MEMORANDUM

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

FROM: Elliott Casey, CASC

RE: Interpretation of Recent Emergency Orders: EO-61

DATE: May 12, 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 20 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.

5. March 30, 2020: Governor Northam issued Executive Order Fifty-Five (hereinafter "EO-55"). 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-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf

6. May 8, 2020: Governor Northam issued Executive Order Sixty-One (hereinafter "EO-61"). This order amended the earlier orders. 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-61-and-Order-of-Public-Health-Emergency-Three---Phase-One-Easing-Of-Certain-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf

   EO-61 also includes references to a document entitled "Guidelines for All Business Sectors." That document contains some requirements and many best-practice recommendations and is available here: https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/Virginia-Forward-Phase-One-Business-Sector-Guidelines.pdf
   Another location for those requirements and best-practice recommendations is here: https://www.virginia.gov/coronavirus/forwardvirginia/

Conclusion as to Criminal Sanctions Available for Violations of EO-61

It is my conclusion that under EO-61, the following acts would constitute a Class 1 misdemeanor:

1. Operating a non-essential business (such as restaurants, farmer's markets, retail stores, fitness and exercise facilities, personal care or personal grooming businesses, private campgrounds and indoor shooting ranges) without adhering to certain specific operations requirements.
2. Public or private in-person gatherings of more than ten individuals, with exceptions for families, employment, and religious services under certain conditions.
3. Failure to close all in-person classes and instruction, and cancel all gatherings of more than ten individuals at institutions of higher education.
4. Failure to abide by closure of all public beaches for all activity, except exercising and fishing.
5. Failure to close overnight summer camps, theaters, racetracks, and other public amusement facilities.

Each of those provisions have significant exceptions, which are explained below.

EO-61 will go into effect on 12:00 a.m., Friday, May 15, 2020, and will remain in effect until 11:59 p.m., Wednesday, June 10, 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 May 8, 2020 Order. That might appear as:

"Va. Code 44-146.17 (EO-61)"

However, for a violation of item #1 (Operating a non-essential business improperly) Law Enforcement should also add a citation to § 32.1-13, which provides additional authority for that part of the order. That might appear as:

"Va. Code 44-146.17, 32.1-13 (EO-61)"

Analysis

This memorandum will provide my analysis of the criminal sanctions for violations of EO-61. This memorandum will not address the other, non-criminal provisions of EO-61.

The Governor issued and signed EO-61. In EO-61, the Governor explicitly states he issued the order "by virtue of the authority vested in me by Article V of the Constitution of Virginia, by § 44-146.17." 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-61 declares that violation of several provisions shall have the force and effect of a Class 1 misdemeanor. Those provisions are discussed in this memorandum.

The Commissioner of Public Health also signed the Order. The Commissioner "shall be vested with all the authority of the Board when it is not in session." Va. Code § 32.1-20. The paragraph entitled "Directive," preceding the substance of the order, invokes that authority. Although EO-61 does not explicitly say so, the State Board of Health is not in session. The Board's website indicates as such; their March 26 meeting was cancelled and their next meeting is not until June 4. That website is located here:
http://www.vdh.virginia.gov/commissioner/administration/board-of-health/schedule-of-meetings/
Thus, the Commissioner has the authority to issue this Order, and EO-61 explicitly states that it is issued under that authority. In particular, section (A) of the order states that it has the force of a Class 1 misdemeanor under Title 32.1.

The Commissioner of Public Health also has authority over restaurants, summer camps, and campgrounds under Title 35.1. Va. Code § 35.1-10 provides that the Commissioner has authority to take "whatever action he deems necessary to control the spread of preventable diseases." Under Title 35.1, "violating, or refusing, failing, or neglecting to comply with any regulation or order of the Board or Commissioner" is a Class 3 misdemeanor unless a different penalty is specified." Va. Code § 35.1-7. In this order, the penalty specified is a Class 1 misdemeanor.

Thus, EO-61 sets a penalty of a Class 1 misdemeanor for violations of some, but not all, of its terms. I will address the portions of EO-61 that have criminal penalties in eight parts:

PART ONE: BUSINESS RESTRICTIONS
PART TWO: UNLAWFUL GATHERINGS
PART THREE: BUSINESS CLOSURES
PART FOUR: INSTITUTIONS OF HIGHER EDUCATION
PART FIVE: CLOSURE OF PUBLIC BEACHES
PART SIX: OVERNIGHT SUMMER CAMPS
PART SEVEN: "CATCHALL" EXCEPTION
PART EIGHT: CHARGING VIOLATIONS

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PART ONE:
BUSINESS RESTRICTIONS

Like previous orders, EO-61 has a number of restrictions on various types of businesses. However, these restrictions are less stringent than previous orders; indeed, section (A) of the order is entitled "Easing of Business Restrictions." In addition, EO-61 permits "essential businesses" to remain open, and does not attach any unique criminal sanctions to such businesses.

