

**REPORT OF THE
ADMINISTRATIVE LAW ADVISORY COMMITTEE ON**

**THE GUIDANCE DOCUMENTS
SUBCOMMITTEE**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 54

**COMMONWEALTH OF VIRGINIA
RICHMOND
1997**

REPORT OF THE GUIDANCE DOCUMENTS SUBCOMMITTEE OF THE ADMINISTRATIVE LAW ADVISORY COMMITTEE

Professor Charles H. Koch, Jr., Chairman

EXECUTIVE SUMMARY

This report and its proposed legislation are in response to a request from the Virginia Code Commission. The request relates to proposed legislation designed to disclose documents of general applicability which are not "rules" or "regulations" under the Virginia Administrative Process Act (VAPA), (§ 9-6.14:1 et seq). Such documents are often important to understanding the agency's law but are not readily available. Indeed, their existence is often unknown to the public.

The subcommittee recommends legislation which would require agencies to publish in the Virginia Register of Regulations a list of such documents each year. Defined as "guidance documents" in a new term to be added to the VAPA, these documents contain agencies' interpretations of rules, regulations and statutes.

LEGISLATIVE BACKGROUND

During the 1996 Session of the General Assembly, House Bill 1532 was introduced which would (i) include the definition of a "guidance document" in the VAPA, and (ii) require state agencies to publish a list of current guidance documents in the Virginia Register and publish notice whenever a guidance document is adopted, altered, or repealed (Appendix B). Currently, the definition and publication of guidance documents are not addressed in the VAPA.

House Bill 1532 passed the House of Delegates 72-21. Amendments adopted in the Senate Committee on General Laws would apply the requirement only to environmental guidance documents. The Senate Committee on General Laws carried over the bill as amended until the 1997 Session.

The Honorable William C. Wampler, Jr., chairman of the Senate Committee on General Laws, asked the Virginia Code Commission to review the bill. The Virginia Code Commission requested the assistance of the Administrative Law Advisory Committee in studying the potential effects of such legislation and developing a recommendation for the 1997 General Assembly Session. In response, the Administrative Law Advisory Committee created the Guidance Documents Subcommittee to focus on two issues: (i) the language of the definition and (ii) the publication requirement.

The proposed definition in House Bill 1532 is as follows:

“Guidance document means any manual or other document developed by a state agency for official use to provide general direction, instruction or advice to agency employees in determinations regarding permitting activities.”

The proposed publication requirements in House Bill 1532 are:

“A. Each state agency shall annually publish a list of guidance documents. Notice of any changes to existing guidance documents shall be published at the time of the change in the Virginia Register of Regulations unless the change is so minor that the agency finds such publication to be impractical or unnecessary.
B. When a state agency proposes to use new guidance documents developed by it, notice of the proposed use shall be published by the agency in at least one issue of the Virginia Register of Regulations before commencing the use.”

DESCRIPTION OF THE ISSUES

The VAPA supplements each state agency’s basic laws and governs agency actions during the development, promulgation, and application of regulations. Accordingly, unless exempt from the VAPA or different procedures are specified in the agency’s basic law, an agency must follow the procedures of the VAPA to promulgate a rule or regulation. A rule or regulation is defined as “any statement of general application, having the force of law, affecting the rights or conduct of any person, promulgated by an agency in accordance with the authority conferred on it by applicable basic laws.” (§ 9-6.14:4.F). The term “promulgate” means to publish or to announce officially. A subject agency’s rule or regulation is necessarily invalid if the agency fails to comply with the VAPA and the Virginia Register Act during the promulgation process.

The proposals of House Bill 1532 create significant administrative law changes. For various reasons, agencies use guidance not subject to the promulgation process of the VAPA, in lieu of the promulgation processes specified in the VAPA. “Guidance” includes documents such as manuals, policies, and administrative letters which are developed by the agency, but do not follow the rule making requirements of the VAPA (i.e., public notice and comment). Although these documents do not carry the force of law, guidance materials may indeed affect the public. For example, an agency’s policy on completing a permit application influences how the regulation is carried out in everyday practice, and how the public must respond. While this policy does not undergo public notice and comment, the policy nonetheless impacts the public and regulated entities’ actions.

The publication of guidance documents also involves the publication of the Administrative Code because the Registrar makes decisions about publishing documents that have not been promulgated as regulations. Moreover, issues are raised regarding (i) the costs and benefits of compiling and updating a list of guidance documents, and (ii) the time required to create, publish, and implement the document. A guidance document is frequently useful simply because of its short implementation time. A middle ground must be met between creating a valuable list for the public's use and interfering with an agency's quick dissemination of helpful guidance materials.

SUMMARY OF FINDINGS

Administrative law has evolved a practical distinction between rules having the force of law, ("legislative rules,") and those having only an advisory function, ("nonlegislative rules", "interpretative rules" or "statements of policy"). Public procedures are generally required for legislative rules but not for nonlegislative rules.

Although Virginia law makes no provision for the issuance of nonlegislative rules, these rules often carry considerable weight. Thus, the argument was raised that agencies should advise the public of the existence of documents disclosing agency pronouncements of general applicability.

At present, the Virginia APA does not contain a term for the designation of these documents. The federal APA, the model state APA, and the acts of sister states in the Fourth Circuit do not provide a definition of such documents. Therefore, the subcommittee developed its own definition.

The subcommittee found that Virginia practice generally referred to these documents as "guidance documents" and chose this phrase for its definition. It then drafted a definition which would provide adequate disclosure to the public without unduly burdening the agencies.

METHODOLOGY

The subcommittee intended to develop a definition and requirement that equally balanced the interests of the public, the regulated entities, and state agencies. The original bill encompassed every agency governed by the VAPA. In accordance with the Administrative Law Advisory Committee's traditional approach to legislative recommendations, the subcommittee applied the proposed definition to all guidance documents and agencies, instead of targeting recommendations to one specified agency and activity. The issues relating to guidance documents used by all agencies are as important as the guidance

documents applied in the environmental permitting process, and thus should apply consistently.

The subcommittee completed the following activities:

1. Reported on the collection of guidance materials to learn how an agency classifies its own documents. Documents compiled in accordance with the requirements of Chapter 735 of the 1993 Acts of the Assembly were studied for this stage (Appendix C).
2. Surveyed eight selected agencies and their regulated communities to solicit opinions on the proposed language of House Bill 1532 (Appendix D).
3. Compiled materials written by administrative law commentators that discuss the different categories of administrative rules (Appendix E).
4. Researched and compared federal and other states' administrative process acts' approaches to the issues raised by guidance documents (Appendix F).

1. Survey of Existing Archives

The subcommittee felt that it should sample a broad range of documents produced by Virginia agencies in order to determine the scope of its recommendations. The agency response to Ch. 735 provided a sample group. Chapter 735 required agencies to file with the Registrar every document the agency currently enforced (Appendix C).

Agencies submitted various rules or regulations and written statements such as resolutions, administrative letters, directives, state plans, manuals, policies, procedures, and guidelines (Appendix G). A few agencies submitted intra-office memoranda. The subcommittee found many of these written statements were the "guidance documents" House Bill 1532 originally sought. Most of the submissions were a type of guidance material; only three agencies needed to promulgate their submission as a rule or regulation (Appendix C).

The study reveals the large number of documents which could be perceived as guidance documents. Many of the written statements submitted would be encompassed by the subcommittee's proposed definition of guidance documents.

2. Survey of Agencies and Regulated Community

The subcommittee developed a survey to discover the need for, and application of, the proposed guidance documents (Appendix D). The goals were (i) to determine the efficacy of the definition and (ii) to determine whether compiling a list of those documents would impose a burden on agencies. The definition's language strongly influences the impact of including a guidance document in the VAPA procedures. Broad language may incorporate a wide range of agency-produced documents that have no application to the general public, while too restrictive language could defeat the purpose of the bill.

a. Survey of Agencies

The subcommittee surveyed eight agencies: Department of Agriculture; Department of Corrections; Department of Health; Department of Historic Resources; Department of Mines, Minerals and Energy; Department of Motor Vehicles; Department of Taxation; and Department of Youth and Family Services. Each agency's regulatory coordinator was asked to indicate his/her opinions on the proposed definition and an annual publication requirement.

The definition in the survey read: "A guidance document is any document, other than a rule or regulation, developed by a state agency to provide general direction, instruction, or advice to the agency staff or to the general public."

Most agencies believed that the definition was too vague and over-inclusive. The definition seemingly encompassed documents for which the general public would have no practical use (i.e., intra-agency management memoranda). The agencies desired a narrower, more focused definition that would clearly specify those materials considered guidance documents.

No agency supported a continuously updated publication requirement. The agencies felt the administrative costs would be greater than the benefits. On the other hand, most of the agencies surveyed found acceptable a periodic publication of a list of such documents, if a requirement was imposed (Appendix H).

b. Survey of Regulated Community

The community questionnaire inquired about an affected group's satisfaction with the accessibility of agency documents. The responses of the community members indicated little dissatisfaction with their ability to access information from the agencies.

Respondents felt the agencies sufficiently supplied guidance documents and knew the information was available upon request. Nonetheless, the majority of the respondents believed that wider disclosure of these documents would be valuable. The majority of the community opined that an annual publication of a list of

guidance documents would suffice. Several respondents would also require a continuously updated listing (Appendix I).

CONCLUSIONS

Based on the results of the study, the subcommittee concludes that agencies should be required to publish annually in the Virginia Register of Regulations a list of the generally applicable “guidance documents” upon which they rely. The subcommittee also recommends a somewhat narrower definition of that term than that proposed in House Bill 1532.

1. Revised Definition

The subcommittee concluded that the revised definition of guidance documents should address the expressed concerns. All responding agencies voiced concern over the all-inclusive language of the definition which seemed to include any type of intra-agency memorandum, regardless of its application or interest to the public. If the bill’s intention was to ensure public access to agency documents, then the language of the definition must be more tailored to specifically pinpoint those types of documents.

The subcommittee recommends the following definition:

“A guidance document is any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency’s rules or regulations, excluding agency minutes or documents that pertain only to the internal management of the agency.”

The words in the proposed definition were chosen for distinct purposes:

- The delineation between state “agency or staff” corresponds to the definition of agency in the VAPA. By definition, an agency issues only regulations. The inclusion of the term “staff” ensures that the source of the guidance document will not affect the document’s label as a guidance document.

The phrase “general applicability” addresses the broad scope of guidance documents; the term refers to the types of documents that affect the public at large. This phrase excludes case-specific documents that are particular to a certain situation and fact analysis. The committee does not intend for the term “guidance documents” to apply to case decisions unless the agency states that the case decision is intended to have general applicability in similarly situated cases.

- Guidance documents may be those issued to either the “staff or public.” Not all documents issued to the staff are necessarily guidance documents; however, those which explain to the staff ways to implement a rule should be included.
- The terms “interpret or implement” describe the role of guidance documents, as compared to duly promulgated agency rules. Guidance documents explain and clarify an existing law; they do not create new obligations or rights as a rule or regulation does.
- Guidance documents expressly exclude those documents that are for the agency’s internal use only (such as a memorandum regarding the personnel’s parking facilities or bond savings program).

2. Annual Publication of a List

The subcommittee concluded that publishing an annual list of guidance documents is a reasonable requirement and sufficiently provides the public with access to guidance documents.

Although the first compilation may require extra effort, the maintenance of such a list will be less time consuming in the subsequent years. For example, in the summer of 1996, the Department of Environmental Quality voluntarily compiled a list of guidance documents (based on the proposed definition of House Bill 1532). While the decision-makers had some varying opinions on what constituted a guidance document, the list nonetheless was successfully generated by this large agency. After developing the original list, the only maintenance will be to update existing documents, to include new documents, and to remove obsolete ones.

The subcommittee recommends deleting the additional requirements regarding changed and new guidance documents for the following reasons: (i) fewer on-going requirements will ease the administrative burden on agencies and encourage compliance and (ii) too many restrictions may hinder the quick implementation benefits of guidance materials. However, the subcommittee recommends that the Registrar provide that the publication will specify an agency contact person to provide information on updates and copies of guidance documents. In addition, the Registrar’s format should require that the agency indicate the statute or regulation which each guidance document interprets or implements.

The subcommittee did not recommend changes to the existing provisions in the Virginia Register Act for enforcement in the event of an agency’s noncompliance with the requirement. The subcommittee concluded that agencies will generally comply with the legislation. Hence, the vast majority of the agencies should not be burdened with enforcement devices aimed at a few possible recalcitrants.

3. Clarification of Access

The subcommittee suggested clarifying the availability of guidance documents for public inspection within the Virginia Register Act. Note however, that the proposed requirement does not impose new obligations on the agencies because the Virginia Freedom of Information Act already requires such access.

RECOMMENDATIONS

1. Based on the foregoing, the subcommittee recommends that the definition of guidance document read as follows:

“A guidance document is any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency’s rules or regulations, excluding agency minutes or documents that pertain only to the internal management of the agency.”

2. Moreover, because the subcommittee found the issues relating to guidance documents developed by other agencies are as compelling as environmental issues covered by the original bill, the legislation should apply to all agencies subject to the requirements of the Virginia Administrative Process Act and/or Register Act.

3. The subcommittee also recommends the annual publication of a list of guidance documents be maintained. Thus, the requirement will read:

“It shall be the duty of every agency to annually file with the Registrar for publication in the Virginia Register of Regulations a list of any guidance documents upon which the agency currently relies. Such filing shall be made on or before January 1 of each year in a format to be developed by the Registrar.”

This statement is based on the premise that any bill will take effect on July 1, 1997 with the first filing on or before January 1, 1998.

MEMBERSHIP OF THE GUIDANCE DOCUMENTS SUBCOMMITTEE

Professor Charles H. Koch, Jr.*, chairman
Marshall-Wythe School of Law, College of William and Mary

Professor Robert Anthony
George Mason University School of Law

Angela P. Bowser*
State Corporation Commission

Roger L. Chaffe*
Office of the Attorney General

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Virginia Municipal League

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* Denotes member of the Administrative Law Advisory Committee

APPENDIX

<u>Appendix</u>	<u>Title of Document</u>
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A	Recommended Bill
B	House Bill 1532
C	Review of the Documents Submitted Pursuant to Ch. 735 (1993)
D	Agency Survey and Regulated Community Survey
E	Nonlegislative Versus Legislative Rules
F	Guidance Documents in Other States' Administrative Process Acts
G	Summary of Individual Agency Submissions
H	Responses to the Agency Surveys
I	Responses to the Regulated Community Surveys

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HOUSE BILL NO. 1532
AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the Senate Committee on/for General Laws
on _____)
(Patron Prior to Substitute--Delegate Grayson)

A BILL to amend and reenact §§ 9-6.14:4, 9-6.16, and 9-6.18 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 9-6.14:7.2, relating to the Administrative Process Act and the Virginia Register Act; guidance documents.

Be it enacted by the General Assembly of Virginia:

1. That §§ 9-6.14:4, 9-6.16, and 9-6.18 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 9-6.14:7.2 as follows:

§ 9-6.14:4. Definitions.

As used in this chapter:

A—"Agency" means any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases.

B—"Agency action" means either an agency's regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or denial of relief or of a license, right, or benefit by any agency or court.

C—"Basic law" or "basic laws" means provisions of the Constitution and statutes of the Commonwealth of Virginia authorizing an agency to make regulations or decide cases or containing procedural requirements therefor.

D—"Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of

threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

"Guidance document" means any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations, excluding agency minutes or documents that pertain only to the internal management of the agency.

E.—"Hearing" means agency processes other than those informational or factual inquiries of an informal nature provided in §§ 9-6.14:7.1 and 9-6.14:11 of this chapter and includes only (i) opportunity for private parties to submit factual proofs in formal proceedings as provided in § 9-6.14:8 of this chapter in connection with the making of regulations or (ii) a similar right of private parties or requirement of public agencies as provided in § 9-6.14:12 hereof in connection with case decisions.

F.—"Rule" or "regulation" means any statement of general application, having the force of law, affecting the rights or conduct of any person, promulgated by an agency in accordance with the authority conferred on it by applicable basic laws.

G.—"Subordinate" means (i) one or more but less than a quorum of the members of a board constituting an agency, (ii) one or more of its staff members or employees, or (iii) any other person or persons designated by the agency to act in its behalf.

H. [Repealed.]

§ 9-6.14:7.2. Availability of guidance documents.

It shall be the duty of every agency to annually file with the Registrar for publication in the Virginia Register of Regulations a list of any guidance documents upon which the agency currently relies. Such filing shall be made on or before January 1 of each year in a format to be developed by the Registrar.

§ 9-6.16. Definitions.

As used in this chapter:

1 "Agency" means any authority, instrumentality, officer, board, or other unit of the
2 government of the Commonwealth with express or implied authority to issue regulations other
3 than the General Assembly, courts, municipal corporations, counties, other local or regional
4 governmental authorities including sanitary or other districts and joint state-federal, interstate
5 or intermunicipal authorities, the Virginia Resources Authority, the Virginia Code Commission
6 with respect to minor changes made under the provisions of § 9-77.10:1, and educational
7 institutions operated by the Commonwealth with respect to regulations which pertain to (i)
8 their academic affairs; (ii) the selection, tenure, promotion and disciplining of faculty and
9 employees; (iii) the selection of students; and (iv) rules of conduct and disciplining of
0 students.

1 "Virginia Administrative Code" means the codified publication of regulations under the
2 provisions of Chapter 8.1 (§ 9-77.4 et seq.) of Title 9.

3 "Commission" means the Virginia Code Commission.

4 "Guidance document" means any document developed by a state agency or staff that
5 provides information or guidance of general applicability to the staff or public to interpret or
6 implement statutes or the agency's rules or regulations, excluding agency minutes or
7 documents that pertain only to the internal management of the agency.

8 "Administrative Law Appendix" means the published listing of agency regulations with
9 supplemental information as provided by §§ 9-6.18 and 9-6.19.

0 "Registrar" means the Registrar of Regulations appointed as provided in § 9-6.17.

1 "Rule" or "regulation" means any statement of general application, having the force of
2 law, affecting the rights or conduct of any person, promulgated by an agency in accordance
3 with the authority conferred on it by applicable basic laws.

4 "Virginia Register of Regulations" means the publication issued under the provisions of
the Administrative Process Act in Article 7 (§ 9-6.14:22 et seq.) of Chapter 1.1:1 of Title 9.

6 § 9-6.18. Agencies to file regulations with Registrar; other duties; failure to file.

1 It shall be the duty of every agency to have on file with the Registrar the full text of all of
2 its currently operative regulations, together with the dates of adoption, revision, publication, or
3 amendment thereof and such additional information as may be requested by the Commission
4 or the Registrar for the purpose of published listing in accordance with § 9-6.19. Thereafter,
5 coincidentally with the issuance thereof, each agency shall from day to day so file, date, and
6 supplement all new regulations and amendments, repeals, or additions to its previously filed
7 regulations. Such filed regulations shall (i) indicate the laws they implement or carry out, (ii)
8 designate any prior regulations repealed, modified, or supplemented, (iii) state any special
9 effective or terminal dates, and (iv) be accompanied by a signed statement or certification that
10 they are full, true, and correctly dated. No regulation or amendment or repeal thereof shall be
11 effective until filed with the Registrar.

12 Orders condemning or closing any shellfish, finfish or crustacea growing area and the
13 shellfish, finfish or crustacea located thereon pursuant to Article 2 (§ 28.2-803 et seq.) of
14 Chapter 8, of Title 28.2, which are exempt from the requirements of Chapter 1.1:1 (§ 9-6.14:1
15 et seq.) of this title as provided in subsection B of § 9-6.14:4.1 shall be effective on the date
16 specified by the promulgating agency. Such orders shall continue to be filed with the
17 Registrar either before or after their effective dates in order to satisfy the need for public
18 availability of information respecting the regulations of state agencies.

19 In addition each agency shall itself (i) maintain a complete list of all of its currently
20 operative regulations for public consultation, (ii) make available to public inspection a
21 complete file of the full texts of all such regulations, and (iii) allow public copying thereof or
22 make copies available either without charge, at cost, or on payment of a reasonable fee.
23 Each agency shall also maintain as a public record a complete file of its regulations which
24 have been superseded on and after June 1, 1975.

