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**HOUSE BILL NO. 1937**

Offered January 11, 2017

Prefiled January 10, 2017

A *BILL to amend and reenact §§ 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 54.1-100.01 through 54.1-100.04, relating to professions and occupations; active supervision of regulatory boards.*

Patron—Heretick

Referred to Committee on General Laws

**Be it enacted by the General Assembly of Virginia:**

1. That § 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 is 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 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.

**CHAPTER 1.****GENERAL PROVISIONS RELATING TO THE REGULATION OF PROFESSIONS AND OCCUPATIONS AND REGULATORY BOARDS.***Article 1.**Regulation of Professions and Occupations.***§ 54.1-100. Regulation of professions and occupations.**

A. The right of every person to engage in any lawful profession, trade, or occupation of his choice is clearly protected by both the Constitution of the United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable 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

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59 Virginia. Periodically and at least annually, all agencies regulating a profession or occupation shall  
60 review such regulations to ensure that no conflict exists.

61 **§ 54.1-100.01. Definitions.**

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

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

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

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

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

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

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

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

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

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

105 *"Registration" means a method of regulation whereby any practitioner of a profession or occupation*  
106 *may be required to submit information to a regulatory board concerning (i) the practitioner's name and*  
107 *address, (ii) the name of any agent for service of process, (iii) the location of services to be performed,*  
108 *and (iv) a description of the services to be provided.*

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

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

117 **§ 54.1-100.02. Degrees of regulation.**

118 *A. A regulatory board shall regulate only to the degree necessary to fulfill the need for regulation*  
119 *and only upon approval by the General Assembly. A regulatory board shall consider the following*  
120 *degrees of occupational regulation in the order provided in subdivisions 1 through 5 to achieve the least*

restrictive regulation of the practice or activity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. The use of the terms "certification" and "certified" 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. Upon 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

182 state policy established by this article, or (iii) remand the rule to the regulatory board to obtain more  
183 information or take action.

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

## 187 Article 2.

### 188 General Provisions Relating to Regulatory Boards.

#### 189 § 54.1-100.1. Department of Commerce continued as Department of Professional and 190 Occupational Regulation.

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

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

#### 197 § 54.1-300. Definitions.

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

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

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

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

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

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

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

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

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

#### 221 § 54.1-311. Degrees of regulation.

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

227 1. Private civil actions and criminal prosecutions. — Whenever existing common law and statutory  
228 causes of civil action or criminal prohibitions are not sufficient to eradicate existing harm or prevent  
229 potential harm, the Board may first consider the recommendation of statutory change to provide more  
230 strict causes for civil action and criminal prosecution.

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

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

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

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

244 B. In determining the proper degree of regulation, if any, the Board shall determine the following:  
 245 1. Whether the practitioner, if unregulated, performs a service for individuals involving a hazard to  
 246 the public health, safety or welfare.  
 247 2. The opinion of a substantial portion of the people who do not practice the particular profession,  
 248 trade or occupation on the need for regulation.  
 249 3. The number of states which have regulatory provisions similar to those proposed.  
 250 4. Whether there is sufficient demand for the service for which there is no regulated substitute and  
 251 this service is required by a substantial portion of the population.  
 252 5. Whether the profession or occupation requires high standards of public responsibility, character  
 253 and performance of each individual engaged in the profession or occupation, as evidenced by established  
 254 and published codes of ethics.  
 255 6. Whether the profession or occupation requires such skill that the public generally is not qualified  
 256 to select a competent practitioner without some assurance that he has met minimum qualifications.  
 257 7. Whether the professional or occupational associations do not adequately protect the public from  
 258 incompetent, unscrupulous or irresponsible members of the profession or occupation.  
 259 8. Whether current laws which pertain to public health, safety and welfare generally are ineffective  
 260 or inadequate.  
 261 9. Whether the characteristics of the profession or occupation make it impractical or impossible to  
 262 prohibit those practices of the profession or occupation which are detrimental to the public health, safety  
 263 and welfare.  
 264 10. Whether the practitioner performs a service for others which may have a detrimental effect on  
 265 third parties relying on the expert knowledge of the practitioner.