

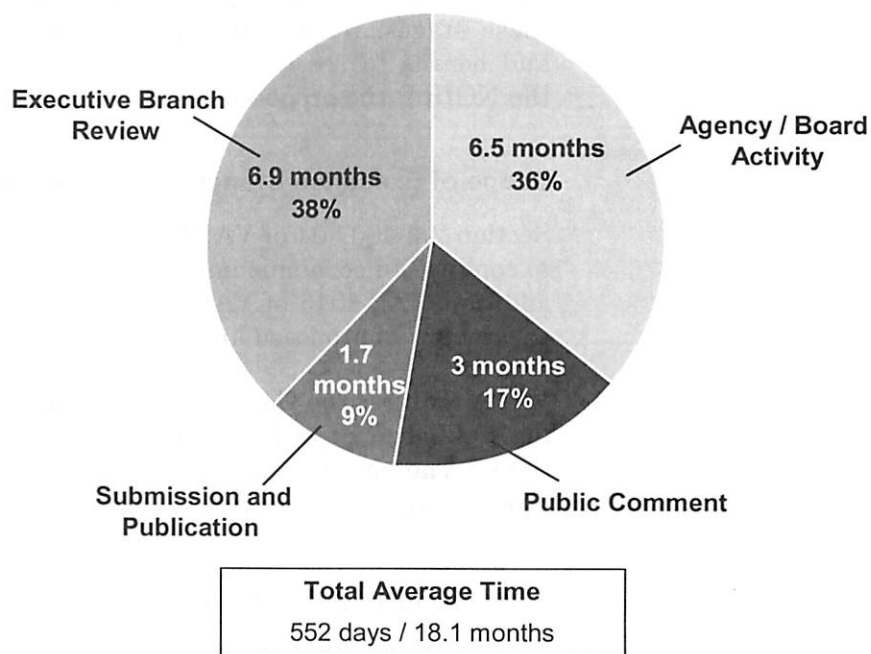
Administrative Process and Executive Branch Review -JLARC 2009 Report on APA Exemptions		
Stage	APA	EO 17 (and several others before it)
NOIRA		
	<p><u>2.2-4007.01</u> Requires publication in Register</p> <p><i>Note - JLARC states: APA does not address executive branch review before publication</i></p>	<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>Not less than 15 days after end of 60-day public comment period, agency may adopt regulation with or without recommended amendments</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</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</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</i>

Final		
	<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 prior to submission to Registrar</i></p>

**Report of the
Joint Legislative Audit and Review Commission
To the Governor and
The General Assembly of Virginia**

**Review of Exemptions to
the Virginia Administrative
Process Act**

Figure 6: Substantial Time Was Spent in Executive Branch Review of Board of Pharmacy Regulations (From Publication of NOIRA to Publication of the Final Regulation)



Note: Based on seven Board of Pharmacy Regulations published as final regulations between September 20, 2004, and April 13, 2009.

Source: JLARC staff analysis of data from the Office of the Registrar of Regulations and the Department of Health Professions.

The use of an exemption is an attractive way for an agency or board to avoid lengthy VAPA timeframes and potentially protracted reviews by executive branch entities. Because the length of time taken by external review in Virginia is substantial and can contribute to making the use of exemptions attractive, executive orders and the time that regulations spend undergoing executive review processes were examined in more detail.

EXECUTIVE ORDER REVIEW REQUIREMENTS ARE DELAYING REGULATIONS AND MAY EXCEED VAPA BOUNDARIES

There are at least three stages in the current rulemaking process in which regulatory agencies or boards are currently required by VAPA to publish rulemaking information in the *Register*. First, agencies are to publish the Notice of Intended Regulatory Action, or NOIRA. Second, they are to publish the proposed regulation. Finally, they are to publish the regulation when it has been adopted in final form.

The current executive order, as well as several executive orders prior to it, provide for executive branch review of the agency's regulatory plans, its proposed regulation, and its final regulation. In addition to providing for executive branch review at each of these stages, recent executive orders have called upon agencies and boards to receive the Governor's approval before publishing the NOIRA, the proposed regulation, and the final regulation.

Scope of Executive Branch Review Authority Under VAPA

Section 2.2-4007.04 of VAPA requires the Department of Planning to conduct an economic impact analysis of proposed regulations. In addition, §2.2-4013 of VAPA contains provisions regarding executive review of proposed and final regulations.

VAPA requires the Governor to develop an executive order containing published procedures "for the review of all proposed regulations." The act specifies that the executive review procedures for proposed regulations shall include

- review by the Attorney General to ensure statutory authority for the proposed regulations, and
- examination by the Governor to determine if the proposed regulations are (a) necessary to protect the public health, safety and welfare and (b) clearly written and easily understandable.

