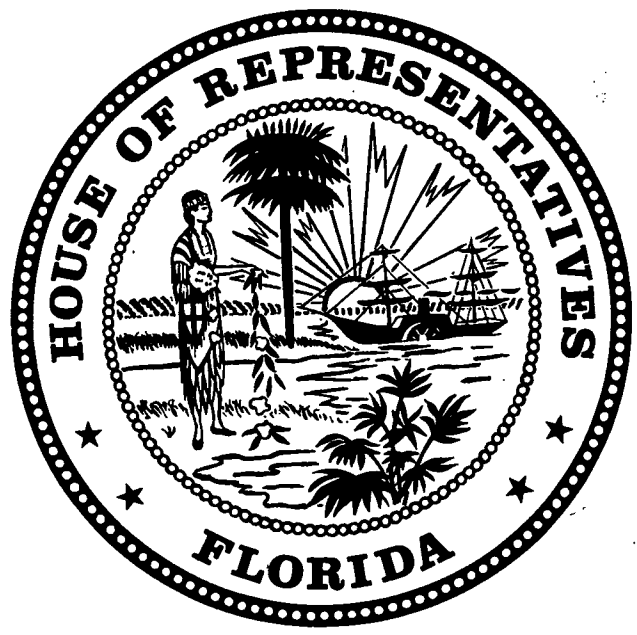


3890

#32919760

C.P.

SUNRISE STUDY
ON THE PROPOSAL TO
ESTABLISH REGULATION OF
PRIVATE HOME BUILDING INSPECTORS



The Honorable Jack N. Tobin, Chairman

The Honorable James Bush III, Vice-Chairman

By the Staff of
 Committee on Business and Professional Regulation
 Lucretia Shaw Collins, Staff Director
 November, 1994

F690.2s
 2958

ACJ3159



SUNRISE STUDY
ON THE PROPOSAL TO
ESTABLISH REGULATION OF
PRIVATE HOME BUILDING INSPECTORS

The Honorable Jack N. Tobin, Chairman

The Honorable James Bush III, Vice-Chairman

By the Staff of
Committee on Business and Professional Regulation
Lucretia Shaw Collins, Staff Director
November, 1994

Contact: Michael J. Loparco

I.	Introduction	1
II.	Executive Summary	3
	A. Background	3
	B. Profile of the Occupation	3
	C. Summary Conclusions	4
	D. Summary Recommendations	6
III.	Government Regulation of Professions or Occupations: When is it Needed? ...	7
	A. Minimum Criteria for Proposing Regulation	7
	B. The Demand for Licensure	8
	C. An Historical Perspective	13
	D. Regulatory Choices: Mandatory Licensure, Registration, or Certification?	15
	1. The Three Types of Regulation	15
	2. Specific Purposes of Regulation	17
	a. David Young's Analysis	17
	b. Thomas Moore's Analysis	19
	c. What Justifies Mandatory Licensure?	21
IV.	Is Government Regulation Needed?	22
	A. Does the Unregulated Practice of this Profession Harm the Public?	22
	B. Is There Insufficient Protection Without Regulation?	23
	C. Will Regulation Accomplish Protection?	24
	D. What will be the Economic Impact of Regulation?	25
V.	The Regulatory Situation in Other States	26
	A. Texas	26
	B. North Carolina	26
	C. South Carolina	26
	D. Maryland	27
	E. Unsuccessful Attempts at Proposed Regulation	27
VI.	Professional Opinions of the Industry	28
VII.	Conclusions	30
VIII.	Recommendations	32
IX.	Appendices	33

I. Introduction

This report is a Sunrise review relating to a proposal to initiate regulation of private home building inspectors in Florida. Section 11.62, Florida Statutes, known as the "Sunrise Act," establishes a procedure for evaluating a proposal to initiate regulation of any occupation, trade, group, or profession.

The purpose of a Sunrise review is to examine the unregulated practice of an activity to determine whether the absence of regulation poses a significant and discernible threat to the public's health, safety, and welfare. If regulation is deemed necessary to protect the public, the review must then determine the least intrusive, least costly, and lowest form of regulation which will accomplish the public protection purpose behind the regulation.

The Sunrise Act (s. 11.62, Florida Statutes) specifically provides that it is the intent of the Legislature:

- 1) That no profession or occupation be subject to regulation by the state unless the regulation is necessary to protect the public health, safety, or welfare from significant and discernible harm or damage and that the police power of the state be exercised only to the extent necessary for that purpose; and
- 2) That no profession or occupation be regulated by the state in a manner that unnecessarily restricts entry into the practice of the profession or occupation or adversely affects the availability of the professional or occupational services to the public.

Therefore, in order for the committee to recommend any form of regulation, the report must conclude that significant and discernible harm will continue without regulation. If this criterion is met, then the level of regulation (mandatory licensure, mandatory registration, or voluntary certification) must be set at the **lowest and least intrusive** level that will accomplish the necessary public protection.

The Sunrise Act requires that the legislature consider four factors before determining that regulation is needed. Those factors are:

- 1) Whether the unregulated practice of the profession or occupation will substantially harm or endanger the public health, safety, or welfare and whether the potential for harm is recognizable and not remote;
- 2) Whether the practice of the profession or occupation requires specialized skill or training, and whether that skill or training is readily measurable or

quantifiable so that examination or training requirements would reasonably assure initial and continuing professional or occupational ability;

- 3) Whether the public is or can be effectively protected by other means; and
- 4) Whether the overall cost-effectiveness and economic impact of the proposed regulation, including the indirect costs to consumers, will be favorable.

The Sunrise questionnaire provides an information base for the committee and allows proponents of regulation to set forth a rationale for such regulation. Upon receipt of the completed questionnaire, committee staff engaged in research to gather further information, and sought to allow those who might oppose regulation to provide arguments and information in support of their position.

Staff sought input from local governments, state agencies, other state governments, and individuals practicing in or affected by the industry. Staff then examined whether the information compiled and the arguments provided were sufficient to justify recommending regulation of private home building inspectors based on the aforementioned factors.

II. Executive Summary

A. Background

In early 1993, Mr. Larry Cerro, on behalf of the Florida Association of Building Inspectors (FABI) and the Florida chapters of the American Society of Home Inspectors (ASHI), initiated efforts to remove private home building inspectors from 1993 legislation affecting public building inspectors. A sunrise study ensued to determine whether or not the need existed to regulate the private inspectors. After receiving the sunrise questionnaire provided by the House Committee on Business and Professional Regulation, the proponents requested more time to adequately and effectively complete the questionnaire and collect the information requested therein. Consequently, the issue was resubmitted as an interim project for 1995.

B. Profile of the Occupation

Home inspectors typically perform pre-purchase home inspections for prospective buyers, wherein the buyer pays a fee ranging from \$100 - \$350 depending on the size of the home, the part of the state in which it is located, age, features, special structures, and the type of report issued. The inspector, who may follow a checklist or provide a narrative report, addresses the overall condition of a home and reports on various repairs that need to be made. While not so concerned with cosmetic features, the inspector checks the electrical system, the heating system, the central air conditioning system, the interior plumbing, the roof and visible insulation, walls, ceilings, floors, windows and doors, the foundation, and basement or crawl space.

Most home inspection reports will not include specific repair methods, and even the most qualified inspector will be limited in providing certain technical information to the buyer. Often times, the home inspector is able to identify a problem and recommend that a licensed tradesman be contacted. In addition to identifying potential problems in the structure of the house or its mechanical components, a home inspector also seeks to educate the home buyer as to how the various systems in the house are designed to work, the appropriate maintenance for the house and systems, and the remaining life expectancies of the various aspects of the house (such as the roof), and their approximate replacement costs. Clarity and fairness are critically important in the communication of the inspector's identification of a problem or potential problem with a house. The home inspector should also communicate to the client that this inspection is one person's visual opinion of potential problems in a house and is not an insurance policy that problems with the house will not surface.

A home inspector may be a former government building official, a licensed contractor, an architect, an engineer, a builder experienced in renovation, a professional who specializes in home inspections, or someone with no reputable qualifications

whatsoever. No matter what the experience or education, it is estimated that there are between 600 and 1000 people currently offering their services as private home inspectors in Florida. Of this group, 186 members and candidates belong to the American Society of Home Inspectors (ASHI), a national professional organization; 72 belong to the Florida Association of Building Inspectors (FABI), a trade association based in Florida; and 20 are members of the National Association of Home Inspectors (NAHI), a national organization.

As home buyers become more concerned about the construction of their homes, especially with much shoddy construction in Florida revealed after Hurricane Andrew, requests for home inspectors to inspect new home construction has increased as well. Such inspections occur in addition to the inspection conducted by the local government building official who is responsible for determining whether the construction meets the requirements of the State Minimum Building Codes, and others, as cited in the Florida Building Codes Act.

C. Summary Conclusions

The Sunrise Act requires that the Legislature consider the following factors before determining whether regulation is needed:

- 1) **Will the unregulated practice of the profession or occupation substantially harm or endanger the public health, safety, or welfare and is the potential for harm recognizable and not remote?**

This report concludes that the unregulated practice of home building inspection does and will substantially harm or endanger the public health, safety, or welfare.

The potential for harm in this industry is real and recognizable. While no one body or organization has jurisdiction to receive complaints for this industry, the aggregate number and the nature of complaints received are significant. The following have received complaints regarding private home inspectors: the Department of Agriculture and Consumer Affairs; the six Better Business Bureau departments in Florida; County Local Licensing Officials; and the Committee on Business and Professional Regulation (once the Sunrise review was initiated).

FABI has 72 official members, the Florida Chapters of ASHI have 186 members and candidates, and NAHI has 20 members. However, there are an estimated 600 to 1000 persons practicing home inspection in Florida. Therefore, there are a substantial number of inspectors practicing without any regulatory body monitoring their performance, and without testing, education, or experience credentials.

- 2) **Does the practice of the profession or occupation require specialized skill or training, and is that skill or training readily measurable or quantifiable so that examination or training requirements would reasonably assure initial and continuing professional or occupational ability?**

The practice of home building inspection requires specialized skill and training. Texas, for instance, requires 15 months of training and several examinations before earning the title of Professional Home Inspector. Both FABI and ASHI require written and verbal tests, and a minimum number of inspections before membership, as well as continuing education once a member. Such training requirements reasonably assure initial and continuing professional ability. Clearly, the potential exists that many inspectors have not substantiated any minimum level of qualifications to practice in the industry.

- 3) **Can the public be effectively protected by other means?**

There are several means of protection other than regulation. The public could rely on word-of-mouth-referrals regarding the qualifications of prospective home inspectors. Also, they could exercise reasonable due care in evaluating for themselves the qualifications of the prospective home inspector before hiring him. [For instance, whether the inspector is a member of a reputable trade association or organization]. However, it may be difficult for the average consumer to adequately and capably evaluate these qualifications. Also, with the possible exception of the different trade organizations, these options generally do not provide any complaint processing or disciplinary capability should the home inspector prove incompetent or unscrupulous.

