**MEMORANDUM**

TO: Virginia's Commonwealth's Attorneys and Assistant Commonwealth's Attorneys

FROM: Elliott Casey, CASC

RE: Interpretation of Recent Emergency Orders

DATE: March 23, 2020

**Executive Orders**

1. March 12, 2020: Virginia Governor Ralph S. Northam declared a state of emergency due to COVID-19 in Executive Order No. 51 (EO-51). No criminal sanctions were included.

2. March 17, 2020: Governor Northam and State Health Commissioner Norman Oliver issued another Executive Order (not numbered and no citation provided). A suggested citation is CoVA PHE Order 3/17/20. That order included criminal sanctions for violations and is available here: https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-854500-en.html

3. March 20, 2020: Governor Northam and State Health Commissioner Norman Oliver issued an amended Executive Order, "Order of Public Health Emergency One." CASC issued guidance on this order on March 21, 2020. That order included clarified criminal sanctions for violations and is available here: https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/Amended-Order-of-the-Governor-and-State-Health-Commissioner-Declaration-of-Public-Health-Emergency.pdf

4. March 23, 2020: Governor Northam issued Executive Order Fifty-Three (hereinafter "EO-53"). This order amended the earlier, March 23 order. This order includes new restrictions and new criminal sanctions for violations and is available here: https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf

   EO-53 also has a "frequently asked questions" (hereinafter "FAQ") page, which is located here: https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Frequently-Asked-Questions-Regarding-EO-53.pdf

   Please note that the "frequently asked questions" page does not have the force of law, but is advisory regarding how to interpret EO-53.

**Conclusion as to Criminal Sanctions Available for Violations of EO-53**

It is my conclusion that under EO-53, the following acts would constitute a Class 1 misdemeanor:

1. Public or private in-person gatherings of 10 or more individuals.
2. Failure to close dining or congregation areas in restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets.
3. Failure to close all public access to recreational and entertainment businesses.
4. Failure of any "brick and mortar" retail business, not deemed essential, to limit all in-person shopping to no more than 10 patrons per establishment.
5. Failure of any "brick and mortar" retail business, not deemed essential, to close if it cannot adhere to the 10-patron limit with proper social distancing requirements.

The order goes into effect on 11:59 p.m., Tuesday, March 24, 2020 and remains in effect until 11:59 p.m., Thursday, April 23, 2020.

Law Enforcement should cite Va. Code § 44-146.17 in a citation for such a violation. It would be advisable to include, in parenthesis, a citation to the March 23, 2020 Order. That might appear as: "Va. Code 44-146.17 (EO-53)"

**Analysis**

This memorandum will provide my analysis of the criminal sanctions for violations of EO-53. I do not plan to address the other, non-criminal provisions of EO-53.

In short, EO-53 seeks to enforce "social distancing" by outlawing gatherings of 10 people or more, closing certain businesses, and setting a 10-patron limit on many, but not all, retail stores. In outlawing gatherings of 10 people or more, EO-53 is not limited to businesses or public spaces; it applies to any assembly or meeting of persons, including in private homes and facilities.

Nonetheless, as will be noted below, some "gatherings" of people in a building appear to remain potentially lawful. For example, some retail establishments such as grocery stores may operate with more than 10 patrons at once. In addition, employment settings are not considered gatherings. Other such exceptions will be noted below.

EO-53 issues several orders that carry criminal sanctions:

1. Effective 11:59 p.m., Tuesday, March 24, 2020 until 11:59 p.m., Thursday, April 23, 2020, all public and private in person gatherings of 10 or more individuals are prohibited. Violation of this Order shall be a Class 1 misdemeanor pursuant to Va. Code § 44-146.17.

2. Closure of all dining and congregation areas in restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets effective 11:59 p.m., Tuesday, March 24, 2020 until 11:59 p.m., Thursday, April 23, 2020. Restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets may continue to offer delivery and take-out services. Violation of this Order shall be a Class 1 misdemeanor pursuant to Va. Code § 44-146.17.

