



# COMMONWEALTH of VIRGINIA

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The Honorable Edgardo Cortés  
Commissioner of Elections  
Department of Elections  
1100 Bank Street, First Floor  
Richmond, Virginia 23219

Dear Mr. Cortés:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.<sup>1</sup>

## Issue Presented

You ask whether regulations administering Chapters 9.3, 9.4, and 9.5 of Title 24.2 of the *Code of Virginia*, which concern campaign finance laws, relate to “the conduct of elections or eligibility to vote,” thereby qualifying for an exemption from the Virginia Administrative Process Act (“APA”) regulatory process.

## Response

It is my opinion that regulations implementing Chapters 9.3, 9.4, and 9.5 of Title 24.2 of the *Code of Virginia* do not relate to “the conduct of elections and eligibility to vote,” and therefore do not qualify for an exemption from the regulatory process established by the APA.

## Applicable Law and Discussion

The Virginia Administrative Process Act<sup>2</sup> governs the adoption of regulations by agencies of the Commonwealth. Pursuant to the APA, prior to becoming effective, agency regulations are subject to various requirements:

- public notice and, potentially, public hearings;<sup>3</sup>
- public comment and, potentially, the taking of evidence;<sup>4</sup>
- review by both the Attorney General and the Governor;<sup>5</sup> and
- legislative review.<sup>6</sup>

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<sup>1</sup> This request originally was submitted by Donald Palmer in his capacity as Secretary of the State Board of Elections prior to the establishment of the Department of Elections on July 1, 2014.

<sup>2</sup> VA. CODE ANN. §§ 2.2-4000 through 2.2-4031 (2011 & Supp. 2014).

<sup>3</sup> Section 2.2-4007.01 (2011).

<sup>4</sup> Sections 2.2-4007 (2011); 2.2-4009 (Supp. 2014).

<sup>5</sup> Section 2.2-4013 (2011).

Nevertheless, the APA contains several exemptions from its applicability, including blanket exemptions for certain agencies<sup>7</sup> and exemptions based on the subject matter of the agency action.<sup>8</sup> Although the APA does not contain a blanket exemption for the Department of Elections, it does exempt agency action that relates to “[t]he conduct of elections or eligibility to vote.”<sup>9</sup>

The Chapters about which you inquire contain the Campaign Finance Disclosure Act of 2006,<sup>10</sup> restrictions on fundraising by and for statewide officials while the General Assembly is in session,<sup>11</sup> and disclosure requirements for campaign advertisements.<sup>12</sup> These provisions regulate certain financial aspects of candidates’ campaigns for elected office. Because regulations implementing such provisions would not affect voter eligibility issues,<sup>13</sup> your request requires only an analysis of whether regulations addressing campaign finance laws relate to “the conduct of elections.”

That matters related to “the conduct of elections” do not encompass all regulations implementing the election laws is evident from the General Assembly’s decision not to provide a blanket APA exemption to the Department of Elections, the state agency charged with the administration of the election laws.<sup>14</sup> Moreover, such a broad interpretation would render the specific exemption of agency action related to the eligibility to vote superfluous.<sup>15</sup> Thus, action related to “the conduct of elections” does not include all regulations that may implicate an activity associated with the election process.<sup>16</sup> Rather, based on the General Assembly’s general treatment of election-related activities and organization of the statutory provisions governing them, as well as related case law, I conclude that the phrase is limited to activities occurring on, or in preparation for, election day, so that regulations addressing campaign finance laws do not relate to “the conduct of elections.”

The *Code of Virginia* constitutes a single body of law, and it is well established that other portions of it provide interpretative guidance.<sup>17</sup> Although not dispositive, it is notable that the portion of

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<sup>6</sup> Section 2.2-4014 (2011).

<sup>7</sup> See § 2.2-4002(A) (Supp. 2014).

<sup>8</sup> Section 2.2-4002(B).

<sup>9</sup> Section 2.2-4002(B)(8).

<sup>10</sup> Chapter 9.3, “Campaign Finance Disclosure Act of 2006,” VA. CODE ANN. §§ 24.2-945 through 24.2-953.5 (2011 & Supp. 2014).

<sup>11</sup> Chapter 9.4, “Campaign Fundraising; Legislative Sessions, § 24.2-954 (2011).

<sup>12</sup> Chapter 9.5, “Political Campaign Advertisements,” §§ 24.2-955 through 24.2-959.1 (2011 & Supp. 2014).

<sup>13</sup> The eligibility to vote in the Commonwealth of Virginia is governed by Article II, § 1 of the Constitution of Virginia, entitled “Qualifications of voters” and various chapters of Title 24.2 of the Code, including Chapter 4, which establishes the requirements for voter qualification and registration.

