February 12, 2020
Testimony provided for the Senate Health and Welfare Committee
Enhanced Nurse Licensure Compact-S. 124

Good morning and thank you for granting me the opportunity to speak with you today on a subject I care very deeply about, the nursing shortage in Vermont. My name is Deb Snell and as well as being the President of AFT-VT and the Vermont Federation of Nurses I have been a nurse at the UVM Medical Center for over 20 years with 18 of them in the Medical Intensive Care Unit. Trust me when I say I have first-hand working knowledge of this issue.
I am here today to raise a number of serious concerns my members have about the NLC.

I am lucky in the fact that many other states have done a lot of research on this issue and have published position papers on the compact already. Their arguments are the same as the ones I was looking to make today and hold true for their states as well as ours.

In Alaska, the Alaska Nurses Association writes, "the Nurse Licensure compact is a states right issue. Alaska currently enjoys complete autonomy over the regulation of the profession of nursing, allowing local experts to make local decisions that are best for our state. Joining the compact would erode Alaska's sovereignty. The compact imposes complicated regulatory mechanisms including a powerful new "Interstate Commission" for the compact with the power to adopt rules and assess payments from the states. The commission's rules decisions are binding on all member states, yet there is no independent oversight or accountability for their decisions."

The Compact unnecessarily complicates state regulation, essentially creating two separates, simultaneously functioning regulatory structures for the profession of nursing in Vermont, one system for nurses holding a Vermont license and another for out of state nurses with a compact license. This unnecessarily complicates and impeded the state's regulatory abilities.

The Commission is able to hold closed door, not open to the public meetings. There is an utter lack of transparency.

The compact also raises public safety concerns. We lose the ability to control the standards of quality, we have no way of knowing if the nurses entering out state are competent to care for our patient population. We are would have the task of tracking which nurses are moving to our state to practice. In New Mexico their Senate Bill 222 to enact the Nurse Licensure compact was taken to task because New Mexico was asking that any nurse practicing in their state under the multistate privilege register with their Board of Nursing within 30 days. Rick Masters, the Special counsel to the Interstate Commission of Nurse Licensure Compact Administrators wrote "Requiring a nurse practicing under a multistate privilege to register with the New Mexico Board of Nursing within thirty days after beginning to practice has the effect of adding an additional requirement to the eleven uniform licensure requirements set forth in Article IIIc.1-11 placing an additional burden upon the licensee's ability to practice in New Mexico which is not imposed by any other compact member state."

All states that participate in the compact are required to follow the National Council of State Board of Nursing's Uniform Licensure Requirements. This is concerning. States often have

tougher requirements that those of the National council and license renewal requirements are controlled by the state that issued the Compact license, not by the state in which the nurse practices.

On top of these very valid concerns, there is a rather simple fact. There is no proof that after having been in existence for 20 years that the compact has done what it set out to do.

A study out of Emory University and the University of Michigan found the following:

"In this paper, we use data from the American Community Survey and the U.S. Census for years 1990-2012 to estimate the effects of the Compact on labor force and commuting outcomes. In comparison to other health workers who were not affected by the Compact, we find little evidence that the labor supply or mobility of nurses increased following the adoption of the Compact in the nurses' home state. Specifically, we find no effect on labor force participation, employment levels, hours worked, wages or the probability of working across state lines. When limiting our sample to nurses that live in border counties and examining the effect of living in a Compact state and bordering another member state, we similarly find no effect on labor market outcomes, including commuting times. We also use data from the annual Current Population Survey to rule out the possibility that pre-trend differences in labor market outcomes or worker

Furthermore, it is possible that the benefits of a cross-state system of occupational licensing will only accrue if the licensing regime is truly national. Even with the Compact, nurses still face licensing barriers when moving across states (even within the Compact) or working in non-Compact states. Though the NLC provides the best evidence to date on the likely effects of a nationalized licensing system, it still may not go far enough to generate measurable impacts on the nurse labor market.

Our results imply the following for licensing and health care policy. First, while we do not find that the multistate licensing provided by the NLC reduces labor market frictions caused by occupational licensing, it is important to note that we necessarily focus on nurses. The results may not generalize to other licensed professionals, such as lawyers, therapists, physicians and teachers. Second, from a healthcare delivery perspective, our results indicate that the NLC is likely not to increase the labor supply of nurses. We find no evidence that reducing licensing barriers will increase the pool of workers from which hospitals draw or that it will bring nurses into the labor force. As a result, this reduction in licensing barriers does not appear to be a solution to an aggregate shortage of nurses. "a

States that have been part of this compact form the beginning are still facing minor to crippling nursing storages.

