



STATE ETHICS COMMISSION

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SUPPLEMENTAL FORMAL ADVISORY OPINION EDITED FOR PUBLICATION

February 13, 2009

Re: Lobbyists' and Lobbyist Principals' In-Kind Contributions to a State Governmental Entity for a Meeting of a Regional Affiliate of a National Nonpartisan Organization
AO-L-09-004

Dear Requester:

You have asked the State Ethics Commission to reconsider Part B.2 of AO-L-08-001, in light of recent amendments to the Lobbying Law. Specifically, you have asked the Commission to redetermine whether in-kind contributions from registered lobbyists and lobbyist principals to a State governmental entity to support the meeting of a regional affiliate of a nonpartisan national organization ("nonpartisan organization") are consistent with the gifts ban of the Lobbying Law. This opinion is in response to that specific request.

You have also asked that the Commission reconsider Part B.4 and B.5 of AO-L-08-001 concerning the reporting of those contributions. However, the Commission will address those reporting questions in a subsequent opinion. Please note that pursuant to AO-L-09-001, "reportable expenditures" should be disclosed by contributing lobbyists or lobbyist principals in the next report that is due following the meeting sponsored by the in-kind contributions.

This formal advisory opinion was adopted by the Commission at its February 13, 2009, meeting.¹

I. Brief Conclusion.

The Commission has concluded that in-kind contributions made by registered lobbyists and lobbyist principals to a State governmental entity to support the meeting in question would most likely be indirect gifts that would be governed by G.S. 120C-303(a)(2). However, the Commission has determined that under the circumstances outlined below, those gifts would fall within the G.S. 138A-32(e)(5) exception to the gifts ban. It is therefore permissible for lobbyists and lobbyist principals to make those in-kind contributions.

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.

II. Background.

You previously sought the Commission's opinion with respect to cash and in-kind contributions by lobbyists and lobbyist principals in support of the meeting of a regional affiliate of a nonpartisan organization of which a State governmental entity is a member. In AO-L-08-001, the Commission concluded that it was permissible for lobbyists and lobbyist principals to make those cash and in-kind contributions. Specifically, with respect to cash contributions, the Commission determined that G.S. 120C-303(d) and (e) provided safe harbors from the Ethics Act's gifts ban, and that, notwithstanding the restrictions on direct and indirect gifts contained in G.S. 120C-303(a)(2), permitted cash contributions by lobbyists or lobbyist principals directly to the nonpartisan organization.

The Commission also determined that the G.S. 120C-303(d) and (e) safe harbors were inapplicable to in-kind contributions, since those contributions were made directly to the State governmental entity. Therefore, the in-kind contributions were subject to the indirect gifts ban of G.S. 120C-303(a)(2), which prohibited lobbyists and lobbyist principals from knowingly giving a gift to a "third party" with the intent that a designated individual be the ultimate recipient.

Application of the indirect gifts ban required that the Commission interpret "third party," an undefined term. After an extensive analysis of the purpose behind the Ethics and Lobbying Acts and their unique application to State entities, the Commission interpreted the term "third party," to exclude State entities. Thus, the Commission concluded that if a gift of cash or other resources, such as goods or services, is given to and accepted by the State, those gifts would not be subject to the G.S. 120C-303(a)(2) indirect gifts ban.

On August 15, 2008, S.L. 2008-213 was signed into law by the Governor. Section 17.(a) of S.L. 2008-213 amended the Lobbying Law's indirect gifts ban to delete the term "third party."

III. The Facts.

The nonpartisan organization is a 501(c)(3) nonprofit governed by a board composed of State governmental representatives from its member states. It is recognized statutorily as a North Carolina governmental agency.

The regional affiliate of the national organization that is holding the meeting is not a separate legal entity, but operates through and is overseen by the nonpartisan organization and the nonpartisan organization's Governing Board. One of the affiliate's primary purposes is to host educational meetings, including annual conferences attended by designated individuals and their families. Those conferences are hosted on a rotating basis by the affiliate's member states.

