

ALAC Executive Review Process Recommendations (Draft)

Based on JLARC Report: Review of Exemptions to the Virginia Administrative Process Act (2009)

ALAC Recommendation 1: Amend VAPA to codify executive branch review at the NOIRA stage to increase timeliness and transparency at this stage. The statute would allow the executive branch to approve the NOIRA, recommend that the agency withdraw the NOIRA within a prescribed timeframe, or suspend the timeframe period indefinitely. If the executive branch takes no action on within the prescribed timeframe, the NOIRA will be considered approved. The executive branch shall provide an explanation to the agency if the timeframe is suspended.

JLARC Recommendation 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.

ALAC Recommendation 2: Amend VAPA to codify timeframes for DPB review where none exist or limit DPB review to certain stages of the process. This does not prevent DPB from reviewing regulations from a policy perspective. The Governor's office will be free to define the scope of DPB review in the Executive Order.

JLARC Recommendation 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.

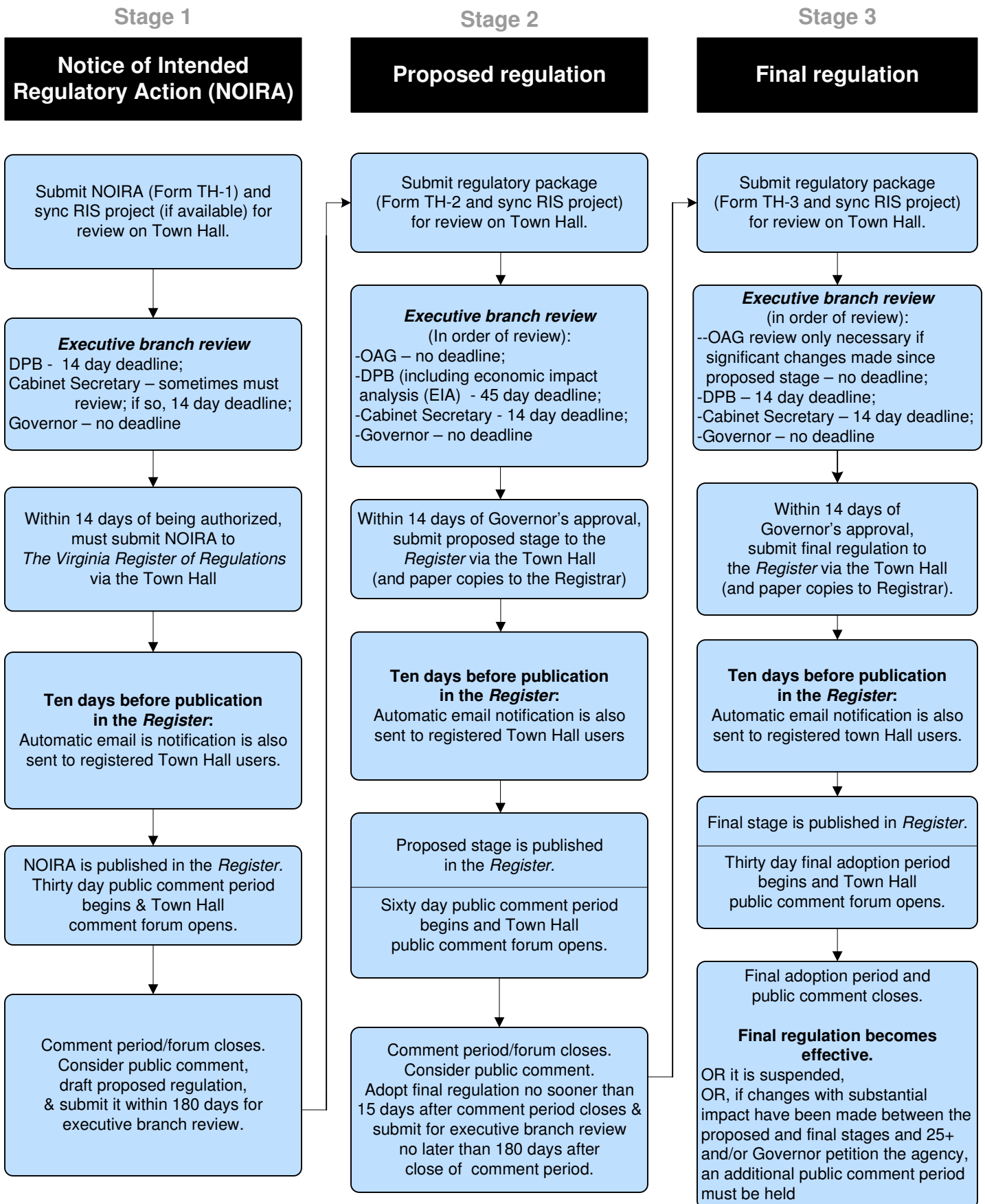
ALAC Recommendation 3: Amend VAPA to eliminate redundancies at the proposed stage and authorize agencies to proceed with submitting regulatory packages within an established timeframe, similar to Recommendation 1. Allow the Governor's office to suspend this timeframe indefinitely as in recommendation 1. Also allow DPB to certify that a proposed regulation which received no public comment or only positive public comment is unchanged and does not need to be reviewed by the Governor at the Final stage.

