

BILL ANALYSIS

Senate Research Center

S.B. 1995
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State Affairs
6/5/2019
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Federal antitrust laws prohibit anticompetitive conduct and unfair methods of competition. These laws may be enforced via private lawsuits or the Federal Trade Commission (FTC) may bring an enforcement action to require compliance.

States are immune from antitrust lawsuits when they act in their sovereign capacity, but the United States Supreme Court has held that states lose their immunity when they act through certain types of agencies. Specifically, the U.S. Supreme Court ruled in *North Carolina Dental Board* that if a controlling number of a state agency's board members are active market participants, then the agency cannot claim immunity unless it satisfies two tests: first, the State must articulate a clear policy to allow the anticompetitive conduct, and, second, the State must provide active supervision of the anticompetitive conduct.

Many of Texas' agency boards are controlled by active market participants based simply on the numbers, and active market participants may control others, even if the regulated members make up the minority. This is problematic because agencies regularly engage in anticompetitive conduct. Rules limiting who may practice a certain profession is the most common example. Many of these actions will stem from a clearly articulated state policy, but many will not because Texas statutes are not always precise and they are not always updated to reflect changing market conditions. Finally, Texas does not exercise active supervision over the vast majority of its boards' decisions.

S.B. 1995 alleviates this problem by creating "active state supervision" by creating a division within the Office of the Governor that is charged with reviewing anti-market participation rules. S.B. 1995 requires a state agency that issues a license to submit any proposed rule affecting market competition relating to the business, occupation, or profession for which a license is issued to the division for review before the rule is adopted or implemented.

A state agency that issues a license must also submit to the division for review any rule that the agency is considering for readoption if the rule affects market competition as described by this section. A rule affects market competition if the rule would, if implemented or readopted, 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 division is required to conduct a thorough, independent review of each proposed rule submitted to determine if the effect of the proposed rule on market competition is consistent with applicable state policy and whether the proposed rule promotes a clearly articulated and affirmatively expressed policy as established by the legislature to displace competition with government action. An agency may not finally adopt or implement a proposed rule required to be submitted for review unless the division has approved the rule. (Original Author's/Sponsor's Statement of Intent)

S.B. 1995 amends current law relating to the review of certain occupational licensing rules by the office of the governor.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the division established by the governor to review state agency rules in SECTION 4 (Section 57.107, Occupations Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 57, Occupations Code, by designating Section 57.001 as Subchapter A and adding a subchapter heading to read as follows:

SUBCHAPTER A. GENERAL PROVISIONS

SECTION 2. Amends Chapter 57, Occupations Code, by adding Subchapter B, and adds a heading to that subchapter to read as follows:

SUBCHAPTER B. GOVERNING BOARD MEMBERSHIP

SECTION 3. Transfers Section 57.002, Occupations Code, to Subchapter B, Chapter 57, Occupations Code, as added by this Act, redesignates it as Section 57.051, Occupations Code, and makes no further changes.

SECTION 4. Amends Chapter 57, Occupations Code, by adding Subchapter C, as follows:

SUBCHAPTER C. REVIEW OF STATE AGENCY RULES

Sec. 57.101. DEFINITION. Defines "division" for purposes of this subchapter.

Sec. 57.102. APPLICABILITY. Provides that this subchapter applies only to a state agency with a governing board that is controlled by persons who provide services that are regulated by the agency.

Sec. 57.103. ESTABLISHMENT OF DIVISION. (a) Requires the governor to establish a division to review state agency rules in accordance with this subchapter and appoint a director for the division with the advice and consent of the senate.

(b) Requires the director to be licensed to practice law in this state and have experience in antitrust law.

(c) Provides that the director serves a two-year term expiring February 1 of each odd-numbered year.

Sec. 57.104 CONFLICT OF INTEREST. (a) Defines "Texas trade association" for purposes of this section.

(b) Prohibits a person from being appointed as director or employed by the division in a "bona fide executive, administrative, or professional capacity," as that phrase is used for purposes of establishing an exemption to the overtime provisions of the federal Fair Labor Standards Act of 1938 (29 U.S.C. Section 201 et seq.), and its subsequent amendments, if:

(1) the person is an officer, employee, or paid consultant of a Texas trade association; or

(2) the person's spouse is an officer, manager, or paid consultant of a Texas trade association.

(c) Prohibits a person from being appointed as director or acting as the general counsel to the division if the person is required to register as a lobbyist under Chapter 305 (Registration of Lobbyists), Government Code.

Sec. 57.105. SUBMISSION OF CERTAIN STATE AGENCY RULES. (a) Requires a state agency that issues a license to submit any proposed rule affecting market competition in this state relating to the business, occupation, or profession for which a license is issued to the division for review before the rule is adopted or implemented.

(b) Requires a state agency that issues a license to submit to the division for review any rule that the agency proposes to repeal or readopt with amendment after a review under Section 2001.039 (Agency Review of Existing Rules), Government Code, if the rule affects market competition as described by this section.

(b-1) Requires a state agency that issues a license to submit to the division for review any rule that the agency proposes to readopt without amendment after a review under Section 2001.039, Government Code, if the rule affects market competition as described by this section. Provides that this subsection expires January 1, 2024.

(c) Requires the state agency 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.

(d) Provides that, for purposes of this section, a rule affects market competition if the rule would, if implemented or readopted, create a barrier to market participation in this state or result in higher prices or reduced competition for a product or service provided by or to a license holder in this state.

Sec. 57.106. REVIEW BY DIVISION. (a) Requires the division to conduct a thorough, independent review of each proposed rule submitted under Section 57.105 to determine if the effect of the proposed rule on market competition is consistent with state policy as established by the applicable state agency's governing statute and whether the proposed rule promotes a clearly articulated and affirmatively expressed policy as established by the legislature to displace competition with government action.

(b) Authorizes the division, in conducting the review, to request information from the state agency, to require the state agency to conduct an analysis of possible implications of the rule, to solicit public comments, or to hold public hearings.

(c) Requires the division to complete the review not later than the 90th day after the date the proposed rule is submitted under Section 57.105.

(d) Requires the division, after the review, to approve the proposed rule or reject the proposed rule and return the rule to the state agency with instructions for revising the rule to be consistent with applicable state policy.

(e) Prohibits a state agency from finally adopting or implementing a proposed rule required to be submitted for review under this subchapter unless the division has approved the rule under this section.

(f) Requires the division, for each proposed rule submitted under this subchapter, to provide to the state agency and make available to the public an explanation of the division's reasons for approving or rejecting the rule, including a discussion of the division's determination regarding the consistency of the rule with applicable state policy.

(g) Authorizes the division to initiate a review of a proposed rule that was not submitted for review under this subchapter if the division has reason to believe that the proposed rule may have an anticompetitive market effect. Prohibits a state agency from finally adopting or implementing a proposed rule for which the

division has initiated a review under this subsection unless the division approves the rule in accordance with this section.

(h) Requires the division, when conducting a review of a proposed rule or deciding whether to initiate a review, to only consider certain evidence or communications.

Sec. 57.107. RULEMAKING AUTHORITY. Authorizes the division to adopt rules to carry out this subchapter.

SECTION 5. Provides that the Office of the Governor (governor's office) is required to implement a provision of this Act only if the legislature appropriates money specifically for that purpose. Authorizes, but does not require, the governor's office, if the legislature does not appropriate money specifically for that purpose, to implement a provision of this Act using other appropriations available for that purpose.

SECTION 6. Effective date: September 1, 2019.