



**GOVERNMENT AND REGULATORY REFORM TASK FORCE  
INTERIM REPORT #4  
ATTORNEY GENERAL ROBERT F. MCDONNELL  
JUNE 20, 2008**

*COMMONWEALTH of VIRGINIA  
Office of the Attorney General  
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# **Government and Regulatory Reform Task Force**

Attorney General Robert F. McDonnell

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**Government and Regulatory Reform Task Force**  
**The Honorable Robert F. McDonnell**  
**Attorney General**

**June 20, 2008**  
**Virginia State Capitol**  
**House Room 1**

**AGENDA**

- Welcome - Chairman Jack Rust
- Opening Remarks and Introduction - Attorney General Bob McDonnell
- Remarks – Lieutenant Governor Bill Bolling
- Overview of Task Force Report - Martin Kent, Chief Counsel to the Attorney General
  - Small Business Working Group Status Report and Recommendations
  - Environmental Working Group Status Report and Recommendations
  - Health Care Working Group Status Report and Recommendations
- Review of Model Public Participation Guidelines – Rachael Harrell, Policy Analyst, Economic and Regulatory Analysis Division, Department of Planning and Budget
- Public Comment

- Task Force Vote on Current Recommendations
- Update on Previous Recommendations Made to State Agencies - Martin Kent, Chief Counsel to the Attorney General
- Presentation - Ronald D. Utt, Ph.D., Herbert and Joyce Morgan Senior Research Fellow, The Heritage Foundation
- Conclusion

# **Small Business Working Group**

## **Government and Regulatory Reform Task Force**

**Working Group Meeting:     April 28, 2008**

### **STATUS REPORT:**

The Small Business Working Group held its meeting on April 28, 2009, in Richmond, Virginia. During this meeting, members of the work group reviewed Department of Labor and Industry (DOLI) regulations and a draft of the Public Participation Guidelines.

Assistant Attorney General Cindy Norwood presented the members with 29 DOLI regulations and their federal equivalents. The working group members reviewed Chapter 21 dealing with maximum garnishment amounts, Chapter 30 dealing with Virginia rules and regulations declaring hazardous occupation, Chapter 40 dealing with Virginia hours of work for minors and Chapter 50 dealing with regulations governing the employment of minors on farms, in gardens and in orchards.

As members reviewed each regulation and the federal equivalent, it was clear that in many instances the state repeated the federal regulation. In these cases, it was decided that it is best to cite to the appropriate federal regulation to get rid of duplicate regulations. However, in some cases, the state regulations were more detailed, including lists of machines that minors cannot operate, etc. so it was decided that we should keep the state regulation as is so that it is easier for business owners to reference.

After reviewing all 29 regulations, the members voted unanimously to accept 15 recommendations. These recommendations clarify examples in the regulation, revise state regulations to comply with the federal regulations, or site to identical federal regulations. A recommendation was made regarding Chapter 30, section 210 – Employment of minors under age 14. This matter is under further review by the representatives from DOLI to research if parental approval is required in cases such as a newspaper route.

Members of the Department of Planning and Budget (DPB) also attended the meeting and presented the model Public Participation Guidelines (PPGs). The PPGs were a product of the Government and Regulatory Reform Task Force's work last year, which recommended model PPGs for all state agencies to follow. Delegate Saxman carried a bill (HB1167) which requires, on or before July 1, 2008, the Department of Planning and Budget, in consultation with the Office of the Attorney General, to (i) develop model public participation guidelines and (ii) provide these model public participation guidelines to each agency that has the authority to promulgate regulations. By December 1, 2008, each agency shall either (a) adopt the model public participation guidelines or (b) if significant additions or changes are proposed, promulgate the model public participation guidelines with the proposed changes as fast-track regulations

pursuant to § 2.2-4012.1. The legislation passed the General Assembly and was signed by Governor Kaine. DPB presented a draft of the PPGs to the working group members to solicit their input and concerns.

The working group raised two issues regarding the PPGs and the representatives from DPB are currently talking to other agencies to resolve those problems. The working group suggested that instead of individuals being removed from the electronic notification list after their email is returned as undeliverable one time, they should receive one notice by mail (if they provided their mailing address to the agency), that their email was undeliverable so that individuals can contact the agency with a new email address or adjust their email filter. The working group also suggested standardizing the number of days that individuals have to submit public comments regarding a regulatory change. As it states in the current draft, some deadlines are 60 days, some are 30 and some are 21.

## **RECOMMENDATIONS:**

### **1. Remove regulations that are repeated almost word for word in the federal regulation and cite to federal regulation.**

