

**Department of State Health Services
Agenda Item for State Health Services Council
August 6, 2007**

Agenda Item Title: Repeal of 25 TAC §§128.1-128.15, and New Rules §§140.250-140.264 Concerning Permits for Contact Lens Dispensers

Agenda Number: 3-h

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background:

The proposed repeal of §§128.1-128.15, and new §§140.250-140.264 are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 TAC, Chapter 140, Health Professions Regulation.

Sections 128.1-128.15 constitute the agency review of rules required by Government Code, §2001.039. The rule review was due to be completed in April 2007.

Summary:

Existing rule text is being transferred and updated in the new rules. No significant changes are proposed, and no new requirements are being imposed on applicants or permit holders.

Summary of Stakeholder Input to Date (including advisory committees):

The rules were posted on the DSHS website for public comment. There were no comments in opposition to the rules as proposed.

The rules are not anticipated to be controversial.

Proposed Motion:

Motion to recommend HHSC approval for publication of rules contained in agenda item # 3-h.

Agenda Item Approved by: _____
Kathryn C. Perkins, RN, MBA
Assistant Commissioner
Division for Regulatory Services

Date Submitted

May 31, 2007

Presented by: Debbie Peterson **Title:** Unit Manager
Program/Division: PLC **Contact Name/Phone:** Debbie Peterson 834-2725

Title 25. HEALTH SERVICES
Part 1. DEPARTMENT OF STATE HEALTH SERVICES
Chapter 128. Permits for Contact Lens Dispensers.
Repeal §§128.1-128.15
Chapter 140. Health Professions Regulation
New Subchapter F. Contact Lens Dispensers
New §§140.250-140.264

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§128.1-128.15 and new §§140.250-140.264, concerning permits for contact lens dispensers.

BACKGROUND AND PURPOSE

The proposed repeal and new rules are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 TAC Chapter 140 Health Professions Regulation. The new rules transfer and update existing language, and do not impose any new requirements or fees on applicants or permit holders.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 128.1-128.15 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the department is proposing to repeal the existing sections and adopt the rules in 25 TAC Chapter 140 Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

New §140.250 sets forth purpose and scope of the rules. New §140.251 includes definitions for terms used within the rules. New §140.252 lists the fees required for issuance of a permit, renewal, and issuance of a duplicate permit. New §140.253 references the relevant Health and Human Services Commission rules on submitting a petition for rulemaking. New §140.254 sets forth standards for the sale or delivery of contact lenses and prescription verification. New §140.255 sets forth requirements for the display of the permit. New §140.256 describes application procedures and lists qualifications for a permit. New §140.257 provides timelines for the processing of initial and renewal applications, and for refunds to be issued if the timelines are exceeded without sufficient cause. New §140.258 sets forth information concerning permit renewal and late renewal, including renewal procedures for a retired permit holder providing voluntary charity care and a permit holder on active military duty. New §140.259 covers procedures for changes of name or address, including the issuance of a duplicate permit. New §140.260 sets out procedures concerning complaints and investigations. New §140.261 lists violations and prohibited actions, and actions the department may take against a person when violations have occurred. New §140.262 describes the procedures for informal disposition of a complaint. New §140.263 describes the procedures for formal hearings. New §140.264 sets out

the guidelines and criteria on the eligibility of persons with criminal backgrounds to obtain a permit.

FISCAL NOTE

Debbie Peterson, Manager, Professional Licensing and Certification Unit, has determined that for each year of the first five-year period that the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Peterson has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This determination was made because the repeal and new rules do not impose any new requirements. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Peterson has also determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the permitting and regulation of contact lens dispensers.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Yvonne Feinleib, Program Director, Contact Lens Dispensing Permit Program, Professional Licensing and Certification Unit, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas

78756, 512/834-4521 or by email to Yvonne.Feinleib@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services Deputy General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed repeal and new rules are authorized by Occupations Code, §353.005, which authorizes the adoption of rules regarding contact lens dispensing permits; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed repeal and new rules affect the Occupations Code, Chapter 353, and Health and Safety Code, Chapter 1001. Review of these rules implements Government Code, §2001.039.

Sections for repeal

§128.1. Introduction.

§128.2. Definitions.

§128.3. Fees.

§128.4. Petition for Rulemaking.

§128.5. Sale or Delivery of Contact Lenses and Prescription Verification.

§128.6. Display of Permit.

§128.7. Application Requirements and Procedures.

§128.8. Application Processing.

§128.9. Renewal of Permit.

§128.10. Changes of Name or Address.

§128.11. Filing Complaints and Complaint Investigations.

§128.12. Grounds for Disciplinary Actions.

§128.13. Informal Disposition.

§128.14. Formal Hearings.

§128.15. Guidelines For Issuing Permits to Persons with Criminal Convictions.

Legend: (Proposed New Rules)
Regular Print = Proposed new language

§140.250. Introduction.

(a) This subchapter implements the applicable provisions of the Texas Contact Lens Prescription Act, Occupations Code, Chapter 353, concerning the issuance of a contact lens prescription, a patient's right of access to that prescription, and the regulation of persons filling contact lens prescriptions.

(b) These sections cover definitions; permit fees; petition for rulemaking; sale or delivery of contact lenses and prescription verification; display of permit; permit application requirements and procedures; application processing; renewal of permits; name and address changes; filing complaints and complaint investigations; grounds for disciplinary actions; informal dispositions; formal hearings; and guidelines for issuing permits to persons with criminal convictions.

