

SUBJECT: Requiring review of occupational licensing rules by governor's office

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 8 ayes — Phelan, Guerra, Harless, Holland, Hunter, P. King, Parker,  
Springer

4 nays — Hernandez, Deshotel, Rodriguez, Smithee

1 absent — Raymond

SENATE VOTE: On final passage, April 23 — 24-7 (Bettencourt, Campbell, Johnson,  
Menéndez, Schwertner, Watson)

WITNESSES: For — (*Registered, but did not testify*: Arif Panju, Institute for Justice;  
Annie Spilman, NFIB)

Against — (*Registered, but did not testify*: Robert Yezak, International  
Brotherhood of Electrical Workers; Ronnie Smitherman, Texas Building  
Trades Council)

On — (*Registered, but did not testify*: Kim Van Winkle, Office of the  
Attorney General)

DIGEST: SB 1995 would require the governor to establish a division to review  
certain rules proposed by state agencies that issued licenses.

**Rules review process.** The bill would apply only to a state agency with a governing board that was controlled by persons who provided services that were regulated by the agency.

A state agency that issued a license would be required to submit to the division for review any proposed rule or rule being considered for re-adoption that would affect market competition of licensed businesses, occupations, or professions. A rule would be considered to affect market competition if it would create a barrier to market participation or result in

higher prices or reduced competition for a product or service provided by a license holder.

The agency would have to include with the submission a statement of the purpose for the proposed rule; copies of all administrative records regarding the proposed rule, including any information or comments the agency received from the public; and any other information required by the division.

The division would be required to complete a thorough, independent review to determine if the effect of the proposed rule on market competition was consistent with state policy as established by the agency's governing statute and whether the proposed rule promoted a clearly articulated and affirmatively expressed policy as established by the Legislature to displace competition with government action. The division would be authorized to initiate a review of a proposed rule that was not submitted for review if the division had reason to believe the rule could have an anticompetitive market effect.

When conducting a review of a proposed rule or deciding whether to initiate a review, the division could only consider evidence or communications that were submitted to the division in writing from an identified person or entity and made available to the public, submitted in a public hearing, or generally known to the public.

In conducting the review, the division could request information from the agency, require the agency to conduct an analysis of the possible implications of the rule, solicit public comments, or hold public hearings.

The division would have to complete the review by the 90th day after receiving the agency's submission. After the review, the division would either approve the proposed rule or reject it and return the rule to the agency with instructions for revising the rule to be consistent with applicable state policy. An agency could not adopt or implement a rule subject to review under the bill unless the division had approved it.

The division would have to provide to the agency and make publicly available an explanation of its approval or rejection of the rule, including a discussion of the division's determination regarding the consistency of the rule with applicable state policy.

**Division administration.** The governor would appoint a director for the division who had experience in antitrust law and held a Texas law license. The director would serve a two-year term and would be appointed with the advice and consent of the Senate.

The bill would prohibit the appointment of a division director, or the employment of a professional, administrative, or executive division employee, who had a conflict of interest as prescribed by the bill, including being an officer, employee, or paid consultant of a Texas trade association or having a spouse who had such a role. The governor also could not appoint as director or general counsel to the division a person who was required to register as a lobbyist.

The Office of the Governor would be required to implement a provision of the bill only if the Legislature appropriated money specifically for that purpose. Otherwise, the office would be permitted, but not required, to implement the bill with other available appropriations.

The bill would take effect September 1, 2019.

SUPPORTERS  
SAY:

SB 1995 would establish a mechanism for oversight of potentially anticompetitive actions by state regulatory boards, which would mitigate concerns over liability that the state could face under federal antitrust law.

The U.S. Supreme Court in its 2015 *North Carolina State Board of Dental Examiners v. Federal Trade Commission* decision created an exception to the idea that states are immune from antitrust lawsuits when state boards undertake anticompetitive actions. The court articulated that for a state to enjoy immunity from antitrust suits, the state must articulate a clear state policy to justify an anticompetitive action and provide active supervision of the agency undertaking the action.

SB 1995 would enable the state to undertake this active control of potentially anticompetitive actions by creating a division in the Office of the Governor to review rules proposed by state licensing boards to ensure there was a legitimate state purpose for each rule. Without this active control, the state could be subject to liability for an anticompetitive action.

The bill would not concentrate too much power in the hands of the governor because dissatisfied parties would still have recourse to judicial appeal if a proposed rule was rejected, and the Legislature would retain the authority to correct, adjust, or modify the policies governing boards and commissions as needed.

**OPPONENTS  
SAY:**

SB 1995 would concentrate too much power in the Office of the Governor, giving it final say over a substantial amount of agency rulemaking. This would represent a significant departure from how agencies typically make rules.

Although the bill aims to address a legitimate concern, this same concern could be addressed instead by altering the composition of the boards and commission so that fewer members were industry practitioners.

**NOTES:**

According to the Legislative Budget Board, the bill would have an estimated negative impact to general revenue related funds of \$1 million through the biennium ending August 31, 2021. The bill would make no appropriation but could provide the legal basis for one.