- a. 16VAC15-30-30 Manufacturing or storage occupations involving explosives**
  - i. Delete the state regulation
  - ii. Replace with “29 CFR § 570.51 (rev. Dec. 16, 2004) is incorporated in its entirety herein, and compliance therewith is, therefore, also required by Virginia state law.”
- b. 16VAC15-30-60 Power-driven woodworking machine occupations**
  - i. Delete the state regulation
  - ii. Replace with “29 CFR § 570.55 (rev. Dec. 29, 1971) is incorporated in its entirety herein, and compliance therewith is, therefore, also required by Virginia state law.”
- c. 16VAC15-30-80 Power-driven hoisting apparatus occupations**
  - i. Delete the state regulation
  - ii. Replace with “29 CFR § 570.58 (rev. Dec. 29, 1971) is incorporated in its entirety herein, and compliance therewith is, therefore, also required by Virginia state law.”
- d. 16VAC15-30-100 Occupations in connection with any mining operation**
  - i. Delete the state regulation
  - ii. Replace with “29 CFR §§ 570.53 and 570.60 (rev. Dec. 29, 1971) are incorporated in their entirety herein, and compliance therewith is, therefore, also required by Virginia state law.”
- e. 16VAC15-30-140 Occupations involved in the manufacture of brick, tile, and kindred products**
  - i. Delete state regulation
  - ii. Replace with “29 CFR § 570.64 (rev. Dec. 29, 1971) is incorporated in its entirety herein, and compliance therewith is, therefore, also required by Virginia state law.”
- f. 16VAC15-30-150 Occupations involved in the operation of power-driven circular saws, band saws, and guillotine shears**
  - i. Delete state regulation
  - ii. Replace with “29 CFR § 570.65 (rev. Dec. 29, 1971) is incorporated in its entirety herein, and compliance therewith is, therefore, also required by Virginia state law.”
- g. 16VAC15-30-160 Occupations involved in wrecking, demolition, and ship-breaking operations**
  - i. Delete state regulation
  - ii. Replace with “29 CFR § 570.66 (rev. Dec. 29, 1971) is incorporated in its entirety herein, and compliance therewith is, therefore, also required by Virginia state law.”

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2. **Revise state regulation to comply with federal regulation.**

**a. 16VAC15-30-40 Motor Vehicle Occupations.**

- i. Revise regulation to read as follows: Minors under the age of 18 shall not be employed as drivers or helpers on trucks or commercial vehicles ~~of more than two axles. (The provisions of this prohibited occupation shall not apply to 16-year-old and 17-year-old minors employed as drivers of school buses.)~~

**b. 16VAC15-30-50 Logging and sawmilling occupations**

- i. Delete the state regulation and cite to federal regulation. Although they are very similar, the state regulation does not fully comply with the federal regulation. For example, the state regulation applies an exception for sawmilling that reads: Manual loading of bundles of shingles or shakes into trucks or railroad cars. The federal reg provides the following exception: Manual loading of bundles of shingles or shakes into trucks or railroad cars, provided that the employer has on file a statement from a licensed doctor of medicine or osteopathy certifying the minor capable of performing this work without injury to himself.
- ii. Replace with “CFR § 570.54 (rev. Dec. 29, 1971) is incorporated in its entirety herein, and compliance therewith is, therefore, also required by Virginia state law.”

**c. 16VAC15-30-70 Occupation involving exposure to radioactive substances and to ionizing radiations**

- i. Revise regulation to read as follows: Any work is prohibited in any workroom in which (a) radium is stored or used in the manufacture of self-luminous compound; (b) self-luminous compound is made, processed, or packaged; (c) self-luminous compound is stored, used, or worked upon; (d) incandescent mantles are made from fabric and solutions containing thorium salts, or are processed or packaged (e) other radioactive substances are present in the air in average concentrations exceeding 10 percent of the maximum permissible concentrations in the air recommended for occupational exposure by the National Committee on Radiation Protection, as set forth in the 40-hour week column of table one of the National Bureau of Standards Handbook No. 69 entitled “Maximum Permissible Body Burdens and Maximum Permissible Concentrations of Radionuclides in Air and in Water for Occupational Exposure,” issued June 5, 1959.; and, any other work which involves exposure to ionizing radiations.

**d. 16VAC15-30-170 Occupation in roofing operations**

- i. Delete state regulation and incorporate federal regulation because the state regulation does not comply with the federal regulation since it authorizes minors to work on gutters and downspouts, to construct the sheathing or base of roofs, and to install television antennas, air conditioners, exhaust

- and ventilating equipment, or similar appliances attached to roofs, all of which are prohibited by the federal regulation.
- ii. Replace with “29 CFR § 570.67 (rev. Dec. 16, 2004) is incorporated in its entirety herein, and compliance therewith is, therefore, also required by Virginia state law.”
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### 3. Clarify regulation.

#### a. 16VAC15-21-30 Calculation of maximum garnishment amounts for an ordinary debt

- i. Need to make clear that the example given in subdivision A 2 is an example, and such example should be updated. Also, this regulation cites to subdivision A 3 in several places, but there is no such subdivision.
- ii. Revise as follows:

##### A. Weekly earnings.

1. If the amount of weekly disposable earnings equals 40 times the F.M.W.R. or less, nothing may be withheld for garnishment.
2. If the weekly disposable earnings exceed 40 times the F.M.W.R., the maximum amount that can be withheld for garnishment shall be either 25% of the weekly disposable earnings or the amount by which the weekly disposable earnings exceed 40 times the F.M.W.R., whichever is less, so long as the amount withheld does not reduce the weekly disposable earnings to an amount equal to or below 40 times the F.M.W.R. ~~For example, if the~~ ~~Based on a~~ federal minimum wage rate ~~is of \$6.55 5.85~~ per hour, then 40 times the F.M.W.R. is \$262 34. ~~Thus, as of July 24, 2007, In this example, if~~ the weekly disposable earnings are less than or equal to \$262 34, nothing may be withheld for garnishment. Any increase in the F.M.W.R. will increase the amount of weekly disposable earnings that would be shielded from garnishment.

B. Biweekly earnings. The maximum amount ~~which~~ that may be withheld for garnishment from biweekly earnings shall be calculated in the same manner as described for weekly earnings in subsection A of this section, except that the corresponding weekly amounts in subdivisions A 1and, A 2 ~~and A 3~~ of this section shall be multiplied by 2.

