

**Department of Legislative Services**  
 Maryland General Assembly  
 2016 Session

**FISCAL AND POLICY NOTE**  
**Third Reader**

Senate Bill 1083

(Senator Conway)

Education, Health, and Environmental Affairs

Health and Government Operations

**Secretaries of Principal Departments - Supervision and Review of Decisions and Actions by Units Within Department**

This bill requires the secretary of each principal department to adopt regulations for the supervision of each unit of State government within the secretary’s jurisdiction that is composed, in whole or in part, of individuals participating in the occupation or profession regulated by the unit in order to (1) prevent unreasonable anticompetitive actions by the unit and (2) determine whether the decisions and actions of the unit further a clearly articulated State policy to displace competition in the regulated market. The bill specifies the elements that must be included in the regulations. The bill also alters the power of the Secretary of Health and Mental Hygiene to disapprove or modify decisions of a board or commission under specified circumstances.

The bill takes effect June 1, 2016.

**Fiscal Summary**

**State Effect:** No effect in FY 2016. General fund expenditures increase by \$157,100 in FY 2017 for the Department of Labor, Licensing, and Regulation (DLLR) to hire one full-time administrator and one full-time administrative specialist to meet the bill’s requirements. Future year expenditures reflect annualization and inflation. Other affected agencies can likely handle the bill’s requirements with existing budgeted resources, as discussed below. Revenues are not affected.

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	0	157,100	149,400	155,400	161,500
Net Effect	\$0	(\$157,100)	(\$149,400)	(\$155,400)	(\$161,500)

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

**Local Effect:** None.

**Small Business Effect:** Meaningful.

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## **Analysis**

**Bill Summary:** The bill establishes that the power of the Secretary of Health and Mental Hygiene includes the power to disapprove or modify any decision of a board or commission made under authority specifically delegated by law to the board or commission if (1) the board or commission is composed in whole or in part of individuals participating in the regulated occupation or profession and (2) the Secretary has designated that the decision or determination is subject to review under specified regulations. The secretary of each principal department is responsible for the supervision of the units of State government within the secretary's jurisdiction that are composed in whole or in part of individuals participating in the occupation or profession regulated by the units.

The regulations adopted by each secretary must specify (1) the decisions or actions of the unit that require review by the secretary or the secretary's designee; (2) the process by which the secretary or the secretary's designee must review the decisions or actions; and (3) that a decision or action of the unit may not constitute a final decision or action of the unit until after the secretary or the secretary's designee has conducted the required review.

The process of review must require the secretary or the secretary's designee to (1) review the merits of the proposed decision or action; (2) assess whether the proposed decision or action furthers a clearly articulated State policy to displace competition in the regulated market; and (3) issue a written decision approving, disapproving, or modifying the proposed decision or action.

A secretary may not designate an individual as the secretary's designee if the individual is employed by, under the oversight of, or a member of a board or commission whose decision or action is the subject of review.

**Current Law:** There are 19 principal departments within the Executive Branch of State government. The State Government Article establishes the powers and duties of the secretary of each principal department. Among other enumerated responsibilities, each secretary must establish policy for the units of State government within the secretary's department and is responsible for the review and approval of the plans of all units of State government within the secretary's jurisdiction. The secretary of each principal department has the authority and the responsibility to adopt regulations for all units within the secretary's jurisdiction, except as otherwise provided by law.

Many professions and occupations require licensure or certification by State licensing boards and commissions; these entities generally consist, at least in part, of members of the regulated profession or occupation. The majority of licensing boards and commissions are located in the following principal departments: (1) DLLR; (2) the Department of Health and Mental Hygiene (DHMH); (3) the Maryland Department of Agriculture (MDA); and (4) the Maryland Department of the Environment (MDE).

