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HOUSE BILL NO. 880

Offered January 10, 2018

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A *BILL to amend and reenact §§ 30-28.16, 54.1-100, 54.1-100.1, 54.1-300, 54.1-310.1 and 54.1-311 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 30-73.3:1, 54.1-100.01, 54.1-100.02, and 54.1-100.03, relating to professions and occupations; regulatory boards.*

Patron—Webert

Referred to Committee on Rules

Be it enacted by the General Assembly of Virginia:

1. That §§ 30-28.16, 54.1-100, 54.1-100.1, 54.1-300, 54.1-310.1 and 54.1-311 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 30-73.3:1, 54.1-100.01, 54.1-100.02, and 54.1-100.03 as follows:

§ 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;

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

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

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

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

6. *Employ a professional and occupational regulatory analyst pursuant to § 30-73.3:1;*

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

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

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

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

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

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

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

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

§ 30-73.3:1. *Additional duties related to the review of occupational regulations; professional and occupational regulatory analyst; report.*

A. As used in this section:

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

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

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

B. Beginning July 1, 2018, the Commission shall evaluate professions and occupations in the Commonwealth. The Commission shall exert its best efforts to evaluate at least three professions or occupations in each year. The evaluation shall include recommendations for changes to occupational regulations to encourage use of the least restrictive regulation necessary.

C. To the extent feasible, the Commission shall review legislation establishing or modifying an

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HB880

59 occupational regulation to determine whether the legislation uses the least restrictive regulation
60 necessary to protect or preserve the public health, safety, and welfare. In making its determination, the
61 Commission shall (i) evaluate the effects of legislation on opportunities for workers, consumer choices
62 and costs, general unemployment, market competition, governmental costs, and other aspects of the
63 regulation of professions and occupations and (ii) compare the legislation to other states' determinations
64 of whether and how to regulate the profession or occupation.

65 D. The Director of the Division of Legislative Services shall employ a professional and occupational
66 regulatory analyst to assist the Commission in carrying out its duties under this section.

67 E. On or before December 1 of each year, the Commission shall report to the Governor and the
68 General Assembly on its activities relating to the review of the Commission's duties under this section,
69 including any recommendations relating to the professions and occupations reviewed during the previous
70 year.

71 CHAPTER 1.

72 GENERAL PROVISIONS RELATING TO THE REGULATION OF PROFESSIONS AND OCCUPATIONS 73 AND REGULATORY BOARDS.

74 Article 1.

75 Regulation of Professions and Occupations.

76 § 54.1-100. Regulation of professions and occupations.

77 A. The right of every person to engage in any lawful profession, trade, or occupation of his choice is
78 clearly protected by both the Constitution of the United States and the Constitution of the
79 Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable
80 exercise of its police powers when (i) it is clearly found that such abridgment is necessary for the
81 protection or preservation of the health, safety, and welfare of the public and (ii) any such abridgment is
82 no greater than necessary to protect or preserve the public health, safety, and welfare.

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

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

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

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

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

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

97 § 54.1-100.01. Definitions.

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

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

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

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

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

112 1. Market competition.

113 2. Private certification.

114 3. A specific private civil cause of action to remedy consumer harm.

115 4. Prohibition of a deceptive trade practice.

116 5. Regulation of the process of providing the specific goods or services to consumers.

117 6. Inspection.

118 7. Requiring bonding or insurance.

119 8. Registration.

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

"Regulatory board" means any board, bureau, commission, or other agency of state government that is created for the purpose of regulating or controlling the independent administrative entity established by law to administer professional or occupational regulation. "Regulatory board" does not include the Virginia State Bar or any board, bureau, or other agency regulated by the Supreme Court of Virginia.

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

§ 54.1-100.02. Degrees of regulation.

A. A regulatory board shall regulate only to the degree necessary to fulfill the need for regulation and only upon approval by the General Assembly. A regulatory board shall consider the following 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 prosecutions 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 whether 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 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. Except for individuals required to be licensed pursuant to Chapter 44 (§ 54.1-4400 et seq.), 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 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.

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.

§ 54.1-310.1. Petitions for regulation; review by Board; report.

A. Any professional or occupational group or organization, any person, or any other interested party that proposes the regulation of any unregulated professional or occupational group shall submit a request to the Board no later than December 1 of any year for analysis and evaluation during the following year.

B. The Board shall review the request only when filed with a statement of support for the proposed regulation signed by at least 10 members of the professional or occupational group for which regulation is being sought or at least 10 individuals who are not members of the professional or occupational group.

C. The request shall include, at a minimum, the following information:

1. A description of the group proposed for regulation, including a list of associations, organizations, and other groups representing the practitioners in the Commonwealth, and an estimate of the number of practitioners in each group;

2. A definition of the problems to be solved by regulation and the reasons why regulation is necessary;

3. The reasons why registration, certification, licensure, or other type of regulation is being proposed and why that regulatory alternative was chosen;

4. The benefit to the public that would result from the proposed regulation;

5. The cost of the proposed regulation; and

6. A description of any anticipated disqualifications on an applicant for certification, licensure, or renewal and how such disqualifications serve public safety or commercial or consumer protection interests.

D. Upon receipt of a request submitted in accordance with the requirements of subsection C, the Board shall conduct an analysis and evaluation of any proposed regulation based on the criteria enumerated in ~~§ 54.1-311~~ § 54.1-100.02.

E. The Board may decline to conduct a review only if it:

1. Previously conducted an analysis and evaluation of the proposed regulation of the same professional or occupational group;

2. Issued a report not more than three years prior to the submission of the current proposal to regulate the same professional or occupational group; and

3. Finds that no new information has been submitted in the request that would cause the Board to alter or modify the recommendations made in its earlier report on the proposed regulation of the professional or occupational group.

F. The Board shall submit a report with its findings on whether the public interest requires the requested professional or occupational group be regulated to the House Committee on General Laws, the Senate Committee on General Laws and Technology, and the Joint Commission on Administrative Rules no later than November 1 of the year following the request submission.

§ 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 potential harm, the 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 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 which is detrimental to the public well-being. The 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 impact of the operation of a profession or occupation on the public, the 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 Board may implement a system of certification.

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

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

1. Whether the practitioner, if unregulated, performs a service for individuals involving a hazard to

305 the public health, safety or welfare.

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

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

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

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

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

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

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

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

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