

# A Win-Win for Consumers and Professionals Alike: An Alternative to Occupational Licensing

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## Introduction

Markets are good for humanity.<sup>1</sup> Consequently it is a legitimate function of government to make sure institutions encourage and preserve fair market activity. To work well, markets depend on the distribution of relevant information. As economists have shown, if one party in a transaction (usually the seller) commonly has more information than another party (usually the buyer), markets can break down. Those with more information may use it to their advantage, and those with less information may abandon the market or be exploited.<sup>2</sup>

Fully informed choices maximize benefits from trade, diminish buyer's remorse, and generally maximize consumer satisfaction. Markets breaking down means less trade, less specialization, less innovation, less productivity, and a lower standard of living. Full information keeps sellers more honest, and makes products offered within competitive enterprise better, as opposed to rewarding the ability to talk fast, confuse buyers, and even outright deceive them.

Thus in the matter of "information asymmetry" (one party in a transaction knowing more than the other) relevant to markets, government plays a legitimate role in preventing fraud and minimizing other inefficiencies. Occupational licensing is supposed to fulfill this role by providing shorthand information or signals of quality and competence, but unfortunately its negatives largely outweigh its positives. This paper proposes an alternative.<sup>3</sup>

## The Role of Shorthand Market Information

Consumers have an interest in getting accurate shorthand information about sellers and products. At the same time, high-quality, reliable sellers in pursuit of a market advantage have an interest in minimizing the costs of conveying shorthand information that accurately reflects who is likely to produce and sell the best products and services.

The reason shorthand information is valuable is that while consumers and producers alike benefit from

information, too much information can be overwhelming. Consumers simply cannot fully process large volumes of information. Some information is of higher quality than other information, and too much can cause bad or deceptive information to drown out good, which can be worse than having no information at all. Ask any good conscientious legislator about information overload, and most will admit they specialize and vote with others whom they trust to know more regarding issues on which they are not educated.

Quality sellers arguably deserve a way to convey what consumers can depend on to be accurate, shorthand information that differentiates quality sellers from others, and consumers obviously want this too. This is the one truly good thing occupational licensing is supposed to provide—accurate shorthand information regarding seller quality. As discussed below, however, that does not always happen without other costs overwhelming the positive effects of signals from licensing.

Consumers often purchase goods and services only occasionally. One reason car dealers favor restrictive rules on who can act as intermediaries in auto sales is that dealers have a decided advantage over consumers who buy a car only once every five years or so.<sup>4</sup> Most car shoppers have neither the time, nor the resources, nor even the inclination, to fully educate themselves to get the sort of deal a truly experienced buyer could accomplish.

Consequently, shorthand tools have been developed to aid consumers in a market context, including Kelley's Blue Book and car magazines that specialize in monitoring and analyzing consumer choices and presenting them in a shorthand fashion that busy consumers can digest quickly. For other products and services, resources include Angie's List, Yelp, Consumer Reports, and a host of specialized publications.

## Why Licensing Has Proved Ineffective

Unfortunately, occupational licensing accomplishes its one important and beneficial market task in a costly, heavy-handed manner. It is monopolistic, blending all the bad characteristics of monopolies, with

government thrown into the mix.<sup>5</sup> Licensing requirements theoretically offset a monopoly's tendency toward low quality, but the stories of how licensing boards fail to discipline licensees are legion.<sup>6</sup> In the same way monopolistic, cartel-like institutions operate, licensing reduces supply, drives up prices, and compromises quality—great for licensees, but not for consumers. And the licensing cartel has the power of government behind it.

## Enter Fraud-Protected Private Certification

Fortunately, there is a solution. Private certification keeps licensing's benefit of market signaling but does so without its monopoly. Fraud-protected certification, which meets the transparency criteria in the model below, serves to encourage the creation of reliable sources of shorthand information for both sellers and consumers. Privately certified sellers have an incentive to defend their credential from fraud and also an incentive to maintain their credential's credibility by enforcing high quality. Certifying organizations can compete with one another to provide better, more thorough, and more conveniently expressed information to consumers.

