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August 19, 2018

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The Texas Association of Acupuncture and Oriental Medicine (TAAOM) offers the following comments in response to the Texas Board of Chiropractic Examiners' (TBCE or Board) proposed replacement of TBCE Rule 78.14, pertaining to acupuncture, as published in the Texas Register July 20, 2018. These comments are in addition to comments submitted by TAAOM on August 5, 2018, related to the Board's proposed repeal of Rule 78.14, which was published in the Texas Register on July 6, 2018. TAAOM includes for the Board's reference the following attachments:

- August 5, 2018 comments on the Board's repeal of Rule 78.14
- June 26, 2018 letter to TBCE regarding June 20, 2018 TBCE meeting
- April 11, 2018 Summary of TAAOM Key Issue Positions/Priorities and supporting documentation
- March 3, 2017 TBCE document, 'Advertising, Scope and Proper Use of Credentials'
- TBCE document 'Acupuncture FAQs' with reference to dry needling

Overview of Comments

According to the preamble to this rulemaking, TBCE "proposes this new rule *to replace Chapter 78, §78.14*, to promote a clear understanding of the use of acupuncture as a modality by chiropractors", and does so under Texas Occupations Code §201.152, which "authorizes the Board to adopt rules necessary to regulate the practice of chiropractic *to protect the public health and safety*". (Emphasis added)

In the past, TBCE has referred to Texas Occupations Code, Chapter 205 (Acupuncture Chapter) as a source of rulemaking authority. TAAOM recognizes that TBCE's proposed new acupuncture rule does not refer to the Acupuncture Chapter as a source of rulemaking authority. TAAOM supports the Board's removal of the Acupuncture Chapter as a referenced grant of rulemaking authority, consistent with the Third Court of Appeals conclusion in *Texas Association of Acupuncture and Oriental Medicine v. Texas Board of Chiropractic Examiners*, 524 S.W.3d 734 (Tex. App.—Austin 2017, no pet.). The Acupuncture Chapter grants exclusive rulemaking authority to the Texas Medical Board for the regulation of

acupuncture in Texas, with enforcement authority delegated the Acupuncture Board. This regulatory approach is identical to the structure provided in the Occupations Code for the practice of chiropractic and other licensed health care specialties.

TAAOM would note however, that it is not just the Board's acupuncture rules, but all TBCE rules related to needle usage by chiropractic licensees that reference the Acupuncture Chapter as a grant of rulemaking authority. TAAOM therefore encourages this Board to consider the implications of the invalidation of AG Opinion DM-471 by the Austin Court of Appeals in this broader context.¹

As an overarching concern, TAAOM objects to the Board's assertion that its broad rulemaking authority granted in statute to "regulate the practice of chiropractic" is a grant of authority allowing it to unilaterally define and authorize the practice of acupuncture for its chiropractic licensees and chiropractic students.

When asserting authority to define, authorize, and regulate acupuncture "anew" for chiropractic licensees and students in this proceeding, TBCE wrongfully implies that acupuncture—an area of health care the State of Texas has elected to regulate in a completely separate practice act—falls within the scope of practice of chiropractic, or is somehow a natural subset of the practice of chiropractic. TAAOM disagrees with such an assertion, and points to both the legislative history of relevant statutes, as well as the history of acupuncture as a medical treatment, which underscore the very obvious and real differences between these regulated medical professions.

As articulated in TAAOM's August 5, 2018 comments, and in numerous other documents submitted to this Board in conjunction with previous rulemakings, petitions for rulemaking, and the more recent stakeholder workgroup discussions, TAAOM has consistently maintained that TBCE lacks statutory authority to allow its chiropractic licensees to "practice acupuncture" without fulfilling the requirements for acupuncture licensure set forth in the Acupuncture Chapter. And the Austin Court of Appeals has now invalidated the Board's ability to "borrow" language from the Acupuncture Chapter as a legitimate grant of rulemaking authority for adopting acupuncture rules, leaving TBCE with no basis to assert a chiropractic scope of practice that includes acupuncture. Equally significant, nothing in the Acupuncture Chapter exempts chiropractic licensees from the requirements set forth for acupuncture licensure, and the Chiropractic statute includes no exemption allowing chiropractic licensees to use needles to perform acupuncture.

¹ As the Board is aware, in DM-471, the Attorney General opined that the definition of acupuncture in the Acupuncture Chapter could be read *in pari materia* to inform the scope of chiropractic in the Chiropractic Chapter (Texas Occupations Code, Chapter 201). The Austin Court of Appeals rejected this reasoning in *Texas Association of Acupuncture and Oriental Medicine*, 524 S.W.3d at 743-45. The court stated: "Because each statute serves the purpose of defining and regulating a separate health-care field, we cannot conclude that the acts were clearly written to achieve the same objective, despite the fact that they utilize similar terminology. Consequently, we cannot conclude that the Legislature necessarily intended for the respective regulatory authorities over these two, separate health-care fields to apply the same meaning to the term "incisive," and accordingly, we will not construe the Chiropractic Act as if it includes the Acupuncture Act's definition of "acupuncture." *Id.* at 745 (citations omitted).

Notwithstanding the issues relating to the lack of statutory rulemaking authority for TBCE to authorize its licensees to perform acupuncture or use acupuncture needles in the practice of chiropractic, in 2017, TAAOM entered into negotiations with TBCE around the “practice of acupuncture” by chiropractic licensees, in an effort to cooperatively reach a consensus resolution to disputed policy issues that could ultimately end ongoing litigation between TAAOM and TBCE. This new approach could then be validated by the Legislature, precluding future legal challenges from other potential litigants.

Rather than continue down a costly path of constant legal and regulatory challenges—all of which create unnecessary uncertainty and exposure for taxpayers, practitioners, and the consuming public—TAAOM agreed to file a joint motion with TBCE in District Court to abate pending litigation, but only with the understanding that the parties would work in good faith to develop a mutually-acceptable regulatory framework, that could then be approved by the Legislature, to allow for the very limited use of an acupuncture needle within the scope of practice of chiropractic that would include well-defined minimum training standards and consumer protections; bright-line advertising and marketing restrictions for the use of acupuncture needles by chiropractors; and clear regulatory oversight and enforcement standards that are undisputedly lacking today.

