2012
Regulatory Report

LLR South Carolina Department of Labor, Licensing and Regulation

Synergy Business Park; Kingstree Building
110 Centerview Dr.
Columbia, S.C. 29210
(803) 896-4300 • contactllr@llr.sc.gov

South Carolina
Department of Labor, Licensing and Regulation

110 Centerview Drive
Post Office Box 11329
Columbia, SC 29211-1329
(803) 896-4390
FAX: (803) 896-4393
www.llronline.com

Nikki R. Haley
Governor

Catherine B. Templeton
Director

December 19, 2011

The Honorable Nikki R. Haley
Governor, State of South Carolina
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Governor Haley:

Pursuant to S.C. Code § 40-1-50, please find enclosed reports indicating those regulated trades, occupations, and professions that potentially exceed the extent of regulation permitted by state law.[i] We believe the regulatory schemes identified are more restrictive than necessary to protect the health, safety, or welfare of the public.

Reducing fees and decreasing onerous regulation rank highly among our goals for the agency. We believe the enclosed recommendations further those goals without diminishing protection of the public. Our experience suggests that consumers often overestimate the authority and effectiveness of professional and occupational licensure, resulting in a false sense of security. Accordingly, we are concerned that some regulatory schemes may do more harm than good as consumers increasingly rely on imperfect government regulation as a substitute for their own judgment and inquiry. Moreover, against the backdrop of persistent economic uncertainty, the obstacles created by professional and occupational licensure are particularly suspect.

Thank you for your consideration of these reports, and please do not hesitate to contact us for additional information.

Sincerely,

Catherine Templeton

Catherine B. Templeton

Enclosure

cc: The Honorable W. Greg Ryberg

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[i] "The director annually shall prepare a report to the Governor and the General Assembly indicating those regulated trades, occupations, and professions that do not meet the spirit and intent of § 40-1-10." S.C. Code § 40-1-50.

BOARD OF COSMETOLOGY AND BOARD OF BARBERS

In Fiscal Year 2011, tens of thousands of cosmetologists and barbers collectively paid over $1.7 million to maintain a state license.[1] That $1.7 million bought bureaucrats, board travel, office supplies, lawyers, inspections and investigations. The money is more notable, however, for what it didn't buy: public health, safety, or welfare. Of the 4626 inspections of cosmetology facilities conducted by the State in FY2011, only 5% resulted in citations, and inspectors estimate *only 1% of inspections resulted in citations related to health or sanitation.* Of the 1114 barber inspections, inspectors estimate just over 5% resulted in citations, but no one can be sure due to poor record keeping. Weighing the relatively low risk of harm – and even lower likelihood of prevention by the state – against the high cost of the program begs the question of whether state regulation of Cosmetology and Barbers is a wise investment for taxpayers.

Consumers who feel safe dealing with a regulated industry are lulled into a false sense of security by the appearance of regulation, without regard to the effectiveness of the regulatory scheme. The South Carolina Department of Labor, Licensing and Regulation (LLR) maintains a licensee look up feature on its website so the public can easily check the credentials of their doctor, real estate agent, nurse, etc. Presumably, consumers would utilize this feature before selecting a cosmetologist or barber to ensure that professional is licensed and in good standing. LLR statistics, however, paint a different picture. Consumers of cosmetology services rarely, if ever, access the licensee look up feature. Agency statistics show the Board of Medical Examiners has 1,300% more detail look ups than Cosmetology this year, even though Cosmetology has 17,000 more licensees.[2] Assuming 25% of the population visit a cosmetologist four times a year (though the number is likely much higher), one can conservatively estimate only 5% of consumers check the credentials of their Cosmetologist.[3] Barber records show even less interest by consumers, with nearly 80,000 less look ups than Cosmetology. The paltry number of inquiries in both fields suggests consumers enter into millions of barber and cosmetology transactions a year without regard to state licensure.

Some barbers and cosmetologists maintain there is no substitute for the regulation and discipline provided by the State. Barbers and Cosmetologists, after all, utilize chemicals and processes that can be hazardous to clients. For much of the Barber and Cosmetology Boards' histories, health and safety violations have been addressed through citations issued by state-

[1] FY2011 Cosmetology and Barber Board revenue

[2] 2011 Licensee look up statistics

[3] Licensee look up statistics do not account for the number performed by employers or licensees. The statistics also do not account for multiple look ups for a single individual. Accordingly, the number of unique look ups by consumers is likely much lower than reflected, and therefore, the corresponding percentage of look ups per transaction also is likely much lower.

employed inspectors without the participation of the Board. Going forward, it makes sense that the South Carolina Department of Health and Environmental Control (DHEC) conduct inspections of barber shops and salons, much like DHEC inspects the health and safety of restaurants.

