

Department of Legislative Services
 Maryland General Assembly
 2017 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1471 (Delegate Krebs)
 Economic Matters and Health and
 Government Operations

**Business Occupations and Professions and Health Occupations - Regulation of
 Occupational Boards**

This bill establishes the Office of Supervision of Occupational Boards (the office) in the Executive Branch to actively supervise specified occupational boards in the State. The office must review and approve or reject any proposed occupational board regulation, policy, enforcement action, or other regulatory action before its adoption or implementation. Separately, the Office of Policy Analysis (OPA) in the Department of Legislative Services (DLS) must, for any proposed legislation that may lead to the adoption of a regulation by an occupational board, include in its analysis a review of specified aspects of the legislation, as discussed below. Beginning January 1, 2018, and continuing for five years, DLS must annually review approximately 20% of the occupations regulated and make recommendations on how to improve regulation of the occupations in accordance with provisions of the bill. DLS must report by December 30 each year to the Attorney General and the General Assembly the findings and recommendations in its reviews.

Fiscal Summary

State Effect: General fund expenditures increase by at least \$1.1 million annually in FY 2018, increasing to at least \$1.6 million in FY 2022, for DLS staff; for Department of Labor, Licensing, and Regulation (DLLR) staff; and to establish the office, as discussed below. Future years reflect annualization and the elimination of one-time costs. The Department of Health and Mental Hygiene (DHMH) and the Office of the Attorney General (OAG) can handle the bill’s requirements with existing budgeted resources. Revenues are not affected.

(\$ in millions)	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	1.1	1.4	1.4	1.5	1.6
Net Effect	(\$1.1)	(\$1.4)	(\$1.4)	(\$1.5)	(\$1.6)

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

Local Effect: None.

Small Business Effect: Minimal. Establishing an additional unit of State government to review regulations, requiring additional analysis of proposed legislation, and requiring DLS to conduct additional studies has minimal or no effect on small businesses.

Analysis

Bill Summary: For purposes of the bill, “occupational board” means a business occupations board established under the Business Occupations and Professions Article or a health occupations board established under the Health Occupations Article.

For a regulation adopted by an occupational board, it is the policy of the State that:

- the regulation must be construed and applied to increase economic opportunities, promote competition, and encourage innovation;
- if the State finds that it is necessary to displace competition, it must use the least restrictive regulation to protect consumers from significant and substantiated harm that threatens public health and safety; and
- the regulation may be enforced against an individual only to the extent the individual provides goods and services that are included expressly in the law that defines the occupation’s scope of practice.

It is the intent of the State that under the above policy (“board regulation policy”) the occupational boards in the State and the members of the occupational boards will avoid liability under federal antitrust laws.

Office of Supervision of Occupational Boards

The purpose of the office is to “actively supervise” occupational boards in the State to ensure compliance with the board regulation policy. “Active supervision” means the office independently:

- engages in a substantive role in the development of the regulations and policies of an occupational board to ensure that the regulations and policies benefit consumers and do not serve the private interests of the providers of goods and services that the occupational board regulates;

- disapproves the use of any regulation or policy of an occupational board that does not comply with the board regulation policy and terminates any enforcement action against an occupational board in effect on October 1, 2017, that does not comply with the policy;
- exercises control over each occupational board by reviewing and affirmatively approving only the regulations, policies, and enforcement actions that comply with the board regulation policy; and
- to reduce the possibility of antitrust litigation (1) utilizes the analyses prepared by OPA under the bill and (2) conducts reasonable investigations to acquire additional information, including options to make regulations less restrictive.

“Active supervision” does not include general counsel to an occupational board provided by an attorney employed by the State or an attorney in private practice. An attorney who provides counsel to the office may not provide general counsel to any occupational board or exercise any control relating to the process and substantive actions of an occupational board.

The office must review and approve or reject any proposed occupational board regulation, policy, enforcement action, or other regulatory action before its adoption or implementation.

A person may file a complaint with the office relating to a regulation, a policy, or an enforcement action of an occupational board that the person alleges is inconsistent with the board regulation policy. Within 90 days, the office must investigate the complaint, identify any remedies, instruct the occupational board to respond to the complaint in a specified manner (if appropriate), and issue a written response to the person filing the complaint.

A member of the General Assembly may ask the Attorney General to review:

- a regulation, a policy, or an enforcement action of an occupational board that the member believes is inconsistent with the board regulation policy;
- the active supervision of an occupational board by the office; or
- the response of the office to a complaint filed under the bill.

