

Department of Legislative Services
 Maryland General Assembly
 2019 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 43

(The Speaker, *et al.*) (By Request - Administration)

Rules and Executive Nominations

**Elections - Legislative and Congressional Redistricting and Apportionment -
 Commission and Process**

This Administration bill implements provisions of a proposed constitutional amendment by (1) establishing the Legislative and Congressional Redistricting and Apportionment Commission; (2) specifying the membership, duties, and procedures of the Redistricting Commission; (3) specifying the responsibilities of the State Ethics Commission (SEC) with respect to the selection and removal of members of the Redistricting Commission; (4) specifying procedures for the review or establishment of a State legislative or congressional districting plan by the Court of Appeals; and (5) requiring the Governor to include funding in the State budget to carry out the activities included under the bill's provisions. The bill is contingent on the enactment and ratification of House Bill 44 or Senate Bill 91, the proposed constitutional amendment. **The bill takes effect on the proclamation of the Governor that the constitutional amendment has been adopted.**

Fiscal Summary

State Effect: General fund expenditures increase by approximately \$3.5 million in FY 2021. Revenues are not affected.

(in dollars)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	0	3,500,000	0	0	0
Net Effect	\$0	(\$3,500,000)	\$0	\$0	\$0

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

Local Effect: None.

Small Business Effect: The Administration has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services (DLS) concurs with this assessment.

Analysis

Bill Summary:

The bill expresses the intent of the General Assembly that (1) no legislative district or congressional district in the State is established for the purpose of favoring or discriminating against an incumbent officeholder, a candidate for office, or a political party and (2) provisions of the bill comply with and implement specified provisions of the Maryland Constitution.

Legislative and Congressional Redistricting and Apportionment Commission

Membership, Qualifications, and Compensation: The nine-member commission must consist of (1) three members registered with the majority party; (2) three members registered with the principal minority party; and (3) three members registered with neither principal political party.

To be eligible for membership on the commission, an individual must be a registered voter who, for a minimum of three years immediately prior to the date of selection, has been continuously registered with one of the principal political parties or who, at no time during the three years immediately prior to the date of selection, has been registered with either principal political party. A member of the commission must apply the provisions of the bill in a way that is impartial and that reinforces public confidence in the integrity of the redistricting process.

The bill excludes specified individuals from eligibility for membership on the commission, specifically:

- a member of or candidate for election to the U.S. Congress from the State;
- a member of or candidate for election to the General Assembly;
- an officer or employee of a political party or political committee;
- a contractor providing professional services to a specified officeholder or candidate for a specified office;
- a current or former employee of or consultant to a specified contractor;
- an immediate family member of a specified officeholder, candidate for a specified office, or specified contractor;
- a staff member to a specified officeholder or candidate for a specified office; or
- a current or former registered lobbyist.

A member of the commission is ineligible, for a period of five years from the date of his or her selection, to (1) hold appointive federal, State, or local public office; (2) serve as

paid staff to the General Assembly or to a member of the General Assembly; or (3) register as a State, county, or municipal lobbyist in the State.

A member of the commission may not receive compensation for his or her service on the commission but is entitled to reimbursement for expenses.

Selection of Members: In each year ending in the number zero, SEC must, by December 15, initiate an application process for the purpose of selecting members of the commission. The application process must (1) be open to all registered voters in the State and (2) promote the recruitment of a diverse, qualified applicant pool. By January 15 of the following year, SEC must publish the names of all applicants who meet the specified eligibility criteria.

SEC must, after identifying all eligible applicants, select 30 qualified applicants, 10 of whom are registered with the majority party, 10 of whom are registered with the principal minority party, and 10 of whom are not registered with either principal political party. SEC must evaluate and select qualified applicants based on their (1) relevant analytical skills; (2) ability to be impartial; and (3) appreciation for the State's geographic and demographic diversity.

By February 15 of the year ending in the number one, SEC must randomly select three applicants from each of the three categories of the above-mentioned pool of qualified applicants. The nine selected applicants serve as the members of the commission.

The term of office of a member of the commission begins March 1 of the year of his or her selection and expires February 28 the year following the next decennial census.

Vacancies and Removal of Members: In the event of a vacancy on the commission, SEC must, within 30 days after the vacancy occurs, randomly select an applicant from the remaining pool of qualified applicants, as specified. If none of the remaining qualified applicants are available for service, SEC must recruit a new applicant pool from which to select a member, as specified. SEC may, when recruiting applicants to fill a vacancy on the commission, limit participation in the application process to applicants of the same voter registration category as the vacating member.

SEC may, upon a vote of at least four members of SEC, remove a member of the commission (1) for neglect of duty; (2) for misconduct in office; (3) for a disability that prevents the member from carrying out the powers and duties of office; (4) for failing to maintain qualifications for membership, as specified; or (5) if the member is convicted of, pleads guilty to, or pleads *nolo contendere* to a felony or crime of moral turpitude, as specified. Before removing a member of the commission, SEC must provide the affected member written notice of, and an opportunity to answer, the charges.

Duties and Procedures of the Commission: Seven members of the commission constitute a quorum. Any official action of the commission requires at least seven affirmative votes of the members. The commission must elect a member to serve as chair.

The bill generally charges the commission with (1) conducting an open and transparent process that allows full public participation in the redistricting process; (2) preparing and adopting a State legislative and congressional districting plan in accordance with specified standards; and (3) conducting business with integrity and fairness. In addition, the bill clarifies that the activities of the commission are subject to the Open Meetings Act and the Maryland Public Information Act (PIA).

The commission must conduct public hearings for the purpose of collecting public input before and after the commission proposes a plan. The commission is responsible for developing and implementing a public hearing process that is subject to public notice and that promotes citizen outreach and broad public participation. The commission may supplement hearings with other activities to promote public participation, as specified.

The commission must ensure that a proposed plan is readily accessible to the public and allow a 14-day public-comment period before adopting a proposed plan. Moreover, the commission must ensure the availability of a complete, accurate, computerized population database and public access to redistricting data and map-drawing software.

By October 1 of each year ending in the number one, the commission must approve, certify, and send to the Presiding Officers of the General Assembly a State legislative districting plan and a congressional districting plan, as specified. The commission must submit, with each plan, corresponding maps and an explanatory report, as specified.

Upon receipt of a certified plan from the commission, the Presiding Officers of the General Assembly must prepare the plan for consideration by the General Assembly, as specified. The General Assembly must, for purposes of publication, codification, notification, and distribution, treat the plan as a bill, as specified.

In the event that the commission fails to adopt and certify a plan or a plan is not enacted, the commission must petition the Court of Appeals to establish a plan, as specified.

The bill authorizes the commission to hire staff, attorneys, and/or consultants in accordance with the State budget. Employees of the commission are independent of the State Personnel Management System. A possible criminal violation by a member or employee of the commission may be referred to the State prosecutor for criminal prosecution.

Court of Appeals Jurisdiction over Redistricting Proceedings

The bill grants the Court of Appeals exclusive original jurisdiction to establish State legislative or congressional districts, as specified, in the event that (1) the commission fails to approve a plan; (2) a plan is not enacted, as specified; or (3) a registered voter files a petition, as specified.

Upon enactment of a State legislative or congressional districting plan, a registered voter in the State may petition the Court of Appeals to bar the plan from taking effect on the grounds that the plan violates the Maryland Constitution, the U.S. Constitution, or federal or State statute. The commission is the defendant in a proceeding pertaining to an enacted legislative or congressional districting plan, and the commission represents the State in any petition seeking review of a certified or enacted plan. Any State registered voter may participate as an *amicus curiae* in a proceeding pertaining to an enacted districting plan.

Upon the filing of an above-described petition, the Court of Appeals must establish deadlines for the filing of pleadings and *amicus curiae* briefs. The Court of Appeals may appoint a special master to (1) hold a hearing; (2) consider a plan approved by the commission, if any; and (3) make recommendations to the Court of Appeals. A party to the proceeding may file exceptions to the recommendations of the special master, as specified.

