, and branch offices. In its Notice, the Commission stated that such restraints appear to increase prices without providing offsetting public health or safety benefits. See 50 Fed. Reg. 598-612 (1985).

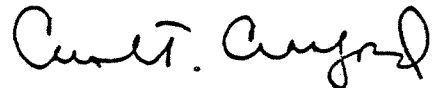
The Honorable Phillip Isenberg

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The Federal Trade Commission seeks to promote 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 effects of state-imposed restrictions on the business practices of professionals, including optometrists, dentists, lawyers, and physicians. Our goal is to identify and encourage the removal of restrictions that impede competition and increase costs to consumers without providing countervailing benefits. In offering the attached comments, we acknowledge that we are not in a position to offer advice on what minimum level of quality of care the states should require.

Thank you for the opportunity to comment on Assembly Bill 1217. In addition to our comments, we have enclosed copies of two studies to which we refer in the comments. Please let us know if we can be of any further assistance.

Sincerely,



Carol T. Crawford  
Director

Enclosures

COMMENTS OF THE BUREAUS OF CONSUMER PROTECTION,  
COMPETITION, AND ECONOMICS OF THE FEDERAL TRADE COMMISSION

TO ASSEMBLYMAN PHILLIP ISENBERG,  
CALIFORNIA LEGISLATURE

ON CALIFORNIA ASSEMBLY BILL 1217,  
TO REMOVE CERTAIN COMMERCIAL PRACTICE  
RESTRICTIONS PERTAINING TO OPTOMETRISTS AND OPTICIANS

June 21, 1985

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These comments represent the views of the Bureaus of Consumer Protection, Competition, and Economics of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

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The Federal Trade Commission's Bureaus of Consumer Protection, Economics, and Competition support the intent of California Assembly Bill 1217 to remove certain trade restrictions in the optical business. Our comments on the bill and analysis of its provisions are set forth below.

#### Analysis of Assembly Bill 1217

Assembly Bill 1217 would remove existing restrictions on the opening of branch offices by optometrists, permit a wider range of business relationships between optometrists and non-optometrists and permit optometrists to use trade names in their practices. The staff of the Federal Trade Commission supports the removal of these restrictions.

#### Branch Offices

Section 3077(f) of the California Business and Professions Code currently provides that no optometrist or group of optometrists may operate more than one branch office. Section 3077(i) does permit an individual optometrist to operate more than one branch office but only if he or she is in personal attendance at each of the offices at least 50 percent of the time that the office is open. Assembly Bill 1217 would repeal these two statutory subsections but provide that any optometrist or group of optometrists may operate more than one branch office so long as the optometry services are performed by licensed persons.

Restrictions on the number of offices an optometrist may operate exemplify what are often termed "commercial practice" restrictions. Proponents of these restrictions claim that they are necessary to maintain a high level of quality in the optometric services market. They assert that chain retailers tend to be less concerned with the quality of professional care than optometrists practicing in more traditional settings, such as a single office.

The actual effect of restrictions on the commercial practice of optometry is likely to be to reduce competition among optometrists and raise the cost of optometric services to consumers. An optometric firm with multiple branch offices can more efficiently use mass media advertising to attract a large volume of patients. This increased volume may enable the firm to realize certain production economies (such as more efficient utilization of its employees and equipment) unavailable to traditional practitioners. High-volume firms may also be able to obtain legitimate quantity discounts on purchases of ophthalmic materials and supplies. The net result is lower prices and increased availability of services to consumers. Commission staff studies discussed below tend to support this latter view.

Assembly Bill 1217, by removing restrictions under California law on opening of branch offices by optometrists, will likely benefit consumers.

## Business Relationships

Section 655 of the Business and Professions Code prohibits licensed optometrists from having a proprietary interest or landlord-tenant relationship with any licensed optician or supplier of optical supplies. Assembly Bill 1217 would remove these restrictions and allow optometrists to enter into franchise contracts, landlord-tenant relationships, partnerships, and other forms of business relationships with licensed opticians and optical suppliers, provided the contractual agreement for payment is not contingent "on the number of prescriptions written by the optometrist" and "does not interfere with the optometrist's professional judgement on what procedures should be performed in an eye examination or specify what equipment may be employed in an examination."

