

Department of Legislative Services  
Maryland General Assembly  
2012 Session

FISCAL AND POLICY NOTE

Senate Bill 537 (Senator Pugh, *et al.*)

Education, Health, and Environmental Affairs  
and Budget and Taxation

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State Finance and Procurement - Special Funds - Diversity

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This bill requires the State Treasurer, in consultation with the Governor's Office of Minority Affairs (GOMA), to require that investments of a "special fund" (as defined by the bill) reflect the diversity of the State. The bill prohibits a unit of State government that administers a special fund that receives fees generated by the public from accepting fees if certain diversity requirements are not met. GOMA must, by regulation, determine requirements necessary to reflect the diversity of the State. By January 1, 2013, the State Treasurer, in consultation with GOMA, must report to the General Assembly on any special funds that are not in compliance with provisions of the bill.

The bill takes effect June 1, 2012.

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Fiscal Summary

**State Effect:** Special fund revenues and expenditures may be reduced due to the loss of fee and investment revenues. The extent of the reduction will depend upon requirements to be established by GOMA determining what is necessary to reflect the diversity of the State.

**Local Effect:** Local government revenues and expenditures are not directly affected.

**Small Business Effect:** Any change in the investment of special funds (as defined by the bill) may increase State support for some small businesses while reducing or eliminating support for other small businesses.

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## Analysis

**Bill Summary:** The bill defines “special fund” as a fund established by law to benefit or expand an industry in the State. A unit of government that administers a special fund that receives fees generated by the public may not accept the fees unless:

- the ownership of the industry that receives the benefit of the special fund reflects the diversity of the State; and
- the industry has procedures that provide opportunities for minority business to achieve goals consistent with State minority business enterprise (MBE) participation law.

**Current Law:** Pursuant to Chapter 600 and 601 of 2008, the State Treasurer’s Office must attempt, to the greatest extent feasible, to use MBEs to provide brokerage and investment management services.

The State’s MBE program establishes a goal that at least 25% of the total dollar value of each agency’s procurement contracts be awarded to MBEs; long-standing subgoals of 7% for African American-owned businesses and 10% for woman-owned businesses were repealed by Chapters 252 and 253 of 2011. Instead, Chapters 252 and 253 authorize GOMA, in consultation with the Maryland Department of Transportation and the Office of the Attorney General, to establish guidelines for each unit to consider while determining whether to set subgoals for individual procurements based on existing categories for minority groups. There are no penalties for agencies that fail to reach the 25% target. Instead, agencies are required to use race-neutral strategies to encourage greater MBE participation in State procurements.

An MBE is a legal entity, other than a joint venture, that is:

- organized to engage in commercial transactions;
- at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and
- managed by, and the daily business operations of which are controlled by, one or more of the socially and economically disadvantaged individuals who own it.

The MBE program is scheduled to terminate July 1, 2012, but has been extended in prior years.

A bidder or offeror may request a waiver from an MBE contract or subcontract goal. A waiver may be granted only if the bidder or offeror reasonably demonstrates that certified

MBE participation could not be obtained, or could not be obtained at a reasonable price, and if the agency head determines that the public interest is served by a waiver.

Failure to comply with MBE contract provisions, or to secure a waiver, can result in contract termination, referral to the Attorney General for appropriate action, or initiation of any other specific remedy identified in the contract.

**Background:** In 1989, the U.S. Supreme Court held in the *City of Richmond v. J.A. Croson Co.*, that state or local MBE programs using race-based classifications are subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. In addition, the ruling held that an MBE program must demonstrate clear evidence that the program is narrowly tailored to address actual disparities in the marketplace for the jurisdiction that operates the program. As a result, prior to each reauthorization of the State's MBE program, the State conducts a disparity study to determine whether there is continued evidence that MBEs are underutilized in State contracting. Since the program was established in its current form in 1990 in response to the *Croson* decision, it has been reauthorized five times, in 1995, 2000, 2001, 2006, and 2011, the latter for just one year. A disparity study was completed in 2006, just prior to a five-year reauthorization of the program that included a requirement for another study to be completed by September 30, 2010. Completion of that study was delayed until February 2011.

The 2011 disparity study found continued and ongoing disparities in the overall annual wages, business earnings, and rates of business formation between nonminority males and minorities and women in Maryland. For instance, average annual wages for African Americans (both men and women) and nonminority women were 33% lower than for comparable nonminority males. It also found continued disparities in the use of MBEs compared to their availability in the market place to perform work in designated categories of work. For instance, African American-owned businesses were paid 4.5% of State construction contract dollars, but they make up 9.7% of the construction sector in the State. Woman-owned businesses were paid 8.5% of maintenance contract dollars, despite making up 18.0% of the maintenance contract sector. Similar disparities were found in other contracting sectors and for other MBE categories.

**State Fiscal Effect:** The bill may prohibit the receipt of some of the following fees: occupational and professional license fees supporting the operation of selected boards and commissions under the authority of the Department of Labor, Licensing, and Regulation (DLLR); and license and other fees supporting certain medical boards and commissions.

Therefore, collection and expenditure of fee revenue supporting the Maryland Real Estate Commission; the Commission of Real Estate Appraisers and Home Inspectors; the Elevator Safety Review Board; the Office of Cemetery Oversight; the Maryland Board of Public Accountancy; and various design boards (*e.g.*, Maryland Board of Architects) may be terminated under the bill. However, DLLR is not certain that the function of these boards is to benefit or expand an industry in the State.

Similarly, collection and expenditure of fees supporting the State Emergency Medical Services Board; the Maryland Board of Nursing; the Maryland Board of Physicians; the Health Services Cost Review Commission; the Maryland Healthcare Commission; the State Board of Chiropractic and Massage Therapy Examiners; the State Board of Dental Examiners; the State Board of Dietetic Practice; and several additional medical boards and commissions may be subject to termination.

The bill may curtail collection of fees associated with other State funds as well.

#### *State Treasurer's Office*

The State Treasurer's Office advises that it is standard operating procedure to use minority broker dealers as often as fiscally sound for investment transactions. In accordance with State Finance and Procurement § 6-222, the Treasurer's Office is only legally allowed to invest in fixed income securities that are issued on the federal level. U.S. Treasury and agency bonds are not intended to reflect the diversity of the State of Maryland.

The State Treasurer's Office advises that if the bill requires the State Treasurer to be responsible for the investment of funds into certain companies, this is not currently a role of the State Treasurer's Office. This estimate does not assume the bill requires additional resources for the State Treasurer's Office.

Some special funds, as defined by the bill, may fail to meet standards to be set by GOMA for reflecting the diversity of the State. For those funds that fail to meet these standards and that also receive fees generated by the public, the fees must not be accepted. The investment of special funds (as defined by the bill) may also be altered to reflect the diversity of the State.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** HB 1197 (Delegate Morhaim) - Health and Government Operations.

**Information Source(s):** Maryland Department of Agriculture; Department of Business and Economic Development; Department of Natural Resources; Governor's Office; Department of Housing and Community Development; Comptroller's Office; Department of Labor, Licensing, and Regulation; Department of State Police; Maryland Department of Transportation; Maryland State Treasurer's Office; Department of Legislative Services

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