

LD2121661

SENATE BILL NO. 486

Senate Amendments in [] — February 11, 1994

A BILL to amend and reenact §§ 2.1-639.2, 2.1-639.4, 2.1-639.14, 2.1-639.31, 2.1-639.33, and 24.2-502 of the Code of Virginia and to amend the Code of Virginia by adding in Title 2.1 a chapter numbered 10.5, consisting of sections numbered 2.1-116.20 through 2.1-116.26, and in Article 2 of Chapter 40.1 a section numbered 2.1-639.4:1, relating to ethics and governmental accountability, conflicts of interests, and standards of conduct for state and local government officers and employees; penalties.

Patrons—Gartlan, Andrews, Calhoun and Waddell; Delegates: Almand, Cranwell, Croshaw and Diamonstein

Referred to the Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.1-639.2, 2.1-639.4, 2.1-639.14, 2.1-639.31, 2.1-639.33, and 24.2-502 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Title 2.1 a chapter numbered 10.5, consisting of sections numbered 2.1-116.20 through 2.1-116.26, and in Article 2 of Chapter 40.1 a section numbered 2.1-639.4:1, as follows:

CHAPTER 10.5.

WHISTLE-BLOWER LAW.

§ 2.1-116.20. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Appropriate authority" means a federal, state, county or municipal governmental body, agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency or organization. The term includes, but is not limited to, the Office of the Attorney General, the Office of the State [Internal] Auditor, and the General Assembly and its committees having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste.

"Employee" means a person who performs a full- or part-time service for wages, salary, or other remuneration under a contract of hire, written or oral, express or implied, for a public body.

"Employer" means a person supervising one or more employees, including the employee in question, a superior of that supervisor, or an agent of a public body.

"Good faith report" means a report of conduct defined in this chapter as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true.

"Public body" means any of the following:

1. A department, division, officer, agency, bureau, board, commission, court in its nonjudicial functions only, council, institution, spending unit, authority or other instrumentality of the Commonwealth;

2. A commission, council, department, agency, board, court in its nonjudicial functions only, official, special district, corporation or other instrumentality of a county or a municipality; or

3. Any other body which is created by state or political subdivision authority or which is funded by thirty-five percent or more by or through state or political subdivision authority, or a member or employee of that body.

"Waste" means an employer's or employee's conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from federal, state or political subdivision sources.

"Whistle-blower" means a person who witnesses or has evidence of wrongdoing or waste while employed with a public body and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee's superiors, to an agent of the employer or to an appropriate authority.

"Wrongdoing" means a violation which is not of a merely technical or minimal nature of a federal or state statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interests of the public or the employee.

§ 2.1-116.21. Discriminatory and retaliatory actions against whistle-blowers prohibited.

A. No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment

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60 because the employee, acting on his own volition, or a person acting on behalf of or under the direction
61 of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer
62 or appropriate authority an instance of wrongdoing or waste.

63 B. No employer may discharge, threaten or otherwise discriminate or retaliate against an employee
64 by changing the employee's compensation, terms, conditions, location or privileges of employment
65 because the employee is requested or subpoenaed by an appropriate authority to participate in an
66 investigation, hearing or inquiry held by an appropriate authority or in a court action.

67 § 2.1-116.22. Civil action by whistle-blower for violation; limitation on actions; burden of proof;
68 defense; use of evidence in civil service proceeding.

69 A. A person who alleges that he is a victim of a violation of this chapter may bring a civil action in
70 a court of competent jurisdiction for appropriate injunctive relief or damages, or both, within 180 days
71 after the occurrence of the alleged violation.

72 B. An employee alleging a violation of this chapter must show by a preponderance of the evidence
73 that, prior to the alleged reprisal, the employee, or a person acting on behalf of or under the direction
74 of the employee, had reported or was about to report in good faith, verbally or in writing, an instance
75 of wrongdoing or waste to the employer or an appropriate authority.

76 C. It shall be a defense to an action under this section if the defendant proves by a preponderance
77 of the evidence that the action complained of occurred for separate and legitimate reasons, which are
78 not merely pretexts.

