
COMMONWEALTH OF VIRGINIA



OFFICE OF THE GOVERNOR

NUMBER FOURTEEN (2010)

Development and Review of Regulations Proposed By State Agencies

Importance of the Initiative

By virtue of the authority vested in me as Governor under Article V of the Constitution of the Commonwealth of Virginia and under the laws of the Commonwealth, including, but not limited, to Sections 2.2-4013 and 2.2-4017 of the *Code of Virginia*, and subject to my continuing and ultimate authority and responsibility to act in such matters, I hereby establish policies and procedures for review of all new, revised, and existing regulations proposed by state agencies, which shall include for purposes of this executive order all agencies, boards, commissions and other entities of the Commonwealth within the executive branch that issue regulations. Nothing in this Executive Order shall be construed to limit my authority under Section 2.2-4013 to require an additional 30-day final adoption period, or to exercise any other rights and prerogatives existing under Virginia law.

General Policy

The executive branch agencies of the Commonwealth must consider, review, and promulgate many regulations each year. This Executive Order sets out procedures and requirements to ensure the efficiency and quality of Virginia's regulatory process. All references to days mean calendar days.

All state employees who draft, provide policy analysis for, or review regulations shall carefully consider and apply the principles outlined below during the regulatory development and review process. All regulatory activity should be undertaken with the least possible intrusion in the lives of the citizens of the Commonwealth consistent with public health, safety, and welfare. Proposed and final regulations shall reflect the Governor's initiative that state government operate more efficiently and effectively. Where applicable and to the extent permitted by law, it shall be the policy of the Commonwealth that, unless otherwise mandated by law, only regulations that are necessary to interpret the law or to protect the public health, safety, or welfare shall be promulgated.

- A. Agencies shall identify the nature and significance of the problem a regulation is intended to address, including, where applicable, why private markets and institutions cannot adequately address the problem.
- B. Agencies shall identify and assess the least costly means including reasonably available alternatives in lieu of regulation for achieving the goals of a regulation. This shall include where feasible and consistent with public health, safety, and welfare:
 - a. The use of economic incentives to encourage the desired outcomes (such as user fees or marketable permits);
 - b. The use of information disclosure requirements, rather than regulatory mandates, so that the public can make more informed choices; and
 - c. The use of performance standards in place of mandating specific techniques or behavior.
- C. Regulatory development shall be based on the best reasonably available and reliable, scientific, economic, and other information concerning the need for, and consequences of, the intended regulation. Agencies shall specifically cite the best reasonably available scientific, economic, and other information in support of regulatory proposals.
- D. Regulations shall be designed to achieve their intended objective in the most efficient, cost-effective manner.
- E. Regulations shall be clearly written and easily understandable by the individuals and entities affected.
- F. All legal requirements related to public participation and all public participation guidelines shall be strictly followed to ensure that citizens have reasonable access and opportunity to present their comments and concerns. Use of the Virginia Regulatory Town Hall Web site (Town Hall) should be specifically offered in each instance. Agencies shall establish procedures that provide for a timely written response to all comments and the inclusion of suggested changes that would improve the quality of the regulation.
- G. In addition to requirements set out in the Virginia Administrative Process Act (APA) (Section 2.2-4006 et seq. of the *Code of Virginia*), agencies shall post all rulemaking actions on the Town Hall to ensure that the public is adequately informed of rulemaking activity.
- H. Agencies, as well as reviewing entities, shall endeavor to perform their tasks in the regulatory process as expeditiously as the regulatory subject matter will allow and shall adhere to the time frames set out in this Executive Order.
- I. Each agency head will be held accountable for ensuring that the policies and objectives specified in this Executive Order are put into effect. Agency heads shall ensure that information requested by the Department of Planning and Budget (DPB) or the Office of the Governor in connection with this Executive Order is provided on a timely basis. Incomplete packages may be returned to the appropriate agency by DPB.

- J. Regulations shall not be considered perpetual and will be subject to periodic evaluation and review and modification, as appropriate, in accordance with the APA, and policy initiatives of the Governor.
- K. Public comment will be encouraged for all regulations. DPB shall work with state agencies to promote use of the Town Hall to facilitate public comment.
- L. Regulatory development shall be conducted in accordance with statutory provisions related to impact on small businesses. DPB shall work with state agencies to address these requirements during the regulatory review process, including notifications as appropriate to the Joint Commission on Administrative Rules.
- M. Agencies shall actively seek input for proposed regulations from interested parties, stakeholders, citizens and members of the General Assembly.
- N. During regulatory development, agencies shall consider the impact on existing and potential Virginia employers and their ability to maintain and increase the number of jobs in the commonwealth, as well as the cost of compliance by the general public.

Applicability

The review process in this Executive Order applies to rulemaking initiated by agencies of the Commonwealth of Virginia in accordance with Article 2 of the APA.

With the exception of the requirements governing the periodic review of existing regulations, the posting of meeting agenda and minutes, and the posting of guidance documents, the requirements of this Executive Order may not apply to regulations exempt from Article 2 of the APA. A Cabinet Secretary, the Governor, or his Chief of Staff may request in writing that an agency comply with all or part of the requirements of this Executive Order for regulations exempt from Article 2 of the APA. Copies of such requests shall be forwarded to the Governor's Policy Office and DPB. In addition, a Cabinet Secretary may request in writing that certain Article 2 exempt regulations be further exempted from all or part of the requirements of this Executive Order.

These procedures shall apply in addition to those already specified in the APA, the agencies' public participation guidelines, and the agencies' basic authorizing statutes.

Any failure to comply with the requirements set forth herein shall in no way affect the validity of a regulation, create any cause of action or provide standing for any person under Article 5 of the APA (Section 2.2-4025 et seq. of the *Code of Virginia*), or otherwise challenge the actions of a government entity responsible for adopting or reviewing regulations.

Regulatory Review Process

Regulations shall be subject to executive branch review as specified herein. For each stage of the regulatory development process, agencies shall complete the agency background document provided by DPB to describe the regulatory action and inform the public about the substance and reasons for the rulemaking. All agency regulatory packages shall be submitted via the Town Hall.

Agencies shall submit regulatory packages to the Registrar on the Town Hall within 14 days of being authorized to do so. The Chief of Staff or Counselor to the Governor may grant exceptions to this requirement for good cause.

A. Standard Rulemaking Process

1. Notice of Intended Regulatory Action (NOIRA) Stage

DPB shall review the submission of a Notice of Intended Regulatory Action to determine whether it complies with all requirements of this Executive Order and applicable statutes and whether the contemplated regulatory action comports with the policy of the Commonwealth as set forth herein. The NOIRA shall include the nature of the regulatory changes being considered and the relevant sections of the *Virginia Administrative Code*. Within 14 days of receiving a complete NOIRA review package from the agency, the Director of DPB shall advise the appropriate Secretary and the Governor of DPB's determination. The agency shall be authorized to submit the NOIRA to the Registrar for publication when at least one of the following conditions is met:

- a. The Governor approves the NOIRA for publication, or
- b. Fourteen days have elapsed since DPB's notice of its determination to the appropriate Secretary and Governor and neither the Governor nor the Secretary has objected to the NOIRA.

If the Director of DPB advises the appropriate Secretary and the Governor that the NOIRA presents issues requiring further review, the NOIRA shall be forwarded to the Secretary. The Secretary shall review the NOIRA within 14 days and forward a recommendation to the Governor. The Chief of Staff or Counselor to the Governor is hereby authorized to approve NOIRAs on behalf of the Governor.

Public comments received following publication of the NOIRA should be encouraged and carefully considered in development of the proposed stage of a regulation.

2. Proposed Stage

Following the initial public comment period required by Section 2.2-4007.01 of the *Code of Virginia* and taking into account the comments received, the agency shall prepare a regulatory review package. Agencies should complete the proposed stage after the close of the NOIRA comment period as expeditiously as the subject matter will allow. However, the agency must submit the package to DPB within 180 days following the close of the NOIRA comment period, unless a waiver is granted.

If a regulatory package is submitted to DPB, and DPB determines that the package is not substantially complete, then DPB shall notify the agency within 10 days. At that time, the agency must withdraw the package from the Town Hall and resubmit the package only after all important missing elements identified by DPB have been added.

A proposed regulatory action shall be in as close to final form as possible, including completed review by all appropriate regulatory advisory panels or negotiated rulemaking panels. A proposed stage shall not address new issues that were not disclosed to the public when the NOIRA was published.

In addition to the information required on the regulation background form, the agency shall also include in the regulatory package a memorandum from the Office of the Attorney General (OAG) certifying that the agency has legal authority to promulgate the regulation being proposed. The OAG may also provide any appropriate comments for consideration by the Governor with respect to the proposed regulation. This process for feedback shall be managed in a manner similar to the process that has traditionally been used for soliciting the Attorney General's advice and recommendations on enrolled legislation.

DPB shall review the proposed regulation package to determine whether it complies with all requirements of this Executive Order and applicable statutes and whether the contemplated regulatory action comports with the policy of the Commonwealth as set forth herein. Per § 2.2-4007.04 of the Code of Virginia, within 45 days of receiving a complete proposed regulation package from the agency, DPB shall prepare a policy analysis and economic impact analysis, and advise the affected Secretary of DPB's determination. The Secretary shall review the proposed regulation package within 14 days and forward a recommendation to the Governor. The Chief of Staff or the Counselor to the Governor is hereby authorized to approve proposed regulations on behalf of the Governor. Within 14 days of receiving notification that the Governor has approved the proposed regulation package, the agency shall submit the proposed regulation package to the Registrar for publication, unless an exception to this requirement is granted for good cause by the Chief of Staff or Counselor to the Governor.

3. Final Stage

Following the public comment period required by Section 2.2-4007.03 of the *Code of Virginia* and taking into account the comments received, the agency shall revise the proposed regulation as necessary. Agencies should complete the proposed stage after the close of the proposed stage comment period as expeditiously as the subject matter will allow. However, the agency must submit the package to DPB within 180 days following the close of the proposed stage comment period, unless a waiver is granted by the Chief of Staff or the Counselor to the Governor.

If any change with substantial impact – as determined by DPB -- has been made to the regulatory text between the proposed and final stages, the agency shall obtain a letter from the OAG certifying that the agency has authority to make the additional changes. The OAG may also provide any appropriate comments for consideration by the Governor with respect to the final regulation. This process for feedback shall be managed in a manner similar to the process that has traditionally been used for soliciting the Attorney General's advice and recommendations on enrolled legislation.

DPB shall review the final stage package to determine whether it complies with all requirements of this Executive Order and applicable statutes and whether the regulatory action comports with the policy of the Commonwealth as set forth herein. In particular, DPB shall assess the effect of any substantive changes made since the publication of the proposed regulation and the responsiveness of the agency to public comment. Within 14 days of receiving a complete final

regulation package from the agency, the Director of DPB shall advise the affected Secretary and the Governor of DPB's determination.

After DPB's review, the final regulation shall be forwarded to the appropriate Secretary and the Governor. The Secretary shall make a recommendation to the Governor within 14 days. The agency shall be authorized to submit the final regulation to the Registrar for publication when the Governor approves the final stage for publication.

B. Fast-Track Rulemaking Process

The fast-track rulemaking process is for rules that are expected to be noncontroversial. A package would clearly qualify as a fast-track if the proposal appears to be (1) non-controversial and the promulgating entity has no discretion over the proposal, or (2) appears to be non-controversial and the areas of board/agency discretion are minor, or (3) appears to be non-controversial and no individual or entity is adversely affected. On the other hand, a regulatory proposal would not be appropriate for the fast-track process if it is controversial and the promulgating entity has discretion over at least some of the significant details. All situations other than those described above would be presented by DPB to the Governor's office for a determination as to whether the regulatory proposal may proceed as a fast-track.

In addition to the information required on the agency background document when the proposed action has the effect of enhancing regulatory oversight, the agency shall also include in the regulatory package a memorandum from the OAG certifying that the agency has legal authority to promulgate the proposed regulation.

DPB shall review the fast-track regulation to determine whether the regulatory change is appropriately within the intended scope of fast-track regulatory authority and whether it complies with all other requirements of this Executive Order and applicable statutes and whether the contemplated regulatory action comports with the policy of the Commonwealth. If there is any question as to whether a package should be allowed to proceed on a fast-track basis, DPB shall request the Governor's office to make this determination. The period to determine whether a regulatory proposal is appropriate for the fast-track process shall not exceed 10 days from the time DPB receives a complete regulatory package.

After a package has been determined to be appropriate for the fast-track process, DPB shall have 30 days to prepare a policy analysis and economic impact analysis of the proposed regulation. After DPB's review, the fast-track regulation shall be forwarded to the appropriate Secretary and the Governor. The Secretary shall make a recommendation to the Governor within 14 days. The agency shall be authorized to submit the fast-track regulation to the Registrar for publication when the Governor approves the fast-track regulatory package for publication.

For purposes of repealing all or part of regulations in accordance with the fast-track rulemaking process provided by Section 2.2-4012.1, such recommendation may be initiated by the Agency Head, DPB or the Governor's Policy Director. The Chief of Staff or Counselor to the Governor has authority to approve the modification once the requirements of the Code have been met.

C. Emergency Rulemaking Process

In addition to the information required on the background form, the agency shall also include in the regulatory package for any emergency regulation a memorandum from the OAG certifying that the agency has legal authority to promulgate the emergency regulation.

DPB shall review the emergency regulation package to determine whether it complies with all requirements of this Executive Order and applicable statutes and whether the contemplated regulatory action comports with the policy of the Commonwealth as set forth herein. Within 14 days of receiving a complete emergency regulation package from the agency, the Director of DPB shall advise the Secretary of DPB's determination. The Secretary shall review the emergency regulation package within 14 days and forward a recommendation to the Governor. Upon receiving notification that the Governor has approved the emergency regulation package, the agency may then submit the emergency regulation package to the Registrar for publication.

Periodic Review of Existing Regulations

Each existing regulation in the state shall be reviewed at least once every four years by the promulgating agency unless specifically exempted from periodic review by the Governor. The review shall ensure that each regulation complies with the principles set out in this Executive Order. In addition, each periodic review shall include an examination by the OAG to ensure statutory authority for the regulation and that the regulation does not exceed the authority to regulate granted as set out in the enabling legislation. The periodic review of a regulation shall be reported to the appropriate Secretary and Counselor to the Governor on a form established by DPB.

Agencies shall cooperate with reviews of regulations by the OAG, including but not limited to, reasonable requests for data and other supporting information as may be necessary to conduct the review.

Prior to the commencement date of the periodic review for a regulation, an agency shall post on the Town Hall a notice of the periodic review. The agency shall provide for a minimum of 21 days of public comment commencing on the posted date for the review. No later than 60 days after the close of the public comment period, the agency shall post a completed periodic review report on the Town Hall.

When a regulation has undergone a comprehensive review as part of a regulatory action and when the agency has solicited public comment on the regulation, a periodic review shall not be required until four years after the effective date of this regulatory action.

The Governor may request a periodic review of a regulation at any time deemed appropriate. Such a request may outline specific areas to be addressed in the review. In the case of such a request, the agency shall follow the procedures for periodic review as established herein or such other procedures as may be stipulated by the Governor.

Petitions for Rulemaking

Agencies shall post petitions for rulemaking and written decisions to grant or deny the petitioner's request on the Town Hall in accordance with the time frames established in Section 2.2-4007 of the Code of Virginia.

Waivers from Process Deadlines

The Chief of Staff or the Counselor to the Governor may waive the deadlines an agency must meet when submitting proposed and final regulatory packages. A waiver shall only be granted when an agency has demonstrated a compelling need for extending the deadlines set out herein. An agency shall submit a waiver request as soon as possible prior to the expiration of a deadline. Such requests shall be submitted on forms prepared by DPB.

Electronic Availability of Meeting Agenda and Minutes

Executive branch agencies that promulgate regulations and keep minutes of regulatory meetings shall post such minutes of their public meetings on the Town Hall in accordance with the time frames established in Section 2.2-3707 and 2.2-3707.1 of the *Code of Virginia*. In addition, agencies shall post the notice of, and agenda for, a public meeting on the Town Hall at least 7 days prior to the date of the meeting, except if it is necessary to hold an emergency meeting in which case the agenda shall be posted as soon as possible.

Electronic Availability of Guidance Documents

Agencies shall make all guidance documents, as defined by Section 2.2-4001 of the *Code of Virginia*, available to the public on the Town Hall. Any guidance document currently available in electronic format shall be posted on the Town Hall. Any changes to a guidance document shall be reflected on the Town Hall within 10 days of the change.

Effective Date of the Executive Order

This Executive Order rescinds Executive Order Number One Hundred and Seven (2009) issued by Governor Timothy M. Kaine. This Executive Order shall become effective upon its signing and shall remain in full force and effect until June 30, 2014, unless amended or rescinded by further Executive Order.

Given under my hand and under the Seal of the Commonwealth of Virginia on this 29th day of June 2010.

Robert F. McDonnell, Governor

Attest:

Secretary of the Commonwealth