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HOUSE BILL NO. 1566

Offered January 11, 2017

Prefiled January 1, 2017

A *BILL to amend and reenact §§ 30-28.16, 54.1-100, 54.1-100.1, 54.1-300, and 54.1-311 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 5 of Title 2.2 an article numbered 5, consisting of a section numbered 2.2-525, and by adding sections numbered 30-28.16:1 and 54.1-100.01 through 54.1-100.04, relating to professions and occupations; active supervision of regulatory boards.*

Patrons—Webert, Freitas, Heretick, Cline, Cole, Garrett, Head, Landes, LaRock, Massie, Minchew, Pogge and Yancey

Referred to Committee on General Laws

Whereas, in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015), the Supreme Court of the United States established a new standard for determining whether state professional licensing boards and board members are entitled to immunity for federal antitrust violations; and

Whereas, pursuant to *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, state professional licensing boards and board members are entitled to antitrust immunity only if (i) their anticompetitive conduct is consistent with "clearly articulated" state policy and (ii) the state provides "active supervision" of their conduct; and

Whereas, it is the policy of the Commonwealth to increase economic opportunities for all of its citizens by promoting competition and thereby encouraging innovation and job growth; and

Whereas, it is also the policy of the Commonwealth to displace competition only when necessary to protect consumers from present, significant, and substantiated harms that threaten public health and safety; and

Whereas, by establishing the policies and procedures of this act, the General Assembly intends to ensure that the state's professional licensing boards and board members are entitled to antitrust immunity and that state laws relating to professions and businesses are interpreted and enforced in a manner consistent with clearly articulated state policies; now, therefore,

Be it enacted by the General Assembly of Virginia:

1. That §§ 30-28.16, 54.1-100, 54.1-100.1, 54.1-300, and 54.1-311 of the Code of Virginia are amended and reenacted and that the Code of Virginia are amended by adding in Chapter 5 of Title 2.2 an article numbered 5, consisting of a section numbered 2.2-525, and by adding sections numbered 30-28.16:1 and 54.1-100.01 through 54.1-100.04 as follows:

Article 5.

Division of Supervision of Regulatory Boards.

§ 2.2-525. Division of Supervision of Regulatory Boards created; duties.

A. As used in this section:

"Active supervision" means the same as that term is defined in § 54.1-100.01.

"Division" means the Division of Supervision of Regulatory Boards.

"Regulatory board" means the same as that term is defined in § 54.1-100.01.

B. There is created in the Department of Law a Division of Supervision of Regulatory Boards that shall be responsible for the active supervision of regulatory boards for compliance with applicable federal antitrust laws and Article 1 (§ 54.1-100 et seq.) of Chapter 1 of Title 54.1.

C. The Division shall (i) approve a rule if it is consistent with applicable federal antitrust laws and the clearly articulated state policy established by Article 1 (§ 54.1-100 et seq.) of Chapter 1 of Title 54.1, (ii) disapprove a rule if it is not consistent with applicable federal antitrust laws and the clearly articulated state policy established by Article 1 of Chapter 1 of Title 54.1, or (iii) remand the rule to the regulatory board to obtain more information or take action.

D. The Division shall receive, investigate, and make findings upon complaints alleging that a rule, policy, or enforcement action of a regulatory board does not comply with applicable federal antitrust laws and Article 1 (§ 54.1-100 et seq.) of Chapter 1 of Title 54.1.

§ 30-28.16. Duties of Division and of Director.

A. The Division shall:

1. Establish a reference library which develops and maintains a library collection to support the work of the Division and the General Assembly and which provides general and specific reference services to members of the General Assembly;

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58 2. Keep on file copies of all bills, resolutions, amendments thereto, reports of committees and other
59 documents printed by order of either house of the General Assembly;

60 3. Accumulate data and statistics regarding the practical operation and effect of statutes of this and
61 other states;

62 4. Carry out such research projects as shall be assigned to it by the Committees on Rules of the
63 House of Delegates and the Senate;

64 5. Furnish upon written request of any person a copy of any charter of a city or town of the
65 Commonwealth at the charge prevailing from time to time for reproducing same;

66 6. *Employ a professional and occupational regulatory analyst pursuant to § 30-28.16:1.*

67 7. Carry out research and obtain and analyze information for members of the General Assembly and
68 its committees; and

69 7. 8. Provide an annual report to the General Assembly, indexed according to standing committee
70 jurisdiction, on the status of all reports, actions, or data collection that is required by legislation enacted
71 by the General Assembly or otherwise requested by the General Assembly of agencies and collegial
72 bodies of state government. The report for the most recently completed calendar year shall be submitted
73 to the General Assembly and the Governor as soon as practicable after the first day of the next regular
74 session and may be provided through the legislative electronic information system.

75 B. Upon the request of the Governor, any member of the General Assembly, any Governor's
76 Secretary, or the head of any legislative, judicial or independent agency, the Division shall:

77 1. Draft or aid in drafting legislative bills or resolutions and amendments thereto;

78 2. Advise as to the constitutionality or probable legal effect of proposed legislation;

79 3. Prepare summaries of existing laws affected by proposed legislation, compilations of laws in other
80 states or countries relating to the subject matter of such legislation, and statements of the operation and
81 effect of such laws; or

82 4. Make researches and examinations as to any subject of proposed legislation.

83 C. The Director shall perform such other duties as may be required of him by the Committees on
84 Rules of the House of Delegates and the Senate.

85 **§ 30-28.16:1. Professional and occupational regulatory analyst; duties; report.**

86 A. As used in this section:

87 "Active supervision" means the same as that term is defined in § 54.1-100.01.

88 "Least restrictive regulation" means the same as that term is defined in § 54.1-100.01.

89 "Occupational regulation" means the same as that term is defined in § 54.1-100.01.

90 "Regulatory analyst" means the professional and occupational regulatory analyst.

91 "Regulatory board" means the same as that term is defined in § 54.1-100.01.

92 B. The Director shall employ a professional and occupational regulatory analyst within the Division
93 to review legislation establishing or modifying an occupational regulation to determine whether the
94 legislation meets the state policy of using the least restrictive regulation necessary to protect or preserve
95 the public health, safety, and welfare. In making his determination, the regulatory analyst shall (i)
96 evaluate the effects of legislation on opportunities for workers, consumer choices and costs, general
97 unemployment, market competition, governmental costs, and other effects and (ii) compare the
98 legislation to whether and how other states regulate the profession or occupation.

99 C. The regulatory analyst shall schedule for review and evaluation all professions and occupations
100 regulated by regulatory boards over a period of five years. The review and evaluation shall include
101 recommendations for changes to occupational regulations to improve compliance with the state policy of
102 using the least restrictive regulation necessary. Beginning November 1, 2019, and annually thereafter,
103 the regulatory analyst shall submit a report to the Governor and the General Assembly for publication
104 as a report document as provided in the procedures of the Division of Legislative Automated Systems
105 for the processing of legislative documents and reports.

106 D. From time to time as may be required, the Senate and House of Delegates shall by joint
107 resolution establish a schedule for the review of the functional areas of state government. In the absence
108 of a resolution, the Joint Legislative Audit and Review Commission shall select a functional area for
109 review pursuant to the Legislative Program Review and Evaluation Act, (§ 30-64 et seq.).

110 CHAPTER 1.

111 GENERAL PROVISIONS RELATING TO THE REGULATION OF PROFESSIONS AND OCCUPATIONS 112 AND REGULATORY BOARDS.

113 Article 1.

114 Regulation of Professions and Occupations.

115 § 54.1-100. Regulation of professions and occupations.

116 A. The right of every person to engage in any lawful profession, trade, or occupation of his choice is
117 clearly protected by both the Constitution of the United States and the Constitution of the
118 Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable
119 exercise of its police powers when (i) it is clearly found that such abridgment is necessary for the

protection or preservation of the health, safety, and welfare of the public and (ii) any such abridgment is no greater than necessary to protect or preserve the public health, safety, and welfare.

B. No regulation shall be imposed upon any profession or occupation except for the exclusive purpose of protecting the public interest when:

1. The unregulated practice of the profession or occupation can harm or endanger the health, safety, or welfare of the public, and the potential for harm is recognizable and not remote or dependent upon tenuous argument;

2. The practice of the profession or occupation has inherent qualities peculiar to it that distinguish it from ordinary work and labor;

3. The practice of the profession or occupation requires specialized skill or training and the public needs, and will benefit by, assurances of initial and continuing professional and occupational ability; and

4. The public is not effectively protected by other means.

C. No regulation of a profession or occupation shall conflict with the Constitution of the United States, the Constitution of Virginia, the laws of the United States, or the laws of the Commonwealth of Virginia. Periodically and at least annually, all agencies regulating a profession or occupation shall review such regulations to ensure that no conflict exists.

§ 54.1-100.01. Definitions.

As used in this title, unless the context requires a different meaning:

"Active supervision" means the process through which a determination is made regarding whether the rules and policies of a regulatory board have the objective of benefiting consumers and do not serve the private interests of the providers of goods and services regulated by the board. "Active supervision" does not include a government or private attorney providing general counsel to a regulatory board.

"Certification" means the process whereby any regulatory board issues a certificate on behalf of the Commonwealth to a person certifying that he possesses the character and minimum skills to engage properly in his profession or occupation. "Certification" may include a voluntary program in which a private organization or the Commonwealth grants nontransferable recognition to an individual who meets personal qualifications established by the private organization or state government.

"Inspection" means a method of regulation whereby a regulatory board periodically examines the activities and premises of practitioners of a profession or occupation to ascertain if the practitioner is carrying out his profession or occupation in a manner consistent with the public health, safety, and welfare.

"Lawful occupation" means a course of conduct, pursuit, or profession that includes the sale of goods or services that are not themselves illegal to sell irrespective of whether the individual selling them is subject to an occupational regulation.

"Least restrictive regulation" means, from least to most restrictive:

1. Market competition.
2. Private certification.
3. A specific private civil cause of action to remedy consumer harm.
4. Prohibition of a deceptive trade practice.
5. Regulation of the process of providing the specific goods or services to consumers.
6. Inspection.
7. Requiring bonding or insurance.
8. Registration.
9. Certification.
10. Licensure.

"Licensure" means a method of regulation whereby the Commonwealth, through the issuance by a regulatory board of a license, authorizes a person possessing the character and minimum skills to engage in the practice of a profession or occupation that is unlawful to practice without a license. Such license shall be a nontransferable authorization for an individual to perform a lawful occupation for compensation based on meeting personal qualifications established by law.

"Occupational regulation" means a statute, rule, practice, policy, or other state law requiring an individual to possess certain personal qualifications to use an occupational title or work in a lawful occupation. Occupational regulation includes registration, certification, and licensure. "Occupational regulation" does not include a business license, facility license, building permit, or zoning and land use regulation, except to the extent such provisions regulate an individual's personal qualifications to perform a lawful occupation.

"Personal qualifications" means criteria related to an individual's personal background and characteristics, including completion of an approved educational program, satisfactory performance on an examination, work experience, other evidence of attainment of requisite skills or knowledge, moral standing, criminal history, and completion of continuing education.

"Registration" means a method of regulation whereby any practitioner of a profession or occupation

181 may be required to submit information to a regulatory board concerning (i) the practitioner's name and
182 address, (ii) the name of any agent for service of process, (iii) the location of services to be performed,
183 and (iv) a description of the services to be provided.

184 "Regulatory board" means any board, bureau, commission, or other agency of state government that
185 is created for the purpose of regulating or controlling the independent administrative entity established
186 by law to administer professional or occupational regulation.

187 "Rule" means a regulation, standard, or statement of general applicability, whether formal or
188 informal that implements, interprets, or prescribes law or policy or describes the organization,
189 procedure, or practice requirements of any regulatory board, including the amendment or repeal of a
190 prior rule. "Rule" does not include statements of policy or interpretation made as a part of a decision in
191 a contested case.

192 **§ 54.1-100.02. Degrees of regulation.**

193 A. A regulatory board shall regulate only to the degree necessary to fulfill the need for regulation
194 and only upon approval by the General Assembly. A regulatory board shall consider the following
195 degrees of occupational regulation in the order provided in subdivisions 1 through 5 to achieve the least
196 restrictive regulation of the practice or activity.

197 1. Private civil actions and criminal prosecutions. Whenever existing common law and statutory
198 causes of civil action or criminal prohibitions are not sufficient to eradicate existing harm or prevent
199 potential harm, the regulatory board may first consider the recommendation of statutory change to
200 provide more strict causes for civil action and criminal prosecution.

201 2. Inspection and injunction. Whenever current inspection and injunction procedures are not
202 sufficient to eradicate existing harm, the regulatory board may promulgate regulations consistent with
203 the intent of this chapter to provide more adequate inspection procedures and to specify procedures
204 whereby the appropriate regulatory board may enjoin an activity that is detrimental to the public health,
205 safety, and welfare. The regulatory board may recommend to the appropriate agency of the
206 Commonwealth that such procedures be strengthened or it may recommend statutory changes in order
207 to grant to the appropriate state agency the power to provide sufficient inspection and injunction
208 procedures.

209 3. Registration. Whenever it is necessary to determine the effect of the operation of a profession or
210 occupation on the public, the regulatory board may implement a system of registration.

211 4. Certification. When the public requires a substantial basis for relying on the professional services
212 of a practitioner, the regulatory board may implement a system of certification.

213 5. Licensure. Whenever adequate regulation cannot be achieved by means other than licensure, the
214 regulatory board may establish licensing procedures for any particular profession or occupation.

215 B. In determining the proper degree of regulation, if any, the regulatory board shall determine the
216 following:

217 1. Whether the practitioner, if unregulated, performs a service for individuals involving a hazard to
218 the public's health, safety, or welfare.

219 2. The opinion of a substantial portion of the people who do not practice the particular profession,
220 trade, or occupation on the need for regulation.

221 3. The number of states that have regulatory provisions similar to those proposed.

222 4. Whether there is sufficient demand for the service for which there is no regulated substitute and
223 this service is required by a substantial portion of the population.

224 5. Whether the profession or occupation requires high standards of public responsibility, character,
225 and performance of each individual engaged in the profession or occupation, as evidenced by
226 established and published codes of ethics.

227 6. Whether the profession or occupation requires such skill that the public generally is not qualified
228 to select a competent practitioner without some assurance that he has met minimum qualifications.

229 7. Whether the professional or occupational associations do not adequately protect the public from
230 incompetent, unscrupulous, or irresponsible members of the profession or occupation.

231 8. Whether current laws that pertain to public health, safety, and welfare generally are ineffective or
232 inadequate.

233 9. Whether the characteristics of the profession or occupation make it impractical or impossible to
234 prohibit those practices of the profession or occupation that are detrimental to the public health, safety,
235 and welfare.

236 10. Whether the practitioner performs a service for others that may have a detrimental effect on
237 third parties relying on the expert knowledge of the practitioner.

238 **§ 54.1-100.03. Use of terms "certification," "certified," "registration," and "registered."**

239 A. The use of the terms "certification" and "certified" in any provision of the Code of Virginia
240 requiring an individual to meet certain personal qualifications to work legally shall be interpreted for
241 the purposes of this title as requiring an individual to meet the requirements of licensure. Upon
242 approval, the individual may use "certified" as a designated title. A noncertified individual may also

perform the lawful occupation for compensation but may not use the title "certified."

B. The use of the terms "registration" and "registered" in any provision of the Code of Virginia requiring an individual to meet certain personal qualifications to work legally shall be interpreted for the purposes of this title as requiring an individual to meet the requirements of licensure. "Registration" does not include personal qualifications but may require a bond or insurance. An individual may use "registered" as a designated title; however, a nonregistered individual may not perform the occupation for compensation or use "registered" as a designated title.

§ 54.1-100.04. Active supervision of regulatory boards by the Attorney General.

A. The Attorney General shall be responsible for the active supervision of regulatory boards to ensure that such regulatory boards and board members comply with applicable federal antitrust laws and the requirements of this article.

B. The Attorney General shall (i) approve a rule if he determines it is consistent with applicable federal antitrust laws and the clearly articulated state policy established by this article, (ii) disapprove a rule if he determines it is not consistent with applicable federal antitrust laws and the clearly articulated state policy established by this article, or (iii) remand the rule to the regulatory board to obtain more information or take action.

C. The Governor and any member of the General Assembly may request the Attorney General to review any rule, policy, or enforcement action of a regulatory board for compliance with applicable federal antitrust laws and this article.

Article 2.

General Provisions Relating to Regulatory Boards.

§ 54.1-100.1. Department of Commerce continued as Department of Professional and Occupational Regulation.

A. The Department of Professional and Occupational Regulation, formerly known as the Department of Commerce, is continued, and wherever "Department of Commerce" is used in this Code, it shall mean the Department of Professional and Occupational Regulation.

B. The Board for Professional and Occupational Regulation, formerly known as the Board of Commerce, is continued, and wherever "Board of Commerce" is used in this Code, it shall mean the Board for Professional and Occupational Regulation.

§ 54.1-300. Definitions.

As used in this chapter unless the context requires a different meaning:

"Board" means the Board for Professional and Occupational Regulation.

"Certification" means the process whereby the Department or any regulatory board issues a certificate on behalf of the Commonwealth to a person certifying that he possesses the character and minimum skills to engage properly in his profession or occupation.

"Department" means the Department of Professional and Occupational Regulation.

"Director" means the Director of the Department of Professional and Occupational Regulation.

"Inspection" means a method of regulation whereby a state agency periodically examines the activities and premises of practitioners of an occupation or profession to ascertain if the practitioner is carrying out his profession or occupation in a manner consistent with the public health, safety and welfare.

"Licensure" means a method of regulation whereby the Commonwealth, through the issuance of a license, authorizes a person possessing the character and minimum skills to engage in the practice of a profession or occupation that is unlawful to practice without a license.

"Registration" means a method of regulation whereby any practitioner of a profession or occupation may be required to submit information concerning the location, nature and operation of his practice.

"Regulatory board" means the Auctioneers Board, Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects, Board for Barbers and Cosmetology, Board for Branch Pilots, Board for Contractors, Board for Hearing Aid Specialists and Opticians, Board for Professional Soil Scientists, Wetland Professionals, and Geologists, Board for Waste Management Facility Operators, Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals, Cemetery Board, Real Estate Appraiser Board, Real Estate Board, Fair Housing Board, Virginia Board for Asbestos, Lead, and Home Inspectors, and Common Interest Community Board.

§ 54.1-311. Degrees of regulation.

A. Whenever the Board determines that a particular profession or occupation should be regulated, or that a different degree of regulation should be imposed on a regulated profession or occupation, it shall consider the following degrees of regulation in the order provided in subdivisions 1 through 5. The Board shall regulate only to the degree necessary to fulfill the need for regulation and only upon approval by the General Assembly as provided in § 54.1-100.02.

1. Private civil actions and criminal prosecutions. — Whenever existing common law and statutory causes of civil action or criminal prohibitions are not sufficient to eradicate existing harm or prevent

304 potential harm, the Board may first consider the recommendation of statutory change to provide more
305 strict causes for civil action and criminal prosecution.

306 2. Inspection and injunction. — Whenever current inspection and injunction procedures are not
307 sufficient to eradicate existing harm, the Board may promulgate regulations consistent with the intent of
308 this chapter to provide more adequate inspection procedures and to specify procedures whereby the
309 appropriate regulatory board may enjoin an activity which is detrimental to the public well-being. The
310 Board may recommend to the appropriate agency of the Commonwealth that such procedures be
311 strengthened or it may recommend statutory changes in order to grant to the appropriate state agency the
312 power to provide sufficient inspection and injunction procedures.

313 3. Registration. — Whenever it is necessary to determine the impact of the operation of a profession
314 or occupation on the public, the Board may implement a system of registration.

315 4. Certification. — When the public requires a substantial basis for relying on the professional
316 services of a practitioner, the Board may implement a system of certification.

317 5. Licensing. — Whenever adequate regulation cannot be achieved by means other than licensing, the
318 Board may establish licensing procedures for any particular profession or occupation.

319 B. In determining the proper degree of regulation, if any, the Board shall determine the following:

320 1. Whether the practitioner, if unregulated, performs a service for individuals involving a hazard to
321 the public health, safety or welfare.

322 2. The opinion of a substantial portion of the people who do not practice the particular profession,
323 trade or occupation on the need for regulation.

324 3. The number of states which have regulatory provisions similar to those proposed.

325 4. Whether there is sufficient demand for the service for which there is no regulated substitute and
326 this service is required by a substantial portion of the population.

327 5. Whether the profession or occupation requires high standards of public responsibility, character
328 and performance of each individual engaged in the profession or occupation, as evidenced by established
329 and published codes of ethics.

330 6. Whether the profession or occupation requires such skill that the public generally is not qualified
331 to select a competent practitioner without some assurance that he has met minimum qualifications.

332 7. Whether the professional or occupational associations do not adequately protect the public from
333 incompetent, unscrupulous or irresponsible members of the profession or occupation.

334 8. Whether current laws which pertain to public health, safety and welfare generally are ineffective
335 or inadequate.

336 9. Whether the characteristics of the profession or occupation make it impractical or impossible to
337 prohibit those practices of the profession or occupation which are detrimental to the public health, safety
338 and welfare.

339 10. Whether the practitioner performs a service for others which may have a detrimental effect on
340 third parties relying on the expert knowledge of the practitioner.