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**HOUSE BILL NO. 1948**

Offered January 12, 2005

Prefiled January 10, 2005

*A BILL to amend and reenact § 2.2-4007 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-4007.1, relating to the Administrative Process Act; regulations impacting small businesses.*

Patrons—Saxman, Cosgrove, Albo, Athey, Barlow, Carrico, Cole, Cox, Dudley, Eisenberg, Frederick, Gear, Griffith, Hall, Jones, S.C., Kilgore, Landes, Lingamfelter, Marshall, D.W., McDougle, McQuigg, Miller, Morgan, Nixon, Nutter, O'Bannon, Oder, Parrish, Petersen, Rapp, Rust, Scott, E.T., Sherwood, Suit, Ware, R.L., Weatherholtz, Welch and Wright; Senator: Cuccinelli

Referred to Committee on General Laws

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

**1. That § 2.2-4007 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-4007.1 as follows:**

§ 2.2-4007. Notice of intended regulatory action; 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 petition shall state (i) the substance and purpose of the rulemaking that is requested, including reference to any applicable Virginia Administrative Code sections, and (ii) reference to the legal authority of the agency to take the action requested. Within 14 days of receiving a petition, the agency shall send a notice identifying the petitioner, the nature of the petitioner's request and the agency's plan for disposition of the petition to the Registrar for publication in the Virginia Register of Regulations in accordance with the provisions of subsection B of § 2.2-4031. A 21-day period for acceptance of written public comment on the petition shall be provided after publication in the Virginia Register. The agency shall issue a written decision to grant or deny the petitioner's request within 90 days following the close of the comment period. However, if the rulemaking authority is vested in an entity that has not met within that 90-day period, the entity shall issue a written decision no later than 14 days after it next meets. The written decision issued by the agency shall include a statement of its reasons and shall be submitted to the Registrar for publication in the Virginia Register of Regulations. Agency decisions to initiate or not initiate rulemaking in response to petitions shall not be subject to judicial review.

B. 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 provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject matter and intent of the planned regulation. At least 30 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 the agency to hold a public hearing or (ii) the agency receives requests for a public hearing from at least 25 persons.

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 that 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 the panels or consultation appropriate and intends to make use of the panels or consultation.

E. In formulating any regulation, including but not limited to those in public assistance and social services programs, the agency pursuant to its public participation guidelines shall afford interested

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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 begin drafting the proposed regulation prior to or during any opportunities it provides to the public to submit comments.

F. In the case of all regulations, except those regulations exempted by §§ 2.2-4002, 2.2-4006, or § 2.2-4011, 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 § 2.2-4031. In addition, the agency may, in its discretion, (i) publish the notice in any newspaper and (ii) publicize the notice through press releases and such other media as will best serve the purpose and subject involved. The Register and any newspaper publication shall be made at least 60 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.

G. If an agency wishes to change a proposed regulation before adopting it as a final regulation, it may choose to publish a revised proposed regulation provided the latter is subject to a public comment period of at least 30 additional days and the agency complies in all other respects with this section.

H. Before delivering any proposed regulation under consideration to the Registrar as required in subsection I, the agency shall deliver 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. 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; and the projected costs to affected businesses, localities or entities to implement or comply with the regulations, including the estimated fiscal impact on such localities and sources of potential funds to implement and comply with such regulation. *The economic impact analysis shall differentiate between small businesses and other businesses identified; estimate the projected reporting, recordkeeping and other administrative costs required for compliance by such small businesses with the regulation; and include a description of any alternative method for achieving the purpose of the regulation while minimizing adverse impact on small businesses.* 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 subsection I, and a copy to the Registrar for publication with the proposed regulation. No regulation shall be promulgated for consideration pursuant to subsection I until the impact analysis has been received by the Registrar. For purposes of this section, the ~~term~~ terms (i) "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 and (ii) "small business" means a business entity, including its affiliates, that (a) is independently owned and operated and (b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million. 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.) of this chapter or otherwise to challenge the actions of the Department hereunder or the action of the agency in adopting the proposed regulation.

I. 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 pursuant to subsection H. 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 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, together with the notice of opportunity for oral or written submittals on the proposed regulation.

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

K. If one or more changes with substantial impact are made to a proposed regulation from the time that it is published as a proposed regulation to the time it is published as a final regulation, any person may petition the agency within 30 days from the publication of the final regulation to request an opportunity for oral and written submittals on the changes to the regulation. If the agency receives requests from at least 25 persons for an opportunity to submit oral and written comments on the changes to the regulation, the agency shall (i) suspend the regulatory process for 30 days to solicit additional public comment and (ii) file notice of the additional 30-day public comment period with the Registrar of Regulations, unless the agency determines that the changes made are minor or inconsequential in their impact. The comment period, if any, shall begin on the date of publication of the notice in the Register. Agency denial of petitions for a comment period on changes to the regulation shall be subject to judicial review.

L. In no event shall the failure to comply with the requirements of subsection F be deemed mere harmless error for the purposes of § 2.2-4027.

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

*§ 2.2-4007.1. Regulatory flexibility for small businesses; periodic review of regulations.*

*A. In addition to the requirements of § 2.2-4007, prior to the adoption of any proposed regulations, an agency shall prepare a regulatory flexibility analysis in which the agency shall consider utilizing regulatory methods that will accomplish the objectives of applicable law while minimizing the adverse impact on small businesses. An agency shall consider, at a minimum, each of the following methods of reducing the impact of the proposed regulation on small businesses:*

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

*B. In addition to the requirements of § 2.2-4017, on or before July 1, 2009, an agency shall review its regulations to determine whether they should be continued without change or be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses.*

*If the agency head determines that completion of the review of existing regulations is not feasible by July 1, 2009, the agency shall publish a statement certifying that determination. An agency may extend the date required by this subsection in increments of one year, not to exceed a total of five years.*

*C. In addition, all final regulations adopted after July 1, 2005, shall be reviewed every five years to ensure that they minimize the economic impact on small businesses in a manner consistent with the stated objectives of applicable law.*

*D. The regulatory review required by this section shall include consideration of:*

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

*E. For the purposes of this section, the terms "economic impact" and "small business" mean the same as those terms are described or defined in § 2.2-4007 H.*