

**Report of the
Joint Legislative Audit and Review Commission
To the Governor and
The General Assembly of Virginia**

**Review of Exemptions to
the Virginia Administrative
Process Act**

In Brief

Review of Exemptions to the Virginia Administrative Process Act

The Virginia Administrative Process Act (VAPA) governs the way in which State agencies promulgate regulations. Several agencies and specific regulatory activities are listed in VAPA as being exempt from the act, and JLARC is directed to periodically review this list of exemptions.

The study found that most exemptions are due to agencies needing to act quickly to adopt regulations, and quick action is not possible through VAPA. About nine months is the fastest time to promulgate a regulation through the standard process, and the average amount of time is about two years. Other states have shorter timeframes and fewer exemptions. A major factor delaying regulations is executive branch review of planned regulations. Executive order requirements for the review of final regulations cause some of the delay and appear to be inconsistent with VAPA provisions.

A few agencies are responsible for a majority of substantive, discretionary exempt regulations. These agencies (and others using exemptions) have public notification policies and appear to provide time for public input. Rationales for most exemptions appear to be reasonable. Three exemptions are obsolete and should be removed from the act, and two others should be modified.

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COMMONWEALTH of VIRGINIA

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November 18, 2009

The Honorable M. Kirkland Cox
Chairman
Joint Legislative Audit and Review Commission
General Assembly Building
Richmond, Virginia 23219

Dear Delegate Cox:

Section 2.2-4005 of the *Code of Virginia* directs JLARC to conduct a periodic review of exemptions to the Virginia Administrative Process Act (VAPA). JLARC staff conducted such a review this year and presented its findings to the Commission on September 14, 2009. Those findings are included in this report.

On behalf of the Commission staff, I would like to thank the staff at the Department and Planning and Budget and the Virginia Registrar of Regulations for their assistance during this study.

Sincerely,

A handwritten signature in black ink, appearing to read "Philip A. Leone".

Philip A. Leone
Director

PAL/mle

Table of Contents

JLARC Report Summary	i
1 Overview of the Virginia Administrative Process Act	1
Purpose of the Virginia Administrative Process Act	2
Rulemaking Framework Under VAPA	2
Significant Proportion of Regulatory Actions Are Exempt	14
2 Causes and Rationales for VAPA Exemptions	17
Key Reason for Many VAPA Exemptions Is to Expedite Rulemaking	18
Other Factors Leading to VAPA Exemptions	24
Length of Process for VAPA Regulations Makes Exemptions Attractive or Imperative for Agencies	28
Executive Order Review Requirements Are Delaying Regulations and May Exceed VAPA Boundaries	30
3 Virginia Compared to Other States	45
Other States Have Fewer Exemptions and Promulgate a Lesser Portion of Rules as Exempt	45
Other States' Administrative Procedures Lead to Faster Promulgation of Regulations	49
Regulations Promulgated as an Emergency Are in Place for Less Time in Other States	54
4 Analysis of Need for VAPA Exemptions	57
A Small Number of Exemptions Account for Majority of Exempt Regulations	57
Public Has Opportunity for Input on Exempt Regulations	60
Most Exemptions Appear to Still Be Needed	64
Consequences of Long Promulgation Process	71
List of Recommendations	75

Appendixes

A: Study Mandate	77
B: Research Activities and Methods	79
C: VAPA Exemptions	85
D: Rationales, Concerns, and Use of Regulatory Exemptions	91
E: Agency Responses	125



JLARC Report Summary:

Review of Exemptions to the Virginia Administrative Process Act

Key Findings

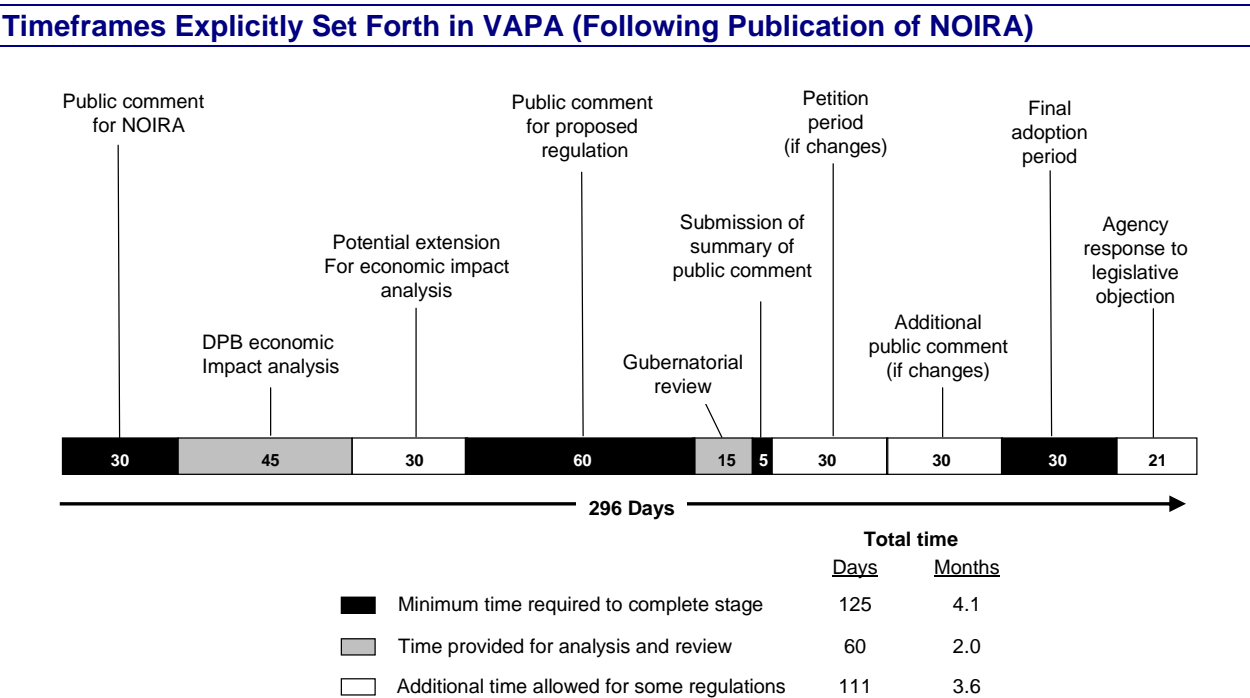
- Exemptions to an administrative process act are a response to the requirements and expectations for implementing the act. Long and unpredictable timeframes associated with going through the standard process provide incentives for using exemptions. (Chapter 2)
- Most exemptions to the Virginia Administrative Process Act (VAPA) are explained by agencies as needed because fast action is required but is not possible through VAPA. (Chapter 2)
- Evidence supports the claim made by regulatory agencies that fast promulgation of regulations through VAPA is not possible under existing regulatory conditions. Few regulations are promulgated within one year or less using the standard VAPA process. (Chapter 2)
- Executive orders, which require nine points of executive branch review, contribute to slowing the promulgation of VAPA regulations and contribute to the unpredictability of the timeframes involved. At least one aspect of executive review appears to be inconsistent with the provisions of VAPA. (Chapter 2)
- Other states generally have shorter timeframes for promulgating regulations through their administrative process act and have fewer exemptions and a lower percentage of exempt regulations. (Chapter 3)
- A few agencies account for the majority of substantive, discretionary exempt regulations. Most exemptions appear necessary given the lengthy VAPA timeframes, but three are unnecessary and can be discontinued, two should be modified, and five might also be discontinued either because the actions addressed do not fit the regulation definition or the regulations could be adopted via the fast-track process. (Chapter 4)
- Several consequences may result from the lengthy rulemaking process, including the likelihood of more exempt and emergency regulations, greater use of the legislative process and administrative actions in place of regulations, and greater confusion among the public. (Chapter 4)

Section 2.2-4005 of the *Code of Virginia* directs the Joint Legislative Audit and Review Commission (JLARC) to conduct a periodic review of exemptions to the Virginia Administrative Process Act (VAPA). VAPA governs the way in which State agencies propose and promulgate regulations, which have the force of law. The act also specifies procedures for public notification and comment as

well as the external review functions of certain entities in the executive and legislative branches. Several agencies and certain regulatory functions are exempt from the VAPA requirements, and the reasons for these exemptions are assessed in this report.

RULEMAKING FRAMEWORK UNDER VAPA

The regulatory process for adopting rules under normal circumstances involves three main stages: (1) publication of a Notice of Intended Regulatory Action (NOIRA), (2) publication of a proposed regulation, and (3) publication and adoption of the final regulation. At each stage, VAPA specifies the minimum amount of time for public notice and comment as well as the procedures and timeframes for executive and legislative review. Based on the timeframes explicitly identified in the act, the minimum amount of time to promulgate a regulation is about four months. Depending on changes that may occur to the proposed rule, objections by the Governor or General Assembly, and extensions granted for external review, between six and 9.7 months may be spent on the process. The following figure shows the stages of the standard VAPA rulemaking process for which timeframes are specifically identified in VAPA, and the number of days associated with each stage.



Note: Other delays may be necessary to meet VAPA requirements including (1) time spent getting information published in the Virginia Register and (2) time that transpires between completion of a stage and the next meeting of a regulatory board. Another delay occurs if a final regulation is suspended by joint action of the Governor and certain committees of the General Assembly, in which case the regulation cannot become effective until after completion of the next legislative session.

Source: JLARC staff analysis of the *Code of Virginia* §§.2.2-4006-4017.

In actual practice, however, regulations under the standard VAPA process are typically promulgated in about two years. This additional time is partly due to internal agency analysis and drafting of the regulations, board meeting schedules, and publication schedules of the *Virginia Register of Regulations*. However, another key reason for the additional time, and one which is largely beyond agency control, is time due to additional executive branch review policy set out in the Governor's executive order. Each incoming Governor is required by VAPA to issue an executive order regarding the administration's rulemaking procedures. The current executive order (Executive Order 36) requires nine points of executive branch review throughout the process: the Department of Planning and Budget (DPB), the relevant cabinet secretary, and the Governor's office each reviews the planned regulation prior to publication in the *Register* at each of the three main stages described above.

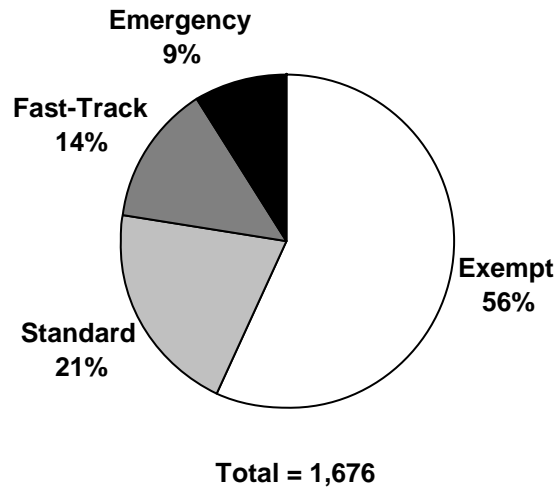
ALTERNATIVES FOR EXPEDITING THE RULEMAKING PROCESS

Because there is often a need for quick adoption of regulations, there are three alternatives for expediting the rulemaking process. For non-controversial regulations, agencies may use the fast-track process. The fast-track process eliminates the NOIRA stage and shortens the public comment period to 30 days. However, if ten or more persons, or any legislator of a standing committee, objects to the fast-track process, promulgation of the regulation must then go through the standard VAPA process. A second alternative is the emergency regulatory process, which may be used if the Governor determines an emergency exists or if statutory law states that the regulation must be adopted within 280 days. Emergency regulations are in effect for up to 18 months and must be replaced with a permanent regulation or they will expire. Publication of the emergency regulation serves as the NOIRA for the permanent regulation.

A third alternative for expediting the rulemaking process is to exempt the regulation from the VAPA requirements. VAPA lists 65 specific exemptions to the act. Some exemptions pertain to all regulations promulgated by a particular agency (for example, the Marine Resources Commission), while others pertain to a certain regulatory action (for example, regulations fixing rates or prices). All exempt regulatory actions still involve some level of public input, but they are not required to go through the various external review steps.

Most regulations promulgated in Virginia in recent years were exempt from VAPA. In fact, only 21 percent were promulgated through the standard process (see figure, next page).

Most Regulations Are Exempt From VAPA Process (2004-2009)



Source: *Virginia Register of Regulations* (Vol. 21, Issue 1 – Vol. 25, Issue 16).

NEED FOR FAST ACTION IS A KEY REASON FOR MOST EXEMPTIONS

Regulatory agencies explain that most exemptions to VAPA are needed because fast action is required in some subject areas, and this is not possible through VAPA. Agencies indicate that timeframes for promulgating regulations through VAPA are long and not fully within agency control. Evidence examined during this review supports the claim of agencies that fast promulgation of regulations through VAPA is not possible under existing regulatory conditions. Analysis of data shows that few regulations are promulgated through VAPA within one year or less, while exempt regulations can be promulgated in about two to three months. The following table shows the timeframes for the standard and alternative processes.

Number of Days for Promulgation Under Standard and Expedited Regulatory Process

Process Used	Fastest	Slowest	Average	Median
Normal	268	4,304	788	661
Fast-Track	143	276	220	226
Exempt	50	131	79	78
Emergency	25 ^a	152	82	71

^a Fewest number of days among regulations from 2008 and 2009. The emergency regulation process can be faster. In October 2007, a Health Department regulation on MRSA disease reporting was submitted, reviewed, and became effective in one day.

Source: JLARC staff analysis of data for 346 standard process regulations adopted between September 2004 and April 2009, and analysis of timeframe information from the Virginia Regulatory Town Hall for recently active regulations going through alternative processes (32 exempt regulations, 19 fast-track regulations, and 8 emergency regulations).

Of the three alternative processes, exemptions provide the most flexibility. Exempt regulations do not need to be replaced within a year like emergency regulations, and they can be controversial, which would preclude the use of the fast-track process.

There are several reasons why fast action is necessary when adopting new or amended rules, and therefore why exemptions are desired by regulatory agencies. Fast action may help prevent harm to persons or property, dislocations in the marketplace, problematic inconsistencies between an agency's rules and new statutes, and the loss of federal funds. Fast action may also be required for regulation of seasonal activities such as hunting and fishing. Other reasons for exemptions include situations in which the agency has no discretion over the regulatory content or when the regulatory matter is deemed inappropriate for public comment or executive branch review.

EXECUTIVE BRANCH REVIEW PROCESS UNDULY SLOWS VAPA REGULATIONS AND COULD BE EXPEDITED

Implementation of the review provisions in executive orders has added substantial amounts of time to the regulatory process. This factor contributes to the slow and unpredictable VAPA timeframes that make exemptions attractive or imperative for agencies. Recent executive orders have required agencies or boards to receive authorization or approval to move forward at three stages in the process. However, such authorization or approval at these stages is not required under VAPA, and in one instance, appears to be inconsistent with a provision explicitly set forth in VAPA.

Analysis of recent regulations at one agency showed that executive branch review for these regulations accounted for an average of about seven months of time, or almost 40 percent of the time spent between publication of the NOIRA and the final regulation. This represented slightly more days than were attributable to agency staff and the regulatory board on matters such as developing regulatory content, justifying the proposed action, responding to public comments, and gaining internal approvals. In addition, executive branch review prior to publication of the NOIRA takes on average another two months to complete. Based on this assessment, it appears that executive branch review may add about nine months on average to the regulatory process. This conclusion was supported by further analysis of review timeframes for the regulations of other agencies.

VAPA provides authority for certain executive review purposes. For example, DPB is authorized to conduct an economic impact analysis. The Governor is authorized to object to a final regulation after it has been published and to suspend the effective date of a

regulation when acting in concert with applicable bodies of the General Assembly. Although the Governor has both the authority and responsibility to review regulations proposed by executive branch agencies, VAPA does not explicitly provide the Governor with the authority to disapprove a final regulation for submission or to stop a regulation by failing to approve it. In fact, VAPA specifically authorizes an agency or board to adopt and submit a final regulation “without changes despite the Governor’s recommendations for change.” However, recent executive orders have required agencies or boards to await gubernatorial approval before moving forward at this point in the regulatory process, which appears to be inconsistent with VAPA provisions.

Four options and a recommendation are presented that could expedite the executive review process and potentially shorten the amount of time needed to promulgate regulations, thus reducing the need for exemptions. The options are listed below:

1. Eliminate executive branch review at the NOIRA stage.
2. Limit DPB’s review responsibilities to the preparation of economic impact analyses.
3. Authorize agencies to submit proposed regulations to the Registrar for publication either (1) within 15 days following completion of DPB’s economic impact analysis or (2) sooner, if advised that the executive branch review is complete.
4. For fast-track regulations, require that all executive branch review activities be completed in no more than 40 to 50 days from the agency’s submission of the regulation to DPB (up to ten days for an assessment of its fast-track status, up to 30 days for DPB’s economic impact analysis as provided by VAPA, and, if deemed necessary, up to ten days for any further review).

In addition, the report contains a recommendation that could speed VAPA implementation. It is recommended that future executive orders and executive branch practices follow the provisions of VAPA §2.2-4013 regarding agency submission of final regulations and Governor review.

OTHER STATES GENERALLY HAVE SHORTER TIMEFRAMES FOR PROMULGATING REGULATIONS.

A survey of other states shows that Virginia appears to spend more time promulgating regulations than most other states and has a higher proportion of exempt regulations. Not including the NOIRA stage (which most other states do not use), the average timeframe for promulgating regulations in other states is about

five to six months faster than in Virginia. Fewer stages and shorter timeframes in each stage of the administrative process may lead to an overall faster promulgation of regulations in other states compared to Virginia. Also, most other states do not appear to have the same level of executive branch review as in Virginia.

Likely as a consequence of the shorter timeframes, other states generally have fewer exemptions to their administrative process acts and a lower percentage of regulations being promulgated as exempt. Some states that have few or no exemptions rely on emergency regulations for quick action. Variation in definitions in other states' administrative process acts likely accounts for some of the differences in the number of exempt regulations being reported by these other states, however, as some states exclude particular agency actions from their definition of a regulation that would be considered a regulation in Virginia.

A SMALL NUMBER OF EXEMPTIONS AND AGENCIES ACCOUNT FOR MAJORITY OF EXEMPT REGULATIONS IN VIRGINIA

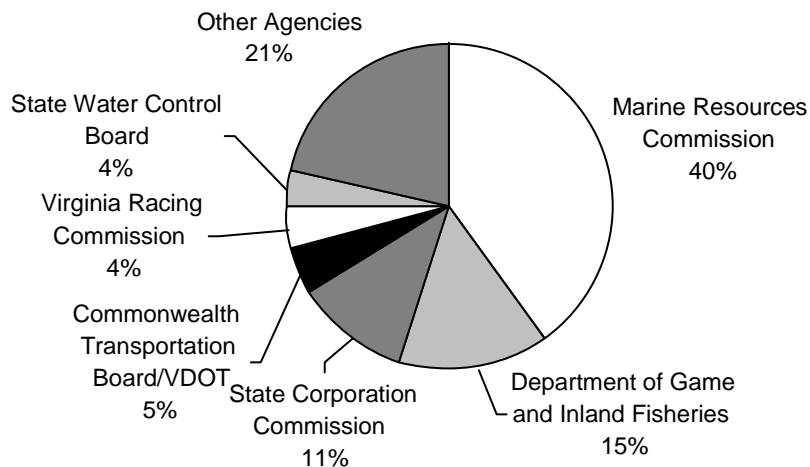
There are 65 specific exemptions to the regulatory process outlined in VAPA. Most of these exemptions, however, are rarely used to promulgate regulations. Five exemptions accounted for nearly 75 percent of all exempt regulations since 2004. The most commonly used exemption was §2.2-4006. A4, which pertains to regulations in which the agency is conforming to Virginia or federal laws and has no discretion in the regulatory content. In many instances, Virginia agencies issue regulations to implement the provisions of federal law. For example, a 2006 JLARC study on the impact of regulations on the manufacturing sector in Virginia found that Virginia regulations for this sector generally follow federal regulations and are not substantially different from other states.

Other commonly used exemptions are

- §2.2-4006. A12. Regulations of the Marine Resources Commission;
- §2.2-4002. A3. Regulations of the Department of Game and Inland Fisheries managing wildlife;
- §2.2-4006. A2. Regulations that consist only of changes in style or form or corrections of technical errors; and
- §2.2-4002. A2. Regulations of the courts, any agency of the Supreme Court, and any agency that the Constitution expressly grants powers of a court of record (for example, the State Corporation Commission).

Many exempt regulations were ones in which the agency had no discretion, or in which the agency was simply making changes to the style or form of the regulation or correcting technical errors. When discounting these types of regulations, three agencies (Marine Resources Commission, Department of Game and Inland Fisheries, and State Corporation Commission) accounted for nearly two-thirds of all exempt regulations. Regulations of the Marine Resources Commission accounted for more than 40 percent of all substantive, discretionary regulations since 2004 (see figure). These agencies, as well as other exempt agencies, appear to provide ample opportunity for public input in the rulemaking process.

A Few Agencies Account for Majority of Substantive, Discretionary Exempt Regulations (2004-2009)



Source: *Virginia Register of Regulations*. Vol. 20, Issue 9– Vol. 25, Issue 25.

MOST EXEMPTIONS APPEAR TO STILL BE NEEDED, BUT THREE CAN BE DISCONTINUED AND TWO MODIFIED

Agencies surveyed by JLARC staff overwhelmingly rated their exemptions as “essential,” and only three were rated as “not important.” The primary rationale cited by agencies was the need for quick adoption of rules. Given the lengthy VAPA process, the agency rationales appear to be reasonable. Three of the exemptions in the act should be discontinued because the committee no longer exists, the entity has no regulatory authority, or the exemption is no longer relevant. These exemptions are

- §2.2-4002. A.16. The Virginia Medicaid Prior Authorization Advisory Committee in making recommendations to the Board of Medical Assistance Services regarding prior authorization for prescription drug coverage;

- §2.2-4002, A.24. The nonprofit, nonstock corporation established by the Commissioner of Agriculture and Consumer Services to promote, develop, and sustain markets for licensed Virginia wineries and farm wineries; and
- §2.2-4006, A.5. Preliminary program permit fees of the Department of Environmental Quality.

Based on agency responses and JLARC staff analysis, two additional exemptions should be modified. The total agency exemption for the Virginia War Memorial Foundation (§2.2-4002, A15) should be limited to the setting of fees for use of its facilities. Also, §2.2-4006, A9, pertaining to general permits, should be amended to remove reference to general wetlands permits issued by the Marine Resources Commission, which already has a total agency exemption under §2.2-4006, A12.

In addition to the exemptions noted above, five others have been identified which might also be discontinued, in most cases because the agency actions do not have a “force of law” or compulsory element meeting the regulation definition. Despite some concerns noted by the regulated community, the other exemptions appear to be necessary given the lengthy rulemaking process. This lengthy process has several consequences, including the need for more exemptions, emergency regulations, and other means to bypass the normal process, as well as greater confusion among the public.

Overview of the Virginia Administrative Process Act

In Summary

Virginia statutes grant authority to State agencies and boards to develop regulations in specific areas. The Virginia Administrative Process Act (VAPA) governs the way in which State agencies propose and promulgate these regulations. Procedures for public notification and comment are identified in the act. VAPA also provides opportunities for executive and legislative branch reviews during the rulemaking process. In recent years, nearly 80 percent of Virginia's regulations have been promulgated through alternative rulemaking processes. Alternative, abbreviated processes are available for regulations exempt from the act, for regulations which are considered emergencies, and for regulations deemed to be non-controversial which can be "fast-tracked." Through these alternative processes, regulations can be made effective more quickly but also may be subject to less public scrutiny and input than those promulgated through the standard VAPA process. The act specifies regulatory actions which are exempt from VAPA, and these exemptions are to be reviewed periodically to determine if any should be modified or discontinued.

The *Code of Virginia* §2.2-4005 requires that the Joint Legislative Audit and Review Commission (JLARC) conduct a periodic review of exemptions to the Virginia Administrative Process Act (VAPA) (Appendix A). The review is to assess whether there are exemptions in VAPA that should be discontinued or modified. To conduct the required assessment, this review considers the reasons behind existing exemptions and also public concerns, if any, about exemptions. The scope of the review is limited to rulemaking actions and does not address exemptions from the case decision process.

In determining the need for current exemptions, it was necessary to determine minimum and typical timeframes for promulgating regulations using the standard VAPA process, because most exemptions are in place to expedite the rulemaking process. Also, information on the use of exemptions in other states was gathered for comparison purposes, as well as to corroborate or refute the rationales for exemptions provided by Virginia regulatory agencies.

The primary research methods used were surveys and structured interviews. Surveys were conducted of State agencies, the regulated community, and administrative process officials in other states. Interviews were conducted with the Department of Planning and Budget, the Virginia Registrar of Regulations, staff to the Administrative Law Advisory Committee, the office of the Attorney General, and regulatory coordinators at selected State agencies.

More details about the research methods for this review are in Appendix B.

PURPOSE OF THE VIRGINIA ADMINISTRATIVE PROCESS ACT

VAPA (*Code of Virginia* §2.2-4000 et seq.) governs the way in which State agencies propose and promulgate regulations. Regulations are rules of general application made by State agencies and boards that have the force of law and affect the rights and conduct of citizens. While regulations are similar to statutes in that they have the force of law, regulations are not made by elected officials but rather by appointed officials and civil servants within State agencies who are given the statutory authority to enact rules in areas of their expertise.

Agencies' rulemaking ability is constrained by statutory authority. That is, the *Code of Virginia* or the Appropriation Act must specifically authorize an agency to promulgate regulations within a specific function. Regulations, then, are not enacted by vote, but rather by informed decisions made by professionals. Because the regulatory process could be less open to public debate, and agency officials are less accountable to public approval than elected officials, there is a need for public input as well as input from elected officials in the rulemaking process. Thus, VAPA specifies procedures for public notification and comment, and sets out procedures for review at some stages in the process by the executive administration, Attorney General, and the General Assembly.

A large proportion of rulemaking actions, however, are exempt from VAPA. These regulations potentially receive less scrutiny and public input than would be the case if they were promulgated through the standard VAPA process. The exemptions exist primarily to expedite the rulemaking process for actions which are thought to require more rapid adoption than is feasible using the standard VAPA process. However, it is necessary to consider the appropriateness of exemptions to assess whether they appear justified given the potential loss of public input in the process.

RULEMAKING FRAMEWORK UNDER VAPA

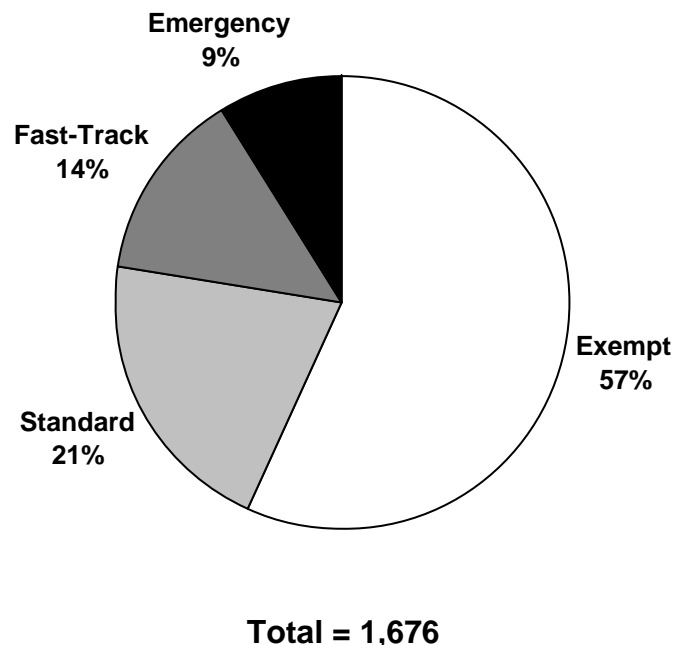
To assess the implications of VAPA exemptions, it is necessary to understand how the rulemaking process works. The regulatory framework laid out in the *Code of Virginia* involves various legislative and executive agencies and committees as well as multiple processes for promulgating regulations. In addition to the regulatory agencies, several levels of review are required by the standard VAPA process. Further, the Governor and standing legislative committees have the authority to suspend regulations if there are concerns. Some of these stages are eliminated with the use of al-

ternative processes. Regulations that are exempt from VAPA are not subject to this regulatory framework, but may have other requirements for public comment or review.

Regulatory Process

Four types of regulatory processes for promulgating regulations are defined in VAPA: standard, fast-track, emergency, and exempt. The three alternative processes eliminate certain stages of the standard process, primarily to promote timely adoption of rules. All types of regulations are filed with the State Registrar of Regulations and published in the *Virginia Register of Regulations (Register)*. Between September 20, 2004 and April 13, 2009, 1,676 regulations were adopted. The majority (57 percent) were exempt from VAPA procedures (Figure 1).

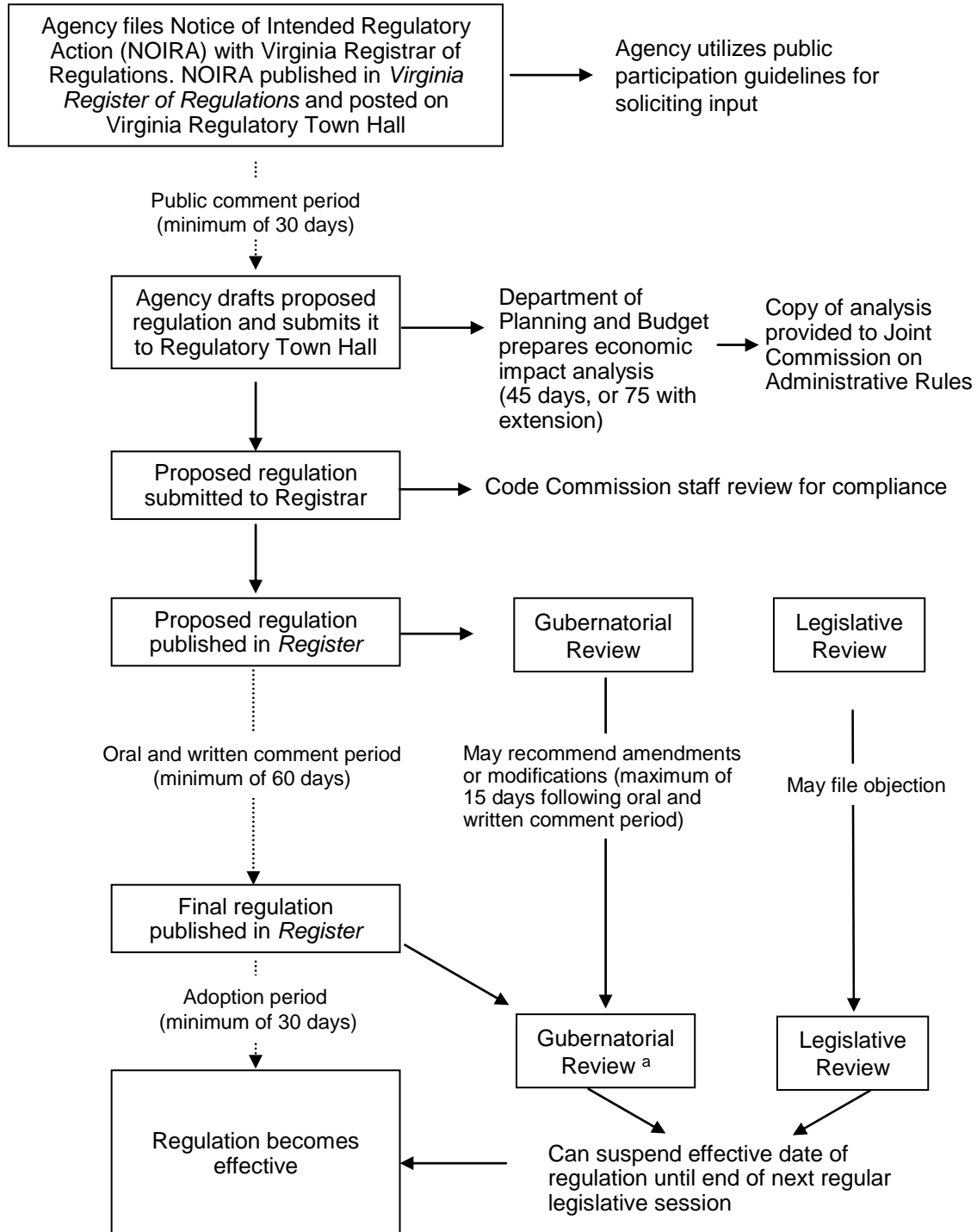
Figure 1: Most Regulations Are Exempt From VAPA Procedures (2004-2009)



Source: *Virginia Register of Regulations* (Vol. 21, Issue 1 – Vol. 25, Issue 16).

