

# MAINE STATE LEGISLATURE

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State of Maine  
123rd Legislature  
First Regular Session

First Annual Report  
of the  
  
MAINE  
Regulatory Fairness Board

Submitted to  
Business, Research & Economic Development Committee  
And to the  
State & Local Government Committee

March 2007

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## Executive Summary

The Board reviewed two specific issues that were brought to it during 2006 and identified several process issues concerning how regulations are made and maintained and the fairness of the process for addressing issues of rules violations.

Three priority recommendations have been identified by the Board and are recommended for immediate action. Additional recommendations and a review of several process issues under consideration are also included in this report.

The need for better communication is at the core of many of the issues the Board has heard. The Board will continue to review this concern in the coming year, and encourages all state agencies, offices and boards consider ways to improve their communications with the public in all matters, whether in rulemaking or in implementing state programs. As a starting point, telecommunications and widespread use of e-mail and websites make it possible today to ensure those who may potentially be affected by a project or a rule receives early notification, and should be used to the maximum.

In the coming year the Board plans to solicit public input on other issues of concern and to continue to review the regulatory process with an eye to making it more equitable.

### Immediate Priorities:

1. **Establish a Board of Associated Dental Professions.**

Discord between the various dental professions has gone on for several years. It is clear the current system of regulation by a single board has not worked well and has not been able to successfully resolve these ongoing problems.

Therefore the formation of a separate board to regulate denturists and hygienists should be considered a highest and urgent priority of the Legislature.

2. **Create an Independent Office of Administrative Law Judges in order to separate Legal Functions and Provide a Separate Process for Disciplinary Action and Appeals.**

Because of the serious impact of licensing and regulatory enforcement actions on licensed professionals and companies, the Board believes it is fundamentally unfair and a denial of due process for licensing boards to act as investigator, prosecutor, judge and jury.

Accordingly, we recommend that the Legislature create an Independent Office of Administrative Law Judges who are independent from the licensing boards and who will hear and decide all agency enforcement actions. These administrative law judges should be legally trained (preferably lawyers or retired judges) and not selected, approved, paid or controlled by the licensing agencies. In addition, we recommend that in any

enforcement hearing the court or administrative law judge apply the Maine Rules of Evidence and provide for pre-hearing discovery pursuant to the Maine Rules of Civil Procedure.

3. **Require Statements of Economic Impact for all new Rules and Substantive Revisions to Rules.**

We recommend the Legislature adopt legislation to require economic impact measurement on all rules and rule changes impacting small businesses in Maine, with special attention to the impact on micro-enterprises<sup>1</sup>.

Specifically, the assessment of economic impact should include, at a minimum, compiling basic information on the number and types of businesses that will be affected, the cost to the business of complying, including the cost of making the changes necessary and the cost of paperwork required to monitor or report on compliance with the new procedures.

**2007 Work Plan, Top Priorities:**

The Board has become engaged in a general review of rules and the rulemaking process. We believe that by examining broader issues of structure and process, the board will identify ways to improve the overall regulatory environment in the State. The following issues have been selected for priority attention in the coming year:

1. Examine ways to ensure public input is being aggressively sought on all new rules and rule revisions and that input is sought at the earliest phase of rulemaking.
2. Consider further the impact on micro-enterprises.
3. Review the structure and function of affiliated boards.
4. Examine the nature and adequacy of the funding mechanism(s). The Board plans to review how various regulatory boards are funded and how it influences their operations as well as the adequacy of financial resources for maintaining the rules and regulatory processes of the State.
5. Continue the discussion of the communications issues raised at DOT in an effort to make the state's communications more open and transparent to private individuals and businesses.

In addition, the Board will continue to hold public hearings and solicit information and comment on specific regulatory problems faced by small businesses.

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<sup>1</sup> Micro-enterprises are very small businesses having 0 employees (i.e., self employed individuals or family-run businesses with no employees) to 5 employees.

## **I. Introduction**

The Maine Regulatory Fairness Board was created in 2005 by the 122<sup>nd</sup> Legislature. The Board was formed in February, 2006 and began to carry out its mission pursuant to Public Law Chapter 458 and Maine Statutes in Title 5, Section 57.

The purpose of the Board is “to hear testimony and to report to the Legislature and the Governor at least annually on regulatory and statutory changes necessary to enhance the State's business climate.”

During 2006, the board held several meetings, first to organize and to engage in orientation and training, and then to work on the issues that had been brought before it in two public hearings and through written comments.

