VERMONT SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION
PRELIMINARY SUNRISE ASSESSMENT:
HOME IMPROVEMENT AND CONSTRUCTION CONTRACTORS (2017/18)

This report identifies consumer harm occurring within a narrow but significant band of the unregulated market for professional home-improvement and construction services; compares policy responses prevailing in other states; applies Vermont legislative policy on the regulation of professions and occupations articulated at 26 V.S.A. chapter 57 (§§ 3101-3107); and discusses the costs, benefits, and limitations of regulatory options. Full, qualifications-based licensure is found to be inconsistent with State policy. The least intrusive system recommended to address persistent harms is tiered to include: (1) mandatory, minimally-intrusive registration for providers of residential home-improvement services, and (2) voluntary, State-backed certification, benefitting those practitioners wishing to distinguish themselves in the marketplace, and those consumers seeking verified skills.

I. History

In the first session of the 2017-18 legislative biennium, the Senate Committee on Government Operations, prompted by growing concern about consumer harm in the building trades, requested that the Office of Professional Regulation (hereinafter, OPR or "the Office") commence a sunrise review of available models of regulating home-improvement and construction contractors.

Simultaneous to interest in contractor licensing within the Committees on Government Operations, the Senate Committee on Economic Development, Housing and General Affairs introduced, as a committee bill, S.136 of 2017, captioned "An act relating to miscellaneous consumer protection provisions." Its first section aimed to attack the problem of consumer fraud in home-improvement contracting through amendments to the laws of commerce and trade found at Title 9.

As introduced, S.136 proposed to amend chapter 102 of Title 9, §§ 4001 *et seq*., concerning construction contracts generally, by adding specific requirements applicable to residential home-improvement contracts, backed the Attorney General's civil enforcement authority. The bill proposed to define "residential home improvement contract" as a "contract between a contractor and an owner for work on residential real estate where the estimated value of the work and materials exceeds $5,000.00." Projects fitting into that description would be those involving "a residential structure with one to four dwelling units and the real property on which it is constructed." 2017, S.136, § 1 (as introduced).[1] The bill called for mandatory written contracts on affected projects, each containing basic, required components, such as a statement of maximum price, scope of work, work dates, and a statement that "the contractor warrants that his or her work is free from faulty materials and is performed in a skillful manner according to the standards of the building code applicable for this location or to a higher

[1] Available at https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/S-0136/S-0136%20As%20Introduced.pdf.

standard agreed to by the parties." *Id*. The bill also proposed to limit down payment "to one-third of the maximum price of the contract, or the price of materials, whichever is greater." *Id*. Violations would be cognizable as unfair and deceptive acts in commerce in violation of 9 V.S.A. § 2453 and would therefore subject a contractor to a civil enforcement action by the Attorney General.[2]

After further work in relevant committees, the Senate passed S.136 with its project threshold raised from $5,000.000 to $10,000.00, a definition of "residential real estate" narrowed from four-or-fewer residential dwellings to two-or-fewer; and no limit as to down payment.[3] In the final days of the 2017 session, interested parties, aware that multiple committees were converging on the same problem from different angles, came to agree that more careful exploration of impacts and efficacy would be prudent. The text of Sec. 1 was stricken and replaced with a reporting requirement:

> *(a) Upon completion of its sunrise review concerning construction contractors, the Office of Professional Regulation (the Office), in addition to the House and Senate Committees on Government Operations, shall submit its sunrise report to the House Committee on Commerce and Economic Development and the Senate Committee on Economic Development, Housing and General Affairs.*
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> *(b) As part of its review and report, the Office shall compile information on how other states address consumer protection in home improvement contracts, including whether contracts should be in writing and at what threshold amount, and how such protections should be incorporated into any regulatory structure recommended by the Office.*
> --2017, No. 70, § 1.

In view of this history and the Legislature's instruction, OPR reconceived its sunrise analysis to focus carefully on the nature and origin of found harms, and then to ask not only whether new professional regulation could mitigate those harms if all else were held equal, but first to ask what elements of the existing landscape might be altered to more effectively protect Vermonters while minimizing or avoiding new regulatory mandates.

II. Legal Standards and Analytical Structure

Vermont law sets clear policies and standards for legislative review of proposed licensing statutes. *See* 26 V.S.A. chapter 57. The law calls for a cost-benefit policy analysis of proposals for new professional regulation. The law unambiguously places upon the proponents of new regulation the burden to demonstrate that new regulation is genuinely necessary to protect the public.

> ***It is the policy of the State of Vermont that regulation be imposed upon a profession or occupation solely for the purpose of protecting the public.*** *The General Assembly believes that all individuals should be permitted to enter into a profession or occupation unless there is a demonstrated need for the State to protect the interests of the public by restricting entry into the profession or occupation.* ***If such a need is identified, the form of regulation adopted by the State***

[2] A private right of action offering exemplary treble damages also attaches where a consumer can show that he or she has "sustain[ed] damages or injury as a result of" an unfair and deceptive act in commerce. 9 V.S.A. § 2461(b). But, in relation to evasion of a writing requirement, it may offer less protection than meets the eye: first, because failure to record an agreement in writing almost never will be the proximate cause of a loss; and second, because civil judgments are effective only in the presence of a defendant with attachable assets.

[3] S.136 (2017) as passed by the Senate; available at https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/S-0136/S-0136%20As%20Passed%20by%20the%20Senate%20Unofficial.pdf.

> ***shall be the least restrictive form of regulation necessary to protect the public interest***. *If regulation is imposed, the profession or occupation may be subject to review by the Office of Professional Regulation and the General Assembly to ensure the continuing need for and appropriateness of such regulation.*
> --26 V.S.A. § 3101 (subsection labels omitted; emphasis added).

"Prior to review … and consideration by the General Assembly of any bill to regulate a profession or occupation," OPR is to prepare for the Legislature "a preliminary assessment of whether [a] particular request for regulation meets the criteria set forth in [26 V.S.A. § 3105(a)]." *Id.* § 3105(d). OPR "shall base its written preliminary assessment upon information contained in the request for regulation, oral comments received at the public meeting, written comments submitted after the public meeting, its own budget analysis, and any other information pertinent to the request." CVR 20-4-1: 2.3.