Review of Legislation by the Department of Legislative Services

OPA in DLS must, for any proposed legislation that may lead to the adoption of a regulation by an occupational board, include in its analysis a review (1) to determine if the

legislation meets the board regulation policy; (2) to evaluate the effect of the legislation on employment opportunities, consumer choice and cost, unemployment in the State, market competition, governmental costs, and any other potential effects of the legislation; and (3) of laws in other states that have comparable regulations. OPA may require a proponent of the legislation to submit evidence of any significant and substantiated harm to consumers in the State that the legislation seeks to address.

Review of Occupational Boards by the Department of Legislative Services

Beginning January 1, 2018, and continuing for five years, DLS must review approximately 20% of the occupational boards each year and make recommendations on how to improve regulation of the occupations in accordance with provisions of the bill. DLS must report by December 30 each year to the Attorney General and the General Assembly the findings and recommendations of its reviews.

Current Law/Background: The Office of Supervision of Occupational Boards does not exist.

Occupational Boards

There are 20 health occupations boards/commissions and 17 business occupations boards/commissions likely subject to the statutory provisions of bill; an additional 5 licensing units/occupations are subject to the uncodified requirement for DLS to review the occupations over a five-year period (see **Additional Comments**). Combined, these boards regulate more than half a million individuals and businesses in the State. In any given year, there can be up to approximately 100 separate pieces of legislation related in some way to these boards. The boards collectively propose about 50 regulations in an average year, although there can be some years when they propose significantly more. For example, just the business occupations boards proposed more than 40 regulations in 2017 (compared to the usual amount of 15 to 20).

There is no established intent of the State directly pertaining to occupational boards avoiding liability under federal antitrust laws. All business occupations boards in DLLR explicitly exercise their powers, duties, and functions subject to the authority of the Secretary of Labor, Licensing, and Regulation.

Current law specifies that the health occupations boards are created to function as independent boards, with the intent that a peer group is best qualified to regulate, control, and otherwise discipline in a fair and unbiased manner the licensees or certificate holders who practice in the State. The power of the Secretary of Health and Mental Hygiene 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.

Regulations proposed by occupational boards go through the same process of review and approval as all other regulations adopted by units of State government.

Department of Legislative Services' Analysis of Legislation

DLS is not required to provide most of the information required by the bill in its analyses of legislation – for occupational boards or otherwise. DLS must prepare a fiscal and policy note for each piece of legislation prior to a committee vote. DLS requires no submission of supporting documentation from a proponent of legislation.

Office of Policy Analysis Review of Occupational Boards

DLS currently conducts reviews of most business and health occupations boards under the Maryland Program Evaluation Act, otherwise known as sunset review. Most boards are evaluated once every 10 years, on average, although some boards are evaluated more frequently, or go through both a preliminary and a full evaluation in successive years. The requirement to conduct these evaluations is unchanged by the bill.

North Carolina Board of Dental Examiners Ruling

The U.S. Supreme Court's 2015 decision in *N.C. Board of Dental Examiners v. Federal Trade Commission* 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, 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. As one option in response to the decision, the memorandum suggested that oversight could be provided by the Secretary, or the Secretary's designee, of each agency in which licensing boards reside. To that end, Chapter 349 of 2016 established the explicit authority of the Secretary of Labor, Licensing, and Regulation over the one board for which it was not already established. Similar legislation for health occupations boards was introduced in 2016 but did not pass.

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: General fund expenditures increase by at least \$1.1 million in fiscal 2018, increasing to at least \$1.6 million in fiscal 2022, for DLS staff, for DLLR staff, and to establish the office. Future years reflect annualization and the elimination of one-time costs. DHMH and OAG can handle the bill’s requirements with existing budgeted resources. The effects on DLS and of establishing the office are discussed separately below.

Office of Supervision of Occupational Boards

The bill establishes a new office in the Executive Branch charged with actively supervising the business and health occupational boards in the State. The office must review and approve or reject any proposed occupational board regulation, policy, enforcement action, or other regulatory action before its adoption or implementation. The office is also required to investigate and resolve complaints relating to a regulation, a policy, or an enforcement action of an occupational board within 90 days. As noted above, the boards collectively regulate more than half a million individuals and businesses and propose an average of 50 regulations per year. The requirements in the bill are substantial and require broad legal and policy knowledge. As the bill specifies that attorneys cannot provide counsel to both the office and to the regulatory boards, the office requires its own legal staff.

