

Joint Legislative Audit and Review Commission



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

Commission Briefing

September 14, 2009



JLARC

# Study Mandate

- § 2.2-4005. Review of exemptions by Joint Legislative Audit and Review Commission.
  - JLARC shall conduct a review periodically of the exemptions authorized by this chapter. The purpose of this review shall be to assess whether there are any exemptions that should be discontinued or modified.

# Primary Research Activities

- Survey analysis
  - State agencies
  - Registered lobbyists, interest groups, and interested individuals
  - Other states
- Data analysis
  - *Virginia Register of Regulations*
  - Virginia Regulatory Town Hall
  - Registrar of Regulations and Division of Legislative Automated Systems
- Interviews with State officials and selected members of the regulated community

# In This Presentation

- Overview of Virginia Administrative Process Act (VAPA)
- Reasons for Exemptions
- Virginia Compared to Other States
- Analysis of Need for VAPA Exemptions

# Purpose of VAPA

## ■ Agency Rulemaking

- Regulations have force of law
- Adopted by appointed officials and civil servants – not elected officials
- Constrained by statutory authority

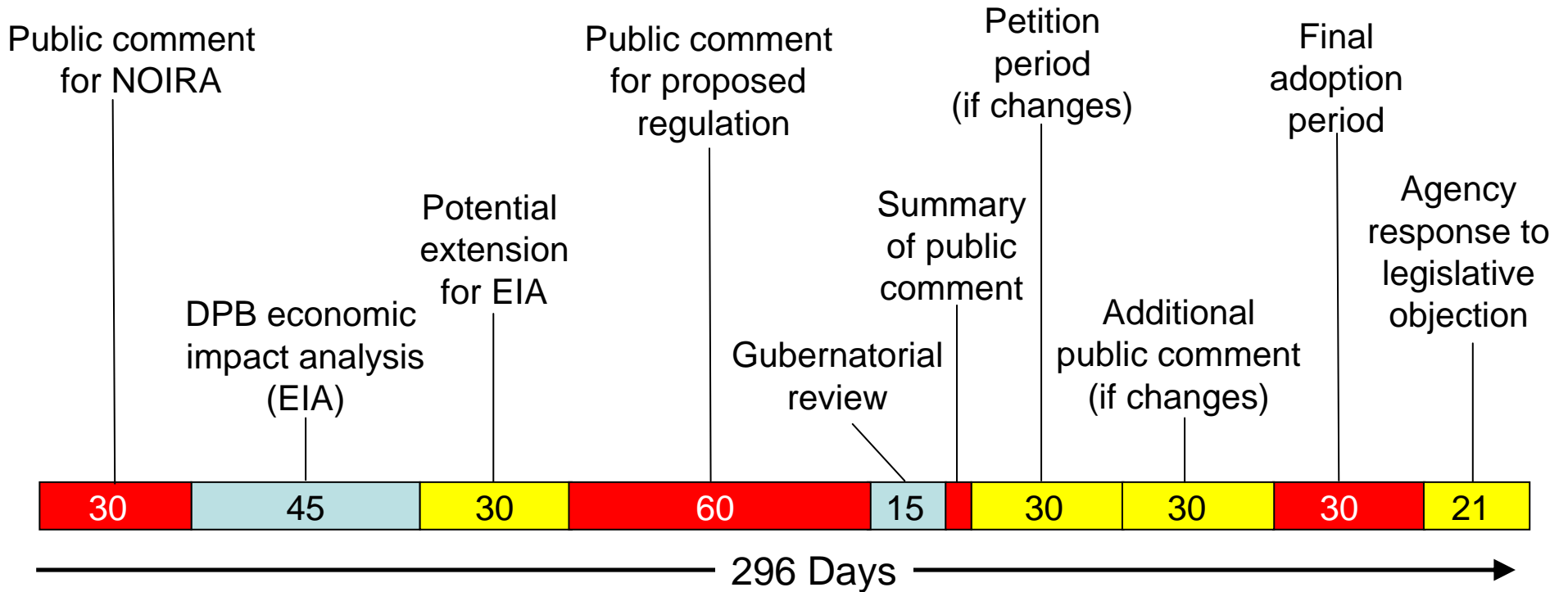
## ■ Need for

- Public input
- External review

# Standard VAPA Rulemaking Process Has Three Stages

- Notice of Intended Regulatory Action (NOIRA)
  - Minimum 30-day public comment period
- Proposed regulation
  - Department of Planning and Budget (DPB) prepares economic impact analysis
  - Minimum 60-day public comment period
  - Gubernatorial and legislative review
- Final Regulation
  - 30-day adoption period after publication in *Register*
  - Governor, acting in concert with certain legislative committees, may suspend effective date

