

# Coalition for Integrity

## Creating Effective Ethics Agencies in Virginia Coalition for Integrity Suggestions

### The Goal

In 2015, Virginia created three ethics agencies: the Virginia Conflict of Interest and Ethics Advisory Council (Advisory Council), the Senate Ethics Advisory Panel and the House Ethics Advisory Panel. Unlike the majority of state ethics agencies, these bodies do not have the power to sanction violations of ethics rules.<sup>1</sup> The Advisory Council cannot even investigate complaints. The goal is to revise the Virginia ethics laws to create an effective ethics regime that can investigate and sanction wrongdoing by Members of the General Assembly and legislative employees and state and local government officials and employees.

Virginia's inadequate ethics regime is reflected in its showing in two recent reports by the Coalition for Integrity.<sup>2</sup> The state scored in the bottom ten of the S.W.A.M.P. Index, an analysis of laws and regulations related to ethics issues.<sup>3</sup> Virginia fared poorly due to its lack of ethics enforcement powers, lack of protections from removal of ethics agency members and weak financial disclosure laws. In a follow-up report on how ethics agencies enforce ethics rules, Virginia's lack of enforcement power among all three agencies precluded it from even being scored.<sup>4</sup>

This paper provides an overview of the existing ethics agencies and their powers, a review of prior legislative actions to strengthen Virginia's ethics regime and suggestions for creating an effective ethics agency, based on examples from other states.

### Virginia's Ethics Agencies

---

<sup>1</sup> Coalition for Integrity, [Enforcement of Ethics Rules by State Ethics Agencies](#) (2019).

<sup>2</sup> Coalition for Integrity is a non-partisan, non-profit, tax-exempt charitable organization under Section 501(c)(3) of the US Internal Revenue Code. The Coalition works to reduce corruption and increase integrity in the public and private sector.

<sup>3</sup> Coalition for Integrity, [States with Anti-Corruption Measures for Public Officials \(S.W.A.M.P.\) Index](#).

<sup>4</sup> Coalition for Integrity, [Enforcement of Ethics Rules by State Ethics Agencies](#) (2019).



1023 15th Street NW  
Suite 300  
Washington, DC 20005

Tel: 202-589-1616  
Fax: 202-589-1512  
EMAIL [coalition@coalitionforintegrity.org](mailto:coalition@coalitionforintegrity.org)  
WEBSITE [www.coalitionforintegrity.org](http://www.coalitionforintegrity.org)

The Advisory Council<sup>5</sup> was created to encourage and facilitate compliance with the State and Local Government Conflict of Interests Act,<sup>6</sup> the General Assembly Conflicts of Interests Act<sup>7</sup> and the lobbying laws in Article 3 of the Code of Virginia.<sup>8</sup> It is part of the Division of Legislative Services, a legislative branch agency, and has a staff of four.<sup>9</sup> Its annual budget is just under \$600,000.<sup>10</sup>

The Advisory Council’s jurisdiction covers advice and training regarding gifts, prohibited conduct, conflicts of interest and financial disclosure for members of the General Assembly, appointed and elected executive branch officials, employees of the legislative and executive branch, as well as local government officials.<sup>11</sup> The Advisory Council has no investigative or sanctioning powers and does not accept complaints regarding ethics violations, except for complaints involving members of the General Assembly.

The Council is also responsible for receiving and reviewing for completeness lobbyist disclosures and Conflict of Interest disclosures from members of the General Assembly, state and local officers and employees, constitutional officers and members of the judiciary.<sup>12</sup> It does not have authority to impose penalties for failure to file but must refer the failures to the Attorney General for action.

