



SENATE BILL 512: Greater Accountability for Boards/Commissions.

2023-2024 General Assembly

Committee:	Senate Judiciary. If favorable, re-refer to Rules and Operations of the Senate	Date:	April 4, 2023
Introduced by:	Sens. Daniel, Rabon, Berger	Prepared by:	Kristen L. Harris
Analysis of:	First Edition		Committee Co-Counsel

OVERVIEW: *Senate Bill 512 would amend the compositions of and appointments to various boards and commissions in North Carolina.*

CURRENT LAW AND BILL ANALYSIS:

PART I. UTILITIES COMMISSION

Section 1.(a) would transfer the North Carolina Utilities Commission (the Commission) from the Department of Commerce to the Department of State Treasurer (the Department or the Treasurer.) The Commission would be administratively located within the Department but would exercise all its prescribed statutory powers independently.

Section 1.(b) would increase the number of commissioners on the Commission from seven to nine and change the appointments as follows beginning July 1, 2023:

- The Governor currently appoints seven commissioners and would appoint four commissioners subject to confirmation by the General Assembly.
- The General Assembly would appoint four commissioners, two upon recommendation of the Speaker of the House of Representatives and two upon recommendation of the President Pro Tempore of the Senate.
- The Treasurer would appoint one commissioner subject to the confirmation by the General Assembly.

The Governor would designate one commissioner to serve as chair of the Commission every three years, instead of every four. In the case of death, incapacity, resignation, or vacancy for any other reason in the office of any commissioner appointed by the Governor or the Treasurer prior to the expiration of the term, the appointing authority must submit the name of a successor to the General Assembly for confirmation within four weeks of the vacancy.

Section 1.(c) would give two new four-year appointments beginning on July 1, 2023, one upon the recommendation of the Speaker of the House and one upon the recommendation of the President Pro Tempore of the Senate.

Section 1.(d) for the three terms expiring on June 30, 2023, would give one appointment to the Governor and two to the General Assembly, one upon the recommendation of the Speaker of the House and one upon the recommendation of the President Pro Tempore of the Senate.

For the three terms expiring on June 30, 2025, would give two appointments to the Governor and one to the Treasurer.

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For the term expiring on June 30, 2027, would give one appointment to the Governor.

Section 1.(e) would make a conforming change.

PART II. ECONOMIC INVESTMENT COMMITTEE

Sections 2.1. would add 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 (the Committee) and remove the prohibition that members of the Committee appointed by General Assembly cannot be members of the General Assembly. Members of the Committee, serving as ex officio members or designees of members appointed by the General Assembly, would serve until they are no longer in office or are replaced with another designee. The Committee would act only upon a decision of a majority of its members.

PART III. ENVIRONMENTAL MANAGEMENT COMMISSION

Section 3.1. would change two of the Governor's nine appointments on the 15-member Environmental Management Commission (the Commission) to two appointments made by the Commissioner of Agriculture. Each appointing authority could reappoint a member of the Commission to an additional term if the member qualified for membership or remove a member. The General Assembly would continue 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.

A chair and vice-chair would be elected by and from members of the Commission rather than designated by the Governor.

PART IV. COMMISSION FOR PUBLIC HEALTH

Section 4.1. would change the 13-person membership of the Commission for Public Health as follows:

- The Governor currently appoints nine members and would appoint five.
- The General Assembly would appoint four members, two upon recommendation of the Speaker of the House of Representatives and two upon recommendation of the President Pro Tempore of the Senate.
- Four members would continue to be elected by the North Carolina Medical Society.

Any appointment to fill a vacancy created by resignation, dismissal, death, or disability would be filled by the appointing authority. Each appointing authority would be able to remove a member.

The General Assembly would make appointments for the four terms expiring on April 30, 2023.

PART V. BOARD OF TRANSPORTATION

Section 5.1.(a) would amend the appointments to the 20-member Board of Transportation (the Board) as follows:

- The Governor currently appoints 14 members and would appoint six.
- The General Assembly currently appoints six members and would appoint 14, seven upon recommendation of the Speaker of the House of Representatives and seven upon recommendation of the President Pro Tempore of the Senate.

The Board, rather than the Governor, would select a chair and vice-chair for two-year terms.

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Section 5.1.(b) would designate six division appointments and five at-large appointments expiring in 2024 to the General Assembly, six at-large appointments expiring in 2026 to the Governor, and two division appointments and one at-large appointment expiring in 2026 to the General Assembly.

PART VI. COASTAL RESOURCES COMMISSION

Section 6.1. would amend the appointments to the 13-member Coastal Resources Commission (the Commission) as follows:

- The Governor currently appoints nine members and would appoint six.
- The General Assembly currently appoints four members and would appoint six.
- The Commissioner of Insurance would appoint one member.

The chair and vice-chair of the Commission would be elected by the Commission members rather than selected by the Governor.

PART VII. WILDLIFE RESOURCES COMMISSION

Section 7.1.(a) would increase the number of members on the Wildlife Resources Commission (the Commission) by changing the number of appointments by the General Assembly from eight to 10 members, five upon recommendation of the Speaker of the House of Representatives and five upon recommendation of the President Pro Tempore of the Senate. The Governor would continue to appoint 11 members.

Sections 7.1.(b) and (c) would change the Governor's two at-large member appointments to one and give the Commissioner of Agriculture one at-large appointment. This section would become effective June 30, 2025.

PART VIII. NORTH CAROLINA RAILROAD BOARD OF DIRECTORS

Section 8.1. would amend the appointments to the 13-person membership of the North Carolina Railroad Board of Directors (the Board) as follows:

- The Governor currently appoints seven members and would appoint six.
- The State Treasurer would appoint one member.
- The General Assembly would continue 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 would replace a Governor's appointee with a term expiring in 2023, and the effective date of this section would be determined by actions taken by the Board and notice to the Revisor of Statutes.

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

Section 9.1. would make changes to the 24-member Board of Directors of the University of North Carolina Health Care System as follows:

- There would be four ex officio members instead of eight.
- Eight at-large members would be appointed annually by the General Assembly, one upon recommendation of the Speaker of the House of Representatives and one upon recommendation of the President Pro Tempore of the Senate.

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- The Board of Governors would continue to appoint 12 at-large members.
- The Board of Directors would no longer appoint four at-large members.

The section would also provide for appointments in 2023, 2024, 2025, and 2026 to allow for staggering of terms of the members.

PART X. MISCELLANEOUS

Section 10.1 would provide a severability clause.

EFFECTIVE DATE: Except as otherwise provided, this act would be effective July 1, 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:
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."

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Given the holding of Wallace v. Bone, Section 2 of the bill 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 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 5 of the bill may pose constitutional concerns, inasmuch as under this provision, the Governor would have 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's unclear if McCrorry v. Berger concerns would apply to other Sections of the bill.