

# COIA Workshop

Virginia Mayors Institute - VML

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Presented by

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# **Conflict of Interests Act**

**Chapter 31 of Title 2.2 of the Code of Virginia (1950), as amended**

“Almost everyone in politics nowadays has at least one conflict of interest.”

— Kenneth Eade, *Terror on Wall Street*, a Financial Metafiction Novel

# Purpose

- General Assembly sought to ensure:
  - All levels of government remain untainted by corruption by prohibiting involvement of legislative members in certain activities, contracts or votes wherein their judgment would be clouded by personal interests. No “personal interests” in a “transaction.”
  - A common body of law on the subject of conflicts of interests for local and state officers or employees throughout the Commonwealth (Virginia Code § 2.2-3100).
  - Disclosure of certain types of interests by elected and some appointed officials, annually and before certain votes.

# Generally

- This presentation is general in nature.
- This presentation is NOT a substitution for reading the Act and receiving advice from your attorney or Commonwealth's Attorney or COIA Council.
- This presentation is not a substitute for advice on your specific fact pattern.
- You should read the Virginia State and Local Government Conflict of Interests Act online in various places, including the COIA Council website, which links to the Virginia Legislative Information Services website.
- COIA Council website also has helpful opinions.

# Generally

- Most prohibitions and requirements regarding involvement in transactions (votes) and in contracts center around whether there is a “personal interest” in the transaction or contract.
- Thus, the Act’s definition of “personal interest” is an important place to start. Generally, it only refers to certain types of FINANCIAL INTERESTS.

# Definitions

- **“Personal Interest” Defined:**
- A financial benefit or liability accruing to an officer or employee or to a member of his immediate family by virtue of;
  - Ownership in a business, or an option to buy in, if the ownership interest exceeds three percent of the total equity of the business, or would result in ownership of real or personal property valued in excess of \$5,000;
  - Annual income that exceeds, or may reasonably be anticipated to exceed, \$5,000 from ownership in real or personal property or a business;

# Definitions

- **“Personal Interest” (Contd.):**
- A financial benefit or liability accruing to an officer or employee or to a member of his immediate family by virtue of;
  - Salary, other compensation, fringe benefits from the use of property, or any combination thereof, paid or provided by a business that exceeds, or may reasonably be anticipated to exceed, \$5,000 annually;
  - 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; and/or
  - Personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the total equity of the business.



# Definitions

- "Immediate family" means (i) a spouse and (ii) any other person who resides in the same household as the officer or employee and who is a dependent of the officer or employee.
- It does NOT mean many people the public may think should not get a financial benefit from your actions.

# Transactions

- Official action generally prohibited when personally interested in a transaction, and requires disclosure and often disqualification from consideration of the transaction.
- But... Certain types of personal interests that (1) affect many people (e.g., business, profession, occupation, industry, groups of 3 or more) or (2) if a party to transaction is client of firm but no personal representation do allow participation after disclosure and disclaimer of 2.2-3115(H).

# Transactions

- Disclosure and disclaimer of 2.2-3115(H) mandates either verbal or written filed disclosure and disclaimer of the personal interest in every case.
- Option of complying with other disclosure and disclaimer requirements in writing in advance or, if time does not allow, the next business day. Verbal disclosure is also mandated in large group situation.

# Transactions

- Disclosure and disclaimer of 2.2-3115(H) for large groups is a statement of “(i) the transaction involved, (ii) the nature of the officer's or employee's personal interest affected by the transaction, (iii) that he is a member of a business, profession, occupation, or group the members of which are affected by the transaction, and (iv) that he is able to participate in the transaction fairly, objectively, and in the public interest. “

# Transactions

- Disclosure and disclaimer of 2.2-3115(H) for firm client situation is a statement of “(i) the transaction involved, (ii) that a party to the transaction is a client of his firm, (iii) that he does not personally represent or provide services to the client, and (iv) that he is able to participate in the transaction fairly, objectively, and in the public interest.”

