

§ 2.2-4012 B. Subject to the provisions of §§ 2.2-4013 and 2.2-4014, all regulations, including those that agencies, pursuant to § 2.2-4002, 2.2-4006, or 2.2-4011, may elect to dispense with the public procedures provided by §§ 2.2-4007.01 and 2.2-4009, may be formally and finally adopted by the signed order of the agency so stating.

**Grammatically, this is the sentence:**

All regulations may be formally and finally adopted by the signed order of the agency so stating.

The verb "may" (preceding "be") is problematic because it means this sentence is not a requirement; it's content is optional. If this is to be a requirement, change that instance of "may" to "must" (preferred) or "shall".

How did it get this way? Probably, the very "may" preceding "be" was not original, but inserted erroneously to be parallel with "may elect" (which is appropriately to offer an option).

**The green clause modifies "regulations" only.**

Such regulations include regulations that agencies may elect to dispense with the public procedures provided by the green citations.

**The blue clause modifies "agencies" only.**

Currently, as written, the blue clause modifies (probably) the wrong word; it's modifying "agencies" instead of the action being taken by an agency. If the goal of the sentence is to stress that this sentence applies to agencies that are (i) exempt wholly or partially from the APA or (ii) filing an emergency regulation, a better phrase might be: including those regulatory actions taken pursuant to.... for which an agency may elect...

Cited sections catchlines (content):

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

§ 2.2-4014. Legislative review of proposed and final regulations.

§§ 2.2-4002 & 2.2-4006 contain exemptions from, respectively, the entire APA and Article 2 of the APA.

§ 2.2-4011. Emergency regulations; publication; exceptions.

§ 2.2-4007.1. Regulatory flexibility for small businesses; periodic review of regulations.

§ 2.2-4009. Evidentiary hearings on regulations.

Put that all together:

B. Subject to the provisions of §§ 2.2-4013 and 2.2-4014, all regulations must be formally and finally adopted by a signed order of an agency stating that such action is a final adoption of the regulation. This includes regulatory actions taken pursuant to § 2.2-4002, 2.2-4006, or 2.2-4011 for which an agency may elect to dispense with the public procedures provided by §§ 2.2-4007.01 and 2.2-4009.

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

- A. The purpose of the regulatory procedures shall be to provide a regulatory plan that is predictable, based on measurable and anticipated outcomes, and is inclined toward conflict resolution.
- B. Subject to the provisions of §§ [2.2-4013](#) and [2.2-4014](#), all regulations, including those that agencies, pursuant to § [2.2-4002](#), [2.2-4006](#), or [2.2-4011](#), may elect to dispense with the public procedures provided by §§ [2.2-4007.01](#) and [2.2-4009](#), may be formally and finally adopted by the signed order of the agency so stating. No regulation except an emergency regulation or a noncontroversial regulation promulgated pursuant to § [2.2-4012.1](#) shall be effective until the expiration of the applicable period as provided in § [2.2-4015](#). In the case of an emergency regulation filed in accordance with § [2.2-4011](#), the regulation shall become effective upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. The originals of all regulations shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies. They, or facsimiles thereof, shall be made available for public inspection or copying. Full and true copies shall also be additionally filed, registered, published, or otherwise made publicly available as required by other laws.
- C. Prior to the publication for hearing of a proposed regulation, copies of the regulation and copies of the summary and statement as to the basis, purpose, substance, issues, and the economic impact estimate of the regulation submitted by the Department of Planning and Budget and the agency's response thereto as required by § [2.2-4007.04](#) shall be transmitted to the Registrar of Regulations, who shall retain these documents.
- D. All regulations adopted pursuant to this chapter shall contain a citation to the section of the Code of Virginia that authorizes or requires the regulations and, where the regulations are required to conform to federal law or regulation in order to be valid, a citation to the specific federal law or regulation to which conformity is required.
- E. Immediately upon the adoption by any agency of any regulation in final form, a copy of (i) the regulation, (ii) a then current summary and statement as to the basis, purpose, substance, issues, and the economic impact estimate of the regulation submitted by the Department of Planning and Budget, and (iii) the agency's summary description of the nature of the oral and written data, views, or arguments presented during the public proceedings and the agency's comments thereon shall be transmitted to the Registrar of Regulations, who shall retain these documents as permanent records and make them available for public inspection. A draft of the agency's summary description of public comment shall be sent by the agency to all public commenters on the proposed regulation at least five days before final adoption of the regulation.

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

## Grammatical Issue in § 2.2-4012 B

From Ashley Colvin, DPB

Per the 2001 recodification report for Title 2.1, § 2.2-4012 B used to be 9-6.14:9. According to HD 26 (page 13) that text said:

Adoption, dating, availability.-All regulations, including those as to which agencies pursuant to § 9-6.14:6 may elect to dispense with the public procedures provided by §§ 9-6.14:7 and 9-6.14:8, may be formally and finally adopted by the signed order of the agency so stating. [31] But no regulation shall be operative in less than thirty days after such adoption and the filing thereof in accordance with the Virginia Register Act except that in the case of an emergency under § 9-6.14:6(iii) hereof the regulation shall become operative upon its adoption and filing unless a later date is specified. [32] The originals shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies. [33] They, or facsimiles thereof, shall be made available by the agency for public inspection or copying. [34] Full and true copies shall also be additionally filed, registered, published, or otherwise made publicly available as may be required by other laws. [35]

The numbers in brackets refer to explanatory endnotes, but the online copy of the PDF is missing endnotes 22-35, because its missing pages 23 and 24. So we need a hardcopy and/or a fresh scan to see what the purpose of this section was.

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Aha! The pages are there but the PDF has them out of order.

Endnote #31 says, "This assumes that all regulations will be in writing. The normal method of adoption would be a signed order stating that the attached (or "foregoing") regulation is "hereby adopted." The signing may be by the official or officials authorized to act, or by some duly designated subordinate such as the secretary or chief clerk of the agency who is by agency minute or otherwise authorized to sign "for" the agency."

**ADMINISTRATIVE PROCESS ACT**

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**REPORT OF THE  
VIRGINIA CODE COMMISSION**

**To**

**THE GOVERNOR**

**And**

**THE GENERAL ASSEMBLY OF VIRGINIA**



**House Document No. 26**

**COMMONWEALTH OF VIRGINIA  
Department of Purchases and Supply  
Richmond  
1975**

argument to the agency itself. [29] Whether or not subordinates take the evidence, after opportunity for the submittal of briefs on request and such oral argument as may be scheduled in its discretion, the agency may settle the terms of the regulation and shall promulgate it only upon (i) its findings of fact based upon the record of evidence made pursuant to this section and facts of which judicial notice may be taken, (ii) statements of basis and purpose as well as comment upon data received in any informational proceedings held under § 9-6.14:7 and (iii) the conclusion or conclusions required by the terms of the basic law under which the agency is operating. [30]

§ 9-6.14:9. Adoption, dating, availability.—All regulations, including those as to which agencies pursuant to § 9-6.14:6 may elect to dispense with the public procedures provided by §§ 9-6.14:7 and 9-6.14:8, may be formally and finally adopted by the signed order of the agency so stating. [31] But no regulation shall be operative in less than thirty days after such adoption and the filing thereof in accordance with the Virginia Register Act except that in the case of an emergency under § 9-6.14:6(iii) hereof the regulation shall become operative upon its adoption and filing unless a later date is specified. [32] The originals shall remain in the custody of the agency as public records subject to judicial notice by all courts and agencies. [33] They, or facsimiles thereof, shall be made available by the agency for public inspection or copying. [34] Full and true copies shall also be additionally filed, registered, published, or otherwise made publicly available as may be required by other laws. [35]

### **Article 3.**

#### **Case Decisions.**

§ 9-6.14:10. Exclusions.—This article shall not apply to case decisions respecting (i) the assessment of taxes or penalties under the tax laws, (ii) the award or denial of claims for workmen's compensation, (iii) the grant or denial of public assistance, or (iv) temporary restraining or like orders authorized by law to be issued summarily. [36]

§ 9-6.14:11. Informal fact finding.—Save to the extent that case decisions are made as provided by § 9-6.14:12, agencies shall, unless the parties consent, ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings. [37] Such conference-consultation procedures include rights of parties to the case (i) to have reasonable notice thereof, (ii) to appear in person or by counsel or other qualified representative before the agency or its subordinates for the informal presentation of factual data, argument, or proof in connection with any case, (iii) to have notice of any contrary fact basis or information in the possession of the agency upon which it may rely in any way in making an adverse decision, (iv) to receive a prompt decision of any application for a license, benefit, or renewal thereof, and (v) to be informed, briefly and generally in writing, of the factual or procedural basis for an

[27] For the definition of “subordinates” see § 9-6.14:5 G.

[28] Note that it is only these evidential proceedings which require a verbatim record, not the informational proceedings under § 9-6.14:7. Another condition is the requirement of a report by such subordinates as mentioned in the next sentence.

[29] Only where subordinates preside at evidential hearings is a report required, the purpose of which is to serve as a basis for further proceedings before the agency itself.

[30] In all cases where evidential hearings are held it is contemplated that parties shall have the opportunity to submit briefs, but oral argument rests in the discretion of the agency. The agency itself must make the findings of fact on the basis of the record (and such judicial notice as is recognized) as well as state the basis and purpose required by the last paragraph of § 9-6.14:7 growing out of any separate informational proceedings. These must lead to the similarly stated ultimate conclusion or conclusions required by the language of the basic law under which the agency is acting. Such findings, statement, and conclusion may be short and simple unless the nature and number of the factual issues require elaboration of the findings.

[31] This assumes that all regulations will be in writing. The normal method of adoption would be a signed order stating that the attached (or “foregoing”) regulation is “hereby adopted.” The signing may be by the official or officials authorized to act, or by some duly designated subordinate such as the secretary or chief clerk of the agency who is by agency minute or otherwise authorized to sign “for” the agency.

[32] Note that, with the exception stated, the normal 30-day deferred effective date period begins to run upon and after the filing of regulations under the Virginia Register Act. Such filing is required only to the extent provided in that Act, amendments thereof, and any instructions or regulations issued thereunder respecting such filing.

[33] Every agency should provide for suitable custody of such public records as well as their availability under the remainder of this section.

[34] Where copies are made available, there would of course be no reason for public inspection or copying of originals unless some controversy should develop as to the existence, terms, dating, or otherwise of the originals.

[35] As stated in note 32 above, filing under the Virginia Register Act is required only to the extent provided therein or by any amendments of that act or any regulations or instructions issued thereunder respecting such filing. Other laws occasionally require the filing of regulations for other purposes, but those are neither made additional filing requirements under this chapter nor does this chapter repeal or modify them. Note that this chapter makes no provision for publishing regulations, which is left to

The APA (§ 2.2-4007.04) requires DPB to assess whether a regulation has “an adverse effect on small businesses...” Because “adverse effect” is not defined, and the definition of “small business” differs from other statutory definitions, DPB cannot make an effective determination. As a result, over 20% of all Economic Impact Analyses (EIA) report an adverse effect, which dilutes its usefulness.

**Because Code does not define “adverse effect” DPB has crafted a broad definition**

In each EIA, DPB indicates the following:

- Statute does not define “adverse impact,” state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.
- An adverse impact is indicated if there is any increase in net cost or reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.

In short, if the regulatory change costs more than \$1, or results in a revenue loss of more than \$1, an adverse impact is reported by DPB. In contrast, Code requires VITA to take certain actions if a specific dollar threshold (\$1 million) is exceeded (§ 2.2-2006).

**APA’s definition of “small business” differs from other Code definitions, hindering analysis**

Per § 2.2-4007.1, “small business” means:

- “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

Department of Small Business & Supplier Diversity:

- “at least 51 percent independently owned and controlled by one or more individuals....has 250 or fewer employees or average annual gross receipts of \$10 million or less averaged over the previous three years” (§ 2.2-1604).

Public Procurement Act:

- “independently owned and controlled by one or more individuals... has 250 or fewer employees, or annual gross receipts of \$10 million or less averaged over the previous three years” (§ 2.2-4310).

Because the APA definition differs from other Code definitions, data collected by other state agencies is not useful.

## § 2.2-4007.04. Economic impact analysis

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

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

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

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

C. Agencies shall provide the Department with such estimated fiscal impacts on localities and sources of potential funds. The Department may request the assistance of any other agency in preparing the analysis. The Department shall deliver a copy of the analysis to the agency drafting the regulation, which shall comment thereon as provided in § 2.2-4007.05, a copy to the Registrar for publication with the proposed regulation, and an electronic copy to each member of the General Assembly. No regulation shall be promulgated for consideration pursuant to § 2.2-4007.05 until the impact analysis has been received by the Registrar. For purposes of this section, the term "locality, business, or entity particularly affected" means any locality, business, or entity



that bears any identified disproportionate material impact that would not be experienced by other localities, businesses, or entities. The analysis shall represent the Department's best estimate for the purposes of public review and comment on the proposed regulation. The accuracy of the estimate shall in no way affect the validity of the regulation, nor shall any failure to comply with or otherwise follow the procedures set forth in this subsection create any cause of action or provide standing for any person under Article 5 (§ [2.2-4025](#) et seq.) or otherwise to challenge the actions of the Department hereunder or the action of the agency in adopting the proposed regulation.

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

E. The Department shall revise and reissue its economic impact analysis within the time limits set forth for the Department's review of regulations at the final stage pursuant to the Governor's executive order for executive branch review if any of the following conditions is present that would materially change the Department's analysis:

1. Public comment timely received at the proposed stage indicates significant errors in the economic impact analysis; or
2. There is significant or material difference between the agency's proposed economic impact analysis and the anticipated negative economic impacts to the business community as indicated by public comment.

