

Department of Legislative Services
 Maryland General Assembly
 2017 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 966 (Delegate Hill, *et al.*)
 Rules and Executive Nominations

Legislative and Congressional Districting

This bill proposes a constitutional amendment that, if approved by the voters at the next general election, repeals existing constitutional provisions relating to the legislative redistricting process and requires the appointment of a General Assembly Legislative Redistricting and Apportionment Commission (redistricting commission) in the year following each decennial Census of the United States or when required by the United States or by court order. The commission must divide the State into consecutively numbered legislative districts that conform to existing constitutional provisions. The bill includes implementing provisions related to the appointment of members to the commission, the process for developing and enacting redistricting plans, and funding for the commission. The bill also establishes a Commission to Study Congressional Districting (study commission), staffed by the Department of Legislative Services (DLS). The study commission must report its findings and recommendations to the Governor and the General Assembly by December 31, 2017, and the commission terminates June 30, 2018.

The bill takes effect June 1, 2017; provisions related to the legislative redistricting commission are contingent on the enactment of the constitutional amendment.

Fiscal Summary

State Effect: If the proposed constitutional amendment is approved by Maryland voters, general fund expenditures for multiple agencies increase by at least \$3.0 million in FY 2020 to provide staff and other resources to the redistricting commission and related agencies. DLS can staff the study commission with existing budgeted resources. Revenues are not affected. **This bill establishes a mandated appropriation for FY 2020.**

| (in dollars) | FY 2018 | FY 2019 | FY 2020 | FY 2021 | FY 2022 |
|----------------|---------|---------|---------------|---------|---------|
| Revenues | \$0 | \$0 | \$0 | \$0 | \$0 |
| GF Expenditure | 0 | 0 | 3,000,000 | 0 | 0 |
| Net Effect | \$0 | \$0 | (\$3,000,000) | \$0 | \$0 |

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: None. It is assumed that the potential for increased costs to notify voters of any constitutional amendments proposed by the General Assembly and to include any proposed constitutional amendments on the ballot at the next general election will have been anticipated in local boards of elections' budgets irrespective of this bill.

Small Business Effect: None.

Analysis

Bill Summary:

General Assembly Legislative Redistricting and Apportionment Commission

The redistricting commission must (1) conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines; (2) draw district lines according to the specified redistricting criteria; and (3) conduct its business with integrity and fairness.

Duties of the Commission

In the year following the year in which the national Census is taken or when required by the United States or by court order, the redistricting commission must be appointed to divide the State into consecutively numbered General Assembly legislative districts that conform to specified standards in Article III, Sections 2, 3, and 4 of the Maryland Constitution. In the course of adjusting legislative district boundaries, the redistricting commission must (1) hold public hearings; (2) accept public comments *before* making decisions; (3) provide access to redistricting data and software; and (4) otherwise ensure full public participation in the redistricting process.

The commission must approve, issue, and submit a final map and report to the Secretary of State by September 15 of each year ending in the number one. The report must explain the basis on which the commission made its decisions to achieve compliance with the criteria set forth in the Maryland Constitution and include definitions of the terms and standards used in drawing the map. The Secretary of State must forward a certified final map and plan of General Assembly legislative districts submitted by the commission to the Presiding Officers of the General Assembly for introduction as a bill.

Legislative District Criteria

Each General Assembly legislative district must be established in accordance with the U.S. and Maryland Constitutions and must be reasonably equal in population, but may not

deviate more than 2% between districts. Senators must be elected from a single-member district. Delegates may be elected at-large from one district or the district may be subdivided into three single-member districts or one single-member and one two-member district. However, each subdistrict must have a proportional population. The place of residence of an incumbent officeholder or the candidate for a political party or any other person may not be considered in the creation of a map. Districts may not be drawn to favor or discriminate against any incumbent, candidate, or political party.

Commission Membership and Qualifications

The selection process for the redistricting commission, specified in further detail below, is designed to produce a commission that is independent from legislative influence and reasonably representative of the State's diversity. The redistricting commission must consist of the following nine members:

- three members registered with the largest political party in the State based on registration;
- three members registered with the second largest political party in the State based on registration; and
- three members who are not registered with either of the two largest political parties.

