Commonwealth of Virginia

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Administrative Law Advisory Committee

# 2017 Session Update

## Recommended by ALAC

### Passed

**SB 916 Virginia Register Act; guidance documents; duty to file with the Registrar.** Consolidates provisions relating to the availability of guidance documents in a single section in the Virginia Register Act. In addition, the bill requires agencies that do not have regulatory authority to annually file with the Virginia Registrar of Regulations for publication in the Virginia Register of Regulations a list of any guidance documents upon which such agencies currently rely. Under current law, the requirement for filing guidance documents applies only to agencies with regulatory authority. As introduced, the bill is a recommendation of the Administrative Law Advisory Committee.

## Not Recommended by ALAC

### Passed

**HB 1731 Joint Commission on Administrative Rules; periodic review of exemptions from the Administrative Process Act.** Requires the Joint Commission on Administrative Rules, beginning November 1, 2017, on a schedule to be established by the Commission, to conduct a review of the exemptions authorized by the Administrative Process Act (APA). The bill also requires agencies having APA exemptions, other than the courts, any agency of the Supreme Court, and any agency that by the Constitution of Virginia is expressly granted any of the powers of a court of record, beginning August 1, 2017, to submit a written report to the Joint Commission on Administrative Rules, which report includes the date the exemption was enacted, a summary of the necessity for the exemption, and a summary of any rule or regulation adopted pursuant to the exemption in the immediately preceding two fiscal years. The bill provides that in the event that an agency having an exemption fails to submit the report required, the Joint Commission on Administrative Rules shall recommend to the Governor and the General Assembly that such agency's exemption be discontinued. The bill also requires general notice of

the provisions of this requirement to be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations by the Joint Commission on Administrative Rules to advise agencies of their obligations under the bill.

**HB 1943/SB 1431 Administrative Process Act; economic impact analysis; opportunity for comment by affected businesses or other entities.** Requires the Department of Planning and Budget to revise and reissue its economic impact analysis within the time limits set forth for the Department's review of regulations at the final stage pursuant to the Governor's executive order for executive branch review if one of the following conditions is present and would materially change the Department's analysis: (i) public comment timely received at the proposed stage indicates significant errors in the economic impact analysis or (ii) there is a significant or material difference between the agency's proposed economic impact analysis and the anticipated negative economic impacts to the business community as indicated by public comment. The bill provides that the determination as to whether either such condition is present shall be made by the Department and shall not be subject to judicial review. The bill contains an emergency clause.

**Failed**

**HB 1871 Joint Commission on Administrative Rules; periodic review of regulations.** Requires the Joint Commission on Administrative Rules, beginning January 1, 2019, and every year thereafter, to conduct a review of agency regulations. The bill also requires, beginning December 1, 2018, and every year thereafter on or before December 1, each agency promulgating a regulation to submit a written report to the Joint Commission on Administrative Rules including a summary of the necessity for the regulation and a summary of any rule or regulation adopted in the immediately preceding fiscal year, if any. The bill provides that in the event that an agency fails to submit the report required, the Joint Commission on Administrative Rules shall recommend to the Governor and the General Assembly that such agency's regulation be modified or suspended in accordance with the Administrative Process Act for legislative objections. The bill also requires general notice of the provisions of this requirement to be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations by the Joint Commission on Administrative Rules to advise agencies of their obligations under the bill.

**HB 2370 Administrative Process Act; reconsideration of an agency's final decision; intermediate relief; suspension of effective date of a regulation or agency decision.** Provides that if a petition for reconsideration is timely filed, the final decision shall be suspended and the time for filing a notice of appeal under Rule 2A:2 of the Rules of Supreme Court of Virginia shall be tolled. Under current law, the final decision is not suspended and the time for filing the notice is not tolled unless the agency provides for the suspension of its decision when it grants a petition for reconsideration. The bill also requires, when judicial review is instituted or is about to be, the agency concerned to postpone the effective date of the regulation or decision involved pending conclusion of the review proceedings.

**HB 2456 Administrative Process Act; schedule of review of regulations; report.** Requires each agency to establish a schedule over a five-year period for the review of all regulations for which the agency is the primary responsible agency. The schedule shall provide for the annual review of at least 20 percent of an agency's regulations by July 1 of each year. Under the bill, the Governor is required to approve a consolidated annual report of the findings of the regulation reviews by August 1 of each year and, upon approval, submit the report to the Chairmen of the standing committees of the House of Delegates and the Senate.

**HJ 614 Study; JLARC to study Virginia Administrative Process Act exemptions; report.** Directs the Joint Legislative Audit and Review Commission (JLARC) to conduct a two-year study of the Virginia Administrative Process Act exemptions. In its study, JLARC is directed to (i) assess whether exemptions for agencies, boards, commissions, and authorities are justified or should be discontinued or modified; (ii) assess whether criteria and a process should be established for determining if requests for exemptions should be granted; (iii) assess the extent of public participation and economic impact analysis provided as part of rulemaking conducted by exempt agencies, boards, commissions, and authorities; (iv) review other states' processes and criteria for exempting state agencies, boards, commissions, and authorities from the rulemaking process; and (v) review other issues and make recommendations as appropriate.

**Vetoed**

**HB 1790 Administrative Process Act; development and periodic review of regulations; report.** Requires agencies to develop regulations in the least burdensome and intrusive manner possible and provides guiding principles for the development, adoption, and repeal of regulations. The bill also requires each agency to establish a schedule over a 10-year period for the review of all regulations for which the agency is the primary responsible agency. The schedule shall provide for the annual review of at least 10 percent of an agency's regulations by July 1 of each year. Under the bill, the Governor will submit an annual report containing the findings of the regulation reviews by August 1 of each year to the chairmen of the standing committees of the House of Delegates and the Senate.

# VIRGINIA ACTS OF ASSEMBLY -- 2017 SESSION

## CHAPTER 488

*An Act to amend and reenact §§ 2.2-436, 2.2-4001, 2.2-4103, and 58.1-205 of the Code of Virginia, to amend the Code of Virginia by adding a section numbered 2.2-4103.1, and to repeal § 2.2-4008 of the Code of Virginia, relating to the Virginia Register Act; guidance documents.*

[S 916]

Approved March 13, 2017

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 2.2-436, 2.2-4001, 2.2-4103, and 58.1-205 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-4103.1 as follows:**

**§ 2.2-436. Approval of electronic identity standards.**

A. The Secretary of Technology, in consultation with the Secretary of Transportation, shall review and approve or disapprove, upon the recommendation of the Identity Management Standards Advisory Council pursuant to § 2.2-437, guidance documents that adopt (i) nationally recognized technical and data standards regarding the verification and authentication of identity in digital and online transactions; (ii) the minimum specifications and standards that should be included in an identity trust framework, as defined in § 59.1-550, so as to warrant liability protection pursuant to the Electronic Identity Management Act (§ 59.1-550 et seq.); and (iii) any other related data standards or specifications concerning reliance by third parties on identity credentials, as defined in § 59.1-550.

B. Final guidance documents approved pursuant to subsection A shall be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations as a general notice. The Secretary of Technology shall send a copy of the final guidance documents to the Joint Commission on Administrative Rules established pursuant to § 30-73.1 at least 90 days prior to the effective date of such guidance documents. The Secretary of Technology shall also annually file a list of available guidance documents developed pursuant to this chapter pursuant to § ~~2.2-4008~~ *2.2-4103.1* of the Virginia Administrative Process Act (§ 2.2-4000 et seq.) and shall send a copy of such list to the Joint Commission on Administrative Rules.