The creation of the Maine Regulatory Fairness Board offers a new avenue to small businesses experiencing difficulty complying with the state laws and regulations that pertain to their businesses. Board members recognized that getting the word out to businesses and business organizations about the purpose of this new board was their first task.

An outreach plan was developed. Members and staff attended events where small businesses were in attendance and established an extensive e-mail list of organizations and interested parties to whom information about the new board and its mission was sent. Notices of meetings, public hearings and other pertinent information are being disseminated through this network on an ongoing basis.

During the past year the Board heard two major issues concerning specific regulations and procedures of state government. The Board also became aware of broad issues and concerns with the overall process of regulation.

In the coming year the Board plans to continue to examine the regulatory process broadly, with emphasis on making the process more responsive and more equitable. The Board will also schedule a series of public hearings and invite written comments on other regulatory issues of concern to small businesses in Maine.

## **II. Summary of Findings and Recommendations**

This section presents an overview of each of the issues the Board has considered or has under consideration. It summarizes the information and arguments presented to the Board, the Board's findings and concerns, and the specific recommendations and disposition of each.

### **Part A. Cases Presented and Considered by the Board**

#### **1. Regulatory Environment of Denturists and Dental Hygienists**

##### **Overview:**

The Maine Society of Denturists and several individual denturists<sup>2</sup> submitted information to the Regulatory Fairness Board. Individual denturists stated that they believe they are unfairly treated by the Board of Dental Examiners (BDE) and have had great difficulty getting problems resolved. They also contend that there are clear distinctions between denturism and dentistry that are not reflected in the rules. All who presented information to the Board agreed that the current situation is not working well and recommended that regulatory oversight of denturists should be transferred to an independent board. In addition, denturists pointed out a number of deficiencies in training and regulations that make it very difficult to operate.

Dental hygienists stated that they believe they also should be regulated independently from the dentists. They argue that the dentists are their employers and they are placed at a disadvantage by being regulated by their bosses. They also report that they often observe unsafe and unlawful practices but dare not report them because they would place their jobs at risk.

The Board of Dental Examiners stated that they have worked hard to make sure denturists' concerns are heard and argue against establishing a separate process for denturists and/or hygienists because they are all part of the "dental family" and should be regulated as one.

The Board of Dental Examiners has stated that the same rules apply to all. They state that the same process for addressing complaints is applied to all dental professions under their jurisdiction. The Board does concede that there is currently no approved educational program for training denturists.

The Board of Dental Examiners also stated their purpose to be the protection of public health. However, if violations go unreported for fear of reprisal within the dental professions, the public welfare is not protected. Other information relating to access and affordability of dental services raises broader issues concerning how well consumers and the public interest are served.

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<sup>2</sup> See appendix for definition of individual dental professions

## **Key Findings:**

### **1. Appropriate, Fair and Balanced Regulatory Process for the Professions**

A. Regulatory Board: It is clear that the regulation of denturism and the practice of dental hygienists is a source of controversy. The number of denturists licensed to practice in Maine is small and justification of a separate board is difficult. However, there are approximately 1000 dental hygienists who also are interested in being regulated separately. The argument made by the BDE that all dental professions should remain under one board is not alone a sufficient argument for maintaining the status quo. There are other precedents for separate regulatory boards, such as the regulation of chiropractic doctors and nurses separately from medical doctors.

It was suggested that the regulation of denturists and hygienists could be transferred to the Board of Complimentary Health Professionals. The Board considered this and found that this board already has responsibility for a group of diverse professions. Adding dental professions to their regulatory duties would require the board to expand its scope significantly, require revisions in the regulatory process, require investment in additional staff and resources, and result in little if any savings when compared to creating a separate board.

B. Educational Programs: The Board also examined issues relating to access to training and professional development for denturists and finds that a lack of a certified and accredited program for the training of denturists in the US is an impediment to the development of the profession.

C. Appropriate Rules and Regulations: The BDE told the Board that the same rules apply to all under their jurisdiction. Denturists make a case that the professions are distinct and their functions different and the recordkeeping requirements and the information that must be documented by a denturist fitting a removable denture would not be the same as the records maintained by a dentist who performs extractions, implants, fillings, etc. on individual teeth, nor would it be the same for a hygienist who performs cleanings or applies sealants.

### **2. Consumer and Public Interests.**

A. Risk, Checks and Balances: The quality of care and service to the consumer is of utmost concern to the Board. It is apparent that the current structure lacks an adequate system of check and balances for the professions and for consumers. Neither is well served. When violations that endanger the patient are observed but not reported for fear of reprisal, the consumer is not protected.