The act indicates that executive order procedures may also include review of the proposed regulation by the appropriate Cabinet Secretary." Under the act, the Governor is to transmit his comments on such proposed regulations no later than 15 days following the completion of the public comment period upon the regulation.

Section 2.2-4013 of VAPA also contains provisions regarding the Governor's review of an agency or board's final regulation. Under the act, authority is given to the Governor to

- review whether an agency has made substantial changes to a regulation between its publication as a proposed regulation and its final version, and to require an additional public comment period regarding such changes,
- object to a final regulation after it has been published, and
- act in concert with the applicable bodies of the General Assembly, to suspend the effective date of a regulation until completion of the next regular legislative session.

However, as was noted in a 1993 JLARC report on VAPA, and as is still the case today, VAPA does not require an agency or board seeking to promulgate a regulation to cease action upon or withdraw that regulation due solely to a gubernatorial objection.

An instance in which the Governor had objected to two regulations of the Virginia Safety and Health Codes Board of the Department of Labor and Industry was noted in the 1993 report. The proposed regulations were to reduce job injuries and provide for more stringent construction sanitation standards. At a meeting of the board following the Governor's objections, no action was taken to withdraw the regulations and the regulations took effect.

If certain legislative committees and the Governor together have an objection to a final regulation, then VAPA does provide authority for the committees and the Governor together to suspend the effective date of a regulation until after the next legislative session, during which time a bill preempting the content of the regulation can be considered. While the Governor has both the authority and responsibility to review regulations proposed by executive branch agencies, VAPA itself does not grant the Governor the authority to halt a regulatory action independent of legislative involvement. VAPA 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.

Recent Executive Orders Have Required Executive Branch Approval or Authorization for Regulations to Move Forward

Since 1990, executive orders pertaining to the adoption of VAPA rules have expanded the scope of executive review. The orders began to explicitly call for executive branch "approval" or "authorization" of regulations, and at higher levels, before regulations can move forward in the process.

Order Signed in 1990 Required Secretarial Review of Proposed Regulation, but Text Did Not Clearly Require Approval. The main executive review check upon regulations contained in the executive order signed in 1990 (and published in the *Register* in 1992) was a required meeting between the agency head and the appropriate cabinet secretary. This meeting was to occur before the agency filed the Notice of Comment Period and before the proposed regulation was submitted to the Registrar, DPB, and the Governor's Office. The secretary was to ensure that the regulations were "reasonable, necessary, and absolutely essential to meet the required objective."

Following this meeting, if “approval” or “authorization” by the secretary was required for the agency or board to move forward with the regulation, the text of the executive order did not clearly establish this point. The secretary was required to issue a “Statement of Assurance” to the Governor’s Office that the regulation met the criteria stated above. The executive order stated that if the Secretary determined that the regulation did not meet the criteria, “the agency head will make every effort to revise them in a manner acceptable to the Secretary.” The order did not expressly state that the agency head or board had to have approval to move forward. On the other hand, the form to be used for the secretary’s Statement of Assurance gave the following options: (1) concur with the regulation’s reasonableness and necessity, (2) indicate that the agency would revise the regulation, or (3) indicate that the agency would not issue the regulation but would pursue an alternative.

Orders From 1994 and 1998 Explicitly Required Secretarial Approval Before NOIRA and Proposed Regulation Publication. Executive orders from 1994 and 1998 explicitly required certain executive branch approval before regulations could move forward at two points in the process: the NOIRA and the preparation of the proposed regulatory package for the Registrar. In addition to completing economic impact analyses of the regulations prepared in coordination with the agencies as required by VAPA, DPB was to conduct initial reviews of regulatory content at these stages, and advise the appropriate cabinet secretary and the Governor of its findings about the regulation. The executive orders required that the cabinet secretary then make a determination of whether or not to “authorize” the submission of the NOIRA and the proposed regulation.

These executive orders did not provide for executive branch approval of the final adopted regulation in advance of its submission to the Registrar. The orders provided that the agency give a copy of the adopted final regulation to DPB, the secretary, and the Governor “at the same time that it submits a copy of the proposed final regulation to the Registrar pursuant to Va. Code Section 9-6.14:9.1B.”

Orders From 2002 and 2006 Explicitly Require Governor’s Office Approval for Agencies to Proceed at Three Stages in the Process. Exhibit 1 summarizes key provisions for executive branch review that are not contained in VAPA itself, but are contained in the current (2006) executive order for the review of regulations. The current executive order is similar to the 2002 executive order, but both of these orders reflect some significant differences from the prior executive orders.

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.

