

# VIRGINIA ACTS OF ASSEMBLY -- 2001 SESSION

## CHAPTER 523

*An Act to amend and reenact §§ 3.1-530.1, 3.1-530.2, 3.1-530.10, and 9-6.14:4.1 of the Code of Virginia and to amend the Code of Virginia by adding in Article 3.1 of Chapter 21 of Title 3.1 a section numbered 3.1-530.11, relating to regulation of milk and milk products; penalty.*

[S 1164]

Approved March 23, 2001

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 3.1-530.1, 3.1-530.2, 3.1-530.10, and 9-6.14:4.1 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 3.1 of Chapter 21 of Title 3.1 a section numbered 3.1-530.11 as follows:**

§ 3.1-530.1. Board authorized to establish standards, adopt regulations, etc.; advice and guidance of State Health Commissioner.

A. The State Board of Agriculture and Consumer Services is authorized to establish definitions, standards of quality and identity and to adopt and enforce regulations dealing with the issuance of permits, production, importation, processing, grading, labeling and sanitary standards for milk, milk products, market milk, market milk products and those products manufactured or sold in semblance to or as substitutes therefor. Regulations concerning the processing and distributing of Grade A market milk and Grade A market milk products shall be adopted with the advice and guidance of the State Health Commissioner or his authorized representative. Regulations concerning the conditions under which the permits referred to in § 3.1-530.4 shall be issued will be promulgated by the Board. The Board may require permits in addition to those prescribed by the terms of this article, and shall promulgate regulations concerning the conditions under which such additional permits shall be issued.

*B. In adopting any regulation pursuant to this section, the Board may adopt by reference:*

*1. Any regulation or part thereof under federal law that pertains to milk or milk products, amending the federal regulation as necessary for intrastate application.*

*2. Any model ordinance or regulation issued under federal law, including the Pasteurized Milk Ordinance (Public Health Service/Food and Drug Administration Publication Number 229) and the United States Department of Agriculture's Milk for Manufacturing Purposes and its Production and Processing Recommended Requirements (hereafter "the USDA Recommended Requirements"), amending it as necessary for intrastate application and to (i) require milk on each dairy farm to be cooled and stored at a temperature of forty degrees Fahrenheit or less, but not frozen; (ii) require the use of recording thermometers and interval timers on every milk storage tank installed on a permitted Grade A milk dairy farm; (iii) specify the design, fabrication, installation, inspection, and record keeping necessary for the proper use of such thermometers and timers; (iv) establish a definition for small-scale processors of cheese under the dairy plant processing requirements contained in the USDA Recommended Requirements; and (v) create exemptions for small-scale processors of cheese from the USDA Recommended Requirements regarding processing requirements for dairy plants, provided such exemptions do not compromise food safety.*

*3. Any reference, standard, or part thereof relating to milk, milk products or milk production published by the American Society of Agricultural Engineers, the American Public Health Association, the American Society of Mechanical Engineers, or the International Association of Food Protection.*

*4. Any method of analysis relating to milk or milk products including, but not limited to, any method of analysis published by the United States Public Health Service, the Association of Official Analytical Chemists, or the American Public Health Association.*

C. Any regulation adopted pursuant to this section shall, unless a later effective date is specified in the regulation, be effective upon filing with the Registrar of Regulations, who shall publish the regulation as a final regulation in the Virginia Register of Regulations. Neither the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.) nor public participation guidelines adopted pursuant thereto shall apply to the adoption of any regulation pursuant to this section. Prior to promulgating any regulation pursuant to this section, the Board shall publish a notice of opportunity to comment in the Virginia Register of Regulations. The notice of opportunity to comment shall contain (i) a summary of the proposed regulation; (ii) instructions on how to obtain the complete text of the proposed regulation; and (iii) the name, address, and telephone number of the agency contact person responsible for receiving public comments. The notice of opportunity to comment shall be made at least ninety days in advance of the last date prescribed in the notice for submittals of public comment. The legislative review provisions of § 9-6.14:9.2 shall apply to the promulgation or final adoption process of regulations under this section. The Board shall consider and keep on file all public comments received for any regulation adopted pursuant to this section.

