

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 9-6.14:7.1, 9-6.14:9.1 and 9-6.14:9.3 of the Code of Virginia, relating*
 3 *to the Administrative Process Act; additional public comment.*

4 [H 1472]

5 Approved

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

7 **1. That §§ 9-6.14:7.1, 9-6.14:9.1 and 9-6.14:9.3 of the Code of Virginia are amended and reenacted**
 8 **as follows:**

9 § 9-6.14:7.1. Public participation; informational proceedings; effect of noncompliance.

10 A. Any person may petition an agency to request the agency to develop a new regulation or amend
 11 an existing regulation. The agency receiving the petition shall receive, consider, and respond to the
 12 petition within 180 days. Agency decisions to initiate or not initiate rulemaking in response to petitions
 13 are not subject to judicial review.

14 B. In the case of all regulations, except those regulations exempted by § 9-6.14:4.1, an agency shall
 15 provide the Registrar of Regulations with a Notice of Intended Regulatory Action which describes the
 16 subject matter and intent of the planned regulation. At least thirty days shall be provided for public
 17 comment after publication of the Notice of Intended Regulatory Action. An agency shall not file
 18 proposed regulations with the Registrar until the public comment period on the Notice of Intended
 19 Regulatory Action has closed.

20 C. Agencies shall state in the Notice of Intended Regulatory Action whether they plan to hold a
 21 public hearing on the proposed regulation after it is published. Agencies shall hold such public hearings
 22 if required by basic law. If the agency states an intent to hold a public hearing on the proposed
 23 regulation in the Notice of Intended Regulatory Action, then it shall hold the public hearing. If the
 24 agency states in its Notice of Intended Regulatory Action that it does not plan to hold a hearing on the
 25 proposed regulation, then no public hearing is required unless, prior to completion of the comment
 26 period specified in the Notice of Intended Regulatory Action: (i) the Governor directs that the agency
 27 shall hold a public hearing or (ii) the agency receives requests for a public hearing from twenty-five
 28 persons or more.

29 D. Public participation guidelines for soliciting the input of interested parties in the formation and
 30 development of its regulations shall be developed, adopted and utilized by each agency pursuant to the
 31 provisions of this chapter. The guidelines shall set out any methods for the identification and notification
 32 of interested parties, and any specific means of seeking input from interested persons or groups which
 33 the agency intends to use in addition to the Notice of Intended Regulatory Action. The guidelines shall
 34 set out a general policy for the use of standing or ad hoc advisory panels and consultation with groups
 35 and individuals registering interest in working with the agency. Such policy shall address the
 36 circumstances in which the agency considers such panels or consultation appropriate and intends to
 37 make use of such panels or consultation.

38 E. In formulating any regulation, including but not limited to those in public assistance programs, the
 39 agency pursuant to its public participation guidelines shall afford interested persons an opportunity to
 40 submit data, views, and arguments, either orally or in writing, to the agency or its specially designated
 41 subordinate. However, the agency may, at its discretion, begin drafting the proposed regulation prior to
 42 or during any opportunities it provides to the public to submit input.

43 F. In the case of all regulations, except those regulations exempted by § 9-6.14:4.1, the proposed
 44 regulation and general notice of opportunity for oral or written submittals as to that regulation shall be
 45 published in the Virginia Register of Regulations in accordance with the provisions of subsection B of
 46 § 9-6.14:22 and such notice shall be published in a newspaper of general circulation published at the
 47 state capital and, in addition, as the agency may determine, it may be similarly published in newspapers
 48 in localities particularly affected, as well as publicized through press releases and such other media as
 49 will best serve the purpose and subject involved. The Register and newspaper publication shall be made
 50 at least sixty days in advance of the last date prescribed in the notice for such submittals. All notices,
 51 written submittals, and transcripts, summaries or notations of oral presentations, as well as any agency
 52 action thereon, shall be matters of public record in the custody of the agency.

53 The Registrar shall develop the format for the proper advertisement of proposed regulations in
 54 newspapers. The Registrar shall also be responsible for the publication of the newspaper advertising
 55 pertaining to proposed regulations. As used in this chapter, "Registrar" means the Registrar of
 56 Regulations appointed as provided in § 9-6.17.

