



OHIO LEGISLATIVE SERVICE COMMISSION

Bill Analysis

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(As Introduced)

Rep. LaTourette

BILL SUMMARY

Antitrust review by Director of Administrator Services

- Requires the Director of Administrative Services to review and approve or disapprove actions or proposed actions that have been referred to the Director and that may have antitrust implications taken by boards and commissions that regulate an occupation or industry.
- Voids an action or proposed action disapproved by the Director.
- Allows a board or commission that has taken or proposes to take an action, person who is affected or is likely to be affected by an action taken or proposed to be taken by a board or commission, or a person granted a stay in court under the bill to refer an action for review by the Director.
- Allows a party adversely affected by the Director's approval or disapproval to appeal to the Franklin County Court of Common Pleas.
- Requires a person to obtain a determination from the Director before pursuing a court action for a violation of antitrust laws and grants the state, a board or commission, or a member of a board or commission the right to request a stay of antitrust proceedings pending in a court that lasts until the Director approves or disapproves the action.
- Requires the Director to adopt rules under the Administrative Procedure Act to implement and administer the bill's review provisions.

Consolidation of health professional licensing boards

- Creates the State Vision and Hearing Professionals Board, the State Behavioral Health Professionals Board, and the State Physical Health Services Board by consolidating several existing health professional licensing boards.
- Establishes regulatory procedures for the three new boards that are similar to current law's provisions that apply to the boards abolished under the bill.
- Requires the three new boards to establish a code of ethical practice for each occupation regulated by that board and authorizes each board to take disciplinary action against an applicant or license holder for violating a code of ethics, which applies under current law to most of the occupations.
- Places the regulation of dietitians under the State Medical Board and abolishes the Ohio Dietetics Board.
- Abolishes the Ohio Respiratory Care Board and places its duties with respect to respiratory care therapists with the State Medical Board and its duties with respect to home medical equipment service providers with the State Board of Pharmacy.
- Provides that employees of the abolished boards are transferred to one of the three new boards, the State Medical Board, or the State Board of Pharmacy, as applicable, and are to retain their positions and benefits.
- Allows the boards abolished by the bill to establish a retirement incentive plan for eligible employees of those boards who are Public Employees Retirement System (PERS) members.

Other changes

- Requires license applicants for all occupations regulated by the new boards to undergo criminal records checks to receive a license.
- Generally provides for electronic occupational license applications and renewals.
- Eliminates the requirement that the Board of Nursing's Executive Director be a registered nurse in Ohio with at least five years of experience practicing as a registered nurse.
- Makes an appropriation.



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CONTENT AND OPERATION

Antitrust review by Director of Administrative Services

The bill requires the Director of Administrative Services (Director) to review and approve or disapprove certain board or commission actions that have been referred to the Director.¹ Only actions with potential antitrust implications are reviewable by the Director (see "**Reviewable actions**," below). And only certain entities may refer an action to the Director for review (see "**Parties**," below). The Director must adopt rules under the Administrative Procedure Act to implement and administer the bill's provisions.²

Covered entities

Under the bill, "board or commission" generally means any multi-member body created by state law that licenses or otherwise regulates an occupation or industry to

¹ R.C. 125.92(B).

² R.C. 125.92(I).



which at least one of the body's members belongs. The bill expressly includes all of the following boards and commissions in the definition:³

Boards expressly subject to antitrust review				
Accountancy Board	Architects Board	Barber Board	Board of Embalmers and Funeral Directors	Board of Executives of Long-Term Services and Supports
Crematory Review Board	Manufactured Homes Commission	Motor Vehicle Dealers Board	Motor Vehicle Repair Board	Motor Vehicle Salvage Dealer's Licensing Board
Ohio Athletic Commission	Ohio Construction Industry Licensing Board	Ohio Landscape Architects Board	Ohio Real Estate Commission	Real Estate Appraiser Board
State Auctioneers Commission	State Behavioral Health Professionals Board	State Board of Cosmetology	State Board of Career Colleges and Schools	State Board of Education
State Board of Emergency Medical, Fire, and Transportation Services	Board of Nursing	State Board of Pharmacy	State Board of Registration for Professional Engineers and Surveyors	State Board of Sanitarian Registration
State Physical Health Services Board	State Dental Board	State Medical Board	State Veterinary Medical Licensing Board	State Vision and Hearing Professionals Board
State Chiropractors Board				

Reviewable actions

Under the bill, the Director must review board or commission actions referred to the Director that could be subject to state or federal antitrust law if undertaken by a

³ R.C. 125.92(A).



private person or combination of private persons, including actions that directly or indirectly have the following effects:

- Fixing prices, limiting price competition, or increasing prices of goods or services provided by the occupation or industry that the board or commission regulates;
- Dividing, allocating, or assigning customers or markets in Ohio among the members of the occupation or industry that the board or commission regulates;
- Excluding present or potential competitors from the occupation or industry that the board or commission regulates;
- Limiting in Ohio the output or supply of goods or services provided by members of the occupation or industry that the board or commission regulates.

The bill exempts the following actions from review by the Director:

- Any action taken by a board or commission that would not be subject to state or federal antitrust law;
- Adopting reasonable minimum qualifications for persons entering or seeking entrance to the occupation or industry regulated by the board or commission;
- Taking disciplinary action against members of the regulated occupation or industry for violating laws or ethical standards or committing malpractice.⁴

Parties

The bill allows the following parties to refer an action to the Director for review:

- A board or commission that has taken or is proposing to take an action;
- A person who is affected or is likely to be affected by an action taken or proposed to be taken by a board or commission;
- A person who has been granted a stay by a court (see "**Exhaustion and stay**," below).

⁴ R.C. 125.92(B).



Referral of an action or proposed action to the Director for review does not constitute an admission that the action violates state or federal law.⁵

Procedure

A board or commission or person who refers an action to the Director for review under the bill must prepare a brief statement explaining the action and describing its consistency or inconsistency with state or federal antitrust law and file it with the Director. If the board or commission's action or proposed action is in writing, the party referring the action must attach it to the party's statement.⁶

The Director must determine whether a referred action is supported by, and consistent with, a clearly articulated state policy expressed in the statutes creating the board or commission or the statutes and rules setting forth the board's or commission's powers, authority, and duties. If the Director finds the action to be consistent with a clearly articulated state policy, the Director must then determine whether the clearly articulated state policy is merely a pretext by which the board or commission enables the members of the occupation or industry the board or commission regulates to engage in anticompetitive conduct that could be subject to antitrust law if undertaken by private persons.⁷

The Director must approve an action if the Director determines that the action is consistent with a clearly articulated state policy, and the state policy is not a pretext for the members of the regulated profession to engage in anticompetitive conduct. The Director must disapprove an action if the Director determines that the action is not consistent with a clearly articulated state policy, or that the state policy is a pretext for the members of the regulated profession to engage in anticompetitive conduct.

A board or commission may proceed with or continue an action approved by the Director. If the Director disapproves an action, the action is void.⁸

The Director must prepare a written memorandum that explains the Director's approval or disapproval. The Director must transmit a copy of the memorandum to all parties involved in the review and post it to the Department of Administrative Services' website.⁹

⁵ R.C. 125.92(C)(1) and (3).

⁶ R.C. 125.92(C)(2).

⁷ R.C. 125.92(D).

⁸ R.C. 125.92(E).

⁹ R.C. 125.92(F).

A board or commission or person adversely affected by the Director's decision may appeal that decision to the Franklin County Court of Common Pleas.¹⁰

Exhaustion and stay

Under the bill, any person who has standing to commence and prosecute a state or federal antitrust action against a board or commission must seek review by the Director before pursuing the antitrust claim. If an antitrust suit is pending in a court, but the action that forms the basis for the suit has not been reviewed by the Director, then the state, a board or commission, or a member of a board or commission may request a stay of the suit. The stay continues until the Director has completed and transmitted the memorandum described under "**Procedure**," above.¹¹

Background – antitrust law, state licensing boards, and state oversight

According to the U.S. Supreme Court, antitrust laws are intended to safeguard the country's free market economic structure by prohibiting cartels and price fixing and limiting other anticompetitive practices. A state, however, when acting to protect the public interest, sometimes restricts the practice of certain professions, confers exclusive rights to a market, or otherwise limits competition.¹²

The Court has interpreted antitrust laws to confer immunity on anticompetitive conduct by a state when the state is acting in its sovereign capacity.¹³

A board that licenses or otherwise regulates an occupation or industry can claim a state's immunity when that board has been charged by the state with furthering a public interest. However, if the board is controlled by active participants in the occupation or industry that is being regulated, the following requirements must be met for the board to have immunity in antitrust suits:

- The anticompetitive conduct at issue must be clearly articulated and expressed as state policy;
- The state must actively supervise the policy.

¹⁰ R.C. 125.92(G).

¹¹ R.C. 125.92(H).

¹² *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015).

¹³ *Parker v. Brown*, 317 U.S. 341 (1941).



If both requirements are satisfied, a board controlled by market participants can claim the same immunity from antitrust liability that is normally granted to the state.¹⁴

Under current law, the Joint Committee on Agency Rule Review (JCARR) and the Common Sense Initiative Office (CSIO) review rules proposed by boards and commissions that license or otherwise regulate occupations and industries. JCARR reviews proposed rules for consistency with statutory authority, legislative intent, and existing rules.¹⁵ CSIO reviews proposed and existing rules for potential adverse impacts on businesses.¹⁶ Neither specifically reviews agency rules for their antitrust implications. It is unclear how review by JCARR, CSIO, and the Director will interact with one another under the bill.

Consolidation of health professional licensing boards

The bill creates the State Vision and Hearing Professionals Board, the State Behavioral Health Professionals Board, and the State Physical Health Services Board by consolidating several existing health professional licensing boards. These boards will regulate the appropriate professions beginning July 1, 2017. The manner in which the boards are consolidated is listed in the table below:¹⁷

Board consolidation		
State Vision and Hearing Professionals Board	State Behavioral Health Professionals Board	State Physical Health Services Board
State Board of Optometry	Chemical Dependency Professionals Board	Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board
Ohio Optical Dispensers Board	Counselor, Social Worker, and Marriage and Family Therapist Board	State Board of Orthotics, Prosthetics, and Pedorthics
Hearing Aid Dealers and Fitters Licensing Board	State Board of Psychology	
Board of Speech-Language Pathology and Audiology		

¹⁴ *N.C. State Bd. of Dental Exam'rs* at 1109-1110.

¹⁵ R.C. 106.021, not in the bill.

¹⁶ R.C. 107.54, not in the bill.

¹⁷ R.C. Chapter 4744., with conforming changes throughout the bill.



Membership

The boards consist of the following members:

State Vision and Hearing Professionals Board¹⁸	
Two licensed optometrists	Two licensed dispensing opticians
Two licensed speech-language pathologists	One licensed audiologist
One licensed physician who practices ophthalmology	One individual representing the general public

State Behavioral Health Professionals Board¹⁹	
One licensed psychologist who is not a school psychologist	One licensed school psychologist
One licensed independent chemical dependency counselor-clinical supervisor, independent chemical dependency counselor, chemical dependency counselor II, or chemical dependency counselor III	One individual holding a prevention consultant certificate or prevention specialist I certificate
One licensed professional clinical counselor, professional counselor, independent marriage and family therapist, or marriage and family therapist	One licensed independent social worker or social worker
One individual representing the general public	

State Physical Health Services Board²⁰	
One licensed occupational therapist	One licensed physical therapist
One licensed athletic trainer	One licensed orthotist or orthotist or prosthetist
One licensed prosthetist or orthotist or prosthetist	One licensed pedorthist
One individual representing the general public	

¹⁸ R.C. 4744.02(A).

¹⁹ R.C. 4744.04(A).

²⁰ R.C. 4744.06(A).



Members of these boards are appointed by the Governor with the advice and consent of the Senate. The Governor must make initial appointments to the board not later than 90 days after the bill's effective date.²¹

Terms of office for board members are three years, except that initial members serve staggered terms of one to three years. Except for initial appointments, terms for Board members begin and end on the following dates (initial terms begin on the date of appointment and end on the date identified in the table below):

Board	Dates of office
State Vision and Hearing Professionals Board	Begin March 23 and end March 22 ²²
State Behavioral Health Professionals Board	Begin October 5 and end October 4 ²³
State Physical Health Services Board	Begin August 28 and end August 27 ²⁴

Members hold office from the date of appointment until the end of the term for which the member was appointed, except that a member continues in office after the expiration date of the member's term until the member's successor takes office. No member may serve more than three consecutive terms. The bill includes the standard vacancy provisions.

The bill prohibits an individual from being appointed to the board who has been convicted of or pleaded guilty to a felony. The Governor may remove a board member for malfeasance, misfeasance, or nonfeasance after a hearing in accordance with the Administrative Procedure Act. The Governor must remove, after a hearing, any member who has been convicted of or pleaded guilty to a felony.²⁵ A board member receives a per diem for each day the member performs the member's official duties and is reimbursed for actual and necessary expenses incurred in performing those duties. The bill makes an appropriation to facilitate the transition to the new boards.²⁶

²¹ R.C. 4744.02(A) and (B), 4744.04(A) and (B), and 4744.06(A) and (B).

²² R.C. 4744.02(B).

²³ R.C. 4744.04(B).

²⁴ R.C. 4744.06(B).

²⁵ R.C. 4744.02(B) and (C), 4744.04(B) and (C), and 4744.06(B) and (C).

²⁶ R.C. 4744.16 and Section 3.



Regulatory procedures

The bill adds provisions regarding regulatory procedures for the three new boards that are similar to current law's provisions that apply to the boards abolished under the bill. In some cases, current law governing the boards abolished by the bill does not include some of these provisions. The provisions include the following:

- Requirements for meetings, recordkeeping, and office space;²⁷
- Appointing board officers and employees and setting their compensation;²⁸
- Maintaining a register of every individual holding a certificate, license, permit, registration, or endorsement and every individual whose certificate, license, permit, registration, or endorsement has been revoked;²⁹
- Annually reporting to the Governor on the board's official acts, receipts and disbursements, and the conditions of the professions regulated by that board;³⁰
- Requiring all payments collected by the boards to be deposited into the Occupational Licensing and Regulatory Fund (rather than the General Operations Fund);³¹
- Rulemaking;³²
- Qualified immunity from liability for board members, employees, agents, and representatives;³³
- Authorizing the board to (1) enter into contracts to implement the laws and administrative rules governing the professions regulated by the board, (2) join national licensing organizations for the professions

²⁷ R.C. 4744.12, 4744.14, and 4744.18.

²⁸ R.C. 4744.12, 4744.14, and 4744.16.

²⁹ R.C. 4744.12(B).

³⁰ R.C. 4744.24.

³¹ R.C. 3701.83, 4743.05, 4747.04, and 4744.20.

³² R.C. 4744.28.

³³ R.C. 4744.30.



regulated by that board, and (3) appoint advisory committees or other groups to assist in fulfilling its duties;³⁴

- Prohibiting the board from discriminating against an applicant or license holder based on the person's race, color, religion, sex, national origin, disability, or age.³⁵

Code of ethics

The bill requires the three new boards to establish a code of ethical practice for each occupation regulated by that board and authorizes each board to take disciplinary action against an applicant or license holder for violating a code of ethics. Currently, each occupation regulated by the new boards includes these provisions in existing law, except for the licensing law governing optometrists, dispensing opticians, and hearing aid dealers or fitters.³⁶

Regulation of dietitians and respiratory care therapists

Effective July 1, 2017, the bill places the regulation of dietitians under the State Medical Board and abolishes the Ohio Dietetics Board.³⁷ The bill also abolishes the Ohio Respiratory Care Board on that date and places its duties with respect to respiratory care therapists with the State Medical Board and its duties with respect to home medical equipment service providers with the State Board of Pharmacy.³⁸

State Medical Board regulatory procedures

The bill applies procedures for the regulation of dieticians and respiratory care professionals that apply to the other health care professionals the State Medical Board currently regulates. The procedures include the following:

- Notifications to be provided to the Board by prosecutors, health care facilities, professional associations or societies, and professional liability insurers regarding actions taken against a license holder;³⁹

³⁴ R.C. 4744.36, 4744.40, and 4744.48.

³⁵ R.C. 4744.54.

³⁶ R.C. 4725.19, 4725.53, 4744.50, and 4747.12.

³⁷ R.C. 4759.011 and Section 9.

³⁸ R.C. 4729.021 and 4761.011, with conforming changes throughout the bill; Section 10.

³⁹ R.C. 4731.224.



- Requirements relating to dietitians and respiratory care professionals suffering impairment from the use of drugs or alcohol;⁴⁰
- Keeping a register of license applicants and licenses issued and a directory of license holders;⁴¹
- Requiring fees, penalties, and other funds governing the regulation of dietitians and respiratory care professionals to be deposited in the State Medical Board Operating Fund (rather than the Occupational Licensing and Regulatory Fund);⁴²
- Use of universal blood and body fluid precautions in performing exposure prone procedures.⁴³

Existing licenses and board employees

The bill includes general transfer authority provisions. With respect to existing licenses, the bill provides that any licenses, certificates, permits, registrations, or endorsements issued before July 1, 2017, by any of the boards that are abolished by the bill will continue in effect as if issued by one of the three new boards, the State Medical Board, or the State Board of Pharmacy, as applicable.⁴⁴

Existing board employees

Under the bill, all employees of the abolished boards are transferred to one of the three new boards, the State Medical Board, or the State Board of Pharmacy, as applicable, and retain their positions and benefits. Beginning July 1, 2017, and ending June 30, 2019, the executive directors of those boards may establish, change, and abolish positions on the board and assign, reassign, classify, reclassify, transfer, reduce, promote, or demote all board employees.⁴⁵

Retirement incentive plans

Continuing law permits a public employer to establish a retirement incentive plan for its employees who are members of the Public Employees Retirement System

⁴⁰ R.C. 4731.25, 4759.07, and 4761.09.

⁴¹ R.C. 4731.07 and 4731.071.

⁴² R.C. 4731.24, 4759.08, and 4761.07.

⁴³ R.C. 4731.051.

⁴⁴ Sections 6 to 10.

⁴⁵ Sections 6 to 10.



(PERS). Under a plan, an employer purchases service credit for eligible members in return for an agreement to retire within 90 days of receiving the credit.⁴⁶

The boards abolished under the bill may, at that board's discretion and with approval from the Office of Budget and Management, establish a retirement incentive plan for eligible employees of those boards who are PERS members. Any retirement incentive plan established under the bill remains in effect until June 30, 2017.⁴⁷

Other changes

Criminal records checks

Continuing law generally requires an individual applying for an occupational license to undergo a criminal records check as a condition of receiving a license. The bill adds provisions requiring individuals applying for any of the following licenses, certificates, or permits to submit to a criminal records check:

- Hearing aid dealer's or fitters licenses;
- Licenses and permits issued under the Speech-Language Pathology and Audiology Licensing Law;⁴⁸
- Licenses and certificates issued under the Chemical Dependency Professionals Licensing Law.⁴⁹

Electronic applications

The bill generally allows for electronic occupational license applications by doing all of the following:

- Eliminating current law's requirement that applications for the following types of licenses, certificates, and endorsements be written:

--All of the following initial licenses, certificates, and endorsements: certificates of licensure to practice optometry, therapeutic pharmaceutical agents certificates, psychology and school psychology licenses, licenses and certificates issued under the Counselors, Social Workers, and Marriage and Family Therapists Licensing Law,⁵⁰

⁴⁶ R.C. 145.297, not in the bill.

⁴⁷ Sections 6 to 10.

⁴⁸ R.C. Chapter 4753.

⁴⁹ R.C. Chapter 4758.; R.C. 109.572, 4747.051, 4753.061, 4758.242, and 4776.01.

⁵⁰ R.C. Chapter 4757.



licenses, certificates, and endorsements issued under the Chemical Dependency Professionals Licensing Law, dietetics licenses, and certified Ohio behavior analyst certificates.⁵¹

--Certificate reinstatement under the Optometry Licensing Law;⁵²

- Eliminating a provision that applications for initial physical therapy and physical therapy assistant licenses must be notarized.⁵³
- Eliminating a requirement that most occupational license renewals be mailed to the individual.⁵⁴

The bill provides that if a failure in any electronic license renewal system occurs, a licensing agency may extend the date by which licenses must be renewed. The licensing agency may extend a renewal period for a reasonable time period after the resolution of the system failure. A licensing agency must obtain approval from the Director of Administrative Services for an extension in excess of 14 days beyond the resolution of the system failure.⁵⁵

Fee increases

The bill authorizes the State Vision and Hearing Professionals Board, with the Controlling Board's approval, to increase fees for the optical dispensing licensing examination in excess of the fee currently established by rule, so long as the increase does not exceed 50% of the current fee.⁵⁶

Qualifications for Board of Nursing Executive Director

The bill eliminates current law's requirement that the Board of Nursing's Executive Director be a registered nurse in Ohio with at least five years of experience practicing as a registered nurse.⁵⁷

⁵¹ R.C. 4725.12, 4732.09, 4757.16, 4758.35, 4759.05, and 4783.04.

⁵² R.C. Chapter 4725.; R.C. 4725.12 and 4725.16.

⁵³ R.C. 4755.42 and 4755.421.

⁵⁴ R.C. 4745.02.

⁵⁵ R.C. 4745.021.

⁵⁶ R.C. 4725.48.

⁵⁷ R.C. 4723.05.



Complaints

The bill eliminates current law's requirement that a person must file with the State Physical Health Services Board (currently, the State Board of Orthotics, Prosthetics, and Pedorthics) three copies of a complaint against an orthotics, prosthetics, or pedorthics license holder and instead requires a person to file a complaint.⁵⁸

TourismOhio Advisory Board

Currently, the membership of the TourismOhio Advisory Board consists of the chief investment officer of JobsOhio, the director of the TourismOhio office, and nine other members appointed by the Governor. The bill allows the JobsOhio chief investment officer's designee to serve on the Advisory Board.⁵⁹

Effective date

The bill takes effect on July 1, 2017, except for its provisions creating the State Vision and Hearing Professionals Board, the State Behavioral Health Professionals Board, and the State Physical Health Services Board.⁶⁰

HISTORY

Introduced	DATE
Introduced	11-15-16

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⁵⁸ R.C. 4779.32.

⁵⁹ R.C. 122.071.

⁶⁰ Section 11.

