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SENATE BILL NO. 1431

Offered January 12, 2017

A *BILL to amend and reenact §§ 2.2-4007.04 and 2.2-4027 of the Code of Virginia, relating to the Administrative Process Act; economic impact analysis of proposed regulations; input from affected businesses.*

Patrons—Reeves, Barker and Sturtevant

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4007.04 and 2.2-4027 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4007.04. Economic impact analysis.

A. Before delivering any proposed regulation under consideration to the Registrar as required in § 2.2-4007.05, the agency shall submit on the Virginia Regulatory Town Hall 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, as follows:

1. 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, 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;

2. *In conducting the economic impact analysis, the Department of Planning and Budget shall provide an opportunity for the businesses or other entities to which the regulation would apply to provide input regarding the anticipated economic impact of the proposed regulation, which shall be considered and included in the economic impact analysis.*

3. 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; and

3. 4. 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.

B. 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.

C. In the event *that* 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

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59 significant adverse economic impact on a locality, business, or entity particularly affected, the
60 Department shall advise the Joint Commission on Administrative Rules, the House Committee on
61 Appropriations, and the Senate Committee on Finance within the 45-day period. The Joint Commission
62 on Administrative Rules shall review such rule or regulation and issue a statement containing the
63 Commission's findings in accordance with § 30-73.3.

64 **§ 2.2-4027. Issues on review.**

65 The burden shall be upon the party complaining of agency action to designate and demonstrate an
66 error of law subject to review by the court. Such issues of law include: (i) accordance with
67 constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction
68 limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which
69 regulations may be made, and the factual showing respecting violations or entitlement in connection
70 with case decisions, (iii) observance of required procedure where any failure therein is not mere
71 harmless error, and (iv) the substantiality of the evidentiary support for findings of fact. The
72 determination of such fact issue shall be made upon the whole evidentiary record provided by the
73 agency if its proceeding was required to be conducted as provided in § 2.2-4009 or 2.2-4020 or, as to
74 subjects exempted from those sections, pursuant to constitutional requirement or statutory provisions for
75 opportunity for an agency record of and decision upon the evidence therein.

76 In addition to any other judicial review provided by law, a small business, as defined in subsection A
77 of § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be entitled to judicial
78 review of compliance with the requirements of ~~subdivision~~ *subdivisions A 2 and 3* of § 2.2-4007.04 and
79 § 2.2-4007.1 within one year following the date of final agency action.

80 When the decision on review is to be made on the agency record, the duty of the court with respect
81 to issues of fact shall be to determine whether there was substantial evidence in the agency record to
82 support the agency decision. The duty of the court with respect to the issues of law shall be to review
83 the agency decision de novo. The court shall enter judgment in accordance with § 2.2-4029.

84 Where there is no agency record so required and made, any necessary facts in controversy shall be
85 determined by the court upon the basis of the agency file, minutes, and records of its proceedings under
86 § 2.2-4007.01 or 2.2-4019 as augmented, if need be, by the agency pursuant to order of the court or
87 supplemented by any allowable and necessary proofs adduced in court except that the function of the
88 court shall be to determine only whether the result reached by the agency could reasonably be said, on
89 all such proofs, to be within the scope of the legal authority of the agency.

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