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**HOUSE BILL NO. 1821**

Offered January 11, 2017

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A BILL to amend and reenact §§ 2.2-1500, 2.2-4007.04, 2.2-4007.1, 2.2-4011, and 2.2-4027 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 15 of Title 2.2 an article numbered 2, consisting of sections numbered 2.2-1514.1 through 2.2-1514.8, relating to the Department of Budget and Planning; establishment of the Division of Regulatory Management; review of regulatory requirements; report.

Patron—Yancey

Referred to Committee on General Laws

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

1. That §§ 2.2-1500, 2.2-4007.04, 2.2-4007.1, 2.2-4011, and 2.2-4027 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 15 of Title 2.2 an article numbered 2, consisting of sections numbered 2.2-1514.1 through 2.2-1514.8, as follows:

*Article 1.**General Provisions.*

**§ 2.2-1500. Department of Planning and Budget created; appointment of Director; powers and duties.**

A. There is created a Department of Planning and Budget (the "Department"), which shall be headed by a Director appointed by the Governor to serve at his pleasure.

B. The Director of the Department shall, under the direction and control of the Governor, exercise the powers and perform the duties conferred or imposed upon him by law and perform such other duties as may be required by the Governor. *The Director shall be responsible for the overall supervision of the Department's divisions, programs, and personnel.*

*Article 2.**Division of Regulatory Management.***§ 2.2-1514.1. Definitions.**

*As used in this article, unless the context requires a different meaning:*

*"Agency" means the same as that term is defined in § 2.2-4001.*

*"Division" means the Division of Regulatory Management.*

*"Plain language explanation" means an explanation written in nontechnical, readily understandable language using words of common, everyday usage.*

*"Regulation" means the same as that term is defined in § 2.2-4001.*

*"Regulatory baseline" means the total number of regulatory requirements established by the Division of Regulatory Management pursuant to § 2.2-1514.4 to serve as the initial baseline to sustain a zero net increase in regulatory requirements.*

*"Regulatory requirement" means any action required to be taken or information required to be provided in accordance with a statute, regulation, or policy in order to access government services or operate and conduct business. "Regulatory requirement" does not include (i) statements or policies concerning the internal management of any agency, (ii) guidance documents, (iii) declaratory rulings, or (iv) intra-agency or interagency memoranda.*

*"Regulatory requirement replacement request" means a request by an agency to create a new regulatory requirement, after the establishment of the regulatory baseline, by either replacing or repealing an existing regulatory requirement.*

**§ 2.2-1514.2. Division of Regulatory Management established.**

*The Division of Regulatory Management is hereby established within the Department of Planning and Budget for the purpose of exercising the powers and duties described in this article.*

**§ 2.2-1514.3. Duties of Division.**

*The Division shall:*

- 1. Establish a regulatory baseline of all state regulatory requirements;*
- 2. Maintain the state's regulatory baseline through the establishment of a process for (i) the review of proposed regulations and (ii) the approval or denial of agency regulatory replacement requests;*
- 3. Develop guidelines to assist agencies in developing a comprehensive list of regulatory requirements that are enforced or administered by such agencies; and*
- 4. Establish and maintain a website, including a searchable database of all current regulations and*

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HB1821

59 regulatory requirements pursuant to § 2.2-1514.4.

60 **§ 2.2-1514.4. Establishment of state regulatory baseline; public information website.**

61 A. Pursuant to § 2.2-1514.3, the Division shall supervise the establishment of an initial state  
62 regulatory baseline. Each agency shall conduct an internal review of its regulatory requirements and  
63 submit a list of each requirement, along with the enabling regulation or statute, to the Division by  
64 October 1, 2017. The Division shall compile the lists of all agency regulatory requirements and  
65 establish the initial state regulatory baseline on or before January 1, 2018.

66 B. The Division shall maintain a website with a searchable database containing the following  
67 information:

- 68 1. A list of all current regulatory requirements;
- 69 2. A plain language description of the purpose of each regulatory requirement;
- 70 3. The agency responsible for each regulatory requirement;
- 71 4. The legislation or regulation authorizing each regulatory requirement; and
- 72 5. A listing of any changes to the initial regulatory baseline established pursuant to subsection A.

73 **§ 2.2-1514.5. Limitation on new regulatory requirements; regulatory requirement replacement**  
74 **requests; special provisions.**

75 A. Any subsequent regulatory requirement proposed by an agency that is not included in the initial  
76 state regulatory baseline shall be considered a new regulatory requirement.

77 B. To maintain a zero net increase in regulatory requirements, the agency proposing a new  
78 regulatory requirement shall be required to submit a regulatory requirement replacement request to the  
79 Division as provided in § 2.2-1514.6.

