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Periodic Review and Small Business Impact Review Report of Findings

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) Chapter citation(s)	2 VAC 5-585
VAC Chapter title(s)	Retail Food Establishment Regulations
Date this document prepared	September 8, 2020

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Acronyms and Definitions

Define all acronyms used in this Report, and any technical terms that are not also defined in the "Definitions" section of the regulation.

"FDA" means the U.S. Food and Drug Administration.

"Model Food Code" means a set of regulatory requirements pertaining to retail food stores published by the FDA every four years to be adopted as regulation by states and localities.

"Model Food Code Supplement" means a set of regulatory requirements pertaining to retail food stores published by the FDA two years after the Model Food Code is released to be adopted as regulation by states and localities.

"VDH" means the Virginia Department of Health.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter

number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

Section 3.2-109 of the Code of Virginia (Code) establishes the Board of Agriculture and Consumer Services (Board) as a policy board with the authority to adopt regulations in accordance with the provisions of Title 3.2 of the Code.

Section 3.2-5121 grants the Board authority to adopt regulations for the efficient enforcement of Article 3 of the Food and Drink Law, which pertains to the adulteration, misbranding, and false labeling of food.

Alternatives to Regulation

Describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.

The agency could attempt to enforce the standards relating to requirements for retail food stores via the general statutes in the Food and Drink Law (Va. Code § 3.2-5100 *et seq.*). However, those statutes lack the specific language necessary to ensure that retail food stores receive, process, package, and sell food products in a manner that is safe. The law falls significantly short in ensuring that the language and requirements relative to retail food stores ensures optimal public health protection. The Retail Food Establishment Regulations, which are adopted from the FDA's Model Food Code, establish reasonable, minimum sanitary standards for retail food establishments such as supermarkets, grocery stores, and convenience stores. Those standards include the safe and sanitary maintenance, storage, operation, and use of food preparation equipment; the safe preparation, handling, protection, and preservation of food including necessary refrigeration or heating methods; procedures for vector and pest control; requirements for toilet and hand washing facilities for employees; requirements for appropriate lighting and ventilation; requirements for an approved water supply and sewage disposal system; personal hygiene standards for employees; and the appropriate use of precautions to prevent the transmission of communicable diseases.

Congress has mandated, through the 2011 Food Safety Modernization Act, the establishment of a national food safety system that integrates federal, state, and local food protection agencies. One component of this integration process is the establishment of uniform regulations at all levels. Currently, most states and localities have adopted FDA's Model Food Code as regulation for their retail food establishments. Uniform adoption of this model code by states ensures the enforcement of similar science-based, protective regulations within each state that are focused on public health protection and is a significant step in the integration of all states into a singular national food safety system.

Currently, within the Commonwealth, both the Virginia Department of Agriculture and Consumer Services (VDACS) and the Virginia Department of Health both enforce the same version of the FDA's Model Food Code at retail food stores and restaurants, respectively. Failure by VDACS to utilize this regulation would result in the enforcement of different standards for similar establishments within the Commonwealth. This potential scenario could be both costly and confusing to the retail food industry. Uniform regulations will result in a regulatory environment both in the Commonwealth and nationally that allows food industries to grow and flourish. Failure to provide regulatory oversight of retail food establishments with these regulations would also result in a decreased level of public health protection as well as the failure to fulfill the congressional mandate to assist in the creation of a national, uniform food safety system.

The current regulation is based on FDA's 2013 Model Food Code and the 2015 Model Food Code Supplement. The Board has adopted amendments to the regulation to incorporate specific, essential

elements of the 2017 Model Food Code as well as the 2019 Model Food Code Supplement. The regulatory action to finalize these amendments is currently underway.

Public Comment

Summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Be sure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. Indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

Commenter	Comment	Agency response
Stefanie Kitchen, Virginia Farm Bureau Federation (VFBF)	VFBF has no recommended changes to the regulation.	The agency appreciates the commenter's feedback and participation in the periodic review of this regulation.

The agency did not form an informal advisory group to assist in this periodic review.

Effectiveness

Pursuant to § 2.2-4017 of the Code of Virginia, indicate whether the regulation meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.

This regulation is applicable to many thousands of retail establishments, all involved in diverse food related activities. The regulation provides specific requirements that are designed to ensure the optimal protection of the public's health, safety and welfare. The regulation ensures that the consuming public has access to food products that are received, processed, and held in a safe manner. The regulation also ensures that requirements are in place that help to ensure that foodborne illnesses do not occur. The standards are not arbitrary but are based on sound science and practical requirements.

The regulation, although comprehensive, is constructed in a manner that is clearly written and easily understandable by regulators and the industry as well as interested citizens.

Decision

Explain the basis for the promulgating agency's decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).

The agency has determined that the regulation does not need any amendments in addition to those recently adopted by the Board to incorporate specific, essential, and relevant elements of the 2017 Model Food Code as well as the 2019 Model Food Code Supplement. The agency is effectuating proposed amendments via a fast-track regulatory action that is currently under executive branch review.

These amendments are necessary to ensure that the agency's Food Safety Program utilizes regulations that are current and based on the latest science. These amendments will also ensure that VDACS

enforces regulations consistent with those regulations enforced by the VDH as well as other states across the nation who are engaged in food safety regulation.

Small Business Impact

As required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (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. Also, discuss why the agency's decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

There is a continued need for this regulation. The regulation ensures that retail food stores meet minimum sanitary requirements and provide safe food products to the citizens of Virginia. The regulation provides effective and practical science-based measures and requirements that are designed to ensure the optimal protection of the public's health, safety, and welfare. The regulation ensures that the consuming public has access to food products that are received, processed, held, and sold in a safe manner. The regulation also provides essential requirements that help to ensure that foodborne illnesses do not occur. The agency has not received any complaints regarding the regulation. Although the regulation provides comprehensive measures to ensure the safety of food products at retail food stores, the regulation is not overly complex and is easily understood by regulators, the industry, and the citizens of Virginia. The regulation does not overlap, duplicate, or conflict with federal or state law or regulation.

The regulation was evaluated following FDA's publication of the 2017 Model Food Code. The regulation is regularly evaluated and updated as the FDA publishes the Model Food Code every four years. Since the Model Food Code is updated on a regular basis, it keeps pace with changes in technology and economic conditions. A regulatory action to amend 2 VAC 5-585 to reflect the 2017 Model Food Code and 2019 Model Food Code Supplement is currently underway.

The regulations are science based, practical requirements for retail food businesses. They are not overly burdensome and will help ensure the prevention of food borne illnesses. These requirements take into account and minimize the economic impact of the regulations for small businesses.