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SENATE BILL NO. 1001

Offered January 8, 2003

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A BILL to amend and reenact §§ 2.2-4007 and 2.2-4012 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-4012.1, relating to the Administrative Process Act; fast-track rulemaking process.

Patrons—Mims; Delegates: Howell and Landes

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4007 and 2.2-4012 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 2.2-4012.1 as follows:

§ 2.2-4007. Notice of intended regulatory action; public participation; informational proceedings; effect of noncompliance.

A. Any person may petition an agency to request the agency to develop a new regulation or amend an existing regulation. The petition shall state (i) the substance and purpose of the rulemaking that is requested, including reference to any applicable Virginia Administrative Code sections, and (ii) reference to the legal authority of the agency to take the action requested. Within ~~fourteen~~14 days of receiving a petition, the agency shall send a notice identifying the petitioner, the nature of the petitioner's request and the agency's plan for disposition of the petition to the Registrar for publication in the Virginia Register of Regulations in accordance with the provisions of subsection B of § 2.2-4031. ~~On the date of publication in the Virginia Register of Regulations, the agency shall commence a twenty-one~~A 21-day period for acceptance of written public comment on the petition *shall be provided after publication in the Virginia Register*. The agency shall issue a written decision to grant or deny the petitioner's request within ~~ninety~~90 days following the close of the comment period. However, if the rulemaking authority is vested in an entity that has not met within that ~~ninety~~90-day period, the entity shall issue a written decision no later than ~~fourteen~~14 days after it next meets. The written decision issued by the agency shall include a statement of its reasons and shall be submitted to the Registrar for publication in the Virginia Register of Regulations. Agency decisions to initiate or not initiate rulemaking in response to petitions shall not be subject to judicial review.

B. In the case of all regulations, except those regulations exempted by §§ 2.2-4002, 2.2-4006 ~~or~~ §, 2.2-4011, *or* § 2.2-4012.1, an agency shall provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject matter and intent of the planned regulation. At least ~~thirty~~30 days shall be provided for public comment after publication of the Notice of Intended Regulatory Action. An agency shall not file proposed regulations with the Registrar until the public comment period on the Notice of Intended Regulatory Action has closed.

C. Agencies shall state in the Notice of Intended Regulatory Action whether they plan to hold a public hearing on the proposed regulation after it is published. Agencies shall hold such public hearings if required by basic law. If the agency states an intent to hold a public hearing on the proposed regulation in the Notice of Intended Regulatory Action, then it shall hold the public hearing. If the agency states in its Notice of Intended Regulatory Action that it does not plan to hold a hearing on the proposed regulation, then no public hearing is required unless, prior to completion of the comment period specified in the Notice of Intended Regulatory Action (i) the Governor directs the agency to hold a public hearing or (ii) the agency receives requests for a public hearing from at least ~~twenty-five~~25 persons.

D. Public participation guidelines for soliciting the input of interested parties in the formation and development of its regulations shall be developed, adopted and utilized by each agency pursuant to the provisions of this chapter. The guidelines shall set out any methods for the identification and notification of interested parties, and any specific means of seeking input from interested persons or groups that the agency intends to use in addition to the Notice of Intended Regulatory Action. The guidelines shall set out a general policy for the use of standing or ad hoc advisory panels and consultation with groups and individuals registering interest in working with the agency. Such policy shall address the circumstances in which the agency considers the panels or consultation appropriate and intends to make use of the panels or consultation.

E. In formulating any regulation, including but not limited to those in public assistance and social services programs, the agency pursuant to its public participation guidelines shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency

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59 or its specially designated subordinate. However, the agency may begin drafting the proposed regulation
60 prior to or during any opportunities it provides to the public to submit comments.

61 F. In the case of all regulations, except those regulations exempted by §§ 2.2-4002, 2.2-4006, or
62 § 2.2-4011, the proposed regulation and general notice of opportunity for oral or written submittals as to
63 that regulation shall be published in the Virginia Register of Regulations in accordance with the
64 provisions of subsection B of § 2.2-4031. In addition, the agency may, in its discretion, (i) publish the
65 notice in any newspaper and (ii) publicize the notice through press releases and such other media as will
66 best serve the purpose and subject involved. The Register and any newspaper publication shall be made
67 at least ~~sixty~~60 days in advance of the last date prescribed in the notice for such submittals. All notices,
68 written submittals, and transcripts, summaries or notations of oral presentations, as well as any agency
69 action thereon, shall be matters of public record in the custody of the agency.