3. Closure of all public access to recreational and entertainment businesses, effective 11:59 p.m., Tuesday, March 24, 2020 until 11:59 p.m., Thursday, April 23, 2020 as set forth below:
    - Theaters, performing arts centers, concert venues, museums, and other indoor entertainment centers;
    - Fitness centers, gymnasiums, recreation centers, indoor sports facilities, and indoor exercise facilities;
    - Beauty salons, barbershops, spas, massage parlors, tanning salons, tattoo shops, and any other location where personal care or personal grooming services are performed that would not allow compliance with social distancing guidelines to remain six feet apart;
    - Racetracks and historic horse racing facilities; and
    - Bowling alleys, skating rinks, arcades, amusement parks, trampoline parks, fairs, arts and craft facilities, aquariums, zoos, escape rooms, indoor shooting ranges, public and private social clubs, and all other places of indoor public amusement

Violation of EO-53 shall be a Class 1 misdemeanor pursuant to Va. Code § 44-146.17.

4. Effective 11:59 p.m., Tuesday, March 24, 2020 until 11:59 p.m., Thursday, April 23, 2020, any brick and mortar retail business, other than those specifically excepted, may continue to operate but must limit all in-person shopping to no more than 10 patrons per establishment. If any such business cannot adhere to the 10-patron limit with proper social distancing requirements, it must close. Violation of this Order shall be a Class 1 misdemeanor pursuant to Va. Code § 44-146.17.

The Governor issued and signed EO-53. Under Va. Code § 44-146.17(1) (fourth paragraph), "Executive orders…shall have the force and effect of law and the violation thereof shall be punishable as a Class 1 misdemeanor in every case where the executive order declares that its violation shall have such force and effect." EO-53 declares that violation of it shall have the force and effect of a Class 1 misdemeanor.

Unlike the previous two orders, the Commissioner of Public Health did not sign EO-53.

Thus, EO-53 sets a penalty of a Class 1 misdemeanor for certain gatherings, closes eating/drinking establishments and "recreational and entertainment businesses," and then sets limits on shopping in retail establishments. I will address EO-53 in five parts:

## PART ONE:
## UNLAWFUL GATHERINGS

**Class 1 Misdemeanor: Gatherings of 10 or more individuals.**

Under EO-53, all public and private in-person gatherings of 10 or more individuals are prohibited. EO-53 does not define the term "gathering." Webster's dictionary defines "Gathering" as an "assembly" or "meeting." The order is not limited to public places; by its own terms, it would apply to an assembly or meeting of persons inside a private home.

Nonetheless, some informal or unintended "gatherings" of people in a building appear to remain potentially lawful. For example, the other provisions of EO-53, including those that permit retail establishments such as grocery stores to operate with more than 10 patrons at once, appear to create exceptions to this rule. In addition, the "catchall" exception discussed at the end of this memorandum would also apply.

Lastly, the FAQ issued with EO-53 explicitly states that "For the purposes of this order, employment settings are not considered gatherings."

*What about churches?*

The order does not specifically mention churches. The FAQ issued with EO-53 explicitly states that "Places of worship that do conduct in-person services must limit gatherings to 10 people, to comply with the statewide 10-person ban."

*What about funerals?*

There is no specific exception for funerals.

*What is a "Gathering" versus "Several Adjacent Gatherings"?*

Law Enforcement will likely encounter large groups of people who claim that they are each part of a "gathering" of less than 10 persons. Those groups may be physically proximate to one another. EO-53 does not provide any guidance on how to address that issue.

*What is the intent required?*

EO-53 does not state the intent required to criminally violate its terms. The March 20 order punished "willful violation, or refusal, failure, or neglect to comply," but this order provides no such guidance. It is not unusual, however, for criminal prohibitions to lack an explicit *mens rea* element. See e.g. *Charles v. Commonwealth*, 63 Va. App. 14, 753 S.E.2d 860, 865 (2014)(noting that § 18.2–266 does not possess a mens rea requirement on its face). However, mere omission from a statute of any mention of intent should not be construed as elimination of that element from the crime. *Morissette v. United States*, 342 U.S. 246, 273, 72 S.Ct. 240, 255, 96 L.Ed. 288 (1952)(cited in *Charles*, 63 Va. App. at Id., 753 S.E.2d at Id.).

