

TO: FTC
FROM: The National Association of Optometrists and Opticians
RE: Occupational Licensing Reform
DATE: October 3, 2017

The staff of the Federal Trade Commission has requested comments from the public to aid in the analysis of whether and how occupational licensing reform could reduce barriers to entry, enhance competition, and promote economic opportunity. The FTC also held a roundtable event to discuss the concerns and opportunities related to occupational licensing on July 27, 2017.¹

On behalf of the National Association of Optometrists and Opticians (the “NAOO”), we offer the following comments and questions.

NAOO is a national organization representing the retail optical industry and eye care providers. Our members offer consumers the convenience of optical dispensaries (staffed with opticians) that are co-located with eye care services from eye care providers (typically optometrists) who prescribe corrective eyewear and perform eye health examinations. Most NAOO members also offer e-commerce optical retailing to customers.

NAOO members collectively represent nearly 9000 co-located eye care offices and optical dispensaries serving millions of patients and eyewear customers each year. NAOO members are dedicated to the principle that consumers are best served when optometrists and opticians are able to be co-located and serve consumers jointly. The form of business models used by NAOO members to affiliate with optometrists may include:

- Subleases or licensed departments to independent contractor optometrists by the optical dispenser,
- Franchising to optometrists and opticians who offer co-located eye care and eyewear sales,
- Operation of a vision care service plan, and
- Employment of the optometrist by the optical dispenser in the states where corporate practice of optometry regulations permit such a model.

These forms of practice offer an alternative to the traditional practice modalities where either there is no on-site eye care available to an optician’s customers, or where the eye care patient is tied or at least strongly induced through a variety of practices to become a customer of the dispensary owned and operated by an optometrist who is also the prescriber.²

¹ <https://www.ftc.gov/news-events/events-calendar/2017/07/streamlining-licensing-across-state-lines-initiatives-enhance>

² Private dispensing optometrists today still make the majority of their revenue from selling the eyewear that they prescribe. These optometrists have a strong incentive to improve the “capture rate” of in-office eyewear sales to their patients. See, e.g., “Equip Your Optical Manager to Take Sales to the Next Level”, Beverly Jue-Smith, OD, MBS. Review of Optometric Business, October 14, 2015. <http://www.reviewob.com/equip-your-optical-manager-to-take-sales-to-next-level.aspx>

NAOO is consumer oriented, and dedicated to the proposition that the free market, in the tradition of the American business system, best meets the consumer's vision care needs.³

The NAOO believes that significant reform of professional licensing in the US is appropriate and needed today, and recommends that one of the first professions the FTC should review is opticianry.

Reform of optician licensing laws should include changes in existing state laws and rules to enhance the mobility of certified and experienced opticians between the states that license opticians and from non-licensed states into a licensed state. The twenty-one states that currently license opticians have a patchwork of requirements and regulations that are unrelated to protecting the public⁴; these state laws offer a clear object lesson demonstrating the FTC staff observations.

"License portability restrictions often prevent otherwise qualified people from marketing their services across state lines or when they move to a new state."

"For some occupations, state licensing standards vary considerably, so that applicants licensed in one state may need additional education or training to qualify for another state's license. Even when a profession's underlying standards are national and state licensing requirements are similar throughout the United States, the process of obtaining a license in another state is often slow, burdensome, and costly."

"The need for multi-state licensure also affects consumers' access to services. It may prevent qualified service providers from addressing time-sensitive emergency situations near state lines, limit the ability of health care providers to supply telehealth services to consumers in rural and underserved locations, or otherwise reduce the availability of any service for which providers are in short supply."

³ The FTC is well aware of the negative impact on consumers of restraints on competition in the market for ophthalmic goods. In a 1989 rulemaking proceeding, the FTC concluded that anticompetitive, unfair laws "insulate local optometrists from competition from large, price-competitive chain firms, most of which operate interstate" and thus "deny interstate ophthalmic providers access to local markets when the evidence demonstrates that the States' asserted basis for such actions – to protect citizens from poor-quality ophthalmic care – has no substantial basis in fact." 54 Fed. Reg. 10285, 10298. The FTC observed that a "substantial body of evidence demonstrates that these restrictions raise prices [for] consumers and, by reducing the frequency with which consumers obtain vision care, decrease the overall quality of care provided in the market" without providing "any offsetting benefits" to consumers." 54 Fed. Reg. 10286.