# Timeframes Explicitly Set Forth by VAPA



	Total time	
	Days	Months
<span style="color: red;">■</span> Minimum time required to complete stage	125	4.1
<span style="color: lightblue;">■</span> Time provided for analysis and review	60	2.0
<span style="color: yellow;">■</span> Additional time allowed for some regulations	111	3.6



# Alternative, Expedited Rulemaking Processes

## ■ Fast-Track

- Non-controversial regulations
- No NOIRA
- Minimum 30-day public comment period
- If no objections, regulation becomes effective 15 days following close of public comment period

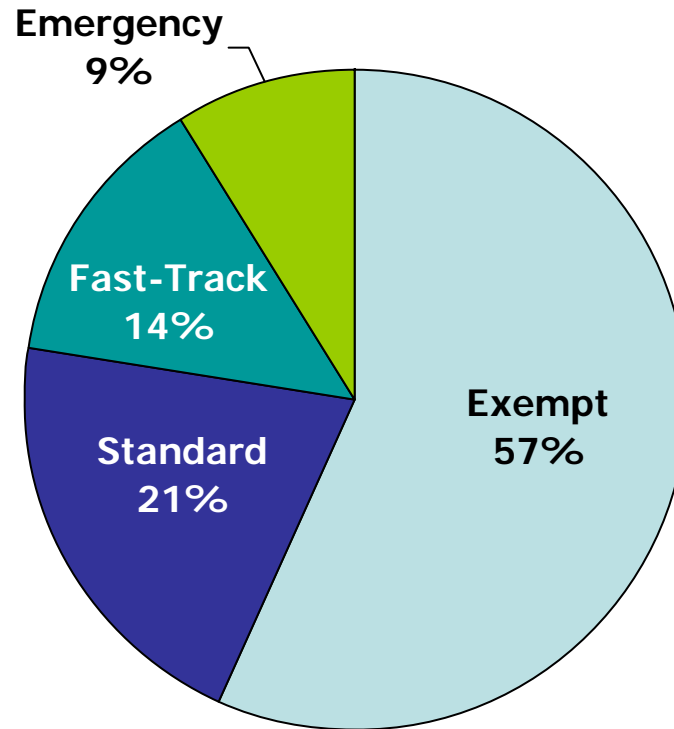
## ■ Emergency Regulations

- Governor determines emergency exists or regulation required to be effective within 280 days
- Effective upon approval of Governor
- In effect up to 12 months (may be extended six months)

# Regulatory Activity May Be Exempt From VAPA

- VAPA lists 65 specific exemptions
  - Some agencies totally exempt, for example
    - Marine Resources Commission
    - State Corporation Commission
    - Virginia Housing Development Authority
  - Other specific agency actions and general functions are exempt, for example
    - Regulations of the Department of Game and Inland Fisheries regarding the management of wildlife
    - Agency orders or regulations fixing rates or prices
    - Agency actions related to traffic signs, markers, or control devices

# Most Regulations Promulgated in Recent Years Were Exempt (2004-2009)



Source: Virginia Registrar of Regulations. Issue 1 of Volume 21 through Issue 16 of Volume 25 of the *Virginia Register of Regulations*.

