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HOUSE BILL NO. 866

Offered January 8, 2020

Prefiled January 7, 2020

A *BILL to amend and reenact §§ 2.2-4007.01, 2.2-4007.04, 2.2-4007.05, 2.2-4012, and 2.2-4027 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 2.2-4007.01:1, 2.2-4007.01:2, and 2.2-4007.04:1, relating to the Administrative Process Act; regulations; public notice and economic impact; prohibition on certain regulations.*

Patron—Freitas

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4007.01, 2.2-4007.04, 2.2-4007.05, 2.2-4012, and 2.2-4027 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 2.2-4007.01:1, 2.2-4007.01:2, and 2.2-4007.04:1 as follows:

§ 2.2-4007.01. Notice of intended regulatory action; public hearing.

A. 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 ~~(i)~~ prepare a notice of intended regulatory action for any regulation that it plans to promulgate. Such notice shall include:

1. A description of the objective of the regulation.
2. A description of existing policies relevant to the regulation and of new policies proposed to be included in the regulation and an analysis of policy alternatives.
3. The statutory authority for the regulation.
4. Estimates of the amount of time that state employees will spend to develop the regulation and of other resources necessary to develop the regulation.
5. A description of all of the entities that may be affected by the regulation.
6. A summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed regulation.
7. Whether the agency plans to hold a preliminary public hearing or a public hearing on the proposed regulation after it is published.

B. An agency that has prepared a notice of intended regulatory action for a proposed regulation shall present the notice to the Office of the Attorney General, which shall make a determination as to whether the agency has the explicit authority to promulgate the regulation as proposed in the notice and shall report the notice and its determination to the Governor who may approve the notice. The agency may not send the notice to the Registrar for publication pursuant to subsection C until the Governor issues written approval of the notice.

C. Upon approval of the notice of intended regulatory by the Governor the 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 and ~~(ii)~~ such notice and allow at least 30 days for public comment, to include an on-line public comment forum on the Virginia Regulatory Town Hall, after publication of the Notice of Intended Regulatory Action.

D. Whenever a Virginia statutory change necessitates a change to, or repeal of, all or a portion of a regulation or the adoption of a new regulation, the agency shall file a Notice of Intended Regulatory Action with the ~~Registrar~~ Attorney General within 120 days of such law's effective date.

E. An agency shall not file proposed regulations with the Registrar until the public comment period on the Notice of Intended Regulatory Action has closed.

~~B. 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.~~ F. If the agency states an intent to hold a preliminary public hearing or 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 preliminary hearing or 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 agency is required to hold a preliminary public hearing pursuant to § 2.2-4007.01:1, (ii) the Governor directs the agency to hold a public hearing, or ~~(ii)~~ (iii) the agency receives requests for a public hearing from at least 25 persons.

§ 2.2-4007.01:1. Preliminary public hearing and comment period.

A. Within 10 days after publication by the Registrar of a notice of intended regulatory action for a

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59 proposed regulation submitted pursuant to § 2.2-4007.01, either the chairman or vice-chairman of the
60 Joint Commission on Administrative Rules may submit a written directive to the agency that prepared
61 the notice for the agency to hold a preliminary public hearing and comment period on the notice of
62 intended regulatory action as provided in this section.

63 B. If the agency is directed to hold a preliminary public hearing and comment period on a notice of
64 intended regulatory action as provided in subsection A or if the agency otherwise opts to do so on its
65 own initiative, the agency shall submit to the Registrar, in a format approved by the Registrar, a notice
66 of a preliminary public hearing and comment period to allow for public comment and feedback on the
67 notice of intended regulatory action. The agency may also take any other action it considers necessary
68 to provide notice of the preliminary public hearing and comment period to other interested persons. The
69 notice shall include:

70 1. A statement of the date, time, and place of the preliminary public hearing.

71 2. The place where comments on the notice of intended regulatory action shall be submitted and the
72 deadline for submitting those comments.