⁴ Separately, the NAOO will provide the staff with a chart listing the 21 states that license or require registration of opticians, summarizing the key laws and regulations related to licensing of optical dispensers and the differences that lead to restrictions on interstate mobility.

This crazy quilt of optician regulation (with the majority of states not requiring a license to dispense prescription eyewear) makes it difficult for many qualified opticians to get licensed in a timely and efficient manner. Opticians who are both credentialed⁵ and experienced, and who have been providing services in a state that does not license optical dispensers, often face significant challenges in getting licensed in one of the licensed states.

Although some states offers opticians who are licensed in another state the opportunity for reciprocity of license or “licensure by endorsement” (where a license from one state is accepted as the basis for granting a license in a new state)⁶, the current processes for reciprocity in most states are opaque, ambiguous, interpreted arbitrarily, not well understood by the potential licensees and rarely utilized.

In most states that license opticians, there is no path to licensure for opticians from non-licensed states other than having to complete a lengthy apprenticeship and pass added written and/or practical examinations. A few years ago, as part of a review of the state of opticianry in the United States, the NAOO recommended to a group of optician associations and other interested parties that the associations all support adoption of a model optician mobility act.⁷

Participants in the Optician Collaboration Forums developed a draft Model Optician Mobility Act (“MOMA”). The forum included representatives from:

- The American Board of Opticianry & the National Contact Lens Examiners (ABO-NCLE),
- The Commission on Opticianry Accreditation (COA),
- The Contact Lens Society of America (CLSA),
- The National Academy of Opticianry (NAO),
- The National Association of Optometrists and Opticians (NAOO),
- The National Commission of State Opticianry Regulatory Boards (NCSORB),
- The National Federation of Optical Schools (NFOS),
- The Opticians Association of America (OAA), and
- The Society to Advance Opticianry (SAO).

⁵ The most widely used system of credentialing opticians, both to fit and dispense spectacles and separately to fit contact lenses, is based on the voluntary testing programs operated by the American Board of Opticianry – National Contact Lens Examiners (“ABO-NCLE”). See <http://www.abo-ncle.org>. The National Optician Competency and the Contact Lens Registry Exams are currently offered four times per year.

⁶ Most states that have “licensure by endorsement” as an alternative for opticians do not specify which other states are viewed as comparable, leaving it to the regulatory board to make an ad hoc judgment on the suitability of the candidate.

⁷ As a result of this difficulty, the NAOO has worked with the ABO-NCLE and most of the other associations related to ophthalmic dispensing to create a “Model Optician Dispensing Act.” A copy of the model act is attached. Despite the stated support of the national optician-related associations for the model act at the time it was drafted, to date there has been little active support for these improvements at the state level, with the exception of rule changes by the Kentucky Board of Ophthalmic Dispensers.

We believe adoption of the MOMA (either by rule or, as appropriate, by legislation) would improve the ability of competent, experienced and credentialed opticians to become licensed in the 21 states that currently require licensing or registration of optometrists.

The proposal is a compromise that would allow states to make narrow modifications to the MOMA by inserting customized but limited language to fit their specific licensing laws (see discussion below). Even with customization of the ultimate language adopted, appropriate use of the MOMA would reduce current differences in optician licensing laws that do not advance public welfare and that unnecessarily restrict the mobility of experienced and credentialed opticians.

The proposed language in the MOMA would define “Licensure by Credentials”. We believe this approach could be incorporated by statute, and in some cases may be possible through regulation, when the Board has broad rulemaking power. However, other than Kentucky, states are not embracing the MOMA, and it appears that there is little or no incentive for the current Boards of Opticianry to make it easier for credentialed and experienced opticians to get licensed.⁸

The Model Act also addresses apprenticeship programs. It proposes to allow credit for verified work experience out-of-state and would allow opticians-in-training to avoid duplication of the experience requirements of an apprenticeship program. The Forum participants believed this was also appropriate to standardize and promote the development of opticians, thereby enhancing the profession nationally.

We believe it is important to reduce the existing barriers for qualified opticians who wish to practice in multiple licensed states or who want to relocate to a licensed state. The patchwork of regulations from state to state relating to optician licensing creates burdens for patients to gain access to quality eye care, and makes it difficult for opticians to practice across state lines or to move from state to state. In turn, this hurts the image of the profession by limiting the recognition of qualified opticians.

