

**Report of EO 17 Workgroup
November 12, 2014**

Background: The Administrative Process Act (APA) provides for executive branch participation in the rulemaking process after publication of the proposed regulation and the final regulation (see Attachment 1).

In a 2009 report, JLARC found that key provisions for executive branch review in then current Executive Order 36 (2006) (as well as others before it) were not provided for in the APA (see Attachment 2). JLARC offered several options to avoid unnecessary delays in the rulemaking process and recommended that executive orders be developed to be consistent with the APA (see Attachment 3).

Executive Order 17 (2014), similar to EO 36, includes additional points of executive branch review and requires agencies to obtain approval from the Governor before submitting the NOIRA, Proposed, or Final to the Registrar for publication.

At the last ALAC meeting, the workgroup was asked to review the JLARC recommendations for possible amendments to APA and to finalize the internal timeframe policy recommendation.

The workgroup met on October 29 and considered possible changes to the APA to implement the JLARC recommendations. In the course of the discussion, the workgroup also considered a different approach -- to modify the APA to include executive branch review before submission of a regulatory stage for publication, with specific timeframes and the ability of the agency to move forward notwithstanding any objection from the Governor.

After discussing the issues related to each option, the workgroup decided to obtain guidance from full committee on how to proceed regarding changes to the APA.

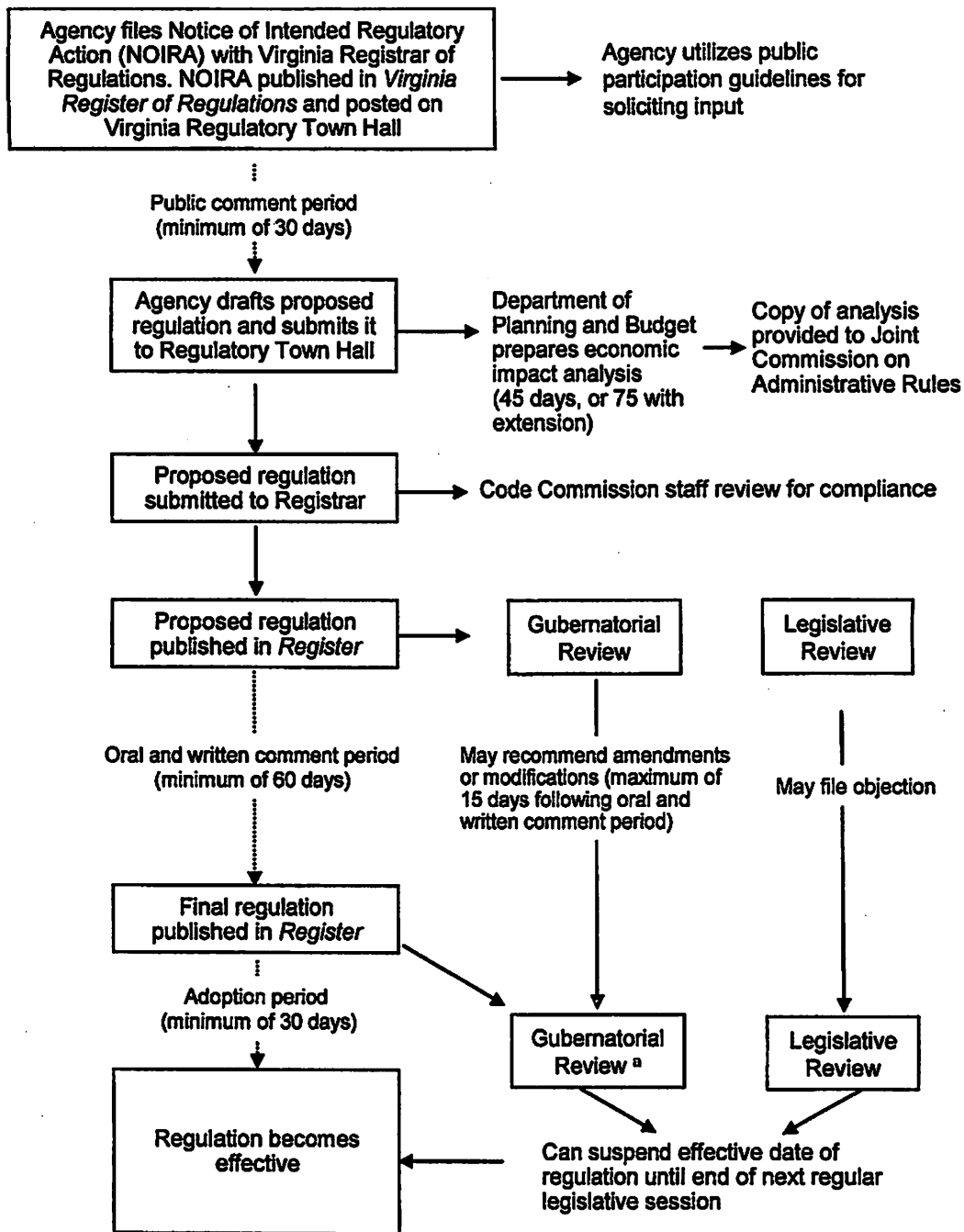
Questions for ALAC:

1. Should the APA be modified to (i) implement the JLARC recommendations or (ii) provide for executive branch review before publication of the proposed and final stages, but include time limits and a default provision that requires agencies to proceed notwithstanding any objection or recommendation from the Governor?
2. Should ALAC recommend that the executive branch adopt internal timeframes for its review of regulations (see Attachment 4)?

Workplan:

After receiving input from ALAC, the workgroup will continue its work over the next year.

Figure 2: Statutory Steps in Standard VAPA Regulatory Process



^a Governor may require an additional 30-day public comment period if substantial changes are made to the proposed regulation.

Source: JLARC staff analysis of Virginia Administrative Process Act (Chapter 40 of Title 2.2 of the Code of Virginia).

Exhibit 1: Key Provisions for Executive Branch Review Contained in Executive Order (EO) 36 but Not Contained in VAPA

Provision**Review of Agency's NOIRA Submission**

DPB shall review the agency submission, and advise the Secretary and Governor of its determination as to whether the regulation complies with EO requirements and comports with State's policies set forth in the EO.

If DPB's director advises that the NOIRA presents issues requiring further review, the Secretary shall review the NOIRA within seven days and forward a recommendation to the Governor.

"The agency shall be authorized to submit the NOIRA to the Registrar for publication when the Governor approves the NOIRA for publication."^a

Prior to Submission of the Proposed Regulation to the Registrar

DPB shall review the proposed regulation package to determine compliance with the EO and its comport with policies set forth in the EO, and shall advise the Secretary of its "determination" within 45 days.

"The Secretary shall review the proposed regulation package within 14 days and forward a recommendation to the Governor."

"The Chief of Staff is hereby authorized to approve proposed regulations on behalf of the Governor. Within 14 days of receiving notification that the Governor has approved the proposed regulation package, the agency shall submit the proposed package to the Registrar..."

Prior to Submission of the Final Regulation to the Registrar

DPB shall review the final package for compliance and comport with the EO, and advise the Secretary and the Governor of its "determination" within 14 days.

After DPB's review, package forwarded to Secretary and Governor; Secretary is to "make a recommendation to the Governor within seven days."

The agency is "authorized" to submit final regulation if the Governor "approves" the package for publication.

^a Executive Order 21 (2002) stated that the agency could submit the NOIRA to the Registrar if at least one of three conditions is met: "a. The Governor approves the NOIRA for publication. b. Fourteen days have elapsed since DPB's determination and neither the Governor nor the Secretary has objected to the NOIRA. c. Fourteen days have elapsed and any objections raised by the Governor or the Secretary have been withdrawn."

Source: JLARC staff analysis of EO 36 (2006).

One significant difference is that the level for approval of a regulatory package before submission to the Registrar has increased from the secretarial level to the Governor. The executive order requires the Governor's approval before publication of the NOIRA, the proposed regulation, and the final regulation.

The fact that under the executive order, a final regulation package must be reviewed and approved before it is submitted to the Registrar, is also a significant change. DPB, the cabinet secretary, and the Governor's office all review the regulation before it is published as a final regulation. As noted above, prior executive orders referenced the provisions of VAPA in only requiring that agencies furnish the final regulation package to executive branch reviewers at the same time as they provided it to the Registrar.

