

11-1-2015

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Recommended Citation

Christopher R. Nolen & Jeffrey S. Palmore, *Election Law and Government Ethics*, 50 U. Rich. L. Rev. 143 (2015).

Available at: <https://scholarship.richmond.edu/lawreview/vol50/iss1/7>

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ELECTION LAW AND GOVERNMENT ETHICS

Christopher R. Nolen *
Jeffrey S. Palmore **

INTRODUCTION

While the 2014–2015 period brought relatively modest changes to election law, it saw substantial changes in Virginia’s ethics laws for legislators, other public officials, and lobbyists. This article surveys developments in Virginia election and government ethics laws for 2014 and 2015, with an emphasis on legislative developments. The focus is on those statutory developments that have significance or general applicability to the implementation of Virginia’s election and ethics laws. Consequently, not every election-related bill approved by the General Assembly is discussed.

I. ELECTION LEGISLATION

A. *General Administration*

1. Officers of Election

During the 2014 session, the General Assembly adopted changes related to “officers of election,” those individuals who staff an electoral precinct on Election Day. First, the General Assembly approved legislation to allow the chief officer of election and assistant officer of election to be not affiliated with a political party.¹ Prior to this legislation, the Code required the electoral board

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1. See Act of Apr. 23, 2014, ch. 777, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-115 (Cum. Supp. 2015)).

to ensure these individuals represented different political parties.² With this change, if individuals representing the two major parties are unavailable, the electoral board may appoint individuals to serve as chief and assistant officer of election, provided that the electoral board gives the parties at least ten days notice.³

The General Assembly also adopted a change regarding the removal of officers of election. Legislation passed that allows electoral board members to request removal of an officer of election because of a familial relationship to a candidate on the ballot.⁴ Previously, such requests could only be made by a candidate.⁵

2. Boards of Election

The day after an election, the electoral board meets to ascertain the results of the election.⁶ The board may also meet several days during the week after the election to consider provisional ballots and other matters.⁷ Prior to 2014, the board could only adjourn “from day to day,” meaning it had to reconvene the following day.⁸ Following legislation enacted in 2014, the board may now instead adjourn to later in the week.⁹

3. Registrars

Every four years, electoral boards appoint a general registrar for their locality.¹⁰ The registrar must be a qualified voter for that locality, with an exception for cities surrounded by one county.¹¹ The General Assembly considered legislation in 2015 that would have permitted the registrar to be a resident of the locality he or she serves or of a contiguous county or city.¹² Governor McAuliffe,

2. VA. CODE ANN. § 24.2-115 (Repl. Vol. 2011).

3. *Id.* § 24.2-115 (Cum. Supp. 2015).

4. *See* Act of Mar. 31, 2014, ch. 410, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-117 (Cum. Supp. 2015)).

5. VA. CODE ANN. § 24.2-117 (Repl. Vol. 2011).

6. *Id.* § 24.2-671 (Cum. Supp. 2015).

7. *Id.*

8. *Id.* (Repl. Vol. 2011).

9. *Id.* (Cum. Supp. 2015).

10. *Id.* § 24.2-110 (Repl. Vol. 2011).

11. *Id.*

12. H.B. 1473, Va. Gen. Assembly (Reg. Sess. 2015).

however, vetoed this legislation, stating that “[t]here has been no demonstration of widespread difficulty in recruiting well-qualified individuals to serve as general registrars.”¹³

Also during the 2015 session, the General Assembly approved legislation that transferred a number of responsibilities from the electoral board to the general registrar.¹⁴ These duties are primarily ministerial duties and range from witnessing in-person absentee ballot applications, to delivering voter assistance forms, and to duties related to the local filing of campaign finance records.¹⁵ For some of these responsibilities, the authority was previously shared by the electoral board and the registrar; in other cases, the responsibility shifted from the electoral board to the registrar.¹⁶

4. State Board of Elections

The General Assembly has paid attention over the last two years to ensuring the accuracy of the Virginia voter rolls and preventing individuals from being registered in multiple states. In 2014, the General Assembly added a requirement that the State Board of Elections (the “Board”) prepare an annual report detailing its actions to maintain the integrity of the voter registration system.¹⁷

In 2015, the General Assembly expanded the Board’s specific responsibilities for finding duplicate voter registrations and voters who no longer live in Virginia.¹⁸ Previously, the Board had a duty to work with other states to develop systems to keep voter rolls up-to-date, prevent duplicate registrations,¹⁹ and request voter lists from neighboring states.²⁰ The 2015 legislation requires

13. Governor’s Veto Explanation, H.B. 1473 (Mar. 30, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+amd+HB1473AG>.

14. See Act of Mar. 26, 2015, chs. 644 & 645, 2015 Va. Acts __, __ (codified as amended at multiple parts of VA. CODE ANN. tit. 24.2).

15. *Id.*

16. See *id.*

17. Act of Mar. 31, 2014, ch. 452, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-404(F) (Cum. Supp. 2015)).

18. Act of Mar. 27, 2015, ch. 713, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-404.4 (Cum. Supp. 2015)).

19. VA. CODE ANN. § 24.2-404 (Repl. Vol. 2011).

20. *Id.* § 24.2-404 (Cum. Supp. 2014).

that the Board use data received through voter list comparisons with other states to identify duplicate registrations and otherwise maintain the accuracy of the voter list.²¹

The General Assembly also changed the date that the Board meets to ascertain the results of the November election. From 2015 forward, the Board will meet on the third Monday in November.²² Previously, the Board met on the fourth Monday in November.²³

5. Removal of Officers

The Code of Virginia includes a list of grounds for which a circuit court can remove from office an elected officer or someone who has been appointed to an elected office after receipt of a petition signed by enough voters to equal 10% of people who voted in the last election for that office.²⁴ These grounds include certain criminal offenses as well as neglect of duty and misuse of office.²⁵ In 2014, the General Assembly added to the list of grounds for removal a number of sexual crimes, including sexual battery, attempted sexual battery, consensual sex with a minor, and indecent exposure, provided that the conviction has a material adverse impact on the holding of the office.²⁶

B. *Conduct of Elections*

1. Filings

With 2014 legislation, the legislature streamlined the process for the transmission of lists of candidates who have filed statements of economic interests.²⁷ Prior to enactment of this legisla-

21. Act of Mar. 27, 2015, ch. 713, 2015 Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-404.4 (Cum. Supp. 2015)). The 2015 amendments also substitute “Department” or “Department of Elections” for “State Board” throughout title 24.2. *See generally* VA. CODE ANN. § 24.2 (Cum. Supp. 2015).

22. VA. CODE ANN. § 24.2-679 (Cum. Supp. 2015).

23. *Id.* (Repl. Vol. 2011).

24. *Id.* § 24.2-233 (Cum. Supp. 2015).

25. *Id.*

26. Act of Apr. 4, 2014, ch. 566, 2014 Va. Acts __, __ (codified at VA. CODE ANN. § 24.2-233(4) (Cum. Supp. 2015)).

27. See Act of Apr. 1, 2014, ch. 473, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 24.2-502, -511 (Cum. Supp. 2015)).

tion, all lists of candidate filers were sent to the Board.²⁸ Following this new legislation, lists of candidates for statewide offices and the General Assembly making filings are sent to the Board, and lists of candidates for local offices making filings are sent to the *local* electoral board.²⁹ The legislation also requires that party leadership certify the date of nomination whenever certifying a candidate who has been nominated by a method other than a primary.³⁰

2. Voter Registration

Senator Jill Vogel proposed legislation in 2015 that would have required a registrar to cancel the voter registration of any voter for whom notice has been sent to the Department of Motor Vehicles under the Driver License Compact that the voter has moved out of Virginia.³¹ Though the legislation passed both houses unanimously, Governor McAuliffe proposed an amendment to make such cancellation permissive rather than mandatory, keeping that part of the Code unchanged.³² The Senate rejected the Governor's proposed amendment 15-25,³³ and the Governor subsequently vetoed the legislation, stating that it would make Virginia non-compliant with the National Voter Registration Act requirements related to list maintenance.³⁴

3. Ballots

Following legislation in 2014, ballots will now have more specific language regarding the number of candidates for which to cast a vote. Under this legislation, in an election where only one candidate can be elected, the ballot will say, "Vote for only one."³⁵

28. VA. CODE ANN. § 24.2-502 (Repl. Vol. 2011).

29. *Id.* (Cum. Supp. 2015).

30. *Id.* § 24.2-511 (Cum. Supp. 2015).