§140.251. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Words and terms defined in the Texas Contact Lens Prescription Act shall have the same meaning in this subchapter as that assigned in the Act.

- (1) Act--The Texas Contact Lens Prescription Act, Occupations Code, Chapter 353.
- (2) Applicant--A person or entity who applies for a permit under the Act.
- (3) Business entity--A business operating under any legal business structure other than a sole proprietorship.
- (4) Commissioner--The Commissioner of the Department of State Health Services.
- (5) Department--The Department of State Health Services.
- (6) Executive Commissioner--The Executive Commissioner of the Health and Human Services Commission.
- (7) Optician--A person, other than a physician, optometrist, therapeutic optometrist, or pharmacist, who is in the business of dispensing contact lenses.
- (8) Permit--A contact lens dispensing permit issued under the Act to an optician, a corporation, or other business entity that fills a contact lens prescription in this state or sells, delivers, or dispenses contact lenses to any person in this state.

§140.252. Fees.

- (a) The permit fees are as follows:

(1) \$100 for a two-year term for an optician who has registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352;

(2) \$150 for a two-year term for an optician who has not registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352;

(3) \$50 for a two-year term for a retired optician providing voluntary charity care who has registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352;

(4) \$75 for a two-year term for a retired optician who has not registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352; and

(5) \$600 for a two-year term for a business entity.

(b) For all applications and renewal applications, the department is authorized to collect fees to fund the Office of Patient Protection, Health Professions Council, as mandated by law.

(c) For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§140.253. Petition for Rulemaking.

The Executive Commissioner's procedures for the submission, consideration, and disposition of a petition to adopt a rule are set out in 1 TAC §351.2 (relating to Petition for the Adoption of a Rule).

§140.254. Sale or Delivery of Contact Lenses and Prescription Verification.

(a) An individual or business holding a permit shall comply with the federal "Fairness to Contact Lens Consumers Act" Public Law 108-164, and applicable standards in Occupations Code, Chapter 353.

(1) A permit holder may not deliver or dispense contact lenses to a customer unless the permit holder:

(A) receives a valid prescription directly or by facsimile; or

(B) verifies a prescription in accordance with this subsection.

(2) A permit holder shall retain an electronic or paper record of each prescription or verification for a minimum of two years from the last date lenses were dispensed based on that prescription or verification. The record shall contain all information specified by federal and

state laws and rules related to requirements for a prescription or verification, including any authorized modification showing the number of lenses dispensed. If the prescription is extended by the prescriber, a record of the extension or verification of the extension shall also be maintained.

(3) A permit holder may not sell, deliver, or dispense contact lenses in a flea market.

(b) A prescription is considered verified if it meets the standards for verification set out by federal law, the "Fairness to Contact Lens Consumers Act" (Public Law 108-164), federal rules, 16 CFR Part 315 (Contact Lens Rule) and state law, Occupations Code, §353.1015.

(c) A prescription may only be verified by direct communication, which means completed communication by telephone, facsimile, or electronic mail. A prescription is verified only if one of the following occurs:

(1) the prescriber confirms the prescription is accurate by direct communication with the permit holder;

(2) the prescriber informs the permit holder through direct communication that the prescription is inaccurate and provides the accurate prescription; or

(3) the prescriber fails to communicate with the permit holder within eight business hours after receiving from the permit holder the information described in subsection (d) of this section.

(d) It is the responsibility of the permit holder to provide the prescriber with all information required by federal and state law for the verification of a prescription, including:

(1) the patient's full name and address;

(2) the contact lens power, manufacturer, base curve or appropriate designation, and diameter when appropriate;

(3) the quantity of lenses ordered;

(4) the date of patient request;

(5) the date and time of verification request; and

(6) the name of a contact person at the permit holder's company, including facsimile and telephone numbers.

(e) If the permit holder opts to include the prescriber's regular business hours on Saturdays as "business hours" as specified by subsection (c)(3) of this section, a clear statement of the prescriber's regular Saturday business hours must be included with the verification request.

(f) If a permit holder attempts to verify a prescription, and a prescriber informs a permit holder before the deadline specified by subsection (c)(3) of this section that the contact lens prescription is inaccurate, expired, or otherwise invalid, the permit holder shall not fill the prescription. The prescriber shall specify the basis for the inaccuracy or invalidity of the prescription. If the prescription communicated by the permit holder to the prescriber is inaccurate, the prescriber shall correct it, and the prescription shall then be deemed verified.

(g) During the eight business hours specified by subsection (c)(3) of this section, the permit holder shall provide a reasonable opportunity for the prescriber to communicate with the permit holder concerning the verification request.

(h) The Executive Commissioner and the executive director of the Texas Optometry Board may enter into interagency agreements as necessary to implement and enforce this subchapter.

§140.255. Display of Permit.

(a) A permit holder shall prominently display the contact lens dispensing permit in his or her primary place of employment or business and shall make the department's address available upon request to any person who wishes to file a complaint.

(b) A business entity that holds one permit for multiple business locations shall display the permit in one of the locations and shall make the permit number and the department's address available upon request at any location to any person who wishes to file a complaint.

§140.256. Application Requirements and Procedures.

(a) Contact lenses may only be dispensed by the following persons: a physician, optometrist, or therapeutic optometrist; a pharmacist; or an optician, a corporation, or other business entity that holds a valid contact lens dispensing permit issued under the Act.

(b) An employee of a corporation or business entity with a permit issued under the Act is not required to obtain a separate permit.

