Administrative, Executive, and Legislative Review Committee 2012 Membership Roster

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MARYLAND GENERAL ASSEMBLY

JOINT COMMITTEE ON ADMINISTRATIVE, EXECUTIVE, AND LEGISLATIVE REVIEW

December 18, 2012

The Honorable Thomas V. Mike Miller, Jr., Co-chairman
The Honorable Michael E. Busch, Co-chairman
Members of the Legislative Policy Committee

Ladies and Gentlemen:

The following report of the Joint Committee on Administrative, Executive, and Legislative Review for 2012 is submitted in accordance with § 2-506(b) of the State Government Article.

Functions of the Committee

The committee has several statutory review functions relating to the activities of the Executive Branch. The committee's primary role is to review regulations issued by State administrative agencies. The specific statutory functions of the committee are as follows:

- review of all regulations proposed by State executive agencies before publication of the regulations in the *Maryland Register*;
- review and approval of all requests from State executive agencies for the immediate adoption, through the emergency process, of proposed regulations;
- discretionary review of the operations of any executive agency;
- discretionary inquiry into any alleged failure of an officer or employee of any branch of State government to comply with the laws of the State;
- review and approval of any executive order promulgated by the Governor pursuant to the Governor's emergency energy powers under Title 14, Subtitle 3 of the Public Safety Article;

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- review of executive agency "work plans" and "evaluation reports" submitted in the course of an agency's cyclical review of its existing regulations under the Regulatory Review and Evaluation Act, as implemented by Executive Order 01.01.2003.20;

- ongoing supervisory responsibilities under the "State Documents Law" relating to the publication of the *Maryland Register* and the *Code of Maryland Regulations* (COMAR); and

- other specific review responsibilities established by statute.

Statistical Overview

The committee held one public hearing and two information sessions in 2012, the subjects of which are summarized below under Major Regulatory Issues of 2012.

As of December 17, 2012, the committee had received 43 regulations submitted by executive agencies in 2012 for emergency approval and 326 regulations proposed for adoption within normal timeframes, for an overall total of 369 regulations. In 2011, the committee received 61 emergency regulations and 314 proposed regulations for a total of 375 regulations.

The committee has compiled statistics since 1993 on the number of regulations received by the committee from each agency. The Department of Health and Mental Hygiene (DHMH) consistently has been the most prolific in submitting regulations to the committee. In 2012, DHMH submitted 112 regulations to the committee, of which 13 were emergency proposals and 99 were proposed regulations. The regulations submitted by DHMH constituted 31% of the total number of regulations the committee received for the year.

The Department of Natural Resources, which submitted 36 proposed regulations and 5 emergency regulations for a total of 41 regulations, was the second most prolific source of regulations. The Department of Labor, Licensing, and Regulation was the third highest source of regulations in 2012, submitting 10 emergency regulations and 30 proposed regulations for a total of 40 regulations. Other agencies submitting significant numbers of regulations were the Maryland Department of Transportation (18 regulations), the State Board of Education (17 regulations), the Department of the Environment (16 regulations), the Department of Agriculture (14 regulations), the Maryland Insurance Administration (13 regulations), the Department of Human Resources (12 regulations), and the Comptroller of Maryland (12 regulations).

Major Regulatory Issues of 2012

Workers' Compensation Commission

- **Workers' Compensation Commission: Guide of Medical and Surgical Fees:** COMAR 14.09.03.01 and .04

The Workers Compensation Research Institute published a study in March 2010 entitled *Prescription Benchmarks for Maryland*, which noted that some Maryland physicians dispensed prescription drugs directly to the patient at their offices. This occurred in 47% of claims with prescriptions and accounted for 24% of all prescriptions paid under workers' compensation. Physicians who dispensed prescriptions were paid nearly four times what would be paid if the same prescription was filled at a pharmacy.

Section 12-102 of the Health Occupations Article and COMAR 10.13.01 authorize a physician licensed to dispense prescription drugs to dispense prescriptions to a patient only when a pharmacy is not conveniently available to the patient, as determined by the patient.

The Workers' Compensation Commission first introduced regulations pertaining to this matter that were published in the January 28, 2011 issue of the *Maryland Register*. AELR put the prior regulations on hold on March 10, 2011. The commission then proposed regulations again in September 2011.

The regulations proposed new definitions and a new pharmaceutical fee schedule. The schedule was designed to eliminate the disparity in reimbursement rates between physician-dispensed and pharmacy-dispensed prescriptions by establishing a single reimbursement rate tied to a specified formula. The regulations also proposed new procedures for reimbursement, authorized the commission to assess a fine against the employer or its insurer for untimely reimbursement, and established procedures for an employer or insurer to deny a claim for reimbursement.

The committee held a public hearing on February 8, 2012, and voted to oppose adoption of the proposed regulations. The proposed regulations were withdrawn by the commission on June 11, 2012.