From the outset, TAAOM agreed to enter into a negotiated rulemaking process whose stated goal was to produce a consensus rulemaking agreement necessary for TAAOM in its role as a litigant to be able to support joint dismissal of pending litigation. Especially in the absence of any clear statutory authority under current law for TBCE to allow its licenses to use acupuncture needles in the practice of chiropractic, TAAOM firmly believes that a negotiated, mutually-agreeable consensus rule was not only appropriate, but the only way we could reasonably be expected to go forward with dismissal of litigation

Unfortunately, the process that unfolded—and the proposed new rule that it produced—do not currently live up to the true consensus approach that TAAOM considers essential to resolution of the disputed policy issues surrounding the use of an acupuncture needle by chiropractors. Moreover, TAAOM has concerns regarding the process itself. While TAAOM later in this document cites our specific concerns with the new rule as proposed, including highlighting several issues important to the acupuncture community that were simply not addressed in the proposed rule, we feel it is imperative to first elaborate on some of our concerns with the process leading up to this point.

TAAOM’s concerns related to process

Shifting terms of engagement in stakeholder participation impede consensus-building on critical issues.

As far back as the 2017 legislative session, and with the encouragement of key legislators on the Sunset Commission, TAAOM and TBCE leadership began to informally discuss a potential process by which our two professions might attempt to resolve long-standing areas of dispute surrounding the practice of acupuncture by chiropractors. From those earliest interactions, the stated goal of both parties was to work cooperatively toward a potential *negotiated* settlement that would allow for ultimate dismissal of pending litigation between TAAOM and TBCE. Central to our discussions was a recognition by both leadership teams that the status quo was unacceptable, and that the historic lack of proper training

standards, marketing and disclosure restrictions, and regulatory oversight would remain an area of significant exposure for the state and practitioners unless affirmatively addressed.

While initial collaboration with TBCE was quite promising—even including productive discussion of the parties entering into a memorandum of understanding (MOU) following negotiations that would serve to inform the rulemaking process—before long TBCE abruptly changed the terms of engagement for negotiations and the mix of participants, with little advance notice to TAAOM and no public discussion.

More specifically, TBCE initially voted on May 18, 2017, to seek joint abatement of the lawsuit with TAAOM and to engage in a negotiated rulemaking process under Chapter 2008 of the Government Code. The negotiated rulemaking process was to include representatives from TBCE, the Texas Chiropractic Association, TAAOM and the Texas State Board of Acupuncture Examiners.

However, at its next Board meeting on August 17, 2017, following Executive Session, the TBCE chairman moved, and the full Board approved, a motion to conduct a “series of informal conferences to consider specific changes to acupuncture rule 78.14 rather than engage in the specific procedures required under negotiated rulemaking Texas Government Code Section 2008.052 as previously approved.” TBCE did not notify TAAOM of its vote to engage in informal conferences in lieu of negotiated rulemaking, and there was no posted agenda item for the August 17, 2017 meeting that would have informed affected stakeholders that such a shift was being considered.

Nonetheless, TAAOM elected to continue participation in the more informal process amidst assurances from TBCE leadership that the desired goal remained to reach a consensus that could produce needed policy reform and lay the groundwork for joint dismissal of abated litigation. The three informal working group sessions that ensued, however, became increasingly unilateral, with non-litigant chiropractic stakeholders having a disproportionate voice in driving the agenda. Moreover, despite being identified as a key stakeholder when TBCE took its initial vote to approve negotiated rulemaking, the Texas State Board of Acupuncture Examiners was ultimately dissuaded from participating when TBCE staff learned the presiding officer would be accompanied by the Medical Board Interim Director and General Counsel.

TBCE’s lack of responsiveness and mischaracterization of TAAOM’s position on stakeholder discussions

Another troubling aspect of the process leading up to this rule proposal was the difficulty TAAOM had extracting feedback from TBCE on our policy proposals or engaging chiropractic stakeholders in meaningful discussion on the full array of issues essential to resolving long-standing policy disputes and litigation.

For example, when asked by TBCE during the work group process to provide white papers on the acupuncture profession’s priority issues, TAAOM submitted a comprehensive written policy position document to all participants on January 24, 2018. The document makes clear that many areas of concern remain unresolved and reiterates TAAOM’s position that agreement on any component piece of negotiations would necessarily be contingent upon consideration of the final terms of proposed rule

changes. TBCE did not acknowledge receipt of the document, and despite TAAOM's written and verbal requests for feedback, did not provide specific feedback on the various issues raised.

Similarly, while TAAOM had envisioned a negotiations process that included a robust exchange of ideas, meaningful issue-by-issue deliberation, and the parties working together to develop proposed rule language, TAAOM had to submit multiple written requests in order to receive an advance draft of the proposed new rule, and was provided language only two days before the June 20, 2018 meeting at which the Board voted to publish the proposed rule in the Texas Register.

Compounding these concerns was TBCE's public representation at its specially-called June 20 meeting that the proposed new rule addresses all of the concerns raised by acupuncture stakeholders in the work group process. As stated in the attached June 26, 2018 letter to the Board, this is simply not the case.

Stakeholder engagement must be considered in a different context when the goal is to resolve litigation

TAAOM acknowledges the Board's authority to unilaterally accept or reject any recommendation made by a stakeholder in its rulemaking process, including any "consensus" rulemaking that may come before it.

TAAOM also acknowledges that TBCE did fulfill the minimum requirements of Texas Occupations Code, Section 201.1526 for seeking input and advice from affected stakeholders in rulemaking—TAAOM was consulted early in the rule development process and did have an opportunity to voice our position.

However, TAAOM did not enter into these discussions simply to provide input and await the production of a unilateral rulemaking. Instead, we embarked upon this process as a litigant desiring to negotiate a resolution to a pending lawsuit. As such, we expected a more two-way negotiation process aimed at producing a mutually agreeable outcome. Unfortunately, the proposed rule that has resulted from this process does not live up to those expectations, failing to address some of the most important policy priorities TAAOM identified as vital to reaching consensus, and also falling short in other key areas, such as advertising and marketing restrictions, where clearer guidance is needed but missing in the rules as proposed.

