



STATE ETHICS COMMISSION

1324 MAIL SERVICE CENTER
RALEIGH, NC 27699-1324
WWW.ETHICSCOMMISSION.NC.GOV

ROBERT L. FARMER
CHAIRMAN

PERRY Y. NEWSON
EXECUTIVE DIRECTOR

FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

February 27, 2008

Re: Lobbyists' and Lobbyist Principals' Donations to a Nonpartisan State, Regional, National, or International Organization and the Reporting of Such Donations
AO-L-08-001

Dear Requester:

You requested an advisory opinion concerning donations by lobbyists and lobbyist principals to a nonpartisan state, regional, national, or international organization ("nonpartisan organization") to support an organization affiliated with the nonpartisan organization ("affiliated organization"). This letter is the formal advisory opinion you requested.

Limited Civil Immunity

North Carolina General Statutes ("G.S.") 120C-102 applies to written requests for a formal advisory opinion from certain individuals, including lobbyists and lobbyist principals. G.S. 120C-102 requires the request for a formal advisory opinion to be in writing and relate to real or reasonably anticipated fact settings and circumstances. All opinions are based on the particular facts presented and only have prospective application. G.S. 120C-102(a). Once issued, a formal advisory opinion confers limited civil immunity upon the requester if the advice given is followed. Good faith reliance by the requester on the Commission's issued formal advisory opinion immunizes the requester from (1) investigation by the Commission regarding the specific facts and circumstances addressed in the Commission's formal advisory opinion and (2) any adverse action by a legislator, legislative employee, or public servant's employing entity regarding the same. In addition, good faith reliance by the requester upon a formal advisory opinion issued by the Commission also grants civil immunity to the requester from investigation by the Secretary of State's Office. The Commission's formal advisory opinions do not confer immunity from any other investigative or enforcement agency; nor do they include immunity from criminal investigation or prosecution. Requests for advisory opinions, the opinions themselves and all materials related thereto are confidential and not a matter of public record, although the Commission is required to publish redacted copies of its formal advisory opinions annually. G.S. 120C-102(d).

Advisory Opinion

A. Facts

You have provided detailed information about a nonpartisan organization and an affiliated organization. Additional information was gathered from the nonpartisan organization's webpage. The nonpartisan organization was established by states and its membership includes all 50 states. The nonpartisan organization is organized as a 501(c)(3) nonprofit which is governed by a board, which includes executive branch and legislative representatives from its member states. The nonpartisan organization provides services to the executive, judicial, and legislative branches of state government. It describes itself as a "nonpartisan, nonprofit organization that seeks to foster excellence in state government."

The nonpartisan organization is funded by a combination of state appropriations from its member states publications, associates' dues, and conference fees. The nonpartisan organization's "Associates Program" allows government affairs professionals from private sector entities to pay annual dues of \$6,000 in return for discounts on meeting registration fees and complimentary publications by the nonpartisan organization.

The affiliated organization is one of four regional groups operated by the nonpartisan organization. The affiliated organization is not a separate legal entity; rather, it operates through and is overseen by the nonpartisan organization and the nonpartisan organization's Governing Board. Designated individuals participate in the affiliated organization. One of the regular functions of the affiliated organization is its annual conference. These annual conferences are hosted on a rotating basis by the affiliated organization's member states.

North Carolina is hosting an upcoming conference of the affiliated organization and assumes numerous duties as the host state, including printing informational materials and programs, handling registration for attendees, organizing social activities for attendees and their families, providing gift bags, arranging transportation, handling all administrative and onsite support, and fundraising to cover the costs of these and all other conference-related activities. These responsibilities have been delegated by the State to the North Carolina Host Committee ("Host Committee"). The Host Committee is made up solely of North Carolina designated individuals and is further organized into smaller committees, each with responsibility for designated tasks. One of the tasks of the Host Committee is fundraising, and that function has largely been assigned to the Private Sector and Fund Raising Committee. Designated individuals have been assigned to various committees.

Host states secure private contributions to offset the cost of these meetings. North Carolina is no exception and will seek private contributions to assist with financing the conference. Fundraising will include soliciting both cash and in-kind contributions from a variety of individuals and entities, including North Carolina lobbyists and lobbyists' principals. Those contributions will be solicited by designated individuals. All *cash contributions* will be made to the nonpartisan organization initially through the affiliated organization for coding and record keeping, and then sent to the nonpartisan organization for deposit into a designated account specifically for the conference. *In-kind contributions* will be made directly to the State for use at the conference.