<sup>14</sup> See § 24.2-103(A) (Supp. 2014). The newly created Department of Elections continues to fulfill many of its duties through the State Board of Elections.

<sup>15</sup> “The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd.” *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984).

<sup>16</sup> *Cf. Moore v. Pullem*, 150 Va. 174, 189-91, 142 S.E. 415, 419-20 (1928) (distinguishing between distinct aspects of the election process and the provisions governing them, including voter qualifications, voter registration, and the method of voting, noting that laws concerning the qualification of voters do not relate, except incidentally, to the conduct of elections)

<sup>17</sup> See, e.g., 1990 Op. Va. Att’y Gen. 126, 128 (quoting *King v. Commonwealth*, 2 Va. App. 708, 710, 347 S.E.2d 530, 531 (1986)).

Title 24.2 entitled “Conduct of Election; Election Results” is codified separately as Article 4 of Chapter 6.<sup>18</sup> Chapters 9.3, 9.4, and 9.5 are not included there, nor does Article 4 of Chapter 6 contain provisions relating to financial matters. Rather, the statutes included in Article 4 govern activities that occur on the day of an election. For example, certain sections provide the procedures by which qualified voters are to vote at a polling place,<sup>19</sup> while other sections address the appropriate use and handling of ballots and voting equipment on the day of an election,<sup>20</sup> as well as the counting of ballots at the close of the election day.<sup>21</sup> The context of other parts of the Code where “conduct of election” is used also suggests that the term is limited to election-day operations.<sup>22</sup>

In addition, the legislature has vested oversight of the “conduct of elections” in local electoral boards.<sup>23</sup> As part of this duty, electoral boards are responsible for the appointment and training of officers of election,<sup>24</sup> who are assigned to precincts on election day to manage polling place operations and to maintain order.<sup>25</sup> These activities are limited, by their essence, to events occurring on election day. In contrast, further evincing that issues related to campaign finance regulation are distinct from the conduct of elections, the role of local electoral boards in administering the provisions about which you inquire is very limited: they are charged with implementing the provisions of Chapter 9.3 only as they apply to candidates seeking local office,<sup>26</sup> and they possess no authority with respect to Chapters 9.4 and 9.5. The General Assembly otherwise has vested the State Board of Elections with the administration of campaign finance laws.<sup>27</sup>

Furthermore, although the phrase “the conduct of elections” has not been defined for purposes of the exemption under the APA, similar language has been held to be limited to the management of events occurring on election day. In construing the constitutional prohibition against enacting local or special laws “[f]or registering voters, conducting elections, or designating the place of voting[,]”<sup>28</sup> the Supreme Court of Virginia has considered the extent to which this language applies to overall operations of electoral boards. In two cases, the Court distinguished between activity tied to the management of an election on election day, and other electoral board functions.

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<sup>18</sup> See §§ 24.2-643 through 24.2-680 (2011 & Supp. 2014).

<sup>19</sup> See §§ 24.2-643 through 24.2-644 (2011 & Supp. 2014).

<sup>20</sup> See §§ 24.2-645 through 24.2-648 (2011).

<sup>21</sup> See §§ 24.2-657 through 24.2-667 (2011).

<sup>22</sup> See §§ 24.2-114(5) (Supp. 2014) (general registrar to ensure “pollbooks used for the conduct of elections” identify those voters who registered by mail); 24.2-309 (2011) (procedure available for “the conduct of elections [in precincts] where all voters do not have the same choice of candidates; 24.2-310(B) (Supp. 2014) (localities required to provide funding for ‘adequate facilities at each polling place for the conduct of elections’”).

<sup>23</sup> Section 24.2-109(B) (2011) (“The electoral board shall perform the duties assigned by this title including, but not limited to, the preparation of ballots, the administration of absentee ballot provisions, the conduct of the election, and the ascertaining of the results of the election.”).

<sup>24</sup> Section 24.2-115 (Supp. 2014).

<sup>25</sup> See, e.g., §§ 24.2-603 (2011); 24.2-606 through 24.2-608 (2011); 24.2-610(C) (2011); 24.2-643 (Supp. 2014); 24.2-649 (Supp. 2014); 24.2-654 (Supp. 2014); 24.2-657; 24.2-668 (2011).

<sup>26</sup> Section 24.2-948.1 (2011).

<sup>27</sup> See §§ 24.2-946 through 24.2-946.5 (2011 & Supp. 2014); 24.2-947.3:1 (2011); 24.2-947.4 (2011); 24.2-947.5 (2011); 24.2-955.3 (2011).