**§ 2.2-4001. Definitions.**

As used in this chapter, unless the context requires a different meaning:

"Agency" means any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases.

"Agency action" means either an agency's regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or denial of relief or of a license, right, or benefit by any agency or court.

"Basic law" or "basic laws" means provisions of the Constitution and statutes of the Commonwealth authorizing an agency to make regulations or decide cases or containing procedural requirements therefor.

"Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

~~"Guidance document" means any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations, excluding agency minutes or documents that pertain only to the internal management of agencies. Nothing in this definition shall be construed or interpreted to expand the identification or release of any document otherwise protected by law.~~

"Hearing" means agency processes other than those informational or factual inquiries of an informal nature provided in §§ 2.2-4007.01 and 2.2-4019 and includes only (i) opportunity for private parties to submit factual proofs in formal proceedings as provided in § 2.2-4009 in connection with the making of regulations or (ii) a similar right of private parties or requirement of public agencies as provided in § 2.2-4020 in connection with case decisions.

"Hearing officer" means an attorney selected from a list maintained by the Executive Secretary of the Supreme Court in accordance with § 2.2-4024.

"Public assistance and social services programs" means those programs specified in § 63.2-100.

"Registrar" means the Registrar of Regulations appointed as provided in § 2.2-4102.

"Rule" or "regulation" means any statement of general application, having the force of law, affecting

the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.

"Subordinate" means (i) one or more but less than a quorum of the members of a board constituting an agency, (ii) one or more of its staff members or employees, or (iii) any other person or persons designated by the agency to act in its behalf.

"Virginia Register of Regulations" means the publication issued under the provisions of Article 6 (§ 2.2-4031 et seq.).

"Virginia Regulatory Town Hall" means the website operated by the Department of Planning and Budget, which has online public comment forums and displays information about regulatory actions under consideration in the Commonwealth and sends this information to registered public users.

**§ 2.2-4103. Agencies to file regulations with Registrar; other duties; failure to file.**

It shall be the duty of every agency to have on file with the Registrar the full text of all of its currently operative regulations, together with the dates of adoption, revision, publication, or amendment thereof and such additional information requested by the Commission or the Registrar for the purpose of publishing the Virginia Register of Regulations and the Virginia Administrative Code. Thereafter, coincidentally with the issuance thereof, each agency shall from day to day so file, date, and supplement all new regulations and amendments, repeals, or additions to its previously filed regulations. The filed regulations shall (i) indicate the laws they implement or carry out, (ii) designate any prior regulations repealed, modified, or supplemented, (iii) state any special effective or terminal dates, and (iv) be accompanied by a statement or certification, either in original or electronic form, that the regulations are full, true, and correctly dated. No regulation or amendment or repeal thereof shall be effective until filed with the Registrar.

Orders condemning or closing any shellfish, finfish or crustacea growing area and the shellfish, finfish or crustacea located thereon pursuant to Article 2 (§ 28.2-803 et seq.) of Chapter 8, of Title 28.2, which are exempt from the requirements of the Administrative Process Act (§ 2.2-4000 et seq.) as provided in subsection B of § 2.2-4002, shall be effective on the date specified by the promulgating agency. Such orders shall continue to be filed with the Registrar either before or after their effective dates in order to satisfy the need for public availability of information respecting the regulations of state agencies.

An order setting a date of closure for the Chesapeake Bay purse seine fishery for Atlantic menhaden for reduction purposes pursuant to § 28.2-1000.2, which is exempt from the requirements of the Administrative Process Act as provided by subsection A of § 2.2-4002, shall be effective on the date specified. Such orders shall be filed with the Registrar for prompt publication.

In addition, each agency shall itself (i) maintain a complete list of all of its currently operative regulations for public consultation, (ii) make available to public inspection a complete file of the full texts of all such regulations, and (iii) allow public copying thereof or make copies available either without charge, at cost, or on payment of a reasonable fee. Each agency shall also maintain as a public record a complete file of its regulations that have been superseded on and after June 1, 1975.

~~It shall be the duty of every agency to annually file with the Registrar for publication in the Virginia Register of Regulations a list of any guidance documents upon which the agency currently relies. The filing shall be made on or before January 1 of each year in a format to be developed by the Registrar. Each agency shall also (i) maintain a complete list of all of its currently operative guidance documents and make such list available for public inspection, (ii) make available for public inspection the full texts of all such guidance documents to the extent such inspection is permitted by law, and (iii) upon request, make copies of such lists or guidance documents available without charge, at cost, or on payment of a reasonable fee.~~

Where regulations adopt textual matter by reference to publications other than the Federal Register or Code of Federal Regulations, the agency shall (i) file with the Registrar copies of the referenced publications, (ii) state on the face of or as notations to regulations making such adoptions by reference the places where copies of the referred publications may be procured, and (iii) make copies of such referred publications available for public inspection and copying along with its other regulations.

Unless he finds that there are special circumstances requiring otherwise, the Governor, in addition to the exercise of his authority to see that the laws are faithfully executed, may, until compliance with this chapter is achieved, withhold the payment of compensation or expenses of any officer or employee of any agency in whole or part whenever the Commission certifies to him that the agency has failed to comply with this section or this chapter in stated respects, to respond promptly to the requests of the Registrar, or to comply with the regulations of the Commission.

***§ 2.2-4103.1. Guidance documents; duty to file with Registrar.***

*A. For the purposes of this section, "agency" means any authority, instrumentality, officer, board, or other unit of the government of the Commonwealth other than the General Assembly, courts, municipal corporations, counties, other local or regional governmental authorities including sanitary or other districts and joint state-federal, interstate or intermunicipal authorities, the Virginia Resources Authority, the Virginia Code Commission with respect to minor changes made under the provisions of § 30-150, and educational institutions operated by the Commonwealth with respect to regulations that pertain to*

*(i) their academic affairs; (ii) the selection, tenure, promotion, and disciplining of faculty and employees; (iii) the selection of students; and (iv) rules of conduct and disciplining of students.*

*B. It shall be the duty of every agency to annually file with the Registrar for publication in the Virginia Register of Regulations a list of any guidance documents upon which the agency currently relies. The filing shall be made on or before January 1 of each year in a format to be developed by the Registrar. Each agency shall also (i) maintain a complete list of all of its currently operative guidance documents and make the list available for public inspection, (ii) make available for public inspection the full texts of all guidance documents to the extent inspection is permitted by law, and (iii) upon request, make copies of such lists or guidance documents available without charge, at cost, or upon payment of a reasonable fee.*

*C. Nothing in this section is intended to nor shall it confer or impose any regulatory authority upon an agency, nor shall this section create any rights to appeal or challenge a guidance document adopted by an agency.*

**§ 58.1-205. Effect of regulations, rulings, etc., and administrative interpretations.**

In any proceeding relating to the interpretation or enforcement of the tax laws of this Commonwealth, the following rules shall apply:

1. Any assessment of a tax by the Department shall be deemed prima facie correct.

2. Any regulation promulgated as provided by subsection B of § 58.1-203 shall be sustained unless unreasonable or plainly inconsistent with applicable provisions of law.