In criminal law, the scienter, or mens rea, element of a crime is simply the unlawful intent or design necessary to any criminal act that is not a strict liability offense. *Saunders v. Commonwealth*, 31 Va.App. 321, 324, 523 S.E.2d 509, 511 (2000). (citing *Reed v. Commonwealth*, 15 Va. App. 467, 424 S.E.2d 718 (1992); 1 Wayne R. LaFave, Substantive Criminal Law, § 3.4 (1986); *Livingston v. Commonwealth*, 184 Va. 830, 36 S.E.2d 561 (1946). "All crimes of affirmative action, even strict liability crimes, require something in the way of a mental element-at least an intention to make the bodily movement which constitutes the act which the crime requires." *Herron v. Commonwealth*, 55 Va. App. 691, 688 S.E.2d 901, (2010)(quoting 1 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 3.5(e), at 314 (1986)). However, some offenses are strict liability offenses.

In construing EO-53, a Court would likely apply typical principles of statutory construction. "While we construe penal statutes strictly against the Commonwealth, `a statute should be read to give reasonable effect to the words used "and to promote the ability of the enactment to remedy the mischief at which it is directed."'" *Dillard v. Commonwealth*, 28 Va. App. 340, 344, 504 S.E.2d 411, 413 (1998) (quoting *Mayhew v. Commonwealth*, 20 Va.App. 484, 489, 458 S.E.2d 305, 307 (1995) (quoting *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984))). In determining the elements established by such statutes, "[w]e may not add ... language which the legislature has chosen not to include." *County of Amherst v. Brockman*, 224 Va. 391, 397, 297 S.E.2d 805, 808 (1982). See also *Saunders v. Commonwealth*, 31 Va. App. 321, 326, 523 S.E.2d 509, 511 (2000); *Adkins v. Commonwealth*, 27 Va.App. 166, 170, 497 S.E.2d 896, 897 (1998). See, e.g., *Stuart v. Commonwealth*, 11 Va.App. 216, 217-18, 397 S.E.2d 533, 533-34 (1990) (refusing to find a specific intent element "because the unambiguous language" of the statute did "not require proof of a specific intent" to commit bigamy); *Polk v. Commonwealth*, 4 Va. App. 590, 594, 358 S.E.2d 770, 772 (1987) ("The resulting effect of the offender's threats ... is not an element of the crime defined in Code § 18.2-460. By the express terms of the statute, it is immaterial whether the officer is placed in fear or apprehension.").

Virginia law is clear that the legislature may create strict liability offenses as it sees fit, and there is no constitutional requirement that an offense contain a *mens rea* or scienter element. *Esteban v. Commonwealth*, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003) (citations omitted). Thus, Virginia courts construe statutes and regulations that make no mention of intent as

dispensing with it and hold that the guilty act alone makes out the crime. *Id; Herron v. Commonwealth*, 55 Va. App. 691, 688 S.E.2d 901 (2010)(No intent required to prove appellant intended to bring drugs into a correctional facility).

*Esteban* is instructive. In *Esteban*, the defendant was convicted under Code § 18.2-308.1(B), which prohibits possession of a firearm on school property. *Id*. at 606-07, 587 S.E.2d at 524. Esteban argued that she did not know there was a firearm in the bag she was carrying, although she admitted to intentionally and voluntarily entering onto school property. *Id*. at 608, 587 S.E.2d at 525. The Supreme Court of Virginia held that, in § 18.2-308.1(B), the General Assembly intended to "assure that a safe environment exists on or about school grounds" by prohibiting "the introduction of firearms into a school environment," even those introduced inadvertently or unintentionally. *Id*. at 609-10, 587 S.E.2d at 526. Thus, the Court in *Esteban* held § 18.2-308.1(B) created a strict liability crime and affirmed Esteban's conviction. *See also* As long as the Commonwealth proves beyond a reasonable doubt that an intoxicated individual "operated" his vehicle, regardless of intent, he is guilty of driving while under the influence. *Charles*, 63 Va. App. 14, 753 S.E.2d at 866 (finding that, in light of the public safety concern, as long as the Commonwealth proves that an intoxicated individual "operated" his vehicle, regardless of intent, he is guilty of driving while under the influence).

***Document continues on next page***

## PART TWO:
## CLOSURE OF CERTAIN BUSINESSES

**Class 1 Misdemeanor: Eating/Drinking establishments**

EO-53 orders the closure of all dining and congregation areas in restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets. However, restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, tasting rooms, and farmers markets may continue to offer delivery and take-out services.

Thus, EO-53 uses several new terms that previous orders did not use. Some of those terms are defined in the Code; some are not. I will address the terms below.

*"Restaurants"*

Unlike the March 23, 2020 order, EO-53 does not define "Restaurants." However, the March 23, 2020 order cited to Va. Code § 35.1-1, which defines a "Restaurant" as:

1. Any place where food is prepared for service to the public on or off the premises, or any place where food is served, including lunchrooms, short order places, cafeterias, coffee shops, cafes, taverns, delicatessens, dining accommodations of public or private clubs, kitchen facilities of hospitals and nursing homes, dining accommodations of public and private schools and institutions of higher education, and kitchen areas of local correctional facilities subject to standards adopted under § 53.1-68.

2. Any place or operation that prepares or stores food for distribution to persons of the same business operation or of a related business operation for service to the public, including operations preparing or storing food for catering services, push cart operations, hotdog stands, and other mobile points of service.

3. Mobile points of service to which food is distributed by a place or operation described in subdivision 2 unless the point of service and of consumption is in a private residence.

"Restaurant" does not include any place manufacturing packaged or canned foods that are distributed to grocery stores or other similar retailers for sale to the public. Va. Code § 35.1-1.

*"Breweries"*

Under Va. Code § 4.1-500, "Brewery" means every person, including any authorized representative of such person pursuant to § 4.1-218 which:
(i) is licensed as a brewery located within the Commonwealth,

(ii) holds a beer importer's license and is not simultaneously licensed as a beer wholesaler, or (iii) manufactures any malt beverage, has title to any malt beverage products excluding licensed Virginia wholesalers and retailers or has the contractual right to distribute under its own brand any malt beverage product whether licensed in the Commonwealth or not, who enters into an agreement with any beer wholesaler licensed to do business in the Commonwealth.

"*Distilleries*"

While the term "Distillery" is not specifically defined in the Code, Va. Code § 4.1-206 provides that distillers' licenses authorize the licensee to manufacture alcoholic beverages other than wine and beer, and to sell and deliver or ship the same, in accordance with ABC Board regulations, in closed containers.

"*Wineries*"

The term "Winery" is not defined in the Code. However, the terms "Contract Winemaking Facility" and "Farm Winery" are specifically defined. The term "Winery" should be treated as broader than either of those terms.

Under Va. Code § 4.1-100, a "Contract Winemaking Facility" means the premises of a licensed winery or farm winery that obtains grapes, fruits, and other agricultural products from a person holding a farm winery license and crushes, processes, ferments, bottles, or provides any combination of such services pursuant to an agreement with the farm winery licensee.

Under Va. Code § 4.1-100, a "Farm Winery" means (i) an establishment (a) located on a farm in the Commonwealth on land zoned agricultural with a producing vineyard, orchard, or similar growing area and with facilities for fermenting and bottling wine on the premises where the owner or lessee manufactures wine that contains not more than 21 percent alcohol by volume or (b) located in the Commonwealth on land zoned agricultural with a producing vineyard, orchard, or similar growing area or agreements for purchasing grapes or other fruits from agricultural growers within the Commonwealth, and with facilities for fermenting and bottling wine on the premises where the owner or lessee manufactures wine that contains not more than 21 percent alcohol by volume or (ii) an accredited public or private institution of higher education, provided that (a) no wine manufactured by the institution shall be sold, (b) the wine manufactured by the institution shall be used solely for research and educational purposes, (c) the wine manufactured by the institution shall be stored on the premises of such farm winery that shall be separate and apart from all other facilities of the institution, and (d) such farm winery is operated in strict conformance with the requirements of this clause (ii) and Board regulations. As used in this definition, the term "farm" as used in this definition includes all of the land owned or leased by the individual members of the cooperative as long as such land is located in the Commonwealth.

"*Farmer's Markets"*

Under the Virginia Administrative Code, a "Farmer's Market" means "a year-round or seasonal open air or permanent facility, marketing itself as a "farmer's market," where multiple farmers come to sell their products to the consumer." 24 VAC 30-551-10.

"*Dining Establishments,"* "*Food Courts,*" "*Microbreweries,"* "*Tasting Rooms*"

The terms "dining establishment," "food court," "microbrewery," and "tasting room" are not defined in the Virginia Code.

**Class 1 Misdemeanor: "Recreational and Entertainment Centers"**

EO-53 orders the closure of all public access to recreational and entertainment "businesses." Except where otherwise provided below, this closure provision has no exception for "social distancing" or number of patrons. For one of the below-listed businesses to remain open would be a Class 1 misdemeanor.

EO-53 defines "Recreational and Entertainment Businesses" as:

- Theaters, performing arts centers, concert venues, museums, and other indoor entertainment centers;
- Fitness centers, gymnasiums, recreation centers, indoor sports facilities, and indoor exercise facilities;
- Beauty salons, barbershops, spas, massage parlors, tanning salons, tattoo shops, and any other location where personal care or personal grooming services are performed that would not allow compliance with social distancing guidelines to remain six feet apart;
- Racetracks and historic horse racing facilities; and
- Bowling alleys, skating rinks, arcades, amusement parks, trampoline parks, fairs, arts and craft facilities, aquariums, zoos, escape rooms, indoor shooting ranges, public and private social clubs, and all other places of indoor public amusement.

EO-53 applies to the "Business" and requires that it close. EO-53 specifically uses the word "Businesses," a word with many different definitions in the Virginia Code. Except where specified, EO-53 does not indicate whether a private, non-commercial facility would qualify as a "business" under its terms. However, EO-53 does not appear to prevent an individual from providing a service for profit in a private home. The FAQ issued along with EO-53 explicitly states that a person may "provide personal services (tanning services, make-up, haircuts and styling, etc.)" to "clients in their home," even when the "business" is otherwise closed.

As with eating/drinking establishments, in this section, EO-53 uses several new terms that previous orders did not use. Some of those terms are defined in the Code; some are not. I will address the terms below.

"*Theaters"*

EO-53 does not define "Theater," but the March 23, 2020 order explicitly defined the term "Theater," using the definition in the Indoor Clean Air Act, Va. Code §15.2-2820: "Theater" means "any indoor facility or auditorium, open to the public, which is primarily used or designed for the purpose of exhibiting any motion picture, stage production, musical recital, dance, lecture, or other similar performance."

*"Museums"*

Under Va. Code § 55.1-2600, a "Museum" means an institution located in the Commonwealth and operated by a nonprofit corporation or public agency whose primary purpose is educational, scientific, or aesthetic and that owns, borrows, or cares for and studies, archives, or exhibits museum property.

"*Barbershop"*

Under Va. Code § 54.1-700, "Barbershop" means any establishment or place of business within which the practice of barbering is engaged in or carried on by one or more barbers. Further, "Barbering" means any one or any combination of the following acts, when done on the human body for compensation and not for the treatment of disease, shaving, shaping and trimming the beard; cutting, singeing, or dyeing the hair or applying lotions thereto; applications, treatment or massages of the face, neck or scalp with oils, creams, lotions, cosmetics, antiseptics, powders, clays, or other preparations in connection with shaving, cutting or trimming the hair or a beard. Id. The term "barbering" does not apply to the acts described hereinabove when performed by any person in his home if such service is not offered to the public, Id., which is consistent with the advice provided in the FAQ.

"*Spas*"

The term "Spa" is a generic term that is not, by itself, defined in the Virginia Code. However, the Code does define two types of "Spas:" "day spas" and "esthetics spas." EO-53 does not limit itself to only those types of spas, however, and should be treated as having a broader meaning.

Under Va. Code § 4.1-100, a "Day Spa" means any commercial establishment that offers to the public both massage therapy, and barbering or cosmetology services. "Cosmetology" includes, but is not limited to, the following practices: administering cosmetic treatments; manicuring or pedicuring the nails of any person; arranging, dressing, curling, waving, cutting, shaping, singeing, waxing, tweezing, shaving, bleaching, coloring, relaxing, straightening, or similar work, upon human hair, or a wig or hairpiece, by any means, including hands or mechanical or electrical apparatus or appliances, but shall not include hair braiding upon human hair, or a wig or hairpiece, or such acts as adjusting, combing, or brushing prestyled wigs or hairpieces when such acts do not alter the prestyled nature of the wig or hairpiece.

Under Va. Code § 54.1-700, an "Esthetics Spa" means any commercial establishment, residence, vehicle, or other establishment, place, or event wherein esthetics is offered or practiced on a regular basis for compensation under regulations of the Board. "Esthetics" includes, but is not limited to, the following practices of administering cosmetic treatments to enhance or improve the appearance of the skin: cleansing, toning, performing effleurage or other related movements, stimulating, exfoliating, or performing any other similar procedure on the skin of the human body or scalp by means of cosmetic preparations, treatments, or any nonlaser device, whether by electrical, mechanical, or manual means, for care of the skin; applying make-up or eyelashes to any person, tinting or perming eyelashes and eyebrows, and lightening hair on the body except the scalp; and removing unwanted hair from the body of any person by the use of any nonlaser device, by tweezing, or by use of chemical or mechanical means. Id. However, "esthetics" is not a healing art and shall not include any practice, activity, or treatment that constitutes the practice of medicine, osteopathic medicine, or chiropractic. Id.

Note also that the Virginia Administrative Code, 13 VAC 5-63-200, incorporates the definition of "Spa" contained in the International Swimming Pool and Spa Code (ISPSC). Under that definition, a "Spa" is "a product intended for the immersion of persons in temperature-controlled water circulated in a closed system, and not intended to be drained and filled with each use. A spa usually includes a filter, an electric, solar or gas heater, a pump or pumps, and a control, and can also include other equipment, such as lights, blowers, and water-sanitizing equipment."

*"Massage Parlors"*

The Virginia Code does not define "Massage Parlor," but many local ordinances use this phrase. The Virginia Code appears to leave the definition of "massage parlor" to localities. See Va. Code § 58.1-3706(A)(4). The state has regulations, however, over "massage therapy", which is defined as "the treatment of soft tissues for therapeutic purposes by the application of massage and bodywork techniques based on the manipulation or application of pressure to the muscular structure or soft tissues of the human body." Va. Code § 54.1-3000. There is no reason, however, to restrict the term "Massage Parlors" to places where licensed massage therapists practice their trade.

*"Tattoo Shops"*

The Virginia Code does not define "Tattoo Shop." Instead, the Code uses the term "Tattoo Parlor." Under Va. Code § 54.1-700, "Tattoo parlor" means any place in which tattooing is offered or practiced. "Tattooing" means the placing of designs, letters, scrolls, figures, symbols or any other marks upon or under the skin of any person with ink or any other substance, resulting in the permanent coloration of the skin, including permanent make-up or permanent jewelry, by the aid of needles or any other instrument designed to touch or puncture the skin. Id.

*"Any Other Location Where Personal Care or Personal Grooming Services Are Performed that Would Not Allow Compliance with Social Distancing Guidelines to Remain Six Feet Apart."*

This "catchall" section does not carry a definition, but would seem to capture the types of services listed in Va. Code § 54.1-700 such as: nail care, waxing, cosmetics, and the like. To qualify under this "catchall" provision, the personal care or personal grooming service must require two people to be within six feet of one another.

However, beauty salons, barbershops, spas, massage parlors, tanning salons, and tattoo shops all must close, regardless of whether they can comply with social distancing guidelines to remain six feet apart.

"*Racetracks"*

Under Va. Code § 59.1-365, a "Racetrack" means an outdoor course located in Virginia which is laid out for horse racing and is licensed by the Virginia Racing Commission.

"*Private Social Clubs"*

Neither the Virginia Code nor EO-53 define the term "Private Social Club." However, under Va. Code § 15.2-2820, the Indoor Clean Air Act, which the March 23 order had referenced, a "Private club" means an organization, whether incorporated or not, that (i) is the owner, lessee, or occupant of a building or portion thereof used exclusively for club purposes, including club or member sponsored events; (ii) is operated solely for recreational, fraternal, social, patriotic, political, benevolent, or athletic purposes, and only sells alcoholic beverages incidental to its operation; (iii) has established bylaws, a constitution, or both that govern its activities; and (iv) the affairs and management of which are conducted by a board of directors, executive committee, or similar body chosen by the members at an annual meeting.

*"All Other Places of Indoor Public Amusement"*

Like earlier sections, EO-53 includes a "catchall" provision that orders the closure of all "places of indoor public amusement."

Finally, EO-53 orders the closure of the following businesses, which are not defined in the Virginia Code or in EO-53, but at least some of which may be self-explanatory:

- "*Performing Arts Centers"*
- *"Concert Venues"*
- "*Indoor Entertainment Centers"*
- "*Fitness Centers"*
- *"Gymnasiums"*
- *"Recreation Centers"*

- *“Indoor Sports Facilities”*
- *“Indoor Exercise Facilities”*
- *“Beauty salons”*
- *“Tanning Salons”*
- “*Historic Horse Racing Facilities”*
- *“Bowling Alleys”*
- “*Skating Rinks*”
- “*Arcades”*
- *“Amusement Parks”*
- “*Trampoline Parks*”
- “*Fairs”*
- “*Arts and Craft Facilities”*
- *“Aquariums”*
- *“Zoos”*
- “*Escape Rooms”*
- “*Indoor Shooting Ranges”*

***Document continues on next page***

## PART THREE:
## 10-PATRON LIMIT ON RETAIL STORES

**Retail Establishments: 10-Person Limit**

EO-53 orders that any "brick and mortar" retail business must limit all in-person shopping to no more than 10 patrons per establishment. Failure to do so is a Class 1 misdemeanor.

