



Commonwealth of Virginia
Office of the Governor

Executive Order

NUMBER SEVENTEEN (2014)

DEVELOPMENT AND REVIEW OF STATE AGENCY REGULATIONS

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 the review of all new regulations and changes to 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 are authorized to promulgate regulations. Nothing in this Executive Order shall be construed to limit my authority under the *Code of Virginia*, including to require an additional 30-day public comment period, file a formal objection to a regulation, suspend the effective date of a regulation with the concurrence of the applicable body of the General Assembly, or to exercise any other rights and prerogatives existing under Virginia law.

Acronyms and Definitions

The following acronyms and definitions are set out here for ease of use and represent only a summary of terms and acronyms related to the regulatory review process. More detailed descriptions and definitions can be found throughout the Administrative Process Act (APA), Section 2.2-4000, *et seq.* of the *Code of Virginia*.

ABD – Agency Background Document. An ABD is a form completed by agencies and uploaded on the Virginia Regulatory Town Hall (Town Hall) for each regulatory stage in order to describe and explain the regulatory action. The form for each stage is available on the Town Hall.

APA – Administrative Process Act, Section 2.2-4000, *et seq.* of the *Code of Virginia*. Article 2 of the APA contains provisions on how regulations are to be promulgated in Virginia.

Day – All references to a day mean a calendar day.

DPB – Virginia Department of Planning and Budget. DPB houses the Economic and Regulatory Analysis Division (ERAD), which reviews regulatory proposals for economic and policy impact and manages the Town Hall website.

EIA – Economic Impact Analysis. An EIA is prepared by DPB and evaluates the estimated costs and benefits of a regulatory proposal.

Emergency rulemaking process – This process is invoked (1) when there is an emergency situation as determined by the agency and the Governor agrees that an emergency regulation is necessary, or (2) when a Virginia statutory law or the appropriation act or federal law or federal regulation requires that a state regulation be effective in 280 days or less from its enactment.

Executive branch review – The review of a regulatory proposal at various stages by the executive branch before it is published in the *Virginia Register of Regulations* and available for public comment. The scope of review depends on the stage type, e.g., a proposed stage is reviewed by: the Office of the Attorney General (OAG), DPB, the appropriate Cabinet Secretary, and the Governor.

Exempt rulemaking process – Agency actions that are exempt from the promulgation requirements of Article 2 of the APA can generally be adopted and filed directly with the Office of the Registrar of Regulations (Registrar) and are not subject to executive branch review.

Fast-track rulemaking process – This process may be utilized for rules that are expected to be noncontroversial.

Legislative mandate – When a law is passed by the General Assembly that requires a regulation to be promulgated, amended, or repealed in whole or part.

NOIRA – Notice of Intended Regulatory Action. A NOIRA is the first stage in the standard rulemaking process in Virginia.

OAG – Office of the Attorney General. The OAG must review regulatory proposals at the emergency stage, the fast-track stage, and the proposed stage. In addition, the OAG must review a proposal at the final stage if there have been changes with substantial impact made since the proposed stage.

Register – The *Virginia Register of Regulations* is an official legal publication that provides information about proposed and final changes to Virginia’s regulations. The Registrar is responsible for publication of the *Register*.

RIS – Regulation Information System. The RIS is a web-enabled application operated by the Registrar and is used by agencies to create text for regulatory proposals. This text is then synchronized on the Town Hall website for display to all Town Hall users.

Rulemaking or regulatory process – There are four types of rulemaking processes in Virginia: (1) emergency, (2) fast-track, (3) standard, and (4) exempt.

Standard rulemaking process – This is the default rulemaking process in Virginia. If a regulatory proposal does not meet the criteria for exempt, fast-track, or emergency rulemaking, it goes through the standard rulemaking process, generally consisting of three stages: NOIRA, proposed, and final.

Town Hall – The Virginia Regulatory Town Hall website. The Town Hall is managed by DPB and used by agencies to post regulatory proposals and to facilitate the regulatory review process. The site features public comment forums, meeting information, and an email notification service.

VAC – *Virginia Administrative Code*. The VAC is the official legal publication for regulations in Virginia.

General Policy

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

General Principles

- A. All regulatory activity should be undertaken with the least possible intrusion into the lives of the citizens of the Commonwealth and be necessary to protect the public health, safety, and welfare. Accordingly, agencies shall consider:
 - 1. The use of economic incentives to encourage the desired outcomes (such as user fees or marketable permits);
 - 2. The use of information disclosure requirements, rather than regulatory mandates, so that the public can make more informed choices;
 - 3. The use of performance standards in place of mandating specific techniques or behavior; and
 - 4. The consideration of reasonably available alternatives in lieu of regulation.
- B. Where applicable, and to the extent permitted by law, it shall be the policy of the Commonwealth that only regulations necessary to interpret the law or to protect the public health, safety, or welfare shall be promulgated.
- C. Regulations shall be clearly written and easily understandable.
- D. Regulations shall be designed to achieve their intended objective in the most efficient, cost effective manner.

Regulatory Development

- E. 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 and reliable scientific, economic, and other information in support of regulatory proposals.
- F. Regulatory development shall be conducted in accordance with the 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.

- G. 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 to the general public.

Public Participation

- H. Agencies shall actively seek input for proposed regulations from interested parties, stakeholders, citizens, and members of the General Assembly.
- I. In addition to requirements established in Article 2 of the APA, agencies shall post all rulemaking actions on the Town Hall to ensure that the public is adequately informed of rulemaking activities.
- J. 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. Agencies shall inform interested persons of (1) the Town Hall's email notification service that can send information regarding the specific regulations, regulatory actions, and meetings about which they are interested, and (2) the process to submit comments in the Town Hall public comment forums. 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.

Other

- K. 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 timeframes set out in this Executive Order.
- L. Regulations will be subject to periodic evaluation, review, and modification, as appropriate, in accordance with the APA, policy initiatives of the Governor, and legislation.
- M. 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 DPB, the appropriate Cabinet Secretary, or the Office of the Governor, in connection with this Executive Order, is provided on a timely basis. Incomplete regulatory packages may be returned to the appropriate agency by DPB.

Applicability

The review process in this Executive Order applies to rulemakings 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, agencies and agency regulatory action exempt from Article 2 of the APA are not subject to the requirements of this Executive Order. Nonetheless, the Governor, a Cabinet Secretary, or the 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. As of June 30, 2014, these procedures shall apply to all regulatory actions and stages that have been submitted to DPB for any stage of executive branch review.

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. All agency regulatory packages shall be submitted via the Town Hall. For each stage of the regulatory development process, agencies shall complete and post the applicable ABD on the Town Hall to describe the regulatory action and inform the public about the substance and reasons for the rulemaking. Agencies shall ensure that the correct regulatory text is synchronized with the appropriate stage information page on the Town Hall.

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 missing elements identified by DPB have been added. Agencies shall submit regulatory packages to the Registrar for publication on the Town Hall within 14 days of being authorized to do so.

In rulemakings where there are two or more stages, the filing of each subsequent stage shall be submitted on the Town Hall as expeditiously as the subject matter allows and no later than 180 days after the conclusion of the public comment period for the prior stage. If this deadline is not met, it shall be reported to the appropriate Cabinet Secretary in an end of year report further described below.

A. Standard Rulemaking Process

1. Notice of Intended Regulatory Action (NOIRA) Stage

The NOIRA shall include the nature and scope of the regulatory changes being considered and the relevant sections of the Virginia Administrative Code. This package shall include draft regulatory text if it is available.

DPB shall review the NOIRA 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 NOIRA review package from the agency, the Director of DPB shall advise the appropriate Secretary and the Governor of DPB's determination. 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. If DPB does not find issues requiring further review, the agency shall be authorized to submit the NOIRA to the Registrar for publication when the Governor approves the NOIRA for publication.

The Chief of Staff to the Governor is hereby authorized to approve or disapprove NOIRAs on behalf of the Governor.

Public comments received following publication of the NOIRA should be encouraged and carefully considered in developing the proposed stage of a regulatory proposal.

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.

At this stage, the proposed regulation and regulatory review package shall be in as close to final form as possible, including completed review by all appropriate regulatory advisory panels or negotiated rulemaking panels. New issues that were not disclosed to the public when the NOIRA was published shall not be addressed at the proposed stage.

The order of executive branch review shall be as follows:

- a. OAG. The OAG will conduct a review of the proposed regulation and produce a memorandum assessing the agency's legal authority to promulgate the regulation. The OAG may also provide any advice, recommendations, or other comments for consideration by the Governor with respect to the proposed regulation. After the OAG has completed its review, the package will be submitted to DPB.
- b. DPB. DPB shall review the proposed regulatory package to determine whether it complies with all requirements of this Executive Order, applicable statutes, and other policies of the Commonwealth. Per Section 2.2-4007.04 of the *Code of Virginia*, within 45 days of receiving a complete regulatory review package, the Director of DPB shall prepare a policy analysis and EIA before advising the appropriate Secretary and the Governor of the results of the review.
- c. Cabinet Secretary. The Secretary shall review the proposed regulation package within 14 days and forward a recommendation to the Governor.
- d. Governor. The Chief of Staff to the Governor is hereby authorized to approve or disapprove proposed regulations on behalf of the Governor.

Revised Proposed Stage (Optional)

Following the proposed stage public comment period, required by Section 2.2-4007.03 of the *Code of Virginia*, the agency may wish to make additional changes and/or receive additional public comment by publishing a revised proposed regulation. The order of executive branch review for the revised proposed stage shall be as follows:

- a. OAG. The OAG will conduct a review of the revised proposed regulation and produce a memorandum assessing the agency's legal authority to promulgate the regulation. The OAG may also provide any advice, recommendations, or other comments for consideration by the Governor with respect to the revised proposed regulation. After the OAG has completed its review, the package will be submitted to DPB.
- b. DPB. DPB shall review the revised proposed regulatory package to determine whether it complies with all requirements of this Executive Order, applicable statutes, and other policies of the Commonwealth. Within 21 days of receiving a complete regulatory package, the Director of DPB shall prepare a policy analysis and EIA before advising the appropriate Secretary and the Governor of the results of the review.
- c. Cabinet Secretary. The Secretary shall review the revised proposed regulation package within 14 days and forward a recommendation to the Governor.
- d. Governor. The Chief of Staff to the Governor is hereby authorized to approve or disapprove revised proposed regulations on behalf of 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 all comments received since the last stage was published, the rulemaking entity shall revise the proposed regulation.

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 order of executive branch review shall be as follows:

- a. DPB. DPB shall review the final stage package to determine whether it complies with all requirements of this Executive Order, applicable statutes, and other policies of the Commonwealth. 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 prepare a policy analysis before advising the appropriate Secretary and the Governor of the results of the review.
- b. Cabinet Secretary. The Secretary shall review the final stage regulation package within 14 days and forward a recommendation to the Governor.
- c. Governor. The Chief of Staff to the Governor is hereby authorized to approve or disapprove proposed final regulations on behalf of the Governor.

B. Fast-Track Rulemaking Process

The fast-track rulemaking process is for rules that are expected to be noncontroversial.

DPB shall review the fast-track regulation to determine whether the regulatory change is appropriately within the intended scope of fast-track regulatory authority, 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. DPB shall request the Governor's office to determine if the fast-track process is appropriate when there is any question as to whether a package should be allowed to proceed in this manner. The Governor shall retain discretion to disapprove use of the fast-track rulemaking process when the Governor determines use of this process is not in the public interest, the determination of which shall be at the sole discretion of the Governor.

After a fast-track regulation has been submitted on the Town Hall, executive branch review will proceed as follows:

1. OAG. The OAG will conduct a review of the proposed fast-track regulation and produce a memorandum assessing the agency's legal authority to promulgate the regulation. The OAG may also provide any advice, recommendations, or other comments for consideration by the Governor with respect to the fast-track regulation. After the OAG has completed its review, the package will be submitted to DPB.
2. DPB. DPB shall determine within 10 days or less whether the regulatory package is appropriate for the fast-track rulemaking process and communicate this decision to the agency. After a package has been determined to be appropriate for the fast-track process, the Director of DPB shall have 30 days to prepare a policy analysis and EIA before advising the appropriate Secretary and the Governor of the results of the review.
3. Cabinet Secretary. The Secretary shall review the fast-track regulation package within 14 days and forward a recommendation to the Governor.
4. Governor. The Chief of Staff to the Governor is hereby authorized to approve or disapprove fast-track regulations on behalf of the Governor.

C. Emergency Rulemaking Process

Emergency regulations may be promulgated by an agency if it determines there is an emergency situation, consults with the OAG, and obtains the approval of the Governor. Emergency regulations may also be promulgated in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a state regulation be effective in 280 days or less from its enactment and the regulation is not exempt from the APA.

If the agency plans to replace the emergency regulation with a permanent regulation, it should file an Emergency/NOIRA stage. The order of executive branch review shall be as follows:

1. OAG. The OAG will conduct a review of the proposed emergency regulation and produce a memorandum assessing the agency's legal authority to promulgate the regulation. The OAG may also provide any advice, recommendations, or other comments for consideration by the Governor

with respect to the proposed emergency regulation. After the OAG has completed its review, the package will be submitted to DPB.