Section 3105(a) provides:

> *A profession or occupation shall be regulated by the state only when:*
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> > *(1) it can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;*
> >
> > *(2) the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability; and*
> >
> > *(3) the public cannot be effectively protected by other means.*

If and only if regulation of the profession is found necessary by the Legislature based upon the § 3105(a) criteria "and considering governmental and societal costs and benefits," then "the least restrictive method of regulation shall be imposed, consistent with the public interest" and the policies set out at *id.* § 3105.

Chapter 57 recognizes a three-part hierarchy of regulation: registration, certification, and licensure:

> ***"Registration"*** *means a process requiring that, prior to rendering services, a practitioner formally notify a regulatory entity of his, her, or its intent to engage in the profession or occupation. Notification may include the name and address of the practitioner, the location of the activity to be performed, and a description of the service to be provided.*
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> ** * **
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> ***"Certification"*** *means a voluntary process by which a statutory regulatory entity grants to a person who has met certain prerequisite qualifications the right to assume or to use the title of the profession or occupation, or the right to assume or use the term "certified" in conjunction with the title. Use of the title or the term "certified," as the case may be, by a person who is not certified is unlawful.*
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> ** * **
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> ***"Licensing"*** *and* ***"licensure"*** *mean a process by which a statutory regulatory entity grants to a person who has met certain prerequisite qualifications the right to perform prescribed professional or occupational tasks and to use the title of the profession or occupation. Practice without a license is unlawful.*
> --26 V.S.A. § 3101a(7), (1), & (2) (ordered respectively; emphasis added).

The law establishes five policies by which to identify the least restrictive regulatory response:

> *(1) if existing common law and statutory civil remedies and criminal sanctions are insufficient to reduce or eliminate existing harm, regulation should occur through enactment of stronger civil remedies and criminal sanctions;*
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> *(2) if a professional or occupational service involves a threat to the public and the service is performed primarily through business entities or facilities that are not regulated, the business entity or the facility should be regulated rather than its employee practitioners;*
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> *(3) if the threat to the public health, safety, or welfare, including economic welfare, is relatively small, regulation should be through a system of registration;*
>
> *(4) if the consumer may have a substantial interest in relying on the qualifications of the practitioner, regulation should be through a system of certification; or*
>
> (5) *if it is apparent that the public cannot be adequately protected by any other means, a system of licensure should be imposed.*
>
> -- 26 V.S.A. § 3105(b)(1)-(5).

Finally, Chapter 57 identifies ten questions judged by the Legislature to be so consistently relevant to sunrise analysis that they should be asked of all proposals for new regulation:

> *(1) Why regulation is necessary …*
> *(2) The extent to which practitioners are autonomous…*
> *(3) The efforts that have been made to address the concerns that give rise to the need for regulation…*
> *(4) Why … alternatives to licensure … would not be adequate to protect the public interest…*
> *(5) The benefit to the public if regulation is granted…*
> *(6) The form and powers of the regulatory entity…*
> *(7) The extent to which regulation might harm the public…*
> *(8) How the standards of the profession or occupation will be maintained…*
> *(9) A profile of the practitioners in this state, including a list of associations, organizations, and other groups representing the practitioners including an estimate of the number of practitioners in each group.*
> *(10) The effect that registration, certification, or licensure will have on the costs of the services to the public.*
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> --26 V.S.A. § 3107 (omitting more descriptive subcategories).

III. Outreach

The Office held three public hearings in Montpelier, two occurring during the business day, one in the evening, all broadcast by videoconference to interested participants who could not attend in person. We publicized the sunrise analysis by sending fliers and mailers to building supply companies and professional associations, and by direct email outreach to known interested parties, including all Vermont licensed engineers, architects, real estate appraisers, and real estate brokers. The first hearing generated only one attendee.[4] A second hearing, joined by representatives from the Attorney General's

[4] A full-time home-improvement contractor and former registered lobbyist from Lamoille County, he offered a combination of real-world experience and familiarity with the legislative process that was so extraordinary the lonely hearing went on for more than an hour.

Consumer Assistance Program, saw approximately 12 attendees. Approximately 20 Vermonters braved a snowstorm to join the third and most robust hearing, which carried on well into the evening. An extraordinary 120 written comments were received.

General public awareness of the process benefitted tremendously from two brief television news stories, carried statewide by WCAX television, directing interested persons to the sunrise website. Facebook commentary on the station's page provided a kind of shadow forum for public comment and seems to have appealed to those who may have been disinclined to write directly to the State.

Motivation bias is inherent to any voluntary solicitation of feedback. No consumer writes the State or sits through a three-hour public hearing for a chance to say that he hired a contractor at a reasonable price; it went mostly as expected; and all is right with the world. Likewise, few contractors would rationally participate for a chance to say that $50 in annual regulatory expense might shake out bad seeds but might not. With that in mind, the public comments and public hearings in this matter—appealing, as they inevitably did, to those with strong preexisting views—were notable for participants' openness to other perspectives and interest in nuance. We are comfortable that this sunrise process garnered valuable perspectives from a diverse range of Vermonters expert in the building trades, affected by the work of contractors, interested in the State's business climate, interested in consumer protection, or simply curious about the prospect of new legislation. It is hard to overstate how grateful we are for the civility, thoughtfulness, and insight shown by those who took time to participate.

IV. Identifying Harms and Remedial Potential

Vermonters wronged by practitioners in *regulated* fields can make their way to the appropriate regulator using little more than an internet search engine. Vermonters wronged by practitioners in *unregulated* fields cannot turn to a regulator for help, and for them, the Attorney General's Consumer Assistance Program (CAP) stands as the default executive authority from which to seek help. Consequently, CAP tends to serve as the canary in the coal mine of unregulated professional-service markets.

