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MEMORANDUM

TO: M. Norman Oliver, M.D., M.A.
Commissioner, Department of Health

FROM: Grant E. Kronenberg
Assistant Attorney General

DATE: May 20, 2021

SUBJECT: Periodic Review of Regulations
Food Regulations, 12VAC5-421-10 *et seq.*

In accordance with Code of Virginia § 2.2-4017 and Executive Order 14 (2018 Amended), I reviewed the Food Regulations, 12VAC5-421-10 *et seq.* These regulations have undergone periodic review.

In my opinion, the Board of Health had the statutory authority under Code of Virginia §§ 35.1-11 and 35.1-14 to adopt the current Food Regulations, with the following exception.

The Food Regulations at 12VAC5-421-10 set forth a definition of “food establishment.” The regulation includes the following carve out from that definition:

‘Food establishment’ does not include:...

4. A kitchen in a private home if only food that is not time/temperature control for safety food is prepared for sale or service at a function such as a religious or charitable organization’s bake sale if allowed by law and if the consumer is informed by a clearly visible placard at the sales or service location that the food is prepared in a kitchen that is not subject to regulation and inspection by the regulatory authority;

5. An area where food that is prepared as specified in subdivision 4 of this definition is sold or offered for human consumption...

Title 35.1 imposes obligations, including licensure, on any entity that qualifies as a “restaurant” as defined in therein. Code of Virginia § 35.1-25(3) provides an exemption from these statutory requirements for churches, 501(c)(3) organizations, school and fraternal organizations, volunteer fire departments, and volunteer emergency medical services agencies, that are engaged in a fundraising event. This statutory exemption contains specific requirements that must be met for the entity to fall within the exemption. While the above-provided regulatory carve out from the definition of “food establishment” tracks the statutory exemption in part, it adds a requirement that the food being served not be time/temperature control for safety food and that a consumer advisory placard be used. Additionally, the regulatory carve out does not contain any time limitation, while a time limitation is found in the statutory exemption. Consequently, an entity could fall within the regulatory carve out but not be exempt by statute, and vice versa.

I do not find there to be authority under Title 35.1 to impose regulatory requirements upon an entity when that entity would otherwise fit within the statutory exemption, or to exempt an entity by regulation from statutory requirements when the entity falls within the regulatory carve out but not the statutory exemption.

Importantly, I note that there are currently pending amendments to the Food Regulations, which will soon go into effect, that address and resolve this issue.