⁸ For example, the Georgia Board of Opticians has reviewed two proposals to revise the Georgia laws or rules, and has made no improvements to opening access to a license. The first proposal came from the NAOO and was based on the Model Optician Mobility Act. The state attorney representing the Board advised that the proposed change could not be done by rule and required legislation, and the Board as a result decided no response was needed to the NAOO proposal. See the Board minutes of the March 15, 2017 meeting.

http://sos.ga.gov/PLB/acrobat/BoardMinutes/disp_opticians/20170315%20Conference%20Call%20meeting.pdf

The second opportunity came and went when the Georgia legislature empowered the state’s professional licensing Boards to revise the rules to make it easier for military personnel and family members to get licensed in the professions. The Optician Board simply restated the reciprocity language already in the laws of Georgia and failed to address how experienced and credentialed applicants from states that did not have optician licensing could get a license without completing a full apprenticeship in the state. See the Board minutes of the May 4, 2017 meeting.

http://sos.ga.gov/PLB/acrobat/BoardMinutes/disp_opticians/20170504%20Conference%20Call%20Meeting.pdf

The variances are often unnecessary. When there are barriers to mobility resulting from these variances that don't enhance public welfare or consumer health and safety, it is appropriate to reduce or eliminate these. This is particularly true given that the practice of opticianry does not significantly change from state to state.

Most licensed states define the practice of opticianry to include the following, based on written prescriptions from duly licensed optometrists or physicians:

- Measuring, fitting, adapting and adjusting spectacle lenses, spectacles, eyeglasses, contact lenses and other prescription ophthalmic devices (collectively referenced as "ophthalmic devices") for the aid or correction of visual or ocular anomalies of the human eye [states have some variations with respect to fitting contact lenses];
- Preparing and delivering work orders to laboratory technicians engaged in grinding lenses and fabrication of ophthalmic devices;
- Verifying the quality of finished ophthalmic devices;
- Preparing and dispensing to the intended wearer finished ophthalmic devices; and
- Duplicating, replacing, or reproducing ophthalmic devices (except for contact lenses) without a prescription when there is no change in refractive value.

Most licensed states require all individuals seeking licensure, including licensed opticians from other states, to complete either an educational course of study (e.g., two-year degree or certificate program) or an apprenticeship (ranging from one to four years) under the supervision of a licensed optician, optometrist or ophthalmologist.⁹ When these requirements are applied to experienced certified opticians who have been working in another state, this can limit or delay the ability of those qualified professionals to serve the eye care needs of the patients in the new state.

The proposed model act would reduce barriers to mobility that arise when an individual who wants to begin optical dispensing in a new state possesses either (a) qualifications validated by another licensed state or (b) optical dispensing experience in a state that doesn't license opticians, plus credentials that validate opticianry competencies, such as nationally recognized voluntary certification.

The value of licensing or certification to the professional is diminished when the credentials and experience developed and confirmed in one state are not portable to another, thereby reducing the supply of competent opticians available to service patients and inhibiting the ability of these opticians to practice their profession.

At least two states—Nevada and Washington—have legislation to allow experienced and qualified opticians to become licensed without requiring additional time as an apprentice. The Massachusetts Board of Registration for Dispensing Opticians (MBRDO) has adopted Rule 2.08 that allows a certified optician with proof of at least five years experience in a state that doesn't license opticians to become licensed.¹⁰

⁹ Rhode Island is the only state that requires optician licensure that does not allow apprenticeship as a path to licensure.

¹⁰ 235 CMR 2.08(3)

<http://www.mass.gov/ocabr/docs/dpl/boards/do/235cmr2.pdf>

The language in these examples served as a model for the proposal.¹¹ The Forum participants recommended that the Model Act allow flexibility for a licensed state to adjust the certification, experience and other licensure requirements to align licensure by credentials with its current licensure and apprentice program.

For example, the participants in the Forum recommended that certification of a candidate for licensure by credentials by the National Contact Lens Examiners (“NCLE”) should be optional.¹² The eleven states that currently require NCLE certification as part of a licensure program could retain this under the Model Act¹³; states that currently do not require NCLE certification for licensure as an optician licensed to fit spectacles would eliminate this from the Model Act.

