Sunset Licensing and Regulation Model

Overview: The Sunset Licensing and Regulation Model (usually called the Licensing Model) is intended to guide Sunset teams as they evaluate whether occupational licensing and regulatory agencies are efficient, effective, fair, and accountable in their mission to protect the public. The model reflects over 40 years of experience reviewing regulatory agencies and identifying standards that guide their existence, oversight, and operations. **The standards are not meant for across-the-board application and may simply raise topics for consideration.** Special circumstances may exist within agencies that potentially make some standards impractical, requiring a complete understanding of the agency, its statutes, and the historical context of the issue in question. Standards should be applied only to fix a real or potential problem at the agency.

The model continues to be a work in progress. In the fall of 2017, Sunset staff significantly updated the model to reflect recent evaluation experiences, the 2015 White House framework for occupational licensing, and the United States Supreme Court ruling in FTC v. North Carolina. As new information comes in and standards are tested against reality, Sunset staff will continue to update and expand the model.

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1	Need for agency	Overall Need	Regulation should protect the public from a potentially serious threat to its health, safety, and welfare.	Regulation should be undertaken to protect the public from the unqualified practice of a profession, and not to protect the regulated group. An assessment must be made as to whether the threat is serious enough to warrant state regulation. Ultimately, drawing the line on the need to regulate is a judgment call and is determined by a combination of perceived threat, public expectations, common practice elsewhere, and resources available to regulate. As a starting point, consider whether the licensing program serves both **a broad base of consumers** and **a clear public interest** when determining whether regulation is necessary.
2	Need for agency	Overall need	Regulation should be implemented at the minimum level necessary to protect the public.	Although a need to regulate may exist, consideration should be given to whether regulation is unnecessarily layered or duplicative. For background purposes, three categories of licensing have historically existed: • **Registration** is the lowest level of regulation. In its simplest form, registration requires a person to register with a state agency, which simply keeps a roster of practitioners. At times, the agency or statute may set minimum requirements that must be met before a person may be added to the list. • **Certification**, the next level up, mandates that practitioners must meet certain minimum qualifications before using a title. Other persons may perform similar work, but are subject to agency enforcement action if they use the title. This type of regulation typically is set up in a "title act." • **Licensing** of practice is the most stringent regulatory approach and involves regulation of the practice of the profession or occupation and often the title as well. For instance, only a medical doctor with specific qualifications can perform actions that are considered to fall within the practice of medicine. Professions regulated in this manner are operating under a "practice act." Relying on these labels alone, however, may not reveal whether regulation is truly implemented at the minimum level possible. Frequently, statutory language and agency practices use these terms inconsistently. For example, certified public accountants and medical radiologic technicians are certified in their act, but the statute actually regulates both the practice and the title through licensure. Therefore, "downgrading" from one level to another may simply lead to surface-level updates in language, not real-world changes in regulation. Rather than focusing on the terms used to describe regulation, consideration should be given to the **layers** of regulation needed to practice an occupation or profession. For example, requiring an individual to obtain multiple, overlapping credentials to perform a task or service may increase administrative burdens on an agency without enhancing public safety. Similarly, requiring credentials

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				from entities that are tangential to regulated individuals, such as the businesses employing them, may prove duplicative and unnecessary.
3	Need for agency	Merge/transfer functions	Regulation of groups with highly similar practices and qualifications should be merged into one agency with a common board.	Branches of a profession may try to distinguish between each other and lend legitimacy to their existence through a separate licensing act. Where practice and qualifications are highly similar, consideration should be given to merging regulation under a larger umbrella structure, such as the Texas Medical Board or the Texas Department of Licensing and Regulation. Such a structure provides opportunities for staff development and continuity in key licensing and enforcement functions that small agencies have trouble matching.
4	Need for agency	Merge/transfer functions	An agency's regulatory scope should not cover occupations, or include functions, that present possible conflicts of interest.	Some licensing agencies regulate more than one occupation. While consolidating the regulation of groups with highly similar practices and qualifications should be the goal, a potential risk of conflicting interests between professions should be avoided. Such a situation could result in the agency favoring one occupation at the expense of another, or harming the public interest by favoring one group's interest over consumer or patient choice. For example, an agency that regulates physicians may not be appropriate to exercise regulatory authority over podiatrists due to the potential for conflicting interests, such as limiting the scope of practice of one profession to benefit the other. If this situation exists, consideration should be given to transferring the conflicting regulation or function to another agency. Or, if transfer is not feasible, ensure the agency's organizational structure provides a sufficient barrier or other protections between the occupations.
5	Need for agency	Merge/transfer functions	An agency's regulatory functions should have developed to the point of structured processes to deal with regulatory operations or be considered for transfer or attachment to another agency.	Some regulatory agencies may be too small and their regulatory mission too complicated for the regulatory program to become a stable and efficient operation. These agencies often have difficulty complying with the standard administrative requirements placed on all agencies or meeting their performance measures. In these cases, consideration should be given to transferring the function to another agency. The Texas Department of Licensing and Regulation (TDLR) is a likely candidate to serve as a receiving agency given its umbrella structure. However, consideration should also be given to whether an umbrella agency already has too many programs under it and whether the Legislature would want to give it more.
6	Need for agency	Merge/transfer functions	Regulatory authority should be vested in a state structure that can provide unbiased and fair regulation to the benefit of the public.	A regulatory agency should be organized and structured in a way that protects the public. At times, the fundamental underpinnings of an organizational structure need to be examined to ensure unbiased regulation. In some cases, the scope of an agency's regulatory responsibilities and the setup of its policymaking body may create an environment that promotes conflicts between the industry's interests and the public interest that could require major organizational or process changes to fix, if problems warrant. For example, boards often have a majority membership of professionals from within the regulated industry, requiring close scrutiny for potential anticompetitive behavior. In particular, the rulemaking behavior of an agency's policymaking body should be closely examined for potential bias. See related information in Standard 11 regarding policy body composition and behavior.

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7	Overall structure	Regulatory structure	The regulatory structure for a licensing agency, profession, or activity should be set up in a fashion similar to that used for other professions or activities related to the field or roughly similar in scope of authority.	Many agencies have similar regulatory missions with licensee groups and activities that fall into the same broad category. For example, many health professionals (medical doctors, physician assistants, and acupuncturists) are regulated under the Texas Medical Board. Establishing similarity in regulatory structure for related agencies and professions can foster more efficient operations and cost effectiveness internally, as well as give licensees a level of expectation for board processes. Providing for consistency, when appropriate, helps ensure related licensee groups are treated fairly and in the same way, unless a good reason exists to do otherwise.
8	Overall structure	Regulatory structure	The agency's enabling legislation should be consistent with the agency's actual operations.	In some cases, an agency may change its operations for good reasons, but its enabling legislation may not change accordingly. To ensure lawful operation, an agency's statute and practices must be consistent. As an example, this standard previously applied to the regulation of water treatment specialists. This program was administratively transferred from the predecessor to what is now the Department of State Health Services to what is now the Texas Commission on Environmental Quality (TCEQ), with its creation in 1993. However, statutory authority for regulation remained under the former health agency. A Sunset Commission recommendation in 2001 squared up the legal authority with TCEQ's programmatic responsibility.
9	Overall structure	Regulatory structure	A separate licensing and regulatory body with independent rulemaking authority should not be administratively attached to a licensing or regulatory agency with its own leadership.	A licensing and regulatory agency is typically led by an appointed individual, an elected official, or an overarching policymaking body that has ultimate regulatory authority, including powers to adopt rules and take enforcement action. An arrangement in which a separate policymaking body exists within a larger agency's structure to license and regulate a certain population poses significant challenges to operational and organizational effectiveness, including: • **Blurred lines of authority:** Employees must carry out regulatory activities for two entities that may have different, or even conflicting, priorities. • **Undue administrative burdens:** When serving two bosses, agency staff cannot efficiently carry out their responsibilities. Additionally, the agency's leadership cannot control staff workload or the agency's strategic direction. • **Risks to the state, licensees, and the public:** A cumbersome and confusing regulatory structure can cause delays in or legal challenges to rulemaking, licensing, and enforcement activities. Consideration should be given to reconstituting the attached body as an advisory committee that can make recommendations to the overarching policymaking body but cannot adopt its own rules. As a result, the agency's leadership can have clear, unduplicated authority to carry out the agency's mission while still benefitting from stakeholder input and subject matter experts. See Standard 13 for more information on advisory committees.
10	Policy Body	Composition	A regulatory board should consist of an odd number of members who are appointed	The Texas Constitution requires a board to be composed of an odd number of members. Boards with an even number of members could split votes and hamper decision making.

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			by the governor and confirmed by the Senate, with as close to one-third public members as possible.	To establish clear accountability, the governor should generally appoint the members of an agency's policymaking body and designate a presiding officer, with confirmation by the Senate. Some agencies have board members appointed by the lieutenant governor or the speaker of the house. Questions have been raised as to the constitutionality of these appointments, particularly when a legislative member serves on an executive body. These appointments may be more of a problem for boards with final decision-making authority, rather than an advisory function. Typically, one-third of board members should represent the public. In some cases, more than one-third public membership is appropriate. Public membership on boards balances industry perspectives from becoming dominant, controlling entry into the market, and overwhelming the public interest function of an agency. The key to keep in mind is balancing the need for expertise with the need for public or consumer input.
11	Policy Body	Composition	Policymaking bodies should be structured to promote the public's interest and provide needed regulatory expertise.	The board should effectively lead the agency and develop rules, carry out regulatory decision making, and protect the public interest according to established laws and best practices, including conflict of interest provisions. An appropriate structure allows a broad perspective and depth of expertise that a board should bring to regulation, particularly in setting policy for an industry through rulemaking, licensing, and enforcement matters. However, board compositions should not be automatically changed to include positions not necessary to provide expertise, such as for increasing representation from the industry. Broad industry representation is typically unnecessary to the functions of a board, except as a possible means to balance anticompetitive behavior or industry bias, or if the agency has a regular need for diverse areas of expertise that could not otherwise be obtained through advisory committees or stakeholder input. Consideration may be given to whether a single official would be better suited for leading the agency. This structure offers greater accountability to the governor and Legislature, although this may come at the expense of the expertise and perspective provided by boards. Legislation during the 86th Regular Session created a mechanism to stem some concerns related to boards dominated by licensees. Chapter 57 of the Occupations Code requires agencies with governing boards controlled by market participants — including, but not limited to, licensees — to submit certain rules that could affect market competition to a division within the Office of the Governor for evaluation and approval. The division on its own may also initiate a review of an agency's rules. This process is designed to provide more state supervision of agency rulemaking to ensure: • Agencies avoid displacing competition. • Adherence to state policies. • Proper focus on agencies' public health and safety missions.
12	Policy body	Compensation	Travel reimbursement or other types of compensation paid to board members	Board members should be subject to reasonable standards for travel reimbursement or other compensation. The common approach is for board members to be reimbursed for their travel-related expenses and not to receive other compensation, such as a "compensatory per diem" paid in addition to reimbursement for transportation, hotel, and meals. This approach ensures that board