Standard VAPA Process. There are three main stages in promulgating a regulation under VAPA: (1) publication of a notice of intended regulatory action (NOIRA), (2) publication of the proposed regulation, and (3) publication of the final regulation. Figure 2 provides an illustration of the regulatory process. VAPA specifies the minimum procedures that must be followed for each stage. The Governor also is required to issue an executive order specifying the policies for executive branch review of planned regulatory changes.

Figure 2: Statutory Steps in Standard VAPA Regulatory Process



^a Governor may require an additional 30-day public comment period if substantial changes are made to the proposed regulation.

Source: JLARC staff analysis of Virginia Administrative Process Act (Chapter 40 of Title 2.2 of the *Code of Virginia*).

The executive order overlays an additional set of review requirements on the VAPA requirements. These additional requirements are discussed in Chapter 2. The following discussion refers only to the VAPA requirements.

When an agency decides a new regulation is needed or an existing regulation needs to be modified, it issues a NOIRA which describes the subject matter and intent of the planned regulation. The NOIRA is published in the *Register*, which is updated every two weeks, and also posted on the Virginia Regulatory Town Hall (Town Hall). The Town Hall, administered by the Department of Planning and Budget (DPB), is an online forum and a comprehensive source of information about proposed changes to Virginia's regulations. A minimum of 30 days is required to allow for public comment on the NOIRA prior to issuing a proposed regulation.

Following the public comment period on the NOIRA, the agency then posts the proposed regulation on the Town Hall. At this point, DPB conducts an economic impact analysis of the proposed regulation in coordination with the regulatory agency. Once DPB completes the economic impact analysis (within 45 days or up to 75 days if an extension is allowed), it submits the analysis to the Registrar of Regulations and provides a copy to the Joint Commission on Administrative Rules (JCAR) for its review. The regulatory agency may then submit the proposed regulation to the Registrar along with the required accompanying documents described above. After the Registrar reviews the material to ensure compliance with VAPA, the proposed regulation is published in the *Register*.

Prior to publishing the final regulation in the *Register*, there is a minimum 60-day public comment period on the proposed regulation. During this time, the Governor, JCAR, or the standing committees in the General Assembly may also review the regulation and submit comments to the Registrar for modification. The agency then chooses whether to adopt any changes to the proposed regulation and submits the final regulation for publication in the *Register*. Once the final regulation is published, there is a 30-day adoption period before the regulation becomes effective, during which time the public may object if substantial changes have been made to the proposed regulation. If at least 25 persons object to the changes, the agency must suspend the regulatory process for an additional 30 days to receive oral and written comments on the changes to the regulation. Acting together, the Governor and certain committees of the General Assembly can suspend the effective date of the regulation during this time until after the next legislative session.

An example of a recent regulation that was promulgated through the standard VAPA process is shown below.

A notice of intended regulatory action was published in February 2008 for revisions to regulations of the Board of Audiology and Speech-Language Pathology. The regulations allow an applicant to the board whose license has been expired for five or more years to be reinstated, if the individual meets certain practice and educational requirements. The regulation also modifies initial licensure requirements for qualified individuals not meeting certain criteria. Changes were made to the proposed regulations and the final regulations were effective July 8, 2009—about 16 months after the NOIRA was published.

Fast-Track Process. In 2003, VAPA was changed by the General Assembly to expedite rulemaking for non-controversial regulations. Section 2.2-4012.1 of the act provides a mechanism to fast-track regulations. Under the fast-track process, an agency may gain concurrence from the Governor that a proposed regulation is not controversial, in which case the agency may skip the NOIRA process and have the proposed regulation published in the *Register* and posted on the Town Hall. In practice, the Governor typically delegates this responsibility to DPB. The agency must notify JCAR and the standing legislative committees that the regulation is being promulgated through the fast-track process, and the published proposal must be accompanied by a statement indicating the reasons for the fast-track process.

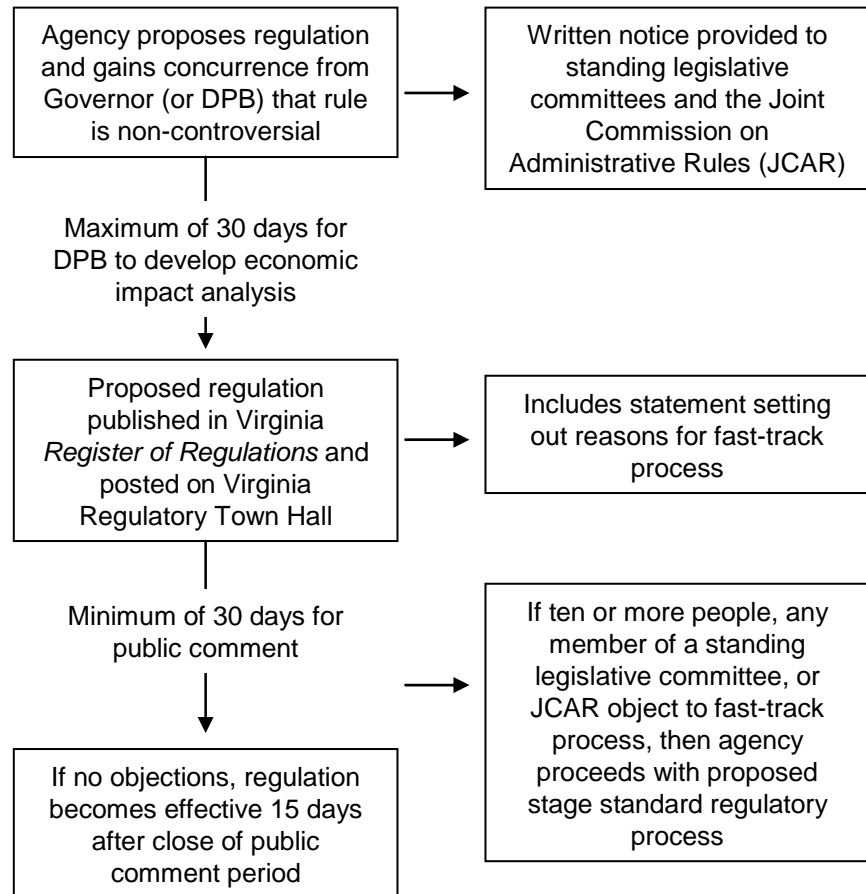
Once the fast-track regulation is proposed, DPB has ten days to determine whether the proposal qualifies for fast-track processing. If fast-track is deemed appropriate, DPB then has 30 days to prepare an economic impact analysis. Following this analysis, there is a minimum 30-day public comment period. During the public comment period, if ten or more people, or any member of JCAR or a standing legislative committee, object to the fast-track process, then the proposed regulation must proceed through the standard VAPA process. Otherwise, the regulation becomes effective 15 days following the close of the public comment period. Figure 3 illustrates the fast-track process.

An example of a recent regulation that was promulgated through the fast-track process is shown below.

In January 2009, the Auctioneers Board of the Department of Professional and Occupational Regulation proposed a change to the regulations to clarify current practices related to the use of funds collected by credit card payments (18VAC25-21-150). The board and agency expect no adverse impact on the public or opposition to the regulatory change, and therefore are promulgating this as a fast-track regulation. The proposed regulation has been approved by the At-

torney General, Secretary, and Governor, and the text was published in the Register on August 3, 2009. The regulation will be effective on October 1, 2009—about nine months after it was proposed by the board.

Figure 3: Fast-Track Regulatory Process



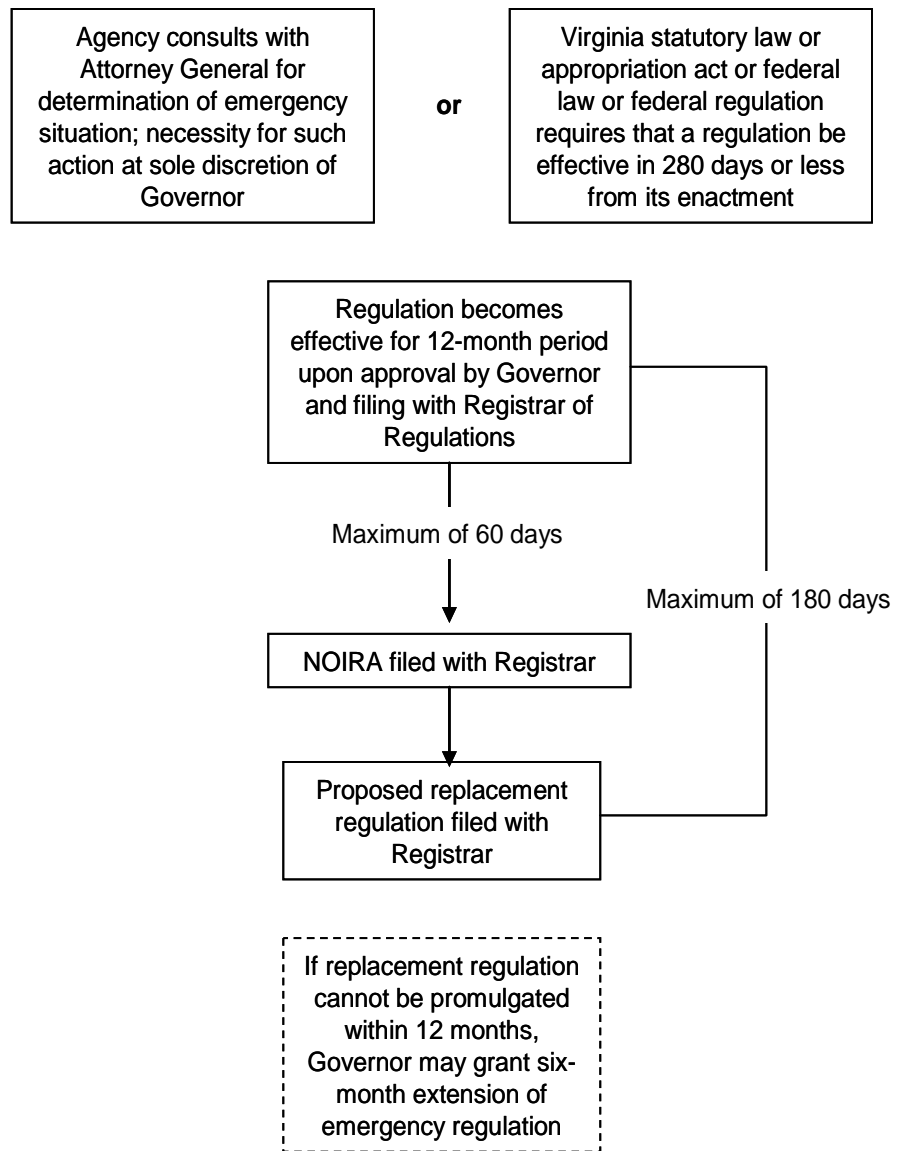
Source: JLARC staff analysis of Virginia Administrative Process Act §2.2-4012.1.

Emergency Regulatory Process. In cases of emergency situations, §2.2-4011 of the act allows for regulations to bypass the standard VAPA procedure. Regulations qualify for emergency status in one of two ways: (1) the agency consults with the Attorney General concerning the nature of the emergency, who determines that an emergency exists, and the Governor decides that such action is necessary; or (2) Virginia statutory law or the appropriation act or federal regulation requires that a regulation be effective in 280 days or less from its enactment.

Emergency regulations become effective upon approval of the Governor and filing with the Registrar of Regulations. However, emergency regulations are only effective for 12 months, and a replace-

ment regulation must be promulgated through standard or fast-track VAPA procedures if the regulation is to continue beyond the first year. If the agency is unable to promulgate a replacement within 12 months, the Governor may extend the emergency regulation an additional six months. The emergency regulatory process is illustrated in Figure 4.

Figure 4: Process for Promulgating Emergency Regulations



Source: JLARC staff analysis of Virginia Administrative Process Act §2.2-4011.

An example of a recent emergency regulation is shown below.

In August 2008, the State Board of Health (board) submitted an emergency regulation for review which added three

sections to the Administrative Code (12VAC5-67-10, -20, -30) regarding the creation of an online central registry for Advance Health Care Directives. The board noted that “the regulation is essential to protect the welfare of Virginians because it [allows] a central and secure means for providers of health care services to quickly and accurately identify and understand patients’ wishes regarding the provision and continuation of health care services.” The enacting legislation from the 2008 General Assembly required that the board promulgate the regulations within 280 days. The regulation became effective on November 1, 2008—about three months after it was submitted for review.

Exempt Regulatory Process. While VAPA ensures public input and external review of regulations during the promulgation process, several agencies and many regulatory actions are exempt from VAPA. Exemptions from VAPA are listed in §2.2-4002 and §2.2-4006 of the act and in Appendix C. Although most exemptions pertain to specific actions, certain State agencies and entities have “blanket exemptions.” Such exemptions mean that any regulation one of these agencies adopts within their statutory authority is exempt from the public notification and input requirement of VAPA. However, agencies with blanket exemptions may have their own processes for public input. The agencies and State entities with blanket exemptions are

- General Assembly
- courts and any agency of the Supreme Court of Virginia
- municipal corporations, counties, and all local, regional or multijurisdictional authorities
- educational institutions of the Commonwealth
- Virginia Housing Development Authority
- Virginia Resources Authority
- Virginia War Memorial Foundation
- Virginia Small Business Financing Authority
- Virginia Economic Development Partnership Authority
- Marine Resources Commission

In addition to the exemptions specified in VAPA, basic laws of an agency in the *Code of Virginia* may also exempt certain regulatory actions. Although these agency actions are not listed specifically in VAPA, the act does exempt “agencies expressly exempted by any other provision of this Code” (§2.2-4002 A9). For example, §22.1 of the *Code of Virginia* contains the basic laws governing the Department of Education, and §22.1-202(B) specifically exempts the

Board of Education from the requirements of VAPA when developing guidelines on constitutional rights and restrictions relating to the recitation of the pledge of allegiance to the American flag in public schools.

The following is an example of a regulatory change that was exempt from VAPA.

The 2009 General Assembly mandated the Department of Medical Assistance Services (DMAS) to increase income eligibility for the FAMIS MOMS program from 185 percent of the federal poverty level (FPL) to 200 percent FPL. Other than the income level, no changes were made to the regulations; therefore, DMAS was able to promulgate the regulations as an exemption based on §2.2-4006. A.4.a, which allows an exemption from administrative procedures “to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved.” The regulation was submitted to the Attorney General (AG) for review on April 28, 2009. AG review lasted three days, and the regulation was published in the Virginia Register on May 25, 2009, with a delayed effective date of July 1, as mandated by the General Assembly.

Key State Entities Involved in Rulemaking Process

Several entities are involved in the promulgation of regulations in addition to the regulatory agencies. These entities represent all branches of State government, and are listed below along with their functions related to the promulgation of regulations.

General Assembly. In addition to legislative commissions (JCAR, ALAC, and the Code Commission), the General Assembly as a whole has some input into the regulatory process. The standing committees of each house (that is, the committees to which matters relating to the content of the regulation are most properly referable) may file with the Registrar an objection to a proposed or final regulation. If an objection is filed, the regulatory agency must respond within 21 days. Either standing committee may then suspend the effective date of the regulation, with the concurrence of the Governor, until after the next legislative session. Furthermore, the General Assembly may pass a bill to nullify or modify a regulation. The standing committees may also file an objection to a fast-track regulation, and thus require the regulation to go through the standard VAPA process.

The General Assembly can also have a substantial impact upon the regulatory process if it chooses to include in bills language mandating regulatory action within 280 days. By including this

language in a bill, the ensuing proposed regulation automatically qualifies as an emergency regulation, thus bypassing public input in the process before the regulation becomes effective.

Department of Planning and Budget. DPB administers the Virginia Regulatory Town Hall and conducts policy and economic impact analyses on all non-exempt proposed regulations. The Town Hall is a comprehensive source of information about proposed changes to Virginia's regulations, and it facilitates public participation through online comment forums and an email notification service. Agencies are required to post the NOIRA, proposed regulation, and final regulation on the Town Hall for all non-exempt regulatory actions. Some exempt regulations are also posted on the Town Hall. Interested parties may post their comments on the Town Hall, and the agency can then download and respond to these comments. Before proposed regulations are published in the *Register*, DPB conducts an economic impact analysis in coordination with the regulatory agency. The economic impact analysis is to include at least the following elements:

- projected number of businesses or other entities to whom the regulation would apply;
- identity of any localities and types of businesses or other entities particularly affected by the regulation;
- projected number of persons and employment positions to be affected;
- impact of the regulation on the use and value of private property;
- projected costs to affected businesses, localities, or entities of implementing or complying with the regulations; and
- projected costs related to the development of real estate for commercial or residential purposes.

For regulations that may have an adverse effect on small businesses, DPB must include additional elements related to the effect on small businesses. For all regulations, DPB must also provide a description of any less intrusive or less costly alternatives for achieving the purpose of the regulation. DPB is to complete the economic impact analysis within 45 days, but a 30-day extension is allowed if DPB cannot complete the analysis within 45 days. To date, DPB has never requested such an extension.

Registrar of Regulations. The Registrar is a position within the Division of Legislative Services. The person who serves as Registrar is appointed by the Virginia Code Commission. The primary function of the position is to publish the *Virginia Register of Regulations* and the *Virginia Administrative Code*. NOIRAs, proposed

regulations, and final regulations are published in the *Register*, which is updated every two weeks. The Registrar is also responsible for ensuring that agencies comply with VAPA and the Virginia Register Act. Prior to posting a proposed regulation, the Registrar receives and reviews from the agency a list of statements related to the regulation, including

- a summary of the regulation;
- the basis of the regulation, defined as the statutory authority for promulgating the regulation;
- the purpose of the regulation, defined as the rationale or justification for the new provisions of the regulation, from the standpoint of the public's health, safety, or welfare;
- the substance of the regulation, defined as the identification and explanation of the key provisions of the regulation that make changes to the current status of the law;
- the issues of the regulation, defined as the primary advantages and disadvantages for the public, and as applicable for the agency or the State, of implementing the new regulatory provisions; and
- the agency's response to the economic impact analysis submitted by the Department of Planning and Budget.

The Registrar is also responsible for posting final regulations in the *Register* and updating the *Virginia Administrative Code* once a regulation becomes effective.

Joint Commission on Administrative Rules. JCAR is charged with reviewing existing rules, regulations, and practices as well as new regulations being promulgated during the proposed or final adoption process. The commission is composed of seven members of the House of Delegates and five senators, and it convenes approximately four times per year. JCAR may file an objection with the Registrar and regulatory agency to any proposed or final regulation, and it may suspend the effective date of a final regulation with the concurrence of the Governor until after the next legislative session. Furthermore, JCAR may halt the fast-track rulemaking process if it believes the regulation may be controversial. JCAR also makes recommendations to the Governor and General Assembly based on its review of any proposed regulation. The commission may introduce legislation to clarify the intent of the General Assembly or to correct any misapplication of a law by an agency.

Administrative Law Advisory Committee. ALAC is a legislative branch agency that assists the Virginia Code Commission with fulfilling its duties in monitoring the operation of the Administrative Process Act. ALAC members are appointed by the Code Commis-

sion and may consist of representatives from State agencies, the academic community, consumer and other interest groups, the office of the executive secretary of the Supreme Court, the bar, and local governments. ALAC is charged with undertaking research projects, sponsoring conferences, holding public hearings, conducting surveys, and engaging in other efforts to fulfill its responsibilities in ensuring that VAPA is working properly.

Attorney General. The Attorney General's office works with regulatory agencies and the Registrar to ensure that statutory authority exists for proposed regulations. Furthermore, the Attorney General determines if a proposed regulation is exempt from VAPA, and if an emergency situation exists to promulgate a regulation through the emergency process. State agencies are represented by the Attorney General in court when regulations are challenged.

Governor. VAPA requires that each entering Governor issue an executive order by June 30 of his or her first year in office which specifies executive branch procedures to be used in reviewing proposed regulations. This review includes an examination by the Attorney General to ensure statutory authority for the proposed regulations, and an examination by the Governor to determine if the proposed regulations are necessary to protect the public, health, safety, and welfare as well as being clearly written and easily understandable.

The Governor also has sole discretion in determining if an emergency situation exists, thus allowing a proposed regulation to be classified as an emergency regulation, in which case the regulation would become effective upon approval of the Governor and filing with the Registrar. The Governor may also extend emergency regulations by an additional six months if an agency is not able to promulgate a replacement for the emergency regulation.

VAPA also provides several instances in which the Governor may seek to exert some influence on proposed regulations during promulgation. The Governor may transmit comments on a proposed regulation following the public comment period and recommend amendments or modifications. If the Governor finds that the final regulation contains substantial changes from the proposed regulation, he or she may require an additional 30-day public comment period. Finally, the Governor has the power to review the regulation during the 30-day adoption period and may, acting in concert with certain committees of the General Assembly, suspend the effective date of the regulation until the end of the next legislative session.

SIGNIFICANT PROPORTION OF REGULATORY ACTIONS ARE EXEMPT

Over the last five plus years, slightly more than half (57 percent) of all regulations promulgated in Virginia were exempt from VAPA. Of the 1,676 regulations promulgated, 951 were exempt. This percentage has varied from 43 percent in 2006-2007 to 72 percent in the first half of 2008-2009. (The high percentage in 2008-2009 is anomalous in that a number of regulations promulgated during that timeframe were in response to legislation requiring that all State agencies publish standard public participation guidelines, which were exempt from VAPA.) A small number of agencies appear to account for a large proportion of the exempt regulations. The agencies or boards which have promulgated the most exempt regulations include the Marine Resources Commission, Department of Game and Inland Fisheries, and the State Air Pollution and Water Control Boards.

Emergency regulations are a special type of exemption, as they are based on special circumstances and not the regulatory content area. Furthermore, they are limited to duration of 12 months, with an optional six-month extension with the Governor's approval. According to the State Registrar and ALAC staff, emergency regulations represent a growing proportion of all regulations, primarily due to the need to promulgate regulations within 280 days. This 280-day requirement is often inserted into legislation. In fact, this language is one of the selections in a drop-down box of boilerplate language in the Legislative Information System's bill drafting system. According to ALAC staff, this language is often inserted in bills because the legislators want the laws to take effect quickly.

Based on interviews conducted by JLARC staff, both the State Registrar and DPB staff have some concerns with the overuse of emergency regulations. According to DPB staff, the shorter timeframe provides less opportunity for in-depth policy analysis, which can lead to regulations with unknown impact. Previously, an emergency regulation was granted in "a situation involving an imminent threat to public health or safety." This language was removed in 2007 based on a recommendation from an Attorney General's committee.

Concerns about the overuse of emergency regulations were identified in the 1993 JLARC report, *Review of Virginia's Administrative Process Act*. In 1990-1991, emergency regulations were the most frequent VAPA exemption and more than one-third of exempt regulations were promulgated as an emergency. The Department of Medical Assistance Services was identified as an agency that overused emergency regulations. In 1990-1991, the Department of Medical Assistance Services averaged two emergency regulations

for every one regulation promulgated under standard VAPA procedures. Furthermore, the study found that the use of emergency regulations was not limited to emergency situations, some emergency regulations were effective for more than one year, and basic participation requirements were sometimes ignored.

The extensive use of exempt and emergency processes to promulgate regulations can have an impact on the viability of VAPA as a mechanism for guiding rulemaking processes. However, exemptions to an administrative process act are a response to the act's expectations and requirements. Therefore, it is important to consider what role the act plays in creating conditions under which the use of exempt and emergency procedures is seen as necessary. Timeframes for processing regulations which are unduly lengthy or unpredictable in ways outside of agency control provide incentives to agencies to seek and use exemptions.

Causes and Rationales for VAPA Exemptions

In Summary

State regulatory agencies explain that most exemptions to VAPA are needed because fast action is required in some subject areas, and fast action is not possible through VAPA. Agencies indicate that timeframes for promulgating regulations through VAPA are long and not fully within agency control. Exemptions, as well as emergency regulations and fast-track regulations, permit more rapid implementation of regulations. Evidence examined during this review support these claims. Few regulations go through the standard VAPA process in one year or less, and even “fast-track” VAPA regulations take at least four months and average about seven months. Meanwhile, exempt regulations can be promulgated, on average, in less than three months.

The current executive order, which requires nine points of executive branch review, contributes to the slow and unpredictable timeframes for VAPA regulations that make exemptions attractive or imperative for agencies. At least one aspect of executive review appears to be inconsistent with the provisions of VAPA. Options are available to expedite executive branch reviews in the future.

The most commonly cited rationale for rulemaking actions being exempt from VAPA is the need for quick action. Fast action may be needed to prevent harm to persons or property, prevent dislocations in the marketplace, amend regulations for seasonal activities, align regulations with existing State or federal laws, or to maximize federal funds. Other rationales include instances in which the agency lacks discretion (thus obviating the need for public debate), the subject matter is not deemed appropriate for public participation, the entity has its own authority and legal procedures for adopting rules, or the regulatory process is not deemed necessary for agency action.

Public input and review procedures under VAPA require months for adoption of rules under the standard process. However, additional executive branch review procedures required under the Governor’s executive order account for even more time, on average, than the time allotted for public input in the standard VAPA process. These additional review requirements cause the average length of time to promulgate a rule to exceed two years and make fast action infeasible under the standard VAPA process.

KEY REASON FOR MANY VAPA EXEMPTIONS IS TO EXPEDITE RULEMAKING

For various reasons, new or amended regulations may need to be adopted quickly. New regulations or changes to existing regulations may be needed to respond to changes in law, to protect the health, safety, and welfare of citizens of the Commonwealth, or to resolve confusion that may exist regarding regulatory requirements.

Staff of regulatory agencies in Virginia have claimed over the years that it is not possible to implement the requirements of VAPA and executive orders quickly. One of the ways that is available to expedite rulemaking is to exempt the regulatory activity from VAPA. Agencies responding to a JLARC staff survey overwhelmingly cited the ability to implement an exempt regulation more rapidly than a VAPA regulation as a key rationale for having the exemption.

In Practice, VAPA Rulemaking Takes At Least Nine Months and Typically Takes About Two Years

JLARC staff analyzed the time that was spent promulgating regulations through the standard VAPA process (that is, without the use of expedited rulemaking through fast-track, emergency, or exempt processes). The analysis was conducted to assess the claim often made by agency staff that it is rarely possible to implement a regulation through the process in an expeditious manner, and that most regulations take well over one year to promulgate. This is one of the leading justifications given for exemptions.

The analysis addressed 342 regulations which were published as final in the *Virginia Register of Regulations* between September 20, 2004, and April 13, 2009. It should be noted that the starting point for measuring the length of time spent in promulgation in this analysis was publication of the Notice of Intended Regulatory Action (NOIRA) in the *Register*. As will be discussed later in this chapter, it appears that about two months of time are typically spent prior to publication of the NOIRA in the *Register*. During this time, certain executive branch reviews of the NOIRA occur.

The analysis shows that in practice, relatively few regulations are adopted in less than one year's time. In addition, there is considerable variation in the time spent across agencies, and in many cases, within the same agency.

Specifically, across agencies, the range in time spent promulgating a regulation was from a low of 268 days (just under nine months) to a high of 4,304 days (almost 12 years). The average time spent

was 788 days (about 2.2 years), while the median was 661 days (about 1.8 years). Thirty-one of the 342 regulations (about nine percent) were adopted in 366 days or less. (Nineteen of these 31 regulations were adopted in 352 days or less, and another 12 regulations were adopted in exactly 366 days.)

Table 1 shows the fastest, slowest, average, and median timeframes adopting regulations through the standard VAPA process. The table shows this information for the agencies with the most activity during the timeframe addressed by the analysis. It also summarizes the data across all other agencies and shows overall statistics for all the regulations. The data show the considerable variation in VAPA regulatory timeframes that exists both within and across agencies.

Table 1: Timeframes for Promulgating Regulations Using the Standard VAPA Process

Agency / Board ^a	# of Regulations	Timeframe, in Days			
		Fastest	Slowest	Average	Median
Dept. of Medical Assistance Services	43	343	1,962	554	436
Board of Medicine	26	310	814	586	548
State Water Control Board	26	366	1,108	726	709
Dept. of Health	25	506	4,304	1,394	1,160
Dept. of Social Services	22	478	1,507	778	721
Dept. of Education	11	469	914	717	716
Air Pollution Control Board	10	646	898	725	709
Dept. of Criminal Justice Services	8	296	1,094	722	695
Dept. of Housing & Community Development	8	506	506	506	506
Board for Contractors	7	749	1,133	890	805
Board of Counseling	7	380	786	721	772
Board of Nursing	7	310	706	502	492
Pharmacy Board	7	268	940	582	618
All Others	135	310	3,776	859	701
All Regulations	342	268	4,304	788	661

^a Separately listed agencies or boards had seven or more regulatory actions adopted in the period from September 20, 2004, to April 13, 2009.

Source: JLARC staff analysis of data from the Office of the Registrar of Regulations and the Division of Legislative Automated Systems.

An Exemption Is One of Three Ways to Expedite Rulemaking

As mentioned in Chapter 1, there are three methods of bypassing the standard VAPA process for adopting rules: the use of the emergency process, the use of an exemption, and the use of a fast-track process for non-controversial regulations. Of these methods, exemptions provide the most flexibility, as emergency and fast-track processes may only be used in certain circumstances, and emer-

gency regulations must be replaced within a year (or 18 months if an extension is granted) with a permanent regulation.

Exemptions allow agencies to adopt rules quickly, whether or not they are controversial or determined to be of an emergency nature. With an exemption, the agency can adopt a rule simply through the approval of its board or, in some cases, through an order by the agency director or commissioner. Regulations must still be published in the *Register* to notify the public before they become effective.

Table 2 shows the timeframes for some regulations recently promulgated through these three alternative means. As indicated in the table, emergency and exempt regulations can be promulgated within a time span of about two to three months. Fast-track regulations have been typically taking about seven to eight months.

Table 2: Exempt and Emergency Regulations Are Completed Much More Quickly Than “Fast-Track” VAPA Regulations

Process Used	Fastest	Slowest	Average	Median
Emergency (<i>n</i> = 8)	25 ^a	152	82	71
Exempt (<i>n</i> = 32)	50	131	79	78
Fast-Track (<i>n</i> = 19)	143	276	220	226

^a Fewest number of days among regulations from 2008 and 2009. The emergency regulation process can be faster. In October 2007, a Health Department regulation on MRSA disease reporting was submitted, reviewed, and became effective in one day.

Source: JLARC staff data analysis of timeframes based on regulations that were in these categories as indicated by information on the Virginia Regulatory Town Hall in late July 2009.

There are two main types of exemptions. An exemption may either allow an agency to promulgate regulations without going through the standard VAPA process, or it may allow an agency to perform administrative actions that do not constitute regulations. These types of exemptions are discussed below.

Regulations Exempted From VAPA. Many of the exemptions listed in VAPA specifically state that certain regulatory actions are exempt from the act. These exemptions pertain to rules of general applicability that have the force of law. Examples of this type of exemption include regulations of the Marine Resources Commission, the Department of Game and Inland Fisheries regarding the management of wildlife, and the Department of Agriculture and Consumer Services regarding the prevention and eradication of infectious diseases among livestock. These exemptions are clearly intended to allow fast action on enforceable rules.

Administrative Actions Exempted From VAPA. Several exemptions listed in the act rarely if ever result in new regulations. These exemptions, however, provide agencies with the authority to conduct

their business without having to issue regulations defining their procedures. Thus, even though no regulations may be promulgated under an exemption, it may still be vital in allowing an agency to quickly adopt new procedures and guidelines. Examples of this type of exemption include faculty tenure and student selection policies at State colleges and universities, operating procedures for review of child deaths developed by the State Child Fatality Review Team, policies regarding prison inmates, and customary police functions.