The Forum participants also recommended that licensed states that adopt the model act be able to set the length of work experience to the same as the years of apprenticeship required in the licensed state (in our opinion, the experience required should be no longer than the apprenticeship requirements).¹⁴

¹¹ We believe that the length of experience that Massachusetts requires for an applicant from a non-licensed state (five years versus three from a licensed state) is longer than it should be, creating a barrier itself. Currently, Massachusetts law states that an optician who:

- Has passed *a written or practical examination, or both, to determine whether he possesses the ability, knowledge and fitness properly to engage in practice as a dispensing optician* (currently defined by the Board as being certified by the ABO and the NCLE) and
- Has passed a practical exam prescribed or approved by the Board **shall** (emphasis added) be granted a license in Massachusetts upon providing the Board with credible evidence that he or she has **at least three years of training and experience in optical dispensing under the personal supervision of a licensed dispensing optician, registered physician or optometrist.**

The MBRDO appears to have exceeded its statutory authority in Rule 2.08 by requiring five years of experience for opticians from states where *licensure or registration of dispensing opticians is not required by law in that state, territory or political subdivision*. The law does not support this added requirement for an additional two years of experience.

¹² The NCLE typically is used as an added certification for opticians that “fit” contact lenses. Many states that license opticians allow “spectacle dispensing opticians” to also dispense but not fit contact lenses, and don’t require the NCLE for such a license.

¹³ Although the MOMA would not require that a state revise a current requirement that all opticians be certified under the NCLE, the NAOO believes that the NCLE should not be a requirement for opticians who don’t fit contact lenses. Most opticians fit and dispense spectacles and dispense contact lenses without touching, altering or fitting the lenses.

¹⁴ Currently, one state (AK) requires an apprenticeship be a minimum of 1 year. Six states require at least two years, ten states require at least three years and two states require at least four years. Three- and four-year apprenticeships are clearly excessive and not justified by any protection of the public. In our opinion, the reason for the longer apprenticeship requirements is to make the formal education path to licensure comparatively more attractive, without any evidence that it is in fact better for the public.

Similarly, some, but not all licensed states require a practical examination in addition to the written exam. The ABO-NCLE and NCSORB both offer voluntary practical exams that can be taken by opticians in any state. The majority of licensed states that require a practical exam currently accept one of these two alternatives. Two states use a third alternative, and New Jersey conducts its own practical exam. The NAOO believes that states that require a practical exam should accept any nationally recognized practical certification related to optical dispensing for applicants from other states and also accept any practical exam accepted by another licensed state.

Finally, the Forum participants endorsed the idea that experience in one state should be transferable to another to expedite the apprenticeship period. Under the Model Act, an optician in training who has adequate proof of work experience in one state would be able to apply that to an apprenticeship in another state, rather than having to start the apprenticeship from the beginning. This would be the case whether the experience is gained in another state's regulated apprenticeship program, or is from work in an unlicensed state.

Ultimately, the effectiveness of a Model Act is dependent upon the willingness of the regulatory boards that have the authority to ease mobility to use that authority, and on the openness of the regulated profession to supporting legislation to expand mobility that would revise existing state laws to allow an experienced and credentialed person to become licensed in a new state with a simple and straightforward process. Unfortunately, too often there is inertia at best and hostility and active opposition at worst to the idea, as existing licensees see expansion of supply in their home state as a threat to their incomes and job opportunities.

As a result, while Model Acts and perhaps Compacts may have a role in enhancing consumer welfare by easing licensure portability and professional mobility, it is not nearly enough. We encourage the FTC to support efforts to encourage states to identify and remove unnecessary and overly restrictive optician licensing regulations currently in place that restrict entry by qualified opticians to the profession. We also encourage the FTC to recommend to states that optician licensing not be established in states where none currently exists unless the sunrise standards discussed below are met.

Should the specific area of over-regulation of opticianry be of interest to the FTC, we are able offer some specific examples of specific state optician licensing requirements that impose added restrictions that do not advance consumer welfare and that burden competition, restrict consumer access to eyewear and add costs unnecessarily to the price of eyewear and related services. These restrictions reduce the supply of ophthalmic dispensing services, hurting the employment and career opportunities for opticians and limiting access by consumers to prescription eyewear and driving up the cost of eyeglasses and contact lenses.

The NAOO offers the following comments on the staff's questions on occupational licensing mobility:

- **Is obtaining a license in another state a significant barrier to mobility in certain occupations? If licensing is a barrier, what factors contribute to the**

difficulty – e.g., differences in state standards, burdensome paperwork, multiple fees, etc.?