Other concerns related to the skill of practitioners are better addressed by the industry, than a team of inspectors and investigators largely composed of retired military and police. Professional certification (and marketing of that certification) can serve as an effective and representative indication of training and skill. For example, a C.F.P. designation from the Certified Financial Planner Board of Standards, Inc. is indicative of a financial planner's training and skill. Barbers and Cosmetologists concerned about the void left by licensure can develop their own local equivalents of other well known professional designations.

Ultimately, consumers are in the best position to assess the abilities of barbers and cosmetologists by the consumer's own experience and the professional's reputation. It stands to reason that most professionals are selected on this basis anyway, irrespective of an individual's status as a state licensed professional. The marketplace protects consumers in few industries as well as Barbers and Cosmetology, where reputation drives business.

Moreover, even where barbers and cosmetologists break the law, the repercussions for doing so are often so slight as to have no real impact on the health, safety and welfare of the public. In one recent case before the Board of Cosmetology, an entire salon operated for over three years without a license. When the Board discovered this grievous example of unlicensed practice, it levied a menial fine and granted the salon a new license.

At the same time, professional associations of all descriptions grow in terms of membership and resources. The development of a strong professional association provides the assurance to the public that association members undergo rigorous training and adhere to professional standards to maintain membership in the association. A professional association, as distinct from a state board or commission, enjoys the benefits of independence, freedom from costs of doing business unique to government entities, and the flexibility to quickly adapt to changes in the marketplace.

For example, the SC chapter of Realtors represents nearly 1/2 of real estate licensees in the state. Realtors have managed to offer a level of service that makes membership appealing without the compulsion of state law. The Realtors association provides a forum for complaints by consumers and enforces a code of ethics among its membership. With over 44,700 Cosmetology and Barber licensees in South Carolina and professional associations already in place, this model easily could be replicated.

Against a backdrop of varied remedies, privately enforced consumer protections and professional associations, state regulation of Barbers and Cosmetologists has become a redundancy. Those who are wronged in a significant way typically avail themselves of their legal rights in court. Those who experience the embarrassment of an unfortunate hairstyle or a coloring gone wrong regulate with their patronage. Those who feel safe behind state law perhaps should not. The emergence of professional associations, abundance of information about professionals of every description, availability of legal remedies, and skill and experience of DHEC inspectors will undoubtedly fill the void, if any, left by the state Boards of Barbers and Cosmetology. Accordingly, it would be possible to eliminate the boards and repeal the corresponding tax on licensees.

REAL ESTATE COMMISSION

South Carolina regulates over 40 professional areas, including over 70 different types of licenses and registrations. Among the larger license groups are the 12 different types of real estate licensees – from brokers to salesman to property manager and various iterations of the same. The largest population in real estate, active licensed salesmen or brokers, account for over 31,000 of the hundreds of thousands of professionals licensed by LLR.

With so many real estate professionals, one could reasonably assume that a real estate professional is required to buy or sell property; however, a recent survey concluded that 17% of homes are listed for sale without the aid of a real estate licensee. Conversely, many choose to employ real estate professionals for valuable services in terms of pricing and marketing real estate, just as any number of unregulated professionals. In doing so, some rely on licensure as an indication of character and competence. Agency statistics suggest, however, that licensure and discipline don't necessarily weed out agents with dissatisfied customers. Of the 284 complaints disposed of in FY2010, less than 2% resulted in suspension or revocation.[4] 77% of complaints involve no discipline whatsoever.

Some, like Milton Friedman, have observed that certification alternatives to licensure may be better indicators of professional competence:

> "The usual arguments for licensure, and in particular, the paternalistic arguments, are satisfied almost entirely by certification alone. If the argument is that we are too ignorant to judge good practitioners, all that is needed is

[4] FY2010 Real Estate Commission Annual Report

> to make the relevant information available. If, in full knowledge, we still want to go to someone who is not certified, that is our business; we cannot complain that we did not have the information. … I personally find it difficult to see any case for which licensure rather than certification can be justified."

Milton Friedman, Capitalism and Freedom (Chicago: University of Chicago Press, 1962), p. 149.

Those who complain that deregulation would expose consumers to incompetent practitioners ignore the consumer's ability to protect himself through the selection of established, reputable, or certified professionals. With the proliferation of state licenses in a variety of industries, consumers are less likely to look behind the license to a professional's education and experience. Absent the empty comforts of licensure, the marketplace could adequately screen those who are incompetent.

For example, nearly 1/2 of active South Carolina real estate licensees are members of the state's Realtors association. Realtors provide professional services for members, while also providing accountability for the public. In addition to the code of ethics imposed on its members, the Realtors association solicits complaints from consumers.[5] Educational requirements for membership in the association and corresponding certification provide the public with information about professional credentials at least as reliable as that provided through the Real Estate Commission.