The Court of Appeals may, after (1) holding a hearing; (2) considering a plan approved by the Redistricting Commission, if any; and (3) considering the recommendations, if any, of a special master, order relief, as specified. In a proceeding pertaining to a plan adopted and certified by the commission, the Court of Appeals may approve or modify the plan or adopt a new plan. In the case of the commission's failure to adopt and certify a plan, the Court of Appeals must establish State legislative and congressional districts, as specified.

The Court of Appeals must give priority to ruling on a petition pertaining to the State legislative or congressional districting plan, as specified.

Funding for Redistricting Activities and Proceedings

The Governor must include funds in the State budget to implement the provisions of the bill, including funds to cover the costs of litigation authorized under the bill.

Duties of the State Ethics Commission

The bill specifies that SEC is responsible for administering provisions of the bill pertaining to the selection and removal of members of the commission.

Current Law/ Background:

Legislative and Congressional Redistricting in Maryland

Legislative Districting: Article III of the Maryland Constitution sets forth requirements for State legislative districts and procedures for legislative redistricting. The Maryland Constitution and federal case law require that the boundaries of the State's 47 legislative districts are redrawn after each decennial census to adjust for population changes. State legislative districts must (1) consist of adjoining territory; (2) be compact in form; (3) be substantially equal in population; and (4) duly reflect natural and political boundaries. Legislative districts may be subdivided into single-member and/or multi-member districts for the purpose of electing delegates. Chapters 66 and 67 of 2010 address the allocation of the State's prison population among legislative districts.

In the second year following the decennial census, the Governor must, on the first day of the legislative session, after conducting public hearings, submit a legislative districting plan to the Presiding Officers of the General Assembly, who introduce the plan as a joint resolution to the General Assembly. Unless the General Assembly adopts an alternative plan before the forty-fifth day of the session, the Governor's plan becomes law. The Court of Appeals has original jurisdiction to review, upon petition by a registered voter, the legislative districting plan and grant relief.

In 2011, in concurrence with recent practice, the Governor established a Redistricting Advisory Committee to conduct public hearings around the State on legislative and congressional districting. The General Assembly adopted the Governor's 2011 legislative districting plan under Joint Resolution 2 of 2012.

State legislative boundaries are governed by the U.S. Constitution, federal statute, including the Voting Rights Act of 1965, and applicable case law. Under the Fourteenth Amendment to the U.S. Constitution, state legislative districts must be substantially equal in population (*Reynolds v. Sims* 377 U.S. 533 (1964)).

Congressional Redistricting: Congressional redistricting is governed by the U.S. Constitution, federal statute, including the Voting Rights Act of 1965, and applicable case law. Under federal case law, congressional district boundaries must be redrawn after each decennial census to adjust for population changes, and they must be as closely equal in population as practicable (*Wesberry v. Sanders*, 376 U.S. 1 (1964)).

Congress has left to the states the task of redrawing congressional district boundaries. Traditionally, the Governor has submitted a new congressional map to the General Assembly at the same time as a legislative redistricting plan. The General Assembly may adopt an alternative congressional map and is subject to no

deadline after which the Governor's plan becomes law. In 2011, the Governor convened a special session to finalize congressional districts for the 2012 primary elections. The General Assembly adopted the current congressional districting plan under Chapter 1 of the 2011 special session.

The Maryland Constitution does not explicitly address congressional districting. Chapters 66 and 67 of 2010 addressed the allocation of the State's prison population among congressional districts in the State.

Legislative and Congressional Redistricting Authority in Other States

According to the National Conference of State Legislatures (NCSL), 14 states delegate primary authority for legislative redistricting to commissions. Michigan is the most recent state to transfer responsibility for legislative redistricting to a commission; in November 2018, Michigan voters approved a constitutional amendment establishing an Independent Citizens Redistricting Commission. State legislative redistricting commissions vary significantly in terms of composition and selection process.

In 2015, the U.S. Supreme Court upheld the validity of independent congressional redistricting commissions in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. __ (2015). According to NCSL, 7 states, including Michigan as of November 2018, delegate authority for congressional redistricting to independent commissions.