Section 2556 of the Business and Professions Code significantly restricts the ability of optical firms to employ or furnish the services of optometrists or other refractionists. It also makes it unlawful for such firms to advertise the availability of refractionists' services. Assembly Bill 1217 would amend this section by easing a number of these restrictions, but would not repeal the provision of Section 2556 that prohibits anyone from "directly or indirectly employ[ing] on or near the premises used for optical dispensing, an optometrist; or a physician and surgeon." Thus, while the bill would amend California law to permit certain business relationships between optometrists and others, such as the franchise contracts and

partnerships described above, it would continue the ban on employment relationships.

Restrictions on the nature of the business format under which health care professionals operate can reduce competition in health care markets by preventing the formation and development of innovative forms of professional practice that may be more efficient, provide comparable quality, and offer competition to traditional providers. For example, 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 institutions and from entering into partnerships or similar relationships with non-physicians unreasonably restrained competition and thereby violated the antitrust laws.<sup>1</sup> 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 not countervailing procompetitive justifications for these restrictions.

Current California law bans partnerships between optometrists and opticians or other professionals who might provide complementary health care services in a single office.

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<sup>1</sup> In re 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).

Such restrictions, which limit the availability of equity capital for professional practices, may well increase the cost of capital to professional firms and hinder the development of high-volume practices that may reduce costs through economies of scale. In addition, the offering of complementary services at a single location may provide greater convenience and lower costs to consumers who might otherwise have to go to different locations to obtain the services of both an optometrist and an optician. Assembly Bill 1217, by removing these restrictions under current California law, will likely benefit consumers.

Assembly Bill 1217 would not, however, remove the prohibition in Section 2556 of the Business and Professions Code against employment of optometrists by non-optometrists. The Commission's proposed Trade Regulation Rule would remove such bans on employer-employee relationships between optometrists and others.<sup>2</sup> The staff recommended this provision because available empirical evidence suggested that prohibitions on the employment of optometrists -- like other restraints on modes of practice in the ophthalmic marketplace -- may raise prices without raising the level of quality in the provision of eye care services. We are not aware of any evidence, on the other hand, that demonstrates any benefits to consumers from prohibitions on employment relationships between optometrists and non-optometrists.

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2 50 Fed. Reg. 610 (1985).



## Trade Names

Section 3125 of the Business and Professions Code makes it unlawful to practice optometry under a false or assumed name, or to use a false or assumed name when practicing optometry.<sup>3</sup> Assembly Bill 1217 would repeal this provision and instead make it unlawful for an optometrist to practice optometry "under a false or assumed name unless the real name is prominently and conspicuously displayed at the site of his or her practice location."

Trade names can be essential to the establishment of large group practices and chain operations that can offer lower prices. Trade names are chosen because they are easy to remember and because they can convey useful information, such as the location or other characteristics of a practice. Over time, a trade name can also come to be associated with a certain level of quality, service, and price, thus facilitating consumer search. Without trade names, larger practices must use lengthy and difficult-to-remember names that include the individual names of all the practitioners or owners of a practice, and that communicate less information. In addition, the names of group practices would have to be changed periodically as members join or leave the firms, thus contributing to consumer confusion. Without convenient and enduring trade names, development of high-volume, low-price practices becomes more difficult. Assembly

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<sup>3</sup> Many states interpret this language to prohibit trade names usage.

Bill 1217, by removing existing bans on trade name usage, will likely benefit consumers.

### Commission Studies

Studies performed by staff of the Federal Trade Commission provide evidence that limits on branch offices and other restrictions on the nature of business relationships may harm consumers. The first study,<sup>4</sup> performed by the Commission's Bureau of Economics, was conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration. It compared the price and quality of eye examinations and eyeglasses in cities displaying a variety of different legal environments. Cities were classified as markets where advertising was present if there was advertising of eyeglasses and eye exams in local newspapers or "Yellow Pages." Cities were classified as markets with chain optometric practices if eye exams were available from large chain optical firms. Since restrictions on branch offices necessarily limit the operation of chain optometric firms, the study provides important information about the likely effects of such restrictions.

The study found that prices for eye examinations and eyeglasses were significantly higher in cities without advertising and chain firms than in cities where advertising and chain firms

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<sup>4</sup> Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980). A copy of this study is enclosed.

were present. The average adjusted price charged by optometrists in the cities without advertising and chain firms was 33.6 percent higher than in the cities with advertising and chain firms (\$94.46 versus \$70.72). Calculations based on the data reported in the study show that about 55 percent of this approximately \$24 difference (\$13) is attributed to the absence of chain firms, the remaining difference being attributed to the absence of advertising.

