

Chapter 2 *Regulatory Actions and Stages*

Regulations are changed by following specific procedures found in state law and in executive orders. There are different procedures depending on the nature of the change, and changes made by agencies in the executive branch of state government are generally reviewed by the Governor.

Regulations Are Laws Made by State Agencies

Unlike statutory law, which is enacted by the General Assembly, regulations are laws promulgated by agencies and regulatory boards. Almost all agencies and regulatory boards are in the executive branch, but regulations also are promulgated by legislative, judicial, and independent agencies.

The policy of granting regulatory authority directly to boards, and not to an agency, reflects the Commonwealth's history. Virginia may have been the first state to regulate a profession, when the General Assembly passed a law in 1639 "for the regulating [of] phisitians and chirurgeons." Under this act, the physician or surgeon had to declare under oath before the county court the true value of the medicines they had prescribed. This requirement was intended to address complaints made to the Assembly about the "imoderate and excessive rates and prices exacted by practitioners" (Hening's Statutes at Large, Vol. 1, p. 316). Virginia then created the State Board of Medical Examiners in 1884 to regulate the practice of medicine, and authorized it to collect fees and issue licenses (Chapter 6 of the 1884 *Acts of Assembly*). This Board is now one of many boards in the Department of Health Professions (DHP).

Generally speaking, the majority of regulations are promulgated by regulatory boards. In these cases, the associated agency provides staff support. Examples include the Boards of Education, Health, Medical Assistance Services, and Social Services. In some cases, an agency supports more than one regulatory Board, such as the boards served by DHP, the Department of Professional and Occupational Regulation (DPOR), and the Department of Environmental Quality. Although some of these agencies also may have limited regulatory authority, almost all regulatory activity is conducted by the boards they support.

Procedures that Govern Regulatory Changes

State law defines a regulation as "any statement of general application, having the force of law, affecting the rights or conduct of any person." This definition is in Virginia's [Administrative Process Act](#) (APA), the state law that describes the procedures typically used when an agency makes regulatory changes. Although the APA is typically used, it only supplements any procedural requirements that an agency may have in its "**basic laws**," the statutes that create an agency and grant its powers and duties.

Regulations are promulgated by following the procedures in the APA, which was enacted in 1975 to replace the *General Administrative Agencies Act* of 1952 (Chapter 703). As noted by legislative studies at that time, policymakers had, "come to understand that some delegation of legislative and judicial functions to administrative agencies is unavoidable" (Senate Document Number 7, 1951). The APA therefore represents the current framework by which the, "delegation of the legislative function by the General Assembly" to regulatory agencies and boards occurs (House Document Number 5, 1944).

Almost all regulatory changes must follow the procedures described in the APA, but certain regulatory changes are exempt from the APA and therefore do not have to follow all or some of its procedures. This

can occur if regulations pertaining to an agency or board, a topic or subject matter, or an activity or function have been statutorily exempted from the APA. These “exempt” regulations may then be adopted without going through the typical promulgation and review process outlined in the APA.

After following the process in the APA, a regulatory change is then published in the *Virginia Register of Regulations* by the [Registrar of Regulations](#). Afterwards, all regulations are added to the [Virginia Administrative Code](#) (VAC), which is a counterpart to the [Code of Virginia](#) that contains laws enacted by the General Assembly. Generally speaking, a regulation is a “chapter” in the VAC. (The exception is “emergency” regulations, which are temporary and therefore are not listed in the VAC.)

An agency or board can promulgate (adopt or add) a regulation, amend a regulation, or repeal a regulation. These regulatory changes are done through regulatory “actions,” which amend the VAC. Each action has at least one component called a “stage.” An action is therefore a bundle of one or more stages. (The Registrar’s Regulation Information System uses the term “Project” instead of Action.) The typical action, known as a “standard” action,” has at least three stages. Other types of actions (listed below) have only one stage.

Although most regulations are adopted by agencies in the executive branch of government (those under the direction of the Governor), some regulations may be adopted by legislative, judicial, or independent agencies. Regulatory changes made by executive branch agencies may be reviewed and approved by the Governor pursuant to the **Executive Order on Rulemaking**, which each Governor is required to adopt. Pursuant to that executive order, regulatory changes made by executive branch agencies must be posted on the Town Hall. However, any agency is allowed to use the Town Hall, even if use is not required.

The APA requires each agency that has regulations to promulgate a particular regulation known as **Public Participation Guidelines** (PPG). (Agencies with an APA exemption may not have this regulation.) Generally speaking, each PPG is identical to ensure that each agency uses the same process to involve the public in regulatory changes. An agency’s PPG provides procedures and timeframes for regulatory changes that supplement the APA and the Executive Order on Rulemaking.

The section below provides an overview of the types of regulatory actions and the process used to review them. Because this manual is about the Town Hall, the focus of the information is on regulatory changes which are posted on the Town Hall.

Categories of Regulatory Actions: Exempt and Non-Exempt

There are two broad categories of regulatory actions: exempt and non-exempt:

- An action is referred to as “exempt” if it does not have to follow the procedures in the APA. This typically occurs when an agency uses an exemption listed in the APA, such as the exemption for changes that are “necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved.”
- In contrast, a regulatory action is referred to as “non-exempt” if it must follow the procedures in the APA, including opportunities for notice and public comment.

There are three types of non-exempt rulemaking processes: (1) a standard action, (2) a fast-track action, and (3) an emergency action:

- A standard action is the default or typical type of action, and it always has at least three stages with a public comment period after each stage has been published.
- A fast-track action has only one stage and is used for changes that are expected to be non-controversial. However, if 10 or more people, or one legislator, objects to the use of the fast-track process during the public comment period, then if the agency wishes to continue promulgating the action, it must use a standard action, with the fast-track stage serving as the Notice of Intended Regulatory Action
- An emergency action is also a one-stage action, but it can take effect immediately upon filing with the Registrar before public comment is received. Emergency regulations are temporary and can only be in effect for 18-24 months.

All regulatory stages are published in the *Virginia Register of Regulations (Register)*, which is managed by the Registrar of Regulations.

Standard Action

If a regulatory change does not meet the criteria to use a fast-track or an emergency action, then it would use a standard action. This process consists of three stages, as follows:

- 1. Notice of Intended Regulatory Action (NOIRA):** A standard action begins when a NOIRA stage is posted on the Town Hall. At this point, the public is notified that a regulatory change is planned, along with a description of the changes being considered. Once this stage is published in the *Register* and the public comment forum opens on the Town Hall, there is at least a 30-day period during which the agency receives comments from the public.
- 2. Proposed:** Next, the agency files a proposed stage on the Town Hall. At this point, the agency provides the full text of the proposed changes, a statement explaining the substance of the regulatory change, a summary of comments that were received during the public comment period following publication of the NOIRA stage, and the agency's response. The Department of Planning and Budget also prepares an Economic Impact Analysis (EIA), which is published in the *Register* along with the agency's response to the EIA. Once the stage is published and the public comment forum opens on the Town Hall, there is at least a 60-day public comment period. If the agency decides to modify the proposed text of the regulation, it can use a "revised proposed stage" or make changes before the "final" stage is adopted.
- 3. Final:** To finalize the action, a final stage is filed on the Town Hall. The public is provided with the full text of the final regulation, along with an explanation of any changes made to the text of the regulation since the prior stage. Once the final stage is published in the *Register* and the public comment forum opens on the Town Hall, there is a 30-day final adoption period during which the public may submit comments. The regulation becomes effective at the end of the 30-day period.

Fast-track Actions

According to the APA, a fast-track action is for regulatory changes that are “expected to be noncontroversial.” The use of a fast-track action must be approved by the Governor for all agencies (not just those in the executive branch).

Once a fast-track action is published in the *Register*, and during the 30-day comment period, objections from any of the following groups can prevent an agency from using the fast-track process:

- Ten or more members of the public, or
- Any one member of the
 - applicable standing committee of the Senate,
 - applicable standing committee of the House of Delegates,
 - Joint Commission on Administrative Rules.

If an objection listed above occurs, then the agency must use a standard action to continue promulgating the regulation. In that case, the fast-track stage serves as the NOIRA stage. If there are no objections as described above, the fast-track regulation will become effective 15 days after the close of the public comment period, unless a later effective date is specified by the agency.

Emergency Action

An emergency regulation can initially be effective for up to 18 months but may be extended for an additional six months (for a total of two years). The use of an emergency action, and any extension, must be approved by the Governor for all agencies (not just those in the executive branch). In contrast to a regulation that is adopted via a standard or fast-track action, the APA says that an emergency regulation is effective “upon approval by the Governor and filing with the Registrar of Regulations.”

Because an emergency regulation is temporary, an agency will usually create a permanent regulation to replace the emergency regulation before it expires. In this case, a NOIRA is filed along with the emergency stage (this is referred to as an “Emergency/NOIRA” stage), and once the emergency regulation goes into effect the agency then follows the same process as a standard action.

Exempt Actions

Some regulatory actions are exempt from the APA and are not required to follow the regulatory procedures described above. Most exempt regulations are published by using a final stage only, and no comment period or EIA is required. However, agencies can choose to include a NOIRA and/or a proposed stage. Because there are many different types of exemptions with differing promulgation requirements, agencies are encouraged to consult the Registrar of Regulations or the Office of the Attorney General.

Executive Branch Review Process

Regulatory actions that must be reviewed and approved by the Governor are required to follow the executive branch review process, which is outlined in the Executive Order on Rulemaking. Although the process described below generally applies, in some cases not all of the steps below are applicable.

Subsequent chapters of this manual describe these procedures in more detail, including how to perform them on the Town Hall.

- **Office of the Attorney General (OAG).** Once a stage is submitted to the OAG for review, that office must prepare a memorandum certifying that the promulgating entity has statutory authority to promulgate the proposed action. This memo is required at the following stages: Proposed, Fast-Track, and Emergency; it is also required for an exempt action. The OAG has no mandated time frame within which to complete its review.
- **Department of Planning and Budget (DPB).** DPB reviews all non-exempt actions by completing a confidential policy analysis for every stage and an economic impact analysis (EIA) for each Proposed and Fast-Track stage. The timeframes for DPB's review are mandated by the APA and/or the Executive Order on Rulemaking.

It is DPB's practice to make an agency aware of, and try to resolve during its review, any issues that DPB has identified regarding a regulatory proposal. This includes informing the Governor's office of DPB's concerns and recommendations, along with the agency's response. Sometimes it is not possible to resolve these issues within the timeframe allotted for DPB's review (e.g., the agency agrees that a change is appropriate but needs time to revise the proposed text of the regulation or obtain formal approval by the responsible regulatory board). In these cases, DPB works with the agency to determine the best means of addressing identified issues.

- **Cabinet Secretary.** After DPB's review is complete, the stage is sent to the responsible Cabinet Secretary, who forwards a recommendation to the Governor. A Cabinet Secretary has no mandated time frame within which they must complete their review.
- **Governor.** After the Secretary's review of a regulatory stage is complete, the stage is forwarded to the Governor's office. The Governor's office reviews all stages submitted by executive branch agencies, as determined by the Executive Order on Rulemaking. In addition, the Governor's office approves the use of all Emergency and Fast-Track stages submitted by any agency, as required by the APA. The Governor's office has no mandated time frame within which to complete its review.

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