

TO: Members of the Integrity Commission
FROM: David Jonas, Office of the Counselor to the Governor
RE: Conflict of Interest Rules for Board and Commission Members
DATE: 10/31/2014

Executive Summary

Under Articles 3 and 4 of Virginia's State and Local Government Conflict of Interests Act, members of boards and commissions (like other state and local government officers and employees) are prohibited from having personal interests in contracts and transactions their boards consider.¹ The law requires them to disqualify themselves and to disclose details about the nature of their personal interest in these cases. Enforcement of these rules is the responsibility of the Attorney General.

The law provides generous exemptions to these rules and employs such broad language that many restrictions regarding conflicts of interest can be circumvented. For example, even if a transaction were to have a direct financial benefit to a board member's business or profession, he or she can simply disclose that interest and participate in the transaction.² Likewise, outside of issuing advisory opinions, oversight and enforcement is intermittent, as the law provides little more than authority of the Attorney General to appoint attorneys to prosecute potential violations.

As a result, the Commission may want to consider offering recommendations along the lines of these options:

- Tighten the scope of exemptions related to personal interests, for example, by removing the ability for members to disclose a personal interest and still participate in a transaction or authorize the signing of a contract.
- Eliminate most exemptions and allow for an ethics commission to offer waivers when there is no evidence that participating in a transaction would lead a reasonable person to question the impartiality of that board member.
- For boards or commissions made up of members overseeing their own professions, allow an ethics commission to issue rules and policies governing appropriate conduct.
- Give oversight and enforcement authority to an ethics commission to investigate potential conflicts of interest and impose penalties, such as civil penalties or temporary disqualification of board members.

¹ <http://law.lis.virginia.gov/vacodefull/title2.2/chapter31/>

² Virginia code § 2.2-3112.2

Definition of Personal Interests

Under Virginia’s conflict of interest laws, appointed board and commission members (regardless of whether or not they receive compensation for their service) are considered “officers” and thus subject to restrictions regarding personal interests.

There are three types of personal interests that the law addresses:

1. **Personal Interest:** “a financial benefit or liability accruing to an officer or employee or to a member of his immediate family.”³ This interest must be at least 3 percent equity in a business, entail annual income or personal benefit exceeding \$5,000 a year, or involve real or personal property owned by the member valued at more than \$5,000.⁴
2. **Personal Interest in a Contract:** “means a personal interest that an officer or employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in a business that is a party to the contract.”⁵
3. **Personal Interest in a Transaction:** “means a personal interest of an officer or employee in any matter considered by his agency. Such personal interest exists when an officer or employee or a member of his immediate family has a personal interest in property or a business or governmental agency, or represents or provides services to any individual or business and such property, business or represented or served individual or business (i) is the subject of the transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction.”⁶

Exemptions Relating to Transactions

When it comes to personal interests in transactions, a state and local government employee or officer (which would include a board or commission member) is required to “disqualify himself from participating in the transaction if the transaction has application solely to property or a business or governmental agency in which he has a personal interest or a business that has a parent-subsidary or affiliated business entity relationship with the business in which he has a personal interest...”⁷

However, these definitions carry with them significant exceptions:

1. A member may participate in the transaction if “he is a member of a business, profession, occupation, or group of three or more persons the members of which

³ <https://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+30-101>

⁴ Virginia Code § 2.2-3101

⁵ Ibid.

⁶ Ibid.

⁷ § 2.2-3112.1

are affected by the transaction, and he complies with the declaration requirements...”⁸

2. A member may participate in the transaction “when a party to the transaction is a client of his firm if he does not personally represent or provide services to such client and he complies with the declaration requirements...”⁹
3. A member may participate in the transaction if “it affects the public generally, even though his personal interest, as a member of the public, may also be affected by that transaction.”¹⁰

And if a transaction requires so many members of the board to disqualify themselves that they do not meet the minimum number of participants to act, then “the remaining member or members shall constitute a quorum for the conduct of business and have authority to act for the agency by majority vote, unless a unanimous vote of all members is required by law, in which case authority to act shall require a unanimous vote of remaining members.”¹¹

Exemptions Relating to Contracts

When it comes to contracts, board members (like other state and local government officers and employees) are prohibited from having personal interests “in a contract with the governmental agency of which he is an officer or employee, other than his own contract of employment,” or “unless such contract is (i) awarded as a result of competitive sealed bidding or competitive negotiation (ii) is awarded after a finding, in writing, by the administrative head of the governmental agency that competitive bidding or negotiation is contrary to the best interest of the public.”¹²

There are over 30 enumerated exemptions in the statute. These exemptions include (but are not limited to) personal interests emanating from:

1. An immediate family member’s business with a state institution of higher education. (§ **2.2-3106.2**)
2. Contracts of employment for an officer’s own agency. (§ **2.2-3106.3**)
3. Contracts for sale of goods or services at uniform prices made available to the public. (§ **2.2-3106.4**)
4. Textbooks and other educational materials. (§ **2.2-3106.5**)
5. Further exemptions if an employee or officer is a member of a county board of supervisors, city council, or town council. (§ **2.2-3107**)

⁸ § 2.2-3112.2

⁹ § 2.2-3112.3

¹⁰ § 2.2-3112.4

¹¹ § 2.2-3112 Section C

¹² § 2.2-3112 Sections A and B

6. Further exemptions if an employee or officer is a member of a local school board. (§ 2.2-3108)
7. Further exemptions if an employee or officer is serving as an officer or employee of a local governmental agency. (§ 2.2-3109)
8. The sale of property between an officer and a governmental agency, subject to disclosure requirements. (§ 2.2-3110.1)
9. An officer whose sole personal interest in a contract with the governmental agency is by reason of income from the contracting firm or governmental agency in excess of \$10,000 per year, provided the officer or employee or a member of his immediate family does not participate in the procurement. (§ 2.2-3110.3)
10. Contracts between an officer's governmental agency and a public service corporation, financial institution, or company furnishing public utilities in which the officer or employee has a personal interest, provided the officer disqualifies himself. (§ 2.2-3110.6)

Illustrative Examples of Specific Boards and Commissions

- The **Tobacco Indemnification and Community Revitalization Board** is a 31-member board that has awarded more than \$1 billion in grants since its founding in 1999. In its enabling legislation, all it states regarding conflicts of interest is that “Members and employees of the Commission shall be subject to the standards of conduct set forth in the State and Local Government Conflict of Interests Act (§ 2.2-3100) and may be removed from office for misfeasance, malfeasance, nonfeasance, neglect of duty, or misconduct in the manner set forth therein.”¹³ There are also provisions barring the use of confidential information for private purposes.¹⁴
- The **Virginia Board of Optometry** is a 6-member board that develops the licensing standards to practice as an optometrist.¹⁵ By law, it must be composed of five optometrists and one citizen member. The enabling statute makes no mention of conflicts of interest.
- The **Virginia Potato Board** is a 7-member board that oversees the Virginia Potato Fund, which finances research, education, advertising, and publicity for potato-growers in Virginia. The enabling statute makes no mention of conflicts of interest.¹⁶

¹³ § 3.2-3102 Section C

¹⁴ § 3.2-3111

¹⁵ § 54.1-3207

¹⁶ § 3.2-1804

Policy Considerations

As can be seen, exemptions surrounding conflicts of interest for board members are generous and employ broad language. Board members can routinely participate in transactions where a personal interest would otherwise exist by simply disclosing details of the personal interest to the rest of the committee. There are also loopholes that allow for influencing decision-making outside of participation in the formal decision-making process.

Many of these exceptions have been written into law for good reason. Many professional boards require members to have a professional background in the field they are advising or issuing regulations. If restrictions were too tight, few boards could function as currently constructed, because their members are professionals working in the same field that they are overseeing.

As for oversight, enforcement of these rules is the responsibility of the Attorney General. Outside of issuing advisory opinions requested by board members, oversight and enforcement is intermittent, as the law provides little more than authority of the Attorney General to appoint attorneys to prosecute potential violations. Given the large number of boards and commissions in Virginia, this may be seen as an inadequate regime to faithfully oversee conflicts of interest in Virginia.

The Commission may want to consider offering recommendations along the lines of these options:

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