TAAOM herein offers the following comments on the proposed replacement to 78.14, and also offers alternative sample draft language for the Board's consideration.

Specific TAAOM Comments on TBCE Proposed Replacement to Rule 78.14

These comments on the new proposed rule 78.14 are offered conditionally, with the view that any rule the Board might approve allowing the use of acupuncture needles by chiropractic licensees would require some type of legislative amendment to provide an exemption from the education and licensing requirements of the Acupuncture Chapter, and to affirmatively authorize the limited use of acupuncture needles by chiropractic licensees where TAAOM asserts such authority currently does not exist. (See TAAOM summary policy document, p.8)

TAAOM therefore urges the Board's consideration of the statutory limitations contained in Occupations Code Chapter 201, and to conform its rulemaking to the directive of Section 201.1525 to *clarify what activities are included within the scope of the practice of chiropractic and what activities are outside of that scope.*

Comments on proposed 78.14(a):

- (a) Acupuncture, and the related practices of acupressure and meridian therapy, include methods for diagnosing and treating a patient by stimulating specific points on or within the musculoskeletal system by various means, including, but not limited to, manipulation, heat, cold, pressure, vibration, laser, ultrasound, light electrocurrent, and the insertion of acupuncture needles or solid filiform needles for the purpose of obtaining a bio-positive reflex response by nerve stimulation. All therapeutic modalities provided by licensees, including the performance of acupuncture services, must comply with the chiropractic scope of practice as defined by the Texas Occupations Code §201.002.

Occupations Code, Section 205.201 requires a license issued by the Texas State Board of Acupuncture Examiners to practice "acupuncture." TBCE has no authority to define "acupuncture" or authorize the practice of acupuncture by its licensees without an acupuncture license, and TAAOM continues to urge the Board to more appropriately constrain its rulemaking to the use of acupuncture needles as an adjunctive modality within the practice of chiropractic rather than the practice of "acupuncture" more broadly. Attempting to create a new definition of acupuncture outside of the terms of Chapter 205 is confusing and unnecessary, has the potential to result in less clarity for practitioners and the public, and could result in new legal challenges by other affected parties.

Additionally, "the insertion of... solid filiform needles for the purpose of obtaining a bio-positive reflex response by nerve stimulation" sounds like needle EMG, which has been determined previously to be outside the chiropractic scope of practice.

TAAOM also has concerns with changes made to the Boards' definition of acupuncture in light of guidance on acupuncture training and "dry needling" recently having been removed from the 'Acupuncture FAQs' document available on the TBCE website, as below:

"Question: Can I perform dry needling in lieu of acupuncture?"

The Board does not permit dry needling without being qualified to perform acupuncture, because dry-needling involves the use of acupuncture needles. A chiropractor who intends to perform dry needling must have obtained training and/or certification to perform acupuncture pursuant to requirements of Board Rule 78.14 Acupuncture." (See TBCE document 'Acupuncture FAQs')

Consistent with our position in previous discussions with TBCE, TAAOM asserts this guidance likely should be incorporated into this rulemaking, and here questions the Board's intentions as relates to the use of acupuncture needles in the context of so called "dry needling." (See TAAOM summary policy document, p.7)

TAAOM believes TBCE should remove or modify all references to chiropractors being licensed to “practice acupuncture” or “qualified to perform acupuncture”, to ensure chiropractic licensees understand clearly going forward that the new proposed rule would only allow for the limited use of an acupuncture needle within the practice of chiropractic. Using an acupuncture needle within the existing statutory scope of chiropractic would very clearly be a more limited subset of activities and treatments than the more broad practice or performance of acupuncture.

Comments on 78.14(b):

- (b) A licensee shall use acupuncture as an adjunctive modality only after obtaining certification to do so from the Texas Board of Chiropractic Examiners (Board).

TAAOM believes any new rule proposed should implement a system of verifying that training requirements have been met.

TAAOM also agrees with former statements by TBCE from its 2017 ‘Advertising, Scope, and Proper Use of Credentials’ pdf:

*“The National Board of Chiropractic Examiners (NBCE) is a testing organization and **does not award board certification**. Likewise, the TBCE is a licensing and regulatory agency and **does not award board certification**. Being awarded a certificate of attainment by a testing or regulatory board does not make a licensee board certified. Board certification is awarded by authorized specialty boards after a program of advanced training, usually 3-5 years, advancement to candidacy and board testing (e.g. written, oral, practical).”* (See TBCE document, ‘Advertising, Scope, and Proper Use of Credentials’)

Consistent with the above referenced document and as articulated in our April 11, 2018 summary policy document previously provided to this Board, TAAOM does not support any representations that could be construed as “board certification” or “board certified” in relation to acupuncture and TBCE. TAAOM also notes that the ‘Advertising, Scope, and Proper Use of Credentials’ document appears to have been removed from the TBCE website in its entirety, and urges the Board to reinstate this document and to not adopt a rule that contradicts its own previous well-reasoned guidance to licensees. This document represents clarifications which should be adopted as a matter of formal policy, rather than made to disappear. (See TAAOM summary policy document, p.3)

Comments on 78.14(c):

- (c) A licensee with an acupuncture certification may not delegate the performance of acupuncture services to a chiropractic assistant or technician.

TAAOM suggests clarifying: “may not delegate the insertion of or the removal of acupuncture needles.”

Comments on 78.14(d)(1):

- (d) Requirements for acupuncture certification.

- (1) A person who becomes a licensee on or after the effective date of this rule may receive an acupuncture certification from the Board by successfully completing and passing an examination in at least two-hundred (200) hours of training in the use and administration of acupuncture. The classes must be provided by an accredited chiropractic college or post-secondary university approved by the Board. Such training shall include didactic, clinical, and practical training in the use and administration of acupuncture, as well as clean needle techniques, examination, and protocols that will satisfy the blood-borne pathogen standard established by the federal Occupational Safety and Health Administration.