70 G. If an agency wishes to change a proposed regulation before adopting it as a final regulation, it
71 may choose to publish a revised proposed regulation provided the latter is subject to a public comment
72 period of at least ~~thirty~~30 additional days and the agency complies in all other respects with this section.

73 H. Before delivering any proposed regulation under consideration to the Registrar as required in
74 subsection I, the agency shall deliver a copy of that regulation to the Department of Planning and
75 Budget. In addition to determining the public benefit, the Department of Planning and Budget in
76 coordination with the agency, shall, within ~~forty-five~~45 days, prepare an economic impact analysis of the
77 proposed regulation. The economic impact analysis shall include, but need not be limited to, the
78 projected number of businesses or other entities to whom the regulation would apply; the identity of any
79 localities and types of businesses or other entities particularly affected by the regulation; the projected
80 number of persons and employment positions to be affected; the impact of the regulation on the use and
81 value of private property; and the projected costs to affected businesses, localities or entities to
82 implement or comply with the regulations, including the estimated fiscal impact on such localities and
83 sources of potential funds to implement and comply with such regulation. Agencies shall provide the
84 Department with such estimated fiscal impacts on localities and sources of potential funds. The
85 Department may request the assistance of any other agency in preparing the analysis. The Department
86 shall deliver a copy of the analysis to the agency drafting the regulation, which shall comment thereon
87 as provided in subsection I, and a copy to the Registrar for publication with the proposed regulation. No
88 regulation shall be promulgated for consideration pursuant to subsection I until the impact analysis has
89 been received by the Registrar. For purposes of this section, the term "locality, business, or entity
90 particularly affected" means any locality, business, or entity that bears any identified disproportionate
91 material impact that would not be experienced by other localities, businesses, or entities. The analysis
92 shall represent the Department's best estimate for the purposes of public review and comment on the
93 proposed regulation. The accuracy of the estimate shall in no way affect the validity of the regulation,
94 nor shall any failure to comply with or otherwise follow the procedures set forth in this subsection
95 create any cause of action or provide standing for any person under Article 5 (§ 2.2-4025 et seq.) of this
96 chapter or otherwise to challenge the actions of the Department hereunder or the action of the agency in
97 adopting the proposed regulation.

98 I. Before promulgating any regulation under consideration, the agency shall deliver a copy of that
99 regulation to the Registrar together with a summary of the regulation and a separate and concise
100 statement of (i) the basis of the regulation, defined as the statutory authority for promulgating the
101 regulation, including an identification of the section number and a brief statement relating the content of
102 the statutory authority to the specific regulation proposed; (ii) the purpose of the regulation, defined as
103 the rationale or justification for the new provisions of the regulation, from the standpoint of the public's
104 health, safety or welfare; (iii) the substance of the regulation, defined as the identification and
105 explanation of the key provisions of the regulation that make changes to the current status of the law;
106 (iv) the issues of the regulation, defined as the primary advantages and disadvantages for the public, and
107 as applicable for the agency or the state, of implementing the new regulatory provisions; and (v) the
108 agency's response to the economic impact analysis submitted by the Department of Planning and Budget
109 pursuant to subsection H. Any economic impact estimate included in the agency's response shall
110 represent the agency's best estimate for the purposes of public review and comment, but the accuracy of
111 the estimate shall in no way affect the validity of the regulation. Staff as designated by the Code
112 Commission shall review proposed regulation submission packages to ensure the requirements of this
113 subsection are met prior to publication of the proposed regulation in the Register. The summary; the
114 statement of the basis, purpose, substance, and issues; the economic impact analysis; and the agency's
115 response shall be published in the Virginia Register of Regulations, together with the notice of
116 opportunity for oral or written submittals on the proposed regulation.

117 J. When an agency formulating regulations in public assistance and social services programs cannot
118 comply with the public comment requirements of subsection F due to time limitations imposed by state
119 or federal laws or regulations for the adoption of such regulation, the Secretary of Health and Human
120 Resources may shorten the time requirements of subsection F. If, in the Secretary's sole discretion, such

time limitations reasonably preclude any advance published notice, he may waive the requirements of subsection F. However, the agency shall, as soon as practicable after the adoption of the regulation in a manner consistent with the requirements of subsection F, publish notice of the promulgation of the regulation and afford an opportunity for public comment. The precise factual basis for the Secretary's determination shall be stated in the published notice.