The Board also found a lack of standards in terms of quality, life expectancy and cost of materials used in dentistry. The BDE does not review fees charged by dentists and has no quality control or materials standards for materials used. This is an area that needs further study and it is clearly an area where consumers need better information to make the right choices to meet their needs.



B. Consumer Need and Access: Given the out of control growth in health care costs, Maine should carefully consider all opportunities to cut costs and improve health care access. The qualifications for each of the dental professions are different and the skills required are different. Non-invasive procedures performed by denturists and dental hygienists carry little risk and as such require far less overhead and can be provided at a lower cost to the public when they can act on their own. Opportunities for advanced or expanded practice in these professions would greatly increase public access to needed care as well as to education and preventative care. The level of risk, especially when compared to the services provided by dentists, is outweighed when compared to the risk to the public of little or no care.

The statistics are clear. Lack of adequate dental care is a problem for many Maine citizens. Maine has a chronic shortage of dentists in many parts of the state. The cost of dental care and of dentures has left many people doing without. Poor dental health can lead to other serious health problems through its impact on overall nutrition and digestion. There is an opportunity to provide wider access to affordable dental health in Maine through realignment of the dental professions.

**Recommendations:**

1. Create a Board of Associated Dental Professions. Formation of a separate board to regulate denturists and hygienists should be considered a highest and urgent priority. Friction between the various dental professions has gone on for several years. It is clear the current system of regulation by a single board has not worked to resolve these ongoing problems.
2. The lack of state approved training for denturists should be immediately addressed. Training programs should be identified or developed, approved, and certified for those wishing to enter the field of denturism and for denturists to expand their training and to obtain continuing education credit.
3. The scope of practice for denturists and hygienists should be reviewed periodically in light of the level of training they receive.
4. Rules and regulations applied to the individual professions should be reviewed and those not necessary or pertinent to the field of denturism or to the practices of hygienists removed from the requirements of the professions.
5. Maine should examine the regulatory structure of dental health care professions broadly to identify areas where it may be an impediment to opportunities to improve quality and access and reduce cost. The Board recommends the Governor and legislature move quickly to make the Maine Oral Health Task Force operational.

## **2. Clarity of Processes for Public Input into State Projects that Impact Private Business**

### **Overview:**

Several small businesses in Kittery were having difficulty understanding how to make their concerns about the impact of a road widening project known and brought their concern to the Board. The issue at hand is the Maine Department of Transportation (MDOT)'s plans to widen Route 1 and eliminate on-street parking along a stretch of highway in front of a group of thriving small businesses. Businesses oppose the widening as planned primarily because the result would increase the speed of traffic through the area and would eliminate on-street parking in front of their businesses.

At the core of the issue, the presenters were frustrated with the process for input. They stated that the process was confusing and they found it difficult to know exactly how to make their concerns known or to be certain that they were being heard. The weight MDOT gives to the economic impact on small businesses was also unclear to them.

### **Key Findings:**

The questions raised to the board are more of a planning issue than a regulatory issue. At the same time they raise a priority issue for the state, i.e., that of Maine's reputation for being business unfriendly. For the State to become more business friendly, a helpful atmosphere has to pervade the state organization/bureaucracy. The creation of the RFB is a chance to change not just the regulatory environment, but the attitude of government toward business.

Agency programs, such as road improvements, reconstruction and widening often involve complex projects with multiple issues and concerns. Government agencies have responsibility for efficiency in program delivery and protection of the public safety, as well as environmental and social responsibility in accommodating the needs of public. When conflicting or competing issues develop, it is often difficult for the general public to make their needs known effectively or to be certain that their concerns are being equally considered and weighed fairly. Often the process seems unbending and, to the individual, seems to offer little opportunity for modifications and solutions that reflect their needs.

### **Recommendations:**

1. Agencies need to make sure that their processes are more transparent, their procedures for public input are clear and straightforward as possible, and that those impacted by their actions are made to feel that they have had input and if not accommodated, understand why not.

This issue continues to be of concern to the Board and will receive further review.

## **Part B: Issues of Process**

A number of broader process issues were raised by individuals that presented materials to the Board, and by Board members themselves as they reviewed the regulatory process as it played out in the issues that had come before it.