Notably, EO-61 has many new and specific restrictions and requirements. EO-61 is the first order to impose a criminal sanction for failure to separate people by six feet or more of distance at certain businesses.

Expiration of Public Health Emergency One

EO-61 specifically provides that the Governor's March 20 order, "Order of Public Health Emergency One," will expire on Thursday, May 14, 2020 at 11:59 p.m. That order had a number of specific provisions, which now will expire:

- Order One restricted the number of patrons allowed in restaurants, as defined in § 35.1-1, to 10 patrons or less in any such establishment.
- Order One restricted the number of patrons allowed in "fitness centers" to 10 patrons or less in any such establishment.
- Order One restricted the number of patrons allowed in theaters, as defined in § 15.2-2820, to 10 patrons or less in any such establishment.

EO-61 replaces those provisions with new, more detailed restrictions, although theaters are still simply ordered to be closed.

"Essential Business"

Beginning Friday, May 15, 2020, at 12:00 a.m., EO-61 provides that "essential retail businesses" may remain open during their normal business hours. The businesses that are "essential" under EO-61 and may remain open are:

a. 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;

b. Medical, laboratory, and vision supply retailers;

c. Electronic retailers that sell or service cell phones, computers, tablets, and other communications technology;

d. Automotive parts, accessories, and tire retailers as well as automotive repair facilities;

e. Home improvement, hardware, building material, and building supply retailers;

f. Lawn and garden equipment retailers;
g. Beer, wine, and liquor stores;
h. Retail functions of gas stations and convenience stores;
i. Retail located within healthcare facilities;
j. Banks and other financial institutions with retail functions;
k. Pet and feed stores;
l. Printing and office supply stores; and
m. Laundromats and dry cleaners.

Although EO-61 also recommends that essential business comply with the "Guidelines for All Business Sectors", there are no restrictions on "essential" businesses that appear to carry the force of a Class 1 misdemeanor.

"Restaurants, Dining Establishments, Food Courts, Breweries, Microbreweries, Distilleries, Wineries, and Tasting Rooms."

EO-61 orders that restaurants, dining establishments, food courts, breweries, microbreweries, distilleries, wineries, and tasting rooms may operate delivery, take-out, and outdoor dining and beverage services only, provided such businesses comply with the Guidelines for All Business Sectors, and sector-specific guidance for restaurant and beverage services incorporated by reference in the order. Those guidelines are contained on page 5-9 of the "Guidelines for All Business Sectors." Such guidance includes, but is not limited to, the following requirements:

a. Occupancy may not exceed the 50% of the lowest occupancy load on the certificate of occupancy, if applicable, while maintaining a minimum of six feet of physical distancing between all individuals as much as possible.
b. No more than 10 patrons may be seated as a party. All parties, whether seated together or across multiple tables, must be limited to 10 patrons or less.
c. Do not seat multiple parties at any one table unless marked with six-foot divisions (such as with tape).
d. Tables at which dining parties are seated must be positioned six feet apart from other tables. If tables are not movable, parties must be seated at least six feet apart. Spacing must also allow for physical distancing from areas outside of the facility's control (i.e. provide physical distancing from persons on public sidewalks).
e. No self-service of food (except beverages), including condiments. Condiments should be removed from tables and dispensed by employees upon the request of a customer. Buffets must be staffed by servers. For self-service beverage areas, use beverage equipment designed to dispense by a contamination-free method.
f. Bar seats and congregating areas of restaurants must be closed to patrons except for through-traffic.

g. Non-bar seating in an outdoor bar area may be used for customer seating as long as a minimum of six feet is provided between parties at tables.
h. Employees working in customer-facing areas must wear face coverings over their nose and mouth at all times.
i. A thorough cleaning and disinfection of frequently contacted surfaces must be conducted every 60 minutes during operation. Tabletops, chairs, and credit card/bill folders must be cleaned in between patrons.
j. Post signage at the entrance that states that no one with a fever or symptoms of COVID-19, or known exposure to a COVID-19 case in the prior 14 days, is permitted in the establishment.
k. Post signage to provide public health reminders regarding physical distancing, gatherings, options for high risk individuals, and staying home if sick.
l. Keep game areas, dance floors, and playgrounds closed. If live musicians are performing at an establishment, they must remain at least six feet from patrons and staff.
m. Use single-use disposable menus (e.g., paper) and discard after each customer. Reusable menus are not permitted.
n. Refilling food and beverage containers or implements brought in by customers is not allowed.
o. Prior to each shift, employers should ask that the employee self-measure their temperature and assess symptoms.
p. Table resets must be done by an employee who has washed their hands with soap and water for at least 20 seconds just prior to reset activities.
q. Only 10 patrons may wait for takeout in the lobby area at one time.

If any restaurant, dining establishment, food court, brewery, microbrewery, distillery, winery, or tasting room cannot adhere to these requirements, it must close. Thus, it would be a Class 1 misdemeanor for such a business to fail to implement the above requirements and it would be a Class 1 misdemeanor for such a business to fail to close if it could not adhere to those requirements.

Unlike EO-53, EO-61 does not define “Restaurants.” However, EO-53 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.

The terms “dining establishment,” “food court,” “microbrewery,” and “tasting room” are not defined in EO-61 or in the Virginia Code.

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.

While the term “Distillery” is not specifically defined in the order or 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.

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.

"Farmers Markets"

EO-61 permits farmers markets to reopen, provided such businesses comply with the Guidelines for All Business Sectors and the sector-specific guidelines for farmers markets incorporated by reference in the order. Those guidelines are contained on page 10-12 of the "Guidelines for All Business Sectors." Such guidance includes, but is not limited to, the following requirements:

a. On-site shopping is allowed, as long as physical distancing guidelines are followed. (Neither the order nor the website state what specific guidelines must be followed).
b. Configure operations to avoid congestion or congregation points.
c. Employees and vendors in customer-facing areas must wear face coverings over their nose and mouth at all times.
d. Vendors must supply hand sanitizer stations or hand washing stations for patrons and employees.
e. A thorough cleaning and disinfection of frequently contacted surfaces must be conducted.
f. Post signage at the entrance that states that no one with a fever or symptoms of COVID-19, or known exposure to a COVID-19 case in the prior 14 days, is permitted in the establishment or farmers market.
g. Post signage to provide public health reminders regarding physical distancing, gatherings, options for high risk individuals, and staying home if sick.
h. Provide a minimum of six feet between parties at tables, (i.e., the six feet cannot include the space taken up by the seated guest).
i. Spacing should also allow for physical distancing from areas outside of the facility's control (i.e. provide physical distancing from persons on public sidewalks).

If any farmer's market cannot adhere to these requirements, it must close. Thus, it would be a Class 1 misdemeanor for a farmer's market to fail to implement the above requirements and it would be a Class 1 misdemeanor for a farmer's market to fail to close if it could not adhere to those requirements.

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.

“Brick and Mortar Retail Businesses”

Under EO-61, any “brick and mortar” retail business that is not listed in the list of “essential” retail above may continue to operate, provided such businesses comply with the “Guidelines for All Business Sectors” and the sector-specific guidance for “brick and mortar” retail expressly incorporated by reference in the order. Those guidelines are contained on page 13-15 of the “Guidelines for All Business Sectors.” Such guidance includes, but is not limited to, the following requirements:

a. Occupancy must be limited to no more than 50% of the lowest occupancy load on the certificate of occupancy.
b. Employees working in customer-facing areas must wear face coverings over their nose and mouth at all times.
c. Post signage at the entrance that states that no one with a fever or symptoms of COVID-19, or known exposure to a COVID-19 case in the prior 14 days, is permitted in the establishment.
d. Post signage to provide public health reminders regarding physical distancing, gatherings, options for high risk individuals, and staying home if sick (samples at bottom of this document).
e. Retailers must assist customers in keeping at least six feet of space between individuals or households while shopping and waiting in line. Mark floors in six-foot increments in areas where customers will be congregating or standing in line such as cashier areas. If six feet of space cannot be maintained between checkout lines, only operate alternate checkout lines.
f. If seating is available, provide a minimum of six feet between tables; if tables are not movable, parties must be spaced at least six feet apart.
g. Meeting rooms and other enclosed spaces such as fitting rooms should be closed to customers.
h. Perform a thorough cleaning and disinfection of frequently contacted surfaces including digital ordering devices, self-service areas, countertops, bathroom surfaces, cashier stations, belts, shelves, cash machine pads, keyboards, order separation bars, and other high touch surfaces, at a minimum, every 2 hours.
i. Eliminate stations where food or drink can be sampled. No self-service of food (except beverages), including condiments. Self-service beverage areas must use beverage equipment designed to dispense through a contamination-free method.
j. Ensure there is a way to sanitize shopping cart and basket handles: either make an EPA-approved disinfectant easily accessible to customers or have employees manage the process and sanitize between each customer use.

If any non-essential "brick and mortar" retail business cannot adhere to these requirements, it must close. Thus, it would be a Class 1 misdemeanor for a "brick and mortar" retail business to fail to implement the above requirements and it would be a Class 1 misdemeanor for such a business to fail to close if it could not adhere to those requirements.

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.

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).

"Fitness and Exercise Facilities"

EO-61 provides that fitness centers, gymnasiums, recreation centers, sports facilities, and exercise facilities may reopen for outdoor activities only. Indoor activities are prohibited.

Outdoor activities may be conducted, provided such businesses comply with the "Guidelines for All Business Sectors" and the sector-specific guidelines for fitness and exercise facilities expressly incorporated by reference in the order. Those guidelines are contained on page 16-17 of the "Guidelines for All Business Sectors." Such guidance includes, but is not limited to, the following requirements:

a. Patrons, members, and guests must remain at least ten feet apart during all activities.
b. Hot tubs, spas, splash pads, spray pools, and interactive play features must be closed.
c. Outdoor swimming pools may be open for lap swimming only and must be limited to one person per lane.
d. Employees working in customer-facing areas are required to wear face coverings over their nose and mouth at all times. However, lifeguards responding to distressed swimmers are exempt from this requirement.

e. Employers must ensure cleaning and disinfection of shared equipment after each use.
f. Facilities shall prohibit the use of any equipment that cannot be thoroughly disinfected between uses (e.g., climbing rope, exercise bands, etc.).
g. Facilities must also prohibit the use of equipment requiring more than one person to operate, unless those operating are from the same household (e.g., free weights when it requires a spotter).
h. Businesses must supply hand sanitizer stations or hand washing stations for patrons, members, and guests.
i. All group outdoor activities may not have more than 10 guests, patrons, or members.

If any fitness center, gymnasium, recreation center, sports facility, or exercise facility cannot adhere to these requirements, it must close. Thus, it would be a Class 1 misdemeanor for such a facility to fail to implement the above requirements and it would be a Class 1 misdemeanor for such a facility to fail to close if it could not adhere to those requirements.

Neither the Virginia Code nor EO-61 define the terms "fitness center", "gymnasium", "recreation center", "sports facility", or "exercise facility."

"Personal Care and Personal Grooming Services"

EO-61 permits beauty salons, barbershops, spas, massage centers, tanning salons, tattoo shops, and any other location where personal care or personal grooming services are performed may reopen, provided such businesses comply with the "Guidelines for All Business Sectors" and the sector-specific guidelines for personal care and personal grooming services expressly incorporated by reference in the order. Those guidelines are contained on page 18-20 of the "Guidelines for All Business Sectors." Such guidance includes, but is not limited to, the following requirements:

a. Occupancy may not exceed 50% of the lowest occupancy load on the certificate of occupancy while maintaining a minimum of six feet of physical distancing between all individuals as much as possible.
b. Stagger stations with at least six feet of separation.
c. Services must be provided by appointment only, with only one appointment per service provider at a time.
d. Services must be provided by appointment only, with only one appointment per service provider at a time.
e. Maintain physical distancing of at least six feet within the waiting area.
f. Service providers and employees working in customer-facing areas must wear face coverings over their nose and mouth at all times.
g. Provide face coverings for clients or ask that clients bring a face covering with them, which they must wear during the service.

h. Limit services to only those that can be completed without clients removing their face covering.
i. A thorough cleaning and disinfection of frequently-contacted surfaces must be conducted every 60 minutes in operations, while cleaning and disinfecting all personal care and personal grooming tools after each use. If that is not possible, such items must be discarded.
j. Post signage at the entrance that states that no one with a fever or symptoms of COVID-19, or known exposure to a COVID-19 case in the prior 14 days, is permitted in the establishment.
k. Post signage to provide public health reminders regarding physical distancing, gatherings, options for high-risk individuals, and staying home if sick (samples at bottom of this document).
l. Staggered appointments must be utilized to minimize the number of individuals congregating in a waiting area and allow time to disinfect work stations and tools in between clients.
m. Employees and service providers working in customer-facing areas are required to wear face coverings over their nose and mouth.
n. Wash hands with soap and water for at least 20 seconds after each service is performed, and, when gloves are worn, change gloves after each client's service.
o. Employers must maintain a list of the names and contact information for all clients, to include the date and time services are received.

If any personal care and personal grooming service business cannot adhere to these requirements, it must close. Thus, it would be a Class 1 misdemeanor for such a business to fail to implement the above requirements and it would be a Class 1 misdemeanor for such a business to fail to close if it could not adhere to those requirements.

