

MEMORANDUM

To: Rick Boucher
From: Marc Korman
Re: Virginia Ethics Rules

The following memorandum provides an overview of Virginia's current ethics laws. Topics include conflicts of interest and gifts; lobbyists; political contributions; and recent developments.

Conflict of Interest and Gift Rules

Virginia's underlying conflict of interests law dates to 1987.¹ The two major laws are the State and Local Government Conflict of Interests Act² and the General Assembly Conflicts of Interest Act.³ The laws largely parallel each other with the former applying to state and local government officials and employees and the latter applying to members of the General Assembly and—in some cases—candidates for the General Assembly.

¹ Prior to 1970, Virginia had a broad range of statutes addressing conflicts of interest. In 1970, the General Assembly enacted the Virginia Conflict of Interest Act, a comprehensive and far reaching statutory limitation on the conduct of public officers and employees. Concern remained that the 1970 law did not sufficiently alleviate conflicts of interest relating to the financial interests of public officials and employees in matters arising from the performance of their official duties and did not differentiate what restrictions were appropriate for what type of official. In 1983, the General Assembly replaced the law with the Comprehensive Conflict of Interest Act. But the Virginia Supreme Court interpreted the law in a manner found to be overly restrictive and it was replaced by the 1987 State and Local Government Conflicts of Interest Act and the General Assembly Conflict of Interest Act. The 1987 law still forms the basis for state conflict of interests law. *See Report of the Joint Subcommittee Studying The State and Local Government Conflict of Interest Act*, House Document No. 31 (2003) available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD312003/\\$file/HD31_2003.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD312003/$file/HD31_2003.pdf).

² VA. CODE ANN. §§ 2.2-3100 *et seq.*

³ VA. CODE ANN. §§ 30-100 *et seq.*

State and Local Government Conflict of Interests Act

Prohibited Conduct. No officer or employee of a state or local governmental or advisory agency shall:

- (1) Solicit or accept money or other thing of value for services performed within the scope of his or her official duties;
- (2) Offer or accept any money or other thing of value for—or in consideration—of obtaining employment, appointment, or promotion of any person with any governmental or advisory agency;
- (3) Offer or accept any money or other thing of value for or in consideration of the use of his or her public position to obtain a contract for any person or business;
- (4) Use for his or her own economic benefit or that of another party confidential information;
- (5) Accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him or her in the performance of his or her duties;
- (6) Accept any business or professional opportunity in order to influence performance of official duties;
- (7) Accept any honoraria for any appearance, speech, or article related to official duties;
- (8) Accept a gift from a person who has interests that may be substantially affected by the performance of official duties when the timing and nature of the gift would cause a reasonable person to question impartiality; and
- (9) Accept gifts from sources on a basis so frequent as to raise an appearance of the use of the public office for private gain.⁴

Gifts. The law also has a specific provision on gifts added in 2014.⁵ Any officer or employee of a local government or candidate required to file a disclosure form may not solicit,

⁴ VA. CODE ANN. § 2.2-3103.

⁵ The 2014 law is discussed further below.

accept, or receive any single tangible gift⁶ with a value in excess of \$250 or a combination of tangible gifts with an aggregate value in excess of \$250 from (1) a lobbyist; (2) lobbyist's principal;⁷ or (3) any party seeking to enter a contract with the local agency or state. They shall report any tangible gifts with a value of less than \$250 or any intangible gift.⁸ The same restriction applies to an officer or employee of a state governmental or advisory agency or candidate.⁹ During the pendency of a civil action to which the Commonwealth is a party, the Governor and Attorney General shall not solicit, accept, or receive any tangible gift from any person who is a party to such civil action.¹⁰ The Virginia Conflict of Interest and Ethics Advisory Council may adjust the \$250 figure every five years on the basis of inflation.¹¹

Waiting Period. There is a one year waiting period for the Governor, Lieutenant Governor, Attorney General, officers appointed by the Governor, officers and employees who report directly to agency heads and those immediately below that level, and officers and

⁶ A tangible gift is "a thing of value that does not lose its value upon the happening of a certain event or expiration of a given date." Examples include currency, negotiable instruments, securities, stock options, or other financial instruments. But it excludes payments or reimbursements received for any intangible gift. VA. CODE ANN. § 2.2-3103.1(A).

⁷ A lobbyist's principal is the "entity on whose behalf the lobbyist influences or attempts to influence." See VA. CODE ANN. 2.2-419.

⁸ VA. CODE ANN. § 2.2-3103.1(B). Intangible gift "means a thing of temporary value or a thing that upon the happening of a certain event or expiration of a given date loses its value." Examples given are entertainment, hospitality, a ticket, admission, or pass, transportation, lodgings, and meals. *Id.*

⁹ VA. CODE ANN. § 2.2-3103.1(C).

¹⁰ VA. CODE ANN. § 2.2-3103.1(D).

¹¹ VA. CODE ANN. § 2.2-3103.1(E).

professional employees of the legislative branch to act in a representative capacity for compensation before their agency.¹²

Contracts. The Governor, his political action committee, or the Governor's Secretaries may not knowingly solicit or accept a contribution, gift, or other item with a value greater than \$50 from any bidder, offeror, or private entity who has submitted a bid or proposal pursuant to the Virginia Public Procurement Act, Public-Private Transportation Act, or the Public-Private Education Facilities and Infrastructure Act between submission and execution if the value is \$5 million or more.¹³

Officers and employees of agencies of state government may not have a personal interest¹⁴ in a contract with their governmental agency. Furthermore, officers and employees may not have a personal interest in a contract with any other governmental agency unless such contract is awarded as the result of competitive sealed bidding and is found in the best interest of

¹² VA. CODE ANN. § 2.2-3104.

¹³ VA. CODE ANN. § 2.2-3104.01. Below, the reverse of this law is described wherein a bidder or offeror is also legally restricted from providing a contribution or gift during a procurement process.

¹⁴ "Personal Interest" is defined as "a financial benefit or liability accruing to an officer or employee or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, \$5,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business or governmental agency that exceeds, or may reasonably be anticipated to exceed, \$5,000 annually; (iv) ownership of real or personal property if the interest exceeds \$5,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; (v) personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business; or (vi) an option for ownership of a business or real or personal property if the ownership interest will consist of clause (i) or (iv) above." VA. CODE ANN. § 2.2-3101. The statute also has more specific definitions for "personal interest in a contract" and "personal interest in a transaction."

the public.¹⁵ Similarly, no person elected or appointed as a member of a local governing body shall have a personal interest in a contract with that governing body or component of that governing body, with some specified exceptions.¹⁶

Transactions. If an officer or employee has a personal interest in a transaction,¹⁷ they must disqualify themselves from participating in the transaction if the transaction has application solely to a property or a business in which he or she has a personal interest or a business that has a parent-subsidiary or affiliated business entity relationship with the business in which he has a personal interest. The personal interest shall also be disclosed. But there are exceptions that require disclosure but allow participation for:

- Transactions in which the officer or employee is a member of a business, profession, occupation, or group of three or more persons the members of which are affected by the transaction;
- When a party to the transaction is a client of his or her firm if he or she does not personally represent or provide services to such client; and
- It affects the public generally.¹⁸

¹⁵ VA. CODE ANN. § 2.2-3106.

¹⁶ VA. CODE ANN. § 2.2-3107. Similar restrictions apply to members of school board, VA. CODE ANN. § 2.2-3108, and officers and employees of local governmental agencies. VA. CODE ANN. § 2.2-3109.

¹⁷ A “transaction” is defined as “any matter considered by any governmental or advisory agency, whether in a committee, subcommittee, or other entity of that agency or before the agency itself, on which official action is taken or contemplated.” VA. CODE ANN. § 2.2-3101.

¹⁸ VA. CODE ANN. § 2.2-3112.

Disclosures. Twice a year, statewide elected officials, judges, and other specified government officials must file disclosure forms of their personal interests.¹⁹ Candidates for statewide office and local office have a separate filing requirement.²⁰

General Assembly Conflict of Interest Act

Prohibited Conduct. No legislator shall:

- (1) Solicit or accept money or other thing of value for services performed within the scope of his or her official duties;
- (2) offer or accept any money or other thing of value for—or in consideration—of obtaining employment, appointment, or promotion of any person with any governmental or advisory agency;
- (3) Offer or accept any money or other thing of value for or in consideration of the use of his or her public position to obtain a contract for any person or business;
- (4) Use for his or her own economic benefit or that of another party confidential information;
- (5) Accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him or her in the performance of his or her duties;
- (6) Accept any business or professional opportunity in order to influence performance of official duties;
- (7) During a one year period after termination of service as a legislator, represent a client or act in a representative capacity on any matter before the General Assembly;²¹
- (8) Accept any honoraria for any appearance, speech, or article related to official duties;

¹⁹ VA. CODE ANN. § 2.2-3114. Local government officers and employees have similar requirements. VA. CODE ANN. §§ 2.2-3115; 2.2-3116.

²⁰ VA. CODE ANN. § 24.2-502.

²¹ Note that the State and Local Government Conflict of Interests Act nests the waiting period provision elsewhere in the structure of the statute and not in the recitation of conduct that is prohibited. *See* VA. CODE ANN. § 2.2-3104.

