

Certification of Regulatory Professionals: Why Not? (Part I)

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Accountants, architects, barbers, cosmetologists, crane operators, dentists, docking masters, doctors, electricians, engineers, foresters, home inspectors, interior designers, landscape architects, lawyers, land surveyors, pilots, plumbers, private detectives, real estate appraisers, real estate brokers, security systems technicians, security guards and tax preparers.

These are among the professions my state of Maryland certifies. Most states have similar lists. And missing from every state's list is "utility regulators." Having practiced within this field in multiple roles—as a hearing room litigant, appellate lawyer, commission advisor, opinion-drafter, legislation-drafter and expert witness—I am convinced that regulation can improve if it certifies its practitioners. How we do that leads to a series of questions, explored this month and next.¹

Why Certify?

Certification has a market mission and a professional mission. In the marketplace, certification protects consumers from harm, while rewarding the qualified and penalizing the unqualified. In the professions, certification defines the profession's purpose, then establishes and upholds its standards. It answers the question, "What does it mean to be a good architect/accountant/doctor/lawyer?"

These two missions, mutually reinforcing, apply equally to the regulatory profession. The purpose of regulation is performance: to induce excellence in the industries whose actors and actions we regulate. To induce excellence, regulators do three things: they set standards, apply those standards to actors and their actions, then assign consequences, positive and negative, by setting compensation and imposing penalties. For their decisions to be credible, regulators must earn trust: from the industry whose performance they judge, and from consumers whose welfare they protect.

Certification can help us earn that trust. It would act centripetally, pulling the profession—its commissioners and staff, utility executives and their employees, consultants and course providers—toward a central, common vision of excellence in industry performance.

What to Certify?

To know what to certify we must ask: In a regulatory professional, what characteristics and knowledge do we value? Of those characteristics and knowledge, which should we validate

through certification? The answers then drive more practical questions: (1) Is there a core body of knowledge all regulatory professionals should have? (2) Is there also discipline-specific, industry-specific and subject-specific knowledge that professionals should master? (Examples: What should engineers know? What should telecommunications regulators know? What should rate of return experts know?) Answering these questions then helps us decide whether and how to differentiate certification. For example:

Regulation-generic mastery: Certification would cover subjects all regulatory professionals should know, such as: the purposes of regulation; market structure (e.g., distinction between monopoly markets and competitive markets, and ways to transition between them); the different types of transactions and actions that trigger commission involvement; commission powers, structures and decisionmaking processes; and (to encourage multidisciplinary knowledge) the principles that underlie each of the relevant professional disciplines (law, economics, finance, accounting, engineering, management).

Profession-specific mastery: Certification would be different for lawyers, economists, accountants, financial analysts, and engineers. A regulatory lawyer, for example, would need to master concepts common to most regulatory statutes, such as the "just and reasonable" standard, undue discrimination and retroactivity; constitutional law, such as due process, takings, interstate commerce clause, contract clause and federal-state supremacy; administrative and procedural law, such as substantial evidence, the "arbitrary and capricious" standard, due process, cross examination, and judicial review; and judicial doctrines affecting regulatory powers, such as legislative delegation, filed rate doctrine, and the "managerial prerogative."

Industry-specific mastery: This certification would vary with each regulated industry: electricity, gas, telecommunications, water. Materials to be mastered would include: history, market structure, corporate and financial structure, transactions, state–federal regulatory relationship, and emerging issues.

Subject matter mastery: Reliability, consumer protection, rate design, competition, hearing room procedures, competitive bidding, renewable energy, universal service, integrated resource planning, competitive bidding for generation, regional transmission organizations, audits. The subjects covered by regulation are myriad and intimidating. But they can be mastered.

Role mastery: The regulatory profession includes different roles: commissioners, commission advisors, litigation attorneys, expert witnesses, administrative law judges. Each role requires mastery of certain procedures and substantive topics.

Attendance vs. Achievement

In Lima, Perú last month, I gave a lecture to a group of young professionals. These 20 attorneys, 20 economists and 20 engineers, were competitively selected from a field of 2500 applicants by OSIPTEL, Perú's telecommunications regulator. They were spending their summer studying regulation. My hour lecture, from 11 a.m. to noon, was their third of the day. I had expected to follow my talk with lunchtime conversation, but when I finished no one moved. Instead, administrators came in, passing out papers. Another lecture? No—an exam. These students will be tested throughout their three months. Achievement, not attendance.

To certify is to recognize achievement—to confirm that a person or entity has achieved some defined measure of expertise, knowledge or competence. A graduate school receives certification after objective experts monitor and review for curriculum, scholarship, teaching quality and student success. A lawyer, doctor, engineer or accountant receives certification after completing educational requirements at a certified school and taking one or more professional exams.

In the regulatory community we have dozens of conferences, seminars, professional meetings and continuing legal education. But only in rare cases, such as New Mexico State University's master's degree program and the Society of Utility and Regulatory Financial Analysts' professional exam, do we certify achievement. In all other cases (including my own legal seminars), attendees merely attend. But attendance is not achievement; exposure is not mastery. And smart phones—the bane of any seminar presenter—have not helped. We need to certify not what chairs we have filled, but what material we have mastered.

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At stake is our nation's infrastructure: our electricity, gas, telecommunications and water industries. Our goal is performance. We can rely on faith and beliefs, as in "good faith efforts" and "belief in competitive markets," or we can insist on old-fashioned objectivity, rooted in professional training validated by certification. We license manicurists; why not regulators? Next month I will address steps we can take.

¹ This two-part series draws from writing I did while the Executive Director of the National Regulatory Research Institute.