

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 628

(Delegates Barron and West)

Health and Government Operations

Education, Health, and Environmental Affairs

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

This bill generally requires the Secretary of each principal department to supervise 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 Office of Administrative Hearings (OAH) must review a decision or action of a board or commission within the Department of Health and Mental Hygiene (DHMH), in accordance with regulations adopted by the Secretary of Health and Mental Hygiene and OAH. OAH, in conjunction with the Office of the Attorney General (OAG), must establish a process for such review. Each board or commission within DHMH is responsible for the costs associated with OAH review. DHMH and OAH must convene at least two stakeholder meetings at least six months before proposing the required regulations and must submit the proposed regulations by June 1, 2018.

The bill takes effect June 1, 2017.

Fiscal Summary

State Effect: The bill’s requirements can generally be handled with existing budgeted resources, as discussed below. To the extent the bill results in additional OAH review costs for health occupations boards, general and/or special fund expenditures increase by an indeterminate amount beginning in fiscal 2019, as discussed below. Revenues are not affected.

Local Effect: None.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Department of Health and Mental Hygiene and Office of Administrative Hearings

The Secretary of Health and Mental Hygiene and OAH must adopt regulations, in consultation with interested stakeholders, for the supervision of each board or commission that is composed in whole or in part of individuals participating in the occupation or profession regulated by the board or commission, 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.

OAH must review a decision or action of a board or commission that is referred to the office in order to determine whether the decision or action furthers the specified State policy and may not approve a decision or action that does not do so. In making its determination, OAH must (1) review the merits of the proposed decision or action; (2) assess whether the proposed decision or action furthers the specified State policy; and (3) issue a written decision approving, disapproving, or modifying the proposed decision or action or remanding the proposed decision or action back to the board or commission for further review. The final board or commission decision or action must comply with OAH's written decision.

OAH must, in conjunction with OAG, establish a process of review that is independent of the process by which OAH hears adjudicated, contested cases and that includes (1) the types of decisions or actions that may be referred to OAH for review; (2) qualifications and specialized training requirements for administrative law judges (ALJs) conducting reviews; (3) checks for identification and management of potential conflicts when OAH hears contested cases; and (4) appropriate standards and guidelines for conducting reviews.

An ALJ may not review a decision or action if the judge is appointed by, under the oversight of, or a member of a board or commission whose action is the subject of review.

Each board or commission within DHMH is responsible for the costs associated with OAH review under the bill. However, the bill does not require review of (1) a decision or determination of a board or commission concerning ministerial acts; (2) internal operations of a board or commission; (3) investigations; (4) charges; or (5) consent orders and letters of surrender related to an individual regulated by a board or commission.

DHMH and OAH must convene at least two stakeholder meetings before proposing regulations to implement the bill's requirements. One of these meetings may be public and open to anyone interested in the noted issues. The meetings must include a representative from each board or commission, as well as members of professional licensing associations, as appropriate.

Secretaries of Other Principal Departments

With the exception noted above for DHMH, the Secretary of each principal department must supervise 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. If the Secretary or the Secretary's designee finds that a proposed decision or action of a unit may result in an unreasonable anticompetitive decision or may not further a clearly articulated State policy to displace competition in the regulated marketplace, the Secretary or the Secretary's designee must (1) review the merits of the proposed decision or action; (2) assess whether the proposed decision or action furthers the specified State policy; and (3) issue a written decision approving, disapproving, or modifying the proposed decision or action or remanding it back to the unit for further review before it becomes final or is implemented. A decision or action of a unit is not final until after the required review and must comply with the written decision.

Neither the Secretary nor the Secretary's designee may be appointed by, under the oversight of, or a member of a board or commission whose decision or action is the subject of review.

Finally, any regulations adopted to implement these requirements must be drafted in consultation with interested stakeholders.

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) the Department of Labor, Licensing,

and Regulation (DLLR); (2) 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.

Exhibit 1
Licensing Boards and Commissions in the
Department of Labor, Licensing, and Regulation

Architects
Athletics
Barbers
Cemeteries
Certified Interior Designers
Collection Agencies
Cosmetologists
Elevator Safety
Foresters
Heating, Ventilation, Air-Conditioning, and
Refrigeration Contractors
Home Improvement
Individual Tax Preparers
Landscape Architects
Master Electricians
Pilots
Plumbing
Professional Engineers
Professional Land Surveyors
Public Accountancy
Racing
Real Estate
Real Estate Appraisers, Appraisal Management
Companies, and Home Inspectors
Stationary Engineers

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

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.

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

Acupuncture
Audiologists, Hearing Aid Dispensers, and Speech-Language Pathologists
Chiropractic
Dental
Dietetic Practice
Environmental Health Specialists
Massage Therapy
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

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, 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 formulate a process for review of board decisions and actions for anticompetitive effects.

DHMH advises that the required stakeholder meetings, regulations, and review process can be developed and implemented 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 (fewer than 15 cases annually). Further, the department currently has a management position within the health occupations boards whose responsibilities include reviewing policies and practices of health occupations boards to ensure they are up to date.

The Department of Legislative Services (DLS) notes that, although most health occupations board decisions and actions may not ultimately affect market competition, select board decisions and actions are not final until after OAH review, and OAH may

disapprove, modify, or return these decisions and actions to the boards for further review. 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 and OAH through regulations.

Additionally, the bill specifies that each board or commission within DHMH is responsible for the costs associated with OAH review. With the exception of the State Board of Nursing Home Administrators and the State Board for Certification of Residential Child Care Program Professionals, all health occupations boards are special funded. Although the bill likely results in a fiscal impact for some health occupations boards, DLS advises that the extent of this impact cannot be reliably estimated. The costs to each board depend on the types of decisions and actions ultimately subject to review, as determined through regulations. Costs for each board also depend on the volume of decisions and actions that the board must annually refer to OAH for review. Therefore, to the extent the bill results in additional OAH review costs, general and/or special fund expenditures for some health occupations boards increase by an indeterminate amount beginning in fiscal 2019. This analysis assumes that DHMH and OAH do not submit the required regulations before June 1, 2018, and that the regulations do not take effect until fiscal 2019.

OAH advises that development of the review process and associated regulations, as well as any increased workload that results from cases forwarded from DHMH, can be absorbed within existing budgeted resources. OAG similarly advises that it can handle the bill's requirements with existing resources.

DLLR notes that all of its boards are already explicitly subject to the Secretary's supervision under statute and that DLLR is structured so as to allow review of board decisions at the executive director, deputy commissioner, or commissioner levels. DLLR advises that the review required under the bill is already part of DLLR's routine practice. Thus, DLLR advises that the bill's requirements can be handled with existing resources.

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.

Additional Information

Prior Introductions: Similar legislation, SB 1083 of 2016, passed the Senate and received a hearing in the House Health and Government Operations Committee, but no further action was taken.

Cross File: SB 517 (Senator Zucker, *et al.*) - Education, Health, and Environmental Affairs.

Information Source(s): Department of Commerce; Maryland Department of Agriculture; Department of Budget and Management; Maryland Department of the Environment; Department of Health and Mental Hygiene; Department of Housing and Community Development; Department of Labor, Licensing, and Regulation; Department of Natural Resources; Department of State Police; Office of Administrative Hearings; Office of the Attorney General; Department of Legislative Services

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