



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

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**2 VAC 5-585 Retail Food Establishment Regulations**  
**Department of Agriculture and Consumer Services**  
**Town Hall Action/Stage: 6484 / 10354**  
October 10, 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 Board of Agriculture and Consumer Services (Board) proposes to amend the existing *Retail Food Establishment Regulations* to incorporate, in part, 2022 amendments to the Food and Drug Administration (FDA) Food Code. The current regulation is based on the 2017 Food Code and its 2019 Supplement.

## **Background**

The *Retail Food Establishment Regulations* establish 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 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

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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 or 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.

standards for employees; and the appropriate use of precautions to prevent the transmission of communicable diseases.

Standards in the regulation are labelled as either priority, priority foundation, or core; these labels correspond to certain timeframes and other corrective action requirements for each affected item. The current and proposed regulation state that "... an operator or person in charge shall at the time of inspection correct a violation of a priority item or priority foundation item of this chapter and implement corrective actions for a HACCP [Hazard Analysis and Critical Control Point] plan provision that is not in compliance with its critical limit." Further,

Considering the nature of the potential hazard involved and the complexity of the corrective action needed, the department may agree to or specify a longer timeframe, not to exceed:

1. 72 hours after the inspection, for the operator to correct violations of a priority items; or
2. 10 calendar days after the inspection, for the operator to correct a priority foundation item or HACCP plan deviations.

For core items, the current and proposed regulation state that "... the operator or person in charge shall correct core items by a date and time agreed to or specified by the department but no later than 90 calendar days after the inspection."<sup>2</sup>

The proposed amendments with a potential impact in each section are discussed below. Some of these items are labelled as priority, priority foundation, or core.

#### *Section 40 Definitions*

There are several amendments to this section. Adding "sesame" to the definition of "Major food allergen" may have an impact as described below in the Estimated Benefits and Costs section.

#### *Section 70 Duties of person in charge*

The Board proposes to add the following to the list of items for which the person in charge is responsible to ensure: "Food employees are properly maintaining the temperature of

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<sup>2</sup> The regulation also states that "The department may approve a compliance schedule that extends beyond the time limits specified under subsection A of this section if a written schedule of compliance is submitted by the operator and no health hazard exists or will result from allowing an extended schedule for compliance."

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time/temperature control for safety foods during thawing through daily oversight of the food employees' routine monitoring of food temperatures.”

*Section 80 Responsibility of permit holder, person in charge, and conditional employees*

Under the current regulation, food employees who are diagnosed with an infection from Salmonella (nontyphoidal) and are asymptomatic, are to be prevented from working as an employee in the food establishment or entering the food establishment as an employee. The Board proposes to amend the text to indicate that such individuals are to be restricted rather than be excluded from working. The current and proposed regulation define “restrict” as “to limit the activities of a food employee so that there is no risk of transmitting a disease that is transmissible through food and the food employee does not work with exposed food, clean equipment, utensils, linens, or unwrapped single-service or single-use articles.”

*Section 430 Molluscan shellfish; original container*

The Board proposes to add that “Molluscan shellfish from one tagged or labeled container may not be commingled with molluscan shellfish from another container with different certification numbers, different harvest dates, or different harvest areas identified on the tag or label before being ordered by the consumer.”

*Section 440 Molluscan shellfish; maintain identification*

The current regulation requires specified recordkeeping information on the tag or label. The proposed regulation adds a third option, the invoice.

*Section 620 Food storage; prohibited areas*

Currently, the prohibition on storing food in toilet rooms is a core standard. The Board proposes to make it a priority foundation item.

*Section 726 Manufacturer cooking instructions*

This section is new under the proposed regulation. In its entirety, it states that:

A. Commercially packaged food that bears a manufacturer’s cooking instructions shall be cooked according to those instructions before use in ready-to-eat foods or offered in unpackaged form for human consumption, unless the manufacturer’s instructions specify that the food may be consumed without cooking. <sup>P</sup>

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B. Food for which the manufacturer has provided information that it has not been processed to control pathogens, when used in ready-to-eat foods or offered for human consumption, shall be cooked according to a time and temperature appropriate for the food. <sup>P</sup>

The “P” superscripts indicate that the proposed new standards are priority items.

