



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

2 VAC 5-585 Retail Food Establishment Regulations
Department of Agriculture and Consumer Services
Town Hall Action/Stage: 5521 / 8955
October 30, 2020

Summary of the Proposed Amendments to Regulation

The Board of Agriculture and Consumer Services (Board) proposes numerous amendments to 2 VAC 5-585 *Retail Food Establishment Regulations*, mostly for consistency with the latest U.S. Food and Drug Administration (FDA) model regulations, i.e., the FDA's 2017 Food Code and the 2019 Food Code 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 standards for employees; and the appropriate use of precautions to prevent the transmission of communicable diseases. The current regulation is based on the FDA's 2013 Food Code and the 2015 Food Code Supplement.

The FDA describes its Food Code as “a model for safeguarding public health and ensuring food is unadulterated and honestly presented when offered to the consumer. It represents FDA's best advice for a uniform system of provisions that address the safety and

protection of food offered at retail and in food service.”¹ The FDA encourages states to adopt the latest version of the FDA Food Code,² but it is not federal law.

Conforming to 2017 FDA Food Code and 2019 Food Code Supplement

The following proposed amendments to the regulation conform to requirements in the 2017 FDA Food Code or the 2019 Food Code Supplement:

- Require that the person in charge be a certified food protection manager (CFPM).
- Add an exception to the requirement that a person in charge³ is present at the food establishment during all hours of operation. The exception is proposed for food establishments deemed by the Virginia Department of Agriculture and Consumer Services (VDACS) to pose minimal risk of causing, or contributing to, foodborne illness based on the nature of the operation and the extent of the food preparation.
- Require that if used, an impermeable cover such as a bandage, finger cot, or finger stall located on the wrist, hand or finger of the food employee working with exposed food shall be covered with a single-use glove.
- Require that food establishments have written procedures for employees to follow when responding to vomiting or diarrheal events that involve the discharge of vomitus or fecal matter onto surfaces in the food establishment. The procedures must address the specific actions employees must take to minimize the spread of contamination and the exposure of employees, consumers, food, and surfaces to vomitus or fecal matter.
- Require the protection of prewashed fruits and vegetables from cross contamination by separating them from raw animal foods during storage, preparation holding and display.
- Increase the minimum required cooking time from 15 to 17 seconds (at 155°F) for certain raw animal foods.⁴
- Reduce the minimum required cooking time from 15 seconds to less than one second (165°F or above) for certain raw animal foods.⁵

¹ See <https://www.fda.gov/food/fda-food-code/food-code-2017>

² Ibid

³ “Person in charge” is defined as the individual present at a food establishment who is responsible for the operation at the time of inspection.

⁴ See 2VAC5-585-700.A.2 for affected raw animal foods.

<https://townhall.virginia.gov/l/viewXML.cfm?textid=14682&replace=yes>

⁵ See 2VAC5-585-700.A.3 for affected raw animal foods.

- Include timelines for required reporting of nitrate and E. coli positive lab results to VDACS.
- Permit VDACS to allow the continuing operation of food establishments in the event of an extended interruption of electrical or water service if certain conditions are met.

When inspectors find violations of any of the regulation's requirements, the food establishment must correct the deficiencies within specified time periods. All requirements are delineated as priority, priority foundation, or core. Priority items must be remedied within 72 hours, priority foundation items within 10 calendar days, and core items within 90 days. In order to conform to the 2017 FDA Food Code, the Board proposes to decrease the length of time in which certain violations of requirements must be corrected, as follows:

Priority instead of Core (requiring correction within 72 hours instead of 90 calendar days):

- Except during preparation, cooking, or cooling, or when time is used as the public health control,^{6,7} time/temperature control for safety food must be maintained at 41°F (5°C) or less.

Priority Foundation instead of Core (requiring correction within 10 calendar days instead of 90 calendar days):

- Water from a private well must be sampled and tested at least annually for nitrate and total coliform.
- Various specifications for thawing of food.
- Cleaning agents and chemical sanitizer must be provided and available for use during all hours of operation.

Other Proposed Changes

The following proposed amendments to the regulation are not related to the 2017 FDA Food Code or the 2019 Food Code Supplement:

⁶ See 2VAC5-585-850 for time is used as the public health control
<https://law.lis.virginia.gov/admincode/title2/agency5/chapter585/section850/>

⁷ The situations described in 2VAC5-585-820 B and C would also be excepted:
<https://law.lis.virginia.gov/admincode/title2/agency5/chapter585/section820/>

- Specify that shucked shellfish from one tagged or labeled container are not commingled with shellstock⁸ or shucked shellfish from another container with different certification numbers, different harvest dates, or different growing areas as identified on the tag or label before being ordered by the consumer.
- Require that labels for commercially slaughtered or processed rabbits that are offered for sale or service contain certain specified information, including a producer number, safe handling instructions, identifying code, and a warning statement.