Case Study

A fast-track regulation of the Board of Counseling spent 135 days in executive review before becoming final on July 23, 2009. The purpose of the fast-track regulation was to clarify an oversight in a regulatory revision from the previous year. The regulatory revision had added a provision to allow clinical practice in another state to count towards licensure in Virginia. The intent was that the experience be "post-licensure," but the regulation did not state this. Therefore, the board promulgated a fast-track regulation to clarify this. This also was to ensure that requirements for the board are consistent with other professional boards that use the "post-licensure" statement. This fast-track regulation took 206 days from filing to become effective and 135 of these days were in review.

Changes May Be Needed to Avoid Unnecessary Delays in the Rulemaking Process

Executive branch review appears to contribute to the slow and unpredictable timeframes for standard and fast-track VAPA regulations which make exemptions attractive or imperative for agencies. As will be discussed in the next chapter, such an extensive, multi-stage executive branch review process appears to occur in few other states. Furthermore, the time spent in executive branch review in Virginia rivals the total rulemaking timeframes reported in some states. There are some options which could be considered to potentially expedite Virginia's executive branch review process in the future. Specific options include

1. ***VAPA and future executive orders could be written to eliminate executive branch review at the NOIRA stage.*** At this stage, the agency or board is only indicating that it is considering developing or amending a regulation on a particular subject matter. The purpose of the NOIRA is to gain feedback from the public and others as to what it should consider before proposing a regulation in this area. If executive branch reviewers have any concerns, their consideration and feedback could be provided simultaneously with the public comment period on the NOIRA.
2. ***VAPA and future executive orders could be written to limit DPB's review responsibilities to its preparation of the economic impact analysis already required by the act.*** VAPA currently requires DPB to perform an analysis of the economic impact of proposed regulations. However, the Act does not require DPB to conduct reviews of regulatory policy. Currently, both DPB and Governor policy office staff review regulations from a policy perspective.

This redundancy adds time to the process. To the extent that the Governor's Office is active in such policy reviews, the DPB review could be eliminated.

3. *For regulations to which the standard VAPA process applies, both VAPA and future executive orders could be written to explicitly authorize agencies to proceed with submitting their proposed regulatory package either (1) within 15 days following completion by DPB of its statutorily-prescribed economic impact analysis, or (2) sooner, if advised that the executive branch review is complete.* The purpose of this option is to set forth an expectation that agencies can proceed with the process if reviewers have not responded to the agency with their comments within an established timeframe.
4. *For fast-track regulations, both VAPA and future executive orders could be written to expedite executive branch review.* Executive orders could be written to include a requirement that executive branch review of fast-track regulations shall be completed within no more than 40 or 50 days from the time of agency submission of the regulation to DPB. The 40-day maximum time would include ten days for an assessment of the fast-track status and 30 days for DPB's required economic impact analysis. Up to an additional ten days could be allotted if further review by the secretary or Governor is deemed necessary.

Also, once the agency has submitted its proposed regulation package to the Registrar and it has been published, VAPA already contains specific provisions to expedite the process. As previously noted, VAPA requires that "no later than 15 days" following the close of the public comment period on the proposed regulation, the Governor is to transmit comments, if any, on the proposed regulation; and after that time has passed, the agency is authorized to proceed with adopting the regulation and to forward the regulation to the Registrar. Implementation of the rulemaking process would be expedited if this provision of the act were to be followed. The following recommendation addresses this issue.

Recommendation (1). Regarding the Governor's review following completion of the public comment period on proposed regulations, future executive orders should be developed to be consistent with the terms contained in §2.2-4013 of the Virginia Administrative Process Act.

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Recommendations:

1. The Governor's Office should adopt an internal policy that sets a time period for review by the Governor for each stage of the regulatory process. The policy could include a provision for the extension of any time period in a particular case after review and determination that the time period cannot be met.

The Work Group recommends the follow time periods:

- a. Notice of Intended Regulatory Action: 14 days.
 - b. Proposed: 30 days.
 - c. Revised proposed: 30 days.
 - d. Final - no changes or changes that are not substantial: 30 days.
 - e. Final - substantial changes: 45 days.
 - f. Fast-Track: 30 days.
 - g. Emergency: comply with statutory requirements and in no case exceed those timeframes.
2. The Office of the Attorney General should adopt an internal policy regarding review of regulations. (Note: The OAG has established a task force to develop such an internal policy).