If any such "brick and mortar" retail business cannot adhere to the 10-patron limit with proper social distancing requirements, it must close. Failure to close is a Class 1 misdemeanor.

*"Proper Social Distancing Requirements"*

EO-53 does not specifically refer to any "social distancing requirements" for retail businesses. Earlier, referring to personal care or grooming services, EO-53 specified "social distancing guidelines to remain six feet apart." It is not clear whether or how that guideline would apply in a retail business.

*Exclusions from 10-patron limit*

EO-53, paragraph #5, specifically excludes the following from the 10-person & social-distancing limits:

- Grocery stores, pharmacies, and other retailers that sell food and beverage products or pharmacy products, including dollar stores, and department stores with grocery or pharmacy operations;
- Medical, laboratory, and vision supply retailers;
- Electronic retailers that sell or service cell phones, computers, tablets, and other communications technology;
- Automotive parts, accessories, and tire retailers as well as automotive repair facilities;
- Home improvement, hardware, building material, and building supply retailers;
- Lawn and garden equipment retailers;
- Beer, wine, and liquor stores;
- Retail functions of gas stations and convenience stores;
- Retail located within healthcare facilities;
- Banks and other financial institutions with retail functions;
- Pet and feed stores;
- Printing and office supply stores; and
- Laundromats and dry cleaners.

As far as criminal sanctions, those excluded businesses listed immediately above:

- ✓ may remain open during their normal business hours.
- ✓ are not subject to the shopping limit of no more than 10 patrons per establishment.
- ✓ are not required to impose proper social distancing requirements.

I will not address whether there are non-criminal-law requirements for those businesses, as that issue is outside the scope of this memorandum.

"*Establishment*"

Black's Law Dictionary defines "Establishment" as "An institution or place of business, with its fixtures and organized staff. Black's Law Dictionary, Sixth Edition, p.546 (citing *Abnie v. Ford Motor Co. Ohio Com.Pl., 195 N.E.2d 131, 135*).

Note that an "establishment" appears to be the *entire* institution or place of business. Thus, even if a theater or restaurant has separate rooms, or indeed separate ventilation systems, HVAC and HEPA filters, under the Order, it appears that the *entire* institution or place of business is limited to 10 patrons or less.

*"Retail"*

Neither the Virginia Code nor EO-53 define the word "Retail," although the order specifically distinguishes "professional services," in paragraph 8, from "retail services." Black's Law Dictionary defines the word "Retail" as: "A sale for final consumption in contrast to a sale for further sale or processing (i.e. wholesale); A sale to the ultimate consumer." Black's Law Dictionary, Sixth Edition, p.1315.

*"Brick and Mortar"*

The term "brick and mortar" appears to refer to a traditional business serving customers in a building, as contrasted to an online business.

The term "brick and mortar" does not appear in the Virginia Code and EO-53 does not define this term. However, that phrase appears often in modern usage and in Virginia litigation. See, e.g. *South Dakota v. Wayfair, Inc*., 585 U.S. ___, 138 S.Ct. 2080, 2100, 201 L.Ed.2d 403 (2018)(Thomas, J. Concurring)(Distinguishing "brick-and-mortar" firms from Internet and mail-order firms); *Sprint Nextel Corp. v. Wireless Buybacks Holdings*, LLC, 938 F.3d 113, 119 (4th Cir. 2019); *Small v. WellDyne, Inc*., 927 F.3d 169, n.1 (4th Cir. 2019)(Distinguishing "brick and mortar" from online delivery services); *Combe Inc. v. Dr. Aug. Wolff GMBH & Co.*, 382 F.Supp.3d 429, 441 (E.D. Va. 2019) )(Distinguishing "brick and mortar" stores from websites).

## PART FOUR:
## EXCLUDED ENTITIES & ACTIVITIES

### Professional Service Business Operations

EO-53 specifically states that "business operations offering professional rather than retail services may remain open."