Factors Which Impact the Length of Time in Review

There are several factors which appear to impact the length of time that planned regulations spend under review. For example, regulations that do not complete the process prior to a change in administrations may lose visibility or languish until the new administration is in place and ready to proceed. There are also certain months during the year in which executive branch reviews are unlikely to be done on a timely basis. Specifically, because of the additional workload demands on executive branch reviewers immediately before and during the legislative session, agencies have been told that regulations requiring review are unlikely to be receive much priority between the beginning of January and the end of the session. In addition, the review time for some regulations can be impacted by the extent to which time is spent working with one or more agencies on the regulation content. A recent regulation of the Virginia Department of Agriculture and Consumer Services, for example, has reportedly been delayed at the stage of Governor's Office review due to a need to address permitting issues with the Department of Environmental Quality.

Still, a key factor in the length of time accounted for by the executive branch review process is the number of stages and actors involved in the reviews. With DPB, cabinet secretaries, and the Governor's Office each involved in conducting reviews at three points in the process, there are nine points of review. In addition, at the Governor's Office, at least four persons are involved in the review: one of four policy analyst staff members, the director of the policy office, legal counsel, and the chief of staff. Depending on their availability, each could potentially delay completion of the review.

Current Executive Order Provides Nine Points of Executive Branch Review That Can Impede or Stop Rulemaking Action

VAPA requires that executive orders include provisions for review by the Attorney General as to whether the agency or board has statutory authority to promulgate rules for the subject matter of its planned regulation. However, implementation of the current executive order has led to nine points of executive branch review beyond Attorney General certification that can impede or potentially stop rulemaking action. DPB, the cabinet secretary, and the Governor's office are each involved before the NOIRA, proposed regulation, and final regulation can be submitted and published.

On Virginia's Regulatory Town Hall, the result from DPB's review at the pre-NOIRA, pre-proposed, and pre-final stages is described as "review completed," rather than "regulation approved." A DPB policy analyst completes a policy memo on the regulation that is considered part of the "Governor's Confidential Working Papers."

These working papers are now shared with agencies seeking to promulgate the regulation, but this was not the case prior to 2009. If DPB has issues with the regulation, it can identify the regulation as “not recommended” or “recommended with reservations.” Staff in the Governor’s Office and DPB staff indicate that it is not DPB’s decision as to whether or not a regulation moves forward. However, an agency regulatory coordinator has stated that in practice, a regulation which is not recommended by DPB does not go forward in its existing form.

The Town Hall also indicates for the pre-NOIRA, pre-proposed, and pre-final stages whether the cabinet secretary and the Governor have “approved” the regulation. Agencies and boards cannot proceed with the planned regulation without cabinet secretary and Governor’s Office approval at these stages. Implementation of the process in this way provides the cabinet secretary and the Governor the ability to stop or veto a planned regulation.

Nine Points of Executive Review Contribute Substantially to the Length of Time Needed to Promulgate Regulations

Analysis of Regulatory Town Hall information about pending regulations indicates that the reviews by DPB, cabinet secretaries, and the Governor’s Office contribute to the length of time required to promulgate VAPA regulations. It appears that the reviews and approvals by these entities at the pre-NOIRA, pre-proposed, and pre-final regulation stages can account for nine months or more of the time spent promulgating a VAPA regulation.

Executive Review Before NOIRA Publication. The provision of VAPA addressing the NOIRA, §2.2-4007.01, does not address executive branch review prior to NOIRA publication. At this early stage in the process, the extent to which the agency knows the likely content of the planned regulation, or has begun drafting the regulation, will vary. The 2006 executive order requires DPB and cabinet secretary review of the NOIRA, and authorization by the Governor before an agency or board can publish its intent to develop a rule in the *Register*. The 2006 executive order does not continue a requirement from the 2002 executive order that DPB’s review be completed in 14 days, but DPB still abides by the 14-day limit. The 2006 executive order does continue a requirement that the secretary’s review should be completed in seven days.

Table 3 shows the amount of time spent in executive review by DPB, the applicable cabinet secretary, and the Governor, and also the cumulative total time. The data indicate that the review process may typically take about two months.

Table 3: Executive Review Time Before Submission of NOIRA to Registrar

Stage of Review	Number of Days	
	Median	Mean
DPB Review	10	10
Secretary Review	17	27
Governor Approval	19	24
All Three Stages	53	60

Note: The median for all three stages combined exceeds the median for the stages analyzed separately by seven days.

Source: JLARC staff analysis of regulations shown as active on the DPB Virginia Regulatory Town Hall in late July 2009 and also with this stage complete by November 16, 2009 (n = 61 for DPB and secretary review and n = 60 for Governor review and all three stages.)