The accompanying model bill does not propose wholesale replacement of traditional occupational licensing, however. In fact, it does not repeal any existing license.

Instead, the model proposes a voluntary system that complements existing licenses. Specifically, it allows for private certifying organizations to (1) register with the state, (2) privately certify individuals to practice an occupation according to the organization's performance criteria, and (3) employ modern technology, including consumer-rating systems using smartphone applications, to protect consumers. The privately certified individual would be free to work in the state regardless of other occupational regulations. Multiple certifying organizations could occupy the same occupational "space," competing to provide the highest-quality credential.

While private certification organizations already perform this service in some ways, this proposal would

expand and strengthen their ability to do so by creating an incentive to provide a quality credential in exchange for fraud protection. Currently, the only recourse for a private organization to protect its credibility is to sue anyone who illegitimately claim certification. Our model proposes extending criminal fraud protection to certifying organizations that follow certain practices, mainly having to do with transparency to consumers.

## 21st Century Consumer Protection & Private Certification Act – A Model

The model bill is organized into six sections. Each section is followed by a brief italicized explanation (or annotation) of the section's purpose. Explanatory annotations not only explain the provisions, but might also lay out reasonable alternatives for legislatures.

### **Model Bill with Annotations**

#### **SECTION 1. DEFINITIONS**

- (1) "Government" means the State of \_\_\_\_\_ and its political subdivisions.
- (2) "Lawful occupation" means a course of conduct, pursuit, or profession that includes the sale of goods or services that is not itself illegal irrespective of an occupational regulation.
- (3) "Occupational regulation" means a statute, ordinance, rule, or other requirement in law that requires an individual to possess certain personal qualifications to work in a lawful occupation.
- (4) "Qualifications" are criteria related to an individual's personal background that may include completion of an approved educational program, satisfactory performance on an examination, work experience, criminal history, moral standing, completion of continuing education, a standard of ethical behavior, or other criteria as determined by a private certifying organization to qualify the individual to perform a service to an acceptable standard as determined by the private certifying organization.

(5) “Private certification” is a nontransferable recognition by a private certifying organization that an individual meets qualifications determined by the private certifying organization.

(6) “Private certifying organization” means a nongovernmental organization that allows any individual to apply for private certification regardless of the individual’s race, creed, color, ethnicity, national origin, religion, sex, sexual orientation, or marital status.

(7) “Participating private certifying organization” means a private certifying organization that registers and otherwise meets the criteria specified in Section 2(C) of this act.

(8) “Privately certified” is a designated title that an individual may use if the individual is certified by a participating private certifying organization.

### **Section 1 Annotation**

*The “Qualifications” definition is written broadly with flexibility in mind. The intent is to allow markets (consumers and producers) to determine what is important when it comes to qualifications and not substitute the judgment of one or a handful of government-empowered individuals for that of a state’s citizenry.*

## **SECTION 2. PRIVATE CERTIFYING ORGANIZATIONS; BOND**

(A) A private certifying organization may voluntarily participate and register with the government under this section.

(B) To participate, a private certification organization shall register with the Secretary of State. It shall provide the Secretary with the organization’s name, address, officers, and the names of individuals initially privately certified. The Secretary may impose a registration fee to recoup its costs and promulgate rules and forms to facilitate registration.

(C) A participating private certifying organization shall:

(1) Publish on a publicly accessible website all of the following:

(a) The scope of practice for each lawful occupation that the organization certifies;

(b) The qualifications that an individual must possess to become certified by the private certifying organization;

(c) Other factors the private certifying organization uses to certify individuals, which may include consumer comments, rankings, and other consumer-initiated elements;

(d) The names, business addresses, and websites of all individuals privately certified by the organization; and

(e) The states in which the private certifying organization is registered.

(2) Require qualifications that are related to the lawful occupation for which an individual is certified.

