



STATE ETHICS COMMISSION

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FORMAL ADVISORY OPINION—EDITED FOR PUBLICATION

May 11, 2012

Re: Permissibility of Providing Food and Beverages to Organization's Advisors and Directors
AO-L-12-003

Dear Requester:

This is in response to your request for a formal advisory opinion. You have requested advice concerning whether the gift ban of G.S. Chapter 120C, the Lobbying Law, would restrict your organization from providing food and beverages to certain legislators, public servants, and legislative employees ("designated individuals") who are members of the organization's Advisory Committee ("Advisors"), in connection with various business meetings held by the organization. You have also asked whether legislators who serve as Advisors are restricted from taking legislative action that affects the organization.

This formal advisory opinion was adopted by the State Ethics Commission ("Commission") at its May 11, 2012, meeting.¹

I. Brief Conclusion.

The Commission has determined that your organization may provide food and beverages to designated individuals serving on its Board of Directors ("the Board") at various business meetings if available to all individuals serving in the same capacity. The organization may also provide food and beverages to designated individuals serving on its Board and as Advisors where that service is not related to the designated individual's official position.

In addition, if a public servant's service on the Board or as an Advisor is primarily related to his or her public service or position and 10 other individuals are present at the meeting in question, the organization may provide food and beverages to that public servant. The

¹ 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.

organization may also provide food and beverages to all designated individuals serving on its Board or as Advisors if the specific invitation requirements of G.S. 138A-32(e)(1)c. are met and 10 individuals associated with the organization are also present.

Finally, although the Commission is not authorized to provide specific recommended advice to the organization with respect to the actions of legislators, the Commission has generally outlined applicable conflict of interest standards.

II. Facts.

Your organization is registered as a Lobbyist Principal. The organization's bylaws establish the Board and an Advisory Committee. The Board consists of the organization's officers, the immediate past chair of the Board, and additional voting members ("the Directors"). The organization's bylaws also describe the qualifications of the individuals who will serve as Advisors. Several of the organization's Advisors will be public officials subject to the Ethics Act, including legislators and public servants who are serving as Advisors by virtue of their public position.

All corporate powers are vested in the Board. The Board also has the authority to direct the organization's operations. The organization's Advisors, on the other hand, consider major issues and make policy recommendations to the Board. However, the organization's Advisors have no role in the management of the organization.

Directors will attend annual, regular, and special meetings of the Board and meetings of Board committees as outlined in the bylaws. In addition, the organization's Advisors will attend regular membership meetings and meetings of various working groups as established by the Board. The organization will provide food and beverages for immediate consumption at those meetings.

III. Applicable Statutory Provisions.

A. Gift Ban Exceptions Allowing the Giving and Receipt of Food and Beverages.

G.S. 120C-303(a)(1) restricts a lobbyist or a lobbyist principal from knowingly giving a gift to designated individuals unless a gift ban exception applies. G.S. 138A-32(c) similarly prohibits designated individuals from knowingly accepting gifts from a lobbyist or a lobbyist principal. Public servants are also restricted from knowingly accepting gifts from persons described in G.S. 138A-32(d). Pertinent gift ban exceptions that may allow the giving and receipt of food and beverages for immediate consumption include G.S. 138A-32(e)(1)c., 138A-32(e)(10), 138A-32(e)(11), and 138A-32(e)(12).

G.S. 138A-32(e)(1)c. allows the giving and acceptance of food and beverages for immediate consumption where at least 10 individuals in a particular "qualifying group" of designated individuals are invited and at least 10 individuals associated with a lobbyist, lobbyist

principal, or interested person (in the case of public servants) sponsoring the event are present, or “all shareholders, employees, board members, officers, etc.” of the sponsor are invited. The phrase “associated with” includes an employee and a director, officer, or partner of an entity. 30 NCAC 07B.0102.

Subsection 32(e)(1)c. also requires that a written invitation be sent to all members of a qualifying group by at least one host or sponsor of the event no later than 24 hours in advance. The invitation must note the date, time, and location of the event and specify that it qualifies under the exception.

G.S. 138A-32(e)(10) permits the giving and acceptance of gifts, including food and beverages, given as part of a business, civic, religious, fraternal, personal, or commercial relationship that is “not related to the person’s public service or position.” That exception also requires that the gift be given “under circumstances that a reasonable person would conclude that the gift was not given to lobby.”