(c) A corporation or other business entity that dispenses contact lenses to a person in this state must obtain a contact lens dispensing permit. A corporation or other business entity with ten or more locations may obtain a single permit for the entity and its employees.

(d) An applicant for a permit must submit all required information on official application forms prescribed by the department and submit the required permit fee.

(e) The application form shall contain the following information:

(1) specific information regarding personal data, full legal name, date of birth, social security number, information regarding other licenses, registrations, permits, and

certifications held by applicant, and information regarding misdemeanor and felony convictions of applicant;

(2) trade names and addresses of all locations in which the optician intends to conduct business;

(3) if applicant is a corporation or other business entity, specific information regarding type of ownership, registered address, and names and addresses of all officers, directors, registered agents and major shareholders;

(4) a statement that the applicant has read the Act and these rules;

(5) a statement that the applicant, if issued a permit, shall return the permit to the department upon revocation or suspension of the permit or other disciplinary action against the permit holder;

(6) a statement that the applicant understands that fees and materials submitted in the permitting process are nonrefundable and nonreturnable;

(7) a statement that the applicant agrees to comply with all state and federal laws and regulations regarding the sale, delivery, or dispensing of contact lenses;

(8) a statement that the information contained in the application is truthful and complete; and

(9) the signature of the applicant.

(f) The department shall not issue a permit to an applicant who has had a contact lens dispensing permit revoked or denied for cause within the 24-month period preceding the application date.

§140.257. Application Processing.

The department shall comply with the following procedures in processing applications for permits and applications for permit renewal.

(1) The following periods of time shall apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required. The contact lens dispensing permit may be sent in lieu of the notice of acceptance of a complete application. The time periods are as follows:

(A) letter of acceptance of application for a permit--30 working days;

(B) issuance of permit renewal after receipt of documentation of all renewal requirements--20 working days; and

(C) letter of denial of permit--30 working days.

(2) In the event an application is not processed in the time periods stated in paragraph (1) of this section, the applicant has the right to request reimbursement of all fees paid in that particular application process. Application for reimbursement shall be made to the department. If the department does not agree that the time period has been violated or finds that good cause existed for exceeding the time period, the request will be denied.

(3) Good cause for exceeding the time period is considered to exist if the number of applications for permits and permit renewal exceeds by 15% or more the number of applications processed in the same calendar quarter the preceding year; another public or private entity relied upon by the department in the application process caused the delay; or any other condition exists giving the department good cause for exceeding the time period.

(4) If a request for reimbursement under paragraph (2) of this section is denied by the department, the applicant may appeal to the commissioner for a timely resolution of any dispute arising from a violation of the time periods. The applicant shall give written notice to the commissioner at the address of the department that he or she requests full reimbursement of all fees paid because his or her application was not processed within the applicable time period. The department shall prepare a written report of the facts related to the processing of the application and of any good cause for exceeding the applicable time period. The department shall provide written notice of the commissioner's decision to the applicant. An appeal shall be decided in the applicant's favor if the applicable time period was exceeded and good cause was not established. If the appeal is decided in favor of the applicant, full reimbursement of all fees paid in that particular application process shall be made.

(5) Contested cases. The time periods for contested cases related to the denial of permits or permit renewals are not included within the time periods stated in paragraph (1) of this section. The time period for conducting a contested case hearing runs from the date the department receives a written request for a hearing and ends when the decision of the department is final and appealable. A hearing may be completed within one to four months, but may extend for a longer period of time depending on the particular circumstances of the hearing.

§140.258. Renewal of Permit.

(a) The purpose of this section is to set out the rules governing permit renewal.

(b) When issued, a permit is valid for two years, commencing on the date of issuance of the initial permit.

(c) A permit holder must renew the permit every two years. The renewal date of a permit shall be the last day of the month in which the permit was originally issued.

(d) At least 30 days prior to the expiration date of a permit, the department shall send a notice to the permit holder's address in the department's records and a permit renewal form. The renewal form shall give notice of the expiration date of the permit and the amount of the renewal fee required. The permit holder must complete and return the renewal form and fee to the department.

(e) The permit renewal form shall require the applicant to provide the preferred mailing address, primary employment address and telephone number, trade names and addresses of all locations in which the optician intends to conduct business, and the disclosure of misdemeanor or felony convictions.

(f) A permit holder has renewed the permit when the permit holder has mailed the fully completed renewal form and the required renewal fee to the department prior to the expiration date of the permit. The postmark date shall be considered the date of mailing.

(g) The department shall issue a renewed permit to a permit holder who has met all requirements for renewal.

(h) Each permit holder is responsible for renewing the permit before the expiration date and shall not be excused from paying additional fees or penalties. Failure to receive notification from the department prior to the expiration date of the permit shall not excuse failure to file for timely renewal.

(i) A permit holder whose permit has expired may not fill a contact lens prescription in this state or sell, deliver, or dispense contact lenses to any person in this state.

(j) A person whose permit has been expired for 90 days or less may renew the permit by paying to the department a renewal fee that is equal to one and one-half times the normally required permit fee.

(k) A person whose permit has been expired for more than 90 days but less than one year may renew the permit by paying to the department a renewal fee that is equal to two times the normally required permit fee.

(l) A person whose permit has been expired for one year or more may not renew the permit. The person may obtain a new permit by complying with requirements and procedures for an original permit.

(m) A retired individual permit holder who wishes to dispense contact lenses only in the provision of voluntary charity care may renew the permit every two years by submitting the renewal form and the retired contact lens dispenser renewal fee in accordance with the renewal procedures described in this section. Voluntary charity care means dispensing contact lenses at no cost to the consumer. A retired contact lens dispenser who renews under this subsection may not sell contact lenses or receive any remuneration for dispensing lenses.