Therefore, this report concludes that the avenues of protection available to the consumer are not sufficient.

- 4) **Will the overall cost-effectiveness and economic impact of the proposed regulation, including the indirect costs to consumers, be favorable.**

Regulation in almost any form will result in regulatory fees ultimately passed to the consumer. However, regulation will protect the consumer by "weeding out" unscrupulous or incompetent inspectors. In turn, the consumer will avoid costly repairs or potential problems, and if necessary, hold accountable the unqualified inspector for his harmful actions. It would be overall cost-effective - - the beneficial consumer protection would

outweigh any additional cost to the consumer. Clearly, though, the more intrusive and restrictive the regulation, the higher the costs.

FINAL CONCLUSION:

This report concludes that there is sufficient evidence to establish that the unregulated practice of this activity will result in significant and discernible harm to the public. Therefore, the criteria for recommending licensure according to section 11.62, Florida Statutes, is met and this report recommends professional regulation of private home building inspectors.

D. Summary Recommendations

- Pursuant to 11.62, Florida Statutes, known as the Sunrise Act, this report finds that harm to the public due to the unregulated practice of private home building inspections is significant and discernible, and therefore, recommends regulation.
- This report recommends mandatory registration for **any** individual practicing private home building inspections in Florida. This is the least restrictive form of regulation capable of accomplishing consumer protection in the form of complaint processing and discipline.

In addition, this report recommends that any person performing home inspections provide a disclosure form to the consumer before any inspection. This form will notify the consumer that "state registration" involves no demonstrated expertise or minimum level of qualifications. The form shall disclose to the consumer all qualifications the inspector claims to possess (with sanctions for any false information provided). Moreover, the disclosure form shall reveal whether or not the inspector carries "errors and omissions insurance," and in what amount. The form shall notify the consumer that the inspector is proscribed from performing any repairs on a home that he has inspected within the preceding 12 months. The disclosure shall have the date and the inspector's registration number should the consumer wish to file a grievance or complaint.

At this time, the needs of the private home inspection industry do not justify the intrusive and expensive regulation offered by mandatory licensure (entrance requirements consisting of education, experience, examination or some combination thereof). Voluntary certification would be a duplication of measures already provided by voluntary association with various private trade organizations. Whereas, "mandatory registration and disclosure to the consumer" does not restrict entry into the profession, but will hold inspectors who harm the public accountable for their actions, and provide consumer awareness to the public.

III. Government Regulation of Professions or Occupations: When Is It Needed?

A. Minimum Criteria for Proposing Regulation

The only legitimate justification for imposing regulation is to protect the public. A desire to produce heightened "professionalism," or an effort to assure a "higher quality of work" is not -- in the absence of showing a significant danger to the public by unregulated activity -- sufficient to justify regulation.

Nor is it sufficient in most cases to allude to "potential" dangers. It is reasonable to assume that any unregulated activity which is (allegedly) a danger to the public will have resulted in numerous and significant actual damages -- by virtue of its existence in its unregulated form for years. If groups promoting the proposed regulation are unable to demonstrate multiple instances of significant harm which has already occurred, the argument that government needs to impose regulation in order to prevent harm is substantially rebutted.

In addition, even if harm can be shown (and a problem is thereby concluded to exist), this alone is not enough to justify regulation. It must also be shown that the proposed regulation will substantially remove the problem and prevent the harm. It is pointless to impose regulation as a response to a demonstrated problem unless it can be concluded that the regulation will have the effect of solving or significantly alleviating the problem.

Therefore, in order to even consider recommending regulation two (2) essential elements must be established:

- (1) unregulated activity must be found to present a significant and clearly discernible danger to the public; and
- (2) the proposed regulation must be seen as likely to substantially remove the danger.

In other words, first a problem must be shown to exist, and then it must be shown that the regulation will substantially correct the problem. If conclusive evidence for either of these propositions is lacking the regulation should not be imposed.¹

¹ The New York State Bar Association, in its report: "New York State Regulatory Reform," indicates that even if the activity in question is an important one, regulation may not be needed. Their report states:

(The) rationale for licensing may be inapplicable where:

- 1) customers are sophisticated and knowledgeable;

B. The Demand for Licensure

According to David Young,² there are two theories regarding the existence of licensing laws, their purpose, and who are the beneficiaries.

In the Public Interest theory of licensing, regulation is seen to be imposed for the benefit of the public. Presumably, such regulation is introduced due to public outcry or at the urging of consumers. This theory hypothesizes that by imposing regulation a benevolent government purpose is at work, and that (according to Young): "regulators believe, rightly or wrongly, that efficiency or fairness -- or both -- will be enhanced."

Under this theory, the benefits of regulation center on the assertion that licensing provides the consumer information and protection not otherwise available. Licensure benefits consumers by providing assurance of minimum competency prior to the consumer selecting a practitioner, as well as providing an avenue (disciplinary hearings) to press grievances, should grievances develop.

The second theory of the purpose and benefits of licensing is the Capture³ theory of licensing. This theory suggests that professional groups ask for and use the government regulation for their own economic advantage. As Mr. Young explains:

In effect, they capture the regulatory apparatus and use it to restrain competition and raise income.

- 2) the providers are selected through skilled intermediaries competent to make their own judgements, such as public or private agencies, boards or supervisors;
- 3) competence itself is elusive because the factors relevant to good performance are controversial, hard to define, and incapable of precise workable definition;
- 4) the number or sources of the service are so large that state efforts to assure quality will be likely to be nugatory -- for example where a multitude of publications, advertisements and personnel of every kind tell the public what is the best diet, how to lose weight, or how best to invest money; and
- 5) where fraud or unethical behavior rather than incompetence is the key problem, and ordinary legal processes may be far more effective than licensing in curbing abuses and less likely to shield malefactors.

² Young, David, The Rule of Experts: Occupational Licensing in America, Cato Institute, 1987.

³ This theory was first advanced by the economist George Stigler in his article "The Theory of Economic Regulation," Bell Journal of Economics and Management Science, Spring, 1971.

In this view, regulation's true purpose and effect is anti-competitive rather than benevolent. This theory contends that the primary purpose of licensure is to benefit the licensed professionals themselves. Naturally, under this theory the professional groups do not admit (perhaps not even to themselves) their true purpose, and instead cloak it with pronouncements of their desire "to protect the public." Still, it is certainly possible that the professionals' efforts to establish licensure could actually evidence a genuine concern for the public -- and the fact that they would derive substantial benefits from reducing competition, and would receive more money for their services, is only a coincidence.

Additional argument in support of the "Capture" theory is supplied by Walter Gellhorn in his article "The Abuse of Occupational Licensing."⁴ He points out that licensing has only infrequently been imposed upon an occupation against its wishes.⁵ According to Gellhorn:

In many more instances, licensing has been eagerly sought -- always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members become protected against competition from newcomers.

Proponents of the "Capture" theory point out that licensing limits the number of people who may engage in the regulated activity.⁶ An economic principle generally known as the "Law of Supply and Demand" predicts that (other things being equal) any limitation imposed upon the supply of goods or services inevitably results in a higher cost for those goods or services. Therefore, regulation (to the extent it can be counted upon to restrict the number of practitioners)⁷ will consistently have the effect of raising (either immediately or eventually) the costs of the regulated goods or services.

Thomas Moore of the Carnegie Institute of Technology conducted a survey of regulated occupations and businesses which indicated:

⁴ The University of Chicago Law Review, 1976.

⁵ He notes one example of the rare instance of unwelcome and unsolicited licensure imposition would be federal regulation of stockbrokers imposed in response to the financial scandals of 1929.

⁶ In "The Effectiveness of Licensing: History, Evidence, and Recommendations," Law and Human Behavior, Vol. 7, 1983, Daniel Hogan states: "While little research exists on this point, the influence of licensing seems obvious, especially since its explicit purpose is to limit supply to those deemed qualified to practice."

⁷ According to Hogan ("The Effectiveness of Licensing: History, Evidence, and Recommendations," Law and Human Behavior, Vol. 7, 1983), the researchers Carrol and Gaston, in their report to the National Science Foundation titled: Occupational Licensing, studied eight professions and found that "restrictive licensing significantly lowered the number of people licensed... ."

[T]he least restrictive types of regulations were imposed for the public welfare while the most restrictive types appear to have been established to benefit practitioners of the regulated occupations and businesses.⁸ (Emphasis added)

(In Moore's analysis, "least restrictive" refers to voluntary certification or registration without entry requirements, and "most restrictive" refers to mandatory licensing.)

Moore further proffers that establishing restrictions of entry primarily benefits the practitioners who are in the industry at the time the restrictions are imposed. The more restrictive the regulations, the more practitioners will benefit.

Regarding the economic effects of licensure, he later adds:

The higher entry standards imposed by licensing laws reduce the supply of professional services, causing the market to clear at a higher price. In effect, then, the costs of the higher standards are distributed throughout the state in the form of higher prices. Affluent consumers who can afford these higher prices are better off, because the higher standards provide them with more confidence in the quality of the services they purchase. Poor consumers, however, do not benefit, because they cannot afford the higher prices. The poor are net losers, because the availability of low-cost service has been reduced. (Emphasis added)

In his book, The Rise and Decline of Nations, Mancur Olson of the University of Maryland described how this self-protective process works. As described by James Fallows in More Like Us (1989), Olson's theory states:

Any society is more productive if every group in the society is exposed to competition -- but each group is better off if it's not. American quotas on imported sugar hurt America but help its sugar growers. Japanese laws forbidding chain stores hurt Japan but help its small shopkeepers.

Sometimes, Olson said, small groups can shield themselves from competition on their own, through private, informal, or even cultural means. According to Olson, (as described by Fallows):

Big steelmakers can tacitly agree to raise their prices all at the same time. The caste system in India is a form of private action against competition, since it excludes most people from certain jobs. Prejudice against minority groups has the same effect.

But, Olson said, these private steps are always more effective if they are backed up with government action (mandatory licensure).

⁸ Moore, Thomas, "The Purpose of Licensing," Journal of Law and Economics, October 1961.

It nevertheless remains that even if one accepts the "Capture" theory as being the dominant motive force, regulation may still serve a valid, justified, and even necessary purpose -- protecting the public. So, with certain professions, the government has determined that the genuine and demonstrated potential for harm in unregulated activity is so great, and the potential for alleviating the harm by instituting regulation so clear, that the costs of regulation should be borne.