C. Semimonthly earnings. The maximum amount ~~which~~ that may be withheld for garnishment from semimonthly earnings shall be calculated in the same manner as described for weekly earnings in subsection A of

this section, except that the corresponding weekly amounts in subdivisions A 1 ~~and~~, A 2 ~~and~~ A 3 of this section shall be multiplied by 2.16665.

D. Monthly earnings. The maximum amount of monthly disposable earnings which may be withheld for garnishment shall be calculated in the same manner as weekly earnings in subsection A of this section, except that the corresponding weekly amounts in subdivisions A 1 ~~and~~, A 2, ~~and~~ A 3 of this section shall be multiplied by 4.33330.

E. Earnings for a period of more than one month. The maximum amount ~~which~~ that may be withheld in garnishment for work periods in excess of one month shall be calculated in the same manner as described for weekly earnings in subsection A of this section, except that the corresponding weekly amounts in subdivisions A 1 ~~and~~, A 2 ~~and~~ A 3 of this section shall be multiplied by the number of weeks worked. The number of weeks worked shall be calculated by dividing the total number of days in the period worked by 7, calculated to 4 decimal places.

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- 4. Revise state regulation because the Virginia Code negates or merely reiterates what is in the state regulation:**
- a. 16VAC15-30-190 Fire Fighting**
    - i. Eliminate the state regulation because Virginia Code § 40.1-100 negates this section.
  - b. 16VAC15-30-200 Other prohibited occupation**
    - i. Eliminate the state regulation because it merely reiterates what is already found in Virginia Code §§ 40.1-100 and 100.2.
  - c. 16VAC15-40-50 Exceptions**
    - i. Cite to Virginia Code §§ 40.1-79.1, 80.1, 88 and 89 and any other Code sections deemed appropriate and not simply regurgitate those sections as it does now.
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# **Environmental Working Group**

## **Government and Regulatory Reform Task Force**

**Working Group Meeting:     May 5, 2008**

### **STATUS REPORT:**

The Environmental Working Group held its meeting on May 5, 2008, in Richmond, Virginia. The working group reviewed several chapters in the Department of Environmental Quality (DEQ).

Assistant Attorney General Al Albiston gave a general overview of the Virginia Pollution Discharge Elimination System (VPDES) Permitting. As part of VPDES, the group discussed how Nutrient Credit Trading in the Chesapeake Bay maximizes overall nutrient reduction from point sources and provides flexibility to dischargers in meeting their permitted nutrient limits. The group also reviewed how the funding for the Water Quality Improvement Fund (WQIF) maximizes permittees' compliance with their nutrient allocations. Representatives from DEQ informed the working group that DEC is currently undergoing a regulatory development process, targeted for September 2008. They proposed regulation to develop a special designation for aquaculture waters in the Water Quality Standards and to modify the VPDES regulation to require that alternatives to traditional wastewater discharges be considered for waters so designated. Finally under the VPDES, members reviewed the Water Reuse and Reclamation regulations which are scheduled for final adoption in June 2008. These regulations encourage and address requirements for reusing wastewater for irrigation or processes not requiring potable water. Notably, a VPDES permittee will not need to obtain a second permit for reuse, but will have these requirements added to his existing permit.

Members then reviewed Virginia Pollution Abatement Permitting which addresses owners handling of waste or waste water to locations other than state waters. The group discussed Virginia Water Protection (VWP) Permitting which regulates activities in surface waters, including wetlands, such as filling, flooding and withdrawals of water and Water Resources Management which regulates groundwater supply and permitting.

Albiston concluded the meeting by presenting the group with his recommendations regarding biosolids regulation, inspection provisions relating to reviewing VPA permit compliance and inconsistencies in environmental criminal provisions.

He recommended adding a provision to 9VAC25-31-190 to allow for photographs to be taken during an inspection. The provision states that the director shall subsequently withhold those photographs from public disclosure which the permit claims as confidential trade secrets. Currently, based on a circuit court decision, photographs are allowed during inspections, but there is no protection against the photos being released from FOIA. There was a lot of discussion

from the members about the importance of needing to protect trade secrets and ultimately it was decided to hold on making a formal recommendation. The working group wants to further look into an exact procedure for identifying trade secrets and research what other agencies do with photographs during inspections.

On the final recommendation of the meeting, the working group decided to take no action on the inconsistencies in environmental criminal provisions. Amending these provisions would require substantive changes to statutes, so the group suggested presenting the issue to the courts committee during the next General Assembly session and streamlining the provisions through legislation. A proposal to that effect will be presented to the next Full Task Force for its approval in advance of the 2008 General Assembly Session. The proposal will seek to ensure that environmental violations have uniform standards of culpability and can be found within one provision of the Code.

## **RECOMMENDATIONS:**

- 1. Delete 12VAC5-585 (Biosolids Use Regulations) because DEQ has recently amended its water regulations to address this comprehensive program. The DOH regulations can be deleted because they have no force or effect.**

By deleting this chapter under the Department of Health, we are eliminating 179 pages of regulations that are repeated. Some of the content has been included, where appropriate, into existing DEQ regulations regarding the particular subject matter.