*Department of Labor, Licensing, and Regulation:* The Business Regulation Article authorizes the Secretary of Labor, Licensing, and Regulation to review and approve, disapprove, or modify the plans and proposals of the units in DLLR. Additionally, a unit must submit proposed regulations to the Secretary before publication. The Secretary *may* approve, disapprove, or revise any proposed regulation. Within 30 days after submission of a proposed regulation on a regulatory, supervisory, quasi-judicial, disciplinary, or enforcement function of a unit, the Secretary *may* disapprove the proposed regulation if the Secretary finds that the regulation (1) would discourage competition within a regulated occupation or profession; (2) would unfairly restrict entry of applicants into a regulated occupation or profession; or (3) is otherwise contrary to the public interest.

DLLR regulates many of the State's nonhealth professions that require a State license or similar professional credential through various professional licensing boards, offices, commissions, units, and other licensing structures. Most of these boards and commissions explicitly operate under the authority of the Secretary. **Exhibit 1** lists the licensing boards and commissions in DLLR and whether or not the board or commission is explicitly subject to the Secretary's authority under existing law.

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**Exhibit 1**  
**Secretary Authority Over Licensing Boards and Commissions in the**  
**Department of Labor, Licensing, and Regulation**

	<b><u>Explicitly Operates Under</u></b> <b><u>Authority of Secretary</u></b>
Architects	Yes
Athletics	Yes
Barbers	Yes
Cemeteries	Yes
Certified Interior Designers	Yes
<b>Collection Agencies</b>	<b>No</b>
Cosmetologists	Yes
Elevator Safety	Yes
Foresters	Yes
<b>Heating, Ventilation, Air-Conditioning, and</b> <b>Refrigeration Contractors</b>	<b>No</b>
Home Improvement	Yes
Individual Tax Preparers	Yes
Landscape Architects	Yes
Master Electricians	Yes
Pilots	Yes
Plumbing	Yes
Professional Engineers	Yes
Professional Land Surveyors	Yes
Public Accountancy	Yes
Racing	Yes
Real Estate	Yes
Real Estate Appraisers, Appraisal Management Companies, and Home Inspectors	Yes
Stationary Engineers	Yes

Note: Some licenses issued directly by the Secretary of Labor, Licensing, and Regulation are excluded from the exhibit because the licensees are not regulated by a board or commission; for example, locksmiths and secondhand precious metal object dealers.

Source: Department of Legislative Services

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*Department of Health and Mental Hygiene:* Under the Health-General Article, the Secretary of Health and Mental Hygiene has the authority and powers specifically granted to the Secretary over the units in DHMH. All authority and powers not granted are reserved to those units free of the control of the Secretary. The Secretary *must* review and *may* revise the rules and regulations of each unit in DHMH. The Health Occupations Article establishes that the Secretary's power over plans, proposals, and projects of units in DHMH *does not* include the power to disapprove or modify any decision or determination that a board or commission makes under authority specifically delegated by law to the board or commission. DHMH regulates health occupations through licensing boards. **Exhibit 2** lists the health occupations boards within DHMH.

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**Exhibit 2**  
**Health Occupations Boards in the Department of Health and Mental Hygiene**

Acupuncture  
Audiologists, Hearing Aid Dispensers, and Speech-Language Pathologists  
Chiropractic and Massage Therapy  
Dental  
Dietetic Practice  
Environmental Health Specialists  
Morticians and Funeral Directors  
Nursing  
Nursing Home Administrators  
Occupational Therapy  
Optometry  
Pharmacy  
Physicians  
Physical Therapy  
Podiatry  
Professional Counselors and Therapists  
Psychologists  
Residential Child Care Program Professionals  
Social Work

Source: Department of Legislative Services

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*Maryland Department of Agriculture:* Under the Agriculture Article, the Secretary *must* adopt and review rules and regulations for MDA. The Secretary *may* approve, disapprove,

or modify the plans, proposals, and projects of each unit. MDA has two licensing boards: the State Board of Veterinary Medical Examiners and the Maryland Horse Industry Board.