What this compact doesn't do is fix why nurses are not coming to Vermont to begin with and why our current workforce is leaving. The OPR has previously testified that it is not difficult to get a license in Vermont and its study done in March 2019 offered no guarantees that nurses will come to Vermont if the compact is passed. When new graduates or nurses looking to move research Vermont, they will find that we are tied in first place for the most nurse job openings

per capita and rank 2nd for the worst states for nurses and are number 48 out of 51 for lowest annual nursing salary adjusted for cost of living.

These are the problems that we as a state need to fix before we contemplate the compact. Until we address these issues, we will not attract nurses to this state, compact or not. If the compact passes I fear we will become a mecca for travel nurses who have a higher salary, similar health and retirement benefits and a housing allowance of several hundred dollars a week. We need to become competitive. Our southernmost hospitals are already competing with Massachusetts and New Hampshire, invoking the compact will just make it easier for them to leave. We need a bipartisan solution to this problem, and I am more than willing to roll up my sleeves and work with you on creative solutions to address this issue.

NURSE LICENSURE COMPACT

MEMORANDUM

TO: Jim Puente, Director, Interstate Commission of Nurse Licensure Compact Administrators

FROM: Rick Masters, Special Counsel, Interstate Commission of Nurse Licensure Compact Administrators[1]

RE: NM Senate Bill 222 – New Mexico Nurse Licensure Compact

DATE: January 17, 2019

This is to advise you various provisions of the above referenced bill appear to materially conflict with the model compact legislation enacted by thirty-one (31) states to date. Specifically, the conflicting amendments provide as follows:

1. Any RN or LPN practicing in NM under the multistate privilege shall register with the NM Board of Nursing within 30 days;

2. Nursing faculty and adjunct faculty practicing in pre-licensure approved programs for nursing shall hold a NM state nursing license;

3. Add language that passed the 2018 Legislature and was vetoed by the governor that requires all rules passed by the Compact Administrators that affect the practice of nursing in NM to be adopted by the BON in NM. All agendas, minutes, reports, and rulemaking records of the Compact Commission shall be filed by the Administrator with the BON subject to the Inspection of Public Records Act; and

4. RN's and LPN's who declare New Mexico as their home state of licensure shall opt in should they choose to practice with the multi-state privilege; otherwise, single state licenses will be provided upon initial licensure and renewal within the State of New Mexico.

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[1] *Rick Masters is also Special Counsel to the National Center for Interstate Compacts of the Council of State Governments and an expert in the field of interstate compacts who also provides legal guidance to other compact governing agencies. He has testified before state and congressional legislative committees about interstate compacts and has litigated many court cases and authored numerous publications on the subject including the largest existing compendium of legal authorities on compacts published by the American Bar Association in 2017.*

Article X, f. of the Nurse Licensure Compact ("NLC") as enacted by New Mexico specifically provides that "No amendment to this Compact shall become effective and binding upon the party states unless and until it is enacted into the laws of all party states.

Additionally, the proposed amendments are in conflict with the provisions of the current NLC as enacted by the State of New Mexico and thirty (30) other compact member states. These conflicts are as follows:

1. Requiring a nurse practicing under a multistate privilege to register with the New Mexico Board of Nursing within thirty (30) days after beginning to practice has the effect of adding an additional requirement to the eleven (11) uniform licensure requirements set forth in Article III, c. 1.-11 placing an additional burden upon the licensee's ability to practice nursing in New Mexico which is not imposed by any other compact member state.

2. Requiring nursing faculty and adjunct faculty practicing in pre-licensure approved programs for nursing to hold a NM state nursing license, even if otherwise qualified under the provisions of Article III, c. of the current New Mexico statute is in conflict with Section a. of Article III which provides that a multistate license to practice registered or licensed practical/vocational nursing issued by a home state resident will be recognized by Each party state as authorizing a nurse to practice as a registered nurse (RN) or as a licensed practical/vocational nurse (LPN/VN), under a multistate licensure privilege in each party state.

