

Interim Report of the Commission on Integrity and Public Confidence in State Government

Governor Terry McAuliffe signed Executive Order 28 on Sept. 25, 2014, establishing the Commission on Integrity and Public Confidence in State Government. He instructed its co-chairmen, former Congressman Rick Boucher and former Lt. Gov. Bill Bolling, and the other eight commission members, who are evenly divided in partisan affiliation, to produce recommendations that will guide him in his pursuit of a better state government that is more accountable to the citizens of the Commonwealth.

“I am creating this commission because it is imperative that we foster a culture of professionalism in state government that attracts future leaders of the highest caliber,” Governor McAuliffe said during his announcement at the state Capitol. “I want to guarantee superior service to the next generation of Virginians. And I want to establish an enduring culture of integrity on which this state can prosper. These are not merely my values. They are the essential covenant of democracy.”

The commission’s interim report focuses on ethics laws and policies. Gov. McAuliffe asked the commission to put this subject at the top of its list and to make interim recommendations by Dec. 1, 2014, with the goal of having the commission’s recommendations considered during the Virginia General Assembly’s 2015 session.

Given the two-month time frame and the importance of their task, commission members approached their assignment with urgency and a sense of purpose. They held two meetings at the State Capitol, each lasting several hours, conducted a public hearing in Charlottesville and reached broad bipartisan consensus on reform recommendations.

In the commission's first meeting, on Oct. 27, 2014, members adopted a set of guiding principles and received presentations on existing state ethics laws, previous reform efforts and best practices in other states. Commission members then engaged in a wide-ranging discussion of reform proposals and organized their work into five topics:

- **Ethics oversight and enforcement**
- **Gifts and loans**
- **Conflicts of interest**
- **Disclosure requirements**
- **Post-public service restrictions**

The commission's second meeting, on Nov. 14, 2014, was primarily devoted to a thorough discussion of the details of the proposed reforms and adoption of the interim recommendations reflected in this report.

At the beginning of their work, co-chairmen Boucher and Bolling signaled their commitment to public participation in the commission's work. They upheld that commitment by holding a public forum to receive public comment on Nov. 6, 2014, hosted by the University of Virginia's School of Law and the Center for Politics. Virginians from as far away as Norfolk, Loudoun County and Roanoke, in addition to a number of residents from the Charlottesville area, attended the forum and shared their ideas with commission members.

The commission also established a website, <https://governor.virginia.gov/integrity-commission/>, and received a large number of comments from individuals, all posted online along with formal testimony submitted by various organizations. The commission's website also makes available to the public a variety of research documents collected by the commission, news articles and background material on the

commission's work, along with audio recordings of both full commission meetings and the public forum.

“Many hours have been invested by all members of the commission in the development of these recommendations. By imposing an overall limit on both tangible and intangible gifts to public officials, creating an independent ethics review commission with investigative and enforcement authority, and strengthening Virginia's conflict of interests prohibitions, these interim recommendations constitute a major step forward in the effort to ensure that in Virginia no interest comes before the public interest,” said Co-chairman Boucher.

“These issues are complex, and they are crucial to regaining the public's trust in their leaders,” said Co-chairman Bolling. “We have taken our mission seriously, and these recommendations represent our collective effort to provide the Governor with realistic and meaningful reforms.”

Ethics Oversight and Enforcement

Accountability: We believe in meaningful enforcement of the rules and laws that govern ethical conduct, campaign finance and lobbying. We favor oversight by an independent commission with the authority and resources to serve as an effective watchdog for the public.

Current Virginia Practice: Oversight of conflicts of interest of legislative, executive and local government officials and lobbyist disclosures is handled by the newly-created Virginia Conflict of Interest and Ethics Advisory Council (VCIEAC).¹ The Council is largely made up of appointees chosen by the legislature.

Complaints are registered with the Council, which then transmits the complaints to the ethics advisory panel for either the House or Senate. Legislators accused of violations are subject to hearings by the panel, and the proceedings are confidential. If the violation was made unknowingly, the matter is resolved by the House or Senate. If it was made knowingly, the matter is referred to the Attorney General.

Proposal – Establish an independent, seven-member Ethics Review Commission to oversee ethics issues related to executive and legislative branch officials, local government officials and members of boards and commissions. Members of the commission could not be holders of any compensated Virginia state or local government office.

The Speaker and minority leader of the House of Delegates and the majority and minority leaders of the State Senate would each appoint one member. At least one member appointed by each chamber will be a retired lawmaker. The Governor will appoint three members to the Commission, including one retired city official, one retired county official and one retired justice of the Supreme Court of Virginia or a retired judge from the Virginia Court of Appeals or a circuit court. The Governor will

¹ § 30-355: <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+30-355>

consult with organizations representing Virginia cities and counties in the selection of local government appointments. Commission members will be appointed for a term of three years, and the terms of the members will be staggered to ensure continuity.

Responsibilities and authorities of the Ethics Review Commission include:

- Provide advisory opinions and educational opportunities to public officials
- Investigate malfeasance, disclosure and ethics complaints filed with the commission
- Initiate investigations
- Issue civil penalties and refer criminal cases to the appropriate law enforcement authority
- Receive and maintain disclosure forms of public officials and lobbyists
- Conduct regular random audits of disclosure documents
- Create and manage an online database of disclosure forms accessible to the public and media
- Consider and act on applications for waivers from public officials for certain gifts, including third-party reimbursed travel expenses for activities directly related to the performance of their official duties

The Ethics Review Commission would receive an appropriation sufficient to hire the legal and administrative staff necessary to effectively and efficiently fulfill its responsibilities.

Analysis: This recommendation is at the core of the commission's interim recommendations. Other reforms we propose presume the existence of an independent watchdog with the authority to implement random audits, to initiate investigations of potential violations of ethics laws and policies, rather than merely react to external complaints, and to issue appropriate sanctions and waivers when necessary and appropriate.

However, commission members also felt strongly that the proposed Ethics Review Commission's primary purpose should not be punitive in nature. Rather, the new panel's staff would devote a substantial part of their time to providing guidance to those who seek advice in an earnest effort to avoid error.

The commission engaged in much discussion over the issue of civil penalties and how best to balance the need for meaningful enforcement with the desire to ensure that the penalty range would be reasonable given the circumstances of individual matters the commission may consider. While the commission decided not to spell out the range of penalties that might be imposed, we suggest that the Governor consider the establishment of appropriate penalty parameters in drafting legislation. In doing so, it may be useful to examine the range of penalties that under current law may be imposed by the Board of Elections.

The commission also desires to ensure that the work of the Ethics Review Commission occurs with adequate transparency to ensure public trust, while also encouraging individuals to seek advice in good faith. The commission recommends that formal written opinions be posted on the Ethics Review Commission website along with the name of the individuals seeking the opinions.

In order to further understanding of and compliance with ethical rules, the Ethics Review Commission may receive anonymous informal oral requests for advice about how current ethical rules apply to given factual situations. Answers may be provided by staff members of the commission on a confidential basis. Online information about such informal oral requests should be noted in the commission's annual reports based on the category of the requesters, such as government officials, media and the public.

This recommendation is the only one approved by the commission without a unanimous vote, a reflection of its complexity. It was adopted 8-1. Mr. Malveaux expressed concerns related to the separation of powers and noted his preference for separate Ethics Review Commissions with oversight over the legislative and executive branches. Other members

expressed confidence that a commission with members appointed by both branches passes constitutional analysis, and legal advice has affirmed that opinion.

Gifts and Loans

Integrity: We believe in strong, clear and realistic rules guiding gifts and loans offered to public officials and their immediate family members, including restrictions on high-value items and equitable policies covering both tangible and intangible gifts.

Current Virginia Practice: Tangible gifts valued at more than \$250 given to elected officials or most executive-level officials by a registered lobbyist, a lobbyist's principal, or a party—or someone seeking to become a party—to a contract are prohibited.² There are no limits on intangible gifts such as travel, meals, or entertainment. Members must disclose gifts they or their immediate family members receive in excess of \$50 (or \$100 cumulatively). Gifts from personal friends are not prohibited but may need to be disclosed. (The disclosure form indicates that gifts from personal friends “for reasons clearly unrelated to your public position” are exempt.) Legislators are required to file semi-annual disclosures of economic interests such as gifts, loans, and travel.³

Governor McAuliffe's Executive Order: Officers and employees of the executive branch and their immediate family members may not accept anything of value from any lobbyist or from any principal or employee or agent of a principal. Any gift valued at more than \$100 from any one source, singularly or in the aggregate, over the course of a calendar year is banned, but any gift with a value of \$25 or less does not count toward the \$100 cumulative total.