57 G. Before delivering any proposed regulation under consideration to the Registrar as required in
58 subsection H below, the agency shall deliver a copy of that regulation to the Department of Planning
59 and Budget. In addition to determining the public benefit, the Department of Planning and Budget in
60 coordination with the agency, shall, within 45 days, prepare an economic impact analysis of the
61 proposed regulation. The economic impact analysis shall include, but need not be limited to, the
62 projected number of businesses or other entities to whom the regulation would apply; the identity of any
63 localities and types of businesses or other entities particularly affected by the regulation; the projected
64 number of persons and employment positions to be affected; and the projected costs to affected
65 businesses or entities to implement or comply with such regulations. The Department may request the
66 assistance of any other agency in preparing the analysis. The Department shall deliver a copy of the
67 analysis to the agency drafting the regulation, which shall comment thereon as provided in subsection H,
68 and a copy to the Registrar for publication with the proposed regulation. No regulation shall be
69 promulgated for consideration pursuant to subsection H until such impact analysis has been received by
70 the Registrar. For purposes of this section, the term "particularly affected" locality, business, or entity
71 means any locality, business, or entity which bears any identified disproportionate material impact which
72 would not be experienced by other localities, businesses, or entities. The analysis shall represent the
73 Department's best estimate for the purposes of public review and comment on the proposed regulation.
74 The accuracy of the estimate shall in no way affect the validity of the regulation, nor shall any failure to
75 comply with or otherwise follow the procedures set forth in this subsection create any cause of action or
76 provide standing for any person under Article 4 (§ 9-6.14:15 et seq.) of this Chapter or otherwise to
77 challenge the actions of the Department hereunder or the action of the agency in adopting the proposed
78 regulation.

79 H. Before promulgating any regulation under consideration, the agency shall deliver a copy of that
80 regulation to the Registrar together with a summary of the regulation and a separate and concise
81 statement of (i) the basis of the regulation, defined as the statutory authority for promulgating the
82 regulation, including an identification of the section number and a brief statement relating the content of
83 the statutory authority to the specific regulation proposed; (ii) the purpose of the regulation, defined as
84 the rationale or justification for the new provisions of the regulation, from the standpoint of the public's
85 health, safety or welfare; (iii) the substance of the regulation, defined as the identification and
86 explanation of the key provisions of the regulation that make changes to the current status of the law;
87 (iv) the issues of the regulation, defined as the primary advantages and disadvantages for the public, and
88 as applicable for the agency or the state, of implementing the new regulatory provisions; and (v) the
89 agency's response to the economic impact analysis submitted by the Department of Planning and Budget
90 pursuant to subsection G. Any economic impact estimate included in the agency's response shall
91 represent the agency's best estimate for the purposes of public review and comment, but the accuracy of
92 the estimate shall in no way affect the validity of the regulation. Staff as designated by the Code
93 Commission shall review proposed regulation submission packages to ensure the requirements of this
94 subsection are met prior to publication of the proposed regulation in the Register. The summary and the
95 statement of the basis, purpose, substance, issues, estimated impact and identity of any localities affected
96 shall be published in the Virginia Register of Regulations, together with the notice of opportunity for
97 oral or written submittals on the proposed regulation. However, only the summary shall be printed in the
98 newspapers unless the agency requests publication of the statement of basis, purpose, substance, issues,
99 estimated impact and identity of any localities particularly affected. As used in this section, the term
100 "locality particularly affected" means any locality which bears any identified disproportionate material
101 impact which would not be experienced by other localities.

102 I. When an agency formulating regulations in public assistance programs cannot comply with the
103 public comment requirements of subsection F of this section due to time limitations imposed by state or
104 federal laws or regulations for the adoption of such regulation, the Secretary of Health and Human
105 Resources may shorten the time requirements of subsection F. If, in the Secretary's sole discretion, such
106 time limitations reasonably preclude any advance published notice, he may waive the requirements of
107 subsection F. However, the agency shall, as soon as practicable after the adoption of the regulation in a
108 manner consistent with the requirements of subsection F, publish notice of the promulgation of the
109 regulation and afford an opportunity for public comment. The precise factual basis for the Secretary's
110 determination shall be stated in the published notice.

111 J. For the purpose of this article, public assistance programs shall consist of those specified in
112 § 63.1-87.

113 K. If one or more changes with substantial impact are made to a proposed regulation from the time
114 that it is published as a proposed regulation to the time it is published as a final regulation, any person
115 may petition the agency within thirty days from the publication of the final regulation to request an
116 opportunity for oral and written submittals on the changes to the regulation. If the agency receives
117 requests from at least twenty-five persons for an opportunity to submit oral and written comments on the

118 changes to the regulation, the agency shall (i) suspend the regulatory process for thirty days to solicit
 119 additional public comment, and (ii) file notice of the additional thirty-day public comment period with
 120 the Registrar of Regulations, unless the agency determines that the changes made are minor or
 121 inconsequential in their impact. *The comment period, if any, shall begin on the date of publication of the*
 122 *notice in the Register.* Agency denial of petitions for a comment period on changes to the regulation
 123 shall be subject to judicial review.

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

126 M. This section shall not apply to the issuance by the Department of Air Pollution Control of
 127 variances to its regulations.

128 § 9-6.14:9.1. Executive review of proposed and final regulations; changes with substantial impact.