(n) A permit holder whose check for the renewal fee is not honored by the financial institution shall remit to the department a money order or cashier's check within 30 days of the date of the permit holder's receipt of the department's notice. If proper payment is not received, the permit shall not be renewed. If a renewed permit has already been issued, it shall be ineffective.

(o) If a permit holder fails to timely renew his or her permit because the permit holder is or was on active duty with the armed forces of the United States of America serving outside the state of Texas, the permit holder may renew the permit pursuant to this subsection.

(1) Renewal of the permit may be requested by the permit holder, the permit holder's spouse, or an individual having power of attorney from the permit holder. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(2) Renewal may be requested before or after expiration of the permit. Permit holders who renew in accordance with this subsection shall be excused from paying late fees and penalties.

(3) A copy of the official orders or other official military documentation showing that the permit holder is or was on active duty serving outside the State of Texas shall be filed with the department along with the renewal form.

(4) A copy of the power of attorney from the permit holder shall be filed with the department along with the renewal form if the individual having the power of attorney executes any of the documents required in this subsection.

(p) The department shall not renew a permit if renewal is prohibited by the Education Code, §57.491 (relating to Loan Default Ground for Nonrenewal of Professional or Occupational License).

(q) The department shall not renew a permit if renewal is prohibited by a court order or attorney general's order issued pursuant to the Family Code, Chapter 232 (relating to Suspension of License), for failure to pay child support or failure to comply with a court order providing for the possession of or access to a child.

§140.259. Changes of Name or Address.

(a) The purpose of this section is to set out the responsibilities and procedures for name and address changes.

(b) The permit holder shall notify the department of changes in name or preferred mailing address within 30 days of such change(s).

(c) Notification of changes shall be made in writing and mailed to the department and shall include the former and present name, permit number, former and present mailing address, and a copy of the legal name change document, if applicable.

(d) Before a replacement permit will be issued by the department, the permit holder shall return any previously issued document(s).

(e) It is the responsibility of the permit holder to comply with the provisions of this section. Notice of complaints, violations, disciplinary action, or other correspondence sent to the address in the department's records are deemed received by the permit holder.

§140.260. Filing Complaints and Complaint Investigations.

(a) Complaints alleging that a person has violated the Act or this subchapter, may be filed with the department on a department complaint form or in writing by regular mail, facsimile, or electronic mail. The department may initiate a complaint based on a telephone call if there is a sufficient basis and documentation to proceed.

(b) Upon receipt of verified complaint, the department shall send the complainant an acknowledgment letter. The department shall, at least as frequently as quarterly, notify the complainant and the respondent of the status of the complaint until its final disposition.

(c) Anonymous complaints may be investigated by the department if there is a sufficient basis and documentation to proceed.

(d) The department shall investigate the complaint. If the department determines that the complaint is not within the department's jurisdiction, the complainant will be notified. If warranted, the complaint may be referred to another governmental agency for review.

(e) The department may determine that the permit be revoked, suspended, placed on probation or that other appropriate action as authorized by law be taken.

(f) If the department determines that there are insufficient grounds to support the complaint, the complaint shall be dismissed. Written notice of the dismissal will be provided to the permit holder or person against whom the complaint has been filed and the complainant.

§140.261. Grounds for Disciplinary Actions.

(a) The department may deny a permit renewal application, suspend or revoke a permit, or place a permit on probation for a violation of the Act or this subchapter. The department may also impose an administrative penalty of not more than \$1,000 for a violation of the Act.

(b) Prior to institution of formal proceedings to deny a renewal application, revoke, suspend, or place on probation or impose an administrative penalty, the department shall give written notice to the permit holder by certified mail, return receipt requested, of the facts or conduct alleged to warrant the proposed action, and the permit holder shall be given an

opportunity, as described in the notice, to show compliance with all requirements of the Act and this subchapter.

(c) If disciplinary action of a permit holder is proposed, the department shall give written notice by certified mail, return receipt requested, that the permit holder must request, in writing, a formal hearing within 30 days of receipt of the notice, or the right to a hearing shall be waived and the action shall be taken.

(d) The department may request the Attorney General to bring an action for an injunction to prohibit a person from violating the Act or this subchapter.

(e) The department may not deny a permit renewal application or suspend, revoke, or probate a permit or impose administrative penalties against a permit holder based on the refusal of the permit holder to:

(1) submit to a genetic test; or

(2) reveal:

(A) whether the applicant or permit holder has submitted to a genetic test;

or

(B) the results of any genetic test to which the applicant or permit holder has submitted.

(f) The department may impose an emergency suspension for a violation of the Act or this subchapter in accordance with the procedures established in Occupations Code, §353.2025.

§140.262. Informal Disposition.

(a) Informal disposition of any complaint or contested case involving a permit holder or an applicant for a contact lens dispensing permit may be made through an informal settlement conference held to determine whether an agreed settlement order may be secured.

(b) An informal settlement conference shall be voluntary.

(c) A settlement conference shall be informal and shall not follow the procedures established in this subchapter for contested cases and formal hearings.

(d) The permit holder, the permit holder's attorney, and department staff may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(e) The complainant shall not be considered a party in the settlement conference but shall be given an opportunity to be heard if the complainant attends. Any written statement submitted by the complainant shall be reviewed at the conference.