31. S.B. 1350, Va. Gen. Assembly (Reg. Sess. 2015).

32. Governor's Recommendation to S.B. 1350 (Mar. 27, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+amd+SB1350AG>.

33. Senate Roll Call Vote on Governor's Recommendation to S.B. 1350 (Apr. 15, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+vot+SV1060SB1350+SB1350>.

34. Governor's Veto Explanation, S.B. 1350 (May 1, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+amd+SB1350AG>.

35. Act of Apr. 4, 2014, ch. 568, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-613 (Cum. Supp. 2015)).

The previous ballot language, "Vote for not more than . . ." will remain on the ballot for any office to which more than one candidate can be elected.³⁶

4. Absentee Ballots

The law around absentee ballots garnered a great deal of attention during the 2014 and 2015 sessions. First, the legislature adopted several provisions to ensure that an absentee ballot would not be invalidated because of a technical deficiency with the return of the ballot. Failure to print the date that the voter signed the statement on the back of the ballot envelope cannot be grounds for voiding a ballot.³⁷ Failure to provide the voter's middle name or middle initial shall not void a ballot, provided the voter provides his or her full first and last name.³⁸ Failure to seal the inner envelope containing the ballot is not grounds for invalidation of the ballot, provided the outer mailing envelope is sealed.³⁹

Under legislation passed in 2014, a voter who requests an absentee ballot but returns it prior to election day may vote a regular ballot in the election, provided the locality has confirmed the return of the unused ballot.⁴⁰ Prior to enactment of this legislation, a voter who returned his ballot could only cast a provisional ballot.⁴¹ If the locality cannot confirm the return of the ballot, the voter will vote using a provisional ballot.⁴²

One change regarding the permissible reasons for voting absentee took effect in 2015. In order to vote absentee, voters must meet one of the requirements provided in Virginia Code section 24.2-700, and one of the enumerated qualifications is inability to

36. *Id.*

37. Act of Apr. 4, 2014, ch. 574, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-707 (Cum. Supp. 2015)).

38. Act of Apr. 4, 2014, ch. 575, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-707 (Cum. Supp. 2015)); Act of Mar. 31, 2014, ch. 453, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-707 (Cum. Supp. 2015)).

39. Act of Apr. 4, 2014, ch. 580, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-709 (Cum. Supp. 2015)).

40. Act of Apr. 4, 2014, ch. 600, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-708 (Cum. Supp. 2015)).

41. See VA. CODE ANN. § 24.2-708 (Supp. 2012).

42. *Id.* (Cum. Supp. 2015).

vote on the designated day because of an obligation of the voter's religion.⁴³ Previously, the voter had to state the nature of his or her religious obligation.⁴⁴ Under legislation passed in 2015, the voter now must only state that an obligation exists and need not elaborate on the nature of the obligation.⁴⁵

The General Assembly made several changes to Virginia's statutory provisions related to the Uniformed Military and Overseas Voters Act (UMOVA). The legislation transferred from localities to the state Department of Elections the responsibility for preparing election information to be used with a federal write-in absentee ballot that outlines the anticipated offices and measures for an upcoming election.⁴⁶ These notices shall be provided to a UMOVA voter by the Department of Elections without cost.⁴⁷ Additionally, statewide paper ballots for UMOVA voters will only be available for those voting in presidential elections.⁴⁸ For other elections, these voters can use the federal write-in absentee ballot.⁴⁹ This legislation also repealed section 24.2-702 of the Code, which addressed early absentee ballots for statewide Virginia offices, because of Virginia's transition to the federal write-in absentee ballot.⁵⁰

The General Assembly considered legislation in 2014 that would establish a means for electronic delivery of voted ballots by UMOVA voters.⁵¹ The General Assembly approved the measure but included a reenactment clause stating that it only becomes effective if enacted by the 2016 General Assembly session.⁵² In the meantime, the legislation directs the Board to convene a working

43. *Id.* § 24.2-700 (Repl. Vol. 2011 & Cum. Supp. 2015).

44. *Id.* § 24.2-701 (Repl. Vol. 2011).

45. Act of Mar. 17, 2015, ch. 314, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-701 (Cum. Supp. 2015)).

46. Act of Mar. 17, 2015, ch. 313, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-701 (Cum. Supp. 2015)).

47. VA. CODE ANN. § 24.2-166 (Cum. Supp. 2015).

48. Act of Mar. 17, 2015, ch. 313, 2015 Va. Acts __, __ (codified at VA. CODE ANN. § 24.2-612 (Cum. Supp. 2015)).

49. VA. CODE ANN. § 24.2-702.1 (Cum. Supp. 2015).

50. Act of Mar. 17, 2015, ch. 313, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-612 (Cum. Supp. 2015)); *see also* Department of Planning and Budget, Fiscal Impact Statement, H.B. 2397 (Feb. 25, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+oth+HB2397FER122+PDF>.

51. Act of Apr. 3, 2014, ch. 506, 2014 Va. Acts __, __ (awaiting confirmation by 2016 Va. Gen. Assembly; to be codified as amended at VA. CODE ANN. § 24.2-706).

52. *Id.* (fourth enactment clause).

group to study the issue and to develop best practices for electronic delivery of completed ballots.⁵³

The General Assembly debated legislation that would require absentee voters to submit a copy of their voter identification card with their absentee ballot applications.⁵⁴ This requirement would not have applied to UMOVA voters.⁵⁵ The House passed the legislation 62-34, and the Senate passed it 20-17.⁵⁶ Governor McAuliffe vetoed the legislation, saying it would “result in the disenfranchisement of qualified eligible Virginian voters and increase the potential for costly and time-consuming litigation.”⁵⁷ The General Assembly was unable to override the veto.⁵⁸

5. Voter Identification

Following significant changes to Virginia’s voter identification laws in 2012 and 2013,⁵⁹ the 2014 and 2015 sessions brought only relatively minor changes to this area of election law. First, the General Assembly clarified that a voter’s name in the pollbook need not match exactly to the name printed on the voter’s identification.⁶⁰ The names must either be “identical . . . or substantially similar.”⁶¹ Second, photo identification from a Virginia private school was added to the list of acceptable forms of identification for voting.⁶²

53. *Id.* (second and third enactment clause).

54. H.B. 1318, Va. Gen. Assembly (Reg. Sess. 2015).

55. *Id.*

56. History of H.B. 1318, <http://leg1.state.va.us/cgi-bin/legp504.exe?151+sum+HB1318> (last visited Oct. 1, 2015).

57. Governor’s Veto Explanation, H.B. 1318 (Mar. 27, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+amd+HB1318AG>.

58. History of HB 1318, <http://leg1.state.va.us/cgi-bin/legp504.exe?151+sum+HB1318> (last visited Oct. 1, 2015).

59. *See, e.g.*, Act of Mar. 25, 2013, ch. 725, 2013 Va. Acts 1315, 1317–19 (codified as amended at VA. CODE ANN. §§ 24.2-643, -701 (Cum. Supp. 2013)); Act of Mar. 23, 2013, ch. 703, 2013 Va. Acts 1264, 1264–66 (codified as amended at VA. CODE ANN. §§ 24.2-643, -701 (Cum. Supp. 2013)); *see also* Christopher Nolen & Jeff Palmore, *Annual Survey of Virginia Law: Election Law*, 47 U. RICH. L. REV. 181, 183–86 (2012) (discussing the 2012 changes to Virginia’s voter identification laws).

60. Act of Mar. 16, 2015, ch. 134, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-643 (Cum. Supp. 2015)).

61. VA. CODE ANN. § 24.2-643 (Cum. Supp. 2015).

62. *Id.*

6. Authorized Representatives

Authorized representatives are representatives of political parties who observe an election from inside polling places.⁶³ These representatives must be authorized by party leadership in order to serve.⁶⁴ Pursuant to a change in 2015, a state or district party chairman may authorize a representative if the local unit chairman is unavailable to sign a designation statement.⁶⁵ If there is a conflict, the city or county chairman's designation remains superior to any state or district chairman's designation.⁶⁶ The legislature also changed what equipment an authorized representative may have with him in the polling place.⁶⁷ Prior to this statutory change, authorized representatives could not use a handheld wireless communications device if it had a camera or other imaging capability.⁶⁸ Under the 2015 change, such devices are permitted, but the representative may not use them to take a photo or video inside the polling place.⁶⁹

7. Elections

In order to reduce wait times at polling places, the General Assembly approved legislation in 2015 that makes two important changes for populous precincts. First, the legislation will require precincts with more than 4000 registered voters to have at least five officers of election during presidential elections.⁷⁰ Second, any precincts with more than 4000 registered voters that use ballot scanners must have at least two scanners for a presidential election.⁷¹ The locality's governing body may waive this requirement

63. *See id.* § 24.2-604 (Cum. Supp. 2015).