This, of course, does not mean consumers always will be safe from unscrupulous or incompetent real estate professionals. Where marketplace incentives and disincentives fail to protect consumers, legal remedies are available. In addition to traditional notions of fraud, breach of contract, and negligence, state and federal law make specific provisions regarding the conduct of parties in real estate transactions. For example, The Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607 (2005), prohibits kickbacks and unearned fees, including any fee, kickback or anything of value being given to or received by anyone in any business that is incident to or part of a settlement service. The Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10, requires real property owners to furnish purchasers with a written statement disclosing the condition of the property. Statutory protections like

[5] See www.screaltors.org (viewed on November 2, 2011)

these for consumers, overlaid with tort claims, provide consumers with ample options, and provide a much stronger disincentive for bad actors than the loss of a real estate license.

Certification and licensure alternatives should not be compared against some ideal of licensure – they should be compared against the experiences of the system as it exists. At present, licensure and discipline fails to prevent complaints and never rights a monetary wrong. A civil suit that could cost a real estate professional everything presents a much more compelling incentive or disincentive than the prospect of losing a real estate license.

Proponents of licensure also presuppose discipline will be meted out fairly and in accordance with the conduct before the Commission. Experience suggests otherwise. In one recent case, a real estate licensee convicted in the beatings of three women received a suspended disciplinary action by the Real Estate Commission. The licensee continued to sell real estate on weekdays, while serving his criminal sentence on the weekends. Such treatment begs the question of how effective regulation can be when convicted criminals are permitted to engage in the practice while contemporaneously serving a sentence.

Consumers looking for justice readily find it in courtrooms, and consumers looking for indications of competence or character find them in the marketplace – while neither are abundantly available through state licensure of real estate.

The erosion of economic liberties and the cartelization of industry through licensing have created innumerable barriers to entry, without achieving a corresponding advancement of the public interest. As government revenues decline and business opportunities become more scarce, prudence demands a reexamination of whether 40 South Carolina industries regulated through LLR require comprehensive government oversight. The presence of marketplace incentives and judicial remedies suggests the answer for real estate professionals could be no.

Vacation Timeshares

The authority of the South Carolina Real Estate Commission begins and ends with license revocation. Victims of vacation timeshare fraud want their money back. Unfortunately for consumers looking for justice at LLR, there is a significant disconnect between these facts. The Real Estate Commission does not award monetary remedies, and license revocations do nothing to replenish depleted savings. Even if license revocations provided meaningful relief to victims, however, fraudsters do not always register with the state; and many salespeople do not have to be licensed, as vacation time share salespeople are allowed to work without registration if employed by the time share developer or seller as an employee.

The Vacation Timeshares Act in South Carolina requires a number of things of sellers – some that could be jettisoned without consequence and others codified as part of judicial remedies. Among the most ineffective, timeshare plans must be registered with the state by a licensee. In order to be properly registered, the seller must provide:

> (a) timeshare contracts with consumers;
> (b) promotional materials, including verbatim scripts of all radio and television advertising;
> (c) description of the selling entity, including a list of all directors, principal officers, dealers, distributors, and sales personnel, and the seller's agent for service of process;
> (d) contracts between seller and businesses providing accommodations;
> (e) rules, regulations, conditions, or limitations on use of the accommodations;
> (f) synopsis of any sales presentation made by the seller to the purchaser over the telephone or other electronic device;
> (g) projected budget of all recurring expenses which may become the responsibility of all time sharing purchasers.[6]

The effectiveness of this registration requirement presupposes that those intending to take advantage of consumers will a) comply with registration requirements, and b) conduct themselves in accordance with the registered and approved timeshare plan. Common sense suggests that those intent on defrauding purchasers are also capable of evading these requirements.

According to the program staff, the most frequent complaints received by the Real Estate Commission related to vacation timeshares cannot be adequately redressed. The majority involve salespeople making misleading representations that bear little relationship to the contract. Unwitting, infirm, or simply excited – consumers often rely on the representations of the salespeople and fail to read and/or understand the contract they sign. These kinds of allegations are difficult to prove, often perpetrated by employees of licensees, and rarely result in disciplinary action against the licensee.

The Vacation Timeshares Act is not without potential, however. For example, the Act requires specific contractual language beside the signature line:

[6] S.C. Code Ann. § 27-32-20.

> "YOU MAY CANCEL THIS CONTRACT WITHOUT PENALTY OR OBLIGATION WITHIN FIVE DAYS AFTER THE DATE YOU SIGN THIS CONTRACT, NOT INCLUDING SUNDAY IF THAT IS THE FIFTH DAY, OR THE DATE YOU RECEIVE THE DISCLOSURE STATEMENT PURSUANT TO Section 27-32-100, WHICHEVER OCCURS LATER. IF YOU DECIDE TO CANCEL, YOU MUST NOTIFY THE SELLER IN WRITING OF YOUR INTENT TO CANCEL BY SENDING NOTICE BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, OR BY ANOTHER VERIFIABLE MEANS, TO (NAME OF SELLER) AT (SELLER'S ADDRESS)."[7]

Specific contractual requirements like these are of much greater benefit to a victim who avails themself of useful judicial causes of action like Fraud, Negligent Misrepresentation, Violation of the Unfair Trade Practices Act, Breach of Contract, etc. Where the statue can place parties of unequal bargaining power on equal footing in court, regulation of Vacation Timeshares can be useful. Where it provides for inept licensure and registration, the regulation places an undue burden on legitimate businesses without achieving a corresponding protection for consumers. Accordingly, licensure and registration related to timeshares could be repealed in favor of provisions tailored for sellers and consumers in litigation.