# **Health Care Working Group**

## **Government and Regulatory Reform Task Force**

**Working Group Meetings: May 13, 2008**

### **STATUS REPORT:**

The Health Care Working Group held its meeting on May 13, 2008, in Richmond, Virginia. This meeting focused on the remaining chapters of the Department of Medical Assistance Services (DMAS) – The State Plan (Chapters 20-90), family access to medical insurance security plan (Chapter 141) and uninsured medical catastrophe fund (Chapter 150).

Martin Kent, Chief Counsel to the Attorney General, presented the model Public Participation Guidelines (PPGs), discussed earlier in the small business working group section. Martin presented a draft of the PPGs to the working group members to solicit their input and concerns.

Assistant Attorney General Matt Cobb and Clay Garrett gave a brief overview of the state plan in DMAS. Amendments to this section must go through the federal process, so attorneys simply solicited concerns and input from the working group members. The following chapters were reviewed in brief:

- Chapter 20 – Administration of medical assistance services
- Chapter 30 – Groups covered and agencies responsible for eligibility determination
- Chapter 40 – Eligibility conditions and requirements
- Chapter 50 – Amount, duration, and scope of medical and remedial care services
- Chapter 60 – Standards established and methods used to assure high quality care
- Chapter 70 – Methods and standards for establishing payment rates – inpatient hospital services
- Chapter 80 – Methods and standards for establishing payment rates; other types of care
- Chapter 90 – Methods and standards for establishing payment rates for long-term care

Assistant Attorney General Usha Koduru also presented her recommendations regarding the family access to medical insurance security plan (FAMIS) and the uninsured medical catastrophe fund. In discussion of the FAMIS plan, Usha reviewed adverse actions, eligibility determination and application requirements, cost sharing, benefits and reimbursement, and quality assurance and utilization control. The review continued by discussing the eligibility criteria, treatment plan, availability of funds, contracts with providers, payments, application procedures and waiting list, and appeals under the uninsured medical catastrophe fund.

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1. Update citations in the state regulations.

a. **12VAC30-20-90 Confidentiality and disclosure of information concerning Medicaid applicants and recipients**

i. 8. Client's Right of Access to Information.

A. Client's right to access. Any client has the right to obtain personal information held by the agency or its representative. Upon written or verbal request, the client shall be permitted to review or obtain a copy of the information in his record with the following exceptions:

1. Information that the agency is required to keep confidential from the client pursuant to § ~~2.2-3705.5(1)~~ ~~2.1-342(b)(3)~~ of the Code of Virginia, or any other applicable law; or;
2. Information that would breach another individual's right to confidentiality.

B. Process for disclosure. Consistent with the Virginia Freedom of Information Act, § ~~2.2-3704~~ ~~2.1-342.4~~, Code of Virginia, the agency shall provide access within five work days after the receipt of the request. The agency shall make disclosures to applicants and recipients during normal business hours. Copies of the requested documents shall be provided to the client or a representative at reasonable standard charges for document search and duplication.

C. Types of information available for client access. The client shall be permitted to be accompanied by a person or persons of the client's choice and may grant permission verbally or in writing to the agency to discuss the client's file in such person's presence. Upon request and proper identification of any client or agent of the client, the agency shall grant to the client or agent the right to review the following:

1. All personal information about the client except as provided in § ~~2.2-3705.5(1)~~ ~~2.1-342(b)(3)~~ of the Code of Virginia; and
2. The identity of all individuals and organizations not having regular access authority that request access to the client's personal information.

D. Contested information. Pursuant to the Virginia Privacy Act, § ~~2.2-3806~~ ~~2.1-382.5~~, Code of Virginia, a client may contest the accuracy, completeness or relevancy of the information in his record. Correction of the contested information, but not the deletion of the original information if it is required to support receipt of state or federal financial participation, shall be inserted in the record when the agency concurs that such

correction is justified. When the agency does not concur, the client shall be allowed to enter a statement in the record refuting such information. Corrections and statements shall be made a permanent part of the record and shall be disclosed to any person or entity that receives the disputed information.

**b. 12VAC30-20-500 Definitions**

- i. "Hearing officer" means an individual selected by the Executive Secretary of the Supreme Court of Virginia to conduct the formal appeal in an impartial manner pursuant to §§~~2.2-4020~~ ~~9-6.14:12~~ and 32.1-325.1 of the Code of Virginia and this part.
- ii. "Informal appeals agent" means a DMAS employee who conducts the informal appeal in an impartial manner pursuant to §§~~2.2-4019~~ ~~9-6.14:11~~ and 32.1-325.1 of the Code of Virginia and this part.

**c. 12VAC30-20-520 Provider appeals: general provisions**

- i. B. A provider may appeal any DMAS action that is subject to appeal under the Virginia Administrative Process Act (~~Chapter 1.1:1 of Title 9~~ Chapter 40 of Title 2.2 of the Code of Virginia), including DMAS' interpretation and application of payment methodologies. A provider may not appeal the actual payment methodologies.

**d. 12VAC30-141-120 Children ineligible for FAMIS**

- i. 4. An inpatient in an institution for mental disease (IMD) as defined in ~~42 CFR 435.1010~~ 42 CFR 435.1009, he shall be ineligible for FAMIS. 1

**e. 12VAC30-141-760 Pregnant women ineligible for FAMIS MOMS**

- i. 4. An inpatient in an institution for mental disease (IMD) as defined in 42 CFR 435.1010 ~~42 CFR 435.1009~~, she shall be ineligible for FAMIS MOMS.

