



SENATE BILL 512: Greater Accountability for Boards/Commissions.

2023-2024 General Assembly

Committee:		Date:	December 15, 2023
Introduced by:		Prepared by:	Jennifer McGinnis
Analysis of:	S.L. 2023-136		Staff Attorney

OVERVIEW: *S.L. 2023-136, as amended by Section 6.1 of S.L. 2023-139, amends appointments and makes associated changes to the following boards and commissions in North Carolina:*

- *Economic Investment Committee*
- *Environmental Management Commission*
- *Commission for Public Health*
- *Board of Transportation*
- *Coastal Resources Commission*
- *Wildlife Resources Commission*
- *North Carolina Railroad Board of Directors*
- *Board of Directors of The University of North Carolina Health Care System*
- *Utilities Commission*
- *Board of Governors of The University Of North Carolina*
- *Boards of Trustees for North Carolina State University and the University of North Carolina at Chapel Hill*

This bill was vetoed by the Governor on August 24, 2023, and the veto was overridden by the General Assembly on October 10, 2023. Except as otherwise provided, this act became effective October 10, 2023.

BILL ANALYSIS/PRIOR LAW:

PART I. ECONOMIC INVESTMENT COMMITTEE

Section 1.1. amends appointments and makes associated changes to the Economic Investment Committee as follows:

- Adds the Speaker of the House of Representatives and the President Pro Tempore of the Senate, or their designees, as members of the Economic Investment Committee.
- Removes language included under prior law that prohibited members appointed by the General Assembly from being members of the General Assembly.

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- Provides that:
 - Ex officio members of the Committee, or designees of those members, serve until they are no longer in office or are replaced with another designee.
 - The Committee can act only upon a decision of the majority of its members.

PART II. ENVIRONMENTAL MANAGEMENT COMMISSION

Section 2.1. amends appointments and makes associated changes to the 15-member Environmental Management Commission as follows:

- Decreases the Governor's appointments from nine to seven, and gives two appointments to the Commissioner of Agriculture. The General Assembly continues to appoint six members, three upon recommendation of the Speaker of the House of Representatives and three upon recommendation of the President Pro Tempore of the Senate.
- Provides that the chair must be elected by and from members of the Commission (rather than designated by the Governor as under prior law).

Section 6.1 of S.L. 2023-139 provides that:

- The membership changes are effective when that act became law (October 10, 2023).
- The Commission must elect a chair and vice-chair no later than 90 days after the date that both members to be appointed by the Commissioner of Agriculture are initially appointed by the Commissioner.

PART III. COMMISSION FOR PUBLIC HEALTH

Section 3.1. amends appointments and makes associated changes to the 13-member Commission for Public Health by reducing the Governors' appointments from nine members to five, and giving the General Assembly four appointments (two upon recommendation of the Speaker of the House and two upon recommendation of the President Pro Tempore of the Senate). The North Carolina Medical Society will continue to elect four members.

The section requires that the General Assembly appoint four at large members to the Commission to succeed the four members appointed by the Governor under prior law whose terms expired on April 30, 2023.

PART IV. BOARD OF TRANSPORTATION

Section 4.1.(a) amends appointments and makes associated changes to the 20-member Board of Transportation as follows:

- Decreases the number of appointments by the Governor from 14 members to 6.
- Increases the number of appointments by the General Assembly from 6 to 14, (7 upon recommendation of the Speaker of the House of Representatives and 7 upon recommendation of the President Pro Tempore of the Senate).
- Changes a requirement under prior law that one member be appointed from each of the 14 highway divisions, to instead require that 14 members be appointed from the 7 distribution regions (as defined under the statutes governing the Strategic Prioritization Funding Plan for Transportation Investments).

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- Changes the manner in which the Board's chair and vice chair are selected to provide that the chair and vice-chair are elected by the Board, rather than selected by the Governor (as under prior law).

The section became effective July 1, 2023.

PART V. COASTAL RESOURCES COMMISSION

Section 5.1. amends appointments and makes associated changes to the 13-member Coastal Resources Commission as follows:

- Decreases the number of appointments by the Governor from nine members to six.
- Increases the number of appointments by the General Assembly from four members to six.
- Gives the Commissioner of Insurance one appointment.
- Changes the manner in which the Commission's chair is selected to provide that the chair is elected by the Commission members rather than selected by the Governor (as under prior law).

PART VI. WILDLIFE RESOURCES COMMISSION

Section 6.1.(a) amends appointments and makes associated changes to the Wildlife Resources Commission as follows:

- Increases the number of members appointed by the General Assembly from 8 to 10, 5 upon recommendation of the Speaker of the House of Representatives and 5 upon recommendation of the President Pro Tempore of the Senate. This change became effective October 10, 2023.
- Decreases the number of at-large members appointed by the Governor from two to one, and gives the Commissioner of Agriculture one at-large appointment. These changes become effective June 30, 2025.

PART VII. NORTH CAROLINA RAILROAD BOARD OF DIRECTORS

Section 7.1. amends appointments and makes associated changes to the 13-person North Carolina Railroad Board of Directors as follows:

- Decreases the number of appointments by the Governor from seven to six.
- Gives the State Treasurer one appointment.