It shall be the duty of every agency to annually file with the Registrar for publication in
the Virginia Register of Regulations a list of any guidance documents upon which the agency
currently relies. Such filing shall be made on or before January 1 of each year in a format to

1 be developed by the Registrar. In addition each agency shall itself (i) maintain a complete list
2 of all of its currently operative guidance documents for public consultation, (ii) make available
3 for public inspection the full texts of all such guidance documents, and (iii) allow public
4 copying thereof or make copies available either without charge, at cost, or on payment of a
5 reasonable fee.

6 Where regulations adopt textual matter by reference to publications other than the
7 Federal Register or Code of Federal Regulations, the agency shall (i) file with the Registrar
8 copies of such referred publications, (ii) state on the face of or as notations to regulations
9 making such adoptions by reference the places where copies of the referred publications may
10 be procured, and (iii) make copies of such referred publications available for public inspection
11 and copying along with its other regulations.

12 Unless he finds that there are special circumstances requiring otherwise, the Governor,
13 in addition to the exercise of his authority to see that the laws be are faithfully executed, may,
14 until compliance with this chapter is achieved, withhold the payment of compensation or
15 expenses of any officer or employee of any agency in whole or part whenever the Commission
16 certifies to him that the agency has failed to comply with this section or this chapter in stated
17 respects, to respond promptly to the requests of the Registrar, or to comply with the
18 regulations of the Commission.

19 #

1996 SESSION
ENGROSSED

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1 HOUSE BILL NO. 1532
2 AMENDMENT IN THE NATURE OF A SUBSTITUTE
3 (Proposed by the House Committee on General Laws)
4 (Patron Prior to Substitute—Delegate Grayson)
5 House Amendments in []—February 13, 1996

6 A BILL to amend and reenact [§ § 9-6.14:4, ~~9-6.14:16, 10-1-1318, and 62-1-44.29~~] of the Code of
7 Virginia and to amend the Code of Virginia by adding a section numbered 9-6.14:7.2, relating to
8 the Administrative Process Act [~~rights of citizens~~].

9 Be it enacted by the General Assembly of Virginia:

10 1. That [§ § 9-6.14:4, ~~9-6.14:16, 10-1-1318, and 62-1-44.29~~ of the Code of Virginia are is]
11 amended and reenacted and that the Code of Virginia is amended by adding a section
12 numbered 9-6.14:7.2 as follows:

13 § 9-6.14:4. Definitions.

14 As used in this chapter:

15 A. "Agency" means any authority, instrumentality, officer, board or other unit of the state
16 government empowered by the basic laws to make regulations or decide cases.

17 B. "Agency action" means either an agency's regulation or case decision or both, any violation,
18 compliance, or noncompliance with which could be a basis for the imposition of injunctive orders,
19 penal or civil sanctions of any kind, or the grant or denial of relief or of a license, right, or benefit by
20 any agency or court.

21 C. "Basic law" or "basic laws" means provisions of the Constitution and statutes of the
22 Commonwealth of Virginia authorizing an agency to make regulations or decide cases or containing
23 procedural requirements therefor.

24 D. "Case" or "case decision" means any agency proceeding or determination that, under laws or
25 regulations at the time, a named party as a matter of past or present fact, or of threatened or
26 contemplated private action, either is, is not, or may or may not be (i) in violation of such law or
27 regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or
28 other right or benefit.

29 "Guidance document" means any manual or other document developed by a state agency for
30 official use [~~to direct, instruct or advise to provide general direction, instruction or advice to~~]
31 agency employees in determinations regarding permitting activities.

32 E. "Hearing" means agency processes other than those informational or factual inquiries of an
33 informal nature provided in §§ 9-6.14:7.1 and 9-6.14:11 of this chapter and includes only (i)
34 opportunity for private parties to submit factual proofs in formal proceedings as provided in
35 § 9-6.14:8 of this chapter in connection with the making of regulations or (ii) a similar right of
36 private parties or requirement of public agencies as provided in § 9-6.14:12 hereof in connection with
37 case decisions.

38 F. "Rule" or "regulation" means any statement of general application, having the force of law,
39 affecting the rights or conduct of any person, promulgated by an agency in accordance with the
40 authority conferred on it by applicable basic laws.

41 G. "Subordinate" means (i) one or more but less than a quorum of the members of a board
42 constituting an agency, (ii) one or more of its staff members or employees, or (iii) any other person
43 or persons designated by the agency to act in its behalf.

44 H. ~~[Repealed.]~~

45 § 9-6.14:7.2. Use of supplemental information by agency.

46 A. Each state agency shall annually publish a list of any guidance documents. Notice of any
47 changes to existing guidance documents shall be published at the time of the change in the Virginia
48 Register of Regulations unless the change is so minor that the agency finds such publication to be
49 impractical or unnecessary.

50 B. When a state agency proposes to use new guidance documents developed by it, notice of the
51 proposed use shall be published by the agency in at least one issue of the Virginia Register of
52 Regulations before commencing the use.

53 C. This requirement shall not apply to federal guidance documents.

54 [~~§ 9-6.14:16. Right, forms, venue.~~

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INDICATED

A. Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision, as the same are defined in § 9-6.14:4 of this chapter and whether or not excluded from the procedural requirements of Article 2 (§ 9-6.14:7.1 et seq.) or 3 (§ 9-6.14:11 et seq.) hereof, shall have a right to the direct review thereof by an appropriate and timely court action against the agency as such or its officers or agents in the manner provided by the rules *Rules* of the Supreme Court of Virginia. *In the case of environmental-permitting decisions made under the authority of §§ 10.1-1318, 10.1-1457, or § 62.1-44.29, "aggrieved" shall be interpreted no more broadly than required by federal environmental laws and regulations governing delegation of federal environmental programs to state agencies for administration.* Such actions may be instituted in any court of competent jurisdiction as provided in § 9-6.14:5, and the judgments of such courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law. In addition, when any such regulation or case decision is the subject of an enforcement action in court, the same shall also be reviewable by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases.

B. The provisions of this article shall apply to case decisions regarding the grant or denial of aid to dependent children, Medicaid, food stamps, general relief, auxiliary grants, or state-local hospitalization. However, no appeal pursuant to this article may be brought regarding the adequacy of standards of need and payment levels for public assistance programs. Notwithstanding the provisions of § 9-6.14:17, such review shall be based solely upon the agency record, and the court shall be limited to ascertaining whether there was evidence in the agency record to support the case decision of the agency acting as the trier of fact. If the court finds in favor of the party complaining of agency action, the court shall remand the case to the agency for further proceedings. The validity of any statute, regulation, standard or policy, federal or state, upon which the action of the agency was based all not be subject to review by the court. No intermediate relief shall be granted under § 9-6.14:18.

§ 10.1-1318. Appeal from decision of Board.

A. Any owner aggrieved by a final decision of the Board under §§ 10.1-1309, 10.1-1322 or subsection D of § 10.1-1307 is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.).

B. Any person who is aggrieved by a final decision of the Board under § 10.1-1322, who participated, in person or by submittal of written comments, in the public comment process related to the Board's decision and who has exhausted all available administrative remedies for review of the Board's decision, shall be entitled to judicial review of the Board's decision in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.). The person invoking jurisdiction under this subsection bears the burden of establishing that (i) such person has suffered an actual, threatened or imminent injury; (ii) such injury is an invasion of an immediate, legally protected, pecuniary and substantial interest which is concrete and particularized; (iii) such injury is fairly traceable to the decision of the Board and not the result of the action of some third party not before the court; and (iv) such injury will likely be redressed by a favorable decision by the court. *For purposes of this section, "aggrieved" shall have the meaning ascribed to it in § 9-6.14:16.*

§ 62.1-44.29. Judicial review.

(1) Any owner *person* aggrieved by a final decision of the Board under §§ 62.1-44.15 (5), 62.1-44.15 (8a), (8b), and (8c), 62.1-44.16, 62.1-44.17, 62.1-44.19 or § 62.1-44.25, whether such decision is affirmative or negative in form, is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.). *For purposes of this section, "aggrieved" shall have the meaning ascribed to it in § 9-6.14:16.*

(2) through (8) [Repealed.]]

APPENDIX C

REVIEW of the Documents Submitted to the Registrar of Regulations Pursuant to Chapter 735

The following assessment is based on the documents submitted by each agency under the requirements of Chapter 735 passed by the General Assembly in 1993. Additional research done by reviewing selected agencies' files maintained by the Registrar of Regulations (Registrar). This preliminary study was conducted to begin exploring the realm of "guidance documents." The goal of the research was to examine the documents state agencies submitted as having the force of law, yet had not been filed with the Registrar. The documents surveyed do not include those regulations already on file with the Registrar, nor ones added since.

Background of Collection of Documents by Registrar:

Chapter 735 required each state agency to submit every document that the agency currently enforced but that had not been promulgated through the Virginia Administrative Process Act (VAPA), nor filed with the Registrar under the Virginia Register Act (VRA). The deadline for submission was August 15, 1993. These documents included those that were (1) subject to the Virginia Register Act, (2) have general applications, and (3) were currently being enforced as having the force of law. Agencies submitted various rules or regulations and written statements such as resolutions, administrative letters, directives, state plans, manuals, policies, procedures, and guidelines. Chapter 735 states that any document not filed would subsequently not possess the force of law. The collected documents are currently stored by the Registrar.

Although a total of 173 agencies were sent certification letters, only 162 replied and were listed in the computer data base as responding to the survey (as of November 8, 1993). This represents a return of 94 percent.

Exemptions

An agency had several methods to qualify for an exemption from the filing of regulations. The agency may have been exempt (1) based on general provisions of the VAPA or VRA, or (2) based on an exception afforded the agency during the submission procedure. The Registrar, as allowed by the VRA, could provide an exemption (due to length or format of the document, for example), as long as each exemption was individually applied for by the agency. If the agency claimed exemption under the VAPA, then the agency must cite the pertinent exemption provision and the reasoning behind the claim. A letter from the Attorney General's Office (A.G.) was not needed to verify this response.

A letter from the A.G. would however, certify the agency's exemption from requirements of the VRA or the VAPA requirements for adopting regulations or other materials. First, the agency would request the A.G. to review the questioned regulation. The A.G. would then instruct the agency as to the appropriate action to take concerning the regulation. A total of twelve agencies (18 percent) asked the A.G. to analyze their submissions.

The A.G. exempted documents from the VAPA for reasons as: (1) the document did not define policy that has the force of law; it only outlined procedures for implementing current policy; (2) the results of annual reviews need not to be promulgated; and (3) the rule had already been promulgated. The decisions of the A.G. were forwarded to the Registrar for recording purposes. A few documents were held to be fully exempt from filing as well.

Alterations

The A.G. may have determined a course of action other than exemption. For example, the A.G. might recommend changes, such as alerting the public to that fact that a process was followed or used, or publishing the guideline in some form to make it available for public reference. Although not requiring formal promulgation, several decisions of the A.G. nonetheless indicated the concern that the public must be made aware and notified of nonlegislative rules.

Promulgation

On the other hand, the A.G. reviewed some documents and determined (based on the document's contents) that promulgation was necessary in accordance with the VAPA. For instance, items such as definitions and criteria that were not already in regulations needed promulgation,

while the processes for authorizations, approvals, etc. did not. The A.G. also requested that some agencies clarify the policy contained in the document prior to the necessary promulgation.

Only three agencies (5 percent) were required to promulgate a rule or regulations. The majority of the rules submitted had already been correctly promulgated but were either (1) inadvertently omitted from the certification list, or (2) exempt from the VAPA's promulgation standards.

Withdrawal

Please note that since the submission pursuant to Chapter 735, some documents have been withdrawn from the Registrar's file upon review by the A.G. For example, the Department of Medical Assistance Services submitted many policy statements (such as Fiscal Year End Letter, Medicaid Claims Denial Codes, and the Virginia Indigent Health Care Trust Fund Guide) which were subsequently withdrawn in January of 1995.

RESPONSES TO THE REGISTRAR'S MAILING

The following categories report the type of document submitted by an agency in response to the Registrar of Regulations request for information pursuant to Chapter 735. The categories were generated according to an agency's submission responding to (1) a certification list and (2) an accompanying questionnaire. The two documents were distributed by the Registrar to state agencies in efforts to comply with the requirements of Chapter 735.

Certification

To be considered "certified," the Chief Executive Officer (CEO) of the particular agency would sign and date a list of regulations, or other written statements, which the agency was currently enforcing. This list was generated by the Registrar based on its files for the agency. The CEO would certify whether the submitted list was complete or not. If the listed was incomplete, the Registrar requested that the agency submit these additional regulations. This document, and/or supplementary regulations, was forwarded to the Registrar for review. These newly submitted documents have been categorized below beginning on page eight.

Questionnaire

The questionnaire component consisted of nine questions that were distributed by the Virginia Code Commission to applicable state agencies. The form was entitled "Senate Bill No. 639 (Chapter 735) Regulatory Documentation." The questionnaire asked the agency if the attached list of agency regulations, forms, and other statements composed the complete list on file with the Registrar. This attached list was the list that the agency was certifying (see above). If the list was incomplete, the agency was instructed to provide those missing regulations, forms, etc.

The questionnaire also alerted the agency that if it was enforcing any regulations that were not filed with the Registrar, nor published in the Virginia Register, then the agency was required to do so to be enforceable. A letter from the A.G. would be necessary to exempt any regulation. Please note however, that many agencies simply cited the Virginia Code provision that exempted their agency and did not obtain verification from the A.G.

Nearly all of the agencies re-submitted to the Registrar completed certification and questionnaire reports.

• **Certification and Questionnaire Responses Plus Additional Regulations**

A total of 157 agencies (91 percent of the 173 agencies receiving the questionnaires) returned completed certification and questionnaire reports.

The following 65 agencies (41 percent of the total certification and questionnaire submissions) submitted both completed certification and questionnaire responses, as well as other types of documents that were currently being enforced, but not yet contained on the certification list generated by the Registrar:

Alcoholic Beverage Control Board
Auctioneers Board
Auditor of Public Accounts
Board for Accountancy
Board for Barbers
Board for Contractors
Board for Cosmetology
Board for Geology
Board for Hearing Aid Specialist
Board for Waste Management Facility Operators
Board of Bar Examiners
Board of Optometry
Board of Pharmacy
Board of Professional Counselors
Board of Psychology
Board of Social Work
Board of Veterinary Medicine
Board of Wastewater Works Operators
Chesapeake Bay Local Assistance Department
Christopher Newport University
College of William & Mary
Commission on the Virginia Alcohol Safety Action Program
Dept. for the Aging
Dept. for the Deaf and Hard of Hearing
Dept. for the Visually Handicapped
Dept. of State Police
Dept. of Agriculture & Consumer Services
Dept. of Criminal Justice Services
Dept. of Game & Inland Fisheries
Dept. of General Services
Dept. of Health
Dept. of Mines, Minerals and Energy
Dept. of Motor Vehicles
Dept. of Professional & Occupational Regulation
Dept. of Social Services
Dept. of State Internal Auditor
Dept. of Taxation
Dept. of Transportation
Dept. of Waste Management
Dept. of Youth & Family Services
George Mason University
James Madison University
Judicial Inquiry & Review Commission
Longwood College
Marine Resources Commission
Milk Commission

Norfolk State University
 Old Dominion University
 Potomac River Fisheries Commission (omitted from study results because agency is
 multistate)
 Professional Social Scientists
 Public Defender Commission
 Real Estate Appraisers Board
 Secretary of the Commonwealth
 State Air Pollution Control Board
 State Corporation Commission
 State Land Evaluation Advisory Council
 State Lottery Department
 State Water Control Board
 University of Virginia
 Virginia Board For Architects, Professional Engineers, Land Surveyors & Landscape
 Architects
 Virginia Community College System
 Virginia Employment Commission
 Virginia Health Services Cost Review Council
 Virginia Port Authority
 Virginia State Bar

• **Certification and Questionnaire Responses Only**

From the certification and questionnaire responses, 92 agencies (59 percent) of the total certification and questionnaire responses) submitted **only** the completed certification and questionnaire reports without including any additional regulations or rules that needed to be promulgated or reviewed by the A.G. This response indicated that the Registrar's current file of regulations, forms, and written statements contained the complete listing of enforceable law for that agency. (Additional regulations may have been filed after this original determination was made in 1993):

Advisory Commission on Intergovernmental Relations
 Athletic Board
 Attorney General
 Board for Branch Pilots
 Board for Opticians
 Board of Audiology & Speech-Language Pathology
 Board of Dentistry
 Board of Funeral Directors & Embalmers
 Board of Historic Resources
 Board of Medicine
 Board of Nursing
 Board of Nursing Home Administrators
 Board of Recreation Specialists
 Board of Treasury
 Certified Seed Board
 Child Day Care Council
 Clinch Valley College
 Commission for the Arts
 Commission on Local Government
 Commonwealth's Attorneys' Services Council
 Compensation Board
 Comptroller

Council of the Environment
Council on Human Rights
Council on Information Management
Dept. for Rights of Virginians With Disabilities
Dept. of Correctional Education
Dept. of Corrections
Dept. of Economic Development
Dept. of Employee Relations Counselors
Dept. of Environmental Quality
Dept. of Fire Programs
Dept. of Forestry
Dept. of Health Professions
Dept. of Historic Resources
Dept. of Housing & Community Development
Dept. of Information Technology and Virginia Public Telecommunications Board
Dept. of Labor and Industry
Dept. of Mental Health, Mental Retardation & Substance Abuse Services
Dept. of Minority Business Enterprises
Dept. of Personnel and Training
Dept. of Planning & Budget
Dept. of Rail & Public Transportation
Dept. of Rehabilitative Services
Dept. of Veterans' Affairs
Division of Capitol Police
Frontier Culture Museum of Virginia
Governor's Office
Gunston Hall Board of Regents
Housing Study Commission
Innovative Technology Authority
Jamestown-Yorktown Foundation
Library Board
Mary Washington College
Maternal & Child Health Council
Medical Advisory Board
Military Affairs
Motor Vehicle Dealers' Advisory Board
Motor Vehicle Reciprocity Board
Radford University
Real Estate Board
Richard Bland College
Science Museum of Virginia
Secretary of Finance
Specialized Transportation Council
State Board of Education
State Board of Elections
State Council of Higher Education for Virginia
Statewide Health Coordinating Council (this agency has since been abolished)
Supreme Court of Virginia
Transportation Safety Board
Virginia Aviation Board
Virginia College Building Authority
Virginia Community College System
Virginia Council on Child Day Care & Early Childhood Programs
Virginia Education Loan Authorities

Virginia Emergency Response Council
Virginia Health Planning Board
Virginia Housing Development Authority
Virginia Liaison Office
Virginia Military Institute
Virginia Museum of Natural History
Virginia Outdoors Foundation
Virginia Parole Board
Virginia Polytechnic Institute
Virginia Public School Authority
Virginia Racing Commission
Virginia Resource Authority
Virginia Retirement System
Virginia State Crime Commission
Virginia State University
Workers' Compensation Commission

- **Miscellaneous**

Two agencies did not qualify for either of the above categories because neither submitted a responding certification or questionnaire. Both did, however, submit documents that needed to be filed. These two agencies were: (1) Department of Medical Assistance Services and (2) Department of Emergency Services.

- **Trends to look for**

Most Boards of technical / professional groups submitted applications regarding licensure, certification, and/or reinstatement. These were standard form applications that generally requested information about the applicant (name, address, etc.) and education / qualifications for receiving the certification.

Colleges and universities generally submitted smoking and parking regulations but not much more (with exception of William & Mary). Most higher education agency actions are exempt from the VAPA requirements unless the regulation will affect the general public, not just the facility, students, or employees. Note that smoking policies fall under the aegis of the Clean Air Act and are not included in the Registrar.

Very few agencies submitted any sort of document that might be considered an internal office memorandum. However, this may be a reflection of the questionnaires' instructions of what documents should be included ("agency regulations, forms, and other written statements"), and not a result of the agencies knowing that the memorandum was excluded. Remember however, that if the agency did not submit the document, it was no longer enforceable as law. This stipulation may have incited agencies to submit many documents and affirmatively alerted the agency to the fact that any omitted document became unenforceable.

GENERAL CATEGORIES OF DOCUMENTS SUBMITTED: The materials that were submitted to the Registrar were grouped into the following categories.

