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STATE ETHICS COMMISSION

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Confidential Formal Advisory Opinion

March 17, 2008

Ms. Susan Valauri
President
North Carolina Professional Lobbyist Association
P.O. Box 905
Raleigh, NC 27602

VIA E-MAIL AND
U.S. MAIL

RE: Reporting of Lobbyists' Compensation by Lobbyist Principals
AO-L-08-002

Dear Ms. Valauri:

By a letter dated January 31, 2008, you requested a formal advisory opinion regarding the reporting by a lobbyist principal of the compensation it pays to a lobbyist. On February 28, 2008, you requested a formal advisory opinion asking for clarification on the reporting of reimbursements by the lobbyist principal to the lobbyist for parking fees, lodging, travel, and other direct expenses that the lobbyist incurs in the course of his or her work as a lobbyist. Based on the direct connection between your two requests, the Ethics Commission's staff is addressing the questions and issues raised in your two requests in one advisory opinion. This letter is the formal advisory opinion addressing your January 31 and your February 28 requests.

I. 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

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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 regarding the specific facts and circumstances addressed in the Commission's formal advisory opinion. 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).

II. Advisory Opinion

A. Facts

Many lobbyists are not employed full-time to lobby. An employee of a lobbyist principal may be a lobbyist but also may be assigned numerous duties and responsibilities other than lobbying. Also, a contract lobbyist may be an employee of a firm that provides many other professional services for the lobbyist principal. One example would be a lobbyist who is employed by a public relations firm and whose duties include management services or product advertising as well as lobbying for a particular client of the firm. Another example would be a lawyer who is both a lobbyist and is a member of a law firm which has been retained by a company to represent it in many matters. One of these matters may involve lobbying on behalf of the client-company, making the company a lobbyist principal. Other matters may involve representing the company in a civil lawsuit and drafting a business contract for the company, neither of which are related to the lobbying duties being performed. However, the attorney, who is also a lobbyist, may be the attorney that lobbies on behalf of the company and also be the attorney that represents the company in the civil lawsuit. The lobbyist principal company pays either the law firm for the attorney's lobbying duties and for his/her trial work or directly pays the attorney for his/her lobbying duties and his trial work. The lobbyist principal may also reimburse the lobbyist, indirectly through the firm or directly, for expenses he/she incurs related to his/her lobbying duties and responsibilities.

B Specific Questions

1. When a lobbyist principal has an employee who is a lobbyist for the principal but performs other duties in addition to lobbying, is the lobbyist principal required to report the entire amount of compensation it paid the lobbyist/employee?

No. The lobbyist principal must only report the percentage of the employee's compensation that is related to lobbying. G.S. § 120C-403(b)(3) requires a lobbyist principal to report compensation of an employee who is a lobbyist as follows:

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(3) Compensation paid to all lobbyists during the quarter. If a lobbyist is a full-time employee of the principal, or is compensated by means of an annual fee or retainer, the principal shall estimate and report the portion of the salary, fee, or retainer that compensates for lobbying.

The term "compensation" is not defined in G.S. Chapter 120C, but it is defined in G.S. Chapter 138A, the Ethics Act. G.S. § 120C-100(b) specifically states that, except as otherwise defined in this section, the definitions in Article 1 of G.S. Chapter 138A apply to G.S. Chapter 120C. G.S. § 138A-3(6) defines "compensation" as any money, thing of value, or economic benefit conferred on or received by any person in return for services rendered or to be rendered by that person or another. This definition specifically excludes properly received and properly reported campaign contributions. G.S. § 138A-3(6).

G.S. § 120C-403(b)(3) requires that the principal determine the portion of the employee's entire salary or total wages that are paid to the employee for their lobbying duties and responsibilities, and this amount is the amount of the employee's salary or wages that is required to be reported by the principal. In addition, based on the definition of compensation, the amounts that are reimbursed by the principal to the employee for lobbying expenses may also be reportable "compensation" under G.S. Chapter 120C.[1]

Lobbying is defined by G.S. § 120C-100(a) as follows:

(9) Lobbying. – Any of the following:

a. Influencing or attempting to influence legislative or executive action, or both, through direct communication or activities with a designated individual or that person's immediate family.

b. Developing goodwill through communications or activities, including the building of relationships, with a designated individual or that person's immediate family with the intention of influencing current or future legislative or executive action, or both.