Each redistricting commission member must be a voter who, for the five years immediately preceding the date of the individual's appointment, has been registered continuously in the State with the same political party or unaffiliated with a political party and who has not changed party affiliation during the five-year period. A commission member may not have been (1) a candidate for election to or served as a member of the General Assembly or of the U.S. Congress from Maryland or (2) an immediate family member (by blood or legally) of a candidate or member, within the five years immediately preceding the date of the individual's appointment. A member also may not be a regulated lobbyist in this State or currently serving, or previously served, as staff or consultant to a person under contract with or related to (by blood or legally) the Governor, a member of the General Assembly, or a member of Congress from Maryland.

The term of office of each redistricting commission member expires on the appointment of the first member of the succeeding commission. Seven members of the commission is a quorum, and six or more affirmative votes are required for any official action, including the adoption of final proposed maps.

Each redistricting commission member must apply the provisions of applicable law in a manner that is impartial and that reinforces public confidence in the integrity of the redistricting process. For five years, beginning from the date of appointment, each member is ineligible to (1) hold appointive public office at the federal, State, or local level in the

State; (2) serve as paid staff for the General Assembly or any individual legislator; or (3) register as a federal, State, county, or municipal lobbyist in the State.

Legislative Approval Process

The final certified map and plan introduced by the Presiding Officers may not be amended. A member of the General Assembly may not introduce an alternative map or plan that is different from the certified map and plan.

Three-fifths of the members in each house of the General Assembly must vote to adopt a map and plan. On passage by the General Assembly, the bill must be presented to the Governor for signature or veto. If the Governor vetoes the bill and the General Assembly overrides the veto, the bill becomes law in accordance with the Maryland Constitution. If a map and plan fails to receive the requisite three-fifths vote from each house of the General Assembly, or if the General Assembly fails to override a gubernatorial veto, the Presiding Officers must return the bill together with any recommendations to the commission and request that the commission propose an alternative map and plan.

If the General Assembly fails to pass by a three-fifths vote of each house the bill for an alternative map and plan submitted by the commission, or if the bill is vetoed by the Governor and not overridden by the General Assembly, the Court of Appeals establishes the districts. Any registered voter of the State may become a party to the proceeding on approval by the Court of Appeals.

Legal Challenges

The redistricting commission has the sole legal standing to defend any action regarding a certified final map and must inform the General Assembly if the commission determines that funds or other resources provided for the operation of the commission are not adequate. The General Assembly must provide adequate funding to defend any action regarding a certified map, and the commission has sole authority to determine whether the Attorney General or other legal counsel retained by the commission must assist in the defense of a certified final map.

The Court of Appeals has original and exclusive jurisdiction in all proceedings in which a certified final map is challenged. Upon enactment of any bill establishing General Assembly districts, any registered voter may file a petition for a writ of mandamus or writ of prohibition to bar the map from taking effect on the grounds that the plan violates the State or U.S. Constitution, or any federal or State statute. The court must give priority to ruling on a petition filed subsequent to enactment of a legislative plan by the General Assembly. If the court determines that a final certified map is in violation of these requirements, the court must establish the relief that it deems appropriate.

Amending the Statute

The bill also specifies criteria that must be met in order for the General Assembly to amend the provisions set forth in the bill, which involves a super majority in both houses of the General Assembly.

Duties of Legislative Auditor/Selection of Commission Members

In each year ending in the number zero, the Legislative Auditor must initiate an application process, which must be open to all registered voters in the State in a manner that promotes a diverse and qualified applicant pool. Individuals with specified conflicts of interest must be removed from the applicant pool.

The Legislative Auditor must establish an applicant review panel, consisting of three “qualified independent auditors” to screen applicants. A “qualified independent auditor” means an auditor who is currently licensed by the State and has been a practicing independent auditor for at least 10 years preceding appointment to the applicant review panel. The names of three qualified independent auditors must be randomly drawn from a pool consisting of all auditors employed and licensed by the State at the time of the drawing. The Legislative Auditor must draw until the names of three auditors have been drawn, including one who is registered with the largest political party in the State based on party registration, one who is registered with the second largest political party, and one who is not registered with either.