Department of the Environment

- **Regulation of Water Supply, Sewage Disposal, and Solid Waste: Sewage Disposal and Certain Water Systems for Homes and Other Establishments in the Counties of Maryland Where a Public Sewage System is Not Available:** COMAR 26.04.02.00-.12

The federal Clean Water Act requires states to designate intended uses, such as swimming or fishing, for their water bodies and to set water quality standards to achieve these uses. Water bodies that do not meet the water quality standards are designated as *impaired* and are assigned a Total Maximum Daily Load (TMDL) or "pollution diet," which (1) sets the maximum amount of pollution that the water body can receive and still attain water quality standards and (2) identifies specific pollution reduction requirements among the various contributing sources. The U.S. Environmental Protection Agency (EPA) has been working with watershed states and the District of Columbia to develop a Chesapeake Bay TMDL since 2000 in order to prepare for a federal court-ordered deadline.

Nitrogen has been identified as a contaminant to both groundwater and surface water in the TMDL because its concentration exceeds basic nutrient requirements. Excess nitrogen causes algal blooms that deprive aquatic grasses of sunlight and create "dead zones" by lowering levels of dissolved oxygen in the water. According to the Maryland Department of the Environment (MDE) septic systems account for about 6% of the total nitrogen load to the Chesapeake Bay from Maryland.

Chapter 280 of 2009 (codified in § 9-1108 of the Environment Article) requires the best available technology (BAT) for nitrogen removal for septic systems connected with new construction in the Chesapeake Bay critical area or the Atlantic coastal bays critical area and when replacing septic systems in the critical areas. MDE proposed regulations on June 1, 2012, to expand the BAT requirement to include all septic systems serving new construction in the Chesapeake Bay watershed, the Atlantic coastal bays watershed, and in the watershed of any nitrogen impaired water body. The regulations also require BAT for any replacement system on property located in the Chesapeake Bay critical area and Atlantic Coastal Bays critical area, which is consistent with Chapter 280. Furthermore, the regulations require operation and maintenance of BAT for the life of the system.

The committee held an information session (due to the failure to gather a quorum necessary to constitute a public hearing) on July 10, 2012. The committee released the hold on the regulations on July 25, 2012, and the regulations were finally adopted on September 21, 2012.

Department of Agriculture

- **Soil and Water Conservation: Agricultural Operation Nutrient Management Plan Requirements**: COMAR 15.20.07.02

Since the passage of the Water Quality Improvement Act of 1998 (Chapters 324 and 325), agricultural operations with $2,500 or more in gross annual income and livestock operations with 8,000 pounds or more of live animal weight must have, and comply with, a nutrient management plan for nitrogen and phosphorus. A nutrient management plan is a plan developed by a certified nutrient management consultant to manage the amount, placement, timing, and application of animal waste, commercial fertilizer, sludge, or other plant nutrients to prevent pollution by transport of nutrients and to maintain productivity on agricultural land. Reducing nutrient runoff pollution is a key component of the Bay TMDL Watershed Implementation Plan required by federal law.

To implement the Water Quality Improvement Act, the Maryland Department of Agriculture certifies and licenses nutrient management consultants and businesses to prepare nutrient management plans for farm operations and also issues certificates to farm operators to develop their own plans. In consultation with the Nutrient Management Advisory Committee, the department is required, by regulation, to prescribe the criteria, form, and content for certified nutrient management plans applicable to licensees and certificate holders and also establish specified continuing education, recordkeeping, and reporting requirements.

The department proposed a new regulation in June 2012 to amend the Nutrient Management Manual in COMAR 15.20.07.02, which is relied on to produce nutrient management plans. The regulation proposed to include Supplement No. 7 to the manual to ensure consistency with the most up-to-date scientific findings from research conducted by the University of Maryland. Additionally, the department sought to ensure consistency in how all nutrient sources are managed and applied to agricultural land throughout the State. Specifically, the addition of Supplement No. 7 to the manual generally results in three categories of changes: (1) changes to crop nutrient recommendations; (2) changes to nutrient application and storage guidelines; and (3) changes to clarify existing policy related to sources of nutrients.

The committee held an information session (due to the failure to gather a quorum necessary to constitute a public hearing) on July 10, 2012. The regulations were finally adopted on October 5, 2012.

Department of Health and Mental Hygiene

- **Maternal and Child Health:**
  Prohibition of Sale of Baby Bumper Pads:
  COMAR 10.11.07.01-.03

Bumper pads are pieces of cushioned lining designed to be attached to the inner portions of the sides of an infant's crib from birth until the infant begins to pull to stand, at approximately six to nine months of age. Citing evidence that bumper pads have been a causal factor in fatal asphyxiation of infants, some pediatric experts and health agencies have expressed concern that the use of bumper pads is an unsafe sleep practice. There are three potential mechanisms for the risk of asphyxiation and death: direct contact of the bumper with the face of the infant, obstruction of sufficient air flow by the face being very close to the bumper pad, and strangulation from the straps or ties to the bumper.

In Maryland each year, approximately 50 infants die from Sudden Infant Death Syndrome, Sudden Unexplained Death of Infancy, or accidental suffocation and strangulation, all of which may be associated with unsafe sleep arrangements. In light of these concerns, the department initiated a review of crib bumper pads in April 2011.