The term "lobbying" does not include communications or activities as part of a business, civic, religious, fraternal, personal, or commercial relationship which is not connected to legislative or executive action, or both. G.S. § 120C-100(a)(9).

The percentage of time that the employee spends on any activities that fall within the definition of lobbying must be estimated by the lobbyist principal The amount of salary, fees, or wages paid to the employee for time spent on lobbying, including all duties and responsibilities related to lobbying, is the portion of the employee's salary, fees, or wages that is required to be

[1] See answer to question number 3 below.

CONFIDENTIAL

reported by the principal to the Secretary of State.[2] One way to determine the reportable amount of an employee's salary, fee, or wage compensation is to multiply the employee's entire salary, fee, or wage compensation by the percentage of time the employee spent on lobbying, including all duties and responsibilities related to lobbying.

There are civil sanctions for failing to properly report, so the percentage of time spent on lobbying should be verifiable. See G.S. § 120C-602(b) A lobbyist principal must file its report with the Secretary of State quarterly, except a report is required monthly when lobbying legislators or legislative employees during the legislative session. G.S. § 120C-403.

2. When a lobbyist principal contracts for lobbying services from a firm which also provides other services for the lobbyist principal which are unrelated to lobbying, is the lobbyist principal required to report all payments to the firm?

No. A lobbyist principal must only report:

(1) reportable expenditures relating to lobbying;

(2) solicitation of others when such solicitation involves an aggregate cost of more than three thousand dollars ($3,000);

(3) compensation for lobbying paid to all lobbyists during the quarter;

(4) reportable expenditures reimbursed or paid to lobbyists for lobbying that are not reported on the lobbyist's report, with an itemized description of those reportable expenditures; and

(5) all reportable expenditures for gifts given under G.S. 138A-32(e)(1)-(9), 138A-32(e)(11), 138A-32(e)(12), and all gifts given under G.S. 138A-32(e)(10) with a value of more than two hundred dollars ($200.00).

G.S. § 120C-403(b). There is no requirement for the lobbyist principal to report payments to the firm employing the lobbyist which do not fall within the items listed above. Even if the lobbyist is paid for services other than lobbying, only the compensation related to lobbying must be reported. G.S. § 120C-403(b)(3) states that when a lobbyist is "compensated by means of an annual fee or retainer, the principal shall estimate and report the portion of the salary, fee, or retainer that compensates for lobbying." The entire amount of the lobbyist's salary, annual fee, or retainer need not be reported unless the entire amount is compensating the lobbyist for lobbying duties and responsibilities.

[2] The question you presented is limited to reporting of a lobbyist's compensation. G.S. § 120C-403(b) requires other expenditures to be reported. See the discussion in question number 2.

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3. Are expenses a lobbyist incurs in the course of performing his or her lobbying duties and responsibilities that are reimbursed by the lobbyist principal required to be reported by the lobbyist principal, and if required to be reported, under what category of G.S. 120C-403(b) are these reimbursed expenses to be reported?

Yes. A lobbyist principal is required to report reimbursements it paid to a lobbyist for direct expenses the lobbyist incurred in the course of performing his or her lobbying duties and responsibilities.[3] The facts of each situation will determine what category of G.S. 120C-403(b) the lobbyist principal will report the reimbursement under in its report. For example, if the lobbyist is reimbursed for a "reportable expenditure," the reimbursement would be reported under sub-subsections (1), (4), or (5), depending on which of these sub-subsections describes the reportable expenditure.

A reportable expenditure is defined as:

any of the following that directly or indirectly is made to, at the request of, for the benefit of, or on behalf of a designated individual or that individual's immediate family member:

a. any advance, contribution, conveyance, deposit, distribution, payment, gift, retainer, fee, salary, honorarium, reimbursement, loan, pledge, or thing of value greater than ten dollars ($10.00) per designated individual per calendar day;[4]

b. a contract, agreement, promise, or other obligation whether or not legally enforceable.