The data also showed that there was no reduction in the quality of care in cities where chain practice and advertising were present. The thoroughness of eye examinations, the accuracy of eyeglass prescriptions, the accuracy and workmanship of eyeglasses, and the extent of unnecessary prescribing were, on average, the same in both cities -- that is, in those cities with and those without advertising and chain practices.

A second study performed by the Bureaus of Consumer Protection and Economics compared the costs and quality of cosmetic contact lens fitting by various types of eye care professionals.<sup>5</sup> This study was designed and conducted with the assistance of the major national professional associations representing ophthalmologists, optometrists and opticians. Its findings are based on examinations and interviews of more than 500 contact lens wearers in 18 urban areas. The study showed that, on average, "commercial" optometrists -- that is,

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<sup>5</sup> Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983). A copy of the study is enclosed.

optometrists who worked for a chain firm or advertised heavily -- fit cosmetic contact lenses at least as well as ophthalmologists, opticians, and other optometrists, but charged significantly lower prices.

In summary, our studies and analysis indicate that existing restrictions on branch offices, development of trade names, and on business relationships between optometrists and non-optometrists, have likely raised prices above the levels that would otherwise prevail without providing countervailing improvements in the quality of care. Accordingly, the staff of the Federal Trade Commission strongly supports the provisions of Assembly Bill 1217 that would broaden the scope of permissible commercial practices by eye care providers.

Thus, the staff of the Federal Trade Commission views Assembly Bill 1217 as a significant step in removing impediments to the open competition that has been shown to benefit consumers of eye care goods and services. We believe that the elimination of the prohibition on employment relationships would have an additional salutary effect on the optical marketplace by opening another avenue of competition for eye care practitioners.

# California Legislature

PHILLIP ISENBERG  
ASSEMBLYMAN  
 STATE CAPITOL, SACRAMENTO 95814  
(916) 445-1611

RECEIVED

JUN 17 1985

LOS ANGELES OFFICE

June 14, 1985

Ann Guler  
Los Angeles Regional Office  
Federal Trade Commission  
11000 Wilshire Boulevard, Suite 13209  
Los Angeles, CA 90024

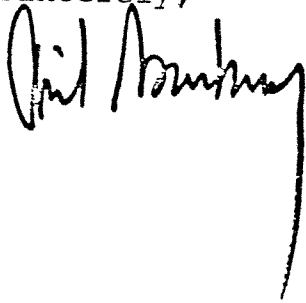
Dear Ms. Guler:

I would appreciate your views on AB 1217, my legislation to remove trade restrictions in the optical business.

It would be helpful if we could have your analysis by June 24, 1985.

Thank you for your assistance.

Sincerely,



DISTRICT OFFICE  
1215 15TH ST., STE 102  
SACRAMENTO, 95814  
(916) 324-4676

DISTRICT OFFICE  
4 N. HUTCHINS ST.  
LODI, 95240  
(209) 334-4945

DISTRICT OFFICE  
625 W. FOURTH ST., ROOM 5  
ANTIOCH, 94509  
(415) 778-4510

AMENDED IN ASSEMBLY MAY 2, 1985  
AMENDED IN ASSEMBLY MARCH 28, 1985

CALIFORNIA LEGISLATURE—1985-86 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1217**

Introduced by Assembly Member Isenberg  
(Coauthors: Assembly Members Agnos, Dennis Brown,  
Chacon, Hill, Johnston, Leonard, Molina, and Robinson)

March 4, 1985

An act to amend Sections 2556, 3041, and 3070 of, to add Section 3025.3 to, to repeal and add Sections 655, 3077, and 3125 of, and to repeal Section 3163 of, the Business and Professions Code, relating to optometry.

LEGISLATIVE COUNSEL'S DIGEST

AB 1217, as amended, Isenberg. Optometry.

(1) Existing law prohibits specified business arrangements or relationships between optometrists and registered dispensing opticians or suppliers of optometric appliances or devices.

This bill would delete that prohibition and would specifically authorize optometrists and opticians to enter into specified business relationships under specified conditions.

(2) Existing law makes it unlawful for a registered dispensing optician (a) to advertise the furnishing of, or to furnish, the services of a refractionist, an optometrist, or a physician and surgeon or (b) to duplicate or change lenses without a prescription.

This bill would delete those prohibitions.

(3) Existing law makes it unlawful for a registered dispensing optician to employ a refractionist, an optometrist, a physician and surgeon, or a practitioner of any other profession for the purpose of any examination or treatment of

the eyes.

