

Ethics and Conflicts of Interest Act

January 9, 2009
Richmond, Virginia

Phyllis C. Katz, Esquire
Andrew R. McRoberts, Esquire



Conflict of Interest Act

- Defines and prohibits inappropriate conflicts and requires disclosure of economic interest
- Intent is to have a single body of law to guide state and local public officials and employees in exercising judgment on conflicts in contracts and transactions of their agency

Violations of Conflict of Interest Act

- Contracts can be invalidated
- Sales can be rescinded
- Money derived can be forfeited
- Knowing violations
 - Criminal misdemeanor
 - Malfeasance in office or employment

Covers Officers, Employees, Appointees

- **Governmental agencies** (City and Town Councils, Boards of Supervisors, School Boards, Authorities) – any entity exercising some regulatory or sovereign power
- **Advisory agencies** – any board, commission, or committee appointed by a governmental agency for the purposes of making studies or recommendations, or advising or consulting with the appointing agency

The Act Prohibits

- Conduct that is specifically prohibited
- Involvement in certain transactions or contracts if there is a “personal interest”

Receive a Copy of Act

- COIA mandates that any person required to file a disclosure statement (all elected officials and others) must receive a copy of the Act within two weeks of appointment or reappointment.
- Recommend that every employee receive a copy of the Act.

**First Type of Prohibited
Conduct:
Specific Prohibitions**

Conflict of Interest Act (Va. Code § 2.2-3103)

**Accept No Financial Benefit for
the Performance of Your Duties**

"Solicit or accept money or other thing of value for services performed within the scope of his official duties, except the compensation, expenses or other remuneration paid by the agency of which he is an officer or employee."

Give or Receive No Financial Inducements for Employment

"Offer or accept any money or other thing of value for or in consideration of obtaining employment, appointment, or promotion of any person with any governmental or advisory agency."

Do Not Use Position to Obtain a Contract

"Offer or accept any money or other thing of value for or in consideration of the use of his public position to obtain a contract for any person or business with any governmental or advisory agency."

Do Not Use Confidential Information for Own Benefit

“Use for his own economic benefit or that of another party confidential information that he has acquired by reason of his public position and which is not available to the public.”

Do Not Be Influenced by Money or Personal Benefit

“Accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him in the performance of his official duties.”

Reject Opportunities Offered to Influence Decisions

"Accept any business or professional opportunity when he knows that there is a reasonable likelihood that the opportunity is being afforded him to influence him in the performance of his official duties."

Avoid Appearance of Impartiality (Timing or Nature of Gift)

- *Accept a gift from a person who has interests that may be substantially affected by the performance of the officer's or employee's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the officer's or employee's impartiality in the matter affecting the donor. Violations of this subdivision shall not be subject to criminal law penalties.*

No criminal penalties imposed for violations

Avoid Appearance of Impartiality (Receipt of Frequent Gifts)

- *Accept gifts from sources on a basis so frequent as to raise an appearance of the use of his public office for private gain.*

No criminal penalties imposed for violations

Local Regulation of Gifts

- *“The governing body of any county, city or town may adopt an ordinance setting a monetary limit on the acceptance of any gift by the officers, appointees or employees of the county, city or town and requiring the disclosure by such officers, appointees or employees of the receipt of any gift.”*

Va. Code § 2.2-3104.2

Second Type of Prohibited Conduct: Certain Contracts and Transactions if a "Personal Interest" Exists

**Conflict of Interest Act
(Va. Code §§ 2.2-3105 - 2.2-3112)**

"Personal Interest"

- "Personal interest" means a financial benefit or liability accruing to an officer/employee or a member of his or her "immediate family"
Va. Code § 2.2-3101
- When an officer or an employee has a "personal interest," the Act
 - Restricts the ability of officers and employees to participate in or enter into certain contracts
 - Restricts the ability to participate in certain transactions of their governmental agency

“Immediate Family”

- “Immediate family” means your spouse and also any other person who resides in your household if (i) the person is your dependent or (ii) you are a dependent of that person.