With respect to committing and expending donated funds, either the Host Committee or the State will contract for services that are necessary to fulfill North Carolina's host state obligations, but the invoices for those services will ultimately be paid by the nonpartisan organization from funds raised for that purpose. You have not specified what the nature of those in-kind contributions will be or how in-kind contributions to the State will be tracked. Presumably, the State will be responsible for documenting those state resources and tracking their use.

B. Specific Questions

1. May a lobbyist and/or lobbyist principal make cash contributions [e.g., cash, checks, money orders, or other traceable payments] to the nonpartisan organization through designated individuals for the purpose of the conference?

Yes. Cash contributions given by lobbyists or lobbyists' principals directly to the nonpartisan organization are not subject to the general gift ban. G.S. 120C-303(a) generally prohibits a lobbyist or lobbyist's principal from (1) knowingly giving a gift to a designated individual and (2) knowingly giving a gift to a third party with the intent that a designated individual be the ultimate recipient. A designated individual includes legislators, legislative employees, and public servants. G.S. 120C-100(a)(2).

The general gift ban was amended in 2007 to allow gifts to nonpartisan organizations and affiliated organizations:

Gifts made to a nonpartisan state, regional, national, or international legislative organization of which the General Assembly is a member or a legislator or legislative employee is a member or participant by virtue of that person's public position, or to an affiliated organization of that nonpartisan state, regional, national, or international organization, shall not constitute a violation of subdivision (a)(2) of this section [120C-303] or of G.S. 138A-32(c).

Gifts made to a nonpartisan state, regional, national, or international organization of which the public servant's agency is a member or a public servant is a member or participant by virtue of that person's public position, or to an affiliated organization of that nonpartisan state, regional, national, or international organization, shall not constitute a violation of subdivision (a)(2) of this section [120C-303] or of G.S. 138A-32(c).

Thus, G.S. 120C-303(d) and (e) provide a safe harbor from the Lobbying Law's gifts ban, and, notwithstanding the restrictions on gifts to third parties when the intended recipient is a designated individual, permits gifts that fall within this subsection.

The following is an application of the G.S. 120C-303 criteria to proposed cash contributions from lobbyists and lobbyist principals to the nonpartisan organization for purposes of the conference:

A. The State is a member of the nonpartisan organization;

- B. The nonpartisan organization is an organization that serves all three branches of government;
- C. Even if the contributions would be made to the nonpartisan organization for the benefit of the affiliated organization, this would still fall within the safe harbor;
- D. Both the nonpartisan organization and the affiliated organization are “nonpartisan,” insofar as membership is not limited to members of a particular political party.

Based upon the application of the criteria, general cash contributions given by lobbyists or lobbyist’s principals directly to the nonpartisan organization, not designated or earmarked for a particular event or specific group of individuals, are not subject to the gift ban. However, please note that designating or earmarking contributions could raise other issues not addressed in this opinion, including whether the earmarked gift may be viewed as a sponsorship of a separate event and not a gift to the nonpartisan organization or the affiliated organization, thus triggering the gift ban exception analysis under G.S. 138A-32(e).

2. May a lobbyist and/or lobbyist principal make in-kind contributions to the State through designated individuals for the purpose of the conference?

Yes. As previously stated, G.S. 120C-303(a)(2) provides that no lobbyist or lobbyist’s principal may “[k]nowingly give a gift to a *third party* with the intent that a designated individual be the ultimate recipient” (emphasis added). However, the Commission staff has decided that the term “third party” should be interpreted to exclude State entities. Thus, if a gift of cash or other resources, such as goods or services, is given to and accepted by the State, and a designated individual ultimately derives a benefit from those resources and cash contributions, such gifts would not be subject to the G.S. 120C-303(a)(2) indirect gifts ban.

It is unclear what in-kind contributions will be made to the State for purposes of the affiliated organization conference. It is likely, however, that designated individuals will derive some benefit from those contributions. The method by which these benefits are made available to the meeting attendees would impact the application of the G.S. 120C-303 safe harbor, as they could be construed to be gifts given directly to the designated individuals (if, for example, attendees are directly given free admission to a particular theme park compliments of a particular lobbyist’s principal). Therefore, in order for those contributions to be outside the indirect gifts ban, those contributions must be made directly to the State and accounted in accordance with established procedures. However, any in-kind gifts that are independently provided by lobbyists and lobbyist’s principals, in conjunction with the Conference, would still be subject to the G.S. 138A-32(c) and 120C-303(a) gifts bans.