CAP's compilation of consumer complaints offers some of the most concrete information available from and about consumers aggrieved by providers of contracting services. CAP attorneys express special concern about consumer vulnerability in the home-improvement and construction market. The first section of S.136 of 2017, discussed above, reflected CAP's ongoing concern that available civil and criminal tools have proven insufficient to responsibly protect Vermont homeowners when a home-improvement project goes wrong.

In the five-year period from 2012 to 2017, CAP received 587 consumer complaints about home-improvement services, with claimed losses exceeding $3.1 million. Were OPR to observe complaint volume of that character in any regulated profession—including those, like nursing, where practitioners are far more numerous than contractors—we would conclude either that we have a genuine epidemic of misconduct, or else that some unique social phenomenon is leading consumers to expect something fundamentally different from what they are getting from honest practitioners.

Empiricists are fond of saying, usually with a sneer, that the plural of *anecdote* is not *data*. So it is well to pause here to acknowledge serious limitations bounding even our best information. The CAP

compilation arises from self-reports from motivated consumers and emphatically is not a scientific sample of home-improvement consumers. It is anecdotes in the form of a spreadsheet.

At first, recalling the limitations of our knowledge may suggest things could be less dire than they appear. One would not purport to assess the economic damage from medical malpractice by visiting the civil courts and aggregating the damage claims in plaintiffs' complaints. Plaintiffs do not aim low, and many of their complaints, when resolved, prove not to have merit. The same may be true of CAP complainants generally. By aggregating claims without validating those claims, we could grossly overestimate economic harm.

But the same limitations may lead us to forget real-world harms this particular information inevitably misses. Public health researchers argue persuasively that most medical malpractice goes undetected, and when detected, rarely results in a suit or insurance settlement. In this analogous assessment, we must be mindful that we know only how many Vermonters were motivated to do an unusual thing: identify wrongdoing by a contractor, give up on resolving it directly with that contractor, give up finding relief as plaintiff in a civil action, locate a very specific division of government with limited ability to offer an immediate solution, and engage in a process that looks from most perspectives like voluntary, postal mediation with the same contractor they couldn't come to terms with on their own. Not everyone harmed by a contractor would do that, or know to do it. By relying exclusively upon self-reports from a unique and unrepresentative universe of consumers—and along the way, excluding latent life-safety issues of which those consumers would be unaware—we could grossly underestimate economic harm.

As we proceed to discuss OPR's findings of harm, derived from public comments, public hearings, CAP reports, and other external authorities, it may be helpful to summarize in a sentence what we can say with confidence: *Vermont homeowners are being harmed by the unregulated practice of home-improvement contracting, to a degree that would be considered significant by any reasonable observer, but the particular economic cost cannot be determined from available data.*

Those concessions behind us, there is much in our limited data to inform sound policymaking.

a. Observable Patterns

Among the 587 CAP claims reported in the past five years and the stories shared by sunrise participants, the most striking characteristics are found in: (1) the narrow distribution of damage claims, (2) the outsize role of deposits, (3) the consistency of sources, and (4) the unique vulnerability of the consumer-occupant.

Damage claims filed with CAP fall very consistently within the range of several hundred dollars to $35,000. Three-hundred-fifty-seven of 587, or 61%, corresponded with damages under $5,000; 413 of 587, or 70%, corresponded with damages under $10,000.[5] Only 18 claims exceeded $40,000; 11

[5] Recall that an intermediate amendment to S.136 would have applied written-contract and warranty requirements only to jobs exceeding $10,000 in value, while the as-introduced threshold would have applied a $5,000 threshold. Though the threshold used by S.136, job size, is apples-and-oranges to the metric assessed by CAP, claimed damage, it is reasonable to infer that the fixes in S.136 would not have reached many of the jobs that led to CAP complaints. A lower threshold would be preferable and may tend to facilitate enforcement in small claims that is presently forgone for lack of documentary evidence.

exceeded $60,000; 7 exceeded $80,000; and 4, or slightly less than one complaint per year of data collection, exceeded $100,000.

Deposits play a striking role. Deposit cases account for 263 of 587, or 45%, of all CAP complaints related to home-improvement services and about 37% of all claimed losses.[6]

We can also draw conclusions about the character of the work leading to consumer harm. Complaints to CAP, and those shared by Vermonters in the sunrise process, relate almost exclusively to residential work, and almost always in the context of owner occupancy. Complaints about contractor work on large commercial projects and public buildings were nearly nonexistent. Although five or so Vermonters each year file complaints about painters, and about the same number file complaints about driveway work, and a handful are aggrieved by exterminators and alarm installers, CAP's five-year complaint compendium is dominated by claims of harm caused by roofers and contractor/builders.[7]

Finally, work on occupied dwellings presents a special risk of harm. Though they were few, the most memorable and troubling stories in our public hearings came from Vermonters displaced from their homes by contractor walk-offs or grossly incompetent work. Once it occurs, displacement from one's home is irrevocably injurious and resistant to mitigation by traditional civil and criminal remedies. Legal processes take time, and a person unable to live in his or her only home does not have time. A court cannot command a contractor to magically restore a home's plumbing or make its kitchen safe for use. The threat of prison—which is rarely a genuine threat—also cannot induce a contractor in personal dysfunction to competently complete work he does not understand with tools he does not have. Insurance, where it provides coverage, is a powerful tool with which at least to ensure affected homeowners are put up somewhere, but as a government, Vermont offers homeowners no assurance of basic competence and accountability specific to home-improvement contractors. One hearing participant noted that the State regulates who can paint fingernails, but not who can work on the most valuable asset most people own, which can be rendered uninhabitable by negligence.[8]

Though CAP damage claims are individually smaller than expected, this is not a story of nobody losing any real money. It is a story of hundreds of Vermonters losing $3,000, or $5,000, or $7,000 at a time and finding no recourse, despite a slim majority of all loss claims falling beneath the jurisdictional cap for the small-claims courts. For the very unlucky, it is a story of displacement or destroyed asset value, where civil remedies are distant and uncertain. The phenomenon of broad, small consumer losses, punctuated by rare cases of displacement, explains persistent frustration among consumers and State officials assigned to assist them. There is a gap between the end of small-claims jurisdiction and the beginning of economically-rational civil litigation, and CAP has watched hundreds of people fall into it.