Unfortunately, even in the instances where the proposal for regulation is thereby properly justified, some research indicates that the regulation -- once enacted -- cannot always be counted upon to actually deliver its anticipated benefit. Several studies indicate that even though licensure may raise the quality of services delivered by licensees, it may not actually raise the quality of services received by the public. According to Sidney L. Carroll and Robert J. Gaston:⁹

The evidence available indicates that licensing tends to enhance the capabilities of the licensed professionals, resulting in better delivered quality.¹⁰ Often, however, this is not reflected in better quality received in the society as a whole. It is the lower middle income classes and poor.... who tend to be shortchanged and offered low quality or no service at all.

⁹ "Occupational Licensing and the Quality of Service," Law and Human Behavior, Vol. 1, 1983.

¹⁰ A Federal Trade Commission study (Phelan, J.J., "Regulation of the Television Repair Industry in Louisiana and California: A Case Study," Staff Report to the FTC, 1974) disagrees even on the point that the more restrictive licensure scheme can be expected to produce more professional service. He examined the cost of TV repairs in 1) Louisiana, which licenses TV repairmen; 2) California, which merely registers TV repairmen; and 3) Washington, D.C., which has no regulations. The study found the incidence of fraud more frequent and prices 20 percent higher in Louisiana than in either of the other jurisdictions.

Because licensure tends to raise the costs of licensed goods or services,¹¹ as well as to reduce the number of practitioners available, it appears many consumers choose injurious self-treatment or go without help altogether.¹² Carroll and Gaston¹³ have found that states with strict laws regulating plumbers have more people doing their own plumbing (as measured by per-capita retail sales of plumbing supplies). Where entry requirements for real estate brokers are strict, they found that houses tended to stay on the market longer.

¹¹ Carrol and Gaston state: "To our knowledge, theory has not been disconfirmed by evidence, and licensing has been shown repeatedly to have an upward price effect" (Emphasis added). Carrol and Gaston cite numerous studies in support of this:

Arnould, R.J. and Friedland, T.S. "The Effect of Fee Schedules on the Legal Services Industry," The Journal of Human Resources, 1977;

Blair, R.D. and Rubin, S. Regulating the Professions, 1980;

Begun, J.W. Professionalism and the Public Interest, 1981;

Shepard, Lawrence, "Licensing Restrictions and the Cost of Dental Care," Journal of Law and Economics, 1978;

Perloff, J.M. "The Impact of Licensing Laws on Wage Changes in the Construction Industry," Journal of Law and Economics, 1980;

White, W.D. "The Impact of Occupational Licensure of Clinical Laboratory Personnel," Journal of Human Resources, 1978;

White, W.D. "Dynamic Elements of Regulation: The Case of Occupational Licensure," Research in Law and Economics; and

Pashigan, B.P. "Occupational Licensing and the Interstate Mobility of Professionals," The Journal of Law and Economics, 1979.

¹² In "New York State Regulatory Reform," by the New York State Bar, the report states:

As a result of higher costs, those who cannot afford officially-approved services may do without any service at all, or have to resort to an unofficial underground network affording less protection than would have existed without the licensing laws. For example, if local religious or community organizations cannot afford to meet day-care requirements, children otherwise given good, but less than ideally required care may get none at all, be left on the street or alone at home, or be left to the tender mercies of less honorable borderline operators.

¹³ Carroll, S.L. and Gaston, R.J. Occupational Licensing. (Final Report to the National Science Foundation), 1977.

Most incredibly, Carrol and Gaston discovered that accidental electrocutions are directly related to the restrictiveness of a state's licensing laws for electricians. In the seven most restrictive states, up to ten times more accidental electrocutions occurred.¹⁴

This perverse effect upon carefully calculated and well intended regulations may be ignored only at great peril by regulators considering adopting licensure requirements.

Finally, according to David Young, when considering a proposal to initiate regulation of a previously unregulated profession:

It is the policymaker's job to sift through arguments based on self-interest to discover the valid arguments affecting the interest of consumers.¹⁵

C. An Historical Perspective

In our current regulatory society, it appears that the idea that the individual knows what is best for himself has given way to the concept that it is society which can best judge. The belief that the consumer is not capable of evaluating the ability of a prospective professional employee, and then determining for himself the qualifications necessary for the job, is not new. However, a society so fully accepting this idea, and adopting it as government policy, is a relatively recent development.

In fact, the very idea of licensed occupations -- the practice of law, accounting, optometry, psychiatry -- is now accepted so unquestioningly that it is startling to realize how recent it is.¹⁶

According to James Fallows,¹⁷ practitioners of almost every occupation now thought of as a profession organized themselves around the time of the Civil War. Dentists, in 1840, were the first. Medical doctors banded together soon after, in 1847.¹⁸

¹⁴ "How Licensing Hurts Consumers," Business Week, November 28, 1977, pp. 127-129.

¹⁵ Young, David, The Rule of Experts: Occupational Licensing in America, Cato Institute, 1987.

¹⁶ According to David Young, the early licensing movement met with considerable resistance. In the 1830's and 1840's, when the Jeffersonian/Jacksonian philosophy of laissez-faire was at its zenith, many consumers opposed state regulation. Also, according to David Hogan, the prevailing philosophy of the Jacksonian democracy emphasized minority groups, the underprivileged, the poor and the needy. It advocated a policy that allowed citizens maximum freedom of choice, and considered that a free and responsible society needed only the doctrine of "caveat emptor" (let the buyer beware) as public protection.

¹⁷ Fallows, James, More Like Us, 1989.

¹⁸ According to Daniel Hogan, in "The Effectiveness of Licensing: History, Evidence, and Recommendations," Law and Human Behavior, vol. 7, 1983, sporadic regulatory efforts in the field of medicine had been going on since 1639 (in Virginia), but by the mid-19th century: "the practice of medicine was open to virtually anyone who desired to hang out a shingle."

A generation later, dozens of other groups had become licensed professionals: architects; accountants; lawyers; chemical engineers; and many more.

According to David Young,¹⁹ before World War I, not a single state required its lawyers to have attended (let alone have finished) law school; and the American Bar Association asked only that prospective lawyers have finished high school before they took the bar exam.

It is worth noting that the practice of law in England never went through this shift. According to Young:

There, law school is an alternative to college, not a course for college graduates only -- and in any event a degree is not strictly required for solicitors and barristers. It's hard to find evidence that the average standard of practice in America is higher than in England.

According to R.H. Shryock,²⁰ between 1911 and 1915 alone, 110 state or local statutes licensing 24 occupations were enacted. In medicine, licensing became mandatory in every state by 1900, and 22 states required both medical school diploma and successful passage of an exam.

Today, another surge of licensing laws has occurred. As of 1950, 73 occupations were licensed in one or more states, with 13 licensed in every state.²¹ The passage of legislation has been so rapid since 1950 that 20 years later the health field alone licensed 30 different occupations, with 12 regulated in all states. According to a Department of Labor study,²² almost 5000 different licenses, covering more than 500 different occupations, were available in one state or another by 1969. At that time, California and Illinois were the leading regulators, licensing more than 175 occupations each.

According to a 1990 study,²³ the number of different licensure categories has more than doubled, with over 1000 different occupations, trades, or professions being licensed.

¹⁹ Young, David, The Rule of Experts: Occupational Licensing in America, Cato Institute, 1987.

²⁰ Shryock, R.H., Medical Licensing in America, 1650-1965, 1967.

²¹ Council of State Governments, Occupational Licensing Legislation in the States: A Study of State Legislation Licensing the Practice of Professions and Other Occupations, 1952.

²² U.S. Department of Labor, Occupational Licensing and the Supply of Nonprofessional Manpower, 1969.

²³ Occupational and Professional Regulation in the States: A Comprehensive Compilation, The National Clearinghouse on Licensure Enforcement and Regulation (CLEAR), 1990.

Needless to say, the impact of licensing on the economy is substantial. As of 1976, licensing laws were estimated to affect directly a third to a fifth of the work force.²⁴ According to the Department of Labor, 25% of the employed labor force in some states is composed of licensed practitioners,²⁵ and as of 1969, roughly 10% of the national income of the United States originated in occupationally licensed labor markets.²⁶

An astonishingly wide variety of "professional" practice is licensed in one state or another. The following sampling from a Department of Labor study illustrates the unexpected range of professions: aerial horse hunters; athletic exhibition agents; alligator hunters; astrologers; bedding cleaners; ice cream buyers; cactus plant agents; rainmakers; and photographers.

D. Regulatory Choices: Mandatory Licensure, Registration, or Certification?

1. The Three Types of Regulation

If it is determined that regulation is necessary and justified, there is still the question of which form of regulation should be imposed. Regulation can take any one of three forms:

- 1) Licensure (mandatory) -- This is a "practice act" form of regulation. Anyone wishing to practice the regulated activity must become state licensed. Licensure usually entails entrance requirements consisting of education, experience, or examination (or any combination thereof).
- 2) Registration (mandatory) -- This is also a "practice act" form of regulation requiring anyone wishing to practice the regulated activity to become state registered. It differs from (mandatory) licensure in that no (or only an absolute minimum of) entrance requirements are imposed, other than payment of a fee and provision of certain information. Sometimes a minimalist requirement such as provision of insurance or assurance of no criminal history is imposed, but education, experience, or examination requirements are generally not part of the regulatory scheme. If those sorts of entrance requirements are imposed, the regulation becomes, in effect, mandatory licensure.

²⁴ "Pressure Builds to Improve Occupational Licensing by States," Behavior Today, August 23, 1976.

²⁵ "How Licensing Hurts Consumers," Business Week, November 28, 1977.

²⁶ Carroll, S.L. and Gaston, R.J., Occupational Licensing. (Final Report to the National Science Foundation), 1977.

- 3) Certification (voluntary) -- Certification is voluntary. That is, persons who are not state certified may engage in the very same activity (practice) as someone who is certified -- however, they may not refer to themselves as certified (or refer to themselves by any other term which has been held as deceiving the public as to their qualifications or lack thereof). Certification usually imposes entrance requirements similar to licensure -- education, experience, and testing. This is what has been termed a "title act." A title act is a form of regulation which only restricts the use of a title, rather than prohibiting the practice of an activity.

Mandatory licensure is the most restrictive of the three because it provides significant entry requirements prior to licensure, and prohibits the practice of the activity except for those who obtain licensure. Registration is the next most restrictive because it prohibits the practice of the activity except for those who obtain registration, but does not impose significant entry requirements. Certification is the least restrictive because those who are not certified may still continue to practice the activity.

According to David Young, in 1989, 490 different occupations were licensed in one state or another, 643 different occupations were registered in one state or another, and 65 different occupations were certified in one state or another.

The "Sunrise Act" (section 11.62, Florida Statutes) provides guidance for determining which form of regulation to recommend or impose. The Sunrise Act requires that when regulation is imposed, it must be imposed at the lowest and least intrusive level which will serve the purpose.²⁷

It is therefore necessary to return to the question of what specific purpose regulation serves, in order to determine what is the lowest form of regulation which will serve that intended purpose.