<sup>28</sup> VA. CONST. art. IV, § 14(11).

In *Porter v. Joy*, plaintiffs challenged legislation that permitted the election, rather than appointment, of school board members.<sup>29</sup> In upholding the enactment, the Court acknowledged that a local law authorizing a county “to set up its own regulations with respect to the time of opening and closing the polls, the selection of the judges of election, and the many other matters related to the conduct of elections, would be obviously undesirable[,]”<sup>30</sup> but concluded that the constitutional prohibition “clearly was not intended as a restriction upon the General Assembly to provide what offices in a county should be filled by election.”<sup>31</sup> The Court reached a similar conclusion in *Davis v. Dusch*, which addressed an amendment to a city charter that ordered redistricting based on consolidation of the city and a county.<sup>32</sup> In finding no constitutional violation in amending the charter, the Court stated that the constitutional provision

‘refers to the manner in which an election is conducted.’ We are not concerned in this case with the manner of conducting an election. Our concern is whether the city council has the power to reapportion itself and has the authority to order the election of a new council -- an entirely different matter from that envisioned by [the restriction on enacting local or special law related to conducting elections].<sup>[33]</sup>

This Office, in applying the constitutional prohibition, also has interpreted the term “the conduct of elections” as a reference to overseeing and managing elections on an election day. In a previous Opinion, the Attorney General considered whether proposed legislation to establish guidelines for the nomination of candidates for certain positions constituted an unconstitutional special law.<sup>34</sup> The Attorney General concluded that the prohibition “refers purely to the manner in which elections are conducted, whereas Senate Bill No. 70 refers only to the method of nominating candidates for office.”<sup>35</sup> Later opinions also have limited contextually the application of the phrase “the conduct of elections” to those events which take place on, or are taken to directly prepare for, an election day.<sup>36</sup>

As a result, the case law and prior opinions of this Office addressing the phrase “the conduct of elections” are consistent with the statutory analysis of the Code detailed above. As “the conduct of elections” routinely has been determined to include only those activities that occur on, or in preparation for, election days, campaign finance laws do not fall within the scope of this phrase. Consequently, regulations adopted for the administration of the provisions of the Campaign Finance Disclosure Act are not exempt from the APA regulatory process.

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<sup>29</sup> *Porter v. Joy*, 188 Va. 801, 51 S.E.2d 156 (1949) (construing Va. Const. of 1902, art. IV, § 16, predecessor provision to current VA. CONST. art. IV, § 14(11)).

<sup>30</sup> *Id.*, 188 Va. at 806, 51 S.E.2d at 158.

<sup>31</sup> *Id.*

<sup>32</sup> *Davis v. Dusch*, 205 Va. 676, 139 S.E.2d 25 (1964).

<sup>33</sup> *Id.*, 205 Va. at 684, 139 S.E.2d at 30 (quoting *Porter*, 188 Va. at 805, 51 S.E.2d at 158 (1949)).

<sup>34</sup> 1969-70 Op. Va. Att’y Gen. 114.

<sup>35</sup> *Id.* at 115.

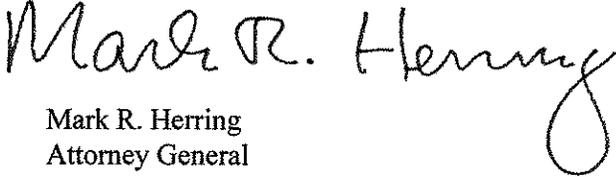
<sup>36</sup> See 2011 Op. Va. Atty Gen. 132, (addressing electoral boards’ authority to prevent actions which “impede the orderly conduct of elections” under § 24.2-604(D); 2003 Op. Va. Atty Gen. 108, 111 (concluding that while § 24.2-106 prohibits electoral board members from engaging in certain political activities, “[t]he partisan nature of selecting participants to conduct elections, however, does not require [electoral board members] to perform their duties in a partisan fashion.” The participants mentioned are officers of election, who are responsible for the administration of polling places on election days under §§ 24.2-115 and 24.2-116).

**Conclusion**

Accordingly, it is my opinion that regulations adopted by the SBE for the purpose of administering Chapters 9.3, 9.4, and 9.5 of Title 24.2 of the *Code of Virginia* concerning campaign finance laws do not relate to “the conduct of elections or eligibility to vote,” and therefore do not qualify for an exemption from the APA regulatory process under § 2.2-4002(B)(8).

With kindest regards, I am

Very truly yours,

  
Mark R. Herring  
Attorney General