Here, TBCE seemingly increases training requirements while simultaneously lessening them. Specifically, TBCE increases the number of training hours while removing the requirement of passing the National Board of Chiropractic Examiners (NBCE) standardized acupuncture exam. The Board instead requires passing an unspecified “examination”. TAAOM suggests the Board maintain and articulate the requirement of passing a nationally recognized standardized test, such as the NBCE exam.

TAAOM also notes that where the Board has now articulated that a clinical component be part of the required training, the Board has failed to set a minimum number of required clinical hours. Throughout discussions with TBCE there was agreement that training should be competency based. TAAOM therefore urges the Board to establish some number of required clinical hours so that a uniform standard of establishing competency can be arrived at. A sample curriculum provided by curriculum experts from one Texas acupuncture school suggested 80 hours clinical training was appropriate. (See TAAOM summary policy document, p.2)

In the 2009 preamble to the adoption of rule 78.14 (formerly 78.21), the Board recognizes that further rulemaking would be needed on the issue of sufficient training standards. And now, in this proposed replacement to rule 78.14, TBCE proposes an increased training requirement seemingly based on discussions with TAAOM on the World Health Organization’s 1996 document, ‘Guidelines on Basic Training and Safety in Acupuncture’, which sets out a standard of not less than 200 hours training for qualified physicians for the limited use acupuncture as a technique in their clinical work.

While acknowledging the WHO guidelines as at least a standard that was arrived at through a formal consensus process - and signed off on by the World Federation of Acupuncture and Moxabustion Societies, TAAOM also recognizes that 300 hours training is the industry standard in the medical profession, and here notes that 300 hours is also consistent with the standard set by the American Board of Chiropractic Acupuncture. TAAOM additionally acknowledges that the Texas State Board of Acupuncture Examiners has implemented a requirement of 240 hours additional training for individuals who have completed a full four year acupuncture curriculum but have been delayed in getting licensed, or have been out of practice two years. TAAOM does not oppose a 200 hour training standard outright, but does encourage this Board to “maintain the highest standards of scholarship, education and

training”² as it endeavors to establish a more appropriate and more contemporary standard of training for the use of acupuncture needles by chiropractors.

TAAOM notes that the Board does not indicate that all training must be live, in person training, and that online training or distance learning may not substitute for in person training. TAAOM urges the Board to correct this deficiency in the proposed rule. (See TAAOM summary policy document p.2)

TAAOM suggests including “accredited acupuncture school” in the list of allowable course providers.

TAAOM urges the Board to conform this proposed rule to Texas Occupations Code, Section 201.1525(3) and 201.003(c) by indicating clearly that a chiropractic license is requisite to receiving additional training in the use of acupuncture needles. (See TAAOM summary policy document p.3)

Section 201.1525(3) states the Board “may require a **license holder** to obtain additional training or certification to perform certain procedures or use certain equipment” (Emphasis added), and Occupations Code 201.003(c) APPLICATION AND EXEMPTIONS states: “This section does not affect or prevent a student enrolled in a college of chiropractic in this state from engaging in all phases of clinical practice **if the practice is part of the curriculum** and conducted under the supervision of a licensed chiropractor or a licensed physician.” (Emphasis added) Acupuncture is *not* part of the Council on Chiropractic Education accredited chiropractic curriculum, and chiropractic students therefore are not exempt from the requirements of the Chiropractic Chapter when engaging in a clinical activity outside scope of the chiropractic curriculum – in this case acupuncture.

In addition to citing the Acupuncture Chapter in asserting authority to regulate the practice of acupuncture in the preamble to rule 78.14 (then 78.21) in 2009, TBCE also represented “post graduate training in acupuncture” already offered in chiropractic schools as justification for the proposed rule, when in fact chiropractic schools offer training in acupuncture as *continuing education* not just to licensed chiropractors, but also to chiropractic students mid-way through their chiropractic training, despite acupuncture not being part of the chiropractic curriculum - a practice TBCE defends.

Where TBCE has allowed or even defended the practice of allowing non-licensed students of chiropractic to engage in acupuncture training in violation of the Chiropractic Chapter, TAAOM urges the Board to correct these regulatory inconsistencies and conform to Sections 201.1525(3) and 201.003(c), cited above. To do otherwise would put the Board at odds with its own guiding statute and serves no purpose other than to competitively advantage its licensees over individuals who have met the full requirements of the Acupuncture Board to practice as a Licensed Acupuncturist.

As stated in our summary policy document, TAAOM maintains it is inappropriate, based on multiple policy and statutory standards, for an unlicensed student of any medical profession to be allowed by a state licensing board to receive training to practice any other specialized medical procedure prior to licensure, much less in a practice area outside the student’s primary education and training, and that continuing to allow entry terms for chiropractic students that are unjustifiably more favorable than

² Texas Board of Chiropractic Examiners, RULE §77.11 Code of Ethics

those required by individuals actually licensed by the state to practice acupuncture creates additional legal exposure for the state. (See TAAOM summary policy document, p.3)

Comments on 78.14(d)(2) to (d)(3)(A),(B),(C):

- (2) A person who became a licensee after January 1, 2010, and before the effective date of this rule shall have until September 1, 2019, to obtain an acupuncture certification from the Board by passing the National Board of Chiropractic Examiners' standardized certification examination in acupuncture and completing 100 hours of acupuncture training.
- (3) A person who became a licensee before 2010 shall have until September 1, 2019, to obtain an acupuncture certification from the Board by having either:
 - (A) Successfully completed and passed an examination in a 100-hour training course in the use and administration of acupuncture;
 - (B) Successfully completed and passed either the National Board of Chiropractic Examiners' standardized certification examination in acupuncture or the examination offered by the National Certification Commission of Acupuncture before the effective date of this rule; or
 - (C) Satisfied what would otherwise be the training requirement by counting each year of the licensee's practice in which the licensee performed acupuncture as an adjunct modality as ten (10) hours of training in the use and administration of acupuncture, so long as the licensee has been trained in and practicing acupuncture for ten (10) years and is in good standing with the Board and the regulatory entities of the other jurisdictions in which the licensee is licensed.

