



OCCUPATIONAL LICENSING ADVISORY COMMISSION REPORT

A STUDY OF OCCUPATIONAL LICENSING IN OKLAHOMA
2020 REPORT & RECOMMENDATIONS

THIS REPORT WAS PREPARED BY:
The Occupational Licensing Commission

December 1, 2019

Occupational Licensing Advisory Commission Members

- Labor Commissioner Leslie Osborn
- Senator Nathan Dahm
- Senator Kay Floyd
- Senator Adam Pugh
- Representative Mark McBride
- Representative Cyndi Munson
- Representative Mike Osburn
- Bo Reese, Chief Information Officer, OMES
- Matthew Burns, Chief Communications Officer, HCSC-BCBS of OK
- Paul Campbell, President & CEO, Bison Energy
- Steven Shoemaker, VP of Sales and Marketing, Ideal Homes

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Executive Summary

In 2018, the Occupational Licensing Advisory Commission (“Commission”) was formed and charged with conducting a comprehensive review of Oklahoma’s occupational and professional licenses (collectively, “occupational licenses”) not less than once every four (4) years and to provide recommendations to the Oklahoma Legislature. A written report of the Commission’s legislative recommendations will also be provided to the Governor, President Pro Tempore of the Senate, and the Speaker of the House of Representatives. The Commission’s 2020 Report and Recommendations strives to balance free market principles with protecting public safety, and reducing unreasonable barriers to entry into the workforce.

In 2019, immense work was done to create an updated data source of all occupations requiring a license in Oklahoma. Through a refocused consideration of licensure classification, the Commission adjusted its initial listing of over four hundred (400) licenses to the accurate number of two hundred ten (210) occupational licenses, which are being administered by forty-two (42) separate licensing entities in Oklahoma. This change was due to information received in response to a letter the Commission sent to all licensing entities (attached) requesting updated information on occupational licenses, exclusive of sub-license categories, and updated agency contact information. Licensing entities were also requested to provide information on their fee structures, annual fiscal information, and implementation efforts for HB 1373 and SB 670 relating to felony convictions and military member/spouse reciprocity, respectively. They were also requested to provide information on implementation provisions for HB 2933, which requires a one-time, one-year, fee waiver for low-income individuals seeking occupational licensure. This database is available on the Oklahoma Department of Labor’s website (www.ok.gov/odol/) as well as that of Office of Management and Enterprise Services (<https://omes.ok.gov/boards-commissions/occupational-licensing-advisory-commission>).

Two (2) important bills passed during the 2019 Legislative session which will allow a positive impact and reduce barriers into Oklahoma’s workforce:

- HB 1373 supports criminal justice reform by requiring state licensing entities to modify licensure requirements for convicted felons through the limitation of disqualifying felony convictions to only those offenses that substantially relate to the duties and responsibilities of the occupation and pose a reasonable threat to public safety.
- SB 670 supports military personnel and their families’ expedited integration and licensure into the workforce upon presentation of satisfactory evidence of equivalent education, training, and experience for the desired license(s).

The Commission held six (6) separate meetings, and examined sixty-seven (67) licenses issued through eleven (11) different licensing entities, in making this recommendation of whether those licenses should be maintained, modified, or eliminated. An Occupational Regulation Blueprint (“Blueprint”) (attached) went to all reviewed licensing entities in advance of their appearances before the Commission to assist with the Commission’s review.

The Commission’s legislative recommendations for licenses reviewed in 2019 are as follows:

1. **Legislative review and additional investigation of the need for, and requirements of, the Certified Micropigmentologist License, issued by the Oklahoma State Department of Health, with additional review by the Commission in 2020**
2. **Additional Commission review in 2020 to determine if insurance reimbursement for services rendered by or through any of the following occupations is contingent upon the occupation being licensed by the Oklahoma Board of Medical Licensure and Supervision.**
 - Anesthesiologist Assistant
 - Licensed Dietitian

