

Department of Legislative Services
 Maryland General Assembly
 2017 Session

FISCAL AND POLICY NOTE
Third Reader

Senate Bill 137

(Senator Lee, *et al.*)

Judicial Proceedings

Health and Government Operations

State Government - Maryland Uniform Electronic Legal Materials Act

This bill requires a State agency designated as an “official publisher” that publishes legal material only in an electronic record to designate the electronic record as official. In order to designate the electronic record as official, the official publisher must authenticate the electronic record in a specified manner, take specified actions to preserve and secure the record, and ensure that the material is reasonably available for use by the public on a permanent basis. The bill creates a legal presumption that authenticated legal material in an electronic record is an accurate copy of the legal material.

The bill applies to all legal material in an electronic record designated as official that is first published electronically on or after October 1, 2017.

Fiscal Summary

State Effect: General fund expenditures for the Department of Legislative Services (DLS) increase by \$28,500 in FY 2018 for hardware and software associated with the bill’s authentication requirement. Future year expenditures reflect ongoing costs. The bill does not immediately affect the operations or finances of most official publishers because the bill does not mandate designating an electronic record as official if the material is available in another format. To the extent other State agencies designate electronic records as official, they may incur additional expenses to authenticate them in the future. Revenues are not affected.

| (in dollars) | FY 2018 | FY 2019 | FY 2020 | FY 2021 | FY 2022 |
|----------------|------------|------------|------------|------------|------------|
| Revenues | \$0 | \$0 | \$0 | \$0 | \$0 |
| GF Expenditure | 28,500 | 20,500 | 20,500 | 20,500 | 20,500 |
| Net Effect | (\$28,500) | (\$20,500) | (\$20,500) | (\$20,500) | (\$20,500) |

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

Local Effect: None.

Small Business Effect: Minimal or none.

Analysis

Bill Summary: Under the bill, “electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. “Publish” means to display, present, or release to the public, or cause to be displayed, presented, or released to the public, by the official publisher.

Exhibit 1 lists the legal materials and associated “official publishers” affected by the bill.

Exhibit 1 Legal Materials and Associated Official Publishers

| <u>Legal Material</u> | <u>Official Publisher</u> |
|--|--|
| Maryland Constitution | Department of Legislative Services |
| Session Laws | Department of Legislative Services |
| Code of Maryland | Department of Legislative Services |
| Maryland Rules | Court of Appeals |
| Journal of the Senate of Maryland | Department of Legislative Services |
| Journal of the House of Delegates of Maryland | Department of Legislative Services |
| Reported Decision of the Court of Appeals, Court of Special Appeals | Court of Appeals |
| Opinion Issued by the Office of the Attorney General | Office of the Attorney General |
| Code of Maryland Regulations (COMAR) | Division of State Documents |
| Final Decision in a Contested Case Issued by a Unit of State Government Under the Administrative Procedure Act | Unit* of State Government (that issued the decision) |
| Maryland Register | Division of State Documents |

*“Unit” means an executive agency, a department, a board, a commission, or any other instrumentality of the State.

Source: Department of Legislative Services

If an official publisher publishes legal material only in an electronic record, the official publisher *must* designate the electronic record as official. If an official publisher publishes legal material in an electronic record and in a record other than an electronic record, the publisher *may* designate the electronic record as official. In order to designate the electronic record as official, the official publisher must:

- authenticate the electronic record by providing a method for a user to determine that the electronic record received by the user from the official publisher is unaltered from the official electronic record published by the official publisher;
- provide for the preservation and security of the record in an electronic form or a form that is not electronic – if the material is preserved in an electronic record, the official publisher must ensure the integrity of the record, provide for backup and disaster recovery of the record, ensure the continuing usability of the material, and deliver a copy to the State Archives; and
- ensure that the legal material is reasonably available for use by the public on a permanent basis.

Legal material in an electronic record that is authenticated is presumed to be an accurate copy of the legal material. If another state has adopted a law substantially similar to the bill, legal material in an electronic record that is designated as official and authenticated by the official publisher in that state is presumed to be an accurate copy of the legal material. A party contesting the authentication of legal material in an electronic record authenticated under this bill has the burden of proving by a preponderance of evidence that the record is not authentic.

In implementing the bill's provisions, an official publisher of legal material in an electronic record must consider the following:

- standards and practices of other jurisdictions;
- the most recent standards regarding the authentication of, preservation and security of, and public access to legal material in an electronic record and other electronic records, as adopted by national standard-setting bodies;
- the needs of users of legal material in an electronic record;
- the view of governmental officials and entities and other interested persons; and
- to the extent practicable, methods and technologies for the authentication of, preservation and security of, and public access to legal material that are compatible with methods and technologies used by their official publishers in the State and in other states that have adopted a law substantially similar to the bill.

Moreover, in applying and construing the bill, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact

substantially similar laws. The bill supersedes the federal Electronic Signatures in Global and National Commerce Act (E-SIGN), except for E-SIGN's consumer disclosure provisions and notices excluded under E-SIGN.

Current Law/Background:

Legal Materials and Official Publishers

Maryland Constitution: After each election in which voters have approved amendments to the Maryland Constitution, DLS publishes the amended version and posts the document online.

Session Laws: After the Governor signs or vetoes bills, DLS publishes the *Laws of Maryland* (Session Laws) for that year. The Session Laws are a set of volumes containing all laws adopted during the previous session and all bills vetoed by the Governor with the veto messages. Beginning with the 1996 session, the Session Laws are available online through the Chapter Indexes and as a compilation, beginning with the 2007 session.

Maryland Code: DLS is required to (1) create and maintain, in the form of a statutory database, a code of Maryland and (2) maintain the structural integrity and textual accuracy of that code. The Annotated Code of Maryland, published by commercial publishers, is a multivolume compilation of the permanent public general laws. Each year, the publisher updates the code, using the newly passed laws found in the *Laws of Maryland*. Except for any copyrighted material owned by the publisher, such as section captions, editor's notes, and applicable court case references, the code is accessible through the "Search" and "Statute Text" links on the General Assembly website homepage.

Journals of the Senate and House of Delegates: DLS is required to sell, exchange, or otherwise distribute bound volumes of the journals of the Senate and the House. The journals, prepared by the Secretary of the Senate and the Chief Clerk of the House, are the official record of the proceedings of the Senate and the House for the entire session. These documents are published in both softbound and hardbound versions. The journals are available on the General Assembly website from 2007 forward. Beginning with the 1996 session, the daily Senate and House floor proceedings are available on the General Assembly website.

Maryland Rules: The Division of State Documents must publish, in an issue of the *Maryland Register*, each rule of court that the Court of Appeals adopts or permits to be adopted. The Judiciary advises that these documents have been posted on its website since 2003.

Reported Decisions of the Courts: The State Reporter, appointed by the Court of Appeals, is responsible for the publication and distribution of the official opinions of the Court of Appeals and the Court of Special Appeals. Opinions designated for publication must be published within six months of the decision in the case. Reported opinions filed since 1995 are available on the Judiciary website. However, the Judiciary website provides the disclaimer that only bound volumes of the *Maryland Reports* and *Maryland Appellate Reports* are considered the final, official texts of the opinions of the Court of Appeals and the Court of Special Appeals.

The Code of Maryland Regulations: Most rules and regulations adopted by a unit of government are published in the Code of Maryland Regulations (COMAR). The Administrative Procedure Act sets forth requirements for the publication of regulations once they are adopted by units of government under the jurisdiction of the Act. A regulation may be in any form – including a guideline, rule, standard, or statement of interpretation or policy. After adopting a regulation, a unit is required to submit to the Administrator of State Documents a notice of adoption, for publication in the *Maryland Register*. The official text of a regulation submitted for publication in the *Register* is the *Register* until incorporation in COMAR. After incorporation, the printed version of COMAR is the official text. COMAR is available online.

Opinions Issued by the Office of the Attorney General: Formal opinions of the Attorney General are letters written to State officials that have gone through a specified review process. Opinions are required to be published annually, in a bound volume. The opinions are also posted on the Office of the Attorney General website.

Final Decision in a Contested Case Issued by a Unit of State Government: In 1990, the General Assembly created the Office of Administrative Hearings (OAH). OAH administrative law judges hear and rule on contested agency actions for more than 30 State agencies. All OAH hearings are recorded or have a court reporter. Audio recordings and transcripts of the hearings are available upon written request.

The Maryland Register: The Division of State Documents publishes the *Register* every two weeks. The *Register* serves as the temporary supplement to COMAR. Any change to the text of regulations published in COMAR, whether by adoption, amendment, repeal, or emergency action, must first be published in the *Register*. The following information is published in the *Register*: Governor executive orders and appointments to State offices, Attorney General opinions, Open Meetings Compliance Board opinions, State Ethics Commission opinions, court rules, District Court administrative memoranda, Courts of Appeal hearing calendars, agency hearing and meeting notices, and other documents considered to be in the public interest. The most recent issues of the *Register* are available online.

Authentication and Security of Electronic Documents

According to the American Association of Law Libraries, authentication of electronic documents includes methods such as encryption, public key infrastructure, digital signatures, and digital watermarks.

When authentication of a document available on a public-facing website is required, the approach used by many organizations, including the Government Printing Office, is to digitally sign the document. This digital signature becomes part of the document, and when the document is opened, the signature is verified. If the document has been altered in any manner, the embedded digital signature will not match the altered document and the authentication mechanism will fail. Typically, the notification at the top of the document will indicate whether the document is valid or invalid. Certification signatures within a document rely on Public Key Infrastructure (PKI), which generates the public and private key used in the certification signature applied to the document. The private key is used to encrypt the document during the signing process, and the public key is used to decrypt the document by the end user. For PDF documents, these keys are supplied by certificate authorities such as Entrust, Symantec, GlobalSign, and Keynectis.

Other States

According to the National Conference of Commissioners on Uniform State Laws, 13 states have enacted the Uniform Electronic Legal Materials Act: Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Minnesota, Nevada, North Dakota, Oregon, and Pennsylvania.

State Fiscal Effect: The bill has minimal or no immediate fiscal effect on State official publishers that publish their materials in a nonelectronic format if they continue to publish their materials in that format.

To the extent that an official publisher designates electronic records as official, the costs vary depending on the method chosen. In 2011, following the passage of the California Uniform Electronic Legal Materials Act, the Office of Legislative Counsel of California released a study of various methods of electronic authentication. The study found that initial costs of developing a system varied from as little as \$1,049 to as much as \$178,100, not including development, integration costs, or standard hardware platforms. Annual costs for the systems featured in the study ranged from \$618 to nearly \$45,000. In 2012, the Minnesota Legislature's Office of the Revisor of Statutes published a similar study, which included a prototype of an electronic record authentication method that required minimal equipment, software, and programming costs.

Department of Legislative Services: As the official publisher of the Maryland Code under the bill, DLS does not publish the Code in any nonelectronic record. Because a commercial publisher, rather than DLS, publishes the Maryland Code in print form, the bill's provisions could be construed to require DLS to designate the electronic database in which the Maryland Code is maintained as an official record. Assuming that the bill requires DLS to authenticate the Code database, general fund expenditures increase by \$28,500 in fiscal 2018, which includes a one-time cost of \$8,000 for server hardware and annual costs of \$20,500 for software licenses and other services. This estimate reflects the cost of hardware and software required to update each article maintained in the electronic code database with a certification signature using PKI to authenticate the resulting PDF document. The bill's preservation requirements are already being implemented by DLS. Future year expenditures reflect only ongoing costs.

Additional Information

Prior Introductions: SB 611 of 2015 received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, HB 162, received a hearing in the House Health and Government Operations Committee but no further action was taken. HB 46 of 2014, a similar bill, was withdrawn after receiving a hearing in the House Health and Government Operations Committee. Its cross file, SB 275, was withdrawn without a hearing in the Senate Judicial Proceedings Committee.

Cross File: HB 165 (Delegate Barron, *et al.*) – Health and Government Operations.

Information Source(s): Secretary of State; Judiciary (Administrative Office of the Courts); Department of Budget and Management; Maryland Department of the Environment; Department of Health and Mental Hygiene; Department of Labor, Licensing, and Regulation; Department of Natural Resources; Maryland Department of Transportation; Office of Administrative Hearings; Maryland State Archives; Office of Legislative Counsel of California; Minnesota Legislature Office of Revisor of Statutes; Department of Legislative Services

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