*D. Notwithstanding the provisions of subsections B and C, any permits that may be issued or regulations that may be promulgated for the sale or manufacture of cheese from milk from any species not required to be permitted or regulated in intrastate commerce prior to July 1, 2001 under this article, shall be in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.) if such regulations or permits apply to persons who manufacture less than 1,000 pounds of such cheese annually.*

§ 3.1-530.2. Conformity with recommendations, etc., of United States Department of Health, Education and Welfare and Department of Agriculture; application of Administrative Process Act.

In adopting regulations for the purpose of sanitation and to prevent deception, the Board shall be guided by those regulations recommended from time to time by the United States Department of Health, Education and Welfare and the United States Department of Agriculture. The definitions and standards so promulgated may conform, so far as practical, to the definitions and standards promulgated or recommended by the Secretary of the United States Department of Health, Education and Welfare. The regulations authorized by ~~§ 3.1-530.1~~ and this section shall be adopted in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.).

§ 3.1-530.10. Civil penalties.

A. In addition to the penalties prescribed in § 3.1-530.9, any person violating any provision of this article or regulation adopted thereunder may be assessed a civil penalty by the Commissioner for each violation in an amount not to exceed \$1,000; ~~provided, however, that any civil penalty which the Commissioner assesses against a person as a consequence of a positive test for animal drug residues in milk shall not exceed \$100.~~ Any civil penalty may be in lieu of suspension of a permit issued pursuant to § 3.1-530.1. In determining the amount of any civil penalty, the Commissioner shall give due consideration to (i) the previous violations committed by the person; (ii) the seriousness of the violation; and (iii) the demonstrated good faith of the person charged in attempting to achieve compliance with this article or regulation adopted thereunder after notification of the violation. Any civil penalty shall be in addition to any payment which may be required for the wholesale value of all milk and milk products which must be destroyed as a consequence of such violation.

B. A civil penalty may be assessed by the Commissioner only after the Commissioner has given the person charged with a violation an opportunity for a public hearing. Where such a public hearing has been held, the Commissioner shall make findings of fact and issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted, incorporating, when appropriate, an order therein requiring that the penalty be paid. When appropriate, the Commissioner shall consolidate such hearings with other proceedings pursuant to the provisions of this chapter. Any hearing under this section shall be a formal adjudicatory hearing in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.). When the person charged with such a violation fails to avail himself of the opportunity for a public hearing, a civil penalty shall be assessed by the Commissioner after the Commissioner determines that a violation has occurred and the amount of the penalty warranted, and issues an order requiring that the penalty be paid.

C. Civil penalties assessed under this section shall be paid into the general fund of the state treasury. The Board shall prescribe procedures for payment of civil penalties. The procedures shall include provisions for a person to consent to abatement of the alleged violation and pay a penalty or negotiated sum in lieu of such penalty without admission of civil liability arising from such alleged violation.

D. Final orders may be recorded, enforced and satisfied as orders or decrees of a circuit court upon certification of such orders by the Commissioner. Such orders may be appealed in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.).

E. Nothing in this section shall require the Commissioner to institute proceedings for the imposition of civil penalties if the Commissioner considers the violations of this article to be minor. In such cases, the Commissioner may serve a suitable notice of warning in writing when he believes that the public interest will be served by so doing.

*F. The penalty provisions of this section shall not apply to violations of this article or any regulation adopted thereunder with respect to excessive drug residue. The penalty for any such violation shall be as provided in § 3.1-530.11.*

§ 3.1-530.11. Excessive drug residue; penalty.