64. *See id.*

65. *Id.* § 24.2-604 (Cum. Supp. 2015).

66. *Id.*

67. *Id.*

68. *Id.* § 24.2-604 (Rep. Vol. 2011).

69. *Id.* (Cum. Supp. 2015).

70. Act of Mar. 26, 2015, ch. 667, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-115 (Cum. Supp. 2015)).

71. Act of Apr. 15, 2015, ch. 740, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-627(B) (Cum. Supp. 2015)); Act of Mar. 26, 2015, ch. 667, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-627(B) (Cum. Supp. 2015)).

if it determines, after consulting with the registrar and the electoral board, that a second scanner is not necessary based on prior turnout and wait times.⁷²

The legislature also authorized audits of ballot scanner machines in order to study the accuracy of the machines.⁷³ The machines may be examined if the margin in the election was wide and the electoral board consents.⁷⁴ This provision replaces a previous audit pilot program.⁷⁵

Following the resignation of Representative Eric Cantor before the end of his term in the U.S. House of Representatives, a unique situation presented itself wherein there was an election and a special election for the same office on the same day.⁷⁶ Voters elected David Brat to the remainder of Cantor's term and also elected Brat to a full term in the House of Representatives.⁷⁷ The General Assembly responded by attempting to prevent a repeat of this practice. The General Assembly passed legislation stating that no special election may be held if the date of the election is within seventy-five days of the end of the term to be filled by the election.⁷⁸ Additionally, the legislation would have allowed an individual elected to a vacant seat to take office as soon as the individual is qualified and takes the oath of office.⁷⁹ Governor McAuliffe vetoed both bills, citing a conflict with Virginia Code section 24.2-228.1 regarding court-ordered elections to fill vacancies in certain constitutional offices.⁸⁰

72. Act of Apr. 15, 2015, ch. 740, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-627(B) (Cum. Supp. 2015)); Act of Mar. 26, 2015, ch. 667, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-627(B) (Cum. Supp. 2015)).

73. Act of Apr. 4, 2014, ch. 576, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-671.1(A) (Cum. Supp. 2015)); Act of Apr. 3, 2014, ch. 540, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-671.1(A) (Cum. Supp. 2015)).

74. VA. CODE ANN. § 24.2-671.1(A) (Cum. Supp. 2015).

75. Compare *id.* § 24.2-671.1(A) (Cum. Supp. 2015), with *id.* § 24.2-671.1(A) (Repl. Vol. 2011).

76. Markus Schmidt, *McAuliffe Sets Nov. 4 Special Election for Cantor's Seat*, RICH. TIMES-DISPATCH (Aug. 5, 2014, 3:35 PM), http://www.richmond.com/news/Virginia/article_9cc0204e-1cd7-11e4-9e4f-001a4bcf6878.html.

77. Larry O'Dell, *After Toppling Eric Cantor, Dave Brat Wins His Seat*, PROGRESS-INDEX (Nov. 5, 2014, 4:30 PM), <http://www.progress-index.com/article/20141105/NEWS/141109850>.

78. S.B. 1066, Va. Gen. Assembly (Reg. Sess. 2015); H.B. 1296, Va. Gen. Assembly (Reg. Sess. 2015).

79. *Id.*

80. Governor's Veto Explanation, H.B. 1296 (Apr. 30, 2015), <http://leg1.state.va.us/cgi->

Also on the topic of special elections, the General Assembly passed two bills dealing with the filling of vacant local offices. One bill requires special elections for filling vacancies in local offices to be held at the next general election, depending on whether that office is normally filled in May or November.⁸¹ If the next general election is less than ninety days away, the special election shall be on the second general election date.⁸² The governing body or school board may petition the court for a different election date.⁸³

The second bill clarifies that any local charter provision providing for succession to a constitutional office is void insofar as it conflicts with the succession established by the Code.⁸⁴ The law states that the highest ranking deputy in the office serves as the interim officer until a special election is held.⁸⁵

Following an election, electoral boards send a list of individuals who voted to the state.⁸⁶ Following 2015 legislation, localities with electronic pollbooks must now send the list to the Department of Elections within fourteen days following the election, down from sixty days.⁸⁷ Localities with printed pollbooks must send the list within seven days after the pollbooks are released from the clerk of court.⁸⁸

C. Campaign Finance and Advertisements

The 2014–2015 period was one of relatively little change in the areas in the laws governing campaign finance and campaign advertisements. In the area of campaign finance, the General Assembly addressed the reporting of large financial contributions

bin/legp504.exe?151+amd+HB1296AG; Governor's Veto Explanation, S.B. 1066 (Apr. 30, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+amd+SB1066AG>.

81. Act of Apr. 1, 2014, ch. 476, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-226(A) (Cum. Supp. 2015)).

82. *Id.*

83. *Id.*

84. Act of Mar. 26, 2015, ch. 648, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-228.1(B) (Cum. Supp. 2015)).

85. VA. CODE ANN. § 24.2-228.1(B) (Cum. Supp. 2015).

86. *See id.* § 24.2-406(A) (Cum. Supp. 2015).

87. Act of Mar. 27, 2015, ch. 712, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-406(A) (Cum. Supp. 2015)).

88. *Id.*

just before an election.⁸⁹ In the final days before an election, candidates must report large contributions their campaigns receive no later than the day after receiving the contribution.⁹⁰ The law in place prior to this legislation did not align this reporting schedule with the regular periodic campaign finance disclosures, such that a candidate would have to make an immediate disclosure of a large contribution and include it on a simultaneous periodic filing.⁹¹ The new legislation provides that the periodic filing covers the period through the twelfth day before the election and the next-day filings of large contributions begin the next day.⁹²

In the arena of political advertisements, the General Assembly included campaign yard signs in the definition of “print media” for the purposes of political campaign advertisement regulation.⁹³ This will mean that yard signs will require disclosures identifying the person or committee that paid for the sign.⁹⁴ The legislation includes an exception for signs paid for or distributed prior to July 1, 2015.⁹⁵

D. *Redistricting*

In the past, the legislature has passed bills to adjust legislative district lines between redistricting cycles.⁹⁶ In 2014, one such bill making adjustments to several Senate districts reached Governor McAuliffe’s desk.⁹⁷ Governor McAuliffe vetoed the bill, saying that the legislation raised “significant legal and policy concerns.”⁹⁸

89. Act of Mar. 26, 2015, ch. 646, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-947.9(B) (Cum. Supp. 2015)).

90. VA. CODE ANN. § 24.2-947.9(B) (Cum. Supp. 2015).

91. *Id.* §§ 24.2-947.6 to -947.9 (Repl. Vol. 2011).

92. Act of Mar. 26, 2015, ch. 646, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 24.2-947.6 to 24.2-947.9 (Cum. Supp. 2015)).

93. *See* Act of Mar. 23, 2015, ch. 573, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 24.2-955.1 (Cum. Supp. 2015)).

94. VA. CODE ANN. §§ 24.2-956, -956.1 (Cum. Supp. 2015).

95. *Id.*

96. *See, e.g.*, Act of Mar. 5, 2008, ch. 395, 2008 Va. Acts 581 (codified as amended at VA. CODE ANN. §§ 24.2-302.1(D), -303.3(D), -304.03(D) (Repl. Vol. 2011 & Cum. Supp. 2015)) (altering Congressional, Senate, and House of Delegates districts in York County and the City of Newport News based on 2007 changes to the boundary lines); Act of Mar. 22, 2003, ch. 824, 2003 Va. Acts 1136 (codified as amended at VA. CODE ANN. §§ 24.2-303.2) (altering a number of Senate districts).

97. S.B. 310, Va. Gen. Assembly (Reg. Sess. 2014).

98. Governor’s Veto Explanation, S.B. 310 (Apr. 7, 2014), <http://leg1.state.va.us/cgi->

First, he said that the legislation potentially conflicts with Article II, Section 6 of the Virginia Constitution, which requires decennial redistricting.⁹⁹ He also stated that the legislation creates “a terrible precedent” and “undermine[s] the trust of our citizens in their government.”¹⁰⁰ The Senate sustained the Governor’s veto, preventing enactment of the legislation.¹⁰¹

In 2015, the same events repeated themselves. This time, six bills making adjustments to House and Senate districts reached the Governor’s desk.¹⁰² The Governor vetoed all six bills, providing the same concerns in his explanation as in the prior year.¹⁰³ While the House voted to override the veto, the Senate “passed by” the vote, effectively sustaining the Governor’s veto and preventing the proposed changes from becoming law.¹⁰⁴

II. VIRGINIA GOVERNMENT ETHICS REFORM

In the wake of the charges brought against, and subsequent trial of, former Governor Robert F. McDonnell, the General Assembly made two attempts at “ethics reform” legislation. In 2014, through an executive order, the Governor instituted ethics rules for certain executive branch employees.¹⁰⁵ The 2014 and 2015 ethics legislation focused on the three primary ethics laws in Virgin-

[bin/legp504.exe?141+amd+SB310AG](#).

99. *Id.*

100. *Id.* (“Allowing the legislature to make substantive changes to electoral districts more frequently than once a decade injects further partisanship into a process that I regard as already too partisan.”).

101. History of S.B. 310, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=141&typ=bil&val=sb310> (last visited Oct 1, 2015).

102. H.B. 1332, Va. Gen. Assembly (Reg. Sess. 2015); H.B. 1417, Va. Gen. Assembly (Reg. Sess. 2015); H.B. 1699, Va. Gen. Assembly (Reg. Sess. 2015); S.B. 986, Va. Gen. Assembly (Reg. Sess. 2015); S.B. 1084, Va. Gen. Assembly (Reg. Sess. 2015); S.B. 1237, Va. Gen. Assembly (Reg. Sess. 2015).

103. Governor’s Veto Explanation, H.B. 1332 (Mar. 26, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+amd+HB1322AG>; Governor’s Veto Explanation, H.B. 1417 (Mar. 26, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+amd+HB1417AG>; Governor’s Veto Explanation, H.B. 1699 (Mar. 26, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+amd+HB1699AG>; Governor’s Veto Explanation, S.B. 986 (Mar. 26, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+amd+SB986AG>; Governor’s Veto Explanation, S.B. 1084 (Mar. 26, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+amd+SB1084AG>; Governor’s Veto Explanation, S.B. 1237 (Mar. 26, 2015), <http://leg1.state.va.us/cgi-bin/legp504.exe?151+amd+SB1237AG>.

104. Minute Book, Va. Senate (Apr. 15, 2015), <http://lis.virginia.gov/cgi-bin/legp604.exe?151+min+SM0415>.

105. Exec. Order No. 33 (2014) (Nov. 14, 2014).

ia: the State and Local Conflicts of Interest Act (the “SLCOIA”), the General Assembly Conflicts of Interest Act (the “GACOIA”), and the statutes governing the registration and disclosure of expenditures by lobbyists (the “Lobbying Act”).¹⁰⁶

A. *Ethics Reform—Part I*

Because the 2015 General Assembly changed several aspects of the ethics legislation that was enacted in 2014, this section will focus only on the reforms enacted in 2014 that were not significantly revised by the 2015 legislation.

In 2014, the General Assembly enacted legislation that established the Virginia Conflict of Interest and Ethics Advisory Council, which would be comprised of legislators, representatives from two local government advocacy groups, appointees of the Governor, and a designee of the Attorney General.¹⁰⁷ The Council was given the responsibility to accept and make publicly available lobbyist disclosure statements and statements of economic interests filed by certain public officials, and to render opinions and advice as to the new rules concerning ethics.¹⁰⁸

In 2014, the General Assembly clarified that the provisions of the SLCOIA and GACOIA “do not preclude prosecution for any violation of any criminal law of the Commonwealth, including [certain bribery statutes], and do not constitute a defense to any prosecution for such a violation.”¹⁰⁹ This provision makes clear that compliance with the disclosure requirements and other sections of the applicable conflicts of interest statute does not prevent prosecution under Virginia’s criminal law.

The 2014 ethics legislation also required more frequent filing of certain disclosure reports. A lobbyist’s disclosure statement, detailing the amount of money spent on lobbying and entertaining

106. VA. CODE ANN. §§ 2.2-418 to -435 (Repl. Vol. 2014 & Cum. Supp. 2015); VA. CODE ANN. §§ 2.2-3100 to -3131 (Repl. Vol. 2014 & Cum. Supp. 2015); VA. CODE ANN. §§ 30-100 to -129 (Repl. Vol. 2011 & Cum. Supp. 2015).

107. Act of Apr. 23, 2014, chs. 792 & 804, 2014 Va. Acts __, __ (codified at VA. CODE ANN. § 30-348 (Cum. Supp. 2014)) (codified as renumbered at VA. CODE ANN. § 30-355 (Cum. Supp. 2015)).

108. VA. CODE ANN. § 30-356 (Cum. Supp. 2015).

109. *Id.* §§ 2.2-3100 (Repl. Vol. 2014 & Supp. 2015), 30-100 (Cum. Supp. 2015) (pertaining to the GACOIA).

certain state officials, moved from an annual filing on July 1 of each calendar year to a semi-annual filing on June 15 and December 15 of each calendar year.¹¹⁰ Additionally, following 2014, certain state and local officers and employees, along with members of the General Assembly, are required to file their statement of economic interest disclosure form semi-annually on June 15 and December 15 of each year, as opposed to the previous practice of filing annually in January.¹¹¹

In an effort to address a situation highlighted by certain allegations against former Governor McDonnell and a separate situation involving the then-Attorney General accepting a gift from an individual who was a significant shareholder in a company that was involved in a pending tax dispute with the Commonwealth of Virginia,¹¹² the 2014 ethics legislation prohibited the Governor, Attorney General, and their respective employees from soliciting, accepting, or receiving “any gift from any person that he knows or has reason to know is a person, organization, or business that is a party to” a civil action in which the Commonwealth is also a party.¹¹³

Prior to the 2014 amendments, Virginia law did not require an elected official to disclose certain gifts received by family members.¹¹⁴ Former Governor McDonnell was criticized for not disclosing on his statement of economic interest disclosure form gifts received by certain members of his family.¹¹⁵ As part of the 2014

110. *Id.* § 2.2-426 (Repl. Vol. 2014 & Supp. 2015).

111. *Id.* §§ 2.2-3114A, -3115(A) (Repl. Vol. 2014 & Supp. 2015), 20-110(A) (Cum. Supp. 2015).

112. Rosalind S. Helderman, *Cuccinelli Sold Star Stock When He Didn't Know About McDonnell Probe*, WASH. POST (July 3, 2013), http://www.washingtonpost.com/local/va-politics/cuccinelli-sold-star-stock-when-he-didnt-know-about-mcdonnell-probe/2013/07/03/895e15e0-e003-11e2-b2d4-ea6d8f477a01_story.html; Michael Laris, *Va. Moves to Tighten Ethics Rules, but Not Too Much*, WASH. POST (Mar. 1, 2014), https://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.

113. Act of Apr. 23, 2014, chs. 792 & 804, 2014 Va. Acts __, __ (codified at VA. CODE ANN. § 2.2-3103.1 (Supp. 2015)).

114. Rosalind S. Helderman, *McDonnell Final Financial Disclosure Cites Nearly \$28,000 In Personal Gifts In 2013*, WASH. POST (Jan. 15, 2014), http://www.washingtonpost.com/local/virginia-politics/mcdonnell-final-financial-disclosure-cites-nearly-28000-in-personal-gifts-in-2013/2014/01/15/f0570504-7e32-11e3-9556-4a4bf7bcbbd84_story.html.

115. Editorial Bd., *Virginia Governor Bob McDonnell Needs to Come Clean On Gifts*, WASH. POST (July 20, 2013), https://www.washingtonpost.com/opinions/virginia-governor-bob-mcdonnell-needs-to-come-clean-on-gifts/2013/07/20/6e7acb96-ef22-11e2-9008-61e94a7ea20d_story.html.

ethics legislation, the General Assembly enacted provisions that require a public official or employee to provide on his or her statement of economic interests a listing of reportable gifts received by his immediate family members.¹¹⁶ Similarly, the 2014 ethics reforms also require lobbyists to disclose any reportable gifts given to a member of a legislative or executive official's immediate family on his lobbyist disclosure statement.¹¹⁷

B. *Ethics Reform—Part II*

In 2015, on the heels of a verdict finding former Governor McDonnell guilty of federal corruption charges, the General Assembly made a second attempt at significant ethics reform. The 2015 ethics legislation undid some of what was adopted in 2014 and revised other parts of the previous year's ethics legislation. With three exceptions pertaining to revisions to the Virginia Conflict of Interest and Ethics Advisory Council, the provisions adopted during the 2015 session are not effective until January 1, 2016.¹¹⁸

1. Treatment of Gifts Generally

In 2014, the General Assembly imposed a limit on gifts to certain state and local public officials. Specifically, the General Assembly imposed a \$250 annual cap on "tangible" gifts.¹¹⁹ The 2015 amendments to the SLCOIA and GACOIA remove the distinction, adopted in 2014, between tangible and intangible gifts.¹²⁰ In place of the prior distinction, the General Assembly adopted, effective January 1, 2016, a broad restriction that prohibits certain enumerated individuals from soliciting, accepting, or receiving a single gift with a value exceeding \$100 from certain persons, as de-

116. Act of Apr. 23, 2014, chs. 792 & 804, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 2.2-3117 (Repl. Vol. 2014 & Supp. 2015), 30-111 (Cum. Supp. 2015)).

117. Act of Apr. 23, 2014, chs. 792 & 804, 2014 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 2.2-426 (Supp. 2015)).

118. Act of Apr. 30, 2015, chs. 763 & 777, 2015 Va. Acts __, __ ("That the provisions of this act shall become effective on January 1, 2016, except that the provisions of this act amending §§ 30-355, 30-356, and 30-357 shall become effective on July 1, 2015.").

119. Act of Apr. 23, 2014, chs. 792 & 804, 2014 Va. Acts __, __ (codified at VA. CODE ANN. §§ 2.2-3103.1 (Supp. 2015), 30-103.1 (Cum. Supp. 2015)).

120. Act of Apr. 30, 2015, chs. 763 & 777, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. §§ 2.2-3103.1 (Supp. 2015), 30-103.1 (Cum. Supp. 2015)).

tailed below. The gift cap also applies to the immediate family members of covered individuals. The gift cap includes any combination of gifts that in the aggregate exceed \$100 in a calendar year from the same source.¹²¹

2. Who Is Subject to the Gift Cap?

In addition to applying to members of the General Assembly, the gift cap applies to those state and local public officers and employees that are required to file the statement of economic interests disclosure statement found in Virginia Code section 2.2-3117. The gift cap also applies to the “immediate family members” of those individuals and to candidates for offices required to file the disclosure statement contained in section 2.2-3117. Section 2.2-3117 contains the codified disclosure form, which details the economic interests of the filer.

Specifically, the following individuals are subject to the \$100 gift cap by virtue of being required to file the statement of economic interests disclosure statement contained in section 2.2-3117, or section 30-111 in the case of members of the General Assembly:

General Assembly

- Members and members-elect of the General Assembly;
- Officers or employees of the legislative branch as designated by the Joint Rules Committee of the General Assembly.¹²²

State Officers & Employees

- The Governor;
- Lieutenant Governor;
- Attorney General;
- Members of Virginia’s judiciary;
- Members of the State Corporation Commission;
- Members of the Virginia Workers’ Compensation Commission;

121. VA. CODE ANN. §§ 2.2-3103.1(B)–(C) (Supp. 2015), 30-103.1(B) (Cum. Supp. 2015).

122. *Id.* §§ 2.2-3114(A) (Supp. 2015), 30-110 (Cum. Supp. 2015).

- Members of the Commonwealth Transportation Board;
- Members of the Board of Trustees of the Virginia Retirement System;
- Members of the Virginia Alcoholic Beverage Control Board;
- Members of the Virginia Lottery Board;
- “[O]ther persons occupying such offices or positions of trust or employment in state government, including members of the governing bodies of authorities, as may be designated by the Governor”¹²³

Local Officers & Employees

- “[M]embers of every governing body and school board of each county and city and of towns with populations in excess of 3,500;”
- “[M]embers of the governing body of any authority established in any county or city, or part or combination thereof, and having the power to issue bonds or expend funds in excess of \$10,000 in any fiscal year,” and who are required by the local governing body to file the statement of economic interests contained in section 2.2-3117;
- “Persons occupying such positions of trust appointed by governing bodies and persons occupying such positions of employment with governing bodies as may be designated to file [a statement of economic interest contained in section 2.2-3117] by ordinance;”
- “Persons occupying such positions of trust appointed by school boards and persons occupying such positions of employment with school boards as may be designated to file [a statement of economic interest contained in section 2.2-3117] by an adopted policy of the school board.”¹²⁴

123. See *id.* § 2.2-3114(A) (Supp. 2015). The 2015 ethics legislation specifically exempted “chairs of departments at a public institution of higher education in the Commonwealth” from being “required to file the disclosure form prescribed by § 2.2-3117 or 2.2-3118.” See *id.* § 2.2-3114(H) (Supp. 2015).

124. See *id.* § 2.2-3115(A) (Supp. 2015).

Local County and City Constitutional Officers

- Treasurer;
- Sheriff;
- Attorney for the Commonwealth;
- Clerk of the circuit court;
- Commissioner of the Revenue.¹²⁵

Candidates

The 2015 ethics legislation clarified that the gift prohibitions of the SLCOIA and GACOIA apply to “a person who seeks or campaigns for an office of the Commonwealth or one of its governmental units” or the General Assembly, “in a general, primary, or special election and who is qualified to have his name placed on the ballot for the office.”¹²⁶ Once the candidate for public office files his statement of qualification as required by Virginia election law, he becomes subject to the gift cap provisions of the SLCOIA and GACOIA applicable according to the office for which he stands for election.¹²⁷

Immediate Family Members

Immediate family members of the public officers and employees, candidates, and members of the General Assembly are also covered by the gift cap.¹²⁸ For the purposes of the gift cap, “‘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.”¹²⁹

125. *See id.* § 2.2-3116 (Supp. 2015).

126. *Id.* § 2.2-3101 (Supp. 2015) (defining “candidate” for the purposes of the SLCOIA); *id.* § 30-101 (Cum. Supp. 2015) (defining “candidate” for the purposes of the GACOIA).

127. *See id.* § 2.2-3103.1(B) (Supp. 2015). The 2014 ethics legislation extended the then applicable \$250 cap on “intangible gifts” in the SLOCIA and the GACOIA to “candidates,” but did not provide a definition so as to easily discern which candidates were subject to the provisions of the respective acts. *See id.* § 2.2-3103.1(B) (Repl. Vol. 2014). *Compare id.* §§ 2.2-3101 (Supp. 2015), 30-101 (Cum. Supp. 2015), *with id.* §§ 2.2-3101 (Repl. Vol. 2014), 30-101 (Repl. Vol. 2011).

128. *Id.* §§ 2.2-3103.1(B)–(C) (Supp. 2015), 30-103.1(B) (Cum. Supp. 2015).

129. *Id.* §§ 2.2-3103.1(B) (Supp. 2015), 30-101 (Cum. Supp. 2015).

3. The Gift Cap Prohibition—Source of Gift

A covered state or local officer or employee, candidate for a state or local office, or immediate family member thereof, as detailed previously, is prohibited from soliciting, accepting, or receiving gifts that exceed the \$100 cap in a calendar year from individuals that such person “knows or has reason to know” is: (i) a registered state lobbyist; (ii) the principal that retains or employs state lobbyists; or (iii) a person or entity “who is or is seeking to become a party to a contract with [a unit of state or local government].”¹³⁰ In other words, the gift cap is applicable when the gift is coming from one of the three categories of persons or entities listed. For General Assembly members, the source of the gift that triggers the cap is the same, except that a person or entity seeking to do business with the state or has a contract with the state is not included.¹³¹ Presumably, this omission is because the General Assembly itself does not enter into or approve contracts, hence the distinction between the restrictions on its members and those on state and local officers and employees.

4. What Is a Gift?

A “gift” for the purposes of the SLCOIA and GACOIA is “any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance or reimbursement after the expense has been incurred.”¹³² The 2015 ethics legislation amends the Lobbying Act definition of “gift” to be consistent with the SLCOIA and the GACOIA.¹³³

5. What Is Not a Gift?

Current law excludes certain items from the definitions of a “gift” for the purposes of the SLCOIA and the GACOIA. Such ex-

130. *Id.* § 2.2-3103.1(B) (Supp. 2015).

131. *Id.* § 30-103.1(B) (Cum. Supp. 2015).

132. *Id.* § 2.2-3101 (Supp. 2015) (defining “gift” under the SLCOIA); *id.* § 30-101 (Repl. Vol. 2015) (defining “gift” under the GACOIA).

133. Compare *id.* § 2.2-419 (Supp. 2015), with *supra* note 132.

clusions include things like unused tickets or coupons, honorary degrees, educational scholarships available to the general public, properly reported campaign contributions, gifts received in the course of the person's private professional life or in the course of a member of his family's professional or occupational career, and in some instances gifts from "personal friends."¹³⁴

The 2015 ethics amendments to the SLCOIA and GACOIA further defined what is not considered a gift for the purposes of those acts. Effective January 1, 2016, the following are not considered gifts for the purposes of the SLCOIA and GACOIA: food and beverages consumed at events related to the person's public position; unsolicited awards and mementos of appreciation related to the person's public service; inheritances; travel reported on a campaign finance report; travel paid for by a government source; and certain travel related to the person's public position.¹³⁵ These exclusions from the definition of gift are also reflected in amendments to the Lobbying Act.¹³⁶

6. Exceptions to the \$100 Gift Cap

The 2015 ethics amendments provide certain exceptions to the \$100 gift cap. Just as the \$100 gift cap applies to those persons required to file an economic interests disclosure statement pursuant to section 2.2-3117 or section 30-111, and to members of such a person's immediate family, the following exceptions to the gift cap apply to those individuals as well for the purposes of the SLCOIA and the GACOIA.

a. De Minimis Gifts

Gifts with a value less than \$20 are not subject to the aggregation calculation for the purposes of the \$100 cap.¹³⁷

134. *Id.* §§ 2.2-3101 (Supp. 2015), 30-101 (Cum. Supp. 2015).