Comments: The work group noted that the EO had been streamlined and definitions were added, which made it an improved, more useful document.

The section on guidance documents now gives agencies the option of either posting the actual guidance document itself on Town Hall or posting a link to the guidance document.

The section on periodic review clarifies that a periodic review may be accomplished during the course of a comprehensive regulatory action.

SENATE BILL NO. _____ HOUSE BILL NO. _____

1 A Bill to amend the Code of Virginia by adding in Article 1 of Chapter 6 of Title 2.2 a section numbered
2 2.2-601.2, and by adding in Chapter 1 of Subtitle I of Title 54.1 a section numbered 54.1-101.2 relating to
3 notice provisions; commercial delivery services.

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

5 **1. That the Code of Virginia is amended by adding in Article 1 of Chapter 6 of Title 2.2 a section**
6 **numbered 2.2-601.2, and by adding in Chapter 1 of Subtitle I of Title 54.1 a section numbered**
7 **54.1-101.2 as follows:**

8 **§ 2.2-601.2. Delivery of notice by mail, ordinary mail, registered mail, or certified**
9 **mail.**

10 Where service, delivery, or transmission of any notice or paper is authorized or required by any
11 provision of this Title to be accomplished by “mail,” “ordinary mail”, “registered mail,” or
12 “certified mail,” service, delivery, or transmission by third-party commercial carrier is deemed to
13 be authorized by such provision. Any applicable requirements in other titles of this Code or the
14 Rules of the Supreme Court of Virginia for proof of such service, delivery, or transmission shall
15 remain in effect when a third-party commercial carrier is used.

16 **§ 54.1-101.2. Delivery of notice by mail, ordinary mail, registered mail, or certified**
17 **mail.**

18 Where service, delivery, or transmission of any notice or paper is authorized or required by any
19 provision of this Title to be accomplished by “mail,” “ordinary mail”, “registered mail,” or
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- 1 Rules of the Supreme Court of Virginia for proof of such service, delivery, or transmission shall
- 2 remain in effect when a third-party commercial carrier is used.

EX PARTE COMMUNICATIONS

§ 2.2-4024.2. Ex Parte Communications (Option 2)*

A. Except as otherwise provided in this section, while a contested case is pending, the hearing officer may not make to or receive from any person any communication concerning the case without notice and opportunity for all parties to participate in the communication.

B. A hearing officer may communicate about a pending contested case with any person if the communication is required for the disposition of *ex parte* matters authorized by statute or concerns an uncontested procedural issue.

C. A hearing officer may communicate about a pending contested case with an individual authorized by law to provide legal advice to the hearing officer or presiding officer and may communicate on ministerial matters with an individual who serves on the administrative staff of the hearing officer if the individual providing legal advice or ministerial information has not served as investigator, prosecutor, or advocate at any stage of the case, and if the communication does not augment, diminish, or modify the evidence in the record.

D. If a hearing officer makes or receives a communication in violation of this section, the hearing officer:

(1) if the communication is in a record, shall make the record of the communication a part of the hearing record and prepare and make part of the hearing record a memorandum that contains the response of the hearing officer or presiding officer or final decision maker to the communication and the identity of the person that communicated; or

(2) if the communication is oral, shall prepare a memorandum that contains the substance of the verbal communication, the response of the hearing officer or presiding officer or final decision maker to the communication, and the identity of the person that communicated.

E. If a communication prohibited by this section is made, the hearing officer shall notify all parties of the prohibited communication and permit parties to respond in a record not later than 15 days after the notice is given. For good cause, the hearing officer may permit additional testimony in response to the prohibited communication.

F. If necessary to eliminate the effect of a communication received in violation of this section, a hearing officer may be disqualified under § 2.2-4024.1, the parts of the record pertaining to the communication may be sealed by protective order, or

* Option 2 – *Ex parte* prohibition applies to only formal hearings handled by presiding officers and hearing officers.

other appropriate relief may be granted, including an adverse ruling on the merits of the case.