North Carolina is hosting the affiliate's upcoming annual conference. As the host state, North Carolina is required to plan the upcoming conference, which will include organizing social activities for attendees and their spouses and children, providing gift bags, handling registration, and arranging transportation. Another responsibility of the host state is to secure private contributions to assist with financing the conference. Designated individuals plan to solicit both financial and in-kind contributions from a variety of individuals and entities, including registered North Carolina lobbyists and lobbyist principals. You have noted that in-kind contributions will be made to the host state for use at the upcoming conference. You have not specified what those in-kind contributions will be.

IV. Applicable Statutory Provisions.

G.S. 138A-32(c) prohibits a public servant, legislator or legislative employee from knowingly accepting a gift from a registered lobbyist, lobbyist principal (1) directly or (2) if he or she knew that the gift was “obtained indirectly” from a registered lobbyist or lobbyist principal who intended that a legislator or legislative employee be the “ultimate recipient” of the gift.

G.S. 120C-303(a), as amended by S.L. 2008-213, provides that unless permitted by an exception to the gifts ban, no lobbyist or lobbyist principal may: “(1) Knowingly give a gift to a designated individual,” or “(2) Knowingly give a gift with the intent that a designated individual be the ultimate recipient.” There are a number of gifts ban exceptions listed in G.S. 138A-32(e). G.S. 138A-32(e)(5) sets forth an exception for “[g]ifts accepted on behalf of the State for use by the State or for the benefit of the State.”

V. Discussion.

A. Are In-Kind Donations Indirect Gifts?

The first question to be considered is whether those in-kind contributions made by lobbyists and lobbyist principals for the purpose of the upcoming meeting are indirect gifts subject to G.S. 120C-303(a)(2). At this point, it is unclear what in-kind contributions will be made to the State governmental entity for purposes of the conference. In order to make a concrete determination as to the application of the indirect gifts ban, the Commission would need to know the circumstances surrounding each solicitation and contribution and the specific nature of the in-kind contribution. However, because the meeting will be hosted by a State governmental entity and will take place in North Carolina, it is likely that a high percentage of attendees will be designated individuals from North Carolina.

Therefore, given the proportion of designated individuals from North Carolina who will benefit from the contributions and the fact that those individuals will also be soliciting the contributions, it is likely that contributing lobbyists and lobbyist principals intend that the designated individuals attending the conference will be the ultimate recipients of the in-kind contributions. Under such circumstances, those in-kind contributions would be subject to the indirect gifts ban of the Lobbying Law.

B. G.S. 138A-32(e)(5) “Gift to the State” Exception.

G.S. 120C-303(b) provides that the indirect gifts ban does not apply to gifts that meet a gifts ban exception. G.S. 138A-32(e)(5), permits “[g]ifts accepted on behalf of the State for use by the State or for the benefit of the State.” That provision does not otherwise explain what criteria should be applied in determining whether a gift is accepted “for use by the State” or “for the benefit of the State.” However, in determining whether a gift is for use by the State or for the State’s benefit, it would be important to consider the intended purpose, function, and authority of the State entity in question, as established by the State Constitution and applicable laws, regulations, policies, and procedures, and whether the gift in question can be utilized in a manner that is consistent with that intended purpose, function, and authority. Moreover, assuming the intended use of the gift is consistent with the State entity’s purpose, that entity must also comply with applicable restrictions on the receipt and expenditure of State resources.

Thus, whether lobbyists and lobbyist principals may make in-kind contributions for use at the conference would depend upon whether the host state's responsibilities would be consistent with its State purpose and authority. The nonpartisan organization is recognized statutorily. One of the primary purposes of the affiliate is to educate its members. In connection with its membership in the affiliate, the State governmental entity is responsible for hosting annual conferences on a rotating basis. That responsibility includes fundraising activities, including the solicitation of cash and in-kind contributions from various individuals and entities, which may include registered lobbyists and lobbyist principals.

Given the unique status of the nonpartisan organization as a joint governmental agency of North Carolina, the obligations associated with the State's membership in the affiliate, and the educational purpose of the conference, the Commission has concluded that in-kind contributions supporting that meeting would most likely be for the benefit of the State. Therefore, under such circumstances, those contributions may be made by lobbyists and lobbyist principals.

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, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 120C-102(a) and (a1).

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. 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. 102(d1).