Fast Rulemaking May Be Necessary in Certain Situations

Given the statutory directive and demonstrated need for a rule change, fast action is generally preferable to a lengthy process. However, there is often a need for public debate and review regarding most regulations, and this need must be weighed against the desire for quick action. For an agency or regulatory action to be exempt from VAPA, and thus from much of the public debate and review process, there should be a demonstrated rationale as to why the need for fast action outweighs the possible need for extensive public input and review. There are a number of instances in which such fast action with limited debate may be necessary. Five such instances are listed below.

Fast Action to Prevent Harm to Persons or Property. Perhaps the most important rationale for fast promulgation is to prevent harm to persons or property. This type of situation may occur with environmental, health, and safety regulations. Emerging threats, such as disease outbreaks, or newly acquired knowledge regarding harmful pollutants, may require a quick response from the regulatory agencies to prevent or minimize danger to the public. In such instances, time spent reviewing the details of the regulations through the standard VAPA process may be counterproductive; significant risks to the public would remain until the regulation finally becomes adopted. While debate may remain about the necessity of the regulation or some specifics in the regulation, the costs (in terms of human life or destruction of the environment or property) of doing nothing would likely outweigh the costs of the regulation.

Regulatory exemptions intended to prevent harm to persons or property include

- list of diseases promulgated by the Board of Health that laboratories, hospitals, and physicians must report to the Department of Health (§2.2-4002 A.23);
- the Board of Pharmacy when specifying special subject requirements for continuing education for pharmacists in order

to make pharmacists aware of emerging disease and drug threats (§2.2-4002 A.26); and

- orders by the State Health Commissioner condemning or closing any shellfish, finfish, or crustacea growing area due to pollution or unsanitary grounds (§2.2-4002 B.16).

Fast Action to Prevent Dislocations in the Marketplace. In some instances, an exemption is necessary in order to prevent disruptions to a particular market sector. Among the regulated community, producers of certain commodities are governed by regulations that dictate procedures in the production process, classification systems for products sold, and/or the price of products sold. Changes in the supply of these commodities may cause the need to amend such regulations quickly. For example, a disease outbreak among livestock, or crop damage due to drought or pestilence, may require a quick adjustment of regulated prices or implement new measures to contain an outbreak. Without quick regulatory action, markets could be disrupted in that prices do not accurately reflect the supply and demand for products, which could cause shortages and financial hardships on the producers. Another example is in the area of interstate and international commerce. Quick regulatory action may be required to align practices in Virginia with federal or foreign laws and thus enable Virginia producers to sell their commodities across state lines.

Regulatory exemptions intended to prevent dislocations in the marketplace include

- the Milk Commission in promulgating regulations regarding class prices for producers' milk (§2.2-4002. A.7);
- the Commissioner of Agriculture and Consumer Services in adopting regulations concerning the prevention and control of avian influenza in the live bird marketing system (§2.2-4002. A.12); and
- the Commissioner and Board of Agriculture and Consumer Services in promulgating regulations regarding fertilizer, commercial feed, and slaughterhouses (§2.2-4002. A.13).

Fast Action to Regulate Seasonal Activities. Some regulations must be amended frequently to reflect new information on the state of scarce resources and wildlife populations. In these situations, there may be a need for a VAPA exemption in order to adopt rules in time to be effective for hunting or fishing seasons, for example. Agencies responsible for regulating these seasonal activities receive information regarding the health of wildlife populations and must set acceptable limits on the number of animals to be harvested and appropriate methods for harvesting prior to the start of

the season. In order to be effective, these rules must often be adopted within a 30-day period.

Regulatory exemptions intended to allow fast action on regulating seasonal activities are

- the Department of Game and Inland Fisheries in promulgating regulations regarding the management of wildlife (§2.2-4002. A.3); and
- regulations of the Marine Resources Commission (§2.2-4006. A.12).

Fast Action to Prevent Problematic Inconsistency Between an Agency Rule and New Statutes. Another rationale for exemptions to VAPA is that fast action may be required to align regulations with new statutes – either State or federal. New statutes are often enacted to address safety or equity issues, and regulatory agencies may need to implement these statutes through appropriate regulation in a timely manner. For example, the Virginia Department of Transportation (VDOT) may need to adopt regulations quickly in order to align Virginia highway designs and traffic control devices with federal laws. Another example is the need for loan programs to remain consistent with changes in State or federal laws, thus allowing projects to move forward without delay.

Regulatory exemptions intended to prevent inconsistencies between rules and statutes include

- the Virginia Housing Development Authority in adopting rules regarding housing developments and mortgage loan programs (§2.2-4002. A.4);
- the Commissioner and Board of Agriculture and Consumer Services in promulgating regulations regarding fertilizer, commercial feed, and slaughterhouses (§2.2-4002. A.13); and
- the Commonwealth Transportation Board in adopting rules regarding traffic signs, markers, and control devices (§2.2-4002. B.11).

Fast Action to Maximize Receipt of Federal Funds or Prevent Their Loss. A final reason for agencies needing to quickly adopt regulations is to maximize federal funds or prevent their loss. Federal funding is often contingent on states being in compliance with federal laws and regulations. Penalties may be assessed to states that are not in compliance. Furthermore, states may be required to return unused portions of federal grants, thus forcing states to adopt rules quickly in order to disburse the grants in a timely manner. A VAPA exemption is especially helpful in this case for agencies that receive considerable federal funds each year, such as in the areas

of medical assistance services (Medicaid), transportation, and education.

An example of an exemption that could be used to maximize federal funds is

- agency action relating to grants of state or federal funds or property (§2.2-4002. B.4).

OTHER FACTORS LEADING TO VAPA EXEMPTIONS

While the necessity for fast action appears to be the primary rationale for most VAPA exemptions, several other reasons have also been cited by agency staff. Exemptions may be put in place to avoid unnecessary delays on moot discussion, protect the privacy of individuals, prevent undue influence on the part of elected officials, avoid duplication with existing procedural rules, or allow for more effective management by not requiring every administrative action to be a codified regulation. These additional rationales are discussed below.

Agency Lacks Discretion Over Content of Regulation

Many State regulations do not involve any discretion on the part of regulatory agencies. Rather, these regulations simply reiterate language in the *Code of Virginia* or in federal statutes or regulations. Because agencies have no discretion in adopting these rules, public comment and executive review through VAPA are unnecessary. In these cases, the appropriate forums for debating the issues are the General Assembly, the U.S. Congress, or the federal regulatory agencies.

The most commonly cited exemption for exempt regulations is §2-4006. A.4, which enables agencies to bypass the VAPA process for regulations in which no agency discretion is involved. This exemption is used when State statutory laws, federal laws or regulations, or court orders specifically dictate rules, and the regulations must conform to these rules. Between January 12, 2004 and August 17, 2009, this exemption was cited 375 times. In about 70 percent of the cases, the exemption was used to conform to Virginia statutory law. Only once was the exemption used for a regulation conforming to a court order. The remainder of the exempt regulations was for conforming with federal laws or regulations.

As with all proposed exempt regulations, the Attorney General is responsible for determining that the exemption is justified (that is, that the regulation does not differ materially from the law or court order). Furthermore, the Registrar of Regulations must determine

that proposed Virginia regulations do not differ materially from federal laws or regulations.

Regulated Activity Is Deemed Inappropriate Matter for Public Participation

In some instances, the subject matter of a proposed regulation may not be suitable for discussion in a public forum, either because of privacy issues or to prevent undue influence on the part of elected or other State officials. In these cases, other concerns may outweigh the desire for public input and executive review.

One example of an exemption designed to protect the privacy of individuals is the exemption for the operating procedures for review of child deaths developed by the State Child Fatality Review Team (§2.2-4002. B.17). The review team, which is assigned to the Chief Medical Examiner's office in the Virginia Department of Health, reviews the circumstances surrounding child deaths. According to staff on the review team, the operating procedures are dependent upon each case, and it would be impossible to protect the identity of the child if the procedures had to be promulgated through VAPA.

An example of an exemption designed to prevent undue influence over the regulatory process is the exemption provided for the conduct of elections or eligibility to vote (§2.2-4002. B.8). The State Board of Elections (SBE) is charged with ensuring unbiased elections, and it promulgates regulations pertaining to campaigns and penalties for campaign violations. According to SBE staff, there would be a clear conflict of interest in requiring the Governor, Attorney General, and legislators to review such proposed regulations.

Entity Has Own Authority and Legal Procedures for Adopting Rules

The State may also grant exemptions to VAPA for entities that have their own legal procedures for adopting rules. These exemptions are enacted to avoid duplication and to recognize the authority of that entity. Examples of this type of exemption are

- the General Assembly (§2.2-4002. A.1);
- courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record (§2.2-4002. A.2);
- municipal corporations, counties, and all local, regional or multi-jurisdictional authorities (§2.2-4002. A.5); and

- educational institutions of the Commonwealth (§2.2-4002. A.6).

The General Assembly, of course, does not promulgate regulations but rather enacts statutes with the force of law. Furthermore, its rules are voted on in a democratic process, and the elected legislators are accountable to voters. Thus, the VAPA process for these rules is unnecessary.

Although localities and multi-jurisdictional authorities are political subdivisions of the State, they are afforded a certain amount of autonomy in how they govern. The VAPA exemption recognizes their autonomy to develop their own procedures for adopting rules and ordinances. A similar situation exists for educational institutions, although they are State agencies and not political subdivisions.

In addition to recognizing the authority of certain entities, this type of exemption helps ensure separation of powers in State government. For example, the judicial branch of government is insulated from the legislative and executive branches, and it would be inappropriate for the legislature to specify how the courts implement their rules.

The Constitution expressly grants the powers of a court of record to the State Corporation Commission (SCC), and therefore all regulations of the SCC are exempt from VAPA.

It should be noted that the Constitution of Virginia expressly grants the powers of a court of record to the State Corporation Commission (SCC), and therefore regulations promulgated by the SCC are exempt from VAPA. The SCC has great authority and promulgates many regulations in the areas of public utilities, telecommunications, banking, securities, insurance, railroads, and the chartering of corporations.

Despite the VAPA exemption, the SCC has developed its own process for promulgating regulations which is similar to VAPA in many respects. The main differences between the SCC's process and that of VAPA is that for SCC regulations, there is no NOIRA stage, minimum number of days for public comment on proposed regulations, or posting of proposed regulations on the Regulatory Town Hall. However, the agency does provide a public comment period and holds public hearings on proposed regulations upon request, and the agency has an online forum for discussion and public comment regarding proposed regulations similar to the Regulatory Town Hall. As required by §2.2-4031 B of VAPA, all SCC proposed and final regulations are published in the *Register*. Furthermore, persons may appeal regulations to the Supreme Court. The average time to promulgate a regulation through the SCC ranges from four to seven months, depending on the regulated area.

Regulatory Process Is Not Deemed Necessary for Agency Action

A final rationale for exempting certain administrative actions from VAPA is that regulatory action is not deemed to be necessary to execute the action. Actions that fall under these exemptions include guidelines or recommendations, and internal practices and procedures. These actions either do not have the force of law or do not impact the general public. Examples of this type of exemption include

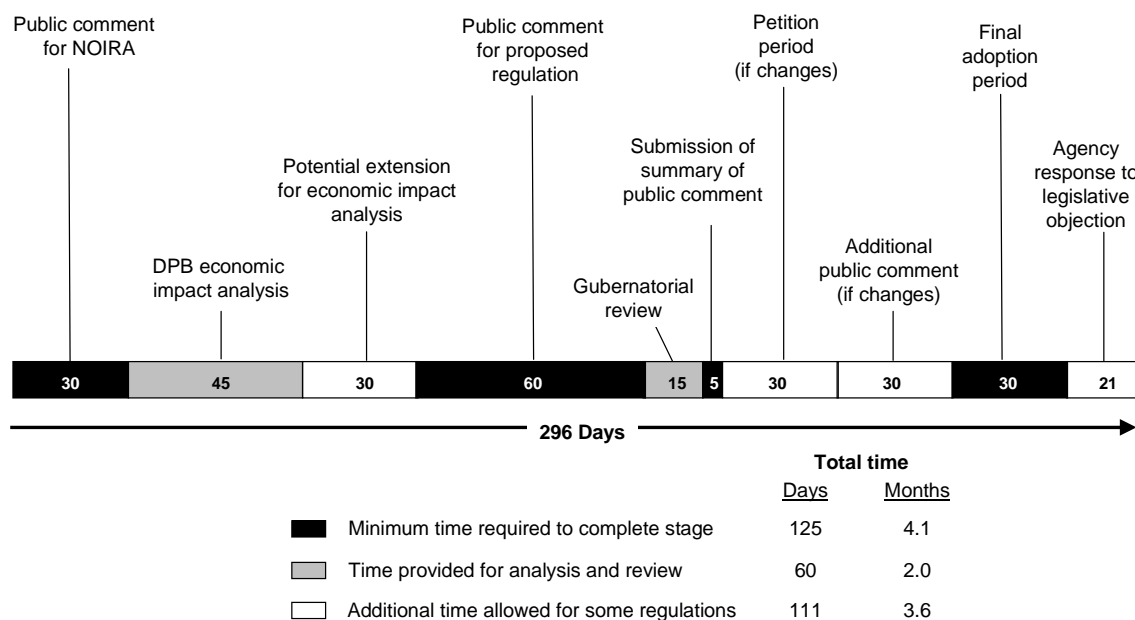
- the Virginia Medicaid Prior Authorization Advisory Committee in making recommendations (§2.2-4002. A.16);
- the development and issuance of procedural policy relating to risk-based mine inspections by the Department of Mines, Minerals and Energy (§2.2-4006. A.8);
- the award or denial of State contracts, as well as decisions regarding compliance therewith (§2.2-4002. B.2);
- educational institutions with regard to the selection and disciplining of students and faculty (§2.2-4002. A.6);
- any rules for the conduct of specific lottery games, so long as such rules are not inconsistent with duly adopted regulations (§2.2-4002. B.15); and
- actions related to inmates of prisons and parolees therefrom (§2.2-4002. B.9).

While several administrative actions are specifically exempted from VAPA, other actions may be executed by State agencies without a VAPA exemption. For example the State Executive Council of the Comprehensive Services Act for At-Risk Youth and Families, according to the *Code of Virginia*, may establish policies “through the promulgation of regulations by the participating state boards or by administrative action, as appropriate.” The council has adopted rules affecting local entitlement programs and local budgets through administrative actions. Staff in the Office of Comprehensive Services stated that these actions did not constitute new rules, but rather were orders implementing existing laws, and therefore it was appropriate that the orders were implemented through administrative action. Furthermore, a 60-day minimum time period for public comment is provided for these actions. However, representatives of organizations representing locality interests indicate that the changes involved some substantive discretion and expanded public comment opportunities afforded by VAPA would have been useful for these rules.

LENGTH OF PROCESS FOR VAPA REGULATIONS MAKES EXEMPTIONS ATTRACTIVE OR IMPERATIVE FOR AGENCIES

VAPA requires certain minimum timeframes for public comment upon a planned regulation and for other matters that are applicable to all regulations promulgated under the act. In addition, VAPA specifies some timeframes that can apply to VAPA regulations under certain conditions. The timeframes that are specified in VAPA for all regulations, and for some regulations under certain conditions, are summarized in Figure 5. As indicated in the figure, the length of time that may be required by the mandatory aspects of VAPA is from 4.1 to 6.1 months. In addition, under certain conditions, up to an additional 3.6 months could be required to promulgate a VAPA regulation, or a potential total of up to 9.7 months for those regulations.

Figure 5: Timeframes Explicitly Set Forth in VAPA (Following Publication of NOIRA)



Note: Other delays may be necessary to meet VAPA requirements including (1) time spent getting information published in the Virginia Register and (2) time that transpires between completion of a stage and the next meeting of a regulatory board. Another delay occurs if a final regulation is suspended by joint action of the Governor and certain committees of the General Assembly, in which case the regulation cannot become effective until after completion of the next legislative session.

Source: JLARC staff analysis of the *Code of Virginia* §§2.2-4006-4017.

As indicated earlier in the chapter, however, actual timeframes for processing regulations through VAPA have substantially exceeded the minimum statutory requirements. Timeframes in excess of the time explicitly or inherently required by what is set forth in VAPA can be due to a combination of factors which are both within and outside of agency control. Factors within the agency's control include the priority which the agency gives to the regulation, the

diligence with which it shepherds the regulation through those steps which are within its control, and the extent to which it voluntarily allows for more participation and a longer public comment opportunity than is required by the Act. Factors that can be mostly outside of the agency's control, beyond the minimum requirements of VAPA, include the complexity of the regulatory subject matter, the difficulty of writing the regulation, the degree of controversy inspired by the regulation, and review processes by external entities (such as DPB, cabinet secretaries, and the Governor's Office).

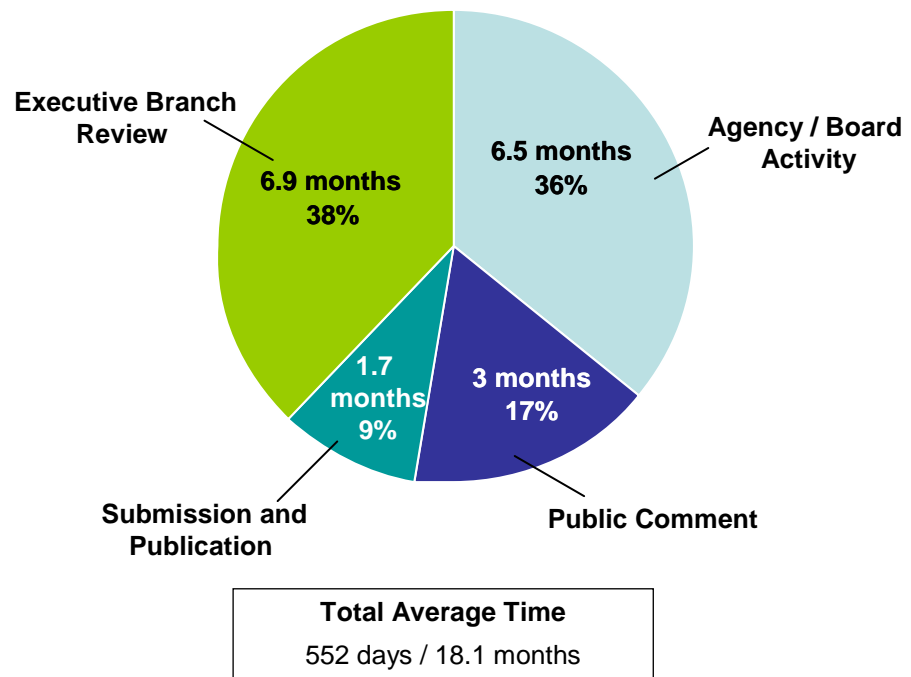
To further examine the time spent in promulgating VAPA regulations, the progress of regulations promulgated by the Board of Pharmacy was studied in more detail. The Board of Pharmacy was chosen because it promulgated a VAPA regulation in the fastest time of any entity during the period reviewed (268 days). However, it also promulgated other regulations taking more time, including one regulation which took 940 days.

With each of the board's regulations taking exactly 30 days to become effective after being published as a final regulation, the analysis focused on time spent from publication of the NOIRA to publication of the final regulation. The time spent was divided into four categories:

- public comment (in each case for the Board of Pharmacy, 30 days comment on the NOIRA and 60 days of comment on the proposed regulation),
- agency or board activity (regulation development or editing time, board approval processes, and regulatory package development and submission time which occurs outside of the public comment periods),
- external review processes (by DPB, the cabinet secretary, and the Governor's Office), and
- the submission of the regulation to the Registrar, including time for the published *Register* to appear.

The analysis showed that the external (executive branch) review times for these regulations accounted for a substantial portion of the total time (Figure 6). Between publication of the NOIRA and the final regulation, the amount of time spent in executive branch review rivaled the time that was specifically attributable to the board and its staff on matters such as developing the content of the regulation, justifying the proposed action, responding to public comment, and gaining internal approvals. For the board's fastest regulation (268 days), executive branch review time was 66 days, but for the other six regulations the average length of time in stages of review was 233 days.

Figure 6: Substantial Time Was Spent in Executive Branch Review of Board of Pharmacy Regulations (From Publication of NOIRA to Publication of the Final Regulation)



Note: Based on seven Board of Pharmacy Regulations published as final regulations between September 20, 2004, and April 13, 2009.

Source: JLARC staff analysis of data from the Office of the Registrar of Regulations and the Department of Health Professions.

The use of an exemption is an attractive way for an agency or board to avoid lengthy VAPA timeframes and potentially protracted reviews by executive branch entities. Because the length of time taken by external review in Virginia is substantial and can contribute to making the use of exemptions attractive, executive orders and the time that regulations spend undergoing executive review processes were examined in more detail.

EXECUTIVE ORDER REVIEW REQUIREMENTS ARE DELAYING REGULATIONS AND MAY EXCEED VAPA BOUNDARIES

There are at least three stages in the current rulemaking process in which regulatory agencies or boards are currently required by VAPA to publish rulemaking information in the *Register*. First, agencies are to publish the Notice of Intended Regulatory Action, or NOIRA. Second, they are to publish the proposed regulation. Finally, they are to publish the regulation when it has been adopted in final form.

The current executive order, as well as several executive orders prior to it, provide for executive branch review of the agency's regulatory plans, its proposed regulation, and its final regulation. In addition to providing for executive branch review at each of these stages, recent executive orders have called upon agencies and boards to receive the Governor's approval before publishing the NOIRA, the proposed regulation, and the final regulation.

Scope of Executive Branch Review Authority Under VAPA

Section 2.2-4007.04 of VAPA requires the Department of Planning to conduct an economic impact analysis of proposed regulations. In addition, §2.2-4013 of VAPA contains provisions regarding executive review of proposed and final regulations.

VAPA requires the Governor to develop an executive order containing published procedures "for the review of all proposed regulations." The act specifies that the executive review procedures for proposed regulations shall include

- review by the Attorney General to ensure statutory authority for the proposed regulations, and
- examination by the Governor to determine if the proposed regulations are (a) necessary to protect the public health, safety and welfare and (b) clearly written and easily understandable.

The act indicates that executive order procedures may also include review of the proposed regulation by the appropriate Cabinet Secretary." Under the act, the Governor is to transmit his comments on such proposed regulations no later than 15 days following the completion of the public comment period upon the regulation.

Section 2.2-4013 of VAPA also contains provisions regarding the Governor's review of an agency or board's final regulation. Under the act, authority is given to the Governor to

- review whether an agency has made substantial changes to a regulation between its publication as a proposed regulation and its final version, and to require an additional public comment period regarding such changes,
- object to a final regulation after it has been published, and
- act in concert with the applicable bodies of the General Assembly, to suspend the effective date of a regulation until completion of the next regular legislative session.

However, as was noted in a 1993 JLARC report on VAPA, and as is still the case today, VAPA does not require an agency or board seeking to promulgate a regulation to cease action upon or withdraw that regulation due solely to a gubernatorial objection.

An instance in which the Governor had objected to two regulations of the Virginia Safety and Health Codes Board of the Department of Labor and Industry was noted in the 1993 report. The proposed regulations were to reduce job injuries and provide for more stringent construction sanitation standards. At a meeting of the board following the Governor's objections, no action was taken to withdraw the regulations and the regulations took effect.

If certain legislative committees and the Governor together have an objection to a final regulation, then VAPA does provide authority for the committees and the Governor together to suspend the effective date of a regulation until after the next legislative session, during which time a bill preempting the content of the regulation can be considered. While the Governor has both the authority and responsibility to review regulations proposed by executive branch agencies, VAPA itself does not grant the Governor the authority to halt a regulatory action independent of legislative involvement. VAPA does not expressly grant DPB, cabinet secretaries, or the Governor the authority to disapprove, or refuse to authorize, publication of a NOIRA, a proposed regulation, or a final regulation.

Recent Executive Orders Have Required Executive Branch Approval or Authorization for Regulations to Move Forward

Since 1990, executive orders pertaining to the adoption of VAPA rules have expanded the scope of executive review. The orders began to explicitly call for executive branch "approval" or "authorization" of regulations, and at higher levels, before regulations can move forward in the process.

Order Signed in 1990 Required Secretarial Review of Proposed Regulation, but Text Did Not Clearly Require Approval. The main executive review check upon regulations contained in the executive order signed in 1990 (and published in the *Register* in 1992) was a required meeting between the agency head and the appropriate cabinet secretary. This meeting was to occur before the agency filed the Notice of Comment Period and before the proposed regulation was submitted to the Registrar, DPB, and the Governor's Office. The secretary was to ensure that the regulations were "reasonable, necessary, and absolutely essential to meet the required objective."

Following this meeting, if “approval” or “authorization” by the secretary was required for the agency or board to move forward with the regulation, the text of the executive order did not clearly establish this point. The secretary was required to issue a “Statement of Assurance” to the Governor’s Office that the regulation met the criteria stated above. The executive order stated that if the Secretary determined that the regulation did not meet the criteria, “the agency head will make every effort to revise them in a manner acceptable to the Secretary.” The order did not expressly state that the agency head or board had to have approval to move forward. On the other hand, the form to be used for the secretary’s Statement of Assurance gave the following options: (1) concur with the regulation’s reasonableness and necessity, (2) indicate that the agency would revise the regulation, or (3) indicate that the agency would not issue the regulation but would pursue an alternative.

Orders From 1994 and 1998 Explicitly Required Secretarial Approval Before NOIRA and Proposed Regulation Publication. Executive orders from 1994 and 1998 explicitly required certain executive branch approval before regulations could move forward at two points in the process: the NOIRA and the preparation of the proposed regulatory package for the Registrar. In addition to completing economic impact analyses of the regulations prepared in coordination with the agencies as required by VAPA, DPB was to conduct initial reviews of regulatory content at these stages, and advise the appropriate cabinet secretary and the Governor of its findings about the regulation. The executive orders required that the cabinet secretary then make a determination of whether or not to “authorize” the submission of the NOIRA and the proposed regulation.

These executive orders did not provide for executive branch approval of the final adopted regulation in advance of its submission to the Registrar. The orders provided that the agency give a copy of the adopted final regulation to DPB, the secretary, and the Governor “at the same time that it submits a copy of the proposed final regulation to the Registrar pursuant to Va. Code Section 9-6.14:9.1B.”

Orders From 2002 and 2006 Explicitly Require Governor’s Office Approval for Agencies to Proceed at Three Stages in the Process. Exhibit 1 summarizes key provisions for executive branch review that are not contained in VAPA itself, but are contained in the current (2006) executive order for the review of regulations. The current executive order is similar to the 2002 executive order, but both of these orders reflect some significant differences from the prior executive orders.

Exhibit 1: Key Provisions for Executive Branch Review Contained in Executive Order (EO) 36 but Not Contained in VAPA

Provision

Review of Agency's NOIRA Submission

DPB shall review the agency submission, and advise the Secretary and Governor of its determination as to whether the regulation complies with EO requirements and comports with State's policies set forth in the EO.

If DPB's director advises that the NOIRA presents issues requiring further review, the Secretary shall review the NOIRA within seven days and forward a recommendation to the Governor.

"The agency shall be authorized to submit the NOIRA to the Registrar for publication when the Governor approves the NOIRA for publication."^a

Prior to Submission of the Proposed Regulation to the Registrar

DPB shall review the proposed regulation package to determine compliance with the EO and its comport with policies set forth in the EO, and shall advise the Secretary of its "determination" within 45 days.

"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 package to the Registrar..."

Prior to Submission of the Final Regulation to the Registrar

DPB shall review the final package for compliance and comport with the EO, and advise the Secretary and the Governor of its "determination" within 14 days.

After DPB's review, package forwarded to Secretary and Governor; Secretary is to "make a recommendation to the Governor within seven days."

The agency is "authorized" to submit final regulation if the Governor "approves" the package for publication.

^a Executive Order 21 (2002) stated that the agency could submit the NOIRA to the Registrar if at least one of three conditions is met:

"a. The Governor approves the NOIRA for publication. b. Fourteen days have elapsed since DPB's determination and neither the Governor nor the Secretary has objected to the NOIRA. c. Fourteen days have elapsed and any objections raised by the Governor or the Secretary have been withdrawn."

Source: JLARC staff analysis of EO 36 (2006).

One significant difference is that the level for approval of a regulatory package before submission to the Registrar has increased from the secretarial level to the Governor. The executive order requires the Governor's approval before publication of the NOIRA, the proposed regulation, and the final regulation.

The fact that under the executive order, a final regulation package must be reviewed and approved before it is submitted to the Registrar, is also a significant change. DPB, the cabinet secretary, and the Governor's office all review the regulation before it is published as a final regulation. As noted above, prior executive orders referenced the provisions of VAPA in only requiring that agencies furnish the final regulation package to executive branch reviewers at the same time as they provided it to the Registrar.

Factors Which Impact the Length of Time in Review

There are several factors which appear to impact the length of time that planned regulations spend under review. For example, regulations that do not complete the process prior to a change in administrations may lose visibility or languish until the new administration is in place and ready to proceed. There are also certain months during the year in which executive branch reviews are unlikely to be done on a timely basis. Specifically, because of the additional workload demands on executive branch reviewers immediately before and during the legislative session, agencies have been told that regulations requiring review are unlikely to be receive much priority between the beginning of January and the end of the session. In addition, the review time for some regulations can be impacted by the extent to which time is spent working with one or more agencies on the regulation content. A recent regulation of the Virginia Department of Agriculture and Consumer Services, for example, has reportedly been delayed at the stage of Governor's Office review due to a need to address permitting issues with the Department of Environmental Quality.

Still, a key factor in the length of time accounted for by the executive branch review process is the number of stages and actors involved in the reviews. With DPB, cabinet secretaries, and the Governor's Office each involved in conducting reviews at three points in the process, there are nine points of review. In addition, at the Governor's Office, at least four persons are involved in the review: one of four policy analyst staff members, the director of the policy office, legal counsel, and the chief of staff. Depending on their availability, each could potentially delay completion of the review.

Current Executive Order Provides Nine Points of Executive Branch Review That Can Impede or Stop Rulemaking Action

VAPA requires that executive orders include provisions for review by the Attorney General as to whether the agency or board has statutory authority to promulgate rules for the subject matter of its planned regulation. However, implementation of the current executive order has led to nine points of executive branch review beyond Attorney General certification that can impede or potentially stop rulemaking action. DPB, the cabinet secretary, and the Governor's office are each involved before the NOIRA, proposed regulation, and final regulation can be submitted and published.

On Virginia's Regulatory Town Hall, the result from DPB's review at the pre-NOIRA, pre-proposed, and pre-final stages is described as "review completed," rather than "regulation approved." A DPB policy analyst completes a policy memo on the regulation that is considered part of the "Governor's Confidential Working Papers."

These working papers are now shared with agencies seeking to promulgate the regulation, but this was not the case prior to 2009. If DPB has issues with the regulation, it can identify the regulation as “not recommended” or “recommended with reservations.” Staff in the Governor’s Office and DPB staff indicate that it is not DPB’s decision as to whether or not a regulation moves forward. However, an agency regulatory coordinator has stated that in practice, a regulation which is not recommended by DPB does not go forward in its existing form.

The Town Hall also indicates for the pre-NOIRA, pre-proposed, and pre-final stages whether the cabinet secretary and the Governor have “approved” the regulation. Agencies and boards cannot proceed with the planned regulation without cabinet secretary and Governor’s Office approval at these stages. Implementation of the process in this way provides the cabinet secretary and the Governor the ability to stop or veto a planned regulation.

Nine Points of Executive Review Contribute Substantially to the Length of Time Needed to Promulgate Regulations

Analysis of Regulatory Town Hall information about pending regulations indicates that the reviews by DPB, cabinet secretaries, and the Governor’s Office contribute to the length of time required to promulgate VAPA regulations. It appears that the reviews and approvals by these entities at the pre-NOIRA, pre-proposed, and pre-final regulation stages can account for nine months or more of the time spent promulgating a VAPA regulation.

