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SENATE BILL NO. 916

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology
on January 23, 2017)

(Patron Prior to Substitute—Senator Edwards)

A BILL to amend and reenact §§ 2.2-436, 2.2-4001, 2.2-4103, and 58.1-205 of the Code of Virginia, to amend the Code of Virginia by adding a section numbered 2.2-4103.1, and to repeal § 2.2-4008 of the Code of Virginia, relating to the Virginia Register Act; guidance documents.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-436, 2.2-4001, 2.2-4103, and 58.1-205 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-4103.1 as follows:

§ 2.2-436. Approval of electronic identity standards.

A. The Secretary of Technology, in consultation with the Secretary of Transportation, shall review and approve or disapprove, upon the recommendation of the Identity Management Standards Advisory Council pursuant to § 2.2-437, guidance documents that adopt (i) nationally recognized technical and data standards regarding the verification and authentication of identity in digital and online transactions; (ii) the minimum specifications and standards that should be included in an identity trust framework, as defined in § 59.1-550, so as to warrant liability protection pursuant to the Electronic Identity Management Act (§ 59.1-550 et seq.); and (iii) any other related data standards or specifications concerning reliance by third parties on identity credentials, as defined in § 59.1-550.

B. Final guidance documents approved pursuant to subsection A shall be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations as a general notice. The Secretary of Technology shall send a copy of the final guidance documents to the Joint Commission on Administrative Rules established pursuant to § 30-73.1 at least 90 days prior to the effective date of such guidance documents. The Secretary of Technology shall also annually file a list of available guidance documents developed pursuant to this chapter pursuant to § 2.2-4008 2.2-4103.1 of the Virginia Administrative Process Act (§ 2.2-4000 et seq.) and shall send a copy of such list to the Joint Commission on Administrative Rules.

§ 2.2-4001. Definitions.

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

"Agency" means any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases.

"Agency action" means either an agency's regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or denial of relief or of a license, right, or benefit by any agency or court.

"Basic law" or "basic laws" means provisions of the Constitution and statutes of the Commonwealth authorizing an agency to make regulations or decide cases or containing procedural requirements therefor.

"Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

"Guidance document" means any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations, excluding agency minutes or documents that pertain only to the internal management of agencies. Nothing in this definition shall be construed or interpreted to expand the identification or release of any document otherwise protected by law.

"Hearing" means agency processes other than those informational or factual inquiries of an informal nature provided in §§ 2.2-4007.01 and 2.2-4019 and includes only (i) opportunity for private parties to submit factual proofs in formal proceedings as provided in § 2.2-4009 in connection with the making of regulations or (ii) a similar right of private parties or requirement of public agencies as provided in § 2.2-4020 in connection with case decisions.

"Hearing officer" means an attorney selected from a list maintained by the Executive Secretary of the Supreme Court in accordance with § 2.2-4024.

"Public assistance and social services programs" means those programs specified in § 63.2-100.

"Registrar" means the Registrar of Regulations appointed as provided in § 2.2-4102.

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60 "Rule" or "regulation" means any statement of general application, having the force of law, affecting
61 the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on
62 it by applicable basic laws.

63 "Subordinate" means (i) one or more but less than a quorum of the members of a board constituting
64 an agency, (ii) one or more of its staff members or employees, or (iii) any other person or persons
65 designated by the agency to act in its behalf.

66 "Virginia Register of Regulations" means the publication issued under the provisions of Article 6
67 (§ 2.2-4031 et seq.).

68 "Virginia Regulatory Town Hall" means the website operated by the Department of Planning and
69 Budget, which has online public comment forums and displays information about regulatory actions
70 under consideration in the Commonwealth and sends this information to registered public users.

71 **§ 2.2-4103. Agencies to file regulations with Registrar; other duties; failure to file.**

72 It shall be the duty of every agency to have on file with the Registrar the full text of all of its
73 currently operative regulations, together with the dates of adoption, revision, publication, or amendment
74 thereof and such additional information requested by the Commission or the Registrar for the purpose of
75 publishing the Virginia Register of Regulations and the Virginia Administrative Code. Thereafter,
76 coincidentally with the issuance thereof, each agency shall from day to day so file, date, and supplement
77 all new regulations and amendments, repeals, or additions to its previously filed regulations. The filed
78 regulations shall (i) indicate the laws they implement or carry out, (ii) designate any prior regulations
79 repealed, modified, or supplemented, (iii) state any special effective or terminal dates, and (iv) be
80 accompanied by a statement or certification, either in original or electronic form, that the regulations are
81 full, true, and correctly dated. No regulation or amendment or repeal thereof shall be effective until filed
82 with the Registrar.

83 Orders condemning or closing any shellfish, finfish or crustacea growing area and the shellfish,
84 finfish or crustacea located thereon pursuant to Article 2 (§ 28.2-803 et seq.) of Chapter 8, of Title 28.2,
85 which are exempt from the requirements of the Administrative Process Act (§ 2.2-4000 et seq.) as
86 provided in subsection B of § 2.2-4002, shall be effective on the date specified by the promulgating
87 agency. Such orders shall continue to be filed with the Registrar either before or after their effective
88 dates in order to satisfy the need for public availability of information respecting the regulations of state
89 agencies.

