

Department of Planning and Budget 2022 Fiscal Impact Statement

1. Bill Number: HB329

House of Origin Introduced Substitute Engrossed
Second House In Committee Substitute Enrolled

2. Patron: Freitas

3. Committee: General Laws

4. Title: Administrative Process Act; regulations; public notice and economic impact; prohibition.

5. Summary: Requires that an agency prepare a detailed notice of intended regulatory action (NOIRA) for any regulation that it plans to promulgate. The bill requires that prior to publication by the Registrar of Regulations, the NOIRA be submitted to the Attorney General (OAG) for a determination as to whether the agency has the explicit authority to promulgate the regulation as proposed in the NOIRA. The bill requires OAG to report the NOIRA and its determination to the Governor for approval. Within 10 days after publication by the Registrar of a NOIRA for a proposed regulation, either the chairman or vice-chairman of the Joint Commission on Administrative Rules may submit a written directive to the agency that prepared the NOIRA for the agency to hold a preliminary public hearing and comment period on the NOIRA. The bill prescribes requirements for the conduct of such public hearings on regulatory matters. The bill requires the Department of Planning and Budget (DPB) to prepare an economic impact analysis (EIA) of the proposed regulation that includes a qualitative analysis of the regulation and a detailed quantitative analysis of the impact of the regulation, which must include analysis of the implementation and compliance costs that are reasonably expected to be incurred by or passed along to the businesses, localities, and individuals that may be affected by the proposed regulation. The bill requires DPB to determine whether \$10 million or more in implementation and compliance costs are reasonably expected to be incurred by or passed along to businesses, localities, and individuals over any two-year period as a result of the proposed regulation. After DPB submits an EIA for a proposed regulation to the legislature but before the agency submits the proposed regulation for final approval by the Governor, the chairman or vice-chairman of the Joint Commission on Administrative Rules (JCAR) may request an independent economic impact analysis to be prepared by the Joint Legislative Audit and Review Commission (JLARC) for the proposed regulation. DPB is required to provide a detailed explanation of any variance between estimates in the two EIAs. If either EIA indicates \$10 million or more in implementation and compliance costs, the bill requires the agency proposing the regulation to stop work on the proposed regulation until the regulation is modified to reduce its costs to below the \$10 million threshold or a bill is enacted explicitly allowing the regulation to proceed.

6. **Budget Amendment Necessary:** Preliminary - Indeterminate, see Item 8.
7. **Fiscal Impact Estimates:** Preliminary - Indeterminate, see Item 8.
8. **Fiscal Implications:** The bill would modify existing steps that the Governor's Office and agencies are presently required to take regarding review and approval of a NOIRA, and related public hearings and comment periods. The bill would also add additional steps that DPB must take when preparing an EIA. If the \$10 million threshold is reached, the bill would then require DPB, JLARC, and regulatory agencies to take other steps.

The APA presently requires agencies to create a NOIRA and hold a public comment period (§ 2.2-4007.01) but a public hearing is not required. The bill allows JCAR to direct the agency to hold a hearing, which may create additional costs for agencies. The bill also creates new statutory responsibilities to provide certain information on the NOIRA, which would increase the workload of agencies. OAG must also review the NOIRA to determine whether the agency has explicit authority for the regulation, followed by the Governor's approval. This would add to existing responsibilities in the APA for OAG and the Governor to review all proposed regulations to determine if the agency has statutory authority (§ 2.2-4013). Because that existing responsibility would remain, this would increase the workload at OAG and the Governor's Office.

The bill would substantially amend DPB's existing responsibilities in the APA for preparation of an EIA, by striking some existing duties and adding additional duties, but without increasing the time available to DPB under the APA (45 calendar days). Many of the new duties involve an analysis of information that exceeds DPB's existing resources and subject matter expertise. Addressing them, therefore, would require a substantial increase in resources, including access to consulting support. For example, the bill's requirement that DPB determine the likely effectiveness of a regulation, assess alternatives, and compare it to other approaches by the federal government and other states would require specific subject matter expertise in a variety of topical areas that DPB does not possess. An extension of the statutory timeframe for preparation of an EIA may also be required.

The bill provides that if DPB's EIA determines that \$10 million or more in potential costs over a two-year period are likely to be incurred, then JCAR may request that JLARC prepare an independent EIA, for which 60 days are granted. JLARC staff estimate that up to 20 requests for EIAs may be received in a given year, which equates to the average number of EIAs with findings of adverse impact per year since 2006. The first 2-3 EIAs could be conducted at no additional cost. However, if JLARC receives additional requests then it would need to contract with a third-party to conduct the additional EIAs. Assuming no more than 17 additional requests are received annually, the total maximum cost would be \$426,360 (\$25,080 per EIA, assuming 44 working days, at a contracted cost of \$570 per day). The maximum estimated cost does not include JLARC staff time to develop a contract, develop procedures for conducting the EIAs, and review the contractor's work. These costs would be absorbed within JLARC's existing budget.

If either EIA determines that the \$10 million threshold has been exceeded, then the agency must stop work on the regulation until the regulation is modified to reduce its costs to below the \$10 million threshold or a bill is enacted explicitly allowing the regulation to proceed. This would increase the workload at affected agencies. If the agency modifies the regulation, DPB must prepare a new EIA. Because the bill provides no exception for regulatory changes that were directed by state or federal law, the Appropriation Act, or court order, this provision has the potential to increase the workload at agencies, DPB and JLARC if a subsequent bill or regulation requires additional reviews.

- 9. Specific Agency or Political Subdivisions Affected:** All regulatory agencies that are not exempt from the Administrative Process Act (APA): Board of Accountancy; the Departments for Aging and Rehabilitative Services, Blind and Vision Impaired, Deaf and Hard-of-Hearing; the Departments of Agriculture and Consumer Services, Aviation, Behavioral Health and Developmental Services, Conservation and Recreation, Corrections, Criminal Justice Services, Education, Elections, Energy, Environmental Quality, Fire Programs, Forensic Science, Forestry, General Services, Health, Health Professions, Historic Resources, Housing and Community Development, Human Resource Management, Juvenile Justice, Labor and Industry, Medical Assistance Services, Motor Vehicles, Professional and Occupational Regulation, Social Services, State Police, Taxation, Transportation, Treasury, and Wildlife Resources; Motor Vehicle Dealer Board, Office of the State Inspector General, State Council of Higher Education for Virginia, Virginia Birth-Related Neurological Injury Compensation Program, Virginia Employment Commission, Virginia Racing Commission. In addition: the Office of the Governor, the Office of the Attorney General, Department of Planning and Budget, the Joint Legislative Audit and Review Commission, Registrar of Regulations.

Because the bill modifies the APA, it would not affect the 21 executive branch agencies who promulgate regulations but are exempt from the APA. It may affect 11 legislative, judicial, and independent agencies with regulations, if they are not exempt from the APA (in whole or in part).

10. Technical Amendment Necessary:

11. Other Comments: