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**FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION**

April 24, 2009

Re: Conflicts of Interest Associated With Spouse's Consulting Business  
Interpretation of G.S. 138A-31(a) and 138A-36(a)  
AO-E-09-003

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Dear Requester:

This formal advisory opinion addresses the question of whether the State Government Ethics Act ("Ethics Act") would restrict your official actions as a public servant because your spouse's company provides services to your employing entity. This opinion was adopted by the Commission at its April 24, 2009, meeting.<sup>1</sup>

**I. Brief Conclusion.**

The Commission has concluded that your spouse's ownership of a private company that provides services to your employing entity could create a conflict of interest to the extent you make decisions specifically with respect to the selection, compensation, or evaluation of services provided by your spouse's company, or that otherwise would provide a reasonably foreseeable financial benefit to your spouse's company (or a detriment to a competitor). However, as more fully discussed below, it is the Commission's opinion that the oversight of those services by an independent unit within your employing entity will ensure that you are not involved in those decisions. In addition, the Commission has concluded that, notwithstanding your spouse's business interests, you may participate in the establishment of general goals with respect to the use of private businesses by the unit which you oversee.

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<sup>1</sup> Please see the enclosure entitled "Formal Advisory Opinions Issued by the State Ethics Commission" for further information regarding the protections offered to individuals receiving those opinions.

## **II. The Facts.**

You are a public servant. Your employing entity, including the unit which you oversee, periodically contracts with private businesses to provide a variety of services.

Your spouse is a business owner. Seventy-five percent of your spouse's company's business is with private and governmental entities in North Carolina. In addition to general areas of expertise, your spouse's company is qualified to provide certain specialized services. In the past, your spouse's company has provided services to your employing entity. A small proportion of those services were provided to the unit which you currently oversee.

According to public resources, at least 60 North Carolina companies provide general services similar to those provided by your spouse's company to your business unit. Of those firms, fewer than ten also provide the same specialty services provided by your spouse's company. At the present time, all contract services provided to your employing entity are overseen by a business unit managed independently from your unit.

## **III. Applicable Statutory Provisions.**

G.S. 138A-36(a) generally prohibits public servants from participating in an official action if that public servant or a person with which the public servant is associated "may incur a reasonably foreseeable financial benefit" which would impair the public servant's "independence of judgment" or otherwise influence the public servant's participation in that official action. G.S. 138A-31(a) similarly prohibits a public servant from taking an official action that would result in a financial benefit to the public servant, a member of the public servant's extended family, or a business with which the public servant is associated. "Financial benefit" includes a direct pecuniary gain to a person with which the public servant is associated or a pecuniary loss to a business competitor. G.S. 138A-38(a)(1) establishes a safe harbor for certain official actions if the only benefit that would accrue is no greater than the benefit to all members of the same "profession, occupation, or general class." In the event a conflict exists, the public servant should take appropriate steps to abstain from the action and document the reasons for his or her abstention. G.S. 138A-36(b).

"Person with which associated" includes "a business with which the public servant or a member of the public servant's immediate family is associated." "Business with which associated" includes businesses with which the public servant or a member of the public servant's immediate family is employed; holds positions as a director, officer, partner, or proprietor; owns an interest of \$10,000 or more or five (5%) of the business; or for whom the public servant or his or her immediate family works as a lobbyist.

**IV. Discussion.**

Applying the statutory criteria outlined above, your spouse's company would be a "business with which associated." Thus, under G.S. 138A-31(a) and 138A-36(a), you would be restricted from taking official action that would provide a "reasonably foreseeable" financial benefit to your spouse's company to the extent that benefit would influence your official actions.

This would prohibit you from selecting your spouse's company to provide services to your employing entity or otherwise taking any direct action with respect to any contractual relationship your spouse's company has with your employer. However, such decisions are the responsibility of another unit. You have also indicated that you do not intend to participate in such official actions.

You have stated that you may become involved in establishing general goals for utilization of outside services by your unit, including services generally provided by your spouse's company. You ask whether such actions would present a conflict of interest between your official responsibilities and your spouse's company, thereby restricting you from establishing those goals. Any financial benefit to your spouse's company (or financial detriment to its competitors) as a result of those decisions would not be reasonably foreseeable given the number of businesses (approximately 60) that could potentially stand to benefit from those actions. Therefore, neither G.S. 138A-31(a) nor 138A-36(a) would restrict you from establishing general goals for use of outside businesses by your unit.

However, the more specialized those goals become, such as goals that target businesses that provide services in which your spouse's company specializes and are provided by relatively few businesses, the more likely it is that your actions could provide a reasonably foreseeable benefit to your spouse's company. In those limited circumstances, the Commission recommends that you generally refrain from taking official action with respect to those matters.

**Formal Advisory Opinions Issued by the State Ethics Commission**  
**Pursuant to the Ethics Act**

Upon the written request of a public servant or legislative employee, G.S. 138A-13(a) of the State Government Ethics Act (“the Ethics Act”) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions on the “meaning and application” of the Ethics Act “and the public servant’s or legislative employee’s compliance therewith.” All opinions have prospective application only, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 138A-13(a) and (a2).

Reliance upon a formal advisory opinion immunizes the public servant or legislative employee making the request from (1) investigation by the Commission, except the alleged violation of criminal law while performing his or her official duties, (2) adverse action by his or her employing entity, or (3) investigation by the Secretary of State. G.S. 138A-13(a2).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 138A-13(d). Otherwise, requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 138A-13(e).