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			should follow reasonable standards.	members are treated equally across agencies with part-time boards and provides greater transparency for the actual cost of conducting board business. In some cases, however, board members may be compensated for work performed while serving as a board member. Consideration should be given to the appropriateness of such reimbursement and if the amount is reasonable for the work performed. Board members who misuse or stretch appropriate reimbursement or compensation privileges permitted for official business often find themselves under heavy scrutiny from lawmakers and the public. Agencies should have clear policies for approving reimbursements to avoid these issues.
13	Policy body	Advisory committees	The need for advisory committees to provide stakeholder input or special expertise to the agency should be evaluated.	Advisory committees are one means of providing additional input to the agency, thereby broadening its policy perspective and enabling greater representation in agency policy development. Advisory committees generally exist to advise the board, which retains final decision-making authority. If the agency lacks advisory committees, consider whether the agency, stakeholders, and public would benefit from the creation of advisory committees. If the agency has statutory advisory groups, the Sunset Act requires an evaluation of the continuing need for those committees as part of an agency's Sunset review. Statutorily-created advisory committees often exist in larger umbrella agencies such as TDLR. Also, Chapter 2110, Government Code, provides many agencies the flexibility to create advisory committees without the limitations of specific statutory requirements, but also establishes a series of requirements agencies should comply with. Finally, when evaluating the need for advisory committees the following additional considerations should be kept in mind: • Board members should not be on advisory committees as voting members, as this hinders the committee's independence. • As a best practice and to encourage transparency, advisory committee meetings should comply with the Open Meetings Act. • Advisory committees should be a workable size and should have members with the appropriate expertise. • To ensure appropriate accountability and operation, advisory committees should be appointed by the board with input from stakeholders. Consideration should be given to inclusion of public members on advisory committees and applying conflict-of-interest provisions to them if needed. Public members can help balance the perspective of the advisory committee. On the other hand, they may not add value if the committee provides highly technical advice and expertise. Conflict-of-interest provisions may prevent lobbyists or association members from using their appointment to further causes that may not be in the public interest. On the other hand, these provisions may limit expertise on bodies that are only advisory and do not have final decision-making authority. Generally, the Legislature has shied away from reimbursing advisory committee members for travel expenses. However, committee members provide a valuable service to the state and in some cases, travel reimbursement may be reasonable. Section 2110.004, Texas Government Code, allows for reimbursement specifically authorized in the General Appropriations Act.

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14	Policy body	Stakeholder involvement	Stakeholders should be involved early in the policy development process as another way to provide needed expertise and perspective and as an alternative to advisory committees.	Early stakeholder involvement, possibly through processes like negotiated rulemaking, provides a broader perspective to agencies and helps improve policymaking. Unlike advisory committees, early stakeholder involvement is designed to identify problems and deal with them as policies are being developed, before positions and approaches can become entrenched. Stakeholder involvement should be an open, inclusive process that strengthens policy development by helping ensure a more complete range of opinions on an issue and a better understanding of impact of the proposed policy changes. It also improves public buy-in in the policymaking process and can help agencies avoid problems that may not be apparent until they try to implement the changes. By actively seeking input in those formative stages of policy development, agencies are more likely to be aware of potential problems than if they passively await comments through the rulemaking process or if they rely on the more limited perspective of a set advisory committee. To ensure a consistent, comprehensive approach regarding the use of stakeholder involvement, agencies should develop guidelines for this input. Agencies may also consider documenting the invitees and actual participants in stakeholder meetings to inoculate themselves against claims of trying to control the input received on policy matters.
15	Policy Body	Miscellaneous	Committees of the board should be composed only of board members to ensure accountability to the governor for board actions.	Board committees allow boards to divide their workload and take advantage of specialization or expertise among members. Board committees typically focus on issues and forward their recommendations to the full board for final action. Boards may sometimes provide for non-board members to serve on board committees as a way to provide additional expertise and a broader perspective to help guide their decision making. Such representation is generally discouraged because non-board members may have undisclosed interests in matters before the board. It is particularly troublesome to have such representation on board committees responsible for establishing policy, which requires greater accountability to the governor and Legislature. If non-board members serve on board committees, they should be specifically authorized in statute to do so, and they should be required to meet the same statutory qualifications as board members. Similarly, agency staff should not serve on board committees because this creates an improper delegation of authority and does not necessarily provide additional advice and expertise on issues.
16	Administration	Funding Structure	A regulatory agency should generate sufficient funds and receive funding necessary to perform its duties to protect the public.	Licensing agencies exist to protect the public. Agencies should receive sufficient revenue to perform public protection responsibilities and should raise enough revenue through fees to cover the cost of regulating the profession or industry. Within this concept are several considerations and standard practices: • Agencies should deposit revenue in the General Revenue Fund and receive funding from appropriations of general revenue, thus ensuring appropriate legislative oversight of agency expenditures. • Agency revenue should equal or exceed annual appropriations, but to the extent agency collections greatly exceed appropriations, consideration should be given to lowering fees for licensees. • While this standard may not be directly applicable to self-directed, semi-independent agencies, every agency should ensure its funding mechanisms are appropriate to fulfill the agency's purpose.

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17	Administration	Funding Structure	An agency's fee-setting authority should be flexible enough to respond to changing circumstances while still allowing for proper legislative oversight.	Some agencies have fixed fee amounts set in statute, an approach that requires legislative action before fees can be adjusted to cover changing circumstances. As a general principle, licensing agencies should be able to set fees to cover the costs of its operations, including fees for licenses, renewals, and duplicate licenses. Over time, the Legislature has removed many statutory fee floors and caps to provide agencies with more flexibility in setting fees, often when the fee cap or floor presents a problem. In all instances, the Legislature continues to exert control and oversight of agency expenditures through the appropriations process, because agencies are expected to generate enough, and only enough, revenue to cover the cost of their expenditures. Fee floors are more easily removable from statute, even when such action may have minimal practical effect for licensees. On the other hand, removing statutory fee caps should not be a standard that is automatically applied. Consideration should be given to whether current fee revenues are insufficient to cover costs of administering that particular fee. For example, if some fees are not capped but others are, and the uncapped fees are set high to pay for a disproportionate share of agency costs, recommending removal of the caps would be appropriate. If, however, an agency has sufficient funds and is providing excess revenue to the General Revenue Fund, removing fee caps becomes less compelling.
18	Administration	Funding Structure	Agencies with the authority to maintain reserve funds should have policies in place guiding their use, growth, and goals.	Some entities subject to Sunset review have the authority and ability to maintain reserve funds outside of their more traditional operating budgets. Agencies with self-directed, semi-independent (SDSI) status are the most common example. With SDSI status, an agency does not go through the typical legislative appropriations process to secure funding. Instead, these agencies set their own budgets and fund themselves through fees on their regulated populations. They maintain reserve funds to provide a financial cushion and save for major projects, such as building improvements or IT needs. Agencies with reserve funds should have policies in place to ensure their fund balances are adequate to cover potential needs, but not excessive or unjustifiable. Maintaining an inadequate fund balance may leave the agency unprepared for an economic downturn, emergency, or other budgetary uncertainty. However, maintaining an excessive fund balance or enabling it to grow unchecked may indicate the agency is charging regulatory fees beyond what is required to meet operational needs or, if unmet needs exist, is mismanaging funds. This practice could also be a sign the agency is setting aside revenue without clear objectives for future use. An effective reserve fund policy may do the following, depending on the agency's needs: • Require operating reserves to cover at least three months of agency expenditures to manage unplanned expenses or revenue shortages. • Specify savings should be for probable, quantifiable, and non-routine needs. • Base the reserve fund on the agency's budget and expenditures, not a fixed amount that may not accurately reflect future needs. • Provide flexibility to adjust based on fluctuating needs, and allow for gradual savings to be applied to major projects. • Set goals for and limits on fund balance changes each year. • Establish procedures for tracking performance toward the reserve fund's goals. • Specify, when reserve funds are tied to a specific project, the timelines for development and use, goals for growth, and finalized plan for expenditure.

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19	Administration	Coordination with other agencies	Where possible, a small agency should coordinate with other agencies to achieve administrative efficiencies.	Many freestanding licensing agencies are small and struggle to obtain and pay for administrative services that are more easily absorbed in the budget of a large agency. Some agencies may be able to share administrative resources or staff or be collocated with other small agencies to collaborate more efficiently. Because consolidation is often very hard to achieve in practice, consideration should be given to achieving efficiencies by linking and sharing common administrative functions. For example, several health licensing agencies receive administrative and information technology services from the Health Professions Council.
20	Administration	Standardization	Programs within an umbrella regulatory structure should be standardized to the extent possible.	An umbrella licensing agency such as the Texas Department of Licensing and Regulation (TDLR) oversees a range of licensing and regulatory programs. The existence of multiple programs within one organizational structure presents the opportunity to standardize functions, such as licensing and enforcement. TDLR, for example, has a standardized central licensing function instead of replicating this function through each of its regulatory programs. Standardization promotes efficiency by reducing the number of administrative processes needed to arrive at the same outcome. It also promotes consistent treatment of licensees and applicants, resulting in fairer processes.
21	Administration	Coordination with other agencies	An agency should coordinate its regulatory activities with other agencies having overlapping responsibilities or interests.	Regulation of an industry is sometimes divided between agencies. The funeral industry, for example, is regulated in several agencies, including the Texas Funeral Service Commission, the Texas Department of Banking, and the Texas Department of Insurance. In addition, engineers who practice architecture may be regulated by both the Texas Board of Professional Engineers and the Texas Board of Architectural Examiners. Although consideration should also be given to combining such functions or eliminating duplicative functions (Standards 1 through 3), agencies should coordinate their overlapping responsibilities where consolidation or streamlining is impractical. One tool for accomplishing this end is a memorandum of understanding (MOU) to guide and coordinate the efforts of the affected agencies. Licensing agencies must also coordinate with the Office of the Attorney General (OAG) to ensure that persons practicing or engaging in a particular business, occupation, or profession are in compliance with required child support. While OAG is responsible for the enforcement process, licensing agencies should have the capability to participate in the cooperative arrangement to take action, as needed, against a person's license.
22	Administration	Workload	An agency should adjust staff to accommodate variations in workload and address the agency's most critical functions.	Regulatory agencies' internal processes should be flexible to accommodate variations in workload. Some agencies experience seasonal variations in licensing, complaints, or regulatory activity. The agency's staffing arrangements and internal policies should adjust to account for these fluctuations. Seasonal and part-time employment could be considered as well. Consideration should also be given to whether the agency's staffing allocation aligns with its most critical functions. For example, opportunities may exist to redistribute existing resources from ancillary activities toward functions more closely aligned with the agency's mission. Such a redistribution could allow the agency to make better use of its staff's time without requiring additional funding.
23	Administration	Workload	An agency should accept applications and fees online	Most state licensing agencies now accept license applications and fees online, which is easier for applicants and adds little cost to licensees. Allowing applications and fees to be submitted online lessens filing hurdles on applicants without reducing an agency's

