



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

2 VAC 5-510 Rules and Regulations Governing the Production, Processing, and Sale of Ice Cream, Frozen Desserts, and Similar Products

Department of Agriculture and Consumer Services

Town Hall Action/Stage: 6530/10418

October 11, 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 Board of Agriculture and Consumer Services (Board) seeks to update the regulation to align with the United States Department of Agriculture's (USDA) current *General Specifications for Dairy Plants Approved for USDA Inspection and Grading Service* (USDA Specifications). The proposed changes would (i) condense the text of the regulation by replacing the current text for standards of identities for frozen dessert products with references to the standards of identities promulgated in the Code of Federal Regulations (21 CFR Part 135); (ii) remove a requirement for out-of-state importers to obtain a permit to operate a frozen dessert plant from the Commissioner; (iii) provide flexibility in determining the required processing steps to ensure consumer safety; (iv) remove all references to retail sale; (v) allow the use of electronic record keeping systems; (vi) align requirements in the regulation with other existing dairy-related regulations; (vii) enhance record keeping procedures to further protect public health

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.

through lot traceability; and lastly, (viii) update the referenced version of documents incorporated by reference.

Background

This regulatory action would update the existing *Rules and Regulations Governing the Production, Processing, and Sale of Ice Cream, Frozen Desserts, and Similar Products* (regulation), which are based on federal USDA Specifications. The regulation currently includes requirements pertaining to the safe and sanitary maintenance, storage, operation, and use of equipment; the safe handling, protection, and preservation of frozen dessert products; the proper pasteurization techniques used to ensure dairy ingredients in frozen desserts are safe for consumers; proper lighting and ventilation; proper equipment design and cleanability; proper facility construction; and personal hygiene for employees. The Board reports that the proposed amendments are necessary to remain current with federal laws and reflect current practice, which are based on the latest scientific knowledge and technological advancements, and thus to protect public health.

The most substantive changes are summarized below:

- The definition of “frozen dessert retail establishment” would be struck from Section 10 (Definitions) and all references to retail establishments would be removed throughout the regulation, as requirements that are specific to retail establishments are already included in the Board’s retail food establishment regulation (2 VAC 5-585).²
- Sections 30, 40, and 50 currently contain the definitions and/or standards of identity (SOI) for ice cream; ice cream mix; and frozen custard, french ice cream, french custard ice cream, respectively. These sections would be combined to mirror the structure of the federal regulation. The state-specific SOIs would be replaced with references to SOIs in the CFR because the existing state-specific SOIs are nearly identical to those in the CFR.
- Similarly, Sections 90 and 130, which currently pertain to fruit sherbet and non-fruit sherbet would be consolidated into Section 90, which would be renamed “Sherbets.” Sections 110 and 150, which pertain to water ice and nonfruit water ice, would also be consolidated. Again, the state-specific SOIs would be replaced with references to SOIs in the CFR.

² See <https://law.lis.virginia.gov/admincode/title2/agency5/chapter585/>.

- Section 170 pertains to artificially sweetened ice cream or frozen dietary dairy dessert. This section would be repealed in its entirety as these desserts are included under “ice cream” and covered in Section 30.
- Section 415 (Recall Plans) would be newly added, requiring recall plans to be included in applications for permits. According to Virginia Department of Agriculture and Consumer Services (VDACS) staff, this amendment would codify an existing practice as all plants already do this, as required by 21 CFR Part 117.³ The recall plan requirements are identical to those in the regulation governing milk for manufacturing (2 VAC 5-531).⁴
- Section 420 (Issuing, suspension, and revocation of permits) currently requires manufacturers as well as importers (from out-of-state) to obtain a permit. VDACS reports that it is impractical and unrealistic for the agency to permit and track the numerous frozen dessert products coming into Virginia and that manufacturers in other states are already permitted and inspected in their own state. Thus, the permit requirement for importers would be repealed.
- Section 550 (Pasteurization of frozen dessert mix) would be amended to clarify that frozen dessert mixes must be re-pasteurized at the receiving plant before being offered for sale, unless VDACS grants permission for the frozen dairy dessert mix to be sold without re-pasteurization. VDACS explained that the current language has caused confusion in the past and that the proposed language is intended to ensure that VDACS has “the flexibility to evaluate, on a case-by-case basis, manufacturer processing steps and practices to ensure that finished products are safe to consume, while relaxing the requirement to re-pasteurize certain products.”⁵
- Section 620 (Health) currently requires employees to undergo a medical and physical examination before beginning their employment; this requirement would be struck. VDACS reports that the primary purpose of this section is to prevent employees sick with communicable diseases from coming into work and that the other requirements in this section address this concern. Additionally, VDACS expressed concern that the requirement to