"Campgrounds"

EO-61 permits campgrounds to reopen, provided they comply with the "Guidelines for All Business Sectors" and the sector-specific guidelines for campgrounds, which are expressly incorporated by reference in the order. Those guidelines are contained on page 21-22 of the "Guidelines for All Business Sectors." Such guidance includes, but is not limited to, the following requirements:

a. A minimum of 20 feet must be maintained between units for all lots rented for short-term stays of less than 14 nights (and not owned by individuals).
b. Employees working in public-facing areas are required to wear face coverings over their nose and mouth at all times.
c. The provision of hand washing in bath houses and sanitizing stations for guests and employees.

d. Post signage at the entrance that states that no one with a fever or symptoms of COVID-19, or known exposure to a COVID-19 case in their prior 14 days, is permitted in the establishment.
e. Post signage to provide public health reminders regarding physical distancing, gatherings, options for high risk individuals, and staying home if sick (samples at bottom of this document).
f. All common areas that encourage gathering must remain closed such as pavilions, gazebos, picnic areas, etc.
g. No physical sharing of recreation or sports equipment unless it is cleaned and disinfected with an EPA-approved disinfectant.
h. No day passes or visitors. Only persons listed on the registration are allowed on the property.
i. No gatherings of greater than 10 people in one location.
j. On site retail, recreation and fitness, cabins, and food establishments must follow the requirements and guidelines specific to those establishments.
k. All lots rented for short term stays of less than 14 nights (and not owned by individuals) must maintain a minimum of 20 feet between units

If any campground cannot adhere to these requirements, it must close. Thus, it would be a Class 1 misdemeanor for a campground to fail to implement the above requirements and it would be a Class 1 misdemeanor for a campground to fail to close if it could not adhere to those requirements.

EO-61, like EO-55, specifically adopts the definition of "campground" found in Va. Code § 35.1-1. That definition provides that ""Campground" means any area, place, parcel, or tract of land, by whatever name called, on which three or more campsites are occupied or intended for occupancy, or facilities are established or maintained, wholly or in part, for the accommodation of camping units for periods of overnight or longer, whether the use of the campsites and facilities is granted gratuitously, or by rental fee, lease, or conditional sale, or by covenants, restrictions, and easements, including any travel trailer camp, recreation camp, family campground, camping resort, or camping community.

Under § 35.1-1, "Campground" does not mean a summer camp, migrant labor camp, or park for manufactured homes as defined in this section and in §§ 32.1-203 and 36-85.3, or a construction camp, storage area for unoccupied camping units, or property upon which the individual owner may choose to camp and not be prohibited or encumbered by covenants, restrictions, and conditions from providing his sanitary facilities within his property lines.

"Indoor Shooting Ranges"

Under EO-61, indoor shooting ranges may reopen, provided they comply with the following requirements:

a. Occupancy must be limited to 50% of the lowest occupancy load on the certificate of occupancy with at least six feet of physical distancing between individuals at all times. Use every other lane to achieve six feet of physical distancing.
b. Employees working in customer-facing areas are required to wear face coverings over their nose and mouth at all times.
c. Perform thorough cleaning and disinfection of frequently contacted surfaces every 60 minutes in operation, while disinfecting all equipment between each customer use and prohibiting the use of equipment that cannot be thoroughly disinfected.
d. Either thoroughly clean shared or borrowed equipment in between uses, or only allow the use of personal equipment at the range."

EO-61 orders that, if any indoor shooting range cannot adhere to these requirements, it must close. Thus, it would be a Class 1 misdemeanor for an indoor shooting range to fail to implement the above requirements and it would be a Class 1 misdemeanor for an indoor shooting range to fail to close if it could not adhere to those requirements.

EO-61 does not define the term "indoor shooting range," and the Virginia Code does not contain a definition for that term.

What is the intent required?

With regards to the above restrictions, EO-61 provides that "willful violation or refusal, failure, or neglect to comply with this Order" is a Class 1 misdemeanor. This statement of a *mens rea* (intent) requirement is unique to the provisions above; it does not apply to the other parts of the order.

The intent language in this section is lifted from Title 32.1, which this section cites as authority. Title 32.1, et. seq, are the statutes that govern the State Board of Health. Under Va. Code § 32.1-13, "The Board may make separate orders and regulations to meet any emergency, not provided for by general regulations, for the purpose of suppressing nuisances dangerous to the public health and communicable, contagious and infectious diseases and other dangers to the public life and health." Under that Title, any person willfully violating or refusing, failing or neglecting to comply with any regulation or order of the Board or Commissioner shall be guilty of a Class 1 misdemeanor, unless a different penalty is specified. Va. Code § 32.1-27.

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PART TWO:
UNLAWFUL GATHERINGS

Class 1 Misdemeanor: Gatherings of more than 10 individuals.

EO-61 prohibits all "public and private in-person gatherings of more than 10 individuals." A "gathering" includes, but is not limed to, parties, celebrations, or other social events, whether they occur indoors or outdoors.

The Governor's executive orders have not defined 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; the order specifically states it "includes parties, celebrations, religious, or other social events, whether they occur indoor or outdoor."

EO-61 also specifically makes three exceptions. The first exception is: "The presence of more than 10 individuals performing functions of their employment is not a "gathering." This exception was included in EO-55 and mentioned in the "Frequently Asked Questions" (FAQ) page for EO-53, which did not apply the 10-person rule to "the operation of businesses not required to close to the public under Executive Order 53." The FAQ issued with EO-53 explicitly stated that "For the purposes of this order, employment settings are not considered gatherings."

The second exception to EO-61's rule on unlawful gatherings was also included in EO-55: "This restriction does not apply to the gathering of family members living in the same residence." EO-61 adds a definition for such gatherings: "Family members" include blood relations, adopted, step, and foster relations, as well as all individuals residing in the same household." EO-61 also stipulates that family members are not required to maintain physical distancing while in their homes

Lastly, EO-61 also creates conditions under which religious service may take place, which are discussed below.

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 separate "gathering" of 10 or less persons. Those groups may be physically proximate to one another. EO-61, like EO-55 and EO-53, does not provide guidance on how to address that issue.

What is the intent required?

Like EO-55 and EO-53, EO-61 does not state the intent required to criminally violate this term. The March 20 order punished "willful violation, or refusal, failure, or neglect to comply," but the more recent orders provide 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-61, 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 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).

Permission for Religious Services of more than 10 individuals.

EO-61 creates a new set of conditions under which individuals may lawfully gather in groups of 10 or more for "religious services." This new exception applies only to the "religious service" and not to any associated social gatherings; any social gathering held in connection with a religious service is still subject to the restriction on gatherings of more than 10 individuals.

The restrictions on services are mandatory; violation of them would be a Class 1 misdemeanor under the terms of the order. Therefore, those restrictions are addressed below:

i. "Religious services must be limited to no more than 50% of the lowest occupancy load on the certificate of occupancy of the room or facility in which the religious services are conducted."
ii. "Individuals attending religious services must be at least six feet apart when seated and must practice proper physical distancing at all times.
    a. "Family members, as defined above, may be seated together."
    b. This provision includes a requirement that attendees "practice proper physical distancing." That term is not defined.
iii. "Mark seating in six-foot increments and in common areas where attendees may congregate."
iv. "Persons attending religious services must strongly consider wearing face coverings over their nose and mouth at all times." The language that the attendee "strongly consider" this requirement does not seem to require that the attendee necessarily wear a face covering.
v. "No items can be passed to or between attendees, who are not family members, as defined above." This requirement appears to include "passing" physical objects like handouts, programs, food or beverages. However, the next

requirement appears to permit food and beverages at religious services, as long as the food and beverages are not "passed to" attendees.

vi. "Any items used to distribute food or beverages must be disposable, used only once, and discarded." This requirement appears to permit food and beverages, so long as the food and beverages are made available on a disposable device.

vii. "A thorough cleaning and disinfection of frequently contacted surfaces must be conducted prior to and following any religious service."

viii. "Post signage at the entrance that states that no one with a fever or symptoms of COVID-19 is permitted in the establishment."

ix. "Post signage to provide public health reminders regarding social distancing, gatherings, options for high risk individuals, and staying home if sick."

EO-61 states that "If religious services cannot be conducted in compliance with the above requirements, they must not be held in-person."

Neither EO-61 nor the Virginia Code define the term "religious service." EO-61 distinguishes a "religious service" from an "associated social gathering," but also does not provide a definition for an "associated social gathering."

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PART THREE:
BUSINESS CLOSURES

EO-61 orders that certain recreational and entertainment businesses shall remain closed:

> a. Theaters, performing arts centers, concert venues, museums, and other indoor entertainment centers;
> b. Racetracks and historic horse racing facilities; and
> c. Bowling alleys, skating rinks, arcades, amusement parks, trampoline parks, fairs, arts and craft facilities, aquariums, zoos, escape rooms, public and private social clubs, and all other places of indoor public amusement.

Thus, for those categories of businesses, there are no exceptions and they simply must remain closed. It would be a Class 1 misdemeanor for one of those facilities to fail to close.

EO-61, like previous orders, does not provide a definition for these terms. 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 EO-53 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.

"*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 EO-53 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.