The Advisory Council is supposed to have nine members. Each of the Speaker of the House of Delegates and the Senate Committee on Rules appoints two legislative members from their chamber and one former judge of a court of record. The Governor appoints a current or former executive branch employee, one from a list of nominees submitted by the Virginia Association of Counties and one from a list of nominees submitted by the Virginia Municipal League. Currently, the Advisory Council has only the three members appointed by the Governor, as the terms of the remaining General Assembly members expired on January 8, 2020 and there are no public members appointed by the General Assembly.<sup>13</sup>

The Senate Ethics Advisory Panel and the House Ethics Advisory Panel have authority to investigate complaints received from the Advisory Council, relating to violations of the General Assembly Conflict of Interest Law by members of the General Assembly.<sup>14</sup> The Panels have the authority to issue subpoenas, but they have no power to sanction violations they uncover.<sup>15</sup> Instead, each Panel refers its findings to its respective legislative chamber if the Panel determines a violation was done “unknowingly” or to the Attorney General if it determines the violation was done knowingly.<sup>16</sup>

---

<sup>5</sup> Va. Code § [30-355\(A\)](#).

<sup>6</sup> VA Code § [2.2-3100 et seq.](#)

<sup>7</sup> VA Code § [30-100 et seq.](#)

<sup>8</sup> VA Code § [2.2-418 et seq.](#)

<sup>9</sup> VA Code § [30-357](#); <http://ethics.dls.virginia.gov/about.asp>.

<sup>10</sup> [Virginia Acts of Assembly - Chapter 854](#), p. 22.

<sup>11</sup> VA Code §§ [2.2-3101](#); [30-356](#).

<sup>12</sup> VA Code § [30-110](#).

<sup>13</sup> <http://ethics.dls.virginia.gov/about.asp>.

<sup>14</sup> Va. Code § [30-112](#).

<sup>15</sup> VA Code § [30-115](#).

<sup>16</sup> VA Code § [30-116](#).

The Senate Ethics Advisory Panel is composed of five non-legislative members: three of whom are former members of the Senate; and two of whom are citizens of Virginia who have not previously held such office.<sup>17</sup> The House Ethics Advisory Panel has five non-legislative members: one of whom is a retired justice or judge of a court of record; two are former members of the House of Delegates; and two are citizens of Virginia, at least one of whom has never been a member of the House of Delegates.<sup>18</sup>

Neither Panel has permanent staff members nor do they maintain a website. Information on who the Panel members are or whether the Panels have ever met or conducted an investigation is not available.

### **Previous Legislative Actions**

In the 2017 General Assembly session, Dels. Marcus Simon, Jennifer Boysko, Kaye Kory, Ken Plum, and Roz Tyler introduced [HB 2380](#) to give the Advisory Council the authority to investigate violations of the General Assembly Conflicts of Interests Act and the State/Local Government Conflicts of Interest Act (collectively, the Acts). The authority could be exercised either on the Council’s own accord or upon receipt of a complaint.

HB 2380 set out the steps and timetable for an investigation, gave the Advisory Council subpoena power for documents and witnesses and required a public hearing if the Council concludes that the facts establish a violation of the Acts. It includes a requirement to notify the person who is the subject of a complaint and give that person various rights.

The legislation did not grant the Advisory Council any power to sanction violations, giving it only the ability to make recommendations. In the case where the Advisory Council determines there is a knowing violation of the law, it is required to notify the relevant authority – either the Attorney General or the relevant Commonwealth’s Attorney – for prosecution.

HB 2380 raises a number of issues besides its failure to grant sanctioning authority to the Advisory Council. For example, it is not clear how the investigative power of the Advisory Council meshes with the jurisdiction of the House Ethics Advisory Panel or the Senate Ethics Advisory Panel in cases where a complaint is filed against a member of the General Assembly. Other questions revolve around the suitability of the time frames, what kind of information must be contained in a complaint and whether complaints can be made anonymously. In addition, it does not address other issues identified by the Coalition for Integrity as the hallmarks of an effective ethics regime, such as independence.

In 2018, the General Assembly adopted a resolution to “study the current ethics laws of the Commonwealth.” [Senate Jt. Resolution No. 75](#) authorized the creation of a joint subcommittee, composed of three members of each of the House of Delegates and Senate and two members of the public. Its focus was the disclosure requirements for members of the General Assembly and

---

<sup>17</sup> VA Code § [30-112](#).

<sup>18</sup> Id.

the reporting requirements for lobbyists. It does not appear that the subcommittee was ever formed or conducted business.