Va. Code § 2.2-3101

“Personal Interest”

- Such interest exists by reason of
 - Ownership of a business (>3%)
 - Annual income >\$10,000 from ownership in property or a business;
 - Annual salary >\$10,000;
 - Ownership of property if interest is >\$10,000;
 - Option to own business or property if ownership interest >3% (business) or >\$10,000 (property)
 - Personal liability, assumed on behalf of a business, that exceeds 3% of business's total equity

Related Business Entities

- If you have a “personal interest” in a business, you also have a “personal interest” in any related business entity:
 - Parent-subsiary (>50% voting power)
 - Affiliated (one entity controls another, same controlling owner, or shared management or control look to intermingled or shared funds, support staff, facilities, close working relationship, etc.)

Va. Code § 2.2-3101

If You Have a “Personal Interest”

- If you have a “personal interest” in a business or property, the next step in the analysis is to determine whether you have a “personal interest in a transaction.”

"Personal Interest in a Transaction," Defined

- "Personal interest in a transaction" exists when an officer (or "immediate family" member)
 - has a "personal interest" in property or business OR
 - represents or provides services to an individual or business

AND

- Is the subject of the transaction OR
- May realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction

Va. Code § 2.2-3101

If You Have a "Personal Interest in a Transaction"

- An officer with a "personal interest in a transaction," will
 - Be required to disclose the interest and abstain OR
 - Be allowed to participate and vote, upon disclosure of the interest

THIRD POSSIBILITY:

- An exception may apply

Exceptions

- Transaction affects the public generally (i.e., adoption of tax rate)
- Member of a business, profession, occupation, or group (three or more members), the members of which are affected by the transaction

Exceptions: Example and Procedure

- Group exception ex. #1: Lot A is the subject of the zoning application. You own one of three adjoining lots, all affected the same.
- Group exception ex. #2: Spouse in my household is teacher in local schools, and will receive salary from school board budget.
- If the exception for members of a group, business, profession, or occupation applies, then you may participate, upon disclosure.

Sample Transaction Disclosures for Public Official

- I am an employee of XYZ Corp. XYZ Corp. provides services to Company A. Company A is the owner of the land that is the subject of today's vote. I do not personally provide services to Company A, and I am able to participate in this transaction fairly, objectively, and in the public interest.

Personal Interest in a Contract

- The provisions regarding a "personal interest in a contract" apply to officers or employees of a governmental agency (e.g., Governing Body, School Board, Planning Commission, Authority), but they do not apply to members of advisory agencies.

Va. Code § 2.2-3109(A)-(B)

Personal Interest in Contract

- Elected or appointed officer or employee may not have a "personal interest in a contract" with governmental agency (or an agency that is part of, or subject to the control of, his or her governmental agency), other than own contract of employment.
- "Contract" includes subcontracts only when the contract of which it is a part is with the officer's or employee's own governmental agency.

Va. Code §§ 2.2-3107 – 2.2-3109

Personal Interest in a Contract – Some Exceptions to Prohibitions

- Personal interest in employee's contracts for goods, services of employment accruing due to family member, if no control or influence by employee
- Officer/employee's contract awarded as result of competitive procurement, or administrative head finds in writing that competition is not in best interest of public, or contracts at uniform prices
- Sale or lease of real property between officer/employee and governmental agency if the officer/employee does not participate on behalf of the governmental agency and interest is disclosed

Required Annual Disclosures

Annual Disclosures

- Prior to taking office, and annually during one's term of office, certain governmental officials and appointees are required to file one of three disclosure forms:
 - The Statement of Economic Interests (the "long form")
 - The Financial Disclosure Statement (the "short form")
 - The Disclosure of Real Estate Holdings

Va. Code § 2.2-3115

Annual Disclosures

- Members of local governing bodies, school boards, and authorities; and positions identified as occupying "positions of trust" (by governing body or school board) must file the Statement of Economic Interests.
- The Financial Disclosure Statement is generally used for nonsalaried citizen appointees to local boards and commissions.
- The Disclosure of Real Estate Holdings must be filed by members of planning commissions, boards of zoning appeals, real estate assessors, and county, city and town managers (pop. >3,500).

Violations, Penalties, Enforcement and Opinions

Penalties for Violation of the Act

- An official who knowingly violates the provisions regarding a personal interest in a transaction is guilty of a Class 3 misdemeanor.
- An official who knowingly violates any other provision of the Act is guilty of a Class 1 misdemeanor.

Va. Code § 2.2-3120

“Knowing Violation”

- A “knowing violation” is one in which the person engages in conduct, performs an act or refuses to perform an act, when he knows that the conduct is either prohibited or required by the Act.

Va. Code § 2.2-3120

- Be aware that you are required to receive, read and familiarize yourself with the Act. (Ignorance is no excuse.)

Va. Code § 2.2-3100.1

Knowing Violation Constitutes Malfeasance

- Any person who knowingly violates any of the Act's provisions is also guilty of malfeasance in office. Upon conviction, the judge or jury may order the forfeiture of such office or employment.

Va. Code § 2.2-3122

Enforcement

- The Commonwealth's Attorney prosecutes violations by local government officers and employees.

Va. Code § 2.2-3126

Opinions of a Local Government Attorney: A Defense

- A written advisory opinion from a local government attorney, made after a full disclosure of the facts, may be introduced as evidence that the officer did not knowingly violate the Act.

Va. Code § 2.2-3121(C)

Opinions of a Commonwealth's Attorney: Immunity

- An officer may not be prosecuted for a knowing violation of the Act if the alleged violation resulted from his good faith reliance on a written opinion of the Commonwealth's Attorney and the opinion was made upon written request in which the officer fully disclosed all pertinent facts.

Va. Code § 2.2-3121(B)

- Seek advice beforehand, early and often

Other Law Related to Conflicts of Interest

- Procurement Act, Art. 6 (ethics in public contracting)
- Local ordinances regulating the acceptance of gifts
- Disclosure of real parties of interest
 - § [15.2-852](#) (disclosure in land use proceedings)
 - §§[15.2-2287](#), [15.2-2287.1](#), and [15.2-2289](#)
- Common Law duties of loyalty and care

Ethical Duties of Elected Officials

Ethics and Conflict of Interest are Different

- Conflict of Interest
 - Legally imposed standards
 - Criminal or civil penalties
- Ethical standards
 - Established by a collegial group
 - Non-binding
 - General guidance on “proper” conduct

Code of Ethics

- Many local governing bodies, school boards, and other governing boards have adopted a code of ethics
- These codes of ethics are based on model codes developed by professional associations
- They serve as guidance

NACO – Code of Ethics

- Properly administer the affairs of the county
- Promote decisions which only benefit the public interest
- Actively promote public confidence in county government
- Keep safe all funds and other properties of the county

NACO – Code of Ethics

- Engage in outside interests that are not compatible with the impartial and objective performance of his or her duties
- Improperly influence or attempt to influence other officials to act in his or her own benefit
- Accept anything of value from any source which is offered to influence his or her action as a public official

Local Codes of Ethics

- Powhatan County
- Spotsylvania County
- James City County
- Amherst County

Common Law Duties

- Duty of Care
- Duty of Loyalty

Ethical Standards for Employees

- General ethical standards for employees are frequently not developed
- NACO's standards are written for Chief Administrative Officers
- Virginia Department of Social Services developed standards for employees of local departments

Personal Code of Ethics

- Avoid any appearance of impropriety
- Avoid the accusation
- Do not do anything that would require more than a 5-10 word explanation
- Operate always with the knowledge that there are no secrets
- Today word spreads instantly (10 balloons, less than 9 hours)

Phyllis C. Katz, Esquire
Sands Anderson Marks & Miller
Richmond, Virginia

pkatz@sandsanderson.com

(804) 783-7287

Andrew R. McRoberts, Esquire
Sands Anderson Marks & Miller
Richmond, Virginia

amcroberts@sandsanderson.com

(804) 783-7211