(3) Verify an individual’s qualifications before certification and periodically verify that the certified individual remains eligible for certification.

(4) Require a privately certified individual to prominently display the private certification and make available materials about the qualifications and other factors required for the private certification on request.

(5) Have at least fifty (50) privately certified individuals in active practice in the United States after one year of applying for registration with the Secretary.

(D) A participating private certifying organization may require individuals it certifies to obtain and maintain a bond for liability that is related to the practice of the individual’s privately certified lawful occupation.

(E) A participating private certification organization may require a privately certified individual to pay initial and ongoing fees.

### **Section 2 Annotation**

*Private organizations already certify individuals they train. This proposal does not require that an organization that trains and certifies also*

register with the government or participate in the provisions of the bill if enacted. Participation by a private certifying organization results in the obligations laid out in this section but also results in privileges for those who are privately certified by a participating organization, which are laid out in subsequent sections.

*This draft does not place a cap on the registration fee, but that is an option legislatures might consider. Initial and yearly fees might also be considered.*

*The Secretary of State is designated as the regulating agency, but depending on the state it might be the Attorney General or the Corporation Commission.*

*A participating private certifying organization is required to periodically verify ongoing qualifications of certified individuals. How this is done is purposely not specified. Currently, licensing agencies require continuing education and periodic fees. Under this act, verification could be by exam. How often these checks should be done is not specified in this draft but could be in actual legislation, although this should be done with caution since different professions might require different periods of time.*

*A minimum number of certified individuals is specified in the draft in order to keep a single individual or other small number from abusing the statute. A nationwide number is specified but could be a statewide number, and the number will ultimately be fairly arbitrary. A national number is specified because some narrow occupations have few practitioners in any given state.*

*Sections D and E are for clarification; private organizations already have such rights.*

### **SECTION 3. RIGHT TO ENGAGE IN A LAWFUL OCCUPATION**

(A) An individual who is certified by a participating private certifying organization may engage in the lawful occupation for which that individual is privately

certified notwithstanding any other occupational regulation enacted by the government.

(B) The government shall not prohibit or impose a penalty, fine, or fee on an individual who is certified by a participating private certifying organization for engaging in a lawful occupation in compliance with this chapter.

### **Section 3 Annotation**

*An individual privately certified by a participating organization is able to practice the certified occupation without fear of prosecution by a licensing agency whose regulated scope of practice extends into or overlaps with the privately certified scope of practice.*

*This is less an assault on licensing than a way to combat the tendency for licensing enforcement to become overly broad. Much occupational licensing occurs simply as a way for practitioners to avoid prosecution under a licensing provision that was passed for a different, but related, occupation. For example, podiatrists, chiropractors, and naturopaths sought to create their own licensing laws partly to avoid prosecution for practicing medicine without license. (See the section, “And Speaking of Medicine ...” below.)*

*Another issue that arises with licensing is turf wars, where scopes of practice and/or daily practice conflict with the law. Legislatures are constantly asked to mediate whether or not horse massage is a form of veterinary medicine, or whether physical therapists should be allowed to do any spinal manipulation, or whether there is a difference between “dry needling” and acupuncture. Private certification can bypass these disputes and let consumers decide, by allowing sub-professions to create certifying organizations without being forced to appeal to the legislature for recourse.*

### **SECTION 4. SIGN; VIOLATION; CLASSIFICATION**

(A) An individual who is certified by a participating private certifying organization and who engages in a

lawful occupation for which the government has otherwise enacted an occupational regulation must prominently display a sign with lettering that is at least one inch in height stating that (1) the government licenses the service; (2) the individual is not licensed by the government, (3) the individual is privately certified by \_\_\_\_\_ (the name of the private certifying organization), and (4) the contact information of the private certification organization.

(B) An individual who is certified by a participating private certifying organization and who is not licensed, registered, or certified by the government shall not use the term “licensed,” “certified,” or “registered” to describe the individual’s credential or any words, titles, abbreviations, or letters that would induce a reasonably knowledgeable consumer of such services to believe the privately certified individual using them is occupationally regulated by the government.

