

Memorandum

To: Directors of and Counsel to Virginia State Agencies

From:

Copy:

Date:

Re: Recent Virginia Supreme Court Case Regarding State Agency Regulations:
Volkswagen of America, Inc. v. Smit, et al, 279 Va. 327, 689 S.E.2d 679 (2010).

Earlier this year, the Supreme Court of Virginia issued an opinion in the *Volkswagen v. Smit* case (cited above) which addresses the interplay between a state agency's statutory authority and the regulations and guidelines which it promulgates – or fails to promulgate – under that authority.¹ The Supreme Court's opinion was narrowly written, and may not have broad application, but provides insight that may prove valuable to agencies in addition to those charged with administering the particular statutes at issue.

In *Volkswagen v. Smit*, the statute at issue was Va. Code § 46.2-1569 (7), which requires a motor vehicle manufacturer to ship to its dealers the number of new vehicles of each make, series and model needed to make the percentage of such vehicles “equitably related to the total new vehicle production or importation currently being achieved nationally.” Under this statute, the Commissioner of the Department of Motor Vehicles (“DMV”) determined that Volkswagen had violated the statute when it failed to supply certain high-demand models to one of its Virginia dealerships.

The Supreme Court first noted that “it is possible for a statute or ordinance to be facially valid, yet unconstitutional as applied in a particular case.” *Id.* at 9. The Court also noted that, although the DMV had been given authority to issue regulations under the statute by Va. Code § 46.2-203, and that it could have provided “guidance documents” on the application of the statute under Va. Code § 2.2-4001 et seq., the DMV had done neither.

The Supreme Court then found that the absence of any regulation or guidance document was significant in reaching its holding that, in this particular case, the statute at issue was unconstitutionally vague as applied. The Court explained as follows:

¹ The United States Supreme Court recently denied certiorari and will not be hearing an appeal of the Virginia Supreme Court's decision. *Miller Auto Sales, Inc. v. Volkswagen of America, Inc.*, 2010 U.S. LEXIS 6564 (U.S., Oct. 4, 2010).

In short, the requirement of fair notice contained in due process is not satisfied if the public cannot determine what the law prohibits or the standard to which they must conform from either the language of the statute or a properly promulgated regulation or other official guidance provided prior to the statute being enforced, but rather only after the fact from the result of an arbitrary exercise of discretion by the administrative official charges with enforcing the statute.

Id. at 19-20.

Many Virginia state agencies are charged with enforcing statutes employing standards such as “fairness” and “equity.” Many of those statutes empower those agencies to issue regulations and guidelines.

In light of the *Volkswagen v. Smit* decision, your agency may want to consider whether it is operating under statutes which should be made more clear or specific, and may wish to consider whether appropriate regulations or guidance documents have been, can be and should be promulgated.