80 C. Each regulatory requirement replacement request shall include the following:

- 81 1. The existing statute authorizing the regulatory requirement;
- 82 2. The regulation authorizing the regulatory requirement, if applicable;
- 83 3. The purpose of the regulation;
- 84 4. The proposed regulatory requirement to be replaced or repealed; and
- 85 5. The total number of regulatory requirements that will be added if the measure is enacted.

86 **§ 2.2-1514.6. Review of new proposed regulations and accompanying regulatory requirement**  
87 **replacement requests; special provisions for the reduction of regulatory requirements.**

88 A. Each state agency shall achieve regulatory goals as effectively and efficiently as possible without  
89 imposing unnecessary regulatory requirements that unduly burden the public. To mitigate the negative  
90 economic effects of regulatory requirements, any new proposed regulatory requirement and the  
91 accompanying regulatory requirement replacement request or proposed sunset of an existing regulatory  
92 requirement shall be submitted to the Division for approval.

93 B. The Division shall evaluate each new proposed regulatory requirement and the accompanying  
94 regulatory requirement replacement request using the following factors:

- 95 1. Whether the regulatory requirement is the only effective and necessary way to achieve the desired  
96 outcome, including an analysis of whether the requirement (i) complements and does not duplicate  
97 existing regulatory requirements and (ii) is simple to administer in both enforcement and compliance;
- 98 2. The degree to which the regulatory requirement includes performance measures that are directly  
99 related to the desired outcome, including a provision establishing enhanced periodic review to ensure  
100 intended outcomes or providing for the sunset of the provision upon a determination that the regulatory  
101 requirement no longer achieves the original desired outcomes;
- 102 3. The presence of clear justifications for implementation of the regulatory requirement, including  
103 development and implementation processes that are (i) transparent, (ii) easily accessible by the public  
104 and contain appropriate and modern notification methods, (iii) written in plain language, and (iv)  
105 designed to allow citizens and businesses to clearly understand their rights and obligations under the  
106 regulatory requirement;
- 107 4. Whether the regulatory requirement is the most cost effective manner to achieve the desired  
108 outcome and whether the benefits of the regulatory requirement are greater than the burdens it imposes;  
109 and
- 110 5. Whether the regulatory requirement has a detrimental effect on the state's economy, including a  
111 determination as to whether it (i) has a negative effect on economic competitiveness, (ii) is harder to  
112 comply with than similar regulatory requirements in similar jurisdictions, and (iii) is compatible with  
113 the strategic goals of promoting a level playing field for all businesses and industries, job creation, and  
114 economic growth.

115 C. The Division shall approve a regulatory requirement replacement request only if (i) the regulatory  
116 requirement has undergone an evaluation pursuant to subsection B and (ii) the total number of  
117 regulatory requirements for the requesting agency is either kept at the regulatory baseline for the  
118 agency or reduced.

119 D. Any agency seeking an exemption from the approval requirement of subsection C shall submit a  
120 request for an exemption at the same time the documentation is submitted for the regulatory requirement

replacement request. The request for exemption shall also be submitted to (i) the Clerk of the Senate and (ii) the Clerk of the House of Delegates. The request for exemption shall include a detailed explanation of why the new regulatory requirement should be exempt from the approval requirement.

**§ 2.2-1514.7. Request for exemptions.**

A. Any agency seeking an exemption from the approval requirement of § 2.2-1514.6 shall submit a request for an exemption at the same time the documentation is submitted for the regulatory requirement replacement request required by § 2.2-1514.6. The request shall also be submitted to (i) the Clerk of the Senate and (ii) the Clerk of the House of Delegates. The exemption request shall include a detailed explanation of why the new regulatory requirement should be exempt from the approval requirement, including an explanation of how the requirement is necessary to protect the health, safety, and welfare of the citizens of the Commonwealth.

B. Any exemption approved by the Division shall be limited to no more than 18 months in duration.

**§ 2.2-1514.8. Annual report.**

The Director shall submit an annual report to the Governor and General Assembly on or before November 1 of each year. Such report shall include a description of the activities of the Division and contain (i) a list of all regulatory requirements, (ii) a description of the purpose of each regulatory requirement and the responsible agency, (iii) the law or regulation authorizing each regulatory requirement, and (iv) a list of any changes to the initial regulatory baseline. The report shall be submitted as a report document as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.