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[6] Claims arising from deposits are comparatively more concrete than those arising from negligent work, so the role of deposits in real losses, as compared to claimed losses, may be underestimated by taking the ratio of total claims.

[7] Another caveat: Subcategory complaint ratios are not controlled for marketplace activity in each subcategory. If builder/contractors do fifty times more work than landscapers, and both generate complaints at the same rate, CAP will have fifty times more complaints about builder/contractors. Readers could be tempted to think contractors are conspicuously problematic when they are merely conspicuously numerous. Nonetheless, among subcategories, roofers stick out like a sore thumb (90 complaints).

[8] This is a more powerful argument that we should not license nail technicians than that we should license builders, but point taken.

To the extent we can draw a bullseye around the sources of un-remedied consumer harm reported to the Attorney General, we should draw it around professionals doing comparatively small construction work, generally involving significant deposits, on or within the building envelope of residential dwellings. We should make sure roofers are inside the circle. And we should attach a flashing light to jobs that could displace a consumer if done wrong or abandoned.

b. Fraud

The characteristics of home-improvement contracting lend themselves perfectly to fraud. Expensive, job-specific materials must be obtained prior to performance, so down payment is rational and necessary. Most work is novel, so the median homeowner-client is inexperienced, unfamiliar with industry norms, and unlikely to have had prior dealings with his contractor counterpart. These characteristics make home-improvement offerings ideal bait for criminal fraud by individuals who are not bona fide contractors.

And then there are frauds of desperation: Some people who conceive of themselves as bona fide contractors may fall into dysfunctional or desperate personal circumstances where it is too easy to meet urgent personal wants or needs by reaching into a homeowner's deposit. Other professionals who handle significant client monies, like attorneys and real-estate brokers, are governed by strict rules that prevent comingling and premature distribution of funds. Deposits held by contractors are not overseen.

Where a person holding himself out as a contractor takes a $10,000 deposit to build an addition, and then disappears without performing any work, or with only a quarter of the work complete, one is less inclined to see an incompetent contractor than to see a competent criminal. Accordingly, Vermont's criminal law has a robust section dedicated to home-improvement fraud:

> *(a) As used in this section, "home improvement" includes the fixing, replacing, remodeling, removing, renovation, alteration, conversion, improvement, demolition, or rehabilitation of or addition to any building or land, or any portion thereof, which is used or designed to be used as a residence or dwelling unit. Home improvement shall include the construction, replacement, installation, paving, or improvement of driveways, roofs, and sidewalks, and the limbing, pruning, and removal of trees or shrubbery and other improvements to structures or upon land that is adjacent to a dwelling house.*
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> *(b) (1) A person commits the offense of home improvement fraud when he or she enters into a contract or agreement, written or oral, for $500.00 or more, with an owner for home improvement, or into several contracts or agreements for $2,500.00 or more in the aggregate, with more than one owner for home improvement, and he or she knowingly:*
>
> *(A) fails to perform the contract or agreement, in whole or in part; and*
>
> *(B) when the owner requests performance or a refund of payment made, the person fails to either:*
>
> *(i) refund the payment; or*
>
> *(ii) make and comply with a definite plan for completion of the work that is agreed to by the owner;*
>
> *(2) misrepresents a material fact relating to the terms of the contract or agreement or to the condition of any portion of the property involved;*
>
> *(3) uses or employs any unfair or deceptive act or practice in order to induce, encourage, or solicit such person to enter into any contract or agreement or to modify the terms of the original contract or agreement; or*
>
> *(4) when there is a declared state of emergency, charges for goods or services related to the emergency a price that exceeds two times the average price for the goods or services and the increase is not attributable to the additional costs incurred in connection with providing those goods or services.*

(c) Whenever a person is convicted of home improvement fraud or of fraudulent acts related to home improvement:

(1) the person shall notify the Office of Attorney General;
(2) the court shall notify the Office of the Attorney General; and
(3) the Office of Attorney General shall place the person's name on the Home Improvement Fraud Registry.

(d) *(1) A person who violates subsection (b) of this section shall be imprisoned not more than two years or fined not more than $1,000.00, or both, if the loss to a single consumer is less than $1,000.00.*
(2) A person who is convicted of a second or subsequent violation of subdivision (1) of this subsection shall be imprisoned not more than three years or fined not more than $5,000.00, or both.
(3) A person who violates subsection (b) of this section shall be imprisoned not more than three years or fined not more than $5,000.00, or both, if:
(A) the loss to a single consumer is $1,000.00 or more; or
(B) the loss to more than one consumer is $2,500.00 or more in the aggregate.
(4) A person who is convicted of a second or subsequent violation of subdivision (3) of this subsection shall be imprisoned not more than five years or fined not more than $10,000.00, or both.
(5) A person who violates subsection (c) or (e) of this section shall be imprisoned for not more than two years or fined not more than $1,000.00, or both.

(e) A person who is sentenced pursuant to subdivision (d)(2), (3), or (4) of this section, or convicted of fraudulent acts related to home improvement, may engage in home improvement activities for compensation only if:

(1) the work is for a company or individual engaged in home improvement activities, and the person first notifies the company or individual of the conviction and notifies the Office of Attorney General of the person's current address and telephone number; the name, address, and telephone number of the company or individual for whom the person is going to work; and the date on which the person will start working for the company or individual; or
(2) the person notifies the Office of Attorney General of the intent to engage in home improvement activities, and that the person has filed a surety bond or an irrevocable letter of credit with the Office in an amount of not less than $50,000.00, and pays on a regular basis all fees associated with maintaining such bond or letter of credit.