3. Adding language requiring all rules passed by the Compact Administrators that affect the practice of nursing in NM to be adopted by the BON in NM and all agendas, minutes, reports, and rulemaking records of the Compact Commission to be filed by the Administrator with the BON directly conflicts with the existing provisions of Article VIII of the New Mexico NLC statute which does not require rules promulgated by the NLC Commission to also be adopted by the NM BON, nor does it require filing with the BON.

4. Finally the existing provisions of the NM NLC statute do not require RN's and LPN's who declare New Mexico as their home state of licensure to opt in should they choose to practice with the multi-state privilege; nor does it require that single state licenses will be provided upon initial licensure and renewal within the State of New Mexico.

The legal basis upon which the above referenced conflicts caused by the proposed amendments are not permitted, notwithstanding the fact that the NM NLC statute already provides that no amendment will become effective and binding unless and until it is enacted into the laws of all party states is that fundamentally an interstate compact is a "statutory contract" entered into by the state legislatures of the compact member states and the contractual nature of the compact controls over any unilateral action by a state; no state being allowed to adopt any laws "impairing the obligation of contracts," including a contract adopted by state legislatures pursuant to the Compact Clause. *See* U.S. Const. art. I, § 10, cl. 1 ("No state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts …"); *see also West Virginia ex rel. Dyer v. Sims, 341 U.S. 22,* 33 (1951); U.S. Trust v. New Jersey, 431 U.S. 1

(1977); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 101 Colo. 73 (1937), rev'd 304 U.S. 92 (1938).

The contractual and statutory nature of the compact are the legal basis for the binding and uniform nature of compacts which makes them preferable to federal intervention and which allows the states to achieve uniformity in regulation without the need for federal legislation.

The 'down side,' if there is one, is that the language of the compact statute, like any other contract, must be sufficiently similar in all member states to demonstrate that there has been an agreement on the material terms of the compact. As the U.S. Supreme Court has observed, an interstate compact cannot be "... given final meaning by an organ of one of the contracting states."

Member states may not take unilateral actions, such as the adoption of conflicting legislation or the issuance of executive orders or court rules that violate the terms of a compact. *See Dyer v. Sims, supra. at 33; Northeast Bancorp v. Bd. of Governors of Fed. Reserve System*, 472 U.S. 159, 175 (1985). *See Wash. Metro. Area Transit Auth. v. Once Parcel of Land,* 706 F.2d 1312, 1318 (4th Cir. 1983); *Kansas City Area Transp. Auth. v. Missouri,* 640 F.2d 173, 174 (8th Cir. 1981). *See also McComb v. Wambaugh*, 934 F. 2d 474, 479 (3rd Cir. 1991); *Seattle Master Builders Ass'n v. Pacific Northwest Electric Power & Conservation Planning Council,* 786 F.2d 1359, 1371 (9th Cir. 1986); *Rao v. Port Authority of New York*, 122 F. Supp. 595 (S.D.N.Y. 1954), aff'd 222 F.2d 362 (2nd Cir. 1955); *Hellmuth & Associates, Inc. v. Washington Metropolitan Area Transit Authority*, 414 F. Supp. 408, (Md. 1976).

In a similar case involving the Driver's License compact a member state enacted a provision allowing the Secretary of the Pennsylvania Department of Transportation to enter into the compact on behalf of the state rather than activating the compact through legislative enactment, including signing by the Governor as provided by the statutes adopted by all other party states. In a subsequent legal challenge, the Pennsylvania Supreme Court held that the State's attempted adoption of a compact by an alternative method from the other member states was null and void. *Sullivan vs. DOT, 708 A.2d 481 (Pa. 1998).*

The above proposed amendments not only are not effective until and unless enacted by all other compact member states, but also because such amendments provision have the potential to jeopardize the participation of New Mexico in the Nurse Licensure Compact and as legal counsel to the Interstate Commission of Nurse Licensure Compact Administrators, it would be my recommendation to the Commission that if enacted by the State of New Mexico, these amendments could not be enforced and that any attempt to do so would subject the State of New Mexico to enforcement action under the terms of Article IX of the NM NLC.

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THE NURSING LICENSURE COMPACT AND APRN COMPACT: A BAD OPTION FOR WASHINGTON

EXECUTIVE SUMMARY

The National Council of State Boards of Nursing (NCSBN), a private, Chicago-based trade association, has recently proposed two compacts for multistate nursing practice: a Nursing Licensure Compact (NLC) for registered nurses and licensed practical nurses and an Advanced Practice Registered Nurse (APRN) * Compact. The Compacts pose significant new complications for regulating nursing practice while eroding Washington's state sovereignty. They are a bad option for Washington, for Washington nurses and for Washington patients. **Washington lawmakers should reject them**.