After the drawing, the Legislative Auditor must notify the three qualified independent auditors whose names have been drawn that they have been selected. If any of the auditors decline to serve on the panel, the random drawings must resume until three qualified independent auditors who meet the requirements specified have agreed to serve on the panel. A member of the panel is subject to the conflict of interest provisions set forth in the bill.

After removing individuals with conflicts of interest from the applicant pool, the Legislative Auditor must publicize, no later than August 1 in each year ending in the number zero, the names in the applicant pool and provide copies of their applications to the applicant review panel. From the applicant pool, the panel must select 30 of the most qualified applicants, including 10 who are registered with the largest political party in the State, 10 who are registered with the second largest political party in the State, and 10 who are not registered with either of the two largest political parties. The subpools must be created on the basis of relevant analytical skills, ability to be impartial, and appreciation for the State’s diverse demographics and geography. The members of the panel may not communicate with any member of the General Assembly or their representatives, about any matter related to the nomination process or applicants before the presentation by the

panel of the pool of recommended applicants to the Secretary of the Senate and the Chief Clerk of the House.

By November 20 in each year ending in the number zero, the Legislative Auditor must randomly draw names from the remaining pool of applicants, as specified. These individuals must serve on the redistricting commission.

Removal and Vacancies

In the event of substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office, a member of the commission may be removed by the Governor with the concurrence of two-thirds of the members of the Senate after having been served written notice and provided with an opportunity for a response. A finding of substantial neglect of duty or gross misconduct in office may result in referral to the Attorney General for criminal prosecution or the appropriate administrative agency for investigation.

A vacancy in a commission position, whether created by removal, resignation, or absence, must be filled within 30 days after the vacancy occurs, from the pool of applicants of the same voter registration category as the vacating nominee that was remaining as of November 20 in the year in which that pool was established. If none of the remaining applicants are available for service, the Legislative Auditor must fill the vacancy from a new pool created for the same voter registration category in accordance with the procedures specified above.

Activities and Staffing of Commission

The activities of the redistricting commission are subject to applicable State law governing open meetings and access to public information. The commission must provide at least 14 days' public notice for each meeting, except that meetings held in September in the year ending in the number one may be held with three days' notice.

Redistricting commission members and staff may not communicate with or receive communications about redistricting matters from anyone outside of a public hearing. However, communication between commission members, staff, legal counsel, and consultants retained by the commission is allowed.

The redistricting commission must select one of its unaffiliated members to serve as the chair. The commission may hire staff, legal counsel, and consultants as needed, and must establish clear criteria for the hiring and removal of these individuals, communication protocols, and a code of conduct. At least one of the legal counsels hired by the

commission must have demonstrated and extensive experience and expertise in the implementation and enforcement of the federal Voting Rights Act of 1965.

The redistricting commission must make hiring, removal, or contracting decisions on staff, legal counsel, and consultants by six or more affirmative votes. Notwithstanding any other provision of law, an employer may not discharge, threaten to discharge, intimidate, coerce, or retaliate against any employee by reason of such employee's attendance or scheduled attendance at any meeting of the commission.

A member of the redistricting commission may not receive compensation but is entitled to reimbursement of expenses under the standard State travel regulations, as provided in the State budget. With fiscal oversight from the Department of Budget and Management, the commission has procurement and contracting authority and may hire staff and consultants, including legal representation.

Hearing Process and Public Involvement

The redistricting commission must establish and implement an open hearing process for public input and deliberation that is subject to public notice and designed to encourage citizen outreach and solicit broad public participation in the redistricting public review process.

The hearing process must include hearings to receive public input before the commission draws any maps and hearings following the drawing and display of any commission maps. Hearings must be supplemented with other activities as appropriate to further increase opportunities for the public to observe and participate. The redistricting commission must display the maps for public comment in a manner designed to achieve the widest public access reasonably possible. Public comment must be taken for at least 14 days from the date of public display of any map.