(f) The Office of Attorney General shall release the letter of credit at such time when:

(1) any claims against the person relating to home improvement fraud have been paid;
(2) there are no pending actions or claims against the person for home improvement fraud; and
(3) the person has not been engaged in home improvement activities for at least six years and has signed an affidavit so attesting

--13 V.S.A. § 2029.

This section of Title 13 is extraordinary in: (1) reaching not only wholesale fraud, but also failure to perform "in part," (2) containing a felony enhancement for second and subsequent convictions, (3) attaching all convictions to entry upon a Home Improvement Fraud Registry, (4) prohibiting any future home-improvement employment except by notice to an employer or maintenance of a $50,000 surety bond with the Office of the Attorney General (OAG), and (5) applying post-conviction obligations not only upon persons convicted under the section, but also upon persons "convicted of … [other] fraudulent acts related to home improvement." *Id.*

The system does not go unused. The OAG posts an online Home Improvement Fraud Registry listing ninety-one persons convicted under 13 V.S.A. § 2029.[9] Vermont prosecutors and courts are using

[9] Available at http://www.ago.vermont.gov/assets/files/Home%20Improvement%20Fraud%20Registry.pdf.

§ 2029 to pursue the State's most serious instances of home-improvement fraud, and the OAG is diligently executing its reporting function.[10]

But within the Registry is clear evidence that it provides incomplete protection for consumers. A single defendant collected seven qualifying convictions in docket years 2009 to 2016. Another defendant accrued ten qualifying convictions in docket years 2008 to 2011. And the post-conviction consumer protections set out at § 2029(e)—those requiring employer oversight or a performance bond—go completely unused in practice. Although a majority of all persons on the Registry are obligated to comply with § 2029(e) if undertaking future home-improvement work, every single person so obligated is listed as non-compliant.

Multiple-docket defendants are not unusual on the Registry; they are typical. Disregard for § 2029(e) is not unusual; it is universal.[11] If deterrence and consumer awareness of the Registry worked as hoped to reduce or eliminate harm to consumers, these patterns would not appear. The OAG site for victims of home-improvement fraud warns consumers frankly:

> *Home improvement problems are among the top ten complaint categories in Vermont and throughout the country. Because your home is probably your most valuable asset, it is particularly important that you protect that asset by making wise decisions when having work done on your home … You can contact the Consumer Assistance Program (CAP) to find out if complaints have been filed against the contractor you are considering hiring. Keep in mind, however, that a lack of complaints doesn't necessarily mean that the contractor is reputable, particularly if he or she is new to the area. Also, some disreputable contractors may change business names to keep a clean record….*[12]

c. Appropriate Regulatory Solutions to Mitigate Fraud

"[I]f existing common law and statutory civil remedies and criminal sanctions are insufficient to reduce or eliminate existing harm, regulation should occur through enactment of stronger civil remedies and criminal sanctions." 26 V.S.A. § 3105(b)(1). Where home-improvement fraud is concerned, however, those have been tried. Small-claims judgments and restitution orders are more easily obtained than enforced. Robust criminal remedies seem to have hit a deterrent ceiling. For these reasons, we find, consistent with the OAG's urging, that a conspicuous amount of fraud in the unregulated marketplace for professional home-improvement services persists despite considerable efforts to combat it. The question becomes what regulation can and cannot do to help.

Regulation cannot frighten criminals out of criminality or provide compensation to the victims of crime.[13] Regulation can provide consumers information with which to avoid criminals. A regulatory

[10] When checked, the Registry was easily found and current within 60 days.

[11] Some individuals required to comply with § 2029(e) before continuing in the field may elect to cease all home-improvement offerings, and so have no reason to demonstrate compliance to the OAG, but it is clear from sequential convictions that this is not the majority case, and that we are instead seeing a deterrent ceiling. The threat of a first entry on the Registry could be a considerable deterrent; the threat of an eighth, not so much.

[12] Excerpted from https://www.uvm.edu/~cap/?Page=hif.html.

[13] Some states do employ compensation funds. This approach is discussed below in a brief survey of other states' practices. Vermont's law of professional regulation does not place regulators in the role of assigning compensation, except for losses arising from pre-paid funeral contracts. We do not recommend a compensation fund. As an equitable matter, good actors would be penalized for the bad acts of others. As a practical matter, no established administrative and adjudicative mechanisms exist to operate such a fund.

solution that adds value in this area would deliver that value not by incapacitating criminals, which is the work of the criminal justice system, but by helping consumers identify good actors. This, in turn, could realize pro-competitive potential by reducing consumer uncertainty, and could deter fraud by making efforts at home-improvement fraud less likely to succeed.

With regard specifically to the prevention of fraud, the least intrusive and least burdensome level of professional regulation—registration—could offer consumers of reasonable diligence a simple tool, presently unavailable in Vermont, with which to ensure that a person purporting to be a contractor actually is in the business he says he is in, is appropriately insured, complies with the business and tax laws binding his honest neighbors and peers, and has so far done nothing to warrant his removal from the list of persons doing that work in the State. A registration requirement would not offer any assurance of professional competency, but for many consumers, an affirmative governmental assurance of basic legal compliance and accountability would be a significant improvement over the *status quo*. This possibility is described further in our recommendations.

d. Incompetence and Unfamiliarity with Code and Best Practices

We have so far discussed harm arising from the tendency of the unregulated market for home-improvement contracting to provide cover for crime and fraud. But not all harm is caused by intentional wrongdoing or gross indifference. Among sunrise participants, we found broad consensus that Vermont is troubled by a weak and often nonexistent system for residential code enforcement, and that our lack of building inspection combines with the absence of contractor regulation to create dangers to the public health, safety, and welfare that are not appreciated by the consumer public.

In many states, rural building inspection falls to the unit of government best suited by scale to perform the task: the county. But in Vermont, our fourteen counties are assigned few executive functions and are not funded or structured in a manner amendable to construction oversight. Consequently, residential building codes are enforced only in the State's largest municipalities, leaving even highly qualified contractors to rely upon industry best practices in the vast majority of the State's territory.