1. Is there sufficient involvement of those to be regulated at the early stages of rulemaking?
2. Is the process for measuring impact sufficient?
3. Is a regulatory process financed by those regulated in the best interest of the public, small businesses or consumers? And, is the mechanism for oversight of independent affiliated boards sufficient?
4. Is the current system under funded and under staffed?
5. Is the regulatory process fair to those who are charged with violating the rules?
6. Is there robust public input into the regulatory process?

### **1. Early Participation in Rule Development by Those that will be Regulated by the Rule.**

There is widespread public perception that Maine's regulatory environment is overly burdensome to small businesses. Rules become burdensome when they require complex solutions to simple problems or when rules are broadly written and applied although the specific need that led to rulemaking is actually very narrow, causing more businesses than necessary to be impacted and the burden of paperwork and compliance added to the cost of doing business.

While the present system of rulemaking may vary somewhat with agency or department, generally a proposed rule is drafted, made available for public comment (through opportunity for written comments and by public hearings), modified in some cases, and then adopted. The public comment period is the primary access point for public input and generally occurs only after the rule is already drafted.

Those affected by a rule should be engaged much earlier in the process, i.e., before the rule is drafted and during the drafting process. Such a change in process would result in better rules and will ensure rules address the concern that led to rulemaking while reducing or eliminating completely any effect on businesses not directly engaged in the activity to which the rule applies.

#### **Recommendation:**

1. The rulemaking process should be as transparent as possible and as open as possible to those affected with opportunity for input provided at the earliest point possible. Rule making agencies should consider adopting practices such as widespread and routine e-mail distribution of alerts to upcoming rule making processes, major state projects, such as road construction or reconstruction, sent to businesses that may potentially be impacted and to their trade associations.

## **2. Adequacy of the Process for Measuring Impact on Small Business.**

Some statutes require state agencies and departments to make an assessment of the impact (fiscal) of the proposed rule, and to specify who or which entities are impacted. Though this requirement primarily relates to public concerns over shifting cost burdens to towns, some rules require broader impact analysis (cost to anyone). In other cases assessment of the impact of rules is required if the rule will result in an impact in excess of \$1 million. However, there is nobody in state government that is evaluating the impact statements and there are no enforcement powers. Agencies file information along with the rule without review.

The Board believes that the cost of a new rule or rule revision to the affected business should be a central consideration and an assessment of that cost should be conducted before a rule is drafted.

Additionally, engaging members of the affected industry(ies) during the impact assessment phase will result in rules that are better tailored to meet their objectives without undue burden, and will further address the concerns raised above regarding earlier input from those regulated.

The nature of small businesses in Maine must be considered in how impacts are measured. The vast majority of Maine's small businesses are micro-enterprises (vs. small businesses as defined by federal programs such as the Small Business Administration).

### **Recommendations:**

1. The language in the current statutes relating to assessing the impact of proposed rules on the public should be strengthened and an impact analysis required. Such an analysis should include compiling basic information on the number and types of businesses that will be affected, the cost to the business of complying, including the cost of making the changes necessary and the amount of time and cost of paperwork required to monitor or report on compliance with the new procedures.
2. Since not all rules have the same level of impact, a first step in the process could be developed to identify which ones are of minor impact and which ones impact businesses or individuals widely or that create significant costs to the public. Rules with broad impact and which create significant costs to those regulated should be subject to more thorough impact analysis and the public input process allotted more time.
3. The impact on small businesses of different scale should also be addressed in the impact statement. Impact assessments should assess the cost and burden on small businesses<sup>3</sup> and the analysis should give special attention to the burden on micro businesses.

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<sup>3</sup> Small businesses are currently defined in 5 MSRA, Sec 1.5, subsec. 8052-5-A as firms with 20 or fewer employees. The Finance Authority of Maine (FAME) defines small businesses as firms with 50 or fewer employees.

### **3. Financing and Oversight in the Regulatory Process**

The rulemaking process is complex and multiple systems of funding and oversight of regulatory functions are in effect. Some regulatory processes are publicly financed while others, licensing boards in particular, are financed fully or in part by fees from the professions regulated.

There are six independent affiliated boards of which this Board is aware. Affiliated boards have no departmental oversight. These boards hire their own administrator(s) and the administrator's job is contingent on pleasing the board. It is a powerful board structure for its members.

These systems carry potential risks. When funds come from within or independent oversight is lacking or minimal at best, the potential for misuse or abuse of power is greater.

The Board is also concerned about the level at which the process of maintaining the rules is funded at the Office of the Secretary of State. This concern is discussed in greater depth under item 4 below.