- Provisional Licensed Dietitian
 - Prosthetist/Orthotist
 - Registered Prosthetist/Orthotist Assistant
 - Registered Prosthetist/Orthotist Technician
 - Pedorthist
 - Radiologist Assistant
 - Registered Electrologist
 - Therapeutic Recreation Specialist
 - Licensed Professional Music Therapist
3. **Additional Commission review in 2020 of the following licenses:**
 - Licensed Tattoo Artist, and Body Piercing Artist, issued by the Oklahoma State Department of Health;
 - Cosmetologist, Facialist, and Manicurist, issued by the Oklahoma State Board of Cosmetology and Barbering;
 - Embalmer and Funeral Director, issued by the Oklahoma Funeral Board; and
 - Home Inspector, issued by the Oklahoma Construction Industries Board.
 4. **Elimination of the Employee Alcoholic Beverage License contingent upon amendment of the Retail Alcoholic Beverage License to include employers' legal obligation to provide employee training regarding the requirements/restrictions of the Oklahoma Alcoholic Beverage Control Act. Each license is issued through the Oklahoma ABLE Commission.**
 5. **The Oklahoma Water Resources Board (“OWRB”) shall look at restructuring and streamlining the following licenses, and report back to the Commission:**
 - License to perform commercial drilling or plugging of groundwater wells including test drilling for groundwater, and commercial drilling or plugging of fresh water observation wells;
 - License to perform commercial drilling or plugging of monitoring wells and site assessment wells, and drilling or plugging of geotechnical borings;
 - License to perform commercial installation of water well pumps; and
 - License to perform commercial drilling or plugging of wells utilized for heat exchange purposes.
 6. **Legislative review and potential combination of the Certified Registered Nurse Anesthetist and Anesthesiologist Assistant licenses, which are issued by the Oklahoma Board of Nursing and the Oklahoma Board of Medical Licensure and Supervision, respectively, as they may be duplicative or significantly similar.**

After extensive work and input from Commission members, various boards and stakeholders, and the public, the Commission respectfully submits this report of its findings and recommendations for licenses reviewed in 2019.

Background

What is Occupational Licensing?

Occupational licensing is the process by which a state legislature grants an agency or board the power to enforce and maintain licensing requirements for persons providing regulated, professional or occupational services. A licensure board is typically made up of individuals from the profession who will accept and review applications or oversee the administration of certain requirements (such as exams). These powers and the organization of such licensure bodies are created by legislation.

Benefits of Occupational Licensing

Occupational licensing ensures integrity of the trade and protects the public. Workers may seek to become licensed as a move toward greater professionalism. It also builds community and cohesiveness within an occupation to standardize work functions. Consumers benefit as they are able to research information through the licensing entity before seeking service. Licensing creates incentives for workers to invest in increased training and skill development for high quality services.

History of Licensing Review in Oklahoma

Oklahoma began addressing the issue of occupational licensing by convening an Occupational Licensing Task Force in 2017 (Final Report can be found at (www.ok.gov/odol/) per Executive Order No. 2018-02 by Governor Fallin. What the Task Force found was a state of complete disarray in licensing review and administration. The Task Force recommended further analysis of licenses by an independent entity utilizing an Occupational Regulation Blueprint to review the necessity, utility, and impact of existing licensing regulations. As a result of the Task Force the Oklahoma Legislature enacted SB1475, creating an Occupational Licensing Advisory Commission (effective July 1, 2018). This Commission is comprised of a broad representation of needed stakeholders including: legislators, industry members, information technology representatives, license holders, and others. It is tasked with conducting a review of all Oklahoma occupational licenses and making recommendations to the Legislature.

Work of the Commission

The Commission utilizes the Occupational Regulation Blueprint (attached) to conduct an analysis of all the occupational licenses in Oklahoma. Each year the Commission reviews a portion of the occupational licenses issued in Oklahoma to make recommendations to the legislature and administrative agencies for potential reform or modification. The review will be prioritized by critical occupations to Oklahoma. These recommendations are made following a public meeting and vast input from stakeholders. The recommendations for reform or modification are made to the Oklahoma Legislature in December of each year, prior to the start of the legislative session. The Commission also compiles data to determine the number of differing occupational licenses issued by Oklahoma's agencies, boards, and commissions, in order to continually update the online database created by the Task Force (licensing.ok.gov).

License Review Process

The Occupational Regulation Blueprint ("Blueprint") – in conjunction with informational meetings between the Commission and licensing entities, industry participants, and the public – forms the basis for the Commission to analyze licensing requirements and make recommendations to the Oklahoma Legislature. The Blueprint creates an objective, practical tool to determine whether an occupational license is needed or whether a lower form of regulation would be equally effective. It contains questions to determine whether there is a government interest in regulating an occupation (such as public safety, public health, a fiduciary duty, or preservation of a fundamental right). It also questions whether a lesser form of regulation such as insurance, bonding, or registration may be more appropriate. It also considers the composition of Oklahoma licensing boards. The Commission will utilize the Blueprint to conduct an analysis of all the

occupational licenses in Oklahoma. Newly created licenses will be reviewed by the Commission within ninety (90) days of enactment. Licenses are to be reviewed every four (4) years. In year one, (i.e., 2019 Report and Recommendations), the Commission examined some of Oklahoma's critical occupations with high economic potential indicators and licenses that appeared to be outliers. In this second year, the 2020 Report and recommendations will focus on many of Oklahoma's remaining critical occupation licenses (as identified by Oklahoma Works), and the Occupational Licensing Policy Learning Consortium's targeted occupations list. The following years will examine the balance of Oklahoma's occupational licenses. Commission members can add licenses to the proposed schedule at any time with a majority vote.

Commission Members and Staff Activities

The Occupational Licensing Advisory Commission met once during legislative session. The Commission actively tracked proposed licensing legislation, and many Commission members proposed legislation dealing with licensing reform.

During session, Commission staff also met with partner organizations and stakeholders to present the Commission's 2019 Report and Recommendations. Commission staff also met with the Department of Defense liaison for the State of Oklahoma, working on occupational licensing reform and discussing ways Oklahoma could update licensing regulations to benefit military members and their spouses.

Commission staff also met with criminal justice reform groups across the state including: Department of Corrections, Pardon and Parole Board, Oklahomans for Criminal Justice Reform, Center for Employment Opportunities, Oklahoma Works, Women in Recovery, Career Tech Centers, The Education and Employment Ministry, and others. The purpose of these meetings was to gather information regarding where past offenders were encountering the most workforce entry barriers and in what particular occupations. From these meetings the Commission was able to create a list of licenses causing the most hardship for those with past felony convictions, and to begin reviewing potential adjustments.

A large amount of time was spent updating and correcting the Occupational Licensing Database at licensing.ok.gov. The database originated out of the 2017 Occupational Licensing Task Force but over time critical information had gone missing, was incorrect, or had become outdated.

The Commission also hosted an informational breakfast for Oklahoma Legislators to inform them about the issues facing occupational licensing and licensees, what Oklahoma has done (and is continuing to do) to address these issues, and the purpose of the Commission.

May 2, 2019 Commission Meeting

This first meeting in 2019 was held to determine what Oklahoma licenses to review next. The Commission decided to focus on licenses where citizens with prior criminal records were encountering workforce entry barriers. Comparing those licenses against a previously compiled list of Oklahoma's critical occupations, the Commission chose to focus its review on the overlapping licenses for its 2020 Report and Recommendations. The resulting list consisted of sixty-seven (67) licenses. The Commission then met with the licensing entities responsible for these licenses in several subsequent meetings, gathering information necessary to knowingly analyze the licenses and form its recommendations to the Oklahoma Legislature.

The Occupational Regulation Blueprint (attached) was sent to all agencies and boards with licenses up for review in 2019. The Commission respectfully requested that they complete the Blueprint, along with a handful of additional general, licensing questions, and return them to the Commission in advance of their subsequent meetings with the Commission. The additional questions were:

- Expand on the fees collected by your Agency/Board; what those fees fund at your Agency/Board; and the annual, fiscal impact of said fees to your Agency/Board;
- How your Agency/Board plans to implement new laws relating to felony convictions and military member/spouse reciprocity found in HB 1373 and SB 670; and,
- How your Agency/Board has, or will, implement provisions in last session's HB 2933, codified at 59 O.S. § 4003, which requires a one-time, one-year, fee waiver for low-income individuals.

July 1, 2019 Commission Meeting

In July, nineteen (19) occupational licenses, issued by three (3) separate licensing boards or agencies, were publicly reviewed by the Commission. The agencies were: Oklahoma State Department of Health (15 licenses); ABLE Commission (3 licenses); and the Oklahoma Department of Agriculture, Food, and Forestry (1 license). The Oklahoma State Department of Health had two (2) representatives that discussed the different levels of education, skills, and experience required for each of its fifteen (15) reviewed licenses. The General Counsel for the ABLE Commission discussed the different requirements for each of its three (3) reviewed licenses and answered questions from the Commission. The Director of Community Protection Services and the Legislative Liaison for the Oklahoma Department of Agriculture, Food, and Forestry discussed the requirements for a Pesticide Applicator: Commercial vs Noncommercial, as well as a Consultant vs Technician.