As with harm from fraud, harm from bad building practices bears uniquely upon *residential* building and home improvement. The Department of Public Safety, Division of Fire Safety oversees statewide permitting for public buildings, but in the construction and renovation of residential dwellings of four or fewer units, the descriptor most commonly uttered by sunrise participants was, "Wild West."

Unlike fraud and facially-unsatisfactory performance, a great deal of deficient home-improvement work is not transparent to the consumer and never becomes the subject of any complaint to the government. It is largely seen by other professionals participating in the construction process, or discovered years or decades after the fact, when a latent defect in workmanship becomes patent at huge cost.

Architects and professional engineers were particularly vocal on this issue and attested to observing residential buildings without appropriate firewalls, egress windows, and other basic life-safety elements broadly accepted as necessary in the national homebuilding industry.[14] Their concerns were echoed by

[14] Architects and Engineers tended strongly to favor regulation of contractors, but not unanimously. An architect opposed to regulation explained, "I haven't found there to be a problem with performance by residential

many contractors. Nearly every experienced practitioner—including those opposed to regulation out of skepticism that it could help—had stories to share of opening walls to find them filled with black mold, being called to replace a roof collapsed from incompetent construction, encountering a home with dangerously poor ventilation, or seeing a relatively new home lost to condemnation because of incompetent foundation work. To these professionals, the State's housing stock is part of the State's shared infrastructure, and regulatory neglect of it is wasteful and dangerous in the same way it would be wasteful to allow a bridge to rust for lack of paint. Skilled builders, architects, engineers, and persons interested in environmental conservation see tremendous economic waste arising from unregulated building practices.

Established contractors expressed concern that their peers have not been driven to keep up with rapid developments in building practices and materials science. Many are given to seeing a home as an interactive, mechanical system, where a flaw in one element can have knock-on effects to the livability, safety, and function of other systems. But because consumers cannot see or easily evaluate these systems, they do not necessarily assign them appropriate economic value. This creates an incentive for unregulated contractors, free from code inspection in many parts of the State, to cut corners in a manner inconsistent with evolving standards, or to invest nothing in learning of those standards, to the net detriment of the State's housing stock. A 45-year contractor and owner of a New Haven construction firm explained the effects of the lack of information available to clients:

> *[One harm] is the real cost difference between building and estimating to code, compared to those who do not. The playing field is not even--and will not be even--if left to the unlicensed, uninspected building communities. As with all of us, every dollar we have is precious. Our clients are no different, and are not in the building community; it is not their area of expertise. They trust that when they interview builders and receive estimates from builders that what they receive to evaluate is a fair market check. The difference in cost between the two contractor types is often significant enough that the [non-]code-compliant contractor's numbers are chosen. This in the extreme can put creditable and professional contractors out of business.*[15]

e. Regulatory Solutions to Promote Competence

In an ideal world, we would insist that all attention be directed at improving residential building code enforcement. Commenters emphasized repeatedly that professional regulation of contractors is not and cannot be a substitute for code enforcement, and a few scorned licensure proposals as a political excuse to avoid tackling residential construction oversight. Most thought some regulation of the profession better than none. In the real world, we can indeed do a better job of construction oversight, plausibly by involving architects and engineers in the evaluation of residential construction at critical points, but there is virtually no prospect that a rural State of weak counties can undertake a residential inspection regime in the near term. Practical opportunities to expand residential code enforcement are few enough as not to be a viable solution.

The sunrise process has revealed real harm to the public health, safety, and welfare arising from poor consumer insight into contractor education, training, and experience. Where qualitative information is opaque to consumers, they cannot price it. Where anyone can call himself a contractor, scrupulous

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contractors … The danger with regulating these workers would be to subject them to another fee and additional time complying with the legislation." Those sentiments, resting in fear of costs, are representative of almost all comments discouraging contractor regulation.

[15] Comment of Santa Maria, R., available on file.

practitioners compete with unscrupulous practitioners in an environment where unseen good practice is a competitive disadvantage.

Although it is appealing to imagine that the State should close the field to those without formal training and testing, the Chapter 57 regulatory review principles lead the Office to see deficiencies in competence among some contractors less as a problem requiring occupational-training mandates than as a problem of information asymmetry between homeowners and contractors in the market for home-improvement and construction services. This would suggest a non-coercive mode of regulation—certification—to level the playing field.

If the problem is as supposed, it should right itself in the presence of better consumer insight into practitioner qualifications. If it does not, the problem may not be as supposed. Instead, it may be that consumers are getting what they want, at a price they find tolerable, but without creating conditions upmarket building professionals perceive as desirable.[16] We must remember that, in the context of limited means, the alternative to imperfect home improvement is not perfect home improvement; it is inability to afford needed home maintenance. Rather than knocking all contractors into line with what the State presumes a homogenous group of omniscient consumers with infinite resources would demand, we can provide qualified practitioners who want it a credible signal to show consumers, and then see what they do with it. This possibility offers some of the benefits of licensure with few or none of licensure's detriments, and it is described further in our recommendations.

V. Approaches Prevailing in Other States

Among the states, regulatory approaches to contracting are more varied than in most professions. The OAG entered a helpful chart of state insurance mandates and remedies into the legislative record in 2017.[17]

Twenty-three states and Washington D.C. license residential contractors administratively, whereas ten states regulate contractors through a registration board. Nine states license contractors at the municipal level; and eight states do not regulate contractors. No state could be found using a certification scheme.

Of the regulated states, twelve require a background check for contractors, and fourteen states require contractors to enroll in continuing education. Five states require both background checks and continuing education.

[16] Low-end work acceptable to a consumer could yet be unacceptable to the State for public health and safety reasons.