79 D. ~~[An employee covered by the Virginia Personnel Act who contests a personnel action, believing it~~
80 ~~to be motivated by his having made a disclosure of information, may submit as admissible evidence any~~
81 ~~or all material relating to the action as whistle-blower and to the resulting alleged reprisal. Any~~
82 ~~employee covered by a grievance procedure pursuant to § 2.1-114.5:1, § 15.1-7.1, or § 15.1-7.2, may~~
83 ~~initiate a grievance alleging a violation of this act. The grievance panel shall have authority to award~~
84 ~~reinstatement, back pay, benefits, costs, and attorney's fees associated with the grievance.]~~

85 § 2.1-116.23. Redress for whistle-blower.

86 A court, in rendering a judgment for the complainant in an action brought under this chapter, shall
87 order, as the court considers appropriate, reinstatement of the employee, the payment of back wages,
88 full reinstatement of fringe benefits and seniority rights, actual damages or any combination of these
89 remedies. A court may also award the complainant all or a portion of the costs of litigation, including
90 reasonable attorney and witness fees, if the court determines that the award is appropriate.

91 § 2.1-116.24. Civil penalty; suspension from public service.

92 A person who, as an employer or under color of an employer's authority, violates this chapter is
93 liable for a civil penalty of not more than \$500. Unless the person holds a public office by election or
94 appointment, if the court specifically finds that the person, while in the employment of the
95 Commonwealth or a political subdivision, committed a violation of § 2.1-116.21 with the intent to
96 discourage the disclosure of information, the court may order the person's suspension from public
97 service for up to six months. A civil penalty collected under this section shall be paid to the State
98 Treasurer for deposit into the general fund.

99 § 2.1-116.25. Limitations on scope of construction.

100 The provisions of this chapter shall not be construed to require an employer to compensate an
101 employee for participation in an investigation, hearing or inquiry held by an appropriate authority.

102 § 2.1-116.26. Notice to employees of protection of whistle-blowers.

103 An employer shall post notices and use other appropriate means to notify employees and keep them
104 informed of the protections and obligations set forth in the provisions of this chapter.

105 § 2.1-639.2. Definitions.

106 As used in this chapter:

107 "Advisory agency" means any board, commission, committee or post which does not exercise any
108 sovereign power or duty, but is appointed by a governmental agency or officer or is created by law for
109 the purpose of making studies or recommendations, or advising or consulting with a governmental
110 agency.

111 "Business" means a corporation, partnership, sole proprietorship, firm, enterprise, franchise,
112 association, trust or foundation, or any other individual or entity carrying on a business or profession,
113 whether or not for profit.

114 "Contract" means any agreement to which a governmental agency is a party, or any agreement on
115 behalf of a governmental agency which involves the payment of money appropriated by the General
116 Assembly or political subdivision, whether or not such agreement is executed in the name of the
117 Commonwealth, or some political subdivision thereof. "Contract" includes a subcontract only when the
118 contract of which it is a part is with the officer's or employee's own governmental agency.

119 "Dependent" means a son, daughter, father, mother, brother, sister or other person, whether or not
120 related by blood or marriage, if such person receives from the officer or employee, or provides to the
121 officer or employee, more than one-half of his financial support.

"Employee" means all persons employed by a governmental or advisory agency, unless otherwise limited by the context of its use.

"Financial institution" means any bank, trust company, savings and loan association, industrial loan association, consumer finance company, credit union, broker-dealer as defined in § 13.1-501, or investment company or advisor registered under the federal Investment Advisors Act or Investment Company Act of 1940.

"Gift" means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance or reimbursement after the expense has been incurred. "Gift" shall not include awards and honorary degrees; reasonable food, travel, and lodging expenses for participating at a public function; tickets to attend an event as a courtesy or ceremony customarily extended to the office; reasonable food and beverage for one person consumed at one time; gifts from relatives; and gifts that are purely private and personal in nature.

"Governmental agency" means each component part of the legislative, executive or judicial branches of state and local government, including each office, department, authority, post, commission, committee, and each institution or board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties. Corporations organized or controlled by the Virginia Retirement System, RF&P Corporation and its wholly owned subsidiaries are "governmental agencies" for purposes of this chapter.

"Immediate family" means (i) a spouse and (ii) any other person residing in the same household as the officer or employee, who is a dependent of the officer or employee or of whom the officer or employee is a dependent.