Proposal: Prohibit gifts (tangible and intangible) to legislators, executive-level officials, local government officials, board and commission members, their spouses and dependents exceeding \$250 in aggregate, over a calendar year, from any one source, and require officials to disclose any gift exceeding \$100. Additional provisions include:

- Allow for the Ethics Review Commission to provide waivers for third-party sponsored travel that exceeds the gift limit for activities directly related to public duties. Detailed itinerary, agenda and estimated costs must be provided to the

²§ 30-103.1: <https://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+30-103.1>

³ § 30-110: <https://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+30-110>

Ethics Review Commission and will be subject to public disclosure. Waivers shall be posted on the Ethics Review Commission website within 48 hours of approval. In determining whether to grant waivers, the Ethics Review Commission would evaluate the purpose of the trip as revealed by the detailed agenda in light of the public official's duties and responsibilities. Duration of trips will be limited.

- Disclosure forms to reveal dates of the travel, destination, purpose of the travel, the sponsoring entity and the amount expended for the travel by the sponsoring entity.
- Standard exemptions would be provided for travel reimbursement by a government entity. This exemption does not apply to travel reimbursed by a foreign government.
- Bundled gift” is defined as a gift delivered by any person comprised of separate gifts derived from another person, organization, or group of persons or organizations. The value of any bundled gift must be reported along with the identities of the individuals, groups or organizations that contributed to it. The full value of the gift counts toward the \$250 aggregate cap on gifts in a calendar year for each of the contributors. The full value also must be used for determining disclosure requirements.
- Exemptions would be provided for unsolicited, personally-inscribed awards of appreciation or recognition in the form of a plaque, trophy, wall memento, or similar item given in recognition of public, civic, charitable, or professional service.
- Any loan to officials, their spouses or dependent children in excess of \$5,000 that is not from a commercial lender must be pre-cleared by the Ethics Review Commission and reported on disclosure forms.
- Gifts and loans among immediate family members of public officials are exempt. Gifts to public officials, their spouses or dependent children from personal friends in excess of the \$250 annual aggregate limit are subject to review and provision of a waiver by the Ethics Review Commission. In determining whether to grant a waiver, the Commission will consider the nature and length of the friendship as revealed in an application for a waiver filed by the official.

Analysis: The commission retained the \$250 cap on gifts that exists in the Code of Virginia, but significantly strengthens the law in two important ways:

First, the \$250 cap covers only tangible gifts under current law. The commission's recommendation would greatly expand that restriction to cover all gifts, both tangible and intangible. At least one watchdog group has noted that the vast majority of gifts reported by legislators are intangibles, including meals, tickets and trips.

Second, the limits recommended by the commission apply broadly to all givers. Under existing law, those limits apply only to gifts received from lobbyists, a lobbyist's principal or a party – or someone seeking to become a party – to a state contract.

The recommendation also gives the independent Ethics Review Commission authority to issue waivers for travel after reviewing the details of a request and determining whether the trip serves a legitimate purpose related to the official's duties and responsibilities. The Ethics Review Commission also is given authority to issue waivers in certain cases involving gifts exceeding \$250 from personal friends.

The commission included standard exemptions for certain government-reimbursed travel, gifts and loans among immediate family members, and for personally-inscribed rewards.

Conflict of Interests

Trust: We believe in broad-based, consistent policies that ensure financial decisions made by public boards are not colored by personal, familial or business interests of individual members.

Current Virginia Practice: Legislators are prohibited from voting on matters in which they have a personal interest in the result of a question.⁴ A personal interest is defined as “a financial benefit or liability accruing to a legislator or to a member of his immediate family.”⁵ 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.

Members sitting on a board or commission are subject to Virginia’s State and Local Government Conflict of Interests Act. Unless spelled out in the statute establishing the board or commission, appointees are not required to recuse themselves from awarding grants or influencing decisions that may have a direct financial benefit to immediate family members, personal friends or close business associates, even when the law requires them to disclose a personal interest.⁶

Proposal - Prohibit members of boards and commissions from voting, authorizing grants, awarding contracts, issuing opinions or otherwise influencing a decision that directly benefits the interests of themselves, an immediate family member or business associate.