135. *Id.*

136. *Id.* § 2.2-419 (Supp. 2015).

137. *Id.* §§ 2.2-3103.1(B)–(C) (Supp. 2015), 30-103.1(B) (Cum. Supp. 2015).

b. Widely Attended Events

“[G]ift[s] of food and beverages, entertainment, or the cost of admission with a value in excess of \$100” are allowed, as long as such entertainment and hospitality are provided at a “widely-attended event.”¹³⁸ Attendance at such events will still require the recipient of the gift of entertainment and hospitality to report the gift on his disclosure statement.¹³⁹

c. Gifts from Foreign Dignitaries

Recognizing that state and local public officials and employees interact with foreign dignitaries and that it is often customary to exchange gifts in such circumstances, the General Assembly provided a process by which the public official or employee may accept such gifts. Specifically, when there is a gift from a foreign dignitary that exceeds \$100 or “greater or equal value has not been provided or exchanged,” the gift is accepted on behalf of the official’s governmental body “in accordance with guidelines established by the Library of Virginia.”¹⁴⁰ The public official or employee is required to disclose the gift “as having been accepted on behalf” of the official’s governmental body, “but the value of such gift shall not be required to be disclosed.”¹⁴¹

d. Personal Friendship

A public official or employee may accept gifts with a value greater than \$100 if the gift is based on personal friendship. In order to prevent abuse of this provision, the General Assembly set forth certain guidance to determine whether the donor of the gift

138. *Id.* § 2.2-3103.1(D) (Supp. 2015). “*Widely attended event*” means an event at which at least 25 persons have been invited to attend or there is a reasonable expectation that at least 25 persons will attend the event and the event is open to individuals (i) who share a common interest, (ii) who are members of a public, civil, charitable, or professional organization, (iii) who are from a particular industry or profession, or (iv) who represent persons interested in a particular issue.” *Id.* §§ 2.2-3103.1(A) (Supp. 2015), 30-103.1(A) (Cum. Supp. 2015).

139. *Id.* § 2.2-3103.1(D) (Supp. 2015).

140. *Id.* § 2.2-3103.1(E) (Supp. 2015).

141. *Id.*

can truly be considered a “personal friend.”¹⁴² The guidance includes such things as evaluating the nature and longevity of the relationship, whether the donor deducts the gift as a business expense or seeks reimbursement, and the extent to which the same or similar gifts were given to other public officials.¹⁴³

e. Gifts of Travel Pre-Approved by Virginia Conflict of Interest and Ethics Advisory Council

Gifts of travel and related expenses that exceed \$100 in value are allowed if pre-approved by the Virginia Conflict of Interest and Ethics Advisory Council.¹⁴⁴ Any such gift must still be disclosed on the recipient’s statement of economic interest form.¹⁴⁵

7. Return of Gifts

The 2015 amendments to the SLCOIA provide a “safe harbor” for covered state and local public officials and employees that accept a gift without knowing the value, but subsequently determine that the value is greater than the \$100 cap. Specifically, if the gift is not used by the recipient and the gift or the equivalent value in money is returned to the donor of the gift or separately donated to a charity within a “reasonable period of time” upon learning of the gift’s value, then the recipient is not considered to have violated the \$100 gift cap.¹⁴⁶ However, in order to utilize this safe harbor, the initial recipient of the gift may not claim the donation of the gift to a charity as a deduction on his federal income tax return.¹⁴⁷ Additionally, upon discovering that the value of an accepted gift exceeds the \$100 gift cap, the recipient may reim-

142. Act of Apr. 30, 2015, chs. 763 & 777 (codified as amended at VA. CODE ANN. §§ 2.2-3103.1(F) (Supp. 2015), 30-103.1(E) (Cum. Supp. 2015)) (In determining whether the relationship constitutes a personal friendship, “the following factors shall be considered: (i) the circumstances under which the gift was offered; (ii) the history of the relationship between the person and the donor, including the nature and length of the friendship and any previous exchange of gifts between them; (iii) to the extent known to the person, whether the donor personally paid for the gift or sought a tax deduction or business reimbursement for the gift; and (iv) whether the donor has given the same or similar gifts to other persons required to file the disclosure form prescribed in § 2.2-3117 or 30-111”).

143. *Id.*

144. *Id.* § 2.2-3103.1(G) (Supp. 2015).

145. *Id.*

146. *Id.* § 2.2-3103.2 (Supp. 2015).

147. *Id.*

burse the donor of the gift “within a reasonable period of time” in such an amount as to cause the value of the gift received to not exceed the \$100 gift cap.¹⁴⁸ For members of the General Assembly, a similar “safe harbor” is provided for in the 2015 amendments to the GACOIA.¹⁴⁹

8. Penalties

The 2015 ethics legislation imposed a \$250 civil penalty for the failure to file the disclosure statement prescribed in section 2.2-3117 within the required time period.¹⁵⁰ Additionally, the General Assembly made it a Class 5 felony for “any person who knowingly and intentionally makes a false statement of a material fact on the Statement of Economic Interests” form prescribed in section 2.2-3117.¹⁵¹ The Class 5 penalty is now consistent with the penalty for a lobbyist who “knowingly and intentionally makes a false statement of a material fact” on the lobbyist’s lobbying disclosure form.¹⁵²

9. The Virginia Conflict of Interest Ethics Advisory Council

In 2014 the General Assembly established the Virginia Conflict of Interest and Ethics Advisory Council “to encourage and facilitate compliance with” the SLCOIA, the GACOIA and the Lobbying Act.¹⁵³ Under the 2015 ethics legislation, the Council now consists of nine members: four members of the legislature, two former judges of a court of record, and three gubernatorial appointees, one of whom must be a former or current state executive

148. *Id.*

149. *Id.* § 30-103.2 (Cum. Supp. 2015).

150. *Id.* § 2.2-3124(B) (Supp. 2015).

151. Act of Apr. 30, 2015, chs. 763 & 777, 2015 Acts __, __ (codified as amended at VA. CODE ANN. § 2.2-3117 (Supp. 2015), 30-103.1(E) (Cum. Supp. 2015)). A Class 5 felony is punishable by

a term of imprisonment of not less than one year nor more than 10 years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.

See VA. CODE ANN. § 18.2-10 (Repl. Vol. 2014 & Supp. 2015).

152. VA. CODE ANN. § 2.2-426(D) (Supp. 2015).

153. Act of Apr. 23, 2014, chs. 792 & 804, 2014 Va. Acts __, __ (codified at VA. CODE ANN. § 30-348 (Cum. Supp. 2014)) (codified as renumbered at VA. CODE ANN. § 30-355(A) (Cum. Supp. 2015)).

employee and two of whom are to be picked from a list submitted by two local government advocacy organizations.¹⁵⁴ Additionally, the 2015 legislation requires that the legislative members of the Council be equally representative of the two major political parties.¹⁵⁵

Among the several powers and duties granted to the Council, the most notable are the powers to: (1) review lobbyist disclosure forms and statements of economic interest filed by certain state officers and employees and members of the General Assembly;¹⁵⁶ (2) require the electronic filing of lobbying disclosure forms and statements of economic interest;¹⁵⁷ (3) furnish formal advisory opinions and informal advice “regarding ethics [and] conflicts issues arising under” the SLCOIA, the GACOIA and the Lobbying Act;¹⁵⁸ (4) approve and conduct training seminars and educational programs for individuals subject to the SLCOIA, the GACOIA, and the Lobbying Act;¹⁵⁹ and (5) approve certain travel with a value greater than the \$100 gift cap.¹⁶⁰

The 2015 ethics legislation provides the Council with the authority to approve certain travel-related expenses for covered state officers and employees¹⁶¹ and members of the General Assembly that would otherwise be prohibited by the \$100 cap.¹⁶² Generally, a request for such approval must be acted on within five business days or the proposed travel will be deemed approved.¹⁶³ In determining whether to approve the travel request, the Council is required to approve any such request that “bears a reasonable relationship between the purposes of the travel and the official duties” of the official making the request.¹⁶⁴ The new law provides a list of event attributes that satisfies the “reasona-

154. Act of Apr. 30, 2015, chs. 763 & 777, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 30-355(B) (Cum. Supp. 2015)).

155. *Id.*

156. VA. CODE ANN. § 30-356(1) (Cum. Supp. 2015).

157. *Id.* § 30-356(2) (Cum. Supp. 2015).

158. *Id.* § 30-356(5) (Cum. Supp. 2015).

159. *Id.* §§ 30-356(6)–(7) (Cum. Supp. 2015).

160. *Id.* § 30-356.1 (Cum. Supp. 2015).

161. Specifically, those state and local officers or employees required to file a disclosure statement pursuant to section 2.2-3117. *See id.*

162. *Id.*

163. *Id.* § 30-356.1(D) (Cum. Supp. 2015).

164. *Id.* § 30-356.1(B) (Cum. Supp. 2015).

ble relation” test. Such travel includes “any meeting, conference or other event” that is

(i) composed primarily of public officials, (ii) at which public policy related to the duties of the requester will be discussed in a substantial manner, (iii) reasonably expected to educate the requester on issues relevant to his official duties or to enhance the requester’s knowledge and skills relative to his official duties, or (iv) at which the requester has been invited to speak regarding matters reasonably related to the requester’s official duties.¹⁶⁵

Additionally, in making a determination that the proposed travel bears “no reasonable relationship between the purpose of the proposed travel and the official duties of the requester . . . [T]he Council shall consider the duration of travel, the destination of travel, the estimated value of travel, and any previous or recurring travel.”¹⁶⁶ Presumably, these factors bear on whether the proposed travel is really for knowledge and skill development or really in furtherance of the official’s public duties, as opposed to a vacation masquerading as an educational endeavor.

The 2015 legislation also provides that a covered state official or employee or a member of the General Assembly cannot be prosecuted or otherwise penalized for accepting a gift related to travel in excess of the \$100 cap if approved by the Council, even if that approval is subsequently revoked, so long as the travel occurred before the revocation.¹⁶⁷

Finally, 2015 legislation makes clear that certain travel related to campaigns, travel provided by a governmental entity, travel to “facilitate attendance by a legislator” at certain legislative meetings and events, and certain travel related to governmental or charitable organization meetings attended by virtue of the official’s or employee’s appointment or election to the entity or organization do not require approval by the Council but are required to be disclosed as may be necessary pursuant to the SLCOIA or the GACOLA.¹⁶⁸

165. *Id.*

166. *Id.* § 30-356.1(C) (Cum. Supp. 2015).

167. *Id.* § 30-356.1(F) (Cum. Supp. 2015).

168. *Id.* § 30-356.1(A) (Cum. Supp. 2015).

10. Revolving Door

Current Virginia law prohibits, for a period of one year upon leaving state service or employment, certain state officers or employees from being paid to represent clients on matters related to legislation, executive orders, or regulations promulgated by the agency in which the person was an officer or employee.¹⁶⁹ The 2015 SLCOIA amendments clarified that for the Governor's cabinet secretaries, the current "revolving door" prohibition applies not only to their respective cabinet office, but also to all agencies that are assigned to that secretariat by law or executive order of the Governor.¹⁷⁰ This amendment overturns a 1996 opinion of the Virginia Attorney General.¹⁷¹

11. Expanded Scope of What Constitutes Lobbying

The 2015 ethics legislation expands the scope of what constitutes "lobbying." Prior to this change, the Lobbying Act required the registration and disclosure of expenditures related to activities to influence or attempting to influence legislative and executive officials' actions on legislation, appointments, and executive orders.¹⁷² Effective January 1, 2016, certain activities related to state procurement transactions now trigger the requirement to register as a lobbyist. The new bill amends the definition of "executive action" to include "procurement transactions."¹⁷³

The 2015 legislation further defines "procurement transaction" as "all functions that pertain to obtaining all goods, services, or construction on behalf of an executive agency, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration."¹⁷⁴ This change raises practical concerns for any entity that regularly attempts to do business with state government. Depending on the job function and activities of business development employees for businesses seeking to do business with the

169. *Id.* § 2.2-3104 (Repl. Vol. 2014).

170. *Id.* (Supp. 2015).

171. 1996 Op. Va. Att'y Gen. 10.

172. See VA. CODE ANN. § 2.2-419 (Repl. Vol. 2014) (defining "lobbying," "executive action," and "legislative action").

173. *Id.* (Supp. 2015) ("Executive action' includes procurement transactions.").

174. *Id.*

state, the activities of some of those employees may now trigger the requirement to register as a lobbyist unless an exception is applicable. If an employee's primary job responsibility is to engage state agency personnel with regard to the procurement of goods and services, the company employee may now be required to register as a lobbyist when interacting and attempting to influence certain high-level state officials and state employees on procurement matters.¹⁷⁵

For these individuals, registration as a lobbyist may implicate other provisions of the Lobbying Act that affect how lobbyists may be compensated. The Lobbying Act makes it "unlawful for any individual to lobby for compensation that is dependent in any manner upon the outcome of any legislative or executive action."¹⁷⁶ Now that "procurement transactions" are considered "executive action" for the purposes of the Lobbying Act, the contingency fee prohibition is implicated. It appears that a common industry practice—company employees receiving bonuses for winning awards of specific state government contracts—would be prohibited if the company employee has registered as a lobbyist.

12. Expansion of Pay-to-Play Prohibition

The 2015 ethics legislation expands the current "pay-to-play" prohibitions contained in Virginia Code section 2.2-3104.01, which generally prohibit the Governor, his cabinet secretaries, and his campaign apparatus from soliciting contributions from those seeking to do business with the state under certain circumstances.¹⁷⁷ Effective January 1, 2016,

[n]either the Governor, his campaign committee, nor a political action committee established on his behalf shall knowingly solicit or accept a contribution, gift, or other item with a value greater than \$100 from any person or entity that has submitted an application for a grant or loan from the Commonwealth's Development Opportunity Fund

175. *Id.* § 2.2-419 (Supp. 2015) (see definitions of "executive agency," "executive officials," and "legislative officials" for a list of included officials).

176. *Id.* § 2.2-432 (Supp. 2015).

177. Act of Apr. 30, 2015, chs. 763 & 777, 2015 Va. Acts __, __ (codified as amended at VA. CODE ANN. § 2.2-3104.01 (Supp. 2015)).

while an application for a grant or loan from that fund is pending and “for the one-year period immediately after any such award is made.”¹⁷⁸ Violation of this provision is punishable by the greater of a \$500 civil penalty or twice the amount of the prohibited contribution or gift.¹⁷⁹ The 2015 ethics legislation further requires that the “contribution, gift or other item shall be returned to the donor.”¹⁸⁰

13. Executive Order 2

Soon after Governor McAuliffe took office in 2014, he signed Executive Order 2, which was updated in February 2015.¹⁸¹ The order establishes “an ethical framework for state Executive Branch officers and employees with regard to gifts,” and bans the solicitation or acceptance of certain gifts by state officers and employees and establishes an Executive Branch Ethics Commission.¹⁸² The order further provides that

[a]n officer’s or employee’s ethical duties and responsibilities under this Executive Order are in addition to those prescribed by law, primarily the State and Local Government Conflict of Interests Act, § 2.2-3100 *et seq.*, and the Virginia Public Procurement Act, § 2.2-4300 *et seq.*, of the Code of Virginia.¹⁸³

Executive Order 2 establishes a \$100 gift cap for state executive branch officers and employees.¹⁸⁴ Specifically, such officers and employees, and their immediate family members, may not solicit anything of value or “accept directly or indirectly, any gift valued at over \$100, from any one source, singularly or in the aggregate over the course of any given calendar year.”¹⁸⁵ The gift cap does not apply to reimbursement for “any legitimate travel and related expenses incurred while engaging in an activity that serves a legitimate public purpose,” as those terms are defined in

178. VA. CODE ANN. § 2.2-3104.01(B) (Supp. 2015). This subsection also provides that, “[f]or purposes of this subsection, entity includes individuals who are officers, directors, or owners of or who have a controlling ownership interest in such entity.” *Id.*

179. *Id.* § 2.2-3104.01(D) (Supp. 2015).

