

MEMORANDUM

To: Council of State Governments, National Center for Interstate Compacts
From: Samantha Nance
Date: October 1, 2023
Re: Analysis of AADB Compact

I. Introduction and Background

This memo was drafted to describe critical issues that have been identified in the AADB Dental and Dental Hygiene Compact as proposed by the American Association of Dental Boards (hereinafter, the “AADB Compact”). This Compact is styled as proposed legislation and was reviewed in light of the legal principles governing the creation and operation of interstate compacts and their commissions, and the standards historically applied during judicial review of interstate compact statutes. Current draft version is published at <https://aadbcompact.org/wp-content/uploads/2023/09/AADB-Compact-official-draft-Aug-31-final-version-Clean.pdf> and it is that language upon which this memorandum’s analysis is based.

This review revealed significant legal concerns, ranging from state constitutionality concerns to possible violations of federal antitrust laws. Moreover, the language, style, and overall drafting of the compact fails to enact many best practices in compact drafting that have been identified over the years, yielding a structure that will likely have significant administrative challenges even if adopted. . In short, this Compact, if enacted in its current state, would be materially insufficient to establish an effective interstate compact commission, and it would almost certainly give rise to potentially fatal legal challenges. It is imperative to ensure that a compact is legally and mechanically sound before it is circulated to potential member states. The AADB Compact simply does not meet this standard.

II. Fundamental Legal Concerns

a. Non-Delegation Doctrine Violation

As with most occupational licensure compacts, the AADB Compact provides its compact commission with rulemaking authority. The Supreme Court has repeatedly held that any delegation of legislative (read “rulemaking”) authority by a legislature to another entity must be based on some “intelligible principle” to describe the limits of the delegated authority. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) (“In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination”); *see also A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

The AADB Compact explicitly incorporates the Association by statute, requiring that the commission be organized “within the American Association of Dental Boards,” (Section 3(d)), requiring member state dental boards to utilize and accept materials from the AADB’s recordkeeping services (Section 4(d)), and requiring member states to accept any continuing education course accredited by the

AADB (Section 4(e)). Further, the definition of “Bylaws” seems to suggest that the Bylaws would be enacted by AADB.

These structural feature are combined with rather broad rulemaking authority: Section 13(a) empowers the Commission to act in any way deemed reasonably necessary to “enforce the provisions and rules of the Compact”; Section 11(a) limits the commission to establishing “reasonable rules in order to effectively and efficiently achieve the purposes of the Compact” but never defines those purposes; Section 11(b) appears to require any proposed rule to include a preliminary determination that the rule is appropriate for the operation of the commission, (Section 8(a) allows the commission to define its own authority by authorizing it to “develop rules for ... other provisions as determined by the AADB Compact Commission”).

Where a statute does not sufficiently limit the rulemaking authority delegated by the legislature, courts in most states have found that statute to be inconsistent with the separation of powers inherent in their state’s constitution. While the specific requirements differ in each state¹, they are all ideologically consistent with the mandate that “important subjects ... must be entirely regulated by the legislature itself” while other agencies may be employed only to “act under ... general provisions to fill up the details.” *Wayman v. Southard*, 23 U.S. 1, 43 (1825). Where a statutory grant of authority amounts to a fundamental delegation of legislative power, that statute is likely to be held to be unconstitutional and invalidated accordingly.

b. Anti-Competitive Concerns and Deficient *Parker* Immunity

Moreover, this grant of authority is given (in part, and in practical effect) to AADB who is a non-governmental, private entity Establishing the commission as “a separate body within the American Association of Dental Boards” immediately recalls the non-delegation concerns described in part (a) above, as this provision suggests that the commission could be subject to the oversight, supervision, or even direct control of the AADB. Given that the commission is empowered to enact rules which have the force of law in the member states, this would appear to allow the AADB itself to exercise legislative authority—possibly even overriding conflicting state statutes. This is blatantly in conflict with the aforementioned nondelegation doctrine.

Further, as the compact creates clear economic advantages for AADB by codifying the organization’s position at the exclusion of others, there is a significant risk that the compact itself (or the commission’s actions pursuant thereto) would amount to anti-competitive conduct in violation of federal antitrust law. The AADB Compact is particularly vulnerable here, as the broad rulemaking authority granted to the commission and the absence of any government oversight of AADB’s operations could likely preclude the AADB from claiming immunity under the state-action doctrine. *See Parker v. Brown*,

¹ See <https://www.ncsl.org/about-state-legislatures/separation-of-powers-delegation-of-legislative-power>. (Researchers often divide the states into three general groups: the “strict standards and safeguards” category, which permit “delegation of legislative power only if the statute delegating the power provides definite standards or procedures” to which the recipient must adhere; the “loose standards and safeguards” category, which views delegation as acceptable “if the delegating statute includes a general legislative statement of policy or a general rule to guide the recipient in exercising the delegated power.”; and the “procedural safeguards” category, which “find[s] delegations of legislative power to be acceptable so long as recipients of the power have adequate procedural safeguards in place.”)

