

# 2022 REPORT & RECOMMENDATIONS

A STUDY OF OCCUPATIONAL LICENSING IN  
OKLAHOMA

## Occupational Licensing Advisory Commission Report



THIS REPORT WAS PREPARED BY:

The Occupational Licensing Advisory  
Commission  
December 2021

## 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
- Matthew Burns, Chief Communications Officer, Grail, Inc
- Lisa Dillon, Goodwill Industries of Central Oklahoma, Inc
- Jerry Moore, Chief Information Officer, OMES
- Mike Robins, Founder, Michael Robins Consulting LLC
- Steven Shoemaker, President, 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 shall be provided to the Governor, President Pro Tempore of the Senate, and the Speaker of the House of Representatives prior to the deadline for requesting legislation for the upcoming legislative session. The Commission’s report 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/](http://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) 2019 bills significantly reduced 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).

In 2020 Senate Bill 1823 added a new occupational license in Oklahoma and was therefore added to the Commission’s review. Under SB 1823, a Certified Professional Midwife (CPM) or Certified Midwife (CM) would be required to be licensed in Oklahoma. All midwives would be required to disclose what credentials or licensure they may or may not have, their limitation of skills and whether they carry malpractice insurance. A required informed consent document would also include information on the midwife’s plan for emergencies and complications and gives parents the ability to pre-select a hospital in case of an emergency.

In 2021 two bills passed for easier access to an occupational license in Oklahoma:

- HB 1880 to allow district attorneys to create restorative justice programs for non-violent offenders.
- HB 2873 to allow a person living in Oklahoma that can show proof of residency or is married to an active member of the military, to be able to apply for licensing or certification and be able to use their previous scope of work, education, clinical supervision to satisfy requirements for issuance of a license or certification in Oklahoma.

The Commission held three (3) separate meetings and examined fifty-two (52) licenses issued through thirteen (13) 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 2021 are as follows and listed on the Recommendation page of this report.

**1. Discussion, Recommendations and Public Action/Vote on all Licenses reviewed in 2021.**

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

*Board of Chiropractic Examiners*

1. Chiropractor
2. Certified Chiropractic Assistant

*Department of Consumer Credit*

3. Precious Metal and Gem Dealer
4. Mortgage Loan Originators

*Council on Law Enforcement Training*

5. Bail Enforcer-Armed
6. Bail Enforcer-Unarmed
7. Peace Officer
8. Polygraph Examiner
9. Combination Licensed (Private Investigator/Security Guard-Armed)
10. Private Investigator-Armed
11. Private Investigator- Unarmed
12. Security Guard-Armed
13. Security Guard-Unarmed

*Oklahoma Insurance Department*

14. Bail Bondsman License
15. Adjuster Individual-Public
16. Adjuster Individual-Insurance Adjuster
17. Producer - Limited Lines
18. Producer - General Lines and Variable

*Real Estate Appraiser Board*

19. Certified General Real Estate Appraiser
20. Certified Residential Real Estate Appraiser
21. State Licensed Real Estate Appraiser
22. Trainee Real Estate Appraiser

*Oklahoma Board of Osteopathic Examiners*

23. Osteopathic Physician (D.O.)

*Oklahoma State Board of Examiners of Psychologist*

24. Psychologist

*Oklahoma Board of Examiners for Long Term Care Administrators*

25. Adult Day Care (ADC) Administrator
26. Certified Nursing Home Assistant Administrator (CAA)
27. Nursing Home Administrator (NHA)
28. Residential Care Administrator (RC)
29. Residential Care/Assisted Living (RCAL) Administrator

*Board of Dentistry*

- 30. Dental Assistant Permit
- 31. Dental Hygiene License
- 32. Dental License

*Oklahoma Department of Public Safety*

- 33. Commercial Motorcycle Training School Instructor
- 34. Commercial Truck Driver Training School Instructor
- 35. Driver License - Designated Examiners
- 36. Driver License - Third Party Testers
- 37. Driver Training Commercial School Instructor
- 38. Wrecker Service Operator