³ See <https://www.ecfr.gov/current/title-21/section-117.139>. See also the Agency Background Document (ABD), page 4: https://townhall.virginia.gov/L/GetFile.cfm?File=48\6530\10418\AgencyStatement_VDACs_10418_v1.pdf.

⁴ See item K: <https://law.lis.virginia.gov/admincode/title2/agency5/chapter531/section50/>.

⁵ ABD, p.4.

receive a medical exam before beginning work could create an unnecessary barrier to employment.

- Additional amendments would align the structure and content of the regulation with other Virginia dairy regulations. For example, language outlining the actions that would warrant the cancellation, suspension, or denial of a permit would be added to Section 420⁶ and the requirement that employee facilities include “conveniently located sanitary drinking water” would be removed from Section 500.⁷

Estimated Benefits and Costs

The proposed amendments would benefit current and prospective manufacturers of ice cream and frozen desserts by providing clear, concise, and updated requirements that conform to current USDA Specifications. VDACS reports that the proposed amendments reflect current federal requirements and current practice, and that manufacturers of ice cream and frozen desserts are not expected to incur any new costs as a result. The proposed amendments would benefit consumers of ice cream and frozen desserts manufactured in Virginia by ensuring that these products continue to be produced in a manner that makes them safe for consumption.

Businesses and Other Entities Affected

VDACS reports that there are currently 41 manufacturers in Virginia, some of which may also have retail establishments on their premises. VDACS also reports that there are 20 permitted importers who would no longer be required to renew or maintain this permit; however, this is likely an undercount of all the businesses importing ice cream and frozen desserts from other states.

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.⁸ An adverse impact is indicated if there is any increase in net cost or

⁶ This would align the regulation with Chapters 490 and 531. ABD, page 15.

⁷ VDACS staff explained that this requirement is not present in the other dairy regulations. VDACS staff also confirmed with the Department of Labor and Industry that the Occupational Safety and Health Administration’s Sanitation Standard for General Industry (29 CFR 1910.121(b)(1)), which requires employers to provide potable drinking water, would apply to frozen dessert manufacturing facilities. 16 VAC 25-60-120 incorporates 29 CFR 1910.

⁸ 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.

reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.⁹ Since the proposed amendments largely serve to clarify the requirements and conform the regulation to federal regulations, they are not anticipated to be an increase in net costs or decrease in net benefits for any entity. For example, although recall policies would be newly added in the regulation, they are already required by federal regulation. Further, some manufacturers may benefit from increased flexibility with respect to re-pasteurization or hiring workers without requiring an initial health and physical examination. However, to the extent that these provisions have already been implemented in practice, any associated benefits have likely already accrued. Thus, an adverse impact is not indicated.

Small Businesses¹⁰ Affected:¹¹

Manufacturers of ice cream or frozen desserts that are small businesses would not be expected to face any new costs.

Localities¹² Affected¹³

The proposed amendments do not appear to disproportionately affect any locality in particular or affect costs for local governments.

Projected Impact on Employment

The proposed amendments would not be expected to affect employment by manufacturers of ice cream or frozen desserts.

⁹ 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.

¹⁰ 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.”

¹¹ 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.

¹² “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.

¹³ § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.

Effects on the Use and Value of Private Property

The proposed amendments are not expected to affect the value of private businesses that manufacture ice cream or frozen desserts. The proposed amendments do not affect real estate development costs.