**f. 12VAC30-150-40 Eligibility Criteria**

- i. 3. Has a gross income equal to or less than 300% of the federal nonfarm poverty income guidelines as published in the Federal Register, 66 FR 10695 ~~as published in the United States Code of Federal Regulations, 66 CFR 10695 (Feb. 16, 2001)~~, updated each July 1;

## Public Participation Guidelines

### Previous Legislation:

#### CHAPTER 321

*An Act to standardize public participation guidelines for executive branch agencies.*

[H 1167]

Approved March 4, 2008

Be it enacted by the General Assembly of Virginia:

**1.** § 1. *That on or before July 1, 2008, the Department of Planning and Budget, in consultation with the Office of the Attorney General, shall (i) develop model public participation guidelines meeting the requirements of § [2.2-4007.02](#) of the Code of Virginia and (ii) provide these model public participation guidelines to each agency that has the authority to promulgate regulations. By December 1, 2008, each agency shall either (a) adopt the model public participation guidelines or (b) if significant additions or changes are proposed, promulgate the model public participation guidelines with the proposed changes as fast-track regulations pursuant to § [2.2-4012.1](#) of the Code of Virginia. Agency action in adopting the model public participation guidelines in accordance with clause (a) shall be exempt from the operation of Article 2 (§ [2.2-4006](#) et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia. The repeal of any existing public participation guidelines shall occur in the same regulatory action as the promulgation of the model public participation guidelines required by this section.*

§ 2. *The model public participation guidelines adopted pursuant to this act shall apply to the promulgation and adoption of regulations for which a notice of intended regulatory action is filed in accordance with § [2.2-4007.01](#) of the Code of Virginia on or after January 1, 2009.*

§ 3. *However, any amendments made after January 1, 2009, to an agency's public participation guidelines adopted as required by this act shall be subject to the requirements of the Administrative Process Act (§ [2.2-4000](#) et seq. of the Code of Virginia).*

§ 4. *For the purposes of this act, the terms "agency" and "regulations" mean the same as those terms are defined in § [2.2-4001](#) of the Code of Virginia.*

**Model:**

CHAPTER [redacted]  
PUBLIC PARTICIPATION

Part I

Purpose and Definitions

\_\_VAC\_\_ - \_\_-10. Purpose.

The purpose of this chapter is to promote public involvement in the development, amendment or repeal of the regulations of the [redacted]. This chapter does not apply to regulations, guidelines, or other documents exempted or excluded from the provisions of the Administrative Process Act (§2.2-4000 et seq. of the Code of Virginia).

\_\_VAC\_\_ - \_\_-20. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Administrative Process Act" means Chapter 40 (§2.2-4000 et seq.) of Title 2.2 of the Code of Virginia.

"Agency" means the [redacted], which is the unit of state government empowered by the agency's basic law to make regulations or decide cases.

"Basic law" means provisions in the Code of Virginia that delineate the basic authority and responsibilities of an agency.

"Commonwealth Calendar" means the electronic calendar for official government meetings open to the public as required by §2.2-3707 C of the Freedom of Information Act.

"Negotiated rulemaking panel" or "NRP" means an ad hoc advisory panel of interested parties established by an agency to consider issues that are controversial with the assistance of a neutral facilitator or mediator, for the purpose of reaching a consensus in the development of a proposed regulatory action.

"Notification list" means a list used to notify persons pursuant to this chapter. Such a list may include an electronic list maintained through the Virginia Regulatory Town Hall or other list maintained by the agency.

"Open meeting" means any scheduled gathering of a unit of state government empowered by an agency's basic law to make regulations or decide cases.

"Person" means any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof.

"Public hearing" means a scheduled time at which members or staff of the agency will meet for the purpose of receiving public comment on a regulatory action.

"Regulation" means any statement of general application having the force of law, affecting the rights or conduct of any person, adopted by the agency in accordance with the authority conferred on it by applicable laws.

"Regulatory action" means the promulgation, amendment, or repeal of a regulation by the agency.

"Regulatory advisory panel" or "RAP" means a standing or ad hoc advisory panel of interested parties established by the agency for the purpose of assisting in regulatory actions.

"Town Hall" means the Virginia Regulatory Town Hall, the website operated by the Virginia Department of Planning and Budget at [www.townhall.virginia.gov](http://www.townhall.virginia.gov) that has online public comment forums and displays information about regulatory meetings and regulatory actions under consideration in Virginia and sends this information to registered public users.

"Virginia Register" means the Virginia Register of Regulations, the publication that provides official legal notice of new, amended and repealed regulations of state agencies, which is published under the provisions of Article 6 (§2.2-4031 et seq.) of the Administrative Process Act.

## Part II

### Notification of Interested Persons

\_\_VAC\_\_ - \_\_-30. Notification list.

A. The agency shall maintain a list of persons who have requested to be notified of regulatory actions being pursued by the agency.

B. Any person may request to be placed on a notification list by registering as a public user on the Town Hall or by making a request to the agency. Any person who requests to be placed on a notification list shall elect to be notified either by electronic means or through a postal carrier.

C. The agency may maintain additional lists for persons who have requested to be informed of specific regulatory issues, proposals, or actions.

D. When electronic mail is returned as undeliverable on multiple occasions at least 24 hours apart, that person may be deleted from the list. A single undeliverable message is insufficient cause to delete the person from the list.

E. When mail delivered by a postal carrier is returned as undeliverable on multiple occasions, that person may be deleted from the list.

F. The agency may periodically request those persons on the notification list to indicate their desire to either continue to be notified electronically, receive documents through a postal carrier, or be deleted from the list.

\_\_VAC\_\_-\_\_-40. Information to be sent to persons on the notification list.

A. To persons electing to receive electronic notification as described in \_\_VAC\_\_-\_\_-30, the agency shall send electronically the following information:

1. A notice of intended regulatory action (NOIRA).
2. A notice of the comment period on a proposed regulation.
3. A notice soliciting comment on a final regulation when the regulatory process has been extended pursuant to §2.2-4007.06 or 2.2-4013 C of the Code of Virginia.

B. To persons electing to receive notification through a postal carrier as described in \_\_VAC\_\_-\_\_-30, the agency shall send the following information:

1. A notice of intended regulatory action (NOIRA).
2. A notice of the comment period on a proposed regulation and instructions on how to obtain a copy of the regulation and any supporting documents.
3. A notice soliciting comment on a final regulation when the regulatory process has been extended pursuant to §2.2-4007.06 or 2.2-4013 C of the Code of Virginia.

C. The failure of any person to receive any notice or copies of any documents shall not affect the validity of any regulation or regulatory action.

### Part III

#### Public Participation Procedures

\_\_VAC\_\_-\_\_-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in

writing, to the agency. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues, the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a final adopted regulation.

4. For a minimum of 30 calendar days following the publication of a fast-track regulation.

5. For a minimum of 21 calendar days following the publication of a notice of periodic review.

6. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with §2.2-4013 C of the Code of Virginia.

E. The agency shall send a notice of final adoption to all public commenters at least five calendar days before final adoption of the regulation in accordance with §2.2-4012 of the Code of Virginia.

\_\_VAC\_\_-\_\_-60. Petition for rulemaking.

A. As provided in §2.2-4007 of the Code of Virginia, any person may petition the agency to consider a regulatory action.

B. A petition shall include but is not limited to the following information:

1. The petitioner's name and contact information;

2. The substance and purpose of the rulemaking that is requested, including reference to any applicable Virginia Administrative Code sections; and

3. Reference to the legal authority of the agency to take the action requested.

C. The agency shall receive, consider and respond to a petition pursuant to §2.2-4007 and shall have the sole authority to dispose of the petition.

D. The petition shall be posted on the Town Hall and published in the Virginia Register.

E. Nothing in this chapter shall prohibit the agency from receiving information or from proceeding on its own motion for rulemaking.

\_\_\_ VAC \_\_\_-70. Appointment of regulatory advisory panel.

A. The agency may appoint a regulatory advisory panel (RAP) to provide professional specialization or technical assistance when the agency determines that such expertise is necessary to address a specific regulatory issue or action or when individuals indicate an interest in working with the agency on a specific regulatory issue or action.

B. Any person may request the appointment of a RAP and request to participate in its activities. The agency shall determine when a RAP shall be appointed and the composition of the RAP.

C. A RAP may be dissolved by the agency if:

1. The proposed text of the regulation is posted on the Town Hall, published in the Virginia Register, or such other time as the agency determines is appropriate; or

2. The agency determines that the regulatory action is either exempt or excluded from the requirements of the Administrative Process Act.

\_\_\_ VAC \_\_\_-80. Appointment of negotiated rulemaking panel.

A. The agency may appoint a negotiated rulemaking panel (NRP) if a regulatory action is expected to be controversial.

B. An NRP that has been appointed by the agency may be dissolved by the agency when:

1. There is no longer controversy associated with the development of the regulation;

2. The agency determines that the regulatory action is either exempt or excluded from the requirements of the Administrative Process Act; or

3. The agency determines that resolution of a controversy is unlikely.

\_\_ VAC \_\_\_ - \_\_\_-90. Meetings.

Notice of any open meeting, including meetings of a RAP or NRP, shall be posted on the Virginia Regulatory Town Hall and Commonwealth Calendar at least seven working days prior to the date of the meeting.

\_\_VAC\_\_-\_\_-100. Public hearings on regulations.

A. The agency shall indicate in its notice of intended regulatory action whether it plans to hold a public hearing following the publication of the proposed stage of the regulatory action.

B. The agency may conduct one or more public hearings during the comment period following the publication of a proposed regulatory action.

C. An agency is required to hold a public hearing following the publication of the proposed regulatory action when:

1. The agency's basic law requires the agency to hold a public hearing;

2. The Governor directs the agency to hold a public hearing; or

3. The agency receives requests for a public hearing from at least 25 persons during the public comment period following the publication of the notice of intended regulatory action.

D. Notice of any public hearing shall be posted on the Town Hall and Commonwealth Calendar at least seven working days prior to the date of the hearing.

\_\_VAC\_\_-\_\_-110. Periodic review of regulations.

A. The agency shall conduct a periodic review of its regulations consistent with:

1. An executive order issued by the Governor pursuant to §2.2-4017 of the Administrative Process Act to receive comment on all existing regulations as to their effectiveness, efficiency, necessity, clarity, and cost of compliance; and

2. The requirements in §2.2-4007.1 of the Administrative Process Act regarding regulatory flexibility for small businesses.