*Oklahoma Real Estate Commission*

- 39. Active Broker License
- 40. Broker Associate License
- 41. Provisional Sales License
- 42. Sales Associate License

*Oklahoma Securities Department*

- 43. Broker-Dealer Agent
- 44. Investment Adviser Representative (or Individual Investment Adviser)
- 45. Issuer Agent (Non-FINRA)

**2. Additional Commission review in 2022 of the following licenses:**

*Department of Mental Health & Substance Abuse Services*

- 46. Alcohol and Drug Substance Abuse Course Assessor
- 47. Alcohol and Drug Substance Abuse Course Facilitator
- 48. Behavioral Health Case Manager
- 49. Peer Recovery Support Specialists

**3. Elimination of the following licenses:**

*Oklahoma Department of Securities*

- 50. Subdivided Land Sales Agent

*Oklahoma Insurance Department*

- 51. Customer Service Rep
- 52. Insurance Consultant

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 2021.





## Background

### ***What is Occupational Licensing?***

Occupational licensing is the process by which an agency or state board enforces and maintains licensing requirements for persons/legal entities 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/](http://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 additional occupational license review through an independent entity tasked with considering the necessity, utility, and impact of all existing licensing regulations in the state. 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***

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](http://licensing.ok.gov)).

### ***License Review Process***

The Commission uses informational meetings with licensed entities, industry participants and the public; independent research; and fact gathering tools such as the Occupational Regulation Blueprint ("Blueprint" attached) in its review of licensing requirements and in submitting its informed recommendations to the Oklahoma Legislature. These tools, which are under constant review for potential improvement, allow for an objective, practical determination of whether an occupational license is necessary or whether a lesser form of regulation would be equally effective. This process helps determine whether there is a governmental interest in regulating an occupation (such as public safety, public health, a fiduciary responsibility, or preservation of a fundamental right.) It also questions whether insurance, bonding, or registration would be preferable to licensing. Furthermore, it considers the composition of Oklahoma licensing boards.

Newly created licenses will be reviewed by the Commission within ninety (90) days of enactment. 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.

In 2021 the Commission completed the first review of all occupational licenses for the state of Oklahoma. The Commission discussed recommendations for future license review as well as interest to serve on the Commission for the next four years. Some of the ideas discussed were to revise the Blueprint, appropriated boards versus non-appropriated boards, reciprocity, fees, and the possibility of more compacts for Oklahoma.

## Commission Members and Staff Activities

### *January – March 2021*

Part of this quarter was spent tracking licensing legislation dealing with licensing reform during the current legislative session. Due to the legislative session being cut short last year because of COVID, as well as an increased interest in occupational licensing issues in Oklahoma, there were 46 bills pertaining to occupational licensing.

In January, zoom meetings and email correspondence were used to present the Occupational Licensing Advisory Commission Report and Recommendations. The boards/entities that were involved in the report were also contacted and sent a report.

Contact was made with several entities to start the process of getting the Occupational Licensing database changed into an easily searchable product. The goal is for individuals to have one spot they can come to and have the answers to what they need to apply/renew any of the occupational licenses in Oklahoma.

### *April – June 2021*

To determine future Commission meetings a survey monkey poll was sent to all the Commission members with optional dates. Meeting dates were set for August 10<sup>th</sup>, September 9<sup>th</sup>, and October 5<sup>th</sup>. Work began on notifying and gathering information from entities for the 2021 meetings.

Meetings were held with several businesses to research the development of a website for the Occupational Licensing Commission. This website would contain one location to determine where to pursue any occupational license in the state of Oklahoma. The goal is to have the information and links to the location needed for each license.

### *July – September 2021*

In July prep work was completed getting ready for the August 10<sup>th</sup> Occupational Licensing Advisory Commission meeting. Blueprints were gathered, the meeting agenda was set, as well as meeting notices and invites sent to interested parties.