129 A. The Governor shall adopt and publish procedures by executive order for review of all proposed
 130 regulations governed by this chapter by June 30 of the year in which the Governor takes office. The
 131 procedures shall include (i) review by the Attorney General to ensure statutory authority for the
 132 proposed regulations; (ii) examination by the Governor to determine if the proposed regulations are
 133 necessary to protect the public health, safety and welfare; and (iii) examination by the Governor to
 134 determine if the proposed regulations are clearly written and easily understandable. The procedures may
 135 also include review of the proposed regulation by the appropriate Cabinet Secretary.

136 The Governor's review of a proposed regulation shall begin upon the publication of that proposed
 137 regulation in the Register. The Governor shall transmit his comments on that proposed regulation to the
 138 Registrar and the agency prior to the completion of the public comment period provided for in
 139 § 9-6.14:7.1. The Governor may recommend amendments or modifications to any regulation which
 140 would bring that regulation into conformity with statutory authority or state or federal laws, regulations
 141 or judicial decisions.

142 Upon receipt of the Governor's comments on the proposed regulation, the agency (i) may adopt the
 143 proposed regulation if the Governor has no objection to the regulation; (ii) may modify and adopt the
 144 proposed regulation after considering and incorporating the Governor's objections or suggestions; or (iii)
 145 may adopt the regulation without changes despite the Governor's recommendations for change.

146 B. Upon final adoption of the regulation, the agency shall forward a copy of the regulation to the
 147 Registrar of Regulations for publication as soon as practicable in the Register. All changes to the
 148 proposed regulation shall be highlighted in the final regulation, and substantial changes to the proposed
 149 regulation shall be explained in the final regulation.

150 C. If the Governor finds that one or more changes with substantial impact have been made to the
 151 proposed regulation, he may require the agency to provide an additional thirty days to solicit additional
 152 public comment on the changes *by transmitting notice of the additional public comment period to the*
 153 *agency and to the Registrar within the thirty-day adoption period described in subsection D, and*
 154 *publishing the notice in the Register. The additional public comment period required by the Governor*
 155 *shall begin upon publication of the notice in the Register.*

156 D. A thirty-day final adoption period for regulations shall commence upon the publication of the
 157 final regulation in the Register. The Governor shall review the final regulation during this thirty-day
 158 final adoption period and if he objects to any portion or all of a regulation, the Governor may file a
 159 formal objection to the regulation, suspend the effective date of the regulation in accordance with
 160 subsection B of § 9-6.14:9.2, or both.

161 If the Governor files a formal objection to the regulation, he shall forward his objections to the
 162 Registrar and agency prior to the conclusion of the thirty-day final adoption period. The Governor shall
 163 be deemed to have acquiesced to a promulgated regulation if he fails to object to it or if he fails to
 164 suspend the effective date of the regulation in accordance with subsection B of § 9-6.14:9.2 during the
 165 thirty-day final adoption period. The Governor's objection, or the suspension of the regulation, or both if
 166 applicable, shall be published in the Register.

167 A regulation shall become effective as provided in § 9-6.14:9.3.

168 E. This section shall not apply to the issuance by the State Air Pollution Control Board of variances
 169 to its regulations.

170 § 9-6.14:9.3. Effective date of regulation.

171 A regulation adopted in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) and the
 172 Virginia Register Act (§ 9-6.15 et seq.), shall become effective at the conclusion of the thirty-day final
 173 adoption period provided for in subsection D of § 9-6.14:9.1, or any other later date specified by the
 174 promulgating agency, unless:

175 1. A legislative objection has been filed in accordance with § 9-6.14:9.2, in which event the
 176 regulation, unless withdrawn by the promulgating agency, shall become effective on a date specified by
 177 the promulgating agency which shall be after the expiration of the applicable twenty-one-day extension
 178 period provided in § 9-6.14:9.2;

179 2. The Governor has exercised his authority in accordance with § 9-6.14:9.1 to require the agency to
180 provide for additional public comment, in which event the regulation, unless withdrawn by the
181 promulgating agency, shall become effective on a date specified by the promulgating agency which shall
182 be after the period for which the Governor has provided for additional public comment; or

183 3. The Governor and the General Assembly have exercised their authority in accordance with
184 subsection B of § 9-6.14:9.2 to suspend the effective date of a regulation until the end of the next
185 regular legislative session; or

186 4. *The agency has suspended the regulatory process in accordance with subsection K of § 9-6.14:7.1,*
187 *in which event the regulation, unless withdrawn by the agency, shall become effective on the date*
188 *specified by the agency which shall be after the thirty-day public comment period required by subsection*
189 *K of § 9-6.14:7.1.*

190 This section shall not apply to the issuance by the State Air Pollution Control Board of variances to
191 its regulations.