If the intention here is to merely set a deadline for obtaining the necessary permission from the board for all licensees who have met various training options set by the board previously, this is not clear and should be made clear.

As written, it would appear the Board is creating a window for all licensees licensed prior to the adoption of this proposed rule to meet various lower standards of training, some of which have already been superseded by section (d) under the current rule, including as under (d)(3)(C), reopening the window for “grandfathering” licensees who have potentially not taken even 100 hours of training or passed the NBCE exam. It would be troubling as a matter of policy if this *is* what the Board is condoning as it works to correct the inadequacies of the current regulatory structure. TAAOM seeks clarification on the intention of this section of the proposed rule.

Given the wide disparities in training TBCE has allowed in authorizing its licensees to perform acupuncture under the exiting rule, and the historical lack of verification or recordkeeping by TBCE of its licensee’s training and testing, TAAOM believes the need remains for discussion on a regulatory process that could provide TBCE with a uniform and clear set of standards by which to evaluate any licensee seeking verification by the Board based upon historic practice experience of the licensee.

Grandfathering that simply memorializes the standards set out in the current rule is unworkable, specifically because it appears the current rule allows a chiropractic licensee to self-declare competency simply because they issued a chiropractic license prior to 2010.

As stated in our summary policy document, TAAOM would support a public process whereby TBCE licensees in good standing are evaluated based upon providing some type of assurance that they are qualified and capable according to agreed-upon standards. TAAOM would be willing to explore alternative ways of arriving at agreed-to minimum-hour requirements – but not simply grandfathering all 100 hour trained licensees without meeting some additional measure, and certainly not a licensee without any demonstrable training. (See TAAOM summary policy document, p.4)

Comments on 78.14(d)(4)

- (4) All licensees seeking certification in acupuncture may verify training in acupuncture by submitting signed certificates of attendance or completion, or diplomas from course sponsors or instructors. All licensees seeking certification in acupuncture may document experience by submitting a sample of patient records spanning the years claimed for review by the board.

See preceding comments. Additionally, TAAOM suggests shall verify rather than “may verify”. And TAAOM suggests the Board clarify under what circumstances documentation of experience by submitting patient records is appropriate or required.

Comments on 78.14(e)

- (e) As part of his or her required continuing education, a licensee certified to perform acupuncture must complete a minimum of eight (8) hours in acupuncture for each two (2) years of licensure. The continuing education must be a course or seminar approved by the Board.

TAAOM supports a CE requirement.

Comments on 78.14(f)

- (f) A licensee may not perform acupuncture services until the licensee has submitted proof of compliance with subsection (d) of this section to the Board and has received a numbered acupuncture certificate from the Board, verifying that the licensee has met the criteria and requisite training to use acupuncture as an adjunctive modality.

TAAOM supports a regulatory structure that verifies training requirements have been met, but takes issue with the Board issuing numbered acupuncture certificates, as this is tantamount to the Board issuing acupuncture licenses – which TBCE has no authority to do.

As an alternative to a numbered acupuncture certificate, TAAOM proposes that TBCE instead send licensees who have been verified as having met the standards set out by the Board a “Letter of Verification”, acknowledging that the Board has verified that the licensee has met the criteria and requisite training in the use of acupuncture needles as an adjunctive modality within the practice of chiropractic.

Because misrepresentations around scope and advertising are so rampant among chiropractors using acupuncture in their practices, TAAOM also encourages the Board to consider including with this letter succinct guidance on matters of scope and advertising as relates to the use of acupuncture needles as an adjunctive modality within the practice of chiropractic. (See TAAOM summary policy document, p.5)

Comments on 78.14(g)

(g) A licensee performing acupuncture services under this section shall not advertise in a manner that would suggest the licensee possesses a license to practice acupuncture issued by the Texas State Board of Acupuncture Examiners, including by using any of the terms "acupuncturist," "licensed acupuncturist," "L.Ac.," "Traditional Chinese Medicine," or "degreed in acupuncture" unless the licensee has satisfied the criteria for licensure found in Texas Occupations Code chapter 205.

While a step in the right direction, in addition to the above restrictions, TAAOM would add that any chiropractic licensee who represents they practice “acupuncture” is inherently advertising in a manner that is potentially misleading to the public, because the practice of acupuncture requires a license issued by the Texas State Board of Acupuncture Examiners.

Texas Acupuncture Code, Sec. 205.201 states: LICENSE REQUIRED. Except as provided by Section 205.303, a person may not practice acupuncture in this state unless the person holds a license to practice acupuncture issued by the acupuncture board under this chapter.

Therefore, unless licensed by the Texas State Board of Acupuncture Examiners, a chiropractic licensee should not represent to the public that they practice acupuncture. Further, restrictions in the Healing Arts Identification Act, Texas Occupations Code Chapter 104, prevents representations by licensed chiropractors as anything other than “chiropractor; doctor, D.C.; doctor of chiropractic; or D.C.”.

TAAOM deems clear “bright line” advertising restrictions as necessary to ending the existing confusion and lack of clarity around chiropractic scope and advertising as relates to acupuncture, and TAAOM remains concerned that if chiropractic licensees are allowed to represent they practice “acupuncture” when they do not have an acupuncture license, it becomes virtually impossible to create substantive and enforceable advertising restrictions. (See TAAOM summary policy document, p.5)

In discussions with TAAOM, the expressed concern of chiropractic stakeholders was that if they cannot say they practice acupuncture, how will they be able to bill for it? As a solution, TAAOM proposes TBCE

add language clarifying that unless licensed by the Texas State Board of Acupuncture Examiners, a chiropractic licensee may not represent they practice acupuncture except for purposes of billing, similar to a statutory provision which prohibits the use of the term “physician” by a chiropractor except for purposes of billing.