RESIDENTIAL BUILDERS COMMISSION

Many regulatory schemes simply make more sense on paper than practice. Experience shows that regulations governing industries like residential building can fall woefully short of aiding consumers presented with practical problems. For example, a young family decides to make the addition necessitated by their growing family, a new bedroom and bathroom for their young twins. After years of saving, they have just enough money to hire a residential builder to construct the addition. The family selects a builder, "licensed and bonded" of course, confident that their investment is a sound one that will increase the value of their home.

Six months later, the builder is nowhere to be found and the local building inspector pulls the certificate of occupancy because the partially completed work is so shoddy. Resolute, the family rents a home until the work can be repaired and completed. Recalling that the builder is "licensed and bonded," the family gets an estimate of $103,000 for repairing the work and files a complaint with LLR. First they learn that the builder's bond is only $15,000; and next they learn that when the builder skipped town he left two other homeowners in the lurch who also

[7] S.C. Code Ann. § 27-32-40.

made claims against his bond. LLR informs the family that the three of claimants must split the $15,000. Dismayed, the family wonders how this can be possible?

Since FY2009, consumers lodged over 2,500 complaints against residential builders.[8] 62 of those complaints matured into claims against residential builder's bonds. Some take years to be resolved, and when resolved, many exceed the bond amount. In 2010, more than 1/3 of the claims paid exceeded the bond amount. To date in 2011, 5 of the 11 pay outs have exceeded the $15,000 bond. If substandard work or abandonment resulting in code violations can be proved, the only remedy is an oft-insufficient $15,000 bond. Additionally, if more than one homeowner claims against the bond, the homeowners must share the already insufficient funds. With the state of the economy, and the real estate market in particular, it is easy to conceive of a failed builder leaving numerous homeowners to divide up an already small pie.

In three recent bond claims, homeowners obtained estimates to repair the work of a licensee. At $78,000, $25,000, and $28,000 – all three far surpassed the $15,000 bond available to them. In another recent case, two homeowners obtained estimates for repairs, both in excess of $100,000. If the bond company honors the claims, each homeowner will receive $7,500 and be left to contend with over 90% of their damages.

Homeowners are likely to find that bond payments are not only too little, but also too late. Bond companies rely on LLR to investigate the validity of claims presented. One pending claim currently before the Commission was filed for work performed in 2007. Four years later, the claim remains unresolved and unpaid due to a lengthy investigation that was only recently completed.

Facing the long investigation times and tiny sums available to bond claimants, homeowners must pursue legal remedies and hope the Defendant maintained adequate, current insurance to cover the balance. While some are not so lucky, most significant construction cases are resolved in court – not at LLR. Taxpayers, namely those responsible builders whose fees support the investigations of others, can ill afford to continue funding this ineffective redundancy.

Disciplinary actions by LLR can provide some small consolation to aggrieved homeowners, but only 3% of cases last fiscal year resulted in suspension or revocation of the builder's license.[9] Some builders continue to work despite suspensions and revocations. When LLR and the Residential Builders Commission order a cease and desist, builders circumvent the order by

[8] See FY2009 – FY2011 Residential Builders Commission Annual Reports.
[9] See FY2011 Residential Builders Commission Annual Report.

pulling permits under another builder's license at the municipal level where the state lacks controls. New homeowners are either ignorant to the license situation or complicit in exchange for low cost work. Complicit consumers shield themselves from exposure by borrowing from unsuspecting lenders, adding another degree of harm to already vulnerable financial institutions.

Unlicensed practice carries a misdemeanor charge, but LLR plays no role in criminal prosecution and violations rarely get the attention of prosecutors. Moreover, a misdemeanor does nothing to make victimized homeowners and lenders whole. As in many regulated professions, victims are lulled into a false sense of security by assurances that their builder is "licensed and bonded." Consumers rarely appreciate how little licensed and bonded really means. In fact, 2331 licensees are grandfathered because they practiced before the regulatory act took effect. These grandfathered licensees have no more objective or qualitative training than those who are unlicensed.

Given the inadequacy of the current regulatory scheme, and the actual harm resulting from consumers' false sense of security, the Residential Builders Commission could be abolished. Certification, including educational, insurance and bonding requirements, by professional associations could easily step in to provide a recognizable, meaningful way for consumers to safely select builders.