Therefore, if a public servant or a legislator receives a gift in connection with a relationship with a lobbyist principal that is related to his or her public position, this exception would not apply. Thus, in AO-E-07-0003, the Legislative Ethics Committee found that where a legislator would not have been appointed to a Board if he or she had not been a member of the General Assembly, subsection (e)(10) was inapplicable. However, if the gift is unrelated to the person’s public service or position, and is otherwise not given under circumstances where a reasonable person would conclude that it was given to lobby, subsection 32(e)(10) would allow the giving and receipt of the gift, including food and beverages.

G.S. 138A-32(e)(11) also allows the giving and receipt of transportation and food and beverages for immediate consumption if the recipient is “a director, officer, governing board member, employee, or independent contractor” of: (1) the lobbyist principal giving the food, beverage, and transportation; or (2) the recipient that received funds from the lobbyist principal to provide those items; as long as the food, beverages, and transportation are available to all attendees “of the same class as the recipient.”

Finally, G.S. 138A-32(e)(12) allows the giving and receipt of food and beverages for immediate consumption by a *public servant* at an event “for purposes primarily related to” his or her “public service or position,” and at least 10 additional individuals attend or to which all shareholders, employees, board members, officers, etc. of the sponsor who are located in a specific North Carolina office or county are invited. However, that gift ban exception is inapplicable to legislators.

B. Lobbyist Principal Reporting Requirements.

In those circumstances where a gift is allowed under the gift ban exceptions, G.S. 120C-403(b)(5) requires that a lobbyist principal report all “reportable expenditures” for gifts given under G.S. 138A-32(e)(10) of more than \$200 in value per designated individual and/or

immediate family member, per day. If the gift is given under any other exception, that gift is reportable if the value is more than \$10 per designated individual and/or immediate family member, per day. For purposes of calculating this threshold, the aggregate value of all items given to the designated individual or immediate family per calendar day shall be used. 30 NCAC 10C.0101.

The specific information that a lobbyist principal is required to include on its Principal Expense Report Form is delineated in G.S. 120C-401.

C. Conflict of Interest Standards Applicable to Legislators.

You have also asked if a legislator who is serving as an Advisor can take legislative action concerning organization funding.

Under G.S. 138A-13(b), the Commission is authorized to provide specific recommended advice to legislators upon a specific request from the legislator affected. Advice issued by the Commission is considered by the Legislative Ethics Committee, which makes the final determination regarding the legislator's request. However, although the Commission cannot provide specific advice in response to your request, it can outline the general conflict standards applicable to legislators.

G.S. 138A-37(a) restricts a legislator's participation in a legislative action if: (1) the legislator knows that the legislator, a member of the legislator's extended family, the legislator's client, or a business or nonprofit corporation with which the legislator is associated may derive "a reasonably foreseeable financial benefit" from that action, and (2) the "legislator concludes that an actual financial benefit" exists and that the interest "would impair the legislator's independence of judgment." In reaching this conclusion, G.S. 138A-37(a) requires that the legislator consider: (a) whether "the legislator's judgment would be substantially influenced by the interest" and (b) the need for the legislator's contribution to the matter.

A business or nonprofit corporation "with which associated" includes any corporation if a legislator or a member of his or her immediate family acts as a governing board member. G.S. 138A-3(3) and 138A-3(24). The term "governing board member" is not defined in the Ethics Act. However, the NC Nonprofit Corporation Act defines the terms "Board" or "board of directors" as the group of persons with the authority to manage the corporation's affairs. G.S. 55A-1-40(2). Thus, those terms would not include an advisory committee of a business or nonprofit corporation that has no authority to manage the corporation's business.

In the event a legislator has a conflict of interest that would otherwise require recusal, he or she may still take legislative action if the interest falls within one of the G.S. 138A-38 safe harbors. One of those safe harbors allows legislators to take legislative action, notwithstanding a conflict of interest, if the benefit in question is no greater than the benefit that could "reasonably be foreseen" to accrue to all members of the affected profession, occupation, or general class. G.S. 138A-38(a)(1).

IV. Analysis.

A. Providing Food and Beverages at the Meetings.

Since the organization is a lobbyist principal, a gift ban exception must apply in order for it to provide food and beverages to designated individuals. Since it is likely that there will be public servants and legislators serving as organization Advisors, and perhaps as Directors, the role of each individual and the circumstances underlying the receipt of food and beverages must be considered in order to apply the gift ban exceptions of the Ethics Act.

