



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

12 VAC 5-421 Food Regulations
Virginia Department of Health
Town Hall Action/Stage: 6453 / 10313
June 4, 2024

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.¹

Summary of the Proposed Amendments to Regulation

The State Board of Health (Board) proposes to amend the existing *Food Regulations* to: 1) allow other representatives of the Virginia Department of Health (VDH), not just the local health director, to act as presiding officer over an informal conference or proceeding, 2) allow presiding officers, not just the local health director, to affirm a hold order on food, and 3) remove the name of a document from 12 VAC 5-421-9999 *Documents Incorporated by Reference* that is not otherwise referenced in the text of the regulation.

Background

The *Food Regulations* establish minimum sanitary standards for the operation of the Commonwealth’s food establishments,² which include traditional restaurants, mobile food units, temporary food vendors, hospital and nursing facility food service, and school food service.

¹ 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.

² The regulation defines food establishment as “an operation that (i) stores, prepares, packages, serves, vends food directly to the consumer, or otherwise provides food for human consumption such as a market, restaurant, satellite or catered feeding location, catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people, vending location, conveyance used to transport people, institution, or food bank and (ii)

Under the current regulation, only the local health director may preside over informal fact-finding conferences. The Board proposes to amend the regulation so that other representatives of VDH may act as presiding officers.

Upon written notice to the owner, permit holder, or person in charge, VDH may place a hold order on food that: 1) originated from an unapproved source; 2) may be unsafe, adulterated, or not honestly presented; or 3) is not otherwise in compliance with the regulation. Food that is subject to the order may not be used, sold, moved from the food establishment, or destroyed without a written release of the order from the department. Under the current regulation, VDH may direct that food under a hold order be brought into compliance with this regulation, or that the food be destroyed or denatured, if “Following an informal fact-finding conference held pursuant to the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) the *director* affirms the hold order....” (emphasis added). The Board proposes to change “director” to “department,” so that representatives of the agency in addition to local health directors may act as the presiding officer who affirms the order.

Pursuant to the regulations of the Virginia Code Commission, an agency may incorporate a document into the text of the regulation by, in part, including in the regulatory text the complete name of the document. When that occurs, the text of the document becomes part of the text of the regulation. Such a document is listed in the *Documents Incorporated by Reference* section of a regulation.

Estimated Benefits and Costs

According to VDH, the current approach of restricting the options for a presiding officer to one individual increases the chances of delay in scheduling. Additionally, at times, it may be best for local health directors to recuse themselves from presiding due to prior involvement in the case. Thus, allowing other representatives of VDH to act as presiding officers over informal fact-finding conferences, and to also affirm hold orders, may be beneficial.

Additionally, according to the agency, “VDH Procedures for Certification and Standardization of Food Inspection Staff, 2017, Virginia Department of Health, Division of Food and Environmental Services, 109 Governor Street, 5th Floor, Richmond, VA 23219,” which is

relinquishes possession of a food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.”

listed in 12 VAC 5-421-9999 *Documents Incorporated by Reference* but not otherwise referenced in the text of the regulation, should have been stricken in a prior regulatory action. The agency states that its inclusion is erroneous and misleading. Removing the name of this document from 12 VAC 5-421-9999 may be beneficial in that it may reduce the possibility of confusion amongst readers of the regulation pertaining to its relevance.

Businesses and Other Entities Affected

The proposed amendments potentially affect approximately 31,000 permitted food establishments in the Commonwealth.³

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.⁴ 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.⁵ As described above, the proposed amendments neither increase costs nor reduce benefits for any entity. Thus, an adverse impact not indicated.

Small Businesses⁶ Affected:⁷

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

³ Data source: VDH

⁴ 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.

⁵ 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.

⁶ 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.”

⁷ 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.

Localities⁸ Affected⁹

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

Projected Impact on Employment

The proposed amendments are not likely to have a substantive impact on total employment.

Effects on the Use and Value of Private Property

The proposed amendments are unlikely to have a substantive impact on the use and value of private property and real estate development costs.

⁸ “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.

⁹ § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.