By way of example, the Home Builders Association of South Carolina offers its 6,400 members benefits in purchasing, insurance, warranties, and education. The Association also provides certification opportunities like the Certified Master Builders of South Carolina. All candidates must qualify through education and other strict requirements. To stay in the program, Certified Master Builders must complete continuing education each year. Contrasted with no state requirements for continuing education and grandfathered licensees with no educational requirements whatsoever, the Home Builders Association and others like it present an appealing alternative to state regulation.

BOARD OF REGISTRATION FOR FORESTERS

The South Carolina State Board of Registration for Foresters was created in 1961, and provides very broad regulation of the practice of forestry. The state requires a license to provide "any professional service relating to forestry, such as consultation, investigation, evaluation, planning, or responsible supervision of forest management, protection, silviculture,

measurements, utilization, economics, education, or other forestry activities in connection with any public or private lands."[10]

Forestry is not without risk to landowners and natural resources. Like many industries, however, institutional and market safeguards exist that provide adequate protection. In the last five years, LLR investigated just two complaints against Foresters, and both were dismissed without any disciplinary action.

According to agency staff, the most common problem in forestry stems from contractual disputes between landowners and those who buy their timber. Timber buyers are not required to be licensed foresters. So while foresters often aid landowners in negotiating the sale of timber, nothing prohibits a landowner from negotiating timber sales personally. In other words, no licensure is required to engage in the activity most apt to injure consumers. In addition, LLR does not play the most significant role in the timber risks faced by landowners, as the South Carolina Forestry Commission investigates fraud and theft in timber.[11]

In recognition of these issues, the Legislative Audit Council stated in a March 2002 report that it "could not identify a connection between the regulation of the practice of forestry and protection of the public."[12] The LAC continued: "The board has done little to ensure that landowners consult registered foresters or to enforce the law requiring registration. Existing civil and criminal penalties for timber theft and fraud address the potential harm from incompetent practice." This report follows two earlier reports recommending that the state abolish the Board of Registration for Foresters and end licensure of foresters.

Errors in forestry can be costly, but LLR provides no remedies for an aggrieved landowner other than discipline against a professional license. Remuneration for landowners is exclusively obtained through the courts, settlement, insurance, or a combination of the three. Because landowners requiring the services of a forester are relatively few, it seems unlikely a landowner would retain a professional based on licensure; rather, landowners likely consider a forester's reputation first and foremost. Moreover, where landowners are concerned, the best assurance is to retain a forester who carries specialized insurance policies specific to the risks faced by consultant foresters.

[10] S.C. Code Ann. § 48-27-10.
[11] See S.C. Code Ann. §48-23-97 and § 48-23-265.
[12] "Regulation of the Profession of Forestry", Legislative Audit Council Report (March 2002).

In addition, forestry education and certification programs provide evidence of expertise. For example, the South Carolina Forestry Association conducts training and certification. The association posts a roster of "SFI Trained" professionals on its website. SFI Trained status is awarded upon completion of the SCFA Timber Operations Professional (TOP) Program or comparable course approved as meeting Sustainable Forestry Initiative, Inc. guidelines for logger training and education.

The Forestry Commission and other natural resource agencies have professionals that can assist landowners with project planning and implementation. Many of these services can be provided free of charge. As such, a consumer who coordinates with a government forester, as well as a private consulting forester, can rely on the concurrence of opinions in assessing advice.

The market for forestry services, available insurance and court remedies, and active professional associations and certifications combine to greatly minimize the risks faced by consumers of forestry services. In light of the overlap between these elements and the Board of Registration for Foresters, the Registration of Foresters Act could be repealed as an unnecessary layer of regulation.

BOARD OF REGISTRATION FOR GEOLOGISTS

The South Carolina State Board of Registration for Geologists was created in 1986 to regulate the public practice of geology. In 1993, South Carolina was one of only 7 states that regulated the practice of geology and the only state that required mandatory continuing education in order to renew a license. Since that time the number of states that regulate geologists by registration, certification, or licensure increased more than four-fold. Some of those states, like South Carolina, have run roughshod over the statutory threshold for professional licensure. In South Carolina,

> [t]he right of a person to engage in a lawful profession, trade, or occupation of choice is clearly protected by both the Constitution of the United States and the Constitution of the State of South Carolina. The State cannot abridge this right except as a reasonable exercise of its police powers when it is clearly found that abridgement is necessary for the preservation of the health, safety, and welfare of the public.[13]

[13] S.C. Code Ann. § 40-1-10

Many professions seek licensure to protect and enhance the stature and profitability of their profession. State law requires, however, a clear finding of need to preserve the health, safety, and welfare *of the public*. Through that statutory and Constitutional lens, it is hardly clear that state regulation of the practice of geology is necessary.