Legend: After each bullet heading definition, an agency that submitted that type of document is listed. The information contained in the parentheses, after some agency names, gives a general description of the document. An asterisk (*) denotes that the agency's submissions were somewhat unique. Please refer to the document "Summary of Individual Agency Submissions" for more detailed information about the agency.

- **Applications :** Usually presented as a standard, agency form, most applications requested a type of certification or re-certification within that agency's field of expertise. Many were also for applying for licensure. The majority of the applications requested a notary's signature, applicant's education, and a processing fee. Note that the VAPA grants a subject exemption from promulgation requirements for the application and renewal of a license, certificate, or registration.

Alcoholic Beverage Control Board

Auctioneers Board

Board for Accountancy (initial, reexamination)

Board for Barbers (for license, examination, reinstatement)

Board for Contractors (for water well examination, specialty ID, business change of address)

Board for Geology (for certification asbestos analytic lab)

Board for Hearing Aid Specialist

Board for Waste Management Facility Operators (approval of training course, renew interim certification, interim operator certification)

Board of Bar Examiners (application for examination and license to practice law)

Board of Cosmetology

Board of Optometry (for licensure, professional designation, reinstatement)

Board of Pharmacy (reinstatement, approval of continuing pharmacy education program)

Board of Professional Counselors (for licensure)

Board of Psychology (examination or licensure)

Board of Social Work (supervision package for registration)

Board of Veterinary Medicine (for reinstatement of license, Technician license)

Board of Wastewater Works Operators (re-examination)

Dept. of Criminal Justice Services (for certification, for exemption from minimum training standards)

Dept. of Health (for Va. bedding, for licenses, permits)

Dept. of Motor Vehicles (various types - license plates, change of record, lien transfers, salvage certificate, duplicate title, registration)

Dept. of Professional & Occupational Regulation (for certification, license)

Dept. of State Police (multiple handgun purchase)

Dept. of Waste Management (application for shipment of hazardous radioactive materials)

Professional Soil Scientists (certification, reference)

Real Estate Appraisers Board (for certification, approval of course offering)

Secretary of the Commonwealth (notary application)

State Corporation Commission

Virginia Board For Architects, Professional Engineers, Land Surveyors & Landscape Architects

- **Bylaws :** An organization adopts bylaws for the regulation of its affairs and government of the members.

College of William & Mary (bylaws of faculty of the School of Education)

Virginia State Bar

- **Consumer Information Sheets / General Information :** Basic data used to expand the regulated public's awareness/knowledge about the activity.

Board for Geology (asbestos licensing)
Board of Bar Examiners (fee schedule; listing of ABA approved schools)
Board of Wastewater Works Operators (exam content outline)
Dept. of Professional & Occupational Regulation (asbestos licensing)
Virginia Community College System (parking information)

- **Federal Materials** : Existing, duly promulgated federal regulations, manuals, etc. that have been incorporated by reference into another agency regulation. These materials are exempt from filing with the VRA. The agency must simply provide the federal citation in its incorporation and keep the reference available for public review.

Chesapeake Bay Local Assistance Department

Dept. for the Aging

Dept. of Game & Inland Fisheries

Dept. of General Services

* Dept. of Social Services

* State Air Pollution Control Board

- **Financial Information** : Budgetary data pertinent to the particular agency and /or its regulated public.

Auditor of Public Accounts (specifications for audits of counties, cities, and towns)

* Dept. of Medical Assistance Services (wholesale prices; cost indexes and data; compensation limits; payment agreements)

Secretary of the Commonwealth (disclosure statements regarding financial, real estate holdings, lobbyists; statement of economic interests)

Secretary of the Commonwealth (financial disclosure statement)

Virginia Health Services Cost Review Council (budget filing)

- **Forms** : Standardized agency documents generally requesting specific information from the individual completing the form. Many forms submitted were pertaining to some sort of application and/or the process of applying for a certification or license. The Administrative Law Appendix publishes annually a *list* of all agency forms; the actual form itself is not published.

Alcoholic Beverage Control Board (application for off-premises keg permit)

Board for Contractors (certification of termination form)

Board for Geology (geology applicant check-off form)

Board for Waste Management Facility Operators (verification of education, employment, for reporting continuing education credit hours)

Board of Bar Examiners (personal identification form)

Board of Professional Counselors (registration of Supervision)

Board of Psychology (verifications)

* Dept. of Agriculture & Consumer Services (remittance)

Dept. of Criminal Justice Services (training completion form)

* Dept. of Medical Assistance Services

Dept. of Motor Vehicles (various applications for licenses, permits, registration, reports, etc.)

Dept. of Professional & Occupational Regulation (applicant check-off form)

Professional Soil Scientists (applicant check-off form, verification forms)

State Corporation Commission (cancellation of certification of registration)

Virginia Employment Commission (benefit and tax forms)

- **Handbooks / Manuals / Guidelines / Catalogs** : These materials included internally used and externally distributed manuals. While some references are only a few pages in length, others are large hard bound books. Many handbooks, manuals, etc. address the policy and procedure of the agency and/or the activity that the agency oversees.

Auditor of Public Accounts (Virginia Sheriffs Accounting Manual)

College of William & Mary (finance committee guidelines; assorted handbooks: policies & procedures, student teaching, doctoral student, advisor, student, faculty; guide to the sport club; honor system at Marshall Wythe School of Law)

Dept. for the Visually Handicapped (manuals regarding policy and procedure for certain topics: Business Enterprises; Intake; Program for Infant, Children, and Youths; Instructional Materials; Low Vision; Volunteer services; Va. Rehabilitation Center; Va. State Library; Rehabilitation teaching)

Dept. of Medical Assistance Services (52 manuals are filed with the Registrar of Regulations as of January 21, 1994. Manuals include such topics as hospital, nursing home, physician, baby care, private duty, personal care, pharmacy, dental, elderly, podiatry)

Dept. of Social Services (service manual, IEVS User Guide, Energy assistance, ADC Policy)

Dept. of Transportation (uniform traffic control devices; guide for additions, abandonments & discontinuances)

Dept. of Waste Management (notification guidelines for shipments of hazardous radioactive material)

Longwood College

Milk Commission

Public Defender Commission (policies and procedures)

State Land Evaluation Advisory Council

Virginia Community College System (policy and procedure)

- **Instructions** : Similar to guidelines, instructions outline the correct procedure for the agency or the regulated community to follow.

College of William & Mary (for students not returning, withdrawal, filing a committee on academic status petition)

Dept. of Professional & Occupational Regulation (Va. asbestos licensing instructions)

Virginia Health Services Cost Review Council (for nursing home charge survey, hospital charge survey)

- **Licenses / Permits / Licensure Procedure** : These documents consisted of the actual permit or instructions for obtaining a license for various activities that the agency oversaw. Note that the VAPA grants a subject exemption from promulgation requirements for the application and renewal of a license. (Cross-reference with the category "Applications.")

Alcoholic Beverage Control Board

Auctioneers Board

Board for Geology (Va. asbestos licensing instructions)

Board of Optometry

Board of Social Work (for social worker, clinical social worker)

Dept. of Agriculture & Consumer Services

Dept. of Game & Inland Fisheries (license agent appointment and removal)

Dept. of Health

- **Orders** : The term "order" refers to an agency action that determines the legal rights, duties, privileges, or other legal interests of a specific person(s) in particular to a certain agency action.

Marine Resources Commission

* Milk Commission

Potomac River Fisheries Commission (fishing permits, catch limits, tagging, seasons)

State Corporation Commission

State Lottery Department

- **Plans** : Plans are written documents outlining a course of action, or directing a certain activity, that is monitored by the particular agency. A plan may be exempt from the VAPA requirements if it is a federal requirement.

Dept. for the Aging (state plan for department)
Dept. of Agriculture & Consumer Services (approval of dead poultry disposal plan)
* Dept. of Emergency Services (plans for emergency situations)
Dept. of General Services (state plan of operation in conformity with Federal Property and Administration Service Act)
Dept. of Health (State Emergency Medical Plan)
State Water Control Board (water quality management plans for various bodies of water)

- **Policies / Procedures :** Agencies submitted documents which described the management and particular method of action for certain aspects of the agency. (See Handbooks & Manuals category for policy and procedure documents written in that particular format.)

Air Pollution Board (procedures for surface coating, implementing regulations)
College of William & Mary (grants office, investment, short term investment)
Dept. of Medical Assistance Services (included are 51 statements of policy that were filed with the Registrar of Regulations as of January 1994)
Dept. of State Internal Auditor (directive on internal auditors)
* Dept. of Transportation (for control of cut-through traffic, inclusion of routes)
George Mason University (space utilization, parking citation appeals)
Longwood College
Norfolk State University (smoking policy)
Old Dominion University (smoking policy)
State Land Evaluation Advisory Council
State Water Control Board (Dulles Area Watershed, Wetlands Policy)
Virginia Community College System (parking enforcement policy)
Virginia State Bar (Disciplinary Board Rules of Procedure)

- **Programs :** Plans or systems by which the agency, or its regulated public, may take action toward a specific goal.

College of William & Mary (graduate and undergraduate programs)
Dept. for the Deaf and Hard of Hearing (technology assistance program)
Dept. for the Visually Handicapped (vocational rehabilitation)
Dept. of Health (x-ray protection program, nursing scholarship)
Dept. of Medical Assistance Services
Dept. of Social Services (general relief, Food Stamp programs)

- **Public Participation Guidelines (PPGs) :** Documentation of how the public would be notified and allowed to participate in the promulgation of new rules. Please note that since this determination in 1993, many agencies have promulgated permanent public participation guidelines as a result of the 1993 amendment to the VAPA requiring such PPGs. However, at the time of Ch. 735 request, many agencies were simultaneously developing emergency PPGs to comply with the PPGs bill passed in the same session.

Auctioneers Board
Auditor of Public Accounts
Board of Optometry
Board of Wastewater Works Operators
Chesapeake Bay Local Assistance Department
Commission on the Virginia Alcohol Safety Action Program
Dept. of the Visually Handicapped
Professional Soil Scientists
Real Estate Appraisers Board
State Lottery Department
Virginia Board For Architects, Professional Engineers, Land Surveyors & Landscape Architects

- **Regulations / Rules :** As a result of some of these submissions, agencies were instructed to promulgated some of these rules in accordance with the VAPA. Prior to this review by the Registrar, the agency might have been using this regulation absent the required promulgation process.

Art & Architectural Review Board

Board of Bar Examiners

Christopher Newport University (Motor Vehicle Regulations)

Dept. of Criminal Justice Services (training, testing for law enforcement officials, jailers)

Dept. of Game & Inland Fisheries (federal regulations adopted to apply to motorboats)

Dept. of General Services (regulations for Capitol Square)

Dept. of Health (for licensure, construction of labor camps, sewage handling, governing campgrounds, x-rays, shellfish)

Dept. of Medical Assistance Services

Dept. of Mines, Minerals and Energy (Board procedural rules, civil charge procedure)

Dept. of Motor Vehicles

Dept. of Social Services (eligibility requirements, Food Stamp issuance)

Dept. of Taxation

Dept. of Transportation (pre-qualification of bidders, state highway commission, registration)

Dept. of Waste Management (transportation of hazardous radioactive materials)

George Mason University (motor vehicle regulations)

James Madison University (smoking regulations, parking & traffic regulations)

Judicial Inquiry & Review Commission (rules of the Commission)

Marine Resources Commission

Norfolk State University (motor vehicle regulations)

Old Dominion University (motor vehicle and parking regulations)

Potomac River Fisheries Commission

State Lottery Department

State Water Control Board (for implementation of Groundwater Act, procedural rules)

Virginia Port Authority (terminal rules)

Virginia State Bar

- **Reports / Reviews :** These documents were written studies containing recommendations or conclusions that the agency used as reference resources. The agency may itself produce these materials, or rely on ones created by another.

Alcoholic Beverage Control Board (mixed beverage annual review/report)

Dept. of Agriculture & Consumer Services (annual tonnage of commercial fertilizer sold report; plant monthly report on quality of milk received)

Dept. of Health (Morbidity report)

Dept. of Medical Assistance Services (includes studies)

Dept. of Motor Vehicles (Fuels Tax, suppliers, aviation consumer, limited dealer)

Dept. of Social Services (VAPA Status Report)

- **Standards :** Documents which outline the established and recognized procedures an agency must follow for the particular action. For example, the standards of review for a procedure, or an acceptable minimum level of compliance.

Dept. of Youth & Family Services (Standards for family group homes, secure detention, outreach detention, court services, post dispositional confinement)

State Water Control Board (Water Quality standards)

- **Waivers / Exemptions :** Types of forms which would exclude the applicant from a particular agency program, service, etc.

Dept. of Agriculture & Consumer Services (various exemption application forms)

Dept. of Medical Assistance Services (for Va. Medallion Program; for Home and Community Based Services for Persons with Mental Retardation; for Virginia Medicaid Direct Purchase Vaccine Program)

- **Miscellaneous** : This category encompasses some of the documents submitted which did not fit into any of the above categories, but were interesting types of submissions. The list does not include all the documents which did not fall into a category. Please note the range of the types of documents, and also consider whether the filing was necessary and/or the difficulty in determining the "force of law" of the document.

Alcoholic Beverage Control Board = Resolutions

Board for Hearing Aid Specialist = Model Purchase Agreement

Board of Wastewater Works Operators = information on examinations such as reference list

College of William & Mary = Publications Council, response protocol for victims of sexual assault, social requirements organizations; association of parents; academic status, committee on academic status, student activities, final exams, resident file, brochure of school of education

Dept. of Agriculture & Consumer Services = consent to solicit; committee for receipt of donated tickets

Dept. of Health = delegation of authority, responsibilities of district directors, fish ban

Dept. of Medical Assistance Services = directories; service drug information; evaluations; codes; data resources; releases; drug list; classification of diseases and mental Retardation; newsletters; internal criteria for certain procedures; Medicaid memos; Interagency Agreement

Dept. of Taxation = tax bulletins (table of contents only)

Department of Transportation = list of differentiated speed limits. VDOT specifically excluded internal forms which the VDOT regulated party does not complete itself.

Exchanges of information through a resolution or correspondence (not a form) was omitted as well.

Milk Commission = informational memorandum issued to licensed distributors to "reaffirm the Commission's Rules and Regulation" regarding the applicable topic

State Corporation Commission = numerous case decisions for its following divisions: Public Utilities, Accounting, Communications, Energy, Bureau of Financial Institutions, Bureau of Insurance, MotorCarrier Division. Many of the divisions also listed (1) rules that had resulted from orders, and (2) administrative rulings

State Water Control Board = protection of Water Quality in Va.'s Shellfish Growing Area, Boat Pollution control

University of Virginia = UVA Undergraduate Record which contained four regulations that affected non-university people

APPENDIX D AGENCY SURVEY

A Research Survey Performed by the
Guidance Documents Subcommittee, June 1996

Please refer to the following proposed definition of a "guidance document" when answering the following survey questions:

A guidance document is any document, other than a rule or regulation, developed by a state agency to provide general direction, instruction, or advice to the agency staff or to the general public.

1. Does your agency already publish its documents that meet this definition? If so, please describe where the material is published, how often it is updated, its availability to the public, and any other information you think is pertinent. If your agency does not publish its documents, does your agency publish a list of its documents? How are these documents made available to the public? Please include any currently available lists of these documents.
2. Please comment on your agency's ability to provide these requested lists. Please let us know the time spent generating such a list if you do not already have one compiled.
3. Please describe the categories or types of agency documents that would qualify as documents that "provide general direction, instruction, or advice to the agency staff." Please also describe the categories or types of agency documents that would qualify as documents that "provide general direction, instruction, or advice to the general public."
4. Please describe and comment upon the steps your agency takes to make information available to the public.
5. Which would be more helpful or more of a hindrance, a continuous update of a list of guidance documents, or an annual publication of the list? Please explain your answer.
6. Any other comments, suggestions, or concerns you have would be greatly appreciated. (The Subcommittee is particularly interested in your opinion on these proposed requirements.)

APPENDIX D
REGULATED COMMUNITY SURVEY

A Research Survey Performed by the
Guidance Documents Subcommittee
of the Administrative Law Advisory Committee
August 1996

Please refer to the following proposed definition of a "guidance document" when answering the survey questions:

A guidance document is any document, other than a rule or regulation, developed by a state agency to provide general direction, instruction, or advice to the agency staff or to the general public.

1. Please comment on your company/association's present ability to access these "guidance documents" and your satisfaction with accessibility to agency documents in general.

2. Please tell us about any listings or publications that you rely upon to get information about agency documents that affect the regulated community.

3. Please tell us about any specific recommendations you have regarding making agency documents more accessible to the public.

4. Please describe any concerns you have regarding the accessibility of documents.

5. Which would be more helpful to you: a continuous update of a list of guidance documents, an annual publication of the list, or neither? Please explain your answer.

6. Any other comments, suggestions, or concerns you have would be greatly appreciated.

APPENDIX E

Nonlegislative Versus Legislative Rules

Our discussion begins with the premise that a rule is either a legislative rule or a nonlegislative rule.¹ The Model State Administrative Process Act (APA) defines a rule as “the whole or part of an agency statement of general applicability that implements, interprets, or prescribes (i) law or policy, or (ii) the organization, procedure, or practice requirements of an agency.” Under the Federal APA, a substantive rule encompasses both legislative and nonlegislative rules, and the APA further subdivides them into three categories: (1) legislative rules, (2) interpretive rules, and (3) policy statements. Simply by definition, any substantive rule must fall into one of the categories.

I. Legislative Rules

A legislative rule is defined as one that is the “product of an exercise of delegated legislative power to make law through rules.” An agency may issue a legislative rule only pursuant to a grant of authority to issue rules that possess the binding force of law. As a result, the legislative rule binds both the agency and the public. When a rule meets all of the following six requirements, the rule is a legislative one:

1. A statutory provision delegates the authority to the agency to act upon the rule’s subject matter.
2. The agency’s promulgation of the rule is an intentional exercise of that delegated authority.
3. The agency has statutory authority to make a rule that possesses the force of law.
4. Promulgation of that rule is the intentional exercise of the authority to make such a rule.
5. The promulgation is an effective exercise of statutory authority.
6. Promulgation follows both the agency and the APA’s mandates and procedures.²

If a substantive rule does not meet these six requirements, then the rule is considered to be nonlegislative and will fall into either the category of interpretive rules or policy statements.

An agency’s rule making is “legislative” because rule making operates in the future and concentrates on policy considerations.³ Rule making is the implementation or prescription of law, not an evaluation of past behavior. Similarly under the Virginia Administrative Process Act (VAPA), a regulation is referred to as “legislative” because the regulation provides rules for future conduct or entitlement. The term regulation, however, does not include (1) an agency’s explanation of its decision in a case; (2) any statement about the nature of the regulation issued; (3) advisory rulings based on a hypothetical situations; (4) the terms of an injunctive order; or (5) a license’s conditions.

Legislative rules are those regulations which have been made pursuant to a delegated authorization to make rules.⁴ To be a legislative rule, the rule usually undergoes notice and comment because it represents an extension of legislative process and warrants public participation. This procedure and the underlying delegated authority give the legislative rule the force of law.

As a substantive rule, a legislative rule either (1) grants rights, (2) imposes obligations, or (3) creates other significant effects on the public interest. However, the distinction between a substantive rule and its opposite, an interpretative rule, remains debatable. In attempts to determine this distinction, the reviewing court will look to whether the agency is explicating the legislature’s wishes, or if the agency is adding a substantive context of its own.⁵

¹ This discussion originates from an article written by Robert Anthony for the Duke University Law Journal entitled “Interpretive Rules, Policy Statements, Guidance, Manuals, and the Like—Should Federal Agencies Use Them To Bind the Public?” (1992). The Virginia Administrative Process Act was used as a resource as well. Please note that although the Anthony discussion is in reference to the Federal APA, the categorization remains nonetheless pertinent to the our concern regarding the general concept of guidance documents. For further information, your might consult: C. Koch, Administrative Law and Practice, §§ 3.11 to 353 (West 1985). Also used was the casebook by Bonfield and Asimov, State and Federal Administrative Law (West 1989).

² This stage is where the public notice-and-comment procedure would come into effect as well as the required publication in the Federal Register. In Virginia, the publication would occur in the Virginia Register of Regulations.

³ The Attorney General’s Manual on the Federal APA.

⁴ Note that the VAPA affords many subject and specific exemptions from promulgating a regulation according to its requirements. Thus a “legislative rule” may not have followed the VAPA’s public participation guidelines, but still binds both the agency and the regulated public.