On August 10<sup>th</sup> a meeting was held to review 15 licenses from 5 different Boards. COVID continues to play a part in the meetings as originally there were 11 more licenses that were to be viewed but had to be moved to the September meeting due to COVID exposure. The licenses viewed in August are as follows:

#### **Board of Chiropractic Examiners**

1. Chiropractor
2. Certified Chiropractic Assistant

#### **Department of Consumer Credit**

1. Precious Metal and Gem Dealer
2. Mortgage Loan Originators

#### **Council on Law Enforcement Training**

1. Bail Enforcer-Armed
2. Bail Enforcer-Unarmed
3. Peace Officer
4. Polygraph Examiner

5. Combination Licensed (Private Investigator/Security Guard-Armed)

6. Private Investigator-Armed

7. Private Investigator- Unarmed

8. Security Guard-Armed

9. Security Guard-Unarmed

#### **Oklahoma Board of Osteopathic Examiners**

1. Osteopathic Physician (D.O.)

#### **Oklahoma State Board of Examiners of Psychologist**

1. Psychologists

As soon as the August meeting was completed prep work continued for the September 9<sup>th</sup> Occupational Licensing Advisory Commission meeting. Three Boards were requested to come back to the September meeting for follow-up on the following licenses:

**Board of Chiropractic Examiners**

1. Chiropractor

**Department of Consumer Credit**

1. Precious Metal and Gem Dealer

**Council on Law Enforcement Training**

1. Bail Enforcer-Armed

Thirty-Four (34) licenses were reviewed and voted on from 7 Boards below:

**Board of Examiners for Long Term Care Administrators**

1. Long Term Care Administrator
2. Nursing Home Administrator (NHA)
3. Residential Care/Assisted Living (RCAL) Adm
4. Residential Care Administrator (RC)
5. Adult Day Care (ADC) Administrator
6. Certified Nursing Home Assistant Adm (CAA)

**Board of Dentistry**

1. Dental Assistant Permit
2. Dental Hygiene License
3. Dental License

**Oklahoma Department of Public Safety**

1. Third Party Testers
2. Designated Examiners
3. Wrecker Service Operator
4. Driver Training Commercial School Instructor
5. Commercial Motorcycle Training School Instructor
6. Commercial Truck Driver Training School Instructor

**Oklahoma Real Estate Commission**

1. Provisional Sales License

2. Sales Associate License
3. Broker Associate License
4. Active Broker License

**Oklahoma Securities Department**

1. Subdivided Land Sales Agent
2. Issuer Agent (Non-FINRA)
3. Broker-Dealer Agent
4. Investment Adviser Representative (or Individual Investment Adviser)

**Oklahoma Insurance Department**

1. Bail Bondsman License
2. Adjuster Individual-Public
3. Adjuster Individual-Insurance Adjuster
4. Customer Service Rep
5. Insurance Consultant
6. Producer - Limited Lines
7. Producer - General Lines and Variable

**Real Estate Appraiser Board**

1. Certified General Real Estate Appraiser
2. Certified Residential Real Estate Appraiser
3. State Licensed Real Estate Appraiser
4. Trainee Real Estate Appraiser

**October - November 2021**

Due to scheduling issues and lack of a quorum, the originally scheduled meeting for October 5<sup>th</sup> was moved to November 30<sup>th</sup>. The meeting agenda was set, as well as meeting notices and invites sent to interested parties for the November meeting. Four Boards were requested to come back to the November meeting for follow-up listed below:

**State Board of Chiropractic Examiners**

1. Chiropractor

**Department of Consumer Credit**

1. Precious Metal and Gem Dealer Employee

**Oklahoma Securities Department**

1. Subdivided Land Sales Agent

**Real Estate Appraiser Board**

1. Trainee Real Estate Appraiser

Four (4) licenses were reviewed and voted on from one board below:

**Dept of Mental Health & Substance Abuse Services**

1. Alcohol & Drug Substance Abuse Course  
Assessor
2. Alcohol & Drug Substance Abuse Course  
Facilitator
3. Behavioral Health Case Manager
4. Peer Recovery Support Specialists

With the completion of the above licenses Oklahoma has completed its first view of all occupational licenses in Oklahoma. The Commission discussed recommendations for future license review as well as interest to serve on the Commission. Ideas for the next four years are as follows:

- Revise Blueprint
- Deeper dive into the makeup of Boards
- Check if Boards are following the bills that have passed on Occupational Licensing
- Compacts
- Fees - Is there financial gain to the agency involved

The Legislative recommendations proposed by the Commission for this 2022 Report and Recommendations are listed on the following pages.