B. A periodic review may be conducted separately or in conjunction with other regulatory actions.

C. Notice of a periodic review shall be posted on the Town Hall and published in the Virginia Register.

**VIRGINIA DEPARTMENT OF PLANNING AND BUDGET  
ECONOMIC AND REGULATORY ANALYSIS DIVISION**

**PUBLIC PARTICIPATION GUIDELINES**

**GUIDANCE DOCUMENT 2008-1**

**Introduction:**

This document is designed to provide guidance primarily to state agency regulatory coordinators, but also to agencies, boards, and commissions as they consider whether to adopt the model public participation guidelines, provided by the Virginia Department of Planning and Budget in accordance with [SB 734/HB 1167](#) enacted by the 2008 General Assembly.

**Summary:**

Public participation guidelines exist to promote public involvement in the development, amendment, or repeal of state regulations. Under [Virginia Code § 2.2-4007.02](#), every rulemaking body in Virginia is required to adopt public participation guidelines and to use these guidelines in the development of its regulations. This law was modified during the 2008 General Assembly session: when the amendments take effect on July 1, 2008, agencies will have until December 1, 2008 to either adopt the model public participation guidelines issued by DPB, or, if they need to make significant changes to the guidelines, to file the proposed regulatory action with DPB by that time.

Since the legislative intent is to standardize the public participation process so that interested members of the public know how and when to comment and/or participate in various topics of interest, agencies are urged to carefully consider whether any modifications to the model guidelines are appropriate. Please be advised that DPB will be examining each proposed modification to determine whether they conform to the stated goal of promoting uniformity and consistency among state agencies. Agencies are cautioned not to make minor changes merely for the sake of customization. Agencies with multiple boards are permitted to adopt the model guidelines for one or more boards and modify the guidelines for one or more boards if each board has unique public participation needs.

Note that under [Virginia Code § 2.2-4004](#), regulations adopted pursuant to the Administrative Process Act are severable. DPB interprets this provision to mean that the public participation guidelines are severable as well.

**Definitions:**

As used in this document, the following terms have the following meanings:

*Agency:* agency, board, department, or commission that makes regulations or decides cases.

*Agency's revised PPGs:* the revised public participation guidelines submitted by an agency via the fast-track process. Please note that agencies who wish to submit their own guidelines must use the model guidelines as the starting point.

*APA:* [Virginia Administrative Process Act](#).

*DPB:* [Virginia Department of Planning and Budget](#).

*ERAD:* [Economic and Regulatory Analysis Division](#) of the Department of Planning and Budget.

*FOIA:* [Virginia Freedom of Information Act](#).

*PPGs:* Public Participation Guidelines.

*Model PPGs:* the model PPGs furnished by DPB in accordance with SB 734/HB 1167.

### **Timelines:**

*July 1, 2008:* On or before this date, DPB will provide the model PPGs to all agencies.

*December 1, 2008:* On or before this date, all agencies will do one of the following:

- Adopt the model PPGs as an exempt action while simultaneously repealing the current PPGs; OR
- Submit the agency's revised PPGs as a fast-track regulation to DPB while simultaneously repealing the current PPGs.

*January 1, 2009:* Any NOIRA, fast-track, or emergency regulation submitted on or after this date must be promulgated in accordance with the new PPGs (either model or the agency's revised). A proposed stage which is submitted to DPB after this date shall be promulgated in accordance with the PPGs that were in existence at the time that the original NOIRA or emergency stage was submitted to DPB for review.

*Note I:* Each executive-branch agency will need to take this action for each board that falls under its purview. DPB will provide each agency with a list of its boards.

*Note II:* Please be mindful of timeframe issues: any revised PPG fast-track regulations will need to be reviewed as usual by DPB, the appropriate Secretary's Office, and the Governor's Office. On a related note, please be mindful of workload issues. In addition

to the executive branch review team, the promulgation of revised fast-track regulations will also result in increased workloads for agency regulatory coordinators and the Registrar's Office.

*Note III:* If the agency plans to submit a revised PPG as a fast-track regulation, please remember that by January 1, 2009, the modified PPG will need to have COMPLETED executive branch review, be published in the *Virginia Register*, and have taken effect. Merely having been submitted to DPB or having completed DPB review will be insufficient. An agency that does not have newly adopted PPGs in place by this date (either model exempt or revised fast-track) will be unable to initiate any new regulatory actions until the new PPGs are effective.

### **Chapter**

Each agency will need to insert the appropriate chapter number for the public participation guidelines. Merely making this change and the changes discussed below in § 10, Purpose, and § 20, Definitions, would still qualify the action as exempt.

### **§ 10, Purpose**

Each agency will need to insert the name of the appropriate agency, board, department, or commission. Merely making this change, along with the insertion of the Chapter number, discussed above, and the related change in § 20, Definitions, discussed below, would still qualify the action as exempt.

### **§ 20, Definitions**

*Agency:* Each agency will need to insert the name of the appropriate agency, board, department, or commission. Merely making this change, along with the insertion of the Chapter number and the related change in § 10, Purpose, discussed above, would still qualify the action as exempt.

*Negotiated rulemaking panel or NRP:* NRPs are designed to be used in situations where an agency expects a great deal of controversy and/or there are a significant number of stakeholders. Situations that would involve a NRP are usually those that could be costly and for which consensus cannot be achieved without a facilitator. The facilitator can be any qualified individual of the agency's choosing so long as the agency has the necessary legal authority and financial resources to hire the person.

*Open meeting:* An open meeting is a "meeting" in the traditional sense of the word under the APA; i.e. those that are subject to FOIA and must be posted on the Town Hall/Commonwealth Calendar. It does not include a group of state employees discussing a program or proposed regulatory action.