3. Rulings issued in conformity with § 58.1-203, tax bulletins, guidelines, and other documents published as provided in § 58.1-204, and guidance documents listed in the Virginia Register of Regulations as provided in ~~§§ 2.2-4008 and 2.2-4103~~ *§ 2.2-4103.1* shall be accorded judicial notice.

4. In any proceeding commenced under § 58.1-1821, 58.1-1824 or 58.1-1825, rulings and administrative interpretations other than those described in subdivisions 2 and 3 shall not be admitted into evidence and shall be accorded no weight, except that an assessment made pursuant to any such ruling or interpretation shall be entitled to the presumption of correctness specified in subdivision 1.

**2. That § 2.2-4008 of the Code of Virginia is repealed.**

# VIRGINIA ACTS OF ASSEMBLY -- 2017 SESSION

## CHAPTER 678

*An Act to amend and reenact §§ 2.2-4005 and 30-73.3 of the Code of Virginia, relating to periodic review of exemptions from the Administrative Process Act by the Joint Commission on Administrative Rules.*

[H 1731]

Approved March 20, 2017

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 2.2-4005 and 30-73.3 of the Code of Virginia are amended and reenacted as follows:**

**§ 2.2-4005. Review of exemptions by Joint Legislative Audit and Review Commission; Joint Commission on Administrative Rules.**

*A.* The Joint Legislative Audit and Review Commission shall conduct a review periodically of the exemptions authorized by this chapter. The purpose of this review shall be to assess whether there are any exemptions that should be discontinued or modified.

*B. Beginning November 1, 2017, the Joint Commission on Administrative Rules shall conduct a review of the exemptions authorized by this chapter on a schedule established by the Joint Commission on Administrative Rules. The purpose of this review shall be to assess whether any such exemption should be discontinued or modified.*

*C. Beginning August 1, 2017, each agency having an exemption authorized by this chapter, other than the courts, any agency of the Supreme Court, and any agency that by the Constitution of Virginia is expressly granted any of the powers of a court of record, shall submit a written report to the Joint Commission on Administrative Rules on or before August 1, 2017, which report shall include the date the exemption was enacted, a summary of the necessity for the exemption, and a summary of any rule or regulation adopted pursuant to the exemption in the immediately preceding two fiscal years, if any. Every two years thereafter, each such agency shall submit a written report to the Joint Commission on Administrative Rules that summarizes any rule or regulation adopted pursuant to the exemption in the immediately preceding two fiscal years, if any.*

*D. In the event that an agency having an exemption authorized by this chapter fails to submit the report required pursuant to subsection C, the Joint Commission on Administrative Rules shall recommend to the Governor and the General Assembly that such agency's exemption be discontinued.*

**§ 30-73.3. Powers and duties of Commission.**

A. The Commission shall have the powers and duties to:

1. Review proposed rules and regulations of any agency during the promulgation or final adoption process and determine whether or not the rule or regulation (i) is authorized by statute, (ii) complies with legislative intent, (iii) will cause a substantial reduction in private sector employment, and (iv) contains no mandate that improperly burdens businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected as defined in § 2.2-4007.04.

2. Review the effect of the rule or regulation on (i) the economy, (ii) protection of the Commonwealth's natural resources pursuant to Article XI, Section 1 of the Constitution of Virginia, (iii) government operations of the Commonwealth and localities, and (iv) affected persons and businesses.

3. File with the Registrar and the agency promulgating the regulation an objection to a proposed or final adopted regulation.

4. Suspend the effective date of any portion or all of a final regulation with the concurrence of the Governor as provided in subsection B of § 2.2-4014.

5. Make recommendations to the Governor and General Assembly for action based on its review of any proposed rule or regulation.

6. Review any existing agency rule, regulation, or practice or the failure of an agency to adopt a rule and recommend to the Governor and the General Assembly that a rule be modified, repealed, or adopted.

*7. Beginning November 1, 2017, the Joint Commission on Administrative Rules shall conduct an ongoing review of the exemptions authorized by the Administrative Process Act (§ 2.2-4000 et seq.) in accordance with subsections B and D of § 2.2-4005 on a schedule established by the Commission.*

B. If the Commission finds that a rule or regulation improperly burdens businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, it shall report quarterly to the Governor and the General Assembly on any such regulation. The report shall contain a statement of any position taken by the Commission on any such regulation.

C. If the Commission decides to seek suspension of a final rule or regulation, it shall deliver a statement to the Governor, signed by a majority of the members of the Commission, asking the Governor to concur in delaying the effective date of a portion or all of the final regulation until the end

of the next regular legislative session as provided in §§ 2.2-4014 and 2.2-4015.

D. Based upon its review of (i) any final rule or regulation during the promulgation or final adoption process or (ii) any existing agency rule, regulation, or practice or failure to adopt a rule or regulation, the Commission may prepare and arrange for the introduction of a bill to clarify the intent of the General Assembly when it enacted a law or to correct any misapplication of a law by an agency.

**2. That general notice of the provisions of this act shall be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations by the Joint Commission on Administrative Rules to advise agencies having exemptions authorized by the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) of their obligations under the provisions of this act.**

# VIRGINIA ACTS OF ASSEMBLY -- 2017 SESSION

## CHAPTER 483

*An Act to amend and reenact § 2.2-4007.04 of the Code of Virginia, relating to the Administrative Process Act; economic impact analysis; opportunity for comment by affected businesses or other entities.*

[H 1943]

Approved March 13, 2017

**Be it enacted by the General Assembly of Virginia:**

**1. That § 2.2-4007.04 of the Code of Virginia is amended and reenacted as follows:**

**§ 2.2-4007.04. Economic impact analysis.**

A. Before delivering any proposed regulation under consideration to the Registrar as required in § 2.2-4007.05, the agency shall submit on the Virginia Regulatory Town Hall a copy of that regulation to the Department of Planning and Budget. In addition to determining the public benefit, the Department of Planning and Budget in coordination with the agency shall, within 45 days, prepare an economic impact analysis of the proposed regulation, as follows:

1. The economic impact analysis shall include but need not be limited to the projected number of businesses or other entities to ~~whom~~ *which* the regulation would apply; the identity of any localities and types of businesses or other entities particularly affected by the regulation; the projected number of persons and employment positions to be affected; the impact of the regulation on the use and value of private property, including additional costs related to the development of real estate for commercial or residential purposes; and the projected costs to affected businesses, localities, or entities of implementing or complying with the regulations, including the estimated fiscal impact on such localities and sources of potential funds to implement and comply with such regulation. A copy of the economic impact analysis shall be provided to the Joint Commission on Administrative Rules; *and*

2. If the regulation may have an adverse effect on small businesses, the economic impact analysis shall also include (i) an identification and estimate of the number of small businesses subject to the regulation; (ii) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the regulation, including the type of professional skills necessary for preparing required reports and other documents; (iii) a statement of the probable effect of the regulation on affected small businesses; and (iv) a description of any less intrusive or less costly alternative methods of achieving the purpose of the regulation. As used in this subdivision, "small business" has the same meaning as provided in subsection A of § 2.2-4007.1~~; and~~.