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# Findings

- Exemptions to VAPA are a response to long and unpredictable timeframes associated with the standard VAPA process
- Most exemptions are explained by agencies as needed because fast action is required but is not possible through VAPA
- Few regulations are promulgated in one year or less using the standard VAPA process
- Executive order requires nine points of review and the way this has been implemented slows the promulgation process
- One aspect of the current executive order appears to be inconsistent with the provisions of VAPA

# Key Reason for Most Exemptions Is to Expedite Rulemaking

- In practice, standard VAPA rulemaking process takes more than two years on average
  - Fastest promulgation since 2004 was nine months
- Fast action may be necessary to
  - Prevent harm to persons or property
  - Prevent dislocations in the marketplace
  - Regulate seasonal activities
  - Prevent inconsistencies between agency rules and new statutes
  - Maximize receipt of federal funds

# Reasons Other Than Need for Fast Action

- Agency lacks discretion over regulatory content
- Regulated activity deemed inappropriate for public participation
- Entity has own authority and legal procedures for adopting rules
- Regulatory process is not deemed necessary for agency action

# Executive Review Delays Regulatory Process

- Governor's executive order sets out executive branch review responsibilities for planned regulations
- Nine points of executive branch review

<b>Prior to publication of:</b>	<b>DPB</b>	<b>Cabinet secretary</b>	<b>Governor</b>
NOIRA	✓	✓	✓
Proposed regulation	✓	✓	✓
Final regulation	✓	✓	✓

## Time Spent in Executive Branch Review Averaged About Ten Months

Stage of Review	Median # Days	Mean # Days
Pre-NOIRA	53	60
Prior to Proposed	141	143
Prior to Final	95	112
Total	289	315
Total Months	9.5	10.4

Source: JLARC staff analysis of Town Hall data for regulations considered active in late July 2009 and based on stages of review completed as of August 25, 2009.

# Executive Order Review Requirements Appear to Be Inconsistent With VAPA Provisions\*

## ■ Governor

- Shall transmit comments, if any, on a proposed regulation no later than 15 days following completion of the public comment period
- May recommend amendments or modifications to any regulation

## ■ Agency response to Governor's recommendations

- Adopt proposed regulation if Governor has no objection
- Modify and adopt proposed regulation after considering and incorporating Governor's objections or suggestions
- Adopt regulation without changes despite Governor's recommendations for change

\* § 2.2-4013 of the *Code of Virginia*



## Executive Order Review Requirements Appear to Be Inconsistent With VAPA Provisions (continued)

- Executive Order 36 requires Governor's authorization to proceed with final regulation
  - DPB reviews final regulation package and gives advice within 14 days
  - Applicable cabinet secretary reviews regulation and makes recommendation to Governor within 7 days
  - Agency is authorized to submit final regulation **"if and when"** Governor approves final regulation for publication

## VAPA Provisions If Governor Objects to Final Regulation

- Governor and General Assembly may suspend effective date of final regulation (§ 2.2-4014)
  - Standing committees of both houses or Joint Commission on Administrative Rules (JCAR), with Governor's concurrence, may suspend effective date
  - Effective date shall not take effect until end of next legislative session
  - Bill may be passed during legislative session to nullify all or part of a regulation

# Options to Expedite Executive Branch Review

1. Eliminate executive branch review at the NOIRA stage
2. To the extent that the Governor's office is active in policy reviews, DPB's review responsibilities could be limited to its preparation of the economic impact analysis already required by the act
3. Explicitly authorize agencies to proceed with submitting proposed regulation either (1) within 15 days following completion of DPB's economic impact analysis or (2) sooner, if advised that executive branch review is complete
4. For fast-track regulations, require executive branch review to be completed within 40 to 50 days of submission of proposed regulatory package to DPB