(f) At the conclusion of the settlement conference, department representatives may make recommendations for informal disposition of the complaint or contested case or for any disciplinary action authorized by the Act. The department may also:

- (1) conclude that the department lacks jurisdiction;
- (2) conclude that a violation of the Act or this subchapter has not been established;
- (3) order that the investigation be closed; or
- (4) refer the matter for further investigation.

§140.263. Formal Hearings.

(a) Formal hearings shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001.

(b) Copies of the formal hearing procedures are indexed and filed in the Professional Licensing and Certification Unit, 8407 Wall Street, Austin, Texas 78754, and are available for public inspection during regular working hours.

§140.264. Guidelines For Issuing Permits to Persons with Criminal Convictions.

(a) The purpose of this section is to comply with the requirements of the Occupations Code, Chapter 53, Subchapter C (relating to Notice and Review of Suspension, Revocation, or Denial of License).

(b) The department may deny a permit application or a permit renewal application, or revoke, suspend, or place on probation an existing permit if an applicant or permit holder has been convicted of a crime (felony or misdemeanor) according to the following guidelines:

- (1) those criminal convictions which evidence an unwillingness or inability to comply with the Act or this subchapter; and
- (2) the factors and evidence listed in the Occupations Code, Chapter 53, Subchapter B (relating to Ineligibility for License) shall be considered in determining eligibility for a permit.

~~§128.1. Introduction.~~

~~(a) This chapter implements the applicable provisions of the Texas Contact Lens Prescription Act, Occupations Code, Chapter 353, concerning the issuance of a contact lens prescription, a patient's right of access to that prescription, and the regulation of persons filling contact lens prescriptions.~~

~~(b) These sections cover definitions; permit fees; petition for rulemaking; sale or delivery of contact lenses and prescription verification; display of permit; permit application requirements and procedures; renewal of permits; name and address changes; filing complaints and complaint investigations; grounds for disciplinary actions; informal dispositions; formal hearings; and guidelines for issuing permits to persons with criminal convictions.~~

~~§128.2. Definitions.~~

~~The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words and terms defined in the Texas Contact Lens Prescription Act shall have the same meaning in this chapter as that assigned in the Act.~~

~~—— (1) Act — The Texas Contact Lens Prescription Act, Occupations Code, Chapter 353.~~

~~—— (2) Administrator — The department employee designated as the administrator of the permitting activities authorized by the Act.~~

~~—— (3) Applicant — A person or entity who applies for a permit under the Act.~~

~~—— (4) Business entity — A business operating under any legal business structure other than a sole proprietorship.~~

~~—— (5) Commissioner — The Commissioner of the Department of State Health Services.~~

~~—— (6) Department — The Department of State Health Services.~~

~~—— (7) Executive Commissioner — The Executive Commissioner of the Health and Human Services Commission.~~

~~—— (8) Optician — A person, other than a physician, optometrist, therapeutic optometrist, or pharmacist, who is in the business of dispensing contact lenses.~~

~~—— (9) Permit — A contact lens dispensing permit issued under the Act to an optician, a corporation, or other business entity that fills a contact lens prescription in this state or sells, delivers, or dispenses contact lenses to any person in this state.~~

~~§128.3 Fees~~

~~(a) The permit fees are as follows:~~

~~_____ (1) \$50 for a one year term and \$100 for a two year term for an optician who has registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352;~~

~~_____ (2) \$75 for a one year term and \$150 for a two year term for an optician who has not registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352;~~

~~_____ (3) \$50 for a two year term for a retired optician providing voluntary charity care who has registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352;~~

~~_____ (4) \$75 for a two year term for a retired optician who has not registered with the department under the Opticians' Registry Act, Occupations Code, Chapter 352; and~~

~~_____ (5) \$300 for a one year term and \$600 for a two year term for a business entity.~~

~~(b) For all applications and renewal applications, the department is authorized to collect fees to fund the Office of Patient Protection, Health Professions Council, as mandated by law.~~

~~(c) For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.~~

~~§128.4. Petition for Rulemaking.~~

~~The Executive Commissioner's procedures for the submission, consideration, and disposition of a petition to adopt a rule are set out in 1 TAC §351.2 (relating to Petition for the Adoption of a Rule).~~

~~§128.5. Sale or Delivery of Contact Lenses and Prescription Verification.~~

~~(a) An individual or business holding a permit shall comply with the federal "Fairness to Contact Lens Consumers Act" Public Law 108-164, and applicable standards in Occupations Code, Chapter 353.~~

~~_____ (1) A permit holder may not deliver or dispense contact lenses to a customer unless the permit holder:~~

~~_____ (A) receives a valid prescription directly or by facsimile; or~~

~~_____ (B) verifies a prescription in accordance with this subsection.~~

~~_____ (2) A permit holder shall retain an electronic or paper record of each prescription or verification for a minimum of two years from the last date lenses were dispensed based on that prescription or verification. The record shall contain all information specified by federal and state laws and rules related to requirements for a prescription or verification, including any authorized modification showing the number of lenses dispensed. If the prescription is extended by the prescriber, a record of the extension or verification of the extension shall also be maintained.~~

~~_____ (3) A permit holder may not sell, deliver, or dispense contact lenses in a flea market.~~

~~(b) A prescription is considered verified if it meets the standards for verification set out by federal law, the "Fairness to Contact Lens Consumers Act" (Public Law 108-164), federal rules, 16 CFR Part 315 (Contact Lens Rule) and state law, Occupations Code, §353.1015.~~