~~3.~~ *B.* In the event the Department cannot complete an economic impact statement within the 45-day period, it shall advise the agency and the Joint Commission on Administrative Rules as to the reasons for the delay. In no event shall the delay exceed 30 days beyond the original 45-day period.

~~B.~~ *C.* Agencies shall provide the Department with such estimated fiscal impacts on localities and sources of potential funds. The Department may request the assistance of any other agency in preparing the analysis. The Department shall deliver a copy of the analysis to the agency drafting the regulation, which shall comment thereon as provided in § 2.2-4007.05, a copy to the Registrar for publication with the proposed regulation, and an electronic copy to each member of the General Assembly. No regulation shall be promulgated for consideration pursuant to § 2.2-4007.05 until the impact analysis has been received by the Registrar. For purposes of this section, the term "locality, business, or entity particularly affected" means any locality, business, or entity that bears any identified disproportionate material impact that would not be experienced by other localities, businesses, or entities. The analysis shall represent the Department's best estimate for the purposes of public review and comment on the proposed regulation. The accuracy of the estimate shall in no way affect the validity of the regulation, nor shall any failure to comply with or otherwise follow the procedures set forth in this subsection create any cause of action or provide standing for any person under Article 5 (§ 2.2-4025 et seq.) or otherwise to challenge the actions of the Department hereunder or the action of the agency in adopting the proposed regulation.

~~C.~~ *D.* In the event the economic impact analysis completed by the Department 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 shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period. The Joint Commission on Administrative Rules shall review such rule or regulation and issue a statement containing the Commission's findings in accordance with § 30-73.3.

*E. The Department shall revise and reissue its economic impact analysis within the time limits set forth for the Department's review of regulations at the final stage pursuant to the Governor's executive*

*order for executive branch review if one of the following conditions is present that would materially change the Department's analysis:*

*1. Public comment timely received at the proposed stage indicates significant errors in the economic impact analysis; or*

*2. There is significant or material difference between the agency's proposed economic impact analysis and the anticipated negative economic impacts to the business community as indicated by public comment.*

*The determination of whether a condition is present under this subsection shall be made by the Department and shall not be subject to judicial review.*

**2. That an emergency exists and this act is in force from its passage.**

Commonwealth of Virginia

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Administrative Law Advisory Committee

# 2017 Work Plan Draft
# Administrative Law Advisory Committee

## Executive Review Process

At the request of the Code Commission, ALAC will continue to discuss recommendations to future administrations on ensuring the efficiency and effectiveness of the executive review process for rules and regulations. The work group will survey other states on the veto of regulations by the executive branch.

## Guidance Documents/Timeliness of Filing

ALAC will continue its study of guidance documents, including a requirement for agencies to update its list of guidance documents with the Registrar of Regulations in a timely manner.

## Department of Taxation Regulations

At the request of a member of the Code Commission, ALAC will review articles related to the Department of Taxation's policy of issuing guidelines and public documents instead of regulations.

## Adding Rules of Procedure for Administrative Cases to the Rules of the Supreme Court

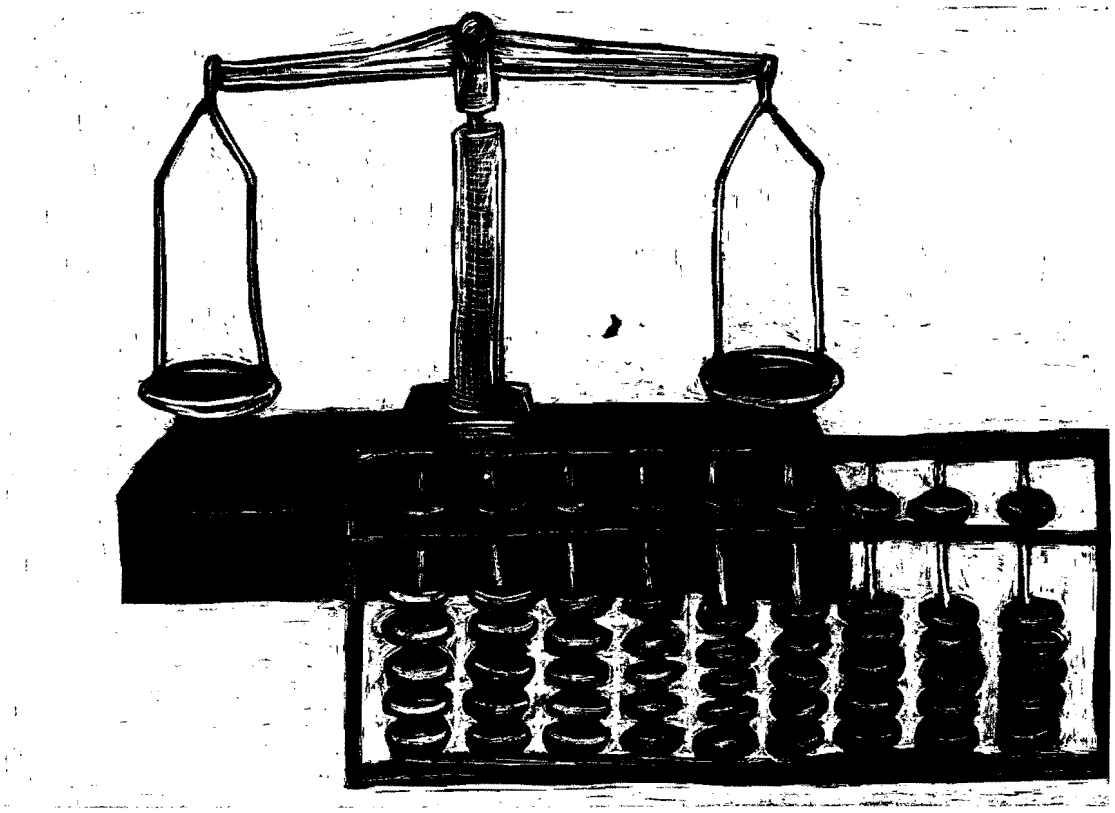
ALAC will consider a suggestion from a hearing officer regarding the creation of standard rules and procedures for administrative cases to be added to the Rules of the Supreme Court. The hearing officer suggested modifying the rules of procedure used by Virginia Circuit Courts.

From many years of experience and insight as a Virginia Administrative Hearing Officer conducting formal appeals under the Virginia APA, and other misc. agency hearings from time to time, I strongly suggest that it would be an improvement for the Virginia Code to be amended by the General Assembly to require the Virginia Supreme Court to promulgate standard rules of procedure for all Virginia administrative (agency) cases. These rules of procedure should be a part of the Rules of the Supreme Court of Virginia and should be closely similar, with some modification, to the rules of procedure applicable in Virginia Circuit Courts (abbreviated somewhat for efficiency, but calculated to impose the same benefits and burdens on all parties equally). I am not necessarily speaking to the assignment of initial burden of proof, but in other respects procedure should be uniform across all agencies, should be equally fair to all parties, and the Supreme Court rules should take precedence over all agency rules of procedure. The parties and Hearing Officer should have sufficient control over case timelines to allow fair and effective case administration. It may be appropriate to give the presiding hearing officer some broader degree of discretion to allow somewhat more discovery than the current APA may allow, but that may be debated.