3. If designated individuals solicit cash contributions to the nonpartisan organization from lobbyists and/or lobbyists’ principals for the purpose of the conference, are the lobbyists and/or lobbyist principals required to report the cash contributions?

Yes. All “reportable expenditures” made for the purpose of lobbying must be reported. G.S. 120C-400(a); *see also* G.S. 120C-402(b)(1); 120C-403(b)(1). A “reportable expenditure” includes

any contribution, gift, or “thing of value” greater than ten dollars that is made *at the request of* a designated individual. G.S. 120C-100(a)(12). Contributions made at the request of designated individuals, and given to a nonpartisan or affiliated organization for the direct or indirect benefit of the designated individuals, clearly appear to be for the purpose of lobbying, particularly considering the breadth of “goodwill” lobbying. *See* G.S. 120C-100(a)(9). Also, even though it appears to be some sort of a quasi-official entity, the nonpartisan organization should not be considered a “State agency” for purposes of G.S. 120C-400(b). (*See* answer to question number 4.) Thus, they need to be reported.

4. If designated individuals solicit in-kind contributions to the State from lobbyists and/or lobbyists’ principals for the purpose of the conference, are the lobbyists and/or lobbyist principals required to report the in-kind contributions?

Probably not. The reporting of reportable expenditures made for the purpose of lobbying is subject to an exception for State agencies:

This section [Article 4, Reporting] shall not apply to any reportable expenditure made directly to a *State agency* and that agency maintains an accounting of the reportable expenditure that is a public record.

G.S. 120C-400(b) (emphasis added). Please note the requirement that the agency must maintain a public accounting of the reportable expenditure in order for it not to be reportable under Article 4 of the Lobbying Law. This is something you would need to discuss with the appropriate parties since civil sanctions may be imposed on a lobbyist or lobbyist’s principal for failing to report as required. *See* G.S. 120C-602.

5. If the lobbyists and/or lobbyists’ principals are required to report contributions, are they required to report the designated individual who solicited or received the contribution?

No. Designated individuals who solicit or receive contributions do not need to be identified in reports to the Secretary of State. Initially, it should be noted that the reporting obligation here only applies to cash contributions to the nonpartisan organization. As discussed above, *in-kind contributions to the State* are reportable expenditures made directly to a State agency and therefore likely excluded from the general reporting obligations pursuant to G.S. 120C-400(b). *See* answer to question number 4 above.

The State is hosting an upcoming conference of the affiliated organization and has numerous obligations and responsibilities with regard thereto. Furthermore, as the host state, North Carolina is required to plan conference, which will include organizing social activities for attendees and their spouses and children, providing gift bags, handling registration, and arranging transportation, among many other things. *See* section II (A) above. These responsibilities have been delegated to the North Carolina Host Committee. Numerous state resources have been and will be devoted to this significant effort. Moreover, while neither your typical state agency nor run-of-the-mill 501(c)(3), the nonpartisan organization is recognized statutorily. Also, the nonpartisan organization was established as a “joint governmental agency established by states, supported by states, for the service to the states,” including North Carolina. *See* section II (A) above. While it is unclear exactly what the nonpartisan organization is, it clearly has some special status *vis-à-vis* the state of North

Carolina. Therefore, this is a very unique situation, and may indeed be one-of-a-kind in North Carolina. It blurs the line between “state” and “private” functions, and who or what is benefiting from or connected with allowable contributions. Thus, the normal reporting requirements, and the underlying reasons therefore, do not readily apply in this unique context.

In particular, while G.S. 120C-401(b) is complicated and difficult to interpret in some respects, the “payee” in this situation is the nonpartisan organization, not any particular designated individual. Likewise, the nonpartisan organization would be the direct “beneficiary” of any cash contributions (reportable expenditures) in this context. Members of the Host Committee, or even designated individuals, are merely conduits for the transfer of contributions to the State or this unique entity and are not “connected with” the reportable expenditures as contemplated by G.S. 120C-401(b). In fact, they are only “connected with” any reportable expenditures as representatives of the State in this unique situation. Even in a more straightforward reporting context, if more than 15 designated individuals will “benefit” from the reportable expenditure (cash contribution here), which will certainly be the case for this conference, then no names of individuals need be reported as long as the other requirements of G.S. 120C-401(b) are met. The approximate number benefiting and the basis of their selection would be sufficient. Thus, the end reporting result would be the same. Therefore, they do not have to be identified individually in this situation.

While all opinions are fact-specific, please keep in mind that this opinion is particularly so given the unique situation involved. Please do not hesitate to contact this office if you have any questions about the foregoing written advisory opinion.