South Carolina law reflects the interrelationship of public geology with other aspects of government regulation. Current law requires that a person hold a state issued license to engage in "the performance of geological service or work in the nature of consultation, investigation, surveys, evaluations, planning, mapping, and inspection of geological work required for or supporting compliance with municipal, county, State of South Carolina, or federal regulations."[14] Thus, by definition, each project for which a license to practice public geology is required is a project that is already subject to another independent regulatory scheme which is structured to provide primary protection of the environment. For examples, state regulatory programs requiring geologic work include: State Underground Petroleum Environmental Response Bank Act, Hazardous Waste Management Location, Primary Drinking Water Regulations, and Drycleaning Facility Restoration. Few, if any, of these projects are undertaken by unsophisticated or uninformed individual consumers who cannot evaluate the professional credentials of a consultant bidding for the work.

The protection from other statutory schemes, corresponding low risk of unregulated practice, and absence of any residual threat to public health, safety, or welfare is supported by low levels of complaint and disciplinary activity. A review of disciplinary actions taken against South Carolina Registered Geologists reveals just two: one for unlicensed practice and another for failing to complete continuing education requirements. No disciplinary actions have been taken for professional negligence or unethical conduct.

Proponents of regulation often cite licensure as a means of protecting the public from unqualified practitioners. The state Board of Registration for Geologists, like many other professional and occupational licensing bodies, only has jurisdiction over the actions of current and former licensees. The Board may only issue cease and desist orders, as penalties for unlicensed practice must be brought by local prosecutors.

Experience shows consumers rarely rely on licensure in selecting a geologist. The South Carolina Department of Labor, Licensing and Regulation (LLR) maintains a licensee look up feature on its website so the public can easily check the credentials of regulated professions. In 2011, only 1,501 general searches were performed for geologists – the least of any profession or occupation licensed by LLR.

[14] S.C. Code Ann. § 40-77-20.

Like a number of other professions, Geologists typically work for sophisticated or institutional clients capable of safeguarding their own interests without reference to licensure or government intervention, as underscored by the complete absence of meaningful discipline meted out by the Board of Registration. The vast majority of geologists are employed by firms, government, or extraction companies. In fact, almost ¼ of geologists work for the government.[15] Many geologists earn PhD or master's degrees; almost 70% of new PhDs are employed in academia[16] and 46% of new master's graduates work in academia or government.[17] Less that 2.4 percent of geoscientists are self-employed.[18]

Moreover, professional associations certify the education and experience of geologists independent of state licensure. For example, the American Institute of Professional Geologists offers the "Certified Professional Geologist" designation. To qualify, an applicant must complete 36 semester or 54 quarter hours in geological sciences with a baccalaureate or higher degree, gain experience 8 years beyond bachelor's degree, or 7 years beyond master's degree, or 5 years beyond doctorate; and obtain 3 sponsors from professional geologists. With alternatives like certification readily available, deregulation of Geology can be accomplished without threatening the health, safety, and welfare of the public or diminishing consumers ability to discern between competing professionals.

ENVIRONMENTAL CERTIFICATION BOARD

LLR keeps records for 35 classes of licensure in 6 major categories under the Environmental Certification Board. The board licenses biological wastewater treatment operators, bottle water operators, water distribution system operators, and wastewater treatment operators. The categories are further broken down into classes based on experience and testing. After navigating this byzantine licensure scheme, environmental licensees work for government entities or in areas heavily regulated by State and Federal law. Nationally, 78% of water and wastewater treatment plant and system operators work for local governments. [19] Accordingly,

[15] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Geoscientists and Hydrologists, on the Internet at http://www.bls.gov/oco/ocos312.htm (visited *October 04, 2011*).
[16] AGI Geoscience Workforce Program, data derived from *AGI/AGU Survey of New Geoscience PhDs, Class of 2006*.
[17] AGI Geoscience Workforce Program,data derived *AGI/AGU Survey of New Geoscience Master's (2006).*
[18] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Geoscientists and Hydrologists, on the Internet at http://www.bls.gov/oco/ocos312.htm (visited *October 28, 2011*).
[19] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Water and Liquid Waste Treatment Plant and System Operators, on the Internet at http://www.bls.gov/oco/ocos229.htm (visited *October 28, 2011*).

licensees practice in an environment with an institutional devotion to the public interest, overlaid with significant regulation to ensure acceptable standards of water quality.
Even where licensure can be said to weed out inept or unethical professionals, investigation and disciplinary statistics reflect little impact. Of the 22 cases decided in 2010, 11 were dismissed with no disciplinary action.[20] The majority of the remainder resulted in minor disciplinary action against the licensee. Due to the specific nature of the field, potential employers can rely on former employers for information just as easily as they might reference disciplinary actions. Along the same lines, employers can determine an applicant's qualifications in terms of education and experience at the time of hiring. Mandatory educational or testing requirements for operators could be rolled into DHEC regulation of facilities without imposing additional burdens on DHEC programs or maintaining a redundant licensure scheme at LLR.