²⁷ The Sunrise Act states:

It is the intent of the Legislature:

- (a) That no profession or occupation be subject to regulation by the state unless the regulation is necessary to protect the public health, safety, or welfare from significant and discernible harm or damage and that the police power of the state be exercised only to the extent necessary for that purpose; and
- (b) That no profession or occupation be regulated by the state in a manner that unnecessarily restricts entry into the practice of the profession or occupation or adversely affects the availability of the professional or occupations services to the public.

2. Specific Purposes of Regulation

a. David Young's Analysis

According to David Young (and as previously discussed), under the "public interest" theory of regulation the purpose is either to: (1) provide information not otherwise available; or (2) provide consumer protection, i.e., complaint investigation and discipline; or both.

Wesley C. Mitchell, in The Backward Art of Spending Money, states that consumers do not have the knowledge necessary to make a "wise" decision when buying the complicated goods and service offered for sale today. This amounts to an argument that the purpose of regulation is to remedy a lack of information.

Licensing, argues Mitchell, increases information by establishing minimum standards for entrants. In effect, all practitioners must meet certain minimum qualifications, for no unlicensed practitioners are permitted. The consumer therefore knows that practitioners of the licensed occupation possess a given degree of competence.

However, this argument, particularly if used to support the choice of mandatory licensure, has at least two problems. The first problem is the assumption that this information is not otherwise available. It is, after all, not impossible for a consumer to gather the information necessary to protect himself. According to David Young, a consumer can acquire this information in several ways:

- 1) By frequently purchasing the goods or services;
- 2) By drawing on the experience of friends, relatives and neighbors;
- 3) By inferences drawn from the length of life of firms offering goods or services for sale; or
- 4) From the sellers themselves, who have market incentives to provide consumers information on quality, often in the form of warranties.

However, it must be said that while these avenues for obtaining information exist, they have significant gaps and shortcomings. In a mobile society, citizens are often new to a community, and the first three avenues cited above for obtaining information would not be readily available. If information provision serves a critical need, regulation performs this service better than leaving people to their own devices.

Nevertheless, a second problem exists in attempting to establish the "lack of information" argument in support of mandatory licensure. A system of certification would furnish at least as much information as licensing. Under a certification arrangement, those practitioners who desire to be certified and who could meet certain standards (usually including the passing of an examination) would be given a certificate of approval.

A system of regulation employing voluntary certification completely satisfies the purpose of information provision. However, it leaves it up to the consumer to choose whether he would prefer to employ an uncertified practitioner (perhaps at a lower cost) whom he personally believes to be competent despite his not having formally "proved" his competency to the state. As the economist Milton Friedman writes:²⁸

The usual arguments for licensure, and in particular the paternalistic arguments for licensure, 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 to make the relevant information available. If, in full knowledge, we still want to go to someone who is uncertified, that is our business.

So, even if lack of information were to be accepted as a sufficient and justifiable argument for regulation, certification would still be preferable to mandatory licensure because it would provide the same benefit at a lower and less intrusive level.

If the "lack of information" argument provides insufficient support for mandatory licensure, perhaps the argument could be advanced that the other part of Young's theory -- consumer protection (in the form of complaint processing and discipline provision) -- is the more important motive force which justifies regulation.²⁹

This "complaint/discipline provision" argument essentially maintains that where lack of competence or fraudulent activity would threaten the public, regulation serves to protect the public by assuring competency and preventing repeated victimization of fraud.

The effectiveness of regulation in assuring competency is dependent upon the specific provisions which establish education, experience, or examination requirements (and the extent to which these specific requirements actually serve to assure competency). These provisions vary from practice act to practice act. One look at the many instances in which licensed individuals (who have, after all, complied with education, experience and testing requirements) have nevertheless performed substandard or incompetent work, and it is clear that such requirements do not assure protection. However, it can be argued that without these requirements incompetent activity would be even greater.

The effectiveness of regulation in protecting against fraud has been called into question as recently as 1982, in New York. In 1982, the New York State Bar Association issued a report entitled "New York State Regulatory Reform." The report declared:

As an anti-fraud measure, licensing is frequently ineffective... If unscrupulous characters are prepared to risk criminal penalties, the

²⁸ Friedman, Milton, Capitalism and Freedom, 1962

²⁹ This argument will hereafter be referred to as the "complaint/discipline provision" argument.

additional sanctions for failure to obtain a license can hardly be a meaningful deterrent. Indeed, it is often even harder to prosecute a malefactor for fraud if the party is licensed, because of an assumption that the person is honest or else the license would have been revoked.

The presence of a license often gives the client a false sense of security where the State cannot insure that a licensed person or agency will act honestly -- merely that paper criteria are met.

Indeed, licensing often gives an imprimatur of competence to the licensee which encourages reliance by the public where this may be unjustified.

Still, while regulation may not prevent licensees from committing fraud or a criminal act, so long as disciplinary avenues are available and effectively prosecuted, regulation (in the form of license or registration revocation) should prevent the licensee from repeatedly victimizing the consumer.

Nevertheless, it appears that whatever its merits in justifying some form of regulation,³⁰ the "complaint/discipline provision" argument cannot be established as support for mandatory licensure. For, just as certification satisfies the "lack of information" argument, but at a lower and less intrusive level, registration satisfies the "complaint/discipline provision" argument, but at a lower and less intrusive level. Registration does not preclude a full complaint-processing, discipline-providing support system. Registration serves to allow anyone who wishes to practice to do so, but will still "weed out" those who are found to be incompetent or unscrupulous.

If the "lack of information" argument cannot justify mandatory licensure (because certification is preferable), and the "complaint/discipline provision" argument cannot justify mandatory licensure (because registration is preferable), what can justify mandatory licensure?

b. Thomas Moore's Analysis

It may be necessary to consider another analyst's theory of regulatory justification. According to the economist, Thomas G. Moore, three rationales based on public interest arguments may be advanced as to why certain occupations should be licensed:

- 1) Lack of information or misinformation;
- 2) Social costs of lack of regulation being higher than private costs; and

³⁰ It should be emphasized that the natural operation of the marketplace serves to eliminate incompetent or unscrupulous practitioners through the information dissemination avenues discussed above; avenues which are available to consumers in the absence of regulation. To the extent that the marketplace functions adequately in this area, complaint processing and discipline may be seen as relatively superfluous.

- 3) Society's knowing better than the individual what is best for the individual.

We have already considered the merits of "lack of information" as regarding its ability to serve as support for mandatory licensure. "Lack of information" does not, by itself, support mandatory licensure.

Moore's second rationale holds that licensing may sometimes be necessary when social costs are greater than private costs. Social costs comprise all the costs or risks which arise from a transaction. Private costs are those costs which are borne only by the parties to the transaction. According to Moore:

The medical profession is often cited as a case where social costs are greater than private costs. It is usually said that "incompetent" physicians may diagnose a disease incorrectly and thus start an epidemic. Only in the case of a few occupations, such as physicians, veterinarians, and pharmacists, is it possible to argue that social costs are greater than private costs. For a great many of the occupations that are licensed, it is unlikely that social costs are larger than private costs.

It may be that Moore should add some other professions to his list. In the construction field, for example, the potential sometimes exists for great public harm (e.g. collapse of a public building) resulting from incompetent work.³¹ It may be legitimate in the construction field to view social costs (and concerns) as eclipsing private costs in some instances.

Finally, Moore considers the argument that society is a better judge than the individual concerning what is good for him. Moore states that this "is the only argument that is both logically consistent and statistically significant." In other words, while this argument may not often be overtly advanced as justification for licensure, it is the only explanation which logically explains the widespread public reliance upon, and legislative enactment of, licensing laws. However, Moore goes on to state:

This approach raises great philosophical problems. If the individual is not the best judge of what is best for him, then what is best and who is to decide? According to this approach, all activity can and should be regulated by the body that does know what is best for the individual.

So, with Moore's analysis, once we determine that regulation is necessary, and seek justification of mandatory licensure, we are left with:

- 1) A discredited argument ("lack of information");

³¹ It should be noted that the same does not hold true for fraud. The damages or costs for fraud are basically limited to the parties to the transaction, and no case appears to be available alleging "public harm" as a result of fraud.

- 2) An argument of only narrow and rare application (public harm as a compelling expectation); and
- 3) An argument which has great philosophical problems in a society which is not comfortable with government telling individuals what is best for them.

c. What Justifies Mandatory Licensure?

While it is clear (both from this analysis and from the plain language of the Sunrise Act) that certification and registration are to be preferred over mandatory licensure, there may still be times when mandatory licensure is justified. Under Moore's analysis, mandatory licensure is justified:

- 1) If it is determined that significant public harm can be expected to occur if the privately-arranged unregulated practice were to continue (Moore's rationale #2); or
- 2) If it is determined that we -- as a society -- cannot trust the members of our society to make decisions regarding what is best for them (Moore's rationale #3).

A third situation, not examined or discussed by Moore, but implicit in Young's analysis, can also support mandatory licensure. If both of the elements of Young's argument in support of "public interest" licensing were established, that is, if there was a compelling need for information (which certification by itself could provide), and a compelling need for complaint processing and discipline (which registration by itself could provide) -- then mandatory licensure could be recommended.

It is important to understand that both elements must be established in order to recommend mandatory licensure. The need for provision of information (on competency) must be compelling and the need for the government (as opposed to the marketplace) stepping in and eliminating below-standard practitioners must be equally compelling. This scenario serves to justify mandatory licensure because in such an instance, neither certification nor registration singly provide the benefits or fulfill the needs. Their benefits must be combined to achieve the purpose. And, when the attributes of certification and registration are combined, you have: mandatory licensure.

IV. Is Government Regulation Needed?

A. Does the Unregulated Practice of this Profession Harm the Public?

An improperly performed home inspection may overlook defects present in the dwelling such as faulty wiring or severe structural defects, to name just two. These items could not only prove expensive to repair, but could cause bodily injury and even death of the occupants.

One measure of harm in an industry is to measure the number of complaints related to the industry. The Division of Consumer Services (DCS) of the Department of Agriculture and Consumer Services (DACCS) is the state agency which receives and compiles general consumer complaints related to business endeavors which are not otherwise regulated. The home inspection industry falls within this category.

The DCS has received only 11 complaints in the last three years relating to the home inspection industry. It is not clear from the files how many of the 11 complaints were successfully mediated.

The Better Business Bureau of Florida, a privately operated organization which receives general consumer complaints, has reported over 163 inquiries and 68 formal complaints in the last three and a half years. However, it indicated that these figures are conservative and not necessarily an accurate reflection of the true number of complaints because often complaints received have been entered into the "complaint module" with several other categories of business, including: Other Construction; Other Real Estate; and Other Home Improvement (see Appendix A).