RESPONSE:

Yes, the differences in state laws relating to optician or ophthalmic dispenser licensing create significant barriers to optician mobility. While 19 states that license opticians allow apprenticeship as a path to licensure, many do not accept experience gained on the job outside the state as acceptable evidence of training.¹⁵ Additionally, there is no consistent approach as to which written or practical exam or exams the state board will require in evaluating applications.¹⁶

The states that have licensure by endorsement or “reciprocity” consider each application on an ad hoc basis and do not publish or otherwise advise applicants which other states have licensing processes and requirements that are considered “equivalent” to the state considering the request for reciprocity.

- **To what extent is the increased ability to provide certain services electronically (such as by telehealth or telework) driving greater interest in mechanisms to ease the burdens of multistate licensing?**

RESPONSE:

Optical retailers that are selling prescription eyewear through e-commerce still tend to rely on in-person fitting and adjusting of spectacles. To date, there has been little or no interest in pursuing multistate optician licensing simply to fill online orders for prescription eyewear. Many such orders are filled in states that don’t require opticians to be licensed. The benefits of mobility in optician licensing will come primarily from the ability of individuals to physically practice as a dispensing optician in an added state.

However, there is a growing interest in prescribing prescription eyewear through ocular telemedicine. Interstate compacts and other approaches to multistate licensing for both optometrists and physicians who prescribe corrective eyewear would facilitate access to remote prescribing services. While medical boards are considering participation in the interstate compact,¹⁷ to date we have seen no discussion of such an approach by optometric licensing boards.¹⁸

¹⁵ Rhode Island requires a 2-year degree in opticianry. RI Gen. Laws Section 5-35-24. Rules – 3.1 & 3.2.

¹⁶ The only state that does not accept the ABO NOCE exam for optician licensure is New Jersey, which requires its own written examination. Not all states require a practical exam. For those that do, there are three different voluntary certification exams currently in use.

¹⁷ The Interstate Medical Licensure Compact Commission processes applications to allow physicians to practice telemedicine across state lines. Nineteen states have adopted the Interstate Medical Licensure Compact, which allows physicians to obtain a license to practice medicine in any Compact state through a simplified process.

Under the system, participating state medical boards retain their licensing and disciplinary authority, and agree to share information essential to licensing. States currently participating in the Medical Licensure Compact are Idaho, Montana, Wyoming, Nevada,

- **What are the advantages and disadvantages of the mechanisms that interstate licensure compacts and model laws use to ease licensing requirements across state lines, such as mutual recognition, endorsement, and expedited licensure?**

RESPONSE:

NAOO members have had little experience with licensure compacts relating to opticians or optometrists, and regulators of opticians and of optometrists have not yet adopted model laws relating to licensure. However, some members have seen the benefits of eased multistate licensing for physicians, nurses and pharmacists, and we support both compacts and model laws to achieve these benefits in the market for ophthalmic goods and services.

We are not aware of any particular disadvantages of compacts. Model laws may be less effective if dependent on each state regulatory board to determine which other states are “equivalent” in their licensing requirements. Mutual recognition and endorsement for expedited licensure will require collaboration and a fair and reasonable review of other state licensing laws by boards.

Unfortunately, in our experience, optician and optometry licensing boards today do not always utilize these approaches. In our opinion, this results from economic and political pressures to restrict the supply of licensees in a state, particularly in a state that is considered attractive as a place for semi-retirement in the later stages of a career.

- **How effective are compacts and model laws in reducing barriers to entry in licensed occupations, enhancing mobility of licensees, increasing the supply of licensees, and promoting competition among service providers?**

Arizona, Utah, Colorado, South Dakota, Kansas, Minnesota, Iowa, Wisconsin, Illinois, Mississippi, Alabama, West Virginia, Pennsylvania, New Hampshire, and Nebraska. Seven other states have proposed legislation to adopt the Compact, including Washington, D.C.

Nurses are planning an interstate compact to facilitate licensing for telehealth. The compact already has 10 states that have approved legislation adopting the [enhanced Nurse Licensure Compact](#), which allows registered nurses (RNs) and licensed practical/vocational nurses (LPNs/VNs) to practice in multiple states under one license. Another 15 states have legislation pending on the eNLC. The compact is set to take effect the earlier of the date a majority of states sign on, or by Dec. 31, 2018.