The General Assembly must take all steps necessary to ensure that a complete and accurate computerized database is available for redistricting, and that procedures are in place to provide the public ready access to redistricting data and computer software for drawing maps.

Mandated Funding

In each year ending in the number nine, the Governor must include, and the General Assembly must make the necessary appropriation in the State budget, funding for the Legislative Auditor, the redistricting commission, the Secretary of State, and DLS that is sufficient to meet the estimated expenses of each of the officers or entities involved in implementing the redistricting process for a three-year period. The appropriation

must include adequate funding for a statewide outreach program to solicit broad public participation in the redistricting process. The Governor must also make adequate office space available for the operation of the commission. The appropriation must be equal to the greater of \$3.0 million or the amount expended in the immediately preceding redistricting process, with each amount adjusted by the cumulative change in the Maryland Consumer Price Index, or its successor, since the date of the immediately preceding appropriation.

Commission to Study Congressional Districting

The study commission is required to (1) study the State's legislative and congressional redistricting processes and (2) make recommendations regarding:

- criteria that should be used to draw congressional districts and how each criterion should be weighed;
- the entity that should draw the congressional district maps;
- ways to make the congressional districting process nonpartisan;
- ways to partner with other states to make congressional districting nonpartisan throughout the country; and
- specific states with congressional districts that are drawn to favor the opposite majority party than the Maryland congressional districts are currently drawn to favor and with whom the State may partner with for the goal of drawing congressional districts on a nonpartisan basis.

By December 31, 2017, the study commission must report its findings and recommendations to the Governor, the President of the Senate, the Speaker of the House of Delegates, and the chairs of specified legislative committees.

Current Law/Background:

State and Federal Redistricting Provisions

State Legislative Districts: State legislative district boundaries are required under the Maryland Constitution and federal case law to be redrawn every 10 years after the decennial Census to adjust for population changes. The Maryland Constitution provides for 47 legislative districts. Article III, Section 4 requires that State legislative districts consist of adjoining territory, be compact in form and of substantially equal population, and that natural boundaries and the boundaries of political subdivisions be given due regard. Legislative districts can be subdivided for the purpose of electing one or two delegates from a subdistrict. Creation of legislative boundaries falls under the

requirements of the U.S. Constitution's Fourteenth Amendment, which requires districts to be equally populated.

Public Hearings: Article III, Section 5 of the Maryland Constitution requires public hearings to be held before the Governor prepares a legislative redistricting plan. In 2011, the Governor appointed a Redistricting Advisory Committee to conduct public hearings around the State as required by the State Constitution. Consistent with prior practice in previous redistricting phases, the public hearings addressed both legislative and congressional redistricting. The Governor must present a legislative districting plan to the General Assembly by the first day of session in the second year following the decennial Census and after the public hearings. If the General Assembly does not pass an alternative plan before the forty-fifth day of session, the Governor's plan becomes law. The current legislative districting plan was enacted as Joint Resolution 2 of the General Assembly in 2012.

Prisoner Allocation: Chapters 66 and 67 of 2010 require that population counts used to create legislative, congressional, county, and municipal districts in Maryland exclude incarcerated individuals who were not State residents prior to their incarceration in either State or federal correctional facilities that are located in the State. If incarcerated individuals were State residents prior to their incarceration, Chapters 66 and 67 require that they be counted as residents of their last known address before their incarceration in a State or federal facility.

Congressional Districts: Under federal case law, congressional district boundaries must be redrawn every 10 years after the decennial Census to adjust for population changes; they must also conform to the requirements of the Voting Rights Act of 1965 and related case law. Congress has left to the states the task of redrawing congressional boundaries. The Governor has traditionally introduced a congressional map along with the State legislative district plan that is required by the State Constitution. The General Assembly may pass its own congressional plan in lieu of the Governor's, but unlike with the legislative plan, there is no deadline set in statute for this to happen. In order to finalize congressional districts for the 2012 primary election cycle, a special session took place in the fall of 2011. The current districts were established under Chapter 1 of the 2011 special session.