A representative of the Occupational Licensing Policy Learning Consortium and a grant officer from the U.S. Department of Labor also held a technical assistance meeting with the Commission in July, which was extremely beneficial.

August 5, 2019 Commission Meeting

In August, the Commission publicly reviewed seventeen (17) licenses, issued by three (3) separate licensing boards or agencies. The Oklahoma Board of Nursing presented eight (8) licenses; the Oklahoma Board of Veterinary Medicinal Examiners presented five (5) licenses; and the Oklahoma Water Resources Board presented four (4) licenses). The Executive Director and Deputy Director for the Oklahoma Board of Nursing discussed the differing degrees and types of skills and training needed for each of the eight (8) reviewed nursing licenses. Each license also required a different level of supervision, as well as involving a different scope of practice. The Executive Director for the Oklahoma Board of Veterinary Medical Examiners discussed five (5) reviewed licenses, explaining the education and training requirements for each license, and how each license permits the licensee to conduct a different scope of work. The Chief of Planning and Management and the Manager of Well Drilling represented the Oklahoma Water Resources Board, explaining that the four (4) reviewed licenses establish necessary construction standards for water wells, and licensure requirements for well operators.

September 9, 2019 Commission Meeting

In September, the Commission publicly reviewed nine (9) licenses, issued by four (4) separate licensing boards or agencies. The Oklahoma State Board of Cosmetology and Barbering presented five (5) licenses; the Oklahoma Department of Labor presented a single license; the Oklahoma Funeral Board presented two (2) licenses; and the Oklahoma Construction Industries Board also presented a single license. The Executive Director of the Oklahoma State Board of Cosmetology and Barbering discussed the necessary skills, training, and various pathways for obtaining each reviewed license. Due to the use of toxic chemicals by cosmetologists and barbers, the Commission stressed the need to ensure public safety. The Licensing Supervisor for the Oklahoma Department of Labor discussed the history, purpose, and function of the Welding License, which requires passing a technical skills test. The Executive Director of the Oklahoma Funeral Board discussed education, training, and continuing education requirements for an Embalmer or Funeral Director license. The Administrator for the Oklahoma Construction Industries Board discussed the Home Inspector license. Public comments were given, and clarifications of the need for and benefits of the Home Inspector License, which had also been reviewed by the Commission for the previous year's 2019 Report and Recommendations, were provided.

October 7, 2019 Commission Meeting

In October, the Commission publicly reviewed twenty-two (22) licenses issued by the Oklahoma Board of Medical Licensure and Supervision ("Medical Board"). Lyle Kelsey represented the Medical Board and answered questions from the Commission members. Discussion included: exam requirements, education and experience requirements, job duties, consumer protections, national board certifications, licensing

pathways, fees, insurance coding and billing, Medicaid expansion, state-by-state licensure comparison, background checks, the role of licensing boards, accountability, and the number of each type of license issued annually.

November 4, 2019

The Commission began its November meeting by publicly listing all sixty-seven (67) licenses that had previously come before the Commission throughout the year, and agreed to place any that did not appear to have Commission recommendations at the end of the meeting. After the Chair, Leslie Osborn, read through the list, there were thirty-two (32) licenses Commission members wanted to discuss at greater length for possible Legislative recommendations. Once the Commission completed its discussion, a public vote on potential recommendations was taken for all sixty-seven (67) licenses. The Legislative recommendations proposed by the Commission for this 2020 Report and Recommendations are listed on the following pages.

Recommendations

Licenses to Investigate Further by Commission

Oklahoma State Department of Health

1. Certified Micropigmentologists - The Commission recommends Legislative review and investigation of the need for, and requirements of this license, as well as additional Commission review in 2020.
2. Licensed Tattoo Artist – The Commission requested additional information from the Oklahoma State Department of Health in order to compare fees for this license with fees charged by other states for similar licenses, and recommends additional review in 2020.
3. Body Piercing Artist - The Commission recommends additional review in 2020.