#### **Recommendation:**

1. The Board makes no specific recommendation at this time. This issue needs further study and review. It is raised at this time to increase awareness of the potential for conflict of interest.
2. The Board does recommend that these concerns be explored and addressed in the pending merger of the Departments of Economic and Community Development and Professional & Financial Regulation into a new Department of Commerce.

### **4. Capacity of the Current System to Efficiently Maintain and Record Changes in Rules as they are Revised and Updated through the Regulatory Agenda Process.**

The board is concerned that there is a lack of staff and resources to maintain a record of all rule changes, ensure that the most recent and current rule is available to the public at all times, and to remove from the books all rules no longer needed due to sunsetted provisions or repealed laws.. The Secretary of State's Office has responsibility for maintaining records of rule changes. A single staff person is assigned to this job.

Several issues concerning Maine's rule making process have been observed.

1. Most rules are not sunsetted, and as such, are in effect until an agency or the legislature closes them down. Often a statute is repealed but the rule remains because it is costly to clean up and re-codify, so the process lags and often doesn't get done, especially for rules believed to be of minor impact.
2. Annual regulatory agendas. Each agency must submit a list of rules they plan to review in the upcoming year. The annual agendas submitted by many agencies often list rules that "may" be

reviewed or updated so that they can make changes if they find a need, but many on the list end up not undergoing review or change. Because of this practice it is difficult for members of the public who may be impacted by a rule to know which ones will actually receive attention. It is equally difficult for a single staff person to keep track of which rules are undergoing change.

**Recommendation:**

1. Maine needs to improve the system for ensuring rules no longer applicable are removed from the books so they do not create undue and inappropriate confusion and burden.

This issue remains under review by the Board.

**5. An Equitable Process and “Level Playing Field” for those being Regulated.**

The issue of whether a “level playing field” exists for those being regulated was raised on several occasions. Under the current system, the regulatory board that made the rule also prosecutes the accused. There is no separation of legal functions. This is of great concern to the board because professional careers are on the line when charges of wrongdoing are raised. It is essential that the process for addressing charges be fair and unbiased.

In circumstances such as noted above (issue #3 concerning funding and oversight of boards) in which some Boards have authority to hire their administrator there is a greater risk of bias since an administrator who observes a process, action, or behavior that is improper or unfair to a member of the profession would be rather hesitant to address the issue to their direct and only supervisory/hiring authority.

One attorney described the current process as a procedure heavily weighted against any individual charged and argued for a separation of functions. Another individual noted that persons charged with violations of the rules were at a disadvantage to prove any charges false. He said that decisions against them by regulatory boards are final without opportunity for appeal.

Under the current system, the same attorney who advises the board on its day to day business and confers privately with it and advises it on whether to proceed with a complaint then switches from the role of advisor to the board to become the prosecutor, and the board in effect becomes a jury. The person charged has little advance information on the details of the charge with which to prepare a defense<sup>4</sup>.

In fact, an individual receiving an adverse action may appeal, but in reality, the cost and risks are so great that virtually none appeal. The option to appeal to the district court for a new hearing is available but only after the license to practice has been revoked (vs. in earlier states of disciplinary action) and the licensee must assume the cost of so doing.

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<sup>4</sup> A description of the Administrative Complaint Procedures of the Office of Licensing and Regulation, Dept. of Professional and Financial Regulation may be found on the Department’s website at [http://www.maine.gov/pfr/professionallicensing/board\\_complaint.htm](http://www.maine.gov/pfr/professionallicensing/board_complaint.htm)

In light of the proposed merger of the Departments of Economic and Community Development and Professional and Financial Regulation, the lack of separation of legal functions takes on heightened importance. Separation offers an opportunity to reduce the potential conflict that arises when the same agency is responsible for promoting and assisting businesses and at the same time regulating them. This same change in process will improve relations between other departments who currently play dual roles and the businesses they regulate and will have widespread benefits through state government.

Several suggestions to improve the process emerged from the discussions:

1. Restore the separation of legal functions between the roles of the prosecutor and judge that was previously in place with the adoption of the Administrative Procedures Act in 1977<sup>5</sup>.
2. Engage the District Court system to review issues of rule violations as Maine law currently permits as is currently permitted by the provisions of the APA.
3. Develop an Office of Administrative Law Judges to serve as independent hearing officers to hear complaints of rule violations.
4. Explore other options.
5. Create an Ombudsman position in the Governor's Office to assist small businesses with regulatory issues

Because of the serious nature of licensing and regulatory enforcement actions on licensed professionals and companies, the Board believes it is fundamentally unfair and a denial of due process for licensing boards to act as investigator, prosecutor, judge and jury.

While it is possible for the Legislature require that all licensing enforcement actions by state agencies be brought and heard in the District Court as required by the original version of the Administrative Procedure Act as enacted in 1977, and the original provisions of the law placed this activity in the district courts, given the backlog of cases, the Board is hesitant to add to their already overwhelming workload.

### **Recommendations:**

1. The Board recommends as the preferred approach the creation of an Independent Office of Administrative Law Judges.

These judges will be independent from the licensing boards and will hear and decide all agency enforcement actions. The administrative law judges should be legally trained (preferably lawyers or retired judges) and not selected, approved, paid or controlled by the licensing agencies. In addition, in any enforcement hearing the court or administrative law judge apply the Maine Rules of Evidence and provide for pre-hearing discovery pursuant to the Maine Rules of Civil Procedure.

2. The option of appeal to the Maine District Court would remain available. The Maine Courts have requested funding for additional judges, two of which would permit establishment of a Small Business Court to focus on small business cases.

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<sup>5</sup> For a more complete review of the 1977 provisions in the APA, see the appendix.

3. Create and fund the Ombudsman position in the Governor's Office to assist small businesses with regulatory issues. Such an office will be beneficial to everyone. By assisting small businesses experiencing difficulties with Maine regulatory procedures and practices the number of incidents that proceed to disciplinary level could be greatly reduced, creating significant savings to the State and to small businesses.

#### **6. Openness of the Process for Public Input and Comment**

It has been brought to the attention of the board that often regulatory boards schedule work on regulatory agenda items as part of a broader meeting agenda, and often the regulatory agenda items are scheduled at the end of the meeting.

For instance, a regulatory board may hold a regular meeting at which a series of regular business items are on the agenda. Then late in the day, or as the last agenda item, regulatory review is scheduled. This process of pushing the regulatory discussion to the end of the meeting makes it very difficult for anyone wanting to present information concerning rule revisions to participate because they can't predict the time the topic will finally come up for discussion and cannot take a whole or half day away from their business to be heard and at best, risk that they will not have the opportunity to be heard.

The practice sends a message to those impacted by regulations that their input is not important or worse, not encouraged. The board believes that any time regulatory changes are under discussion the utmost effort should be made to inform the public and to make the process open to public input.

This process will be reviewed in depth by the Board in the coming year.



## **Appendices**

- A. List of Board Members and contact information
- B. Regulatory Fairness Board Statute 5 MRSA sec 57
- C. Discussion of 1977 Administrative Procedures Act Provisions regarding Regulatory Functions and the Separation of Legal Functions
- D. Outreach Efforts
- E. Components for Draft Legislation
- F. Definitions

## Appendix A

### MAINE REGULATORY FAIRNESS BOARD 2006 MEMBERS

#### Appointed by the Governor

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#### Appointed by the Senate President

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\*Note: At year end these three positions  
are vacant.

Appendix B

**PUBLIC LAWS**  
**First Special Session of the 122nd**

**CHAPTER 458**  
**S.P. 443 - L.D. 1263**

**An Act To Contain Costs, Reduce Paperwork and Streamline the Regulatory  
Process for Maine's Small Businesses**

**Be it enacted by the People of the State of Maine as follows:**

**Sec. 1. 5 MRSA §57** is enacted to read:

**§57. Maine Regulatory Fairness Board established**

The Maine Regulatory Fairness Board, referred to in this section as "the board," is established to hear testimony and to report to the Legislature and the Governor at least annually on regulatory and statutory changes necessary to enhance the State's business climate.

**1. Membership.** The board consists of 7 members who are owners, operators or officers of businesses operating in every region of the State, as follows:

A. One member appointed by the President of the Senate;

B. One member appointed by the Speaker of the House; and

C. Five members appointed by the Governor, at least 2 of whom must represent businesses with fewer than 50 employees and at least 2 of whom must represent businesses with fewer than 20 employees. Prior to making these appointments final, the Governor or the Governor's designee shall present the appointments to the joint standing committee of the Legislature having jurisdiction over business, research and economic development matters.

An officer or employee of State Government may not be a member of the board.

**2. Terms of appointment.** Each member appointed to the board must be appointed to serve a 3-year term. No member may serve more than 3 consecutive terms.

**3. Chair; election of board officers; quorum.** The members of the board shall annually elect a chair and a vice-chair from among the board members. A majority of members of the board constitutes a quorum for the purpose of conducting the board's business, except a lesser number may hold public hearings.