The data also indicate that the cabinet secretaries may be infrequently accomplishing their review within the seven days stipulated in the executive order. For the regulations considered active in the Town Hall database, the median time spent in secretarial review was 17 days, and the mean was 27 days. Less than one-third of the regulations were reviewed by the cabinet secretaries within seven days.

Executive Review After NOIRA Public Comment but Before Publication of the Proposed Regulation. Under VAPA, before a regulation is published in proposed form, it must be submitted to DPB so that DPB can conduct an economic impact analysis. DPB is provided with up to 45 days to complete this analysis, and if it cannot complete the analysis within 45 days, it may advise the agency and the Joint Committee on Legislative Rules on the reasons for delay and take up to another 30 days.

VAPA does not have other requirements for executive review at this stage of the process. Under VAPA, the Governor's executive order is to contain procedures for executive review of proposed regulations, but the language does not make it clear whether the timeframe intended for that review was to be in advance of submission of the proposed regulation to the Registrar as well as following publication. VAPA does not state that the cabinet secretary or the Governor must "approve" or "authorize" the proposed regulation before it can be submitted to the Registrar. Rather, provisions for Governor and legislative action against an objectionable regulation are spelled out in VAPA for a later stage in the process.

The Governor's executive order authorizes DPB to go beyond its responsibilities for the economic impact analysis at this stage in the process and examine whether the proposed regulation package conforms to the policies of the executive order. DPB's determination is to be made within the same 45 days that are extended for

its economic impact analysis. In addition, the executive order provides that the applicable cabinet secretary shall review the proposed regulatory package within 14 days. Under the order, Governor's office approval of the package is required before the proposed regulation can be submitted to the Registrar. A timeframe for Governor Office review is not specified. Upon approval of the regulatory package by the Governor, the agency is to submit the package to the Registrar within 14 days.

Analysis of information from the Virginia Regulatory Town Hall indicates that executive review before publication of the proposed regulation may take four to five months to accomplish. Table 4 shows the amount of time spent in executive review by DPB, the applicable cabinet secretary, and the Governor, and also the cumulative total time. In the process, DPB completes its review before the regulatory "clock" for the secretary's review begins, and the clock for the Governor's approval begins once the secretary's office has "approved" the regulation.

Table 4: Executive Review Time Before Submission of the Proposed Regulation to the Registrar

Stage of Review	Number of Days	
	Median	Mean
DPB Review	45	43
Secretary Review	23	36
Governor Approval	50	64
All Three Stages	140	144

Note: The median for all three stages combined exceeds the median for the stages analyzed separately by 22 days.

Source: JLARC staff analysis of DPB Virginia Regulatory Town Hall Information. (Based on the stages of reviews completed as of November 16, 2009 for regulations under analysis; n = 55 for DPB's review, 54 for the secretary review, and 47 for Governor approval and all three stages.)

Regulatory Town Hall information indicates that with regard to currently active regulations, DPB is consistently meeting the 45-day timeframe for its review. However, the information indicates that cabinet secretaries only completed about one-third of their reviews within the 14 days provided in the executive order. For the regulations considered active in the Town Hall database, the median time spent in secretarial review was 23 days and the mean was 36 days. The time spent at the Governor approval stage typically exceeded the time spent in secretarial review.

Executive Review After Public Comment on the Proposed Regulation but Before Submission to Registrar as a Final Regulation. VAPA §2.2-4013 addresses the Governor's review powers following completion of the public comment period on the proposed regulation. (However, the section does currently misidentify §2.2-4007.01

as the referenced comment period, which is the NOIRA comment period.) The section provides that

The Governor shall transmit his comments, if any, on a proposed regulation to the Registrar and the agency no later than fifteen days following the completion of the public comment period... The Governor may recommend amendments or modifications to any regulation that would bring that regulation into conformity with statutory authority or state or federal laws, regulations, or judicial decisions.

Not less than fifteen days following the completion of the public comment period... the agency may (i) adopt the proposed regulation if the Governor has no objection to the regulation; (ii) modify and adopt the proposed regulation after considering and incorporating the Governor's objections or suggestions, if any; or (iii) adopt the regulation without changes despite the Governor's recommendations for change.

Upon final adoption of the regulation, the agency shall forward a copy of the regulation to the Registrar of Regulations.

VAPA goes on to describe the actions which a Governor can take if the Governor finds that the final regulation published by the agency contains changes with a substantial impact from the proposed regulation, or if the Governor "objects to any portion or all of regulation." In the former case, the regulation can be suspended for further public comment. In the latter case, acting in concert with certain legislative committees, the Governor can suspend the effective date of the regulation.

This section of VAPA does not provide for executive branch review of the adopted final regulation prior to submission to the Registrar. Such a review is an added requirement of the executive order. Under the executive order, DPB is to review the agency's final regulation package and give its advice within 14 days, while the applicable cabinet secretary is then to review the regulation package and make a recommendation to the Governor within seven days. Under the order, the agency is only then "authorized to submit the final regulation to the Registrar for publication if and when the Governor approves the final regulatory package for publication" (*emphasis added*).

VAPA is specific about what agencies and the Governor are authorized to do between the publication of the regulation in its proposed form and the effective date of the regulation. The Act (1)

specifically authorizes agencies to adopt final regulations after waiting 15 days for the Governor’s comment upon the regulation in proposed form (and agencies are not required to make changes recommended by the Governor), (2) states that after adoption, agencies should forward the final regulation for publication “as soon as practicable,” and (3) contains provisions explicitly addressing how the Governor can proceed if the Governor has concerns with the final regulation as published. Consequently, the provisions of the most recent executive orders, requiring DPB and secretarial review and Governor approval prior to agency submission of the final regulation package, appear to exceed the boundaries currently set forth in VAPA.

Analysis of information from the Virginia Regulatory Town Hall indicates that executive review of the final regulation package may take three to four months. Table 5 shows the amount of time that is spent in executive review by DPB, the applicable cabinet secretary, and the Governor, and also the cumulative total time. The median and mean for the total lengths of time are 104 and 118 days, or over three months. Cabinet secretaries infrequently completed their reviews within the seven-day timeframe required in the executive order (nine of 39 regulations, or 23 percent). DPB consistently met its executive order deadlines of 14 days. Only one of the regulations was reviewed by all three entities within 15 days.

Table 5: Executive Review Time Before Submission of the Final Regulation Package to the Registrar

Stage of Review	Number of Days	
	Median	Mean
DPB Review	10	10
Secretary Review	21	32
Governor Approval	54	75
All Three Stages	104	118

Note: The median for all three stages combined exceeds the median for the stages analyzed separately by 19 days.

Source: JLARC staff analysis of DPB Virginia Regulatory Town Hall Information. (Based on the stages of review completed as of November 16, 2009 for regulations under analysis, n = 40 for DPB review, n = 39 for secretary review, and n = 33 for Governor approval and all three stages.)

In some cases, the time for executive review of final regulation packages has been exceptionally long. Total review times for regulations found in July 2009 on the Town Hall included regulations which spent 291, 260, 235, 208, and 202 days under executive review at this stage in the process. The length of time for these regulations, however, was less than the three years of time reported by an agency publishing a final regulation in 2008, as discussed in the following case study.

Case Study

A statement by the Department of General Services in the Virginia Register indicates that executive branch approval of one of its final regulation packages was received about 1,200 days, or 3.3 years, after submission. Specifically, the agency and the Division of Consolidated Laboratory Services sent a draft final regulation package “for review to the Department of Planning and Budget, the Secretary of Administration, and the Governor’s Policy Office, in March 2005.” The DGS statement in the Register notes that “this executive review was ongoing until July 10, 2008, when the Governor’s Office approved the final regulations to be promulgated in the Virginia Register.”

Total Executive Branch Review Time Can Account for Nine Months or More of the Time Taken to Promulgate VAPA Regulations. Table 6 summarizes the time spent by DPB, cabinet secretaries, and the Governor’s Office in reviewing regulations at the pre-NOIRA, pre-proposed, and pre-final stages of promulgating a VAPA regulation. The data suggest that the pre-NOIRA review may take about two months, the review of the proposed regulation may take about four to five months, and review of the final regulation may take three to four months. Consequently, a regulatory effort which experiences external review times of this magnitude at these stages will spend about nine to ten months of the time under executive branch review.

Table 6: Executive Review Time in Days, Three Stages of Review of VAPA Regulations

Stage	Median	Mean
Pre-NOIRA	53	60
Prior to Proposed	140	144
Prior to Final	104	118
Sum of Three Results	297	322
Result in Months	9.8	10.6

Source: JLARC staff analysis of Town Hall data for regulations considered active in late July 2009 and based on stages of review completed as of November 16, 2009.

As noted earlier in the chapter, even fast-track regulations may not be promulgated quickly, with some recent fast-track regulations taking about seven to eight months to promulgate. The executive review process for fast-track regulations appears to be a major factor in the longer timeframes for fast-track regulations compared to emergency and exempt regulations (Table 7). An average of 105 days was spent in external review of some recent fast-track regulations, of which about 96 days or 3.2 months were due to review by DPB, the secretary, and the Governor. The review

Table 7: Average and Median Number of Days for the External Review of Emergency, Exempt, and Fast-Track Regulations

Process Used	Attorney General Certification	DPB Review	Secretary Review	Governor Review	Total Time in Review
Emergency	6 / 5	10 / 11	14 / 10	40 / 23	70 / 46
Exemption	6 / 1	n.a.	n.a.	n.a.	6 / 1
Fast-Track	9 / 4	35 / 39	35 / 28	35 / 42	114 / 110

Source: JLARC staff data analysis of timeframes based on regulations in these categories as indicated by information on the Virginia Regulatory Town Hall in July 2009. For emergency regulations and exemptions, n = 8 and 32, respectively. For fast-track regulations, n = 19. Medians for the total time in review are close to but not equal to the sum of the medians for the review components.

time accounted for almost half of the time spent promulgating these regulations.