## Recommendation to Expedite Executive Branch Review

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

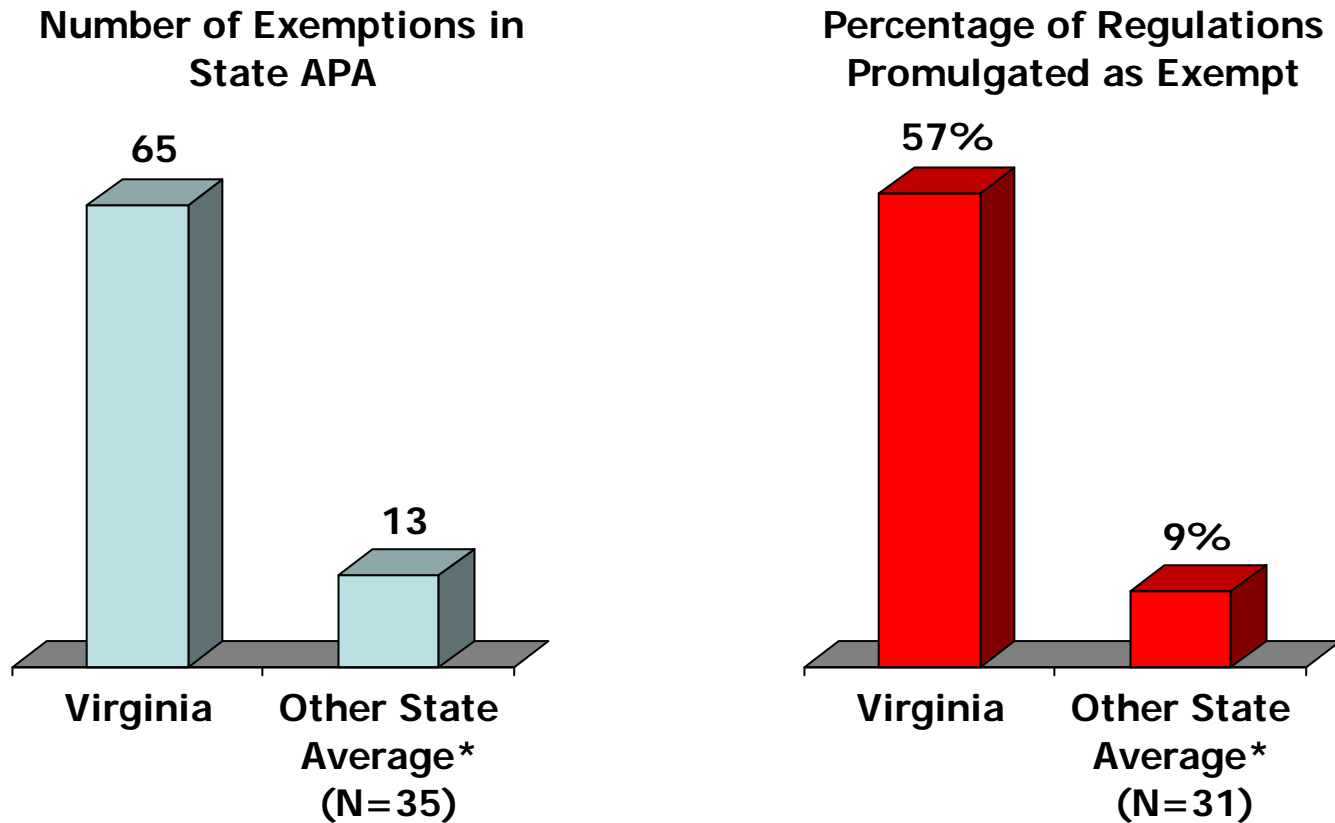
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- Other states generally have fewer exemptions than Virginia and a lower percentage of exempt regulations
- Other states generally have shorter timeframes for promulgating regulations

