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SENATE BILL NO. 1122

Offered January 12, 2005

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A BILL to amend and reenact §§ 2.2-4007 and 2.2-4027 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-4007.1, relating to the Administrative Process Act; regulatory flexibility for small businesses.

Patrons—Obenshain, Bolling and O'Brien

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4007 and 2.2-4027 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-4007.1 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 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. 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 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 90-day period, the entity shall issue a written decision no later than 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, 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 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 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 or its specially designated subordinate. However, the agency may begin drafting the proposed regulation prior to or during any opportunities it provides to the public to submit comments.

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SB1122

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

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

71 H. Before delivering any proposed regulation under consideration to the Registrar as required in
72 subsection I, the agency shall deliver a copy of that regulation to the Department of Planning and
73 Budget. In addition to determining the public benefit, the Department of Planning and Budget in
74 coordination with the agency, shall, within 45 days, prepare an economic impact analysis of the
75 proposed regulation, *as follows*:

76 1. The economic impact analysis shall include, but need not be limited to, the projected number of
77 businesses or other entities to whom the regulation would apply; the identity of any localities and types
78 of businesses or other entities particularly affected by the regulation; the projected number of persons
79 and employment positions to be affected; the impact of the regulation on the use and value of private
80 property; and the projected costs to affected businesses, localities or entities to implement or comply
81 with the regulations, including the estimated fiscal impact on such localities and sources of potential
82 funds to implement and comply with such regulation; and

83 2. *If the regulation may have an adverse effect on small businesses, the economic impact analysis*
84 *shall also include (i) an identification and estimate of the number of small businesses subject to the*
85 *regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small*
86 *businesses to comply with the regulation, including the type of professional skills necessary for*
87 *preparing required reports and other documents; (iii) a statement of the probable effect of the*
88 *regulation on affected small businesses; and (iv) a description of any less intrusive or less costly*
89 *alternative methods of achieving the purpose of the regulation. As used in this subdivision, "small*
90 *business" has the same meaning as provided in subsection A of § 2.2-4007.1.*

91 Agencies shall provide the Department with such estimated fiscal impacts on localities and sources of
92 potential funds. The Department may request the assistance of any other agency in preparing the
93 analysis. The Department shall deliver a copy of the analysis to the agency drafting the regulation,
94 which shall comment thereon as provided in subsection I, and a copy to the Registrar for publication
95 with the proposed regulation. No regulation shall be promulgated for consideration pursuant to
96 subsection I until the impact analysis has been received by the Registrar. For purposes of this section,
97 the term "locality, business, or entity particularly affected" means any locality, business, or entity that
98 bears any identified disproportionate material impact that would not be experienced by other localities,
99 businesses, or entities. The analysis shall represent the Department's best estimate for the purposes of
100 public review and comment on the proposed regulation. The accuracy of the estimate shall in no way
101 affect the validity of the regulation, nor shall any failure to comply with or otherwise follow the
102 procedures set forth in this subsection create any cause of action or provide standing for any person
103 under Article 5 (§ 2.2-4025 et seq.) of this chapter or otherwise to challenge the actions of the
104 Department hereunder or the action of the agency in adopting the proposed regulation.

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

statement of the basis, purpose, substance, and issues; the economic impact analysis; and the agency's response shall be published in the Virginia Register of Regulations, together with the notice of opportunity for oral or written submittals on the proposed regulation.

J. When an agency formulating regulations in public assistance and social services programs cannot comply with the public comment requirements of subsection F due to time limitations imposed by state or federal laws or regulations for the adoption of such regulation, the Secretary of Health and Human 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 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 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 30 days to solicit additional public comment and (ii) file notice of the additional 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.

§ 2.2-4007.1. *Regulatory flexibility for small businesses; periodic review of regulations.*

A. As used in this section, "small business" means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.

B. In addition to the requirements of § 2.2-4007, prior to the adoption of any proposed regulation, the agency proposing a regulation shall prepare a regulatory flexibility analysis in which the agency shall consider utilizing alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small businesses. The agency shall consider, at a minimum, each of the following methods of reducing the effects of the proposed regulation on small businesses:

1. The establishment of less stringent compliance or reporting requirements;
2. The establishment of less stringent schedules or deadlines for compliance or reporting requirements;
3. The consolidation or simplification of compliance or reporting requirements;
4. The establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and
5. The exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

C. Prior to the adoption of any proposed regulation that may have an adverse effect on small businesses, each agency shall notify the Department of Business Assistance of its intent to adopt the proposed regulation. The Department of Business Assistance shall advise and assist agencies in complying with the provisions of this section.

D. In addition to the requirements of § 2.2-4017, on or before July 1, 2009, an agency shall review its existing regulations to determine whether they should be continued without change or be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses. If an agency head determines that completion of the review of existing regulations is not feasible by July 1, 2009, that agency shall publish a statement certifying that determination. An agency may extend the date required by this subsection in increments of one year, not to exceed a total of five years.

E. In addition to other requirements of § 2.2-4017, all final regulations adopted after July 1, 2005, shall be reviewed every five years to ensure that they minimize the economic impact on small businesses in a manner consistent with the stated objectives of applicable law.

F. The regulatory review required by this section shall include consideration of:

1. The continued need for the rule;

182 2. *The nature of complaints or comments received concerning the regulation from the public;*

183 3. *The complexity of the regulation;*

184 4. *The extent to which the regulation overlaps, duplicates or conflicts with federal or state law or*
185 *regulation; and*

186 5. *The length of time since the regulation has been evaluated or the degree to which technology,*
187 *economic conditions, or other factors have changed in the area affected by the regulation.*

188 § 2.2-4027. Issues on review.

189 The burden shall be upon the party complaining of agency action to designate and demonstrate an
190 error of law subject to review by the court. Such issues of law include: (i) accordance with
191 constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction
192 limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which
193 regulations may be made, and the factual showing respecting violations or entitlement in connection
194 with case decisions, (iii) observance of required procedure where any failure therein is not mere
195 harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. The
196 determination of such fact issue shall be made upon the whole evidentiary record provided by the
197 agency if its proceeding was required to be conducted as provided in § 2.2-4009 or § 2.2-4020 or, as to
198 subjects exempted from those sections, pursuant to constitutional requirement or statutory provisions for
199 opportunity for an agency record of and decision upon the evidence therein.

200 *In addition to any other right to judicial review provided by law, a small business, as defined in*
201 *subsection A of § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be*
202 *entitled to judicial review of compliance with the requirements of subdivision H 2 of § 2.2-4007 and*
203 *§ 2.2-4007.1. The small business is authorized to seek judicial review during the one year following the*
204 *date of final agency action.*

205 When the decision on review is to be made on the agency record, the duty of the court with respect
206 to issues of fact shall be limited to ascertaining whether there was substantial evidence in the agency
207 record upon which the agency as the trier of the facts could reasonably find them to be as it did.

208 Where there is no agency record so required and made, any necessary facts in controversy shall be
209 determined by the court upon the basis of the agency file, minutes, and records of its proceedings under
210 § 2.2-4007 or § 2.2-4019 as augmented, if need be, by the agency pursuant to order of the court or
211 supplemented by any allowable and necessary proofs adduced in court except that the function of the
212 court shall be to determine only whether the result reached by the agency could reasonably be said, on
213 all such proofs, to be within the scope of the legal authority of the agency.

214 Whether the fact issues are reviewed on the agency record or one made in the review action, the
215 court shall take due account of the presumption of official regularity, the experience and specialized
216 competence of the agency, and the purposes of the basic law under which the agency has acted.