The determination of whether a condition is present under this subsection shall be made by the Department and shall not be subject to judicial review.

2007, cc. [316](#), [561](#), [873](#), [916](#);2015, c. [608](#);2017, cc. [483](#), [493](#), [599](#).

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia  
Title 2.2. Administration of Government  
Subtitle II. Administration of State Government  
Part B. Transaction of Public Business  
Chapter 40. Administrative Process Act  
Article 1. General Provisions

## § 2.2-4002.1. Guidance documents

A. Guidance documents shall be exempt from the provisions of this chapter, pursuant to this section. Guidance documents do not include agency (i) rulings and advisory opinions, (ii) forms and instructions, (iii) bulletins and legislative summaries, (iv) studies and reports, and (v) internal manuals and memoranda.

B. The agency that develops a guidance document shall certify that the document conforms to the definition of a guidance document in § [2.2-4101](#).

The guidance document shall be subject to a 30-day public comment period, to include public comment through the Virginia Regulatory Town Hall website, after publication in the Virginia Register of Regulations and prior to its effective date.

The agency shall provide notice of the opportunity for public comment to interested parties as identified under § [2.2-4007.02](#) prior to the start of the 30-day public comment period.

C. If a written comment is received during a public comment period asserting that the guidance document is contrary to state law or regulation, or that the document should not be exempted from the provisions of this chapter, the effective date of the guidance document by the agency shall be delayed for an additional 30-day period. During this additional period, the agency shall respond to any such comments in writing by certified mail to the commenter or by posting the response electronically in a manner consistent with the provisions for publication of comments on regulations provided in this chapter. Any person who remains aggrieved after the effective date of the final guidance document may avail himself of the remedies articulated in Article 5 (§ [2.2-4025](#) et seq.).

2018, c. [820](#).

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

## Model Public Participation Guidelines (DPB Website)

<https://www.townhall.virginia.gov/um/PublicParticipation.cfm#PPGuidelines>

### Part III

#### Public Participation Procedures

#### **\_\_VAC\_\_ - \_\_-50. Public comment.**

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency, and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues, the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropose regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with §2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to §2.2-4012 E of the Code of Virginia.

## Proposal Regarding Preservation of Error Issues for ALAC Work Plan

**Background:** The Virginia Administrative Process Act (“VAPA”) generally governs judicial review of regulations and case decisions, as defined under VAPA. While it is not expressly stated in VAPA, principles of procedural default and preservation of error have been judicially established as applying to VAPA, whereby “[a] party in an administrative proceeding must make a specific, contemporaneous objection to a ruling in that proceeding in order to challenge the ruling on appeal.” *McNally v. Virginia Dep’t of Motor Vehicles*, 80 Va. App. 483, 514 n.7 (2024). The rule, in VAPA appeals, is “analogous to those governed by Rule 5A:18,” regarding preservation of error in the trial courts to pursue on appeal. *French v. Virginia Marine Res. Comm’n*, 64 Va. App. 226, 232 n.2 (2015). Unclear in the case law is whether these same rules of procedural default apply in the context of a challenge to a regulation, i.e. must a complaining party challenging a rule or regulation have raised its issues with the agency during the regulatory process. VAPA addresses the issue in neither context—other than to say that review must generally be based only on the agency record, Code § 2.2-4027—so there is little guidance from the General Assembly on this issue.

Application of the preservation of error doctrine, whether in the context of VAPA or on appellate review, is quite harsh and with limited exceptions. As applied in the VAPA context, it often applies to individual litigants or small businesses who proceed before an agency without counsel, often due to the expense of retaining counsel, as well as a potential unawareness of the consequences of proceeding without counsel at the agency level. At the same time, the doctrine serves an essential purpose in the separation of powers between the Executive and Judicial Branches, as well as preserving judicial resources and ensuring that litigants do not treat the agency process as a mere dress rehearsal to an ultimate right of review in the circuit courts.

**Proposal:** That ALAC undertake a study of the preservation of error doctrine under VAPA to determine whether statutory guidelines for its application should be considered by the General Assembly. This could study (1) clarification of its application in the context of regulations versus case decisions, and (2) clarification or change of its application across the board. Comparative review of the federal and state administrative systems would be essential to inform this study. Bottom line questions to be answered: (1) how should the doctrine apply, if at all, in the context of regulations, and (2) should there be exceptions to make it less harsh? For instance, by allowing exceptions where a party is *pro se*, or adopting a plain error exception where certain plain errors of law are not subject to the doctrine.