The Compacts authorize nurses in participating states to practice in all other compact states under multistate privileges authorized by the nurse's state of residence. The Compacts define the site of a nurse's practice as the state in which the patient is located at the time services are provided. This would apply not only to nurses who are physically present in another state; it would also apply when providing services through electronic communications.

The NCSBN Compacts do not improve public protection or access to care. The few public protection improvements promised by the Compacts can be accomplished through less complex and overreaching means. The Compacts require all party states to participate in a coordinated licensing information system, which Washington already does. The Compacts require criminal background checks; Washington currently requires such checks on out-of-state applicants, and a proposal to require them for all applicants is pending. The Compacts would allow out-of-state nurses practicing here to circumvent Washington's continued competence and new suicide prevention training requirements. And despite claims that the Compacts will improve access to care, there is no evidence that they would do so for Washington.

The Compacts create new complications in regulating nursing practice. The Compacts define nursing practice as taking place in the location where the patient receives services. This may seem logical when a nurse is physically present in another state. But when providing care remotely through electronic technologies, it creates significant new complications. Nurses who work in telehealth practices would need to be familiar with the practice acts, rules and policies of multiple states. But because any use of communications technologies across state lines would be considered interstate practice, this would also apply to nurses who work in *any* settings in which they have preadmission, post-discharge or ongoing contact with patients. Some of those patients may reside out of state, and virtually any patient may be out of state or even out of the country temporarily. A nurse could be providing services to a "local" patient who happens to be in another state at the time—often without the nurse being aware of it—and she or he would be considered to be practicing in that state and subject to its laws and regulations.

Under the Compacts, a license is issued by the state in which the nurse resides. A nurse who lives in Oregon or Idaho and commutes into Washington for work could no longer be licensed here; she or he would instead need to hold a license issued by the state of residence.

Under the APRN Compact, a new Interstate Commission would "recognize or define" educational standards for APRN practice, which have not yet been determined. The APRN Compact includes contradictory language about requirements for advanced practice. It states that an APRN with a multistate license can practice without a supervisory or collaborative relationship with a physician—which is consistent with Washington law—but it also

* APRNs include nurse practitioners, certified nurse-midwives, certified registered nurse anesthetists and clinical nurse specialists – regulated in Washington as Advanced Registered Nurse Practitioners (ARNPs).

states that an APRN must comply with the practice laws of the state in which the client is located at the time service is provided. Since several states still require a supervisory or collaborative relationship with a physician, it is not clear how these two provisions can be reconciled. Will Washington ARNPs be expected to comply with those states' requirements?

The Compacts would significantly erode Washington's state sovereignty. The Compacts impose complicated regulatory mechanisms including two powerful new "Interstate Commissions," one for the NLC and one for the APRN Compact, with the power to adopt rules and assess payments from the states. The Commissions' rules and decisions are binding on all member states. Yet there is *no* oversight or accountability for the their decisions.

The Compacts authorize licensing boards in one party state to issue subpoenas for hearings and investigations for attendance and testimony from another party state. A Washington nurse could be compelled to travel to another state to participate in a hearing or to respond to an investigation for alleged conduct that occurred while she was in Washington providing services remotely.

The Compacts will require new expenses and likely loss of revenue. The Compacts will require set-up costs and payment of assessments to each of the new Interstate Commissions. They will likely result in loss of revenue from out-of-state nurses who will no longer pay Washington licensing and renewal fees. These expenses and losses threaten reductions in services and/or increases in licensing fees.

Comparisons to other Compacts fall short. Proponents draw an analogy between the NCSBN Compacts and driver's licenses, based on the fact that a driver's license issued in one state allows the licensee to drive in other states, subject to those states' laws. But driving in another state means that the driver is *physically present* in that state. Nursing services are increasingly provided remotely, through electronic technologies—a fact that proponents frequently cite as a major reason for adopting the NCSBN Compacts. This is a fundamental difference between nursing licenses and driver's licenses.

