

1 **§ 2.2-4007.01. Notice of intended regulatory action; public hearing.**

2 A. In the case of all regulations, except those regulations exempted by § 2.2-4002, 2.2-4006, 2.2-
3 4011, or 2.2-4012.1, an agency shall (i) provide the Registrar of Regulations with a Notice of
4 Intended Regulatory Action that describes the subject matter and intent of the planned regulation
5 and (ii) allow at least 30 days for public comment, to include an on-line public comment forum on
6 the Virginia Regulatory Town Hall, after publication of the Notice of Intended Regulatory Action.

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

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

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

21 *C. The executive order required by § 2.2-4013 may include procedures for the Governor to review
22 and comment on the Notice of Intended Regulatory Action prior to publication in the Virginia
23 Register of Regulations. The executive order may not require the Governor's approval of the
24 Notice of Intended Regulatory Action prior to publication or posting on the Virginia Regulatory
25 Town Hall.*

26 *The Governor shall complete his review and transmit his comments, if any, on the Notice of
27 Intended Regulatory Action no later than 30 days following the agency's submission of the Notice
28 of Intended Regulatory Action for review as may be provided for in the executive order. The
29 Governor may recommend modifications to the Notice of Intended Regulatory Action.*

30 *Upon the expiration of the 30 days, the agency is authorized to (i) submit the Notice of Intended
31 Regulatory Action for publication in the Virginia Register even if the Governor has not
32 transmitted comments; (ii) modify and adopt the Notice of Intended Regulatory Action after
33 considering or incorporating the Governor's comments, if any; or (iii) adopt the Notice of
34 Intended Regulatory Action without change despite the Governor's recommendation for
35 modification.*

36 **§ 2.2-4007.03. Informational proceedings; effect of noncompliance.**

37 A. In the case of all regulations, except those regulations exempted by § 2.2-4002, 2.2-4006, or
38 2.2-4011, the proposed regulation and general notice of opportunity for oral or written submittals
39 as to that regulation shall be posted on the Virginia Regulatory Town Hall and published in the
40 Virginia Register of Regulations in accordance with the provisions of subsection B of § 2.2-4031.
41 In addition, the agency may, in its discretion, (i) publish the notice in any newspaper and (ii)
42 publicize the notice through press releases and such other media as will best serve the purpose and

Comment [A1]: 30 days to cover 14 days for
DPB review and 14 days for rest of review.

43 subject involved. The Register and any newspaper publication shall be made at least 60 days in
44 advance of the last date prescribed in the notice for such submittals. All notices, written
45 submittals, and transcripts and summaries or notations of oral presentations, as well as any agency
46 action thereon, shall be matters of public record in the custody of the agency.

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

51 C. In no event shall the failure to comply with the requirements of this section be deemed mere
52 harmless error for the purposes of § 2.2-4027.

53 **§ 2.2-4007.04. Economic impact analysis.**

54 A. Before delivering any proposed regulation under consideration to the Registrar as required in §
55 2.2-4007.05, the agency shall submit on the Virginia Regulatory Town Hall a copy of that
56 regulation to the Department of Planning and Budget. In addition to determining the public
57 benefit, the Department of Planning and Budget in coordination with the agency shall, within 45
58 days, prepare an economic impact analysis of the proposed regulation, as follows:

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

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

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

82 B. Agencies shall provide the Department with such estimated fiscal impacts on localities and
83 sources of potential funds. The Department may request the assistance of any other agency in
84 preparing the analysis. The Department shall deliver a copy of the analysis to the agency drafting
85 the regulation, which shall comment thereon as provided in § 2.2-4007.05, a copy to the Registrar

86 for publication with the proposed regulation, and an electronic copy to each member of the
87 General Assembly. No regulation shall be promulgated for consideration pursuant to § 2.2-
88 4007.05 until the impact analysis has been received by the Registrar. For purposes of this section,
89 the term "locality, business, or entity particularly affected" means any locality, business, or entity
90 that bears any identified disproportionate material impact that would not be experienced by other
91 localities, businesses, or entities. The analysis shall represent the Department's best estimate for
92 the purposes of public review and comment on the proposed regulation. The accuracy of the
93 estimate shall in no way affect the validity of the regulation, nor shall any failure to comply with
94 or otherwise follow the procedures set forth in this subsection create any cause of action or
95 provide standing for any person under Article 5 (§ 2.2-4025 et seq.) or otherwise to challenge the
96 actions of the Department hereunder or the action of the agency in adopting the proposed
97 regulation.

98 C. In the event the economic impact analysis completed by the Department reveals that the
99 proposed regulation would have an adverse economic impact on businesses or would impose a
100 significant adverse economic impact on a locality, business, or entity particularly affected, the
101 Department shall advise the Joint Commission on Administrative Rules, the House Committee on
102 Appropriations, and the Senate Committee on Finance within the 45-day period. The Joint
103 Commission on Administrative Rules shall review such rule or regulation and issue a statement
104 containing the Commission's findings in accordance with § 30-73.3.

105 *D. The executive order required by § 2.2-4013 may include procedures for a review by the*
106 *Department and Planning and Budget that includes determinations other than those described in*
107 *subsection A of this section. The additional determinations shall be completed within the 45-day*
108 *period set forth in subsection A of this section.*

109 **§ 2.2-4007.05. Submission of proposed regulations to the Registrar.**

110 *A. The executive order required by § 2.2-4013 may include procedures for the Governor to review*
111 *and comment on the proposed regulatory package after completion of the review and economic*
112 *impact analysis by the Department of Planning and Budget and before delivery of the proposed*
113 *regulation to the Registrar for publication in the Virginia Register of Regulations. The executive*
114 *order may not require the Governor's approval of the proposed regulation prior to publication in*
115 *the Virginia Register of Regulations or posting on the Virginia Regulatory Town Hall.*

116 *The Governor shall complete his review and transmit his comments, if any, on the proposed*
117 *regulation no later than 60 days following submission of the proposed regulation for review as*
118 *may be provided for in the executive order. The Governor may recommend modifications to the*
119 *proposed regulation.*

120 *Upon the expiration of the 60 days, the agency is authorized to (i) submit the proposed regulation*
121 *for publication in the Virginia Register even if the Governor has not transmitted comments; (ii)*
122 *modify and adopt the proposed regulation after considering or incorporating the Governor's*
123 *comments, if any; or (iii) adopt the proposed regulation without change despite the Governor's*
124 *recommendations for modification.*

125 *B. Before ~~promulgating any regulation under consideration~~ adopting a proposed regulation as a*
126 *final regulation, the agency shall deliver a copy of that regulation to the Registrar together with a*
127 *summary of the regulation and a separate and concise statement of (i) the basis of the regulation,*
128 *defined as the statutory authority for promulgating the regulation, including an identification of*
129 *the section number and a brief statement relating the content of the statutory authority to the*

130 specific regulation proposed; (ii) the purpose of the regulation, defined as the rationale or
131 justification for the new provisions of the regulation, from the standpoint of the public's health,
132 safety, or welfare; (iii) the substance of the regulation, defined as the identification and
133 explanation of the key provisions of the regulation that make changes to the current status of the
134 law; (iv) the issues of the regulation, defined as the primary advantages and disadvantages for the
135 public, and as applicable for the agency or the state, of implementing the new regulatory
136 provisions; and (v) the agency's response to the economic impact analysis submitted by the
137 Department of Planning and Budget pursuant to § 2.2-4007.04. Any economic impact estimate
138 included in the agency's response shall represent the agency's best estimate for the purposes of
139 public review and comment, but the accuracy of the estimate shall in no way affect the validity of
140 the regulation. Staff as designated by the Code Commission shall review proposed regulation
141 submission packages to ensure that the requirements of this subsection are met prior to publication
142 of the proposed regulation in the Register. The summary; the statement of the basis, purpose,
143 substance, and issues; the economic impact analysis; and the agency's response shall be published
144 in the Virginia Register of Regulations and be available on the Virginia Regulatory Town Hall,
145 together with the notice of opportunity for oral or written submittals on the proposed regulation.

146 **§ 2.2-4007.06. Changes between proposed and final regulations.**

147 If one or more changes with substantial impact are made to a proposed regulation from the time
148 that it is published as a proposed regulation to the time it is published as a final regulation, any
149 person may petition the agency within 30 days from the publication of the final regulation to
150 request an opportunity for oral and written submittals on the changes to the regulation. If the
151 agency receives requests from at least 25 persons for an opportunity to submit oral and written
152 comments on the changes to the regulation, the agency shall (i) suspend the regulatory process for
153 30 days to solicit additional public comment and (ii) file notice of the additional 30-day public
154 comment period with the Registrar of Regulations, unless the agency determines that the changes
155 made are minor or inconsequential in their impact. The comment period, if any, shall begin on the
156 date of publication of the notice in the Register. Agency denial of petitions for a comment period
157 on changes to the regulation shall be subject to judicial review.

158 **§ 2.2-4012. Purpose; adoption; effective date; filing; duties of Registrar of Regulations.**

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

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

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

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

183 *E. The executive order required by § 2.2-4013 may include procedures for the Governor to review
184 and comment on the final regulation after adoption by the agency and prior to publication in the
185 Virginia Register of Regulations. The executive order may not require the Governor's approval of
186 the final regulation prior to publication.*

187 *The Governor shall complete his review and transmit his comments, if any, on the final regulation
188 no later than 30 days following the agency's submission of the final regulation. The Governor may
189 recommend modifications to the final regulation.*

190 *Upon the expiration of the 30 days, the agency is authorized to (i) submit the final regulation for
191 publication in the Virginia Register even if the Governor has not transmitted comments; (ii)
192 modify and adopt the final regulation after considering or incorporating the Governor's
193 comments, if any; or (iii) adopt the final regulation without change despite the Governor's
194 recommendations for modifications.*

195 ~~E F. Immediately upon the adoption by any agency of any regulation in final form~~ Upon final
196 adoption of the regulation *or upon the expiration of the 30 days as set forth in subsection E of this*
197 *section, if applicable, the agency shall forward* a copy of (i) the regulation, (ii) a then current
198 summary and statement as to the basis, purpose, substance, issues, and the economic impact
199 estimate of the regulation submitted by the Department of Planning and Budget, and (iii) the
200 agency's summary description of the nature of the oral and written data, views, or arguments
201 presented during the public proceedings and the agency's comments thereon ~~shall be transmitted to~~
202 *the Registrar of Regulations for publication as soon as practicable in the Virginia Register of*
203 *Regulations. All changes to the proposed regulation shall be highlighted in the final regulation,*
204 *and substantial changes to the proposed regulation shall be explained in the final regulation, who*
205 *The Registrar* shall retain these documents as permanent records and make them available for
206 public inspection.

Comment [A2]: Modified to coordinate with 2.2-4013 B and the new provisions.

207 **G.** A draft of the agency's summary description of public comment shall be sent by the agency to
208 all public commenters on the proposed regulation at least five days before final adoption of the
209 regulation.

210

211 **§ 2.2-4013. Executive review of proposed and final regulations; changes with substantial**
212 **impact.**

213 A. ~~The~~ *By June 30 of the year in which the Governor takes office, the* Governor shall adopt and
214 publish procedures by executive order for review of all proposed regulations governed by this
215 chapter *after publication of a proposed regulation in the Virginia Register of Regulations* ~~by June~~
216 ~~30 of the year in which the Governor takes office.~~ The procedures shall include (i) review by the

Comment [A3]: current APA is designed for Governor's review to occur after publication; see next paragraph as to when comments are transmitted (total of 75 days for review - 60 day comment period and 15 days). This amendment clarifies that the mandated EO is for review post publication. The new language in subsection E allows for review prior to publication, but with timeframes and default provisions.

217 Attorney General to ensure statutory authority for the proposed regulations; and (ii) examination
218 by the Governor to determine if the proposed regulations are (a) necessary to protect the public
219 health, safety and welfare and (b) clearly written and easily understandable. The procedures may
220 also include review of the proposed regulation by the appropriate Cabinet Secretary.

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

Comment [A4]: This is the comment period after publication of the proposed.

226 Not less than fifteen days following the completion of the public comment period provided for in
227 § 2.2-4007.03, the agency may (i) adopt the proposed regulation if the Governor has no objection
228 to the regulation; (ii) modify and adopt the proposed regulation after considering and
229 incorporating the Governor's objections or suggestions, if any; or (iii) adopt the regulation without
230 changes despite the Governor's recommendations for change.

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

235 C. If the Governor finds that one or more changes with substantial impact have been made to the
236 proposed regulation, he may require the agency to provide an additional thirty days to solicit
237 additional public comment on the changes by transmitting notice of the additional public comment
238 period to the agency and to the Registrar within the 30-day final adoption period described in
239 subsection D, and publishing the notice in the Register. The additional public comment period
240 required by the Governor shall begin upon publication of the notice in the Register.

241 D. A 30-day final adoption period for regulations shall commence upon the publication of the final
242 regulation in the Register. The Governor may review the final regulation during this 30-day final
243 adoption period and if he objects to any portion or all of a regulation, the Governor may file a
244 formal objection to the regulation, suspend the effective date of the regulation in accordance with
245 subsection B of § 2.2-4014, or both.

246 If the Governor files a formal objection to the regulation, he shall forward his objections to the
247 Registrar and agency prior to the conclusion of the 30-day final adoption period. The Governor
248 shall be deemed to have acquiesced to a promulgated regulation if he fails to object to it or if he
249 fails to suspend the effective date of the regulation in accordance with subsection B of § 2.2-4014.
250 The Governor's objection, or the suspension of the regulation, or both if applicable, shall be
251 published in the Register.

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

253 *E. The Governor may also adopt and publish procedures by executive order for review of all*
254 *Notices of Intended Regulatory Action required by this chapter and all proposed or final*
255 *regulations governed by this chapter prior to publication in the Virginia Register of Regulations.*
256 *The procedures shall comply with subdivision C of § 2.2-4007.01, subdivision D of § 2.2-4007.04,*
257 *subdivision A of § 2.2-4007.05, and subdivision E of § 2.2-4012.*

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

260 **§ 2.2-4015. Effective date of regulation; exception.**

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

264 1. A legislative objection has been filed in accordance with § 2.2-4014, in which event the
265 regulation, unless withdrawn by the agency, shall become effective on a date specified by the
266 agency that shall be after the expiration of the applicable twenty-one-day extension period
267 provided in § 2.2-4014;

268 2. The Governor has exercised his authority in accordance with § 2.2-4013 to require the agency to
269 provide for additional public comment, in which event the regulation, unless withdrawn by the
270 agency, shall become effective on a date specified by the agency that shall be after the period for
271 which the Governor has provided for additional public comment;

272 3. The Governor and (i) the appropriate standing committees of each house of the General
273 Assembly or (ii) the Joint Commission on Administrative Rules have exercised their authority in
274 accordance with subsection B of § 2.2-4014 to suspend the effective date of a regulation until the
275 end of the next regular legislative session; or

276 4. The agency has suspended the regulatory process in accordance with § 2.2-4007.06, or for any
277 reason it deems necessary or appropriate, in which event the regulation, unless withdrawn by the
278 agency, shall become effective in accordance with subsection B.

279 B. Whenever the regulatory process has been suspended for any reason, any action by the agency
280 that either amends the regulation or does not amend the regulation but specifies a new effective
281 date shall be considered a re adoption of the regulation for the purposes of appeal. If the regulation
282 is suspended under § 2.2-4007.06, such re adoption shall take place after the thirty-day public
283 comment period required by that subsection. Suspension of the regulatory process by the agency
284 may occur simultaneously with the filing of final regulations as provided in subsection B of § 2.2-
285 4013.

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

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

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.

APA provisions

Standard regulatory process: Guide for state agencies

Stage 1

Notice of Intended Regulatory Action (NOIRA)

1. Submit NOIRA (Form TH-1) and sync RIS project (if available) for review on Town Hall.

2. ~~Executive branch review~~
 DPB - 14 day deadline;
 Cabinet Secretary - sometimes must review; if so, 14 day deadline;
 Governor - no deadline

3. ~~Within 14 days of being authorized, must submit NOIRA to The Virginia Register of Regulations via the Town Hall~~

4. Ten days before publication in the Register.
 Automatic email is notification is also sent to registered Town Hall users.

5. NOIRA is published in the Register. Thirty day public comment period begins & Town Hall comment forum opens.

6. Comment period/forum closes. Consider public comment, draft proposed regulation, *and adopt.* & submit it within 180 days for executive branch review.

Stage 2

Proposed regulation

7. Submit regulatory package (Form TH-2 and sync RIS project) for review on Town Hall.

8. ~~Executive branch review~~
 (In order of review):
 -OAG - no deadline;
 -DPB (including economic impact analysis (EIA) - 45 day deadline;
 -Cabinet Secretary - 14 day deadline;
 -Governor - no deadline

9. ~~Within 14 days of Governor's approval, submit proposed stage to the Register via the Town Hall~~

10. Ten days before publication in the Register.
 Automatic email notification is also sent to registered Town Hall users

11. Proposed stage is published in the Register.
 Sixty day public comment period begins and Town Hall public comment forum opens.

12. Comment period/forum closes. Consider public comment. Adopt final regulation no sooner than 15 days after comment period closes & submit for executive branch review no later than 180 days after close of comment period.

Stage 3

Final regulation

13. Submit regulatory package (Form TH-3 and sync RIS project) for review on Town Hall.

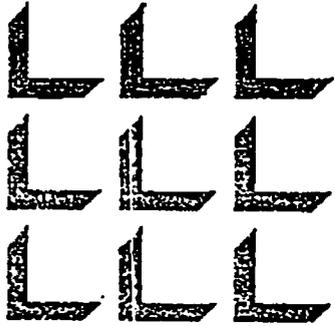
14. ~~Executive branch review~~
 (in order of review):
 --OAG review only necessary if significant changes made since proposed stage - no deadline;
 -DPB - 14 day deadline;
 -Cabinet Secretary - 14 day deadline;
 -Governor - no deadline

15. ~~Within 14 days of Governor's approval, submit final regulation to the Register via the Town Hall~~

16. Ten days before publication in the Register.
 Automatic email notification is also sent to registered town Hall users.

17. Final stage is published in Register. Thirty day final adoption period begins and Town Hall public comment forum opens.

18. Final adoption period and public comment closes.
Final regulation becomes effective.
 OR it is suspended,
 OR, if changes with substantial impact have been made between the proposed and final stages and 25+ and/or Governor petition the agency, an additional public comment period must be held



**THE GOVERNOR'S
REGULATORY REFORM
ADVISORY BOARD
1983 REPORT**

THE
1983 REPORT
OF THE
GOVERNOR'S REGULATORY REFORM ADVISORY BOARD

December 16, 1983

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Recommendation #12 - Agency Analysis of Public Comments:

The analysis of public comment requirement in §9-6.14:7 should remain unchanged; however, the Governor should ensure in his or her review of final regulations that the agency has adequately responded to public concerns.

The Board feels the current law is adequate; compliance may not be. The Board strongly encourages state agencies to provide the responses contemplated in this specific section.

III. EXECUTIVE AND LEGISLATIVE REVIEW OF PROPOSED AND FINAL REGULATIONS

Finding #13 - Executive Reviews:

The Board finds that no formalized objective review of proposed or final regulations existed in the executive branch of Virginia prior to the issuance of Executive Policy Memorandum I-82 by Governor Robb on October 4, 1982. Under current statutory law, Governors may or may not provide necessary oversight of Virginia's regulatory process. Such oversight is essential, especially in light of recent legal action which raises doubts about the constitutional legitimacy of the legislative veto of regulations.

The Board believes that Gubernatorial review of proposed and final regulations provides accountability within our regulatory process and guarantees an objective, full-time source of analysis of regulatory proposals to ensure they do not exceed statutory authority, are not unnecessarily burdensome to the public or businesses in Virginia and are clearly written. As chief executive of the Commonwealth, the Governor is a proper focal point for the review and evaluation of Virginia's state regulations promulgated by executive agencies. In surveying other states in the nation, the Board found that 70% of the 35 states surveyed have established procedures for Gubernatorial/Secretarial review of proposed and/or final regulations.

While strongly favoring enactment of a statute requiring Gubernatorial review of proposed and final regulations, the Board felt that such a statute should leave each Governor necessary discretion to establish the procedures for conducting these reviews. This would allow each governor the flexibility to provide this oversight in the fashion he or

she considers most appropriate. It also allows variations in the approach taken depending on the time, agencies and subject matter involved.

Recommendation #13 - Executive Review:

The General Assembly and the Governor should approve amendments to the APA that:

- (a) Require the Governor by executive order to adopt procedures for review of all proposed regulations governed by the APA. These procedures may include review by the appropriate Cabinet Secretary. In addition, the APA required procedures must include: (1) review by the Attorney General to ensure the proposed regulations do not exceed statutory authority; (2) examination by the Governor of proposed regulations to determine if they are necessary to protect the public health, safety and welfare; and (3) a determination by the Governor that the proposed regulation is clearly written and easily understood.
- (b) Require the Governor's review of proposed regulations to commence upon their publication in the proposed Virginia Register of Regulations, run concurrently with the 60-day public comment period required by the APA and conclude with the transmittal of the Governor's comments on the proposed regulation to the Registrar and agency prior to completion of the 60-day public comment period;
- (c) Upon receiving the Governor's comments on a proposed regulation, the agency or governing body:
 - (1) May adopt the proposed regulation in final form if the governor has no objections to the proposal;
 - (2) Having considered and incorporated the Governor's objections or suggestions, may adopt the proposed regulation in such modified final form;
 - (3) May adopt the regulation in final form without changes despite the Governor's recommendations.

Upon final adoption, the agency would forward a copy of the regulation to the Registrar of Regulations for publication in the next issue of the Register. As indicated earlier, substantial changes to the proposed regulation should be highlighted in the final regulation upon transmittal to the Registrar;

- (d) Establish a 30-day final adoption period to commence upon the publication of the final regulation in the Register. During this 30-day final adoption period, the Governor shall review all final regulations.

Prior to the completion of the 30-day final adoption period, if the Governor objects to any portion or all of a finally adopted regulation, he or she shall:

- (1) Forward his or her objections to the agency or governing body for its consideration.
- (2) Forward his or her objections to the Registrar for publication in the next issue of the Register.

A regulation shall become effective at the conclusion of the 30-day final adoption period, or at a later date so specified by the agency or governing body unless:

- (1) The promulgation process has been extended by up to 21 days for the agency to respond to a legislative objection in accordance with Recommendation #14.
- (2) The agency by signed order delays the effective date of the regulation until a date specified to consider a Governor's objection.

Finding #14 - Legislative Review and Objection:

The Attorney General of Virginia has given his opinion that the legislative veto mechanism currently established in §9-6.14:9 violates the Constitution of Virginia. State

Supreme courts in Alaska, New Hampshire, West Virginia and New Jersey have struck down as unconstitutional legislative veto schemes similar to Virginia's. The recent U.S. Supreme Court decision of Immigration and Naturalization Service v. Chadha, et al. (June 23, 1983) has invalidated a similar congressional veto and has focused renewed attention upon the constitutionality of legislative veto procedures in the rulemaking process that do not contain the same balance of power contemplated in the adoption of legislation.

In light of its research, the above Supreme Court decisions and the Attorney General's opinion, the Board is of the opinion that our current legislative veto system in Virginia is unconstitutional.

Most states are now grappling for constitutional provisions that ensure state agencies are accountable for their regulatory activities. The Board finds that it should recommend the maximum legislative oversight that constitutionally may be implemented in Virginia.