**§ 2.2-4007.04. Analysis of proposed regulations; review.**

A. Before delivering any proposed regulation and associated regulatory requirements under consideration to the Registrar as required in § 2.2-4007.05, the agency shall submit on the Virginia Regulatory Town Hall a copy of that regulation to the Department of Planning and Budget. In addition to determining the public benefit, the Department of Planning and Budget in coordination with the agency shall, within 45 days, prepare an economic impact analysis of the proposed regulation, as follows: a regulatory requirement replacement request to the Division of Regulatory Management of the Department of Planning and Budget pursuant to § 2.2-1514.6.

1. The economic impact analysis shall include but need not be limited to the projected number of businesses or other entities to whom the regulation would apply; the identity of any localities and types of businesses or other entities particularly affected by the regulation; the projected number of persons and employment positions to be affected; the impact of the regulation on the use and value of private property, including additional costs related to the development of real estate for commercial or residential purposes; and the projected costs to affected businesses, localities, or entities of implementing or complying with the regulations, including the estimated fiscal impact on such localities and sources of potential funds to implement and comply with such regulation. A copy of the economic impact analysis shall be provided to the Joint Commission on Administrative Rules;

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

3. In the event the Department cannot complete an economic impact statement within the 45-day period, it shall advise the agency and the Joint Commission on Administrative Rules as to the reasons for the delay. In no event shall the delay exceed 30 days beyond the original 45-day period.

B. Agencies shall provide the Department with such estimated fiscal impacts on localities and sources of potential funds. The Department may request the assistance of any other agency in preparing the analysis. The Department shall deliver a copy of the analysis to the agency drafting the regulation, which shall comment thereon as provided in § 2.2-4007.05, a copy to the Registrar for publication with the proposed regulation, and an electronic copy to each member of the General Assembly. No regulation shall be promulgated for consideration pursuant to § 2.2-4007.05 until the impact analysis has been received by the Registrar the Division of Regulatory Management has approved the request pursuant to § 2.2-1514.6. For purposes of this section, the term "locality, business, or entity particularly affected" means any locality, business, or entity that bears any identified disproportionate material impact that would not be experienced by other localities, businesses, or entities. The analysis shall represent the Department's best estimate for the purposes of public review and comment on the proposed regulation. The accuracy of the estimate shall in no way affect the validity of the regulation, nor shall any failure to

182 comply with or otherwise follow the procedures set forth in this subsection create any cause of action or  
183 provide standing for any person under Article 5 (§ ~~2.2-4025~~ et seq.) or otherwise to challenge the  
184 actions of the Department hereunder or the action of the agency in adopting the proposed regulation.

185 C. In the event the economic impact analysis completed by the Department reveals *Division of*  
186 *Regulatory Management determines* that the proposed regulation *and accompanying regulatory*  
187 *requirement* would have an adverse economic impact on businesses or would impose a significant  
188 adverse economic impact on a locality, business, or entity particularly affected, the ~~Department~~ *Division*  
189 shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations,  
190 and the Senate Committee on Finance within the ~~45-day period~~ *30 days of the determination*. The Joint  
191 Commission on Administrative Rules shall review such rule or regulation and issue a statement  
192 containing the Commission's findings in accordance with § 30-73.3. *For purposes of this section, the*  
193 *term "locality, business, or entity particularly affected" means any locality, business, or entity that bears*  
194 *any identifiable disproportionate material impact that would not be experienced by other localities,*  
195 *businesses, or entities. The analysis shall represent the Division's best estimate for the purposes of*  
196 *public review and comment on the proposed regulation.*

197 **§ 2.2-4007.1. Periodic review of regulations.**

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

201 B. In addition to the requirements of §§ ~~2.2-4007~~ through ~~2.2-4007.06~~, prior to the adoption of any  
202 proposed regulation, the agency proposing a regulation shall prepare a regulatory flexibility analysis in  
203 which the agency shall consider utilizing alternative regulatory methods, consistent with health, safety,  
204 environmental, and economic welfare, that will accomplish the objectives of applicable law while  
205 minimizing the adverse impact on small businesses. The agency shall consider, at a minimum, each of  
206 the following methods of reducing the effects of the proposed regulation on small businesses:

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

215 C. Prior to the adoption of any proposed regulation that may have an adverse effect on small  
216 businesses, each agency shall notify the Joint Commission on Administrative Rules, through the Virginia  
217 Regulatory Town Hall, of its intent to adopt the proposed regulation. The Joint Commission on  
218 Administrative Rules shall advise and assist agencies in complying with the provisions of this section.

219 D. In addition to other requirements of § ~~2.2-4017~~, all *All* regulations shall be reviewed every four  
220 years to determine whether they should be continued without change or be amended or repealed,  
221 consistent with the stated objectives of applicable law, to minimize the economic impact on small  
222 businesses in a manner consistent with the stated objectives of applicable law. When a regulation has  
223 undergone a comprehensive review as part of a regulatory action that included the solicitation of public  
224 comment on the regulation, a periodic review shall not be required until four years after the effective  
225 date of the regulatory action.