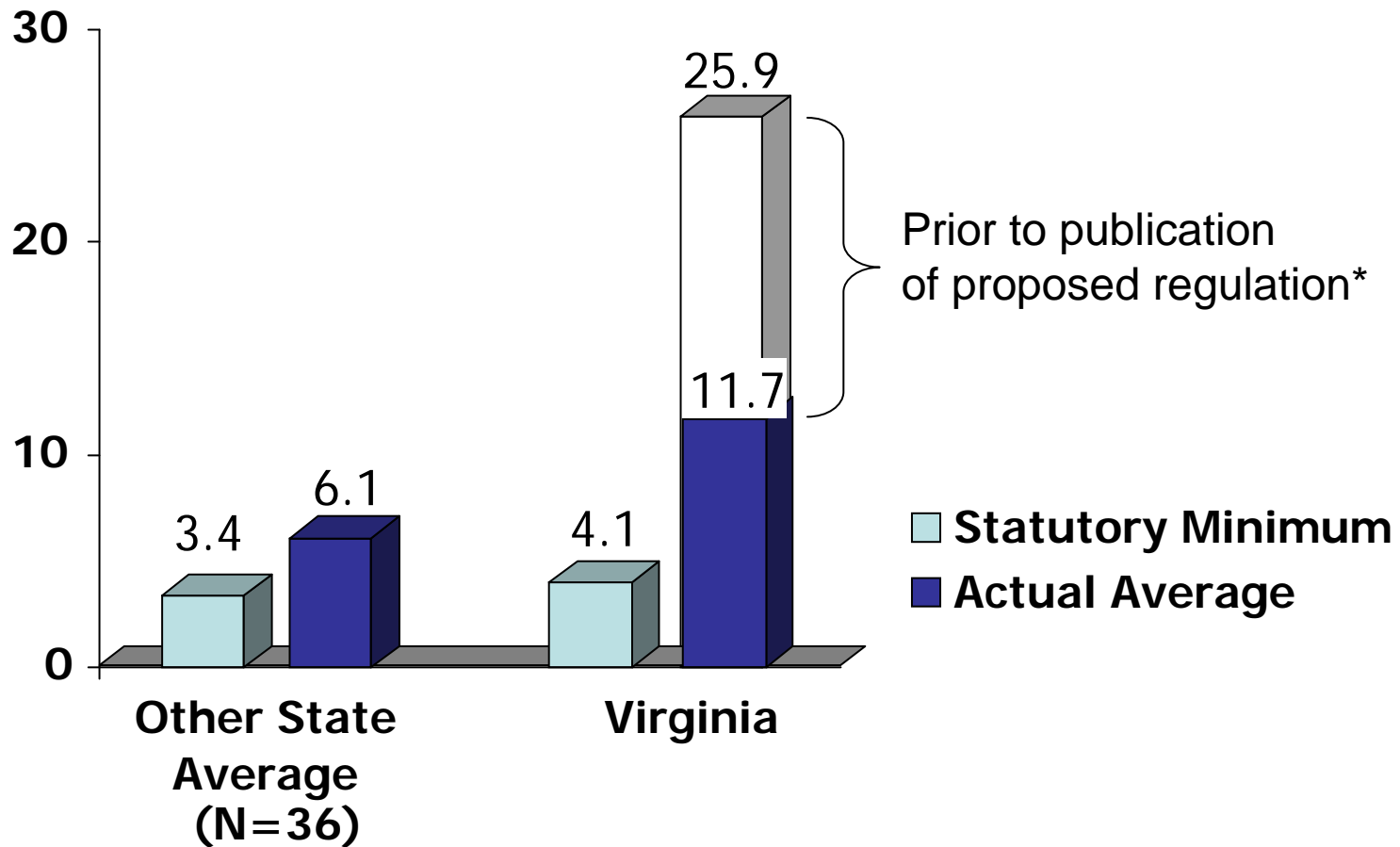
# Other States Have Fewer Exemptions and Lower Percentage of Exempt Regulations



\* Does not include New Mexico, which exempts all state agencies.

Source: *Code of Virginia*, Office of the Registrar of Regulations, and JLARC staff survey of other states.

# Other States Have Faster Promulgation Timeframes



\* Most other states do not have NOIRA stage

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

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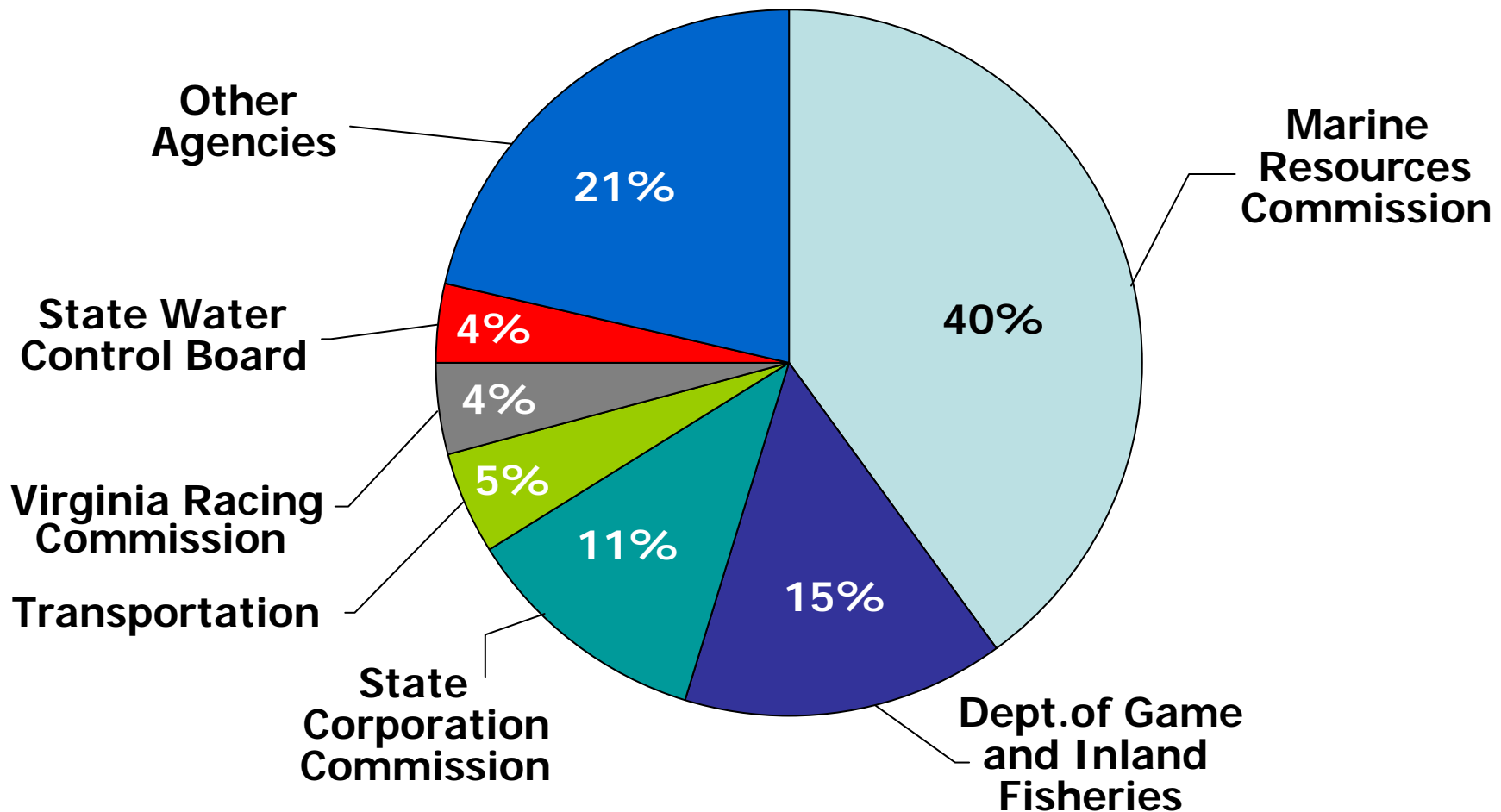
- A few agencies account for majority of substantive, discretionary exempt regulations
- Most exemptions appear necessary given the lengthy rulemaking process; a few exemptions are no longer needed
- Several consequences may result from the lengthy rulemaking process, such as greater use of exemptions and emergency regulations, greater use of the legislative process and administrative actions when regulations may be more appropriate, and greater confusion among the public

## A Few Exemptions Account for Majority of Exempt Regulations (2004-2009)

Rank	Exemption	Description	Number	Percent
1	§2.2-4006. A4a	Conformance with Virginia statutory law – no agency discretion	270	24.9%
2	§2.2-4006. A12	Marine Resources Commission	182	16.8
3	Chapter 321, 2008 Acts of Assembly	Public participation guidelines	163	15.1
4	§2.2-4006. A4c	Necessary to meet requirements of federal law	104	9.6
5	§2.2-4006. A3	Consist only of changes in style or form or corrections of technical errors	75	6.9
6	§2.2-4002. A3	Dept. of Game and Inland Fisheries regarding wildlife management	66	6.1
7	§2.2-4002. A2	Courts and agencies with powers of a court of record	56	5.2
8	§2.2-4006. A7	Regulations limited to reducing fees charged to regulants and applicants	33	3.0
9	§2.2-4006. A9	General Permits	19	1.8
10	§2.2-4002. A4	Grants of State or federal funds or property	15	1.4

Source: *Virginia Register of Regulations*. Vol. 20, Issue 19 to Vol. 25, Issue 25.

# A Few Entities Account for Most Substantive, Discretionary Exempt Regulations (2004-2009)



Source: JLARC staff analysis of the *Virginia Register of Regulations*. Vol. 20, Issue 19 to Vol. 25, Issue 25.

# Public Has Opportunity for Input on Exempt Regulations

- All agencies have public participation guidelines
- All boards and commissions required to hold open meetings
- Length of time for public notification and input varies
  - Enabling statutes often specify procedures
- Exempt regulations are not subject to executive branch review

# Most Exemptions Appear to Be Necessary

- Agencies rated exemptions as “essential” in most cases
  - Most common rationale was need for quick action
    - Prevent harm to persons or property
    - Regulate seasonal activities
    - Prevent dislocations in the marketplace
- Some rated as “useful”
- Three rated as “not important”
- Public had few informed, specific concerns about any of the exemptions

# Several Exemptions May Not Be Needed

<b>Exemption</b>	<b>Description</b>	<b>Reason</b>
§ 2.2-4002 A10	Regulations of the Dept. of General Services regarding inspection of State-owned and local education agency buildings for asbestos	Non-controversial – Fast-track process could be used
§ 2.2-4002 A17	State Board of Education guidelines concerning religious activity in public schools	Not regulations – VAPA does not apply
§ 2.2-4002 A10	State Board of Education guidelines relating to recitation of the pledge of allegiance	Not regulations – VAPA does not apply
§ 2.2-4002 A10	Virginia Small Business Financing Authority	Forms and guidelines – no regulatory activity
§ 2.2-4002 A10	Dept. of Mines, Minerals, and Energy regarding procedural policy related to risk-based mine inspections	Internal to agency – no regulatory activity

## Three Exemptions Should Be Discontinued

<b>Exemption</b>	<b>Description</b>	<b>Reason</b>
§2.2-4002 A16	Recommendations of the Virginia Medicaid Prior Authorization Advisory Committee regarding prescription drug coverage	Committee no longer exists
§2.2-4002 A24	Corporation established by the Commissioner of Agriculture and Consumer Services to promote, develop, and sustain markets for Virginia wineries	Corporation has no authority to promulgate regulations
§2.2-4006 A5	Preliminary program permit fees of the Dept. of Environmental Quality	Permanent fees have been established through VAPA

# Two Exemptions Should Be Modified

<b>Exemption</b>	<b>Modification</b>	<b>Reason</b>
§2.2-4002 A15	Limit exemption for the Virginia War Memorial Foundation to the setting of fees	No compelling reason for blanket exemption
§2.2-4006 A9	Remove reference to general wetlands permits issued by Marine Resources Commission	Blanket exemption already exists for commission

# Recommendations

- Amendments to the *Code of Virginia*
  - Remove the exemptions to the Virginia Administrative Process Act contained in sections 2.2-4002 A.16, 2.2-4002 A.24, and 2.2-4006 A.5.
  - Limit the exemption for the Virginia War Memorial Foundation to the setting of fees for use of its facilities.
  - Remove clause (d) of section 2.2-4006 A.9.

# Possible Consequences of Lengthy Rulemaking Process

- Increased need for exemptions to VAPA
- Likelihood of more emergency regulations
- Likelihood of more rulemaking bills during legislative session
- Likelihood of more rules being adopted through administrative actions where regulations would be more appropriate
- Greater confusion among the public

# Key Findings

- Long and unpredictable rulemaking timeframes create incentives for using exemptions
- Most exemptions are needed because fast action is required but not possible through standard VAPA process
- Executive branch review delays rulemaking process, and one aspect of the current executive order is not consistent with VAPA provisions
- Other states generally have shorter rulemaking timeframes and fewer exemptions than Virginia
- A few agencies account for majority of exempt regulations in Virginia
- Three exemptions should be discontinued and two others modified

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## **For More Information**

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