*Section 870 Reduced oxygen packaging without a variance, criteria*

The Board proposes to include an additional option to package and seal food products by a cooling or sous-vide process so long as the food meets certain refrigeration requirements.

*Section 900 Food labels*

The Board proposes to require food establishments to notify consumers (through card, sign, or other method) regarding potential allergens in bulk food that is available for consumer self-dispensing.

*Section 910 Other forms of information*

The Board proposes to require food establishments to notify consumers in writing of the presence of major food allergens as an ingredient in unpackaged food items that are served or sold to the consumer.

*Section 1540 Equipment, clothes washers and dryers, and storage cabinets, contamination prevention*

Currently, the prohibition on locating equipment, cabinets used for the storage of food, or cabinets used to store cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use article in toilet rooms is a core standard item. The Board proposes to make it a priority foundation item.

*Section 2010 Prohibitions*

Currently, the prohibition on storing cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles in toilet rooms is a core standard. The Board proposes to make it a priority foundation item.

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### *Section 2190 Handwashing sink, installation*

The Board proposes to reduce the minimum hot water temperature at a handwashing sink from 100°F to 85°F.<sup>3</sup>

### *Section 3370 Poisonous or toxic material containers*

The current section in its entirety is the following sentence: “A container previously used to store poisonous or toxic materials shall not be used to store, transport, or dispense food.<sup>P</sup>”

The Board proposes to add “, equipment, utensils, linens, single-service, or single-use articles” after “food” and before the period.

## **Estimated Benefits and Costs**

Alignment of the Virginia *Food Regulations* to the 2022 FDA Food Code may benefit chain food establishments that operate in other states and localities that also use the most recent version of the Food Code. Many large chain operations use the most recent edition of the Food Code as an operational standard to ensure they reduce liability and operate consistently throughout their operational region.<sup>4</sup> By adopting current changes to the FDA Food Code, there is also consistency with the Virginia Department of Health *Food Regulations*.

### *Section 10 Definitions*

The current regulation (Section 900) requires that labels on food packaged in a food establishment include, “The name of the food source for each major food allergen contained in the food unless the food source is already part of the common or usual name of the respective ingredient.” In the proposed regulation (Section 900), bulk food that is available for consumer self-dispensing must also be prominently labeled with each major food allergen contained in the food unless the food source is already part of the common or usual name of the respective ingredient. The Board also proposes to state (Section 910) that, “The permit holder shall notify consumers by written notification of the presence of major food allergens as an ingredient in unpackaged food items that are served or sold to the consumer.”

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<sup>3</sup> The 2022 Edition of the FDA Food Code and the International Plumbing Code define “tempered water” as having a temperature range between 29.4°C (85°F) and 43°C (110°F). The current regulation states that “A handwashing sink shall be equipped to provide water at a temperature of at least 100°F (38°C) ... .” The proposal is to replace “100°F (38°C)” with “85°F (29.4°C).”

<sup>4</sup> Source: VDACS (see page three of Office of Regulatory Management Economic Review Form: [https://townhall.virginia.gov/L/GetFile.cfm?File=48\6484\10354\ORM\\_EconomicImpact\\_VDACS\\_10354\\_v2.pdf](https://townhall.virginia.gov/L/GetFile.cfm?File=48\6484\10354\ORM_EconomicImpact_VDACS_10354_v2.pdf))

Given the current and proposed notification requirements (see above paragraph), adding sesame to the definition of “major food allergen” would make it substantively more likely that individuals allergic to sesame would be aware that food that they may consider obtaining and eating from a food establishment contains sesame. According to the U.S. Department of Health and Human Services, National Institutes of Health, the sesame allergy is one of the ten most common childhood food allergies, and reactions can be severe.<sup>5</sup> Sesame allergies can cause anaphylaxis, a serious and potentially life-threatening reaction.<sup>6</sup> Thus, adding sesame to the definition of “major food allergen” would likely be substantively beneficial for public health.