Estimated Benefits and Costs

Conforming to 2017 FDA Food Code and 2019 Food Code Supplement

The current regulation requires food establishments to employ a CFPM; however, they are not required to be onsite at all times of operation. The proposed regulation expands this time requirement, and effectively requires that a CFPM be onsite at all times of operation. More specifically, the person in charge of the open food establishment would have to be a CFPM. The regulation defines “person in charge” as “the individual present at a food establishment who is responsible for the operation at the time of inspection.” Since most food establishments are unlikely to have one person who works 100 percent of open hours, many would likely need to get one or more additional employees certified.

Under both the existing and proposed regulations, proficiency as a CFPM is established through passing a test, not completing a program. Certification costs (for the test) are approximately \$100 per individual⁹ and renewal is required every five years. Tests are available via six accredited programs and take approximately two hours. Those persons who elect to take training (not required) may sign up for a training course via an accredited provider, and the training time varies from self-pace to approximately sixteen hours. Training and tests are available both online and in person.¹⁰ The total cost of requiring that a CFPM be onsite at all times of operation would therefore be: a) the test fees for each additional needed CFPM, b) fees for training if needed to pass the test, and c) the value of the staff time spent preparing for and taking the test. For example, if a CFPM candidate spends eight hours preparing for the test and two hours taking the test, the ten hours of staff time represents a cost that has to be covered by

⁸ “Shellstock” is defined as “raw, in-shell molluscan shellfish.”

⁹ Source: VDACS

¹⁰ Data and other information source: Virginia Department of Health (VDH)

another employee. However, having a CFPM always present in the open operation, who is certified to be knowledgeable about food protection, would likely reduce the probability that unsafe food practices would occur.

The proposal to provide an exception for certain food establishments to the requirement that a person in charge be present during all hours of operation could potentially reduce costs for such establishments; this exception would apply to food establishments deemed by VDACS to pose minimal risk of causing, or contributing to, foodborne illness. For example, such minimal risk establishments would not need incur the cost of additional staff becoming a CFPM. Since by definition these establishments pose minimal risk, the absence of having a CFPM always present in the open operation would not likely substantively affect the probability of unsafe food practices occurring.

The current regulation only requires the use of a single-use glove when “a lesion containing pus such as a boil or infected wound that is open or draining and is on the hands or wrists ...” The proposed regulation would require that “If used, an impermeable cover such as a bandage, finger cot, or finger stall located on the wrist, hand or finger of the food employee working with exposed food shall be covered with a single-use glove.” This would include band aids for simple uninfected cuts. Thus, single use gloves would need to be purchased and used more often under the proposed regulation. Single-use gloves are available for about five cents a glove when purchasing in bulk (100 gloves).¹¹

The current regulation requires that food establishments have procedures for employees to follow when responding to vomiting or diarrheal events that involve the discharge of vomitus or fecal matter onto surfaces in the food establishment. The procedures must address the specific actions employees must take to minimize the spread of contamination and the exposure of employees, consumers, food, and surfaces to vomitus or fecal matter. The Board proposes to specify that those procedures be written. This would help ensure that those procedures are consistent, regardless of whoever is in charge at a given time. VDACS has a template that can be made available to food establishments to use for their written procedures. Thus, it should not be costly for the businesses to produce written procedures that satisfy the department.

¹¹ Source: Amazon.com accessed on March 13, 2020.

The FDA believes that certain requirements would protect food safety: a) protecting prewashed fruits and vegetables from cross contamination by separating them from raw animal foods during storage, preparation holding and display, and b) increasing the minimum required cooking time from 15 to 17 seconds (at 155 °F) for certain raw animal foods.¹² For any food establishments that do not already protect prewashed fruits and vegetables from cross contamination in the above manner, there may be some cost in finding additional space to keep these items separated. For establishments that already keep such separation, neither of these two proposals appear to be particularly costly. For other raw animal foods,¹³ which must be cooked at 165°F or above, the FDA believes that it is safe to reduce the minimum required cooking time from 15 seconds to less than one second (instantaneous). The Board's proposal to make this amendment would cumulatively moderately reduce the time necessary to prepare such food without apparently increasing health risks.