I have less concern over every detail of such new procedural rules than concern that there is too much diversity between agencies with respect to procedure, most agency procedural rules are poorly written and are too strict, have the potential to be unfair in some cases, and have the appearance of being self-serving to adopting agencies. I find that both attorneys and pro se litigants are often unfamiliar with and can be taken by surprise by agency procedural rules and timelines, and there is little discretion hearing officers may have to correct for this to meet the ends of justice. Procedure that is closely similar to procedure in Virginia Circuit Courts, with modifications, would be much better and attorneys would come into hearings with a basic familiarity to work from. It is also unnecessary to have different rules for different agencies, and it would be better to have this standardized.

# Recent Supreme Court of Virginia Decisions Demonstrate the Urgent Need for New Tax Regulations

by Craig D. Bell and J. Christian Tennant



The January 2015 Supreme Court of Virginia opinion in *The Nielsen Company LLC v. County Board of Arlington County* sent two important messages to state and local governments in Virginia. First, local governments should permit taxpayers to use an estimation methodology when determining a deduction for gross receipts taxed in other states for purposes of the business, professional, and occupational license (BPOL) tax if it is impossible to determine the exact amount of the deduction. Second, the state government, specifically, the Virginia Department of Taxation (tax department) needs to reconsider its current policy of issuing guidelines and public documents instead of regulations in an effort to meaningfully promote taxpayer compliance and minimize tax controversy disputes.

**Multi-State Businesses Must Deduct Gross Receipts Taxed By Other States**

Since 2009, the Supreme Court of Virginia has delivered three very important opinions concerning the BPOL tax imposed by many Virginia local governments on the businesses operating within their boundaries. Each of these cases involves the proper method of calculating the BPOL tax owed by larger businesses and businesses that operate in multiple states. The Virginia General Assembly reformed the BPOL tax in 1996 to reign in local government officials' over-reaching interpretations of the tax and to provide uniformity on how the tax is imposed in different localities in Virginia.[1] Despite the reformation of the BPOL tax, major issues regarding differing interpretations on the proper method of calculating the BPOL tax still exist for businesses that operate in multiple states. In connection with the 1996 reform, the tax department promulgated regulations concerning the BPOL tax, but has failed to update them since they were first promulgated in 2008.[2] Because the BPOL regulations have not been updated, multi-state businesses continue to be forced to incur unnecessary costs relating to administrative and judicial disputes on core issues that should have been dealt with by new regulations.

The first two BPOL tax opinions from the Supreme Court of Virginia prevented local governments from taxing gross receipts not earned in the locality. In *City of Lynchburg v. English Construction Company*[3], the Court determined that the City of Lynchburg had no authority to tax the gross receipts of a taxpayer earned in other localities where that taxpayer maintained a definite place of business. Then, the Court in *Ford Motor Credit Company v. Chesterfield County*[4] determined a multi-state financial service provider's receipts from an office located in a Virginia locality were not 100 percent attributable to the actions performed in the office when the loans originated in the Virginia office but were funded and serviced through offices outside of Virginia. While both of these cases involved different BPOL tax issues, the opinions correctly controlled the local government's power to tax.

**Determining the BPOL Deduction for Gross Receipts Taxed in Other States**

Unlike *English Construction* and *Ford Motor Credit*, the most recent dispute concerning the BPOL tax, *The Nielsen Company LLC v. County Board of Arlington County*[5], could have been avoided had the tax department simply updated its regulations. The *Nielsen* case involved an appeal from the Circuit Court of Arlington County that rejected Nielsen's claim of a deduction for gross receipts taxed outside of Virginia for purposes of calculating the BPOL tax.[6] The Supreme Court of Virginia reversed the circuit court's decision and allowed the deduction as calculated by Nielsen.[7]

The dispute in this case involved the interpretation of a statute allowing businesses a deduction for gross receipts taxed in other states. Specifically, the calculation of the permissible deduction was at issue. Through publicly issued rulings, the Virginia Tax Commissioner (tax commissioner) provided his interpretation of how the deduction should be computed. This methodology was not contained in the BPOL tax regulations. In these rulings, the tax commissioner determined that BPOL taxpayers who use payroll apportionment to situs their taxable receipts should use the same apportionment factor to ascertain the proper amount of the deduction permitted by Virginia Code § 58.1-3732.[8]

The dispute between Nielsen and Arlington over the deduction arose upon an audit by Arlington that resulted in assessment for underpaid BPOL tax issued to Nielsen.[9] Nielsen appealed the assessments back to Arlington and ultimately to the tax commissioner pursuant to Virginia Code § 58.1-3703.1(A)(6)(a).[10] The tax commissioner issued his decision on the appeal in Public Document 12-146.[11] The tax commissioner determined that Arlington used an incorrect methodology to calculate the deduction, and instead permitted a payroll percentage methodology to be used.[12] The tax commissioner stated that the rationale behind this requirement is while this methodology provides an estimate, it results in a reasonable approximation of the deduction, is straightforward to administer, and can be applied uniformly.[13] In a ruling issued by the tax commissioner prior to Nielsen's ruling, he specifically articulated the method to calculate the deduction as follows:

1. Ascertain whether any employees at the Virginia definite place of business participated in interstate transactions by, for example, shipping goods to customers in other states, participating with employees in other offices in transactions, etc. If there has been no participation in interstate transactions, then there is no deduction. If there has been participation, then;
2. Ascertain whether any of this interstate participation can be tied to specific receipts.

If so, then those receipts are deducted; however, if payroll apportionment had to be used to assign receipts to the definite place of business, then it is very unlikely that any of those apportioned receipts can be specifically linked to interstate transactions. If not, or if only some of the participation can be tied to specific receipts, then;

3. The payroll factor used for the Virginia definite place of business would be applied to the gross receipts assigned to definite places of business in states in which the taxpayer filed an income tax return. Note that payroll apportionment would probably be needed to assign receipts to definite places of business in other states.[14]

Arlington filed suit challenging the tax commissioner's ruling arguing that "regardless of how the pool of taxable gross receipts was calculated under Code § 58.1-3703.1(A)(3), determining the deduction under Code § 58.1-3732(B)(2) requires the taxpayer to prove by manual accounting that the receipts attributable to business in a foreign jurisdiction where the taxpayer is subject to an income-based tax liability were actually captured in the pool of taxable gross receipts."[15] The circuit court ultimately ruled that usage of payroll apportionment for purposes of the deduction is "arbitrary and capricious" and that "[t]he taxpayer however, is certainly in a position to demonstrate by time sheets, travel expenses, budget, phone logs and other means how Virginia employees may have contributed to revenues generated out-of-state and therefore entitled to the deduction."[16]

**Entitlement to the deduction**

Requiring Nielsen to calculate its exact deduction ignores the reality that if Nielsen were able to calculate its deduction, it would also be able to directly situs its gross receipts and not be required to use payroll apportionment for situsing purposes. Therefore, the circuit court's ruling that an exact determination was required was in error. Interestingly, Arlington never argued that Nielsen improperly used payroll apportionment to situs its receipts and stipulated that using payroll apportionment to situs receipts was proper for Nielsen.[17] So when the circuit court attempted to require Nielsen to calculate its deduction without using an apportionment formula, the circuit court effectively determined that Nielsen may not claim a deduction to which it was entitled and had been legislatively granted by the General Assembly.[18] The trial court's decision on this issue was contrary to the General Assembly's intent for the BPOL deduction statute.

The Supreme Court of Virginia overturned the circuit court on the basis that the tax commissioner's ruling was neither contrary to law, nor arbitrary and capricious.[19] However, the Supreme Court of Virginia did not state that the tax department's method for calculating the deduction was the method that should be used. After it was acknowledged that the Code of Virginia does not resolve the permissible methodology for calculating the deduction, the Court determined that the tax department's requirement of manual accounting, or payroll apportionment in the event that manual accounting is impossible to calculate the deduction, falls within the scope of accounting methodologies permitted by Virginia Code § 58.1-3732 which provides for the deduction for out-of-state receipts.[20] The Court concludes the tax department's methodology is not contrary to law.[21] The Court also held that the tax department's methodology was not arbitrary or capricious as it followed the statute's scheme for determining the situs of gross receipts when it is impossible or not practical to make such a determination for purposes of the tax.[22] Specifically, the Supreme Court of Virginia stated:

> The use of an estimate methodology when determining a deduction, but only when it is impossible to determine the exact figures to calculate such a deduction, is neither "contrary to ... established rules of law" nor a mechanism permitting an assessment to be "founded on prejudice or preference rather than on reason or fact" when that very same methodology is used to determine the initial tax to be imposed, but only when it is impractical or impossible to determine the exact figures to calculate such a tax.[23]

On this basis, the case was remanded back to the circuit court to issue an order consistent with the opinion.[24]

**Litigation could have been avoided with updated tax regulations**

The Supreme Court of Virginia in *Nielsen* addressed the issue of the deference or weight that must be given to the tax commissioner's rulings. The tax department has a long history of believing that its rulings should be deferred to and given great weight by the judiciary in its decisions. Virginia courts disagree with providing any such deference. The Court directly addressed this contention when it stated, "A court never defers to

the Tax Commissioner's interpretation of a statute."[25] Great weight is only provided when a statute is obscure or its meaning doubtful.[26]

If the tax department would like its interpretations to receive "great weight," the tax department should follow prior Court guidance:

> For purposes of giving weight to the positions of administrative agencies, it does not matter whether an agency has been consistent in its rulings. This is because an agency's "prior rulings and policies themselves are not entitled to great weight, unless expressed in regulations." *Chesapeake Hosp. Auth. v. Commonwealth*, 262 Va. 551, 560, 554 S.E.2d 55, 59 (2001).[27]

The Court also recognized that the tax department's rulings are only accorded judicial notice and nothing more pursuant to Virginia Code § 58.1-203.[28] This subject begs the question of why the tax department will not promulgate regulations so multistate businesses have the necessary regulatory guidance to comply with Virginia's BPOL tax laws. Simply put, there would not have been an issue in dispute in the *Nielsen* case had the tax department simply promulgated a regulation instead of publishing its desired BPOL deduction methodology in a ruling that Virginia courts and Virginia taxpayers are not entitled to rely upon as precedent.

**The Virginia Department of Taxation will not promulgate tax regulations**

The issue of promulgating tax regulations in Virginia is contentious. Regulations interpreting tax statutes typically are more desirable than regulations in other areas of law because tax regulations provide answers and more certainty when trying to determine how tax statutes that frequently are in-artfully worded or are somewhat ambiguous apply to them. Both the Tax Policy Committee of the Virginia Chamber of Commerce and the Taxation Committee of the Virginia Bar Association have expressed their belief on numerous occasions to the tax commissioner that the tax department should put forth more of an effort promulgating new and updating existing tax regulations.

Unfortunately, there does not appear to be much interest from the tax department to devote resources to this endeavor. Members of the Tax Policy Committee of the Virginia Chamber of Commerce and the Taxation Committee of the Virginia Bar Association first met with the tax commissioner and his senior staff approximately five years ago. During this meeting, it was expressed to the tax commissioner that the Chamber would assist the tax department in its efforts to restart the regulation process so tax compliance and certainty could be improved. Note that this is the odd situation where business representatives asked the government to write regulations.

The business community's pleas apparently fell on deaf ears. Subsequent meetings between the various business community stakeholders and the tax department leadership were equally unsuccessful even though the tax department recognized the importance and need for tax regulations in many areas of mutual interest. The tax department's inaction with tax regulations can also be observed on the Virginia Regulatory Town Hall website operated by the Virginia Department of Planning and the Budget.[29] The Town Hall website shows that the last activity for any chapter of the Virginia Administrative Code for which the tax department is responsible occurred in 2009.[30] Furthermore, the Town Hall website shows that the tax department has seventeen actions pending.[31] All seventeen actions were initiated by the tax department between late 2006 and early 2008.[32] None of the pending actions have advanced beyond the initial notice stage referred to as the NOIRA (Notice of Intended Regulatory Action).[33]

**Rulings and guidelines are not the answer**

The tax department has all but abandoned issuing tax regulations. Instead, since 1980 the department has issued approximately 8,800 "public documents," an average of about 245 per year. These "public documents" consist of rulings of the tax commissioner on assessment appeals and refund requests, advisory opinions, and other bulletins and announcements. "Public documents" can cover all of the taxes administered by the tax department plus some local taxes. While it is notable that Virginia releases such documents publicly unlike many other states, such "public documents" are not precedential and receive no deference in a judicial setting.

The tax department last performed a major update of the tax regulations in 1985. In many cases when a new tax policy has been enunciated in a post-1985 public document, the tax regulations have not been updated. The tax regulations also have not been updated to reflect opinions of the Supreme Court of Virginia.[34] Because the regulations have not been updated, Virginia taxpayers in need of more certainty on tax positions must hire advisors simply to comply with the

commonwealth's tax laws. While that is good news for lawyers and CPAs who specialize in Virginia taxation, it is not necessarily financially good news for the taxpayers themselves. The tax department's own auditors must also negotiate the thousands of public documents issued by the tax department in an attempt to find the right tax policy when conducting audits of taxpayers.

The tax department has begun to issue or release "guidelines" as an alternative to tax regulations. Guidelines are provided for in Virginia Code section 58.1-204(A)(4) by requiring the tax commissioner to publish guidelines that he believes "may be of interest to taxpayers and practitioners."[35] It is unclear if anyone asked the tax department to issue such guidelines as both the business community and the legal community has asked for regulations, not guidelines, which taxpayers, the tax imposing authorities, and the Virginia judiciary may rely upon.

The process for issuing guidelines in this manner is easier and less cumbersome. It is the view of the authors that what makes guidelines easier to issue is that there is nothing in the Virginia Code that establishes a procedure for how such guidelines are developed. When writing guidelines, the tax department tries to follow the comment periods provided for in the Administrative Process Act (APA) that are required for the promulgation of regulations. However, the tax department will abandon this practice when it deems it necessary. By writing guidelines completely within the tax department, reviews by other executive branch agencies and the Attorney General of Virginia that are required by the APA for the promulgation of regulations are avoided. The result is a simple statement by the tax department of what it believes to be its policy.

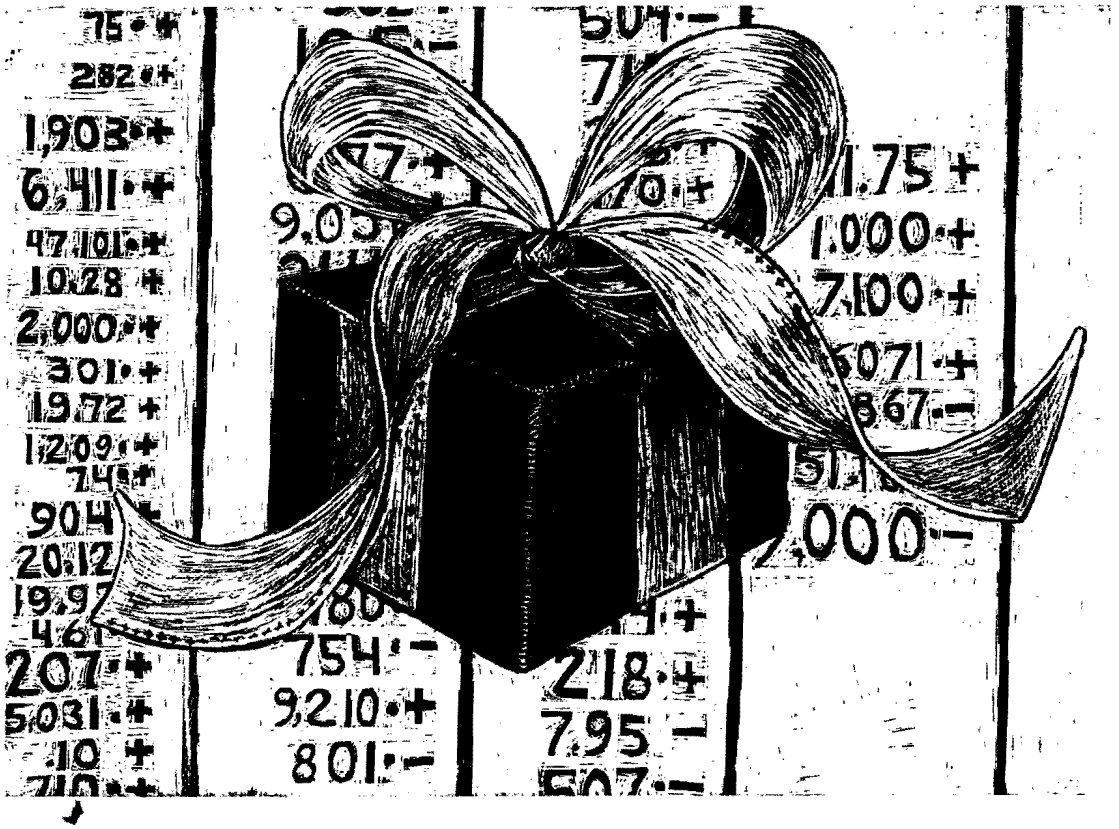
Recognizing the lack of review, the General Assembly chose to give guidelines no weight and solely afforded them judicial notice.[36] Knowing that guidelines receive no formal review outside of the tax department and receive no weight by the judicial system, how can tax lawyers and other tax practitioners advise clients to rely on them? Of all the different state agencies, the tax department probably has the most diect contact with Virginia citizens. Despite that, the tax department has not issued regulations under the APA and instead provides unreviewed policy through the use of guidelines that have no precedential value, thus leading to uncertainty, expense, and litigation that may otherwise be avoided.

Endnotes:

1 Craig D. Bell and J. Christian Tennant, *Is Your Client Overpaying BPOL Tax?*, VIRGINIA LAWYER, Vol. 58/No. 3, (October 2009) at 24.
2 As a temporary measure, the tax department issued BPOL tax guidelines instead of regulations prior to 2008.
3 *City of Lynchburg v. English Construction Company, Incorporated, et al.*, 277 Va. 574, 584; 675 S.E.2d 197, 202 (2009).
4 *Ford Motor Credit Company v. Chesterfield County*, 281 Va. 321; 707 S.E.2d 311 (2011).
5 *The Nielsen Company LLC v. County Board of Arlington County*, 289 Va. 79, 767 S.E.2d 1 (2015).
6 *Nielsen*, 289 Va. at 86.
7 *Nielsen*, 289 Va. at 99.
8 *Nielsen*, 289 Va. at 95.
9 *Nielsen*, 289 Va. at 85.
10 *Id.*
11 *Nielsen*, 289 Va. at 86.
12 *Id.*
13 Ruling of the Virginia Tax Commissioner, Public Document (P.D.) 12-146 (August 31, 2012).
14 Ruling of the Virginia Tax Commissioner, P.D. 12-88 (May 31, 2012).
15 *Nielsen*, 289 Va. at 94.
16 *County Board of Arlington County, Virginia, et al. v. The Nielsen Company (US), LLC*, Case No. CL12-2872, Pg. 5 (County of Arlington Circuit Court, November 19, 2013).
17 Post-trial brief of the respondent at 8, *County Board of Arlington County, Virginia, et al. v. The Nielsen Company (US), LLC*, Case No. CL12-2872 (County of Arlington Circuit Court, November 19, 2013).
18 Post-trial brief of the respondent at 12-13, *County Board of Arlington County, Virginia, et al. v. The Nielsen Company (US), LLC*, Case No. CL12-2872 (County of Arlington Circuit Court, November 19, 2013).
19 *Nielsen*, 289 Va. at 99.
20 *Nielsen*, 289 Va. at 96.
21 *Id.*
22 *Nielsen*, 289 Va. at 97.
23 *Id.*
24 *Nielsen*, 289 Va. at 99.
25 *Nielsen*, 289 Va. at 89.
26 *Nielsen*, 289 Va. at 88 (*citing Superior Steel Corp. v. Commonwealth*, 147 Va. 202, 206, 136 S.E. 666, 667 (1927)).
27 *Nielsen*, 289 Va. at 89.
28 *Nielsen*, 289 Va. at 89 (*citing* Va. Code § 58.1-205(3); *Chesapeake Hosp.*, 262 Va. at 560, 554 S.E.2d at 59).
29 http://www.townhall.state.va.us/
30 https://www.townhall.virginia.gov/l/viewboard.cfm?boardid=75&display=chapters
31 https://www.townhall.virginia.gov/L/NowInProgress.cfm

# Everything Old Is New Again:
## The Virginia Department of Taxation's Attempt to Ignore the Limits of Collection

by Guy C. Crowgey, Robert H. Johnson, and Brockenbrough A. Lamb




On October 17, 2014, the commissioner of the Virginia Department of Taxation issued a Public Document (P.D. 14-177) in which he answered a taxpayer's request for a ruling on the period of limitations for collecting taxes.[1] Turning to § 58.1-1802.1(A) of the Code of Virginia, the commissioner argued "that so long as the any [sic] collection action is initiated or made before the end of the period of limitations, collection may continue until the assessment is satisfied."[2] According to the commissioner, a "collection effort" has occurrec when the Department of Taxation (department) "levies an assessment" on a taxpayer and "encompasses all means of collecting taxes enumerated under Virginia statutes."[3] In practice, this inte pretation of § 58.1-1802.1 permits the department to collect assessed taxes by wage garnishments, *liens, and any othe* means no matter how old the underlying liability.