Legal Challenges to Maryland's Sixth Congressional District

On November 7, 2018, a federal three-judge district court found Maryland's congressional map in violation of the First Amendment to the U.S. Constitution and issued an injunction ordering the State to redraw the boundaries of the Sixth Congressional District in advance of the 2020 elections. The State must develop and submit a revised districting plan for court approval by March 7, 2019. In developing the proposed districting plan, the State may not consider citizens' party affiliation or voting history. If the State fails to submit a plan by the specified deadline, or if the court rejects the State's plan, the court will establish a commission to develop and submit a plan. On November 16, 2018, the court stayed the injunction, pending appeal in the U.S. Supreme Court, until the earlier of a Supreme Court resolution or July 1, 2019. The U.S. Supreme Court will review the three-judge district court's ruling and hear arguments in March.

Maryland Emergency Commission on Sixth Congressional District Gerrymandering

On November 26, 2018, in response to the three-judge court's ruling, the Governor issued an executive order establishing the nine-member Emergency Commission on the

Sixth Congressional District Gerrymandering. The commission consists of three co-chairs appointed by the Governor and six members selected through a public application process. The commission's membership includes equal numbers of registered Democrats, registered Republicans, and individuals unaffiliated with either party.

The executive order charges the commission with preparing a new congressional map, which must revise the boundaries of the Sixth Congressional District, comply with the court order, and adhere to all applicable legal requirements. The commission, which has conducted public hearings across the State, must submit its proposed redistricting plan by March 4, 2019, for public comment, and by April 2, 2019, submit a finalized plan and report to the Governor. Per the executive order, the Governor will submit the finalized plan for introduction as emergency legislation in the 2019 session of the General Assembly.

2015 Maryland Redistricting Reform Commission

In August 2015, the Governor issued an executive order establishing the 11-member Maryland Redistricting Reform Commission. The executive order charged the commission with examining approaches to redistricting reform and, specifically, independent redistricting commissions, collecting citizen input on redistricting reform, developing recommendations for reforming the State's redistricting process, and promoting redistricting reform across the State, among other specified responsibilities. In its November 2015 report, the commission detailed its recommendations for the establishment of an independent redistricting commission.

Open Meetings Act, Generally

Under Maryland's Open Meetings Act, with limited exceptions, a "public body" must (1) provide reasonable advance notice of the time and location of meetings, including whether any portion of the meeting will be in closed session and (2) meet in open session in a location that is reasonably accessible to attendees. A public body is any entity that (1) consists of at least two individuals and (2) is created by the Maryland Constitution; a State statute; a county or municipal charter; a memorandum of understanding or a master agreement to which a majority of the county boards of education and the Maryland State Department of Education are signatories; an ordinance; a rule, resolution, or bylaw; or an executive order of the Governor or of the chief executive authority of a political subdivision. Exclusions from the definition of "public body" include juries, the Governor's cabinet and Executive Council, judicial nominating commissions, and single-member entities, among others.

Maryland Public Information Act, Generally

Under PIA, all persons are entitled to access to information about the affairs of government and the official acts of public officials and employees. Each governmental unit that maintains public records must identify a representative whom a member of the public may contact to request a public record. The Office of the Attorney General (OAG) must post all such contact information on its website and in any *Public Information Act Manual* published by OAG.

State Expenditures: The Governor's Office anticipates that, under the bill, a total of \$3.0 million in general fund expenditures is required to fund redistricting activities over the course of a three-year redistricting process. However, the Office of Legislative Audits (OLA) has previously advised that expenditures necessary to implement similar legislation likely exceed \$3.0 million, based on California's experience implementing a similar redistricting process. Accordingly, general fund expenditures increase by an estimated \$3.5 million in fiscal 2021 to provide staffing, consulting services, and/or legal services for the commission; staffing for SEC to implement the commission selection process; software for developing redistricting plans; computer, printing, map plotting, and other equipment; a computerized population database and public access to redistricting data and map-drawing software; office space; public hearings; and the cost of any litigation resulting from the bill's provisions, as discussed below.

The Commission: Under the bill, the commission is responsible for developing legislative and congressional districting plans, conducting public hearings, and ensuring the availability of a complete and accurate computerized population database and map-drawing software. In addition, the bill authorizes the commission to hire staff, attorneys, and/or consultants in accordance with the State budget.

The staffing and consulting services required to meet the commission's needs cannot be reliably estimated at this time. However, it is assumed that the commission will rely extensively on contractual staff and/or contractual services, including legal and technical services. Because the activities of the commission are limited to the duration of the redistricting process, it is likely impractical for the commission to hire regular, full-time staff.

Providing online access to redistricting data and map-drawing software requires uploading and maintaining the State's official redistricting data to a software program that allows online map-drawing. The redistricting software vendor used by DLS has previously estimated that an online system contemplated in the bill may cost between \$35,000 and \$75,000, depending on the number of anticipated users and the features enabled.

According to OLA, the California State Auditor has previously advised that the state incurred approximately \$4.0 million in expenditures over the course of the previous HB 43/ Page 9

redistricting cycle to support the work of the California Citizens Redistricting Commission, including \$2.0 million for contractual services. Of the roughly \$2.0 million in expenditures for contractual services, approximately \$1.7 million was attributed to public relations and outreach activities. DLS notes that, given the difference in population size between Maryland and California, expenditures related to public outreach are likely to be significantly lower for Maryland than those incurred in California. Based on these considerations, OLA has previously estimated that overall expenses related to redistricting work likely total approximately \$3.5 million.

SEC: Under the bill, SEC is responsible for developing and implementing the commission member selection process. SEC must initiate an application process by December 15, 2020, and by February 15, select the nine members of the commission, as specified. SEC advises that existing staff are unable to absorb this additional responsibility. Accordingly, SEC expenditures increase by approximately \$15,300 in fiscal 2021, which reflects the cost of hiring one part-time (50%) contractual paralegal for nine months, beginning July 1, 2020, to coordinate the commission member selection process. These expenditures are included in the estimate discussed above.

Judiciary: The Judiciary has previously advised that controversies regarding congressional redistricting are rarely heard in State court, so it has limited expertise in resolving disputes. Any expenditures related to increased filings or the appointment of a special master and/or development of congressional and/or legislative district boundaries in the event a plan is not enacted cannot be reliably estimated at this time.

Other State Agencies: The Maryland Department of Planning, the State Board of Elections, OAG, the Department of Information Technology, the Department of Budget and Management, and the State Prosecutor's Office report that the bill can be implemented with existing resources.

Additional Comments: The bill requires the commission to complete final maps by October 1 of each year ending in the number one. However, the State receives the required census data in February or as late as March of the same year. Chapters 66 and 67 of 2010 require that population counts used to create legislative and congressional districts in Maryland exclude certain incarcerated individuals. Implementation of Chapters 66 and 67 of 2010 includes (1) geocoding tens of thousands of prisoner address files in coordination with the Department of Public Safety and Correctional Services; (2) updating census data; and (3) incorporating the adjusted data into the software used to complete maps. During the previous redistricting cycle, in 2011, this process took nine months. DLS anticipates that this process will likely take at least six months in 2021. Thus, it may not be feasible for the commission to meet the bill's deadline for completing its work.

DLS notes that the earliest the bill can take effect is November 2020 following the next general election, and the bill requires the selection process for the commission to begin in December 2020. Even so, it is assumed that funding for the commission can be appropriated prior to the adoption of the constitutional amendment.

Additional Information

Prior Introductions: None.

Cross File: SB 90 (The President, *et al.*) (By Request - Administration) - Education, Health, and Environmental Affairs.

Information Source(s): Department of Information Technology; Office of the Attorney General; Governor's Office; Judiciary (Administrative Office of the Courts); State Prosecutor's Office; Department of Budget and Management; Maryland Department of Planning; Maryland State Board of Elections; State Ethics Commission; National Conference of State Legislatures; Department of Legislative Services

Fiscal Note History: First Reader - February 27, 2019
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ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: **Elections - Legislative and Congressional Redistricting and Apportionment - Commission and Process**

BILL NUMBER: HB43/SB90

PREPARED BY: Governor's Legislative Office

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

X WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

— WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS