



## MEMORANDUM

**To: Virginia Conflict of Interest and Ethics Advisory Council**

**From: Rebekah Stefanski, Attorney**

**Date: October 17, 2017**

**Re: Formal Advisory Opinion 2015-F-002 Commission filers § 2.2-3115<sup>1</sup>**

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### ISSUES PRESENTED

You ask if the members of commissions created by the Regional Cooperation Act are required to file disclosure forms. You also ask if the commission staff members are required to file disclosure forms. If either group is required to file, you ask which form they are required to file and with whom they are required to file it.

### DISCUSSION

Various planning district commissions are established all over the Commonwealth via the Regional Cooperation Act (§ 15.2-4200 et seq. of the Code of Virginia) (the Act). Under the Act, these planning district commissions are created by the local governing bodies of the area in which the commission is established.<sup>2</sup> Therefore, the members of these commissions all fall under the authority of § 2.2-3115 of the Code of Virginia, which applies to all local government officers and employees.

Under § 2.2-3115, local government officers and employees are required to file disclosure forms if they fall into one of several categories outlined in subsection A or if they fall into the nonsalaried citizen category outlined in subsection B. Under subsection A, members of the governing body of any authority that has the power to issue bonds or expend funds in excess of \$10,000 per fiscal year are required to file a disclosure form as a condition of assuming office

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<sup>1</sup> This Formal Advisory Opinion was originally issued on December 10, 2015, concluding in part that all members of a district planning commission with the ability to expend funds in excess of \$10,000 in any fiscal year must automatically file a Financial Disclosure Statement. The Formal Advisory Opinion was withdrawn for reconsideration on July 18, 2017, and was reissued on October 17, 2017, with a different conclusion on that issue.

<sup>2</sup> VA. CODE ANN. § 15.2-4203.

and annually thereafter.<sup>3</sup> Additionally, individuals appointed or employed by a governing body and nonsalaried citizen members of local commissions are not automatically required to file a disclosure form, but may be designated by their governing body to do so.<sup>4</sup>

Although a planning commission may have the authority to issue bonds or expend funds in excess of \$10,000 in any fiscal year, a commission is an entity that is distinct from an authority.<sup>5</sup> Therefore, as it is not an authority, there is no automatic filing requirement that applies to the commission members.<sup>6</sup> However, the governing body that appoints members to the commission may designate nonsalaried citizen members it appoints to file the Financial Disclosure Statement established in § 2.2-3118.<sup>7</sup> It is important to note that if using subsection B of § 2.2-3115 to require commission members to file a disclosure form, the governing body may only require the nonsalaried citizen members to file the Financial Disclosure Statement of § 2.2-3118.<sup>8</sup> The governing body does not have the authority to require the members to file the Statement of Economic Interests established in § 2.2-3117, as none is given in subsection B of § 2.2-3115.<sup>9</sup>

Alternatively, any commission member appointed by a governing body may be required to file the Statement of Economic Interests established in § 2.2-3117, but only if that governing body enacts an ordinance designating such.<sup>10</sup> Should the governing body choose to enact such an ordinance using the authority granted to it by subsection A of § 2.2-3115, the requirement must be for a Statement of Economic Interests and may not be for a Financial Disclosure Statement as established in § 2.2-3118.<sup>11</sup> If the governing body does not pass such an ordinance, the commission members shall not be required to file a Statement of Economic Interests.

If a commission member is not designated by ordinance to file a Statement of Economic Interests or designated to file a Financial Disclosure Statement by his local governing body, he should not file any disclosure forms in his role as a commission member.

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<sup>3</sup> “In accordance with the requirements set forth in § 2.2-3118.2, the members 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, shall file . . . the form prescribed by the Council pursuant to § 2.2-3118 . . . , unless the governing body of the jurisdiction that appoints the members requires that the members file the form set forth in § 2.2-3117.” VA. CODE ANN. § 2.2-3115(A).

<sup>4</sup> VA. CODE ANN. § 2.2-3115(A)-(B).

<sup>5</sup> See 2010 Op. Va. Att’y Gen. No. 10-020 (a planning district commission, created pursuant to Va. Code Ann. § 15.2-4203(A), is not an “authority”).

<sup>6</sup> VA. CODE ANN. § 2.2-3115(A)-(B).

<sup>7</sup> “In accordance with the requirements set forth in § 2.2-3118.2, nonsalaried citizen members of local boards, commissions and councils as may be designated by the governing body shall file . . . the form prescribed by the Council pursuant to § 2.2-3118 . . .” VA. CODE ANN. § 2.2-3115(B).

<sup>8</sup> “In accordance with the requirements set forth in § 2.2-3118.2, nonsalaried citizen members of local boards, commissions and councils as may be designated by the governing body shall file . . . *the form prescribed by the Council pursuant to § 2.2-3118 . . .*” *Id.* (emphasis added).

<sup>9</sup> The Supreme Court of Virginia has long held that a municipality “possesses no powers except those conferred upon it, expressly or by fair implication, by the law which created it and other statutes applicable to it . . . . It can do no act . . . that is not thus authorized.” *City of Winchester v. Redmond*, 93 Va. 711, 714 (1896).

<sup>10</sup> “In accordance with the requirements set forth in § 2.2-3118.2, 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 by ordinance of the governing body shall file . . . the form prescribed by the Council pursuant to § 2.2-3117 . . .” VA. CODE ANN. § 2.2-3115(A).

<sup>11</sup> When a statute creates a specific grant of authority, authority is deemed to exist only to the extent granted in the statute. *Supra* note 5, n. 10 (further citations omitted).

The staff members of any planning district commission are also not automatically required to file any disclosure forms. However, if staff members are employed by the governing body, they may be designated by ordinance of that governing body to file the Statement of Economic Interests established in § 2.2-3117.<sup>12</sup> It is again important to note that the governing body may only require a staff member to file by ordinance and may only require him to file the Statement of Economic Interests established in § 2.2-3117.<sup>13</sup> The governing body does not have the authority to require the staff member to file without an ordinance, nor does it have the authority to require the staff member to file a Financial Disclosure Statement of § 2.2-3118.<sup>14</sup> If the staff members are employees of the district planning commission itself and not of the governing body, then they shall not be required to file a disclosure statement.

Each planning district commission is required to include in its charter “the locality in which its principal office shall be situated.”<sup>15</sup> Additionally, those required to file under § 2.2-3115 are instructed to file their forms with the clerk of the applicable governing body.<sup>16</sup> Therefore, the recommended procedure for those commission members and staff employees required to file disclosure forms is to send their forms to the clerk of the locality in which the commission has chosen its principal office.

## CONCLUSIONS

Commission members are not automatically required to file any disclosure form, but they may be required to file a disclosure form by the governing body that appoints them to the commission. A nonsalaried citizen member of a commission may be required by a designation of the governing body that appoints him to file the Financial Disclosure Statement of § 2.2-3118. Any appointed commission member may be required to file a Statement of Economic Interests under § 2.2-3117, but only if the governing body that appoints him has passed an ordinance requiring such disclosure.

Commission staff members are not automatically required to file, but they may be designated by ordinance to file a Statement of Economic Interests of § 2.2-3117 by their respective governing body. If staff members work directly for the commission and are not employees of the governing body that has established the commission, they shall not be required to file any disclosure statements.

Commission members and staff required to file should file their disclosure forms with the locality in which the principal office of the commission sits.

This analysis applies only to the stated facts. If the facts differ, the analysis will change.

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<sup>12</sup> *Supra* note 10.

<sup>13</sup> “In accordance with the requirements set forth in § 2.2-3118.2, 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 *by ordinance of the governing body* shall file . . . *the form prescribed by the Council pursuant to § 2.2-3117 . . .*” VA. CODE ANN. § 2.2-3115(A) (emphasis added).

<sup>14</sup> *Supra* note 11.

<sup>15</sup> VA. CODE ANN. § 15.2-4203(B)(2).

<sup>16</sup> “Forms filed by members of governing bodies of authorities shall be filed and maintained as public records for five years in the office of the clerk of the governing body of the county or city.” VA. CODE ANN. § 2.2-3115(D).