⁵ Refer to the case of Tabb Lakes Ltd. V. United States, 715 F.Supp. 726 (E.D. Va. 1988).

II. Nonlegislative Rules

Nonlegislative rules are rules which interpret specific statutory or regulatory language. Since the rule was not based upon any delegated authority to issue such a rule, the interpretive rule does not have the force of law. For example, an agency may issue a statement that clarifies the meaning and the language of a statute. An agency need not follow the APA promulgation procedures to issue an interpretive rule. The interpretive rule will bind the public, but the rule does not restrain the from issuing a different interpretation at a later date.

Nonlegislative rules lack the force of law, although they may be binding on the agency. An agency rightfully has these powers, which are incidental to its statutorily granted powers, to accomplish the purposes of the agency. Accordingly, a reviewing court may not second-guess the manner in which an agency responds to this responsibility of carrying out its policies.⁶ Nonlegislative rules are further subdivided into categories of interpretative rules and policy statements.

1. **"Interpretative rules"** refer to agency rules that do not carry the force of law. These documents are ones that describe or expand upon a duly promulgated rule. Interpretative rules act retroactively to clarify the existing law. One Virginia court defined an interpretative rule as one that explained a particular term of an existing law.⁷ An interpretative rule is essentially instructional; it does not possess the full force and effect as a substantive rule, which affirmatively grants rights or imposes obligations.

An agency may change its interpretations of a statute, and if the interpretation is reasonable, the agency will still be afforded deference by the court. An agency's initial interpretation may be continuously re-evaluated and changed as needed.⁸

An example of an interpretative rule is a agency's guidelines. One court defined an agency's guidelines as policies that "merely assist the case worker in interpreting the statute."⁹ The guidelines were not a substitution for the statute, but instead, assisted the local departments in the administration of the law. Moreover, the public was not subject to criminal nor civil penalties under the guidelines, and the guidelines did not have the force of law.

2. **"Policy Statements"** do not possess the force of law either. Policy statements encompass all nonlegislative rules that do not interpret specific or regulatory language. Some authorities have defined policy statements as those rules which address the staff of an agency, not the public. Others portray policy statements as temporary measures that will be replaced in the near future by more definitive legislative rules. The Attorney General's Memorandum on the Federal APA (1947) defines "general statements of policy" as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."

Similar to interpretative rules, these agency rules do not carry the force of law since the rule was not based upon delegated authority to issue the rule. Yet while a policy statement is not legally binding on the agency or the public, its practical effect will be to act as if the policy statement was a duly promulgated rule. Such a statement occurs when the agency issues a document that when applied in everyday use, it has an effect upon the receiving party. The policy statement may be directed to a narrow category, such as the agency's office staff, or more broadly, the general public.

For example, a statement issues a certain procedure for all state employees to follow. The receiving employees comply with the policy statement and in their compliance, create a situation which also binds the public to act in a certain manner. Remember however, the statement never followed the proscribed APA procedure, yet it now binds many people. Notably, all substantive nonlegislative agency issuances --such as manuals or memoranda or press releases--that are not interpretative rules, are considered to be policy statements.

A federal court examined whether an agency's directive was (1) a substantive rule, for which notice-and-comment was required under the APA, or (2) a general statement of policy which did not need to follow such procedures. Here the court found that if a directive merely provided (a) *guidance*

⁶ Refer to Jackson v. W., 419 S.E.2d 385, 14 Va. App. 391 (Ct. App. 1992).

⁷ Tabb Lakes Ltd.

⁸ Hicks v. Cantrell, 820 F.2d 789 (4th Cir. 1986).

⁹ Jackson at 401.

to the agency officials as they exercised their discretionary powers and (b) allowed them to remain flexible and to make “individualized determinations,” then the directive was a general statement of policy. The crucial factor remained the weight of the official’s discretionary power -- did the directive provide the decision maker with flexibility in interpreting the announced policy? A general statement of policy must operate only prospectively and must not establish a binding norm or be determinative of the issue.¹⁰

General statements of policy do not establish a binding norm. Instead, these rules announce an agency’s tentative, future intentions and what the agency seeks to establish as policy.¹¹ If a statement of policy crosses over this line and binds the future conduct of its regulated public, then the policy is treated as a rule or regulation, not as a mere policy statement. For example, the Hearing Determination Chart appended to the Virginia Worker’s Compensation Act was found to be a guideline that the Commission *may* use; the Chart was not mandatory, but voluntary. Furthermore, the Chart was not a substantive rule adopted pursuant to the agency’s rule making authority, and thus it did not possess the power to bind the public.¹²

The concern raised by policy statements is the binding effect these statements possess. One purpose of the APA is to ensure that an agency does not make binding law except when the agency follows the authorities and procedures outlined in the APA. The preservation of fair and effective administrative process relies on the agency’s adherence to statutory procedures. While policy statements lack the power to legally bind the public, agencies do nonetheless inappropriately issue such statements with the intent and/or effect of imposing a practical binding law on the public. By treating the nonlegislative document as one that is a legislative rule, the agency allows the document to bind the public. This leads the affected public to treat and consider the document in a practical binding manner as well. Thus, the nonlegislative document is viewed as dispositive of the issues without undergoing the scrutiny of APA procedures, or public notice-and-comment.

Proponents of exempting nonlegislative rules from notice-and-comment exist as well. Some commentators feel the exemption is warranted because of its practical effectiveness: the adverse consequences of such a rule on the regulated public is usually less than those consequences of a legislative rule. Moreover, courts may judicially review a questioned interpretive rule without deference to the adopting agency. The original drafters of the APA concluded that the public would lose more than it would gain without exemption: the benefits of mandatory public participation for nonlegislative rules were less than the resulting costs of reduced effectiveness, increased expense, and undue delay.

III. Judicial Interpretation of Legislative and Nonlegislative Rules

An important concern regarding these different types of rules is whether an agency followed the correct procedures in creating the particular type of rule. If it is a legislative rule, the notice and comment procedures must have been followed. When dispute arises, the court focuses on whom the agency intended to bind by the rule: the agency and/or others? Remember, that as long as the agency does not act arbitrarily, the reviewing court grants much deference to the agency’s decision: “a court may not merely substitute its judgment for that of an administrative agency.”¹³

The reviewing court may look to several factors in determining if the rule is legislative. For example, binding terms, such as “define” and “prohibit,” indicate that the rule is mandatory and create a sense of unlawfulness. Thus, if dispositive of the issue, the rule would be legislative and needs to follow the correct notice and comment requirements. The court may also consider whether the agency’s decision was based on an exercise of its legislative power.

¹⁰ Mada-Luna v. Fitzpatrick, 813 F.2d 1006 (9th Cir. 1987).

¹¹ See Lake Monticello Owners’ Assn. at Va. 573.

¹² Bader v. Norfolk Redevelopment & Housing Auth., 396 S.E.2d 141, 10 Va. App. 697 (Ct. App. 1990).

¹³ Jackson at 401.

APPENDIX F

“Guidance Documents” Definitions in Other States’ Administrative Process Acts

The following overview was derived from a cursory survey of the administrative law procedures in the Fourth Circuit and a few other selected states. Each state’s definition sections were reviewed for terms similar to House Bill 1532 proposed “guidance documents.” The researcher only considered the direct language of the statute, and did not delve deeply into legislative histories and/or applicable case law.

The majority of the states use very similar language for defining a rule or regulation. The definitions generally appear in the preliminary sections of the statute and state that a regulation is “a rule, regulation, order, standard,” etc. which is adopted by a state agency to “implement, interpret, or prescribe law or policy.” The states would usually follow with an articulation of exclusions from the definition.

California

The California statute specifically excludes internal management procedures and forms and their applicable instructions. A regulation by definition is meant to be binding. An Attorney General’s Opinion (1975) seemingly addresses the scope of non-promulgated agency forms. If the particular form is used in every situation that arises for which the form is employed, then this standard of general application qualifies the form as a regulation that needs promulgation.

The statute also affirmatively states that no agency may issue or enforce any guideline, manual, instruction, or order unless it is adopted pursuant to the Act and filed with the Secretary of State. (§ 11347.5.) If an agency does in fact issue such a guideline, then the administrative office will determine whether it was regulation and notify others to its status. (Both of these requirements would apparently encompass some of the forms, manuals, etc. which Virginia frequently exempts from the VAPA promulgation.)

District of Columbia

Although the District of Columbia Code defines separately a rule and a regulation, the two definitions remain nearly identical. A rule is a “mayor’s or agency’s statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of the Mayor or of any agency.” In comparison, a regulation is a “statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” (DC Code § 1-1502(6).)

No listing of excluded materials followed, nor was a term regarding “guidance documents” described.

Florida

Similar to many other states’ provisions, the Florida statute defines a “rule” and then lists the types of materials that are not included in this category. (§ 120.52(16).) A rule is an “agency statement of general applicability that implements, interprets, or prescribes law or policy.” Somewhat uniquely, Florida expressly includes **any form** which imposes a requirement or solicits information not specifically required by existing law in the definition of a rule. Case law also indicates that an agency directive regarding laying off employees was considered a rule and required promulgation, as did a alcohol beverage license.

Excluded from the rule category are:

- internal management memos that have no applicability outside of the agency;
- legal memos/opinions issued to the agency by the Attorney General prior to use in an agency action;
- preparation of agency budgets, instructions by the comptroller, contract provisions for collective bargaining;
- certain rules regarding the Marine Fisheries Commission;
- tests of the Education Department;

- certain law enforcement policies and procedures; and
- enlistment, organization, training, etc. of the militia.

The Florida code does not contain a long list of exemptions from their APA as the Virginia Code does.

Georgia

Georgia's statutory "rule" does not include internal management, declaratory rulings, intra-agency memorandum, nor statements of policy made in case decisions. To be valid, a rule must be published or made available for public inspection. (§ 50-13-3.)

Kentucky

Slightly different than other state provisions, the Kentucky code's general rule is called an "administrative regulation." The definition follows the same type of wording as the usual description of a rule. The extent of exemptions is brief and has not been altered in at least the last five years. An administrative regulation does not include: an internal management memorandum, declaratory rulings, intradepartmental memos, acquisition of property for highway purposes, or higher education rules.

Maryland

The Maryland Code's Administrative Procedure Act was enacted in 1957. The definition of a "regulation" is explicit and found in §10-101 of the State Government. A regulation is defined as a statement, amendment or repeal of a statement that has general application and future effect. The regulation must have also been adopted to carry out a law, or to govern the organization, procedure or practice of the governmental unit.

A "regulation" may take any form, including one of the following types: a guideline, a rule, a standard, a statement of interpretation, and a policy statement. (§ 10-101(g)(1)(iv).) All regulations must be published in the state Register. (§ 7-205(a)(2).) Thus, under this definition, some of the documents intended to be caught by the term "guidance document" of House Bill 1532 would necessarily be published in accordance with the Maryland Code requirements.

The term "regulation" excludes three types of categories. (§ 10-101(g)(2)(i-iii).) Firstly, a statement that (1) refers to an agency's internal management or (2) does not affect the rights of the public is not a regulation. An agency's response to a petition for the adoption of a regulation remains outside the definition as well. Lastly, a declaratory ruling about a regulation, order, or statute does not constitute a regulation.

New York

The New York State Administrative Procedure Act defines a "rule" as an agency "statement, regulation or code of general applicability" that either (1) implements law, applies law, or prescribes a fee, or (2) is the procedure or practice requirements of the agency. Amendments, suspensions, repeals, etc. are rules as well. (§ 102(2)(a).)

The definition section then continues to exclude fourteen categories of decisions that are not "rules," and thus not covered by the chapter's requirements. These exclusions are many of the similar exclusions from other states' provisions such as internal management rules and rules that fail to affect public rights. Expressly excluded are forms, instructions, interpretative statements, and policy statements which have "no legal effect but are merely explanatory." (§ 102(2)(b)(iv).) (Issue: How is the decision reached as to what constitutes mere explanation?) Several specific references to certain agencies' rules are listed in the exception as well: the superintendent of banks' interest rates, public services commission, and the commissioner of agriculture.

Case law in New York reveals various situations when a document is considered to be a rule or not. For example, a memorandum of agreement, entered into by several state agencies, constituted a "rule" and would only be valid after due promulgation. The memorandum was a statement of "general applicability" that described the procedure of the agency, thus a "rule" by definition. (Dubendorf v. NY State Ed. Dept. (1978).) In comparison, a more recent case found that

the questioned document failed to assert a fixed general principle or course of operation; consequently it was not a "rule" under the state act. A "nonconclusive, nonbinding guideline" such as this memorandum was excluded from the rulemaking requirements. (Rubin v. NY State Ed. Dept. (1994).)

Other decisions have emphasized that interpretive and policy statements are exempt from notice and hearing requirements of the statute. Guidelines for agency procedures do not have to follow formal rule adoption requirements either. Guidelines by definition are explanatory, advisory, and not fixed principles. (Sheehan v. Ambach (1988).) Application forms and instructions are not rules either. (County of Cortland v. Commission (1990).)

North Carolina

North Carolina specifically lists ten categories not included under the definition of rule. Among these exceptions are "statements concerning the internal management of the agency" as long as the statements did not affect private individuals. Other exceptions include forms; non-binding interpretative statements; statements of agency policies; public roadway signs; and criteria and guidelines used by agency staff investigations.

Pennsylvania

Following a typical definition of "regulation," the code defined a statement of policy as a "document promulgated by an agency that sets out substantive or procedural personal or property rights, duties," etc. (44 P.S. § 1102(13).) Policy statements also include any document that interprets or implements an act administered by the agency.

Cases interpreting this broad definition hold that a policy statement is not binding, but that it has persuasive value if the statement tracks the meaning of the applicable statute. Policy statements are not subject to the filing requirements of the Administrative Agency Law. (71 P.S. § 1710.1.)

South Carolina

South Carolina lists the typical exclusions from what constitutes a rule, however, this statute fails to include any provision regarding policy statements made by the agency. The state requires publication of all promulgated documents and each agency has a duty to make available for inspection a description of all forms and instructions used by the agency. The Attorney General's Opinions take a narrow position on the scope of the definition of regulations. Any material -- such as a policy manual -- that does not meet the somewhat vague statutory definition of "regulation" is not subject to the act.

Tennessee

The Tennessee code also defines a rule and then lists various exclusions. (State Gov. § 4-5-102(10).) A rule "implements or prescribes law or policy" and does not include any of the following: internal memorandum; declaratory orders; inter-agency memos; general policy statements "which are substantially repetitious of existing law;" or agency statements regarding traffic signs or rate filings or higher education curriculum.

In addition, the code lists some exemptions from the administrative process chapter: the military, governor, General Assembly, Building Commission, courts, and county boards, committees, etc. Certain actions by the Board of Claims, the State Election Commission, and the Department of Employment Security are exempt, as well as revenue rulings of the Commissioner of Revenue. (§ 4-5-106.) In comparison to Virginia, the list was quite small and no additional agencies have been added to the exemptions from at least 1991 to 1995.

Texas

Texas seems to have a broader definition of a rule and perhaps includes types of documents that might be considered "guidance documents." A rule is any agency statement that "implements, interprets, or prescribes law or policy; or describes the procedure or practice requirements of a state agency." (§ 2001.003.) Similar to North Carolina, the statute excludes internal management statements that do not affect private rights or procedures. In addition, under § 2001.004, the agency must make available any written statement of policy or interpretation.

West Virginia

Under West Virginia code, the definition of a rule follows the typical framework -- a rule is every regulation, standard, statement of policy, etc. that affects private rights. However, West Virginia employs a detailed differentiation (similar to the Federal APA) among three types of rules: legislative, interpretative, and procedural.

A legislative rule has the force of law and must be promulgated. An interpretative rule is "every rule adopted by the agency independently of any delegation of legislative power which is intended by the agency to provide information or guidance to the public." Unlike a legislative rule, an interpretative by definition is not determinative of any issue. Moreover, an interpretative rule may not be relied upon to impose civil or criminal sanctions. As expected, a procedural rule applies to regulations that concern processes that affect private rights. All three types of rules must participate in public comment proceedings. Every rule must be classified as one of these types according with the definitions of the Act. Notably, an agency must file both the rule and its designated type with the state register. (§ 29A-2-5.)

CASE LAW: A brief synopsis of Fourth Circuit cases that have decided issues relevant to our "guidance document" concern. All information gathered from §§ 381 - 450, South Eastern Digest 2d, Vol. 1 (West 1995).

Georgia

Manual of the Department of Medical Assistance was not a "rule" and thus could not be reviewed in a declaratory judgment action. (Georgia Dept. of Med. Assistance v. Beverly Enterprises (1991).) Rules issued by a state agency, without clear legislative authority, lack the force of law. (State v. Holton (1984).)

North Carolina

An "interpretative rule" is an agency statement that fails to effectuate a change in policy, but instead merely explains or clarifies the regulation. As an interpretative rule, no procedural requirements of the state APA apply. (Alexander v. NC Dept. of Human Resources (1994).)

South Carolina

"Interpretative rule" means a rule that is promulgated by a state agency to interpret, clarify, or explain statutory regulations of the agency. (Young v. SC Dept. of Highways (1985).) Interpretative regulations are entitled to great respect, but they are not binding. (Bannister v. Ohio Cas. Ins. Co. (1994).)

West Virginia

An interpretative rule provides information or guidance; it cannot impose legal sanctions. (State ex rel. Paige v. Canady (1993).)

APPENDIX G

Summary of Individual Agency Submissions

The enclosed 65 agencies (41percent of the total certification and questionnaire submissions) submitted both completed certification and questionnaire responses, as well as other types of documents that were currently being enforced, but not yet contained on the certification list generated by the Registrar of Regulations (Registrar). These documents were submitted pursuant to Chapter 735 of the 1993 session of the Virginia General Assembly. The following capsule of the applicable Virginia statutory law may aid in reviewing the enclosed summary:

The Virginia Register Act (VRA)

The central purposes of the VRA are twofold: (1) to facilitate the public availability of information regarding administrative regulations, and (2) to encourage state agencies to develop informative regulations. To fulfill this goal, the VRA provides for the publication of the Virginia Administrative Code and the Administrative Law Appendix (Appendix). The Virginia Administrative Code is the complete, full text of all state agencies' regulations. The Administrative Law Appendix is an annual publication that catalogs the existing regulations of administrative agencies. The Appendix also lists each agency's forms and supplemental information (such as where copies of regulations can be obtained, and the origin of the agency's regulatory power). Lastly, the Appendix reports those agencies that do not have any regulations. Note however, that publication in the Appendix does not mean that the form was necessarily published pursuant to the VRA.

The term "to file" means that the agency delivers the entire text of the regulatory document to the Registrar. All regulations must be filed with the Registrar, including materials adopted by reference. Only after the regulation, amendment, or repeal is filed with the Registrar does the material become effective. The date of adoption, revision, or effective date and the statutory authority for the regulation must be included in the filing. All regulations are subject to the VRA's requirements that the agency (1) maintain a complete list of its entire set of currently operative regulations, and (2) make the full text of those regulations available for public inspection and copying.

If a document "incorporates by reference" another document, this means the incorporating regulation includes the requirements, standards, instructions, or procedures which are established in the reference document. The term "regulation" has been interpreted to include all text adopted by reference and other sources of publications. The reference document may be issued by either a governmental agency or private organization. Although the reference regulation may be filed by description only, the agency must make the entire reference material available for public inspection. In addition, federal reference materials do not need to be filed with the Registrar. However, the Registrar must receive documentation of the full cite of the federal source.

Only a rare, few exemptions from the provisions of the VRA are recognized. Most notably, the Code Commission has the authority (Va. Code § 9-6.20) to waive or modify the requirements of the VRA as to any agency regulation. Accordingly, the Commission has exempted from filing in full with the Register the following classes of regulations: (1) temporary and limited locality regulations, (2) regulations expressly addressed to individuals or organizations, and (3) regulations regarding: public officers and employees; state property or funds; welfare payments; elections; students; persons in state mental, penal, or other institutions; public contracts; defense functions; certain police operations; or money grants, benefits, loans or subsistence.