Redistricting Authority in Other States

Redistricting Commissions: According to the National Conference of State Legislatures (NCSL), there are 13 states that give first and final authority for legislative redistricting to a group other than the legislature. NCSL indicates the commissions vary greatly from state to state in terms of their composition but most include appointments made by legislative leaders. Only 6 states (Arizona, California, Hawaii, Idaho, New Jersey, and Washington) give first and final authority for congressional redistricting to a commission.

In 2000, Arizona voters passed an amendment to the state constitution that transferred the redistricting power from the state legislature, which had previously controlled it, to an independent commission. The Arizona legislature sued on the basis that the U.S. Constitution's Elections Clause prevented voters from removing authority from the legislature to redistrict congressional districts. In July 2015, the U.S. Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 997 F. Supp. 2d 1047; 135 S. Ct. 2652 (2015), upheld the validity of independent redistricting commissions. The congressional and legislative maps drawn by the California Citizens Redistricting Commission have been challenged and upheld in both federal and state courts.

Maryland Redistricting Reform Commission

In August 2015, the Governor established the 11-member Maryland Redistricting Reform Commission. It is comprised of two members of the Maryland Senate appointed by the President of the Senate and the minority leader, two members of the House of Delegates appointed by the Speaker of the House and the minority leader, and seven members appointed by the Governor. The commission was charged with (1) conducting a comprehensive examination of the States' legislative and congressional redistricting process; (2) reviewing the redistricting process in other states with redistricting commissions; (3) conducting regional summits across the State to offer ideas and receive input on redistricting reform; (4) providing an electronic portal to receive citizen input; (5) developing recommendations for a constitutional amendment on congressional and legislative redistricting; and (6) promoting redistricting reform publicly statewide, to ensure fair elected representation in the State. In its November 2015 final report, the commission recommended that the State establish an independent commission similar to that of California to draw legislative and congressional districts.

State Expenditures: If the proposed constitutional amendment is approved by Maryland voters, general fund expenditures for multiple agencies increase by at least \$3.0 million in fiscal 2020 due to the mandated appropriation included in the bill to provide:

- staff for various agencies specified in the bill, plus the Judiciary;
- software used to develop redistricting plans;
- computer, printing, map plotting, and other equipment;
- materials and supplies;
- office space;
- public hearings;
- potential legal services and consultant/technical assistance;
- any costs associated with a redistricting map developed by special masters if the commission's plan is invalidated; and

- online redistricting data and computer software for drawing maps.

The bill specifies that the appropriation must be included in each year ending in the number nine, and that the appropriation must be available during the entire three-year period between 2019 and 2021 to provide funding for the Legislative Auditor, the newly established commission, the Secretary of State, and DLS to implement the redistricting process as established under the bill's provisions. Actual expenditures specific to each of the individual entities cannot be more specifically estimated beforehand for a number of reasons. Because the commission is not yet formed and there are no specific staffing standards, it is not possible to reliably predict the staff that is needed in order for the commission to carry out its responsibilities.

Department of Legislative Services/General Assembly: The bill requires the General Assembly to ensure ready access to an accurate database and software for drawing maps. It is not clear which of the agencies/entities involved are tasked with this requirement. In the event that DLS takes this responsibility, any server space needed could be handled with existing resources. Providing online access to redistricting software, however, requires uploading and maintaining the State's official redistricting data within a software program that allows online map drawing. The current redistricting software vendor used by DLS advises that costs for online redistricting software depends greatly on the specific features supported and the number of users anticipated. Generally, an online system contemplated by the bill could cost between \$35,000 and \$75,000, depending on the features enabled. It is assumed that these costs are included in, and not in addition to, the \$3 million mandated appropriation.

Office of Legislative Audits: The Office of Legislative Audits (OLA) advises that it is also unable to provide a reliable estimate of costs, as the work required under the bill is dissimilar to its current audit responsibilities. OLA does indicate that most of the work needed to implement the bill likely needs to be performed by independent contractors and/or contractual employees; because the work related to the bill is limited to three years (per the congressional redistricting cycle), it may not be practical to hire full-time positions.