(C) An individual who is certified by a participating private certifying organization may use the term “privately certified” to describe the individual’s credentials or as part of a title or designation.

#### **Section 4 Annotation**

*Section 2 specified obligations on the part of participating private certifying organizations. This section specifies a few consumer-friendly obligations on those so certified. These are not obligations placed on anyone else.*

#### **SECTION 5. FALSE CLAIM; VIOLATION; CLASSIFICATION**

An individual who knowingly and falsely claims to be privately certified pursuant to this chapter is guilty of fraud and subject to penalties under the state’s deceptive trade practices act.

#### **Section 5 Annotation**

*This provision is key to this proposal. This provision is the impetus to form and administer a participating private certification organization in the first place. Without it, a private certifying organization must sue in civil court to protect its credential against misuse, which is relatively costly under current law, thanks to*

*government licensing statutes that provide for prosecution by government authorities. Claiming a credential one does not have is fraud, however, and should be a crime. A legislature might wish to be more specific regarding punishment.*

#### **SECTION 6. ENFORCEMENT**

(A) The Secretary shall enforce this chapter and has the authority to terminate the government’s registration of the participating private certifying organization for failure to continue to meet the requirements in section 2(C).

(B) The participating private certifying organization that continues to operate 90 days after failing to meet the requirements in section 2(C) is guilty of fraud and subject to a fine under the state’s deceptive trade practices act.

(C) Except to the extent that this act requires a privately certified individual to possess qualifications established by the government to perform a lawful occupation, this chapter does not limit the government’s authority to enact and enforce laws relating to:

- (1) A business license or permit, facility license, building permit or land use regulation; and
- (2) Public health, safety, and environmental regulations through the enforcement of regulations other than occupational licenses, including the sale and use of substances that endanger public health and safety if mishandled or improperly dispensed, including chemicals, explosives, and pharmaceuticals.

(D) Nothing in this chapter shall be construed to:

- (1) Change the government’s sole authority to require an individual to obtain and maintain a government-issued driver’s license and related insurance for personal or commercial vehicle use;
- (2) Limit damages in a private civil action against an individual who is privately certified or who knowingly and falsely claims to be privately certified;

- (3) Require a private party or the government to do business with an individual who is not licensed, certified, or registered with the government;
- (4) Create a cause of action against a private party or the government;
- (5) Allow for private certification of occupations regulated by the federal government or required by federal law to be occupationally licensed by the government;
- (6) Require a private certification organization to participate and register with the government under this chapter;
- (7) Increase the authority of the government to regulate nonparticipating private certification organizations;
- (8) Require doctors and other medical professional to obtain operating room privileges or other credentials from the state, hospitals, or clinics to perform surgery or an operation or;
- (9) Reduce the authority of the state supreme court to regulate who may issue subpoenas, serve discovery, and litigate cases before state judges.

### Section 6 Annotation

*This section ensures that whatever agency is in authority to enforce the law, it has the ability to de-register a participating private certification organization, setting the terms (which can be adjusted) for such de-registering. It also contains provisions to make certain that the proposed law is narrowly construed and carefully bounded, that it not constrain government more than is intended, and that it does not grant new powers to government that are not intended.*

## Conclusion

Private certification provides the benefits of shorthand information for consumers and producers just like licensing does—and better—without creating monopolistic power under the umbrella of government. With private certification as proposed here, sellers have a property interest in their certification, which

is protected against fraud by the state's trade practices act (or however a legislature might frame the statute). That means certification organizations do not have to sue in civil court to enforce their rights, a costly and uncertain proposition. Fraud protection is not granted lightly, but at the same time, both sellers and consumers are protected through its power.

The private certification model also has the benefit of not relying on future legislatures to understand and implement a vision of proper regulation the way sunrise and sunset laws do. Nor does it rely on attorneys and statutory causes of action to create a litigation-fertile environment where judges might or might not decide in favor of markets and free enterprise.

Private certification takes care of itself. When new professions arise with practitioners who want to set themselves apart, they can form associations and certify themselves (recall the size threshold in the model). They can practice alongside licensed professions without fear of government interference as long as they follow a set of specified criteria, which are focused on transparency for consumers.

Consumers are already used to looking up reviews and credentials online. Companies are increasingly ignoring college degrees and relying on certificates of course completion from private online education services. Over time, with private certification in place, licensing in many occupations would likely disappear, both for lack of need and by consensus. So there is no real need for the political battles involved with licensing repeals if private certification is put in place. And there would be no need for legislatures to mediate disputes between licensed professions in the future.

The ultimate result, compared to licensing, is that private certification will increase quality, increase opportunity, and lower prices.

Many are concerned that the private certification model does not contain carve-outs for medicine or law. However, the model explicitly acknowledges government's right to regulate substances, including prescription medicines. This alone will continue to require licensing for many medical professions, alleviating the most common objections related to public health and safety. And in the case of surgery, hospitals and private

board certifications regulate who does surgery now, not licensing boards.

As for law, Great Britain, which has two levels of attorneys, barristers and solicitors, suggests a helpful alternative. Britain's barristers, who litigate before courts, and all attorneys in the U.S. face similar requirements to practice. Britain's solicitors, who are more numerous, practice only what might be called office law, drawing up contracts, carrying out legal negotiations, and advising clients, but not litigating. Solicitors only face requirements to practice that are akin to certification. In American terms, litigators (Britain's barristers, who argue before judges) are licensed, but attorneys in general (Britain's solicitors, who do not litigate) are not.<sup>7</sup> The model bill stipulates that those privately certified but not licensed must post a sign stating they are not regulated by the state. Bar-licensed attorneys would continue to have an advantage for this reason alone. Plus, judges would still determine if an attorney is qualified to litigate in front of them, a power set in common law and one this model explicitly allows to continue.

Private certification has the potential of doing a better job of protecting consumers than occupational licensing while also generating benefits for those certified under its provisions. Consumers want the shorthand information. Producers want to give it. Government need only create the setting for this to occur.

## And Speaking of Medicine ...

*by Murray Feldstein, MD*

Today, occupational licensure is primarily a political tool to restrict competition rather than to assure competence, including in the medical field. The origins of this system lie in the medieval guild system, resurrected and promoted by organized medicine and successfully enacted over a century ago. Since then, this system has infected one service industry after another. The politics of licensure do more to block competition than to ensure competence and safety, with professional entry controlled by the profession itself through a series of interlocked private institutions.

A certified nurse practitioner, who has a bachelor's in nursing, an RN license, and a master's or doctorate in nursing, can do a vasectomy in Washington State. But in most states, that same individual must either fight a scope-of-practice battle in the legislature or go to medical school in order to perform a vasectomy. I am a board-certified urologist who has performed thousands of vasectomies. I am confident I could train an experienced, competent physician's assistant or nurse practitioner to do the procedure within a few weeks and feel comfortable letting them do it independently.

Defining or changing a scope of practice for a profession is a political power struggle. Legislators, largely laymen, depend on affected regulated professions for their information, and special interests and political considerations are often prioritized over the public interest. Anyone who has been through a scope-of-practice battle knows how vicious, time-consuming, and demeaning they can be. Privileged, incumbent professionals argue that potential competitors lack competence, though no real evidence is provided to support that claim. The case of nurse practitioners performing vasectomies is one blatant example.

In medicine, although graduates from medical schools are granted an unlimited license to practice medicine, potential competitors are restricted by broad scope-of-practice regulations. There is no statutory restriction on licensed physicians performing vasectomies, even though they may never have seen one performed. The reason most non-urologist MDs avoid doing the procedure is not because it is illegal, but because of market conditions, their own moral compass, and

nongovernmental mechanisms such as board certification, hospital credentialing, and liability concerns, which truly assure professional competence.