For fast-track regulations, the Attorney General's Office assesses the agency's legal authority to issue the proposed regulation. This review typically takes about four to nine days. In addition, the current executive order requires DPB to assess whether the fast-track regulation is appropriately within the intended scope of fast-track authority. DPB staff indicate that they make this assessment within ten days. VAPA also provides up to 30 days for DPB to conduct an economic impact analysis of the fast-track regulation. However, Town Hall data indicate that over two months of additional time may typically be spent waiting for secretarial and Governor review of the fast-track regulation. The need for this review and the length of time spent upon it is questionable. VAPA makes it very easy to compel the agency to follow the standard promulgation process if any concerns about the fast-track regulation surface during the public comment period for the regulation. The content of some of the regulatory changes indicates that regulations can be stalled due to regulations being neglected rather than because of time needed for an active substantive review. The following case studies illustrate the point that some very basic fast-track regulatory changes experience substantial delays due to review.

Case Study

One fast-track regulation changing the due date for a certification spent 185 days in executive review. Specifically, in 2006 the Virginia Department of Education (DOE) promulgated a regulation that required local school divisions to certify by April 15th of the school year that they had implemented a plan for making up any missed days. In 2009 DOE promulgated a fast-track regulation to change the due date of the certification from April 15 to the end of May each school year. Revising the due date was the only change to this regulation. This fast-track regulation took 274 days to become effective and 185 of these days were spent in review.

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.

Code of Virginia

Title 2.2. Administration of Government

Chapter 40. Administrative Process Act

Article 2. Regulations

§ 2.2-4007.01. Notice of intended regulatory action; public hearing.

A. In the case of all regulations, except those regulations exempted by § [2.2-4002](#), [2.2-4006](#), [2.2-4011](#), or [2.2-4012.1](#), an agency shall (i) provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject matter and intent of the planned regulation and (ii) allow at least 30 days for public comment, to include an on-line public comment forum on the Virginia Regulatory Town Hall, after publication of the Notice of Intended Regulatory Action.

Whenever a Virginia statutory change necessitates a change to, or repeal of, all or a portion of a regulation or the adoption of a new regulation, the agency shall file a Notice of Intended Regulatory Action with the Registrar within 120 days of such law's effective date.

An agency shall not file proposed regulations with the Registrar until the public comment period on the Notice of Intended Regulatory Action has closed.

B. Agencies shall state in the Notice of Intended Regulatory Action whether they plan to hold a public hearing on the proposed regulation after it is published. Agencies shall hold such public hearings if required by basic law. If the agency states an intent to hold a public hearing on the proposed regulation in the Notice of Intended Regulatory Action, then it shall hold the public hearing. If the agency states in its Notice of Intended Regulatory Action that it does not plan to hold a hearing on the proposed regulation, then no public hearing is required unless, prior to completion of the comment period specified in the Notice of Intended Regulatory Action, (i) the Governor directs the agency to hold a public hearing or (ii) the agency receives requests for a public hearing from at least 25 persons.

2007, cc. [873](#), [916](#);2011, c. [464](#).

§ 2.2-4007.03. Informational proceedings; effect of noncompliance.

A. In the case of all regulations, except those regulations exempted by § [2.2-4002](#), [2.2-4006](#), or [2.2-4011](#), the proposed regulation and general notice of opportunity for oral or written submittals as to that regulation shall be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations in accordance with the provisions of subsection B of § [2.2-4031](#). In addition, the agency may, in its discretion, (i) publish the notice in any newspaper and (ii) publicize the notice through press releases and such other media as will best serve the purpose and subject involved. The Register and any newspaper publication shall be made at least 60 days in advance of the last date prescribed in the notice for such submittals. All notices, written submittals, and transcripts and summaries or notations of oral presentations, as well as any agency action thereon, shall be matters of public record in the custody of the agency.

B. If an agency wishes to change a proposed regulation before adopting it as a final regulation, it may choose to publish a revised proposed regulation, provided the latter is subject to a public comment period of at least 30 additional days and the agency complies in all other respects with this section.