The term "Professional Services" appears in the Virginia Public Procurement Act and is defined as: "work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering; "Professional services" shall also include the services of an economist procured by the State Corporation Commission." Va. Code § 2.2-4301.

In the Virginia Tax Code, "Professional Services" is defined as "any type of personal service to the public that requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and shall include, but shall not be limited to, the personal services rendered by medical doctors, dentists, architects, professional engineers, certified public accountants, attorneys-at-law, and veterinarians." Va. Code § 58.1-439.18.

Later in the Tax Code, the Code directs the Virginia Department of Taxation to promulgate regulations regarding what constitute "Professional Services," providing a more detailed definition. Va. Code § 58.1-3700.1. The Tax definition directs the Department of Taxation to identify and list each occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study, is used in its practical application to the affairs of others, either advising, guiding, or teaching them, and in serving their interests or welfare in the practice of an art or science founded on it. Id. The word "profession" implies attainments in professional knowledge as distinguished from mere skill, and the application of knowledge to uses for others rather than for personal profit. Id.

Lastly, both the Virginia Professional Limited Liability Company Act, Va. Code § 13.1-1102, et. seq., and the Virginia Professional Corporation Act, Va. Code § 13.1-543 et. seq., have highly-detailed definitions for "Professional Service." Va. Code §§ 13.1-543, 13.1-1102.

### "Catchall" Exception

Paragraph (9) of EO-53 stipulates that "Nothing in the Order shall limit:

(a) the provision of health care or medical services;
(b) access to essential services for low-income residents, such as food banks;
(c) the operations of the media;
(d) law enforcement agencies; or

(e) the operation of government."

Thus, to the extent that this order would otherwise limit any of those activities, the order should not be interpreted to do so.

***Document continues on next page***

## PART FIVE:
## CHARGING VIOLATIONS

### Who Can Be Charged?

EO-53 appears to apply equally to patrons, operators, and employees of a restaurant in violation of this order. The FAQ issued with EO-53 specifically states that "Businesses in violation of this order may be charged with a Class 1 misdemeanor." To charge a "business," law enforcement may charge the business directly, rather than an individual employee. The procedure for doing so is set forth in Va. Code §19.2-76:

"If the accused is a corporation, partnership, unincorporated association or legal entity other than an individual, a summons may be executed by service on the entity in the same manner as provided in Title 8.01 for service of process on that entity in a civil proceeding. However, if the summons is served on the entity by delivery to a registered agent or to any other agent who is not an officer, director, managing agent or employee of the entity, such agent shall not be personally subject to penalty for failure to appear as provided in § 19.2-128, nor shall the agent be subject to punishment for contempt for failure to appear under his summons as provided in § 19.2-129."

Thus, service of process for the summons would be under the civil rules of service of process. Va. Code 8.01-285 et. seq. provide rules, which depend on the type of entity. The relevant code sections include:
§ 8.01-296: Service on Persons
§ 8.01-299: Domestic Corporations and LLCs
§ 8.01-301: Corporations, Foreign & Domestic
§ 8.01-304: Partnerships

### Who Enforces this Order?

The last question is: "Does local law enforcement have the authority to enforce this order?"

The power and authority to enforce this order would be the general power of law enforcement to enforce violations of the criminal law. For a sheriff, that authority would be Va. Code § 15.2-1609, which provides, *inter alia*, that a sheriff "shall enforce the law or see that it is enforced in the locality from which he is elected." For a police department, that authority would be Va. Code § 15.2-1704(A), which provides "the police force of a locality is hereby invested with all the power and authority which formerly belonged to the office of constable at common law and is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances."

Therefore, it is my conclusion that a sheriff or police officer would be authorized to enforce a violation of paragraphs 1, 3, 4, and 6 of EO-53, because such a violation would be a Class 1 misdemeanor. The officer should issue a summons pursuant to Va. Code § 19.2-74(A)(1), unless the person fails or refuses to discontinue the unlawful act, or the person is believed by the arresting officer to be likely to disregard the summons, or the person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, Va. Code § 19.2-74(A)(1), or that person refuses to give such written promise to appear under the provisions of that section. Va. Code § 19.2-74(A)(3).

In order to cite this order, prosecutors and officers should cite the order as Executive Order Fifty-Three, or may use the shorthand EO-53.