A voluntary survey was sent to over 200 members of ASHI, FABI and NAHI, in which 152 responded (see Appendix B). Of those responding, 28% admitted having between 1 and 5 complaints lodged against them in the past year alone, while 3.3% reported more than 5 complaints lodged against them in the past year (see question #9 of Appendix B).

Another survey was sent to 67 County Local Licensing Officials of which 43 responded. Of the 41 responding to the question, 24 officials reported that their office had received complaints regarding the home inspection industry; the number ranged from 2-3 per year to as many as 100 complaints a year in Broward County. However, the overwhelming majority of the offices reported that they kept no records of the complaints because the profession was not regulated and there was no recourse they could provide to an injured party. More often than not, civil action was recommended as the only recourse to an aggrieved consumer (see Appendix C).

The complaints alluded to most often included:

- 1) Collusion between the real estate agent attempting to procure a sale, and a home inspector failing to report defects in the home so as not to interfere with the sale;
- 2) Incompetent home inspectors and unprofessional business practices in the industry due to the fact that **anyone** can become a home inspector with no training at all. Cited examples of harm committed included:
 - a) inspector not recognizing deterioration in a roof which two months subsequently developed costly leaks;
 - b) inspector failed to recognize termite damage which may have prevented the sale;
 - c) faulty wiring and other potential electrical hazards not recognized exposing inhabitants to serious risk; and
 - d) inspector cited the need for unnecessary repairs while soliciting to do the work himself; and
- 3) Fraudulent misrepresentation - improperly advertising qualifications and service to the public.

Additionally, the sunrise review prompted numerous letters to the Committee on Business and Professional Regulation discussing the abuses in the industry and citing specific examples of public harm. Except for ethical complaints filed to ASHI or FABI if the inspector is a member, there is currently no place to formally file complaints. Plus, it has been alleged that inspection companies escape liability by "hiding behind the corporate veil." Unscrupulous businesses simply change the name of their corporation and walk away from judgments. The aggrieved party has no recourse.

B. Is there Insufficient Protection Without Regulation?

With 58.5% of Florida County Local Licensing Officials (24 of the 41 responding to the question) reporting that they receive complaints regarding private home inspectors, protection to the public appears insufficient. Moreover, 73.8% (31 of the 42 responding to the question) of County Local Licensing Officials think that state regulation is necessary to protect the public from physical or economic harm.

Only 27.9% of the Local Licensing Officials could substantiate specific instances of physical or economic harm resulting from the unregulated practice of this profession; but many explained that they simply do not keep records of the complaints because their department has no jurisdiction. Nonetheless, 76.7% support state regulation of private home building inspectors (see Appendix C).

Organizations mentioned previously, such as the Florida Association of Building Inspectors (FABI) and the American Society of Home Inspectors (ASHI), are two main agencies which provide some form of regulating home building inspectors in Florida.

These two organizations review an inspector's background and credentials to determine if the applicant has the appropriate training and professional ethics to perform home inspections. Membership often requires applicants to pass several written technical exams and to meet other stringent professional requirements. In addition, continuing education is required of its members; and its members are not allowed to engage in real estate sales or maintenance of any property that they inspect.

The problem, as with any voluntary certification (state or private), is that membership in these organizations is optional. FABI has 72 official members, ASHI has 186 members and candidates, and NAHI has 20 members; of those numbers many inspectors are members of both or all three organizations. Additionally, there are home inspectors who are state licensed engineers, architects, or general contractors. But when one considers there are an estimated 600 to 1000 practicing home inspectors in Florida, many of whom have not met any minimum level of qualifications whatsoever, the potential for harm is great. However, it would be improper for the State of Florida to require membership in a private organization as a condition of licensure.

C. Will Regulation Accomplish Protection?

Whether or not regulation will accomplish protection has been a topic of much debate. This question turns largely on what form of regulation is established to address the problem.

Mandatory licensure means that licensure qualifications would be imposed before obtaining a license, and once licensed, the licensee may be disciplined for improper actions. This form of regulation requires a showing of a highly significant level of present and discernible harm because it is a highly intrusive form of regulation, and because it carries with it the potential to put people who are currently practicing (and who may have practiced the trade competently for many years) out of work. Moreover, the practice of "grandfathering" private home inspectors into licensure without testing allows for the possibility of incompetent inspectors to obtain licensure by virtue of their years of experience in the industry.

Mandatory registration requires no (or only a minimum of) substantiation of qualifications before licensure, but would allow the state to revoke licenses from inspectors who cause public harm or otherwise prove incapable. This form would not "put anyone out of work" unnecessarily, or prevent interested parties from entering the profession, but would ensure a "survival of the competent" approach to regulation -- anyone can practice until their performance becomes harmful. Under registration, there would be a formal organization to receive complaints, and the state could hold guilty parties accountable for their harmful actions. Incompetent inspectors would be "weeded out" of the industry through complaint processing and discipline. So long as the

disciplinary avenues are available and effectively prosecuted, registration should prevent the licensee from repeatedly victimizing consumers. The disadvantage of mandatory registration is that consumers may be falsely led to believe state registration has required of the practitioner to demonstrate some minimum level of qualifications.

Voluntary certification, on the other hand, serves to supply the public information on the qualifications of the home inspector. Once apprised of the qualifications the public would be free to employ, or not employ, the home inspector. Obtaining this voluntary certification would not be required in order to practice the trade. However, such a regulatory choice lacks certain important protections. It may be true that most of the harm to the public from persons in this industry is committed by parties who are not well-trained or adequately competent, and a voluntary certification plan may address that issue of competency, to an extent. Still, the great problem with voluntary certification is that it provides no measure to constrain the ability to practice of persons who have proven incompetent or unscrupulous in practice. Voluntary certification plans have no effective discipline as part of their design.

D. What Will Be the Economic Impact of Regulation?

The direct impact of regulation would depend on the form of regulation established. Any form of licensure requiring an examination would cost more than mandatory registration without an examination. Those costs will initially be borne by the regulated professionals, with their costs presumably passed along to the consumers.

Legal expenses for discipline cannot be accurately determined in advance. These costs are driven by the number of complaints which may occur and the complexity of any resulting investigations and prosecutions. All costs incurred for discipline will be billed directly to the profession and must be paid for by licensure fees.

Estimates of the number of home inspectors who would seek licensure vary (proponents estimate 600 to 1,000 practicing home inspectors). The more who seek licensure, the less the individual license fees will be. Other costs of the regulation would include the costs for development or purchase of the examination, if required.

V. The Regulatory Situation In Other States

A. Texas

The home inspection industry has been regulated under the Texas Real Estate Commission since 1985. In 1991, under Article 65734, Civil Statutes, Texas implemented a three-tier system of mandatory certification for anyone wishing to enter the profession. According to the Texas Real Estate Commission this system has been quite successful since its effective September 1, 1993 date.

The candidate starts as an "apprentice," then graduates after three months to the position of "real estate inspector," and finally after an additional 12 months to "professional inspector." As of May 1994, the Commission reported 144 registered apprentices; 128 real estate inspectors; and 932 professional inspectors.

Enforcement and policing of the industry are largely dependent on testimony from expert witnesses at the complaint hearings. Forty-two complaints were received in 1992; 55 in 1993; and thus far, 87 in 1994.

Moreover, an inspector is prohibited from repairing a home which he/she inspects.

B. North Carolina

North Carolina passed Senate Bill 617 to regulate use of the title "licensed home inspector" and to require licensure of such persons. North Carolina has passed a two-tier system of licensure which will take effect October 1, 1996.

The first tier in licensure requires the candidate to pass a licensing exam to be an "associate home inspector." This allows him to be affiliated with a licensed home inspector who agrees in writing to actively supervise and train the applicant.

The first tier may be bypassed if the candidate is licensed as a general contractor, an architect, or a professional engineer. However, to be licensed as a "home inspector" all candidates must pass a licensing examination prescribed by the North Carolina Home Inspector Licensure Board.

C. South Carolina

South Carolina requires home inspectors to make application and pass a written examination for licensure under Article 3, Chapter 59, Title 40 of the Code of Laws of South Carolina. Exemptions from the licensure examination are provided for licensed general contractors and professional engineers.

The chapter outlines unacceptable conduct and provides civil penalties for violations of any of the provisions. In addition, the home inspector is prohibited from engaging in real estate appraisal activity unless licensed by the state.

D. Maryland

House Bill 662 of Maryland requires a home inspector to disclose certain information to the consumer. This disclosure includes a list of the inspector's credentials and a 10-point bold typed paragraph explaining that the inspection is not intended to disclose latent defects, and that no warranty is expressed or implied. Further, a caveat is disclosed to the consumer warning that if the home inspector is not a licensed engineer or similar professional, the consumer may be advised to seek a professional regarding defects mentioned in the report.

E. Unsuccessful Attempts at Proposed Regulation

While similar regulations exist in other states, an ASHI (American Society of Home Inspectors) Legislative Summary reports that in past years proposed regulation bills have either died in committee or been defeated in the following states: Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Tennessee, Utah, and Wisconsin. Clearly, the issue of regulating home inspectors has surfaced in many states.

VI. Professional Opinions Of The Industry

The Florida Homebuilders Association (FHBA) reports that unlicensed home inspectors represent a growing threat to the consumer and the home building industry. It has adopted the position supporting regulation of this industry, and planned a survey in November 1994 to substantiate numerous examples of actual discernible harm. Results of this survey are not yet available.

The Florida Association of Building Inspectors (FABI) is resoundingly opposed to state regulation of private home building inspectors. It is their position that any state regulation in this area would be a duplication of efforts.

The American Society of Home Inspectors (ASHI) takes the position that state regulation is not warranted for private home building inspectors, nor in the public interest. It was unable to find a risk of significant harm or damage to the public.

The Florida Association of Realtors (FAR) does not endorse regulation of home inspectors at this time, but is still formulating its final opinion.

The Committee on Business and Professional Regulation has received numerous letters from home inspectors and interested parties who have been frustrated with what they allege to be a growing number of unqualified home inspectors in the industry. The letters explain that presently anyone may "open shop" without any training or education, leading to a great potential for public harm. In addition, letters point to the fact that many people who are victims of harm caused by inspectors are not willing to bring civil action or otherwise seek reimbursement from the responsible party because too often the unqualified inspector has no assets or license to protect. Additionally, there is no place where aggrieved parties can complain to take action against the unscrupulous inspector's livelihood.

The Committee has also received a small number of letters from interested parties averse to state regulation as being either unnecessary or duplicative.