<https://mhealthintelligence.com/news/telehealth-licensing-compact-closer-to-reality-for-nurses>

¹⁸ A number of legislative proposals to limit or prohibit prescribing eyewear using ocular telemedicine have been proposed by some state optometric associations or other interested parties. The key issue appears to be whether the standard of care requires a complete eye exam in person before an optometrist can renew or revise an existing prescription for corrective eyewear or issue an initial prescription. Ophthalmologists generally appear to have determined that prescribing eyewear can be appropriate without an in-person comprehensive eye exam, subject to the prescriber’s professional judgment.

- **How does an interstate licensure compact differ from a model law used to streamline licensing across state lines? What factors influence the choice of an interstate compact or a model law to ease cross-state licensing requirements?**
- **What factors contribute to a successful compact or model law for easing licensing requirements across state lines? Are interstate licensure compacts or other mechanisms more suitable for some occupations than others?**
- **To what extent does the effectiveness of a compact or model law depend on harmonization of state requirements for licensing? Do compacts and model laws tend to increase the substantive or procedural standards to obtain a state license? If there is an increase in standards, does that limit licensee participation or otherwise reduce the effectiveness of a compact or model law in easing licensing requirements?**
- **To what extent do centralized databases of applicants' credentials, criminal background checks, and disciplinary information contribute to the effectiveness of an interstate licensure compact? Do centralized databases make it more likely that the compact will be accepted by licensees and employers of licensees?**
- **What factors influence a state's decision to enter into a compact or adopt a model law? Are some states more willing to become part of a compact or model law than others? How effective are compacts and model laws that are not universally adopted? How can organizations that develop and administer compacts and model laws foster their adoption by more states?**
- **What, if anything, can or should the federal government do to encourage adoption of compacts and model laws that promote license portability across state lines?**
- **How effective are state-based initiatives at improving the portability of licenses for military spouses? Are such portability measures more effective for some professions than others? What mechanisms have states used (e.g., endorsement, temporary licensure, expedited licensure, etc.) to assist military spouses, and which have been the most effective?**
- **What lessons have been learned from efforts to improve license portability for military spouses? To what extent might these lessons be extended to streamlining cross-state licensure for all licensees?**

Given our limited experience with interstate compacts and model acts in opticianry and optometry, the NAOO has no comment at this time about the effectiveness of or differences between the approaches used to date to try to expand cross-state licensing. However, we encourage the FTC to address what motivates a profession to support a model act or an interstate compact, how the development of an interstate compact is funded, and by whom.

Are interstate compacts likely to only be realistic in a profession that is licensed in all or almost all states, with a widely accepted national educational certification and individual testing process? Why have pharmacy, medicine and nursing been more open to the model

act or interstate compact approach compared to other professions, including optometry and opticianry?

We also believe it is appropriate for the FTC to keep a close watch on decisions by regulatory boards to deny a qualified individual a license. If an unsupervised board determines that a licensee from another state or a certified, experienced professional from a state that doesn't license the profession does not meet the state's licensing standards, that denial of a license by a board without active supervision by a state official or agency is clearly subject to antitrust scrutiny. We encourage the FTC to be open to investigating complaints of such exclusionary anticompetitive conduct.

We look forward to learning more about the two models of interstate compacts and model acts. We will continue to promote laws and rules that improve the ability of licensees to move across state lines. More importantly, we want to work with the FTC and the states to identify and minimize or eliminate unnecessary licensing restrictions.

We suspect that the lack of harmonization of state laws has a significant effect on the willingness to enter into a compact or adopt a model law. The NAOO has seen evidence of the "our law is more rigorous than your law" mentality in developing the model bill for opticians. The NAOO has found that despite national opticianry organizations participating in the development and writing of a model law, and then indicating their support for that law, state associations seem to have no particular incentive to work on or adopt such laws.

In the case of the MOMA, Kentucky has been the exception. The board saw the sense of the model act approach and the value to those who want to move into the state. It adopted the model very quickly. In the other cases the NAOO has worked on in the last two years, the states have varied from "we just don't want this here" to "our neighboring state isn't adopting it, so why should we?" to plain indifference to the idea.

- **Are there some occupations for which it would be better to reduce or eliminate licensing requirements, rather than develop an interstate licensure compact or model law to ease licensing requirements across state lines?**

RESPONSE:

Yes, there are opportunities to reduce licensing requirements in both opticianry and optometry without harming the health, safety or welfare of the public.