(9) Accept appointment to serve on a body or board of any corporation, company, or other legal entity on which two other members of the General Assembly already serve that is operated for profit;

(10) Accept a gift from a person who has interests that may be substantially affected by the performance of official duties when the timing and nature of the gift would cause a reasonable person to question impartiality; and

(11) Accept gifts from sources on a basis so frequent as to raise an appearance of the use of the public office for private gain.²²

Gifts. The 2014 reform law also added the specific gift provision for legislators and candidates for the legislature, which is essentially identical to the provisions in the State and Local Government Conflicts of Interests Act described above and limits tangible gifts to \$250.

Contracts. Legislators may not have a personal interest in a contract with the legislative branch of state government or a contract with any government agency, other than in a contract of regular employment, unless such contract is awarded as a result of competitive sealed bidding or competitive negotiation.²³ There are several other carved out exceptions to the law (*e.g.*, it does not apply to legislators who authored or created materials used by institutions of higher education in Virginia or to contracts that do not exceed \$500).²⁴

Transactions. A legislator who has a personal interest in a transaction²⁵ shall disqualify him or herself from participating in the transaction but they may participate in debates provided he or she discloses the interest and does not vote on the transaction.²⁶

²² VA. CODE ANN. § 30.103.

²³ VA. CODE ANN. § 30-104.

²⁴ *See, e.g.*, VA. CODE ANN. §§ 30-105(E); 30-106.

²⁵ A “transaction” means “any matter considered by the General assembly, whether in a committee, subcommittee, or other entity of the General Assembly or before the General Assembly itself, on which official action is taken or contemplated.” VA. CODE ANN. § 30-100.

Disclosures. Legislators and legislators-elect for the General Assembly must all file disclosure statements of personal interest twice a year.²⁷ Candidates for the General Assembly have a separate filing requirement.²⁸

Lobbyists

Lobbyists in Virginia must register prior to engaging in lobbying and on an annual basis.²⁹ Lobbyists may not be employed for compensation by an officer, board, institution, or agency of the Commonwealth.³⁰ State political party chairs or full-time paid employees of political parties may not be engaged as lobbyists.³¹ Lobbyists must also file semiannual reports of expenditures, including gifts, for each principal for whom he or she lobbies.³²

Political Contributions

Contribution Limits. Virginia's campaign contribution rules are among the most lax in the nation. According to the National Conference of State Legislatures, Virginia is just one of six states to allow unlimited contributions to candidates by individuals, a state party, a political action committee, a corporation, or a union.³³ Campaign fundraising is prohibited by members

²⁶ VA. CODE ANN. § 30-108. The rules of each chamber may override the provision allowing debate by those with interests in transactions.

²⁷ VA. CODE ANN. § 30-110.

²⁸ VA. CODE ANN. § 24.2-502.

²⁹ VA. CODE ANN. § 2.2-422.

³⁰ VA. CODE ANN. § 2.2-434.

³¹ VA. CODE ANN. § 2.2-435.

³² VA. CODE ANN. § 2.2-426.

³³ See http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2012-2014.pdf. The other states are Alabama, Missouri, Nebraska, Oregon, and Utah.

of the General Assembly, statewide officials, and their campaign committees during the regular legislative session.³⁴

Independent Expenditures. Virginia has an independent expenditure reporting rule, requiring any person, candidate, campaign committee, or political committee that makes independent expenditures in the aggregate of \$1,000 for a statewide election or \$200 for any other election to maintain records and report.³⁵ Reports must be made within 24 hours of the funds being expended or materials are published/broadcast to the public.³⁶

Filing of Campaign Finance Reports. For non-election years, candidates with November elections³⁷ must file campaign finance reports twice a year.³⁸ In election years, candidates must file far more frequently starting on April 15, eight days before the primary, on a monthly basis through October, and eight days before the general election.³⁹

Certain large contributions must also be reported outside of the normal filing periods. Any single \$5,000 contribution for statewide office; \$1,000 contribution for the General Assembly; or \$500 for any other office received on and after the 12th day preceding the primary or general election must be reported in writing to the Board of Elections.⁴⁰

³⁴ VA. CODE ANN. § 24.2-954,

³⁵ VA. CODE ANN. § 24.2-945.2.

³⁶ *Id.*

³⁷ A different schedule is set for candidates for local office with May elections. *See* VA. CODE ANN. §24.2-947.7. Similarly, a different schedule applies for special elections. *See* VA. CODE ANN. §24.2-947.8.

³⁸ VA. CODE ANN. §24.2-947.6(A).

³⁹ *Id.*

⁴⁰ VA. CODE ANN. § 24.2-947.9.

Political action committees, political party committees, referendum committees, and inaugural committees each have their own reporting schedules.⁴¹

Miscellaneous Provisions

Bribery of executive, legislative, or judicial officers, or candidates for such offices, is a criminal offense in Virginia.⁴²

Bidders or offerors who submit bids or proposals to executive branch agencies may not make a contribution, gift, or other item of value greater than \$50 to the Governor, his political action committee, or the Governor's Secretaries. The provision does not apply to contracts awarded as the result of competitive sealed bidding.⁴³

Recent Developments

Two recent actions have been taken in an attempt to strengthen Virginia's ethics law.

Governor's Executive Order

Governor McAuliffe signed Executive Order Number 2 on January 11, 2014. The Executive Order:

- Banned officers and employees of the Executive Branch and their immediate family members from soliciting anything of value or accepting—directly or indirectly—any gift from any lobbyist or from any principal or employee or agent of a principal.
- Banned officers and employees of the Executive Branch and their immediate family members from accepting directly or indirectly any gift valued at over \$100 from any one source, singularly or in the aggregate over the course of a calendar year. But a receipt of anything of value with a value of \$25 or less does not count towards the \$100 cumulative total.

⁴¹ VA. CODE ANN. § 24.2-949.6; VA. CODE ANN. § 24.2-950.6; VA. CODE ANN. § 24.2-951.4; VA. CODE ANN. § 24.2-951.5; VA. CODE ANN. § 24.2-951.6; VA. CODE ANN. § 24.2-952.4

⁴² VA. CODE ANN. §§ 18.2-438; 18.2-439.

⁴³ VA. CODE ANN. § 2.2-4376.1.

- Established the Executive Branch Ethics Commission made up of three Governor-appointed members to provide written opinions as to whether an action violates the executive order and to enforce the Executive Order if there is an alleged violation by the Governor or a member of the Governor's cabinet.⁴⁴

New Ethics Law

In 2014, the Virginia General Assembly passed a reform package to the Commonwealth's ethics laws. The new law:

- Required lobbyists to file disclosure reports twice a year instead of annually;
- Restricted tangible gifts to governmental officials, legislators, and candidates in excess of \$250 or multiple gifts aggregating to \$250 per year from lobbyists, lobbyist's principal, or a party—or someone seeking to become a party—to a contract;
- Required government officials, legislators, and candidates to report their personal interests twice a year instead of annually; and
- Established the Virginia Conflict of Interest and Ethics Advisory Council consisting of 15 members appointed by legislative leaders, the Governor, and from names recommended by Virginia counties and municipalities and subject to General Assembly confirmation to advise on ethics, enforce the law, and conduct ethics orientation sessions for new members of the General Assembly.⁴⁵

Governor McAuliffe vetoed the portion of the Commonwealth's Biennial Budget funding the Council. In vetoing that portion of the budget, Governor McAuliffe explained:

I am vetoing the appropriation for the newly created Virginia Conflicts of Interest and Ethics Advisory Commission. The ethics reform bill passed by the General Assembly was far weaker than what Virginians deserve of proper ethics reform.⁴⁶

⁴⁴ See Executive Order No. 2 available at <https://governor.virginia.gov/news/newsarticle?articleId=2562>.

⁴⁵ See HB 1211 available at <http://lis.virginia.gov/cgi-bin/legp604.exe?141+ful+CHAP0792+pdf>.

⁴⁶ See Statement of Governor Terence McAuliffe on 2015-2016 Budget Actions available at <https://governor.virginia.gov/news/newsarticle?articleId=5216>.

Another criticism of the law is that it did not place limits on “intangible gifts” such as entertainment, hospitality, transportation, lodgings, and meals. Although there are reporting requirements for intangible gifts, they are not subject to the \$250 limit.⁴⁷

⁴⁷ See, e.g., Michael Laris, Va. Moves To Tighten Ethics Rules, But Not Too Much, Wash Post, March 1, 2014, available at http://www.washingtonpost.com/local/virginia-politics/va-moves-to-tighten-ethics-rules-but-not-too-much/2014/03/01/93391db6-9fbc-11e3-b8d8-94577ff66b28_story.html; Laura Vozzella, McAuliffe Does Not Make Substantive Changes to Virginia Ethics Bill, Wash. Post, April 7, 2014, available at http://www.washingtonpost.com/local/virginia-politics/mcauliffe-does-not-make-substantive-changes-to-virginia-ethics-bill/2014/04/07/ab67bfcc-bea8-11e3-b574-f8748871856a_story.html.