The current regulation requires that water from a private well be sampled and tested at least annually for nitrate and total coliform. If nitrate exceeds 10 milligrams per liter, the operator must notify VDACS. If a sample is total coliform positive, the positive culture medium must be further analyzed to determine if *E. coli* is present. The operator must notify VDACS within two days from when the operator is notified of the coliform positive test result. If *E. coli* is present, the operator must notify VDACS. The current regulation does not specify deadlines for notification for positive results of either nitrate exceeding 10 mg/L or the presence of *E. coli*. The Board proposes to specify that notification must be within 24 hours. This would be beneficial in that it would enable VDACS to take faster action regarding a potential health threat.

The proposal to permit VDACS to allow food establishments to continue operating in the event of an extended interruption of electrical or water service, if certain conditions are met, would give greater flexibility to retail food establishments to continue operations if they have a written emergency operation plan that has been approved by the department.

¹² See 2VAC5-585-700.A.2 for affected raw animal foods.
<https://townhall.virginia.gov/l/viewXML.cfm?textid=14682&replace=yes>

¹³ See 2VAC5-585-700.A.3 for affected raw animal foods.

Other Proposed Changes

The current regulation specifies that shellstock from one tagged or labeled container are not to be commingled with shellstock from another container with different certification numbers, different harvest dates, or different growing areas as identified on the tag or label before being ordered by the consumer. “Shellstock” is defined as “raw, in-shell molluscan shellfish,” and thus does not include shucked shellfish. The Board proposes to mandate that shucked shellfish from one tagged or labeled container not be commingled with shellstock or shucked shellfish from another container with different certification numbers, different harvest dates, or different growing areas as identified on the tag or label before being ordered by the consumer. To the extent that this is not already done by food establishments with shucked shellfish, this proposal would be beneficial in that it would likely reduce the probability that spoiled shellfish is mistakenly sold.

The proposal to require that the labels for commercially slaughtered or processed rabbits that are offered for sale or service contain certain specified information, including a producer number, safe handling instructions, identifying code, and a warning statement may effectively require the size of labels used for such rabbits to be larger (or the use of a smaller font) for those that are not already providing this information. The potential cost for larger labels would not likely be large. The provision of information such as safe handling instructions may reduce the likelihood of illness.

Businesses and Other Entities Affected

The proposed amendments would affect the approximate 9,411 retail food stores in the Commonwealth¹⁴ and the six accredited CFPM programs.¹⁵ As described in the Estimated Benefits and Costs section, the proposal to require that there be a CFPM on the premises of the food establishment at all times of operation would likely increase costs for most food establishments. The proposal to mandate that single-use gloves be worn whenever there is an impermeable cover such as a bandage, finger cot, or finger stall located on the wrist, hand or finger of the food employee would also modestly increase costs for most food establishments.

¹⁴ Source: VDACS

¹⁵ Source: VDH

Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined. While the benefits to public health may be large, there would likely be some increases in net costs for some of the affected entities as described in the Estimated Benefits and Costs section.

Small Businesses¹⁶ Affected:

Types and Estimated Number of Small Businesses Affected

VDACS estimates that 4,705 of the retail food stores in the Commonwealth are small businesses. The sizes of the six accredited CFPM programs are unknown.

Costs and Other Effects

Costs for small food establishments would be affected by the proposed amendments as described in the Estimated Benefits and Costs section. The proposal to require that there be a CFPM on the premises of the food establishment at all times of operation would very likely increase revenue for at least some of the six accredited CFPM programs.

Alternative Method that Minimizes Adverse Impact

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

Localities¹⁷ Affected¹⁸

The proposed amendments would affect food establishments in all localities, not disproportionately affecting any particularly. The proposed amendments do not appear to introduce additional costs for local governments.

Projected Impact on Employment

The proposal to require that there be a CFPM on the premises of the food establishment at all times of operation would very likely increase demand for the services of the six accredited CFPM programs, which may moderately increase their employment.

¹⁶ 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.”

¹⁷ “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.

¹⁸ § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.

Effects on the Use and Value of Private Property

The proposals to require that there be a CFPM on the premises of the food establishment at all times of operation and that single-use gloves be worn whenever there is an impermeable cover on the wrist, hand or finger of the food employee would likely increase costs for most food establishments. These cost increases would likely moderately reduce the value of affected firms commensurately.

The proposal to require that there be a CFPM on the premises of the food establishment at all times of operation would very likely increase demand for the services of the six accredited CFPM programs, which may moderately increase their value.

The proposed amendments do not appear to affect real estate development costs.

Legal Mandates

General: The Department of Planning and Budget 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 14 (as amended, July 16, 2018). Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report 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.

Adverse impacts: 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 within the 45-day period.

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.