90 An order setting a date of closure for the Chesapeake Bay purse seine fishery for Atlantic menhaden
91 for reduction purposes pursuant to § 28.2-1000.2, which is exempt from the requirements of the
92 Administrative Process Act as provided by subsection A of § 2.2-4002, shall be effective on the date
93 specified. Such orders shall be filed with the Registrar for prompt publication.

94 In addition, each agency shall itself (i) maintain a complete list of all of its currently operative
95 regulations for public consultation, (ii) make available to public inspection a complete file of the full
96 texts of all such regulations, and (iii) allow public copying thereof or make copies available either
97 without charge, at cost, or on payment of a reasonable fee. Each agency shall also maintain as a public
98 record a complete file of its regulations that have been superseded on and after June 1, 1975.

99 It shall be the duty of every agency to annually file with the Registrar for publication in the Virginia
100 Register of Regulations a list of any guidance documents upon which the agency currently relies. The
101 filing shall be made on or before January 1 of each year in a format to be developed by the Registrar.
102 Each agency shall also (i) maintain a complete list of all of its currently operative guidance documents
103 and make such list available for public inspection, (ii) make available for public inspection the full texts
104 of all such guidance documents to the extent such inspection is permitted by law, and (iii) upon request,
105 make copies of such lists or guidance documents available without charge, at cost, or on payment of a
106 reasonable fee.

107 Where regulations adopt textual matter by reference to publications other than the Federal Register or
108 Code of Federal Regulations, the agency shall (i) file with the Registrar copies of the referenced
109 publications, (ii) state on the face of or as notations to regulations making such adoptions by reference
110 the places where copies of the referred publications may be procured, and (iii) make copies of such
111 referred publications available for public inspection and copying along with its other regulations.

112 Unless he finds that there are special circumstances requiring otherwise, the Governor, in addition to
113 the exercise of his authority to see that the laws are faithfully executed, may, until compliance with this
114 chapter is achieved, withhold the payment of compensation or expenses of any officer or employee of
115 any agency in whole or part whenever the Commission certifies to him that the agency has failed to
116 comply with this section or this chapter in stated respects, to respond promptly to the requests of the
117 Registrar, or to comply with the regulations of the Commission.

118 **§ 2.2-4103.1. Guidance documents; duty to file with Registrar.**

119 A. For the purposes of this section, "agency" means any authority, instrumentality, officer, board, or
120 other unit of the government of the Commonwealth other than the General Assembly, courts, municipal
121 corporations, counties, other local or regional governmental authorities including sanitary or other

122 districts and joint state-federal, interstate or intermunicipal authorities, the Virginia Resources Authority,
123 the Virginia Code Commission with respect to minor changes made under the provisions of § 30-150,
124 and educational institutions operated by the Commonwealth with respect to regulations that pertain to
125 (i) their academic affairs; (ii) the selection, tenure, promotion, and disciplining of faculty and
126 employees; (iii) the selection of students; and (iv) rules of conduct and disciplining of students.

127 B. It shall be the duty of every agency to annually file with the Registrar for publication in the
128 Virginia Register of Regulations a list of any guidance documents upon which the agency currently
129 relies. The filing shall be made on or before January 1 of each year in a format to be developed by the
130 Registrar. Each agency shall also (i) maintain a complete list of all of its currently operative guidance
131 documents and make the list available for public inspection, (ii) make available for public inspection the
132 full texts of all guidance documents to the extent inspection is permitted by law, and (iii) upon request,
133 make copies of such lists or guidance documents available without charge, at cost, or upon payment of
134 a reasonable fee.

135 C. Nothing in this section is intended to nor shall it confer or impose any regulatory authority upon
136 an agency, nor shall this section create any rights to appeal or challenge a guidance document adopted
137 by an agency.

138 **§ 58.1-205. Effect of regulations, rulings, etc., and administrative interpretations.**

139 In any proceeding relating to the interpretation or enforcement of the tax laws of this
140 Commonwealth, the following rules shall apply:

141 1. Any assessment of a tax by the Department shall be deemed prima facie correct.

142 2. Any regulation promulgated as provided by subsection B of § 58.1-203 shall be sustained unless
143 unreasonable or plainly inconsistent with applicable provisions of law.

144 3. Rulings issued in conformity with § 58.1-203, tax bulletins, guidelines, and other documents
145 published as provided in § 58.1-204, and guidance documents listed in the Virginia Register of
146 Regulations as provided in §§ ~~2.2-4008~~ and ~~2.2-4103~~ § 2.2-4103.1 shall be accorded judicial notice.

147 4. In any proceeding commenced under § 58.1-1821, 58.1-1824 or 58.1-1825, rulings and
148 administrative interpretations other than those described in subdivisions 2 and 3 shall not be admitted
149 into evidence and shall be accorded no weight, except that an assessment made pursuant to any such
150 ruling or interpretation shall be entitled to the presumption of correctness specified in subdivision 1.

151 **2. That § 2.2-4008 of the Code of Virginia is repealed.**