Comparisons to the Interstate Medical Licensure Compact (IMLC) also reveal fundamental differences with the NCSBN Compacts, which grant one multistate license authorizing practice in all compact states. The IMLC requires licensure in each state of practice. The IMLC also provides for more limited rulemaking authority for its Interstate Commission and more avenues to challenge its decisions.

The alternative: Focus on telehealth. The proliferation of telehealth technologies poses new challenges in regulating interstate practice. The NCSBN Compacts reflect a flawed attempt to address these challenges. But this does not require the comprehensive, complex, cumbersome and inflexible mechanisms proposed by the NCSBN Compacts. Instead, efforts should focus on the discreet issues posed by interstate telehealth practice.

CONCLUSION: Adopting the NCSBN Compacts is a bad option for Washington. In order to join the NLC and/or the APRN Compact, Washington would have to adopt them as they are, without any substantive changes. Thus, the only two options available to Washington are to adopt each compact as is, despite multiple concerns or to reject them.

WSNA and the American Nurses Association are continuing to seek approaches to interstate practice that are workable and realistic, offer real solutions, and respect state sovereignty. None of this describes the NCSBN Compacts. They are a bad option for Washington. **Washington lawmakers should reject the Compacts.** We can and must work toward better, more effective approaches to interstate practice.

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MULTI-STATE NURSE LICENSURE

In 2005, the Ohio Board of Nursing (Board) examined issues and learned about the experience of some Compact states participating in multi-state licensure. Although the Board recognized that multi-state nurse licensure could be advantageous for occupational health nurses, traveling nurses, or employers, the Board discussed that potential risks of harm to the public outweigh the potential benefits. With multi-state licensure, nurses could be practicing in Ohio when they have not been held to the same standards of safe practice that Ohio has deemed important for public safety. For example, Ohio requires criminal records checks for licensure, but not all Compact states have the same requirement. Also, Ohio statute specifies that there are absolute bars to licensure. If an applicant has been convicted of certain crimes such as Murder and Rape, among others, the applicant cannot be considered for licensure in Ohio. The majority of Compact states either do not bar violent felonies, or impose only time-limited, rather than absolute, bars to licensure.

Over the years, the Board reviewed the actual experience of other states and identified the potential impact of multi-state licensure on public safety. We were advised of nurses with multi-state licenses relocating to states as soon as they find themselves under investigation in their home state. While in theory, the home state would immediately report the investigation to the next state, the reality is neither state may learn of the relocation for a significant period of time. Furthermore, not all states have laws like that in Ohio permitting sharing of investigative information with other governmental entities. In addition, when the nurse moves to another state, the home state does not always continue its investigation. This means that Ohio would not receive vital information unless Ohio attempted to conduct an out-of-state investigation and this is not realistic. In fact, it is unclear whether Ohio would have the ability to compel the production of out-of-state documents or witnesses necessary to prepare a case. These are just some examples of issues that nursing boards across the country are attempting to address.

On September 16, 2005, the Board voted to delay action seeking the introduction of interstate compact legislation until such time more information is gathered to assure that the benefits of multi-state licensure outweigh any risks related to public safety.

Since 2005, the Board has discussed multi-state licensure at numerous meetings and continuously has worked at the national level to address Ohio's concerns. While the Compact states are being encouraged to implement criminal records checks for licensure, several Compact states have not been successful in enacting the requirement. At this time, the Board continues to believe the potential risks of harm to the public outweigh the potential benefits because nurses with multi-state licenses could practice in Ohio without meeting the current statutory and regulatory standards established by the General Assembly and the Board to protect the public. The Board continues to address these issues at the national level through the National Council of State Boards of Nursing.

Re-Issued November 2015

In May 2015, NCSBN voted to approve a new Compact (New NLC). During the NCSBN Annual Meeting in August 2015, an information session for state attorneys, regarding the legal implications of the New NLC, was provided by the Compact Special Counsel and NCSBN Legal Counsel. The New NLC would need to be adopted by each of the 26 Compact member state legislatures. Potential obstacles to adoption identified by state attorneys participating in the information session included (but are not limited to) the following: (i) the New NLC would establish a Commission that would be funded by state revenue, but would not be subject to state transparency requirements (open meetings/open records acts); the Commission could adopt rules binding on Compact member states without undergoing state rule-making processes; (iii) concern was expressed that states would be ceding their legal authority to a privately operated Commission. The New NLC will not be effective until all but two of the Compact member state legislatures adopt the New NLC.