Texas Chiropractic Code, Sections 201.502(9) and (19), GROUNDS FOR REFUSAL, REVOCATION, OR SUSPENSION OF LICENSE, supports TAAOM’s position on advertising, which articulates that the Board may refuse to admit a person to examinations and may revoke or suspend a license or place a license holder on probation for a period determined by the Board for using an advertising statement that is false or that tends to mislead or deceive the public, or for failing to clearly differentiate a chiropractic office or clinic from another business or enterprise. (See TAAOM summary policy document, p.7)

When a chiropractic clinic is branded in such a way that acupuncture is in the name of the clinic, that clinic has obscured the clear differentiation from another type of business (an acupuncture clinic). This is exactly the type of inherently misleading representations which are widespread and TAAOM wants to see stopped, and the cleanest, clearest solution is to simply restrict the use of the term “acupuncture” by those individuals *not licensed* in acupuncture. (See TAAOM summary policy document, p.7)

TAAOM again points to TBCE’s own terminology of “needle therapeutics” from the Board’s ‘Acupuncture FAQs’ document. As it is unclear what type of needle therapeutics chiropractors use beyond the use of acupuncture needles, TAAOM again asserts that TBCE specifying that chiropractors be allowed to operate under the term “acupuncture needle therapeutics” is relevant and a possible solution to many of the most problematic issues this rule is attempting to solve. (See TBCE’s ‘Acupuncture FAQs’)

TAAOM is open to continued discussions on the limited use of acupuncture needles as an adjunctive modality within the practice of chiropractic, but asserts the need for statutory clarification for chiropractors to use acupuncture needles lawfully.

Finally, TAAOM asserts that for purposes of enforcement, TBCE needs to work with Acupuncture Board to develop a memorandum of understanding whereby Doctors of Chiropractic who receive a complaint related to the use of acupuncture needles and who are found to be operating within their scope shall remain under the jurisdiction of TBCE, and those found to be operating beyond scope with acupuncture needles shall be under the jurisdiction of the Acupuncture Board. (See TAAOM summary policy document, p.1)

Comments on 78.14(h)

- (h) A licensee's advertising may include either or both of the terms "Board Certified" or "Board Certified in Chiropractic Acupuncture" if it also clearly identifies the nationally recognized certifying board and credentials. A licensee to whom the Board has issued a

certificate under this Rule may state that the licensee is "Board Certified in Acupuncture as an adjunctive modality by the Texas Board of Chiropractic Examiners."

Throughout discussions with TBCE on the verification of training by licensees, the concept of TBCE issuing something along the lines of a "certificate of verification" had been discussed on multiple occasions, and TAAOM emphasized in our summary policy document that a certificate of verification issued by TBCE should not be represented as "board certified". And yet here, TBCE seemingly rejects TAAOM's stated concerns *and* contradicts the Board's own reasonable and clear guidance previously offered in the 2017 'Advertising, Scope, and Proper Use of Credentials' document (now removed from the TBCE website) and the Board's 'Acupuncture FAQs' document. (See TAAOM summary policy document p. 3)

From TBCE's 'Advertising, Scope, and Proper Use of Credentials':

*"The National Board of Chiropractic Examiners (NBCE) is a testing organization and **does not award board certification**. Likewise, the TBCE is a licensing and regulatory agency and **does not award board certification**. Being awarded a certificate of attainment by a testing or regulatory board does not make a licensee board certified. Board certification is awarded by authorized specialty boards after a program of advanced training, usually 3-5 years, advancement to candidacy and board testing (e.g. written, oral, practical). Successful passing of the board exams allows one to use specialty board designations, such as: DACO, DABCO, DACBR, DABCI, etc. In addition, stating one is a "Diplomate" of the NBCE or the TBCE is inaccurate. In fact, in 1982 the NBCE stopped using the Diplomate designation due to this confusion and instead, began issuing a certificate of attainment. The NBCE website cautions that use of the Diplomate of the NBCE is a violation subject to state sanctions and may result in **legal action** for improper use. See <http://mynbce.org/score/licensing-certification/>." (See TBCE document 'Advertising, Scope, and Proper Use of Credentials')*

From TBCE's 'Acupuncture FAQs':

"Certification can be ambiguous given the many acupuncture courses offered by a variety of programs and organizations. The programs may or may not be accredited by the Council of Chiropractic Acupuncture (CCA) and most organizations are not certifying specialty boards. An example of a specialty board is the American Board of Chiropractic Acupuncture (ABCA). There is a considerable difference between: 1) receiving a certification upon completing a certain-number-of-hours training course and 2) being board certified in a specialty by a specialty board. "Board certified" status requires at least 300 hours of acupuncture course work and passing both a written and practical examination. Many chiropractors obtain acupuncture training through courses offered during their chiropractic college matriculation. This training generally awards a certification of X number of hours in acupuncture (e.g. 100-Hour Certification); however, completion of this training does not make one certified in acupuncture, per se..." (See TBCE document 'Acupuncture FAQs')

As evidenced by a review of TBCE survey data provided to TAAOM, as well as any cursory online search, misleading and inaccurate representations of credentialing and chiropractic scope of practice as related to the practice of acupuncture by chiropractors are widespread and remain a significant area of concern that TAAOM feels this proposed rule replacement fails to sufficiently address. It is not helpful that the Board compounds the problem by proposing regulation in conflict with its own former well-reasoned

guidance. TAAOM requests the Board to reconsider its approach to how it handles advertising, scope, and the use of credentials in this proposed rule. (See TAAOM summary policy document, p.5)

Additionally, TAAOM is aware of only one nationally recognized specialty board related to the practice of acupuncture in chiropractic, the American Board of Chiropractic Acupuncture, and so only one instance where the use of the terminology “board certified” should be relevant. Similarly, the Board needs to come to terms with the term “diplomate”, which, as stated in the Board’s advertising document, can be misleading. Again, the Board has previously published guidance documents that could be of assistance in clarifying advertising requirements and restrictions by rule. TAAOM encourages the Board to re-examine these documents and consider utilizing them more fully in refining this rule.

Comments on 78.14(i)

- (i) Traditional Chinese Medicine (TCM): Approved programs in clinical acupuncture or meridian therapy offered by accredited chiropractic colleges or universities are specifically designed for Doctors of Chiropractic and other disciplines. These courses are not intended as substitute for a full curriculum teaching TCM, but rather focus on the principle, theory, scientific findings, and practical modern application of the modality of acupuncture as a Doctor of Chiropractic might use it in an existing professional practice.