Rich Jones, of the National Council of State Legislatures, testified before the Massachusetts General Assembly on March 24, 1983, that "where the legislature has veto powers over regulations, it has tended to be used very infrequently." Jones' statement is applicable to Virginia's experience with the legislative veto; the Board's survey of other states reached a similar conclusion. The Board finds that care needs to be taken in implementing oversight procedures to ensure that they do not overly complicate the regulatory process or make it unnecessarily difficult and time-consuming to promulgate often non-controversial state regulations. The current legislative veto process adds an additional 90 days to the promulgation process, yet is infrequently used (only one regulation has been delayed under these procedures in two years). A lengthy promulgation process can unnecessarily burden public or private sector organizations seeking regulatory relief.

The Board finds that while Virginia's current legislative veto procedures are unconstitutional and unnecessarily lengthen the promulgation process, legislative review of the regulatory process is essential. The Board believes legislative review will provide an effective check on improper promulgation of regulations by Virginia state agencies.

a legislative objection. The agency shall also forward its response to the objection to the appropriate committee of the General Assembly, the Governor and the Registrar who shall publish the agency's response in the next issue of the Register.

No regulations shall become effective if a legislative objection has been filed until:

1. The compliance of the 30-day final adoption period; or
2. The agency has responded within the time frames established herein, whichever is longer.

As such, there may be instances, if a legislative objection is filed, that the promulgation process may be extended beyond the 90 days recommended in this report to permit the agency to use the three weeks established to consider and respond to legislative objections.

Additional Findings and Recommendations #13 and #14:

The legislative and gubernatorial review procedures contained in Recommendations #13 and #14 will increase agency and Board accountability for their regulatory activities, provide a more thorough and objective analysis of Virginia's proposed and final regulations and preserve the constitutional separation of powers. The Board believes that in practice these procedures will ensure that in virtually all cases legislative objections to proposed or final regulations will be addressed. If differences remain upon completion of these procedures, the Board finds that these differences should and would be addressed through statutory action at the next session of the Virginia General Assembly.

Finding #15 - Executive Veto:

The Board also considered a concept found in many jurisdictions of allowing the chief executive to veto newly proposed regulations...in addition to the executive oversight found in Recommendation #13. Various aspects of this concept were considered:

- (1) Some advocate giving the Governor a full power to veto any regulation which the Governor felt in his or her discretion was (a) not necessary to protect the public health, safety and welfare, (b) unduly

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burdensome, or (c) not clearly written. These advocates feel that only such a proposal would give an elected official full control over state bureaucrats and agency boards; they promote this idea as essential to protecting the public from overzealous regulators.

- (2) Others prefer a more limited approach of giving the Governor the right to veto legislation only if he or she found such regulations exceeded statutory authority or were inconsistent with existing state or federal law, regulation or judicial decision.

Others on the Board believe granting of any such power to the Governor is not necessary and, even more importantly, unwise. They argue that this places one individual (the Governor) in a position where he can thwart the will of boards and commissions that have served the Commonwealth well in meeting their regulatory responsibilities. They feel it would expose the Governor to undue pressure and perhaps lead to unwise interference in the regulatory process. They believe the review procedures established in Recommendation #13 and the Governor's power of persuasion are sufficient to address executive objections. They strongly opposed granting the Governor veto power over "unnecessarily burdensome or unclearly written" regulations. They also believe a statutorily granted gubernatorial veto power over regulations that "exceed statutory authority or are inconsistent with existing state and federal law, regulation or judicial decisions" is unnecessary.

Recommendation #15 - Executive Veto:

The Board voted not to include any executive veto in our recommendations because the Board was divided on this issue and, more importantly, felt its inclusion would unnecessarily endanger the more important other recommendations of this report.

In this vote, those who opposed any form of executive veto were joined by others who favored executive veto but felt the other aspects of the report were much more important improvements in the regulatory process. This latter group did not deem it prudent to include such controversial and decisive proposal in this report. Others stated they still favored an executive veto, but felt that the other powers given to the legislature and chief executive in our recommendations were more than adequate to safeguard against excessive regulation.