226 E. *B.* The regulatory review required by this section shall include consideration of:

- 227 1. The continued need for the rule;
- 228 2. The nature of complaints or comments received concerning the regulation from the public;
- 229 3. The complexity of the regulation;
- 230 4. The extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or  
231 regulation; and
- 232 5. The length of time since the regulation has been evaluated or the degree to which technology,  
233 economic conditions, or other factors have changed in the area affected by the regulation.

234 F. *C.* Prior to commencement of the regulatory review required by subsection ~~D~~ A, the agency shall  
235 publish a notice of the review in the Virginia Register of Regulations and post the notice on the  
236 Virginia Regulatory Town Hall. The agency shall provide a minimum of 21 days for public comment  
237 after publication of the notice. No later than 120 days after close of the public comment period, the  
238 agency shall publish a report of the findings of the regulatory review in the Virginia Register of  
239 Regulations and post the report on the Virginia Regulatory Town Hall.

240 **§ 2.2-4011. Emergency regulations; publication; exceptions.**

241 A. Regulations that an agency finds are necessitated by an emergency situation may be adopted by  
242 an agency upon consultation with the Attorney General, which approval shall be granted only after the  
243 agency has submitted a request to the Division of Regulatory Management pursuant to § 2.2-1514.7

stating in writing the nature of the emergency; and the necessity for such action shall be at the sole discretion of the Governor.

B. Agencies may also adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment and the regulation is not exempt under the provisions of subdivision A 4 of § 2.2-4006. In such cases, the agency shall state in writing the nature of the emergency and of the necessity for such action and may adopt the regulations. Pursuant to § 2.2-4012, such regulations shall become effective upon approval by the ~~Governor~~ *Division of Regulatory Management* and filing with the Registrar of Regulations.

C. All emergency regulations shall be limited to no more than 18 months in duration. During the 18-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 18-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 18-month limitation, a regulation to replace the emergency regulation shall be promulgated in accordance with this article *and pursuant to the requirements of Article 2 (§ 2.2-1514.1 et seq.) of Chapter 15*. The Notice of Intended Regulatory Action to promulgate a replacement regulation shall be filed with the Registrar within 60 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.

D. In the event that an agency concludes that despite its best efforts a replacement regulation cannot be adopted before expiration of the 18-month period described in subsection C, it may seek the prior written approval of the ~~Governor~~ *Division of Regulatory Management* to extend the duration of the emergency regulation for a period of not more than six additional months. Any such request must be submitted to the ~~Governor~~ *Division of Regulatory Management* at least 30 days prior to the scheduled expiration of the emergency regulation and shall include a description of the agency's efforts to adopt a replacement regulation together with the reasons that a replacement regulation cannot be adopted before the scheduled expiration of the emergency regulation. Upon approval of the ~~Governor~~ *Division of Regulatory Management*, provided such approval occurs prior to the scheduled expiration of the emergency regulation, the duration of the emergency regulation shall be extended for a period of no more than six months. Such approval ~~shall be in the sole discretion of the Governor~~ and shall not be subject to judicial review. Agencies shall notify the Registrar of Regulations of the new expiration date of the emergency regulation as soon as practicable.

E. Emergency regulations shall be published as soon as practicable in the Register.

F. The Regulations of the Marine Resources Commission shall be excluded from the provisions of this section.

#### **§ 2.2-4027. Issues on review.**

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

In addition to any other judicial review provided by law, a small business, ~~as defined in subsection A of § 2.2-4007.1~~ *meaning 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*, that is adversely affected or aggrieved by final agency action shall be entitled to judicial review of compliance with the requirements of ~~subdivision A 2 of §§ 2.2-1514.6, 2.2-4007.04, and § 2.2-4007.1~~ within one year following the date of final agency action.

When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be to determine whether there was substantial evidence in the agency record to support the agency decision. The duty of the court with respect to the issues of law shall be to review the agency decision de novo. The court shall enter judgment in accordance with § 2.2-4029.

Where there is no agency record so required and made, any necessary facts in controversy shall be determined by the court upon the basis of the agency file, minutes, and records of its proceedings under § 2.2-4007.01 or 2.2-4019 as augmented, if need be, by the agency pursuant to order of the court or

305 supplemented by any allowable and necessary proofs adduced in court except that the function of the  
306 court shall be to determine only whether the result reached by the agency could reasonably be said, on  
307 all such proofs, to be within the scope of the legal authority of the agency.

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