"Officer" means any person appointed or elected to any governmental or advisory agency, whether or not he receives compensation or other emolument of office. Unless the context requires otherwise, "officer" includes members of the judiciary.

"Personal interest" means a financial benefit or liability accruing to an officer or employee or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, \$10,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business that exceeds, or may reasonably be anticipated to exceed, \$10,000 annually; (iv) ownership of real or personal property if the interest exceeds \$10,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; or (v) personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business.

"Personal interest in a contract" means a personal interest which an officer or employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in a business which is a party to the contract.

"Personal interest in a transaction" means a personal interest of an officer or employee in any matter considered by his agency. Such personal interest exists when an officer or employee or a member of his immediate family has a personal interest in property or a business, or represents any individual or business and such property, business or represented individual or business (i) is the subject of the transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction. Notwithstanding the above, such personal interest shall not be deemed to exist where an elected member of a local governing body serves without remuneration as a member of the board of trustees of a not-for-profit entity and there is a full disclosure of any personal benefit arising from the relationship.

"State and local government officers and employees" shall not include members of the General Assembly.

"Transaction" means any matter considered by any governmental or advisory agency, whether in a committee, subcommittee, or other entity of that agency or before the agency itself, on which official action is taken or contemplated.

§ 2.1-639.4. Prohibited conduct.

No officer or employee of a state or local governmental or advisory agency shall:

1. 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. This prohibition shall not apply to the acceptance of special benefits which may be authorized by law;

2. 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;

3. 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;

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

5. 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. This subdivision shall not apply to any political contribution actually used for political campaign or constituent service purposes and reported as required by Chapter 9 (§ ~~24.1-251~~ 24.2-900 et seq.) of Title ~~24.1~~ 24.2; or

6. 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;

7. *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 that person. Violations of this subdivision shall not be subject to criminal law penalties;*

8. *Accept gifts from sources on a basis so frequent as to raise an appearance of use of public office for private gain. Violations of this subdivision shall not be subject to criminal law penalties; or*

9. *Accept any honoraria for speaking at or attending proceedings or events which he is attending primarily to provide expertise or opinions related to the performance of his official duties. The prohibition in this subdivision shall apply only to the Governor, Lieutenant Governor, Attorney General, Governor's Secretaries, and heads of departments of state government.*

§ 2.1-639.4:1. *Representation of clients after government service; exceptions.*

A. *No former officer or employee shall represent a person in a matter before a governmental agency in which the former officer or employee participated personally and substantially while an officer or employee.*

B. *No former officer or employee shall represent a person in a matter which was pending under his official responsibility within one year before the termination of that responsibility for one year after his service in the public position has ceased.*

C. *The prohibitions in this section shall apply only to officers and employees who are elected or appointed to office or who are employed on a full-time compensated basis and report directly to an elected or appointed officer or employee and may include legislative branch officers and employees designated by the joint rules committee of the General Assembly.*

§ 2.1-639.14. *Disclosure by local government officers and employees.*

A. ~~The members of every~~ *The members of the governing body and elected school board of each county and, city, and of towns with populations in excess of 3,500, and persons occupying such positions of trust appointed by such bodies as may be designated to file by ordinance of the governing body, and persons occupying such positions of employment as may be designated to file by ordinance of the governing body shall file, as a condition to assuming office or employment, a disclosure statement of their personal interests and other information as is specified on the form set forth in § 2.1-639.15 and thereafter shall file such a statement annually on or before January 15. The governing body of any other town may elect, by ordinance, to be treated as a town with a population in excess of 3,500 for the purposes of this chapter. The clerk of the governing body of the town shall file a copy of the ordinance with the general registrar for the town and the State Board of Elections.*

B. *Nonsalaried citizen members of local boards, commissions and councils as may be designated by the governing body shall file, as a condition to assuming office, a disclosure form of their personal interests and such other information as is specified on the form set forth in § 2.1-639.15:1 and thereafter shall file such form annually on or before January 15.*

C. *The disclosure forms required by subsections A and B of this section shall be provided by the Secretary of the Commonwealth to the clerks of the governing bodies not later than November 30 of each year and the clerk of the governing body shall distribute the forms to designated individuals no later than December 10 of each year. Forms shall be filed and maintained as public records for five years in the office of the clerk of the respective governing body.*

