

Blueprint 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 lesser 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 Licensing 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) ☐ Yes ☐ No

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) ☐ Yes ☐ No

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)

☐ Yes ☐ No

-----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) ☐ Yes ☐ No

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 would merit 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 states that do not license a profession are not subject to significant harms as a result of the lack of licensing, the harm the license is purported to address 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 medial 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. There is no case law on the definition of sufficient but some standard of protection should be used to limit someone's ability 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 the very risk of self-dealing a supervision requirement was designed to address. Consequently, 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, as reasonable arguments could be made that these individuals inherently possess strong interest and pose a threat to self-dealing.

6. *Definition of a controlling number.* In the dissent of the *NC Board* case, Justice Alito raises concerns that the Court does not define what a "controlling number" is on the board. He mentions how it could be a majority, a number required for a veto power, or even an obstructionist minority. The safest interpretation would be to consider all of these, or any other number which may prevent or cause action on a Board, to be a controlling number, especially since simpler terms like a "majority," which clearly indicate a specific standard, are not used by the Court. Additionally, does a controlling number change depending on the circumstances and the particular members in attendance for a specific action?

7. *Definition of active state supervision.*

Case law has made it clear that 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. It could be interpreted then that a state must be reasonably informed to the decisions of a board, and then ratify the board's conduct as proper state policy. The Supreme 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 . . ." What methods or controls should constitute active state supervision? Is an appeal process adequate?