# Definition

- “Transaction” means 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.
- Includes votes but also consideration beforehand if official action may be “contemplated.”

# The Quorum Exception

- The “Savings Clause” or “Safe Harbor” provisions of 2.2-3112(D) allows the remaining members of a body to constitute a quorum to take action if disqualification under the Act would result in fewer than the number of members required to act.
  - This does require a disqualification under the Act and not a mere absence or even recusal for some other reason.

Subsection (C) has similar savings clause regarding representing self or immediate family member.

# Disclosure Forms (2.2-3115)

- Members of every governing body and school board of counties and cities (and towns over 3,500 population)
  - Must file as a condition of assuming office;
  - Thereafter, must file annually on or before February 1;
  - File the form specified in 2.2-3117 (Statement of Economic Interests) with personal interests and other information required therein;
  - Note: These requirements have changed three times over the past three years, changing filing dates and frequency—Stay Tuned!



# Disclosure Forms (2.2-3115)

- “Persons occupying such positions of trust” appointed and required by governing bodies to file by ordinance (or appointed and required by school boards by “adopted policy”):
  - Must file as a condition of assuming position;
  - Thereafter, must file annually on or before February 1;
  - File the form specified in 2.2-3117 (Statement of Economic Interests) with personal interests and other information required therein;

# Disclosure Forms (2.2-3115)

- Authorities: Members of the governing body of local or regional authorities having the power to issue bonds or expend funds in excess of \$10,000 in any fiscal year:
  - Must file as condition to assuming office the form set forth in 2.2-3118 (Financial Disclosure Statement—shorter form, less reporting);
  - UNLESS: governing body of the locality (BOS or Council) requires the Authority to file the 2.2-3117 Statement of Economic Interests;
  - And thereafter, file on or before Feb. 1<sup>st</sup>.

# Disclosure Forms (2.2-3115)

- Nonsalaried citizen members of local boards, commissions and councils designated by the governing body:
  - Must file as condition to assuming office the form set forth in 2.2-3118 (Financial Disclosure Statement);
  - Question: “designated by the governing body”; the statute does not say “by ordinance” here.
  - And thereafter, file on or before Feb. 1<sup>st</sup> .

# Disclosure Forms (2.2-3115)

Following local officials are required to file the Real Estate Disclosure (counties, cities and in towns over 3500 pop.) per § 2.2-3115 (G):

- Planning commission members
- Members of board of zoning appeals
- Real estate assessors
- County, city, or town managers
- Executive officers

Same reporting dates and deadlines (before taking office/job, and then by Feb. 1<sup>st</sup>), but form is real estate-focused.

# What Must Be Disclosed?

- The forms specifically set out the required disclosures, but among other things, filers generally must disclose:
  - Liabilities (to any one creditor); securities (in any one business); annual salary and wages (from any one employer); and interests in real estate, etc. in excess of \$5,000
  - Payments in the past 6 months for talks, meetings and publications of more than \$100 where designed to educate the person or enhance skills on issues relevant to duties as officer or employee of public body.

# What Must Be Disclosed?

(continued...)

- Compensation in excess of \$1,000 for representation of any business before any state governmental agency
- Gifts or entertainment with a value in excess of \$50
- The Virginia COIA Council website has the forms which need to be completed, and instructions on how to do so.

<http://ethics.dls.virginia.gov/conflict-of-interest.asp#officials>

# Gifts: Disclosure

- Must disclose gifts to officer/employee (or member of immediate family) if they exceed \$50 and are received from:
  - Registered Lobbyist;
  - Lobbyist's Principal;
  - A person, organization or business who is a party to a contract with the officer/employee's governmental body, or any person seeking such a contract
- If value of a single gift exceeds \$100 in a calendar year, or a combination of gifts from same lobbyist, etc. exceeds \$100 in a calendar year, it is prohibited to accept it.
  - If combination of gifts less than \$20 each, it does not count for aggregation to the \$100 limit

# Gifts: Exceptions

- Note: the Act does NOT prohibit gifts from family members and friends, and the limits and reporting requirements would not apply unless the gift-giver is a lobbyist, lobbyist's principal, or someone who has or is seeking a contract with your public body
- There have been a number of revisions in the past 3 years. Shifting landscape. Seek assistance of the COIA Council or local government attorney.



# Gifts: Exceptions

What is NOT a gift?

- Offers of tickets, admissions, coupons, etc., unless actually used;
- Honorary degrees;
- Athletic, merit, or need based scholarships;
- Campaign contributions already disclosed due to another Act;
- Travel paid for by the federal government or already disclosed due to another Act.

# Gifts: Exceptions

What is NOT a gift? (contd.)

- Gifts related to private profession or volunteer service of self or family;
- Food or beverages while attending event in performance of official duties;
- Food, beverages and admission fees – if featured speaker or lecturer;
- Plaques, mementos, trophies (unsolicited);

# Gifts: Exceptions

What is NOT a gift? (contd.)

- Travel for official duties;
- Devise or inheritance
- Gifts less than \$20 in value;
- Attendance at reception where food can be conveniently consumed standing and walking
- Additional exceptions

# Prohibited Contracts

- An officer or employee of a local government may not have a personal interest in any contract with their own entity (other than their own contract of employment).
- This prohibition extends to contracts where the spouse or family member of the officer or employee has a personal interest of \$5,000 or more in the business. '95 Va. A.G. Op. at 2.
- An officer or employee of a local government may not have a personal interest in a contract with ANY OTHER AGENCY that is a component of the officer's or employee's agency. (Some very specific exceptions)

# General Prohibitions

- Officers and employees cannot accept money or other item of value from a private source for doing what they are legally obligated to do by nature of their position as an officer or employee.
- Use of confidential information for the officer or employee's own personal or another's benefit is not permitted.
- Accept money or other thing of value for using influence to obtain a public contract for someone or some entity.

# Violations

- In the past, knowingly violating any part of the Act constitutes a Class 1 misdemeanor. (Certain violations constitute Class 3 for local officers) As of January 1, 2017, knowing and intentional misstatement on the Statement of Economic Interests (Long Form) is a **Class 5 Felony!**
- Violations of the Act constitute malfeasance in office.
- Contracts or purchases made in violation of the Act may be declared void and rescinded by the governing body.
- Forfeiture of monies or profits by transactions in violation of the Act.

# Violations and Alleged Violations

- Political Fallout
  - The largest of most tangible penalty for violations and even alleged violations, in most cases.
  - Be aware of this, and if in doubt, over-comply.

# What if You Think You Have a Conflict?

- Ask the opinion of the Commonwealth's Attorney or the Conflicts of Interests and Ethics Advisory Council.
- Virginia Code § 2.2-3121 provides that no officer or employee shall be prosecuted if their actions were made in good faith reliance upon the written opinion issued by either.



# What if You Think You Have a Conflict?

- Your request must be in writing;
- Opinion issued to you must be in writing;
  - Full disclosure of facts;
  - Reliance in good faith;
  - Any opinion issued will be a public record subject to disclosure under VFOIA.
- Written opinion of local government attorney admissible, but does not confer immunity.

# What if You Think You Have a Conflict?

- Even without immunity, the advice of your local government attorney is important, as often your attorney will have insights and best practices in your locality to share.
- COIA is complex, and it is best to ask your counsel (and others named above) early and often.

# What if You Think You Have a Conflict?

- Remember that the Conflicts Act is a **MINIMUM STANDARD**, and should not be the end of your consideration of your behavior.
- The public thinks that many things that are **NOT**, in fact, conflicts **ARE** conflicts. Remember that often, perception is reality but for you, perception is almost always a reality.

# Questions?

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