EO-61 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"
- "Historic Horse Racing Facilities"
- "Bowling Alleys"
- "Skating Rinks"
- "Arcades"
- "Amusement Parks"
- "Trampoline Parks"
- "Fairs"
- "Arts and Craft Facilities"
- "Aquariums"
- "Zoos"
- "Escape Rooms"

"All Other Places of Indoor Public Amusement"

Like EO-53, EO-61 includes a "catchall" provision that orders the closure of all "places of indoor public amusement."

What is the intent required?

As with the section on "Unlawful Gatherings," EO-61 does not state the intent required to criminally violate this term.

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PART FOUR:
INSTITUTIONS OF HIGHER EDUCATION

EO-61 orders that "Institutions of higher education shall continue to cease all in-person classes and instruction, and cancel all gatherings of more than ten individuals." This order appears to be directed at the institution itself, rather than, for example, the students or teachers.

However, EO-61 builds in the same exception that EO-55 built into this order; the order permits that, for "purposes of facilitating remote learning, performing critical research, or performing essential functions, institutions of higher education may continue to operate, provided that social distancing requirements are maintained."

"Institution of Higher Education" is a term that appears throughout the Virginia Code. It has two explicit definitions. The first is in Title 23.1, which is the title concerning Institutions of Higher Education. However, that specific definition is confined to private institutions, and specifically excepts "public institutions of higher education." Va. Code § 23.1-213. Title 60.2, concerning unemployment compensation, also contains a definition of "Institution of Higher Education," in § 60.2-220. Neither definition is a complete definition, and is restricted to the purposes of the article in which the definition appears.

The Virginia Code makes repeated reference, however, to the U.S. Code. The Federal Code has an explicit definition for "Institution of Higher Education" contained in 20 U.S. Code § 1001; this definition is nearly identical to the definition in Va. Code § 60.2-220. The Federal definition states that: "the term "institution of higher education" means an educational institution in any State that —

(1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of section 1091(d) of this title;

(2) is legally authorized within such State to provide a program of education beyond secondary education;

(3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;

(4) is a public or other nonprofit institution; and

(5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

Section (b) also states that "the term "institution of higher education" also includes—

(1) any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provision of paragraphs (1), (2), (4), and (5) of subsection (a); and

(2) a public or nonprofit private educational institution in any State that, in lieu of the requirement in subsection (a)(1), admits as regular students individuals—

(A) who are beyond the age of compulsory school attendance in the State in which the institution is located; or

(B) who will be dually or concurrently enrolled in the institution and a secondary school.

Thus, it would be a Class 1 misdemeanor for an institution of higher education to hold in-person classes or instruction. It would also be a Class 1 misdemeanor for an institution of higher education to fail to cancel a gathering of more than ten individuals.

What is the intent required?

As with the section on "Unlawful Gatherings," EO-61 does not state the intent required to criminally violate this term.

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PART FIVE:
BEACHES

EO-61 orders the continued closure of public beaches, directing "Continued closure of all public beaches as defined in § 10.1-705 of the Code of Virginia for all activity, except exercising and fishing." EO-61 further provides that "Physical distancing requirements must be followed." EO-61 has added a criminal sanction for failure to follow "physical distancing requirements."

EO-55 specifically adopts the definition of "Public Beaches" contained in Va. Code § 10.1-705. Under that code section, ""Public beach" means a sandy beach located on a tidal shoreline suitable for bathing in a county, city or town and open to indefinite public use."

The term "exercising" is not defined in the order. The word is an ordinary word, so its common usage would probably control. Webster's dictionary defines "exercise" as the "regular or repeated use of a faculty or bodily organ" or "bodily exertion for the sake of developing and maintaining physical fitness." (note that this definition is secondary; the primary definition requires a direct object for meaning.)

Under Va. Code § 29.1-100, ""Fishing" means taking, capturing, killing, or attempting to take, capture or kill any fish in and upon the inland waters of this Commonwealth."

EO-61 also directs that, at public beaches, "Physical distancing requirements must be followed." Like EO-53 and EO-55, EO-61 does not specify what physical distancing requirements must be followed and does not specifically define those requirements.

Are the "exercise" and "fishing" exemptions elements, or affirmative defenses?

EO-55 creates exceptions to the closure of beaches for "exercise" and "fishing." Those exceptions could be read in one of two ways: First, as elements of the offense that the Commonwealth would have to prove (i.e. prove that the defendant was neither exercising nor fishing), or second, as an "affirmative defense" (i.e. a defense that the defendant could raise, should s/he so choose).

The "bedrock of Virginia's criminal jurisprudence" is the fundamental precept that the Commonwealth bears the burden of proving every essential element of an offense beyond a reasonable doubt. *Williams v. Commonwealth*, 57 Va. App. 341, 351, 702 S.E.2d 260, 265 (2010). However, generally, it is the defendant that bears the burden of producing evidence in support of an affirmative defense. Id.