Here the Board addresses the intention of the trainings, and under the preceding section 78.14(h) addresses representations made in advertising. TAAOM suggests the proposed language falls short of actually stating that the practice of Traditional Chinese Medicine is unauthorized and should make this clarification. (See TAAOM summary policy document, p.6)

Comments on 78.14(j)

- (j) Notwithstanding anything else in this section, a licensed chiropractor may provide for patients' use of herbal supplements or remedies, homeopathic remedies and compounds, and nutritional supplements, including vitamins and minerals.

TAAOM asserts there is no need for this section of the rule. This is restating RULE §78.13(e)(2)(M).

Comments on 78.14(k)

- (k) The practice of acupuncture as an adjunct modality by a licensee who has not complied with the education and certification requirements of this section constitutes unprofessional conduct and subjects the licensee to appropriate disciplinary action by the Board. A licensee who advertises the practice of acupuncture as a modality without first obtaining an acupuncture certification from the Board also has engaged in unprofessional conduct or other sanctionable conduct, subjecting the licensee to appropriate disciplinary action by the Board.

Consistent with guidance from 201.502(9) and 201.502(19), TAAOM believes chiropractors should not be allowed to advertise the practice of acupuncture.

Comments on 78.14(l)

- (l) A licensee performing acupuncture services under this section shall comply with Texas Administrative Code §77.11(a).

§77.11(a) states: “Licensees shall employ their best good faith efforts to provide information and facilitate understanding to enable the patient to make an informed choice with regard to proposed chiropractic treatment. Licensees shall allow the patient to make his or her own determination on such treatment.”

Simply referencing §77.11(a) to serve the purpose of ‘informed consent’ for consumers receiving treatment with acupuncture needles from a chiropractor is insufficient. Transparency for the consuming public is essential. TAAOM proposes it should be made clear to patients in an informed consent/disclosure form that the practitioner is not licensed by the Texas State Board of Acupuncture Examiners, but rather has met the TBCE requirements to use acupuncture needles as an adjunctive modality within the practice of chiropractic to improve the subluxation complex or the biomechanics of the musculoskeletal system. Additionally, what level of training the practitioner has attained should be represented clearly: How to articulate this appropriately is laid out clearly in the Board’s ‘Acupuncture FAQs’ document. Otherwise, consumers are not being provided adequate information to make an informed choice, and can easily be misled – even if inadvertently - to assume their chiropractor has a higher level training in acupuncture than is in fact the case.

TAAOM proposes TBCE expressly state these disclosure requirements as a matter of regulatory policy, and provide a prescribed form for uniform application of these policies by licensees. (See TAAOM summary policy document p.6)

Comments on 78.14(m)

- (m) A licensee performing acupuncture services under this section shall comply with the provisions of Texas Administrative Code §78.2 - Proper diligence and Efficient Practice of Chiropractic.

Texas Occupation Code, Section 205.301, REFERRAL BY OTHER HEALTH CARE PRACTITIONER REQUIRED, states: “A license holder may perform acupuncture on a person only if the person was:

- (1) evaluated by a physician or dentist, as appropriate, for the condition being treated within six months before the date acupuncture is performed; or
- (2) referred by a chiropractor within 30 days before the date acupuncture is performed.”

Given the requirement for referral found in the Acupuncture Chapter, and given that it is evident that some chiropractic licensees are advertising and using acupuncture beyond their chiropractic scope, TAAOM believes it is appropriate that the Board not simply default to an existing rule to address issues

of referral to a licensed acupuncturist when a patient seeks treatment with acupuncture for a condition beyond what is authorized for a chiropractor to treat with acupuncture. (See TAAOM summary policy document p.6)

TAAOM DRAFT proposed alternative language

(a) Scope of Practice

(1) As defined by Federal Code 21CFR880.5580 an acupuncture needle is a device intended to pierce the skin in the practice of acupuncture.

(2) A licensed Doctor of Chiropractic may be authorized to use acupuncture needles as an adjunctive therapy within the practice of chiropractic to improve the subluxation complex or the biomechanics of the musculoskeletal system by meeting training requirements established by the Board.

(3) Unless licensed by the Texas State Board of Acupuncture Examiners, a licensed Doctor of Chiropractic using acupuncture needles as an adjunctive modality within the practice of chiropractic may not hold themselves out as practicing “acupuncture”, except for purposes of billing.

(4) Authorization to use acupuncture needles as an adjunctive modality within the scope of chiropractic is not authorization to practice Traditional Chinese Medicine.

(5) Techniques and equipment which connote the broader practice of “Traditional Chinese Medicine” are prohibited, including but not limited to the use of moxabustion, Ryodoraku or similar devices, 3 edged needles, and 7 star needles.

(5) A licensee may not practice dry needling or any other procedure using acupuncture needles without first meeting the training requirements for the use of acupuncture needles as set forth by the Board in section (b).

(5) A licensee may not delegate the use of acupuncture needles to a chiropractic assistant or technician, including the removal of acupuncture needles.

(b) Training requirements

(1) A licensed Doctor of Chiropractic in good standing may take additional required training in acupuncture for use as an adjunctive modality within the practice of chiropractic.

(2) Approved training programs are specifically designed to provide Doctors of Chiropractic and other disciplines with limited training in the use of acupuncture needles as a technique for their clinical work. These courses are not intended as substitute for a full Acupuncture or Traditional Chinese Medicine curriculum, but rather focus on the principle, theory, scientific findings, and practical modern application of the modality of acupuncture as a Doctor of Chiropractic might use it in an existing professional practice.

(3) Training must be provided by an accredited chiropractic college, accredited acupuncture college, or post-secondary university approved by the Board.

(4) A licensee may use acupuncture needles as an adjunctive modality within the chiropractic scope of practice if the following training requirements are met:

(A) A licensee must successfully complete a minimum of two-hundred (200) hours of training in the use and administration of acupuncture. Such training shall include didactic, clinical training, and practical training in the use and administration of acupuncture, as well as clean needle techniques, examination, and protocols that will satisfy the blood-borne pathogen standard established by the federal Occupational Safety and Health Administration.