Oklahoma State Board of Cosmetology and Barbering

4. Cosmetologist - The Commission recommends additional review in 2020.
5. Facialist – The Commission recommends additional review in 2020.
6. Manicurist – The Commission recommends additional review in 2020.

Oklahoma Funeral Board

7. Embalmer – The Commission recommends additional review in 2020.
8. Funeral Director – The Commission recommends additional review in 2020.

Oklahoma Construction Industries Board

9. Home Inspector - The Commission recommends additional review in 2020.

Oklahoma Board of Medical Licensure and Supervision

The Commission recommends additional review in 2020, particularly consideration of whether any of the following services are available to Oklahomans contingent upon being provided through a licensed entity for insurance reimbursement. The licenses recommended for further Commission review are:

10. Anesthesiologist Assistant;
11. Licensed Dietitian;
12. Provisional Licensed Dietitian;
13. Prosthetist/Orthotist;
14. Registered Prosthetist/Orthotist Assistant;
15. Registered Prosthetist/Orthotist Technician;
16. Pedorthist;
17. Radiologist Assistant;
18. Registered Electrologist;
19. Therapeutic Recreation Specialist; and
20. Licensed Professional Music Therapist

License to Eliminate

ABLE Commission

21. Employee License - The Commission recommends elimination of the Employee Alcoholic Beverage License contingent upon the Retail Alcoholic Beverage License being amended to include a requirement that all Retail Licensees provide their employees with the same, or equivalent, training as currently mandated under the Employee Alcoholic Beverage License.

Licenses to Streamline

The Commission recommends the Oklahoma Water Resource Board look at a new, streamlined structure for the following licenses and report back to the Commission. The licenses recommended for streamlining are:

22. License to perform commercial drilling or plugging of groundwater wells including test drilling for groundwater, and commercial drilling or plugging of fresh water observation wells;
23. License to perform commercial drilling or plugging of monitoring wells and site assessment wells, and drilling or plugging of geotechnical borings;
24. License to perform commercial installation of water well pumps; and
25. License to perform commercial drilling or plugging of wells utilized for heat exchange purpose.

Licenses to Consider Merging

The Commission recommends Legislative review and potential combination of the following licenses if they are determined to be duplicative or significantly similar:

26. Advanced Practice Registered Nurse (APRN) - Certified Registered Nurse Anesthetist License - Oklahoma Board of Nursing, and
27. Anesthesiologist Assistant License – Oklahoma State Board of Medical Licensure and Supervision.

Licenses Reviewed with No Action

Licensing entities provided clarifications for the following licenses, but the Commission makes no recommendations:

28. Pesticide Applicator – Oklahoma Department of Agriculture, Food, and Forestry;
29. Advanced Practice Nurse (APRN) - Clinical Nurse Midwife – Oklahoma Board of Nursing;
30. Non-Veterinary Equine Dental Technician – Oklahoma Veterinary Board;
31. Non-Veterinary Reproductive Service Technician – Oklahoma Veterinary Board;
32. Welding License – Oklahoma Department of Labor

Licenses to Be Maintained As Is

The Commission made no recommendations or changes to the following licenses:

Oklahoma State Department of Health

33. Adult Day Care Aide
34. Medication Aide
35. Developmentally Disabled Direct Care Aide
36. Feeding Assistant
37. Home Health Aide
38. Long Term Care Aide
39. Residential Care Aide
40. Hearing Aid Licensees
41. Home Health Administrators
42. Registered Professional Environmental Specialist
43. Licensed Genetic Counselor
44. Licensed Sanitarians

ABLE Commission

45. Manufacturer

Oklahoma Nursing Board

46. Licensed Practical Nurse (LPN) - Single State License (SSL)
47. Advanced Unlicensed Assistant (AUA)
48. Advanced Practice Registered Nurse (APRN – Certified Nurse Practitioner (CNP)
49. Advanced Practice Registered Nurse (APRN) – Clinical Nurse Specialist (CNS)
50. Advanced Practice Registered Nurse (APRN) – Certified Registered Nurse Anesthetist (CRNA)
51. Multistate (MSL) Registered Nurse (RN) or Licensed Practical Nurse (LPN) License
52. Registered Nurse (RN) Single State License (SSL)

Oklahoma Veterinary Board

- 53. Veterinarians
- 54. Faculty Veterinarian
- 55. Certified Animal Euthanasia Technician

