

STATEMENT OF PROPOSED TESTIMONY

**U.S. House of Representatives
House Judiciary Committee
Subcommittee on Antitrust**

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Good Morning. Chair Nadler and Members of the Sub-Committee, thank you for the opportunity to testify today concerning occupational license compacts and to provide some expert testimony ways in which interstate compacts provide for multi-state licensure for health professionals including medicine, nursing, physical therapy, EMT’s, psychologists and speech pathologists and audiologists; to address issues regarding certification vs. licensing; and to summarize reasons why interstate compacts are uniquely useful in ameliorating some of the potential anti-competitive aspects of professional licensure while preserving the ability of states to protect the public from harm.

I was privileged to serve as a principal drafter of all of the existing health occupational licensure compacts and also currently serve as legal counsel for five of the statutorily created interstate commissions which administer these compacts. I also serve as Special Counsel to the National Center for Interstate Compacts for the Council of State Governments and a co-author of the largest compilation of legal authorities on the subject of interstate compacts published by the American Bar Association in 2016 entitled “The Evolving Law and Use of Interstate Compacts.”

- All aspects of these compacts are generated by state legislatures and implemented by state licensure board officials, with the overall intent being to create a document that reflects the practitioners’ need for portability and the states’ need to preserve public safety. The Compact Clause of the Constitution (Art. I, Sec. 10, Cl 3) was created for the purpose of allowing states to collectively exercise state sovereignty without the need for federal intervention.
- The Federal Trade Commission Report on Options to Enhance Occupational License Portability (9/2018) concludes stakeholders need to “harmonize state licensure standards, using the least restrictive standard that can gain the support of states nationwide.” Occupational interstate compacts use this perspective to establish qualifications.
- In addition to the above referenced professions there are currently at least four more occupations that are prepared to begin the process to develop compacts: teaching, mental health counseling, dental hygiene and occupational therapy. These occupations are estimated to encompass approximately 40% of licensed military spouses.

- The National Center for Interstate Compacts (under the Council of State Governments, the agency with which DoD will enter a cooperative agreement to support the development of compacts), briefs all advisory committee and drafting team members on the need to develop qualifications that reflect the intent expressed by the FTC report: the least restrictive standard that can gain support of states nationwide. As part of this indoctrination, team members are briefed on the anti-trust and personal liability aspects of the FTC v. North Carolina Dental Board case.

Although the general public continues to use the terms interchangeably, there are important functional distinctions between certification and licensure.

Certification

The federal government has defined “certification” as the process by which **a non-governmental organization grants recognition to an individual who has met predetermined qualifications specified by that organization.** ¹ Similarly, the [National Commission for Certifying Agencies](#) defines certification as “a process, often voluntary, by which individuals who have demonstrated the level of knowledge and skill required in the profession, occupation, role, or skill are identified to the public and other stakeholders.”²

Accordingly, there are three hallmarks of certification (as functionally defined). Certification is:

1. voluntary process;
2. by a private organization;
3. for the purpose of providing the public information on those individuals who have successfully completed the certification process (usually entailing successful completion of educational and testing requirements) and demonstrated their ability to perform their profession competently.

Nearly every profession certifies its members in some way, but a prime example is medicine. Private certifying boards certify physician specialists. Although certification may assist a physician in obtaining hospital privileges, or participating as a preferred provider within a health insurer’s network, it does not affect his legal authority to practice medicine. For instance, a surgeon can practice medicine in any state in which he is licensed regardless of whether or not he is certified by the American Board of Surgery.

Licensure

Licensure, on the other hand, is the state’s grant of legal authority, pursuant to the state’s police powers, to practice a profession within a designated scope of practice. Under the licensure system, states define, by statute, the tasks and function or scope of practice of a profession and provide that these tasks may be legally performed only by those who are licensed. As such, licensure prohibits anyone from practicing the profession who is not licensed, regardless of

whether or not the individual has been certified by a private organization. Licensure is also the only means by which a licensed professional may obtain payment authorization under such programs as Medicaid or Medicare and is the only means by which such a licensed professional may obtain malpractice coverage.

Confusion between the terms “certification” and “licensure” arises because many states call their licensure processes “certification,” particularly when they incorporate the standards and requirements of private certifying bodies in their licensing statutes and require that an individual be certified in order to have state authorization to practice.

Regardless of what descriptive title is used by a state agency, if an occupation has a statutorily or regulatorily defined scope of practice and only individuals authorized by the state can perform those functions and activities, the authorized individuals are licensed.

¹ U.S. Department of Health, Education, and Welfare, Report on Licensure and Related Health Personnel Credentialing (Washington, D.C.: June, 1971 p. 7).