73 C. The agency shall hold the preliminary public hearing and comment period in accordance with the
74 notice required under subsection B but may not hold the hearing sooner than the third day after
75 publication of the notice in the Register.

76 D. The agency shall conduct a hearing under this section in accordance with § 2.2-4007.01:2.

77 E. The agency shall report all public comments and feedback on the notice of intended regulatory
78 action for the proposed regulation that the agency receives at the preliminary public hearing and
79 comment period to the individual or body with policy-making powers over the subject matter of the
80 proposed regulation.

81 F. For the purpose of soliciting public comment, an agency may hold a hearing on the general
82 subject matter of possible or anticipated regulations before preparing a notice of intended regulatory
83 action for a proposed regulation. A hearing held under this subsection does not relieve the agency from
84 its obligation to comply with a directive under subsection A.

85 **§ 2.2-4007.01:2. Conduct of hearings on regulatory matters.**

86 A. An agency shall hold a public hearing on a regulatory matter at the date, time, and place
87 designated in the notice of hearing. The person conducting the hearing shall:

88 1. Explain the purpose of the hearing and describe how testimony will be received.

89 2. At the beginning of the hearing, present a summary of the factual information on which the
90 proposed regulation is based, including any information obtained from an advisory committee, informal
91 conference, or consultation.

92 3. Afford each interested person or a representative the opportunity to present facts, opinions, or
93 arguments in writing, whether or not there is an opportunity to present them orally.

94 4. Keep a record of the hearing in a manner the agency considers desirable and feasible.

95 B. The person conducting the hearing may:

96 1. Limit oral presentations if the hearing would be unduly lengthened by repetitious testimony.

97 2. Question or allow others present to question the persons appearing.

98 3 Administer an oath or affirmation to any person appearing.

99 4. Continue or postpone the hearing to a specified date, time, and place.

100 C. If the agency officer or a quorum of the board or commission responsible for promulgating the
101 proposed regulation is not present at the hearing, at the beginning of the hearing, the person
102 conducting the hearing shall inform those present that any person who presents testimony at the hearing
103 may present his argument to the agency officer, board, or commission prior to promulgation of the
104 proposed regulation if the request to do so is made in writing at the hearing.

105 If required by the agency officer, board, or commission, such argument shall be presented to the
106 agency in writing. If oral arguments are permitted, the agency officer, board, or commission may
107 impose reasonable limitations on the length and number of appearances to conserve time and preclude
108 undue repetition.

109 If a recording of the hearing has been made, arguments before the agency officer, board, or
110 commission shall be limited to the recording of the hearing.

111 **§ 2.2-4007.04. Economic impact analysis.**

112 A. Before delivering any proposed regulation under consideration to the Registrar as required in
113 § 2.2-4007.05, the agency shall submit on the Virginia Regulatory Town Hall a copy of that regulation
114 to the Department of Planning and Budget. In addition to determining the public benefit, the The
115 Department of Planning and Budget in coordination with the agency shall, within 45 days, prepare an
116 economic impact analysis of the proposed regulation, as follows:

117 1. The economic impact analysis shall include but need not be limited to the projected number of
118 businesses or other entities to which the regulation would apply; the identity of any localities and types
119 of businesses or other entities particularly affected by the regulation; the projected number of persons
120 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; and

2. The Department of Planning and Budget shall (i) solicit information and advice from businesses, associations representing businesses, localities, and individuals that may be affected by the proposed regulation and (ii) prepare the economic impact analysis in coordination with localities that may be affected by the proposed regulation. The Department of Planning and Budget may also request information that is reasonably necessary for the preparation of an economic impact analysis from other businesses, associations, localities, and individuals and from other agencies. The Department of Planning and Budget may request and shall receive such information or assistance of any other agency as may be necessary for preparing the analysis. The economic impact analysis shall include:

1. An analysis and quantification of the policy problem that the proposed regulation is intending to address, including comparisons with the approaches used by the federal government and states comparable to the Commonwealth to address the same policy problem. If the approach chosen by the agency to address the policy problem is found to be different from the approaches used by the federal government and states comparable to the Commonwealth, the agency shall submit a statement explaining why the agency chose a different approach for inclusion in the economic impact analysis.

