



## Virginia Department of Planning and Budget **Economic Impact Analysis**

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### **3 VAC 5-10 Procedural Rules for the Conduct of Hearings Before the Board and Its Hearing Officers**

**Virginia Alcoholic Beverage Control Authority**

**Town Hall Action/Stage: 6202 / 10227**

February 14, 2024

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The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 19. The analysis presented below represents DPB's best estimate of the potential economic impacts as of the date of this analysis.<sup>1</sup>

### **Summary of the Proposed Amendments to Regulation**

The Virginia Alcoholic Beverage Control Board (Board) proposes amendments to the regulation to 1) specify that only interested parties or their legal counsel can exercise the right of cross-examination; 2) extend the timeframe in which an offer in compromise may be submitted; 3) align the regulation with current procedures, authority, and terminology; and 4) eliminate obsolete text.

### **Background**

#### *Cross-examination*

The current regulation refers to counsel, interested parties, and other representatives of such parties exercising the right of cross-examination. Until recently, non-attorney consultants have at times also done cross-examination.<sup>2</sup> On September 29, 2023, the Supreme Court of

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<sup>1</sup> Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

<sup>2</sup> Source: Virginia Alcoholic Beverage Control Authority

Virginia approved the Virginia State Bar’s Unauthorized Practice of Law Opinion 219 (UPL Opinion 219).<sup>3</sup> UPL Opinion 219 states in part that non-lawyer members of a lay consulting firm may not represent licensees and licensee applicants in hearings before the Board. Thus, the Board proposes to amend the regulation to specify that only interested parties or their legal counsel can exercise the right of cross-examination.

#### *Offers in Compromise*

The current regulation states that “Offers in compromise may be submitted anytime following notice of a disciplinary proceeding and before the conclusion of an appeal hearing.” The Board proposes to amend that wording to “Offers in compromise may be submitted anytime following notice of a disciplinary proceeding and before the **authority issues a final decision in an appeal.**”<sup>4</sup>

The current regulation also states that “Any such offer may not be accepted at the informal conference and no offer shall be submitted after the conclusion of the appeal hearing.” The Board proposes to eliminate that sentence.

#### *Align with Current Procedures and Authority*

The current regulation states that hearings may be conducted in person or by telephone. The Board proposes to add that hearings may also be conducted virtually. According to the Virginia Alcoholic Beverage Control Authority (ABC) staff, hearings are already conducted virtually when all parties agree to that method.

The Board proposes to expand the list of items within the authority of administrative law judges by adding “Conduct mediation between interested parties” and “Require the designation of an interested person to act as a representative for proceedings involving groups of individuals present for the same purpose.”. Administrative law judges were given the authority for mediation by Chapter 698 of the 2017 *Acts of Assembly*.<sup>5</sup> Another section of the regulation already allows the judges to require that an interested person be designated to act as a representative for proceedings involving groups of individuals present for the same purpose via text.<sup>6</sup>

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<sup>3</sup> See <https://vsb.org/common/Uploaded%20files/UPLs/219.pdf>

<sup>4</sup> Bold added for emphasis.

<sup>5</sup> See <https://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+CHAP0698>

<sup>6</sup> Specifically, 3VAC5-10-90(C).

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## Estimated Benefits and Costs

Since the approval of UPL Opinion 219, the administrative law judges have not permitted non-attorney consultants to conduct cross-examination.<sup>7</sup> Thus, amending the regulation to specify that only interested parties or their legal counsel can exercise the right of cross-examination would not affect what occurs in practice, but it would improve clarity and reduce the possibility that readers of the regulation misunderstand what can occur in practice.

Expanding the timeframe within which offers in compromise can be submitted and accepted is beneficial in that it increases the likelihood that a compromise suitable to all parties can be reached.

The proposed amendments to reflect current procedures, authority, and terminology are beneficial in that the regulation would better reflect what occurs and can occur in practice.

## Businesses and Other Entities Affected

The proposed amendments potentially affect ABC's approximate 20,892 licensees<sup>8</sup> who manufacture, distribute, or sell and serve alcoholic beverages in the Commonwealth, and other interested parties.

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.<sup>9</sup> An adverse impact is indicated if there is any increase in net cost or reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.<sup>10</sup> None of the proposed amendments increase cost or reduce benefit. Thus, no adverse impact is indicated.

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<sup>7</sup> Source: ABC

<sup>8</sup> Data Source: ABC

<sup>9</sup> Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance.

<sup>10</sup> Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.

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### **Small Businesses<sup>11</sup> Affected:<sup>12</sup>**

The proposed amendments do not appear to adversely affect small businesses.

### **Localities<sup>13</sup> Affected<sup>14</sup>**

The proposed amendments neither disproportionately affect any particular localities, nor affect costs for local governments.

### **Projected Impact on Employment**

The proposed amendments do not appear to affect total employment.

### **Effects on the Use and Value of Private Property**

The proposed amendments do not substantively affect the use and value of private property. The proposed amendments do not affect real estate development costs.

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<sup>11</sup> Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

<sup>12</sup> If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

<sup>13</sup> “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>14</sup> § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.