There would be cost to food establishments of providing this information on menus, packages, bulk food containers, etc., but it would likely be small, particularly compared to the potential benefit.

#### *Section 70 Duties of person in charge*

As mentioned above, the Board proposes to add the following to the list of items for which the person in charge is responsible to ensure: “Food employees are properly maintaining the temperature of time/temperature control for safety foods during thawing through daily oversight of the food employees' routine monitoring of food temperatures.” The regulation already contains specific time/temperature control requirements for thawing. Adding this to the list of items for which the person in charge is responsible to ensure would put a greater emphasis on the importance of following safe thawing methods, but it would not likely produce a large change on what occurs in practice. The person in charge may remind the employees more often on what the safe thawing methods are.

#### *Section 80 Responsibility of permit holder, person in charge, and conditional employees*

As described above, under the current regulation food employees who are diagnosed with an infection from Salmonella (nontyphoidal) and are asymptomatic, are to be prevented from working as an employee in the food establishment. The Board proposes to amend the text to allow such individuals to work in a capacity where their activities are limited to where there is no risk of transmitting the disease and the food employee does not work with exposed food, clean

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<sup>5</sup> See <https://www.nih.gov/news-events/nih-research-matters/sesame-allergy-common-among-children-food-allergies>

<sup>6</sup> See <https://www.healthline.com/health/allergies/understanding-sesame-allergies>

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equipment, utensils, linens, or unwrapped single-service or single-use articles. This proposed amendment would be beneficial for both employees with such infections in that they can earn income, and for the food establishment in staffing.

*Section 430 Molluscan shellfish; original container*

The Board proposes to add that “Molluscan shellfish from one tagged or labeled container may not be commingled with molluscan shellfish from another container with different certification numbers, different harvest dates, or different harvest areas identified on the tag or label before being ordered by the consumer.” Proper identification is vital for tracing the origin of shellfish in the event of a foodborne outbreak. Prohibiting the comingling may make it more likely that tracing the origin of shellfish in the event of a foodborne outbreak can be done accurately. This is beneficial in that it may reduce the likelihood that people consume unsafe molluscan shellfish. It could also potentially be beneficial for the food establishment and providers of the molluscan shellfish in that recalls of the product could be narrower and the area of growing waters closed to harvesting could be smaller when identification is more precise.

*Section 440 Molluscan shellfish; maintain identification*

Adding a third option (invoices) for recordkeeping could be beneficial for food establishments that would prefer that option over the existing two (tag or label).

*Section 620 Food storage; prohibited areas*

Currently, the prohibition on storing food in toilet rooms is a core standard item. The Board proposes to make it a priority foundation item. This would reduce the maximum number of days that the food establishment could be given to correct this violation from 90 to ten.

*Section 726 Manufacturer cooking instructions*

This section is new under the proposed regulation. In its entirety, it states that:

A. Commercially packaged food that bears a manufacturer’s cooking instructions shall be cooked according to those instructions before use in ready-to-eat foods or offered in unpackaged form for human consumption, unless the manufacturer’s instructions specify that the food may be consumed without cooking.<sup>P</sup>

B. Food for which the manufacturer has provided information that it has not been processed to control pathogens, when used in ready-to-eat foods or offered for

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human consumption, shall be cooked according to a time and temperature appropriate for the food. <sup>P</sup>

The “P” superscripts indicate that the proposed new standards are priority items.

The proposed new standards may be beneficial for food safety, but may also limit a food preparer’s creativity if she or he wishes to cook the commercially packaged food in a different way than is described in the manufacturer’s instructions.

*Section 870 Reduced oxygen packaging without a variance, criteria*

The Board proposes to include an additional option to package and seal food products by a cooling or sous-vide process so long as the food meets certain refrigeration requirements. The additional option could be beneficial for food establishments that wish to use it.

*Section 900 Food labels*

The Board proposes to require food establishments to notify consumers (through a card, sign, or other method) regarding potential allergens in bulk food that is available for consumer self-dispensing. This would make it substantively more likely that individuals with food allergies would be aware that the bulk food contains the food for which they are allergic. As described above, food allergies can potentially be life threatening. Thus, this proposal would likely be substantively beneficial for public health.