In the event that public servants and legislators are selected to serve as Directors or Advisors because of their official position, G.S. 138A-32(e)(10) would not allow the organization to provide food and beverages to those individuals. However, if the public servant or legislator would have been appointed even if he or she did not hold their public position, that exception would allow the organization to provide food and beverages unless a reasonable person would conclude that those items were given for lobbying. For example, if a public servant was appointed as a Director or as a member in his or her private business capacity, subsection 32(e)(10) would allow the organization to give food and beverages to that public servant as long as those items were not otherwise given for lobbying.

Conversely, G.S. 138A-32(e)(12) would allow the organization to provide food and beverages for immediate consumption to those *public servants* who are Advisors or Directors as long as the public servant's service is "primarily related" to his or her official position and at least 10 other individuals are present (other than the public servant's immediate family) or, alternatively, all officers of your organization are invited to attend.

The two remaining food and beverage exceptions that may apply to your request do not necessarily turn on whether the individual's service as a Director or an Advisor is related to his or her public position. But each exception imposes additional criteria that must be satisfied.

G.S. 138A-32(e)(11) would allow the organization to provide food and beverages to public servants and legislators serving as Directors, along with related transportation, if those items are available to all Directors in "the same class" as the public servant or legislator (that is, those Directors serving on the Board, a Board committee, or another defined group of Directors).

However, subsection 32(e)(11) would *not* apply to food and beverages and related transportation given to Advisors, since they are not officers or part of the organization's "governing board" and do not otherwise hold the corporate positions delineated in G.S. 138A-32(e)(11). But, as noted above, under subsection 32(e)(12) public servants serving as Advisors because of their official position would be able to accept food and beverages as long as at least 10 other individuals are present at the meeting in question.

G.S. 138A-32(e)(1)c. would be the only exception that would allow the organization to provide food and beverages to legislators who are serving as Advisors. That exception would also apply to public servants. However, it would require that the organization:

- a. Invite a “specific qualifying group” to the meeting in question, such as 10 public servants, the entire board of which a public servant is a member, all the members of the State House of Representatives or the Senate, various listed county or municipal legislative delegations, or certain legislative committees, commissions, or caucuses;
- b. Have at least 10 other persons “associated with” your organization in attendance or invite all employees, Board members, or officers; and
- c. Send a written invitation at least 24 hours in advance of the meeting noting its date, time, and location including a notice that the meeting is permitted under that exception.

B. Reporting Food and Beverages Provided.

If a gift ban is applicable to allow the organization to give food and beverages to public servants and legislators serving as Directors and Advisors, the organization may be required to report the value of food and beverages on its Principal Expense Report Form if the value is over \$10 per legislator or public servant, per day, except the threshold is \$200 for gifts given under G.S. 138A-32(e)(10).

V. Closing.

Thank you for contacting the State Ethics Commission. Please do not hesitate to call the Commission’s staff if you have any questions about the foregoing formal Advisory opinion. Pursuant to G.S. 120C-102(d1), an unedited copy of this formal Advisory opinion will be forwarded to the Secretary of State. The Secretary of State is statutorily obligated to treat the opinion as confidential and not a public record.

State Ethics Commission

By: _____
Robert L. Farmer
Chairman

Formal Advisory Opinions of the State Ethics Commission
Issued Pursuant to the Lobbying Law

Upon the written request of any person, State agency, or governmental unit affected by G.S. Chapter 120C (“the Lobbying Law”), G.S. 120C-102(a1) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions “on the meaning and application” of the Lobbying Law and “that person’s, State agency’s or any other governmental unit’s compliance therewith.” All opinions have prospective application only and must relate to real or reasonably anticipated fact settings or circumstances. G.S. 120C-102(a). Formal advisory opinions confer limited civil immunity upon a requester who follows the advice given. G.S. 120C-102(a1).

Once issued by the Commission, formal advisory opinions are published in an edited format on the Commission’s website within 30 days of issuance. G.S. 120C-102(c). Requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 120C-102(d). However, the Commission is required to send an unedited copy of each formal advisory opinion to the Secretary of State’s Office at the time the formal advisory opinion is issued to the requester, and the Secretary of State is required to treat the formal advisory opinion as confidential and not a matter of public record. G.S. 120C-102(d1). In addition, Commission staff is specifically authorized to share all information and documents related to requests for formal advisory opinions with the Secretary of State’s Office. The Secretary of State’s Office is required to treat any such information and documents in its possession as confidential and not a matter of public record G.S. 120C-102(d1).

LOBBYING FORMAL ADVISORY OPINION ATTACHMENT