[17] The OAG's State Summary Law Chart is available at: https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Commerce/Bills/S.136/S.136~Christopher%20Curtis~State%20Summary%20Law%20Chart~4-13-2017.pdf. A similar OAG overview of states with written-contract requirements, including applicable monetary thresholds, is available at: https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Commerce/Bills/S.136/S.136~Christopher%20Curtis~Examples%20of%20States%20Requiring%20Written%20Home%20Improvement%20Contracts~4-13-2017.pdf

Twenty-eight states require contractors to meet minimum financial requirements or possess a "contractor's bond" (surety) to protect the client. For example, the Maryland Home Improvement Commission requires home improvement contractors to show a minimum of $20,000 financial solvency, or proof of a sufficient surety bond/indemnitor. This same standard is shared by both the Oregon Construction Contractors Board, and certain New York municipalities (New York licenses contractors at the local level). The South Carolina Residential Builders Commission requires a minimum bond of $15,000. The Virginia Department of Professional and Occupational Regulation Board for Contractors require a cash deposit or bond of $12,000. Twenty-one states do not require financial surety.

Twenty-four states require some degree of liability insurance. For example, the Georgia State Licensing Board for Residential and General Contractors requires minimum liability insurance coverage of $500,000 per event. The Ohio Construction Industry Licensing Board enforces an identical requirement.

Nineteen states require both liability insurance and proof of solvency. These include but are not limited to Alaska, Florida, Louisiana, Tennessee, West Virginia, California, Utah, and Washington. Mississippi and Nebraska require proof of some liability insurance, but do not appear to specify minimum coverage.

Finally, thirteen states manage residential recovery funds. These are generally funded through licensing fees and construction permits. For example, the Nevada State Contractors Board's fund includes a maximum payout of $35,000 to homeowners. The North Carolina Licensing Board for General Contractors limits payouts to 10% of the total fund value. The Michigan Department of Licensing and Regulatory Affairs' fund allows for a maximum payout of $100,000.

In addition to Vermont, it appears that New Hampshire, Maine, Oklahoma, Wisconsin, and South Dakota, do not regulate residential contractors in any way.

VI. Application of Statutory Criteria; Recommendations

The Office's recommendation as to the necessity of occupational or professional regulation pertaining to home-improvement and residential construction contractors is guided first by the three-part test at 26 V.S.A. § 3105(a). If and only if that three-part test is satisfied, the statute directs us to identify "the least restrictive method of regulation … consistent with the public interest." *Id.* § 3105(b).

a. Sources of Harm Susceptible to Regulation

First, we find that it has been demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public. Disregarding harms that are remote or speculative, we find direct harm arising from two narrow and very different causes:

(1) criminal or civilly-fraudulent exploitation of consumers seeking home-improvement services, facilitated by the necessity of high-dollar deposits and natural consumer inexperience making rare purchases; and

(2) inefficient market matching of homeowners with qualified contractors, arising from poor consumer insight into professional ability, and causing training and compliance disincentives for practitioners.

Second, we find that the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability. With regard to the first source of harm, frauds, consumer-homeowners could benefit from very basic assurance that a professional contractor is known to the State, can be located, and is reasonably likely to be answerable in court for actionable negligence or contractual violations. With regard to the second source of harm, poor selection insight, consumer-homeowners could benefit from credible information, mediated by the State, about which contractors are particularly able in particular subfields within the heterogeneous market for home-improvement services.

Third, we find that means of protecting the public from the identified harms are available without regulating the professional practice of contracting as such, but that each of those means may have maximized its realistic potential in Vermont without acceptably reducing public harm. With regard to frauds, available enforcement tools such as criminal and civil sanctions, and the creation of a Home Improvement Fraud Registry, do accomplish significant good, but are notably poor at deterring recidivism or providing timely compensation to victims. Those tools also are very obscure to the naive consumer, so consumers do not protect themselves against recidivists, even when sanctions technically are publicized. With regard to poor selection insight, the tools available to consumers absent government intervention—reliance upon community reputation, association membership, or non-governmental certification—are useful but incomplete. Poor evaluative insight not only harms consumers but also distorts market incentives in a ways that can discourage practitioner investment in training, can disadvantage honest practitioners, and can frustrate other State policy, such as the Residential Building Energy Standards set out at 30 V.S.A. § 51.

b. Recommended Model

The least restrictive regulatory model consistent with the public interest in this case appears to be one that recognizes the two distinct and narrow sources of harm susceptible to mitigation through professional regulation and tailors solutions to those sources. Efforts to use professional regulation as an alternative to criminal law enforcement, or to municipal code adoption and enforcement, will fail and should not be attempted.

We find no case for restricting the market to qualifications-tested licensees. Home-improvement and construction contractors perform a range of functions far too heterogeneous to be reasonably licensed according to a showing of prerequisite education, training, and experience, so any true licensure program necessarily would be freighted with multiple credentials and scopes of practice. Licensure in this context would be certain to carry unintended and undesirable consequences, including enhanced costs to businesses, labor market restriction, consumer cost inflation, and unjustified intrusion into the liberty of Vermonters to employ whom they wish and to work for those who wish to hire them. The hoped-for benefits of licensure are available through less coercive and less burdensome means.

If the General Assembly is persuaded that the State has exhausted non-regulatory options to mitigate harm from the unregulated market for home-improvement and construction services, it should consider a tiered approach to home-improvement regulation, consisting of mandatory, low-cost, low-burden registration of home-improvement and construction contracting businesses, coupled with the availability of voluntary, State-backed certifications for individuals with particular skillsets.

i. Registration of Contracting Businesses or Independent Contractors

The least intrusive of the recognized modes of professional regulation, registration, would not assess initial or continuing competence, and would not police workmanship, but would aim to cure deficiencies in existing protective measures by increasing the probability that registrants are answerable to civil and criminal process, are insured, and are compliant with other State law and obligations, such as child-support, taxes, judgment orders, and where applicable, the presence of workers' compensation insurance.

Registration provides a limited but significant means of improving marketplace fairness by removing from the legitimate marketplace those few actors who defy their legal obligations. If registration enforcement is effective, the State's many conscientious home-improvement contractors will be less likely to find themselves at a competitive disadvantage for meeting their societal obligations.