The commissioner's ruling in P.D. 14-177 raises the question as to what is actually limited by § 58.1-1802.1. If the commissioner's ruling is correct, the department has the same ability to pursue a taxpayer for a liability incurred in 1990 as it does for one incurred in 2014 as long as the department has properly made an assessment. According to the commissioner, a collection effort has already begun once the tax is assessed. Since a liability must be assessed in order to exist, and P.D. 14-177 states the department need only begin a collection effort in order to collect beyond the statutory period, every Virginia tax liability is fair game for collection in perpetuity. This seems contrary to the intent of a code section titled "Period of limitations on collection."[4] Moreover, this statute does not limit the time for the department to assess a liability as that period is set out by Va. Code Ann. § 58.1-1812. If § 58.1-1802.1 does not limit the period of time the department actually has to collect the tax or limit the time the department has to assess a tax, then it does not limit anything at all except for the accrual of interest and penalties under certain circumstances.[5]

The Virginia General Assembly enacted § 58.1-1802.1 in 1990. Prior to this statute, there was no law specifically limiting the collection of tax by the department. Originally § 58.1-1802.1 set forth a limitation on collections of twenty years from the date of a proper assessment[6] of a tax.[7] Since then, the code section has been amended twice, first, in 2010 when the limit was reduced to ten years,[8] and again in 2012 when the limit was reduced to seven years.[9] Under the commissioner's ruling, it is unclear what, if anything, would have been changed by this reduction in years.

In both 2010 and 2012, the department issued impact statements in which it argued the reduced time periods would have little effect on the revenue generated from tax collections because it is unusual for the department not to have instituted a collection effort well before the specified time period.[10] These impact statements naturally dovetail nicely with the commissioner's later ruling in P.D. 14-177. Since the commissioner ruled in P.D. 14-177 that the collection effort commences when the department "levies an assessment," a reduction of the limitations period from twenty years to seven years would, in fact, have no effect on the department's ability to collect assessed liabilities.

It seems unlikely the General Assembly would have created and twice amended a law that is largely meaningless. Evidence that the commissioner has misunderstood the intent of the General Assembly is present in the legislative history. In 2012, the governor formally recommended to the General Assembly an amendment to § 58.1-1802.1, which suggested that the statute, as written, did not, in fact, provide for unlimited collection. The proposed amendment, which the General Assembly tellingly declined to adopt, would have inserted at the end of the statute the following language: "Nothing in this section shall prohibit the continuance of a collection activity begun within the period prescribed in subsection A[11] from continuing beyond that period."[12] Such an amendment would have explicitly allowed for the commissioner's position that the department may continue collection actions past the seven year limit,[13] but again, the General Assembly did not amend § 58.1-1802.1 to include it.

According to the Supreme Court of Virginia, in order to collect a tax, the commissioner must be able to point to a statute that positively and explicitly grants the department such authority.[14] A ruling by the commissioner involving the interpretation of a statute authorizing collection or assessment is presumed to be correct, but only on its face.[15] It may be challenged on the basis that it is "contrary to law, was an abuse of discretion, or was the product of arbitrary, capricious, or unreasonable behavior."[16] Though courts will give weight to the interpretations of the commissioner when statutes are ambiguous, they will never defer to the commissioner.[17] Furthermore, when a statute is unambiguous, a court will grant the interpretation of the commissioner no more consideration than that of a taxpayer.[18]

When it comes to his interpretation of § 58.1-1802.1 in P.D. 14-177, the commissioner has given the department substantial power well beyond the authority explicitly granted by the statute. In P.D. 14-177, the commissioner relies on and interprets a single sentence out of the entire statute:

> Where the assessment of any tax imposed by this subtitle has been made within the period of limitation properly applicable thereto, such tax may be collected by levy, by a proceeding in court, or by any other means available to the Tax Commissioner under the laws of the Commonwealth, but only if such collection effort is made or instituted within seven years from the date of the assessment of such tax.[19]

The commissioner considers this sentence in a vacuum, without the surrounding language, and then gives the taxpayer his "clear" interpretation.

The commissioner suggests that if a collection effort is merely "initiated" within seven years of a proper assessment, "any collection" at any time is good until the debt is repaid.[20] However, the sentence does not say that a collection is good so long as "any collection action is initiated or made before the end of the period"[21] but rather that a collection is good only if "such collection effort is made or instituted"[22] within the period. Even if the statute were limited to this single sentence,[23] it does not say what the commissioner needs it to say. Instead, this sentence, on its own, explicitly limits the collection of taxes to those specific collection actions made or instituted before the expiration of the period of limitations and, as such, is unambiguously at odds with the commissioner's ruling.[24] The commissioner's ruling becomes even more unreasonable once the sentence is read in conjunction with the rest of the statute, as it would require much of 58.1-1802.1 to be meaningless.

Take for instance the following language from § 58.1-1802.1(A) which immediately follows the sentence relied on by the commissioner in P.D. 14-177:[25] "[p]rior to the expiration of any period for collection, the period may be extended by a written agreement between the tax commissioner and the taxpayer."[26] Why would it be necessary to extend a period for collections, especially by written agreement, if all the department has to do to make a collection period last forever is to "lev[y] an assessment"[27] on the taxpayer? Or to ask it another way, why would the General Assembly provide the department with such a meager method of extending a collection period when it has already (according to the commissioner) granted it the tremendous ability to collect a tax in perpetuity?

In the very next sentence of § 58.1-1802.1(A), the General Assembly lists its exceptions to the general "period of limitations provided in this subsection during which a tax may be collected."[28] This language, which directly contradicts the commissioner's ruling, explicitly marks the statute as a general limitation on the time period for collections (with certain listed exceptions). The commissioner, however, rules that the statute does not limit the time period for collections but rather merely limits the time period for the initiation of collections. This reading is likely incorrect because the language of the statute here identifies § 58.1-1802.1 as a straightforward limitation on collections. Moreover, a limitation on the initiation of collections is meaningless when, as the commissioner contends, a collection is initiated by the assessment itself.

To arrive at his understanding of the statute, the commissioner seems to put great weight on the fact that a "tax may be collected . . . if such collection effort is . . . instituted within seven years from the date of assessment."[29] If these specific words could be considered on their own, without the surrounding language of the statute, they might well suggest that § 58.1-1802.1 is an attempt to limit the time period for the initiation of tax collections rather than the time period for the collections themselves. However, given the surrounding language, such an interpretation is flawed.

Considering the statute as a whole, it seems likely that the General Assembly intended to create something like the general federal Collection Statute Expiration Date (CSED), which applies to IRS collections. Using similar language to § 58.1-1802.1, the CSED provides that "[w]here the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun . . . within 10 years after the assessment of the tax."[30] As in the Virginia statute, the federal CSED mentions that a tax may be collected if a collection proceeding is made or begins before the expiration of the collection period;[31] however, unlike § 58.1-1802. the CSED statute has always been interpreted to be a general limitation on the time period for collecting a tax (limiting it to ten years).[32] The IRS interpretation makes sense as such language is easily read to mean that a collection is good to the extent that it is initiated during the statutory period described. Interpreting § 58.1-1802.1 in a similar fashion, the Virginia statute allows that even if a collection cannot be completed during the statutory period, it may still be instituted and partially made during that period. While this reading requires a small degree of interpretation it does not upend the statute.

Until the commissioner's ruling is challenged and overturned by the courts, it will likely remain the stated policy of the department. Such a challenge may be particularly slow in coming given the high cost of litigation when compared with the relatively low-cost administrative avenues for the resolution of outstanding tax assessments.