### **Creating an Effective Ethics Agency in Virginia**

HB 2380 is a good starting place to address the shortcomings in Virginia's ethics regime. It sets out a robust investigative system, provides subpoena power and requires transparency of the proceedings. In these regards, the proposed legislation would bring Virginia in line with many good practices by other state agencies. There are issues, however, which HB 2380 did not address but should be considered when the General Assembly acts to improve the state's ethics regime. These are discussed here, along with examples of practice from other state ethics agencies.

### **Consolidation of ethics agencies**

The Senate Ethics Advisory Panel and the House Ethics Advisory Panel appear to exist in name only, while the Advisory Council already has jurisdiction over training and advice for all members of the General Assembly, legislative employees and state and local government officials and employees. The General Assembly should consider abolishing the Panels.

Currently, 47 states and the District of Columbia have one or more ethics agency.<sup>19</sup> In most states, there is one agency with jurisdiction over both legislative and executive branch officials and employees. There are a few exceptions.

- New York has a separate Legislative Ethics Committee, which has advisory powers and sanctioning authority in cases where the Joint Committee on Public Ethics has found a violation.<sup>20</sup>
- New Jersey, Washington, Alaska and New Hampshire have a separate legislative ethics agency, which has the power to provide advice and training and to investigate and sanction violations.<sup>21</sup>

### **Independence**

The Advisory Council lacks a number of indicia of independence. It is part of the Division of Legislative Services, a part of the General Assembly, and four of its members are members of the General Assembly. In addition, there is no protection against the removal of a member without cause. The General Assembly should consider making the Advisory Council an independent state agency composed of members chosen from the public who are protected from removal without cause.

<sup>19</sup> Coalition for Integrity, [Enforcement of Ethics Rules by State Ethics Agencies](#) (2019) at 5. New Mexico's Ethics Commission started work on January 1, 2020. North Dakota's Ethics Commission held its first meeting in September 2019.

<sup>20</sup> [N.Y. Legis. Law §§ 80-10 to 11.](#)

<sup>21</sup> [N.J. STAT. § 52:13D-22\(h\)\(1\)](#); [Wash. Rev. Code § 320\(1\)](#); [N.H. Rev. Stat. § 14-B:2\(I\)](#); and [Alaska Stat. § 24.60.140\(c\)](#).

- Examples of practices in other states
  - 28 states prevent members of their ethics agencies from removal without cause
  - Florida, Pennsylvania and California are a few of the states which prohibit public officials from serving as members of the ethics agency governing body.<sup>22</sup>

## Complaint Process

HB 2380 provides that the Advisory Council can initiate a complaint on its own or upon receipt of a complaint. It is not clear whether a complainant must be a Virginia resident or whether a complainant must provide identifying details. Anyone should be able to file a complaint against covered officials and employees. There should be some avenue for complainants to report anonymously to avoid fear of retaliation.

Most state ethics agencies allow anybody to file a complaint, whether or not a resident of the state. They differ, however, on whether a complaint can be filed anonymously; whether a complaint must be notarized; when a complaint is provided to the person who is the subject of the complaint; and when a complaint is made public.

- Examples of practices in other states
  - Florida – allows anybody to file a complaint, but requires it be notarized.<sup>23</sup> Identifying information is collected and made public upon a finding of probable cause.
  - Colorado – a complaint must be in writing, but is not required to be sworn or notarized. Identifying information is collected, but kept confidential until the complaint is found to be non-frivolous.<sup>24</sup>
  - California – a complaint must be in writing and can be done either sworn or as an anonymous tip. However, only persons filing sworn complaints have the right to be notified about the Commission’s actions respecting the complaint.<sup>25</sup>

## Sanctioning

The ethics agency should have the power to sanction offenders. There is a range of sanctions that the agency could have, including civil penalties and fines, public censure or reprimand, and termination of employment for an offender who is not subject to impeachment. The amount of civil fines is important, as it must be high enough that it actually acts as a deterrent to potential bad actors.

As of June 2019, there were 50 state ethics agencies with investigative and enforcement powers of some kind.<sup>26</sup> The majority of state ethics agencies have the power to initiate and conduct

<sup>22</sup> [FLA. STAT. §112.321; 65 Pa. Cons. Stat. § 1106\(a\) ; CA Code § 9-83105.](#)

<sup>23</sup> Florida Commission on Ethics, [Guide to the Sunshine Amendment and Code of Ethics for Public Officers and Employees \(2020\)](#), p. 21.