Oklahoma State Board of Cosmetology and Barbering

- 56. Barber Instructor

Oklahoma State Board of Medical Licensure and Supervision

- 57. Athletic Trainer
- 58. Athletic Trainer – Apprentice
- 59. Occupational Therapist
- 60. Occupational Therapist Assistant
- 61. Physical Therapist
- 62. Physical Therapist Assistant
- 63. Physician Assistant
- 64. Physician Surgeon M.D. (Family and General Practice)
- 65. Physician Surgeon M.D. (Internist, General)
- 66. Physician Surgeon M.D. (Physician/Surgeon and all others)
- 67. Respiratory Care Practitioner

APPENDIX

Letter to Licensed Entities

Oklahoma Department of Labor



Leslie Osborn
COMMISSIONER OF LABOR

March 19, 2019

Thanks to your help as a licensing entity, and the hard work of former Labor Commissioner Melissa Houston and Christina Foss, Program Administrator, the Oklahoma Department of Labor now has a permanent link on its webpage the public can access for a list of occupational licenses in Oklahoma. To ensure licensing information on the link remains accurate and up to date, the Occupational Licensing Advisory Commission¹ respectfully requests you review your previously submitted information and update or adjust where needed.

To review your agency's submission, please pull up the Occupational Licensing Database through the ODOL website. Click on the "Safety Inspections & Licensing" tab on the header. Then click on "Occupational Licensing Commission" in the dropdown menu, then the "Licensing Database" hyperlink on the right side of the page in the Related Topics box. Once you've accessed the Occupational Database, please confirm all information on your agency's row is accurate and complete. If your agency has not already done so, then please provide a brief response to the six questions listed below:

- | | |
|--------------------------------------|--------------------------------------|
| A. License Name | D. License Name |
| B. Licensing Authority Name/web link | E. Licensing Authority Name/web link |
| C. Required Education Level | F. Required Education Level |

For our records but not the online Occupational Database, please provide an updated agency contact, phone number mailing and email address.

In a continuing effort to best meet the needs of the public and avoid potential confusion, we do not want licenses listed the online Occupational Database that are not occupations. For example, a Commercial Applicator License for spraying pesticides would probably be something agriculturalists across the state utilize for buying chemicals in bulk, but is not their occupation. If you see any such listing, whether for your agency or another, please notify us so we may make an adjustment to the database. Also, please carefully consider whether subcategories need a separate listing, such as electricians for example. If a Licensee can attain multiple certifications or endorsements, which are all tied to a single, overarching license, then it may not be necessary to list each certification/endorsement as a separate license; the occupational license alone is likely sufficient. The intention of ODOL and the Occupational Licensing Advisory Commission is to have an accurate, easy to access website, showing citizens where to apply for occupational licenses via web links, and what it entails to do so.

The next round of occupational licenses to be reviewed by the Occupational Licensing Advisory Commission will come post legislative session so it is essential we clean up the Occupational Database prior to that start date.

Thank you very much, in advance. We respectfully request this information within the next thirty (30) days. Please send your agency's updated information to the following email addresses: christina.foss@omes.ok.gov; liz.searock@labor.ok.gov; labor.commissioner@labor.ok.gov. If you have questions, Christina Foss, Program Administrator may be reached at 405/521-6102.

Respectfully,

Leslie Osborn
Commissioner of Labor

¹ The Occupational Licensing Advisory Commission is a successor to the Occupational licensing Task Force created on July 1, 2018, pursuant to 40 O.S.9 § 800.1 3017 N. Stiles, Suite 100. Oklahoma City, Oklahoma 73105-5212 · Telephone 405-521-6100 · Fax 405-521-6018 · www.labor.ok.gov Toll-free 1-888-269-5353