² NCCA Standards for the Accreditation of Certification Programs, approved by the member organizations of the National Commission for Certifying Agencies in February, 2002 (effective January, 2003).

While some anti-regulatory groups believe that certification or other less ‘restrictive’ regulatory alternatives should be used, the health care professions and others who are currently licensed have concluded that interstate compacts are uniquely designed to facilitate interstate employment opportunities and provide and even enhance the protection of the public.

Throughout the history of the United States, interstate compacts have been used to define and redefine the relationships of states and the federal government on a broad range of issues, including occupational licensure. The earliest compacts were utilized to settle boundary disputes and disposition of land between two adjoining states and to resolve natural resources issues such as fishing and water rights. Former U.S. Supreme Court Justice Felix Frankfurter referred to interstate compacts as “one of the axioms of modern government.” Moreover, in an historic decision in which the Court upheld the validity of a state’s authority to enter into an interstate compact and to delegate authority to an interstate compact agency to promulgate uniform rules, he called such state action “a conventional grant of legislative power.”¹

Today there are nearly 200 interstate compacts in effect which provide a uniform means of state-based problem solving in areas as diverse as natural resource conservation, utility regulation, public transportation, and criminal justice to regulation of tribal casinos and horse racing and wagering. More recently these instruments have been used to facilitate license portability in health professions requiring occupational licensure including Medicine, Nursing, Physical Therapy, EMT’s and Psychology. On average each state is a member of two dozen interstate compacts and most compacts being developed in the 21st century, like the Nurse Licensure Compact or the Interstate Medical Licensure Compact, involve some aspect of interstate regulation and are designed to achieve state, regional and national goals.²

¹ See *West Virginia, ex rel. Dyer v. Sims*, 341 U.S. 22 (1951).

² Michael Buenger & Richard Masters, *The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems*, *Roger Williams University Law Review*, Fall 2003, pp. 73-79.

The appeal of interstate compacts as a useful and effective tool for resolving national-state and interstate conflicts and problems in intergovernmental relations is a function of a number of factors. These include the continued political debate concerning concentration vs. decentralization of federal government activities and the exercise of state responsibilities and prerogatives in the U.S. federal system; our increasingly mobile society and exponential growth of multi-state business activities by both large and small business entities; and the attendant increase in the number of state problems which frequently exceed the jurisdiction of any state to achieve a solution unilaterally. Among the most recent of these enactments of compact based problem solving are the Nurse Licensure Compact (enacted by 34 states to date), the Interstate Medical Licensure Compact (enacted by 31 states to date), the Physical Therapy Licensure Compact (enacted by 25 states to date), the EMT compact (enacted by 17 states to date), and the Psychology Licensure Compact (enacted by 12 states to date).³

The Federal Trade Commission Report on Options to Enhance Occupational License Portability (9/2018) cited the above referenced ABA published interstate compact treatise and the numerous times and concluded:

- "interstate compacts improve licensure portability nationwide"
- "FTC staff encourages stakeholders such as licensees, professional organizations, organizations of licensing boards, and state legislators to consider the likely competitive effects of options to improve license portability"
- "For reducing barriers to multistate practice, consider the use of a mutual recognition model, in which licensees need only one state license to practice in other member states"
- "Harmonize state licensure standards, using the least restrictive standard that can gain the support of states nationwide"
- "Moreover, by unhanding the ability of licenses to provide services in multiple states, and to become licensed quickly upon relocation, license portability initiatives can benefit consumers by increasing competition, choice, and access to services, especially where providers are in short supply"

Based on the above, the FTC also determined that interstate compacts also serve to address anti-trust concerns about occupational licensure which have been addressed by the North Carolina Dental Board decision by the U.S. Supreme Court and its aftermath. Among its conclusions in the White Paper were that interstate occupational licensure compacts achieve the following:

- Reduce barriers to licensure portability;
- Create uniform standards for entry into practice;
- Eradicate board member discretion and subjectivity over entry into practice by establishing those uniform standards for entry;
- Create greater access to care by allowing for greater mobility of practitioners and additional practitioners to underserved areas;
- Foster cooperation between professions and member states;

³ See Caroline Broun, Michael Buenger, Michael McCabe, Richard Masters, *The Evolving Use and Changing Role of Interstate Compacts: A Practitioner's Guide*, American Bar Association 2007, pp. 180-84.