The cost to the food establishment of providing this information on menus, packages, bulk food containers, etc., would likely be small, particularly compared to the potential benefit.

*Section 910 Other forms of information*

The Board proposes to require food establishment to notify consumers in writing of the presence of major food allergens as an ingredient in unpackaged food items that are served or sold to the consumer. This would make it substantively more likely that individuals with food allergies would be aware that the unpackaged food, including meals at restaurants, contains the food for which they are allergic. As described above, food allergies can potentially be life threatening. Thus, this proposal would likely be substantively beneficial for public health.

The cost to the food establishment of providing this information on menus, packages, bulk food containers, etc., would likely be small, particularly compared to the potential benefit.



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*Section 1540 Equipment, clothes washers and dryers, and storage cabinets, contamination prevention*

Currently, the prohibition on locating equipment, cabinets used for the storage of food, or cabinets used to store cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use article in toilet rooms or their vestibules is a core standard item. The Board proposes to make it a priority foundation item. This would reduce the maximum number of days that the food establishment could be given to correct this violation from 90 to ten.

*Section 2010 Prohibitions*

Currently, the prohibition on storing cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles in toilet rooms or their vestibules is a core standard item. The Board proposes to make it a priority foundation item. This would reduce the maximum number of days that the food establishment could be given to correct this violation from 90 to ten.

*Section 2190 Handwashing sinks, water temperature, and flow*

The Board proposes to reduce the minimum hot water temperature at a handwashing sink from 100°F to 85°F. This could result in energy cost savings for food establishments.

*Section 3370 Poisonous or toxic material containers*

The current section in its entirety is the following sentence: “A container previously used to store poisonous or toxic materials shall not be used to store, transport, or dispense food.<sup>P</sup>” The Board proposes to amend the sentence as follows, to expand this prohibition beyond just food, “A container previously used to store poisonous or toxic materials shall not be used to store, transport, or dispense food<sup>P</sup>, *equipment, utensils, linens, single-service, or single-use articles.* (emphasis added)” To the extent that containers previously used to store poisonous or toxic materials are actually used to store, transport, or dispense equipment, utensils, linens, single-service, or single-use articles, and the poisonous or toxic materials are not consistently 100 percent removed from the containers, this proposed amendment could improve public health. There is no information to indicate that finding containers that were not previously used to store poisonous or toxic materials would be costly.

## **Businesses and Other Entities Affected**

The proposed amendments affect the 9,907 active retail food establishments and an additional 30 with plans approved and waiting for the firm to open.

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.<sup>7</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>8</sup> Some of the proposed amendments likely produce a net benefit for society overall, but still do increase costs for some individual entities. For example, though the proposed required notifications for the presence of allergens potentially have large benefits for people with food allergies, they do (moderately) increase costs for food establishments. Thus, an adverse impact is indicated for food establishments.

### **Small Businesses<sup>9</sup> Affected:<sup>10</sup>**

#### Types and Estimated Number of Small Businesses Affected

VDACS states that it does not track the number of retail food establishments that qualify as small businesses, but notes that 4,946 of the retail establishments are independently owned and operated, and are not corporations.

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<sup>7</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>8</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.

<sup>9</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>10</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.

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### Costs and Other Effects

The proposal to require labeling and notifications for sesame and other allergens would moderately increase costs for small retail food establishments that are not already doing so.

### Alternative Method that Minimizes Adverse Impact

There are no clear alternative methods that both reduce adverse impact and meet the intended policy goals.

### **Localities<sup>11</sup> Affected<sup>12</sup>**

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

### **Projected Impact on Employment**

The proposed amendments do not appear to substantively affect total employment.

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

As described above, the proposal to reduce the minimum hot water temperature at a handwashing sink from 100°F to 85°F may result in reduced energy costs for some food establishments. These reduced costs could increase the value of these businesses. The proposed required notifications for the presence of allergens moderately increase costs for food establishments, potentially moderately reducing value. The proposed amendments do not affect real estate development costs.

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<sup>11</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>12</sup> § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.