The General Assembly continues to appoint six members, three upon recommendation of the Speaker of the House of Representatives and three upon recommendation of the President Pro Tempore of the Senate.

The Treasurer's appointee replaces a Governor's appointee with a term expiring in 2023. The section becomes effective on the date that revisions to the Articles of Incorporation of a State-owned railroad to implement the changes in appointing authority made by this section are enacted by the Board of Directors of the State-owned railroad become effective. The railroad must report to the Revisor of Statutes the effective date of those changes.

PART VIII. BOARD OF DIRECTORS OF THE UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM

Section 8.1. amends appointments and makes associated changes to the Board of Directors of the University of North Carolina Health Care System as follows:

- Increases the total number of members from 24 to 25.
- Decreases the number of ex officio members from eight to five.

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- Provides that eight at-large members are appointed by the General Assembly.
- Eliminates four appointments by the Board of Directors.
- Requires the President of The University of North Carolina to appoint the remaining 12 at-large members with confirmation by the Board of Governors.

Principles under which the Board of Directors must operate are also established.

The section provides for changes to appointments in 2023, 2024, 2025, and 2026 to allow for staggering of terms of the members.

PART X. UTILITIES COMMISSION

Section 10.1 amends appointments and makes associated changes to the Utilities Commission as follows:

- Decreases the total number of commissioners from seven to five. In order to decrease the number of commissioners to five, upon expiration of two of the three terms expiring on June 30, 2025, no additional appointments for those two terms can be made.
- Decreases the number of appointments by the Governor from seven to three.
- Gives the General Assembly two appointments, one upon recommendation of the Speaker of the House of Representatives and one upon recommendation of the President Pro Tempore of the Senate.

PART XI. BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA

Section 11.1 amends the elections process and makes associated changes to the Board of Governors of The University of North Carolina by changing the method of selection by the House of Representatives from election by slate to election by resolution. Members of the Board of Governors elected by the Senate will continue to be elected by slate.

PART XII. BOARDS OF TRUSTEES OF NORTH CAROLINA STATE UNIVERSITY AND THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

Section 12.1 amends appointments and makes associated changes to the Boards of Trustees for North Carolina State University and the University of North Carolina at Chapel Hill, by creating individual appointment statutes for each body (both governed by G.S. 116-31 under prior law), which changes their appointments as follows:

- Increasing the total number of appointments to each Board from 13 to 15.
- Increasing the number of appointments made by the General Assembly from four to six.

PART XIII. MISCELLANEOUS

Section 13.1 provides a severability clause.

EFFECTIVE DATE: Except as otherwise provided, this act became effective October 10, 2023.

BACKGROUND: Legislation involving appointments to boards and commissions may implicate several provisions of the State's constitution, including:

- Article I, Section 6 of the State's Constitution, which provides:

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Sec. 6. Separation of powers.

The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

- Article II, Section 1, of the State's Constitution, which provides:

Section 1. Legislative power.

The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.

- Article III, Section 1 of the State's Constitution, which provides:

Section 1. Executive power.

The executive power of the State shall be vested in the Governor.

- Article III, Section 5, Clauses 4 and 8, of the State's Constitution (Executive), which provides:

Sec. 5. Duties of Governor.

(4) Execution of laws. The Governor shall take care that the laws be faithfully executed.

...

(8) Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.

Such legislation has been challenged on constitutional grounds in the past – two relevant decisions of the State's Supreme Court include:

- [State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 \(1982\)](#)

In this case, the Court considered a challenge to legislation that appointed four members of the General Assembly to serve on the Environmental Management Commission (EMC). The Court held that the statute allowing the General Assembly to appoint legislators to the EMC was a separation of powers violation under the State constitution, and stated:

"It is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws... [T]he legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality."

Given the holding of Wallace v. Bone, Section 1.1 of the act may pose constitutional concerns, inasmuch as that provision appoints members of the General Assembly to the Economic Investment Committee, if a court determines the Committee's duties are administrative or executive in nature.

- [McCrorry v. Berger, 368 N.C. 633, 781 S.E. 2d 248 \(2016\)](#)

In this case, the Court considered a challenge to legislation that gave the General Assembly a majority of the members of the Coal Ash Commission, Oil & Gas Commission, and Mining Commission relative to the Governor. The Court held that the challenged appointment provisions violated the separation of powers clause, and stated:

"When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the

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Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself."

Given the holding of McCrorry v. Berger, Section 4.1 of the act may pose constitutional concerns, inasmuch as under this provision, the Governor has fewer appointees than the General Assembly to the Board of Transportation.

Note, however, that McCrorry v. Berger did not consider how appointment of other officers of the Executive Branch, such as the Commissioners of Agriculture or Insurance, or by other bodies, such as the Medical Society, to a board or commission may impact a separation of powers analysis. Therefore, it is unclear if McCrorry v. Berger concerns would apply to other Sections of the bill.

*Kristen Harris, Brian Gwyn and Wendy Ray, Staff Attorneys for the Legislative Analysis Division, contributed substantially to this summary.