D. *Candidates for membership in the governing body of any county, city or town with a population of more than 3,500 persons, or any other town electing to be treated as a town with such population, shall file a disclosure statement of their personal interests as required by § ~~24.1-167~~ 24.2-502.*

E. *Any officer or employee of local government who has a personal interest in any transaction before the governmental or advisory agency of which he is an officer or employee and who is disqualified from participating in that transaction pursuant to § 2.1-639.11 A 1, or otherwise elects to disqualify himself, shall forthwith make disclosure of the existence of his interest, and his disclosure shall be reflected in the public records of the agency for five years in the office of the administrative head of the officer's or employee's governmental or advisory agency.*

F. *In addition to any disclosure required by subsections A and B of this section, in each county and,*

city, and in towns with populations in excess of 3,500, *or any other town electing to be treated as a town with such population*, members of planning commissions, boards of zoning appeals, real estate assessors, and all county, city and town managers or executive officers shall make annual disclosures of all their interests in real estate located in the county, city or town in which they are elected, appointed, or employed. Such disclosure shall include any business in which such persons own an interest, or from which income is received, if the primary purpose of the business is to own, develop or derive compensation through the sale, exchange or development of real estate in the county, city or town. Such disclosure shall be filed as a condition to assuming office or employment, and thereafter shall be filed annually with the clerk of the governing body of such county, city or town on or before January 15. Such disclosures shall be filed and maintained as public records for five years. Forms for the filing of such reports shall be prepared and distributed by the Secretary of the Commonwealth to the clerk of each governing body.

G. An officer or employee of local government who is required to declare his interest pursuant to §2.1-639.11 A 2 shall declare his interest by stating (i) the transaction involved, (ii) the nature of the officer's or employee's personal interest affected by the transaction, (iii) that he is a member of a business, profession, occupation, or group the members of which are affected by the transaction, and (iv) that he is able to participate in the transaction fairly, objectively, and in the public interest. The officer or employee shall either make his declaration orally to be recorded in written minutes of his agency or file a signed written declaration with the clerk or administrative head of his governmental or advisory agency, as appropriate, who shall, in either case, retain and make available for public inspection such declaration for a period of five years from the date of recording or receipt. If reasonable time is not available to comply with the provisions of this subsection prior to participation in the transaction, the officer or employee shall prepare and file the required declaration by the end of the next business day.

§ 2.1-639.31. Definitions.

As used in this chapter:

"Advisory agency" means any board, commission, committee or post which does not exercise any sovereign power or duty, but is appointed by a governmental agency or officer or is created by law for the purpose of making studies or recommendations, or advising or consulting with a governmental agency.

"Business" means a corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, trust or foundation, or any other individual or entity carrying on a business or profession, whether or not for profit.

"Contract" means any agreement to which a governmental agency is a party, or any agreement on behalf of a governmental agency which involves the payment of money appropriated by the General Assembly or a political subdivision, whether or not such agreement is executed in the name of the Commonwealth of Virginia, or some political subdivision thereof. "Contract" includes a subcontract only when the contract of which it is a part is with the legislator's own governmental agency.

"Financial institution" means any bank, trust company, savings and loan association, industrial loan association, consumer finance company, credit union, broker-dealer as defined in § 13.1-501 (c), or investment company or advisor registered under the federal Investment Advisors Act or Investment Company Act of 1940.

"Gift" means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance or reimbursement after the expense has been incurred. "Gift" shall not include awards and honorary degrees; reasonable food, travel, and lodging expenses for participating at a public function; tickets to attend an event as a courtesy or ceremony customarily extended to the office; reasonable food and beverage for one person consumed at one time; gifts from relatives; and gifts that are purely private and personal in nature.

"Governmental agency" means each component part of the legislative, executive or judicial branches of state and local government, including each office, department, authority, post, commission, committee, and each institution or board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties.

"Immediate family" means (i) a spouse and (ii) any other person residing in the same household as the legislator, who is a dependent of the legislator or of whom the legislator is a dependent.

"Dependent" means a son, daughter, father, mother, brother, sister or other person, whether or not related by blood or marriage, if such person receives from the legislator, or provides to the legislator, more than one-half of his financial support.

"Legislator" means a member of the General Assembly of Virginia.