~~(c) A prescription may only be verified by direct communication, which means completed communication by telephone, facsimile, or electronic mail. A prescription is verified only if one of the following occurs:~~

~~_____ (1) the prescriber confirms the prescription is accurate by direct communication with the permit holder;~~

~~_____ (2) the prescriber informs the permit holder through direct communication that the prescription is inaccurate and provides the accurate prescription; or~~

~~_____ (3) the prescriber fails to communicate with the permit holder within eight business hours after receiving from the permit holder the information described in subsection (d) of this section.~~

~~(d) It is the responsibility of the permit holder to provide the prescriber with all information required by federal and state law for the verification of a prescription, including:~~

~~_____ (1) the patient's full name and address;~~

~~_____ (2) the contact lens power, manufacturer, base curve or appropriate designation, and diameter when appropriate;~~

~~_____ (3) the quantity of lenses ordered;~~

~~_____ (4) the date of patient request;~~

~~_____ (5) the date and time of verification request; and~~

~~_____ (6) the name of a contact person at the permit holder's company, including facsimile and telephone numbers.~~

~~(e) If the permit holder opts to include the prescriber's regular business hours on Saturdays as "business hours" as specified by subsection (c)(3) of this section, a clear statement of the prescriber's regular Saturday business hours must be included with the verification request.~~

~~(f) If a permit holder attempts to verify a prescription, and a prescriber informs a permit holder before the deadline specified by subsection (c)(3) of this section that the contact lens prescription is inaccurate, expired, or otherwise invalid, the permit holder shall not fill the prescription. The prescriber shall specify the basis for the inaccuracy or invalidity of the prescription. If the prescription communicated by the permit holder to the prescriber is inaccurate, the prescriber shall correct it, and the prescription shall then be deemed verified.~~

~~(g) During the eight business hours specified by subsection (c)(3) of this section, the permit holder shall provide a reasonable opportunity for the prescriber to communicate with the permit holder concerning the verification request.~~

~~(h) The Executive Commissioner and the executive director of the Texas Optometry Board may enter into interagency agreements as necessary to implement and enforce this chapter.~~

~~§128.6. Display of Permit.~~

~~(a) A permit holder shall prominently display the contact lens dispensing permit in his or her primary place of employment or business and shall make the department's address available upon request to any person who wishes to file a complaint.~~

~~(b) A business entity that holds one permit for multiple business locations shall display the permit in one of the locations and shall make the permit number and the department's address available upon request at any location to any person who wishes to file a complaint.~~

~~§128.7. Application Requirements and Procedures.~~

~~(a) Contact lenses may only be dispensed by the following persons: a physician, optometrist, or therapeutic optometrist; a pharmacist; or an optician, a corporation, or other business entity that holds a valid contact lens dispensing permit issued under the Act.~~

~~(b) An employee of a corporation or business entity with a permit issued under the Act is not required to obtain a separate permit.~~

~~(c) A corporation or other business entity that dispenses contact lenses to a person in this state must obtain a contact lens dispensing permit. A corporation or other business entity with ten or more locations may obtain a single permit for the entity and its employees.~~

~~(d) An applicant for a permit must submit all required information on official application forms prescribed by the department and submit the required permit fee.~~

~~(e) The application form shall contain the following information:~~

~~_____ (1) specific information regarding personal data, full legal name, date of birth, social security number, information regarding other licenses, registrations, permits, and certifications held by applicant, and information regarding misdemeanor and felony convictions of applicant;~~

~~_____ (2) trade names and addresses of all locations in which the optician intends to conduct business;~~

~~_____ (3) if applicant is a corporation or other business entity, specific information regarding type of ownership, registered address, and names and addresses of all officers, directors, registered agents and major shareholders;~~

~~_____ (4) a statement that the applicant has read the Act and these rules;~~

~~_____ (5) a statement that the applicant, if issued a permit, shall return the permit to the board upon revocation or suspension of the permit or other disciplinary action against the permit holder;~~

~~_____ (6) a statement that the applicant understands that fees and materials submitted in the permitting process are nonrefundable and nonreturnable;~~

~~_____ (7) a statement that the applicant agrees to comply with all state and federal laws and regulations regarding the sale, delivery, or dispensing of contact lenses;~~

~~_____ (8) a statement that the information contained in the application is truthful and complete; and~~

~~_____ (9) the signature of the applicant.~~

~~(f) The board shall not issue a permit to an applicant who has had a contact lens dispensing permit revoked or cancelled for cause within the 24 month period preceding the application date.~~

~~§128.8. Application Processing.~~

~~The department shall comply with the following procedures in processing applications for permits and applications for permit renewal.~~

~~_____ (1) The following periods of time shall apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required. The contact lens dispensing permit may be sent in lieu of the notice of acceptance of a complete application. The time periods are as follows:~~

~~_____ (A) letter of acceptance of application for a permit—30 working days;~~

~~_____ (B) issuance of permit renewal after receipt of documentation of all renewal requirements—20 working days; and~~

~~_____ (C) letter of denial of permit—30 working days.~~

~~_____ (2) In the event an application is not processed in the time periods stated in paragraph (1) of this section, the applicant has the right to request reimbursement of all fees paid in that particular application process. Application for reimbursement shall be made to the administrator. If the administrator does not agree that the time period has been violated or finds that good cause existed for exceeding the time period, the request will be denied.~~

~~_____ (3) Good cause for exceeding the time period is considered to exist if the number of applications for permits and permit renewal exceeds by 15% or more the number of applications processed in the same calendar quarter the preceding year; another public or private entity relied upon by the board in the application process caused the delay; or any other condition exists giving the department good cause for exceeding the time period.~~