For purposes of the commission’s interim recommendations, “immediate family” shall be defined as spouses, children (regardless of whether they are legal dependents), siblings, parents and grandchildren. The definition applied in these recommendations

⁴ Rule 69 in the House: <http://lis.virginia.gov/cgi-bin/legp604.exe?141+ful+HR65ER> Rule 36 in the Senate: <http://hodcap.state.va.us/publications/SenateRules.pdf>

⁵ <https://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+30-101>

⁶ Virginia code § 2.2-3112.2

does not affect the definition of immediate family in other sections of the Code of Virginia.

Analysis: This topic generated the swiftest consensus among commission members. Indeed, Co-chairman Bolling several times expressed his surprise that the conduct described in the recommendation was not already prohibited.

Yet members also acknowledged the complexity of this area of law, given the many types of officials and boards and commissions who are covered by sometimes confusing rules.

This recommendation would strengthen the law in several respects. First the commission supports a clear prohibition against voting by board and commission members on any matter in which a conflict of interests exists. Second, the commission proposes a definition of immediate family that expands the scope of the prohibition. Finally, the commission recommends an expanded definition of conflicts of interests to include business associates.

Disclosure Requirements

Transparency: We believe in disclosure of information about public officials' economic interests in a manner that promotes access, clarity and consistency.

Current Virginia Practice: Legislators, all elected executives and public employees must fill out disclosure forms detailing their economic interests in any gifts they've received. These statements of economic interests must be filed with the Secretary of the Commonwealth twice a year.⁷ Lobbyists must fill out disclosure forms related to their activities and compensation. The content and format of these forms are spelled out in statute; therefore, altering or updating the forms requires a separate act by the General Assembly.

Proposal - Remove prescribed formatting of disclosure forms from the statutes and give the power to draft, amend and distribute forms to the Ethics Review Commission. The Code would still outline the categories of information required for disclosure. The Ethics Review Commission will offer detailed guidance on how these forms should be filled out. Additional provisions include:

- Require that disclosure forms be filed electronically and that the Ethics Review Commission develop an online, searchable database of these forms.
- Disclosure forms may be submitted electronically by local officials via their local clerk. However, responsibility for ensuring that the forms are filed in a timely manner remains with the official.
- Require individuals who file the longer Statement of Economic Interests to do so semiannually, while individuals who file the shorter financial disclosure form shall do so annually.
- Require that all travel and gift waivers approved by the Ethics Review Commission are disclosed on the website within 48 hours.

⁷ § 30-110: <https://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+30-110>

- The Ethics Review Commission shall approve, reject or request modifications to a waiver request within 10 business days of receipt.

Analysis: The goals of the commission are to improve flexibility in amending the required contents of disclosure forms while also improving transparency. Again, the existence of a new Ethics Review Commission is crucial to meeting that two-pronged goal. Members strongly agreed that the disclosure forms should not be frozen in the Code of Virginia.

Rather, the Ethics Review Commission should have the authority to revise the short and long forms to ensure that the contents are meaningful, and to update them as needed in future years.

Finally, full transparency demands that the Ethics Review Commission provide online access to the disclosure forms for public examination.

Post-Public Service Restrictions

Loyalty: We place a high value on post-governmental employment policies that ensure public servants during their time in office are motivated solely by the desire to protect the public's interest in all matters.

Current Virginia Practice: Virginia law states that: “For one year after the termination of public employment or service, no state officer or employee shall, before the agency of which he was an officer or employee, represent a client or act in a representative capacity on behalf of any person or group, for compensation, on matters related to legislation, executive orders, or regulations promulgated by the agency of which he was an officer or employee.”⁸

Proposal – The current one-year lobbying ban is consistent with other states' practices and requires no change.

Clarify state law to ensure that the one-year restriction on representation by former Cabinet secretaries covers all agencies within their secretariats.

Analysis: Commission members learned during their first meeting that only eight states restrict lobbying for more than one year after an individual has left public employment or service. They concluded that the provision in existing law is appropriate and does not require a change.

During the commission's second meeting, Del. May called attention to language in the statute that could be interpreted to permit a former Cabinet secretary to lobby agencies within his or her former secretariat without abiding by the one-year waiting period. The commission recommends the adoption by the General Assembly of language clarifying that the prohibition on lobbying by former cabinet secretaries extends to all agencies within the Secretariat over which they presided.

⁸ <https://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+2.2-3104>