This bill makes it unlawful to so employ only an optometrist or a physician and surgeon.

(4) Existing law authorizes the State Board of Optometry to make and promulgate rules and regulations relating to the practice of optometry.

This bill would specifically authorize the board to establish standards for a thorough eye examination and to adopt rules prohibiting the unnecessary prescribing of corrective lenses.

(5) Existing law defines the practice of optometry as the doing of specified acts, including, among other things, the fitting or adaptation of contact and spectacle lenses to the human eye.

This bill would revise that definition by deleting the fitting or adaptation of lenses and would state that the fitting and adjusting of contact and spectacle lenses does not constitute the practice of optometry, as specified.

(6) Existing law prohibits any person from having an office, singly or in combination with others, for the practice of optometry unless the person is licensed to practice optometry and prohibits optometrists from having additional or branch offices unless they have a permit from the State Board of Optometry.

This bill would delete that provision and would instead specifically authorize an optometrist to have more than one office if all optometry services are performed by a licensed person.

(7) Existing law prohibits the practice of optometry under a false or assumed name unless the State Board of Optometry has issued a permit authorizing the use of another name.

This bill would delete that provision and would instead authorize the practice of optometry under a false or assumed name if the real name of the optometrist is prominently and conspicuously displayed at his or her practice location.

(8) Existing law requires the name of an optometric corporation to contain the name of its shareholder or shareholders, as specified, and requires the inclusion of the words "optometric corporation," or other words denoting corporate existence.

This bill would delete those requirements.

(9) This bill would impose a state-mandated local program by creating new crimes.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. This act shall be referred to as the  
2 Consumer Eye Care Reform Act of 1985.

3 SEC. 2. It is the intent of the Legislature and the  
4 purpose of this act to promote and protect the public  
5 interest by improving access to quality vision care and  
6 vision health. To achieve these results, this act intends to  
7 control abuses of overprescription and inadequate vision  
8 examination procedures and to provide for efficient  
9 delivery of vision care services at a lower cost to  
10 consumers.

11 The Legislature finds and declares that the  
12 prohibitions against branch offices and the use of trade  
13 names by optometrists, restrictions on landlord-tenant,  
14 partnership, coownership and other business  
15 relationships between optometrists and others, and other  
16 restrictions that have been construed by the courts of this  
17 state to prevent the franchising of optometric and optical  
18 services, or which otherwise restrict or limit the form of  
19 business entities permitted to deliver vision care services,  
20 except in the manner limited by the statute, do not  
21 promote the public interest in quality vision care and  
22 should be eliminated.

23 SEC. 3. Section 655 of the Business and Professions  
24 Code is repealed.

25 SEC. 4. Section 655 is added to the Business and  
26 Professions Code, to read:

27 655. (a) Persons licensed under Chapter 7



1 (commencing with Section 3000) may enter into  
2 franchise contracts, landlord-tenant relationships,  
3 coownership contracts, partnerships, stock ownership  
4 agreements, or other forms of business relationships with  
5 opticians licensed under Chapter 5.5 (commencing with  
6 Section 2550), with optical manufacturers and suppliers,  
7 or with any other person if that contract complies with all  
8 of the following:

9 ~~(a)~~

10 (1) It does not base any payment to be made to the  
11 optometrist on the number or volume of prescriptions  
12 written by the optometrist.

13 ~~(b)~~

14 (2) It does not require the optometrist to write a  
15 specified number of prescriptions.

16 ~~(c)~~

17 (3) It does not prohibit the optometrist from seeing  
18 patients on a scheduled basis or limit the time spent with  
19 the patient.

20 ~~(d)~~

21 (4) It does not interfere with the optometrist's  
22 professional judgment on what procedures should be  
23 performed in an eye examination or specify what  
24 equipment may be employed in an examination.

25 ~~(e)~~

26 (5) It does not require the annual or periodic  
27 purchase of a specified volume or dollar amount of  
28 optometric supplies or equipment.

29 *(b) Any violation of this section constitutes a*  
30 *misdemeanor as to those persons licensed under Chapter*  
31 *7 (commencing with Section 3000) or Chapter 5.5*  
32 *(commencing with Section 2550), and as to any and all*  
33 *persons whether or not so licensed who participate with*  
34 *the licensed persons in a violation of any provision of this*  
35 *section.*

36 SEC. 5. Section 2556 of the Business and Professions  
37 Code is amended to read:

38 2556. It is unlawful to directly or indirectly employ on  
39 or near the premises used for optical dispensing, an  
40 optometrist or a physician and surgeon, for the purpose

1 of any examination or treatment of the eyes.