C. In no event shall the failure to comply with the requirements of this section be deemed mere harmless error for the purposes of § [2.2-4027](#).

2007, cc. [873](#), [916](#).

§ 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 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;
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. 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. 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.

2007, cc. 316, 561, 873, 916.

§ 2.2-4007.05. Submission of proposed regulations to the Registrar.

Before promulgating any regulation under consideration, the agency shall deliver a copy of that regulation

to the Registrar together with a summary of the regulation and a separate and concise statement of (i) the basis of the regulation, defined as the statutory authority for promulgating the regulation, including an identification of the section number and a brief statement relating the content of the statutory authority to the specific regulation proposed; (ii) the purpose of the regulation, defined as the rationale or justification for the new provisions of the regulation, from the standpoint of the public's health, safety, or welfare; (iii) the substance of the regulation, defined as the identification and explanation of the key provisions of the regulation that make changes to the current status of the law; (iv) the issues of the regulation, defined as the primary advantages and disadvantages for the public, and as applicable for the agency or the state, of implementing the new regulatory provisions; and (v) the agency's response to the economic impact analysis submitted by the Department of Planning and Budget pursuant to § 2.2-4007.04. Any economic impact estimate included in the agency's response shall represent the agency's best estimate for the purposes of public review and comment, but the accuracy of the estimate shall in no way affect the validity of the regulation. Staff as designated by the Code Commission shall review proposed regulation submission packages to ensure that the requirements of this subsection are met prior to publication of the proposed regulation in the Register. The summary; the statement of the basis, purpose, substance, and issues; the economic impact analysis; and the agency's response shall be published in the Virginia Register of Regulations and be available on the Virginia Regulatory Town Hall, together with the notice of opportunity for oral or written submittals on the proposed regulation.

2007, cc. 873, 916.

§ 2.2-4012. Purpose; adoption; effective date; filing; duties of Registrar of Regulations.

A. The purpose of the regulatory procedures shall be to provide a regulatory plan that is predictable, based on measurable and anticipated outcomes, and is inclined toward conflict resolution.

B. Subject to the provisions of §§ 2.2-4013 and 2.2-4014, all regulations, including those that agencies, pursuant to § 2.2-4002, 2.2-4006, or 2.2-4011, may elect to dispense with the public procedures provided by §§ 2.2-4007.01 and 2.2-4009, may be formally and finally adopted by the signed order of the agency so stating. No regulation except an emergency regulation or a noncontroversial regulation promulgated pursuant to § 2.2-4012.1 shall be effective until the expiration of the applicable period as provided in § 2.2-4015. In the case of an emergency regulation filed in accordance with § 2.2-4011, the regulation shall become effective upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. The originals of all regulations shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies. They, or facsimiles thereof, shall be made available for public inspection or copying. Full and true copies shall also be additionally filed, registered, published, or otherwise made publicly available as required by other laws.

C. Prior to the publication for hearing of a proposed regulation, copies of the regulation and copies of the summary and statement as to the basis, purpose, substance, issues, and the economic impact estimate of the regulation submitted by the Department of Planning and Budget and the agency's response thereto as required by § 2.2-4007.04 shall be transmitted to the Registrar of Regulations, who shall retain these documents.

D. All regulations adopted pursuant to this chapter shall contain a citation to the section of the Code of Virginia that authorizes or requires the regulations and, where the regulations are required to conform to federal law or regulation in order to be valid, a citation to the specific federal law or regulation to which conformity is required.

E. Immediately upon the adoption by any agency of any regulation in final form, a copy of (i) the

regulation, (ii) a then current summary and statement as to the basis, purpose, substance, issues, and the economic impact estimate of the regulation submitted by the Department of Planning and Budget, and (iii) the agency's summary description of the nature of the oral and written data, views, or arguments presented during the public proceedings and the agency's comments thereon shall be transmitted to the Registrar of Regulations, who shall retain these documents as permanent records and make them available for public inspection. A draft of the agency's summary description of public comment shall be sent by the agency to all public commenters on the proposed regulation at least five days before final adoption of the regulation.

1975, c. 503, § 9-6.14:9; 1977, cc. 450, 459; 1981, c. 387; 1982, c. 425; 1983, c. 295; 1984, c. 5; 1989, c. 71; 1992, c. 829; 1993, c. 898; 1994, c. 938; 2001, c. 844; 2003, c. 224; 2007, cc. 873, 916.

§ 2.2-4013. Executive review of proposed and final regulations; changes with substantial impact.

A. The Governor shall adopt and publish procedures by executive order for review of all proposed regulations governed by this chapter by June 30 of the year in which the Governor takes office. The procedures shall include (i) review by the Attorney General to ensure statutory authority for the proposed regulations; and (ii) examination by the Governor to determine if the proposed regulations are (a) necessary to protect the public health, safety and welfare and (b) clearly written and easily understandable. The procedures may also include review of the proposed regulation by the appropriate Cabinet Secretary.