The Virginia Administrative Process Act (VAPA)

The VAPA carefully outlines the procedures which an agency must follow to promulgate a rule. An agency's rule or regulation may be ruled invalid if the agency fails to comply with the VAPA and the VRA in its promulgation process. A rule or regulation is defined by VAPA as "any general statement of general application, having the force of law, affecting the rights or conduct of any person, promulgated by an agency in accordance with the authority conferred on it by applicable basic laws." The term "promulgate" means to publish or to announce officially and is generally used

in the context of formally announcing a regulation. The VAPA authorizes the publication of the Virginia Register of Regulations which contains the codified regulations.

Various exemptions from the promulgation requirements of the VAPA exist. The bulk of the exemptions are provided in § 9-6.14:4(1) et seq. Some basic exemptions apply for regulations that have already followed other appropriate channels. Such channels include that the document is part of the Federal Register, the Code of Federal Regulations, regulations of other Virginia agencies, or that the document is already filed with Registrar.

A detailed list of subject exemptions exists in the VAPA as well. Several of these specific types of exemptions applied repeatedly to many of the submissions of Ch. 735: (1) the content and rules regarding an agency's examination are exempted by § 9-6.14:4.1 (B)13 and (2) the instructions for an application or renewal of a license, registration, or certificate are exempt by § 9-6.14:4.1(B)12.

For higher education institutions, an exemption is provided for activities that affect the general collegiate community -- students, faculty, and employees. The regulations that nonetheless require filing and publishing are those that regulate the community at large. These regulations usually fall into the categories of: motor vehicle parking and traffic rules; space utilization regulations; non-student vendor regulations; alcohol and drug policies; or golf regulations.

Legend for the enclosed listing

Each agency name is listed alphabetically in bold type and is underlined. The information reported on each agency was gathered from computer data regarding Chapter 735 and hardcopy filings. The collection of most materials occurred from May 1993 through spring of 1994.

The classification of the submissions is based upon the definitions of "legislative" and "nonlegislative" rules (See document entitled "Nonlegislative Versus Legislative Rules" for additional details). The classifications are simply educated estimates chosen by the researcher; the labels do not reflect any other written verification or support on the subject. An asterisk (*) next to the agency name denotes that the agency's submissions were in some fashion unique and/or raised issues pertinent to the study of "guidance documents."

Abbreviations frequently used: AG = Attorney General's Office; PPGs = Public Participation Guidelines; VAPA = Virginia Administrative Process Act; VRA = Virginia Register Act

*** Alcoholic Beverage Control Board**

Agency: Secretary of Public Safety

Submissions: Up-dated applications and forms such as an off-keg permit and other types of licenses/permits; mixed beverage annual review/report; Directive for Division of Enforcement & Regulation regarding grain alcohol; and 18 new Resolutions which rescind obsolete resolutions from the years past.

Classification: Forms are policy statements. The directive seems to be interpretive and the resolutions fall into the category of "legislative." Nonetheless, both are exempt from promulgation requirements.

Applicability of VAPA: Yes, but with several exemptions. Firstly, the ABC's Resolutions are delegations of authority which are not subject to promulgation under the VAPA and do not need to be published. Plus the general subject exemption for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12) applies as well.

Applicability of VRA: yes, with minor exceptions. Note that although the agency was not required to publish, ABC has published certain regulations simply for public awareness.

Review by AG? Yes. The AG determined that the Circular Letters and Licensee Bulletins could be removed from Registrar's List -- those documents are not subject to the VRA

Publication in Register required: Yes

* Issue Raised: Many of the Board's documents were either exempt from the VAPA or the VRA.

Would the definition of "guidance documents" apply to this agency or others in a similar situation?

Would inserting the term in the VRA provide fewer exemptions from coverage than the VAPA?

Auctioneers Board

Agency: Dept. of Professional and Occupational Regulation

Submissions: (1) emergency Public Participation Guidelines filed in June 1993, (2) the forms used in conjunction with the application for an auctioneer's license examination and the surety bond requirements (instructions, reference list, affidavit) (3) forms accompanying application for individual licensure via reciprocity (approved reciprocal states, affidavit)

Classification: (1) PPGs = legislative rules (2) forms = policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Comments: Similar to most applications, these were the standard, basic forms which asked for the applicant's name, address, asks if applicant has read relevant Va. Code provisions, background, education, etc.

Auditor of Public Accounts

Submissions: Uniform Financial Reporting Manual for Virginia Counties and Municipalities; General Receivers Accounting Procedures; Virginia Sheriffs Accounting Manual; Specifications for Audits of Counties, Cities, and Towns; and Public Participation Guidelines

Classification: (1) Manuals were determined by the AG to not require promulgation, and thus are policy statements, (2) PPGs are legislative rules

Applicability of VAPA: Yes, but exemptions. Note that specifications for local government audits are self-executing and thus do not require regulations for their implementation.

Promulgation required: Yes, for PPGs because regulation not properly adopted.

Applicability of VRA: Yes

Review by AG? Yes, determined that the agency was not totally exempt from the VAPA because the agency is not part of the General Assembly.

Publication in Register required: Yes, documents incorporated by reference in the manuals -- even though manuals were exempt from VAPA -- needed to be filed.

Comments: Several manuals list regulatory procedures that must be followed. In 1994, the Registrar was awaiting letter from agency regarding whether the manuals were exempt.

Board for Accountancy

Agency: Dept. of Professional and Occupational Regulation

Submissions: Applications

Classification: policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Board for Barbers

Agency: Department of Professional and Occupational Regulation

Submissions: (1) Application of License to Operate Barber School, (2) Application Form for Student Teacher temporary Permit, and (3) Application for Barber Examination

Classification: policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Board for Contractors

Agency: Dept. of Professional and Occupational Regulation

Submissions: Applications, certification of termination form

Classification: policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Board for Cosmetology

Agency: Dept. of Professional and Occupational Regulation

Submissions: Application for Cosmetology Exam; Application for Nail Technician Exam

Classification: policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Board for Geology

Agency: Dept. of Professional and Occupational Regulation

Submissions: (1) Rules and Regulations for the Board, (2) Applications for: certification, reinstatement, check-off form, (3) Verification of Degree and Registration, (4) Reference form, (5) Emergency PPGs, and (6) Policy Core Requirements (information to applicants)

Classification: (1) rules of board and the PPGs are legislative rules (2) the remaining forms are all policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Comments: Some submissions were revisions from previous filings and most had been filed and published in the Register in 1991. The PPGs were filed in the July 1993 Register. The Policy Core Requirement was being filed with the Registrar for the first time.

Board for Waste Management Facility Operators

Agency: Dept. of Professional and Occupational Regulation

Submissions: application; forms for verification of education, employment, and for reporting continuing education credit hours

Classification: policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Board of Bar Examiners

Agency: Supreme Court

Submissions: applications, personal identification form, reader program rule

Classification: Forms are policy statements. The reader program rule and rules of Virginia Board of Bar Examiners are stated as "rules" and qualify as legislative rules.

Applicability of VAPA: Regulations are EXEMPT from the VAPA as an agency of the Supreme Court

Applicability of VRA: Yes, must be filed subject to VRA

Review by AG? None

Promulgation required: None

Comments: Va. Code § 54.1-3922 grants the Board the authority to promulgate rules and regulations as needed to discharge its duties. These applications possess a legally binding effect. The personal identification form itself requires fingerprinting and application requires notary seal.

Board of Hearing Aid Specialists

Agency: Department of Professional and Occupational Regulation

Submissions: Application for Hearing Aid Specialist License; Certification of the Employment of Licensed Hearing Aid Specialists; Reinstatement of License; Application to certify; and Model Purchase Agreement

Classification: All are policy statements.

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? None

Promulgation required: None

Comments: These policy statements seem to carry some force of law. For example, § 54.1-1501(B), reg. 4.9 of Hearing Aid Specialist Board certification has applicant sign that s/he submits self to rules and regulations of the Board and Code of VA. Buyers' right to return provided by § 54.1-1505(A) is basis of the Model Purchase Agreement. The Model Purchase Agreement is similar to a legislative rule because of its binding, sanctioning power; it resembles a contract and seems to be a mandatory agreement.

Board of Optometry

Agency: Dept. of Health Professions

Submissions: Applications for licensure, License

Classification: Policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Comments: Applications contain regulatory-type provisions regarding what the applicant must complete and submit.

Board of Pharmacy

Agency: Dept. of Health Professions

Submissions: Emergency PPGs; Applications for 3 types of reinstatement; Application for approval of continuing education

Classification: PPGs are legislative rules, the applications are all policy statements
Applicability of VAPA: Yes, but several exemptions: Exceptions from requirements when promulgating amendments to Physician's Assistant Formulary (not applicable here), and the general subject exemption for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).
Applicability of VRA: Yes
Review by AG? No
Promulgation required: None

Board of Professional Counselors

Agency: Dept. of Health Professions
Submissions: Application for licensure, registration of Supervision form
Classification: policy statements
Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).
Applicability of VRA: Yes
Review by AG? No
Promulgation required: No
Comments: Policy statements yet binding: "individuals may not engage in the private practice of counseling without being licensed or supervised in conformity with the Board's regulations."
Proactive rules – if do not submit application 60 days prior to test, applicant cannot be examined.

Board of Psychology

Agency: Dept. of Health Professions
Submissions: Application for exam, licensure, verification form
Classification: policy statements
Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).
Applicability of VRA: Yes
Review by AG? No
Promulgation required: No
Comments: The regulatory nature of these policy statements is apparent. For example, Licensure Verification Form states that applicants are "required" and for course verification applicant "must complete" and "are required."

Board of Social Work

Agency: Dept. of Health Professions
Submissions: application, license for social worker, clinical social worker
Classification: policy statements
Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).
Applicability of VRA: Yes
Review by AG? No
Promulgation required: None
Comments: Guidelines in applications appear regulatory because define terms and requirements. Some AG decisions (see DMAS for good example) required promulgation of such terms as this that had not been already promulgated.

Board of Veterinary Medicine

Agency: Dept. of Professional and Occupational Regulation
Submissions: Applications for reinstatement of various licenses
Classification: policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Required to file with Registrar: Yes

Board of Wastewater Works Operators

Agency: Dept. of Professional and Occupational Regulation

Submissions: (1) emergency PPGs, (2) application (and reference lists) for approval of Operator Training, (3) application for re-exam of operator, and (4) exam content outline

Classification: (1) legislative rule (2) - (4) are policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Chesapeake Bay Local Assistance Department

Agency: Secretary of Natural Resources

Submissions: USDA-SCS Food Security Act Manual, National Soils Handbook, and emergency public participation guidelines

Classification: Legislative Rules

Applicability of VAPA: Yes

Applicability of VRA: yes, but note that federal materials that are incorporated by reference are exempt under § 3.3(A).

Review by AG? No

Promulgation required: None

Comments: The federal materials were incorporated by reference in one of the agency's previously existing regulations that needed to be filed with the Registrar. But note that federal materials that are incorporated by reference are exempt under § 3.3(A).

Christopher Newport University

Agency: Secretary of Education

Submissions: Motor Vehicle regulations

Classification: Regulations seem to be legislative rules although not adopted pursuant to the VAPA: regulations describe sanctions against individuals who do not pay their fines with the ultimate solution of appearing in court.

Applicability of VAPA: Yes, but mostly exempt under § 9-6.14:4.1(A)(6) which provides exemptions for regulations pertaining to any higher education institution's (1) academic affairs; (2) selection, tenure, promotion and disciplining of faculty and staff; (3) selection of students; and (4) rules of conduct and disciplining of students.

Applicability of VRA: Yes, but similar exceptions for educational institutions' affairs

Review by AG? Yes, recommended that University submit the Motor Vehicle regulations.

Promulgation required: None - not adopted pursuant to the VAPA

Comments: University also has on file applications for traffic citation appeal, vehicle registration forms, and other documents that affect off-campus individuals (such as catering guidelines and rental fee guide for the gymnasium).

College of William & Mary

Agency: Secretary of Education

Submissions: bylaws; finance committee guidelines; assorted handbooks: policies & procedures, student teaching, doctoral student, advisor, student, faculty; guide to the sport club; honor system at

Marshall Wythe School of Law; instructions for students not returning, withdrawal, filing a committee on academic status petition; grants office policy, investment policy, short term investment policy; graduate and undergraduate programs; Publications Council; response protocol for victims of sexual assault; social requirements organizations; association of parents; academic status; committee on academic status; student activities; parking regulations; final exams; resident file; brochure.

Classification: range from policy statements to legislative rules

Applicability of VAPA: Yes, but mostly exempt under § 9-6.14:4.1(A)(6) which provides exemptions for regulations pertaining to any higher education institution's (1) academic affairs; (2) selection, tenure, promotion and disciplining of faculty and staff; (3) selection of students; and (4) rules of conduct and disciplining of students.

Applicability of VRA: Yes, but similar exceptions for educational institutions' affairs

Review by AG? No

Promulgation required: None

Publication in Register required: yes, published the redrafted parking regulations.

Comments: The College was aware that the majority of its submissions were exempt from the requirements of the VAPA.

Commission on the Virginia Alcohol Safety Action Program

Submissions: PPGs

Classification: Legislative Rules

Applicability of VAPA: Yes (but note in file from reviewer at Registrar that Commission *may* be exempt)

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Publication in Register? Yes

Comments: modified PPGs for file

Dept. for the Aging

Agency: Secretary of Health and Human Resources

Submissions: Incorporated by reference the following: the state plan for department, Compilation of Older Americans Act of 1965, and The Native American Programs Act of 1974

Classification: Legislative Rules

Applicability of VAPA: Yes

Applicability of VRA: Yes, but note that federal materials that are incorporated by reference are exempt under § 3.3(A)

Review by AG? No

Promulgation required: None

Dept. for the Deaf and Hard of Hearing

Agency: Secretary of Health and Human Resources

Submissions: Technology Assistance Program

Classification: policy statement

Applicability of VAPA: Yes

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Comments: The submission was a brochure, application, and equipment coupon for ordering a text telephone to be able to communicate with others who have TDD.

Dept. for the Visually Handicapped

Agency: Secretary of Health and Human Resources

Submissions: (1) Manuals regarding policy and procedure for certain topics: Business Enterprises; Intake; Program for Infant, Children, and Youths; Instructional Materials; Low Vision; Volunteer services; Va. Rehabilitation Center; Va. State Library; Rehabilitation Teaching; Vocational Rehabilitation Program. Other submissions: (2) PPGs; (3) Regulations Governing the Sale and Distribution of Goods and Articles Made by Blind Persons; and (4) Vending Facilities in Public Buildings.

Classification: Legislative rules = PPGs, Regulations Governing the Sale and Vending Facilities.

Manuals are policy statements

Applicability of VAPA: Yes

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Comments: Manuals filed but no promulgation required.

*** Dept. of Agriculture & Consumer Services**

Agency: Secretary of Commerce & Trade

Submissions: Remittance form, license; approval of dead poultry disposal plan; annual tonnage of commercial fertilizer sold report; plant monthly report on quality of milk received; consent to solicit; committee for receipt of donated tickets. Also submitted 3 documents that had been received by Register in June 1993, but not reflected on list sent to agency to certify.

Classification: policy statements

Applicability of VAPA: Yes but exceptions: Agency's response cites § 9-6.14-22 "A copy of all reporting forms the promulgating agency anticipates will be incorporated into or be used in administering the regulation shall be printed with the proposed and final resolution in the Register." Thus, no need to promulgate forms.

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Publication in Register required: Yes

Comments: The Administrative Law Appendix reports that the Board has the authority to issue rules and regulations, but to date, the Board has not issued any.

* Issued Raised: What is the impact of incorporation by reference? Could this agency incorporate a form which contains significant sanctions, and then solely by this incorporation, grant the force of law to that form?

Dept. of Criminal Justice Services

Agency: Secretary of Public Safety

Submissions: Many forms and statements that had already been filed when the regulations were originally promulgated. Additional materials included: Emergency Regulations Relating to Private Security Services; Course Resumes and Objectives for Undercover Officer Training and Dispatchers; Testing for Jailers, Security Officers; Training and Testing for Correctional Officers.

Classification: Emergency Regulations are legislative rules; Course Resumes and Objectives for Undercover Officer Training and for Dispatcher are policy statements; Training and Testing for Correctional Officers seems to be a policy statement, but it lists the performance objectives of the officer and what the officer "shall" do which implies sanctions if he did not do the objective. The manual for Testing for Jailers, Security Officers lists course objectives and what the applicant will be tested upon -- seems like a policy statement.

Applicability of VAPA: Yes, but exceptions for "customary" police functions § 9-6.14:4.1(B)(6).

General exemption for applications for a license, etc. applicable here as well.

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

*** Dept. of Emergency Services**

Submissions: Guidelines

Classification: Policy statements

Applicability of VAPA: Generally yes, but requirements do not currently apply since all of the agency's publications are general guidelines for emergency response or disaster preparedness. The documents are procedural and the agency does not promulgate regulations at this time.

Applicability of VRA: No, not to these guidelines

Review by AG? Yes, in 1985 which stated that emergency operations plans do not fall into the definition of "rule" or "regulation" and thus do not have the force of law. The plans merely facilitate response to tragedy; the plans do not regulate private conduct.

Promulgation required: None

Comments: The AG determined that the publications by the agency are for informational purposes only, and thus the agency requested that nine "emergency situation" guidelines be deleted from the list of "regulations."

* Issued Raised: Would there be similar exemptions for "guidance documents?" How would the exception be applied, and to what agencies? Do such exceptions defeat the purpose of defining guidance documents?

Dept. of Game & Inland Fisheries

Agency: Secretary of Natural Resources

Submissions: (1) Regulations on Wanton Waste and Sunday Hunting on Controlled Shooting Areas; (2) License Agent Appointment and Removal policy; and (3) federal regulations adopted to apply to motorboats, sailboats

Classification: Federal materials are legislative rules. Regulations had been published in the Register and are legislative rules. License appointment is seemingly a policy statement, however, note that removal of agent has significant sanctioning power.

Applicability of VAPA: Yes, but various exemptions will come into effect. Specific exemption provided for regulations regarding the management of wildlife and case decisions rendered. In addition, the general exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12). Note that prior to July 1993, all regulations of the Department were exempt from the VAPA.

Applicability of VRA: Yes, but federal materials that are incorporated by reference are exempt under § 3.3(A)

Review by AG? None

Promulgation required: None

Filing with Registrar: Yes. Under the VRA, although federal materials incorporated by reference are exempt from filing. However, information regarding the title, section, and date of publication must nonetheless be filed and the agency had not done so yet.

Dept. of General Services

Agency: Dept. of General Services

Submissions: (1) State plan of operation in conformity with Federal Property and Administration Service Act, (2) Regulations for Capitol Square, (3) Regulation for Aggressive Air Sampling for Asbestos in Education Agencies

Classification: Legislative Rules

Applicability of VAPA: Yes, but with certain exemptions. The agency is exempt when it promulgates standards for asbestos inspection.

Applicability of VRA: Yes, but note that federal materials that are incorporated by reference are exempt under § 3.3(A). The state plan and regulations for Capitol Square were filed in accordance with the VAPA in force at that time and were not published in the VRA.

Review by AG? No

Promulgation required: None

Filed with Registrar: Yes

Dept. of Health

Agency: Secretary of Health and Human Resources

Submissions: (1) Applications; (2) Licenses; (3) State Emergency Medical Plan; (4) x-ray protection program; (5) nursing scholarship program; (6) Regulations for licensure, construction of labor camps, sewage handling, governing campgrounds, x-rays, shellfish; (7) Morbidity Report; (8) Delegation of authority, (9) responsibilities of district directors, and (10) Fish Ban

Classification: Range from policy statements to legislative rules

Applicability of VAPA: Yes, but many subject exemptions applied for this agency: for Virginia Voluntary Formulary Board's recommendations; applications; for orders condemning shellfish area, orders / regulations fixing prices; internal agency practice / procedure regulations; regulations to conform with Virginia statutory law or federal law; and emergency regulations.

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None, all fell under exemptions from VAPA.

Comments: Agency needed to repeal several of the rescinded regulations.