*Maryland Department of the Environment:* Under the Environment Article, the Secretary *must* review and *may* revise the rules and regulations of each unit within MDE that is authorized by law to adopt rules and regulations. The Secretary *may* approve, disapprove, or modify any plans, proposals, and projects of each unit. MDE has three licensing boards: the State Board of Waterworks and Waste Systems Operators; the State Board of Well Drillers; and the Marine Contractors Licensing Board.

**Background:** The bill is in response to the U.S. Supreme Court's 2015 decision in *N.C. Board of Dental Examiners v. Federal Trade Commission*. The decision held that in order to invoke state action immunity from federal antitrust liability, a state board on which a controlling number of decision makers are active market participants must satisfy the two-pronged test established in *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc*: (1) clear articulation of state policy and (2) active supervision by the State.

In an October 1, 2015 memorandum, the Office of the Attorney General (OAG) addressed both prongs of the *Midcal* test as they relate to State licensing boards and commissions. First, the memorandum indicated that the General Assembly has clearly articulated a State policy that a variety of occupations and professions are best regulated by market participants by establishing boards and authorizing them to establish requirements for licensure, issue licenses, and discipline licensees.

Regarding active supervision, the memorandum noted several instances where the adequacy of the State's supervision of boards and commissions could be considered insufficient in light of the *N.C. Dental* decision. The OAG memorandum presented two recommendations:

- *Executive Order:* The Governor should issue an executive order that requires active review by the appropriate secretary, or the secretary's designee, of regulations that (1) would discourage competition; (2) would unfairly restrict entry into a regulated profession or occupation; or (3) are otherwise contrary to the public interest. The executive order should also direct the Secretaries of Agriculture; the Environment; and Labor, Licensing, and Regulation (or their designees) to exercise their authority to supervise the boards in their departments to prevent anticompetitive actions. Finally, the executive order should direct the health occupations boards, whose actions are currently expressly outside the power of the Secretary of Health and Mental Hygiene to disapprove or modify, to carefully consider in consultation with board counsel whether proposed actions raise anticompetitive concerns and to document those discussions.

- *Statute:* A statute should be added to the Courts and Judicial Proceedings Article that expresses an intent that boards and their members are immune from antitrust liability for actions taken by the board under certain circumstances. The statute should also (1) require the secretaries, or their designees, to review regulations; (2) authorize the secretaries to revise or disapprove regulations and actions that would discourage competition, would unfairly restrict entry into a regulated profession or occupation, or are otherwise contrary to public interest; and (3) with respect to contested cases involving anticompetitive concerns or risks, require the secretaries, or their designees, to review and approve board decisions to charge individuals with violations of practice acts.

The Federal Trade Commission (FTC) also issued guidance in October 2015 on active supervision of state regulatory boards controlled by market participants. FTC presented several factors that are relevant in determining whether the active supervision requirement has been met, including whether the supervisor issued a written decision approving, modifying, or disapproving the recommended action. FTC noted that a written decision demonstrates that the supervisor undertook the required meaningful review of the merits of the board's action.

**State Expenditures:** The bill requires principal departments to review the decisions and actions of units that consist, in whole or in part, of individuals participating in the occupation or profession regulated by the unit. Therefore, this analysis assumes that the bill primarily affects the licensing boards and commissions in four principal departments: DLLR, DHMH, MDA, and MDE.

Given that MDA and MDE each have only two or three units that are likely subject to the bill's requirements, MDA and MDE can handle the requirements with existing resources. Even so, staff may need to be temporarily diverted from other tasks to develop the required regulations and to formulate a process for review of board decisions and actions for anticompetitive effects.

DHMH advises that the required regulations and review process can be developed with existing resources. DHMH advises that most health occupations board decisions do not impact market competition but relate to disciplinary actions and standards of care; therefore, DHMH does not anticipate that a high volume of board decisions and actions will be subject to review. Further, the department currently has a vacant, but funded, management position within the health occupations boards that DHMH could fill and use as the Secretary's designee under the bill.