2. An analysis and detailed quantification of the economic impact of the proposed regulation, including the implementation and compliance costs that are reasonably expected to be incurred by or passed along to the businesses, localities, and individuals that may be affected by the proposed regulation. Such analysis and detailed quantification shall include an estimate of the total implementation and compliance costs that are reasonably expected to be incurred by or passed along to businesses, localities, and individuals as a result of the proposed regulation, expressed as a single dollar figure. With respect to an independent economic impact analysis prepared pursuant to subsection F, the Department of Planning and Budget shall provide a detailed explanation of any variance from the agency's estimate under this subdivision. The Department of Planning and Budget shall also provide a determination, for purposes of the requirement under § 2.2-4007.04:1 as to whether \$10,000,000 or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses, localities, and individuals over any two-year period as a result of the proposed regulation.

3. An analysis of the actual and quantifiable benefits of the proposed regulation, including an assessment of how effective the proposed regulation will be in addressing the policy problem that the regulation is intended to address.

4. An analysis of alternatives to the proposed regulation, including the alternative of not promulgating the proposed regulation.

5. A determination made in consultation with the businesses, localities, and individuals that may be affected by the proposed regulation as to whether the proposed regulation would adversely affect in a material way the economy, a sector of the economy, productivity, jobs, or the overall economic competitiveness of this state.

6. Except as provided in this subdivision, if the economic impact analysis relates to a proposed regulation of the Department of Housing and Community Development establishing standards for the construction of a dwelling, an analysis of whether the proposed regulation would increase the cost of constructing or remodeling such a dwelling by more than \$1,000.

7. An analysis of the ways in which and the extent to which the proposed regulation would place any limitations on the free use of private property, including a discussion of alternatives to the proposed regulation that would minimize any such limitations.

8. 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.

B. 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.

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

D. In the event the economic impact analysis completed by the Department reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period. The Joint Commission on Administrative Rules shall review such rule or regulation and issue a statement containing the Commission's findings in accordance with § 30-73.3.

E. The Department shall revise and reissue its economic impact analysis within the time limits set forth for the Department's review of regulations at the final stage pursuant to the Governor's executive order for executive branch review if any of the following conditions is present that would materially change the Department's analysis:

1. Public comment timely received at the proposed stage indicates significant errors in the economic impact analysis; or

2. There is significant or material difference between the agency's proposed economic impact analysis and the anticipated negative economic impacts to the business community as indicated by public comment; or

3. *The proposed regulation is modified after the initial economic impact analysis is submitted so that the economic impact of the proposed regulation is significantly changed.*

The determination of whether a condition is present under this subsection shall be made by the Department and shall not be subject to judicial review.

F. *After the Department of Planning and Budget submits an economic impact analysis for a proposed regulation to the legislature under subsection C but before the agency submits the proposed regulation for final approval by the Governor, the chairman or vice-chairman of the Joint Commission on Administrative Rules may request an independent economic impact analysis to be prepared by the Joint Legislative Audit and Review Commission for the proposed regulation.*

A request by the chairman or vice-chairman of the Joint Commission on Administrative Rules for an independent economic impact analysis shall require approval by the Committee on Rules for the chamber of which the requestor is a member.

If the chairman or vice-chairman of the Joint Commission on Administrative Rules requests an independent economic impact analysis and the request is approved, the Clerk of the chamber approving the request shall notify the Joint Legislative Audit and Review Commission that the agency is proposing the proposed regulation.