2. DPB. DPB shall review the proposed emergency regulatory package to determine whether it complies with all requirements of this Executive Order, applicable statutes, and other policies of the Commonwealth. Within 10 days of receiving a complete emergency regulation package from the agency, the Director of DPB shall prepare a policy analysis before advising the appropriate Secretary and the Governor of the results of the review.
3. Cabinet Secretary. The Secretary shall review the proposed emergency regulation package within 10 days and forward a recommendation to the Governor.
4. Governor. The Chief of Staff to the Governor is hereby authorized to approve or disapprove emergency regulations on behalf of the Governor.

An emergency regulation shall be effective for up to 18 months and may be extended for up to an additional six months if, despite the rulemaking entity's best efforts, a permanent replacement regulation cannot become effective before it expires. If an agency wishes to extend an emergency regulation beyond its initial effective period, the agency shall submit an emergency extension request to the Governor's Office via the Town Hall as soon as the need for the extension is known and no later than 30 days before the emergency regulation is set to expire. The emergency extension request must be granted prior to the expiration date of the emergency regulation, pursuant to Section 2.2-4011D of the *Code of Virginia*.

Periodic Review of Existing Regulations

Every existing state regulation shall be reviewed at least once every four years by the promulgating agency, unless specifically exempted from periodic review by the Governor. A periodic review shall include notice to the public, a public comment period (minimum of 21 days), and a result to be announced no later than 60 days after the close of the public comment period.

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 agency's rulemaking authority. 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.

The periodic review must be conducted on the Town Hall and may be accomplished either (1) during the course of a comprehensive regulatory action using the standard rulemaking process, or (2) by using the periodic review feature as follows:

- A. During the course of a comprehensive rulemaking using the standard regulatory process. If the agency already plans to undertake a standard regulatory action, the agency can fulfill the periodic review requirement by including a notice of a periodic review in the NOIRA. When the proposed stage is submitted for executive branch review, the ABD shall include the result of the periodic review. 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 the regulatory action.

- B. Using the periodic review feature. If, at the time of the periodic review, the agency has no plans to begin a comprehensive rulemaking using the standard rulemaking process, then the agency shall use the periodic review feature to announce and report the result of a periodic review. If the result of the periodic review is to amend the regulation, the agency shall link the periodic review with the subsequent action to amend the regulation. If the result is to retain the regulation as is, the agency shall so indicate using the appropriate Town Hall form.

In addition to the procedures described above, 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 decisions to grant or deny the petitions on the Town Hall, in accordance with the timeframes established in Section 2.2-4007 of the *Code of Virginia*.

Regulatory Timeframe Deadlines

If an agency fails to meet any regulatory timeframe deadlines set forth below, it shall submit a report to its Cabinet Secretary and DPB no later than December 31 of the year in which the timeframe deadline is not met. This report shall include the Town Hall action and stage number, as well as an explanation of why the timeframe deadline was not met. The report must contain the following missed regulatory timeframe deadlines:

- A. For regulatory actions that have multiple stages, the period between the close of a public comment period and when the next stage is submitted on the Town Hall shall not exceed 180 days.
- B. Agencies have 14 days to submit a regulatory package to the Register once they have been authorized to do so.

Electronic Availability of Meeting Agenda and Minutes

Executive branch agencies shall post the notice of, and agenda for, a public regulatory 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.

In addition, agencies that promulgate regulations and keep minutes of regulatory meetings shall post such minutes of those meetings on the Town Hall in accordance with the timeframes established in Sections 2.2-3707 and 2.2-3707.1 of the *Code of Virginia*.

Legislative Mandates

By July 1 of each year, agencies shall post on the Town Hall all legislative mandates for rulemaking activity required by the most recent session of the General Assembly. The agency shall then link each legislative mandate with the regulatory action that implements the mandate.

Electronic Availability of Guidance Documents

Agencies shall post all guidance documents or a link to each agency guidance document, as defined by Section 2.2-4001 of the *Code of Virginia*, on the Town Hall. Any changes to a guidance document or a guidance document link shall be reflected on the Town Hall within 10 days of the change.

Effective Date of the Executive Order

This Executive Order rescinds and replaces Executive Order Number 14 (2010) issued by Governor Robert F. McDonnell. This Executive Order shall become effective on June 30, 2014, and shall remain in full force and effect until June 30, 2018, unless amended or rescinded by further executive order.

Given under my hand and under the Seal of the Commonwealth of Virginia on this 30th day of June, 2014.



Terence R. McAuliffe, Governor

Attest:

Levar M. Stoney, Secretary of the Commonwealth