**4. Duties of board.** The board shall:

A. Meet at least 3 times a year in different regions of the State to hear testimony from businesses regarding their concerns about enforcement activities of state departments and agencies; and

B. Report to the Governor and the Legislature at least annually on complaints of excessive enforcement actions against businesses by departments and agencies of State Government. The report also must include recommendations for regulatory and statutory changes, if any, that will enhance the State's business climate.

**5. Annual report.** The board shall report by February 1st of each year to the Governor and to the joint standing committee of the Legislature having jurisdiction over business and economic development matters and the joint standing committee of the Legislature having jurisdiction over state and local government matters on its findings and recommendations.

**6. Technical assistance.** The State Planning Office shall provide technical support to the board.

**Sec. 2. 5 MRSA c. 383, sub-c. 4-A** is enacted to read:

**Sec. 3. Transition.** Members serving on the Maine Regulatory Fairness Board on the effective date of this Act continue to serve for the remainder of the terms for which they were appointed.

Effective September 17, 2005.

## Appendix C

### Discussion of 1977 Administrative Procedures Act Provisions regarding Regulatory Functions and the Separation of Legal Functions<sup>6</sup>

“The AG and the Bar Association drafters agreed that a state agency that was initiating an enforcement investigation and possible disciplinary action against a licensee ought not to investigate the allegations, hear from its investigators, decide whether to bring charges and then attempt to sit in judgment of the very persons they had decided to prosecute.

The initial version of the APA enacted in 1977 divested agencies of the power to discipline licensees (i.e. impose fines, suspensions, revocations or other disciplinary action) and placed that power exclusively in the Administrative Court. Under the 1977 version of the APA, an agency could investigate complaints and decide to file a complaint. However, that complaint would have to be heard by an independent impartial tribunal (i.e. the Administrative Court) that would not have played any role in the decision to file charges. The Legislature agreed with that reform and included it in the APA in 1977.”

Under current Maine law, 4 M.R.S.A. 152 (9), the Maine District Court has concurrent jurisdiction with all licensing agencies to hear complaints by an agency against a license asserting that the licensee violated the particular licensing statute or regulations. That means that a board can either initiate a complaint and then act as the fact finder, as outlined above, or the agency can file that complaint in the Maine District Court. In the latter case, the licensee has all the rights of discovery afforded by the Rules of Civil Procedure, gets ample time to prepare and, most importantly, has a right to have all the evidence heard by an independent judicial officer. The court also provides a court reporter. The problem is that no agency ever uses that procedural option, preferring instead to act as a fact finder itself and creating all the problems outlined above.

## Appendix D

### Interested Parties, Outreach Efforts of the Board

SBDC/BIDC – John Massua

DECD, Brian Dancause, small business advocacy

DECD field staff assigned to COG and RPC offices statewide

US Small Business Administration – Mary McAleney, Stephen Adams

Maine Chamber of Commerce & Industry – Dana Connors

(the C of C can forward information to all local chambers)

National Federation of Independent Businesses – David Clough

(the NFIB list reaches 30 or more business associations)

Maine Farm Bureau Association – John Olson

Agricultural Council of Maine (AGCom)

(AGCom distributes information to all agricultural producer associations)

Maine Building Trades Association – John Hanson

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<sup>6</sup> Testimony from John Patterson, Attorney, Bernstein Shur Law Firm.

## Appendix E

### Components for Draft Legislation

#### 1. Office Of Administrative Law Judges

Name: Independent Office of Administrative Law Judges

Function: Shall function independent from the licensing boards

Purpose: To hear and decide all agency enforcement actions

Qualifications: Administrative law judges shall be legally trained (preferably lawyers or retired judges) and not selected, approved, paid or controlled by the licensing agencies.

Procedures: In any enforcement hearing the court or administrative law judge shall apply the Maine Rules of Evidence and provide for pre-hearing discovery pursuant to the Maine Rules of Civil Procedure.

Appeal: Individuals or firms found in violation may appeal to the district court.

Other affected statutes and rules: Those segments of rules and statutes that provide processes for findings of fault, imposition of penalties, or taking other disciplinary action will be revised to reflect the role of the Independent Office of Administrative Law Judges to hear and decide the course of action. Regulatory bodies would receive complaints, review and investigate and refer the matter to the independent office.