The Governor shall transmit his comments, if any, on a proposed regulation to the Registrar and the agency no later than fifteen days following the completion of the public comment period provided for in § 2.2-4007.03. The Governor may recommend amendments or modifications to any regulation that would bring that regulation into conformity with statutory authority or state or federal laws, regulations or judicial decisions.

Not less than fifteen days following the completion of the public comment period provided for in § 2.2-4007.03, the agency may (i) adopt the proposed regulation if the Governor has no objection to the regulation; (ii) modify and adopt the proposed regulation after considering and incorporating the Governor's objections or suggestions, if any; or (iii) adopt the regulation without changes despite the Governor's recommendations for change.

B. Upon final adoption of the regulation, the agency shall forward a copy of the regulation to the Registrar of Regulations for publication as soon as practicable in the Register. All changes to the proposed regulation shall be highlighted in the final regulation, and substantial changes to the proposed regulation shall be explained in the final regulation.

C. If the Governor finds that one or more changes with substantial impact have been made to the proposed regulation, he may require the agency to provide an additional thirty days to solicit additional public comment on the changes by transmitting notice of the additional public comment period to the agency and to the Registrar within the thirty-day adoption period described in subsection D, and publishing the notice in the Register. The additional public comment period required by the Governor shall begin upon publication of the notice in the Register.

D. A thirty-day final adoption period for regulations shall commence upon the publication of the final regulation in the Register. The Governor may review the final regulation during this thirty-day final adoption period and if he objects to any portion or all of a regulation, the Governor may file a formal objection to the regulation, suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014, or both.

If the Governor files a formal objection to the regulation, he shall forward his objections to the Registrar

and agency prior to the conclusion of the thirty-day final adoption period. The Governor shall be deemed to have acquiesced to a promulgated regulation if he fails to object to it or if he fails to suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014 during the thirty-day final adoption period. The Governor's objection, or the suspension of the regulation, or both if applicable, shall be published in the Register.

A regulation shall become effective as provided in § 2.2-4015.

E. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

1984, c. 5, § 9-6.14:9.1; 1993, cc. 551, 772, 898; 1995, cc. 25, 736; 2001, c. 844; 2007, cc. 873, 916.

§ 2.2-4015. Effective date of regulation; exception.

A. A regulation adopted in accordance with this chapter and the Virginia Register Act (§ 2.2-4100 et seq.) shall become effective at the conclusion of the thirty-day final adoption period provided for in subsection D of § 2.2-4013, or any other later date specified by the agency, unless:

1. A legislative objection has been filed in accordance with § 2.2-4014, in which event the regulation, unless withdrawn by the agency, shall become effective on a date specified by the agency that shall be after the expiration of the applicable twenty-one-day extension period provided in § 2.2-4014;
2. The Governor has exercised his authority in accordance with § 2.2-4013 to require the agency to provide for additional public comment, in which event the regulation, unless withdrawn by the agency, shall become effective on a date specified by the agency that shall be after the period for which the Governor has provided for additional public comment;
3. The Governor and (i) the appropriate standing committees of each house of the General Assembly or (ii) the Joint Commission on Administrative Rules have exercised their authority in accordance with subsection B of § 2.2-4014 to suspend the effective date of a regulation until the end of the next regular legislative session; or
4. The agency has suspended the regulatory process in accordance with § 2.2-4007.06, or for any reason it deems necessary or appropriate, in which event the regulation, unless withdrawn by the agency, shall become effective in accordance with subsection B.

B. Whenever the regulatory process has been suspended for any reason, any action by the agency that either amends the regulation or does not amend the regulation but specifies a new effective date shall be considered a readoption of the regulation for the purposes of appeal. If the regulation is suspended under § 2.2-4007.06, such readoption shall take place after the thirty-day public comment period required by that subsection. Suspension of the regulatory process by the agency may occur simultaneously with the filing of final regulations as provided in subsection B of § 2.2-4013.

When a regulation has been suspended, the agency must set the effective date no earlier than fifteen days from publication of the readoption action and any changes made to the regulation. During that fifteen-day period, if the agency receives requests from at least twenty-five persons for the opportunity to comment on new substantial changes, it shall again suspend the regulation pursuant to § 2.2-4007.06.

C. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

1984, c. 5, § 9-6.14:9.3; 1993, cc. 551, 772, 898; 1995, c. [25](#);2001, c. [844](#);2002, cc. [391](#), [677](#);2004, c. [777](#);
2007, cc. [873](#), [916](#).