G. *In preparing an independent economic impact analysis pursuant to subsection F, the Joint Legislative Audit and Review Commission shall:*

1. *Include in the analysis the information that is required under subsection A.*

2. *Upon completion of the analysis, submit a report containing the analysis to the Department of Planning and Budget, the agency drafting the regulation, the Governor, the Registrar for publication with the proposed regulation, and an electronic copy to each member of the General Assembly.*

3. *Complete the independent economic impact analysis within 60 days after being contacted by the Clerk to prepare the analysis.*

H. *When an independent economic impact analysis is requested under subsection F, the agency may not submit the proposed regulation for approval by the Governor until the agency receives the completed report containing the independent economic impact analysis.*

1. *This section does not apply to emergency regulations promulgated under § 2.2-4011.*

§ 2.2-4007.04:1. Passage of bill required for certain regulations.

A. *If an economic impact analysis prepared under subsection A of § 2.2-4007.04, or an independent economic impact analysis prepared pursuant to subsection F of § 2.2-4007.04 indicates that \$10,000,000 or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses, localities, and individuals over any two-year period as a result of the proposed*

regulation, the agency proposing the regulation shall stop work on the proposed regulation and may not continue promulgating the proposed regulation notwithstanding any provision authorizing or requiring the agency to promulgate the proposed regulation, except as authorized under this section.

B. Any member of the legislature may introduce a bill authorizing an agency to promulgate a regulation that the agency is prohibited from promulgating under subsection A. The agency may resume the rule-making process as provided in this chapter upon enactment of a bill introduced under this subsection.

C. If an agency is prohibited from promulgating a regulation under subsection A, the agency may modify the proposed regulation, if the modification is germane to the subject matter of the proposed regulation, to address the implementation and compliance costs of the proposed regulation. If the agency modifies a proposed regulation under this subsection, the Department of Planning and Budget shall prepare a revised economic impact analysis. Following the modification, the agency may continue with the rule-making process as provided in this article if the revised economic impact analysis prepared by the agency indicates, and any independent economic impact analysis prepared pursuant to subsection F of § 2.2-4007.04 subsequent to the agency's modification also indicates, that \$10,000,000 or more in implementation and compliance costs are not reasonably expected to be incurred by or passed along to businesses, localities, and individuals over any two-year period as a result of the proposed regulation.

D. This section does not apply to emergency regulations promulgated under § 2.2-4011.

§ 2.2-4007.05. Submission of proposed regulations to the Registrar.

Before promulgating any regulation under consideration, the agency shall deliver a copy of that regulation to the Registrar together with a summary of the regulation and a separate and concise statement of (i) the basis of the regulation, defined as the statutory authority for promulgating the regulation, including an identification of the section number and a brief statement relating the content of the statutory authority to the specific regulation proposed; (ii) the purpose of the regulation, defined as the rationale or justification for the new provisions of the regulation, from the standpoint of the public's health, safety, or welfare; (iii) the substance of the regulation, defined as the identification and explanation of the key provisions of the regulation that make changes to the current status of the law; (iv) the issues of the regulation, defined as the primary advantages and disadvantages for the public, and as applicable for the agency or the state, of implementing the new regulatory provisions; and (v) the agency's response to the economic impact analysis submitted by the Department of Planning and Budget or an independent economic analysis prepared pursuant to § 2.2-4007.04. Any economic impact estimate included in the agency's response shall represent the agency's best estimate for the purposes of public review and comment, but the accuracy of the estimate shall in no way affect the validity of the regulation. Staff as designated by the Code Commission shall review proposed regulation submission packages to ensure that the requirements of this 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 and be available on the Virginia Regulatory Town Hall, together with the notice of opportunity for oral or written submittals on the proposed regulation.

§ 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 §§ 2.2-4007.01 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 § 2.2-4011, 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 any estimate contained in an independent economic impact analysis prepared pursuant to subsection F of § 2.2-4007.04 and the agency's Department's response thereto as required by § 2.2-4007.04 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 any estimate contained in an independent economic impact analysis prepared pursuant to subsection F of § 2.2-4007.04*, 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.

§ 2.2-4027. 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, 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 8 of § 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 supplemented by any allowable and necessary proofs adduced in court except that the function of the court shall be to determine only whether the result reached by the agency could reasonably be said, on all such proofs, to be within the scope of the legal authority of the agency.

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