G.S. 120C-100(a)(12). Accordingly, to be a reportable expenditure, the expenditure for which the lobbyist principal is reimbursing the lobbyist must have been directly or indirectly made to, at the request of, for the benefit of, or on behalf of a designated individual or their immediate family member. If the facts do not support such, which you acknowledged in your letter will often be the case, then the reimbursement paid by the lobbyist principal to the lobbyist for expenses incurred in performing his or her lobbying duties and responsibilities needs to be reported by the lobbyist principal as "compensation" on their report to the Secretary of State's Office.[5]

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[3] The prior version of the Lobbying Law, Article 9A of N.C.G.S. Chapter 120, defined both "compensation" and "expenditure" to include reimbursements of a certain amount. N.C.G.S. § 120-47.1(1). This past law required lobbyist principals to report each expenditure in excess of $25.00 made in connection with lobbying and all compensation paid to lobbyists in connection with their lobbying activities. N.C.G.S. § 120-47.7(b)

[4] In determining whether greater than ten dollars ($10.00) of value has been given to a designated individual per calendar day, the cumulative value of all that is given to a designated individual and any of his or her immediate family members in one calendar day is the amount that is used.

[5] The past Lobbying Law stated that reimbursement in the ordinary course of business of lobbying expenses, including reimbursement of actual travel and subsistence, was to be considered compensation under certain circumstance. N.C.G.S. § 120-47.1(6).

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As stated previously, G.S. § 120C-403(b)(3) requires a lobbyist principal to report all compensation paid to a lobbyists for lobbying duties and responsibilities. The definition of compensation for the purposes of G.S. Chapter 120C includes anything of value and any economic benefit conferred on or received by any person in return for their services. G.S. § 120C-100(b) and G.S. §138A-3(6). For purposes of G.S. Chapter 120C, the lobbyist principal is conferring an economic benefit upon the lobbyist in return for his/her lobbying services when the principal reimburses the lobbyist for expenses, fees, or other direct costs incurred while or due to the lobbyist performing lobbying duties and responsibilities.[6] Although the lobbyist principal may not be required to report the reimbursement of lobbying expenses to a lobbyist as compensation for tax purposes, pursuant to G.S. §120C-403(b) such reimbursement amounts must be reported in the lobbyist principal's reports it files with the Secretary of State's Office as either compensation or, if applicable, a reportable expenditure made for the purpose of lobbying.

4. Is the Ethics Commission responsible for interpreting or applying rules pertaining to lobbying adopted by the Secretary of State's Office?

No. The Ethics Commission is not responsible for interpreting or applying rules pertaining to lobbying adopted by the Secretary of State's Office.

In your request, you indicate that you believe that certain rules adopted by the Secretary of State's Office conflict with some of the provisions of the Lobbying Law and seem to ask the Commission to resolve these conflicts. The provisions of G.S. § 120C-102 allow the Commission, upon request of a person affected by Chapter 120C of the General Statutes, to issue advisory opinions on "the meaning and application of this Chapter and that person's compliance therewith."[7] The Commission does not interpret or apply the Secretary of State's rules. Questions about the Secretary of State's rules should be referred to that office. However, if a rule adopted by any State agency is determined by the appropriate legal entity to be in conflict with a North Carolina General Statute or a provision of such, the Statute controls and the rule would be deemed invalid. Thomas v. N.C. Dept. of Human Resources, 124 N.C. App. 698, 702-03, 478 S.E. 2d 816, 819 (1996).

Thank you for contacting the State Ethics Commission concerning this issue. I hope this written advisory opinion provides you with sufficient guidance and answers to your specific questions. Please do not hesitate to contact me if you have any questions about the foregoing written advisory opinion.

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[6] General administrative costs and expenses the lobbyist incurs, such as office space rent and office equipment expenses, for which the lobbyist principal is not directly reimbursing the lobbyist, are *not* reportable. However, if the lobbyist principal directly reimburses the lobbyist for these types of expenses, this would be compensation for purposes of N.G.C.S. Chapter 120C and would be reportable as such.

[7] The Ethics Commission has authorized its staff to issue written advisory opinions pursuant to N.C.G.S. §120C-102 and §138A-13 upon the receipt of a proper request.

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An unedited copy of this formal advisory opinion shall be forwarded to the Secretary of State at the time it is issued to the requestor(s) pursuant to G.S. § 120C-102(d), and the Secretary of State shall treat such opinion as confidential and not a public record.

Sincerely,

Susan R. Lundberg

Susan R. Lundberg
Lobbying Director

cc: Robert L. Farmer, Chairman, SEC
Perry Y. Newson, Executive Director, SEC
Kathleen S. Edwards, Assistant Director, SEC
Secretary of State (per 120C-102(d))