*** Dept. of Medical Assistance Services**

Agency: Secretary of Health and Human Resources

Submissions: (1) Financial: whole sale prices, cost indexes, releases, compensation limits, payment agreements, forms; (2) 52 manuals are filed with the Registrar of Regulations as of January 21, 1994. Manuals include such topics as hospital, nursing home, physician, baby care, private duty, personal care, pharmacy, dental, elderly, podiatry, etc.; (3) 1 statements of policy filed with Registrar Jan. 21, 1994; (4) programs; (5) regulations; (6) reports, studies; (7) directories; (8) service drug information; (9) evaluations; (10) codes; (11) data resources; (12) drug list; (13) classification of diseases and mental retardation; (14) newsletters; (15) internal criteria for certain procedures; (16) Medicaid memos; and (17) interagency Agreement

Classification: Ranged from policy statements to regulations that required promulgation and then would be legislative rules

Applicability of VAPA: Yes, with exceptions. Exemptions if materials not different from those required by federal law (§ 9-6.14:4.4 C.4. (c))

Applicability of VRA: Yes, but note that federal materials that are incorporated by reference are exempt under § 3.3(A)

Review by AG? YES - many documents reviewed with various results.

(1) Various policy statements withdrawn in January 1995 after reviewed by the AG who determined that regulations did not need promulgation.

(2) The AG also determined that some regulations (i.e. Guidelines for Home Office Compensation) did not require promulgation, but that it was enforceable to the extent that the agency's interpretation of reasonableness was entitled to deference in court. (Note that this is the customary amount of deference recognized.)

Promulgation required: Yes, for some documents. See the following examples:

(1) Rule on reimbursement.

(2) Durable Medical Equipment Supplies Policy was found to need promulgation of the definitions and criteria that was not already in regulations. Processes for authorizations, approvals, pends, etc. did not require promulgation.

(3) AG determined that (1) Internal Criteria for Reduction Mammoplasty and (2) Internal Criteria for Morbid Obesity both needed promulgation after an assessment / clarification of the policy's legal considerations.

(4) Percentage caps on plant cost needed promulgation because not elsewhere in regulations. However, purely procedural information did not. This document was a Policy and Procedural Memorandum No. CS&A/94-01 to the Division of Cost Settlement and Audit Personnel.

(5) Other Policy and Procedural Memos to agency divisions were reviewed and determined that the rule and its effect should be a promulgated regulation if not already. Rules for administrative procedures (such as processing requests for direct reimbursement) required promulgation but the procedures did not.

(6) Criteria for Cochlear Implants needed promulgation (regulation effective since 1990). Other internal criteria (use of statistical sampling for determining overpayments) did not require promulgation but AG suggested that the public be alerted to the process.

(7) Procedures and guidelines for implementing provisions of the current State Plan regarding long-term care needed to be published, but not promulgated as a regulation.

(8) Validation of Medicaid recipients survey process required filing with Registrar under the VRA.

(9) Adjustment Pre-authorization was later promulgated and withdrawn from list of policy statements.

Several exemptions allowed: Exemption from filing (§ 2.3) because material is not available in document form was given. For example, Supplemental Security Income Record files are databanks continuously updated, thus only filed by policy description. Other regulations received exemptions on the grounds that the material was copyrighted, or the property of, an individual or organization other than the Virginia State Government (such as the Medicare/Medicaid Sanction/Reinstatement Report).

Comments: After originally filing with Registrar, many policy statements were later withdrawn because: (1) found exempt by the AG, (2) rule making was already in process, (3) the document was no longer in effect, or (4) promulgation occurred. Some withdrawals were made but still retained on file with its associated regulation under the requirements of the Virginia Register Form, Style and Procedure Manual (issued by Code Commission pursuant to § 9-6.20). DMAS also filed with the Registrar revised policy statements which were subject to the VRA and that possessed the force of law (for example, the Long-Term Care Section manual).

* Issue Raised: DMAS had several documents that required promulgation based on a seemingly small component -- such as a percentage cap within the text. In the same vein, are there documents that possess only a slight exemption, but that exemption makes the entire document excepted from promulgation? Moreover, how many more agency's documents would have required promulgation and/or withdrawal if the A.G.'s Office had reviewed as many as it did for DMAS?

Dept. of Mines, Minerals and Energy

Agency: Secretary of Commerce & Trade

Submissions: (1) Amended documents: Coal Surface Mining Manual, Geothermal Energy Regulations, and forms; (2) 25 new forms/applications needed to be added; (3) Board Procedural rules; (4) Report of Individual Mining Companies; (5) Relinquishment of Mining Rights; and (6) Listing of Adjoining Property Owners

Classification: reports and forms are policy statements. Regulations are legislative rules but note exemptions below.

Applicability of VAPA: Yes, but some exemptions

Applicability of VRA: Yes

Review by AG? Yes, determined that several documents were exempt from the VAPA. Virginia Gas and Oil Board's orders of general applicability that established procedures for the Board are excluded from the VAPA by § 9-6.14:1(C)(2). These Board Procedural Rules did not meet the definition of an "agency action" and thus were exempt. Civil Charge Procedural Rules were found exempt as well because they do not sanction any party, nor affect the rights or conduct of any person.

Promulgation required: None

Comments: Department submitted regulations which had been listed in Administrative Law Appendix and filed with the Register, but omitted from the certification list. Several obsolete forms needed to be deleted from the list as well.

Dept. of Motor Vehicles

Agency: Secretary of Transportation

Submissions: (1) various applications and forms for such items as: permits, registration, reports, certifications; regulations; and (2) Reports: Fuels Tax Report, suppliers report, aviation consumer report, limited dealer report

Classification: policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Comments: The majority of the submissions were updated forms, applications, etc. that needed to be filed with the Registrar. Other submissions were missing regulations and/or forms that had been previously filed but not on the certification list. Various obsolete forms needed to be deleted from the list as well.

Dept. of Professional & Occupational Regulation

Agency: Secretary of Commerce & Trade

Submissions: applications, licensing consumer information, applicant check-off form, Va. asbestos license instructions

Classification: range from policy to legislative rules

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Publication in Register required: Yes

Comments: many of the submissions were revisions of previously published documents and required re-filing. Other documents had been filed and published, but had been omitted from the list generated by the Registrar. Lastly, some documents had been repealed and needed to be deleted from the list.

*** Dept. of Social Services**

Agency: Secretary of Health and Human Resources

Submissions: social service manual, IEVS User Guide, Energy assistance, ADC Policy; general relief program, Food Stamps program; eligibility requirements, Food Stamp Issuance Regulations, VAPA Status Report

Classification: Legislative Rules

Applicability of VAPA: Several submissions contain policy that was promulgated prior to the VAPA and has not changed since then. All amended policy has been published according to the VAPA.

Federal regulations exempt from the VAPA.

Applicability of VRA: Yes

Review by AG? No

Promulgation required: No

Publication in Register required: Yes, several documents needed to be published

Comments: Follow-up letter sent in 1994 requesting that the agency determine whether some of these manuals were regulations or not.

* Issue Raised: What is the effect of federal guidance documents when the state agency applies them to the regulated community? Does the agency inappropriately use the federal document as one with the force of law?

Dept. of State Internal Auditor

Agency: Secretary of Finance

Submissions: Two directives: (1) Policies, Standards, and Procedures for Agency and Institutional Internal Auditors and (2) External Review Follow-Up for Agency and Institutional Internal Auditor

Classification: Legislative Rule: both directives contain statements that the agency "shall" do a prescribed action.

Applicability of VAPA: Yes

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None, no exemption cited either

Filed with Register: Yes

Comments: Agency's authority to issue the directives comes from Va. Code § 2.1-234.32.

Dept. of State Police

Agency: Secretary of Public Safety

Submissions: (1) Application and certification for multiple handgun permit; and (2) five regulations which had already been filed with the Registrar to initiate regulatory action

Classification: Applications are usually policy statements, but note that this form has statement that "An untruthful answer may subject you to criminal prosecution" which is seemingly a binding sanction.

Applicability of VAPA: Yes, but exceptions for "customary" police functions under 9-6.14:4.1(B)(6).

Exemption for application for license, etc. applies here as well.

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

*** Dept. of Taxation**

Agency: Secretary of Finance

Submissions: Listing of Tax Bulletins, Tax forms, Regulations

Classification: Legislative Rules

Applicability of VAPA: Bulletins and forms are exempt from the VAPA.

Applicability of VRA: Some exemptions: Administrative letters and other materials issued as public documents by TAX pursuant to Va. Code § 58.1-204 are enforceable, but not required to be published in the Register.

Review by AG? No

Promulgation required: None

Publication in Register required: Yes, for some of the tax bulletins - bulletins must be published in Register, although they are not subject to the VAPA.

Comments: Department failed to consult the AG, but the agency did correspond with staff at legislative services and Senator Gartlan for guidance.

*** Issued Raised:** This example simply shows the vast number of exemptions from the VAPA. Yet it also brings to light the question of what would the requirements of "guidance documents" be? Would public participation play a role? How inclusive would the definition be? Any exceptions?

*** Dept. of Transportation**

Agency: Secretary of Transportation

Submissions: (1) uniform traffic control devices; (2) guide for additions, abandonments & discontinuances; (3) procedure for control of cut-through traffic, procedure for inclusion of routes ; (4) Rules and Regulations Governing the Pre-qualification and Classification of Prospective Bidders; (5) Noise Abatement Policy; (6) state highway commission regulations, (7) registration of subcontractors rules; and (8) list of differentiated speed limits.

Classification: Legislative rules and interpretive

Applicability of VAPA: Yes, but exemption provided under § 9-6.14:4.1(B)(11) for traffic signs, markers, or control devices

Applicability of VRA: Yes

Review by AG? Yes, determined that neither the Rules and Regulations Governing the Pre-qualification and Classification of Prospective Bidders nor the Noise Abatement Policy were subject to the requirements of the VAPA.

Promulgation required: No. The AG determined that the Department complied with the existing rules when it originally promulgated the regulations. Moreover, the exemptions from promulgation under the VAPA were correctly asserted.

Filed with Registrar? Yes, several regulations required filing: Dept. of Highway & Transportation Transmittal Slip 1983; Location & Design Policy & Procedures Manual 1991; Rules & Regulations of the State Highway & Transportation Commission 1976

Comments: VDOT specifically excluded internal forms which VDOT regulated party does not complete himself.

* Issue raised: How detailed is the review which determines exemption? How much weight is afforded to an agency's own determination of exemption?

Dept. of Waste Management

Submissions: Application for Registration to Transport Hazardous Radioactive Materials; Notification Guidelines for Shipments of Hazardous Radioactive Materials; Regulation for Transportation of Hazardous Radioactive Materials

Classification: application and notification seem to be policy statements. Regulation is a legislative rule.

Applicability of VAPA: Yes

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Comments: Note that the application cites its authority from the relevant Code section and thus could be interpretive of the granted authority.

Dept. of Youth and Family Services

Agency: Secretary of Public Safety

Submissions: 4 standards: Standards for family group homes, secure detention, outreach detention, court services, and post dispositional confinement.

Classification: Legislative rules

Applicability of VAPA: Yes

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None. However, note historical background: the standards submitted were originally adopted by the State Board of Corrections. Pursuant to § 66-10(6), the Department of Youth and Family Services was allowed to adopt Board of Corrections' regulations and standards and did not need to comply with § 9-6.14:7.1 et seq. if not substantially altered. Regulations were adopted in 1990 and still being enforced in 1993. Department planning to issue revisions pursuant to VAPA. Notice of Intent to Issue Regulations has been filed for some of the standards and others are in various stages of preparation for the VAPA. Existing regulations being enforced until then.

George Mason University

Agency: Secretary of Education

Submissions: (1) Updated Student Handbooks and Catalogs, and (2) other policies: University Facilities Use Policy, Parking Citation Appeal Procedure, Motor Vehicle regulations

Classification: Legislative Rules

Applicability of VAPA: Yes, but mostly exempt under § 9-6.14:4.1(A)(6) which provides exemptions for regulations pertaining to any higher education institution's (1) academic affairs; (2) selection, tenure, promotion and disciplining of faculty and staff; (3) selection of students; and (4) rules of conduct and disciplining of students.

Applicability of VRA: Yes, but similar exceptions for educational institutions' affairs

Review by AG? No

Promulgation required: No, administrative policies are exempt from promulgation under § 9-6.14:4.1(6)

James Madison University

Agency: Secretary of Education

Submissions: smoking regulations**; Collection of Parking Fines; Use of University Facilities by Non-university Activities; Parking and Traffic Regulations

Classification: Legislative Rules

Applicability of VAPA: Yes, but mostly exempt under § 9-6.14:4.1(A)(6) which provides exemptions for regulations pertaining to any higher education institution's (1) academic affairs; (2) selection, tenure, promotion and disciplining of faculty and staff; (3) selection of students; and (4) rules of conduct and disciplining of students.

Applicability of VRA: Yes, but similar exceptions for educational institutions' affairs

Review by AG? No

Promulgation required: No, exempt

Filed with Registrar: Yes

Comments: **smoking regulations governed by Clean Air Act

Judicial Inquiry & Review Commission

Agency: Supreme Court

Submissions: Rules of the Judicial Inquiry and Review Commission

Classification: Legislative Rule

Applicability of VAPA: No, exempt under § 9-6.14:4.1(A)(2) as an agency of the Supreme Court

Applicability of VRA: Yes

Longwood College

Agency: Secretary of Education

Submissions: (1) Updated versions of the following: Longwood Catalog; Policies, Procedures and Sanctions for Alcohol and Other Drugs; (2) Student Handbook; and (3) Policies and Procedures Manual

Classification: Legislative Rules

Applicability of VAPA: Yes, but mostly exempt under § 9-6.14:4.1(A)(6) which provides exemptions for regulations pertaining to any higher education institution's (1) academic affairs; (2) selection, tenure, promotion and disciplining of faculty and staff; (3) selection of students; and (4) rules of conduct and disciplining of students.

Applicability of VRA: Yes, but similar exceptions for educational institutions' affairs

Review by AG? No

Promulgation required: None, because all of the submitted materials were exempt.

Filed with Registrar: Yes

Marine Resources Commission

Agency: Secretary of Natural Resources

Submissions: Orders, Rules and materials to be repealed

Classification: Legislative Rules

Applicability of VAPA: Yes, but various exemptions allowed. Pertinent here is the exemption for orders condemning or closing a shellfish growing area.

Applicability of VRA: Yes

Review by AG? No

Promulgation required: No, but needed to repeal some regulations. The regulations that had been rescinded, terminated or that were no longer active needed to follow the required VAPA process of being repealed.

Publication in Register required: Active regulations that predated or were exempted from the VAPA were filed. Active orders were also filed.

Comments: The Commission has operated since 1875 and thus its older regulations and orders precede the requirements of the VAPA. Prior to July 1987, all program areas were exempted from the VAPA. Now only marine fisheries fall under that exemption. Lastly, prior to 1992, there were numerous exemptions for the Commission to promulgate specific regulations by posting for 5 days in the locality affected in lieu of any other procedures.

*** Milk Commission**

Agency: Secretary of Commerce & Trade

Submissions: (1) Incorporated Fluid Milk Products Cost Manual, (2) Orders adopted by the Commission, and (3) Informational memorandum issued to licensed distributors to "reaffirm the Commission's Rules and Regulation" regarding certain topic.

Classification: (1) Manual is a legislative rule adopted by reference, (2) Orders are legislative rules, and (3) Memorandums were issued to respond to specific inquiries and are interpretative only.

Applicability of VAPA: Yes, but with some exemptions for regulations that are regarding (1) a producer's license and base; (2) the class and allocation of milk; and (3) class prices.

Applicability of VRA: Yes

Review by AG? Yes

Promulgation required: None. Manual is a reference document in the Commission's Rules. The manual had already been submitted to Registrar as promulgated and did not require promulgation under the VAPA. The AG decided that the Orders were exempt from the VAPA because of their "content" and thus no promulgation necessary. The informational memorandums were official statements of interpretation only. As only guidance to the industry, the memorandum do not have the force of law, nor require promulgation.

Filed in Register required: Yes, one of the Orders and the reference manual needed filing.

Comments: The promulgation of the Commission's regulations was exempt from the VAPA until July 1993. Thus, these regulations were promulgated by a process established by the Commission's old regulations. Orders may be adopted by the Commission pursuant to § 3.1-430 of the Code and Regulation No. 8 of the Rules and Regulations of the Commission. These orders are not promulgated as permanent regulation but simply adopted instead.

* Issue Raised: Again, can agencies incorporate their own documents and thus give them the force of law without ever promulgating the reference document? Will a new provision for "guidance documents" address the issue of whether old forms, applications, etc. need to follow the new requirement?

Norfolk State University

Agency: Secretary of Education

Submissions: smoking policy**; motor vehicle regulations

Classification: Legislative Rules

Applicability of VAPA: Yes, but mostly exempt under § 9-6.14:4.1(A)(6) which provides exemptions for regulations pertaining to any higher education institution's (1) academic affairs; (2) selection, tenure, promotion and disciplining of faculty and staff; (3) selection of students; and (4) rules of conduct and disciplining of students.

Applicability of VRA: Yes, but similar exceptions for educational institutions' affairs

Review by AG? No

Promulgation required: None

Comments: **smoking policy covered under Clean Air Act

Old Dominion University

Agency: Secretary of Education

Submissions: smoking policy**, motor vehicle and parking regulations

Classification: Legislative Rules

Applicability of VAPA: Yes, but mostly exempt under provision § 9-6.14:4.1(A)(6) which provides exemptions for regulations pertaining to any higher education institution's (1) academic affairs; (2) selection, tenure, promotion and disciplining of faculty and staff; (3) selection of students; and (4) rules of conduct and disciplining of students.

Applicability of VRA: Yes, but similar exceptions for educational institutions' affairs

Review by AG? No

Promulgation required: None

Comments: **smoking policy covered under Clean Air Act

Potomac River Fisheries Commission

Agency: Independent

Comment: This agency submitted a certification, questionnaire, and additional forms. However, this agency is multistate and follows the laws of more states than just the Commonwealth, and thus we have dropped the Commission from the study.

Professional Social Scientists

Agency: Department of Professional and Occupational Regulation

Submissions: Board for Professional Soil Scientists Regulations, applications, applicant check-off form, verification form, PPGs

Classification: Regulations and PPGs are legislative rules and had already followed the correct procedures. The remaining applications and verifications are policy statements which had also been already published in Register.

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Filing with Registrar required: Two forms that accompanied the applications needed to be filed with the Registrar.

Public Defender Commission

Submissions: Policies and Procedures Manual

Classification: Policy Statement

Applicability of VAPA: Potential exemption under § 9-6.14:4.1 (B)(7) because manual deals with personnel policies

Applicability of VRA: Yes

Review by AG? Yes, AG advised the Registrar that the manual is not a regulation of general application with the force of law; the manual was created to function as an internal operating guide only. Thus, manual should not have been listed with the Registrar pursuant to Ch. 735.

Promulgation required: None

Real Estate Appraisers Board

Agency: Dept. of Professional and Occupational Regulation

Submissions: Emergency PPGs and Applications

Classification: PPGs is legislative rule, applications are policy statements

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Filed with Registrar: Yes. Two applications required filing, but all other forms had previously been filed with the Registrar.

Secretary of the Commonwealth

Agency: Secretary of the Commonwealth

Submissions: Application and Instructions for Restoration of Civil Rights

Classification: policy statement

Applicability of VAPA: No, exemption provided by the VAPA section which authorizes forms as "prescribed by the Secretary of the Commonwealth." See promulgation exemption below.

Applicability of VRA: Yes

Review by AG? Yes, reviewed Application and Instructions for Restoration of Civil Rights

Promulgation required: None: no provision in Code requires the Secretary to provide the submitted forms and they are not subject to promulgation under the VAPA. The governor's right to remove political disabilities after the conviction of a felony is granted by Article V, § 12 of the Virginia Constitution.

*** State Air Pollution Control Board**

Agency: Dept. of Environmental Quality

Submissions: (1) many documents incorporated by reference and they had been previously filed with the Registrar. Documents came from US Environmental Protection Agency, US Government Manual, American Society for Testing and Materials, etc., (2) Also submitted documents that were incorporated by reference but were NOT filed with Registrar; "with the reason being that state documents are not required to be filed with the Registrar." This is presumably in reference to exemption in the VAPA for internal documents. Examples of these documents are: procedures for testing facilities subject to emission standards; procedures for determining compliance with Emission Standards; procedures for preparing and submitting emission statements, etc.

Classification: Legislative Rules

Applicability of VAPA: Yes, but has general subject exemptions for applications

Applicability of VRA: Yes, with exception for federal materials incorporated by reference

Review by AG? No

Promulgation required: None

Publication in Register required: Yes

Comments: Letter from agency stated that the submitted documents are "directly related to the regulatory program and place specific requirements upon the regulated community." Text of the documents is not contained in the regulation, but are incorporated by reference. The documents proceed through the regulatory process as other provisions do, including public participation.

* Issued Raised: Another incorporation by reference issue specifically aimed towards the incorporation of an agency's *own* documents. Are agencies effectively surpassing the VAPA promulgation process, and what safeguards would be installed to prevent this from occurring with "guidance documents?"

*** State Corporation Commission**

Agency: Independent Agency

Submissions: (1) Application; (2) Cancellation of certification of registration form; (3) orders; and (4) numerous case decisions for the following divisions: Public Utilities, Accounting, Communications, Energy, Bureau of Financial Institutions, Bureau of Insurance, Motor Carrier Division (many divisions listed rules that had resulted form orders and administrative orders)

Classification: Case decisions are valuable precedent, but are not considered rules unless the court affirmatively states that the decision is legislative; thus seemingly only policy statements.

Applications and forms are policy statements.

Applicability of VAPA: Exemption from the VAPA under subdivision 2 of subsection A of § 9-6.14:4.1 which exempts "any agency which by the Constitution is expressly granted any of the powers of a court of record."

Applicability of VRA: Yes

Review by AG? None as a result of total exemption

Promulgation required: No

Comments: The following is a sample of some of the documents that were submitted:

- Public Utilities = (3 case decisions) opinion and final order regarding the determination of the reasonableness of certain practices and charges by public utilities
 - Accounting = (7 decisions) Administrative Order for the adoption of a revised uniform system of accounts for electric utilities
 - Communications = (26 decisions) Final order for adopting rules governing the certification and setting of rates for interexchange telecommunications carriers
 - Energy = (16 decisions) Final Order regarding the confidential treatment of fuel monitoring report
 - Bureau of Financial Institutions = (2 decisions) Order amending Virginia Equal Credit Opportunity Regulation
 - Bureau of Insurance = (10 Regulations) Regulation for unfair claim settlement practices
 - Motor Carrier Division = (2 cases) Order adopting increased insurance requirements for motor carriers of property
 - Clerk's Office = (10 Applications, forms) Application for a certificate of authority to transact business in Virginia form
- * Issued Raised: How can the regulated public access these case decisions which may have a binding force of law on their actions?

State Land Evaluation Advisory Council

(Please note that pursuant to SB 550, passed in 1996, the following "Procedures for Determining Ranges" are now currently required to be promulgated as regulations.)

Agency: Department of Taxation

Submissions: Procedures for Determining Ranges of Use-Values of Property

Classification: Policy Statement

Applicability of VAPA: Yes

Applicability of VRA: Yes

Review by AG? Yes, the AG determined that the agency's guidelines are not intended to have the force of law, nor are they enforced as a regulation. The voluntary nature of the guidelines prevents them from having enforcement capabilities. Thus, the AG requested that the Procedures for Determining Ranges of Use-Values be deleted from the files as a regulation or other written statement being enforced by the agency.

Promulgation required: No

Publication in Register required: None

Comments: The AG recommended that if the agency wished to enforce the guidelines, the agency must follow the VAPA procedures.

* Issue Raised: How detailed and uniform is the review of an exemption? In 1993 these documents were labeled guidelines. Three years later, the General Assembly passed a bill which made the same guidelines possess the power of law and necessitated the promulgation of these rules.

State Lottery Department

Agency: Independent Agency

Submissions: (1) emergency PPGs (2) orders (3) rule

Classification: all legislative rules

Applicability of VAPA: Yes

Applicability of VRA: Yes

Review by AG? None

Promulgation required: None, regulations had been published already

Publication in Register required: No, the ten Orders that were submitted had been listed in the Register, but not noted on the Registrar's list.

Comments: The list sent to be certified contained items that had expired: (1) several orders required deletions and (2) two emergency regulations had already been adopted under normal VAPA procedure and thus needed to be deleted.

State Water Control Board

Agency: Dept. of Environmental Quality

Submissions: Occoquan and Dulles Area Watershed Plan; Wetlands Policy; water quality management plans for various bodies of water; Regulations for implementation of Groundwater Act; procedural rules; Water Quality Standards; Protection of water quality in VA's Shellfish Growing Area; Boat Pollution Control. Other regulations had additional dates of action that needed to be noted (i.e. amendments).

Classification: Most seem to be legislative rules.

Applicability of VAPA: Yes

Applicability of VRA: Yes

Review by AG? No

Promulgation required: Yes, the Chowan River regulation's proposed copy was filed but the final copy never went through the VAPA in its final form.

Filed with Registrar? All of the submissions had previously been filed with the Registrar and some subject to requirements of the VAPA.

Comments: Many of these regulations became effective in the late 70's and 80's prior to the creation of the VAPA.

University of Virginia

Agency: Secretary of Education

Submissions: Regulations contained in the University's Undergraduate Record: Dogs Running at Large; Use of the Law; Firearms; Solicitors and Sales; and Department of Parking and Transportation Services

Classification: Legislative rules?

Applicability of VAPA: Yes, but mostly exempt under § 9-6.14:4.1(A)(6) which provides exemptions for regulations pertaining to any higher education institution's (1) academic affairs; (2) selection, tenure, promotion and disciplining of faculty and staff; (3) selection of students; and (4) rules of conduct and disciplining of students.

Applicability of VRA: Yes, but similar exceptions for educational institutions' affairs

Review by AG? No

Promulgation required: None

Publication in Register required: No

Comments: These regulations seem to be outside the scope of the VAPA exemptions because they seemingly would affect the general public, not just the university community. For example, the regulation regarding the Use of University Facilities also applies to non-University users.

Virginia Board For Architects, Professional Engineers, Land Surveyors & Landscape Architects

Agency: Dept. of Professional and Occupational Regulation

Submissions: (1) emergency PPGs (2) application for certification as an interior designer

Classification: (1) Legislative Rules (2) policy statement

Applicability of VAPA: Yes, but a subject exemption is given for the application and/or renewal of a license, certificate, or registration under provision § 9-6.14:4.1(B)(12).

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Virginia Community College System

Agency: Secretary of Education

Submissions: consumer information, policy and procedures manual, parking enforcement policy

Classification: consumer information would be policy statement (may be interpretative?).

Manual and Parking enforcement seem to be legislative rules.

Applicability of VAPA: Yes, but mostly exempt under § 9-6.14:4.1(A)(6) which provides exemptions for regulations pertaining to any higher education institution's (1) academic affairs; (2) selection, tenure, promotion and disciplining of faculty and staff; (3) selection of students; and (4) rules of conduct and disciplining of students.

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Virginia Employment Commission

Agency: Secretary of Commerce & Trade

Submissions: benefit and tax forms

Classification: policy statements

Applicability of VAPA: Yes, some exceptions

Applicability of VRA: Yes

Review by AG? No

Promulgation required: None

Comments: Commission uses countless number of forms which are periodically updated and filed with the Administrative Law Appendix - forms such as Notice of Appeal Hearing, Eligibility Review Interview Notice, Notification of Claim Filed for Benefits, Employer's Quarterly Tax Report, Tax Rate Notice

Virginia Health Services Cost Review Council

Agency: Secretary of Health and Human Resources

Submissions: (1) Emergency Regulations amendments (2) survey and (3) Budget Filings for different divisions

Classification: (1) Legislative Rules (2) policy statements (3) policy statements

Applicability of VAPA: Yes, but note that emergency regulations are exempt from the VAPA and VRA if imminent threat to public health. Agency internal procedure is exempt from PPG as well.

Applicability of VRA: Yes, unless emergency.

Review by AG? No

Promulgation required: None

Publication in Register required: No, emergency regulations already filed and published.

Virginia Port Authority

Agency: Secretary of Commerce & Trade

Submissions: Terminal rules

Classification: Legislative Rules

Applicability of VAPA: Exempt from the VAPA

Applicability of VRA: Exempt from the VRA

Review by AG? Yes. The AG confirmed that the promulgation of the terminal regulations are exempt because the rules relate to agency action concerning customary police functions and traffic signs, markers, or control devices.

Promulgation required: None

Virginia State Bar

Agency: Supreme Court

Submissions: Resolution of the Council; Bylaws of the VA. State Bar & Counsel; Disciplinary Board Rules of Procedures; Disciplinary Procedure for VSB staff; Mandatory Continuing Education Regulations

Classification: Legislative Rules

Applicability of VAPA: Exempt from the VAPA as an agency of the Supreme Court: under the statutory authority of § 54.1-3910 and § 9-6.14:4.1(A)(2)

Applicability of VRA: Yes

Review by AG? None

Promulgation required: None

Publication in Register required: Yes

Comments: Publication in the Virginia Register was for informational purposes only since the Bar is exempt from the VAPA

APPENDIX H RESPONSES TO THE AGENCY SURVEYS

- **Department of Agriculture and Consumer Services**

During a telephone conversation, the regulatory coordinator of the Department of Agriculture and Consumer Services expressed his concern with the reference to a “state agency” in the definition. He stressed that the Virginia Administrative Process Act (VAPA) defines “agency” to mean the entity that makes the regulation. His written response re-iterated this same concern and the following quotes his submission:

1. As written, the definition of “guidance documents” would probably exclude the vast majority of documents that provide “general direction, instruction, or advice” because those documents are not generated by an “agency” as that term is defined in the VAPA.

2. If your definition of “agency” is meant to encompass an agency’s staff, then virtually all documents issued by that staff would qualify as “general direction, instruction, or advice,” and hence would be “guidance documents.” This result is not desirable. Taken literally, a memorandum from the agency head to employees suggesting that they consider enrolling in the U.S. Savings Bond program would qualify as a “guidance document.”

3. A key provision of the draft definition of “guidance document” characterizes a guidance document as something “other than a rule or regulation,” (without saying how the guidance document is different), but in all other particulars the definition of “guidance document” is largely indistinguishable from “regulation,” as that latter term is defined in the VAPA. Thus, unless the bill containing the definition of “guidance document” makes clear how a “guidance document” differs from a regulation, an agency might choose to develop all of its statements of general effect as “guidance documents.” (I should say that the only difference between a regulation and a guidance documents, given the present draft definition of “guidance document,” is the name by which the document is called; agencies, if put to lesser efforts by so doing, will call (and develop their regulations as) “guidance documents.”)

4. Because the answers to your questions would vary widely, depending on the meaning given to the word “agency” (its meaning under the VAPA versus its meaning in ordinary language), I would suggest the need for language that precisely (and with sufficient narrowness) specifies what kinds of documents are subject to any future requirements associated with guidance documents; otherwise, these future requirements may have the effect of imposing potentially great additional administrative-law burdens upon agencies.

5. If this department must prepare a list of documents, it would be simpler to update it yearly. Verifying yearly a list (once established) would be easier than updating the list at every change. You may wish to consider requiring (if the intent is to require a list) only those items that are of a permanent nature (say, guidance documents that will be in effect for one year’s time or less). Perhaps such a list could be published (and updated yearly) as a part of the Virginia Administrative Law Appendix.

- **Department of Corrections**

The Department of Corrections stressed the unique process that the agency follows to ensure that each regulated entity receives its regulation and accompanying guidance documents on a regular basis. Accordingly, the Department believes that publishing a list of such documents would probably not be a useful mechanism. Please note that the following duplicates the agency’s response to the survey with only minor edits:

The Board of Corrections promulgates minimum standards (regulations) for local and regional jails, residential centers, private prisons, and state correctional facilities. In order for each facility to be Board certified for operation, the facility must comply with the minimum standards. In order to assist each facility with meeting the standards and achieving certification, the Department’s Certification Unit publishes “compliance documentation” manuals for each set of minimum standards. The compliance documentation manuals are essentially guidance documents which help the regulated entities understand more fully the requirements of the minimum standards, and give

examples of compliance and non-compliance with standards. The compliance documentation manuals have existed since 1985 and are continuously updated as companions to the regulations. The Department does not maintain an official list of these manuals but distributes them to every regulated entity.

The compliance documentation manuals could be compiled in a list but, as described below, there is not a need for a centralized list of these manuals.

The Department maintains internal policy and procedures manuals for agency staff, both on a Department-wide and Division-wide basis. Occasionally, a memorandum of clarification may be issued by the Director or Deputy Director which provides further interpretation to the procedures in place. The Department maintains a formal mailing system, which ensures that every affected employee receives, or has access to, all procedures and accompanying memoranda. In addition, such documents, or a least description of these documents, are maintained at the Library of Virginia and the Virginia Code Commission. Finally, the Department has a central location, in the Director's Office, where agency staff or the general public may access these documents. It may be noted that some procedures, or related documentation, is security-related, and is not accessible to the public or even to certain agency staff, under § 2.1-342.B.32(i).

Agency documents that provide direction, instruction, or advice to the general public would consist of the compliance documentation manuals described above.

The Department and Board of Corrections take every step possible to ensure that regulated entities receive all pertinent standards and guidance documents. As part of the certification process, the Certification Unit sends to each regulated entity a pre-audit package at least 60 days before the audit, which includes a set of the standards, the accompanying compliance documentation, and the certification regulations (which stipulate the audit process). In addition, a member of the Certification Unit visits the facility 30 days before the audit to answer any additional questions about certification requirements.

Neither a continuous update of list or annual list would be helpful to the Department or the regulated entity. The entities regulated by the Board are discrete categories of facilities which each have their own unique set of standards and accompanying guidance documents. At Department expense, the Department and Board ensure that every single facility has a copy of the pertinent documents related to its particular certification requirements. It would be confusing to the regulated entities to compile and circulate a comprehensive list of such documents. Jails have no need to review standards or compliance documentation for residential centers. Private prisons do need to review standards or compliance documentation for lockups. The categories of facilities regulated by the Board are different and separate to the extent that the Department develops close, individualized communicative relationships with each category. Therefore, there is no need for a central, comprehensive list of such documents.

In general, creating and publishing a list of these diverse documents would be an unnecessary "paperwork project." This Department does an excellent job of developing close relationships with all facilities and ensuring that the facilities are sent every applicable document pertaining to its operation and certification.

Note: The Department of Correctional Education issues internal policies and procedures that govern the management and operation of schools operated in the state's adult and juvenile correctional centers. The guidance documents are public documents and maintained in the agency's central office and all schools. The documents are available to the public upon request. The documents are rarely requested by the public and when they are, the request is usually through the FOIA.

- **Department of Health**

A telephone conversation with the regulatory coordinator from the Department of Health explored his uneasiness regarding the proposed requirement that the documents be published. For example, his department has issued at least 800 working memorandum to its field offices. The topics of these memorandum range from explaining personnel parking lot information, to addressing a specific employee action. The regulatory coordinator believed that simply listing the documents

would be a feasible approach. However, he emphasized that publication would be a tremendous undertaking that would also require much revision and updating of documents as well.

The regulatory coordinator had followed House Bill 1532 and commended the representative's efforts, but he felt that implementing this new definition and requirement needed much research and thought.

• **Department of Historic Resources**

The Deputy Director of the Department of Historic Resources sent a detailed written answer which has been duplicated below, with minor edits:

The definition of "guidance documents" is far too broad and sweeping. Assuming "publish" to mean printing and making copies available, compliance with the publication requirement under the proposed definition would constitute a significant and unreasonable administrative and financial burden wholly out of proportion with the size of this agency and the needs of our clients.

Of particular concern is the vast range of internal communications covered under the proposed definition. We estimate that compliance would require a full time FTE at an annual cost of \$50,000 just to manage the process. Printing and mailing costs in response to requests for documents would be substantial and could not be absorbed within budget. I fear that such a requirement would create a false "demand" for documents, both external and internal, that could not be met except at great cost to the taxpayers.

The requirement with respect to internal documents also appears to disregard the confidential nature of certain documents and fails to understand the process of developing and resolving issues. At the same time, the requirement appears to duplicate FOIA requirements without the appropriate exceptions and safeguards. Unlike FOIA, the burden would be placed solely on the agency to print and produce vast amounts of information of little or no value to the public. For these reasons, the cost of compliance must be measured in both quantifiable terms and for the disruption to internal operations, including the potentially chilling effect on communications.

Even providing a list of all applicable documents under such a sweeping definition would constitute an unreasonable and costly burden to the agency. Again, a full time FTE would be required to manage the process and respond to requests for documents as well as significantly increased funds for associated printing and postage expenses to meet an artificially created demand.

A list of the department's publications is available to the public, free or at cost, in the Library of Virginia's Virginia State Documents. Publications so listed are of general interest, have a wide audience or application, and are not subject to frequent revision. The Library list is updated annually. New publications are added and others are removed from the list as they become outdated or no longer available in sufficient stock to meet demand. Publication priorities are based on customer needs, mission fulfillment and cost considerations.

The agency also maintains on-site a list of the above plus brochures or pamphlets that are more narrow in scope or subject to frequent revision. These brochures are designed to inform the public or client groups about the department's programs, services and assistance. The list is amended as necessary throughout the year and in accordance with the principles described above. Information brochures are made available upon request or offered by staff as the needs of clients require. In addition, information brochures are frequently mailed to appropriate client groups at the time of publication. Similarly, appropriate notices might be placed in both internal and external newsletters.

The agency does not list in any way some documents that would be covered under the proposed definition. These might include, for example, an information sheet on how to properly fill out a permit application or on available services and fees for archives searches. Quite reasonably, such guidance documents are provided to customers as needed. Concerning internal documents covered by the proposed definition, the agency maintains a Policies and Procedures Manual which is available to all staff and updated regularly. Documents in the manual are available to the public upon request. Other internal documents are provided under normal FOIA procedures.

Agency practice for publishing lists of currently available general interest and informational publications is detailed above. The cost of maintaining the lists is minimal and the duties are readily

examples of compliance and non-compliance with standards. The compliance documentation manuals have existed since 1985 and are continuously updated as companions to the regulations. The Department does not maintain an official list of these manuals but distributes them to every regulated entity.

The compliance documentation manuals could be compiled in a list but, as described below, there is not a need for a centralized list of these manuals.

The Department maintains internal policy and procedures manuals for agency staff, both on a Department-wide and Division-wide basis. Occasionally, a memorandum of clarification may be issued by the Director or Deputy Director which provides further interpretation to the procedures in place. The Department maintains a formal mailing system, which ensures that every affected employee receives, or has access to, all procedures and accompanying memoranda. In addition, such documents, or a least description of these documents, are maintained at the Library of Virginia and the Virginia Code Commission. Finally, the Department has a central location, in the Director's Office, where agency staff or the general public may access these documents. It may be noted that some procedures, or related documentation, is security-related, and is not accessible to the public or even to certain agency staff, under § 2.1-342.B.32(i).

Agency documents that provide direction, instruction, or advice to the general public would consist of the compliance documentation manuals described above.

The Department and Board of Corrections take every step possible to ensure that regulated entities receive all pertinent standards and guidance documents. As part of the certification process, the Certification Unit sends to each regulated entity a pre-audit package at least 60 days before the audit, which includes a set of the standards, the accompanying compliance documentation, and the certification regulations (which stipulate the audit process). In addition, a member of the Certification Unit visits the facility 30 days before the audit to answer any additional questions about certification requirements.

Neither a continuous update of list or annual list would be helpful to the Department or the regulated entity. The entities regulated by the Board are discrete categories of facilities which each have their own unique set of standards and accompanying guidance documents. At Department expense, the Department and Board ensure that every single facility has a copy of the pertinent documents related to its particular certification requirements. It would be confusing to the regulated entities to compile and circulate a comprehensive list of such documents. Jails have no need to review standards or compliance documentation for residential centers. Private prisons do need to review standards or compliance documentation for lockups. The categories of facilities regulated by the Board are different and separate to the extent that the Department develops close, individualized communicative relationships with each category. Therefore, there is no need for a central, comprehensive list of such documents.

In general, creating and publishing a list of these diverse documents would be an unnecessary "paperwork project." This Department does an excellent job of developing close relationships with all facilities and ensuring that the facilities are sent every applicable document pertaining to its operation and certification.

Note: The Department of Correctional Education issues internal policies and procedures that govern the management and operation of schools operated in the state's adult and juvenile correctional centers. The guidance documents are public documents and maintained in the agency's central office and all schools. The documents are available to the public upon request. The documents are rarely requested by the public and when they are, the request is usually through the FOIA.

- **Department of Health**

A telephone conversation with the regulatory coordinator from the Department of Health explored his uneasiness regarding the proposed requirement that the documents be published. For example, his department has issued at least 800 working memorandum to its field offices. The topics of these memorandum range from explaining personnel parking lot information, to addressing a specific employee action. The regulatory coordinator believed that simply listing the documents

would be a feasible approach. However, he emphasized that publication would be a tremendous undertaking that would also require much revision and updating of documents as well.

The regulatory coordinator had followed House Bill 1532 and commended the representative's efforts, but he felt that implementing this new definition and requirement needed much research and thought.

• **Department of Historic Resources**

The Deputy Director of the Department of Historic Resources sent a detailed written answer which has been duplicated below, with minor edits:

The definition of "guidance documents" is far too broad and sweeping. Assuming "publish" to mean printing and making copies available, compliance with the publication requirement under the proposed definition would constitute a significant and unreasonable administrative and financial burden wholly out of proportion with the size of this agency and the needs of our clients.

Of particular concern is the vast range of internal communications covered under the proposed definition. We estimate that compliance would require a full time FTE at an annual cost of \$50,000 just to manage the process. Printing and mailing costs in response to requests for documents would be substantial and could not be absorbed within budget. I fear that such a requirement would create a false "demand" for documents, both external and internal, that could not be met except at great cost to the taxpayers.

The requirement with respect to internal documents also appears to disregard the confidential nature of certain documents and fails to understand the process of developing and resolving issues. At the same time, the requirement appears to duplicate FOIA requirements without the appropriate exceptions and safeguards. Unlike FOIA, the burden would be placed solely on the agency to print and produce vast amounts of information of little or no value to the public. For these reasons, the cost of compliance must be measured in both quantifiable terms and for the disruption to internal operations, including the potentially chilling effect on communications.

Even providing a list of all applicable documents under such a sweeping definition would constitute an unreasonable and costly burden to the agency. Again, a full time FTE would be required to manage the process and respond to requests for documents as well as significantly increased funds for associated printing and postage expenses to meet an artificially created demand.

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The agency also maintains on-site a list of the above plus brochures or pamphlets that are more narrow in scope or subject to frequent revision. These brochures are designed to inform the public or client groups about the department's programs, services and assistance. The list is amended as necessary throughout the year and in accordance with the principles described above. Information brochures are made available upon request or offered by staff as the needs of clients require. In addition, information brochures are frequently mailed to appropriate client groups at the time of publication. Similarly, appropriate notices might be placed in both internal and external newsletters.

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Agency practice for publishing lists of currently available general interest and informational publications is detailed above. The cost of maintaining the lists is minimal and the duties are readily

handled by current staff performing other tasks. More important, the agency is able to establish publication priorities based on consumer need. Publishing a list of the full range of documents covered under the proposed sweeping definition, particularly with respect to internal documents, would be an unreasonable and impractical burden yielding little public benefit. Such a requirement would be an unwarranted intrusion into the internal workings of executive agencies.

By any common sense interpretation, the definition is so sweeping as to include all written or electronic documents. After all, if what we communicate is not in the nature of "direction, instruction, or advice" in connection with public business, surely we are wasting time, effort, paper and taxpayer funds. Those we serve should be appropriately and fully informed and involved. At the same time, our work is by its nature iterative and it would be destructive to the process if every trivial and tentative step were exposed. What problems is being fixed, and at what cost and benefit to the public we serve?

- **Department of Mines, Minerals, and Energy**

The Department of Mines, Minerals, and Energy (DMME) responded in a lengthy five-page report. DMME also sent a incomplete list of their "guidance documents" which required 25 work hours to compile. The Department felt that substantially more time would be required to compile and maintain a list in accordance with the survey definition. The following answers quote DMME's submissions, however, minor edits have shortened the responses, without deleting important comments:

Overall, DMME believes that any requirement to publish notices in the Register of changes of guidance documents, or notices that new guidance documents have been developed, would be very burdensome for agencies, the Registrar, and the public. The definition included in the survey is so broad that it would cover thousands of documents. It would be very difficult for the public to locate specific documents of interest among all of the guidance documents of state agencies. Requirements to publish lists of guidance documents also may have a chilling effect on development of such documents by agencies, which could decrease the quality of services provided by state government.

DMME publishes some, but not all, agency documents that meet the proposed definition provide on the survey. DMME believes that an annual update of a list of guidance documents would be more helpful to the public than a continuous update. The public could be notified when annual updates are available, so they would not have to continuously check with agencies as to whether their lists are current. An annual update would minimize risk of the people using outdated information.

The proposed definition is very broad. It would include hundreds of external and internal memoranda, procedures, books, pamphlets, maps, and other similar documents at DMME. Publishing a central list all such documents would be a large undertaking and would be costly to the state. The information in some guidance documents, such as many internal agency management procedures, would be of very limited value to the public. Information useful to the public could be lost in the volume of other items on such a centralized list.

DMME has categorized its documents into three types for this survey: (1) Regulatory Program Information: Documents include communication memoranda to operators, certification training manuals, and rescue and recovery plans. These documents are not kept on a central list; (2) Internal Management Documents: The proposed definition would cover internal agency operating procedures that do not directly affect the general public. These include procedures for completing draw-down of funds against federal grants and for governing inspector uniforms which are distributed to involved agency staff. These documents are updated periodically as the procedures are changed; (3) Topical Information Products: These include numerous publications, maps, bulletins, etc. These documents are updated. All information publications that are not distributed as a one-time mailing are included on the Library of Virginia's annual Virginia State Documents list.

DMME divisions maintain a variety of lists of available documents. These lists, and the documents themselves, are provided to the public either through direct distribution to affected persons, or on request. DMME believes that the costs and bureaucracy required to keep a centralized list of internal agency procedural documents exceeds the value to the public from having

such a list available. Imposing requirements such as publishing prior notice before guidance documents are drafted or amended would discourage agencies from completing such documents. This would have the perverse effect of discouraging agencies producing documents meant to provide information to the public, or meant to ensure consistent treatment of citizens by the agency.

Centralizing a list of guidance documents would run counter to quality management practices at agencies. DMME provides service to our customers at the closest possible level. Guidance documents are used to ensure staff are trained in service requirements. Guidance documents are a key element of cross-training, which helps ensure quality services are maintained when there is turn over in service positions. Here, discouraging the use of guidance documents would decrease the effectiveness of government services to the public.

DMME drafts department and division procedures that provide general direction, instruction, or advice to agency staff. Agency-wide procedures address internal department operations such as telecommunications, inclement weather, travel expenses, and others. Divisions-wide procedures cover topics such as hazardous waste reporting and property management. Work-unit procedures cover items such as verification of travel authorizations and computer reboot processes. Other internal guidance documents provide direction to agency staff related to regulatory programs to ensure fair and consistent treatment of agency customers (such as making corrections to permit applications, performing inspections, taking enforcement actions). A third type of internal guidance provides direction to agency staff on contracting and procurement.

DMME makes all non-confidential documents available to the public. The agency distributes copies of some documents, such as operators memoranda and guidance documents, to all regulated entities and interested persons. Other documents are provided upon request. The department holds information meetings for the public and industry as new types of information become available. DMME uses press releases and provides information through trade groups and trade shows related to specific industries.

- **Department of Motor Vehicles**

The following quotes the submission by DMV:

The Department of Motor Vehicles (DMV) publishes (many in-house) literally hundreds of forms, brochures and documents that fit the definition for "guidance document," including a number of internal and external policy/procedure manuals, which are generally not offered for public consumption. DMV does not publish a list of these documents, but does offer the "public" documents to those entities and individuals who request the information.

Compiling and maintaining such a complex list would require task-dedicated personnel in a continuing effort, especially since this would involve ever-changing information.

Those types of documents that "provide general direction, instruction or advice to agency staff" would be those relating to internal and external policies and procedures. Those types of documents that "provide general direction, instruction or advice to the general public" would be those forms brochures and documents on various DMV-related topics.

Of the over two hundred forms, brochures and other documents available to the public, over a dozen are displayed in the lobbies of our customer service centers. The rest are available by request, either by mail, telephone or in person. Copies of internal or external policies and procedures also are available to the general public by request.

Neither of the two choices (an annual or continuous update of the list) is satisfactory. Both require a very high level of detailed maintenance and place significant burdens on agency personnel. Of the two choices, an on-going update of a guidance document list may be better in terms of the type of information provided and the processing time. The information would be more up-to-date and accurate, and the compilation and maintenance somewhat easier because it would be an on-going effort. Although most major changes occur on an annual basis as a result of legislative activity, some policy and procedural changes occur at different times throughout the year, sometimes month-to-month, making an on-going update the better of the two choices.

The narrower the definition for "guidance document," the less of an overall impact the proposed requirements will have on agencies. The definition used for the survey is quite broad and

inclusive. We believe it should be as narrow as possible. The proposed definition and its application would be burdensome to DMV because of the multitude of documents, forms and brochures we provide, and would be detrimental to its frequently changing policies and procedures.

If the intent of the legislation using the definition is to remedy a specific problem, the legislation should be tailored to do so. If the intent is to provide extraordinary public access to government policy making, the use of the guidance document will exceed that goal while placing unnecessary burdens on all agencies in the process. The FOIA already allows for expedient access to government policy making. The use of the "guidance document" definition approaches the threshold of overkill. An open, accessible government is assured by FOIA.

There is a fine balance between appropriate access and unnecessarily burdensome involvement. The extent and necessity of public access to government policy making should be carefully examined to ensure that this balance is struck and maintained.

- **Department of Taxation**

The regulatory coordinator of the Tax Department orally responded that the Department was very interested in the issue of guidance documents and the proposed bill. The Department distributes many documents that would fall under the category of guidance documents (such as the instructions on filling out tax forms).

- **Department of Youth and Family Services**

A personal interview with the regulatory coordinator of Department of Youth and Family Services revealed many concerns of this agency regarding the proposed definition. Generally, the regulatory coordinator expressed his desire to tailor the definition to be more focused on interpretative policy documents; explanatory documents as these could be more easily published and updated than the broad category of guidance documents.

Firstly, the department heavily relies on a Directives Manual which is periodically updated. This manual illustrates the tremendous problem that the proposed definition would create: where would the agency draw the line between something that was purely internal, versus that which needed to be published, and how could this material be accurately updated given the constantly changing directives in this agency? The present Manual was updated twice last year, but it could be reviewed as many as eight times per year. The Index, which lists the current policies, is an extremely fluid document. The regulatory coordinator questioned whether this information would require public updates for every change and what sanctions could be incurred for non-compliance.

The regulatory coordinator felt uneasy about designating a person who confirmed that a list contained all the agencies' guidance documents when that compilation may become outdated the next day by a new directive. The large Manual does not contain all of the requested guidance documents, either. Each time a director signs a procedure, that document is disseminated internally. If a public individual wanted a copy, the agency would send them one. A request under the FOIA would grant access to the information as well. Certain interpretations of regulations are already disseminated to the affected public.

The vagueness of the bill's language troubled the regulatory coordinator. He did not know if guidance documents included memorandum on personnel policies, administrative policies, and/or fiscal management. Many materials would fall into the broad definition of guidance, and the regulatory coordinator questioned the usefulness or appropriateness of publishing these documents. For example, certain security measures (such as pepper spray) must remain confidential. These principles could be revealed to let the public know that pepper spray may be used, but not to let the public know where the spray is located.

The DYFS also receives grants to construct Juvenile Detention Homes. Each agency office has a distinct process to follow regarding the submission of applications, review by the Board, and the Board's formula for recommending funds. This information is made available to the affected people as needed (i.e., a private constructor submitting a bid). Would this material need to be published as well? Would a Request For Proposal (RFP) for the operation of a juvenile correction facility to a private provider be published? Lastly, DYFS intersects with various types of individuals

(private providers, regional coordinators) and some of those documents might not be entirely internal, but who would draw the line?

The regulatory coordinator thought that the requirement of publishing a list of documents would be easier than a publication of the materials in their entirety, however, he did not believe that a list would be beneficial. A listing for DYFS would rely on the directives' titles which would not indicate the data, nor policy contained in the document. Continuously updating the list would be a monumental task and would perhaps require hiring another employee just to oversee that job because of the fast turnover of new directives.

The regulatory coordinator proposed a solution: shift the definition's language to limit the coverage to *explanations* and *interpretations* of regulations. The regulatory coordinator believes a uniform interpretation and clarification of the application of the regulations would be helpful to the facilities. He feels that the department and the staff in the field would welcome such a publication. For example, the Department has Certification Managers who perform audits on different types of juvenile facilities. Regulations outline exactly what a facility must have, but facility operators frequently phone the department for guidance on the details for which the certification managers will be looking. Under an explanatory document requirement, DYFS could publish a document that interprets the regulations, without overstepping the law, and provide a consistent auditor's statement. This would also benefit the uniformity of the process and minimize differing results.

A guideline to the regulations would disburse useful information, without spending a full year as an adopted regulation needs. The variances currently issued by the Board illustrates. A variance clearly references the regulations and provides guidelines for the affected community. The variances are not standards but instead, explanations on how to manage and secure a facility. Of course, the facility would still be responsible for complying with the duly promulgated regulations. The regulatory coordinator did recognize however, that even keeping these guideline documents updated might be difficult as well.

- **Miscellaneous**

The staff acquired several issues of The Policy Page published by the Virginia School Boards Association (VSBA). The monthly fliers are written by the VSBA Policy Services Specialist.

The May 1995 (Number 40) issue defined several terms that the subcommittee has been exploring. The following quotes the language in the publication:

"Policies are principles adopted by the local school board to chart a course of action. They tell what is to be done...They indicate broadly the direction to be taken by the administration in dealing with day to day activities and are narrow enough to give the administration clear guidance. *Policies are binding.*"

"Regulations are detailed directions to put policy in practice...*Regulations are rules, they are not discretionary.*"

"Guidelines set forth best practice and procedures for implementing policy. *Guidelines are not binding, they are discretionary.*"

The publication also clarifies who may issue which type of "rule." Guidelines are apparently only to be developed by the superintendent unless : (1) the board has already asked to give its approval for that guideline, or (2) board action is required by law.

Policy Page Number 43 printed in August 1995 describes the School Board Policy Manual Procedures/Guidelines. The Division Contact Person works directly with VSBA on policy questions and/or requests. Furthermore, a School Contact Person may be contacted to interpret school divisions policy in conformance with the policy manual. Any type of policies will be presented to the school board for approval. Once okayed, the newly adopted policy is distributed to the divisions for inclusion in all manuals.

**APPENDIX I
RESPONSES OF THE REGULATED COMMUNITY SURVEYS**

Department of Agriculture and Consumer Services

Respondents:

1. Virginia Dairymen's Association
2. Virginia Cattle Industry Board
3. Professional Lawn Care Association of America

Ability to access agency's "guidance documents" and satisfaction:

- In 29 years experience with the Association, very pleased and satisfied with getting information from any state agencies.
- We are currently satisfied with accessibility to agency documents in general.
- We are unaware of them and have never seen any.

Regulated community relies on the following publications/listings:

- None.
- The notice we receive about board meeting from the VA Department of Agriculture Pesticide Division would be a good source.

Specific recommendations?

- The internet or any newsletters from agencies.

Concerns about accessibility of documents?

- Not at all. If the Association needs anything, they simply call the agency directly and immediately get some answers and results. The system in place has always worked well for the Association.
- None.
- Agricultural County Agents are a good source for some distributors.

Continuous or annual publication?

- Annual publication of list because we may miss a continuous update and like the publication in its entirety.
- An annual list would be more cost effective and the use of the internet.

Comments:

- Generally, the Association has very little contact with any agencies or guidance documents. However, when the Association does need information, whatever agency it calls upon does a efficient job.
- Industry that is most affected should be provided an opportunity to comment on guidance documents prior to their finalization. Examples of inspection forms used is also helpful.

Department of Corrections

Respondents:

1. Rockbridge Regional Jail
2. Montgomery County Jail
3. Department of Correctional Education

Ability to access agency's "guidance documents" and satisfaction:

- Sometimes have to call for information but jail does not really depend on the Department of Corrections for too much guidance beyond the Minimum Standards. The jail's governing body is the surrounding county and/or city that signed the contract with the state.

- No problem receiving materials from Department. If anything, seems to be an excess of documents.
- Need to access guidance documents of other state agencies has been limited to policies and procedures of the Department of Corrections and Juvenile Justice.

Regulated community relies on the following publications/listings:

- Department of Correction's Minimum Standards

Concerns about accessibility of documents?

- No, because jail does not rely on the Department of Corrections for too much information and the jail has significant autonomy apart from state regulation.
- None, department allows sends the information that the jail needs and that information is usually very precise.
- No, easily accessible through formal policies and procedures manuals issued and maintained by the Department of Corrections and Juvenile Justice.

Comments:

- Jail has its own set of policies and procedures manuals that it develops and is approved by its regional board.
- Updates of the manuals are sent to regulated community on a "more or less" automatic basis.

Department of Mines, Minerals, and Energy

Respondents:

1. Virginia Petroleum Council
Virginia Aggregates Association

Ability to access agency's "guidance documents" and satisfaction:

- Good
- No trouble accessing guidance documents when the need arises. Most agencies have provided prompt access to these documents upon request.

Regulated community relies on the following publications/listings:

- Department of Environmental Quality Regulation Update, Virginia Environment Compliance Update, Virginia Register
- The Virginia Register and the newspaper magazine Environment Virginia. In addition, several law firms publish periodic newsletters containing articles on a variety of regulatory topics and commonly reference the existence of guidance documents.

Continuous or annual publication?

- Continuous update would be helpful.
- Each agency should publish a listing of their guidance documents on an annual basis in the Virginia Register. Additionally, a listing of such documents could be posted on-line on the Legislative Information System or the Virginia home-page (Internet). A continuous update should only be considered in an electric media because of the fluid nature of any such listing. Again, an annual/semi-annual listing should be sufficient.

Comments:

- Can guidance documents be listed in a Virginia Database, such as Division of Legislative Automotive Systems ("R-link" program)?
- The major objection the Virginia Aggregates Association had with the original House Bill 1532 was the onerous requirement that a state agency could not utilize a guidance document until it had been published in the Virginia Register. There has been much effort by the Department of Environmental Quality and other state agencies to reduce permit processing times. This

requirement would have resulted in unnecessary and costly delays to the regulated community as a result of these agencies having to defer action on permit application until a guidance document had been published.

Department of Motor Vehicles

Respondent: Car and Truck Renting and Leasing Association of Virginia

Ability to access agency's "guidance documents" and satisfaction:

- Varies from agency to agency

Regulated community relies on the following publications/listings:

- Virginia Register

Specific recommendations?

- Keep a list of affected industry/association, contact these when reworking documents, publish intent in Virginia Register.

Concerns about accessibility of documents?

- They should be readily available early on for industry input -- saves time and money for industry and government.

Continuous or annual publication?

- Continuous update is good - once a year is not enough -- show new listings in bold.

Comments:

- Government agencies and their regulations become a larger segment of government each year so need to keep up with them.

Department of Youth and Family Services

Respondents:

1. VA Community and Residential Care Association
2. Shenandoah Valley Juvenile Detention Home

Ability to access agency's "guidance documents" and satisfaction:

- Fine
- Usually unaware of their existence

Regulated community relies on the following publications/listings:

- Legislative proposals, proposed policy changes by various related agencies such as DJJ, DSS, Dept. of Ed.
- None

Specific recommendations?

- It would help to have a listing of proposed changes because sometimes, one has to know that changes are being contemplated.
- Make an annually updated listing available to regulated organizations and in public libraries.

Continuous or annual publication?

- Continuous
- Annual - an annual reference of what is available is sufficient.

Comments:

- How much is this going to cost?

NONYMOUS response

Ability to access agency's "guidance documents" and satisfaction:

- "I am uncertain as to the overall ability to access documents. I personally am unaware of any listing of such documents in general."

Regulated community relies on the following publications/listings:

- Agencies responsible for documents and/or networking with other providers

Specific recommendations?

- Listing of current or applicable documents

Concerns about accessibility of documents?

- Lack of knowledge around their existence or reliance on responsible agency to forward

Continuous or annual publication?

- An initial publication of existing applicable guidance documents then a periodic update

Agencies that did not submit a list of regulated community to be surveyed: Departments of Historic Resources, Taxation, and Health.