JLARC Recommendation 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 for than expectation that agencies can proceed with the process if reviewers have not responded to the agency with their comments within an established timeframe.

ALAC Recommendation 4: Work with the current administration to ensure that future Executive Orders are consistent with the provisions of the VAPA with regard to fast-track regulations. Any amendments to the VAPA would have a delayed effective date so as to not impact the current administration.

JLARC Recommendation 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.

Standard regulatory process: Guide for state agencies



Administrative Process and Executive Branch Review -JLARC 2009 Report on APA Exemptions		
Stage	APA	EO 17 (and several others before it)
NOIRA		
	<p><u>2.2-4007.01</u> Requires publication in Register</p> <p><i>Note - JLARC states: APA does not address executive branch review before publication (p. 36)</i></p>	<p>Before publication, requires:</p> <ul style="list-style-type: none"> • DPB review - 14 days • Secretary review - only if DPB indicates further review is needed - 14 days • Governor approval <p>Agency required to submit package to Registrar within 14 days of approval</p>
Proposed		
	<p><u>2.2-4007.04</u> Before submitting proposed regulation to Registrar, agency must submit regulation to DPB</p> <p>DPB determines public benefit and, in coordination with agency, conducts economic impact analysis - 45 days (with additional 30 days, if necessary)</p>	<p>Before publication, requires:</p> <ul style="list-style-type: none"> • OAG review • DPB policy analysis (whether regulation conforms to EO, statutes, & other policies) and economic impact analysis - 45 days • Secretary review • Governor approval
	<p><u>2.2-4007.03</u> Requires:</p> <ul style="list-style-type: none"> • publication in Register & posting on Town Hall • 60-day minimum public comment period after publication 	<p>Agency required to submit package to Registrar within 14 days of approval by Governor</p>
	<p><u>2.2-4013 A</u> Governor's executive order for review of proposed regulations:</p> <ul style="list-style-type: none"> • must include review by OAG to ensure statutory authority • must include examination by Governor to determine that proposal is (i) necessary for public health, safety, and welfare and (ii) clearly written and understandable • may include review by Secretary <p>Governor must transmit comments, if any, on proposed regulations to Registrar and agency within 15 days of end of 60-day public comment period</p> <p>Governor may recommend amendments for conformity with laws, regulations, or court decisions</p> <p>Agency may adopt regulation with or without recommended amendments of Governor, but adoption must be at least 15 days after end of 60-day public comment period</p>	<p><i>Note - JLARC states:</i></p> <ul style="list-style-type: none"> • <i>Other than DPB review, there are no other APA requirements for executive review at proposed stage (p. 37)</i> • <i>APA is not clear if EO procedures for review at proposed stage are in advance of submission to Registrar for publication as well as after publication (p. 37)</i> • <i>APA does not state that cabinet secretary or Governor must "approve" proposed regulation before submission to Registrar. Instead, provision for Governor and legislative action are set out in APA at final stage (p. 37)</i>

<p>Final</p>	<p><u>2.2-4012 E:</u> Immediately upon adoption, agency submits regulation to the Registrar</p> <p><u>2.2-4013 B:</u> Upon final adoption, agency shall forward regulation to Registrar; all changes since proposed must be highlighted.</p> <p><u>2.2-4013 C:</u> During the 30-day final comment period, Governor may review whether agency has made changes with substantial impact to proposed, and notify agency & Registrar of required additional 30 day public comment period regarding such changes</p> <p><u>2.2-4013 D:</u> Publication in the Virginia Register begins a 30-day final adoption period.</p> <p>Governor may review final regulation during 30-day final adoption period and file an objection, suspend the regulation with concurrence of appropriate legislative body, or both. Formal objection or suspension must be filed prior to end of 30-day final adoption period.</p>	<p>Before publication, requires:</p> <ul style="list-style-type: none"> • DPB review - 14 days • Secretary review - only if DPB indicates further review is needed - 14 days • Governor approval <p><i>Note: JLARC states: APA provides for executive branch review of final, but no provision for review of adopted final regulation <u>prior</u> to submission to Registrar (p. 39) APA does not require an agency to stop action on a regulation or withdraw the regulation solely due to governor's objection (p. 32)</i></p>
<p>All Stages</p>	<p><i>Note: JLARC states: APA does not expressly grant DPB, cabinet secretaries, or the Governor the authority to disapprove or refuse to authorize publication of a NOIRA, a proposed regulation, or a final regulation (p. 32)</i></p> <p><i>Exhibit 1 (Key Provisions for Executive Branch Review Contained in Executive Order (EO) 36 but Not Contained in VAPA) of the JLARC report is basically still correct due to similarities between EO 36 (2006) and EO 17 (2014) (p. 34)</i></p>	<p><i>JLARC options to expedite Executive Branch review (p. 43-44):</i></p> <ol style="list-style-type: none"> 1. Eliminate executive branch review at the NOIRA stage 2. Limit Department of Planning and Budget review to economic impact analysis 3. Explicitly authorize agencies to proceed with submitting proposed regulation if Governor has not acted within set amount of time 4. Require Governor to comment on proposed regulation within 15 days following close of public comment period 5. For fast-track regulations, require executive branch review to be completed within 40 to 50 days