

---

# COMMONWEALTH OF VIRGINIA



## OFFICE OF THE GOVERNOR

### Executive Order 36 (2006)

---

#### **NUMBER THIRTY-SIX (2006)**

#### **DEVELOPMENT AND REVIEW OF REGULATIONS PROPOSED BY STATE AGENCIES**

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 which 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 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. 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, the failure of private markets and institutions to adequately address the problem.
- B. Agencies shall identify and assess reasonably available alternatives in lieu of regulation for achieving the goals of a regulation, including 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 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 Townhall website 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, agencies shall post all rulemaking actions on the Virginia Regulatory 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 after timely notice to 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 Administrative Process Act.
- K. Public comment will be encouraged for all regulations. The Department of Planning and Budget 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. The Department of Planning and Budget 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.

### **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 Administrative Process Act (APA) (Section 2.2-4006 et seq. of the *Code of Virginia*).

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 or the Governor 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, DPB shall develop an appropriate background form describing the regulatory action. Agencies shall use the form to inform the public about the substance and reasons for the rulemaking. All agency regulatory packages shall be submitted on the Virginia Regulatory Town Hall and shall include the completed form for that stage of the regulatory process and the text of the regulation where applicable.

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

#### **A. *Notice of Intended Regulatory Action (NOIRA)***

DPB shall conduct an initial review of 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*. The Director of DPB shall develop an appropriate review form for NOIRAs to ensure the most efficient use of DPB staff resources. 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 the Governor approves the NOIRA for publication. Public comments received following publication of the NOIRA should be encouraged and carefully considered in development of the proposed stage of a regulation.

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 seven days and forward a recommendation to the Governor. The Chief of Staff is hereby authorized to approve NOIRAs on behalf of the Governor.

***B. Proposed Regulation and Fast-Track Regulations***

Following the initial public comment period required by Section 2.2-4007.B 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 regulation after the close of the NOIRA comment period as expeditiously as the subject matter will allow.

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 calendar 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 completed.

A proposed regulatory action shall be in as close to final form as possible, including completed review by all appropriate technical advisory committees. A proposed regulation shall not address new issues that were not disclosed to the public when the NOIRA was published. If an agency can demonstrate a compelling reason to include new issues, an exception to this policy may be granted by the Chief of Staff during the proposed regulation review process.

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 certifying that the agency has legal authority to promulgate the regulation being proposed.

The Attorney General's Office will also be requested to provide any appropriate comments for consideration by the Governor with respect to the proposed regulation. It is my intent that this process for feedback 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. Within 45 days of receiving a complete proposed regulation package from the agency, the Director of DPB shall advise the 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 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 Counselor to the Governor.

With respect to fast-track regulations, the Department of Planning and Budget shall review the fast-track regulation to determine whether the regulatory change is appropriately within the intended scope of fast-track regulatory authority. Agencies shall report to DPB and the Governor's Policy Office all comments and or objections received with respect to a fast-track rulemaking.

If the Governor does not approve the regulatory package, the appropriate agency or board shall revisit the regulation as appropriate.

### ***C. Final Regulation***

After the agency has reviewed the comments received during the public comment period following publication of the proposed regulation and has revised the proposed regulation, as the agency deems necessary and proper, the agency shall prepare the final regulation package for submission to the Department of Planning and Budget.

The agency shall submit the final regulation to DPB after the close of the proposed regulation comment period as expeditiously as the subject matter will allow. The Attorney General's Office will also be requested to provide any appropriate comments for consideration by the Governor with respect to the final regulation. It is my intent that this process for feedback 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 regulation 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 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 seven days. The agency shall be authorized to submit the final regulation to the Registrar for publication if and when the Governor approves the final regulatory package for publication.

If the Governor does not approve the regulatory package, the appropriate agency or board shall revisit the regulation as appropriate.

#### ***D. Emergency Regulation***

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 Office of the Attorney General 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.

If the Governor does not approve the regulatory package, the appropriate agency or board shall revisit the regulation as appropriate.

#### **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 Office of the Attorney General to ensure statutory authority for the regulation and that the regulation does not exceed the authority to regulate granted in the

enabling legislation. The periodic review of a regulation shall be reported on a form established by DPB. Such form shall minimally provide an opportunity for the agency to demonstrate the regulation's compliance with the policies set out in this Executive Order.

Agencies shall cooperate with reviews of regulations by the Office of the Attorney General, 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 90 days after the close of the public comment period, the agency shall post a completed periodic review report on the Virginia Regulatory 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 Virginia Regulatory Town Hall in accordance with the time frames established in Section 2.2-4007 of the Code of Virginia.

### **Waivers from Process Deadlines**

Agencies shall file all regulatory actions in a timely manner. Agencies shall file all actions in as timely a manner as possible, and in all instances within 90 days of approval by the Governor unless a waiver of this requirement is granted. The Chief of Staff may waive the deadlines an agency must meet when submitting NOIRAs, 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 Virginia Regulatory Town Hall in accordance with the time frames established in Section 2.2-3707.1 of the *Code of Virginia*. In addition, wherever feasible, agencies shall post the agenda for a public meeting on the Virginia Regulatory Town Hall at least seven days prior to the date of the meeting.

### **Electronic Availability of Guidance Documents**

To the extent feasible, agencies shall make all guidance documents, as defined by Section 2.2-4001 of the *Code of Virginia*, available to the public on the Virginia Regulatory Town Hall. Any guidance document currently available in electronic format shall be posted on the Virginia Regulatory Town Hall. Any changes to a guidance document shall be reflected on the Virginia Regulatory Town Hall within 10 days of the change. The Counselor to the Governor may waive these requirements or extend these deadlines in cases where agencies have demonstrated a compelling need. An agency shall submit a waiver request as soon as possible prior to the expiration of the deadline. Such requests shall be submitted on forms prepared by DPB.

This Executive Order rescinds Executive Order Number Twenty-One (2002) issued by Governor Mark R. Warner. This Executive Order shall become effective upon its signing and shall remain in full force and effect until June 30, 2010, unless amended or rescinded by further Executive Order.

Given under my hand and under the Seal of the Commonwealth of Virginia on this 20th day of September 2006.

---

Timothy M. Kaine, Governor

Attest:

---

Secretary of the Commonwealth