

## REGULATORY REFORM

# THE LATEST ON OCCUPATIONAL LICENSING REFORM

*At the federal level and in the state of Michigan, there have been encouraging moves toward market liberalization.*

✦ BY THOMAS A. HEMPHILL AND JARRETT SKORUP

Occupational licensing reform became a hot-button issue among U.S. policy-makers in 2016, and the first half of 2017 saw reform efforts at the federal and state levels. At the federal level, this activity builds upon two 2015 occupational licensing reports issued by the Brookings Institution and the Obama White House, respectively. At the state level, where most occupational licensing regulation takes place, Michigan has arguably taken the lead in instituting reform initiatives that have removed or reduced barriers to employment.

This reform movement has been further propelled by the 2015 U.S. Supreme Court decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission*. The Court agreed with the FTC's contention that a government-empowered regulatory body operated by an industry group—in this case, a state dental board controlled by market participants who are elected by other market participants—is a non-sovereign “private actor” that is not automatically exempt from antitrust challenges. Where once the courts gave states broad discretion in how they empower these regulatory bodies, the 2015 ruling pointed out “the risk that active market participants will pursue private interests in restraining trade.” This created a new, stricter standard for the state-action immunity doctrine, which now only applies if the state government itself “actively supervises” and accepts legal responsibility for the private actor's decisions.

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## FTC GUIDANCE ON ANTITRUST EXPOSURE

In October 2015, in response to the Supreme Court ruling, the FTC's Bureau of Competition issued a guidance document on state licensing boards. Concerning boards that are not actively managed by state governments, the guidance offers the following advice:

In general a state may avoid all conflict with the federal anti-trust laws by creating regulatory boards that serve only in an advisory capacity, or by staffing a regulatory board exclusively with persons who have no financial interests in the occupation that is being regulated.

However, the FTC recognized the reality that state occupational licensing boards are largely dominated by active members of their respective professions, e.g., physicians regulating other physicians, pharmacists regulating other pharmacists, hair stylists regulating other hair stylists, etc. Under such circumstances, state governments “must accept responsibility for [the boards'] conduct by actively supervising them.”

The FTC guidance reviews the basic components of what would be considered “good supervision.” These include instituting a comprehensive review of a potentially anticompetitive board decision, maintaining a factual record, and awarding state officials—the governor, attorney general, or legislature—the power to veto or modify particular decisions. That veto power is intended to ensure that elected officials are in agreement with state policy.

## OCCUPATIONAL REGULATORY REFORM

In early 2017 the FTC announced the creation of an Economic Liberty Task Force. Its first policy initiative focuses on occupa-

tional licensing. It is intended to support an alternative policy approach relying on competition in the marketplace to protect the public against unqualified service providers. It recommends that voluntary certification or other types of occupational regulation offer less restrictive alternatives that can help some employers and consumers when comparing their options for hiring employees or vendors.

The task force reflects the FTC's growing willingness to push back against industry rent-seeking disguised as government occupational regulation. Maureen Ohlhausen, appointed by President Trump as the acting chair of the FTC, recently told *Forbes* that the agency

can help ensure that [state] legislators hear both sides of the story by using the bully pulpit, commenting on proposed legislation, and partnering with state and local officials who are interested in occupational licensing reform. The FTC has a long history of commenting on proposed state laws, and my task force is going to build on those efforts to help states reform their occupational licensing regimes.

Ohlhausen pointed out that “the uneven licensing of the

same occupation and different requirements for the same license across states strongly suggest that many occupational licenses do not advance public health, safety, or other legitimate public protections.” She went on to say:

I am particularly concerned that occupational licensing disproportionately affects those seeking to move up the lower and middle rungs of the economic ladder, as well as military families and veterans. Occupational licensing regulations can prevent individuals from using their vocational skills and entering new professions, as well as starting small businesses or creating new business models.

Toward that end, a bipartisan, bicameral bill, the New Hope and Opportunity through the Power of Employment (New HOPE) Act, would amend the Perkins Technical Education Act of 2006 to authorize funds to identify and eliminate excessive occupational licensure at the state level. Specifically, those federal funds would be used for consulting and coordinating among state government agencies for the identification, consolidation, or elimination of licenses or certifications that pose an unnecessary barrier to entry for aspiring workers and provide

limited consumer protection.

“Occupational licensing requirements are some of the most burdensome obstacles for aspiring workers and entrepreneurs,” said one of the legislation’s sponsors, Rep. Tim Walberg (R-MI). “Too often, the scope and complexity of these regulations go beyond their intended purpose and place unnecessary barriers on individuals trying to use their skills to earn a paycheck or grow a small business.” Another sponsor, Sen. Gary Peters (D-MI), adds, “This bipartisan legislation will give states the flexibility to streamline the licensing process and reduce barriers to good-paying jobs that enable workers to provide for their families, send their kids to school, and save for retirement.”

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## REGULATORY REFORM

## STATE LICENSING REFORM

The federal antitrust efforts and proposed legislation are promising, but the vast majority of licensing exists at the state level. The 2015 Obama administration report notes that the typical state licenses some 60 different occupations. Yet there is little evidence of positive effects resulting from such licensing on consumer health and safety.

Most economic and policy experts from across the ideological spectrum agree that too many occupations are licensed, with results being negative economic effects. Researchers blame state-level licensing for fewer jobs, higher consumer costs, less competition, increased income inequality, and less social and economic mobility, among other negative externalities. Still, little has been done to lessen the licensing burden across the states. The percentage of workers requiring a license has risen from 5% in 1950 to nearly 30% today.

Michigan, however, is becoming an encouraging exception to that trend. Shortly after he took office in 2011, Gov. Rick Snyder established the Office of Regulatory Reinvention (ORR), which in turn created an occupational licensing advisory rules committee to review the nearly 200 occupations in Michigan that require some form of state licensing. In February 2012 the agency released a report calling for reforms to state licensing laws. It suggests changes based among other things on whether a license protects consumers from harm, requires specialized skills or training, and is aligned with state and national standards. The report offers several policy recommendations, including matching the total revenue from fees charged to licensees to the costs the state incurs in overseeing a licensed occupation (as opposed to using the fees as a general revenue source), reviewing the continuing education requirements, and reviewing licensing boards on “necessity, authority, and proper functions.”

Since the release of the ORR report, Michigan has repealed seven license requirements outright. (As a point of comparison, *nationwide* only about 15 state license requirements have been repealed in recent decades.) These include requirements on dietitians and nutritionists, auctioneers, community planners, oculists, school solicitors, immigration clerical assistants, and interior designers. The state also eliminated a few licensing boards and reduced regulatory requirements in other areas, such as the number of mandated apprenticeship hours required for a barber’s license.

In its current legislative session, the

state seems poised to go further with occupational licensing reform. The Michigan House passed a package of bills that would severely reduce licensing requirements for many contractors, including painters, concrete workers, and window and gutter installers. In addition, about a half-dozen other de-licensing bills have been introduced.

Governor Snyder has made it clear that he does not favor licensing as a regulatory tool. After taking office, he commissioned the ORR report, which led to real policy change, and also sent a letter to Michigan’s House Speaker and Senate majority leader saying he would not approve of new licenses that were not directly related to consumer health and safety. He wrote, “Going forward, we need to continue to exercise diligence and caution in determining whether to impose new regulations or requirements on any occupations—whether previously unregulated or not—and we should enact new restrictions only when they are absolutely necessary to protect the public welfare.”

**Criminal justice reform** / A key focus in Michigan (besides rolling back occupational regulations) is on the criminal justice side of the licensing issue. For many occupations—government employees, public safety workers, and people in the health care field—the state prohibits persons from working in those fields if they have a felony criminal record (with a few exceptions). And like many states, Michigan has “good moral character” provisions in about 75% of its licensing statutes, meaning people can be denied a license based on somewhat arbitrary character issues.