## **2. Board of Associated Dental Professions**

Name: Board of Associated Dental Professions

Board Structure:

1. **Members:** Shall consist of 9 members  
3 denturists, 3 dental hygienists, 1 public member, 1 dentist and  
1 person engaged in training and education of hygienists or denturists
2. **Quorum:**  
Five members of the board shall constitute a quorum for the transaction of business provided that at least one of the five members is a dental hygienist as defined by 32 M.R.S.A. §1095; one member is a denturist as defined by 32 M.R.S.A. §1100-B and of the remaining members at least two are either a public member or an instructor.
3. **Officers:** Elect annually from among its members a chair and a secretary.
4. **Meetings:**

Rules governing denturists and dental hygienists:

1. Current rules presently administered by the Board of Dental Examiners concerning the duties and functions of denturists and dental hygienists shall apply until revised or amended. Administration of the rules will transfer from the Board of Dental Examiners to the Board of Associated Dental Professions.
2. Hygienists - Expanded Function Dental Assistant as set forth in Subchapter 3-A, 32 MRSA shall apply and be transferred from the Board of Dental Examiners to the Board of Associated Dental Professions.

Function:

Shall operate pursuant to the Administrative Procedures Act.

The agency shall consider all relevant information available to it, including, but not limited to economic, environmental, fiscal, and social impact analyses and statements and arguments filed before adopting any rules as provided for by the APA.

Authority & Duties:

1. Set standards of practice for denturists and dental hygienists
2. Ensure denturists and dental hygienists meet minimum standards of proficiency and competency to protect the public health, safety and welfare of the public
3. Adopt rules, revise rules, and amend rules
4. Conduct hearings
5. Hire employees

6. Maintain and make available to the public a register of individuals licensed by the Board
7. Establish fees for application, examination, license renewal
8. Issue licenses to qualified persons
9. Provide for approved course of training and continuing education programs
10. Provide for independent practice of dental hygienists who have met the requirements for independent practice
11. Submit annual report of operations

Subcommittees:

Two subcommittees, one to address concerns relating to denturism and one to address concerns relating to dental hygienists. (The subcommittees addressing issues associated with dental hygienists and denturists within the Board of Dental Examiners will be eliminated.)

Subcommittee membership: Each shall have at least 3 members.

In matters involving denturists the subcommittee will have a majority of denturist members assigned by the chair of the board to serve as subcommittee, and in matters involving dental hygienists, the subcommittee will have a majority of dental hygienists. The dentists would not serve on the disciplinary or scope of practice subcommittee.

Duties and Function of subcommittees:

Subcommittees should be charged with all matters having to do with discipline or scope of practice.

Disciplinary Functions:

In the interim (until enactment of the Independent Office of Administrative Law Judges) Repeal Section 1078 and 1079 (BDE) and adopt some of their mandates including the duties provision, so that the subcommittee performs a review of any complaints, reports to the full board its recommended disposition of matters, and provides that the board shall adopt the subcommittees recommended disposition unless no fewer than 2/3 of the board members who are voting were to reject that recommended disposition.

Public Register of licensees: Register to Include:

1. Name of licensee
2. Licensee's current professional office address
3. Address of licensee's employer
4. Date of issuance and licensee number
5. Whether in good standing with the Board
6. Any specialty or advanced certifications
- 7 Any restrictions or limitations on license
8. Any record of revocation or suspension



## **Appendix F.**

### **Definitions**

Denturist: (Title 32 MRSA- §1100-B. Definitions)

A person engaged in the practice of Denturism. Denturism means:

“The taking of denture impressions and bite registration for the purpose of or with a view to the making, producing, reproducing, construction, finishing, supplying, altering or repairing of a complete upper or complete lower prosthetic denture, or both, to be fitted to an edentulous arch or arches; [1993, c. 600, Pt. A, §88 (amd).]

B. The fitting of a complete upper or lower prosthetic denture, or both, to an edentulous arch or arches, including the making, producing, reproducing, constructing, finishing, supplying, altering and repairing of dentures; and [1993, c. 600, Pt. A, §88 (amd).]

C. The procedures incidental to the procedures specified in paragraphs A and B, as defined by the board. [1993, c. 600, Pt. A, §88 (amd).] [1995, c. 590, §4 (amd).]

Dental Hygienist: (Title 32 MRSA- §1095. Definition)

“The dental hygienist who practices under the supervision of a dentist of record may perform duties as defined and set forth in the rules of the Board of Dental Examiners, except that nothing in this subchapter may be construed to affect the practice of medicine or dentistry or to prevent students of a dental college, university or school of dental hygiene from practicing dental hygiene under the supervision of their instructors.

Printed under Appropriation 010-07b-2101-012