<sup>24</sup> Colorado Independent Ethics Commission, [Rules of Procedure \(2019\), § 7.](#)

<sup>25</sup> [Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations\), § 1836; California Fair Political Practices Commission, Potential Anonymity of Complaint.](#)

<sup>26</sup> Coalition for Integrity, [Enforcement of Ethics Rules by State Ethics Agencies](#) (2019) at 5.

their own investigations and the ability to issue subpoenas.<sup>27</sup> Most of these agencies have the power to enjoin improper conduct, impose fines and issues letters of reprimand.<sup>28</sup> Three agencies have the ability to take personnel actions, including termination of an official not subject to impeachment - the Louisiana Board of Ethics, New Jersey State Ethics Commission and Rhode Island Ethics Commission.<sup>29</sup>

The fines which state ethics agencies can impose range from a minimal amount to significant penalties. In most cases, however, the minimal amount relates to failure to file financial disclosure statements. In the period from 2016 to 2018, 16 ethics agencies imposed fines of \$10,000 or more in individual cases.<sup>30</sup>

- Examples of practices in other states
  - Massachusetts – can issue cease and desist or compliance orders, impose fines up to \$10,000 (\$25,000 for corruptly demanding or accepting anything of value)<sup>31</sup>
  - Hawaii – can impose fines of up to \$1,000 per violation.<sup>32</sup>
  - West Virginia – can impose fines of up to \$5,000 per violation plus costs and issue cease and desist orders and public reprimands.<sup>33</sup>
  - Ohio can issue public censures.<sup>34</sup>

## Transparency

Transparency is a crucial part of any ethics regime. It deters future violations and gives the public access to information that can be used to assess the performance of the ethics agency and evaluate whether reforms are needed. Transparency includes publishing complaints once they have been found to demonstrate probable cause or not be frivolous, written decisions about why a complaint was dismissed without a finding of an ethics violation, holding public hearings, issuing written decisions resolving complaints and publishing an annual or biennial report on the agency's activities.

The Advisory Council is one of a few ethics agencies to publish an annual report. In 2018, only 19 other ethics agencies did so.<sup>35</sup> Most state agencies make findings and sanctions publicly available, either through their annual report or on their agency's website.

- Examples of practices in other states
  - Colorado – decisions are required to be made public. A report is not required, but the agency still issues one, and it contains the number of complaints received and

<sup>27</sup> Coalition for Integrity, [States with Anti-Corruption Measures for Public Officials \(S.W.A.M.P.\) Index](#) at 14.

<sup>28</sup> Id. at 15.

<sup>29</sup> [La. Stat. §§ 42:1151:1153 \(1980\)](#); [N.J. STAT. § 52:13D-21\(i\)](#); [R.I. Gen. Laws §§ 36-14-13\(d\)\(5\)](#), 14.

<sup>30</sup> [Enforcement of Ethics Rules by State Ethics Agencies](#) at 14.

<sup>31</sup> [Mass. Gen. Laws ch. 268B, § 4\(j\)\(1\)](#)

<sup>32</sup> [HAW. REV. STAT. § 84-39\(a\)](#); [HAW. REV. STAT. § 84-32\(a\)](#).

<sup>33</sup> [W. VA. CODE § 6B-2-4\(s\)\(1\) and \(2\)](#).

<sup>34</sup> [Ohio Admin. Code 102-11-02\(D\)](#).

<sup>35</sup> [Enforcement of Ethics Rules by State Ethics Agencies](#) at 21.

- dismissed, as well as the number of cases resolved with a finding of an ethics violation and with a finding of no ethics violation.
- Massachusetts – decisions are not required to be made public, nor is a report required, but the agency still does both. The report includes all complaints received and dismissed, as well as the number of cases resolved with a finding of an ethics violation and with a finding of no ethics violation.
  - New Mexico – under the new law, the ethics agency is required to submit an annual report of its activities to the legislature and the governor.<sup>36</sup>

---

<sup>36</sup> [New Mexico Ethics Commission Act](#)