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			to maximize administrative efficiencies.	ability to determine applicants' eligibility for licensure. Accepting online applications and fees also reduces administrative burden on agency staff.
24	Administration	Public Information	Regulatory agencies should make consumer information available to the public and accessible online.	Regulatory agencies exist to protect the public, so the agency should provide the public with access to general information about the profession and the operations of, and services provided by, the agency. Providing information about the regulated industry or occupation can help the public make more informed decisions in obtaining these services and seeking relief in the event of a complaint. This information should be: • in plain language and understandable by the consumer, rather than targeting only members of the occupation; • reasonably sophisticated and provide easy access by users; and • accessible to individuals with disabilities. To ensure the public receives sufficient information, Government Code Sec. 2001.023 requires an agency to publish on its website a summary of a proposed rule written in plain-language English and Spanish when the agency files a notice for publication in the *Texas Register*. Note, however, the provision did not take effect until **September 1, 2023**. H.B. 139 (88R) clarifies failure to post this summary does not invalidate an adopted rule. H.B. 139 (88R) also requires the proposed rule notice to identify the bill number granting the statutory authority to propose that rule, if that bill was passed in the four years preceding the notice. The agency must also notify the primary author and primary sponsor of the bill granting the relevant rulemaking authority, if those individuals are still state legislators. Failure to include the bill number in the notice or to give notice to the bill's author/sponsor does not invalidate an adopted rule. Additionally, agency websites should include important regulatory topics, such as upcoming board meetings, proposed rulemaking and the decision-making process, and governing laws. Licensing agencies should also make the full text of final disciplinary actions subject to public disclosure available to the public online. This practice should be encouraged to provide the public with information to make informed choices when obtaining services.
25	Licensing	General qualifications	Licensure qualifications should not arbitrarily overburden applicants or create unreasonable barriers to entering a profession.	Requirements to obtain a license should be clear, objectively determinable, represent a current condition, and related to the practice of the profession. Regulatory provisions should not create a significant burden for applicants unless there is a clear nexus between the requirement and protecting the public. In the past, Sunset has removed overly burdensome or vague provisions, including: • State residency requirements, which have no bearing on competency or practice. • Qualifications related to an applicant's "good moral character," "honesty, trustworthiness, and integrity," and when appropriate, "moral turpitude," which are subjective requirements that more typically involve review of an applicant's criminal history.

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				Criminal history evaluations are more objectively and appropriately guided by the standards set in Chapter 53, Texas Occupations Code. (See Standard 26.) • Age requirements that, when set too narrowly, do not relate to the practice of the profession. • Disqualifiers related to drug or alcohol addiction that should be stated in terms of a current addiction or related behavior, rather than a history of addiction. Similarly, qualifications related to mental illness, which should focus instead on current conditions and conduct, rather than the diagnosis or a history of mental illness. • Letters of recommendation or other form of granting of permission to an applicant from a current licensee to enter the profession. • Notarization requirements, since Section 37.02(a)(1), Texas Penal Code already makes it a crime to knowingly make a false entry in a government record and since such a requirement prevents an agency from accepting information electronically. This standard is intended in part to align with clear legislative and judicial direction. For example, lawmakers clearly state their intent in Occupations Code section 53.003 "to enhance opportunities for a person to obtain gainful employment" following a conviction and minimize unnecessary barriers to employment. Similarly, in a 1994 decision involving the Board of Law Examiners, the Texas Supreme Court noted the danger of subjective license requirements without additional legislative guidance.
26	Licensing	General qualifications	An agency's application of qualifications related to felony and misdemeanor convictions should be guided by the standards contained in Chapter 53, Texas Occupations Code, "Consequences of Criminal Conviction."	Chapter 53 of the Texas Occupations Code sets out a licensing agency's authority to suspend, revoke, or refuse licensure to an individual because of a felony or misdemeanor conviction. Since a change to Chapter 53 made during the 86th Regular Session, agencies may now only consider convictions directly related to the relevant profession. Before denying an individual a license, agencies also must provide applicants notice and an opportunity to be examined for a license due to a prior conviction, and agencies must follow specific procedures to justify the denial, suspension, or revocation of a license. During the 87th legislative session, lawmakers made similar changes beyond Chapter 53. Article 42, Code of Criminal Procedure, now prohibits licensing agencies, when issuing a license denial, suspension, or revocation, from considering certain offenses for which a defendant received a dismissal and discharge, if the applicant is otherwise qualified. However, agencies may consider a defendant's previous deferred adjudication community supervision if: • the defendant's offense falls into certain categories (e.g., capital murder) or relates to the activity for which they seek a license; • the occupation or profession involves direct contact with children; or • the Texas Commission on Law Enforcement issues the license. Statute requires a license to be revoked on the licensee's imprisonment, usually when the imprisonment results from a felony conviction. An agency should not consider a deferred adjudication to be a conviction, or act based on an arrest in the absence of a conviction, without meeting the criteria established in Section 53.021(d) and (e), Texas Occupations Code. Statute also requires agencies to have clear guidelines identifying which crimes relate to the regulated occupation and how they relate. Generally, deference is given to an agency's interpretation as to what crimes relate to the profession, but at a minimum, the analysis should include consideration of the relationship of the crime to the ability, capacity, or fitness of the licensee to perform the duties and responsibilities of the licensed occupation.

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				Licensing agencies should have a process to perform a criminal history evaluation or declaratory order on request prior to an individual formally applying for a license, such as the system used at the Board of Nursing for evaluating the criminal history of students or prospective students. This process allows an individual to avoid the need to incur the time and expense of obtaining the required education to seek licensure if a conviction would render that individual ineligible for the license.
27	Licensing	General qualifications	An agency should conduct criminal background checks for license issuance or renewal if necessary to determine whether the applicant or licensee presents a risk to the health, safety, or welfare of the public. An agency should have statutory authority and direction to perform the appropriate level of background check.	Conducting criminal background checks is an important tool for licensing agencies to gather full information about an individual before providing the state's official endorsement of the person's fitness to practice. Generally, agencies should require criminal background checks before issuing or renewing a license to ensure protection of the public's health and welfare unless a compelling reason not to exists. A regulatory agency should have access to criminal history and fully apply Chapter 53, Texas Occupations Code, to determine whether a licensee has demonstrated a pattern of behavior that presents a risk to the public. However, as discussed in Standard 26 above, criminal history should be one of many data inputs to make licensure decisions and should not automatically or arbitrarily preclude an individual from licensure. The two most common types of background checks are name-based and fingerprint-based checks. Some agencies conduct name-based background checks, but this method is limited in its efficacy. However, not all licensed occupations or professions need to have a more robust criminal background check performed on potential licensees. When determining the type of criminal background check an agency should perform on current and potential licensees, consider the type of work the licensees would be doing, whether they enter a person's home, and whether licensees may perform an act that could injure or otherwise harm a member of the public. Fingerprint-based checks have become standard in government agencies and may be preferable for a number of reasons. Unlike name-based checks, fingerprints are a more accurate way of verifying an applicant's identity. Fingerprinting is typically done through a DPS vendor on a cost-recovery basis, which enables agencies to obtain current information from DPS of licensees' criminal history. Additionally, only fingerprint checks enable DPS to access FBI records to provide nationwide criminal history, and eventually, this service will provide ongoing, automatic updates. Professions that require fingerprint-based background checks include attorneys, physicians, acupuncturists, medical radiologic technologists, nurses, dentists, pharmacists, teachers, peace officers, real estate agents, architects, and engineers. Recent changes to FBI criteria for the access and use of federal background check information require state agencies that conduct fingerprint-based checks to have specific authorization language in their enabling statutes, promulgated in HB 4123 (88R). Beyond criminal history, agencies may also need authority to require additional disclosures as part of a background check to prevent fraud. For example, in past reviews, Sunset found licensees can evade disciplinary action by acquiring a license under a new, reincorporated business name or through a proxy. For business entity licenses, agencies may benefit from authority to require additional disclosure of applicants' financial and controlling information as part of the background check process to root out repeat violators.

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28	Licensing	General qualifications	Temporary permits should not be allowed except in very limited, controlled circumstances.	A temporary permit authorizes the holder to practice before meeting all licensure qualifications. Such a license should be authorized only in very limited circumstances since the public is offered no assurance of competency. Temporary permits may be appropriate during catastrophes or natural disasters, when the immediate, short-term demand for practitioners outstrips the need to follow the agency's regular administrative processes. An agency may also grant temporary status to applicants while it completes the steps in the licensing process, but this is more typically handled through a provisional license process, described in Standard 37.
29	Licensing	General qualifications	An agency's application of qualifications related to military service members, military veterans, and military spouses should be guided by the standards contained in Chapter 55, Texas Occupations Code.	Chapter 55, Texas Occupations Code, provides for renewal exemption, deadline extension, alternative license procedure, expedited license procedure and renewal, apprenticeship requirement, and license eligibility requirements for active military, military veterans, or military spouses. Specifically, occupational licensing agencies must: • Adopt guidelines in rule to identify states with substantially similar license requirements. • Adopt rules concerning issuing licenses to veterans, military service members, and military spouses who either hold a current license issued by another jurisdiction with substantially equivalent requirements or who, within the last five years, held a Texas license. • Adopt rules regarding the documentation needed for an applicant who is a military service member or spouse to establish residency in Texas. The law also authorizes: • A licensing agency's executive director to waive certain prerequisites after reviewing an applicant's credentials. • A licensing agency to adopt rules establishing alternate methods for a military service member, veteran, or spouse to demonstrate competency, including receiving credit for training, education, and clinical or professional experience. In addition, military service members and their spouses may engage in a licensed occupation without obtaining a Texas license for up to three years, if: • they hold a license in good standing in another jurisdiction; and • the jurisdiction has substantially similar requirements to obtain the license as compared to Texas.
30	Licensing	Education	Educational requirements should be the minimum necessary to ensure competency of an entry-level professional.	The courts have held that a state can impose standards, including educational standards, as they reasonably relate to entry-level practice. While determining specific educational standards may be difficult, consideration can be given to determining if requirements present an unnecessary or unreasonable burden on applicants, especially those from other states.
31	Licensing	Education	A licensing agency should not set standards for	The standard for approving degree-granting schools and educational institutions for state licensing purposes is to rely on the process of the Texas Higher Education Coordinating Board to approve the operation of the institution (e.g., through regional accreditation by