A. For the purposes of this section:

*"Dairy farm" means any farm producing Grade A milk or milk for manufacturing purposes.*

*"Excessive drug residue" means drug residue that is (i) greater than the value specified as a safe level by the United States Food and Drug Administration; (ii) equal to or greater than the value specified as the minimum actionable level by the United States Food and Drug Administration; or (iii) greater than the value specified as the maximum tolerance level established by federal law. In the event that no safe level, actionable level, or tolerance level for drug residue has been established under federal law, any drug residue shall be deemed to exceed the safe level, minimum actionable level, or tolerance level of drug residue.*

*"Official drug test" means a test (i) performed by a laboratory that is certified by the Interstate Milk Shippers (IMS) and listed as certified in the IMS List Sanitation Compliance and Enforcement Ratings*

*of Interstate Milk Shippers published by the United States Food and Drug Administration; (ii) performed in a laboratory operated by the Commonwealth of Virginia; or (iii) performed using a method that has been reviewed and accepted by the United States Public Health Service, the Association of Official Analytical Chemists, or the American Public Health Association.*

*B. Where an official drug test detects the presence of excessive drug residue in milk produced at a dairy farm, the Commissioner may (i) assess a civil penalty not to exceed \$100 against the operator of the dairy farm or (ii) order the suspension of any permit issued to the operator pursuant to § 3.1-530.1. No civil penalty shall be assessed under this section unless the operator of the dairy farm has been given the opportunity for an informal fact-finding conference pursuant to § 9-6.14:11. If the matter is not resolved by the informal fact-finding conference or the operator of the dairy farm is dissatisfied with the Commissioner's decision from the informal fact-finding conference, the operator may request a second informal fact-finding conference. Any such request shall be submitted by the operator to the Commissioner within thirty days after the operator's receipt of the decision. The Commissioner in his discretion may grant or deny such request.*

*Nothing in this section shall be construed to require the Commissioner to hold a formal hearing pursuant to § 9-6.14:12 prior to the assessment of a civil penalty or the suspension of a permit pursuant to this section.*

*C. If the Commissioner assesses a civil penalty pursuant to this section and the operator of the dairy farm fails to pay the civil penalty in a timely manner, the Commissioner shall suspend any permit issued pursuant to § 3.1-530.1 to the operator.*

*D. Civil penalties assessed under this section shall be paid into the general fund of the state treasury. The Board shall prescribe procedures for payment of civil penalties. The procedures shall include provisions for a person to consent to abatement of the alleged violation and pay a penalty or negotiated sum in lieu of such penalty without admission of civil liability arising from such alleged violation.*

#### § 9-6.14:4.1. Exemptions and exclusions.

A. Although required to comply with § 9-6.18 of the Virginia Register Act (§ 9-6.15 et seq.), the following agencies are exempted from the provisions of this chapter, except to the extent that they are specifically made subject to §§ 9-6.14:14.1, 9-6.14:21 and 9-6.14:22:

1. The General Assembly.
2. Courts, any agency of the Supreme Court, and any agency which by the Constitution is expressly granted any of the powers of a court of record.
3. The Department of Game and Inland Fisheries in promulgating regulations regarding the management of wildlife and for all case decisions rendered pursuant to any provisions of Chapters 2 (§ 29.1-200 et seq.), 3 (§ 29.1-300 et seq.), 4 (§ 29.1-400 et seq.), 5 (§ 29.1-500 et seq.), and 7 (§ 29.1-700 et seq.) of Title 29.1.
4. The Virginia Housing Development Authority.
5. Municipal corporations, counties, and all local, regional or multijurisdictional authorities created under this Code, including those with federal authorities.
6. Educational institutions operated by the Commonwealth, provided that, with respect to § 9-6.14:22, such educational institutions shall be exempt from the publication requirements only with respect to regulations which pertain to (i) their academic affairs; (ii) the selection, tenure, promotion and disciplining of faculty and employees; (iii) the selection of students; and (iv) rules of conduct and disciplining of students.
7. The Milk Commission in promulgating regulations regarding (i) producers' licenses and bases, (ii) classification and allocation of milk, computation of sales and shrinkage, and (iii) class prices for producers' milk, time and method of payment, butterfat testing and differential.
8. The Virginia Resources Authority.
9. Agencies expressly exempted by any other provision of this Code.
10. The Virginia Voluntary Formulary Board in formulating recommendations regarding amendments to the Formulary pursuant to § 32.1-81.
11. [Repealed.]
12. The Department of General Services in promulgating standards for the inspection of buildings for asbestos pursuant to § 2.1-526.14.
- 13., 14. [Repealed.]
15. The State Council of Higher Education for Virginia, in developing, issuing, and revising guidelines pursuant to § 23-9.6:2.
16. The Commissioner of Agriculture and Consumer Services in adopting regulations pursuant to subsection B of § 3.1-726.
17. The Commissioner of Agriculture and Consumer Services and the Board of Agriculture and Consumer Services in promulgating regulations pursuant to subsections B and C of § 3.1-106.4, subsection B of § 3.1-126.12:1, §§ 3.1-271.1, 3.1-398, 3.1-530.1, subsections B and C of § 3.1-828.4, and subsection A of § 3.1-884.21:1.
18. The Board of Optometry when specifying therapeutic pharmaceutical agents, treatment guidelines,