A survey sent to over 200 home inspectors (all members of either ASHI, FABI, or NAHI) asked their opinion on state regulation of home inspectors; of 152 responses:

32%	(48 of 152) <u>strongly support</u> ;
11%	(17 of 152) <u>probably support</u> ;
16%	(25 of 152) <u>probably oppose</u> ; and
41%	(62 of 152) <u>strongly oppose</u> ; (see Appendix B).

A survey sent to each county's Local Licensing Official asked various questions related to their opinion on the need for regulation and their ability to substantiate current problems through complaint data:

- 74% (31 of 42 responding) think state regulation of private home building inspectors is necessary to protect the public from physical or economic harm.
- 77% (33 of 43 responding) support state regulation in some form.
- 59% (24 of 41 responding) claim that they receive complaints regarding this industry numbering from a few a year in some counties to over 100 a year in Broward County.
- 28% (12 of 43 responding) can substantiate incidences of harm from the unregulated practice of home inspections.

However, most of those responding indicated that the department simply does not record complaints because it does not have any jurisdiction to act upon the complaints.

VII. Conclusions

The Sunrise Act requires that the Legislature consider the following factors before determining whether regulation is needed:

- 1) **Will the unregulated practice of the profession or occupation substantially harm or endanger the public health, safety, or welfare and is the potential for harm recognizable and not remote?**

This report concludes that the unregulated practice of home building inspection does and will substantially harm or endanger the public health, safety, or welfare.

The potential for harm in this industry is real and recognizable. While no one body or organization has jurisdiction to receive complaints for this industry, the aggregate number and the nature of complaints received in this industry is significant. The following bodies have received complaints: the Department of Agriculture and Consumer Affairs; the six Better Business Bureau departments in Florida; County Local Licensing Officials; and the Committee on Business and Professional Regulation (once the Sunrise review was initiated).

FABI has 72 official members, the Florida Chapters of ASHI have 186 members and candidates, and NAHI has 20 members. However, there are an estimated 600 to 1000 persons practicing home inspection in Florida. Therefore, there is a substantial number of inspectors practicing without any regulating body monitoring their performance, and without testing, education, or experience credentials.

- 2) **Does the practice of the profession or occupation require specialized skill or training, and is that skill or training readily measurable or quantifiable so that examination or training requirements would reasonably assure initial and continuing professional or occupational ability?**

The practice of home building inspection requires specialized skill and training. Texas, for instance, requires 15 months of training and several examinations before earning the title of Professional Home Inspector. Both FABI and ASHI require written and verbal tests, and a minimum number of inspections before membership, as well as continuing education once a member. Such training requirements reasonably assure initial and continuing professional ability. Clearly, the potential exists that many have not substantiated any minimum level of qualifications to practice in the industry.

3) **Can the public be effectively protected by other means?**

There are several means of protection other than regulation. The public could rely on word-of-mouth-referrals regarding the qualifications of prospective home inspectors. Also, they could exercise reasonable due care in evaluating for themselves the qualifications of the prospective home inspector before hiring him. [For instance, whether the inspector is a member of a reputable trade association or organization]. However, it may be difficult for the average consumer to adequately and capably evaluate these qualifications. Also, with the possible exception of the different trade organizations, these options generally do not provide any complaint processing or disciplinary capability should the home inspector prove incompetent or unscrupulous.

Therefore, this report concludes that the avenues of protection available to the consumer are not sufficient.

4) **Will the overall cost-effectiveness and economic impact of the proposed regulation, including the indirect costs to consumers, be favorable.**

Regulation in almost any form will result in regulatory fees ultimately passed to the consumer. However, regulation will protect the consumer by "weeding out" unscrupulous or incompetent inspectors. In turn, the consumer will avoid costly repairs or potential problems, and if necessary hold accountable the unqualified inspector for harmful actions. Overall, it would be cost-effective -- the beneficial consumer protection would outweigh any additional cost to the consumer. Clearly, the more intrusive and restrictive the regulation, the higher the costs.

FINAL CONCLUSION:

This report concludes that there is sufficient evidence to establish that the unregulated practice of this activity will result in significant and discernible harm. Therefore, the criteria for recommending licensure according to section 11.62, Florida Statutes, is met and this report recommends professional regulation of private home building inspectors.

VIII. Recommendations

- Pursuant to 11.62, Florida Statutes, known as the Sunrise Act, this report finds that harm to the public due to the unregulated practice of private home building inspections is significant and discernible, and therefore, does recommend regulation.
- This report recommends mandatory registration for **any** individual practicing private home building inspections in Florida. This is the least restrictive form of regulation capable of accomplishing consumer protection in the form of complaint processing and discipline.

In addition, this report recommends that any person performing home inspections provide a disclosure form to the consumer before any inspection. This form will notify the consumer that "state registration" involves no demonstrated expertise or minimum level of qualifications. The form shall disclose to the consumer all qualifications the inspector claims to possess (with sanctions for any false information provided). Moreover, the disclosure form shall reveal whether or not the inspector carries "errors and omissions insurance," and in what amount. The form shall notify the consumer that the inspector is proscribed from performing repairs on any home that he has inspected within the preceding 12 months. The disclosure shall have the date and the inspector's registration number in the event the consumer wishes to file a grievance or complaint.

At this time, the needs of the private home inspection industry do not justify the intrusive and expensive regulation offered by mandatory licensure (entrance requirements consisting of education, experience, examination or some combination thereof).³² Voluntary certification would be a duplication of measures already provided by voluntary association with various private trade groups. Whereas "mandatory registration and disclosure to the consumer" does not restrict entry into the profession, but will hold home inspectors who harm the public accountable for their actions, and provide consumer awareness information to the public.

³²According to information provided by the Legislative Affairs Office within the Department of Business and Professional Regulation, testing expenses alone could total \$50,000.

IX. Appendices

BETTER BUSINESS BUREAU COMPLAINTS
Home Inspection Services

Location	Contact Number	Number of Complaints 1991-1994
Hillsborough/ Pinellas	813/535-5522	7 complaints
Miami	305/625-5059	1 complaint
Winter Park	407/621-3300	1, 0 complaints so far this year
Pensacola	904/433-6111	46 inquiries/complaints
W. Palm Beach	407/686-2200	117 inquiries, 12 formal complaints
Jacksonville	904/721-2288	47 complaints

NOTE: Several Bureaus have indicated that these estimates are conservative and not necessarily accurate because complaints received have been entered in the complaint module with several other categories of business, including: Other Construction; Other Real Estate; and Other Home Improvement.



**FLORIDA HOUSE OF REPRESENTATIVES
COMMITTEE ON BUSINESS AND PROFESSIONAL REGULATION
SURVEY OF NEED TO REGULATE PRIVATE HOME BUILDING INSPECTORS**

1. How would you describe your training and qualifications as a private home building inspector? (Please check more than one if applicable)

- Have worked as a licensed contractor
- Have been licensed as a Professional Engineer (Ch. 471, F.S.)
- Have received training from the American Society for Home Inspectors (ASHI)
- Have worked as a local building official
- Other (Please explain) _____

2. Do you think the state regulation of home inspectors is necessary "...to protect the public health, safety, or welfare from significant harm or damage...?"

- Yes
- No
- Uncertain

3. If "Yes" to question #2, which form of regulation would best benefit home-building inspectors?

- Registration (least restrictive)
- Voluntary Certification
- Mandatory Licensure (most restrictive)
- Other (Please explain) _____

WHY: _____

4. Please provide specific examples of public harm due to an absence of regulation of home-building inspectors.

Do not know of any.

Examples include: a) _____

b) _____

c) _____

5. Are you a member of a professional trade association?

No

Yes, American Society of Home Inspectors (ASHI)

Yes, Florida Association of Building Inspectors (FABI)

Yes, National Association of Home Inspectors (NAHI)

Yes, National Academy of Building Inspection Engineers

Other (Please provide) _____

6. In your personal experience, please rank (1-6) the following sources for your customers from the most successful source to the least successful source. (1 = most successful, 6 = least successful)

Advertisement in Yellow Pages

News media advertising

Recommendation by a previous customer

Advertising circular

Referred by real estate agent

Other (Please provide) _____

7. How many homes did you inspect in the past year?

0-50

51-150

151-250

251-350

Over 350

8. What percentage of the homes you inspected in the past year were new homes (not previously occupied)?

- 0-5%
- 5-10%
- 10-25%
- Over 25%

9. Of the inspections you conducted in the past year, how many resulted in consumer complaints lodged against you?

- No complaints
- 1-5 complaints
- 6-10
- 11-20
- Over 20

10. If you indicated in question #9 that complaints were filed against you, were these complaints in the nature of:

- The consumer believed you cited a problem that did not exist
- The consumer believed you failed to cite an existing problem
- Both
- Other: _____

11. Do you currently carry errors and omissions insurance?

- Yes
- No
- Uncertain
- Other type of insurance (please describe): _____

12. Do you support state regulation of private home building inspectors?

- Yes, strongly
- Probably yes
- Probably no
- No, strongly

The following information is not required, but in order to help us understand the opinions of all of our respondents, answering this portion would be appreciated.

Person completing this survey: _____
Name Position

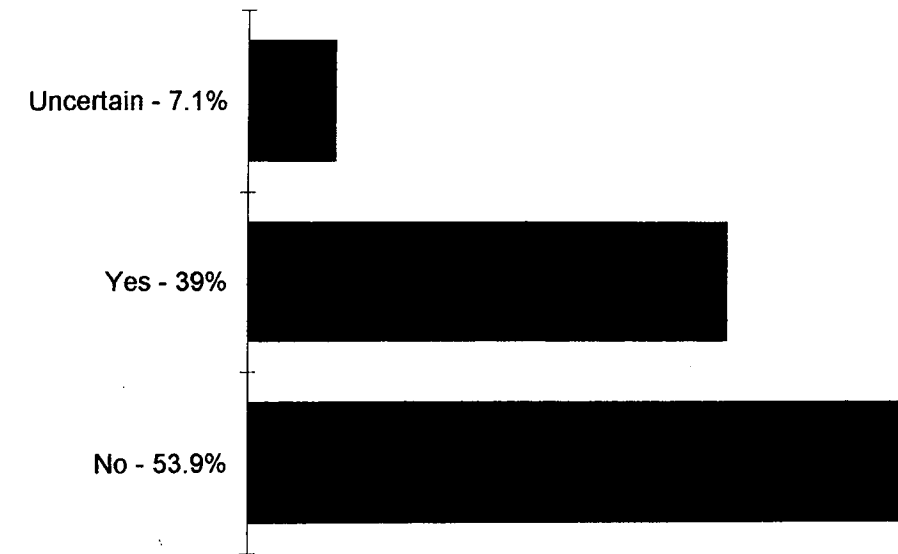
Phone Number: _____
()
Area Code Number

PLEASE RETURN YOUR COMPLETED QUESTIONNAIRE BY SEPTEMBER 5, 1994 TO:

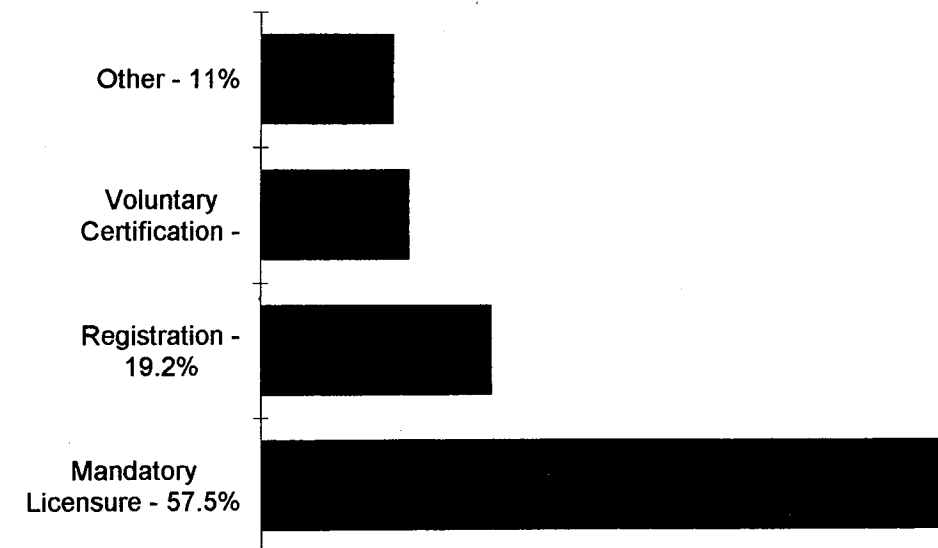
House Committee on Business and Professional Regulation
218 House Office Building
Tallahassee, Florida 32399-1300
Attention: Michael J. Loparco

Thank you for your assistance.

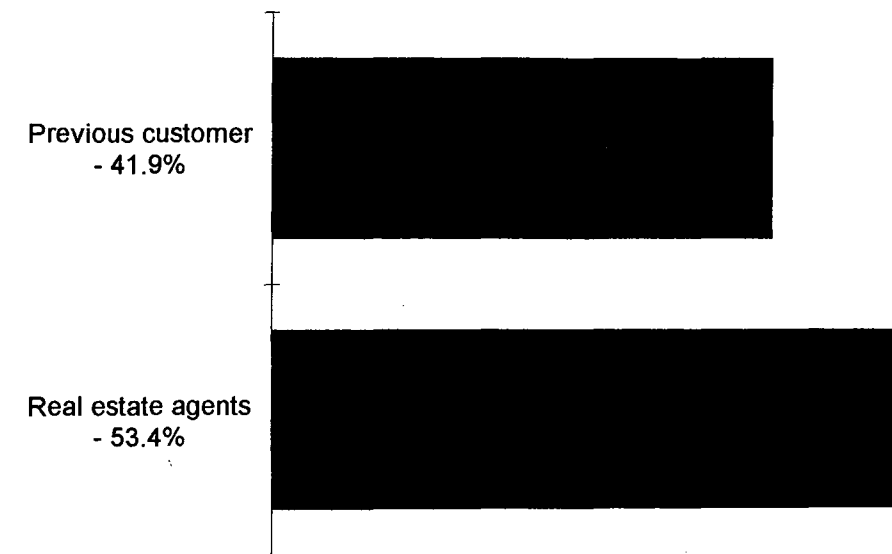
Do you think the state regulation of home inspectors is necessary "... to protect the public health, safety, or welfare from significant harm or damage...?"



Which form of regulation would best benefit home building inspectors?



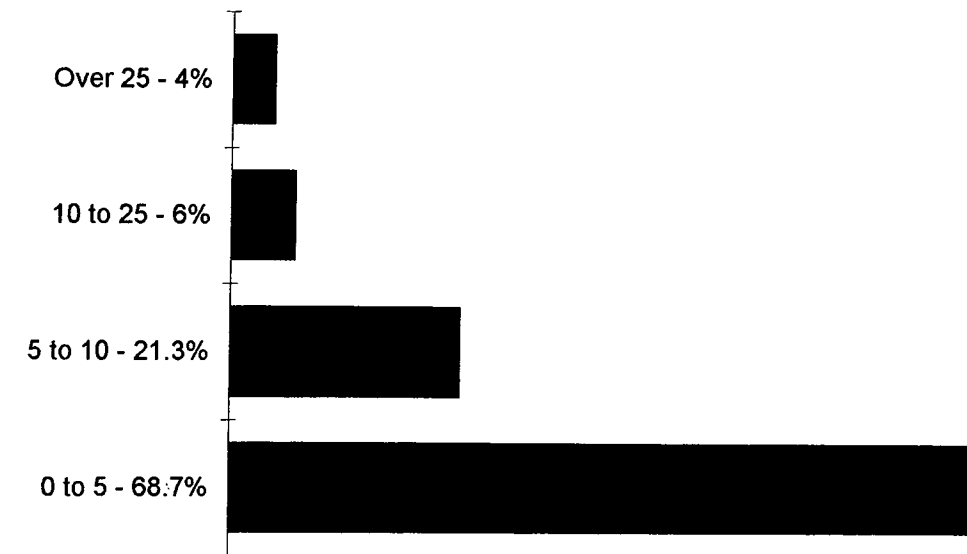
Most successful source of customers according to inspectors surveyed.



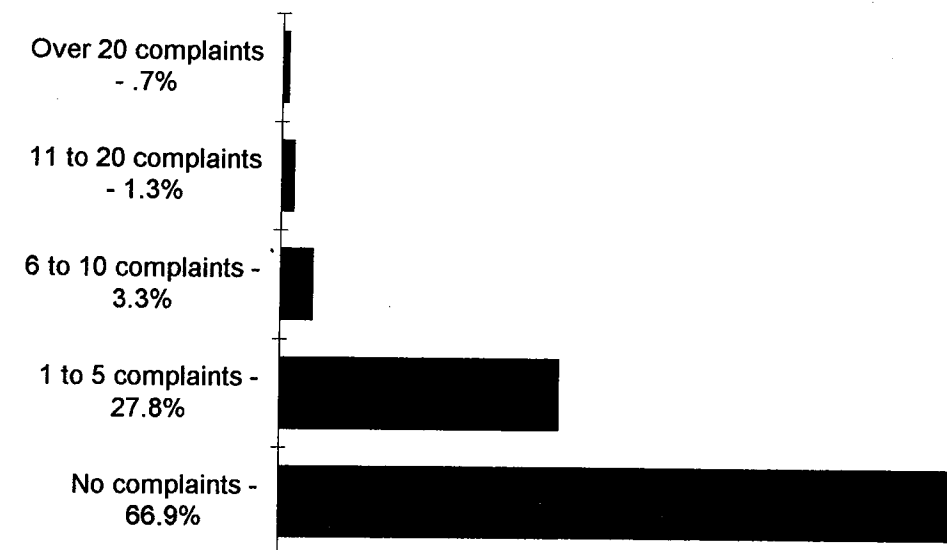
How many homes did you inspect in the last year?



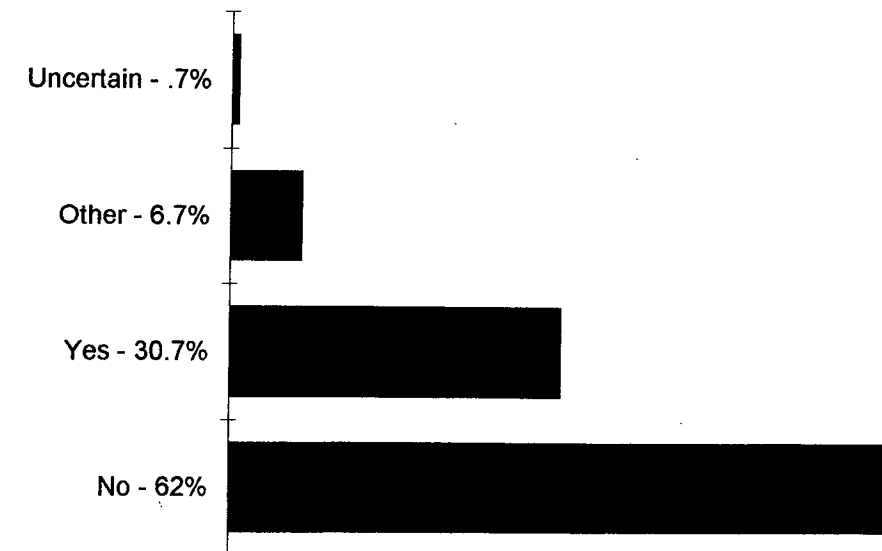
What percentage of the homes you inspected in the past year were new homes?



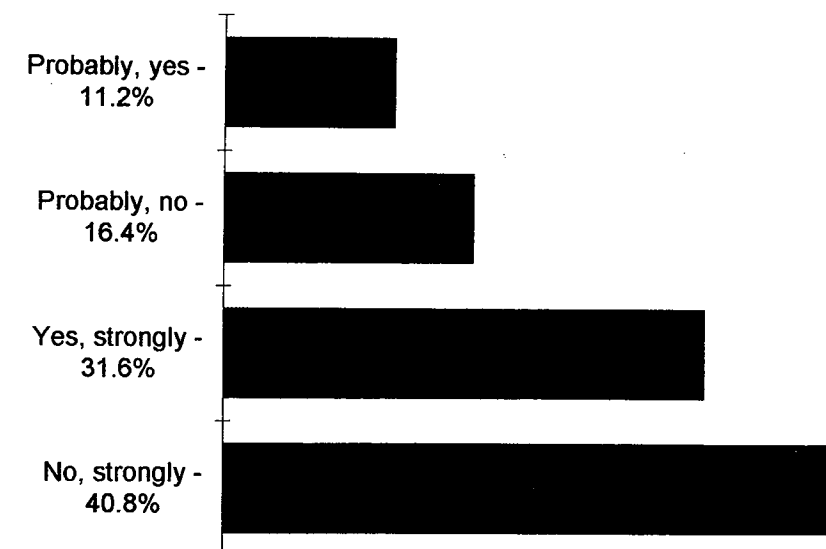
Of the inspections you conducted in the past year, how many resulted in consumer complaints lodged against you?



Do you currently carry errors and omissions insurance?



Do you support state regulation of private home building inspectors?