Executive Review Before NOIRA Publication. The provision of VAPA addressing the NOIRA, §2.2-4007.01, does not address executive branch review prior to NOIRA publication. At this early stage in the process, the extent to which the agency knows the likely content of the planned regulation, or has begun drafting the regulation, will vary. The 2006 executive order requires DPB and cabinet secretary review of the NOIRA, and authorization by the Governor before an agency or board can publish its intent to develop a rule in the *Register*. The 2006 executive order does not continue a requirement from the 2002 executive order that DPB’s review be completed in 14 days, but DPB still abides by the 14-day limit. The 2006 executive order does continue a requirement that the secretary’s review should be completed in seven days.

Table 3 shows the amount of time spent in executive review by DPB, the applicable cabinet secretary, and the Governor, and also the cumulative total time. The data indicate that the review process may typically take about two months.

Table 3: Executive Review Time Before Submission of NOIRA to Registrar

Stage of Review	Number of Days	
	Median	Mean
DPB Review	10	10
Secretary Review	17	27
Governor Approval	19	24
All Three Stages	53	60

Note: The median for all three stages combined exceeds the median for the stages analyzed separately by seven days.

Source: JLARC staff analysis of regulations shown as active on the DPB Virginia Regulatory Town Hall in late July 2009 and also with this stage complete by November 16, 2009 (n = 61 for DPB and secretary review and n = 60 for Governor review and all three stages.)

The data also indicate that the cabinet secretaries may be infrequently accomplishing their review within the seven days stipulated in the executive order. For the regulations considered active in the Town Hall database, the median time spent in secretarial review was 17 days, and the mean was 27 days. Less than one-third of the regulations were reviewed by the cabinet secretaries within seven days.

Executive Review After NOIRA Public Comment but Before Publication of the Proposed Regulation. Under VAPA, before a regulation is published in proposed form, it must be submitted to DPB so that DPB can conduct an economic impact analysis. DPB is provided with up to 45 days to complete this analysis, and if it cannot complete the analysis within 45 days, it may advise the agency and the Joint Committee on Legislative Rules on the reasons for delay and take up to another 30 days.

VAPA does not have other requirements for executive review at this stage of the process. Under VAPA, the Governor's executive order is to contain procedures for executive review of proposed regulations, but the language does not make it clear whether the timeframe intended for that review was to be in advance of submission of the proposed regulation to the Registrar as well as following publication. VAPA does not state that the cabinet secretary or the Governor must "approve" or "authorize" the proposed regulation before it can be submitted to the Registrar. Rather, provisions for Governor and legislative action against an objectionable regulation are spelled out in VAPA for a later stage in the process.

The Governor's executive order authorizes DPB to go beyond its responsibilities for the economic impact analysis at this stage in the process and examine whether the proposed regulation package conforms to the policies of the executive order. DPB's determination is to be made within the same 45 days that are extended for

its economic impact analysis. In addition, the executive order provides that the applicable cabinet secretary shall review the proposed regulatory package within 14 days. Under the order, Governor's office approval of the package is required before the proposed regulation can be submitted to the Registrar. A timeframe for Governor Office review is not specified. Upon approval of the regulatory package by the Governor, the agency is to submit the package to the Registrar within 14 days.

Analysis of information from the Virginia Regulatory Town Hall indicates that executive review before publication of the proposed regulation may take four to five months to accomplish. Table 4 shows the amount of time spent in executive review by DPB, the applicable cabinet secretary, and the Governor, and also the cumulative total time. In the process, DPB completes its review before the regulatory "clock" for the secretary's review begins, and the clock for the Governor's approval begins once the secretary's office has "approved" the regulation.

Table 4: Executive Review Time Before Submission of the Proposed Regulation to the Registrar

Stage of Review	Number of Days	
	Median	Mean
DPB Review	45	43
Secretary Review	23	36
Governor Approval	50	64
All Three Stages	140	144

Note: The median for all three stages combined exceeds the median for the stages analyzed separately by 22 days.

Source: JLARC staff analysis of DPB Virginia Regulatory Town Hall Information. (Based on the stages of reviews completed as of November 16, 2009 for regulations under analysis; n = 55 for DPB's review, 54 for the secretary review, and 47 for Governor approval and all three stages.)

Regulatory Town Hall information indicates that with regard to currently active regulations, DPB is consistently meeting the 45-day timeframe for its review. However, the information indicates that cabinet secretaries only completed about one-third of their reviews within the 14 days provided in the executive order. For the regulations considered active in the Town Hall database, the median time spent in secretarial review was 23 days and the mean was 36 days. The time spent at the Governor approval stage typically exceeded the time spent in secretarial review.

Executive Review After Public Comment on the Proposed Regulation but Before Submission to Registrar as a Final Regulation.

VAPA §2.2-4013 addresses the Governor's review powers following completion of the public comment period on the proposed regulation. (However, the section does currently misidentify §2.2-4007.01

as the referenced comment period, which is the NOIRA comment period.) The section provides that

The Governor shall transmit his comments, if any, on a proposed regulation to the Registrar and the agency no later than fifteen days following the completion of the public comment period... The Governor may recommend amendments or modifications to any regulation that would bring that regulation into conformity with statutory authority or state or federal laws, regulations, or judicial decisions.

Not less than fifteen days following the completion of the public comment period... the agency may (i) adopt the proposed regulation if the Governor has no objection to the regulation; (ii) modify and adopt the proposed regulation after considering and incorporating the Governor's objections or suggestions, if any; or (iii) adopt the regulation without changes despite the Governor's recommendations for change.

Upon final adoption of the regulation, the agency shall forward a copy of the regulation to the Registrar of Regulations.

VAPA goes on to describe the actions which a Governor can take if the Governor finds that the final regulation published by the agency contains changes with a substantial impact from the proposed regulation, or if the Governor "objects to any portion or all of regulation." In the former case, the regulation can be suspended for further public comment. In the latter case, acting in concert with certain legislative committees, the Governor can suspend the effective date of the regulation.

This section of VAPA does not provide for executive branch review of the adopted final regulation prior to submission to the Registrar. Such a review is an added requirement of the executive order. Under the executive order, DPB is to review the agency's final regulation package and give its advice within 14 days, while the applicable cabinet secretary is then to review the regulation package and make a recommendation to the Governor within seven days. Under the order, the agency is only then "authorized to submit the final regulation to the Registrar for publication if and when the Governor approves the final regulatory package for publication" (*emphasis added*).

VAPA is specific about what agencies and the Governor are authorized to do between the publication of the regulation in its proposed form and the effective date of the regulation. The Act (1)

specifically authorizes agencies to adopt final regulations after waiting 15 days for the Governor’s comment upon the regulation in proposed form (and agencies are not required to make changes recommended by the Governor), (2) states that after adoption, agencies should forward the final regulation for publication “as soon as practicable,” and (3) contains provisions explicitly addressing how the Governor can proceed if the Governor has concerns with the final regulation as published. Consequently, the provisions of the most recent executive orders, requiring DPB and secretarial review and Governor approval prior to agency submission of the final regulation package, appear to exceed the boundaries currently set forth in VAPA.

Analysis of information from the Virginia Regulatory Town Hall indicates that executive review of the final regulation package may take three to four months. Table 5 shows the amount of time that is spent in executive review by DPB, the applicable cabinet secretary, and the Governor, and also the cumulative total time. The median and mean for the total lengths of time are 104 and 118 days, or over three months. Cabinet secretaries infrequently completed their reviews within the seven-day timeframe required in the executive order (nine of 39 regulations, or 23 percent). DPB consistently met its executive order deadlines of 14 days. Only one of the regulations was reviewed by all three entities within 15 days.

Table 5: Executive Review Time Before Submission of the Final Regulation Package to the Registrar

Stage of Review	Number of Days	
	Median	Mean
DPB Review	10	10
Secretary Review	21	32
Governor Approval	54	75
All Three Stages	104	118

Note: The median for all three stages combined exceeds the median for the stages analyzed separately by 19 days.

Source: JLARC staff analysis of DPB Virginia Regulatory Town Hall Information. (Based on the stages of review completed as of November 16, 2009 for regulations under analysis, n = 40 for DPB review, n = 39 for secretary review, and n = 33 for Governor approval and all three stages.)

In some cases, the time for executive review of final regulation packages has been exceptionally long. Total review times for regulations found in July 2009 on the Town Hall included regulations which spent 291, 260, 235, 208, and 202 days under executive review at this stage in the process. The length of time for these regulations, however, was less than the three years of time reported by an agency publishing a final regulation in 2008, as discussed in the following case study.

Case Study

A statement by the Department of General Services in the Virginia Register indicates that executive branch approval of one of its final regulation packages was received about 1,200 days, or 3.3 years, after submission. Specifically, the agency and the Division of Consolidated Laboratory Services sent a draft final regulation package “for review to the Department of Planning and Budget, the Secretary of Administration, and the Governor’s Policy Office, in March 2005.” The DGS statement in the Register notes that “this executive review was ongoing until July 10, 2008, when the Governor’s Office approved the final regulations to be promulgated in the Virginia Register.”

Total Executive Branch Review Time Can Account for Nine Months or More of the Time Taken to Promulgate VAPA Regulations. Table 6 summarizes the time spent by DPB, cabinet secretaries, and the Governor’s Office in reviewing regulations at the pre-NOIRA, pre-proposed, and pre-final stages of promulgating a VAPA regulation. The data suggest that the pre-NOIRA review may take about two months, the review of the proposed regulation may take about four to five months, and review of the final regulation may take three to four months. Consequently, a regulatory effort which experiences external review times of this magnitude at these stages will spend about nine to ten months of the time under executive branch review.

Table 6: Executive Review Time in Days, Three Stages of Review of VAPA Regulations

Stage	Median	Mean
Pre-NOIRA	53	60
Prior to Proposed	140	144
Prior to Final	104	118
Sum of Three Results	297	322
Result in Months	9.8	10.6

Source: JLARC staff analysis of Town Hall data for regulations considered active in late July 2009 and based on stages of review completed as of November 16, 2009.

As noted earlier in the chapter, even fast-track regulations may not be promulgated quickly, with some recent fast-track regulations taking about seven to eight months to promulgate. The executive review process for fast-track regulations appears to be a major factor in the longer timeframes for fast-track regulations compared to emergency and exempt regulations (Table 7). An average of 105 days was spent in external review of some recent fast-track regulations, of which about 96 days or 3.2 months were due to review by DPB, the secretary, and the Governor. The review

Table 7: Average and Median Number of Days for the External Review of Emergency, Exempt, and Fast-Track Regulations

Process Used	Attorney General Certification	DPB Review	Secretary Review	Governor Review	Total Time in Review
Emergency	6 / 5	10 / 11	14 / 10	40 / 23	70 / 46
Exemption	6 / 1	n.a.	n.a.	n.a.	6 / 1
Fast-Track	9 / 4	35 / 39	35 / 28	35 / 42	114 / 110

Source: JLARC staff data analysis of timeframes based on regulations in these categories as indicated by information on the Virginia Regulatory Town Hall in July 2009. For emergency regulations and exemptions, n = 8 and 32, respectively. For fast-track regulations, n = 19. Medians for the total time in review are close to but not equal to the sum of the medians for the review components.

time accounted for almost half of the time spent promulgating these regulations.

For fast-track regulations, the Attorney General's Office assesses the agency's legal authority to issue the proposed regulation. This review typically takes about four to nine days. In addition, the current executive order requires DPB to assess whether the fast-track regulation is appropriately within the intended scope of fast-track authority. DPB staff indicate that they make this assessment within ten days. VAPA also provides up to 30 days for DPB to conduct an economic impact analysis of the fast-track regulation. However, Town Hall data indicate that over two months of additional time may typically be spent waiting for secretarial and Governor review of the fast-track regulation. The need for this review and the length of time spent upon it is questionable. VAPA makes it very easy to compel the agency to follow the standard promulgation process if any concerns about the fast-track regulation surface during the public comment period for the regulation. The content of some of the regulatory changes indicates that regulations can be stalled due to regulations being neglected rather than because of time needed for an active substantive review. The following case studies illustrate the point that some very basic fast-track regulatory changes experience substantial delays due to review.

Case Study

One fast-track regulation changing the due date for a certification spent 185 days in executive review. Specifically, in 2006 the Virginia Department of Education (DOE) promulgated a regulation that required local school divisions to certify by April 15th of the school year that they had implemented a plan for making up any missed days. In 2009 DOE promulgated a fast-track regulation to change the due date of the certification from April 15 to the end of May each school year. Revising the due date was the only change to this regulation. This fast-track regulation took 274 days to become effective and 185 of these days were spent in review.

Case Study

A fast-track regulation of the Board of Counseling spent 135 days in executive review before becoming final on July 23, 2009. The purpose of the fast-track regulation was to clarify an oversight in a regulatory revision from the previous year. The regulatory revision had added a provision to allow clinical practice in another state to count towards licensure in Virginia. The intent was that the experience be “post-licensure,” but the regulation did not state this. Therefore, the board promulgated a fast-track regulation to clarify this. This also was to ensure that requirements for the board are consistent with other professional boards that use the “post-licensure” statement. This fast-track regulation took 206 days from filing to become effective and 135 of these days were in review.

Changes May Be Needed to Avoid Unnecessary Delays in the Rulemaking Process

Executive branch review appears to contribute to the slow and unpredictable timeframes for standard and fast-track VAPA regulations which make exemptions attractive or imperative for agencies. As will be discussed in the next chapter, such an extensive, multi-stage executive branch review process appears to occur in few other states. Furthermore, the time spent in executive branch review in Virginia rivals the total rulemaking timeframes reported in some states. There are some options which could be considered to potentially expedite Virginia’s executive branch review process in the future. Specific options include

1. ***VAPA and future executive orders could be written to eliminate executive branch review at the NOIRA stage.*** At this stage, the agency or board is only indicating that it is considering developing or amending a regulation on a particular subject matter. The purpose of the NOIRA is to gain feedback from the public and others as to what it should consider before proposing a regulation in this area. If executive branch reviewers have any concerns, their consideration and feedback could be provided simultaneously with the public comment period on the NOIRA.
2. ***VAPA and future executive orders could be written to limit DPB’s review responsibilities to its preparation of the economic impact analysis already required by the act.*** VAPA currently requires DPB to perform an analysis of the economic impact of proposed regulations. However, the Act does not require DPB to conduct reviews of regulatory policy. Currently, both DPB and Governor policy office staff review regulations from a policy perspective.

This redundancy adds time to the process. To the extent that the Governor's Office is active in such policy reviews, the DPB review could be eliminated.

3. ***For regulations to which the standard VAPA process applies, both VAPA and future executive orders could be written to explicitly authorize agencies to proceed with submitting their proposed regulatory package either (1) within 15 days following completion by DPB of its statutorily-prescribed economic impact analysis, or (2) sooner, if advised that the executive branch review is complete.*** The purpose of this option is to set forth an expectation that agencies can proceed with the process if reviewers have not responded to the agency with their comments within an established timeframe.
4. ***For fast-track regulations, both VAPA and future executive orders could be written to expedite executive branch review.*** Executive orders could be written to include a requirement that executive branch review of fast-track regulations shall be completed within no more than 40 or 50 days from the time of agency submission of the regulation to DPB. The 40-day maximum time would include ten days for an assessment of the fast-track status and 30 days for DPB's required economic impact analysis. Up to an additional ten days could be allotted if further review by the secretary or Governor is deemed necessary.

Also, once the agency has submitted its proposed regulation package to the Registrar and it has been published, VAPA already contains specific provisions to expedite the process. As previously noted, VAPA requires that "no later than 15 days" following the close of the public comment period on the proposed regulation, the Governor is to transmit comments, if any, on the proposed regulation; and after that time has passed, the agency is authorized to proceed with adopting the regulation and to forward the regulation to the Registrar. Implementation of the rulemaking process would be expedited if this provision of the act were to be followed. The following recommendation addresses this issue.

Recommendation (1). Regarding the Governor's review following completion of the public comment period on proposed regulations, future executive orders should be developed to be consistent with the terms contained in §2.2-4013 of the Virginia Administrative Process Act.

Virginia Compared to Other States

In Summary

Many regulatory actions that are exempt from the Virginia Administrative Process Act are not exempt in other states. In addition, the proportion of regulations promulgated as exempt is higher in Virginia than in other states. Variations in the definitions used in other states' administrative process acts (APAs) account for some of these differences. However, fewer stages and shorter timeframes in the APA process, as well as more limited executive branch review, appear to generally lead to the faster promulgation of regulations in other states compared to Virginia. Across states surveyed, the average timeframe for processing regulations from publication of the proposed regulation to completion of the rulemaking action is about five to six months faster than in Virginia. All states appear to allow regulations to be promulgated on an emergency basis, and some states use emergency regulations instead of exemptions to achieve rapid promulgation. However, emergency regulations in other states tend to be in effect for a shorter duration than in Virginia.

Information about administrative procedures for promulgating regulations and exemptions in other states provides an additional context for evaluating Virginia's use of exemptions. To gather information on other states' administrative process or procedures acts (APAs), JLARC staff conducted a survey of the 49 other states and the District of Columbia (D.C.). Thirty-six states and D.C. responded to the survey for a 74 percent response rate. (Two states responded that many of the questions were not relevant because the APA in their state is so different from Virginia's.) Differences between administrative procedures in other states and their use of exemptions are discussed below.

OTHER STATES HAVE FEWER EXEMPTIONS AND PROMULGATE A LESSER PORTION OF RULES AS EXEMPT

As discussed in Chapter 1, three abbreviated processes for promulgating regulations are permitted by the *Code of Virginia*, including (1) exemptions to the VAPA, (2) a non-emergency expedited VAPA process, and (3) emergency regulations. Of the three types of expedited processes, the focus of this review is on VAPA exemptions, and so most survey questions asked about the use in other states. Survey results indicate that many of the specific exemptions contained in VAPA are infrequently or not recognized as exemptions in other states. Partly as a consequence, the proportion of regulations promulgated as exempt is higher in Virginia than other states. However, it is important to note that variations across

states in the definition of what constitutes a rule or regulation appears to account for some of the difference.

Proportion of Regulations Promulgated as Exempt in Other States Is Less

Among other states that responded to the JLARC survey, all have emergency regulations and most have some exemptions to their APA. A smaller proportion of other states has an expedited process for non-emergency situations. Table 8 shows Virginia compared to other states.

Table 8: Other States’ Use of Alternative Processes for Faster Promulgation of Regulations

Alternative Process	Responding States	
	Number	Percent
Emergency regulations	37	100%
Exemptions	31	84
Expedited process in non-emergency situations	9	25

Note: Thirty-seven states responded to questions about emergency regulations and exemptions (n=37) and 36 responded to a question about non-emergency situations (n=36).

Source: JLARC staff survey of other states.

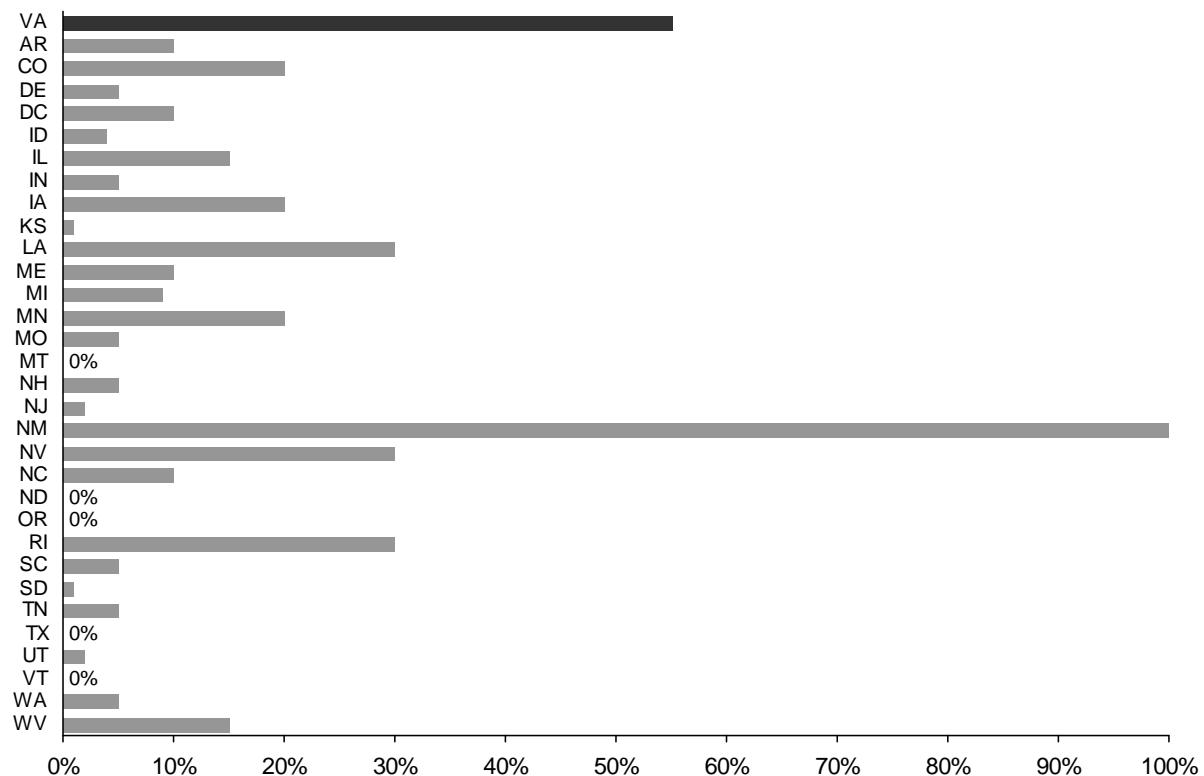
Some States Define a Regulation More Narrowly Than in Virginia

The *Code of Virginia* defines a regulation as a “statement of general application, having the force of law, affecting the rights of conduct of any person” that is duly adopted by an agency. Some states define a regulation more narrowly, thus excluding certain agency actions from APA purview. Georgia’s definition of a rule has 10 exclusions, North Carolina 11, and Michigan 17. For example, Michigan excludes game and fishery actions from its definition of a rule; thus, no exemption from the APA is needed. In Virginia, these actions are considered rules, but are exempt from the APA. Changes to seasonal hunting regulations in Georgia are done by issuing orders rather than by regulation.

Exempt regulations in Virginia account for a greater proportion of all promulgated regulations than in all 30 other states that have an active APA and provided data for the survey question. Approximately 55 percent of promulgated regulations over the last five years were exempt from VAPA, while an average 9.1 percent of regulations were exempt in other states over the previous two years. A range of zero to 100 percent of regulations was exempt across all states (Figure 7). Louisiana, Nevada, and Rhode Island had the second greatest proportion of exempt regulations after Virginia over the previous two years with 30 percent. Five states report that no regulations were promulgated as exempt during the past two years: Montana, North Dakota, Oregon, Texas, and Vermont.

New Mexico promulgated 100 percent of regulations outside of the APA. When the APA was enacted in 1969, New Mexico exempted all state agencies from the provisions of the act. The legislature exempted all agencies from these provisions with the idea that agencies would be placed under the act through other legislation or by agency choice. This never occurred. However, other sections of statute require the filing and notice of new rules. Specific requirements vary by agency. Since New Mexico does not have an active APA, it is not included in the analysis of questions that are specific to the operation of APAs.

Figure 7: Proportion of Regulations Promulgated as Exempt in Virginia and Other States



Note: State Registrar data for Virginia is based on five-year average and for other states is two-year average. Some states appear to include emergency regulations in their proportion and others do not. Virginia analysis does not include emergency regulations.

Source: Data from the Office of the Registrar of Regulations and Division of Legislative Automated Systems for Virginia and JLARC staff survey of other states.

Model APA

The National Conference of Commissioners on Uniform State Laws issued model administrative procedures acts in 1946, 1961, 1981, and is in the process of drafting a revised model to be adopted in July 2010. States' APAs tend to combine various components of these models. The 1981 model act includes exemptions for the legislature, courts, governor, and political subdivisions of the state.

Many of Virginia's Exemptions Are Not Used in Other States

As previously mentioned, VAPA lists 65 specific exemptions to the act. Ten of these are blanket exemptions, exempting an entire body, board or agency, etc. The remaining 55 VAPA exemptions are either specific actions (conducted by an agency) or a particular function of a specific agency.

The most common APA exemptions in other states are for the state legislature, courts, and political subdivisions of the state (local governments). Fifty-three percent of responding states exempt all three of these bodies, as does Virginia, and 72 percent exempt one or more. As previously mentioned, states have different ways of defining regulations and exemptions. This percentage may appear low because some states do not define these entities as rulemaking bodies that are subject to the APA.

Forty percent of responding states (14 states) have at least one blanket exemption while 60 percent (21 states) have none. (Virginia has seven blanket exemptions, not including the legislature,

courts, and political subdivisions.) Among those states with blanket exemptions and an active APA, the average is 5.6 and the range is from one to 14. There is not a clear pattern as to which agencies, commissions, or boards are granted a blanket exemption. Besides those entities mentioned above, the most common blanket exemptions involve public and higher education boards (five states), state universities (four states), parole boards and commissions (three states), and public service commissions (three states).

In addition to blanket, commission, or board exemptions, actions and functions of the states may also be exempt from the APA. On average, 7.5 general regulatory or specific agency actions are exempt from APAs in other states. The range is from zero to 27 exemptions, except for New Mexico which exempts all state agencies. States were asked to identify if any of 41 exemptions of general regulatory or specific agency actions contained within the VAPA are exempt from their APA. Among the 35 responding states, 11 of these exemptions are not exempt in any of these states (Exhibit 2).

Exhibit 2: Eleven VAPA Exemptions Are Not Exemptions in Other States

Regulations related to milk production and sales, §2.2-4002 A7
Regulations regarding the inspection of buildings for asbestos, §2.2-4002 A10
Regulations related to fertilizer and other chemicals used in agricultural processes, §2.2-4002 A13
Regulations of the Board of Optometry related to treatment guidelines, diseases and conditions of the eye, and associated pharmaceuticals. §2.2-4002 A14
Board of Health with regards to the list of diseases required to be reported to the health department, §2.2-4002 A23
Continuing education for pharmacists, §2.2-4002 A26
Preliminary program permit fees of the state environmental protection agency, §2.2-4006 A5
Regulations related to pesticide control, §2.2-4006 A6
Regulations that reduce fees charged to applicants of professional, occupational, and labor boards, §2.2-4006 A7
Regulations related to the state fire prevention code and to Industrialized building safety law, §2.2-4006 A13
Amendments to the list of drugs susceptible to counterfeiting adopted by the Board of Pharmacy, §2.2-4006 A14

Note: This analysis does not include New Mexico, which exempts all state agencies from the APA.

Source: *Code of Virginia* §2.2-4002 and §2.2-4006 and JLARC staff survey of other states, n=35.

The primary justification used by other states for APA exemptions is to prevent harm to persons or property (54 percent of states). APA staff in other states were asked to identify key rationales for the use of APA exemptions. Seven states identified no key rationale for exemptions in their state and most of these have no or few APA exemptions (Table 9).

Table 9: Other States' Key Rationales for APA Exemptions

Rationale	Responding States	
	Number	Percent
Fast action is required to prevent harm to persons or property	19	54%
Fast action is required to prevent a problematic inconsistency between an agency rule and new statutes (state or federal) or judicial decisions	10	29
Fast action is required to maximize federal funds or prevent their loss	10	29
Fast action is required to regulate seasonal activities	9	26
Activity is deemed inappropriate for public participation	6	17
Agency lacks discretion in regulations (e.g., federal law)	5	14
Fast action is required to prevent dislocations in the marketplace	5	14
Legislation provides that first regulations developed under the new law are to be exempt	4	11

Source: JLARC staff survey of other states, n=35.

OTHER STATES' ADMINISTRATIVE PROCEDURES LEAD TO FASTER PROMULGATION OF REGULATIONS

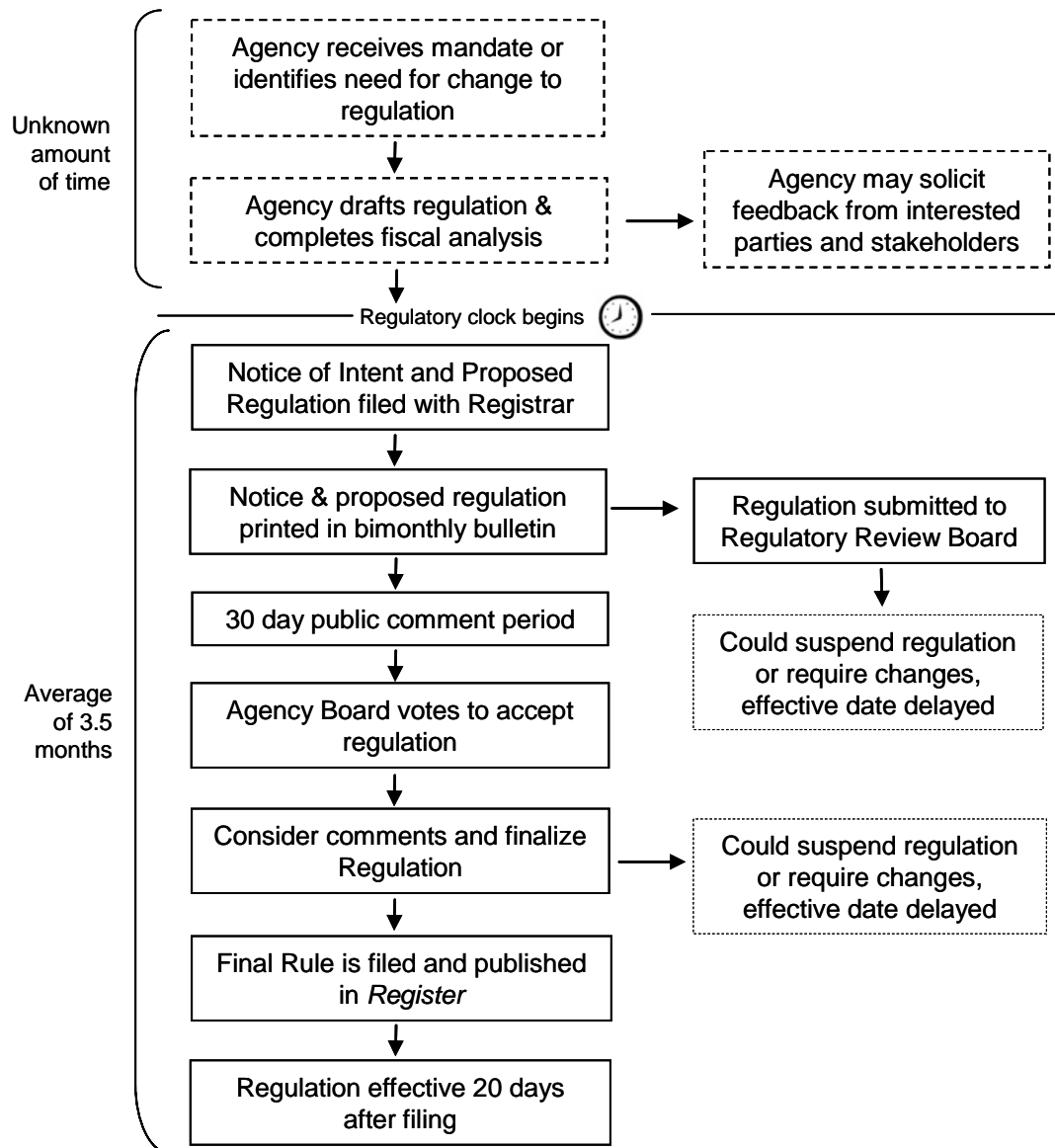
Fewer stages, shorter required timeframes in the stages, and shorter review times each contribute to the faster promulgation of regulations in other states compared to Virginia. The average timeframe for promulgating regulations is about seven months faster in other states than in Virginia.

Other States Have Fewer and Shorter Stages in Their APAs

The stages of the rulemaking process vary across states, and some states have fewer steps to promulgate regulations. In at least 31 states (86 percent of survey respondents), the public notice of a regulatory change and draft regulations are published at the same time. Most states do not have the NOIRA stage that alerts the public and interested parties prior to drafting regulations. Figure 1 in Chapter 1 showed the stages in Virginia's rulemaking process, and Figure 8 provides an example of the APA process in some other states.

Virginia's process allows more time for public comment than is typically available in other states. In Virginia, there are public comment periods after the NOIRA is published and after the proposed regulation is published. Since most other states do not have a NOIRA stage, only one opportunity for public comment is provided. Public comment periods in many states are a total of 30 days, compared to Virginia's combined total of 90 days.

Figure 8: Example of APA Process in Several Other States



Source: JLARC staff survey of other states and analysis of statutes from Georgia, Iowa, Rhode Island, Texas, and Utah.

Complying with minimum statutory APA requirements in other states takes an average of 3.5 months, with a range of from one to nine months. As indicated in Chapter 2, in Virginia, the timeframes explicitly set forth in VAPA require at least four months for completion, while the allowable timeframe for the required steps is up to six months.

Other states also appear to have fewer levels of review and approval for the regulations. For example, many states do not include a gubernatorial review. Most states have legislative review of regulations or both legislative and executive branch review (Table 10).

Table 10: Type of Review of Proposed Regulations in Other States

Reviewing Branch	Responding States	
	Number	Percent
Legislative	14	39%
Legislative and Executive	13	36
Executive, Legislative, and Independent	3	8
Executive	2	6
Independent	2	6
None	2	6

Source: Administrative Codes and Registers Section of the National Association of Secretaries of States, 2007-2009 State and Federal Survey, n=36.

Types of review in other states are described below:

***In Iowa,** the administrative rules review committee meets monthly and has 35 days to take action on proposed rules. The Governor’s administrative rules coordinator reviews all rules, but this does not delay the process. If necessary, this review continues after the final rule is published.*

***In Utah,** there is no time limit imposed on the administrative rules review committee; however, this does not delay final publication and the effective date of the rules. If issues arise, the committee has the ability to review final and effective rules. The Governor’s office of planning and budget has one staff person who reviews all rules concurrent with the 30-day public comment period. No approval is required by either the committee or office of planning and budget. Final rules are submitted seven days after the conclusion of the public comment period. If a problem arises after the final publication of a rule, a ‘change of proposed rule’ is filed.*

***Connecticut** reported the longest average time for promulgating regulations under APA among states responding to the survey. The Governor’s office of policy and management and the legislative regulatory review committee review and approve regulations. According to a legislative review staffer in that state, staff in the Governor’s office are not bound by any time-frame requirements, and regulations tend to “get bogged down.” The legislative committee has 65 days to consider and approve the regulations.*

***In Rhode Island,** the Governor reviews regulations prior to public notification. While there is no statutory timeframe for the Governor’s review, the Rhode Island Code requires that he/she receive the regulations “reasonably in advance.” Administrative rules staff in Rhode Island report that most agencies submit these regulations five to ten days in advance*

of filing and that this is generally accepted and reasonable for all parties.

Regulations Appear To Be Promulgated Faster in Other States

When comparing timeframes across the states, it is important to consider that the regulatory “clock” may begin at different points in the process. The regulatory clock measures the amount of time that it takes to promulgate a regulation using the administrative process.

In Virginia, the NOIRA alerts the public and interested parties that an agency intends to draft regulations, and there is an opportunity for the public to comment prior to publication of a proposed regulation. Based on survey results, it appears that in most states the clock on promulgation also begins when the public is notified of the agency’s intent to take regulatory action, but in many states this notification happens at a point that comes later in Virginia, when the draft regulation itself is first published for comment. In some other states, final regulations may take effect in as little as one month, because the regulatory clock is considered to begin at the time when the intended regulation is published.

Analysis shows that in Virginia, an average of 14 months is spent during the stage from publication of the NOIRA to publication of the proposed regulation. This includes the time for NOIRA comment, development of the regulation, executive branch review of the proposed regulation, and board adoption as needed. With the NOIRA stage included as part of the time for implementing the APA, Virginia’s total timeframe averages 25.9 months, or 2.2 years. However, since counting this time is largely unique to Virginia, the portion of the regulatory process that is most comparable is the time spent from publication of the proposed regulation to completion. Focusing on this portion of the process, Virginia’s average timeframe is 11.7 months, still between five and six months longer than the average of other states (Table 11).

Table 11: Average Timeframes for Promulgation of Regulations in Other States Compared to Virginia, in Months

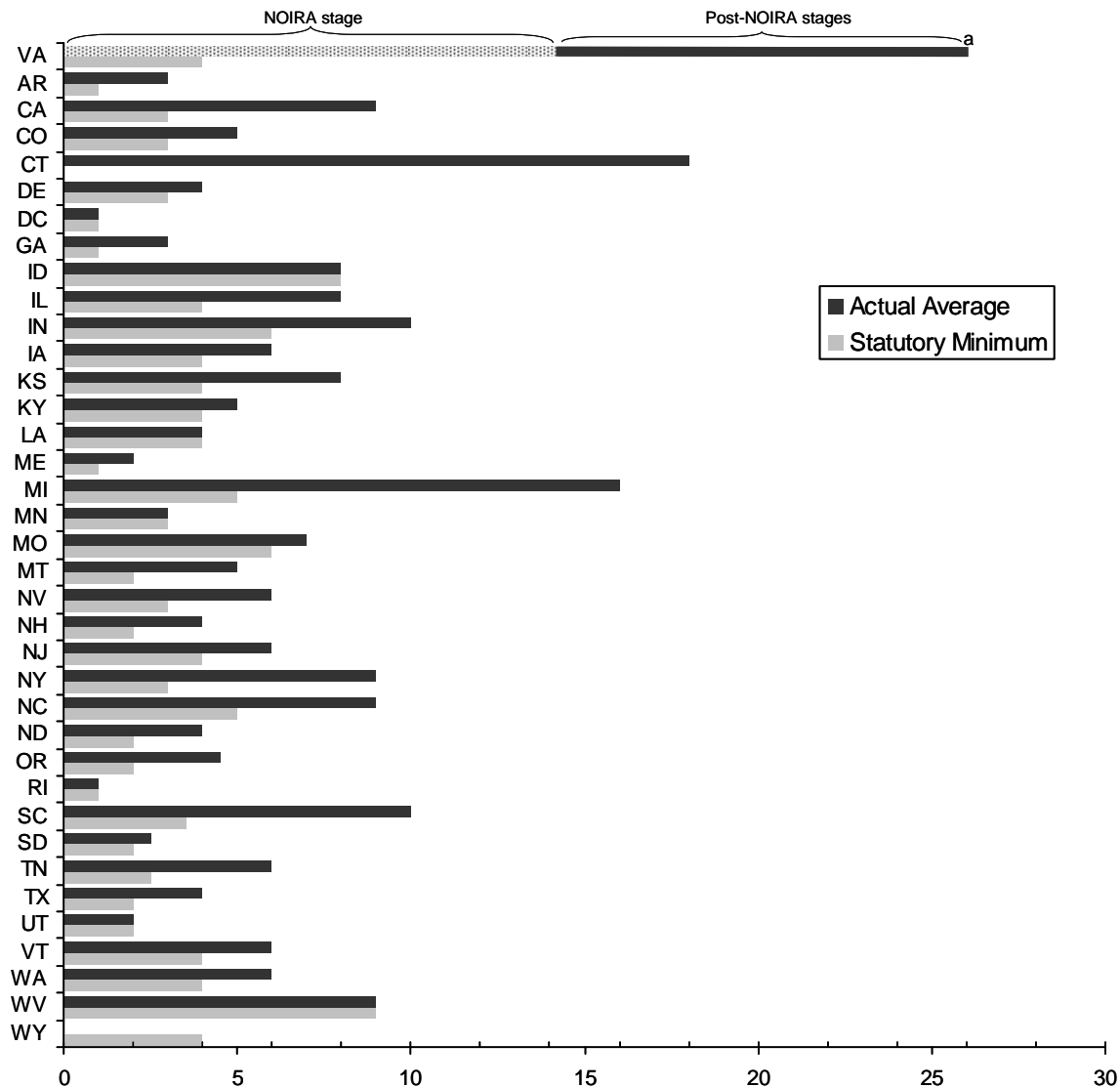
	Including NOIRA	Excluding NOIRA
Other States	n/a ^a	6.1
Virginia	25.9	11.7

^aMost other states surveyed do not have the NOIRA process.

Source: JLARC staff survey of other states (n=35) and analysis of data provided by the Office of the Registrar of Regulations and Division of Legislative Automated Systems.

Figure 9 summarizes the data obtained from the survey on statutory minimum timeframes and actual average timeframes for promulgating regulations. Data from other states are compared to Virginia. In part, Virginia's lengthier timeframe is due to having a fuller accounting of the time spent, because the time spent preparing the proposed regulation is included. However, additional factors include more time provided in statute for public comment, and more time spent in practice in external review of the regulations.

Figure 9: Statutory Minimum and Actual Average Timeframes for the Promulgation of Regulations in Virginia and Other States, in Months



^aMost other states do not have a NOIRA stage. Indiana, Minnesota, and Washington do appear to have a notice period prior to publication of the proposed regulations.

Source: JLARC staff survey of other states (n=35) and data from the Office of the Registrar of Regulations and Division of Legislative Automated Systems for Virginia.

REGULATIONS PROMULGATED AS AN EMERGENCY ARE IN PLACE FOR LESS TIME IN OTHER STATES

The use of an emergency process is an alternative means to an exemption for achieving more rapid processing of a regulation. All states appear to allow regulations to be promulgated on an emergency basis, although the amount of time before they must be replaced by permanent regulations tends to be shorter in duration than in Virginia. Emergency regulations can be in effect for an average maximum of five months in other states (ranging from two to 24 months), and 12 months in Virginia. Emergency regulations in Minnesota remain in effect for up to 24 months, and emergency regulations in Iowa are in effect indefinitely.

Like Virginia, many states permit an extension for emergency regulations (3.5 months on average), but not all states allow for extended emergency regulations. As mentioned in Chapter 1, the *Code of Virginia* allows for a six-month extension. Other requirements related to emergency regulations vary. For example, in Idaho emergency regulations remain in effect until the conclusion of the next legislative session, allowing the state legislature to take action.

Some states, especially those with few or no APA exemptions, use emergency regulations instead of exemptions to achieve rapid promulgation. In such cases, if a regulation needs to be changed quickly, the agency will issue an emergency regulation. In Texas, for example, an agency may promulgate an emergency regulation to update certain numbers or limits on seasonal activities. The agency may then issue a replacement emergency regulation the following year.

Based on an analysis of other states' statutes, the most common justification for emergency regulations is an imminent threat to the public health, safety or welfare. Although less common, some states have multiple justifications for emergency regulations (Table 12). Virginia allows emergency regulations when an agency finds that they are necessary, in consultation with the Attorney General, and permission must be granted by the Governor or when the statute says they must be implemented in 280 days. Among survey respondents, approval from the Governor is required in nine other states, and five other states require approval from the Attorney General.

Table 12: Common Justifications for Emergency Regulations in Other States

Justification for Emergency	Percent of Responding States	Virginia
Imminent peril to the public health, safety, or welfare	88%	No ^a
Compliance with federal law or regulations	24	Yes
Confers a benefit to the state	12	No
Agency identifies necessity	12	Yes
To prevent financial loss	9	No

^a Virginia used this language prior to 2007. This is the underlying rationale for emergency regulations in Virginia; however, the *Code of Virginia* does not contain this language as 88 percent of other states do.

Source: JLARC staff survey of other states (n=33) and statutes.

Analysis of Need for VAPA Exemptions

In Summary

There are 65 specific exemptions to the rulemaking process outlined in the Virginia Administrative Process Act (VAPA). Most of these exemptions, however, are rarely used. Since 2004, three agencies (Marine Resources Commission, Department of Game and Inland Fisheries, and State Corporation Commission) have accounted for 65 percent of all exempt regulations. These agencies, as well as others using exemptions, provide opportunities for public input on exempt regulations.

Three exemptions have been identified through this review that appear to be unnecessary and could be discontinued, and two other exemptions should be modified. Five additional exemptions have been identified which might also be discontinued, in most cases because it does not appear that the agency actions have a “force of law” or compulsory element meeting the regulation definition. Still, despite some concerns noted by the regulated community, most of the exemptions appear to be necessary, particularly given the lengthy rulemaking process in Virginia. The length of time required for promulgation through VAPA has several consequences, including the need for more exemptions, more emergency regulations, and other means to bypass the normal process, as well as greater confusion among the public.

Data analysis and surveys were used to gather information on the recent use of VAPA exemptions, as well as the rationales for and concerns regarding these exemptions. Despite the large number of exemptions listed in VAPA, a small number of exemptions account for the vast majority of all exempt regulations. Although most regulations promulgated in Virginia are exempt from VAPA, agencies promulgating these regulations do have public input processes. Interest groups and the regulated community have some concerns regarding exemptions, but most VAPA exemptions are found to still be needed, especially given the lengthy promulgation process. The lengthy promulgation process does have consequences on rulemaking in Virginia, however, and these consequences are discussed below.

A SMALL NUMBER OF EXEMPTIONS ACCOUNT FOR MAJORITY OF EXEMPT REGULATIONS

The Virginia Administrative Process Act (VAPA) lists 65 specific exemptions to the act. However, only a few of these exemptions account for the majority of exempt regulations over the past five years. Similarly, a small group of agencies are responsible for a

majority of the exempt regulations over this time period. Many exemptions have never been used to promulgate regulations (at least since January 2004) but may still be important to the agencies as they allow them to conduct their business and adopt rules and guidelines without the need for new regulations. Appendix D lists each of the exemptions contained in VAPA, along with the number of times each has been used to adopt a regulation, agency justifications, and specific concerns expressed by the regulated community.

From January 12, 2004, through August 17, 2009, 1,035 regulations were promulgated via an exemption. Of these exempt regulations, 163 were for adopting public participation guidelines, which all agencies with regulatory authority were required to adopt pursuant to Chapter 321 of the 2008 Acts of Assembly. Another 375 exempt regulations were for implementing Virginia or federal laws in which the agency had no discretion. In many instances, Virginia agencies issue regulations to implement federal law. For example, a 2006 JLARC study on the impact of regulations on manufacturing in Virginia found that Virginia regulations applicable to the manufacturing sector generally follow federal regulations and are not substantially different from other states. Regulations that consisted only of changes in style or form or corrections of technical errors accounted for 75 exempt regulations. Thus, only about 43 percent of these regulations were actually new rules in which the agency had discretion or in which the rules affected the general public.

Table 13 lists the ten exemptions used most frequently since 2004. These ten exemptions accounted for about 91 percent of all exempt regulations, and the top five accounted for nearly 75 percent.

Most of the regulations promulgated in which the agency or board had discretion, or in which the rules affected the general public, were environmental regulations: regulations of the Marine Resources Commission (182), Department of Game and Inland Fisheries (66), and Departments of Environmental Quality and Conservation and Recreation (State Air Pollution Control, State Water Control, and Virginia Soil and Water Conservation Boards) (19). Agencies with the powers of a court of record, the State Corporation Commission and the Virginia Bar Association, also accounted for a significant number of exempt regulations (56).

Table 14 lists the top 20 agencies, boards, or commissions ranked by the number of exempt regulations promulgated since the start of 2004. Not counting the public participation guidelines that all agencies were required to promulgate, these 20 agencies accounted for more than 80 percent of all the exempt regulations promulgated over this period of time. The Marine Resources Commission

Table 13: Most Frequently Used Exemptions for Regulations Promulgated (2004-2009)

Rank	Exemption	Description	Number Promulgated	Percent of Total
1	§2.2-4006. A.4.a.	Regulations necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved	270	24.9%
2	§2.2-4006 A12	Marine Resources Commission regulations	182	16.8
3	Chapter 321, 2008 Acts of Assembly	Public Participation Guidelines	163	15.1
4	§2.2-4006 A4c	Regulations necessary to meet requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation, and the Registrar has so determined in writing	104	9.6
5	§2.2-4006 A3	Regulations that consist only of changes in style or form or corrections of technical errors	75	6.9
6	§2.2-4002 A3	Department of Game and Inland Fisheries wildlife management regulations	66	6.1
7	§2.2-4002 A2	Courts, any agency of the Supreme Court, and any agency that the Constitution expressly grants powers of a court of record	56	5.2
8	§2.2-4006 A7	Regulations of the regulatory boards served by (i) the Department of Labor and Industry pursuant to Title 40.1 and (ii) the Department of Professional and Occupational Regulation or the Department of Health Professions pursuant to Title 54.1 that are limited to reducing fees charged to regulants and applicants	33	3.0
9	§2.2-4006 A9	General permits issued by the (a) State Air Pollution Control Board, (b) State Water Control Board pursuant to State Water Control Law, (c) Virginia Soil and Water Conservation Board pursuant to the Virginia Stormwater Management Act, and (d) the development and issuance of general wetlands permits by the Marine Resources Commission	19	1.8
10	§2.2-4002 A4	Grants of State or federal funds or property	15	1.4

Note: Some regulations cite more than one exemption. Percentages are based on a total of 1,083 exempt regulations cited.

Source: *Virginia Register of Regulations*. Vol. 20, Issue 9– Vol. 25, Issue 25.

accounted for the most exempt regulations, with more than one-fifth of the total. This list of the top users of exemptions is characterized mostly by environmental boards and agencies as well as the boards of the Department of Health Professions.

It should be noted that many of the regulations promulgated by the agencies represented in Table 14 were ones in which the agency had no discretion, or in which the agency was simply making changes to the style or form of the regulation or correcting technical errors. By removing these types of regulations, the remainder is a list of substantive rules changes in which the agen-

Table 14: Entities that Promulgated the Most Exempt Regulations (2004-2009)

Rank	Agency/Board/Commission	Number Promulgated	Percent Promulgated	Cumulative Percent
1	Marine Resources Commission	182	20.9%	20.9%
2	Department of Game and Inland Fisheries	66	7.6	28.4
3	State Corporation Commission	52	6.0	34.4
4	State Air Pollution Control Board	50	5.7	40.1
5	State Water Control Board	48	5.5	45.6
6	Board of Medicine	39	4.5	50.1
7	Department of Medical Assistance Services	38	4.4	54.5
8	Dept. of Agriculture and Consumer Services	37	4.2	58.7
9	Board of Counseling	24	2.8	61.5
10	Department of Labor and Industry	24	2.8	64.2
11	Virginia Racing Commission	20	2.3	66.5
12	Virginia Safety and Health Codes Board	18	2.1	68.6
13	Board of Nursing	15	1.7	70.3
14	Board of Pharmacy	13	1.5	71.8
15	Department of Health	13	1.5	73.3
16	Department of Transportation	13	1.5	74.8
17	Commonwealth Transportation Board	12	1.4	76.1
18	State Board of Social Services	12	1.4	77.5
19	Virginia Housing Development Authority	12	1.4	78.9
20	Virginia Waste Management Board	12	1.4	80.3

Source: *Virginia Register of Regulations*. Vol. 20, Issue 9– Vol. 25, Issue 25.

Two agencies (the Marine Resources Commission and the Department of Game and Inland Fisheries) accounted for more than half of all substantive and discretionary exempt regulations since 2004.

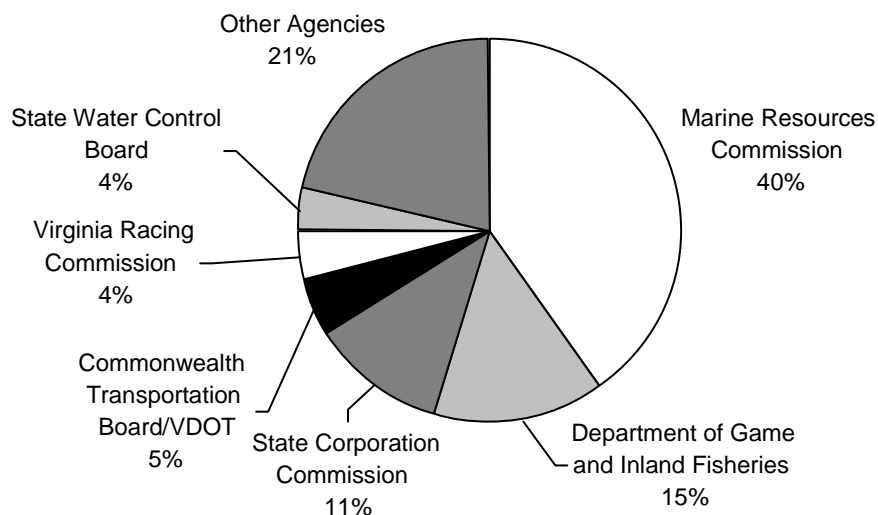
cies had discretion in the nature and parameters of the regulations. These are the regulations in which additional public debate and executive review through the normal VAPA process might be most beneficial.

Figure 10 shows that a handful of agencies were responsible for the majority of substantive, discretionary exempt regulations. Two agencies (the Marine Resources Commission and the Department of Game and Inland Fisheries) accounted for more than half of all substantive and discretionary exempt regulations since 2004. The regulations of those two agencies pertain primarily to hunting and fishing procedures and limits, which must be amended seasonally to adjust for new information on the numbers and health of the fish and animal populations. The only other agency with more than 20 substantive, discretionary exempt regulations over the past five plus years was the State Corporation Commission.

PUBLIC HAS OPPORTUNITY FOR INPUT ON EXEMPT REGULATIONS

Even though regulations may be exempt from VAPA, the public still has opportunity to comment on them. Despite the exemptions, agencies are still required to post the proposed regulations in the *Virginia Register of Regulations* pursuant to the Virginia Register Act and hold open board meetings. All agency boards are required

Figure 10: A Few Agencies Account for Majority of Substantive, Discretionary Exempt Regulations (2004-2009)



Source: *Virginia Register of Regulations*. Vol. 20, Issue 9–Vol. 25, Issue 25.

A major difference between exempt and non-exempt regulations is that the exempt regulations are not subject to executive branch reviews.

to hold open meetings, and interested parties are allowed to address their concerns to the board members. Furthermore, the enabling statutes for the agencies often specify certain procedures that agencies must follow when developing new regulations.

However, the length of time that is available for public comment is typically less for exempt regulations. In addition, a major difference between exempt and non-exempt regulations is that the exempt regulations are not subject to executive branch review from the Department of Planning and Budget, cabinet secretaries, and the Governor.

Examples of public notification and input processes at the agencies that have used exemptions most often to promulgate regulations are provided below. These examples illustrate that although the timeframe for public comment may not be as extensive as VAPA requires, they do offer an opportunity for concerned citizens to express their opinions on proposed regulations. In addition, public notification procedures and timeframes for public input vary widely among exempt agencies.

Marine Resources Commission

Proposed fishery regulations are discussed on at least two occasions by the agency's citizen advisory panels, posted on the agency website and at 117 waterfront and other locations (marinas, tackle shops, etc.), and advertised in the required newspapers in Richmond, Norfolk, and Newport News. The commission also advertises in regional papers in

the Northern Neck and Eastern Shore. In addition to the public advisory panel meetings, the commission holds at least one public hearing in their presence prior to final action. Comment periods of a 30-day minimum are standard. Occasionally, comment periods are extended to 60 days. Once a proposed regulation is drafted, it typically takes 60 to 90 days to become effective.

Department of Game and Inland Fisheries

Prior to regulatory reviews, the Game and Inland Fisheries Board adjusts the review process as needed, and DGIF posts the processes and schedules online in advance of the regulatory reviews. DGIF basic law mandates that before a proposed regulation or amendment may be acted on, the public must be notified of the time and place at which it is to be addressed, “at which time any interested citizen shall be heard” (§29.1-501 B).

For the 2008-09 hunting and trapping regulation review and amendment process, three board meetings were scheduled to discuss the regulatory issues, propose the regulations, and adopt the final regulations. Between the board meetings, two 60-day public comment periods were provided. A series of public meetings was held to help the agency identify the regulatory issues, and another series of public meetings was held to discuss the proposed regulations. The regulations became effective nearly two months after final adoption of the board. The typical promulgation timeframe is 180 days.

State Corporation Commission

Each individual SCC case involving the promulgation or repeal of a regulation is given an SCC case number and entered into the commission’s case information system. The order establishing a proceeding (or order to take notice) sets out some background and general information regarding the regulation. Interested parties and interested members of the public are directed to file either written comments with the SCC’s Clerk’s Office or to file comments electronically in the case information system. Some SCC regulations (usually utility regulations) require notices to be published in newspapers. The comment period varies and is decided on a case-by-case basis and set out in the SCC order. The timeframe can range from 45 days to several months. All comments filed on SCC proposed regulations can be reviewed on the commission’s case information system. SCC staff submit a report of the filed comments to the commission members. Persons aggrieved by a final order of the commission have

an automatic right of appeal to the Supreme Court of Virginia. The SCC typically promulgates regulations within a period of four to seven months, although some rules may take up to two years to become effective.

Commonwealth Transportation Board/Virginia Department of Transportation

VDOT management and the division/office responsible for implementing the regulation determine the level of public comment and input. The amount of time allowed for public input varies depending on how technical the regulation is, whether the regulation is controversial, CTB guidance, mandates/direction given by the General Assembly and Governor, the amount of interest displayed by stakeholder groups, and whether the new regulation is a substantial change in practice or policy. Typically, there are at least one or more public hearings, and public notices are posted on VDOT's website, field offices, and in print media. In addition, exempt regulations promulgated by the CTB are reviewed and approved by the board in open meetings to allow for public comment and input.

Department of Environmental Quality (State Air Pollution and Water Control Boards)

The exemption granted for general permits issued by the State Air Pollution and Water Control Boards actually requires the boards to comply with the NOIRA and proposed regulation stages prescribed in VAPA. It also directs the boards to form a “technical advisory committee composed of relevant stakeholders, including potentially affected citizen groups, to assist in the development of the general permit.” Also, the boards are required to conduct at least one public hearing on the proposed regulation. The Department of Environmental Quality estimates that it typically takes one year to adopt general permits.

For other exempt actions such as conforming to federal law and regulations, the regulatory text is available to interested parties 10 to 15 days ahead of the date of board action. It is announced through the specific board agenda and posted to the department website and the Virginia Regulatory Town Hall. Each board has a policy that allows for public comment at the board meeting on any final regulation prior to the board's decision.

Department of Health Professions

The Board of Optometry and Board of Pharmacy each has statutory requirements for public notification of their respec-

tive exempt regulations. Each board is statutorily required to conduct a public hearing prior to making amendments. Thirty days prior to conducting such hearing, the boards must give written notice by mail of the date, time, and place of the hearing to all affected professionals and any other persons requesting to be notified of the hearings and publish notice of its intention in the Virginia Register of Regulations. During the public hearing, interested parties must be given reasonable opportunity to be heard and present information prior to final adoption of any amendments. Agency staff estimated that it typically takes 90 days to adopt an exempt regulation.

Department of Agriculture and Consumer Services

The agency has no written guidelines for soliciting input on exempt regulations. However, for the majority of exempt regulations, the agency uses the same public participation guidelines to solicit input as it does for non-exempt regulations. These guidelines conform to the model public participation guidelines developed by the Department of Planning and Budget in 2008. Regulations revised by the agency through the exempt process are usually the regulations in which the agency has little or no discretion, such as when federal regulation language is being adopted to maintain a state program that is equal to the federal program. Interested parties can provide public comment at the meetings of the Board of Agriculture and Consumer Services where the exempt action is being considered. Agency staff indicated it typically takes three to four months to promulgate an exempt regulation, as the board only meets four times a year.

MOST EXEMPTIONS APPEAR TO STILL BE NEEDED

Given the lengthy promulgation timeframes under the normal VAPA process and the need for quick adoption of rules, it appears that most exemptions listed in the act are still needed. In almost all cases, agencies rated their exemptions as essential to being able to carry out their statutory duties. While many respondents to the survey of the regulated community expressed concerns about exemptions in general, few concerns regarding specific exemptions were stated. A few exemptions listed in the act are outdated and no longer useful to the regulatory agencies.

Agencies Rate Exemption as Essential in Most Cases

To help determine the need for the current VAPA exemptions, JLARC staff conducted a survey of State agencies that are wholly or partially exempt from the act. Agencies that promulgated regu-

lations through general category exemptions were also surveyed. The agencies were asked to rate the necessity of the exemptions and provide rationales for their ratings. Agencies were asked to assign a rating of

- **Essential**—Your agency, the good of the public, or regulatory efficiency would be substantially harmed if there was not an exemption for this type of regulation;
- **Useful**—Having the exemption provides some benefit, but regulations could often be promulgated effectively through the normal VAPA process; *or*
- **Not important**—The exemption provides little or no benefit to your agency’s ability to carry out its statutory authority.

Not surprisingly, nearly all exemptions were rated as either essential or useful, and most were rated as essential. In most instances, the rationales for their ratings also appeared to be reasonable.

Given the additional time and effort it takes to promulgate regulations through VAPA, regulatory agencies might be expected to be in favor of their exemption(s). Not surprisingly, then, nearly all exemptions were rated by agencies as either essential or useful (94 percent), and most were rated as essential (63 percent). In most instances, the rationales given for their ratings appeared to be reasonable. For the agencies that rated their exemption as essential, the most common reason was the need to quickly adopt regulations, either to regulate seasonal activities, to prevent harm to persons or property, or to prevent dislocations to the marketplace.

The necessity ratings and rationales for all agencies are listed in Appendix D. The following is provided, however, to overview those exemptions which agencies identified as less than essential.

Exemptions Rated as Useful. In some cases, agencies indicated that an exemption from VAPA for some types of rulemaking actions was useful, but they did not rate it as essential. In most of these cases, the information provided by the agency did not suggest that the exemption be modified or discontinued. Examples include the following:

- The Virginia Housing and Development Authority, which has a blanket agency exemption from the APA, identified five rulemaking areas of the agency, and indicated that in one of the five areas, the exemption was useful rather than essential (the administration of rent reduction tax credits).
- Milk Commission exemptions – The commission rated two of the three actions covered by its exemption as useful and one as essential.

- Board of Optometry exemption addressing prescriptions and treatment with certain therapeutic pharmaceutical agents was rated as useful.
- VAPA's exemption for the award or denial of State contracts has been used twice in the past five years, and both times by the Department of Minority Business Enterprise, which indicates that the exemption is useful because it enables the agency to respond without delay when there are changes in the external environment, such as State or federal legislation or executive orders.
- VAPA's exemption for customary military, naval or police functions has been used twice in the past five years, both times by the Department of State Police, which indicates that the exemption is useful to enable fast action because regulations implement critical issues relating to highway safety.
- VAPA's exemption of instructions for applications or renewals of a license, certificate, or registration required by law has been used once in the past five years, by the Department of Minority Business Enterprise, which indicates that the exemption is useful because it enables the agency to respond without delay when there are changes in the external environment, such as State or federal legislative or executive orders.
- VAPA's exemption of regulations implementing the Health Practitioners' Intervention Program, a program designed for monitoring impaired health practitioners, was rated as useful and has been used once in the past five years by the Department of Health Professions.
- Loans from the Small Business Environmental Compliance Assistance Fund are exempt from VAPA, but this program has not been funded recently and no regulations have ever been promulgated under this exemption. However, if the program were to be funded in the future, this exemption would be necessary in order to move funds quickly to capitalize on current interest rates.

In some instances in which exemptions were cited as useful but not essential, information provided in the agency rationale suggests that the exemption may not be needed. In one case, the agency rationale indicates that the VAPA fast-track process could probably be used. In four cases, the agency indicated that the action taken by the agency is not intended to have the force of law. In the latter case, the exemption may not be needed because the action does not constitute a regulation as defined by VAPA. Consideration could be given to discontinuing these exemptions. Examples of both these cases include the following:

- Department of General Services exemption for promulgating standards for the inspection of State-owned and local education agency buildings for asbestos. The department indicated that these regulations are non-controversial and could likely be promulgated through the fast-track process.
- State Board of Education guidelines concerning religious activity in the public schools. DOE indicates that these guidelines do not replace local discretion, and are intended as technical assistance for local consideration.
- State Board of Education guidelines on constitutional rights and restrictions relating to the recitation of the pledge of allegiance. Again, DOE indicates that these guidelines do not replace local discretion, and are intended as technical assistance for local consideration.
- The Virginia Small Business Financing Authority, which is exempted from VAPA, states that it develops forms and guidelines for various loan programs that do not constitute regulatory actions. It has not promulgated any regulations by exemption in the past five years. Consequently, the need to specify an exemption for the authority appears questionable.
- The Department of Mines, Minerals, and Energy exemption for the development and issuance of procedural policy related to risk-based mine inspections by the department. No regulations have been promulgated by the agency using the exemption in the past five years, and the agency explains that its procedures for the inspections are “strictly internal,” and “we do not write regulations to cover our procedures for this activity.”