and diseases and abnormal conditions of the human eye and its adnexa for TPA-certification of optometrists pursuant to Article 5 (§ 54.1-3222 et seq.) of Chapter 32 of Title 54.1.

19. The Board of Medicine, in consultation with the Board of Pharmacy, when promulgating amendments to the Physician Assistant Formulary established pursuant to § 54.1-2952.1.

20. The Virginia War Memorial Foundation.

21. The Virginia Medicaid Prior Authorization Advisory Committee in making recommendations to the Board of Medical Assistance Services regarding prior authorization for prescription drug coverage pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1.

22. The State Board of Education, in developing, issuing, and revising guidelines pursuant to § 22.1-280.3.

23. The Virginia Racing Commission, when acting by and through its duly appointed stewards or in matters related to any specific race meeting.

24. The Virginia Small Business Financing Authority.

25. The Virginia Economic Development Partnership Authority.

26. The Board of Agriculture and Consumer Services in adopting, amending or repealing regulations pursuant to subsection A (ii) of § 59.1-156.

27. The Insurance Continuing Education Board pursuant to § 38.2-1867.

28. The Board of Health in promulgating the list of diseases that shall be reported to the Department of Health pursuant to § 32.1-35.

29. The Virginia Racing Commission in promulgating technical rules regulating actual live horse racing at race meetings licensed by the Commission.

B. Agency action relating to the following subjects is exempted from the provisions of this chapter:

1. Money or damage claims against the Commonwealth or agencies thereof.

2. The award or denial of state contracts, as well as decisions regarding compliance therewith.

3. The location, design, specifications or construction of public buildings or other facilities.

4. Grants of state or federal funds or property.

5. The chartering of corporations.

6. Customary military, naval or police functions.

7. The selection, tenure, dismissal, direction or control of any officer or employee of an agency of the Commonwealth.

8. The conduct of elections or eligibility to vote.

9. Inmates of prisons or other such facilities or parolees therefrom.

10. The custody of persons in, or sought to be placed in, mental, penal or other state institutions as well as the treatment, supervision, or discharge of such persons.

11. Traffic signs, markers or control devices.

12. Instructions for application or renewal of a license, certificate, or registration required by law.

13. Content of, or rules for the conduct of, any examination required by law.

14. The administration of a pool or pools authorized by Article 7.1 (§ 2.1-234.9:1 et seq.) of Chapter 14 of Title 2.1.

15. Any rules for the conduct of specific lottery games, so long as such rules are not inconsistent with duly adopted regulations of the State Lottery Board, and provided that such regulations are published and posted.

16. Orders condemning or closing any shellfish, finfish, or crustacea growing area and the shellfish, finfish or crustacea located thereon pursuant to Article 2 (§ 28.2-803 et seq.) of Chapter 8 of Title 28.2.

17. Any operating procedures for review of child deaths developed by the State Child Fatality Review Team pursuant to § 32.1-283.1.