BUILDING INSPECTORS FREQUENCIES

11:30 Wednesday, December 14, 1994 5

Worked as licensed contractor

ITEM1A	Frequency	Percent	Cumulative Frequency	Cumulative Percent
YES	100	100.0	100	100.0

Frequency Missing = 62

Licensed professional engineer

ITEM1B	Frequency	Percent	Cumulative Frequency	Cumulative Percent
YES	13	100.0	13	100.0

Frequency Missing = 149

Training from American Society Home Insp

ITEM1C	Frequency	Percent	Cumulative Frequency	Cumulative Percent
YES	119	100.0	119	100.0

Frequency Missing = 43

Worked as local building inspector

ITEM1D	Frequency	Percent	Cumulative Frequency	Cumulative Percent
YES	19	100.0	19	100.0

Frequency Missing = 143

BUILDING INSPECTORS FREQUENCIES

11:30 Wednesday, December 14, 1994 6

Some other qualifications

ITEM1E	Frequency	Percent	Cumulative Frequency	Cumulative Percent
YES	91	100.0	91	100.0

Frequency Missing = 71

Is state regulation necessary?

ITEM2	Frequency	Percent	Cumulative Frequency	Cumulative Percent
YES	63	38.9	63	38.9
NO	87	53.7	150	92.6
UNCERTAIN	12	7.4	162	100.0

Which form of regulation would be best?

ITEM3	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	14	18.4	14	18.4
2	9	11.8	23	30.3
3	45	59.2	68	89.5
4	8	10.5	76	100.0

Frequency Missing = 86

Examples of harm listed?

ITEM4	Frequency	Percent	Cumulative Frequency	Cumulative Percent
0	80	59.3	80	59.3
1	27	20.0	107	79.3
2	14	10.4	121	89.6
3	11	8.1	132	97.8
4	1	0.7	133	98.5
9	2	1.5	135	100.0

Frequency Missing = 27

BUILDING INSPECTORS FREQUENCIES

11:30 Wednesday, December 14, 1994 7

Example of harm # 1

ITEM4A	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	31	57.4	31	57.4
2	5	9.3	36	66.7
3	3	5.6	39	72.2
4	2	3.7	41	75.9
5	2	3.7	43	79.6
6	1	1.9	44	81.5
7	2	3.7	46	85.2
8	2	3.7	48	88.9
9	5	9.3	53	98.1
10	1	1.9	54	100.0

unqualified inspectors

Frequency Missing = 108

Example of harm # 2

ITEM4B	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	4	14.8	4	14.8
2	2	7.4	6	22.2
3	3	11.1	9	33.3
4	4	14.8	13	48.1
5	4	14.8	17	63.0
6	1	3.7	18	66.7
7	6	22.2	24	88.9
8	3	11.1	27	100.0

repairs/replacements

Frequency Missing = 135

Example of harm # 3

ITEM4C	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	2	18.2	2	18.2
4	2	18.2	4	36.4
7	4	36.4	8	72.7
8	1	9.1	9	81.8
9	2	18.2	11	100.0

lack of standards

Frequency Missing = 151

BUILDING INSPECTORS FREQUENCIES

11:30 Wednesday, December 14, 1994 8

Member of professional trade assn?

ITEM5	Frequency	Percent	Cumulative Frequency	Cumulative Percent
0	5	3.1	5	3.1
1	56	35.2	61	38.4
2	20	12.6	81	50.9
3	2	1.3	83	52.2
6	30	18.9	113	71.1
9	4	2.5	117	73.6
12	1	0.6	118	74.2
13	3	1.9	121	76.1
14	1	0.6	122	76.7
15	1	0.6	123	77.4
16	1	0.6	124	78.0
17	8	5.0	132	83.0
18	1	0.6	133	83.6
19	10	6.3	143	89.9
20	1	0.6	144	90.6
21	7	4.4	151	95.0
22	1	0.6	152	95.6
23	1	0.6	153	96.2
24	1	0.6	154	96.9
25	1	0.6	155	97.5
99	4	2.5	159	100.0

Frequency Missing = 3

Rank--Yellow pages

ITEM6A	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	10	7.1	10	7.1
2	18	12.9	28	20.0
3	42	30.0	70	50.0
4	42	30.0	112	80.0
5	12	8.6	124	88.6
6	16	11.4	140	100.0

Frequency Missing = 22

BUILDING INSPECTORS FREQUENCIES

11:30 Wednesday, December 14, 1994 9

Rank--News media advertising

ITEM6B	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	3	2.7	3	2.7
2	7	6.4	10	9.1
3	7	6.4	17	15.5
4	16	14.5	33	30.0
5	53	48.2	86	78.2
6	24	21.8	110	100.0

Frequency Missing = 52

Rank--Recommendations from prior cust.

ITEM6C	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	65	42.2	65	42.2
2	55	35.7	120	77.9
3	22	14.3	142	92.2
4	9	5.8	151	98.1
5	2	1.3	153	99.4
6	1	0.6	154	100.0

Frequency Missing = 8

Rank--Advertising circular

ITEM6D	Frequency	Percent	Cumulative Frequency	Cumulative Percent
0	1	0.8	1	0.8
1	6	5.0	7	5.8
2	11	9.1	18	14.9
3	35	28.9	53	43.8
4	36	29.8	89	73.6
5	25	20.7	114	94.2
6	7	5.8	121	100.0

Frequency Missing = 41

BUILDING INSPECTORS FREQUENCIES

11:30 Wednesday, December 14, 1994 10

Rank--Real estate agent referral

ITEM6E	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	82	53.6	82	53.6
2	42	27.5	124	81.0
3	15	9.8	139	90.8
4	3	2.0	142	92.8
5	7	4.6	149	97.4
6	4	2.6	153	100.0

Frequency Missing = 9

Rank--other

ITEM6F	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	8	10.7	8	10.7
2	9	12.0	17	22.7
3	14	18.7	31	41.3
4	8	10.7	39	52.0
5	11	14.7	50	66.7
6	25	33.3	75	100.0

Frequency Missing = 87

Homes inspected?

ITEM7	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	28	17.4	28	17.4
2	30	18.6	58	36.0
3	23	14.3	81	50.3
4	25	15.5	106	65.8
5	55	34.2	161	100.0

Frequency Missing = 1

BUILDING INSPECTORS FREQUENCIES

11:30 Wednesday, December 14, 1994 11

Percent new homes?

ITEM8	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	109	69.0	109	69.0
2	34	21.5	143	90.5
3	9	5.7	152	96.2
4	6	3.8	158	100.0

Frequency Missing = 4

Consumer complaints?

ITEM9	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	106	66.7	106	66.7
2	44	27.7	150	94.3
3	6	3.8	156	98.1
4	2	1.3	158	99.4
5	1	0.6	159	100.0

Frequency Missing = 3

Type of complaint

ITEM10	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	3	5.1	3	5.1
2	43	72.9	46	78.0
3	5	8.5	51	86.4
4	8	13.6	59	100.0

Frequency Missing = 103

BUILDING INSPECTORS FREQUENCIES

11:30 Wednesday, December 14, 1994 12

Error and omissions insurance?

ITEM11	Frequency	Percent	Cumulative Frequency	Cumulative Percent
YES	48	30.4	48	30.4
NO	99	62.7	147	93.0
UNCERTAIN	1	0.6	148	93.7
4	10	6.3	158	100.0

Frequency Missing = 4

Support state regulation of bldg insp.?

ITEM12	Frequency	Percent	Cumulative Frequency	Cumulative Percent
1	51	31.9	51	31.9
2	18	11.3	69	43.1
3	26	16.3	95	59.4
4	65	40.6	160	100.0

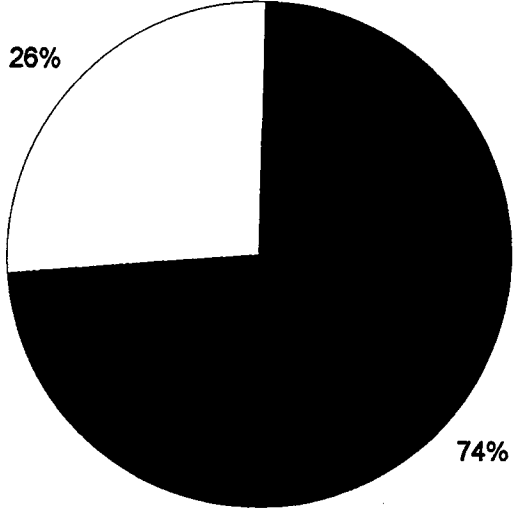
Frequency Missing = 2

Appendix C

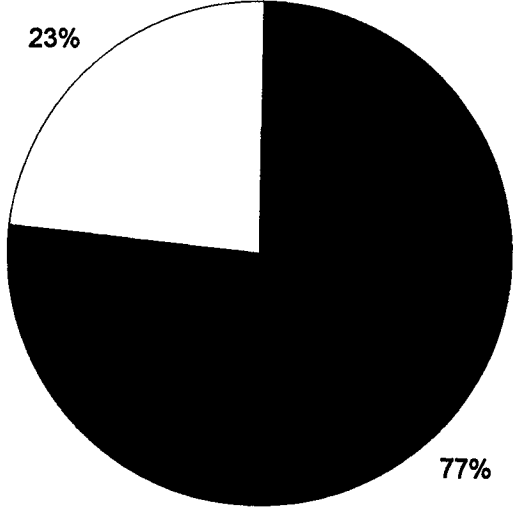
Survey to County Local Licensing Officials

	Yes	No
Do you think state regulation of home private home building inspectors is necessary to protect the public from physical or economic harm?	31	11
Do you support state regulation of private home building inspectors?	33	10
Can you substantiate any instances of physical or economic harm resulting from the unregulated practice of this profession?	12	31
Does your office or any other office of local jurisdiction receive complaints regarding this industry?	24	17

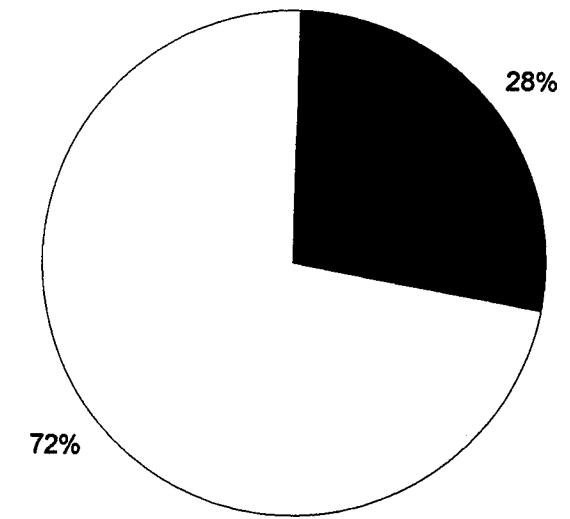
Do you think state regulation of home private building inspectors is necessary to protect the public from physical or economic harm?



Do you support state regulation of private home building inspectors?



Can you substantiate any instances of physical or economic harm resulting from the unregulated practice of this profession?



Does your office or any other office of local jurisdiction receive complaints regarding this industry?