Exemptions Rated as Not Important. Three regulations were rated by the agencies as not important. These exemptions could be discontinued, and are shown in Table 15. Another two exemptions may be modified. The total agency exemption for the Virginia War Memorial Foundation (§2.2-4002 A15) should be limited to the setting of fees for use of its facilities, as there does not appear to be a valid reason for exempting regulations pertaining to the appropriate use of its facilities. Also, §2.2-4006 A9, pertaining to general emissions permits, may be modified to remove reference to the Marine Resources Commission, which already has a total agency exemption under §2.2-4006 A12.

Table 15: VAPA Exemptions Rated as "Not Important" Which Could Be Discontinued

Exemption	Rationale for Rating
§2.2-4002, A.16. The Virginia Medicaid Prior Authorization Advisory Committee in making recommendations to the Board of Medical Assistance Services regarding prior authorization for prescription drug coverage	Committee no longer exists.
§2.2-4002, A.24. The nonprofit, nonstock corporation established by the Commissioner of Agriculture and Consumer Services to promote, develop, and sustain markets for licensed Virginia wineries and farm wineries.	Corporation appears to have no authority to promulgate regulations.
§2.2-4006, A.5. Preliminary program permit fees of the Department of Environmental Quality assessed pursuant to subsection C of §10.1-1322.2	Exemption was provided in order to quickly establish fees for Title V permits issued by the State Air Pollution Control Board until permanent fees could be established through a full VAPA process. The permanent fees have been established and this exemption is no longer necessary.

Source: JLARC staff survey of State agency regulatory coordinators.

Some Concern Regarding VAPA Exemptions Exists Among the Regulated Community and Interest Groups

JLARC staff conducted a survey of the regulated community and special interest groups to determine if concerns existed about any of the current VAPA exemptions. Registered lobbyists, users of the Regulatory Town Hall, and interest group associations with offices in Virginia were asked to complete an online survey regarding VAPA exemptions. Respondents to the survey made many general comments regarding the importance of public input in the development of regulations and the need for transparency in State government, but few specific complaints were expressed about the particular exemptions.

A common theme of the comments submitted by survey respondents is that there is a need for openness and public debate in rulemaking, and that the exemptions may impede this openness and debate. Another concern voiced by several respondents is that people need to have adequate advance notice of pending regulatory changes, and thus it is important that planned rules changes be posted in easily accessible places, such as the Regulatory Town Hall. Examples of general concerns expressed by survey respondents are listed in Exhibit 3.

Survey respondents had few informed concerns regarding specific VAPA exemptions. Informed concerns are those in which the re-

Exhibit 3: General Concerns Expressed by the Regulated Community and Special Interest Groups Regarding VAPA Exemptions

- “Policy development should follow the VAPA process - the process may be long and cumbersome, but it allows interested parties to review, research and make comments on proposed changes.”
- “In general, regulations are more fair, predictable and understandable if they are developed, established and enforced through uniform rules and procedures. Exemptions from such uniform rules and procedures, like the APA, should be minimized and only permitted when required by unusual circumstances.”
- “The less transparent the process is, the less democratic our society becomes. It rarely happens quickly. The loss of rights and ability to participate happens slowly through political actions such as exemptions. What is the point of having a public process if it's slowly eroded by exemptions?”
- “It would be helpful to be notified when regulatory agencies’ policies or interpretations of regulations changes.”
- “In general, it is essential that all agencies announce intentions to amend regulations so that the public can react.”
- “Often, I do not hear of a change or amendment until it is too late.”

Source: JLARC staff survey of Virginia registered lobbyists, users of the Regulatory Town Hall, and interest group associations.

spondent was aware of the subject matter of the exemption and public input processes of the agency, and either expressed a belief or recounted an experience that raised issues with the exemption. Examples of these concerns are noted in Exhibit 4. All relevant concerns regarding the exemptions are contained in Appendix D.

Most Exemptions Appear to Still Be Necessary Given Lengthy VAPA Process

Despite some concerns about particular exemptions listed in VAPA, there does not appear to be a compelling reason to remove the exemptions. With the exception of the three exemptions rated by the agencies as “not important,” the exemptions appear to be necessary given the lengthy promulgation process under VAPA. There may be isolated incidents of certain agencies not providing adequate public input, or where executive branch review could have dissuaded adoption of an inappropriate or overly burdensome rule, but such isolated incidents do not appear to justify removing the exemptions, especially when considering the lengthy timeframe for adoption of rules through VAPA. However, if VAPA and executive orders were to be amended so that agencies could reasonably expect a shorter timeframe for the adoption of rules, the necessity of some of the exemptions may need to be revisited.

Exhibit 4: Examples of Informed Concerns Regarding Specific VAPA Exemptions

Exemption	Concern
§2.2-4002, A.4: The Virginia Housing Development Authority	"The APA is essential in developing regulations because it [provides] a forum for people to express and have their values considered. Addressing values is a central part of governing, and in any situation where they are likely to be a factor in the debate they should be heard. Value decisions are central to the mission and nearly all of the operations of the Virginia Housing Development Association."
§2.2-4002, A.12: The Commissioner of Agriculture and Consumer Services in adopting regulations pursuant to § 3.2-6002 B and § 3.2-6023	"During non-pandemic times, these types of regulations deserve public comment, and such time and promulgation would help with community and public education and debate."
§ 2.2-4002, A.20: The Virginia Economic Development Partnership Authority	"The exemption seems overly broad, particularly for an agency, such as the Virginia Economic Development Authority, whose work is not evidence based."
§ 2.2-4002, A.26: The Board of Pharmacy when specifying subject requirements for continuing education for pharmacists pursuant to § 54.1-3314.1	"Conflicts of interest are always present when a group of self-interested individuals are given the authority to write their own regulations. Continuing education rules have long been used by boards to limit entry into their profession for their own economic benefit at the expense of the public interest."
§ 2.2-4002, B.8: The conduct of elections or eligibility to vote	"[The conduct of elections and eligibility to vote] is an area of great public interest. Rules, policies and procedures should be subject to public comment."
§ 2.2-4006, A.1: Agency orders or regulations fixing rates or prices	"When rates and prices are fixed by agencies, their constituents are really customers. The State Corporation Commission has rules and procedures to make sure that the rates they set are fair and reasonable. When rates are set by other agencies, similar procedures should be required."
§ 2.2-4006, A.12: Regulations of the Marine Resources Commission	<p>"Fisheries management regulations should be subject to regulatory review. Very limited exemptions for setting seasonal catch limits might be appropriate, although the rules for determining those limits should not. There is a substantial danger of undue influence by particular interests, and the public interest will be better served by the standard regulatory process.</p> <p>"The Marine Resources Commission limits the public's ability to speak through means other than a public meeting that most folks cannot attend [due to time and work conflicts]."</p>

Source: JLARC staff survey of Virginia registered lobbyists, users of the Regulatory Town Hall, and interest group associations.

As noted in Chapter 2, the average timeframe for the promulgation of regulations through the normal VAPA process is about two years, and rarely does a regulation get adopted in less than one year. Agencies cannot depend upon the adoption of even fast-track regulations in less than eight months. Agencies have generally provided reasonable rationales for their exemptions. Across the responses, agencies indicate that the amount of time required to go through VAPA is too long for certain actions that are currently exempt, as well as too long to adequately protect the health, safety, and welfare of citizens of the Commonwealth without the availability of the exemptions.

Recommendation (2). The *Code of Virginia* should be amended to remove the exemptions to the Virginia Administrative Process Act contained in sections 2.2-4002 A.16, 2.2-4002 A.24, and 2.2-4006 A.5.

Recommendation (3). Section 2.2-4002 A.15 of the *Code of Virginia* should be amended to limit the exemption for the Virginia War Memorial Foundation to the setting of fees for use of its facilities.

Recommendation (4). The *Code of Virginia* should be amended to remove clause (d) of section 2.2-4006 A.9 pertaining to wetlands permits issued by the Marine Resources Commission.

CONSEQUENCES OF LONG PROMULGATION PROCESS

A determination of the need for exemptions to VAPA must be made in light of the current state of the regulatory process. There appears to be a relationship between Virginia's relatively long regulatory adoption process and relatively high use of exempt regulations. The lengthy regulatory timeframe creates the incentive to exempt more regulations from VAPA and to adopt more emergency regulations. There is reason for concern that exempt status for regulations may be extended further, to exempt additional regulatory activity which may instead merit the fuller input opportunities which are afforded by VAPA.

In addition, the lengthy process could lead to other unwanted consequences. In order to effect policy quickly, the legislature may be more likely to enact statutes for specific rules that might best be addressed through the regulatory process, and State agencies may be more likely to subvert the process by issuing orders and guidelines that should be formulated as regulations. Finally, the lengthy process can lead to increased public confusion and distrust of government's regulatory process.

Increased Need for Exemptions to VAPA

Regulatory agencies' ability to fulfill their statutory authority becomes diminished if they are unable to promulgate regulations in a timely manner. This creates pressure on the legislature to grant exemptions to those agencies so that they can create effective regulations when needed. This scenario appears to be the case in Virginia, as the State has a high number of exemptions, high percentage of exempt regulations, and lengthy regulatory timeframe relative to other states.

Agencies with exemptions have consistently cited the need to adopt regulations quickly and noted the typical timeframe of two years under VAPA as a reason for the necessity of their exemptions. The fast-track process is not a viable alternative for most of these agencies, as the regulations are often controversial. Also, even the fast-track process for non-controversial regulations may take up to a year or more, which may be too long for timely adoption of the rules.

The fact that most of these exempt regulations have the potential to be controversial reinforces the need for a streamlined VAPA process. Because they may be controversial, there is a need for transparency, public debate, and executive review in the process. Yet because there is a pressing need for quick adoption, there is a need for expedited review processes and predictability in the amount of time required for adoption of the rules.

Likelihood of More Emergency Regulations

When new or amended rules are needed or desired quickly, an alternative to exempting regulations is to adopt emergency regulations. The main driver of the increase in emergency regulations in recent years is the greater frequency with which the 280-day time limit for promulgating regulations is put into statutes. By inserting this language into legislative bills, regulations automatically become eligible for emergency status. In fact, all currently active emergency regulations (as of August 2009) promulgated in Virginia in recent years are due to legislation requiring adoption of the rules within 280 days. The use of the 280-day language in bills is certainly a result of the lengthy VAPA process.

Over-reliance on emergency regulations results in less public input and informed debate regarding potentially sensitive and far-reaching laws. Given an emergency exception pursuant to the 280-day limit, agency boards may not consider all relevant factors prior to adopting the regulation, and economic impact analysis and executive branch review are not required. However, the 280-day emergency exception is one method of streamlining the rulemaking

process, and it does give agencies time to notify the public, seek input, and debate the planned rules in public venues and board meetings.

Ultimately, emergency regulations must be replaced with permanent regulations promulgated through the normal VAPA process. However, emergency regulations must be replaced within one year, and agencies have had difficulty accomplishing this due to the lengthy process. (This problem has been alleviated somewhat by allowing an additional 180 days with approval of the Governor.)

Likelihood of More Rulemaking Bills During Legislative Sessions

A related consequence of the lengthy promulgation process is that more rules are likely to be adopted via statute than through the regulatory process. In order to get laws passed in a timely manner, regulations may be substituted with specific legislation, thus circumventing the regulatory process. While passing legislation may address the public need for a law, the legislative session may not be the most appropriate forum for consideration of these laws. Although the issues are debated during the legislative session, the condensed timeframe of the General Assembly session may not be adequate to consider all the factors and ramifications of the rules.

Regulations are often very complex by nature, requiring the collection of scientific data and analyses of the impact on persons, industries, and wildlife in order to develop appropriate rules for procedures and limits. The administrative process provides a longer timeframe to conduct and disseminate research and seek public input which the legislative session does not. For example, the Department of Planning and Budget has at least 45 days to conduct an economic impact analysis on proposed regulations while it is afforded only a few days to conduct a fiscal impact analysis on proposed legislation. Furthermore, the fiscal impact analysis only assesses the impact on the State budget, while the economic impact analysis of proposed regulations is much broader in scope.

In addition, substituting regulations with specific statutory laws adds to the already crowded legislative agenda during the General Assembly session. Time spent debating these detailed bills may result in less time available for discussion of larger policy issues.

Likelihood of More Rules Being Adopted Through Administrative Actions Where Regulations Would Be More Appropriate

In addition to increased use of exempt and emergency regulations, lengthy administrative procedures could lead to agencies avoiding the regulatory process. Instead of promulgating regulations to apply rules of law, agencies could rely on guidance documents and

administrative actions. According to an official with the office of the secretary of state in Texas (which manages the state's administrative procedures), if there are too many obstacles to adopting a regulation, the system "goes underground" through greater use of emergency regulations, exemptions, and administrative actions or guidelines. Administrative actions and guidelines are useful tools for agencies in promoting effective management, but they should not replace regulations when they are statements of general application and have the force of law.

Complaints have been raised about the use of administrative actions by the Office of Comprehensive Services for At-Risk Youth and Families (OCS), as noted in Chapter 2. The *Code of Virginia* allows OCS to issue policies regarding local programs for at-risk children through administrative actions or through regulatory actions, *as appropriate*. However, staff representing the interests of local governments argued that the council has used administrative actions where regulations would be more appropriate, given the budgetary consequences of the policies on mandatory programs. OCS staff claimed that these actions did not constitute new rules, but rather just implemented existing laws as interpreted by the Attorney General. Whether or not these actions should have more appropriately been promulgated as regulations, the lengthy VAPA process is likely a factor in OCS choosing to implement rules through administrative actions.

Greater Confusion Among the Public Is More Likely

A final consequence of the lengthy regulatory process and the various methods of bypassing the standard VAPA process is that it can lead to greater confusion and distrust among the public. There may be confusion, for example, due to the lapse in time between public comment on a regulation and the effective date of the regulations. Staff in an agency interviewed for this study indicated that when there are long delays, the public and the regulated community tend to lose sight of the process, or think that the regulation has already been adopted.

Use of the various means to bypass VAPA can also create some distrust. As noted by comments received from the regulated community, there is a general distrust regarding the openness and transparency of regulatory actions that are exempt from VAPA. This point was made by a survey respondent who stated that "if the public perceives that the exemption is being used repeatedly to hide something, distrust in government is created." This is a concern, even though it appears that many agencies utilizing an exemption are exercising diligence in seeking public comment on proposed rules.



List of Recommendations:

Review of Exemptions to the Virginia Administrative Process Act

1. Regarding the Governor's review following completion of the public comment period on proposed regulations, future executive orders should be developed to be consistent with the terms contained in §2.2-4013 of the Virginia Administrative Process Act. (p. 44)
2. The *Code of Virginia* should be amended to remove the exemptions to the Virginia Administrative Process Act contained in §§2.2-4002 A.16, 2.2-4002 A.24, and 2.2-4006 A.5. (p. 71)
3. Section 2.2-4002 A.15 of the *Code of Virginia* should be amended to limit the exemption for the Virginia War Memorial Foundation to the setting of fees for use of its facilities. (p. 71)
4. The *Code of Virginia* should be amended to remove clause (d) of §2.2-4006 A.9 pertaining to wetlands permits issued by the Marine Resources Commission. (p. 71)

Study Mandate

§ 2.2-4005. Review of exemptions by Joint Legislative Audit and Review Commission.

The Joint Legislative Audit and Review Commission shall conduct a review periodically of the exemptions authorized by this chapter. The purpose of this review shall be to assess whether there are any exemptions that should be discontinued or modified.

Research Activities and Methods

Survey analysis provided most of the information presented in this report on the causes and rationales for exemptions to the Virginia Administrative Process Act (VAPA). Another major research activity was the collection of data on regulatory submissions to the *Virginia Register of Regulations* and the Regulatory Town Hall. Structured interviews and document reviews were also employed throughout the review.

SURVEY ANALYSIS

Three surveys were conducted to obtain information on agency rationales for exemptions, concerns of the regulated community and other interested parties, and administrative procedures and exemptions in other states. The administration of these surveys is discussed below.

Survey of State Agencies

Agency regulatory coordinators were surveyed and asked to provide a justification for each of their exemptions from VAPA as well as their internal procedures for promulgating exempt regulations. Each of the agencies listed in VAPA as having an exemption were surveyed as well as other agencies that had promulgated an exempt regulation since 2004 (other than exemptions in which the agency had no discretion over the regulatory content, regulations that made only minor changes to style or form or corrected technical errors, and the promulgation of public participation guidelines). Specifically, the questionnaire asked for information about

- the necessity of the exemption to the agency's mission or statutory duties (necessity ratings were: essential, useful, or not important;
- the rationale for the necessity rating;
- their public notification and input process;
- the amount of time provided to the public for input on proposed regulations;
- whether the agency conducted an economic impact analysis on proposed regulations;

- whether their exempt regulations could reasonably be promulgated through the fast-track process; and
- the typical number of days required to promulgate an exempt regulation.

The survey was conducted via email with telephone follow-up for certain agencies depending on their initial response.

Survey of Regulated Community

Regulations are a concern to, and are commented upon, by the regulated community and other interested parties, including various interest group organizations and the general public. To obtain information on the concerns of these parties regarding VAPA exemptions, an online survey was administered to Virginia registered lobbyists, users of the Regulatory Town Hall, and interest group associations with offices located in Virginia. The numbers and sources of these participant groups are listed below.

- **Registered lobbyists** – A list of 558 lobbyists registered with the office of the Secretary of the Commonwealth was obtained by JLARC staff. Letters were sent to these lobbyists explaining the nature of the JLARC review and asking them to participate in the online survey. Due to some invalid mailing addresses, 542 lobbyists received the invitation to participate in the survey.
- **Users of the Regulatory Town Hall** – The Department of Planning and Budget (DPB) maintains a list of email addresses of persons registered on the Town Hall. DPB assisted JLARC in the survey administration by forwarding the link to the online survey to each of the 6,335 registered users.
- **Interest Group Associations** – Email addresses were obtained for 389 associations with offices in Virginia. Associations chosen for participation in the survey were selected from a list compiled by the Concept Marketing Group and displayed on their Web site (www.marketingsource.com).

The purpose of the survey was to provide the regulated community and other interested parties with the opportunity to comment on exemptions. It is difficult to determine the exact response rate for the survey because some individuals may have been represented on more than one of the above lists. The survey received a total of 476 responses. A low response rate was expected, however, as many Town Hall users likely had interest in only one regulatory area and were unaware of VAPA and exemptions to the act. Since the intent of the survey was to reach as many interested persons as possible to determine if concerns existed regarding any of the

exemptions, the response rate is less important than the actual comments received. That is, the percentage of respondents who indicated they have a concern with a specific exemption was not deemed to be as important as the content of the individual comments.

Respondents were asked to state their concerns regarding any of the current VAPA exemptions and to also state any general concerns and additional comments. Specifically, respondents were asked:

- Had they ever wished to provide public comment on a proposed regulation but found their ability to do so was limited because the regulation was exempt from VAPA?
- Did they have additional concerns about any Virginia agencies or regulatory processes that are exempt from VAPA? If yes, what was the nature of the concern?
- Did they have any general concerns about the extent of the use of exemptions for the promulgation of regulations in Virginia?
- What additional comments, if any, did they have regarding VAPA and exemptions to the act?

Survey of Other States

Finally, a survey of other states was conducted to obtain comparative information as well as to corroborate or dispute agency rationales for exemptions in Virginia. States were asked to provide information concerning the nature of their administrative process acts and if they exempt certain agencies or actions from the act. Other summary information was also gathered, such as the average length of time for promulgation of regulations, the proportion of regulations which were exempt, and the number of emergency regulations that were promulgated.

The survey of other states was web-based. The Virginia Registrar of Regulations provided names and email addresses of members of the Administrative Codes and Registers Section of the National Association of Secretaries of State. This list contained contacts for 34 other states. Contacts for the other 15 states were identified through an Internet search of the states' registrars and secretaries of state. Emails were sent to these state officials asking them to access a Web site and participate in the JLARC staff survey. Follow-up telephone conversations were conducted with certain officials based on their responses. Responses were received from 37 states and the District of Columbia (a 76 percent response rate).

DATA ANALYSIS

Data analysis was another major research activity conducted during this review. Information on the number of exempt regulations promulgated in Virginia and the usage of particular exemptions in VAPA for promulgating exempt regulations was compiled from the *Virginia Register of Regulations*. The Virginia Registrar assisted JLARC staff by identifying and summarizing exempt regulations promulgated in Virginia since January 2004. The *Register* was also used as the source for determining the usage of fast-track and emergency regulations. The Registrar of Regulations, with the assistance of the Division of Legislative Automated Systems, provided JLARC staff with the NOIRA, proposed, final, and effective dates for VAPA regulations adopted between September 20, 2004 and April 13, 2009. JLARC staff analyzed the data for 342 regulations to determine the fastest, slowest, average, and median timeframes for the most active regulatory agencies as well as across all agencies.

The Regulatory Town Hall was another major source of data on regulatory activity. The Town Hall was primarily used to determine timeframes for promulgating emergency regulations, exempt regulations, and fast-track regulations, as well as time spent in the executive review of normal, fast-track, and emergency regulations at different stages in the process. Regulations included in the analysis were shown on the Town Hall site in late July 2009 and had completed or were undergoing executive review in 2008 and 2009.

STRUCTURED INTERVIEWS

Structured interviews were used to gain an understanding of the issues involved with exempting regulations from VAPA, determine what data exist to help the team answer its research questions, determine the reasons for the length of time required to promulgate regulations, and help gain convergence on opinions regarding whether an exemption should be discontinued or modified. Interviews were conducted with staff from the following:

- Registrar of Regulations
- Department of Planning and Budget
- Administrative Law Advisory Committee
- Office of the Attorney General
- Selected Virginia agency regulatory coordinators and other agency staff

- Other state officials whose survey responses indicated follow-up information was needed
- Interest groups whose survey responses indicated follow-up was needed

DOCUMENT REVIEWS

The *Code of Virginia* was reviewed extensively for information on VAPA processes and exemptions. In addition, enabling laws for state agencies and regulatory activities were reviewed to gain information on the statutory authority of agencies and their required public notification and input processes for adopting regulations. Other state codes were also reviewed to corroborate survey responses from other state officials and to gain a better understanding of administrative processes in these states.

Executive orders pertaining to the development and review of regulations proposed by State agencies were also reviewed to determine the extent of requirements beyond those stated in VAPA, and to determine how these additional review requirements have changed over time.

VAPA Exemptions

§ 2.2-4002. Exemptions from chapter generally.

A. Although required to comply with § [2.2-4103](#) of the Virginia Register Act (§ [2.2-4100](#) et seq.), the following agencies shall be exempted from the provisions of this chapter, except to the extent that they are specifically made subject to §§ [2.2-4024](#), [2.2-4030](#) and [2.2-4031](#):

1. The General Assembly.
2. Courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.
3. The Department of Game and Inland Fisheries in promulgating regulations regarding the management of wildlife and for all case decisions rendered pursuant to any provisions of Chapters 2 (§ [29.1-200](#) et seq.), 3 (§ [29.1-300](#) et seq.), 4 (§ [29.1-400](#) et seq.), 5 (§ [29.1-500](#) et seq.), and 7 (§ [29.1-700](#) et seq.) of Title 29.1.
4. The Virginia Housing Development Authority.
5. Municipal corporations, counties, and all local, regional or multijurisdictional authorities created under this Code, including those with federal authorities.
6. Educational institutions operated by the Commonwealth, provided that, with respect to § [2.2-4031](#), such educational institutions shall be exempt from the publication requirements only with respect to regulations that pertain to (i) their academic affairs, (ii) the selection, tenure, promotion and disciplining of faculty and employees, (iii) the selection of students, and (iv) rules of conduct and disciplining of students.
7. The Milk Commission in promulgating regulations regarding (i) producers' licenses and bases, (ii) classification and allocation of milk, computation of sales and shrinkage, and (iii) class prices for producers' milk, time and method of payment, butterfat testing and differential.
8. The Virginia Resources Authority.
9. Agencies expressly exempted by any other provision of this Code.
10. The Department of General Services in promulgating standards for the inspection of buildings for asbestos pursuant to § [2.2-1164](#).
11. The State Council of Higher Education for Virginia, in developing, issuing, and revising guidelines pursuant to § [23-9.6:2](#).
12. The Commissioner of Agriculture and Consumer Services in adopting regulations pursuant to subsection B of § 3.1-6002 and in adopting regulations pursuant to § [3.2-6023](#).

13. The Commissioner of Agriculture and Consumer Services and the Board of Agriculture and Consumer Services in promulgating regulations pursuant to subsections B and D of § [3.2-3601](#), subsection B of § [3.2-3701](#), § [3.2-4002](#), subsections B and D of § [3.2-4801](#), §§ [3.2-5121](#) and [3.2-5206](#), and subsection A of § [3.2-5406](#).

14. The Board of Optometry when specifying therapeutic pharmaceutical agents, treatment guidelines, and diseases and abnormal conditions of the human eye and its adnexa for TPA-certification of optometrists pursuant to Article 5 (§ [54.1-3222](#) et seq.) of Chapter 32 of Title 54.1.

15. The Virginia War Memorial Foundation.

16. The Virginia Medicaid Prior Authorization Advisory Committee in making recommendations to the Board of Medical Assistance Services regarding prior authorization for prescription drug coverage pursuant to Article 4 (§ [32.1-331.12](#) et seq.) of Chapter 10 of Title 32.1.

17. The State Board of Education, in developing, issuing, and revising guidelines pursuant to § [22.1-203.2](#).

18. The Virginia Racing Commission, (i) when acting by and through its duly appointed stewards or in matters related to any specific race meeting or (ii) in promulgating technical rules regulating actual live horse racing at race meetings licensed by the Commission.

19. The Virginia Small Business Financing Authority.

20. The Virginia Economic Development Partnership Authority.

21. The Board of Agriculture and Consumer Services in adopting, amending or repealing regulations pursuant to subsection A (ii) of § [59.1-156](#).

22. The Insurance Continuing Education Board pursuant to § [38.2-1867](#).

23. The Board of Health in promulgating the list of diseases that shall be reported to the Department of Health pursuant to § [32.1-35](#) and in adopting, amending or repealing regulations pursuant to subsection C of § [35.1-14](#) that incorporate the Food and Drug Administration's Food Code pertaining to restaurants or food service.

24. The nonprofit, nonstock corporation established by the Commissioner of Agriculture and Consumer Services pursuant to subdivision B 5 of § [3.2-102](#).

25. (Expires December 31, 2010) The Secretary of Natural Resources in setting a date of closure for the Chesapeake Bay purse seine fishery for Atlantic menhaden for reduction purposes pursuant to § [28.2-1000.2](#).

26. The Board of Pharmacy when specifying special subject requirements for continuing education for pharmacists pursuant to § [54.1-3314.1](#).

B. Agency action relating to the following subjects shall be exempted from the provisions of this chapter:

1. Money or damage claims against the Commonwealth or agencies thereof.

2. The award or denial of state contracts, as well as decisions regarding compliance therewith.
3. The location, design, specifications or construction of public buildings or other facilities.
4. Grants of state or federal funds or property.
5. The chartering of corporations.
6. Customary military, naval or police functions.
7. The selection, tenure, dismissal, direction or control of any officer or employee of an agency of the Commonwealth.
8. The conduct of elections or eligibility to vote.
9. Inmates of prisons or other such facilities or parolees therefrom.
10. The custody of persons in, or sought to be placed in, mental, penal or other state institutions as well as the treatment, supervision, or discharge of such persons.
11. Traffic signs, markers or control devices.
12. Instructions for application or renewal of a license, certificate, or registration required by law.
13. Content of, or rules for the conduct of, any examination required by law.
14. The administration of pools authorized by Chapter 47 (§ [2.2-4700](#) et seq.) of this title.
15. Any rules for the conduct of specific lottery games, so long as such rules are not inconsistent with duly adopted regulations of the State Lottery Board, and provided that such regulations are published and posted.
16. Orders condemning or closing any shellfish, finfish, or crustacea growing area and the shellfish, finfish or crustacea located thereon pursuant to Article 2 (§ [28.2-803](#) et seq.) of Chapter 8 of Title 28.2.
17. Any operating procedures for review of child deaths developed by the State Child Fatality Review Team pursuant to § [32.1-283.1](#).
18. The regulations for the implementation of the Health Practitioners' Intervention Program and the activities of the Intervention Program Committee pursuant to Chapter 25.1 (§ [54.1-2515](#) et seq.) of Title 54.1.
19. The process of reviewing and ranking grant applications submitted to the Commonwealth Neurotrauma Initiative Advisory Board pursuant to Chapter 3.1 (§ [51.5-12.1](#) et seq.) of Title 51.5.
20. Loans from the Small Business Environmental Compliance Assistance Fund pursuant to Article 4 (§ [10.1-1197.1](#) et seq.) of Chapter 11.1 of Title 10.1.
21. The Virginia Breeders Fund created pursuant to § [59.1-372](#).

22. The types of pari-mutuel wagering pools available for live or simulcast horse racing.
23. The administration of medication or other substances foreign to the natural horse.

C. Minor changes to regulations published in the Virginia Administrative Code under the Virginia Register Act, Chapter 41 (§ [2.2-4100](#) et seq.) of this title, made by the Virginia Code Commission pursuant to § [30-150](#), shall be exempt from the provisions of this chapter.

§ 2.2-4006. Exemptions from requirements of this article.

A. The following agency actions otherwise subject to this chapter and § [2.2-4103](#) of the Virginia Register Act shall be exempted from the operation of this article:

1. Agency orders or regulations fixing rates or prices.
2. Regulations that establish or prescribe agency organization, internal practice or procedures, including delegations of authority.
3. Regulations that consist only of changes in style or form or corrections of technical errors. Each promulgating agency shall review all references to sections of the Code of Virginia within their regulations each time a new supplement or replacement volume to the Code of Virginia is published to ensure the accuracy of each section or section subdivision identification listed.
4. Regulations that are:
 - a. Necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved;
 - b. Required by order of any state or federal court of competent jurisdiction where no agency discretion is involved; or
 - c. Necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation, and the Registrar has so determined in writing. Notice of the proposed adoption of these regulations and the Registrar's determination shall be published in the Virginia Register not less than 30 days prior to the effective date of the regulation.
5. Preliminary program permit fees of the Department of Environmental Quality assessed pursuant to subsection C of § [10.1-1322.2](#).
6. Regulations of the Pesticide Control Board adopted pursuant to subsection B of § [3.2-3929](#) or clause (v) or (vi) of subsection C of § [3.2-3931](#) after having been considered at two or more Board meetings and one public hearing.
7. Regulations of the regulatory boards served by (i) the Department of Labor and Industry pursuant to Title 40.1 and (ii) the Department of Professional and Occupational Regulation or the Department of Health Professions pursuant to Title 54.1 that are limited to reducing fees charged to regulants and applicants.

8. The development and issuance of procedural policy relating to risk-based mine inspections by the Department of Mines, Minerals and Energy authorized pursuant to §§ [45.1-161.82](#) and [45.1-161.292:55](#).
9. General permits issued by the (a) State Air Pollution Control Board pursuant to Chapter 13 (§ [10.1-1300](#) et seq.) of Title 10.1 or (b) State Water Control Board pursuant to the State Water Control Law (§ [62.1-44.2](#) et seq.), Chapter 24 (§ [62.1-242](#) et seq.) of Title 62.1 and Chapter 25 (§ [62.1-254](#) et seq.) of Title 62.1, (c) Virginia Soil and Water Conservation Board pursuant to the Virginia Stormwater Management Act (§ [10.1-603.1](#) et seq.) of Title 10.1, and (d) the development and issuance of general wetlands permits by the Marine Resources Commission pursuant to subsection B of § [28.2-1307](#), if the respective Board or Commission (i) provides a Notice of Intended Regulatory Action in conformance with the provisions of § [2.2-4007.01](#), (ii) following the passage of 30 days from the publication of the Notice of Intended Regulatory Action forms a technical advisory committee composed of relevant stakeholders, including potentially affected citizens groups, to assist in the development of the general permit, (iii) provides notice and receives oral and written comment as provided in § [2.2-4007.03](#), and (iv) conducts at least one public hearing on the proposed general permit.
10. The development and issuance by the Board of Education of guidelines on constitutional rights and restrictions relating to the recitation of the pledge of allegiance to the American flag in public schools pursuant to § [22.1-202](#).
11. Regulations of the Board of the Virginia College Savings Plan adopted pursuant to § [23-38.77](#).
12. Regulations of the Marine Resources Commission.
13. Regulations adopted by the Board of Housing and Community Development pursuant to (i) Statewide Fire Prevention Code (§ [27-94](#) et seq.), (ii) the Industrialized Building Safety Law (§ [36-70](#) et seq.), (iii) the Uniform Statewide Building Code (§ [36-97](#) et seq.), and (iv) § [36-98.3](#), provided the Board (a) provides a Notice of Intended Regulatory Action in conformance with the provisions of § [2.2-4007.01](#), (b) publishes the proposed regulation and provides an opportunity for oral and written comments as provided in § [2.2-4007.03](#), and (c) conducts at least one public hearing as provided in §§ [2.2-4009](#) and [36-100](#) prior to the publishing of the proposed regulations. Notwithstanding the provisions of this subdivision, any regulations promulgated by the Board shall remain subject to the provisions of § [2.2-4007.06](#) concerning public petitions, and §§ [2.2-4013](#) and [2.2-4014](#) concerning review by the Governor and General Assembly.
14. Amendments to the list of drugs susceptible to counterfeiting adopted by the Board of Pharmacy pursuant to subsection B of § [54.1-3307](#).

Rationales, Concerns, and Use of Regulatory Exemptions

This appendix itemizes the rulemaking exemptions which are contained in VAPA. For each exemption, the number of rulemaking actions which have been promulgated using the exemption during the past five years is provided. In addition, a synopsis of the agency's stated rationale(s) for the exemption is provided, based on agency responses to a JLARC staff survey. Concerns about the exemption stated by the regulated community and others (interest groups, members of the public) are also identified. For some of the exemptions, a JLARC staff note is provided where applicable to provide additional information or to comment on apparent strengths or weaknesses of the exemption rationales or concerns expressed. The symbols shown in the key below appear in the left side margin for exemptions that could be discontinued.

Key

- ⦿ - Exemption recommended for discontinuance or modification
- - Exemption may be discontinued because action does not appear to have the force of law or because fast-track process could be utilized

§ 2.2-4002, A.1. The General Assembly

Number of regulations promulgated under exemption in past five years:

0

JLARC staff note:

The General Assembly passes laws and does not promulgate regulations.

Concerns expressed by public:

None

§ 2.2-4002, A.2. Courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.

Number of regulations promulgated under exemption in past five years:

56 (State Corporation Commission 52, Virginia State Bar 4)

Agency necessity rating (State Corporation Commission):

Essential

Agency rationale (State Corporation Commission):

Timeliness. The SCC regulates a wide range of industries including utilities, telecommunications, insurance, banking, railroads, and securities. The situation is often "fluid" and therefore it is important to promulgate regulations quickly. Some regulations could possibly be promulgated through VAPA, but not all regulations across any given area.

The SCC has the powers of a circuit court and operates like a circuit court. Regu-

latory decisions may be appealed to the Supreme Court. The agency has its own case management system for proposed regulations, which provides opportunities for public input. The primary differences between the SCC's regulatory process and VAPA are that there is no NOIRA in the SCC process and no minimum 60-day period for public comment. The amount of time for public comment varies depending on the complexity of the regulation.

Concerns expressed by public:

"Regulations that have large economic impact, such as SCC regulations, are exempt from the APA and thus the public does not receive the benefit of cost-benefit analyses of proposed changes from graduate-level trained economists."

JLARC staff note:

According to the SCC, If filed comments include statements or concerns regarding economic impact, a workgroup or meeting may be established involving Commission staff and representatives of the regulated industry to resolve any issues.

§ 2.2-4002, A.3. The Department of Game and Inland Fisheries in promulgating regulations regarding the management of wildlife.

Number of regulations promulgated under exemption in past five years:

66

Agency necessity rating:

Essential

Agency rationale:

Wildlife populations are more susceptible than are human populations to often unforeseeable changes in the natural environment which impact the habitats essential for the species' survival. Unpredictable factors such as effects of drought or climate change, changes in food availability, introduction of competing exotic species, introduction or shifts in predation, outbreaks of known or unknown wildlife diseases, and other difficult to anticipate factors, cause the management of wildlife to be in many ways not as amenable to planning and schedules as is most governance of human activities. The exemption allows the agency to respond to these shifting conditions in a timely and effective fashion.

In addition, different sporting seasons open and close at various times throughout the calendar year. The APA exemption allows DGIF to promulgate necessary regulatory changes in time for annual season opening dates without ongoing if not continuous use of the emergency regulation amendment provisions.

Concerns expressed by public:

"There does not appear to be a compelling policy reason why these should be exempt, and there is substantial danger of undue influence of agency actions by particular interests. Thus, public openness and the protections of regulatory review are especially important."

"Wildlife is a treasure that is dear to every Virginian, but DGIF places emphasis on the rights of hunters. Environmentalists and conservationists should have an equal voice."

"Managed wildlife, and the regulations thereof, affects citizens and other land use

regulations. Additional public comment would help with community and public education and debate.”

JLARC staff note:

Although exempt from VAPA, DGIF’s basic law does provide for notification of the public and for public comment upon its regulations (see Chapter 4 and § 29.1-501 of the *Code of Virginia*).

§ 2.2-4002, A.4. The Virginia Housing Development Authority.

Number of regulations promulgated under exemption in past five years:

12

Agency necessity rating:

Essential (4), Useful (1)

Agency rationale:

The VHDA identified five areas in which the agency promulgates regulations. In four of these areas, the exemption was rated as essential. In one area (administration of rent reduction tax credits), the exemption was rated as useful. The rationales for the ratings are listed below

Single and multifamily housing developments – *essential*

Developers expect VHDA to be able to respond immediately to permit a new program or program changes or to allow proposed projects to move forward without any delay.

Mortgage loans to persons and families of low and moderate income – *essential*

Changes in the single family loan markets and in federal law and programs occur very rapidly, requiring new programs and changes in existing programs. VHDA’s business partners and customers operate in this fast moving market and expect VHDA to be able to respond immediately to these changes.

REACH Virginia (formerly Virginia Housing Fund) – *essential*

The REACH Virginia program supports the programs identified above. Prompt regulatory changes are needed for the reasons set forth above.

Allocation of low-income housing tax credits – *essential*

This program has been revised annually based on staff review and public input. The changes must be implemented very promptly so that developers can contract for the sites and commence their application process which is complicated and lengthy.

Administration of rent reduction tax credits – *useful*

The exemption has allowed regulatory changes to be made immediately after program changes became necessary.

Concerns expressed by public:

“The APA is essential in developing regulations because it [provides] a forum for people of the commonwealth to express and have their values considered. Addressing values is a central part of governing, and in any situation where they are likely to be a factor in the debate they should be heard. Value decisions are central to the mission and nearly all of the operations of the VHDA.”

“The outcome of VHDA regulations may have effects on local government. The process should be transparent and open to comment.”

“Housing is a basic need of everyone, and inability to comment stifles citizen input.”

JLARC staff note:

Although exempt from the APA, VHDA’s basic law does provide for public notification and public comment (see § 36-55.30:3).

VHDA’s rationale for the single and multi-family housing development exemption could be more persuasive if it also addressed the benefit of the exemption from a public policy perspective instead of stating the rationale as meeting developer expectations only.

§ 2.2-4002, A.5. Municipal corporations, counties, and all local, regional or multijurisdictional authorities created under this Code, including those with federal authorities.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

N/A

Agency rationale:

N/A

Concerns expressed by public:

“[It is difficult to keep track of] local regulations that are not widely distributed via a mechanism such as the Virginia Town Hall system. Legal notices in obscure sections of local newspapers escape scrutiny.”

JLARC staff note:

A mechanism similar to the Virginia Town Hall, that would enable the public to track local rules and ordinances, might be a good idea. However, establishment of such a system was beyond the scope of this review, as the review focuses upon VAPA exemptions and their causes, the need for them, and concerns about them.

§ 2.2-4002, A.6. Educational institutions operated by the Commonwealth, provided that, with respect to §2.2-4031, such educational institutions shall be exempt from the publication requirements only with respect to regulations that pertain to (i) their academic affairs, (ii) the selection, tenure, promotion and disciplining of faculty and employees, (iii) the selection of students, and (iv) rules of conduct and disciplining of students.

Number of regulations promulgated under exemption in past five years:

3

Agency necessity rating:

Essential to useful

Agency rationale:

Policies on student and faculty affairs are internal matters shaped by the college’s or university’s particular mission, culture and values, and are subject to applicable due process and other law. They would not benefit from a public notice and comment process, since they do not apply to the general public, and such a process would be cumbersome, expensive and unnecessary. The ability to promulgate regulations quickly is of critical concern to the operation of the colleges and uni-

versities.

Concerns expressed by public:

“If an educational institution is operated by the Commonwealth, citizens should have the ability to have their opinions and concerns made known.”

“Nothing is more important than the education of Virginia’s children. Parents and citizens of Virginia should have every reasonable opportunity for input into the process, including the opportunity to comment on any substantive proposed regulation governing that process.”

§ 2.2-4002, A.7. The Milk Commission in promulgating regulations regarding (i) producers’ licenses and bases, (ii) classification and allocation of milk, computation of sales and shrinkage, and (iii) class prices for producers’ milk, time and method of payment, butterfat testing and differential.

Number of regulations promulgated under exemption in past five years:

1

Agency necessity rating:

- (i) Useful
- (ii) Useful
- (iii) Essential

Agency rationale:

Because these regulations have financial impacts on producers, processors, retailers, and/or consumers, the length of time it would take to promulgate the regulations under normal VAPA procedures would render the regulations less effective or could cause financial hardships on people in the milk industry.

Concerns expressed by public:

“Based on recent historical experience, there is good reason to believe that the milk industry uses regulations to limit competition.”

JLARC staff note:

No other states appear to have a similar exemption.

§ 2.2-4002, A.8. The Virginia Resources Authority.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

The VRA does not regulate private conduct. As a bond bank for local governments, the agency functions solely as a financial institution, making credit decisions, borrowing and lending funds, and negotiating financial contracts in light of prevailing market conditions. VRA financings do not constitute regulations in the traditional sense, nor do they lend themselves to the regulatory process, since the national and international credit and financial markets within which VRA functions are often volatile and require that VRA have the requisite flexibility to respond to changing economic and credit conditions.

Concerns expressed by public:

None

§ 2.2-4002, A.9. Agencies expressly exempted by any other provision of this Code.

Number of regulations promulgated under exemption in past five years:

Chapter 321 of 2008 Acts of Assembly	163
(Model public participation guidelines)	
§3.2-703	4
(VDACS – extend or reduce regulated areas described in quarantine)	
Chapters 249 and 324 of 2004 Acts of Assembly	3
(Environmental permit fees)	
§2.2-4007.07	2
(State Air Pollution Control Board variances)	
§3.1-796.93:3	1
(VDACS – dangerous dog registry)	
§3.2-703-704	1
(VDACS – Authority to quarantine)	
§9.1-915	1
(Sex offender registry act)	
§15.2.2222.1	1
(State and local transportation planning)	
§58.1-2421	1
(Motor vehicle sales and use tax)	
Chapter 382 of the 2007 Acts of Assembly	1
(VDOT – initial regulations regarding subdivision streets)	
Chapter 847 of the 2007 Acts of Assembly	1
(WIC supplemental nutrition program)	
Chapter 875 of the 2007 Acts of Assembly	1
(VDOT appraisal fee regulations)	
Chapter 781 of the 2009 Acts of Assembly	1
(Virginia WIC program)	
Total	181

Agency necessity rating:

N/A

Agency rationale:

N/A

Concerns expressed by public:

“The State Executive Council, which oversees the Comprehensive Services Act, does not fall under the APA and has enormous authority dealing with at-risk children and the funding thereto.”

○ **§ 2.2-4002, A.10. The Department of General Services in promulgating standards for the inspection of buildings for asbestos pursuant to §2.2-1164**

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Useful

Agency rationale:

Use of the exemption provides a benefit in that the regulatory process can be quick. In these types of exemptions, there is usually only a slight probability of any public comment. The regulations could be promulgated through the fast-track process just as effectively.

Concerns expressed by public:

None

JLARC staff note:

Based on the agency response, it may be possible to discontinue this exemption, particularly if the fast-track process is expedited in the future through increased executive review efficiency.

No other states appear to have a similar exemption.

§ 2.2-4002, A.11. The State Council of Higher Education for Virginia, in developing, issuing, and revising guidelines pursuant to § 23-9.6:2

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

The majority of all updates where SCHEV has some discretion are “non-controversial.” The controversial issues normally come from new laws passed by the state or federal government. SCHEV has no control over these kinds of changes and an extended promulgation process would be of little benefit.

Concerns expressed by public:

None

JLARC staff note:

SCHEV’s rationale for its exemption cites the non-controversial and non-discretionary aspects of these guidelines. It is unclear whether these guidelines must be adopted as regulations. However, if they must, the fast-track process is available for non-controversial regulatory actions; and there is also an exemption in VAPA for regulatory changes over which the agency has no discretion due to State or federal law changes. Based on SCHEV’s response, it appears that if the fast-track process for non-controversial actions could be expedited, SCHEV might not require its own exemption.

§ 2.2-4002, A.12. The Commissioner of Agriculture and Consumer Services in adopting regulations pursuant to subsection B of § 3.2-6002 and in adopting regulations pursuant to § 3.2-6023.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

This exemption for regulations pursuant to § 3.2-6002 allows the Commissioner to adopt by reference any federal regulation pertaining to animal health and amend such as required. Compliance with federal regulations concerning animal health is crucial to maintaining the viability of Virginia livestock products both nationally and globally, as noncompliance could result in the inability of Virginia livestock or livestock products to enter interstate or international commerce.

The exemption for regulations pursuant to § 3.2-6023 allows for the Commissioner to rapidly adopt regulations concerning the prevention and control of avian influenza in the live bird marketing system. This exemption is critical to ensuring that rapid and effective action can be taken to protect Virginia's poultry industry from avian influenza.

Concerns expressed by public:

"During non-pandemic times, these types of regulations deserve public comment, and such time and promulgation would help with community and public education and debate."

"The commissioner could likely benefit from public input regarding the control of infectious diseases which originate on farms. Ultimately, the public is affected by infectious diseases and the policy of VDACS. Therefore, the agency should take their concerns to heart and draw from the public's depth of experience."

"Contagious and infectious diseases impact the citizens and not just the regulated community who try to prevent citizens from knowing the whole story."

JLARC staff note:

While VDACS has no written guidelines for soliciting input on exempt regulations, the agency states that for the majority of exempt regulations, it uses the same public participation guidelines to solicit input as it does for non-exempt regulations. Interested parties can provide public comment at the meetings of the Board where the exempt action is being considered.

§ 2.2-4002, A.13. The Commissioner of Agriculture and Consumer Services and the Board of Agriculture and Consumer Services in promulgating regulations pursuant to subsections B and D of § 3.2-3601, subsection B of § 3.2-3701, § 3.2-4002, subsections B and D of § 3.2-4801, §§ 3.2-5121 and 3.2-5206, and subsection A of § 3.2-5406.

Number of regulations promulgated under exemption in past five years:

5

Agency necessity rating:

Essential

Agency rationale:

The exemption is essential to achieving fast promulgation and revision of regulations to provide for a safe, fair and consistent marketplace. Fast action is critical to establish or incorporate changes to methods of product sampling and analysis to be consistent and compliant with requirements incorporated by federal and state agencies, associations, and laboratories.

In addition, the food industry is continually evolving and changing. Novel food

products and processes are being developed on a regular basis. If the promulgation of regulations is not timely, there is no regulatory framework with which to regulate new products and processes - many which are hazardous. This situation can, in turn, be harmful to the public by contributing to an increased number of food borne illnesses and possible deaths from contaminated food products.

Concerns expressed by public:

“What food is available to me to put on my table should be healthy for me and my family. If the regulated community is the only one with a voice in the debate, how healthy will that food be, or how much of an issue to the corporation’s bottom line will it be.”

“There does not appear to be a compelling policy reason why these should be exempt, and there is a substantial danger of undue influence of agency actions by particular interests. Thus, public openness and the protections of regulatory review are especially important. In particular, based on recent historical experience, there is good reason to believe that the milk industry uses regulations to limit competition.”

JLARC staff note:

See discussion of VDACS’ public comment opportunities in the JLARC staff note for the immediately preceding exemption.

No other states appear to have a similar exemption.

§ 2.2-4002, A.14. The Board of Optometry when specifying therapeutic pharmaceutical agents, treatment guidelines, and diseases and abnormal conditions of the human eye and its adnexa for TPA-certification of optometrists pursuant to Article 5 (§ 54.1-3222 et seq.) of Chapter 32 of Title 54.1.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Useful

Agency rationale:

When optometrists were first authorized to prescribe and treat with certain therapeutic pharmaceutical agents, there was a specific formulary of drugs so the exemption was essential to be able to keep the formulary current. Currently, regulations include broad categories of drugs that TPA-certified optometrists may use and prescribe, so the need for immediate response to changes in the formulary has abated. The APA exemption is still useful to address changes that might arise in medical technology and the appearance of new drugs that would not fit within the categories established in regulation.

Concerns expressed by public:

None

JLARC staff note:

No other states appear to have a similar exemption.

◎ **§ 2.2-4002, A.15. The Virginia War Memorial Foundation.**

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Setting fees for use of the memorial – essential

Adopting regulations regarding appropriate use of memorial – not important

Agency rationale:

The War Memorial Foundation is attempting to get funding for a new education center, and will charge fees for use of the new facility. The exemption will enable the foundation to set appropriate fees in a timely manner.

The foundation has never promulgated a regulation regarding appropriate use of the memorial. Instead, informal guidelines have been adopted. Staff for the foundation indicated there is no reason why such regulations, if adopted, should not go through the full VAPA process.

Concerns expressed by public:

None

JLARC staff note:

It is recommended that this exemption be modified to limit the exemption to setting fees for use of its facilities.

- ◎ **§ 2.2-4002, A.16. The Virginia Medicaid Prior Authorization Advisory Committee in making recommendations to the Board of Medical Assistance Services regarding prior authorization for prescription drug coverage pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1.**

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Not important

Agency rationale:

The advisory committee did not promulgate regulations. It only provided advice to the Board of Medical Assistance Services. Furthermore, this committee no longer exists.

Concerns expressed by public:

“The board should consider broader distribution of notice to potential prescribers of medications – not just pharmaceutical manufacturers.”

JLARC staff note:

The exemption should be discontinued.

- **§ 2.2-4002, A.17. The State Board of Education, in developing, issuing, and revising guidelines pursuant to § 22.1-203.2.**

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Useful

Agency rationale:

The *Guidelines Concerning Religious Activity in the Public Schools* (adopted June 22, 1995, in consultation with the Office of the Attorney General) were not in-

tended as regulations or state policies displacing local discretion. The Guidelines were designed as technical assistance for consideration by local school officials, administrators and teachers in formulating their local policies and decisions. They were adopted following public hearings throughout the Commonwealth and after opportunity for comment and input from the general public, teachers, school administrators and school boards, parents and students, and interested organizations.

The exemption in the *Code of Virginia* was useful because it helped clarify the non-regulatory intent of the Guidelines as well as the consultation role of the Board of Education with the Office of the Attorney General.

Concerns expressed by member of public:

“If my children are going to be subjected to prayers to a god of whom I hold no allegiance, shouldn’t I have a voice in the guidelines?”

JLARC staff note:

If without the force of law, then these guidelines may not have to be considered regulations, and would not have to be subject to VAPA. Thus, an exemption would not be necessary. The Board still could, and probably should, have some public comment opportunity for any changes considered, regardless of whether subject to VAPA.

§ 2.2-4002, A.18. The Virginia Racing Commission, (i) when acting by and through its duly appointed stewards or in matters related to any specific race meeting or (ii) in promulgating technical rules regulating actual live horse racing at race meetings licensed by the Commission.

Number of regulations promulgated under exemption in past five years:

9

Agency necessity rating:

Essential

Agency rationale:

It is essential for the Virginia Racing Commission (VRC) to be able to promulgate the regulations that involve the technical rules of live horse racing in an expeditious manner. In most instances the rule changes are needed to provide for improved safety measures for the participants such as requirements and standards of the helmets and protective vests worn by the jockeys during the races and also by the exercise riders during morning work outs. Another example of this would be the rules for the use of the whip on the race horses including the type of whips to be used. These types of rule changes need to be made quickly as they involve safety issues for the participants as well as the horses that should not have to wait for the regular rule making process, which in some instances can take a year or more to complete.

Concerns expressed by public:

None

○ **§ 2.2-4002, A.19. The Virginia Small Business Financing Authority.**

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Useful

Agency rationale:

The Small Business Financing Authority administers a number of programs to assist small businesses. The agency develops forms and guidelines for the various loan programs. These actions do not constitute regulatory activities.

Concerns expressed by public:

“We need to know that funds that are granted to businesses are legitimate and not being given as return for friendships or relationships.”

“The exemption seems overly broad.”

JLARC staff note:

If without the force of law, then these forms and guidelines may not need to be considered regulations, and would not have to be subject to VAPA; thus, an exemption to VAPA would not be necessary.

§ 2.2-4002, A.20. The Virginia Economic Development Partnership Authority.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

VEDP is an economic development organization that must remain flexible and nimble to meet the goals of encouraging companies to make taxable capital investments and to create new jobs in the Commonwealth. We must be able to meet the diverse needs of diverse companies in diverse industries located in diverse communities throughout the Commonwealth, while maintaining some common themes and continuity. While we do not currently have any regulations, should we need those regulations, speed in the development, implementation and possible amendment of those regulations would be critical to our success.

The statutes governing the discretionary grant programs administered by VEDP provide the framework for administering those programs. VEDP guidelines supplement the statutory framework. Since every economic development project is different, the guidelines need to be fluid enough to make wise public decisions for the Commonwealth, while serving the goals of encouraging companies to make taxable capital investments and to create new jobs in the Commonwealth. Since these are discretionary programs, and not mandated or “by-right” programs, some flexibility and variability in administering the programs is appropriate and desirable to meet the public purpose goals of the Commonwealth and the business goals of the grant recipients.

Concerns expressed by public:

“Most economic development agreements involve initial if not long-term reductions in corporate income taxes and the provision of grants, which may affect the use of my personal income taxes. I would like to know beforehand if I will be forced to subsidize a private corporation.”

“The exemption seems overly broad, particularly for an agency whose work is not evidence based.”

§ 2.2-4002, A.21. The Board of Agriculture and Consumer Services in adopting, amending or repealing regulations pursuant to subsection A (ii) of § 59.1-156.

Number of regulations promulgated under exemption in past five years:

1

Agency necessity rating:

Essential

Agency rationale:

The exemption is essential to achieving fast promulgation and revision of regulations to provide for a safe, fair and consistent marketplace for oxygenated motor fuels. Fast action is critical to establish, or incorporate changes to, oxygenation requirements specified by the federal Clean Air Act or any other federal environmental requirement pertaining to motor fuels, to maintain stability in this rapidly changing marketplace and to ensure consistent environmental and consumer protection.

Concerns expressed by public:

“The outcome may have effects on local government. The process should be transparent and open to comment.”

JLARC staff note:

See prior appendix notes on VDACS’ public comment opportunities for exempt regulations.

§ 2.2-4002, A.22. The Insurance Continuing Education Board pursuant to § 38.2-1867.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

The Insurance Continuing Education Board is entirely voluntary, and it would be very difficult to handle the additional burden of promulgating regulations through the APA. Furthermore, when the board sees the need for changes in instruction of insurance agents, they would like to make these changes quickly and not have to wait a year or more to adopt the change through the full APA process.

The board is self-funded and is not represented by the Attorney General. The *Code of Virginia* sets the required number of hours for continuing education in each insurance discipline. The board approves instructors, courses and programs of instruction. All five professional insurance associations are represented on the board, and the board holds “industry days” to solicit input from insurance professionals before adopting criteria for approving instructors and courses..

Concerns expressed by public:

“This affects individual livelihoods and should be open to interpretation.”

§ 2.2-4002, A.23. The Board of Health in promulgating the list of diseases that shall be reported to the Department of Health pursuant to § 32.1-35 and in adopting, amending or repealing regulations pursuant to subsection C of § 35.1-14 that incorporate the Food and Drug Administration’s Food Code pertaining to restaurants of food service.

Number of regulations promulgated under exemption in past five years:

1

Agency necessity rating:

Essential

Agency rationale:

Regarding the disease reporting exemption: The exemption provides an expeditious mechanism for adding an emerging threat to the list of reportable diseases. Such additions are important so that the Department of Health may follow the emergence and spread of various pathological organisms or other threats to public health, as quickly as possible following their identification, in order to better protect groups and communities, including people within the Commonwealth. Diseases are ever-changing and opportunistic; the Board must maintain the ability to require laboratories, hospitals, physicians, and others (as appropriate) report dependably to the Department the occurrence of laboratory-confirmed (or otherwise certain) instances of diseases. Currently, several dozen such diseases are routinely reported by professionals and technical support workers, as they may and do occur anywhere in the Commonwealth.

Regarding the food exemption: The Board of Health’s Food Regulations are based on the Food and Drug Administration’s (FDA) Food Code. FDA publishes a new Food Code every four years, and a supplement to it every two years. So the Department must revise the Food Regulations every two years. Absent the exemption, it would be impossible for the Board to keep the regulations up-to-date and reflective of the latest federal standards in protecting the public’s food – a matter of some public concern and considerable media attention. Although the exemption requires the staff of the Department to coordinate its adoption efforts closely with adoption efforts concurrently undertaken by staff of the Department of Agriculture and Consumer Services, the exemption is crucial in providing a shortened time-frame for making changes in the FDA’s Food Code effective as Virginia regulations.

Concerns expressed by public:

“Any regulation that potentially affects human health should be open to review by the public.”

JLARC staff note:

No other state appears to have a similar exemption.

- ◎ **§ 2.2-4002, A.24. The nonprofit, nonstock corporation established by the Commissioner of Agriculture and Consumer Services pursuant to subdivision B 5 of § 3.2-102.**

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Not important

Agency rationale:

The exemption is not important because the non-stock corporation appears to have no authority to promulgate regulations.

Concerns expressed by public:

None

JLARC staff note:

It appears that this exemption can be discontinued.

§ 2.2-4002, A.25. (Expires December 31, 2010) The Secretary of Natural Resources in setting a date of closure for the Chesapeake Bay purse seine fishery for Atlantic menhaden for reduction purposes pursuant to § 28.2-1000.2.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

N/A

Agency rationale:

N/A

Concerns expressed by public:

“Chesapeake Bay protection should be open for public comment.”

JLARC staff note:

Given that the exemption has an expiration date, JLARC staff did not inquire about the rationale for this exemption.

§ 2.2-4002, A.26. The Board of Pharmacy when specifying special subject requirements for continuing education for pharmacists pursuant to § 54.1-3314.1.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

Legislation introduced at the request of the Board of Pharmacy included the APA exemption because it is essential for the purpose of identifying and requiring specific continuing education subject matter for pharmacists for a time-limited period. For example, if there is a pandemic flu outbreak, all pharmacists might be required in a given year to take a two-hour continuing education course on prevention and treatment. Without the APA exemption, there would be no ability to address urgent or immediate educational needs for pharmacists.

Concerns expressed by public:

“There does not appear to be a compelling reason why these should be exempt, and there is a substantial danger of undue influence of agency actions by particu-

lar interests. Thus, public openness and the protections of regulatory review are especially important. Potential conflicts of interest are always present when a group of self-interested individuals are given the authority to write their own regulations. Continuing education rules have long been used by boards to limit entry into their profession for their own economic benefit at the expense of the public interest.”

JLARC staff note:

No other state appears to have a similar exemption.

§ 2.2-4002, B.1. Money or damage claims against the Commonwealth or agencies thereof.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

N/A

Agency rationale:

N/A

Concerns expressed by public:

“The public should be made aware of all damages incurred by the Commonwealth.”

“The more transparency, the better for citizens to know what their government is doing.”

JLARC staff note:

JLARC staff did not inquire about the rationale for this exemption.

§ 2.2-4002, B.2. The award or denial of state contracts, as well as decisions regarding compliance therewith.

Number of regulations promulgated under exemption in past five years:

2 (Department of Minority Business Enterprise)

Agency necessity rating:

Useful

Agency rationale:

The exemption is useful because it allows the agency to adopt regulations without delay as changes occur throughout the year (e.g., state or federal legislation, executive orders, new procurement rules or procedures, etc.)

Concerns expressed by public:

“[The regulations] should be subject to full public scrutiny to ensure lawful and fair decision-making.”

“I have a general concern for the welfare of member companies that may bid on said contracts and will therefore be directly impacted by how contracts are either awarded or denied.”

§ 2.2-4002, B.3. The location, design, specifications or construction of public buildings or other facilities.

Number of regulations promulgated under exemption in past five years:

2 (Department of Transportation, Commonwealth Transportation Board)

Agency necessity rating:

Essential

Agency rationale:

This exemption is routinely used by VDOT for regulations that deal with features of a highway design, such as the Noise Abatement Policy (24 VAC 30-80) and the regulation Public Hearings for the Location and Design of Highway Projects (24 VAC 30-380). These regulations allow VDOT to approach proposed facility designs, specifications and locations from an engineering standpoint considering industry standards and the parameters set by federal regulators. This exemption is important because it provides VDOT the ability to act quickly to amend regulations where design and safety standards have changed, and to address potential safety issues in a prompt, expeditious manner.

Concerns expressed by public:

“Regulations should be subject to full scrutiny to ensure wise use of funds and to inhibit grandiose and lavish designs (such as certain VDOT rest areas).”

“Superlative standards increase the cost of construction and do not always represent best value to taxpayers. Non-elected officials can incorporate standards prefaced on personal beliefs without public scrutiny (e.g., “green” standards).”

§ 2.2-4002, B.4. Grants of state or federal funds or property.

Number of regulations promulgated under exemption in past five years:

15

Agency necessity rating:

Essential

Agency rationale:

(Department of Transportation) This exemption is routinely used for regulations that deal with special-purpose funding programs established in the Code of Virginia, such as the Revenue Sharing Program (24 VAC 30-281) and the regulation on Change of Limited Access Control (24 VAC 30-401). The exemption provides the CTB with the ability to make adjustments to fund-oriented types of regulations more rapidly to respond to changing operational conditions, such as modified budget priorities and available state/federal funding. It also affords the CTB the ability to quickly amend regulations to meet the ever changing needs/conditions in local government and the community.

(Department of Rail and Public Transportation) These are grant application procedures. This exemption is essential to ensuring that deadlines are met for the development, contracting and implementation of rail projects funded through state grants.

(State Council of Higher Education) regulations are most commonly updated based upon new law, but in any case, the financial aid programs are an on-going concern with students utilizing the grants governed by the regulations all during the year. Any delay in promulgation means a delay in getting needed updates into effect.

Concerns expressed by public:

“Stimulus funding selection needed better public review.”

“Any requests for state or federal funds should go through the normal regulatory process and be open to the public for viewing.”

§ 2.2-4002, B.5. The chartering of corporations.

Note: The chartering of corporations falls under the authority of the State Corporation Commission, which has an agency exemption for all regulations under § 2.2-4002, A.2.

Number of regulations promulgated under exemption in past five years:

0

§ 2.2-4002, B.6. Customary military, naval or police functions.

Number of regulations promulgated under exemption in past five years:

2 (Department of State Police)

Agency necessity rating:

Useful

Agency rationale:

Fast action is necessary because the regulations, when adopted or amended, implement critical issues relating to highway safety. The regulations are highly technical in nature and are often driven by statute or federal regulation.

Concerns expressed by public:

“All agencies should be open for review and comment unless the nature of the information needs to be secure for matters of public safety.”