~~_____ (4) If a request for reimbursement under paragraph (2) of this section is denied by the administrator, the applicant may appeal to the commissioner for a timely resolution of any dispute arising from a violation of the time periods. The applicant shall give written notice to the commissioner at the address of the department that he or she requests full reimbursement of all fees paid because his or her application was not processed within the applicable time period. The administrator shall submit a written report of the facts related to the processing of the application and of any good cause for exceeding the applicable time period. The program administrator shall provide written notice of the commissioner's decision to the applicant. An appeal shall be decided in the applicant's favor if the applicable time period was exceeded and good cause was not established. If the appeal is decided in favor of the applicant, full reimbursement of all fees paid in that particular application process shall be made.~~

~~_____ (5) Contested cases. The time periods for contested cases related to the denial of permits or permit renewals are not included within the time periods stated in paragraph (1) of this section. The time period for conducting a contested case hearing runs from the date the department receives a written request for a hearing and ends when the decision of the department is final and appealable. A hearing may be completed within one to four months, but may extend for a longer period of time depending on the particular circumstances of the hearing.~~

~~§128.9. Renewal of Permit.~~

~~(a) The purpose of this section is to set out the rules governing permit renewal.~~

~~(b) When issued, a permit is valid for one year or two years, as determined by the department, commencing on the date of issuance of the initial permit.~~

~~(c) A permit holder must renew the permit annually or every two years. The renewal date of a permit shall be the last day of the month in which the permit was originally issued.~~

~~(d) At least 30 days prior to the expiration date of a permit, the department shall send a notice to the permit holder's address in the department's records and a permit renewal form. The renewal form shall give notice of the expiration date of the permit and the amount of the renewal fee required. The permit holder must complete and return the renewal form and fee to the department.~~

~~(e) The permit renewal form shall require the applicant to provide the preferred mailing address, primary employment address and telephone number, trade names and addresses of all locations in which the optician intends to conduct business, and the disclosure of misdemeanor or felony convictions.~~

~~(f) A permit holder has renewed the permit when the permit holder has mailed the fully completed renewal form and the required renewal fee to the department prior to the expiration date of the permit. The postmark date shall be considered the date of mailing.~~

~~(g) The department shall issue a renewed permit to a permit holder who has met all requirements for renewal.~~

~~(h) Each permit holder is responsible for renewing the permit before the expiration date and shall not be excused from paying additional fees or penalties. Failure to receive notification from the department prior to the expiration date of the permit shall not excuse failure to file for timely renewal.~~

~~(i) A permit holder whose permit has expired may not fill a contact lens prescription in this state or sell, deliver, or dispense contact lenses to any person in this state.~~

~~(j) A person whose permit has been expired for 90 days or less may renew the permit by paying to the department a renewal fee that is equal to one and one half times the normally required permit fee.~~

~~(k) A person whose permit has been expired for more than 90 days but less than one year may renew the permit by paying to the department a renewal fee that is equal to two times the normally required permit fee.~~

~~(l) A person whose permit has been expired for one year or more may not renew the permit. The person may obtain a new permit by complying with requirements and procedures for an original permit.~~

~~(m) A retired individual permit holder who wishes to dispense contact lenses only in the provision of voluntary charity care may renew the permit every two years by submitting the renewal form and the retired contact lens dispenser renewal fee in accordance with the renewal procedures described in this section. Voluntary charity care means dispensing contact lenses at~~

~~no cost to the consumer. A retired contact lens dispenser who renews under this subsection may not sell contact lenses or receive any remuneration for dispensing lenses.~~

~~(n) A permit holder whose check for the renewal fee is not honored by the financial institution shall remit to the department a money order or cashier's check within 30 days of the date of the permit holder's receipt of the department's notice. If proper payment is not received, the permit shall not be renewed. If a renewed permit has already been issued, it shall be ineffective.~~

~~(o) If a permit holder fails to timely renew his or her permit because the permit holder is or was on active duty with the armed forces of the United States of America serving outside the state of Texas, the permit holder may renew the permit pursuant to this subsection.~~

~~_____ (1) Renewal of the permit may be requested by the permit holder, the permit holder's spouse, or an individual having power of attorney from the permit holder. The renewal form shall include a current address and telephone number for the individual requesting the renewal.~~

~~_____ (2) Renewal may be requested before or after expiration of the permit. Permit holders who renew in accordance with this subsection shall be excused from paying late fees and penalties.~~

~~_____ (3) A copy of the official orders or other official military documentation showing that the permit holder is or was on active duty serving outside the State of Texas shall be filed with the department along with the renewal form.~~

~~_____ (4) A copy of the power of attorney from the permit holder shall be filed with the department along with the renewal form if the individual having the power of attorney executes any of the documents required in this subsection.~~

~~(p) The department shall not renew a permit if renewal is prohibited by the Education Code, §57.491 (relating to Loan Default Ground for Nonrenewal of Professional or Occupational License).~~

~~(q) The department shall not renew a permit if renewal is prohibited by a court order or attorney general's order issued pursuant to the Family Code, Chapter 232 (relating to Suspension of License), for failure to pay child support or failure to comply with a court order providing for the possession of or access to a child.~~

~~§128.10. Changes of Name or Address.~~

~~(a) The purpose of this section is to set out the responsibilities and procedures for name and address changes.~~

~~(b) The permit holder shall notify the department of changes in name or preferred mailing address within 30 days of such change(s).~~