The Department of Legislative Services (DLS) notes that, although most health occupations board decisions and actions may not ultimately affect market competition, the bill nonetheless requires DHMH to review these decisions and actions for possible effects.

Select board decisions and actions are not final until after DHMH review, and DHMH may disapprove or modify these decisions and actions. Therefore, the bill may have a significant operational impact for health occupations boards, the extent of which depends on the types of decisions and actions ultimately subject to review, as determined by DHMH through regulations.

DLLR advises that the bill has a significant operational impact on DLLR's Office of the Secretary, the Division of Occupational and Professional Licensing, and the Commissioner of Financial Regulation. DLLR advises that the bill requires the Secretary to assess all actions and decisions to determine those that fall under the bill's requirements, develop and adopt regulations, create a mechanism by which decisions are reviewed, and routinely conduct this review. Therefore, DLLR advises that the Office of the Secretary must hire one full-time assistant Attorney General and one full-time administrator. DLLR additionally advises that the Division of Occupational and Professional Licensing must also hire one full-time administrative specialist to monitor and report on board decisions. Finally, DLLR advises that the Commissioner of Financial Regulation must hire one part-time (50%) contractual employee to provide summarized briefings of the Collection Agency Licensing Board decisions to the Secretary for review.

DLS agrees that the bill has an operational impact on DLLR, given the number of occupational boards and commissions and the likelihood that their decisions and actions have market effects (*i.e.*, the decisions and actions are inherently commercial in nature). Under existing law, the Secretary must review *proposed regulations* of boards and commissions within DLLR and may disapprove the regulations for anticompetitive effects. The bill requires DLLR to review *actions and decisions*, not only proposed regulations, of boards and commissions for anticompetitive effects. Therefore, the bill expands DLLR's required scope of review. The bill may also have a significant operational impact on DLLR's boards and commissions.

DLS again notes, however, that the extent of this impact also depends on the types of decisions and actions that are subject to review as determined by DLLR through regulations. Further, as proposed regulations are already subject to disapproval for anticompetitive effects, DLLR already has a framework by which to conduct the review required under the bill. Thus, DLS advises that DLLR can likely handle the development of the required regulations with existing resources. Additionally, to the extent any review requires legal expertise, DLLR's existing legal counsel can likely assist in the review process. However, DLS agrees that additional staff is needed to coordinate ongoing review of decisions and actions of the 23 licensing boards and commissions within DLLR.

Thus, general fund expenditures increase by \$157,143 in fiscal 2017, which accounts for a one-month delay from the bill's June 1, 2016 effective date for DLLR to develop the required regulations. This estimate reflects the cost of hiring one full-time administrator



for DLLR’s Office of the Secretary and one full-time administrative specialist for the Division of Occupational and Professional Licensing to coordinate and conduct the review required under the bill. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	2.0
Salaries and Fringe Benefits	\$147,213
One-time Start-up Costs	8,726
Operating Expenses	<u>1,204</u>
<b>Total FY 2017 State Expenditures</b>	<b>\$157,143</b>

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

**Small Business Effect:** Regulations, decisions, and other actions pertaining to occupations and professions regulated by DHMH, DLLR, MDA, and MDE must be specifically reviewed for anticompetitive market effects, which may benefit small businesses in these areas. However, regulations, decisions, and other actions may also be delayed due to the additional level of required review.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Federal Trade Commission; Department of Commerce; Maryland Department of Aging; Office of the Attorney General; Governor’s Office; Maryland Department of Agriculture; Department of Budget and Management; Department of Disabilities; Maryland Department of the Environment; Department of General Services; Department of Health and Mental Hygiene; Department of Housing and Community Development; Department of Human Resources; Department of Juvenile Services; Department of Labor, Licensing, and Regulation; Department of Natural Resources; Maryland Department of Planning; Department of Public Safety and Correctional Services; Board of Public Works; Department of State Police; Maryland Department of Transportation; Department of Veterans Affairs; Department of Legislative Services

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Analysis by: Sasika Subramaniam

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510