Registrations are "licenses" for purposes of 3 V.S.A. § 129a and consequently can be publicly warned, conditioned, or revoked by the Office in the event of misconduct, known in the law of professional regulation as unprofessional conduct. "Failing to comply with provisions of federal or State statutes or rules governing the practice of the profession" is cognizable as unprofessional conduct under *id*. § 129a(a)(3); consequently, in addition to existing remedies, deceptive acts in commerce in violation of 9 V.S.A. § 2453 could be addressed through administrative process against a registration. The efficiency of enforcement through administrative process compares very favorably with that of civil and criminal litigation.

Any statute implementing registration must contain clear limitations on administrative authority to inquire into quality-of-work issues or to adjudicate contract disputes between private parties; otherwise, this low-cost administrative mechanism to keep practitioners answerable to courts and outside legal obligations could itself become an ersatz, administrative small-claims court, where consumers press regulators to prosecute workmanship grievances as issues of professional competence.

"[I}f a professional or occupational service involves a threat to the public and the service is performed primarily through business entities … that are not regulated, the business entity … should be regulated rather than its employee practitioners" 26 V.S.A. § 3105(b)(2). It follows that businesses employing multiple persons to perform home-improvement contracting should be registered as such. Only independent practitioners should be obligated to register as natural persons. Any statute implementing registration must contain an "anti-masking" provision to prevent evasion of discipline by re-incorporation.

ii. Voluntary Certification of Qualified Practitioners

Registration offers a powerful and minimally-burdensome means of blunting consumer harm from fraud. It will not, however, attack the second source of harm identified: Consumers of many contracting services have a substantial interest in verifying practitioner qualifications, and practitioners have a substantial interest in conveying acquired skills to consumers, but the available, non-governmental signaling systems are poorly understood by consumers and consequently perceived as less valuable than they may actually be. This not only leads to poor consumer choice, but also undermines practitioner interest in skill enhancement.

"If the consumer may have a substantial interest in relying on the qualifications of the practitioner, regulation should be through a system of certification." 26 V.S.A. § 3105(b)(4). Certification differs from other modes of professional regulation in that offers a strictly voluntary, governmental validation of particular skills. It imposes no mandatory cost on consumer or practitioner, because it can be done without.

Non-governmental certifications are plentiful, but limited in public-protective utility. Their virtue lies in excellence at initial testing. Their Achilles' heel is an absolute lack of investigative and enforcement authority to monitor certificants post-certification. State certification offers a powerful enhancement to non-governmental validation of qualifications, because the full enforcement authority of the State, administered through a mature system of investigation and discipline applicable across Vermont's regulated professions, can signal to homeowners and consumers not only that a certificant once met a high standard, but also that the certificant has continued in intervening years to preserve the certification through good conduct. The State also provides an accessible forum in case a consumer's experience suggests a certificant should be disciplined.

Because it is optional, the value of a certification is determined ultimately by the marketplace for services. Where a certification is perceived as offering a credible signal that a practitioner is qualified to do a particular thing, qualified practitioners will find the certification worthy of pursuit because it confers marketplace advantage. Consumers will find it a worthy basis of practitioner selection, because it reduces uncertainty as to skills and accountability. In cases where a certification becomes highly credible, certain market participants, such as insurers, large employers, or government purchasers, may begin expecting it or requiring it, incentivizing practitioners to seek it.

Voluntary, governmental certification contains a self-testing mechanism and becomes self-eliminating in the event of failure. We can know whether a governmental certification adds value to the marketplace, because certification itself is a marketplace good, and the marketplace will tell us in time. If a certification is highly sought, we likely are adding value relative to the cost of obtaining the certification. If a certification is ignored, we likely are running a useless program and should shutter it. Any legislation implementing a home-improvement contractor or builder certification system should ensure that a program can stand on its own two feet by providing that certifications must be self-financing within a defined period, and should provide for fee flexibility so that revenues are matched to expenses of administration.

It is neither desirable nor possible to invent certification standards at the State level. A certification program should, as many licensing programs in other states do, attach itself to third-party training and certification programs available on the private market. These are more rigorous and more mature than anything we could conjure within a small administrative agency. There is also significant opportunity for a certification program to address workforce issues and promote other State policy. For example, the vocational and technical centers and Vermont State Colleges System should be consulted, and graduates of known programs could be offered fast-track certification to lower costs of workforce entry. The Homebuilders and Remodelers Association of Northern Vermont and the American Institute of Architects, among others, organize excellent training programs, have been active participants in the sunrise process, and may offer considerable expertise in the development of certification standards appropriate to the unique circumstances of the State and its workforce.

Convergence around certification as a minimally-intrusive regulatory recommendation arose too late in the sunrise process to permit full exploration of available third-party training programs and non-governmental certifications. Any legislation authorizing a home-improvement contractor or builder certification system should defer, to administrative rulemaking or to a successor General Assembly, the job of particularizing certificates and certification standards.

Our hope is that these recommendations may offer the General Assembly options for addressing real and persistent challenges to consumer protection in the market for home-improvement services. We believe this can be accomplished in a manner that empowers consumers and practitioners by providing reliable information to consumers, and enforcing heightened standards for those who opt to be bound to them, thereby incentivizing enhanced contractor training and experience, without imposing undue mandates.

Respectfully submitted to the House and Senate Committees on Government Operations; the House Committee on Commerce and Economic Development; and the Senate Committee on Economic Development, Housing, and General Affairs.

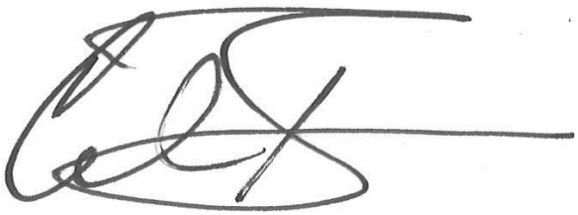
STATE OF VERMONT
SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION

BY:

January 1, 2018

Gabriel M. Gilman — Date
General Counsel

APPROVED:



January 1, 2018

Colin R. Benjamin — Date
Director