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			educational programs that unduly restrict opportunities for applicants to meet educational requirements, thus creating barriers to entry into a profession.	the Southern Association of Colleges and Schools) and to rely on a recognized national accrediting agency to accredit the schools' programs. This two-stage process ensures the soundness of the educational institution and the quality of its programs. It also provides a standard process for educational institutions and programs to be recognized by every state, removing the potential variability of requirements nationwide from having each state agency approve its own education programs. For non-degree-granting institutions, such as career or technical schools, the Texas Workforce Commission typically approves institutions, with non-regional institutional accreditation sometimes used for eligibility purposes for federal funding. Licensing agencies should defer to these processes for education approval when possible. Granting an agency the power to separately approve educational institutions carries a risk of limiting programs and licensure opportunities to the benefit of current practitioners or certain applicants, without a clear benefit to the public, and may contribute to provider shortages. Few agencies retain independent approval authority, but those that do should have approval standards that directly relate to overall program quality and ensure programs provide students with the minimum level of competency to practice the profession. Also, the state should not be in the business of supporting or ensuring the economic viability of educational institutions or programs for which it has independent approval authority. Generally, exemptions to an agency's education program approval should not be permitted. Agencies should have policies clearly defining the circumstances for any exemptions to ensure fair and consistent treatment.
32	Licensing	Testing	A licensing agency should provide clear rules that ensure fairness in the process of administering examinations.	Clear procedures for examinations ensure consistent and fair treatment of applicants. Licensing agencies should have rules and policies established for governing each aspect of examinations, including: • Admissions requirements, such as application deadlines and procedures to verify the identity of applicants who sit for the test. • Exam accessibility for individuals with disabilities, ensuring equal opportunity and access to take an exam. • Use of proctors or testing monitors. • Sufficient frequency and locations of exam administration. • Fees for examinations and clear refund policies only for advanced notice of withdrawal or in emergency circumstances. • Timely notice of examination results. That said, most licensing agencies no longer administer their own exams but instead rely on national or regional associations authorized by the U.S. Dept. of Education to do so. Agencies that do have their own tests often use contracted testing centers or online testing to administer examinations that ensure both timeliness and geographic access to applicants throughout Texas and the U.S. Some educational institutions also provide testing facilities for occupational examinations. Generally, an agency should not delegate exam administration to a trade association, which advocates for industry participants, as there may be an anti-competitive impetus to restrict admissions or adopt burdensome administrative procedures. If an agency does delegate exam administration to a trade association, it should ensure that the delegation does not deprive individuals of an

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				opportunity to take the examination or sacrifice the exam's fairness. Note that some nationally-recognized testing entities have an affiliation with national trade groups.
33	Licensing	Testing	Test components should be fair and unbiased. Consideration should be given to eliminating or restructuring test components that tend to be subjective.	Applicants for licensure are tested in a variety of ways. Three general types of testing exist: the written exam, usually multiple choice or short answer; the practical exam, in which the applicant demonstrates technical skills and abilities; and the oral exam, in which an applicant is interviewed to determine knowledge and skill levels. Over the years, national testing entities have largely taken over test administration from state licensing agencies. Nevertheless, Sunset has developed guidelines for the various components of tests that state agencies still administer. In general, testing preferences include the following: • All parts of the exam should be up to date, unambiguous, clear, and related to testing competency in the field. • For the written exam, an agency should use a national or regional testing service and not prepare its own test. A testing service eliminates possible bias and uses validated questions. It also promotes standardization of licensing requirements nationwide and helps simplify the movement of licensed practitioners from state to state. An agency may have a compelling reason to develop its own test, however, such as in the licensing of attorneys, where laws vary from state to state. If so, the agency should develop a question bank to ensure consistent testing. In addition, multiple choice and short answer questions tend to be less subjective than essay questions. • Practical exams should be used with caution, since they can be subjective if structured poorly. When they are used, practical exams should have written guidelines laying out acceptable methods of examination, clear criteria for performance, and clear definition of tasks to be performed. These elements promote consistency in judging performance, as well as overall fairness of the exam procedure. • Oral exams should not be used except in rare cases. These exams, which typically involve board members as examiners, have a great potential for abuse. Different examiners may have latitude to judge the same answer differently, leaving room for bias and unfair testing. If oral exams are used, questions should be standardized and be addressed consistently to all examinees, and grading should be standardized to the degree possible. • Board members should be excluded from the testing process generally. If they cannot be excluded because of the size of the agency or other factors, they should not be involved in all phases of testing such as test development, test administration, and test grading. • Where possible, fair grading should be promoted through the use of at least two examiners for any part of the exam and requiring that the name of the examinee not be known to examiners.
34	Licensing	Testing	Licensing agencies should have confidence that tests and testing processes adequately ensure the readiness of applicants to	Testing requirements should ensure applicants have a minimum level of competency to practice the profession. • Excessively high failure rates indicate inadequate education or experience qualifications necessary for successful examination, or possibly an effort to limit entry to the profession. • A trend of low failure rates may indicate that the testing process is not a necessary or useful screening device. • Curving scores changes the standard that marks entry-level competency. The competency level necessary to protect the public should be absolute and generally remain constant.

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			become licensed practitioners.	• The agency may have reasonable limits on the number of testing opportunities an applicant has to pass the licensing examination, but these limitations should not be arbitrary. Typically, agencies should provide opportunities to retest after an individual receives additional education. Many agencies accept tests administered by federally-recognized national entities to ensure minimum competencies. In some occupations, multiple national tests may be available, such as those offered by different national associations. An agency should consider recognizing different tests to expand opportunities for individuals to seek licensure, as long as the tests ensure minimum competency to practice.
35	Licensing	Testing	Licensing agencies should have some assurance that practitioners are familiar with state law and regulations related to the profession.	State laws and regulations can have a significant impact on practice, affecting licensure requirements, standards of conduct for practitioners, disciplinary procedures, and scope of practice questions. Familiarity with these laws and regulations can ensure that practitioners are aware of issues that affect public safety and the status of their license. The requirement for knowledge of state laws and regulations should apply to both in-state and out-of-state applicants for licensure. Agencies are typically given latitude as to how applicants should demonstrate this knowledge, but most agencies use a jurisprudence examination. Agencies may also determine how best to develop and administer such an examination. The point of a jurisprudence exam is not to limit entrance into the profession, but rather to ensure practitioners have a working understanding of the laws and rules they will have to operate under, as they would have already completed appropriate training and met all other licensure requirements. Limiting the number of times an applicant can take the jurisprudence exam is unnecessarily restrictive and should not be permitted.
36	Licensing	Experience	Experience requirements should be clear, reasonable, and related to a person's competency in a profession.	Experience requirements should ensure applicants' competency to practice and not unduly limit entry to the profession. An agency should have rules that clearly lay out the length and type of experience required to ensure fairness between licensees. Agencies should consider the following when determining the experience required for licensure: • Experience requirements should ensure a minimum level of competency to protect the public but not be so great as to unduly limit entry into the profession. • Internship or practice requirements should be reasonable in relation to the education of the licensees, such as those who already must undergo an internship or residency to obtain their degree. • Agencies should establish the qualifications of supervisors to ensure training is to the benefit of the public interest and not the special interests of the profession. • Agencies should have procedures to verify experience objectively without excessively delaying the application for licensure or creating an administrative burden. • If statute grants an agency discretion to waive experience requirements, the agency should establish clear rules or written guidelines.
37	Licensing	Equivalency	A licensing agency should have authority and	An agency should have authority and procedures to license out-of-state applicants if the applicant holds a license from another state or a national organization that has licensure requirements substantially similar to Texas's requirements. This policy imposes uniform

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			procedures to evaluate, recognize, and accept credentials and qualifications of out-of-state applicants for a Texas license.	requirements on all applicants and treats in-state and out-of-state applicants equally. Policies banning out-of-state applicants outright or requiring additional hurdles, such as board interviews or sponsorships, are generally seen as anti-competitive and should be discouraged. (See Standard 25). Licensure by reciprocity or endorsement between two states, or if available, through multi-state compacts, have become more popular as agencies increasingly rely on national associations to develop training, testing, and licensing standards. Licensure by reciprocity requires states to enter into reciprocal agreements to recognize each other's licenses, but the relevant Texas agency and other jurisdiction must have authority to enter into such an agreement. Licensure by endorsement requires an agency to review an applicant's credentials to determine if they are substantially similar to the state's requirements. Standard 38 discusses the newer trend of multi-state licensure compacts in more detail. Some professions, most notably the legal profession, require significant localized knowledge and may not be appropriate for this equivalency standard. In these circumstances, states may conduct their own exam to ensure competence to practice. As part of this standard, an agency may issue a provisional license to an applicant currently licensed in another state. A provisional license allows an applicant to practice in Texas while the agency evaluates the applicant's credentials and application for a Texas license. Provisional licenses should only be issued if individuals meet certain requirements, such as having a clean disciplinary history.
38	Licensing	Equivalency	If available, an occupational licensing agency should be able to participate in a licensure compact with other states.	Consideration should be given to authorizing Texas to join a licensure compact, if such an option is available, as a mechanism to facilitate practitioner mobility and ease administrative burden related to processing out-of-state applications. Licensure compacts are formal agreements among states with similar standards for a profession to recognize each other's licensees without requiring an application for a separate license in each state. Compacts typically begin when national organizations prepare a statutory framework that state legislatures may adopt. Typically, when a minimum number of states join the compact, it becomes viable, and a compact commission composed of representatives from participating states is formed to adopt and implement rules for administering the compact. While licensure compacts are not typically controversial, state sovereignty issues need to be considered carefully. The language of the compact should be examined to ensure that: • The compact does not change a state's practice act. • The compact's provisions and rules cannot override a member state's authority to regulate the profession. • An out-of-state licensee who obtains a Texas license through the compact would be under the jurisdiction of the appropriate Texas regulatory agency. • The compact's governing body cannot exercise rulemaking authority beyond the scope of the purposes of the compact.
39	Licensing	Equivalency	Grandfathering individuals into practice can diminish	When licensing agencies are established, current practitioners are often "grandfathered" to continue practicing the profession without meeting new licensing requirements. This can have the effect of decreasing protection to the public since grandfathered individuals