Therefore, to establish the office and provide it with sufficient staff to meet the above requirements, general fund expenditures increase by \$598,655 in fiscal 2018, which reflects the bill’s October 1, 2017 effective date. This estimate reflects the cost of hiring a director, an administrative assistant, two assistant Attorneys General, and four policy analysts to evaluate regulations and board enforcement actions, respond to complaints, and perform the other required duties of the office. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	8
Salaries and Fringe Benefits	\$558,375
Operating Expenses	<u>40,280</u>
Total FY 2018 Office Expenditures	\$598,655

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses. This estimate assumes that sufficient space for the office can be obtained in an existing State building.

Most health occupations boards are special funded and employ extensive staff using the revenues they generate from licensing fees. By contrast, many business occupations boards in DLLR are general funded and operate with limited staff; in many cases, boards share executive directors and lack sufficient support and investigative staff. Although the bill does not directly affect the boards' operations, DLLR anticipates a significant increase in administrative duties associated with regulation review, enforcement action review, and complaint investigation by the office. Unlike the health occupations boards, DLLR cannot absorb any additional work with existing staff.

Therefore, to meet the bill's additional administrative requirements, general fund expenditures increase by \$107,441 in fiscal 2018, which reflects the bill's October 1, 2017 effective date. This estimate reflects the cost of hiring an administrative assistant and one *half-time* assistant Attorney General to coordinate with the office and handle the administrative requirements associated with doing so. The estimate includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	1.5
Salaries and Fringe Benefits	\$98,047
Operating Expenses	<u>9,394</u>
Total FY 2018 DLLR Expenditures	\$107,441

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

As noted above, DHMH can handle the additional administrative requirements associated with the office with existing budgeted resources.

Department of Legislative Services Analyses of Legislation and Review of Occupational Boards

DLS fiscal and policy note staff are fully subscribed, especially given the recent upward trend in the quantity of bills introduced in each legislative session. Any additional analysis requires additional staff. As noted above, the bill affects up to approximately 100 pieces of legislation in any one year. Based on the information that must be included for each piece of legislation that relates to occupational boards, DLS requires three additional policy analysts. The bill also requires DLS to conduct additional reviews of each of 42 occupations (the 37 boards, some of which encompass multiple occupations, as well as 5 additional occupations not overseen by a licensing board) over a five-year period. Based on the time it

takes for existing staff to conduct similar reviews under the Program Evaluation Act, four contractual staff are needed to conduct approximately eight reviews per year.

Therefore, general fund expenditures increase by at least \$346,399 in fiscal 2018, which reflects the bill’s October 1, 2017 effective date and the January 1, 2018 effective date of the board evaluations. This estimate reflects the cost of hiring three regular analysts and four contractual analysts to perform the required analyses of proposed legislation and the reviews of each occupational board over five years. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses; however, it does not reflect the special expertise that may be needed for the types of analyses of legislation required under the bill or any additional operational impacts associated with managing these processes.

Regular Positions	3
Contractual Positions	4
Regular Salaries and Fringe Benefits	\$193,187
Contractual Salaries and Fringe Benefits	118,076
Operating Expenses	<u>35,136</u>
Total FY 2018 DLS Expenditures	\$346,399

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses. The contractual positions are assumed to be eliminated midway through fiscal 2023.

This estimate does not include any health insurance costs that could be incurred for specified contractual employees under the State’s implementation of the federal Patient Protection and Affordable Care Act.

Additional Comments: It is unclear if the licensing units of the Department of State Police and the Department of Public Safety and Correctional Services also qualify as an “occupational board” under the bill. As those units do not have industry members involved in regulating the business and, therefore, do not risk creating a liability under federal antitrust law, they have been excluded from the above analysis associated with statutory provisions. However, the uncodified language of the bill specifies that the occupations regulated under the two volumes of the Annotated Code must be reviewed; thus, those units, as well as crane operators, are assumed to be subject to that requirement.

Even with more staff, it is not clear whether the additional elements to be reflected in analyses of legislation can be incorporated within the timeframes often available for completing fiscal and policy notes during the legislative session.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Office of the Attorney General; Governor's Office; Department of Budget and Management; Department of Health and Mental Hygiene; Department of Labor, Licensing, and Regulation; Department of Legislative Services

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fn/mcr

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