§ 2.2-4002, B.7. The selection, tenure, dismissal, direction or control of any officer or employee of an agency of the Commonwealth.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

N/A

Agency rationale:

N/A

Concerns expressed by public:

“The public should have information on the background and any actions of a state employee or agency having the public trust and being paid as a public servant.”

JLARC staff note:

JLARC staff did not inquire about the rationale for this exemption.

§ 2.2-4002, B.8. The conduct of elections or eligibility to vote.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

The State Board of Elections promulgates various regulations under their authority in Va. Code § 24.2-103. As the entity charged with ensuring pure elections, the agency must act independent of partisan pressure. For this reason, requiring regulations to be reviewed as required in Va. Code § 2.2-4013 could jeopardize the nonpartisan administration of elections in Virginia. Given that the State Board of Elections has the authority to regulate certain aspects of a Governor's or Attorney General's campaign and assess civil penalties for certain violations, there is a clear conflict of interest in requiring the Governor and Attorney General to review such regulations.

Concerns expressed by public:

"This is an area of great public interest. Rules, policies and procedures should be subject to public comment."

"Eligibility to vote is so important in our society, and changes should be considered very carefully."

§ 2.2-4002, B.9. Inmates of prisons or other such facilities or parolees therefrom.

Number of regulations promulgated under exemption in past five years:

4 (Board of Corrections)

Agency necessity rating:

Essential

Agency rationale:

The regulations represent operational and management standards for state operated prisons, field units and work centers; and the programs thereof. These standards govern internal practice and procedures that do not impact the public.

Concerns expressed by public:

"[I have concerns about] changes related to medical treatment of prisoners and reimbursement for the cost of such services."

§ 2.2-4002, B.10. The custody of persons in, or sought to be placed in, mental, penal or other state institutions as well as the treatment, supervision or discharge of such persons.

Number of regulations promulgated under exemption in past five years:

3 (Board of Corrections)

Agency necessity rating:

Essential

Agency rationale:

The regulations represent operational and management standards for state operated Probation and Parole offices, detention centers and diversions centers; and the programs thereof. These standards govern internal practice and procedures that do not impact the public.

Concerns expressed by public:

"The custody, treatment, supervision, and discharge of individuals with mental

illness in state institutions is a critically important issue deserving of public input.”

“Rules, policies, and procedures regarding mental health patients should be subject to public comment.”

§ 2.2-4002, B.11. Traffic signs, markers, or control devices.

Number of regulations promulgated under exemption in past five years:

3 (Commonwealth Transportation Board)

Agency necessity rating:

Essential

Agency rationale:

This exemption is routinely used for regulations that are based in whole or in part on federal regulations or requirements (such as the Manual on Uniform Traffic Control Devices (MUTCD)), which the federal government identified as the nationwide standard for signs and sign specifications. State DOTs may have varying timetables to adopt new or amended MUTCDs, or to adopt variances from these standards where the same are allowed. Therefore, following the standard APA processes may not always be compatible with situations where the MUTCD may include variances or waivers from specific parts necessary to address state-specific conditions. This exemption is important because it provides for needed flexibility and responsiveness to address signage concerns that affects public safety. The Integrated Directional Signing Program (IDSP) Signing Criteria (24 VAC 30-551) provides Virginia’s motorist-service businesses, attractions, tourist destinations and other points of interest a single contact for placing their logo on a sign along a state-maintained highway. Signs in the program serve safety, convenience, and economic purposes by alerting motorists to sites where lodging, meals, entertainment, or cultural events are available. Having the exemption means that VDOT can tailor the program participation requirements with sufficient speed and flexibility to meet changing business demands and safety conditions.

Concerns expressed by public:

“As intelligent transportation systems evolve, the control of traffic has become more interactive and will continue to do so. There will be more options for direct vehicle/signal interfaces to enhance traffic flow, particularly focused on emergency vehicles and mass transit operations, which should be open to public discourse. The use of remote sensing technologies for monitoring traffic flow and road function is increasing, with potential infringements on personal space and privacy (for example, the Google map issue). Implementation of these systems should be subject to publicly endorsed standards.”

§ 2.2-4002, B.12. Instructions for application or renewal of a license, certificate or registration required by law.

Number of regulations promulgated under exemption in past five years:

1 (Department of Minority Business Enterprise)

Agency necessity rating:

Useful

Agency rationale:

The exemption is useful because it allows the agency to adopt regulations without delay as changes occur throughout the year (e.g., state or federal legislation, executive orders, new procurement rules or procedures, etc.)

Concerns expressed by public:

“This is not an emergency type of situation, and the people who would be affected by these changes should be allowed time to comment on them with proper notice. Changes to the rules without proper notice are unfair and unjust.”

§ 2.2-4002, B.13. Content of, or rules for the conduct of, any examination required by law.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

N/A

Agency rationale:

N/A

Concerns expressed by public:

None

JLARC staff note:

JLARC staff did not inquire about the rationale for this exemption.

§ 2.2-4002, B.14. The administration of [investment] pools authorized by Chapter 47 (§ 2.2-4700 et seq.) of this title.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

This regulatory exemption pertains to the Government Non-Arbitrage Investment Act, which provides investment vehicles to localities and allows localities to pool their money for greater return on their investments. The exemption is needed to provide the Treasury Department with the flexibility to quickly adjust to changing market conditions.

Concerns expressed by public:

None

§ 2.2-4002, B.15. Any rules for the conduct of specific lottery games, so long as such rules are not inconsistent with duly adopted regulations of the State Lottery Board, and provided that such regulations are published and posted.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

The types of lottery games offered, the sale of lottery tickets, the licensing of agents, methods of payment to winners, and advertising are all regulatory actions that are subject to the APA. This exemption enables the agency to create different types of games within the regulatory framework. It would be very time-consuming to introduce a new game if the Lottery did not have this exemption.

Concerns expressed by public:

None

§ 2.2-4002, B.16. Orders condemning or closing any shellfish, finfish, or crustacea growing area and the shellfish, finfish or crustacean located thereon pursuant to Article 2 (§ 28.2-803 et seq.) of Chapter 8 of Title 28.2.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

The Virginia Department of Health has a division of Shellfish Sanitation that tests the waters in shellfish growing areas. If the water gets contaminated, the shellfish may become dangerous to eat. The commissioner has the authority to close such waters to fishing and harvesting until the water is deemed safe. The department issues about 100 of these orders per year to close or redefine the areas of contaminated waters. The orders usually do not last for more than 90 days. Because of public health concerns, it is imperative that orders take effect immediately. Furthermore, these decisions are based on scientific assays and are not really a matter of argument to be debated in a public forum

Concerns expressed by public:

“Condemnation of any fishing should solicit input from the citizens that are at risk.”

“Citizen input may be helpful in determining such areas, as well as in spreading the word”

§ 2.2-4002, B.17. Any operating procedures for review of child deaths developed by the State Child Fatality Review Team pursuant to § 32.1-283.1.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

The procedures used by the Review Team are specific to each child death case. The exemption is necessary to protect the identity of the child and the location of the child death.

Concerns expressed by public:

“As Virginia has a poor record among the 50 states regarding infant mortality, I am interested in knowing the issue and procedures concerning this problem.”

§ 2.2-4002, B.18. The regulations for the implementation of the Health Practitioners’ Intervention Program and the activities of the Intervention Program Committee pursuant to Chapter 25.1 (§ 54.1-2515 et seq.) of Title 54.1.

Number of regulations promulgated under exemption in past five years:

2 (Department of Health Professions)

Agency necessity rating:

Useful

Agency rationale:

Regulations for the Health Practitioners’ Intervention Program are unique at the Department because they do not regulate a profession but a program designed for monitoring impaired practitioners. The APA exemption is important to allow the agency to address changes in the operation of the program and in the needs of the individuals served by the program.

Concerns expressed by public:

None

§ 2.2-4002, B.19. The process of reviewing and ranking grant applications submitted to the Commonwealth Neurotrauma Initiative Board pursuant to Chapter 3.1 (§ 51.5-12.1 et seq.) of Title 51.5.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Useful

Agency rationale:

This exemption applies only to the process of reviewing and ranking individual grant applications. The regulation governing the process is not exempt, and the Department of Rehabilitative Services (DRS) recently adopted a new regulation pertaining to the program by going through the full VAPA process. It is unclear whether this exemption is needed to allow DRS to review, rank, and award grants without going through VAPA.

Concerns expressed by public:

“Grant review should always be transparent.”

§ 2.2-4002, B.20. Loans from the Small Business Environmental Compliance Assistance Fund pursuant to Article 4 (§ 10.1-1197.1 et seq.) of Chapter 11.1 of Title 10.1.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Useful

Agency rationale:

This program is no longer being funded and no regulations pertaining to the program were ever promulgated. However, if the program were to be funded in the future, this exemption would be necessary in order to move funds quickly and to capitalize on current interest rates..

Concerns expressed by public:

“The exemption may limit public disclosure in an area of professional interest.”

§ 2.2-4002, B.21. The Virginia Breeders Fund created pursuant to § 59.1-372.

Number of regulations promulgated under exemption in past five years:

3

Agency necessity rating:

Useful

Agency rationale:

One percent of all wagers at race tracks and off-track betting sites goes into the Breeders Fund to reward Virginia Breeders and provide an incentive for breeders to operate in Virginia. The exemption provides the Virginia Racing Commission with the flexibility to change the way bonuses and awards are distributed to Virginia breeders and owners, based on yearly recommendations by the breeders fund committee. The exemption enables the commission to adopt regulations in time for the next year as opposed to waiting possibly two years for the change to take effect – at which point the recommendations may have changed again.

Concerns expressed by public:

None

§ 2.2-4002, B.22. The types of pari-mutuel wagering pools available for live or simulcast horse racing.

Number of regulations promulgated under exemption in past five years:

2

Agency necessity rating:

Useful

Agency rationale:

The exemption allows the Racing Commission to quickly implement new types of betting and changes in minimum wagering amounts. This allows Virginia to keep up with trends at horse race wagering facilities nationwide.

Concerns expressed by public:

“This area needs oversight.”

“All gambling pools and operations should be open to public comment.”

§ 2.2-4002, B.23. The administration of medication or other substances foreign to the natural horse.

Number of regulations promulgated under exemption in past five years:

4

Agency necessity rating:

Essential

Agency rationale:

The business of performance enhancing substances trainers give horses is a fast-moving environment. The Racing Commission wants to be able to quickly limit the use of or ban those substances which are harmful to the horse or create an unfair racing environment. There is a national medication and testing consortium which adopts rules and guidelines, and it is important for Virginia to be consistent with racing venues nationwide.

Concerns expressed by public:

“Recent examples of the death of South American polo horses speak to the need for more public examination.”

§ 2.2-4002, C. Minor changes to regulations published in the Virginia Administrative Code under the Virginia Register Act, Chapter 41 (§ 2.2-4100 et seq.) of this title, made by the Virginia Code Commission pursuant to § 30-150.

Number of regulations promulgated under exemption in past five years:

2

Agency necessity rating:

N/A

Agency rationale:

N/A

Concerns expressed by public:

None

JLARC staff note:

JLARC staff did not inquire about the rationale for this exemption.

§ 2.2-4006, A.1. Agency orders or regulations fixing rates or prices.

Number of regulations promulgated under exemption in past five years:

8

Department of Transportation (2)

Commonwealth Transportation Board (3)

Department of Conservation and Recreation (3)

Agency necessity rating:

Essential

Agency rationale:

(VDOT/CTB) This exemption is used to adjust toll rates provided for in the Rules, Regulations, and Rates Concerning Toll and Bridge Facilities (24 VAC 30-620). Toll rate schedules for VDOT-owned facilities are occasionally adjusted to ensure sufficient funds to cover operating and maintenance costs, and to service debt. This exemption provides VDOT with the flexibility to adjust toll rates in a timely manner to meet its financial and operational obligations to the public. Having to follow the full-scale APA process to amend this regulation would not be feasible to meet operational needs or the terms of any bond requirements.

(DCR) Usage of this exemption allows for necessary adjustments to be made to the prices applicable to various aspects of the State Parks program in an efficient manner. These adjustments, which can represent both increases and decreases, are typically minor in nature and are needed to address budgetary concerns of the Department due to increased costs of providing goods and services at State Parks and other factors. The regulations are typically updated at least annually, and placing them in a full APA process would preclude the Department from reviewing them at this frequency in order to assure that they establish and maintain proper rates.

Concerns expressed by public:

“When rates and prices are fixed by agencies, their constituents are really customers. The State Corporation Commission has rules and procedures to make sure that the rates they set are fair and reasonable. When rates are set by other agencies, similar procedures should be required.”

“There should be some manner of public input/oversight to establishing rates and pricing that affects the public to keep them within reasonable standards.”

“This exemption is too broad.”

§ 2.2-4006, A.2. Regulations that establish or prescribe agency organization, internal practice or procedures, including delegations of authority.

Number of regulations promulgated under exemption in past five years:

10

Agency necessity rating:

Useful

Agency rationale:

(VDOT) This exemption is not as widely used by VDOT as some of the other exemptions. Two regulations (Delegation of Duties (24 VAC 30-15) and Internal Audit Charter (24 VAC 30-16)) originally filed under this exemption have recently been repealed. This exemption has been used by VDOT in the past to address purely managerial decisions, such as the Commissioner’s delegation of duties to VDOT employees. It is also used to delineate the process by which the public may use VDOT facilities.

Concerns expressed by public:

“Internal procedures often become regulations in practice, so they should be fully vetted.”

§ 2.2-4006, A.3. Regulations that consist only of changes in style or form or corrections of technical errors.

Number of regulations promulgated under exemption in past five years:

75

Agency necessity rating:

N/A

Agency rationale:

N/A

Concerns expressed by public:

None

JLARC staff note:

JLARC staff did not inquire about the rationale for this exemption.

§ 2.2-4006, A.4.a. Regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved.

Number of regulations promulgated under exemption in past five years:

270

Agency necessity rating:

N/A

Agency rationale:

N/A

Concerns expressed by public:

“We want to learn about changes in regulations which may impact us. Maybe we, or others, could improve the exact wording of changes to avoid unwanted side effects.”

“We feel it is important to receive notice of changes that might affect our company or our industry.”

JLARC staff note:

JLARC staff did not inquire about the rationale for this exemption.

§ 2.2-4006, A.4.b. Regulations that are required by order of any state or federal court of competent jurisdiction where no agency discretion is involved.

Number of regulations promulgated under exemption in past five years:

1 (Department of Mines, Minerals, and Energy)

Agency necessity rating:

N/A

Agency rationale:

N/A

Concerns expressed by public:

“There is always agency discretion in how such an order might be carried out. The devil is in the details, and the courts do not trouble themselves with the details.”

JLARC staff note:

JLARC staff did not inquire about the rationale for this exemption.

§ 2.2-4006, A.4.c. Regulations that are necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation, and the Registrar has so determined in writing.

Number of regulations promulgated under exemption in past five years:

104

Agency necessity rating:

N/A

Agency rationale:

N/A

Concerns expressed by public:

“The Department of Environmental Quality has adopted regulations without public comment because the new regulations allegedly do not differ materially from those required by federal law. However, that conclusion of ‘no material difference’ is highly questionable.”

“As long as the Registrar is accurate in his/her assessment of what constitutes material differences, I have no problem with this exemption.”

JLARC staff note:

JLARC staff did not inquire about the rationale for this exemption.

◎ **§ 2.2-4006, A.5. Preliminary program permit fees of the Department of Environmental Quality assessed pursuant to subsection C of § 10.1-1322.2.**

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Not important

Agency rationale:

This exemption was provided in order to quickly establish fees for Title V permits issued by the State Air Pollution until permanent fees could be established through a full VAPA process. The permanent fees have been established and this exemption is no longer necessary.

Concerns expressed by public:

“All fee structures should be open for public discourse, particularly with emerging state initiatives across the U.S. to address climate change. These programs can have profound effects on economic development and sustainability.”

“Fees are an important part of the structure of air regulations. There is no reason why DEQ should not be subject to some regulatory review as long as they have any discretion in the setting of fees.”

JLARC staff note:

Exemption can be discontinued.

§ 2.2-4006, A.6. Regulations of the Pesticide Control Board adopted pursuant to subsection B of § 3.2-3929 or clause (v) or (vi) of subsection C of § 3.2-3931 after having been considered at two or more Board meetings and one public hearing.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

The exemption is essential to achieving fast promulgation and revision of regulations to provide for a safe, fair and consistent marketplace for the application of pesticides. Fast action is critical to establish or incorporate changes to 1) commercial applicator or registered technician training and service requirements, and 2) exemptions to this regulation for applicators or supervisors of applicators based upon minimal risk to the public health and safety. If new or revised risk information regarding pesticide products or the application of pesticide products becomes available, the safety of the applicator, public, and environment mandate a rapid response in amending these risk-based regulations.

Concerns expressed by public:

“[I would like to see more public input because] pesticides were developed from the chemical and biological warfare chemicals of World War I. With their toxicity and bioaccumulative nature, they impact not just the ‘pests’ but the whole web-of-life.”

JLARC staff note:

No other state appears to have a similar exemption.

§ 2.2-4006, A.7. Regulations of the regulatory boards served by (i) the Department of Labor and Industry pursuant to Title 40.1 and (ii) the Department of Professional and Occupational Regulation or the Department of Health Professions pursuant to Title 54.1 that are limited to reducing fees charged to regulants and applicants.

Number of regulations promulgated under exemption in past five years:

33

Agency necessity rating:

Essential

Agency rationale:

It is essential that the departments have the ability to reduce fees whenever the statutory requirements are met. There is an equal obligation to raise fees to cover the expenses of the departments, but since a fee increase imposes a regulatory burden, it requires sufficient analysis, justification and opportunity for public comment and has no APA exemption. A fee decrease is never opposed, and the APA exemption allows a board to reduce its surplus with a one-time fee reduction and to bring its budget within the statutory expense/income ratio.

Concerns expressed by public:

None

JLARC staff note:

No other state appears to have a similar exemption.

- **§ 2.2-4006, A.8. The development and issuance of procedural policy relating to risk-based mine inspections by the Department of Mines, Minerals and Energy authorized pursuant to §§ 45.1-161.82 and 45.1-161.292:55.**

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Useful

Agency rationale:

Risk-based mine inspection is an essential part of DMME's mine worker safety program, but the procedures governing this process are strictly internal. We do not write regulations to cover our procedures for this activity and therefore the exemption is not essential.

Concerns expressed by public:

None

JLARC staff note:

If the procedures are strictly internal, and DMME does not write regulations to cover these procedures, then the necessity of this exemption appears to be questionable. A potential concern is if the procedures specify and require certain acts of cooperation by external parties whose rights or conduct are then impacted by the procedures.

- ◎ **§ 2.2-4006, A.9. General permits issued by the (a) State Air Pollution Control Board pursuant to Chapter 13 (§ 10.1-1300 et seq.) of Title 10.1 or (b) State Water Control Board pursuant to State Water Control Law (§ 62.1-44.2 et seq.), Chapter 24 (§ 62.1-242 et seq.) of Title 62.1 and Chapter 25 (§ 62.1-254 et seq.) of Title 62.1, (c) Virginia Soil and Water Conservation Board pursuant to the Virginia Stormwater Management Act (§ 10.1-603.1 et seq.) of Title 10.1 and (d) the development and issuance of general wetlands permits by the Marine Resources Commission pursuant to subsection B of § 28.2-1307.**

Number of regulations promulgated under exemption in past five years:

19

State Water Control Board (17)

State Air Pollution Control Board (1)

Department of Conservation and Recreation (1)

Agency necessity rating:

Essential

Agency rationale:

(Department of Environmental Quality) A general permit establishes requirements and limitations on a category of discharger/emitter. Generally, a discharger/emitter can acquire general permit coverage in a shorter time period and for a lower cost. A discharger/emitter is given the same requirements and limitations in a general permit as would be given to a discharger/emitter through issuance of an individual permit. In addition, a general permit allows for agency resources to be focused on the more complex individual permits. In reality the general permit is a case decision; however, because it covers more than a single party and because it regulates unknown parties (future dischargers/emitters), it is a regulation under the Virginia APA.

The exemption is essential. General permits have expiration dates and it is im-

perative that the general permits are reissued in a timely manner for those covered by the general permit.

(Department of Conservation and Recreation) The Virginia Soil and Water Conservation Board promulgates two types of General Permits related to the Virginia Stormwater Management Program through use of this partial exemption. These permits, pursuant to both federal and state law, may not be issued for a term to exceed five years, are based on underlying regulations that have been established through the full APA process, and are refined with each reissuance based on updated regulations, existing technologies, and industry practices. Usage of the abbreviated (though still public-inclusive) process set forth in §2.2-4006(A)(9) provides much-needed efficiency necessary to maintaining a five-year reissuance schedule, while still providing for substantively all of the same public involvement found in a full APA process (for example, the usage of a technical advisory committee in formation of a proposed regulation and public hearings on the proposed regulation).

Concerns expressed by public:

“I have attempted, but been unable to review general permit authorizations to discharge pollutants from construction sites. The Department of Conservation and Recreation issues and enforces this permit but make no information available to the public regarding new discharges, and also make no effort to include public input regarding new discharges.”

“These general permits have authorized untold amounts of pollution and damage to public resources. As a result, it seems public involvement or at least public participation should be held in high regard in order to learn what the public wants.”

“General permits are being increasingly relied upon to reduce administrative burden within government, which is a good thing. However, the process of developing these permits should remain open to public discourse.”

JLARC staff note:

Clause (d), pertaining to the issuance of wetlands permits by the Marine Resources Commission (MRC), is unnecessary given the blanket exemption for MRC under § 2.2-4006 A12. This exemption is recommended for modification.

- **§ 2.2-4006, A.10. The development and issuance by the Board of Education of guidelines on constitutional rights and restrictions relating to the recitation of the pledge of allegiance to the American flag in public schools pursuant to § 22.1-202.**

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Useful

Agency rationale:

The *Guidelines on the Recitation of the Pledge of Allegiance* (adopted July 26, 2001, in consultation with the Office of the Attorney General) were not intended as regulations or state policies displacing local discretion. The Guidelines were

designed as technical assistance for consideration by local school officials, administrators and teachers in formulating their local policies and decisions. The Guidelines provide information on historical information and legal precedent along with statutory requirements and Board of Education guidance.

The exemption in the *Code of Virginia* was useful because it helped clarify the non-regulatory intent of the Guidelines as well as the consultation role of the Board of Education with the Office of the Attorney General.

Concerns expressed by public:

“This is an emotional and patriotic issue where the public should have the right to comment.”

JLARC staff note:

If without the force of law, then these guidelines may not have to be considered regulations, and would not have to be subject to VAPA; thus, an exemption to VAPA would not be necessary. The Board still could, and probably should, have some public comment opportunity for changes considered, regardless of whether subject to VAPA.

§ 2.2-4006, A.11. Regulations of the Board of the Virginia College Savings Plan adopted pursuant to § 23-38.77.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

Because 529 programs are administered by states under Section 529 of the Internal Revenue Code, the Board must be able to act quickly to respond to any requirements under federal law. It is unlikely that any such requirements would involve the promulgation of state regulations. If, however, this were required, the Board would need the flexibility to respond quickly.

Concerns expressed by public:

“Financial programs should never be exempt.”

“As a parent who invests in a 529 plan, I want to know everything that may affect our investment.”

§ 2.2-4006, A.12. Regulations of the Marine Resources Commission.

Number of regulations promulgated under exemption in past five years:

182

Agency necessity rating:

MRC has a total agency exemption and promulgates regulations in seven functional areas. The exemption was rated as essential for six of the areas, and useful for one area (licensing the taking of fish).

Agency rationale:

The Commission rarely establishes new licenses or adjusts fees. However, there are times when the amount of fishing gear must be reduced, in season, to prevent over fishing, e.g. blue crabs. In these instances, fast promulgation is essential to reducing harvest and preventing over fishing.

Fishing regulations must be adjusted on a very quick time frame for a variety of reasons; for example, to prevent quota overages, to adjust gear restrictions to prevent excess harvest, in response to changing stock conditions, and to meet federally mandated requirements. Promulgation within 30-days is usually a necessity.

Opening and closing of condemned shellfish grounds and regulation of harvest from these areas is essential to the maintenance of public health. Time is of the essence in these situations.

To prevent over harvesting and destruction of public shellfish beds, regulatory action in a timely fashion is necessary. Actions are taken in response to field monitoring.

Regulation of imported shellfish is also essential to the maintenance of public health and as a means to prevent the introduction of shellfish diseases to the waters of the Commonwealth.

The commission's General Wetlands Permit for Emergency Situations is essential. If the current exemption were removed, it could impede or prohibit the agency from rapidly responding to emergent public health and safety situations involving wetlands. The general permit enables the agency to address emergency situations that arise as a result of erosion due to tropical storms and hurricanes.

Similarly, the exemption is also essential for addressing emergency situations resulting from shoreline erosion damage to beaches and dunes.

Concerns expressed by public:

"Significant changes or initiations of new regulations or rules by MRC should be published to the Town Hall system for all to scan over, versus expecting the concerned citizens of Va. to always scan the daily/ weekly notices of this agency."

"Fisheries management regulations should be subject to regulatory review. Very limited exemptions for setting of seasonal catch limits might be appropriate, although the rules for determining those limits should not. There is a substantial danger of undue influence by particular interests, and the public interest will be better served by the standard regulatory process."

§ 2.2-4006, A.13. Regulations adopted by the Board of Housing and Community Development pursuant to (i) Statewide Fire Prevention Code, (ii) the Industrialized Building Safety Law, (iii) the Uniform Statewide Building Code, and (iv) amusement devices (§ 36-98.3).

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

The reliance of the Board upon the national codes and standards obviates the relevance or necessity for more extensive agency discretion and decision-making. The VAPA exemption better permits the Commonwealth of Virginia to maintain uniformity and consistency in the regulations in conjunction with the schedule of standardized national model codes, which are available on a recurrent cycle, minimizing delays in the adoption of contemporary code provisions at the state level. This allows Virginia to focus its review on any potential conflicts or adverse impacts associated with the national models in the Virginia context.

Concerns expressed by public:

“[Elimination of the exemption would] prevent the state's unlawful deviation from USBC without full disclosure and justification of rationale.”

“The Department has removed parts of regulations without explanation or knowledge of workgroup participants or stakeholders.”

JLARC staff note:

The exemption requires all the steps provided in VAPA and the Governor’s Executive Order, except for review by the Department of Planning and Budget.

§ 2.2-4006, A.14. Amendments to the list of drugs susceptible to counterfeiting adopted by the Board of Pharmacy pursuant to subsection B of § 54.1-3307.

Number of regulations promulgated under exemption in past five years:

0

Agency necessity rating:

Essential

Agency rationale:

While the drugs subject to the pedigree requirements are currently those that are outside the normal channels of distribution, a problem or situation could arise in which the Board of Pharmacy needed to act quickly to require a pedigree to ensure that a drug was not being counterfeited and sold to the public.

Concerns expressed by public:

None

JLARC staff note:

No other state appears to have a similar exemption.

Appendix E

Agency Responses

As a part of the extensive validation process, State agencies and other entities involved in a JLARC assessment are given the opportunity to comment on an exposure draft of the report. Appropriate technical corrections resulting from comments provided by these entities have been made in this version of the report. This appendix includes written responses from the Office of the Governor, the Office of the Attorney General and the Department of Planning and Budget.



COMMONWEALTH of VIRGINIA

Office of the Governor

Wayne Turnage
Chief of Staff

September 8, 2009

Mr. Philip A. Leone, Director
Joint Legislative Audit and Review Commission
Suite 1100, General Assembly Building, Capitol Square
Richmond, Virginia 23219

Dear Mr. Leone:

Thank you for the opportunity to comment on JLARC's Review of Exemptions to the Virginia Administrative Process Act.

The responsibility to promulgate regulations in a transparent, inclusive, and fiscally prudent way is one we take very seriously. When the General Assembly delegates specific regulatory authority to a state agency, we are mindful of legislative intent, effects on citizens and businesses, and the need for stable, predictable rulemaking.

Because agency regulations have the potential for great impact on citizens, we think it is important that an elected official, accountable to the citizens, be ultimately responsible for their approval.

These considerations do not always lend themselves to great speed, and for that reason, we always appreciate recommendations about how regulations might be approved more quickly without compromising any of the integrity of the process.

The process is governed by the Administrative Process Act and by Executive Order 36 (2006). While we do not intend to make substantial changes to the process in the last few months of the administration, we do plan to make recommendations during the gubernatorial transition, and we will consider your suggestions and commend this report to the attention of the new administration.

Once again, thank you for your attention to the regulatory process, and for your recommendations.

Sincerely,

A handwritten signature in dark ink, appearing to read "Wayne", followed by a stylized flourish.

Wayne M. Turnage

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COMMONWEALTH of VIRGINIA

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September 8, 2009

Via facsimile: (804) 371-0101

Mr. Philip A. Leone, Director
Joint Legislative Audit and Review Commission
Suite 1100, General Assembly Building
Richmond, Virginia 23219

RE: Review of Exemptions to the Virginia Administrative Process Act

Dear Mr. Leone:

Thank you for your August 26 letter and exposure draft of the above report. I was happy to provide assistance to JLARC. I think the report is very well done and I congratulate your staff for preparing what is a most useful document.

I have a couple of comments.

First, page 24 refers to the so-called "grants exemption" of § 2-2.4002(B) (4) of the *Code* as designed to maximize federal funds. I have not seen it used in that manner despite an Attorney General's Opinion (1982-83 Op. Va. Att'y. Gen. at 11) dealing with the Medicaid program which was as to that program legislatively reversed. If you are aware of examples of such use I would suggest they be listed.

Second, your report correctly identifies two inaccurate cross-references in § 2.2-4013 of the *Code*. These should be corrected.

Otherwise, thank you again for the opportunity to participate in this process. If I can be of further assistance please let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "Roger L. Chaffe".

Roger L. Chaffe
Senior Assistant Attorney General

cc: Bob Rotz, Division Chief, JLARC
5731502



SEP 11 2009

COMMONWEALTH of VIRGINIA

Department of Planning and Budget

DANIEL S. TIMBERLAKE
Director

1111 E. Broad Street
Room 5040
Richmond, VA 23219-1922

September 9, 2009

Mr. Philip A. Leone, Director
Joint Legislative Audit and Review Commission
Suite 1100, General Assembly Building, Capitol Square
Richmond, Virginia 23219

Dear Mr. Leone:

I received a copy of the exposure draft for the JLARC report *Review of Exemptions to the Virginia Administrative Process Act* (JLARC draft report) on August 27, 2009. The Department of Planning and Budget's (DPB) Economic and Regulatory Analysis Division (ERAD) provided a list of technical corrections to the report on September 4, 2009. We hope that these corrections have been incorporated into the final report. This letter serves as our formal response to the report.

I would like to thank you and your staff for the work that went into compiling this report. Further, I hope that the project team was able to benefit from using the Virginia Regulatory Town Hall to study the regulatory process. The ERAD staff within DPB has put significant effort into creating and maintaining this site to facilitate and ensure the greatest level of transparency possible with regard to the regulatory review process.

DPB offers two comments in response to the report's findings:

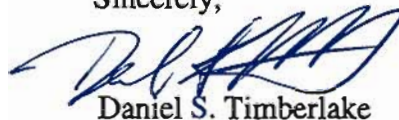
First, DPB follows the regulatory review process established by the Administrative Process Act and the Governor's Executive Order, currently Executive Order 36. In complying with the requirements of the review process, DPB has routinely completed its work within the established timelines for the majority of the regulations promulgated within the past ten years.

Second, DPB agrees that agencies and the regulated community would benefit from a shorter review process, so long as the quality of the analysis and information provided is not sacrificed. DPB has always and will continue to work with the Governor's office to improve the process, including suggesting any changes that could reduce the required time to promulgate a regulation.

Mr. Philip A. Leone, Director
September 9, 2009

Thank you for providing us with the opportunity to respond to this draft report. If you need any additional information, please do not hesitate to contact me at 786-7700 or Melanie West, ERAD Associate Director, at 786-8812.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. S. Timberlake", is positioned above the printed name.

Daniel S. Timberlake

cc: The Honorable Richard D. Brown, Secretary of Finance
Brian Shepard, Policy Director to the Governor
Melanie West, Associate Director, Economic and Regulatory Analysis



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