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			protection to the public and should be avoided.	have not had to show they meet minimum requirements for licensure (e.g., testing). Any grandfathered individuals should be required to demonstrate competency, just as other licensees must do, to protect the public from unqualified practitioners. Grandfathered individuals should have enough time to prepare for testing before being required to demonstrate substantial compliance with entry-level requirements.
40	Licensing	Exemptions	Any exemptions from licensure or licensing requirements should be statutory, have a clear and reasonable basis, and not impair the health, safety, or welfare of the public.	Licensing acts sometimes exempt certain classes of individuals from licensure. These exemptions should be carefully evaluated to ensure that they continue to be reasonable and that exempted classes do not constitute an unreasonable danger to the public. Exemptions, however, affect who can work in a regulated area, and as a result, can be very difficult to ascertain through objective analysis without a high degree of technical expertise. To ensure careful scrutiny and approval, exemptions should be statutory. They should also have a clear basis for existing and should be worded in a clear and unambiguous way so that the scope of practice is clear.
41	Licensing	Renewal	A regulatory agency should have a renewal process that ensures adequate oversight of regulated persons or activities.	Typically, a regulatory agency requires periodic renewal of licenses and other authorizations to ensure that it maintains adequate control over the person or activity. Renewal processes enable an agency to keep proper track of those it regulates and ensure that they meet ongoing regulatory requirements, such as continuing practice, obtaining continuing education, and not committing any disqualifying criminal offenses. Renewal also requires payment of a fee structured to help the agency recover its costs and not simply raise additional revenue. Information required on the renewal form should be sufficient to assess the applicant's satisfaction of renewal requirements without weighing down the process with red tape. Some agencies may allow licensees to go on inactive status, in which the typical renewal process is suspended for a time. Inactive status enables a person to temporarily leave a regulated field, avoiding the time requirement and expense of maintaining a license, and to return later without having to meet the strict requirements of being relicensed. While not uncommon among state agencies, allowing inactive status raises questions about the person's continuing ability to practice and the agency's ability to recover regulatory costs. Considerations to allay these concerns include limiting the time a person may be inactive, tracking persons on inactive status, recovering costs through a nominal administrative fee, and requiring persons returning to practice to meet continuing education requirements during the period of the inactive status.
42	Licensing	Renewal	A licensing agency should have reasonable continuing education requirements that allow for competition among providers.	Proper protection of the public is dependent on practitioners having a working knowledge of recent developments and techniques used in their professions. Continuing education requirements clearly authorized in statute and described in agency rules provide one way of ensuring continued competence. Agencies generally administer continuing education through a process of developing rules, approving activities that meet those rules, and auditing licensees for compliance. Licensees select activities from the marketplace of continuing education offerings that make sense for their practice, provided they comply with agency rules. Typically, agency staff audit a percentage of licensees' continuing education hours to determine if the activities meet agency requirements.

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				Associations that represent a regulated profession or industry often provide continuing education for members of that profession or industry. To facilitate this effort, agencies may preapprove all courses offered or approved by certain organizations, including trade associations, provided the activities meet the agencies' requirements. However, an agency's system should not give one continuing education provider undue advantage over competitors in the continuing education market. When evaluating an agency's continuing education process, consideration should be given to whether an arrangement with an association allows for competition among providers, does not add an undue additional cost to licensees, and is necessary to protect the public.
43	Licensing	Renewal	A licensing agency's statute should require an agency to develop fee and license expiration structures that provide financial incentives to renew on time by penalizing those who renew late.	Penalties for late renewal and expiration dates for non-renewed licenses vary among state licensing agencies. This standard does not prescribe fee and license expiration structures; it just aims to ensure that agencies act properly to encourage the timely renewal of licenses and clarifies that a person holding an expired license may not engage in activities that require a license. A graduated penalty system for licensees who fail to renew on time can encourage timely renewal and ensure equal treatment of all regulated individuals. Penalties for late renewal should not be overly punitive and should be applied fairly across an agency's licensee population. In past Sunset reviews, this standard included a statutory formula to calculate late renewal penalties. Consideration may be given to changing this formula approach if it is causing problems. Another less prescriptive approach only requires agencies to set late penalties at a level sufficient to provide licensees an incentive to renew on time. Statute would authorize agencies to establish a late renewal penalty structure in rule. Agencies, particularly those licensing the health professions, typically provide for licenses to expire after one year if a licensee fails to renew on time, requiring persons to be relicensed. Some agencies' statutes reflect a relaxation of this one-year standard, owing to a perceived hardship on their licensees having to submit to relicensure. Whatever interval is chosen should ensure adequate protection for the public.
44	Licensing	Renewal	License renewal should be scheduled as efficiently as possible to minimize burden on the agency and licensees.	Staggering renewals encourages the periodic renewal of licenses rather than requiring the renewal of all licenses at one particular time each year. This promotes efficient use of agency personnel and reduces the need for seasonal employees. Careful planning of renewal dates helps avoid backlogs and promotes efficiency, such as avoiding holidays and major vacation periods. While two-year licenses are becoming more common, many occupational licenses must still be renewed each year. Annual license renewal typically adds to an agency's administrative workload, particularly for smaller agencies, and is also more burdensome for licensees as well. As such, unless a good reason exists, an occupational licensing agency should have a system of biennial license renewal to ease administrative burdens and allow staff to dedicate more time toward quicker processing of licenses. Renewal periods for permitted activities, on the other hand, may be more variable, and typically relate to the nature of the regulated activity.
45	Licensing	Renewal	A licensee's current compliance status should be	Before renewing a license, a licensing agency should be aware of any compliance issues that a licensee might have and the licensee's efforts to resolve those problems. Existing compliance issues should be in process of resolution in an appropriate manner before a license is renewed.

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			checked before license renewal.	Consideration should be given to authorizing an agency to deny license renewals based on an applicant's noncompliance with a current disciplinary order. Such authority bolsters agencies' enforcement efforts and ensures that disciplined licensees have fulfilled their responsibilities regarding safe practices. Without the authority to deny renewals for noncompliance, an agency must instead open another enforcement case. Having to pursue a new case in these instances requires additional resources and time, allowing noncompliant licensees to continue to work and possibly putting the public at risk. However, there is a difference between denying a renewal for **noncompliance with a current disciplinary order** and denying a renewal to **evade the enforcement process altogether**. As a general rule, a bad compliance history should not be viewed as a potential disqualifier for renewal because the more appropriate approach would be for such disqualification to occur through the enforcement process. Reliance on nonrenewal of a license as an enforcement tool circumvents the Administrative Procedure Act, which provides licensees with the opportunity for an objective review of an agency's decisions during an administrative hearing (e.g., through SOAH). Following a violation, an agency should use its enforcement procedures first to ensure due process for the licensee. After issuing an enforcement order, the agency may deny a license renewal if the applicant fails to comply with the order (presuming the agency has the authority contemplated in this standard).
46	Enforcement	Practice	When appropriate, a regulatory agency should have clear standards of conduct or operation to provide a sound basis for acting on consumer complaints.	Standards of conduct define appropriate behavior for licensees. These standards give the public a measuring stick for judging appropriate behavior and a basis for complaining to the agency when these standards are not met. Standards of operation, defining how certain tasks should be accomplished, also are helpful to the consumer to determine whether a job was performed appropriately. Of course, any standards of conduct or operation should clearly relate to the regulated practice and protection of the public. These standards are most useful in situations where practitioners have close contact with the public and their behavior or practice of the profession can cause serious harm or have other serious financial or legal implications.
47	Enforcement	Practice	Rules restricting advertising and competitive bidding practices should be limited to prevention of deceptive and misleading practices.	The rules of licensing agencies can be used to restrict competition by limiting advertising and competitive bidding by licensees. Such restrictions can affect public access to information regarding professional services. Rules should only address deceptive or misleading practices. This affords all licensees the opportunity to inform the public of their services and to bid on projects. Through this information, the public has greater knowledge of the range of individuals offering a service and a range of pricing for that service. The provision discourages a closed system where entrenched interests act to dominate the field in part by limiting awareness about competitors.
48	Enforcement	Inspections	The agency should have clear procedures, rules, and statutory authority for conducting inspections that promote fair treatment and timely compliance of	Sunset's experience with inspections has led to the following elements that typically should exist or be considered in a licensing or regulatory agency's inspection procedures. The agency should have clear policies defining the records, inventories, and facilities subject to inspection. These policies keep both agency inspectors and regulated entities/individuals focused on priority areas of operation. The policies also discourage arbitrary and potentially unfair variation in subjects of inspection.

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			regulated entities/individuals, while focusing agency resources on the highest risk areas to the public.	The agency should have a process for following up on compliance issues discovered in the inspection process. The process should include informing the regulated entities/individuals in writing of compliance problems, providing a schedule for correcting these problems, and scheduling re-inspections as necessary. Risk assessment is an element that should exist or be considered for an inspections/compliance program, including the following:
				• Requiring the agency to develop specific risk- factors and a risk assessment plan for how it will use risk information. While the agency should have flexibility to add or change factors based on the particular occupation or activity being regulated, the following common risk factors should be considered:
				  ○ Compliance history
				  ○ Information required to be reported to the agency that could indicate impending problems
				  ○ Recent complaints
				  ○ Criminal action or other serious incidents
				  ○ Media reports
				  ○ Turnover of facility management.
				• Providing the agency with the authority to require regular reporting by regulated entities/individuals to gather the information necessary to perform a risk assessment.
				• Using both announced and unannounced inspections. Announced inspections could be used as a privilege for regulated entities/individuals considered low risk; unannounced inspections could be instituted for high-risk entities/individuals.
				• Providing the agency flexibility in statute to schedule inspections as often as necessary and based on risk. Giving the agency this flexibility allows the inspection schedule to balance the highest priorities for inspection against staff resources available to conduct the inspections. If flexibility cannot be provided, the agency should still consider how a risk assessment could help ensure resources are used more efficiently.
				• Regularly updating risk assessments and adjusting inspections, technical assistance, and other use of staff time and resources accordingly.
				• Ensuring individuals or entities consistently identified as low risk still receive the minimum level of attention necessary to provide adequate ongoing oversight.

