

Proposed Regulations

Regulations of the Virginia Code Commission for Implementing the Virginia Register Act for Filing and Publishing Agency Regulations

Part I

General Provisions

§ 1.1. Purpose.

~~A. The purpose of this regulation is to assist and guide administrative agencies in complying with the Virginia Register Act. The regulation defines more particularly the scope of certain terms and provisions of the Act as interpreted and modified by the Code Commission. In order to render them more readably complete and usable, the following text includes statements copying or paraphrasing the Act.~~

~~B. The purpose of the Act is to satisfy the need for public availability of information respecting administrative regulations, and to encourage agencies in developing informative regulations. To that end, it provides for the compilation, publication, and supplementation of the Virginia Administrative Code and the Administrative Law Appendix. The Appendix serves as a finding guide to the existing regulations of administrative agencies of the Commonwealth and the Virginia Administrative Code is a complete, full text, official compilation of all regulations of state agencies. The Act provides for general supervision, application of policies, and determination of guidelines by the Virginia Code Commission, and day-to-day operation under a Registrar of Regulations.~~

Drafting Note: This section is repealed in accordance with the general policy to exclude purpose statements in regulations.

§ 1.2. Definitions.

The following words and terms, when used in ~~these regulations~~, this chapter shall have the following ~~meaning~~, meanings unless the context clearly indicates otherwise:

"Act" means the Virginia Register Act (~~§ 9-6.15 et seq.~~ of the Code of Virginia.)

~~"Administrative Law Appendix" means the published listing of agency regulations with supplemental information as provided by §§ 9-6.18 and 9-6.19 of the Code of Virginia, and referred to in these regulations as the "Appendix."~~

"Administrative Process Act" means Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2 of the Code of Virginia.

~~"Adoption by reference" or "incorporated by reference" means the inclusion in regulations of provisions making applicable in whole or in part any requirements, prohibitions, policies, standards, forms, instructions, or procedures prescribed or established in other documents, except statutes, whether issued by governmental agencies or by private organizations and whether such documents are in express terms "adopted" or "incorporated" in the regulations.~~

~~"Agency" means any authority, instrumentality, officer, board or other unit of the government of the Commonwealth with express or implied authority to issue regulations other than the General Assembly, courts, municipal corporations, counties, other local or regional governmental authorities including sanitary or other districts and joint state-federal, interstate or intermunicipal authorities, the Virginia Resources Authority, the Virginia Code Commission with respect to minor changes made under the provisions of § 9-77.10:1 of the Code of Virginia, and educational institutions operated by the Commonwealth with respect to regulations which pertain to (i) their academic affairs; (ii) the selection, tenure, promotion and disciplining of faculty and employees; (iii) the selection of students; and (iv) rules of conduct and disciplining of students.~~

"Agency" means any authority, instrumentality, officer, board, or other unit of the government of the Commonwealth empowered by the basic laws to adopt regulations or decide cases, except as exempted by the Virginia Register Act.

"Commission" means the Virginia Code Commission.

"File" means to submit to the registrar so that the registrar receives the regulation submission package, or required or requested information.

"Registrar" means the Registrar of Regulations, or his designee, as provided in § 9-6.17 2.2-4102 of the Code of Virginia.

"Regulation" ~~or "operative regulation"~~ means any statement of general application, having the force of law, and affecting the rights or conduct of any person, promulgated by an agency in accordance with the authority conferred on it by applicable basic laws.

"Regulation submission package" means the regulation text and other information required to be submitted by the Administrative Process Act or the Virginia Register Act.

"Regulatory Information System" or "RIS" means the web-enabled application of the Office of the Registrar of Regulations that is used by an agency to file regulations, regulation submission packages, and related information and used by the Office of the Registrar to publish the Virginia Register of Regulations and update the Virginia Administrative Code.

~~"Style Manual" means the Virginia Register Form, Style, and Procedure Manual issued by the Virginia Code Commission.~~

~~"To file" means to deliver the entire text of the regulatory document to the Registrar or, upon a determination by the Registrar in accordance with the criteria established in § 2.3, to deliver a description of the regulatory document to the Registrar.~~

~~"Virginia Administrative Code" or "VAC" means the codified publication of regulations under the provisions of Chapter 8.1 (§ 9-77.4 et seq.) of Title 9 15 (§ 30-145 et seq.) of Title 30 of the Code of Virginia.~~

"Virginia Register Act" means Chapter 41 (§ 2.2-4100 et seq.) of Title 2.2 of the Code of Virginia.

~~"Virginia Register of Regulations" or "Register" means the publication issued under the provisions of Article 6 (§ 2.2-4031 et seq.) of the Administrative Process Act in Article 7 (§ 9-6.14.22 et seq.) of Chapter 1.1:1 of Title 9 of the Code of Virginia.~~

Drafting note: Definitions are added, clarified and updated. Unnecessary or obsolete definitions are removed.

§ 1.2:1 Computation of time.

When Article 2 (§ 2.2-4006 et seq.) or 6 (§ 2.2-4031 et seq.) of the Administrative Process Act or the Virginia Register Act prescribes a time period that is contingent upon publication in the

Register, whether before, after, or upon publication, the day of publication shall not be counted as part of the required time period. This section shall not apply to the comment period designated in § 2.2-4007.06 of the Code of Virginia to begin on the date of publication of the notice in the Register.

Drafting note: This section is new and modeled on § 1-210 of the Code of Virginia, which in part states that when an act is to be performed a certain amount of time before a proceeding, the day of the proceeding is not counted against the time allowed.

§ 1.2:2. General rules of construction.

This section shall be used in the construction of the Virginia Administrative Code.

1. Catchlines of sections. The catchline or title of a section following the section number is intended as a description to indicate the content of the section and does not constitute part of the regulation.

2. Gender. A word used in the masculine includes the feminine and neuter.

3. Number. A word used in the singular includes the plural, and a word used in the plural includes the singular unless the context clearly indicates otherwise.

4. The word "includes" means includes, but not limited to.

5. The word "or" means any one or all of the items listed or any combination thereof.

Drafting note: This section is new. The definition of "catchlines" is adapted from § 1-217 of the Code of Virginia.

The definition of "gender" is identical to § 1-216 of the COV and the definition of "includes" is identical to § 1-218 of the COV.

The definition of "number" is from § 1-227 of the COV, with the addition of the phrase "unless the context clearly indicates one or the other."

The definition of "or" is based on the Code Commission's general policy to avoid use of "and/or"; inclusion of this term will provide a basis for agencies to conclude that "or" includes "and."

§ 1.3. Form and style of regulations.

~~Every regulation shall be drafted in conformance with the Virginia Register Form, Style and Procedure Manual, which has been prepared under the authority of the Virginia Code Commission, and which may be amended from time to time. Every regulation shall also be~~

~~identified with a number as provided in that publication. A sufficient number of copies of the publication are furnished to all agency regulatory coordinators. Additional copies are available from the office of the Registrar for \$7.50.~~

A. The registrar shall develop a manual to advise agencies regarding the form and style of regulations and the codification of regulations.

B. The registrar shall provide procedures stipulating how agencies shall prepare and file with the Registrar's Office (i) regulations, (ii) regulation submission packages and other information concerning regulatory actions, or (iii) other information requested by the registrar for publication in the Virginia Register of Regulations or the Virginia Administrative Code.

C. Pursuant to § 30-150 of the Code of Virginia, the registrar may omit from publication in the Virginia Register of Regulations or inclusion in the Virginia Administrative Code (i) effective date clauses, (ii) severability clauses, (iii) purpose statements, and (iv) provisions that are nonregulatory in nature, such as a defined word, term, or phrase that is not used in the regulatory text.

D. The registrar may accept any of the items or provisions listed in subsection C of this section if the agency establishes a need to the satisfaction of the registrar.

Drafting note: The Code Commission determines all questions of form, makeup, and arrangement for the Virginia Administrative Code pursuant to § 30-146 of the Code of Virginia. Subsections A and B are updated.

Subsections C and D are added to address current practice, based on the Code Commission's authority to omit effective date clauses, severability clauses, and provisions "which in the judgment of the commission are inappropriate in a code."

Currently, the registrar removes a purpose statement after consultation with the agency. Generally, effective date clauses and severability clauses are removed without consulting with the agency, but the agency is notified of the removal. Section 2.2-4004 of the Code of Virginia also addresses severability clauses in regulations for any regulation adopted under APA. Subsection B addresses agency regulations exempt from APA, such as State Corporation Commission.