"Personal interest" means a financial benefit or liability accruing to a legislator or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may

306 reasonably be anticipated to exceed, \$10,000 from ownership in real or personal property or a business;
307 (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination
308 thereof, paid or provided by a business that exceeds, or may reasonably be anticipated to exceed,
309 \$10,000 annually; (iv) ownership of real or personal property if the interest exceeds \$10,000 in value
310 and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits
311 from the use of property; or (v) personal liability incurred or assumed on behalf of a business if the
312 liability exceeds three percent of the asset value of the business.

313 "Personal interest in a contract" means a personal interest which a legislator has in a contract with a
314 governmental agency, whether due to his being a party to the contract or due to a personal interest in a
315 business which is a party to the contract.

316 "Personal interest in a transaction" means a personal interest of a legislator in any matter considered
317 by the General Assembly. Such personal interest exists when an officer or employee or a member of his
318 immediate family has a personal interest in property or a business, or represents any individual or
319 business and such property, business or represented individual or business (i) is the subject of the
320 transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result
321 of the action of the agency considering the transaction. A "personal interest in a transaction" exists only
322 if the legislator or member of his immediate family or an individual or business represented by the
323 legislator is affected in a way that is substantially different from the general public or from persons
324 comprising a profession, occupation, trade, business or other comparable and generally recognizable
325 class or group of which he or the individual or business he represents is a member.

326 "Transaction" means any matter considered by the General Assembly, whether in a committee,
327 subcommittee, or other entity of the General Assembly or before the General Assembly itself, on which
328 official action is taken or contemplated.

329 § 2.1-639.33. Prohibited conduct.

330 No legislator shall:

331 1. Solicit or accept money or other thing of value for services performed within the scope of his
332 official duties, except the compensation, expenses or other remuneration paid to him by the General
333 Assembly. This prohibition shall not apply to the acceptance of special benefits which may be
334 authorized by law;

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

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

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

341 5. Accept any money, loan, gift, favor, service, or business or professional opportunity that
342 reasonably tends to influence him in the performance of his official duties. This subdivision shall not
343 apply to any political contribution actually used for political campaign or constituent service purposes
344 and reported as required by Chapter 9 (§ 24.1-251 24.2-900 et seq.) of Title 24.1 24.2; or

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

348 7. *Accept a gift from a person who has interests that may be substantially affected by the*
349 *performance of the legislator's official duties under circumstances where the timing and nature of the*
350 *gift would cause a reasonable person to question the legislator's impartiality in the matter affecting that*
351 *person. Violations of this subdivision shall not be subject to criminal law penalties;*

352 8. *Accept gifts from sources on a basis so frequent as to raise an appearance of use of public office*
353 *for private gain. Violations of this subdivision shall not be subject to criminal law penalties; or*

354 9. *Accept any honoraria for speaking at or attending proceedings or events which he is attending*
355 *primarily to provide expertise or opinions related to the performance of his official duties.*

356 § 24.2-502. Statement of economic interests as requirement of candidacy.

357 It shall be a requirement of candidacy that a written statement of economic interests shall be filed by
358 (i) a candidate for Governor, Lieutenant Governor, or Attorney General with the Secretary of the
359 Commonwealth, (ii) a candidate for Senate or House of Delegates with the clerk of the appropriate
360 house, (iii) a candidate for a constitutional office with the general registrar for the county or city, and
361 (iv) a candidate for member of the governing body or elected school board of any county, city, or town
362 with a population in excess of 3,500 persons, and (v) *a candidate for member of the governing body or*
363 *elected school board of any other town electing to be treated as a town with a population in excess of*
364 *3,500 [person persons]* with the general registrar for the county or city. The statement of economic
365 interests shall be that specified in § 2.1-639.41 for candidates for the General Assembly and in
366 § 2.1-639.15 for all other candidates. The foregoing requirement shall not apply to a candidate for
367 reelection to the same office who has met the requirement of annually filing a statement pursuant to

368 § 2.1-639.13, § 2.1-639.14, or § 2.1-639.40.

369 The Secretary of the Commonwealth, the clerks of the Senate and House of Delegates, the general
370 registrar, and the clerk of the local governing body shall transmit to the State Board, immediately after
371 the filing deadline, a list of the candidates who have filed initial or annual statements of economic
372 interests. The Secretary of the State Board shall notify the appropriate local electoral boards of the
373 filings.

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