18. The regulations for the implementation of the Health Practitioners' Intervention Program and the activities of the Intervention Program Committee pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1.

19. The process of reviewing and ranking grant applications submitted to the Commonwealth Neurotrauma Initiative Advisory Board pursuant to Article 12 (§ 32.1-73.1 et seq.) of Chapter 2 of Title 32.1.

20. Loans from the Small Business Environmental Compliance Assistance Fund pursuant to Article 4 (§ 10.1-1197.1 et seq.) of Chapter 11.1 of Title 10.1.

21. The Virginia Breeders Fund created pursuant to § 59.1-372.

22. The types of pari-mutuel wagering pools available for live or simulcast horse racing.

23. The administration of medication or other substances foreign to the natural horse.

C. The following agency actions otherwise subject to this chapter and § 9-6.18 of the Virginia Register Act are excluded from the operation of Article 2 (§ 9-6.14:7.1 et seq.) of this chapter:

1. Agency orders or regulations fixing rates or prices.

2. Regulations which establish or prescribe agency organization, internal practice or procedures, including delegations of authority.

3. Regulations which consist only of changes in style or form or corrections of technical errors. Each promulgating agency shall review all references to sections of the Code of Virginia within their

regulations each time a new supplement or replacement volume to the Code of Virginia is published to ensure the accuracy of each section or section subdivision identification listed.

4. Regulations which:

(a) Are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved;

(b) Are required by order of any state or federal court of competent jurisdiction where no agency discretion is involved; or

(c) Are necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation, and the Registrar has so determined in writing; notice of the proposed adoption of these regulations and the Registrar's above determination shall be published in the Virginia Register not less than thirty days prior to the effective date thereof.

5. Regulations which an agency finds are necessitated by an emergency situation. For the purposes of this subdivision, "emergency situation" means (i) a situation involving an imminent threat to public health or safety or (ii) a situation in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation shall be effective in 280 days or less from enactment of the law or the appropriation act or the effective date of the federal regulation, and the regulation is not exempt under the provisions of subdivision C 4 of this section. In such cases, the agency shall state in writing the nature of the emergency and of the necessity for such action and may adopt such regulations. Pursuant to § 9-6.14:9, such regulations shall become effective upon approval by the Governor and filing with the Registrar of Regulations. Such regulations shall be limited to no more than twelve months in duration. During the twelve-month period, an agency may issue additional emergency regulations as needed addressing the subject matter of the initial emergency regulation, but any such additional emergency regulations shall not be effective beyond the twelve-month period from the effective date of the initial emergency regulation. If the agency wishes to continue regulating the subject matter governed by the emergency regulation beyond the twelve-month limitation, a regulation to replace the emergency regulation shall be promulgated in accordance with Article 2 (§ 9-6.14:7.1 et seq.) of this chapter. The Notice of Intended Regulatory Action to promulgate a replacement regulation shall be filed with the Registrar within sixty days of the effective date of the emergency regulation and published as soon as practicable, and the proposed replacement regulation shall be filed with the Registrar within 180 days after the effective date of the emergency regulation and published as soon as practicable.

6. [Repealed.]

7. Preliminary program permit fees of the Department of Environmental Quality assessed pursuant to subsection C of § 10.1-1322.2.

8. Regulations of the Pesticide Control Board adopted pursuant to subsection B of § 3.1-249.51 or clause (v) or (vi) of subsection C of § 3.1-249.53 after having been considered at two or more Board meetings and one public hearing.

9. Regulations of the regulatory boards served by (i) the Department of Labor and Industry pursuant to Title 40.1 and (ii) the Department of Professional and Occupational Regulation or the Department of Health Professions pursuant to Title 54.1 which are limited to reducing fees charged to regulants and applicants.

10. The development and issuance of procedural policy relating to risk-based mine inspections by the Department of Mines, Minerals and Energy authorized pursuant to §§ 45.1-161.82 and 45.1-161.292:55.