*Regulatory advisory panel or RAP:* RAPs are designed to be used in situations where a regulation is fairly complex or would affect numerous stakeholders. RAPs tend to be technical in nature, such as cases in which subject-matter experts are used to “flesh out” the regulation in its development stages.

### **§ 30, Notification list**

*Part D and E:* Note that one undeliverable email is insufficient grounds for an agency to delete a person who has indicated they wish to be on the notification list. The same standard applies for a single instance of undeliverable mail to an individual who elects to receive information through a postal carrier.

Agencies may track returned mail and returned emails by any process that best suits their business practices. As an example, note that DPB’s practice is to delete Town Hall users after three consecutive emails are returned as undeliverable.

In addition to the categories of individuals listed in the PPGs, the agency may, in its discretion, add to its notification list any person the agency believes might be interested in participating in the promulgation of regulations.

### **§ 40, Information to be sent to persons on the notification list**

*Part A* applies to individuals electing to receive electronic notification of regulatory activity.

*Part B* applies to individuals electing to receive notification of regulatory activity through a postal carrier. This provision allows agencies to send instructions on how to obtain the information, rather than the information itself, in an attempt to save agencies time and money. Agencies are not required to copy and mail what could be a potentially extensive information package unless the agency can be sure the recipient wants it and will receive it.

### **§ 50, Public comment**

*Part C:* In determining whether a comment period should be extended, agencies may consider two scenarios.

Example 1: If an agency receives comments after the comment period has closed, the agency may elect to extend the comment period. Note that agencies are not required to extend the timeframe, nor are they required to accept comments submitted after the comment period has ended. However, the agency may decide that in the interests of honoring public participation, it will accept late comment. Agencies should balance openness and accessibility with the danger of setting

precedents so their constituents do not automatically expect comment periods to be extended.

To prevent this, an agency may elect to extend the comment period if, for example, a certain number of comments are received, or if the comments are received within a certain number of days after the close of the comment period. Any agency which elects to extend the public comment period must do so publicly by following the provisions of the APA. An agency cannot merely elect to accept late comments without giving other would-be late commenters a similar opportunity to participate in the regulatory process.

Example 2: An agency can choose to extend a comment period if a regulation that it initially believed would be non-controversial turns out to be contentious. In this instance, an agency may also elect to extend the comment period. Once again, agencies are not obligated to extend the comment period, but may elect to do so in the interest of open government and increasing public participation in the regulatory process.

#### **§ 70, Appointment of regulatory advisory panel**

A RAP is designed to function similar to a technical advisory committee: that is, it is appropriate in a situation involving a complex regulation or in a case where an agency wishes to consult with subject matter experts representing various stakeholder interests.

If an agency elects to use a RAP to develop a regulation, membership must be balanced between various constituencies; for example, citizen groups, representatives of both large and small stakeholders, and related governmental entities.

RAP meetings must be posted on TownHall/the Commonwealth Calendar in accordance with the APA, FOIA, and any other requirements mandated by an agency's basic law.

The appointment of a RAP does not preclude an agency from later using a NRP if the agency deems it to become necessary. Prior to the appointment of a RAP, an agency may also consult with groups or individuals who have demonstrated an interest in working with the agency.

#### **§ 80, Appointment of negotiated rulemaking panel**

A NRP is designed to be used primarily for lengthy and/or complex regulations with many competing constituencies, and often, substantial costs and other compliance requirements.

If an agency elects to use a NRP to resolve any outstanding issues, membership must be balanced between various constituencies: for example, citizen groups, representatives of both large and small stakeholders, and related governmental entities.

If a single facilitator is elected or appointed to lead the NRP, the agency shall strive to obtain a neutral qualified individual who is not a member of any of the competing interest groups.

NRP meetings must be posted on TownHall/the Commonwealth Calendar in accordance with the APA, FOIA, and any other requirements mandated by an agency's basic law.

An agency may appoint a NRP whether it has previously used a RAP, informally consulted with groups or individuals in the development of the regulation, neither, or both.

### **§ 90, Meetings**

This section requires notice of meetings to be posted at least seven working days in advance. While FOIA currently contains a three day notice requirement, the PPGs have set a seven day standard due to notification lists and other mailing requirements. This will allow time for those individuals who receive their information via postal carrier to receive information before the actual meeting date.

In addition, wherever practicable, meetings held during the comment period should occur no less than 15 days prior to the close of the comment period. All meetings should be held in locations that facilitate public participation.

### **§ 100, Public hearings on regulations**

This section requires notice of public hearings to be posted at least seven working days in advance. This will allow time for interested parties to receive all of the necessary information prior to the hearing date.

In addition, wherever practicable, public hearings held during the comment period should occur no less than 15 days prior to the close of the comment period. All public hearings should be held in locations that facilitate public participation.

### **Transition**

Agencies should adhere to the following guidelines over the next several months and years as they begin to promulgate their PPGs and any regulatory actions initiated after the key dates listed in SB 734/HB 1167.

All regulatory actions for which a NOIRA or an Emergency/NOIRA has been published in the *Virginia Register* prior to January 1, 2009 shall be processed in accordance with the agency's PPGs that were in effect on the date the action was submitted to DPB for executive branch review.

All regulatory actions in the NOIRA, Emergency/NOIRA, or fast-track stages submitted to DPB on or after January 1, 2009 will be processed in accordance

with the agency's newly adopted model PPGs, provided that the model PPGs are in effect as of the date the regulatory action was submitted.