

Questions for the Record
Senator Orrin G. Hatch
Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing: “License to Compete: Occupational Licensing and the State Action Doctrine”
February 2, 2016

Questions for Mr. Furman

1. **What is the right way to evaluate the efficacy of licensing schemes? When are such schemes necessary? When are they plainly not? How should we go about determining whether a particular licensing scheme is appropriate or is instead merely protectionist?**

Response: The relative magnitudes of the costs and benefits of licensing depend on the specific circumstances for each profession, so licensing proposals must be carefully considered in each instance. The Administration believes that one of the most effective ways to evaluate the efficacy of licensing schemes is to carry out comprehensive cost-benefit assessments through both sunrise and regular sunset reviews. Sunrise reviews trigger cost-benefit analysis when a new licensing proposal is enacted, while sunset reviews apply cost-benefit analysis to licensing laws that are already in place. These reviews should include—but not necessarily be limited to—consideration of the following criteria:

- The presence of legitimate public health and safety concerns;
- Whether existing legal remedies, consumer rating and reputational mechanisms, and less-burdensome regulatory approaches are adequate to protect consumers;
- Whether the proposed licensing requirements are well-tailored to ensure quality and protect the public;
- The effects that the license would have on practitioner supply and wages;
- The effects that the license would have on the price and availability of goods and services;
- The effects that the license would have on workers’ ability to move across State lines; and
- The administrative costs of enforcing the license.

The argument for licensing is strongest when low-quality practitioners can potentially inflict serious harm or when it is difficult for consumers to evaluate provider quality beforehand. This can be the case when, for example, it is difficult to learn about a provider’s reputation or to try out different providers, or when evaluation requires specialized knowledge or expertise. In cases where public health and safety concerns are minor and it is easier for consumers to evaluate provider quality, alternative forms of regulation such as voluntary State certification (“right-to-title”) may be appropriate.

2. **In your view, what are the circumstances that tend to lead to particularly egregious or problematic licensing schemes? Are certain types of professions particularly susceptible to abuse on this front? Do the problems arise mainly in the decision to license in the first place, or in the imposition of unnecessary, costly licensure requirements later on?**

Response: Both organizational and structural factors contribute to problematic licensing schemes. Since licensing is a policy with concentrated benefits (for the licensed practitioners) and diffuse costs (for consumers and would-be practitioners), practitioners may have a greater interest in licensing and be better positioned to represent their views through their active professional associations. There is some empirical research which suggests that licensed professions' degree of political influence is one of the most important factors in determining whether States regulate an occupation.¹

In addition, licensing boards are often revenue neutral, and in some cases, even revenue generating.² While there has been some movement over time away from funding licensing boards exclusively through fees, fees remain the primary funding mechanism.³ Thus, legislators considering a new licensing proposal often do not have to grapple with the prospect of finding additional sources of revenue to administer the policy.

The current state of research does not allow us to answer whether certain types of professions are especially susceptible to problematic licensing schemes, or whether problems arise mainly in the initial decision to license or in the subsequent imposition of licensure requirements. However, the best practices from the White House report on occupational licensing released this past July are generalizable across professions, and are designed to promote a more thoughtful approach to licensing both at the outset and over time.

It is also worth noting that some licensing requirements arise in response to real problems, and that well-designed licensing schemes can benefit both workers and consumers. For example, if consumers are unable to distinguish between high- and low-quality providers before purchasing a good or receiving a service, then low-quality providers can remain in the market without being recognized as such, reducing the average quality in the market and diminishing the incentives for other providers to invest in quality improvements.⁴ If consumers are sufficiently concerned about getting a low-

¹ Charles Wheelan. 1999. "Politics or Public Interest? An Empirical Examination of Occupational Licensure." The University of Chicago, unpublished manuscript; William D. White. 1980. "Mandatory Licensing of Registered Nurses: Introduction and Impact." Occupational Licensure and Regulation. Washington, DC: American Enterprise Institute Press; Chris Paul. 1984. "Physician Licensure Legislation and the Quality of Medical Care." *Atlantic Economic Journal* 12, no. 4: 18-30.

² Robert J. Thornton and Edward J. Timmons. 2015. "The De-Licensing of Occupations in the United States." *Monthly Labor Review*. U.S. Bureau of Labor Statistics.

³ David A. Swankin. 2012. "Regulation of the Professions: Where Have We Been? Where Are We Going?" Remarks at the 36th Annual Federation of Associations of Regulatory Boards (FARB) Forum.

⁴ George A. Akerlof. 1970. "The Market for Lemons: Quality Uncertainty and the Market Mechanism." *Quarterly Journal of Economics* 84, no. 3: 488-500; Morris M. Kleiner. 2000. "Occupational Licensing." *Journal of Economic Perspectives* 14, no. 4: 189-202. American Economic Association; Carl Shapiro. 1986. "Investment, Moral Hazard, and Occupational Licensing." *Review of Economic Studies* 53, no. 5: 843-862.

quality provider, then informational uncertainty may depress demand for goods and services. Licensing is one possible way to address these problems through requiring providers to meet certain quality benchmarks, and creating greater incentives to invest in increased training and skill development.