The purpose of this section is to confirm current practices, and to identify other provisions that the Code Commission may feel are inappropriate in a code, such as nonregulatory provisions.

~~§ 1.4. Agency services to the public.~~

~~The following requirements apply to all agencies adopting regulations subject to the Act, except that the requirements do not apply to materials adopted by reference to the Code of Federal Regulations or The Federal Register, or by reference to regulations of other Virginia agencies:~~

~~1. Each agency shall maintain for public consultation a complete list of all of its currently operative regulations, including, an itemization of materials adopted by reference.~~

~~2. Each agency shall make available for public inspection a complete file of the full text of all currently operative regulations, as well as all textual material adopted by reference, and allow public copying or make copies available either without charge, at cost, or on payment of a reasonable fee.~~

~~3. Each agency shall maintain as a public record a complete file of its regulations which have been superseded on and after June 1, 1975.~~

Drafting note: This section is unnecessary as it restates § 2.2-4103 of the Code of Virginia.

~~§ 1.5. Place of filings; consultations; inquiries. Method of filing.~~

~~Filing An agency shall be made either in person or by mail at the office of the Registrar of Regulations, Second Floor, General Assembly Building, Capitol Square, Richmond, Virginia 23219 file regulations, regulation submissions packages, and requested information electronically through the Regulatory Information System (RIS), unless specifically approved by the registrar to file through other means.~~

~~A currently updated copy of the Appendix is available for public consultation at the above address. Upon request, the Registrar will furnish any person with both the date on which a regulation was filed and the date on which the regulation became effective. As stated more fully in § 9-6.18, however, it is the responsibility of each agency to make its regulations, including~~

~~textual materials adopted by reference, available to the public and to make available for public
consultation its own list of regulations.~~

Drafting note: This section is updated to reflect the current method of filing regulations with the Registrar's Office. The last paragraph regarding the Administrative Law Appendix is removed as it is obsolete.

§ 1.6. Internet address; contact information; consequential changes.

A. If an agency includes an Internet address in the text of a regulation, the agency is responsible for maintaining the accuracy and currency of the Internet address.

B. If an agency includes contact information in the text of a regulation, the agency is responsible for maintaining the accuracy and currency of the contact information. Contact information includes a title, mailing address, telephone number, email address, or similar information.

C. The agency must (i) promptly notify the Registrar's Office when an Internet address or contact information changes and (ii) provide the correct Internet address or contact information. The agency shall file a request for amendment as directed by the registrar and provide the revised text of the regulation.

D. The registrar may correct an Internet address or contact information upon request by an agency. In addition, the registrar may, in his discretion, make other consequential corrections pursuant to §§ 30-150 and 2.2-4102 of the Code of Virginia.

E. The registrar will publish notice of the correction.

Drafting note: This section is new and is based on § 30-150 of the Code of Virginia, which permits the Code Commission to make consequential changes made necessary by the use of titles, terminology, and references, or other language no longer appropriate.

§ 1.7 Waiver by registrar.

The registrar may waive a provision of this chapter, provided that the waiver is consistent with applicable state law.

Drafting note: This section is new and permits flexibility in application of the regulations to address unique situations.

§ 1.8 Agency regulatory coordinator.

The head of each agency, or his designee, shall appoint or designate an individual as the agency regulatory coordinator who shall coordinate the regulatory activities of the agency with the Office of the Registrar of Regulations.

Drafting note: This section is new and reflects current practice.

PART II.

~~REGULATIONS REQUIRED TO BE FILED.~~

Filing Regulations and Regulation Submission Packages with the Registrar's Office

§ 2.1 Registration of Filing regulations.

~~All operative regulations, including textual materials adopted by reference, shall be registered with the Registrar, either by filing in full or by filing a description of those regulations as specified in § 2.3.~~

A. An agency must file all regulations, including materials incorporated by reference and forms used in administering the regulation, with the registrar. The regulations shall be filed through the Regulatory Information System or as directed by the registrar.

B. The agency shall file the full text of a regulation with the registrar, except text that is incorporated by reference pursuant to § 2.2-4031 of the Code of Virginia shall be filed in accordance with Part III of this chapter.

C. No regulation, or amendment or repeal thereof, is effective until filed with the registrar pursuant to § 2.2-4103 of the Code of Virginia. If the regulation, or amendment or repeal thereof, is incomplete, the registrar may decline to publish the regulation.

Drafting note: The section is updated and amended. Agencies are no longer permitted to file merely a description of the contents of the regulation instead of filing the complete text of the regulation.

Currently, three agencies have regulations that are filed by description: Department of Transportation (14), Department of General Services (2), and the Judicial Inquiry and Review Commission (1).

Here is an example of what is published in VAC:**24VAC30-390-10. Virginia Scenic Highways and Byways (Filed by Description with the Registrar of Regulations).**

Description: The regulations governing Virginia's scenic highways and byways establish the policies and procedures which the Commonwealth Transportation Board, the department, local governing bodies, and the Department of Conservation and Recreation will follow in adding or deleting a route from the lists of scenic highways or Virginia byways. The policy includes a list of criteria which proposed road segments must meet before they can be considered for addition. These include aesthetic, cultural and safety factors.

Document available for inspection at the following location:

Virginia Department of Transportation
Management Services Division
1401 East Broad Street, 7th Floor
Richmond, VA 23219

The Code Commission's policy is to set out text in full. Therefore, subsection A requires the complete text of all regulations to be on file with the registrar. The only exception is text that is incorporated by reference to another publication, such as a building code.

~~§ 2.2. Registration by filing in full.~~

~~All currently operative materials falling within the term "regulation" as defined in § 1.2, and not exempted from filing in full as set out in § 2.3, are required to be on file in full text, with the Registrar (See also the filing requirements in the Administrative Process Act § 9-6.14:9 of the Code of Virginia.)~~

~~All regulations subject to filing in full shall be filed in duplicate with the Registrar. A signed statement or certification, that they are full, true, and correctly dated shall accompany the regulation. The statement shall be filed in triplicate. One copy will be stamped and returned as a receipt to the agency. The signed statement or certification may be in the form of a cover letter.~~

~~Regulations that are required to be filed under the Virginia Register Act and the Administrative Process Act shall comply with the Virginia Register Form, Style, and Procedure Manual.~~

Drafting note - The first paragraph is incorporated into § 2.1; the other paragraphs are unnecessary or obsolete.

~~§ 2.3. Registration by filing description.~~

~~The Registrar may authorize the filing of a document by description in lieu of filing the entire text of any regulatory document in accordance with the following criteria:~~

~~1. Regulations which are expressly addressed to named individuals or organizations;~~

~~2. Regulations which are concerned only with any of the following:~~

~~a. Public officers and employees;~~

~~b. Elections;~~

~~c. Students;~~

~~d. Persons in state mental, penal and other institutions;~~

~~e. State property or funds;~~

~~f. Public contracts;~~

~~g. Defense functions;~~

~~h. Police operations of an enforcement, prosecutorial or investigatory character; or~~

~~i. Money grants, benefits, loans, or subsistence or welfare payments;~~

~~3. The size of the document's pages differs significantly from the standard page size of the Virginia Register of Regulations or the Virginia Administrative Code;~~

~~4. The material is not available in document form; for example, if the material is only available in electronic form or on computer tape or discs; or~~

~~5. Regulations which are both of a temporary nature and operative only in limited localities.~~

~~Any request for exemption shall be made to the Registrar by the agency in writing.~~

~~Any approval granted by the Registrar shall also be made in writing.~~

~~In every instance in which the Registrar authorizes an agency to file a regulatory document by description, a current document shall be maintained and, upon request, be made available to the public by the agency. This current document shall be deemed to be filed in its entirety with the Registrar and shall, at any time during business hours, be made available to the Registrar upon request.~~

All such regulations are otherwise subject to all requirements in these regulations applicable to agency regulations covered by the Act.

Drafting note: The ability to file by description is not included in the proposed regulation. Therefore, this section is repealed.

§ 2.4. Supplemental information required to be supplied.

The Commission, through the Registrar, from time to time, may make general or special calls for additional information. The Act requires prompt response to all such requests. Unless specifically requested, no particular form is required for statements furnishing such supplemental information except that they must be signed, and filed in duplicate if the agency desires one copy stamped and returned as a receipt. The following additional information is regularly and generally hereby required to be on file respecting all regulations subject to the Act, whether the regulations are required to be registered by filing in full or by filing by description:

1. Source or sources in the agency and elsewhere from which official copies may be obtained, and any fee or other requirement therefor. Information shall be filed detailing where and how private persons may obtain official (not certified) copies of all regulations. Unless otherwise stated, it is assumed that there is no charge for such copies.

2. Place of custody of original regulations, and place or places where regulations may be inspected or copied. Unless the agency otherwise informs the Registrar, it will be assumed that its original regulations are maintained, and copies of the regulations may be reviewed or copied, in the same office or offices of the agency as those listed under subdivision 1 of this section. As stated in the preface to the Administrative Law Appendix, the statement "Regulations are available at", unless otherwise indicated, applies to both availability for inspection and availability of copies, as well as to the place of custody of the original regulations. If some or all of the agency's regulations are regularly distributed to, or posted for public inspection at, places other than agency offices, information to that effect should also be furnished.

3. Existing official publication of regulations. When an agency's regulations are regularly published in official publications (e.g., annual reports, etc.), or if the agency regularly

~~makes newspaper publication of regulations, the agency shall coordinate with the Registrar, the publication, of published regulations as they appeared in The Virginia Register of Regulations. If, due to the length of the regulation, only a summary of the regulation was published in the Register, the agency shall advise the Registrar of its need to proceed with publication in other sources, in order that the Registrar can process the document in a timely manner.~~

~~4. Subsequent information or corrections. Agencies shall promptly file new or additional statements as necessary to correct or bring up to date previously filed public availability information of the foregoing nature.~~

Drafting note: This section is unnecessary or obsolete, mainly because of the existence of a published administrative code and because the information described in this section is submitted with the regulatory package.

~~§ 2.5. Data required to be included in filed regulations.~~

~~The date of adoption, revision, or effective date, and terminal date, if any, shall appear on the face of all new regulations, not merely on the certification filed with the Registrar. New forms shall indicate date of issuance or revision.~~

~~Regulations shall indicate statutory authority. Statutory authority shall be cited by referring to the appropriate title and sections or chapters of the Code of Virginia or, for uncodified statutes, the appropriate chapter of the designated Act of Assembly.~~

Drafting note: This section is updated and replaced by § 2.6, except that the requirement that forms include the date of issuance or revision is now in § 5.1.

§ 2.6 Final agency action date; effective date; statutory authority.

A. An agency shall provide the date of final agency action and the effective date of a regulation when filing a regulation submission package for a fast-track or final regulatory action, or other equivalent action.

B. When Virginia law allows a regulation to be effective upon the filing of the regulation with the registrar, the agency should select an effective date at least three business days after filing.

C. An agency shall provide the effective date and expiration date of an emergency regulation when filing the emergency regulation and accompanying regulation submission package. If the expiration date of the emergency regulation is extended, the agency shall notify the registrar within three business days of the governor's approval of the extension.

D. Pursuant to § 2.2-4012 D of the Code of Virginia, a regulation shall contain the statutory authority for the regulation. An agency shall include in the regulatory submission package the complete citation for each statute or regulation that serves as the statutory authority, as follows:

1. For a codified Virginia statute, the citation shall be to the applicable section of the Code of Virginia.

2. For an uncoded Virginia statute, the citation shall be to the applicable chapter of the designated Act of Assembly.

3. When a regulation is required to conform with federal law or regulation, the agency shall provide a citation to the specific federal law or regulation to which conformity is required.

Drafting note: This section updates and expands § 2.5. The first sentence of § 2.5 is found in subsection A.

Subsection B is added to encourage agencies to file a regulation and provide sufficient time for the Registrar's Office to review a submission and update the Virginia Administrative Code.

Subsection C is new. Section 2.2-4011 of the Code of Virginia requires that an agency notify the Registrar of a new expiration date "as soon as practicable."

Subsection D replaces the second paragraph of § 2.5 and adds citations to federal law to comply with § 2.2-4012 D.

§ 2.7. Supplemental information; exemption to APA.

A. Pursuant to § 2.2-4103 of the Code of Virginia, the registrar may request information in addition to the full text of a regulation for the purpose of publishing the Register and VAC.

B. An agency shall respond to a request from the registrar within three business days of the request, unless a different response time is approved by the registrar.

C. When claiming an exemption to the APA, an agency shall provide the specific statutory citation for the claimed exemption. Upon request of the registrar, an agency should file a memorandum from the Office of the Attorney General that confirms the exemption and cites the specific statute upon which the exemption is based.

Drafting note: Section 2.2-4103 requires that an agency respond "promptly" to the requests of the Registrar (see below). This section defines "promptly."

[T]he Governor, ... may, until compliance with this chapter is achieved, withhold the payment of compensation or expenses of any officer or employee of any agency... whenever the Commission certifies to him that the agency has failed to comply with this section or this chapter in stated respects, to respond promptly to the requests of the Registrar, or to comply with the regulations of the Commission.

§ 2.8 Withdrawal of a final regulation; publication.

A. When an agency withdraws a final regulation pursuant to § 2.2-4016 of the Code of Virginia, the agency shall file a written notice of withdrawal with the registrar prior to the effective date of the regulation being withdrawn. The notice shall include:

1. The reason for the withdrawal of the regulation;

2. Agency contact information;

3. The publication information; and

4. The date of agency action.

B. The notice of withdrawal will be published in the Register.

Drafting note: This new section provides a mechanism by which the public is notified that a regulation that was published in the Register as a final regulation with a specific effective date has been withdrawn and will not become effective.

§ 2.9 Omissions and errors.

A. An agency shall notify the registrar of all omissions or errors that the agency becomes aware of in any of the information (i) submitted for publication or (ii) published in the Register or the Virginia Administrative Code.

B. The notification shall be filed with the registrar within three business days of the date that the agency becomes aware of the omission or error.

Drafting note: This section updates and replaces § 4.2, which required agencies to notify the Registrar of errors in the Administrative Law Appendix.

PART III

~~Adoption Incorporation by Reference.~~~~§ 3.1. Filing requirements for material adopted by reference.~~

~~A. Where regulations, which are filed in full, adopt textual matter by reference to other publications as defined in § 1.2, such incorporated publications, in their entirety, shall also be filed with the Registrar. Whether the referenced material is required to be filed in full or by descriptive statement, the agency shall make copies of all referenced publications available for public inspection and copying along with its other regulations.~~

~~B. Whenever a regulation incorporates other textual material by reference, it should specify the date of adoption, revision, or publication, or the effective date, of the adopted material.~~

~~In addition, regulations so adopting other materials are required to have the following information on the cover of the incorporated material and the places where copies of the referenced publications may be procured:~~

- ~~1. Reference to the specific regulation adopting the outside material;~~
- ~~2. The filing date and effective date of the regulation; and~~
- ~~3. A notation containing the name of the agency.~~

Drafting note: Subsection A of this section is now in § 3.1:2 and subsection B, first sentence, is now in § 3.1:3. The last provision regarding information on the cover of the incorporated material is updated and moved to § 3.1:3.

~~§ 3.2. Statement of availability.~~

~~Where numerous adoptions by reference are made in a regulation, notations of sources and places of availability may be set forth in a separate section of the regulation.~~

Drafting note: This section is unnecessary.

§ 3.1:1 Incorporation by reference permitted.

A. A regulation may incorporate textual matter by reference to all or any part of a publication or document. For the purposes of this part, a publication and a document are interchangeable.

The material in the document is incorporated by reference into the text of the regulation and becomes an enforceable part of the regulation.

B. The agency must comply with the provisions of §§ 3.1:2 and 3.1:3 of this chapter when incorporating a document by reference.

C. Effective [insert effective date of this regulation], an agency may not incorporate prospective changes to an incorporated document by referring to a future edition or revision of the document or by using "as updated," "as amended," "future editions," or similar language. When a document that an agency has incorporated by reference is modified by the publisher, the agency may adopt the modification but shall do so through a separate regulatory action. However, when an agency incorporates by reference provisions of the Code of Virginia, the Acts of the General Assembly, or the Virginia Administrative Code into a regulation, future amendments to the incorporated provisions are included unless other intent is specifically stated in the regulation.

D. Effective [insert effective date of this regulation], an agency may not incorporate one of its own documents by reference unless the agency establishes that the documents or circumstances are unique and highly unusual.

Drafting note: The only Code of Virginia provision addressing incorporation by reference is § 2.2-4103: Where regulations adopt textual matter by reference to publications other than the Federal Register or Code of Federal Regulations, the agency shall (i) file with the Registrar copies of the referenced publications, (ii) state on the face of or as notations to regulations making such adoptions by reference the places where copies of the referred publications may be procured, and (iii) make copies of such referred publications available for public inspection and copying along with its other regulations.

This section clarifies incorporation by reference and reflects the current practice of the Registrar's Office and most agencies.

The second sentence of subsection C is based on § 1-220 of the Code of Virginia.

§ 3.1:2 Filing requirements.

A. When an agency adopts textual matter in a regulation by reference to a document, the agency shall file a copy of the referenced document with the regulation submission package. The document shall be filed in its entirety, unless the registrar has approved a request for the

document to be filed by descriptive statement as provided in § 3.3 B. The agency shall also provide information as to where copies of the incorporated publications may be procured.

B. When an agency adopts textual matter by reference to Internet content, the agency shall file the Internet content with the registrar. The agency shall file a read-only electronic copy or a printed copy of the Internet content.

Drafting note: This new section replaces § 3.1 A, supplements the statutory provision regarding incorporation by reference, and addresses Internet content.

§ 3.1:3 Regulation text.

When incorporating material by reference, an agency shall include in the regulatory text (i) a statement that the document is incorporated by reference; (ii) the complete name of the document; (iii) the effective, issue, revision, or publication date; (iv) the version or edition, if any; and (v) the publisher or entity that produced the document.

Drafting note: This new section replaces § 3.1 B and reflects current practice. The publisher's website address, physical address, and contact information will be included on the Document Incorporated by Reference (DIBR) list at the end of the chapter.

§ 3.3. Exemptions to filing of documents adopted or incorporated by reference; requirements.

A. The requirements established in §§ ~~3.4~~ 3.1:2 and ~~3.2~~ 3.1:3 do not apply to incorporation of textual matter by reference to material published in the Federal Register or the Code of Federal Regulations, or by reference to regulations of other Virginia agencies. Where such references are made, ~~however, the citation shall be~~ the regulatory text must contain a citation sufficient for accurate identification of the referenced material.

1. Where the material has been published in the Code of Federal Regulations, the agency must:

a. Include in the regulatory text the title, part of sections or section, and the date of publication shall be given. Example: 1 C.F.R. Part 1 (rev. Jan. 1, 1975) or 1 C.F.R. §§ 1.1 to 1.30 (rev. Jan. 1, 1975) 40 CFR Part 260 (July 1, 2014 update) or 40 CFR §§ 260.1 through 260.11 (July 1, 2014 update); or

b. Include a section listing the applicability of the cited CFR text and stating that when a federal regulation is incorporated in the chapter, that regulation shall be as it exists and has been published on a certain date.

2. Where the referenced material has not been published in the Code of Federal Regulations but appears in the Federal Register, the agency must include in the regulatory text the volume, page, and date of that publication shall be given and, if the material is in codified form, the C.F.R. citation should be given. Example: 16 C.F.R. § 19.1, 39 F.R. 23605 (Nov. 4, 1974). the Federal Register. Example: 79 FR 264, January 2, 2014.

~~Some agency regulations previously filed with the Registrar adopt materials issued by federal agencies without reference to the Code of Federal Regulations or the Federal Register; to the extent that such materials appear in either of those publications, filing may be avoided and public access made easier by use of the appropriate citations.~~

~~B. In certain limited instances, on a case-by-case basis, the Registrar~~ The registrar ~~may exempt an agency from the requirements~~ requirement ~~of filing in full textual material adopted by reference where the incorporated document in its entirety if such filing would be impractical due to:~~ or cause an undue hardship on the agency. The document shall be filed as directed by the registrar.

~~1. The document exceeds 500 pages and is generally available to the public;~~

~~2. The size of the document's pages differs significantly from the standard page size of the Virginia Register of Regulations or the Virginia Administrative Code;~~

~~3. The material is not available in document form; for example, if the material is only available in electronic form or on computer tape or discs;~~

~~4. The material is updated more than twice yearly; or~~

~~5. The material is copyrighted or is otherwise the property of an individual or an organization other than the state government.~~

~~C. Any~~ The agency shall request for an exemption to ~~these~~ this filing requirements shall be made by the agency in writing requirement by submitting a request to the Registrar registrar. Any approval granted by the registrar shall also be made in writing The registrar will notify the agency whether the exemption is approved.

~~D. The granting of an exemption~~ Even if exempted under subsections A and B of this section does not relieve₁ an agency from the requirement of maintaining must maintain on file, and making make available to the public, the full text of all materials adopted by reference.

Drafting note: This section is revised to update language and reflect current practices.

~~PART IV.~~

~~ADMINISTRATIVE LAW APPENDIX.~~

~~§ 4.1. Contents of Appendix; supplementation.~~

~~A. The Appendix contains, for each agency subject to the Act, (i) a summary statement of its regulatory powers with citation to the Virginia Code or other authority; (ii) information as to where its regulations may be inspected or copied; (iii) where and how copies may be obtained; (iv) the place of custody of the originals if not at the same location; (v) references to any official publications of the regulations; (vi) a list of the agency's currently effective regulations, including forms, delegations of authority, and textual material adopted by reference, subject to filing in full under the Act and filed with the Registrar; and (vii) the notation of its regulations exempt from filing in full but otherwise covered by the Act, and which the agency has submitted descriptive statements as required by § 3.3.~~

~~B. The Appendix will be published at least annually, and a currently updated copy maintained in the office of the Registrar.~~

Drafting note: The Administrative Law Appendix is no longer published; therefore, this section is obsolete.

~~§ 4.2. Omissions and errors.~~

~~Agencies should promptly call to the attention of the Registrar any omissions or errors they discover in the Appendix.~~

Drafting note: This section has been moved to § 2.9.

Part V

Forms

§ 5.1. Filing requirements.

A. An agency shall file any form that the agency intends to incorporate into or use in administering the regulation with the proposed or final, including fast-track, regulation submission package for publication in the Register pursuant to § 2.2-4031 A of the Code of Virginia. The agency shall include on the face of the form (i) the date of issuance or revision and (ii) a form number.

B. A form is not a substitute for regulation text and may not contain requirements that are not in the Code of Virginia or VAC.

Drafting Note: Subsection A contains the provision of existing § 2.5 that requires a form to indicate the date of issuance or revision

§ 5.2. Exemption from filing a form.

A. An agency may request an exemption from filing if the form (i) may be completed only online or electronically or (ii) is not in a printable format.

B. The agency shall make a request for an exemption from filing by submitting a request to the registrar. The registrar will notify the agency whether the exemption is approved.

C. If an exemption is approved, the Internet address for the form will be included in VAC.

D. The agency shall notify the registrar in writing if an Internet address for the form changes. Under the authority of § 30-150 of the Code of Virginia, the registrar may correct the Internet address in the Virginia Administrative Code.

E. The granting of an exemption under this section does not relieve an agency from maintaining the forms on file and making the forms available to the public.

Drafting Note: This section is added to address electronic-only forms.

§ 5.3. ~~Filing process for changes only to forms~~ Modification of forms in the Virginia Administrative Code.

A. The provisions of this section apply when a form for a regulation is added, amended, or removed, provided that (i) the regulatory text is not changing and (ii) the change to the form is not making a substantive change to the regulation.

B. An agency shall file form changes as directed by the registrar.

C. Notice of revised forms will be published in the Register and forms will be updated in the Virginia Administrative Code online on the date of publication of the volume and issue of the Register in which it appears.

Drafting note: The modification of a form using this "forms only" process will increase public availability to forms and allow maintenance of a current list of forms in VAC.

§ 5.4. Publication.

A. For the purposes of § 2.2-4031 of the Code of Virginia, a form shall be considered to be published in the Virginia Register of Regulations if (i) the form is published in full, (ii) a hyperlink to the form is published, or (iii) a notice identifying where the form may be obtained is published.

B. The registrar shall determine how a form will be published..

Drafting note: The Administrative Process Act requires that forms be published in the Register. This section allows for "publication" by publishing the forms list for the chapter in lieu of the actual form. Typically, the forms list includes a hyperlink to the form. This provision will increase public availability to forms.

Part VI

Virginia Register of Regulations

§ 6.1. Availability and official version.

As provided in § 2.2-4031 of the Code of Virginia, the Virginia Register of Regulations is published by posting the Register on the Virginia Code Commission's website. The portable document format (PDF) file is the official version of the Register.

Drafting note: Each issue of the Register is posted on the Virginia Register of Regulations website as an HTML and a PDF. This provision establishes that the PDF is the official version.