- Create an enforcement mechanism to ensure timely issuance of the compact privilege by participating member states;
- Greater cooperation and information sharing between member states,

The legal standing of compacts as contracts and instruments of national law applicable to the member states annuls any state action in conflict with the compact's terms and conditions. Therefore, once adopted, the only means available to change the substance of a compact (and the obligations it imposes on a member state) are through withdrawal and renegotiation of its terms, or through an amendment to the compact (or in this case, the administrative rules) adopted by all member states in essentially the same form.

While 'state sovereignty' concerns have sometimes been raised as an objection to an interstate compact, in reality a compact usually serves to promote state sovereignty in that interstate compacts, unlike pre-emptive congressional legislation or regulations, allow states to continue to exercise authority over interstate issues without the need for federal intervention or pre-emption. When examined from that perspective, by enacting an interstate compact the State is only giving up the right to act "unilaterally" with regard to an interstate problem which cannot be resolved without a uniform solution agreed to by all the states involved in the form of either congressional action (See U.S. Constitution, Article I, Section 8) or an interstate compact (See U.S. Constitution, Article I, Section 10, Clause 3).

The occupational licensure compacts do not "divest" local occupational licensure boards of their authority. A closer examination of the text of the various licensure compact will reveal that the compact provisions have been broadly drafted with the intent to avoid conflict with or regulation of 'scope of practice' laws. Instead the licensure compact language does not seek to abrogate state control over health care practice or policy, but only to facilitate the interstate portability of licensure while maintaining and enhancing public safety.

Although states actually enhance their power to uniformly regulate interstate transactions such as the interstate transfer of students of military families by collectively maintaining state based regulatory control, their ability to do so relies upon the binding nature of the contractual obligations of the member states which enact the compact. This is one of the principle reasons why state legislatures have employed interstate compacts as an effective means of achieving this objective. In interpreting and enforcing compacts courts are constrained to effectuate the terms of the agreement (as binding contracts) so long as those terms do not conflict with constitutional principles. Once a compact between states has been approved, it is binding on the states and its citizens. See, *New Jersey v. New York*, 523 U.S. 767 (1998). Thus, "Unless the compact . . . is somehow unconstitutional, no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite." *New York State Dairy Foods v. Northeast Dairy Compact Comm'n*, 26 F. Supp. 2d 249, 260 (D. Mass. 1998), *aff'd*, 198 F.3d 1 (1st Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). For example, in *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) the Supreme Court sustained exceptions to a special master's recommendation to enlarge the Pecos River Compact Commission, ruling that one consequence of the enactment of an interstate compact is that "no court may order relief inconsistent with its express terms." See also *Alabama v. North Carolina*, 560 U.S. 330 (2010).

Whether a given compact should establish a special administrative structure depends upon the subject matter and scope of the compact agreement. While compacts such as those used to resolve boundary disputes or water rights frequently require no formal administrative structure, a compact formed for the purpose of providing regional and national legal channels for uniform governmental action or administrative regulation requires a more formal governing structure. In most recent cases, including the Medical Licensure Compact, the Nurse Licensure Compact, and the Physical Therapy Licensure Compact a state created interstate commission that is a ‘sub-federal, supra-state governing body’ is being advanced to implement such powers as the delegation of rule-making authority or the authority to contract with third parties such as vendors providing information technology services such as those required to collect and process data necessary for the administration of the compact.⁴

Without legislative creation of and delegation of power to a governmental ‘infrastructure’ to administer the compact, both the promulgation and efficacy of uniform rules governing the administration of a compact lack legal validity and are not enforceable between and among the member states. In contrast, the creation of an interstate administrative agency or commission – through a specific grant of a state’s sovereign authority to it via the provisions of the compact statute – provides a formal regulatory scheme for both the development of rules and enforcement of the obligations established by the compact. The existing health occupational licensure compacts provide such a defined agency through which such issues as uniform provisions for obtaining a multi-state compact license as well as joint disciplinary information sharing and joint investigations of disciplinary complaints. Numerous provisions of the compact will detail the powers and duties delegated to the interstate governing body created by the compact. Equally important is the fact that the uniform rulemaking process of the interstate agency substantially conforms to the principles of due process established by the ‘Model State Administrative Procedure Act’ which is the basis for administrative rulemaking procedures in a majority of the states.

By creating an intermediate governing authority to collectively exercise power, the states are free to create fair, uniform, and efficient ways of addressing interstate issues such as occupational licensure which not only ameliorates anti-trust concerns and continues to allow states to continue to provide reasonable standards to protect public safety while facilitating multi-state employment opportunities for licensed professionals. Interstate compacts provides a “shared power” approach that preserves state sovereignty over areas such as occupational licensure which, while transcending individual state boundaries, should remain under the jurisdiction of “the several states.”

⁴ Ibid.