



NCSBN

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Statement of the National Council of State Boards of Nursing

Occupational Licensing: Regulation and Competition

The Judiciary Committee, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

United States House of Representatives

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The National Council of State Boards of Nursing (NCSBN) appreciates the opportunity to provide our position on occupational licensing, the important role state-based regulation plays in public protection, and how boards of nursing (BONs) address competition concerns by striving to ensure decision-making is evidence-based.

NCSBN is an independent, non-profit association comprising 59 BONs from across the U.S., the District of Columbia and four U.S. territories. BONs are responsible for protecting the public through regulation of licensure, nursing practice, and discipline of the 4.7 million registered nurses (RNs), licensed practical/vocational (LPN/VNs) and advanced practice registered nurses in the U.S. with active licenses. NCSBN was created by these BONs to act and counsel with one another and to lessen the burden of government. The mission of NCSBN is to provide education, service, and research through collaborative leadership to promote evidence-based regulatory excellence for patient safety and public protection.

The Role of State-Based Licensing in Protecting the Public

First and foremost, the primary responsibilities of a state licensing board are regulating, overseeing, and enforcing the practice of that profession throughout a state as dictated by the state's practice act with the goal of protecting the public. Depending on the profession, the danger an unsafe professional may pose to the public varies greatly. For health care professionals, such as nurses, this danger is especially high. The exposure to the public at the most vulnerable of times makes the importance of ensuring nurses are competent and safe providers all the more important.

State licensing boards vary in size, organization, membership, and structure. Practice acts are drafted to be profession-specific, and thus vary greatly between one profession to the next in their charges and processes. A one-size-fits-all approach to streamline state licensing board operations across professions is unrealistic and if imposed, could pose a danger to public

protection. Due to the large variance, it is important to know that one-size-fits-all approaches to changing state licensing board operations simply will not work.

The Nurse Licensure Compact: Enhancing License Portability and Public Protection

For years, NCSBN has strived to offer nurses the opportunity to practice safely and competently across state lines without undue licensure burdens. One way that we have worked to facilitate interstate mobility of nurses is through the Nurse Licensure Compact (NLC), an interstate compact that allows a nurse to have one multistate license, in his or her state of residency, that grants the privilege to practice in other NLC participating states both physically and electronically. Since the Nurse Licensure Compact went into effect in 2000, 25 state legislatures enacted the compact to expand the mobility of our nation's nursing workforce and expand the use of new technologies to deliver care via telehealth.

In an effort to increase the number of states participating in the NLC, BONs recently revised the NLC to increase its appeal to states that have not yet joined, creating the enhanced Nurse Licensure Compact (eNLC). Changes include the addition of uniform licensure requirements and mandatory criminal background checks for nurses seeking a multistate license. To date, 26 states have adopted the eNLC, including five states that did not participate in the original NLC. Furthermore, a significant number of states have indicated their interest in bringing forward legislation in the next session. Multistate licenses will begin to be issued through the eNLC beginning on January 19, 2018. Until that time, the original NLC remains in effect.

In addition to the NLC and eNLC, we have also developed a compact that would facilitate interstate license portability for APRNs, who are increasingly delivering care across state lines via telehealth. The APRN Compact maintains most of the same principles as the NLC, including a mutual recognition licensing model that would allow an APRN to practice in any participating state with just one license. The APRN Compact complies with the Consensus Model for APRN Regulation. NCSBN, along with numerous other nursing associations that represent APRNs, created the APRN Consensus Model in 2008 to achieve the goal of standardizing advanced practice nursing and implementing the best available evidence to ensure safe and quality practice. Notably, the APRN Compact would allow providers the ability to practice "independent of a supervisory or collaborative relationship with a physician," a provision that reflects a long time license portability barrier for APRNs and is in line with the FTC's *Competition and the Regulation of Advanced Practice Nurses* position paper in support of policies that promote APRN independence and removal of restrictive anticompetitive barriers on practice.

BONs under the NLC/eNLC facilitate interstate cooperation and coordination of public protection through participation in Nursys®, the only national database currently available for verification of nurse licensure and discipline for RNs, LPN/VNs and APRNs. Nursys® allows access to the status of a nurse's license and provides information about any history of discipline. The broad adoption of Nursys® demonstrates how BONs have made public protection a priority while also finding ways to lessen the burden of licensure on nurses. Ultimately, the eNLC and APRN Compact create the necessary legal structure that requires BONs to report and share

license and discipline information with one another to ensure nurse competency and patient safety across the country.

Congress can reduce burdens created by occupational licensing by supporting and encouraging the enactment of interstate compacts, mutual recognition agreements, uniform laws, and other policies that facilitate licensure portability across state lines.

State-Based Nurse Licensure and Competition: How BONs Are Planning for the Future

In line with its' mission, NCSBN has been a stalwart in promoting regulatory decision-making that is evidence-based and puts public protection and patient safety as top priorities. NCSBN's mission puts the interests of the public and consumers of nursing services in a position paramount to all others, and ensures these interests can be defended on their merits through sound evidence. To help bolster and inform state nursing regulation, NCSBN's *Journal of Nursing Regulation* (JNR) provides a global forum for sharing research, evidence-based practice, and innovative strategies and solutions related to nursing regulation, policy and practice.

Over the past several years, NCSBN has spent considerable time and resources convening BON leaders from across the country and around the world to discuss the future of nursing regulation. In October 2016, NCSBN hosted *Regulation 2030*, a meeting that brought regulators and nurse leaders from across the United States and around the world together to engage in a shared development opportunity to envision the future of regulation. The eighty nurse and other leaders attending the meeting represented nurse leaders and regulators from across the globe, state legislators, representatives of other health professional licensing board associations, the FTC, and the Office of Economic Cooperation Development (OECD). The goal of the summit was to analyze trends in nursing research to attempt to predict and understand where the future of nursing regulation is headed. Ultimately, significant quantities of data were created through the work done at this meeting, which has both generated questions for further research and actionable steps that need to be addressed.

