

Department of Legislative Services
 Maryland General Assembly
 2018 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 1082 (Senator DeGrange)
 Education, Health, and Environmental Affairs

State Government - Regulations Impacting Small Businesses - Economic Impact Analyses

This bill makes several changes to the regulation promulgation process, specifies how State and local regulations are enforced if a State agency promulgates a regulation that has a significant small business impact, and requires State agencies to consider specified mitigation options when assessing civil penalties on small businesses. The bill also requires (1) the Department of Budget and Management (DBM) to provide related training at least once every two years; (2) the Office of Legislative Audits (OLA) to conduct a related performance audit at least once every three years; and (3) the Governor to designate an appropriate entity to conduct a related feasibility study. **The bill takes effect July 1, 2018.**

Fiscal Summary

State Effect: General fund expenditures increase by at least \$280,000 in FY 2019 and by \$30,000 every two years thereafter; expenditures may also increase in other years. General and special fund revenues may decrease minimally beginning in FY 2019.

(in dollars)	FY 2019	FY 2020	FY 2021	FY 2022	FY 2023
GF/SF Rev.	(-)	(-)	(-)	(-)	(-)
GF Expenditure	\$280,000	-	\$30,000	-	\$30,000
Net Effect	(\$280,000)	(-)	(\$30,000)	(-)	(\$30,000)

Note: () = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill does not materially affect local government finances or operations, as discussed below.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Regulation Promulgation Process

Proposed regulations must be submitted to the Advisory Council on the Impact of Regulations on Small Businesses (advisory council) and the Joint Committee on Administrative, Executive, and Legislative Review (AELR Committee) 30 days prior to the date of publication in the *Maryland Register*. This is an increase of 15 days.

A State agency, as part of the existing process of creating an economic impact rating and analysis for proposed regulations, must determine whether any comparable local government regulations exist. If the promulgating agency determines that an existing regulation of a comparable nature that is at least as stringent as the proposed regulation has been promulgated by a unit of local government, the agency may include in its proposed regulation a statement that compliance with the local regulation will constitute compliance with the proposed regulation. Unless otherwise provided by State law, if an agency promulgates a regulation that has a significant small business impact, and the regulation is comparable to a local regulation, the State regulation supersedes enforcement of the local regulation.

In addition to other existing requirements, when a State agency estimates that a proposed regulation will have a significant small business impact, the agency must:

- establish an electronic registry that allows any small business or other interested party to register to receive an electronic notification when the proposed regulation is posted on the agency's website, and send the appropriate notifications;
- post the proposed regulation and the regulation's estimated small business impact on the agency's website within specified timeframes and provide an opportunity for comment; and
- prepare a compliance guide to assist small businesses, update the guide as needed until the regulation is final, and post the guide on the unit's website.

The bill also conforms similar, but separate, definitions of small business.

Consideration of Business Size when Determining Civil Penalties

In addition to other considerations required under current law, a unit of State government authorized to impose a civil penalty up to a specific dollar amount must, if the violator is a small business, consider:

- waiving the penalty if the violator corrects the violation within 30 days after the finding of the violation;
- depending on the violator's financial capacity, imposing a lesser penalty than would be imposed on a larger business entity in a comparable industry; or
- crediting the costs of correcting the violation against the penalty assessed against the violator.

These considerations do not apply to a violator that has been the subject of multiple enforcement actions by a State or local unit that involve willful or criminal conduct or pose serious health, safety, or environmental threats.

DBM Training Program

DBM must enter into an agreement with an appropriate entity to provide training to State agencies on the preparation of the economic analyses for proposed regulations. The training must be provided at least once every two years.

OLA Performance Audit

Beginning no later than June 30, 2019, and at least once every three years thereafter, OLA must conduct a performance audit to evaluate the reliability and efficacy of (1) economic impact analyses required as part of the regulation promulgation process; (2) specified determinations required for proposed regulations with significant small business impacts; and (3) specified evaluations required for proposed regulations related to the impact of the regulations on the basis of business size.

Feasibility Study

The Governor must designate an appropriate entity to study:

- the feasibility, methods, and costs of requiring all State agencies to allow small businesses to electronically submit payments, forms, reports, or other documentation required by regulation; and
- the ability of State agencies to collect and share information regarding the impact of regulations on small businesses.

The study must include specified assessments and recommendations related to the data sharing process among State agencies. The results of the study must be submitted to the Governor and specified committees of the General Assembly by June 30, 2019.

Current Law: Proposed regulations must be submitted to the advisory council and the AELR Committee 15 days prior to publication.

If the appropriate State agency or the Department of Legislative Services (DLS) determines that a regulation will have a meaningful economic impact on small businesses, the agency or DLS must develop a complete written economic impact analysis, unless the agency or DLS is unable to do so, in which case the agency or DLS must provide a written explanation of why the regulation will have a meaningful economic impact.

The economic impact rating and analysis must include estimates directly relating to the following factors, as appropriate: (1) cost of providing goods and services; (2) effect on the workforce; (3) effect on the cost of housing; (4) efficiency in production and marketing; (5) capital investment, taxation, competition, and economic development; and (6) consumer choice.

Separately, if a State agency estimates that a proposed regulation will have a significant small business impact, the agency must:

- identify each provision in the proposed regulation that will have a significant small business impact;
- quantify or describe the range of potential costs of the proposed regulation on small businesses in the State;
- identify how many small businesses may be impacted by the proposed regulation;
- identify any alternative provisions the unit considered that may have a less significant impact on small businesses in the State and the reason the alternative was not proposed;
- identify the beneficial impacts of the regulation, including to public health, safety, and welfare, or to the environment; and
- coordinate with the advisory council.

Background: Chapter 137 of 2015 established the Advisory Council on the Impact of Regulations on Small Businesses. The bill contains many of the recommendations in the advisory council's 2017 annual report. The full report can be found on the DLS [website](#).

State Fiscal Effect: General fund expenditures increase by \$280,000 in fiscal 2019 and by \$30,000 every two years thereafter, which reflects a one-time expense in fiscal 2019 to develop an electronic registry usable by all State agencies and ongoing biennial costs associated with the required training program. General fund expenditures may further increase minimally in fiscal 2019 and 2020 and every three years thereafter to conduct the performance audit. General and special fund revenues decrease minimally beginning in

fiscal 2019 from reduced civil penalties assessed on small businesses. Other operational impacts and assumptions are discussed below for each provision of the bill.

Regulation Promulgation Process

Agencies can generally handle the additional requirements related to the regulation promulgation process, including identifying comparable local government regulations and preparing compliance guides, with existing budgeted resources. To the extent this is not the case for a particular agency, general and/or special fund expenditures increase for additional staff. Any such impact has not been accounted for in this analysis.

The Department of Information Technology estimates the cost for contractual services to develop and implement an electronic registry usable by all State agencies is about \$250,000. Therefore, general fund expenditures increase by \$250,000 in fiscal 2019. While not required by the bill, this is likely more cost effective than each agency developing a separate registry.

Interaction with Local Regulations

The bill allows a State agency to include in its proposed regulation a statement that compliance with the local regulation will constitute compliance with the proposed regulation if there is a comparable local regulation that is at least as stringent. This generally conforms to how State and local regulations currently interact, where the State sets the “floor” and local governments can adopt more stringent regulations, unless they are explicitly barred from doing so in statute. Therefore, this provision does not materially affect State finances or operations.

The bill also specifies that, unless otherwise provided by State law, if an agency promulgates a regulation that has a significant small business impact and the regulation is comparable to a local regulation, the State regulation supersedes enforcement of the local regulation. This analysis assumes that this clarifies the previous provision to make certain that local regulations cannot supersede State regulations. Under this assumption, State finances and operations are not materially affected. The Department of Commerce advises that this is the intent of the provision.

If, however, the bill is interpreted to mean that State regulations with significant small business impacts can effectively nullify local enforcement of comparable regulations, then State expenditures associated with enforcement increase significantly.

Consideration of Business Size When Determining Civil Penalties

Many units of State government that regulate small businesses have the authority to issue civil penalties, the revenue from which generally accrues to either the general fund or a special fund maintained by the regulatory unit. Therefore, general and special fund revenues may decrease beginning in fiscal 2019 to the extent that civil penalties imposed on small businesses are less than they otherwise would have been. The amount is anticipated to be minimal.

DBM Training Program

DBM estimates that the cost for an entity to update training guidelines and provide five days of training is \$30,000. Training must be provided at least every two years. Therefore, general fund expenditures increase by \$30,000 in fiscal 2019 and every two years thereafter.

OLA Performance Audit

Beginning no later than June 30, 2019, and at least once every three years thereafter, OLA must conduct a performance audit to evaluate the reliability and efficacy of specified agency analyses prepared as part of the regulation promulgation process. The analyses usually do not include many of the enumerated items in State law, instead relying on a separate provision that allows for a general qualitative assessment of a meaningful small business impact.

While the bill does not specify how many analyses OLA must review during each audit, the advisory council describes it as a “sample review” (see recommendation 5 of the 2017 annual report). If OLA can conduct a limited sample review, then general fund expenditures for OLA may increase minimally in fiscal 2019 and 2020 and every three years thereafter to conduct the performance audit. The Department of Legislative Services’ Office of Policy Analysis can provide assistance in determining which analyses to review.

A full review of all small business-related items contained in all regulations submitted every three years would require additional full-time auditors to be hired.

Feasibility Study

While the entity the Governor will designate to complete the feasibility study is unknown, it is assumed that the Governor will designate the entity best suited to conduct the study with existing staff and expertise, likely at little or no additional cost.

Local Fiscal Effect: As discussed above, this analysis assumes the provision related to State regulations superseding enforcement of local regulations is a clarifying change. Under this assumption, the bill does not materially affect local government finances or operations. If, however, the bill results in State regulations with significant small business impacts effectively nullifying local enforcement of comparable regulations, then local revenues and expenditures associated with enforcement activities decrease significantly.

Small Business Effect: Small businesses benefit from additional transparency in the regulation promulgation process and potentially from reduced civil penalties. The benefit to any particular small business is unknown, but may be significant.

Additional Information

Prior Introductions: None.

Cross File: HB 855 (Delegate Brooks, *et al.*) - Health and Government Operations and Appropriations.

Information Source(s): Department of Information Technology; Department of Budget and Management; Department of Commerce; Maryland State Department of Education; Maryland Higher Education Commission; Maryland Department of Agriculture; Maryland Department of the Environment; Maryland Department of Health; Department of Labor, Licensing, and Regulation; Department of Natural Resources; Maryland Department of Transportation; Maryland Association of Counties; Maryland Municipal League; Department of Legislative Services

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