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HOUSE BILL NO. 1566

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Appropriations  
on February 3, 2017)

(Patron Prior to Substitute—Delegate Webert)

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 sections numbered 30-73.3:1, 54.1-100.01, 54.1-100.02, and 54.1-100.03, relating to professions and occupations; active supervision of regulatory boards.

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 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

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60 4. Make researches and examinations as to any subject of proposed legislation.  
 61 C. The Director shall perform such other duties as may be required of him by the Committees on  
 62 Rules of the House of Delegates and the Senate.

63 **§ 30-73.3:1. Additional duties related to the review of occupational regulations; professional and**  
 64 **occupational regulatory analyst; report.**

65 A. As used in this section:

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

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

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

69 B. Beginning July 1, 2017, the Commission shall evaluate professions and occupations in the  
 70 Commonwealth. At least three professions and occupations shall be evaluated in each year. The  
 71 evaluation shall include recommendations for changes to occupational regulations to improve  
 72 compliance with the state policy of using the least restrictive regulation necessary.

73 C. To the extent feasible, the Commission shall review legislation establishing or modifying an  
 74 occupational regulation to determine whether the legislation meets the state policy of using the least  
 75 restrictive regulation necessary to protect or preserve the public health, safety, and welfare. In making  
 76 its determination, the Commission shall (i) evaluate the effects of legislation on opportunities for  
 77 workers, consumer choices and costs, general unemployment, market competition, governmental costs,  
 78 and other effects and (ii) compare the legislation to other states' determinations of whether and how to  
 79 regulate the profession or occupation.

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

82 E. On or before December 1 of each year, the Commission shall report to the Governor and the  
 83 General Assembly on its activities relative to the review of the Commission's duties under this section,  
 84 including any recommendations relative to the profession and occupations reviewed during the previous  
 85 year.

#### 86 CHAPTER 1.

### 87 GENERAL PROVISIONS RELATING TO THE REGULATION OF PROFESSIONS AND OCCUPATIONS 88 AND REGULATORY BOARDS.

#### 89 Article 1.

#### 90 Regulation of Professions and Occupations.

#### 91 **§ 54.1-100. Regulation of professions and occupations.**

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

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

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

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

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

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

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

#### 112 **§ 54.1-100.01. Definitions.**

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

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

118 "*Certification*" means the process whereby any regulatory board issues a certificate on behalf of the  
 119 Commonwealth to a person certifying that he possesses the character and minimum skills to engage  
 120 properly in his profession or occupation. "*Certification*" may include a voluntary program in which a  
 121 private organization or the Commonwealth grants nontransferable recognition to an individual who

122 meets personal qualifications established by the private organization or state government.  
123 "Inspection" means a method of regulation whereby a regulatory board periodically examines the  
124 activities and premises of practitioners of a profession or occupation to ascertain if the practitioner is  
125 carrying out his profession or occupation in a manner consistent with the public health, safety, and  
126 welfare.

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

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

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

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

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

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

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

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

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

169 **§ 54.1-100.02. Degrees of regulation.**

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

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

178 2. Inspection and injunction. Whenever current inspection and injunction procedures are not  
179 sufficient to eradicate existing harm, the regulatory board may promulgate regulations consistent with  
180 the intent of this chapter to provide more adequate inspection procedures and to specify procedures  
181 whereby the appropriate regulatory board may enjoin an activity that is detrimental to the public health,  
182 safety, and welfare. The regulatory board may recommend to the appropriate agency of the

183 Commonwealth that such procedures be strengthened or it may recommend statutory changes in order  
 184 to grant to the appropriate state agency the power to provide sufficient inspection and injunction  
 185 procedures.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

215 **§ 54.1-100.03. Use of terms "certification," "certified," "registration," and "registered."**

216 A. The use of the terms "certification" and "certified" in any provision of the Code of Virginia  
 217 requiring an individual to meet certain personal qualifications to work legally shall be interpreted for  
 218 the purposes of this title as requiring an individual to meet the requirements of licensure. Upon  
 219 approval, the individual may use "certified" as a designated title. Except for individuals required to be  
 220 licensed pursuant to Chapter 44 (§ 54.1-4400 et seq.) of Title 54.1, a noncertified individual may also  
 221 perform the lawful occupation for compensation but may not use the title "certified."

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

228 Article 2.

229 General Provisions Relating to Regulatory Boards.

230 **§ 54.1-100.1. Department of Commerce continued as Department of Professional and**  
 231 **Occupational Regulation.**

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

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

238 **§ 54.1-300. Definitions.**

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

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

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

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

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

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

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

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

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

262 **§ 54.1-311. Degrees of regulation.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

305 10. Whether the practitioner performs a service for others which may have a detrimental effect on

**306** ~~third parties relying on the expert knowledge of the practitioner.~~