In addition to *Regulation: 2030*, NCSBN has convened an "Active Supervision Committee" to analyze the Supreme Court's decision in *North Carolina State Board of Dental Examiners* and consider how BONs should prepare for the future of nursing regulation in light of the decision. Though that committee's work is not yet completed, NCSBN hopes to create resources and guidance to BONs to identify areas of exposure to federal antitrust law and to deploy best practices in creating regulation to protect the public. The goal of the committee, and a message continually relayed to BONs, is for BONs to ensure their actions can be legally defended on their merits, thereby removing the potential need for invoking state action immunity. Additionally, NCSBN has long supported the inclusion of consumer or public (non-nurse) members to be added to BONs to further drive regulation in a direction that puts patient interests first. NCSBN recognizes the importance in meeting the legal tests set forth by the Supreme Court in the *North Carolina State Board of Dental Examiners* decision. NCSBN believes that state-level changes should be made to meet any new requirements, based upon the unique circumstances facing each licensing board in a state. State-based changes will ensure the powers specifically granted to the states to regulate the professions that lie within their borders remains

intact. Federal incursion into this area, particularly by Congress, could lead to greater legal uncertainty as states determine the best solutions for their licensed occupations and consumers.

Concerns with the Restoring Board Immunity (RBI) Act

NCSBN recognizes the importance of compliance with the Supreme Court's decision in *North Carolina State Board of Dental Examiners* and for states to assess and create processes for active supervision where needed. The RBI Act, however, raises questions and concerns for BONs. Notably, the RBI Act fails to acknowledge that many states already have systems in place to review licensing board decision-making. Additionally, several states have already taken additional measures following the Supreme Court decision in the *North Carolina State Board of Dental Examiners* case to address concerns raised by the Court. Would these methods, many of which state legislatures and attorneys general have assessed and determined to meet the legal tests put into place by the Supreme Court, be put in legal jeopardy due to federal supremacy that would accompany the RBI Act?

Among NCSBN's concerns, there is no clear path for a state to either opt in or opt out of the two separate frameworks proposed in the RBI Act. This creates unnecessary legal uncertainty for licensing boards, opening additional pathways for potential plaintiffs to pursue when considering their legal options against licensing boards. Furthermore, the RBI Act places a burden of good faith on the state, while potential plaintiffs are not held to the same standard.

The RBI Act requires, through the bill's Active Supervision and Periodic Review framework, a requirement for a state to establish a State Office of Supervision of Occupational Boards. According to the bill, that State Office would be dictated, by the federal government, to review regular daily board operations that are created and regulated by the powers of the state. Creation of such an entity would almost certainly slow down the operations of state licensing boards and create hurdles to the delivery of their services. The services that may experience delay include the expedient issuance of licensure and, more troubling, disciplinary action against those licensees and imposters that pose an immediate threat to the public.

Also of concern, the bill's Judicial Review framework creates a more burdensome intermediate scrutiny standard. Currently, many BONs defend the merits of their decisions in court as necessary. If the framework created by the RBI Act is implemented, it could create legal difficulty for those state licensing boards who are operating appropriately and well within the boundaries of the *North Carolina State Board of Dental Examiners* decision without the added administrative burdens of the RBI Act.

While we recognize BONs are not the target of the RBI Act, the impact on them would be the same as other occupational licensing boards. As addressed previously, a one-size-fits-all occupational licensing reform may have unintended consequences that will ultimately impact licensing boards' ability to protect the public in an expedient and effective method of regulation best suited for the individual profession. Ultimately, if the RBI Act were to become law, it has the potential to damage over 100 years of jurisprudence in administrative law, regardless of whether a state or individual board in a state chooses to adopt its framework.

Though the RBI Act acknowledges in the Statement of Findings and Purpose that licensing should be used to “combat real, substantial threats to public health, safety, or welfare,” it serves as a blunt instrument attempting to address a state problem that ideally requires a scalpel. Across the states, Attorneys General are carefully assessing areas of liability within the states’ occupational licensing framework, and taking careful and calculated steps to address this. As is noted earlier, state licensing boards vary significantly from profession to profession and state to state. To assume that all states should adopt one of two operational pathways not only disregards the lack of evidence for doing so, but also neglects to take each state licensing board’s individual traits into consideration.

Conclusion

NCSBN appreciates the opportunity to provide input on this important matter. We recognize the importance of license portability and ensuring that state regulations don’t unduly impede a nurse’s ability to find work or practice in the state of his or her choosing. This has been a BON priority for over 20 years, and in that time, states have made significant progress in reducing barriers to practice with policies like the eNLC, APRN Compact and APRN Consensus Model while also keeping public protection at the forefront. Legislation like the RBI Act that proposes significant changes to the operations of state licensing boards unnecessarily injects legal questions surrounding federal supremacy in an area that has a long history of being regulated at the state level. While there is no question that state licensing laws, regulations, and operations must be regularly analyzed and updated to meet the modern economic and workforce environment, states are better suited to address specific needs within their own borders.

NCSBN would like to continue the conversation surrounding state licensing boards, regulation, and competition with members of the Subcommittee. If you have any questions or would like any additional information, please do not hesitate to contact us. Elliot Vice, NCSBN’s Director of Government Affairs, can be reached at evince@ncsbn.org and 202-530-4830. We look forward to continuing the dialogue on this very important issue.