180. *Id.*

181. Exec. Order No. 2 (2014) (Jan. 11, 2014; updated Feb. 13, 2015).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

the order.¹⁸⁶ Moreover, a gift with a “value of \$25 or less does not count toward the \$100 cumulative total.”¹⁸⁷

Gifts from lobbyists registered under the Lobbying Act to state executive branch officers and employees are effectively subject to a lower cap under the order. Executive Order 2 provides that such officers and employees shall not “accept, directly or indirectly, any gift from any lobbyist or from any principal or employee or agent of a principal,” as those terms are defined by the Lobbying Act.¹⁸⁸ Essentially, the order bans gifts from lobbyists; however, it sets forth a list of things not considered a gift. Under the order, “a gift with a value of \$25 or less” is not a “gift.”¹⁸⁹ Consequently, gifts from lobbyists are limited to those valued at \$25 or less.

The executive order establishes an Executive Branch Ethics Commission comprised of three members to oversee the implementation of the order.¹⁹⁰ The Commission is authorized to render opinions as to the requirements of the order relative to proposed conduct or the receipt of gifts, to enforce the provisions of the order as related to the Governor and his Cabinet’s compliance with the order, and to recommend revisions to the order “as may appear necessary to ensure the maintenance of high ethical standards within the state Executive Branch.”¹⁹¹ Beyond the Executive Branch Ethics Commission’s enforcement of the order relative to the Governor and his cabinet, enforcement falls on state agency heads as to officers and employees of their agency, cabinet secretaries as to their direct employees, and any head of an advisory or governmental agency organized within their respective secretariat.¹⁹²

The executive order gift cap has a variety of implications. With regard to state officers and employees, the executive order gift cap is broader than the one contained in the SLCOIA in that it applies to all state executive branch officers and employees.¹⁹³ The

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* However, if the received item has a value greater than \$20, it counts toward the aggregate gift cap of \$100 contained in the SLCOIA if the state executive branch of officer or employee is subject to the gift cap contained in the SLCOIA. *See supra* note 121 and accompanying text.

190. Exec. Order No. 2 (2014) (Jan. 11, 2014; updated Feb. 13, 2015).

191. *Id.*

192. *Id.*

193. *See id.*

gift cap in the SLCOIA only applies to those state officers and employees required to file a statement of economic interests form.¹⁹⁴ Additionally, unlike the gift cap in the SLCOIA, the executive order gift cap is not limited to individuals who are lobbyists, entities that employ lobbyists, or entities seeking to do business with the state.¹⁹⁵ Moreover, for those state executive branch officers and employees that file a statement of economic interests disclosure form, the executive order's gift cap as it relates to lobbyists is more restrictive than that contained in the SLCOIA.¹⁹⁶ With the addition of the executive order, a state executive branch officer or employee now has three possible avenues to seek opinions as to whether his conduct is appropriate: the Attorney General for the Commonwealth, the Virginia Conflict of Interest and Ethics Advisory Council, and the Executive Branch Ethics Commission.¹⁹⁷ While the executive order is clearly within the Governor's authority, its continued existence now that the SLCOIA has been amended adds another layer of regulation governing certain state officers and employees that further complicates the analysis as to what conduct is allowed in certain circumstances.

III. OTHER DEVELOPMENTS

A. Redistricting Litigation

Following Virginia's congressional redistricting in 2012, several Virginia voters filed a legal challenge to these new district lines.¹⁹⁸ The 2012 congressional redistricting legislation increased the black voting age population of the majority-minority third congressional district from 53.1% to 56.3%.¹⁹⁹ The suit alleged that, in light of the U.S. Supreme Court's decision in *Shelby County v. Holder*, the congressional redistricting legislation illegally con-

194. VA. CODE ANN. § 2.2-3103.1 (Supp. 2015).

195. Compare *id.*, with Exec. Order No. 2 (2014) (Jan. 11, 2014; updated Feb. 13, 2015).

196. Compare VA. CODE ANN. § 2.2-3103.1 (Supp. 2015) (discussing a limitation regarding the disclosure form prescribed in § 2.2-3117), with Exec. Order No. 2 (2014) (Jan. 11, 2014; updated Feb. 13, 2015) (prohibiting the receipt of certain gifts).

197. See *Opinions Counsel*, VIRGINIA.GOV, <http://ag.virginia.gov/index.php/en/divisions/executive-administration/executive-division/opinions-counsel> (last visited Oct. 1, 2015); VA. CODE ANN. § 30-356 (Cum. Supp. 2015); Exec. Order No. 2 (2014) (Jan. 11, 2014; updated Feb 13, 2015).

198. *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 540 (E.D. Va. 2014).

199. *Id.* at 539.

centrated African American voters into the third congressional district.²⁰⁰

The three-judge panel found that the congressional redistricting process used race as a predominant factor and was not narrowly tailored to accomplish race-conscious redistricting as required by the Equal Protection Clause.²⁰¹ The court emphasized that the General Assembly was following the rules as they understood them to be pre-*Shelby County*.²⁰² Nevertheless, the court found the lines unconstitutional and ordered the General Assembly to redraw the lines.²⁰³ This, however, was just the first step in the process.

The U.S. Supreme Court vacated this opinion and ordered that the three-judge panel reconsider the case in light of the Supreme Court's opinion in *Alabama Legislative Black Caucus v. Alabama*.²⁰⁴ Again, the three-judge panel found that the third-district lines from the 2012 redistricting legislation were unconstitutional, and it again directed the legislature to redraw the lines.²⁰⁵ The case is currently being appealed again to the U.S. Supreme Court.²⁰⁶

A similar challenge was filed in late 2014 concerning the Virginia House of Delegates lines.²⁰⁷ The suit alleges that the majority-minority House of Delegates districts are similarly unconstitutional because of the alleged focus on race in the drawing of the lines.²⁰⁸

200. *Id.* at 539–40 (citing *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013)).

201. *Id.* at 536–37.

202. *Id.* at 537–38 (“The legal landscape changed dramatically in 2013, when the Supreme Court ruled that Section 4’s coverage formula . . . was unconstitutional.”).

203. *Id.* at 555.

204. Order No. 14-518, 575 U.S. __ (Mar. 30, 2015), http://www.supremecourt.gov/orders/courtorders/033015zor_5iek.pdf.

205. Page v. Va. State Bd. of Elections, 2015 U.S. Dist. LEXIS 73514, at *58 (E.D. Va. 2015).

206. *Id.*, appeal docketed, No. 14-1504 (U.S. July 2, 2015).

207. Bethune-Hill v. Va. State Bd. of Elections, 2015 U.S. Dist. LEXIS 68054 (E.D. Va. 2015).

208. *Id.* at *3 (“In this case, Plaintiffs have challenged twelve Virginia House of Delegates districts as unlawful racial gerrymanders in violation of the Equal Protection Clause of the U.S. Constitution.”).

B. *Voting Machines*

In preparing his biennial budget and following touch screen machine problems in 2014,²⁰⁹ Governor McAuliffe proposed \$28 million in funding for new voting machines.²¹⁰ He proposed that the money go towards purchasing digital scan voting machines for a number of localities in Virginia and towards reimbursing localities for recently purchased machines.²¹¹ The General Assembly, however, removed this funding from the budget.²¹²

Following the 2015 session, the State Board of Elections voted to decertify a number of touch screen voting machines, citing security concerns.²¹³ The Board voted to decertify the WINVote touch screen machines that thirty Virginia localities used.²¹⁴ Following this ruling, these localities must obtain new voting machines that are approved by the State Board.²¹⁵

209. See, e.g., *Rigell Campaign Demands Paper Ballots in Va. Beach*, WAVY NEWS (Nov. 4, 2014), <http://wavy.com/2014/11/04/rigell-campaign-demands-paper-ballots-in-va-beach/> (discussing technical problems with calibrating voting machines in certain Virginia areas).

210. Press Release, Office of the Governor, Governor McAuliffe Announces \$28 Million in Funding for New Voting Machines Across Virginia (Dec. 15, 2014), <https://governor.virginia.gov/newsroom/newsarticle?articleId=7476>.

211. *Id.*

212. See Laura Vozzella & Jenna Portnoy, *Va. House, Senate Pass Budget Packages*, WASH. POST (Feb. 12, 2015), http://www.washingtonpost.com/local/virginia-politics/2015/02/12/73cb7b06-b2dd-11e4-854b-a38d13486ba1_story.html (“Democrats also object to . . . the removal of \$28 million for new electronic voting machines.”).

213. Jenna Portnoy, *Va. Board of Elections Votes to Decertify Some Voting Machines*, WASH. POST (Apr. 14, 2015), http://www.washingtonpost.com/local/virginia-politics/va-board-of-elections-votes-to-decertify-some-voting-machines/2015/04/14/46bce444-e2a6-11e4-81ea-0649268f729e_story.html.

214. *Id.*

215. See *id.* (discussing the trouble that local governments are having in arranging for the use of different equipment).