2 SEC. 6. Section 3025.3 is added to the Business and  
3 Professions Code, to read:

4 3025.3. The board may do all of the following:

5 (a) Establish the standards and criteria for a minimum  
6 thorough eye examination.

7 (b) Adopt rules prohibiting the unnecessary  
8 prescribing of corrective lenses. In adopting whatever  
9 rules are necessary to implement this subdivision, the  
10 board shall consider whether a pattern of conduct exists.

11 SEC. 7. Section 3041 of the Business and Professions  
12 Code is amended to read:

13 3041. (a) The practice of optometry is the  
14 performing or the controlling of any or all of the  
15 following acts:

16 (1) The examination of the human eye or eyes, or its  
17 or their appendages, and the analysis of the human vision  
18 system, either subjectively or objectively.

19 (2) The determination of the powers or range of  
20 human vision and the accommodative and refractive  
21 states of the human eye or eyes, including the scope of its  
22 or their functions and general condition.

23 (3) The prescribing or directing the use of, or using,  
24 any optical device in connection with ocular exercises,  
25 visual training, vision training, or orthoptics.

26 (4) The prescribing of contact and spectacle lenses for,  
27 or the fitting or adaptation of lenses which may be  
28 classified as drugs by any law of the United States or of  
29 this state.

30 (5) The use of topical pharmaceutical agents for the  
31 sole purpose of the examination of the human eye or eyes  
32 for any disease or pathological condition. The State Board  
33 of Optometry, with the advice and consent of the  
34 Division of Allied Health Professions of the Board of  
35 Medical Quality Assurance, shall designate the specific  
36 topical pharmaceutical agents, known generically as  
37 mydriatics, cycloplegics, and topical anesthetics, to be  
38 used.

39 (b) The fitting and adjusting of contact and spectacle  
40 lenses, or any other act that may be performed by an

1 optician licensed under Section 2550 does not constitute  
2 the practice of optometry. Licensed optometrists may  
3 dispense spectacle and contact lenses, however, without  
4 complying with Section 2550.

5 SEC. 8. Section 3070 of the Business and Professions  
6 Code is amended to read:

7 3070. Before engaging in the practice of optometry,  
8 each registered optometrist shall notify the board in  
9 writing of the address or addresses where he or she is to  
10 engage, or intends to engage, in the practice of  
11 optometry and, also, of any changes in his or her place of  
12 practice. Any notice required to be given by the board to  
13 any registered optometrist may be given by United States  
14 mail to this address, postage thereon prepaid.

15 SEC. 9. Section 3077 of the Business and Professions  
16 Code is repealed:

17 SEC. 10. Section 3077 is added to the Business and  
18 Professions Code, to read:

19 3077. (a) As used in this section, "office" means any  
20 office or other place for the practice of optometry.

21 (b) Persons registered to practice optometry under  
22 this chapter may have more than one office, if all services  
23 provided pursuant to Section 3041 are performed by  
24 persons licensed under this division to perform those  
25 services.

26 (c) Any optometrist who practices optometry from  
27 more than one office shall provide the board with the  
28 correct address of all offices. The notice shall be provided  
29 to the board within five business days following the  
30 opening of an additional office.

31 SEC. 11. Section 3125 of the Business and Professions  
32 Code is repealed.

33 SEC. 12. Section 3125 is added to the Business and  
34 Professions Code, to read:

35 3125. (a) It is unlawful for any optometrist to  
36 practice optometry under a false or assumed name unless  
37 his or her real name is prominently and conspicuously  
38 displayed at the site of his or her practice location.

39 (b) The use of false or assumed names in the practice  
40 of optometry by optometrists employed pursuant to

1 Section 3103, by community clinics licensed pursuant to  
2 subdivision (a) of Section 1203 of the Health and Safety  
3 Code, or by an optometric corporation shall be governed  
4 by those provisions and subdivision (a) shall not apply.

5 SEC. 13. Section 3163 of the Business and Professions  
6 Code is repealed.

7 SEC. 14. No reimbursement is required by this act  
8 pursuant to Section 6 of Article XIII B of the California  
9 Constitution because the only costs which may be  
10 incurred by a local agency or school district will be  
11 incurred because this act creates a new crime or  
12 infraction, changes the definition of a crime or infraction,  
13 changes the penalty for a crime or infraction, or  
14 eliminates a crime or infraction.