49	Enforcement	Complaints – general	A licensing agency should be required to adopt rules or procedures that clearly lay out policies for all phases of the complaint process.	The entire complaint process should be guided by clear rules or procedures, including complaint receipt, investigation, adjudication, resulting sanctions, and disclosure to the public. Rules and procedures help ensure appropriate and consistent action by the agency, thereby protecting the public and the licensee. The rules or procedures should provide that all phases of complaint investigations be thoroughly documented.
50	Enforcement	Complaints — general	Regulatory agencies should retain primary responsibility and direct oversight for investigating and resolving	One of the most essential elements underlying a state licensing agency's reason for existence is its responsibility to receive and investigate complaints from the public about regulated activities under its jurisdiction. Any delegation of this duty to a third party should be cause for significant scrutiny to ensure that proper oversight is in place and the public interest is being served. In

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			all complaints within their jurisdiction.	particular, agencies should not forward complaints to a professional or trade association, since these groups' primary mission is to promote licensees' interests, creating a high risk for protectionism of licensees and unfairness to complainants. Under certain circumstances, an agency may contract with members of the profession to conduct certain investigatory functions (see Standard 56). However, primary responsibility for investigating complaints and proposing enforcement decisions should be left to staff, while authority to make final determinations on enforcement and disciplinary actions belongs to the appointed members of the board.
51	Enforcement	Complaints — general	The agency should maintain and retain information on complaints.	State agencies should maintain adequate information about each complaint they receive and retain this information over time. Longitudinal complaint information allows an agency to track an individual licensee's competence or compliance with licensing requirements and determine if a licensee demonstrates a pattern of problematic behavior. The agency's retention schedule should be consistent with this intent by requiring staff to keep relevant files long enough to detect trends (e.g., at least five years). This standard solves a historical problem in which licensing agencies often failed to maintain basic information on complaints filed against licensees. An agency's policies and procedures for tracking and retaining external complaints against the agency itself (e.g., a complaint from a licensee regarding the agency's licensing timeframes) should also be assessed. Agencies should also ensure that all parties to a complaint are made aware of the status of the complaint until resolution, as well as agency policies and procedures pertaining to complaint investigation and resolution.
52	Enforcement	Complaints — general	A regulatory agency should have a process to track and refer complaints not within its jurisdiction to the appropriate organization.	Members of the public become frustrated when they cannot find the appropriate organization or resources to deal with regulatory problems. High-quality service to the public requires licensing agencies to have procedures in place for referring complaints not within their jurisdiction to the appropriate organization. Although the agency may have no jurisdiction over some of the complaints received, these complaints should still be logged so the agency has a complete picture of the public's problems and concerns with this general area of regulation. This standard, however, does not require the agency to forward the non-jurisdictional complaint to the proper agency or track the final outcome of the complaint. Instead, an agency should refer complainants to the proper entity and keep a record of this referral, including to which entity the agency made the referral.
53	Enforcement	Complaints — general	The agency should keep, report, and analyze statistical information detailing the number, source, and types of	An agency should compile detailed statistics about complaints received and resolved each year and provide this information in a publicly available and aggregated form, whether on an agency website or in an annual report. Tracking complaints helps an agency promptly, consistently, and reliably address complaints. Sources of complaints could include the general public, the licensee population, other agencies or institutions, and the licensing agency itself.

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			complaints received and the disposition of complaints resolved.	The information could include (by fiscal year and type of license) • Number of licensees • Total number of complaints against licensees • All resolved complaints per fiscal year by each type of action taken (nonjurisdictional, dismissed, warning, probation, suspension, revocation, etc.) • Breakdown of the resolution by the nature of the allegation of each resolved complaint in that fiscal year (standard of care, impairment, dishonorable conduct, continuing education violation, etc.) • Breakdown by source of each resolved complaint in that fiscal year (i.e., administrative violations originating with agency staff, or disciplinary cases originating from the public or another outside source) • Number of cases open longer than one year • Average administrative penalty assessed • Number of cases referred to Informal Settlement Conferences (ISCs) • Number of cases resolved in ISCs • Number of cases referred to the State Office of Administrative Hearings (SOAH) (default + non-default) • Number of contested cases heard at SOAH • Number of cases that went on to district court • Average number of days to resolve a complaint, from complaint received to investigation completed • Average number of days to resolve a complaint, from complaint received to final order issued • Average number of days to issue a license In addition to collecting such data, agency staff and leadership should also analyze this information regularly to identify regulatory problem areas and direct decision making. For instance, data analysis may help an agency uncover the most common types of violations, which could assist the agency in updating its rules, penalty matrix, and education materials. Ultimately, these changes could prevent similar violations in the future and reduce strain on enforcement resources.
54	Enforcement	Complaints — filing	The public, the agency, or a licensee should be able to file a written complaint against a licensee on a simple form provided by the agency.	Agencies should have the authority to file a complaint on their own initiative against a licensee. Lacking such authority hampers the agency's ability to protect the public. In addition, because the affected public may extend beyond the state's boundaries, non-residents should have the same protection from unqualified practice by the state's licensees and should not be limited in their ability to file complaints. In general, complaints should be written and submitted on a standard agency complaint form. While telephone calls or anonymous calls generally do not provide sufficient basis and documentation to fully support a complaint, they may provide the basis for the agency to pursue further action. The form should request enough information to start an investigation but not be so detailed or technical as to discourage complaints. Some agencies have required complainants to cite the statutory provision that is the basis of their complaint, which is generally beyond the public's ability to provide. The form should be made available on the agency's website, through email, or through regular mail. Complaints should also not be required to be notarized, since it is viewed as a

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				barrier to complaint filing. Likewise, an agency should not be required to swear to its formal complaints filed with the State Office of Administrative Hearings.
55	Enforcement	Complaints — filing	Complaints should be placed in priority order so that the most serious problems are handled first.	Addressing complaints based on seriousness places the agency's attention where it is needed most.
56	Enforcement	Complaints — investigation	Agencies should have clear rules governing the expert review process.	Agencies may use expert reviewers to analyze complaints and determine if a violation occurred. Using experts keeps board members out of investigations and unbiased in future phases of the enforcement process. It can also ensure complaints are reviewed by qualified peers, since many agencies do not have experts on staff. Occupational licensing boards that rely on outside experts should be required to develop an expert review process for investigating such complaints. An agency should also have clear rules that address all parts of the expert review process. Rules should establish which types of complaints merit potential expert review, including standard of care cases at a minimum. Some agencies contract as needed with a pool of qualified experts to review cases and aid in the agency's investigation. Agency rules should address qualifications for the pool of expert reviewers, grounds for removal of an expert reviewer, methods to ensure unbiased assignment of complaints to maintain confidentiality and avoid conflicts of interest, timelines for resolving complaints requiring expert review, and content and format of expert review documents. Agencies should also develop policies to address compensation of reviewers. Finally, agencies should ultimately ensure control over all disciplinary outcomes and decisions as discussed in Standard 50.
57	Enforcement	Complaints — investigation	In general, staff should perform complaint investigations, not board members, to keep investigations separate from final disciplinary decisions. If board members are involved in investigations, several safeguards should be considered.	Because board members will make final enforcement decisions, involving board members in complaint investigations could prejudice the outcome of later disciplinary action, as board members who investigate complaints may develop biases about the case. To avoid this situation, board members should generally not be involved in complaint investigations. Staff or contracted experts should be used instead. For smaller agencies with fewer resources that must rely on board member involvement in investigations or informal settlement conferences (ISCs), board members should recuse themselves in all subsequent disciplinary proceedings, including ISCs (for agencies that involve board members in investigations) and final board disciplinary decisions, to promote objective disciplinary proceedings and ensure respondents and complainants are treated fairly. An agency should also have clear policies for the recusal of board members involved in investigations. However, board members who participate in ISCs at larger agencies with lengthy, intricate investigative and expert review processes— like the Texas Medical Board — should **not** have to recuse to themselves from subsequent disciplinary proceedings. ISCs for such agencies are not part of the investigative process and are instead more akin to a formal hearing. If the agency uses investigative or enforcement committees made up of board members, each committee should include at least one public member to help ensure a balance between occupational and public interests.

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58	Enforcement	Complaints — investigation	The agency should ensure that investigations are completed in a reasonable amount of time.	An agency should have clear timeframes for complaint investigations to ensure streamlined case resolution processes. Investigations that are unreasonably long can prolong potentially dangerous situations for the public and disrupt a licensee's practice. Although some investigations require more time than others, the agency should monitor time elapsed to keep investigations within reasonable time limits. On the other hand, some agencies may adopt time limits that are too short and inflexible to allow for complete resolution of some cases. Some investigations may require more time on the front-end for quicker final resolution of the case overall. Investigative timeframes should provide sufficient time for the agency to issue subpoenas, if necessary, and for the licensee or any recipients of a subpoena to respond. Additional time may also be needed if early settlement hearings occur before the official close of an investigation.
59	Enforcement	Complaints — investigation	To the extent possible, licensing agencies should protect the identity of complainants.	Licensees are generally entitled to information regarding a complaint filed against them, but releasing the identity of a complainant to a licensee could potentially discourage people from filing legitimate complaints out of fear of retaliation. While licensees may suspect or eventually find out the identity of an individual who files a complaint against them, consideration should be given to recommending that licensing agencies make a good faith effort to protect complainants' identities to the extent possible. At the same time, protecting the complainant's identity should not be used by the agency to prevent licensees from responding to the allegations against them. Instead of sending licensees a copy of the complaint for response, agencies should send a summary of the complaint allegations. In some situations, protecting the complainant's identity becomes impossible. The needs of a proper investigation must trump the effort to protect identity. Often, this standard can be implemented into an agency's existing investigatory process. Depending on the specific agency's practices and the needs of the industry, it may be more appropriate to recommend a statutory change to strike the right balance between the confidentiality of certain complaint information and the need for thorough, fair investigations.
60	Enforcement	Complaints — investigation	Regulatory agencies should have sufficient authority to issue subpoenas for enforcement activities, balanced with appropriate safeguards.	Occupational licensing agencies should have statutory authority to subpoena information relevant to a pending investigation. Providing this power can be seen as an expansion of government, but subpoenas issued with good cause allow agencies to conduct efficient investigations and resolve cases without unnecessary delays. Many agencies already have this authority, but limitations on the type of subpoenas that can be issued or at what stage they can be issued may hamper the agency's enforcement abilities. For example, if an agency's subpoena authority is limited to only the litigation phase of the disciplinary process, the agency is unable to subpoena records earlier, which could lead to either dismissing complaints that may be valid or moving forward on complaints that may prove baseless. Subpoena authority can also benefit licensees, since subpoenas for records help clear a respondent and dismiss baseless complaints more quickly. Because of the concerns over government expansion, applying this standard should be limited to circumstances in which insufficient subpoena authority has directly hindered an agency's investigative process. In addition, providing an agency enhanced subpoena