## Recommendations

### *Licenses to Investigate Further by Commission*

#### **Department of Mental Health & Substance Abuse Services**

1. Alcohol and Drug Substance Abuse Course Assessor
2. Alcohol and Drug Substance Abuse Course Facilitator
3. Behavioral Health Case Manager
4. Peer Recovery Support Specialists

### *Licenses to Eliminate*

#### **Oklahoma Department of Securities**

5. Subdivided Land Sales Agent

#### **Oklahoma Insurance Department**

6. Customer Service Rep
7. Insurance Consultant

### *Licenses to Be Maintained As Is*

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

#### **Board of Chiropractic Examiners**

8. Chiropractor
9. Certified Chiropractic Assistant

#### **Department of Consumer Credit**

10. Precious Metal and Gem Dealer
11. Mortgage Loan Originators

#### **Council on Law Enforcement Training**

12. Bail Enforcer-Armed
13. Bail Enforcer-Unarmed
14. Peace Officer
15. Polygraph Examiner
16. Combination Licensed (Private Investigator/Security Guard-Armed)
17. Private Investigator-Armed
18. Private Investigator- Unarmed
19. Security Guard-Armed
20. Security Guard-Unarmed

#### **Oklahoma Insurance Department**

21. Bail Bondsman License
22. Adjuster Individual-Public
23. Adjuster Individual-Insurance Adjuster
24. Producer - Limited Lines
25. Producer - General Lines and Variable

#### **Real Estate Appraiser Board**

26. Certified General Real Estate Appraiser
27. Certified Residential Real Estate Appraiser
28. State Licensed Real Estate Appraiser
29. Trainee Real Estate Appraiser

#### **Oklahoma Board of Osteopathic Examiners**

30. Osteopathic Physician (D.O.)

#### **Oklahoma State Board of Examiners of Psychologist**

31. Psychologist

**Oklahoma Board of Examiners for Long Term Care Administrators**

- 32. Adult Day Care (ADC) Administrator
- 33. Certified Nursing Home Assistant Administrator (CAA)
- 34. Nursing Home Administrator (NHA)
- 35. Residential Care Administrator (RC)
- 36. Residential Care/Assisted Living (RCAL) Administrator

**Board of Dentistry**

- 37. Dental Assistant Permit
- 38. Dental Hygiene License
- 39. Dental License

**Oklahoma Department of Public Safety**

- 40. Commercial Motorcycle Training School Instructor
- 41. Commercial Truck Driver Training School Instructor
- 42. Driver License - Designated Examiners
- 43. Driver License - Third Party Testers
- 44. Driver Training Commercial School Instructor
- 45. Wrecker Service Operator

**Oklahoma Real Estate Commission**

- 46. Active Broker License
- 47. Broker Associate License
- 48. Provisional Sales License
- 49. Sales Associate License

**Oklahoma Securities Department**

- 50. Broker-Dealer Agent
- 51. Investment Adviser Representative (or Individual Investment Adviser)
- 52. Issuer Agent (Non-FINRA)



# 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 Commission<sup>1</sup> 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](mailto:christina.foss@omes.ok.gov); [liz.searock@labor.ok.gov](mailto:liz.searock@labor.ok.gov); [labor.commissloner@labor.ok.gov](mailto:labor.commissloner@labor.ok.gov). If you have questions, Christina Foss, Program Administrator may be reached at 405/521-6102.

Respectfully,

Leslie Osborn  
Commissioner of Labor

<sup>1</sup> 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](http://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.
7. *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 of 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.”