When a Court "construe[es] penal statutes which contain qualifications, exceptions or exemptions to their application, the limiting language may be viewed as a negative element of the offense which the prosecution must disprove," or alternatively, as "a statutory defense, which the accused can assert to defeat the prima facie case of the prosecution." *Mayhew v.*

Commonwealth, 20 Va. App. 484, 489, 458 S.E.2d 305, 307 (1995); see, e.g., *Flanagan v. Commonwealth*, 58 Va. App. 681, 699, 714 S.E.2d 212, 220 (2011) (finding that "the last clause of Code § 18.2-85 constitutes a statutory defense for which an accused bears the burden of providing the supporting evidence").

In determining whether specific limiting language is either an element of the offense or a statutory defense, the Court considers four factors:

(1) "'the wording of the exception and its role in relation to the other words in the statute;'"

(2) "'whether in light of the situation prompting legislative action, the exception is essential to complete the general prohibition intended;'"

(3) "'whether the exception makes an excuse or justification for what would otherwise be criminal conduct, i.e., sets forth an affirmative defense;'" and

(4) "'whether the matter is peculiarly within the knowledge of the defendant.'"

Flanagan, 58 Va. App. at 698, 714 S.E.2d at 220 (quoting *Mayhew*, 20 Va. App. at 489, 458 S.E.2d at 307).

Applying the *Mayhew* and *Flanagan* factors to this portion of EO-61, there is a strong argument that the "exercise" and "fishing" exceptions are affirmative defenses, rather than elements that the Commonwealth must prove at trial. Those exceptions are not essential to the stated purposes of these orders. For example, EO-61 states: "By issuing the Stay at Home Order, encouraging physical distancing and teleworking, restricting businesses and gatherings, we lowered transmission rates. These measures also prevented our healthcare systems from being overwhelmed—affording our healthcare systems and healthcare providers time to acquire the tools and resources necessary to respond to the virus."

These exceptions are an excuse or justification for otherwise unlawful activity, which is the purpose of an affirmative defense. Lastly, it is the defendant and not the Commonwealth who will know whether the defendant was present on the beach for exercise or fishing.

What is the intent required?

As with the section on "Unlawful Gatherings," EO-61 does not state the intent required to criminally violate this term.

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PART SIX:
OVERNIGHT SUMMER CAMPS

EO-61 further orders that "Overnight services of summer camps, as defined in § 35.1-1 of the Code of Virginia, must cease."

EO-61 specifically adopts the definition of "campground" found in Va. Code § 35.1-1. That definition provides that ""Summer camp" means any building, tent, or vehicle, or group of buildings, tents, or vehicles, if operated as one place or establishment, or any other place or establishment, public or private, together with the land and waters adjacent thereto, that is operated or used in this Commonwealth for the entertainment, education, recreation, religious instruction or activities, physical education, or health of persons under 18 years of age who are not related to the operator of such place or establishment by blood or marriage within the third degree of consanguinity or affinity, if 12 or more such persons at any one time are accommodated, gratuitously or for compensation, overnight and during any portion of more than two consecutive days."

Thus, unlike EO-55, which concerned "campgrounds," this order provides a new restriction on "summer camps." "Summer Camps" and "campgrounds" are distinct under the law. Under § 35.1-1, "Campground" explicitly does not mean a summer camp. Instead, campgrounds are covered above, as noted.

Thus, it would be a class 1 misdemeanor for a summer camp to provide "overnight services."

What is the intent required?

As with the section on "Unlawful Gatherings," EO-61 does not state the intent required to criminally violate this term.

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PART SEVEN:
"CATCHALL" EXCEPTION

Paragraph (C)(6) of EO-61, just like EO-53 and EO-55, 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 EO-61 would otherwise limit any of those activities, the order should not be interpreted to do so.

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PART EIGHT:
CHARGING VIOLATIONS

Who Can Be Charged?

As noted above, most portions of EO-61 direct charges to a business entity. 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."

The first section of EO-61, part (A), which concerns restrictions on various non-essential businesses, also provides authority to the Virginia Department of Health. Paragraph (9) states that "The Virginia Department of Health shall have authority to enforce section A of this Order…

In addition, any agency with regulatory authority over a business listed in section A may enforce this Order as to that business to the extent permitted by law." That declaration, however, appears to give additional authority, rather than restrict the authority that law enforcement would otherwise have over a potential criminal offense.

Therefore, it is my conclusion that a sheriff or police officer would be authorized to enforce a violation of section the aforementioned provisions of EO-61, 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 Sixty-One, or may use the shorthand EO-61.