In a field characterized by government employment and substantive regulation, licensure proves to be little more than a costly redundancy and a burden on licensees. Accordingly, the Environmental Certification Board could be dissolved.

SOIL CLASSIFIER ADVISORY COUNCIL

State law makes no provision for licensure driven by a desire to protect or promote a profession; rather, licensure can be a response to an existing or emerging risk to public welfare. In the case of soil classifiers, consumers of their services are sophisticated actors who possess the knowledge and wherewithal to protect their interests without government intervention.
Soil Classifying means

> "any service or work, the adequate performance of which requires education in the physical, chemical, biological, and soil sciences, training and experience in the application of the special knowledge of these sciences to soil classification, soil classification by accepted principles and methods, investigation, evaluation and consultation on the effect of measured, observed, and inferred soil properties upon various uses, the preparation of soil descriptions, maps and reports and interpretive drawings, maps and reports of soil properties and the effect of soil properties upon various uses, and the effect of various uses upon kinds of

[20] FY2010 Environmental Certification Annual Board Report.

> soil, any of which embraces this service or work, either public or private, incidental to the practice of soil classifying."[21]

In practical terms, soil classifiers activities include conducting soil surveys, preparing reports describing land and soil characteristics for timber sales, agriculture, watershed rehabilitation projects, transportation planning, and recreation development, and regulating the use of land and soil resources by private and public interests. Nearly all of these activities necessarily involve either regulated activities or other licensed professionals. Developers, engineers, geologists, academia, government – these substantially comprise the limited clientele of soil classifiers. Most if not all are capable of selecting and working with soil classifiers without licensure. Even when these relationships sour, the Soil Classifiers Advisory Council lacks the authority to resolve disputes or attempt to make the complainant whole. As such, when intervention or conflict resolution becomes necessary, it is best suited for the judicial branch.

Irrespective of the delivery method for conflict resolution, statistics show soil classifiers simply don't need regulation. There are only 48 soil classifiers licensed in South Carolina, 17 of whom reside in South Carolina.[22] Of the balance, 19 are from North Carolina, 10 from Georgia, and two from other states. More South Carolina soil classifiers live in North Carolina than South Carolina. With only 17 total licensees from the state, 30% of the eligible licensees serve on the Advisory Council at any given moment. Moreover, since joining LLR, the agency received only 1 complaint against a soil classifier, which was dismissed summarily for a lack of jurisdiction.

Professional licensure also leads to greater expectations and more rigid requirements by regulators with respect to permitting and review by licensed professionals. Obviously, as more outside consultants must be employed, the cost of doing business increases.

The practice of soil classification arguably falls short of the S.C. Code Ann. § 40-1-10 requirement of necessity for preservation of the health, safety, and welfare of the public. The negligible risks associated with unlicensed practice may not warrant formal licensure, and the soil classifiers program could therefore be dissolved.

LP GAS BOARD

Liquefied petroleum gas (LP gas) consists of hydrocarbons, including propane, propylene, butanes, and butylenes. LP Gas is regulated in South Carolina due to its flammability. LP gas is used in a number of residential and commercial applications, including cooking, heating, drying,

[21] S.C. Code Ann. § 40-65-20
[22] See 2011-2012Professional Soil Classifiers Roster.

refrigeration, greenhouse heating, crop drying, powering equipment, metalworking, ceramic and glass production, and construction. The Board regulates everything from the minimum size of storage containers to the permissible proximity of dealers to their customers.

In 2005, and again in a 2008 follow-up, the Legislative Audit Council reviewed the activities of the LP Gas Board. Their findings are instructive and consistent with the experience of LLR. Among other things, the LAC concluded:

- Based on a S.C. Attorney General's opinion, storage requirements could be unconstitutional.
- The absence of the storage requirements would not result in significant harm to consumers.
- The statute requires storage capacity, but it does not require dealers to keep a specific amount of LP gas on hand at any given time.
- Federal Trade Commission officials stated that storage requirements could have a negative effect on smaller competitors in the LP gas industry.
- Zoning restrictions sometimes prohibit new storage facilities.[23] [24]

The Legislative Audit Council also uncovered evidence of anticompetitive behavior by board members. In this particularly egregious example, board members specifically cited unlawful motivations particular regulatory enactments:

> **JULY 2002 ADMINISTRATIVE HEARING**
>
> Board Member A: That's why I think it's really important about the mileage because I really…I just don't think they need to be coming into South Carolina taking more customers from Carolina dealers.
>
> Member B: That's why the parameters are on there.
>
> Lawyer: … Be real careful now. It is not the purpose of a licensing board to protect the business interest of a licensee. We have always got to talk about protecting the customer. So just be real careful what you say here.