States should not license an occupation unless there is clear and convincing evidence presented by the proponents of licensing that:

- The unregulated practice of the occupation or profession clearly harms or endangers the health, safety or welfare of the public;
- The potential for harm is easily recognizable and not remote or dependent on tenuous argument;
- The public needs, and can be reasonably expected to benefit from, an assurance of initial and continuing professional or occupational competence; and

- The public cannot be adequately protected by other means in a more cost-effective manner.¹⁹

Additionally, states should look carefully at claims that licensing is necessary to “advance” or “develop” the profession seeking licensure. Too often, when there is no evidence of a public health, safety or financial welfare need for or benefit from licensure, these are code words for restricting supply to drive up income for the fortunate few who obtain licensure.

- **What factors would influence this analysis?**

State legislatures and Boards should use sunrise and sunset reviews to establish burdens of proof and evidentiary standards that must be met by proponents of occupational licensing. State requirements for evidence of clear risk of systemic harm to the public should be based on similar standards that the FTC requires to substantiate health claims.

That is, the proponents of the licensing requirements should have evidence of

- the risk of meaningful harm to a broad section of the public without licensing and

¹⁹ These principles are drawn from the Colorado Sunrise Act, §24-34-104.1, C.R.S. Other state Sunrise Acts and proposals use similar standards, e.g., Arizona (A.R.S. §§ 32-3101 through 32-3106 and 32-4401 through 32-4403)

A health profession shall be regulated by this state only if:

1. *Unregulated practice can clearly harm or endanger the public, health safety or welfare and the potential for harm is easily recognizable and not remote or dependent on tenuous agreement;*
2. *The public needs and can reasonable be expected to benefit from an assurance of initial and continuing professional ability; and*
3. *The public cannot be effectively protected by other means in a more cost beneficial manner.*

Additionally, A.R.S. § 32-4401 states that a profession or occupation shall not be regulated except for the exclusive purpose of protecting the public interest. A profession or occupation shall be regulated by this state only if all the following apply:

1. *An unregulated practice can clearly harm or endanger the public health, safety or welfare;*
2. *The actual or anticipated **public benefit of the regulation clearly exceeds the costs imposed on consumers, businesses and individuals;***
3. *The public needs and can reasonably be expected to benefit from an assurance of initial and continuing professional ability; and*
4. *The public **cannot be effectively protected by private certification** or other alternatives.*

Emphasis added.

See https://www.azleg.gov/sunset_review.pdf

Washington Sunrise Act, Chapter 43.133 RCW.

<http://app.leg.wa.gov/rcw/default.aspx?cite=43.133>

Florida

<http://consensus.fsu.edu/stormwater-task-force/pdfs2/Sunrise%20Act.pdf>

- the benefits of the licensing be proposed, which should accrue to society as a whole (not just to a protected group).

The evidence should include tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.²⁰

Even when there is widespread consensus that a profession should be licensed to protect the public (such as in the case of medicine, dentistry, nursing or optometry), the FTC and the states should use these evidentiary burdens and standards to review unique licensing requirements by a state that are outside the generally accepted approach used by most jurisdictions.

For example, most states will grant an optometry license to applicants who have graduated from an accredited optometry school and who have passed all three parts of the testing done by the National Board of Examiners in Optometry and a state law exam for the specific state.²¹ However, a few states require in addition that the applicant pass a state-specific written, practical and/or oral exam.²² The regulators typically do not document the evidence that demonstrates the health and safety justification for or benefit to the public of these added steps.

Regular “sunset” review is also appropriate given the likelihood of changes in both relevant technology used in the profession and the scope of practice of the licensed profession.

CONCLUSION

We encourage the FTC to continue to promote limited use of occupational licensing only after careful, evidence-based analysis of the need for and benefits of licensing. We believe the FTC has a leadership role to play in helping states avoid or remove licensing restrictions that prevent qualified people from offering their services, whether in a single state, across state lines or in multiple states.

When there is consensus among states that occupational licensing is appropriate to protect the public from a demonstrable risk of harm, the FTC should work with the states to encourage either interstate compacts or adoption of model laws to ease licensure mobility. The FTC should also promote sunrise and sunset reviews by state legislatures with clear standards for the evidence of the net consumer benefit that should be considered, and with the burden on the proponents of licensing to present evidence that is persuasive as to the need for and benefit of licensing.

²⁰ <https://www.ftc.gov/sites/default/files/attachments/training-materials/substantiation.pdf>

²¹ See http://www.optometry.org/state_requirements.cfm

²² Id.