OLA also indicates that it communicated with the California's State Auditor (CSA) in order to get information on CSA's experience in facilitating the redistricting process, as required by California law. CSA advises that it relied significantly on legal representation in developing the initial process and establishing regulations, and up to four attorneys were used for CSA's redistricting work. OLA advises that, under the bill, it must rely on the Office of the Attorney General for any legal advice and services, which may increase expenditures for that office, particularly during the first redistricting cycle when new procedures must be established.

According to OLA, CSA advises that its expenditures for the three-year period relating to redistricting work totaled approximately \$4.0 million (approximately \$2.0 million for salaries and benefits for CSA staff and \$2.0 million for contractual services). Costs related to public relations and outreach accounted for approximately \$1.7 million of the \$2.0 million for contractual services expenditures and is expected to be greater for the upcoming redistricting cycle. CSA estimates that it received approximately 30,000 applications for its commission positions. OLA notes that, because of its smaller population, Maryland will likely receive far fewer applications for commission positions; however, the infrastructure needed to support the newly established process is still anticipated to be extensive. DLS also notes that the costs for public outreach are likely substantially less than for California due to differences in population size.

State Board of Elections: State costs of printing absentee and provisional ballots may increase to the extent inclusion of the proposed constitutional amendment on the ballot at the next general election result in a need for a larger ballot card size or an additional ballot card for a given ballot (the content of ballots varies across the State, depending on the offices, candidates, and questions being voted on). Any increase in costs, however, is expected to be relatively minimal, and it is assumed that the potential for such increased costs will have been anticipated in the State Board of Elections' (SBE) budget, irrespective of this bill. Pursuant to Chapter 564 of 2001, SBE shares the costs of printing paper ballots with the local boards of elections.

Other State Agencies: The Maryland Department of Planning and the Judiciary advise that the bill can be implemented with existing budgeted resources. The Secretary of State did not respond to requests for a fiscal estimate for this bill. However, it has indicated in responses to similar bills that its responsibilities regarding the certified maps and plans could be handled with existing resources.

Local Expenditures: Local boards of elections' printing and mailing costs may increase to include information on the proposed constitutional amendment, with specimen ballots mailed to voters prior to the next general election, and to include the proposed amendment on absentee and provisional ballots. It is assumed, however, that the potential for such increased costs will have been anticipated in local boards of elections' budgets irrespective of this bill.

Additional Comments: The bill requires the commission to complete final maps by September 15 in each year ending in the number one. However, the State receives the required Census data in February or as late as March in that same year. As noted above, Chapters 66 and 67 of 2010 require that population counts used to create legislative and congressional districts in Maryland exclude certain incarcerated individuals. This process, which took nine months during the last round of redistricting beginning in 2011, includes (1) geocoding tens of thousands of prisoner address files in coordination with the

Department of Public Safety and Correctional Services; (2) updating Census data; and (3) incorporating the adjusted data into the software used to complete maps. DLS anticipates that this process will likely take at least six months in 2021. Thus, it may not be feasible for the commission to meet the bill's deadline for completing its work.

Additional Information

Prior Introductions: HB 458 of 2016, a similar bill, received a hearing in the House Rules and Executive Nominations Committee, but no further action was taken. Its cross file, SB 380, received a hearing in the Senate Education, Health, and Environmental Affairs Committee, but no further action was taken. HB 970 of 2014, a similar bill, received a hearing in the House Rules and Executive Nominations Committee, but no further action was taken. HB 1199 of 2013, a similar bill, was heard by the House Rules and Executive Nominations Committee, but no further action was taken. HB 14 of the 2012 second special session, another similar bill, was referred to the House Rules and Executive Nominations Committee, but no further action was taken.

Cross File: None.

Information Source(s): Comptroller's Office; Judiciary (Administrative Office of the Courts); Maryland Department of Planning; National Conference of State Legislatures; Caliper Corporation; Department of Legislative Services.

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