(B) A minimum of 80 hours clinical training is required.

(C) No part of the training may be substituted with online training.

(D) A licensee must pass the National Board of Chiropractic Examiners acupuncture exam.

(5) As part of their chiropractic continuing education a licensee must complete a minimum of eight (8) hours in acupuncture for each two (2) years of licensure. The continuing education must be a course or seminar approved by the Board.

(c) Board verification and oversight

(1) A licensee shall submit proof of completion of training to the Board for verification. Licensees may verify training in acupuncture by submitting signed certificates of attendance or completion, or diplomas from course sponsors or instructors.

(2) The Board will verify the minimum training standards have been met, and issue a letter of verification, allowing for the limited use of acupuncture as an adjunctive modality within the practice of chiropractic. The Board letter of verification will also contain information for licensees on chiropractic scope of practice and the use of acupuncture needles as an adjunctive modality, and guidance on advertising restrictions related to the use of acupuncture in the practice of Chiropractic.

(3) A licensee may not use acupuncture needles in the practice of chiropractic until the licensee has received a letter of verification from the Board.

(4) The use of acupuncture needles as an adjunct modality by a licensee who has not complied with the education and verification requirements of this section constitutes unprofessional conduct and subjects the licensee to appropriate disciplinary action by the Board.

(5) A licensee who has been using acupuncture needles in their chiropractic practice under previous standards set by the Board will have six (6) months from the effective date of this rule to submit proof to the Board of having met the standards at the time to use acupuncture needles. Licensees may verify training in acupuncture by submitting signed certificates of attendance or completion, or diplomas from course sponsors or instructors, or where applicable, patient records spanning the years under review by the board.

(A) Licensees who were already using acupuncture needles in their chiropractic practice at the time of the adoption of the Board's previous rule (July 2, 2009), who met the requirements to practice by having acupuncture some form of acupuncture training and 10 years of clinical experience in acupuncture must demonstrate proof of training and patient records spanning the years under review by the board.

(B) Licensees who came to use acupuncture needles in their chiropractic practice by meeting the standards set forth in the Board's July 2, 2009 but prior to January 1, 2010 rule shall either:

(i) Demonstrate 100 hours training in undergraduate or post-graduate classes in the use and administration of acupuncture provided by a bona fide reputable chiropractic school or by an acupuncture school approved by the Texas State Board of Acupuncture Examiners; or

(ii) Demonstrate the completion of at least one-hundred (100) hours training in the use and administration of acupuncture in a course of study approved by the board; or

(iii) Demonstrate 100 hours training in acupuncture and successful completion of the national standardized certification examination in acupuncture offered by the National Board of Chiropractic Examiners; or

(iv) Demonstrate completion of the examination offered by the National Certification Commission for Acupuncture and Oriental Medicine.

(C) Licensees who came to use acupuncture needles in their chiropractic practice by meeting the standards effective as of January 1, 2010 shall demonstrate completion of 100 hours training and successful completion of the standardized certification examination in acupuncture offered by the National Board of Chiropractic Examiners.

(6) A licensee using acupuncture in their chiropractic practice under previous standards set by the Board shall have 2 years from the effective date of this rule to fulfill the additional training requirements established under section (4).

(d) Advertising

(1) A licensee who advertises the use of acupuncture needles without first obtaining a letter of verification from the Board also has engaged in unprofessional conduct or other sanctionable conduct, subjecting the licensee to appropriate disciplinary action by the Board.

(2) Subject to possible revocation or suspension of one's license, or being placed on probation for a period determined by the board:

(A) A licensee is prohibited from directly treating with acupuncture needles or advertising to treat with acupuncture needles systems or conditions that fall outside of the chiropractic scope of practice as defined by the Texas Occupations Code §201.002 as of the effective date of this rule.

(B) A licensee using acupuncture needles under this section shall not advertise in a manner that would suggest the licensee possesses a license to practice acupuncture issued by the Texas State Board of Acupuncture Examiners or suggest additional educational status that one has not formally obtained, including by using any of the terms: "acupuncture," "acupuncturist," "licensed acupuncturist," "L.Ac.," "Traditional Chinese Medicine," "Oriental medicine," "degreed in acupuncture", unless the licensee has satisfied the criteria for licensure found in Texas Occupations Code chapter 205.

(C) A licensee shall clearly differentiate a chiropractic office or clinic from another business or enterprise.

(3) Training in the use of acupuncture needles shall be represented by stating the number of hours training successfully completed, type of credential or certification conferred, and the organization or entity that awarded the credential or certification, such as: or "X-hours certification in acupuncture from ----- ." The board recommends stating all your hourly training, certification, examination and other awards with specificity and clarity.

(e) Informed consent and disclosure

(1) In addition to informing patients of the possible risks associated with the use of acupuncture needles, in order for patients to be able to make a fully formed decision about their treatment options, a Doctor of Chiropractic shall disclose to the patient of the following:

(A) Where applicable, that they are not licensed by the Texas State Board of Acupuncture Examiners to practice acupuncture.

(B) They have met the training requirements established by the Texas Board of Chiropractic Examiners to use acupuncture needles as an adjunctive modality within the scope of practice of chiropractic as defined by Texas Occupations Code §201.002

(C) Their training: Number of hours training and from where.

(f) Referral required

(1) A Doctor of Chiropractic must refer patients seeking treatment with acupuncture to a Licensed Acupuncturist for conditions beyond the chiropractic scope of practice as defined in §201.002 as of the effective date of this rule.

(g) Enforcement

(1) A complaint against a Doctor of Chiropractic for the use of acupuncture needles who is determined to have been operating within the chiropractic scope of practice shall fall under the jurisdiction of this Board.

(2) A complaint against a Doctor of Chiropractic for the use of acupuncture needles who is determined to have been operating beyond the chiropractic scope of practice as defined in this rule shall fall under the jurisdiction of the Texas State Board of Acupuncture Examiners.