11. General permits issued by the State Air Pollution Control Board pursuant to Chapter 13 (§ 10.1-1300 et seq.) of Title 10.1 if the Board: (i) provides a Notice of Intended Regulatory Action in conformance with the provisions of subsection B of § 9-6.14:7.1, (ii) following the passage of thirty days from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit, (iii) provides notice and receives oral and written comment as provided in subsection F of § 9-6.14:7.1, and (iv) conducts at least one public hearing on the proposed general permit.

12. General permits issued by the State Water Control Board pursuant to the State Water Control Law (§ 62.1-44.2 et seq.), Chapter 24 (§ 62.1-242 et seq.) of Title 62.1 and Chapter 25 (§ 62.1-254 et seq.) of Title 62.1 if the Board: (i) provides a Notice of Intended Regulatory Action in conformance with the provisions of subsection B of § 9-6.14:7.1, (ii) following the passage of thirty days from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit, (iii) provides notice and receives oral and written comment as provided in subsection F of § 9-6.14:7.1, and (iv) conducts at least one public hearing on the proposed general permit.

13. The development and issuance by the Board of Education of guidelines on constitutional rights and restrictions relating to the recitation of the pledge of allegiance to the American flag in public schools pursuant to § 22.1-202.

14. Regulations of the Board of the Virginia College Savings Plan promulgated pursuant to § 23-38.77.

15. The development and issuance of general wetlands permits by the Marine Resources Commission pursuant to subsection B of § 28.2-1307 if the Commission: (i) provides a Notice of Intended Regulatory Action in conformance with the provisions of subsection B of § 9-6.14:7.1, (ii) following the passage of thirty days from publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit, (iii) provides notice and receives oral and written comment as provided in subsection F of § 9-6.14:7.1, and (iv) conducts at least one public hearing on the proposed general permit.

Whenever regulations are adopted under this subsection, the agency shall state as part thereof that it will receive, consider and respond to petitions by any interested person at any time with respect to reconsideration or revision. The effective date of regulations adopted under this subsection shall be in accordance with the provisions of § 9-6.14:9.3, except in the case of emergency regulations, which shall become effective as provided in subsection B of § 9-6.14:9.

D. The following agency actions otherwise subject to this chapter are excluded from the operation of Article 3 (§ 9-6.14:11 et seq.) of this chapter:

1. The assessment of taxes or penalties and other rulings in individual cases in connection with the administration of the tax laws.
2. The award or denial of claims for workers' compensation.
3. The grant or denial of public assistance.
4. Temporary injunctive or summary orders authorized by law.
5. The determination of claims for unemployment compensation or special unemployment.
6. The suspension of any license, certificate, registration or authority granted any person by the Department of Health Professions or the Department of Professional and Occupational Regulation for the dishonor, by a bank or financial institution named, of any check, money draft or similar instrument used in payment of a fee required by statute or regulation.

E. Appeals from decisions of the Governor's Employment and Training Department otherwise subject to this chapter are excluded from the operation of Article 4 (§ 9-6.14:15 et seq.) of this chapter.

F. The Marine Resources Commission, otherwise subject to this chapter and § 9-6.18 of the Virginia Register Act, is excluded from the operation of subdivision C 5 of this section and of Article 2 (§ 9-6.14:7.1 et seq.) of this chapter.

G. A regulation for which an exemption is claimed under this section and which is placed before a board or commission for consideration shall be provided at least two days in advance of the board or commission meeting to members of the public that request a copy of that regulation. A copy of that regulation shall be made available to the public attending such meeting.

H. The Joint Legislative Audit and Review Commission shall conduct a review periodically of exemptions and exclusions authorized by this section. The purpose of this review shall be to assess whether there are any exemptions or exclusions which should be discontinued or modified.

I. Minor changes to regulations being published in the Virginia Administrative Code under the Virginia Register Act, Chapter 1.2 (§ 9-6.15 et seq.) of this title, made by the Virginia Code Commission pursuant to § 9-77.10:1 shall be exempt from the provisions of this chapter.