317 U.S. 341 (1943) (providing immunity from federal antitrust standards for non-state actors only if: (1) there is a clearly articulated legislative intent to displace competition; and (2) the non-state actors are under active government supervision). Absent such immunity, fundamental features of the AADB Compact Commission's structure are subject to a host of anti-trust challenges and concerns.

To be clear, these concerns are not common to all occupational license compacts, but rather a unique feature of the AADB Compact attempting to vest an inordinate amount of authority in AADB. All of these issues may be properly avoided in a correctly-drafted compact structure, such as that developed in connection with the National Center for Interstate Compacts for Dentists and Dental Hygienists as model compact legislation.

III. Deficient Provisions Relating to Compact Administration

a. Mechanical and Logical Inconsistencies

The AADB Compact contains a host of technical and logical inconsistencies, including but not limited to the inconsistent use of specific terms and drafting errors, and provisions which are simply legal impossibilities. While imprecise legal drafting may be corrected in some circumstances, a draft compact statute is intended to be widely circulated at a national level, and will be closely reviewed by myriad legislators, lawyers, regulators, and other interested professionals; the importance of deliberate and careful drafting simply cannot be overstated. This concern is only amplified when the document is intended to provide a detailed and specific reflection of a complex agreement reached between multiple state governments which will govern the conduct of an independent organization whose membership and scope of authority is intended to ultimately span across the country. Prior to adoption, compact statutes must be as close to identical as possible to reduce the risk of adverse judicial action; after they are enacted, even technical corrections require coordinated efforts across numerous state legislatures and become all but impossible. If the AADB Compact is to be advanced for further consideration, it must undergo substantial and immediate editorial review.

b. Inclusion of AADB Marketing Statements and Value Signals

In addition to the non-delegation and regulatory capture concerns discussed above, the AADB Compact includes several provisions which serve no legal purpose and whose only rhetorical impact is to underscore the value and importance of the AADB itself. See Section 1(i), Section 2(a), Section 2(j). Including such language in a compact statute would enshrine this in state law. Specifically naming private entities in a compact statute creates fundamental mechanical risks for the compact. As legislative creations, interstate compacts and their commissions can persist for many years, and the continued existence and operation of the AADB should not be tethered to statutory law. Best practices in statutory draft of compacts dictates that the statutes should be drafted so that the Compact and its commission, can continue to exist and operate regardless of whether the AADB (or any specific, private entity) continues to exist and operate as it currently does. The current form of the AADB Compact would be essentially nullified if the AADB were to cease to exist, reorganize, divide operations, or even simply cease providing certain business functions. States cannot rely upon a licensure scheme that requires the existence of a particular private entity to maintain status quo in order for the statute to function.

c. Rigidity of Compact Participation

It is noted that the AADB Compact has extremely narrow requirements for Compact participation—for participation, a dentist or dental hygienist must have never been convicted, received adjudication, deferred adjudication, community supervision or deferred disposition for **any** offense by a court of appropriate jurisdiction and further must have never been a subject of discipline by a board through **any** adverse action, order or other restriction of the licensee by the board with the exception of failure to pay fees or failure to complete continuing education. While this is included under the auspices of public protection, this narrow approach to compact participation both (a) degrades the overall value to states and practitioners by excluding a large swath of otherwise qualified participants and (b) is extremely divergent from state law trends in more flexible treatment of individuals with prior offenses.

d. Compact Model

Finally, the “letter of approval” model is one that has less utility than a compact privilege structure for this occupation. The burden on states in such a model is that it is much more expensive to administer and can result in delay of administration for Licensees. All features of this model that address public protection concerns (attestation of the licensee’s primary state of residence as to the primary source verification, background checks, and the sharing of information regarding adverse actions and the existence of a pending investigation) are addressed under the compact privilege model, with the advantage of being less expensive and more streamlined for states to administer. In short, the privilege model of practice developed for the DDH Compact with NCIC is more appropriate for the current demands of the profession.

IV. Conclusion

The current draft of the AADB Compact is largely inconsistent with established jurisprudence regarding the operation of interstate compacts and its structure includes several significant legal deficiencies. The specific references to non-government entities create ethical and legal risks to the commission’s ongoing operations, and the compact’s structure would grant largely unchecked legislative authority the commission and possibly to the AADB itself while providing no public accountability or safeguards. Most notably, none of these issues inherently arise from the desire to utilize the AADB’s services to facilitate the functioning of the compact and the commission, but rather from the manner in which this compact seeks to accomplish that objective. It is simply essential that discretion and authority under a compact are vested in an independent commission that is responsible fully and solely to its members, and no others. For those reasons, the AADB Compact should be rejected by state legislatures as a flawed and defective model legislation.