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				power should include safeguards from potential abuse or overreach, such as limiting subpoena authority to just complaint response and requiring judicial review when a subpoena is challenged.
61	Enforcement	Complaints — investigation	Agencies that regulate healthcare practitioners or other high-risk professions should have clear authority to order evaluations for potentially impaired licensees, under certain circumstances.	Agencies that license and regulate professionals should be authorized to order a licensee to submit to an evaluation by a peer assistance program or an approved healthcare provider when an impairment is suspected. Use of this authority should be predicated on probable cause that the practitioner is currently impaired due to substance abuse or a physical or mental health condition, and limited to professions where the risk to the public merits such consideration. Agencies should have a process that balances licensees' privacy and due process rights with the need to protect the public. Once an agency has requested a licensee to undergo an evaluation, the agency's process should provide for a show cause hearing for licensees who wish to contest an order for an evaluation. This hearing provides an opportunity for licensees to present evidence demonstrating why an evaluation is not necessary. After the hearing, the board should be able to either order the licensee to submit to the evaluation or withdraw its original request. The authority to require an evaluation should be limited to proving or disproving whether grounds for disciplinary action exists under existing law. Information related to participation in a peer assistance program, including the results of an evaluation, should be kept confidential, but the board should be authorized to disclose this information in enforcement and other proceedings affecting a person's license because of the threat to public safety. The agency should also be permitted to publicly disclose that the license of a person ordered to participate in a peer assistance program is suspended, revoked, or otherwise limited by referring to the statutory grounds for disciplinary action, without disclosing the specific impairment or condition that resulted in the board's action. Confidentiality can promote participation in peer assistance programs without creating a fear of stigmatization.
62	Enforcement	Complaints — hearings	The agency's statute or rules should provide for administrative dismissal of complaints.	An agency's statute or rules should authorize its policymaking body to 1) administratively dismiss low-level complaints, and 2) delegate this activity to staff. Staff should still inform the board about all such dismissals. However, they should have the discretion to increase efficiency by providing this information as aggregated data, instead of describing each complaint individually. This approach saves board time in considering each complaint while still providing the board information on staff actions. Though expungement of dismissals is not considered standard practice, the Legislature has seen fit to add expungement procedures for lawyers, dentists, and land surveyors. Expungement means that record of the case is removed from the licensee's file, depriving the agency of information that may be useful if subsequent complaints are filed against the licensee. Another approach that may be considered is making dismissed complaints — especially if they can be judged frivolous — exempt from public disclosure under the Public Information Act. Such an approach would not limit the agency's access to past complaint information that may be useful in subsequent complaints against the licensee but would prevent information on dismissed complaints from being publicly accessible, which is fairer to the licensee.

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63	Enforcement	Complaints — hearings	The agency should use methods other than just hearings, such as settlement conferences, to resolve complaints.	Formal hearings often require significant time and expense, both for the agency and the licensee. Texas has developed other means for resolving complaints short of formal hearings. These methods include informal settlement conferences (ISCs) and mediated settlement conferences conducted either by the agency or by the State Office of Administrative Hearings. When possible, resolution through these less formal methods should be explored before using the full hearing process. Agencies with rulemaking bodies that rely on outside expertise for enforcement cases should have clear authority to seek participation from advisory board members or experts in informal disposition of cases as appropriate. These experts can provide subject matter knowledge during information dispositions, which may be critical to deciding practice violations or other technical issues. To avoid conflicts of interest, experts should not have participated in the investigation phase of any complaint. The agency's board should approve informal agreements. This approach ensures the board's knowledge of staff decisions and appropriate oversight of staff operations.
64	Enforcement	Complaints — hearings	An agency's hearings should comply with the Administrative Procedure Act (APA).	The APA, found in Chapter 2001 of the Texas Government Code, sets out minimum standards of uniform practice and procedure for state agencies. Whether an agency's administrative hearings are held at SOAH or in-house, the agency's hearings process should comply with these minimum standards. The APA also entitles a person who has exhausted all administrative remedies to judicial review. The idea behind the APA is that, in general, agencies should have a standard approach to hearings that allows for due process and clear expectations for both the agency and the industry or profession it regulates. A standard approach is intended to create a more consistent, coherent body of law for agencies and regulated entities/individuals to follow and for courts to apply. Two cautions apply when this using this standard too rigidly. First, some aspects of administrative procedure have to be developed by each agency's rules, providing some flexibility for different agency circumstances. Second, some agencies, like the Railroad Commission, have statutes that deviate from APA standards. In cases where standard APA provisions and an agency's statute conflict, such as deadlines for filing and certain prerequisites for appeals, the agency's statutes supersede the APA. Care must also be taken to differentiate formal hearings governed by the APA from informal settlement conferences (ISCs), which are much more flexible. Very little "standard" law exists for ISCs and, generally, the agency's statute or rules establish each agency's ISC process. For information about the intersection between the APA and an agency's use of license renewals, see Standard 45.
65	Enforcement	Complaints — hearings	The State Office of Administrative Hearings (SOAH) should conduct a licensing agency's complaint hearings, unless a	SOAH handles hearings for almost all licensing agencies, as well as other agencies of state government. An agency uses SOAH for its administrative hearings if its own statute is silent on hearings procedure or mandates the use of SOAH, or if the agency wishes to contract with SOAH for assistance. Agencies may hold their own hearings if they have their own hearings examiners that are dedicated solely to the hearings process.

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			compelling reason not to exists.	SOAH offers a consistent standard of independence and professionalism in carrying out the hearings process. In most cases, agencies using SOAH have the opportunity to relinquish the final decision to SOAH, or to leave the final decision to its own board. If the decision is left to the agency's board, the board may change SOAH's findings of fact or conclusions of law only in limited circumstances where errors have clearly been made (Section 2001.058, Texas Government Code), and must do so in writing. In addition, the opportunity to have a formal hearing is an essential part of providing due process to parties in a regulatory dispute. SOAH receives annual funding to conduct a certain number of formal hearings per each agency that is statutorily directed to use SOAH for formal hearings. Although SOAH has funding to conduct the hearing, some agencies may discourage use of SOAH because hearings may create additional costs for expert witnesses, travel, and transcripts. Nevertheless, each agency that is required to use SOAH for formal hearings should make a full faith effort to provide this option to licensees who are the subjects of complaint investigations.
66	Enforcement	Complaints — sanctions	A licensing agency's enforcement process should not make it overly difficult to bring disciplinary action.	The burden for bringing disciplinary action should be reasonable and not set so high that its use is discouraged. For example, requirements for a higher vote threshold for the board to take disciplinary action can discourage an agency from disciplining a licensee. Another impediment may be increasing the burden of proof before disciplinary action may be taken. Examples include a requirement that a person knowingly or repeatedly violated a law or regulation or that a person be given the opportunity to cure their alleged violation before the agency may act.
67	Enforcement	Complaints — sanctions	A regulatory or occupational licensing agency's statute should authorize a full range of enforcement actions and sanctions that should be scaled to violations of the agency's statute or rules.	A regulatory or occupational licensing agency should have clear authority to enforce its rules and law. In addition, an agency's range of enforcement penalties should conform to the seriousness of the offenses committed. However, in many cases, regulatory agencies are not given a sufficient range of penalties to ensure that appropriate sanctions can be implemented for offenses committed. The general range of sanctions are: revoking a license or permit; suspending a license or permit; assessing an administrative penalty; refusing to renew a license or permit; probating a suspended license or permit; or issuing a reprimand. **Administrative penalties** Consideration should be given to authorizing an agency to assess administrative penalties as an additional enforcement tool that the agency can use to encourage compliance without having to suspend or revoke a license. Over time, administrative penalties have been accepted as an enforcement tool for almost all regulatory agencies, with authority up to $5,000 per day per violation common for most agencies. Higher penalty levels may be considered where more serious potential harm exists, but specific amounts should be based on a sound methodology and rationale beyond a basic "good government" argument. Note, the Legislature passed S.B. 424 (87R), which may restrict an agency's use of administrative penalties against small businesses, as defined by Sec. 2006.001(2), Government Code. The bill authorizes a state agency to adopt a policy stating they will not attempt to recover an administrative penalty from a business for certain first-time violations, unless the agency provides written notice of the violation and a reasonable timeframe to remedy the violation.

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				Probated suspension Probated license suspension allows a licensee to continue practicing the profession after being found in violation. To ensure that probation is not abused, the licensing authority should have the authority to impose conditions on probation, including additional continuing education, periodic visits or reports, and limitations on practice. Licensees should be notified in writing of the probation and the actions that they need to take during the probation period. Finally, the agency should track the progress of licensees to ensure compliance with probation terms. **Guidance materials for consistent decision-making (precedent manual, schedule of sanctions, and advisory opinion)** Agencies should establish guidance materials to assist both staff and the regulated population in understanding how an agency enforces its rules. For agencies that have recurring types of cases with similar fact patterns, a **precedent manual** can be helpful to ensure consistent treatment of the regulated population. Such a manual is a collection of an agency's precedent-setting decisions, documenting specific circumstances and case outcomes, used to guide staff and the public on how its policymaking body is likely to decide a case with similar factors. Agencies with varied cases would not benefit as greatly from a precedent manual. Agencies should also develop a **schedule of sanctions**, often called a **penalty matrix**, to help ensure disciplinary action relates appropriately to the nature and seriousness of the offense. A penalty matrix provides the regulated population with transparency into the enforcement process without limiting an agency's authority or discretion in issuing sanctions. Such a matrix should also guide the determination of administrative penalty levels, include information about the range of penalties available, and describe when to use those penalties. In determining the type of sanction or the amount of an administrative penalty, agencies should base their decisions on a variety of factors including the regulated entity's compliance history, seriousness of the violation, and the threat to the public's health, safety, and welfare, as well as any mitigating factors. Some agencies may want to inform the regulated population of its interpretation of statute to avoid future compliance and enforcement issues, such as by issuing an **advisory opinion** that forecasts an agency's decision based on a specific fact pattern. However, an agency cannot issue advisory opinions without statutory authority to do so. More importantly, agencies cannot evade proper rulemaking. If an agency wants to establish a requirement that legally binds the regulated population or the public, the requirement needs to go through the APA rulemaking process and cannot simply be issued in "guidance materials." An agency should establish its precedent manual, penalty matrix, and other guidance materials as a non-binding **policy**, not an **administrative rule**, to provide staff with ample flexibility to update the guidance materials when necessary. However, the agency should consider publishing the materials online to ensure transparency and further incentivize consistent penalty applications. **Remedial plans** Consideration should be given to authorizing an agency that regulates complex, high-risk professions, such as medicine, to issue remedial plans for more minor violations. For agencies like the Texas Medical Board that regulate practitioners with extensive educational and licensure requirements and whose scope of practice entails high-risk, complex functions, it may make sense to allow for some leniency when practitioners commit violations that are not a risk to health or safety.