After receiving public comment and input from two advisory panels consisting of pediatric and other experts who reviewed autopsy reports and other data, the department found that "the risk of death from crib bumper pads, while small, is real" and that the risk "is not offset by evidence for significant benefit to infants of bumper pads." Panel members noted that the cause of an infant death in a crib can be "multifactorial" and that further research is needed but concluded that there is a rare but concerning risk of death from crib bumpers. Panel members noted, moreover, an absence of data on the benefits of bumper pads in cribs.

The department published proposed regulations in the July 13, 2012 issue of the *Maryland Register* to prohibit the sale of baby bumper pads in Maryland for use in infant cribs. Declaring baby bumper pads to be a hazardous material, the regulations prohibit the shipment or sale of baby bumper pads to a purchaser in the State beginning June 21, 2013. Among other terms, the regulations define "baby bumper pads" to mean a pad or pads of nonmesh material resting directly above the mattress in a crib, running the circumference of the crib or along the length of any of the interior sides of the crib, and intended to be used until the age that an infant "pulls to stand."

The regulations also include general provisions relating to standard consumer safety performance specifications for infant bedding and related accessories set by the American Society for Testing and Materials (ASTM), an organization of technical experts and business

professionals who develop voluntary consensus standards for a variety of products. Under the regulations, the Secretary of Health and Mental Hygiene may:

- provide an opportunity for public comment, after notification that ASTM has adopted a new standard for baby bumper pads, on whether the new ASTM standards should replace the prohibition on the shipment or sale of baby bumper pads; and

- issue an order, within 60 days after the close of public comment, allowing the sale of baby bumper pads that comply with the new ASTM standards if the Secretary determines that bumper pads are not a danger to the public health and safety.

In addition, the Secretary may issue an order suspending the regulations governing baby bumper pads if the Consumer Product Safety Commission (the federal agency charged with protecting the public from unreasonable risks of injury or death from certain consumer products) affirmatively finds that the benefits of baby bumper pads exceed the risks.

Finally, the regulations specify that a notice of violation will be issued by the department to any person found to have shipped or sold a baby bumper pad to a purchaser in the State after June 21, 2013. A person who ships or sells a baby bumper pad to a purchaser in the State, after being issued a notice of violation, shall be subject to a civil fine of up to $500 for each baby bumper pad shipped or sold.

The committee put the regulations on hold on August 23, 2012, and scheduled a public hearing. The committee held an information session (due to the failure to gather a quorum necessary to constitute a public hearing) on October 2, 2012. On October 11, 2012, the committee released the hold on the regulations. The regulations were published for final adoption on November 16, 2012, with an effective date of November 26, 2012.

- **Board of Morticians and Funeral Directors:**
  Requirements for Apprenticeship:
  COMAR 10.29.09.03 and .04

On July 31, 2012, the department submitted emergency/proposed regulations to specify credits and courses that an applicant for an apprentice license must complete before the State Board of Morticians and Funeral Directors issues an apprentice license. Specifically, the required two-thirds of academic credits an individual must complete prior to applying for a license must include successful completion of embalming theory, embalming practical experience, and an Occupational Safety and Health Administration (OSHA) course.

Historically, the board had assumed that the two-thirds of academic credits earned prior to licensure included embalming theory, practice embalming, and OSHA training. However, according to the board, some mortuary science programs allow students to practice embalming at Maryland funeral homes rather than in a campus laboratory. Thus, some apprentices are learning embalming on the job rather than in a teaching setting.

After a member of the AELR committee requested a public hearing, a hearing was scheduled on these emergency/proposed regulations. The committee held an information session (due to the failure to gather a quorum necessary to constitute a public hearing) on October 2, 2012. Due to the lack of a quorum, no vote was taken to approve the request for emergency adoption. The committee released the hold on the proposed regulations on October 31, 2012. The regulations were published for final adoption on December 14, 2012, with an effective date of December 24, 2012.

Supervisory Responsibilities under the State Documents Law

As part of its supervisory responsibilities under the "State Documents Law" (Title 7, Subtitle 2 of the State Government Article), the committee continued to monitor significant developments concerning publications of the Division of State Documents (DSD), a unit within the Office of the Secretary of State. DSD publishes the *Maryland Register* and the *Code of Maryland Regulations* (COMAR).

Existing Agency Operations and Regulations

Under § 2-506(b) of the State Government Article, the committee is required to comment on any recommendations to bring about the more efficient operation of the branches of the State government and on any legislative action that is needed to change or reverse a regulation of a unit of the Executive Branch. The committee has been satisfied with the continued cooperation it receives from the Executive Branch and is pleased to report that no recommendations for change are required at this time.

The committee wishes to note its appreciation for the continued cooperation of the Executive Branch and its various agencies in making the process of legislative review of regulations successful.

Respectfully submitted,

Delegate Anne Healey
House Chairman

Senator Paul G. Pinsky
Senate Chairman

PGP:AH/MHR/EMI/arr

cc: Karl S. Aro
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