~~(c) Notification of changes shall be made in writing and mailed to the department and shall include the former and present name, permit number, former and present mailing address, and a copy of the legal name change document, if applicable.~~

~~(d) Before a replacement permit will be issued by the department, the permit holder shall return any previously issued document(s).~~

~~(e) It is the responsibility of the permit holder to comply with the provisions of this section. Notice of complaints, violations, disciplinary action, or other correspondence sent to the address in the department's records are deemed received by the permit holder.~~

~~§128.11. Filing Complaints and Complaint Investigations.~~

~~(a) Complaints alleging that a person has violated the Act or this chapter, may be filed with the department on a department complaint form or in writing by regular mail, facsimile, or electronic mail. The department may initiate a complaint based on a telephone call if there is a sufficient basis and documentation to proceed.~~

~~(b) Upon receipt of verified complaint, the department shall send the complainant an acknowledgment letter. The administrator, on behalf of the board, shall, at least as frequently as quarterly, notify the complainant and the respondent of the status of the complaint until its final disposition.~~

~~(c) Anonymous complaints may be investigated by the department if there is a sufficient basis and documentation to proceed.~~

~~(d) The department shall investigate the complaint. If the department determines that the complaint is not within the department's jurisdiction, the complainant will be notified. If warranted, the complaint may be referred to another governmental agency for review.~~

~~(e) The department may determine that the permit be revoked, suspended, placed on probation or that other appropriate action as authorized by law be taken.~~

~~(f) If the department determines that there are insufficient grounds to support the complaint, the complaint shall be dismissed. Written notice of the dismissal will be provided to the permit holder or person against whom the complaint has been filed and the complainant.~~

~~§128.12. Grounds for Disciplinary Actions.~~

~~(a) The board may deny a permit renewal application, suspend or revoke a permit, or place a permit on probation for a violation of the Act or this chapter. The board may also impose an administrative penalty of not more than \$1,000 for a violation of the Act.~~

~~(b) Prior to institution of formal proceedings to deny a renewal application, revoke, suspend, or place on probation or impose an administrative penalty, the department shall give~~

~~written notice to the permit holder by certified mail, return receipt requested, of the facts or conduct alleged to warrant the proposed action, and the permit holder shall be given an opportunity, as described in the notice, to show compliance with all requirements of the Act and this chapter.~~

~~(c) If disciplinary action of a permit holder is proposed, the department shall give written notice by certified mail, return receipt requested, that the permit holder must request, in writing, a formal hearing within 30 of receipt of the notice, or the right to a hearing shall be waived and the action shall be taken.~~

~~(d) The department may request the Attorney General to bring an action for an injunction to prohibit a person from violating the Act or this chapter.~~

~~(e) The department may not deny a permit renewal application or suspend, revoke, or probate a permit or impose administrative penalties against a permit holder based on the refusal of the permit holder to:~~

~~_____ (1) submit to a genetic test; or~~

~~_____ (2) reveal:~~

~~_____ (A) whether the applicant or permit holder has submitted to a genetic test;~~
~~or~~

~~_____ (B) the results of any genetic test to which the applicant or permit holder has submitted.~~

~~(f) The department may impose an emergency suspension for a violation of the Act or this chapter in accordance with the procedures established in Occupations Code, §353.2025.~~

~~§128.13. Informal Disposition.~~

~~(a) Informal disposition of any complaint or contested case involving a permit holder or an applicant for a contact lens dispensing permit may be made through an informal settlement conference held to determine whether an agreed settlement order may be secured.~~

~~(b) An informal settlement conference shall be voluntary.~~

~~(c) A settlement conference shall be informal and shall not follow the procedures established in this chapter for contested cases and formal hearings.~~

~~(d) The permit holder, the permit holder's attorney, and department staff may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.~~

~~(e) The complainant shall not be considered a party in the settlement conference but shall be given an opportunity to be heard if the complainant attends. Any written statement submitted by the complainant shall be reviewed at the conference.~~

~~(f) At the conclusion of the settlement conference, department representatives may make recommendations for informal disposition of the complaint or contested case or for any disciplinary action authorized by the Act. The department may also:~~

- ~~_____ (1) conclude that the department lacks jurisdiction;~~
- ~~_____ (2) conclude that a violation of the Act or this chapter has not been established;~~
- ~~_____ (3) order that the investigation be closed; or~~
- ~~_____ (4) refer the matter for further investigation.~~

~~§128.14. Formal Hearings.~~

~~(a) A formal hearing shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001.~~

~~(b) Copies of the formal hearing procedures are indexed and filed in the administrator's office, Professional Licensing and Certification Unit, 1100 West 49th Street, Austin, Texas 78756-3183, and are available for public inspection during regular working hours.~~

~~§128.15. Guidelines For Issuing Permits to Persons with Criminal Convictions.~~

~~(a) The purpose of this section is to comply with the requirements of the Occupations Code, Chapter 53, Subchapter C (relating to Notice and Review of Suspension, Revocation, or Denial of License).~~

~~(b) The department may deny a permit application or a permit renewal application, or revoke, suspend, or place on probation an existing permit if an applicant or permit holder has been convicted of a crime (felony or misdemeanor) according to the following guidelines:~~

- ~~_____ (1) those criminal convictions which evidence an unwillingness or inability to comply with the Act or this chapter; and~~
- ~~_____ (2) the factors and evidence listed in the Occupations Code, Chapter 53, Subchapter B (relating to Ineligibility for License) shall be considered in determining eligibility for a permit.~~