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HOUSE BILL NO. 1272

Offered January 25, 1994

A BILL to amend and reenact §§ 9-6.14:7.1 and 9-6.14:9 of the Code of Virginia, relating to the impact of regulations under the Administrative Process Act.

Patrons—Wilkins, Albo, Callahan, Dudley, Hargrove, Ingram, Katzen, Martin and Ruff; Senator: Benedetti

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:**1. That §§ 9-6.14:7.1 and 9-6.14:9 of the Code of Virginia are amended and reenacted as follows:**

§ 9-6.14:7.1. 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 agency receiving the petition shall receive, consider, and respond to the petition within 180 days. Agency decisions to initiate or not initiate rulemaking in response to petitions are not subject to judicial review.

B. In the case of all regulations, except those regulations exempted by § 9-6.14:4.1, an agency shall provide the Registrar of Regulations with a Notice of Intended Regulatory Action which describes the subject matter and intent of the planned regulation. At least thirty 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 that the agency shall hold a public hearing or (ii) the agency receives requests for a public hearing from twenty-five persons or more.

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 which 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 such panels or consultation appropriate and intends to make use of such panels or consultation.

E. In formulating any regulation, including but not limited to those in public assistance 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, at its discretion, begin drafting the proposed regulation prior to or during any opportunities it provides to the public to submit input.

F. In the case of all regulations, except those regulations exempted by § 9-6.14:4.1, the proposed regulation and general notice of opportunity for oral or written submittals as to that regulation shall be published in the Virginia Register of Regulations in accordance with the provisions of subsection B of § 9-6.14:22 and such notice shall be published in a newspaper of general circulation published at the state capital and, in addition, as the agency may determine, it may be similarly published in newspapers in localities particularly affected, as well as publicized through press releases and such other media as will best serve the purpose and subject involved. The Register and newspaper publication shall be made at least sixty days in advance of the last date prescribed in the notice for such submittals. All notices, written submittals, and transcripts, summaries or notations of oral presentations, as well as any agency action thereon, shall be matters of public record in the custody of the agency.

The Registrar shall develop the format for the proper advertisement of proposed regulations in newspapers. The Registrar shall also be responsible for the publication of the newspaper advertising pertaining to proposed regulations. As used in this chapter, "Registrar" means the Registrar of

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60 Regulations appointed as provided in § 9-6.17.

61 G. Before promulgating any regulation under consideration, the agency shall deliver a copy of that
62 regulation to the Registrar together with a summary of the regulation and a separate and concise
63 statement of (i) the basis of the regulation, defined as the statutory authority for promulgating the
64 regulation, including an identification of the section number and a brief statement relating the content of
65 the statutory authority to the specific regulation proposed; (ii) the purpose of the regulation, defined as
66 the rationale or justification for the new provisions of the regulation, from the standpoint of the public's
67 health, safety or welfare; (iii) the substance of the regulation, defined as the identification and
68 explanation of the key provisions of the regulation that make changes to the current status of the law;
69 (iv) the issues of the regulation, defined as the primary advantages and disadvantages for the public, and
70 as applicable for the agency or the state, of implementing the new regulatory provisions; ~~and~~ (v) *the*
71 *merits of the proposed regulation, in writing, comparing the protection of the public health, safety and*
72 *general welfare versus the regulation's general impact on the use and value of private property; and* (vi)
73 the estimated impact, defined as the projected number of persons affected, the projected costs, expressed
74 as a dollar figure or range, for the implementation and compliance thereof, and the identity of any
75 localities particularly affected by that regulation. The estimated impact shall represent the agency's best
76 estimate for the purposes of public review and comment, but the accuracy of the estimate shall in no
77 way affect the validity of the regulation. Staff as designated by the Code Commission shall review
78 proposed regulation submission packages to ensure the requirements of this subsection are met prior to
79 publication of the proposed regulation in the Register. The summary and the statement of the basis,
80 purpose, substance, issues, estimated impact and identity of any localities affected shall be published in
81 the Virginia Register of Regulations, together with the notice of opportunity for oral or written
82 submittals on the proposed regulation. However, only the summary shall be printed in the newspapers
83 unless the agency requests publication of the statement of basis, purpose, substance, issues, estimated
84 impact and identity of any localities particularly affected. As used in this section, the term "locality
85 particularly affected" means any locality which bears any identified disproportionate material impact
86 which would not be experienced by other localities.

87 H. When an agency formulating regulations in public assistance programs cannot comply with the
88 public comment requirements of subsection F of this section due to time limitations imposed by state or
89 federal laws or regulations for the adoption of such regulation, the Secretary of Health and Human
90 Resources may shorten the time requirements of subsection F. If, in the Secretary's sole discretion, such
91 time limitations reasonably preclude any advance published notice, he may waive the requirements of
92 subsection F. However, the agency shall, as soon as practicable after the adoption of the regulation in a
93 manner consistent with the requirements of subsection F, publish notice of the promulgation of the
94 regulation and afford an opportunity for public comment. The precise factual basis for the Secretary's
95 determination shall be stated in the published notice.

96 I. For the purpose of this article, public assistance programs shall consist of those specified in
97 § 63.1-87.

98 J. If one or more changes with substantial impact are made to a proposed regulation from the time
99 that it is published as a proposed regulation to the time it is published as a final regulation, any person
100 may petition the agency within thirty days from the publication of the final regulation to request an
101 opportunity for oral and written submittals on the changes to the regulation. If the agency receives
102 requests from at least twenty-five persons for an opportunity to submit oral and written comments on the
103 changes to the regulation, the agency shall suspend the regulatory process for thirty days to solicit
104 additional public comment, unless the agency determines that the changes made are minor or
105 inconsequential in their impact. Agency denial of petitions for a comment period on changes to the
106 regulation shall be subject to judicial review.

107 K. In no event shall the failure to comply with the requirements of subsection F of this section be
108 deemed mere harmless error for the purposes of § 9-6.14:17.

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

111 § 9-6.14:9. Purpose; adoption; effective date; filing; emergency regulations; duties of Registrar of
112 Regulations.

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

115 B. Subject to the provisions of §§ 9-6.14:9.1 and 9-6.14:9.2, all regulations, including those as to
116 which agencies pursuant to § 9-6.14:4.1 may elect to dispense with the public procedures provided by
117 §§ 9-6.14:7.1 and 9-6.14:8, may be formally and finally adopted by the signed order of the agency so
118 stating. No regulation except an emergency regulation shall be effective until the expiration of the
119 applicable period as provided in § 9-6.14:9.3. In the case of an emergency regulation filed in accordance
120 with subdivision C 5 of § 9-6.14:4.1, the regulation shall become operative upon its adoption and filing
121 with the Registrar of Regulations, unless a later date is specified. The originals of all regulations shall

122 remain in the custody of the agency as public records subject to judicial notice by all courts and
123 agencies. They, or facsimiles thereof, shall be made available by the agency for public inspection or
124 copying. Full and true copies shall also be additionally filed, registered, published, or otherwise made
125 publicly available as may be required by other laws.

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

127 C. Prior to the publication for hearing of a proposed regulation, copies of the regulation and copies
128 of the summary and statement as to the basis, purpose, substance, issues, *comparison of the merits*, and
129 impact of the regulation and the agency's comments thereon as required by § 9-6.14:7.1 shall be
130 transmitted to the Registrar of Regulations, who shall retain these documents.

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

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