A recent study by Stephen Slivinski of the Center for the Study



of Economic Liberty at Arizona State University found that states with higher licensing barriers saw people more likely to return to prison. The study estimates that

between 1997 and 2007 the states with the heaviest occupational licensing burdens saw an average increase in the three-year, new-crime recidivism rate of over 9 percent. Conversely, the states that had the lowest burdens and no such character provisions saw an average decline in that recidivism rate of nearly 2.5 percent.

In Michigan, there has been bipartisan interest in reducing provisions in state statutes that prevent people with a criminal record from working. Several bills have been taken up to reduce the

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imposition of this penalty, and business groups and a bipartisan panel of lawmakers have begun work on a more comprehensive package of legislation related to the issue.

### LOCAL LICENSING

One particular problem in many states is licensing requirements at the local government level. In many cases, these are for occupations already licensed by the state, meaning that any added regulations are unlikely to positively affect consumer protection. For other occupations, local governments require a license for some occupations that state government does not see a need to regulate.

In Michigan, a prominent example of this is in the city of Detroit. As noted in a recent Mackinac Center licensing study:

Detroit licenses approximately 60 occupations. About half of these are already licensed by the state of Michigan—in these cases, the city simply mandates extra fees and requirements above and beyond what is already required by the state. Some examples include plumbers, electricians, fire alarm technicians, elevator repairmen, and more. The other half of the occupational licenses Detroit requires are for jobs that the state does not require licenses for. Some examples of these include awning erectors, window washers, movers, auctioneers, sign erectors, landscape gardeners, snowplowers, among others.

Michigan is a relatively economically depressed state and Detroit is among the poorest of cities (having emerged from

bankruptcy in 2014). The research shows that eliminating barriers to entry, such as licensing, is a low-cost way of enhancing job growth and consumer wealth.

### POLICY CHALLENGES

The *North Carolina Board of Dental Examiners v. FTC* decision has put states on notice that their boards can be investigated for violation of the federal antitrust law. The FTC strongly recommends that a state legislature should empower a regulatory board to restrict competition only when necessary to protect against a credible risk of harm, such as health and safety risks to consumers. Moreover, “the Federal Trade Commission and its staff have frequently advocated that states avoid unneeded

and burdensome regulation of service providers,” the agency noted in its 2015 guidance. This guidance provides added impetus for proactive state-level occupational regulatory reform efforts

At the state level, governments should take a different approach to occupational licensure. States should thoroughly review all the current licenses on their books and eliminate those that cannot be shown to improve public health and safety. In states where there are no local pre-emption law

on occupational regulation, such legislation needs to be passed to eliminate multiple levels of costly regulation that hinders job entry and reduces competition. Policymakers should also establish criteria for creating new licenses so that new regimes meet strict standards before they are written into law and those regimes utilize the least restrictive typology of occupational regulation that is effective. (See “Occupations: A Hierarchy of Regulatory Options,” Fall 2016.)

Proponents of occupational regulatory reform now have a public policy “window of opportunity” open to get substantive reforms enacted. The question is, do they have the political will to follow through on these bipartisan intentions? R

### READINGS

- “FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants,” issued by the U.S. Federal Trade Commission, October 2015.
- “Occupational Licensing: A Framework for Policymakers,” issued by The White House, July 2015.
- “Protection Racket: Occupational Licensing Laws and the Right to Earn a Living,” by Mark Flatten. Goldwater Institute, December 2016.
- *Reforming Occupational Licensing Policies*, by Morris M. Kleiner. Brookings Institution Press, March 2015.
- “This Isn’t Working: How Michigan’s Licensing Laws Hurt Workers and Consumers,” by Jarrett Skorup. Mackinac Center for Public Policy, March 2017.
- “Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform,” by Stephen Slivinski. Center for the Study of Economic Liberty, Arizona State University, November 2016.