The proposed form of private certification outlined in this paper would likely see private entities creating certification tracks that are not unlike pilot certification, a truly competency-based system: The pilot profession does not control the student level leading to professional entry. The prerequisites and competencies required for any certificate—from day-flight only, to instrument rating, to commercial and airline pilot—are clearly specified. No politicians are making decisions about matters they know little about, and market forces largely determine the efficient distribution of piloting skills within the industry.

Under a certification system, many motivated, capable individuals unable to enter a highly restricted licensing regime could use their skills to provide themselves with greater opportunity and help those in need of their skills. In medicine, for instance, perhaps a military corpsman, an international medical graduate, or an emergency room aide who became an EMT could find a place in a healthcare industry that, quite frankly, needs them and the important, useful skills they have acquired. Under today's laws, licensing prevents this—and we all lose, not just those who yearn to realize their dreams by helping others through medicine, but also patients who need access to medical care.

An advantage of the private certification proposal in medicine is that the system gains additional healthcare professionals, but no new mandates are imposed upon existing institutions. Licensing boards will still have to verify credentials and decide which programs they are willing to accredit. The market mechanisms that truly assure public safety remain intact.

Regardless of policies enacted in Washington, states that reform medical licensing can improve medical access, lower medical costs, streamline the adoption of 21st-century technologies, facilitate modern teaching methods, provide opportunity for self-advancement to segments of our population who have been falling behind, and empower patients by reforming medical licensing. Part of that reformation, of course, can include private certification. And if this is true for medicine, it is true for every other licensed occupation.

# GENERAL REFERENCES & ENDNOTES

## General References

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## Endnotes

- <sup>1</sup> Elizabeth Warren’s first two answers in this interview provide a shorthand description of benefits that markets provide: Franklin Foer, “Elizabeth Warren’s Theory of Capitalism,” *The Atlantic*, August 28, 2018, <https://www.theatlantic.com/politics/archive/2018/08/elizabeth-warrens-theory-of-capitalism/568573/>.

- <sup>2</sup> See “Information Economics – The Market for Lemons,” tutor2u.net, for a discussion: <https://www.tutor2u.net/economics/reference/information-economics-the-market-for-lemons>.
- <sup>3</sup> A version of this was previously proposed in Byron Schломach, *Six Reforms to Occupational Licensing Laws to Increase Jobs and Lower Costs*, Goldwater Institute Policy Report #247, July 10, 2012, <https://goldwaterinstitute.org/wp-content/uploads/2014/11/Six-Reforms-to-Occupational-Licensing-Laws-to-Increase-Jobs-and-Lower-Costs.pdf>.
- <sup>4</sup> This is the only conclusion that can be drawn from Texas car dealers’ intense opposition to a bill that would have allowed credit unions to broker car sales in that state, which would have merely involved checking prices at multiple dealers and choosing the best deal, not direct sales. Authored by a legislator for whom coauthor Byron Schломach worked, the bill did not affect car dealer franchising in any way. It merely allowed credit unions to search out good deals for customers whose car loans the credit unions carried.
- <sup>5</sup> Morris M. Kleiner and Evgeny Vorotnikov, “Analyzing Occupational Licensing Among the States,” conference working paper, August 9, 2016, <https://www.aeaweb.org/conference/2017/preliminary/paper/3T5Sze74>
- <sup>6</sup> Katherine Barrett & Richard Greene, “America’s 1,800 Licensing Boards and Their Countless Problems,” *Governing*, March 2018, <http://www.governing.com/commentary/gov-state-licensing-boards-failing.html>. “Doctors to Lose Right of Self-policing,” *The Guardian*, February 21, 2007, <http://www.guardian.co.uk/uk/2007/feb/21/health.publicservices>.
- <sup>7</sup> For more information, see “Solicitor: British Lawyer,” *Encyclopedia Britannica*, <https://www.britannica.com/topic/solicitor>.