K. If one or more changes with substantial impact are made to a proposed regulation from the time that it is published as a proposed regulation to the time it is published as a final regulation, any person may petition the agency within ~~thirty~~30 days from the publication of the final regulation to request an opportunity for oral and written submittals on the changes to the regulation. If the agency receives requests from at least ~~twenty-five~~25 persons for an opportunity to submit oral and written comments on the changes to the regulation, the agency shall (i) suspend the regulatory process for ~~thirty~~30 days to solicit additional public comment and (ii) file notice of the additional ~~thirty~~30-day public comment period with the Registrar of Regulations, unless the agency determines that the changes made are minor or inconsequential in their impact. The comment period, if any, shall begin on the date of publication of the notice in the Register. Agency denial of petitions for a comment period on changes to the regulation shall be subject to judicial review.

L. In no event shall the failure to comply with the requirements of subsection F be deemed mere harmless error for the purposes of § 2.2-4027.

M. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

§ 2.2-4012. Purpose; adoption; effective date; filing; duties of Registrar of Regulations.

A. The purpose of the regulatory procedures shall be to provide a regulatory plan that is predictable, based on measurable and anticipated outcomes, and is inclined toward conflict resolution.

B. Subject to the provisions of §§ 2.2-4013 and 2.2-4014, all regulations, including those that agencies, pursuant to §§ 2.2-4002, 2.2-4006, or § 2.2-4011, may elect to dispense with the public procedures provided by §§ 2.2-4007 and 2.2-4009, may be formally and finally adopted by the signed order of the agency so stating. No regulation except an emergency regulation *or a noncontroversial regulation promulgated pursuant to § 2.2-4012.1* shall be effective until the expiration of the applicable period as provided in § 2.2-4015. In the case of an emergency regulation filed in accordance with § 2.2-4006, the regulation shall become effective upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. The originals of all regulations shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies. They, or facsimiles thereof, shall be made available for public inspection or copying. Full and true copies shall also be additionally filed, registered, published, or otherwise made publicly available as required by other laws.

C. Prior to the publication for hearing of a proposed regulation, copies of the regulation and copies of the summary and statement as to the basis, purpose, substance, issues, and the economic impact estimate of the regulation submitted by the Department of Planning and Budget and the agency's response thereto as required by § 2.2-4007 shall be transmitted to the Registrar of Regulations, who shall retain these documents.

D. All regulations adopted pursuant to this chapter shall contain a citation to the section of the Code of Virginia that authorizes or requires the regulations and, where the regulations are required to conform to federal law or regulation in order to be valid, a citation to the specific federal law or regulation to which conformity is required.

E. Immediately upon the adoption by any agency of any regulation in final form, a copy of (i) the regulation, (ii) a then current summary and statement as to the basis, purpose, substance, issues, and the economic impact estimate of the regulation submitted by the Department of Planning and Budget, and (iii) the agency's summary description of the nature of the oral and written data, views, or arguments presented during the public proceedings and the agency's comments thereon shall be transmitted to the Registrar of Regulations, who shall retain these documents as permanent records and make them available for public inspection. A draft of the agency's summary description of public comment shall be sent by the agency to all public commenters on the proposed regulation at least five days before final adoption of the regulation.

§ 2.2-4012.1. *Fast-track rulemaking process.*

Notwithstanding any other provision, rules that are expected to be noncontroversial may be promulgated in accordance with the process set out in this section. With the concurrence of the Governor, the agency may submit a fast-track regulation without having previously published a Notice of Intended Regulatory Action. The fast-track regulation shall be subject to the requirements set out in subsections F, H, and I of § 2.2-4007, and shall be published in the Virginia Register of Regulations along with an agency statement setting out the reasons for using the fast-track rulemaking process. If an objection to the use of the fast-track process is received within the public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General

182 *Assembly or of the Joint Commission on Administrative Rules, the agency shall (i) file notice of the*
183 *objection with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed*
184 *with the normal promulgation process set out in this article with the initial publication of the fast-track*
185 *regulation serving as the Notice of Intended Regulatory Action. Otherwise, the regulation will become*
186 *effective 15 days after the close of the comment period, unless the regulation is withdrawn or a later*
187 *effective date is specified by the agency.*