[23] "A Review of the Liquefied Petroleum Gas Board", Legislative Audit Council Report (November 2005)
[24] "A Review of the Liquefied Petroleum Gas Board", Legislative Audit Council Follow-Up Report (February 2008)

Member B: I think I've been called on that on several occasions.

Member A: I just want to make sure everybody's served.

Lawyer: Precisely.
Member A: By people who are close by. [25]

Exchanges like this one cast serious doubt on the suitability of board regulation and licensure for the industry – particularly where a ready, appropriate alternative exists. The Office of the State Fire Marshal regulates other flammable combustible gases and liquids and, therefore, would be a natural fit to administer LP gas regulations. For the forgoing reasons, the LP Gas Board could be dissolved in favor of an approach consistent with that of the majority of states regulating LP Gas through a state agency as opposed to a board.

AUCTIONEERS COMMISSION

Online commerce has transformed nearly every aspect of the global economy, and auctions are no different. Ebay, the global website where practically anyone can auction off their goods, facilitated the sale of $14.7 billion worth of merchandise, not including vehicles, in the third quarter alone of 2011.

Want to get in on a piece of that $14.7 billion in sales? All you really need is a valid email address to register, and your little corner of the global marketplace will be up and running auctions in minutes. Conducting auctions in person, however, is another matter entirely.

The South Carolina state statute is one of the most stringent and restrictive in the country, requiring licensure both of individual auctioneers and of the firm which conducts the auction, participation in a recovery fund, and regular continuing education to renew the license. To obtain an auctioneer's license in South Carolina, an applicant must complete an 80 hour class and pass an examination. Instead of an 80 hour class, an applicant may pass a test and complete a year-long apprenticeship. An acceptable apprenticeship requires eighty hours of supervised training including forty hours of auctioneering, ten hours of auction ringing, twenty hours of clerking, and ten hours of cashiering.[26]

Auctioneers are unique among those regulated by the South Carolina Department of Labor, Licensing & Regulation in that their enterprise is a purely commercial one. Where other

[25] "A Review of the Liquefied Petroleum Gas Board", Legislative Audit Council Report (November 2005)
[26] S.C. Code § 40-6-230

professions may expose individuals or the environment to physical harm, those aggrieved by an auctioneer's errors, omissions, or misdeeds can be made perfectly whole with a monetary remedy. Moreover, many of the same risks of fraud or financial mismanagement cited by proponents of auctioneer licensing are present in any commercial transaction – yet other retailers are not subject to onerous professional licensure requirements.

When examining the consumer protection aspects of the Auctioneers' licensing scheme, it is important to note that all auctions in South Carolina (in addition to the aforementioned online auctions) are not regulated by the Auctioneers' Commission. Auctions under the direction of a public authority or pursuant to judicial order are exempted from the licensing statute. Other auctions are subject to limited regulation. Buyers and sellers at tobacco auctions and the auctions of purebred livestock are not protected by the recovery fund. The auctioneers, themselves, must be licensed. Auction sales of real estate are subject to parallel regulation in that they must also involve a person licensed by the Real Estate Commission. The character of the remaining regulated auctions varies greatly. These sales range from "entertainment" auctions of small items of consigned personal property to the liquidation of major commercial or industrial estates. Because the recovery fund is not authorized to pay more than $20,000 in claims against a single auctioneer in a year and $10,000 for any single transaction, the fund provides very limited consumer protection against major fraud or misconduct. Buyers and sellers at major auctions must still make a personal determination concerning the reliability of the auctioneer or the auction firm.

The negligible risk associated with most auctions and unavailability of remedies for significant auctions simply do not justify such a high threshold for entry and close regulation of the practice. If high risks were inherently present with inexperienced auctioneers, online auction sites requiring very little of sellers would have failed a long time ago. Even the former President of the National Auctioneers equated online and traditional auctions in testimony before the Federal Trade Commission: "[t]he differences between online auctions and traditional auctioneers are minimal. The only significant difference between the two is the choice of medium."[27]
And while the practice may be the same, the business world around the practice changed considerably since Auctions and Auctioneers legislation passed in 1977. The incremental changes to the Act over the years bear little relationship to transformative change in the economy. In fact, some retailers post stronger revenues from Ebay sales than from traditional sales at their bricks and mortar stores; so instead of supplementing income with online auctions, online auctions are driving growth in stores and warehouses. In a struggling economy,

[27] Larry Theurer, National Association of Auctioneers, *Summary of Testimony for the Federal Trade Commission: Possible Anticompetitive Efforts to Restrict Competition on the Internet Workshop*, on the internet at http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/theurer.pdf (visited *October 28, 2011*)

this kind of business dynamic introduces the sort of economic opportunity entrepreneurs are desperate for, and demonstrates the opportunity to abandon outdated regulatory schemes when they lose relevance.