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				However, agencies with this authority should balance the need for leniency with public safety concerns. An agency's remedial plan authority should be limited to violations that do not involve direct harm to the consumer or patient. Further, agencies should not use remedial plans to address allegations against repeat violators. For example, statute prohibits the Texas Medical Board and the State Board of Dental Examiners from issuing remedial plans to resolve a complaint against a licensee if the licensee has entered into a plan in the last five years. Finally, agencies should allow public access to data regarding remedial plans and corresponding complaints. Consideration should be given to allowing agencies to remove this information after a sufficient timeframe (e.g., five years after the plan is issued). However, if an agency issues remedial plans for high-risk or repeat violations, the agency should not remove such information.
68	Enforcement	Complaints — sanctions	Fines should be deposited to general revenue to prevent allegations about conflicts of interest.	Potential exists for agencies to abuse their authority by issuing fines and using the resulting revenue to supplement their funding. To avoid this situation, fines should be deposited to general revenue and should not be accessible only to the licensing authority. For agencies with self-directed, semi-independent (SDSI) status, the need for this requirement is even more urgent. Because SDSI agencies do not go through the appropriations process, the risk that financial motives could drive the agency's enforcement activity is even greater.
69	Enforcement	Complaints — sanctions	Consideration should be given to granting an agency authority to summarily suspend a license without an initial hearing if the agency regulates activities that can result in substantial and immediate harm to the public.	Summary suspension (or a temporary or emergency suspension) is useful in situations where substantial harm can result if an activity is not stopped immediately. Under this authority, an agency may suspend a license without a hearing, subject to subsequent hearings designed to ensure due process. In assessing the potential for substantial and immediate harm, consider the range of activities and the nature of the profession's work. For example, the practice of engineering involves long-term planning and development of projects typically in a team approach that would tend to mitigate the risk of immediate harm by an individual licensee. However, some activities performed by individual engineers, such as foundation and windstorm inspections, can cause the kind of immediate harm that the regulatory agency should be able to effectively stop. In most cases, the potential for harm must be clear and substantial in order to recommend summary/temporary suspension authority. When agencies have temporary suspension authority, statute should balance use of this authority with an oversight process to prevent abuse. Possible safeguards include requiring an agency to schedule a hearing before the State Office of Administrative Hearings (SOAH) within 10 days of issuing a temporary suspension order. As part of this safeguard, consideration should be given to clearly requiring agencies to cooperate with and notify SOAH immediately after issuing an order. This will better ensure SOAH can meet the 10-day requirement.
70	Enforcement	Complaints — sanctions	Consideration should be given to granting civil or criminal penalty authority to	State licensing agencies are occasionally granted civil penalty authority, which allows the state to bring suit against potential violators and impose a monetary penalty. These penalties are often structured to reflect a per-day amount up to a certain limit that may be significantly higher than administrative penalties.

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			licensing agencies in only limited situations.	Generally, civil penalty authority pre-dates authority for agencies to assess administrative penalties, and is rarely added to agencies' statutes anymore. That does not mean, however, that it should be removed from these agencies' statutes. Any consideration of this standard should include an assessment of the different circumstances under which administrative and civil penalties are used. • Agencies levy **administrative penalties** against licensees for violations of the agency's rules or statute. If violators do not pay their penalties, the agency may refuse to renew their license, which typically compels compliance. • With proper authority, agencies may levy **civil penalties** when an administrative penalty is insufficient to stop harmful behavior. For example, this authority may be necessary against violators who do not intend to renew their licenses and therefore have no incentive to pay an administrative penalty, or against those who are not licensed in the first place. Civil penalties can be effective deterrents, but, unlike administrative penalties, they require a judicial proceeding that can be time-consuming and costly. For that reason, civil penalties may best apply to violations where the potential for serious harm to the public justifies use of a larger and costly remedy. For example, the Texas Commission on Environmental Quality — which has a broad jurisdiction and has to consider a wide range of violations — is an agency for which civil penalties are a necessary enforcement tool. Statutes of licensing agencies do not generally identify prohibited actions that constitute misdemeanors or felonies, which are typically punishable by incarceration, fines, or both. Although an agency's statute may designate certain actions as criminal violations, such violations are generally pursued through law enforcement organizations and not through administrative agencies. Criminal penalties should exist only for agencies overseeing practices that can have dire consequences on the public's health and welfare. Additionally, an agency should devote its time and resources to investigating and prosecuting the administrative violations it is charged with enforcing, not criminal violations it is not authorized to enforce. While agencies should assist law enforcement upon request, their foremost job is enforcing administrative violations, not criminal violations.
71	Enforcement	Complaints — sanctions	Consideration should be given to authorizing some form of refund to an aggrieved party.	Refunds return to complainants money they paid to a licensee who violated the law or regulations. Common agency sanctions are designed to bring the licensee into compliance but not to repay aggrieved parties the funds they are out. Granting an agency authority to order a refund instead or in addition to an administrative penalty or other sanction would help the agency make consumers whole again. In practice, some agencies may require refunds through an agreed order. However, clear refund authority is still necessary if agencies must adopt a commission or default order instead due to a licensee's disagreement with a proposed order or their lack of communication with the agency. A refund is sometimes granted when a member of the public has been defrauded or subjected to a loss that can be quantified. For example, the Texas Department of Insurance has authority to order a refund to policyholders when insurance companies have not made good on legitimate claims. The dental board may order a dentist who violates the Dental Practice Act to refund the fee to the aggrieved consumer. Generally, the losses suffered by the public from a licensee group must be easily determined and quantifiable for a refund to be applied reasonably.

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				A refund should not assess damages, which are much more subjective in nature, requiring a separate determination that is much more of a judicial function. Instead, the amount of a refund should not exceed the amount the consumer paid to the licensee. An alternative to giving agencies authority to require a refund is to allow them to consider such awards through their informal settlement process.
72	Enforcement	Complaints — sanctions	An agency should be able to move expeditiously in dealing with unlicensed practice violations, either through injunctive relief in the courts or through administrative cease-and-desist orders.	A licensing agency should have authority to prohibit the unlicensed practice of a trade or profession it regulates. The standard range of sanctions against licensees does not apply to such unlicensed activity. Agencies should rely on injunctive authority, which allows the agency to take legal action against unlicensed violators without having to wait for law enforcement agencies, many of which have much larger concerns than unlicensed practice. Some agencies employ an interim step before an injunction, in which they issue a "cease-and-desist order" under their own authority. This type of action is administrative in nature and does not have to work through the court system. However, based on the agency's use or prospective use of cease-and-desist authority, provisions should also ensure due process for the alleged violator and safeguards against anticompetitive behavior by the policymaking body. The need for cease-and-desist authority must be clearly shown, preferably with specific examples showing real or potential harm. The use of cease-and-desist authority for broader regulatory purposes beyond unlicensed practice violations should be very carefully considered because even in the context of unlicensed practice, such actions create the potential for allegations of impermissible anticompetitive activity by agencies. In some cases, consideration should be given to having cease-and-desist orders or injunctive actions enforced by the Office of Attorney General, rather than the agency.
73	Enforcement	Complaints — sanctions	The agency should ensure compliance with its enforcement efforts.	The agency should develop a system to monitor compliance with requirements placed on licensees who are the subject of disciplinary action. For example, such a system should ensure that persons with a probated license suspension appropriately satisfy the terms of the probation, or that a person ordered to pay an administrative penalty actually does so. Failure to comply with agency enforcement orders could be a consideration for further disciplinary action according to the guidance materials described in Standard 67.
74	Enforcement	Complaints — appeals	Board actions should be subject to review in district court under the substantial evidence rule.	A respondent aggrieved by a board action should be able to appeal, typically in district court in Travis County. Two types of appeals processes are used in district court appeals of administrative actions (judicial review): substantial evidence and trial *de novo*. Under substantial evidence, the appeal allows for review of the case record to ensure that evidence presented bears out the ruling. The court will give deference to reasonable conclusions of the agency so long as they are supported by substantial evidence. The substantial evidence standard saves time and expense while generally providing a sufficient level of protection on appeal. The standard does, however, impose a greater burden on the agency to provide an accurate record. Under trial *de novo*, the court hears the case in its entirety, with evidence repeated anew and no deference given to the agency's process. One alleged concern of shifting from a *de novo* to a substantial evidence review is the feared loss of a jury trial by the appellant. On the other hand, shifting the standard from substantial evidence to *de novo* review undermines the point of the agency's formal

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				hearing process, wasting both the agency's and licensee's time and resources, and further burdening already crowded trial court dockets. Overall, the standard for substantial evidence review is well established in Texas. The Administrative Procedure Act (APA) provides that substantial evidence, not trial *de novo*, is the standard for review of agency administrative decisions if an agency's statute does not specify otherwise. Reflecting this standard, agencies regulating occupations, insurance, and utilities make decisions affecting individuals and businesses in significant ways and operate under substantial evidence. The rationale for substantial evidence review becoming the standard is that the success of these agencies and administrative processes ultimately depends on limited judicial review, based largely on the following characteristics: • A large volume of cases is likely to be processed annually • The availability of intermediate administrative penalties moderates civil- or court-ordered penalties that may be significantly higher • The importance of speedy adjudications to the enforcement scheme • The need for specialized knowledge and agency expertise in resolving disputed issues • Relative rarity of issues of law (e.g., statutory interpretation) requiring judicial resolution • The importance of greater consistency of outcome (particularly as to penalties imposed), which could result from agency/SOAH, as opposed to district court, adjudications • The likelihood that an agency will establish an impartial forum in which cases can be efficiently and fairly decided
75	Enforcement	Complaints — public information	Licensing agencies should participate in and make effective use of information from national or federal data banks, as well as appropriate state, federal, or local agencies.	A number of data banks exist to collect information on disciplinary orders issued by various licensing agencies. These data banks help protect the public by making important information more widely available across the country. Many licensing agencies in Texas are members of or report information to these data banks. Sharing disciplinary information with other agencies involved with a licensee group also helps protect the public through greater availability of enforcement information, especially for applicants who have practiced outside of the state. Licensing agencies should also check such data banks for enforcement information before awarding an initial license or renewal. Otherwise, an agency may award or renew licenses of practitioners who have faced enforcement action in other states, potentially putting Texans at risk. Agencies should also have clear legal authority to discipline licensees for actions taken by other states or other licensing boards for conduct that would be actionable in Texas. Given the growing emphasis on licensure mobility, regulatory agencies should take proactive steps to ensure a licensee cannot evade discipline. Providing clear authority to monitor licensees for adverse actions taken by other states and agencies, and clarifying an agency's authority to discipline licensees based on these actions would better ensure licensees do not pose a risk to the public.

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				Note: careful analysis needs to be given to how agencies treat a case of a Texas licensee or applicant for Texas licensure who is also licensed in multiple states and whose license in another state is suspended or revoked based on a violation committed in the other state. In such a case, the license suspension or revocation issued by another state based on a violation committed outside of Texas should not always result in automatic suspension, revocation, or licensure denial of the Texas license. Rather, in this scenario, the agency should give proper consideration to how the state that initiated the complaint treated the underlying offense.