Roadmap for Occupational Licensing

- Is there a compelling public interest that needs to be protected?
 - If yes, then continue
 - If no, then no regulation is required
 - Types public interests
 - Public health
 - Public safety
 - Fundamental rights
 - Substantial fiduciary interest
- Is the least restrictive means that would sufficiently protect the public interest used?
 - If yes, then continue
 - If no, then use a less restrictive means
 - Regulation options from least restrictive to most restrictive
 - Market Competition
 - Third-party or consumer created ratings and reviews
 - Private certification
 - Specific private civil cause of action or alternative dispute resolution
 - Deceptive trade practice act
 - Regulation of the process of providing specific goods or services to consumers
 - Public inspection
 - Mandatory bonding or insurance
 - Registration
 - Government certification
 - Business License
 - Specialty occupational license for medial reimbursement
 - Occupational license
- If occupational licensing is used, does the board in charge of such licensure have a controlling number of board members as market participants?
 - If yes, continue (board does not have antitrust immunity yet)
 - If no, stop (board has antitrust immunity)
- Is there active supervision of the board's actions by the state?
 - If yes, then board has antitrust immunity
 - If no, then board is subject to antitrust litigation

Occupational Regulation Blueprint

License Details

What is the license? _____

What does the license cover? _____

What Board regulates the license? _____

Compelling Public Interest

What is the compelling public interest (see Annex, item 1)? _____

Is this public interest a demonstrated, real, significant, and probable harm (see Annex, item 2)?

Least Restrictive Means

What means is used to protect the public interest? _____

Is it the least restrictive means (see Annex, item 3), which sufficiently protects the interest (see Annex, item 4)? _____

If the answer to the above question is “No” then do not use that type of regulation to protect the public interest.

-----*Continue only if Occupational Licensing was Used*-----

Controlling Number of Market Participants on the Board

How many members are on the regulatory board? _____

How many of them are active market participants (see Annex, item 5)? _____

Is the board controlled by these active market participants (see Annex, item 6)? _____

-----*Continue only if the Board is Controlled by Market Participants*-----

Active Supervision of the Board

Is there active state supervision of the board (see Annex, item 7)? _____

If the answer to the above question is “No” then board’s conduct may violate the Sherman Act and the board’s actions are not protected by state immunity.

Annex

1. *Definition of a compelling public interest.* A compelling public interest must be one of the following interests: public health, public safety, fundamental rights, or a substantial fiduciary interest.
2. *Definition of a demonstrated, significant, and probable harm.* A harm is demonstrated when it has occurred in the past. A harm is significant when it could cause damage that merits action by lawmakers. A harm is probable when its propensity to occur merits action by lawmakers. When determining whether a harm is significant and probable, lawmakers may analyze various sources of information, including whether similar activities are licensed or regulated in other states. If, in other states, a lack of licensing does not cause significant harms, the harm is not demonstrated, real, or probable.
3. *List of means from least to most restrictive.*
 - Private Governance Options
 - Market Competition
 - Third-party or consumer created ratings and reviews
 - Private certification
 - Specific private civil cause of action or alternative dispute resolution
 - Public Regulation
 - Deceptive trade practice act
 - Regulation of the process of providing specific goods or services to consumers
 - Public inspection
 - Mandatory bonding or insurance
 - Command and Control
 - Registration
 - Government certification
 - Business license
 - Specialty occupational license for medical reimbursement
 - Occupational license
4. *Definition of sufficient protection.* A regulation sufficiently protects an interest if the regulation adequately remedies the harm or possible harm to the legitimate public interest so that the likelihood of such harm is appropriate considering the degree of damages which the harm may cause. “Sufficient” has not been uniformly defined by courts, but there should be some limitation on

the choice to use a high standard of protection (like a guarantee) to justify the most restrictive mean every time.

5. *Definition of an active market participant.* The Court has found that active market participants possess strong private interests in a matter and pose a risk of self-dealing. A conservative interpretation of a “market participant” is any practitioner who works in the general industry, which is affected by the types regulations addressed by their respective boards. One could persuasively argue that these individuals possess strong interests and pose a threat of self-dealing.
6. *Definition of a controlling number.* Justice Alito, in his dissent in *NC Dental*, raises concerns that the Court did not define a “controlling number” on the board. He mentions how it could be a majority, a number required for a veto power, or even an obstructionist minority. To be safe, the State should consider all of these options to be a “controlling number,” especially since simpler terms like a “majority”—which clearly indicate a specific standard—are not used by the Court.

Definition of active state supervision. Active state supervision constitutes more than simply authorizing and enforcing decisions made by the board. States need to establish, review, or monitor decisions to ensure they are clearly articulated and firmly expressed as state policy. Therefore, a state must be reasonably informed to the decisions of a board, and then ratify the board’s conduct as proper state policy. The Court has made it clear that a “state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their violation is lawful.

