STATE ETHICS COMMISSION

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FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

February 12, 2010

Re: Application of the AO-L-09-010 "But For" Test
AO-L-10-001

Dear Requester:

You requested a formal advisory opinion regarding the application of AO-L-09-010 to the annual salary a Lobbyist Principal pays to each of its employee-lobbyists. You specifically questioned whether certain services provided by the Principal's lobbyists are services "for the purpose of lobbying," requiring that the Principal report that portion of each lobbyist's salary that is reasonably allocated to these services.

This formal advisory opinion was adopted by the State Ethics Commission ("the Commission") at its February 12, 2010, meeting.[1]

I. Brief Conclusion.

Whether certain communications or activities constitute lobbying depends upon whether they involve designated individuals or their immediate family and concern a particular legislative or executive action. Payments for those lobbying services and other services that would not have been provided but for those lobbying activities need to be reported on a lobbyist principal's expense report. Please see the responses to your particular questions below.

II. Facts.

The Lobbyist Principal's ("the Principal's") staff includes non-lobbyists and lobbyists. The employee-lobbyists perform a number of job duties that include lobbying and non-lobbying tasks. Each employee-lobbyist spends varying amounts of his or her time on lobbying efforts.

The Principal has developed a process to facilitate the formation of policies and goals to be used for legislative and regulatory purposes. This process has been and continues to be

[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.

developed with input from staff members who may be lobbyists. The process relies upon various levels of committees to consider and recommend legislative and regulatory changes. Staff members were involved in the development of the structure of the committees and identify and recommend individuals for appointment to the committees. Those individuals include employees of the Principal and other individuals and entities that have an interest in the Principal's legislative and regulatory goals.

Generally, concerns or needs regarding policy issues are expressed to the Principal's staff, mentioned to members of the committees, or brought up by committee members themselves. The staff may also independently identify matters of interest. Policy issues considered range from whether the Principal should seek legislation to a specific legislative proposal.

Members of these committees may also discuss lobbying strategy, be advised of the status of ongoing legislative issues, and be recruited to help in speaking to designated individuals. However, policy development is the reason the committees were created.

Various staff members of the Principal, including the lobbyists, may be involved in the process used to determine the Principal's position on an issue. Staff members research issues, present information to, and provide administrative support for the Principal's Board of Directors and Executive Board, and the various committees described above.

III. Applicable Statutory Provisions.

Article 4 of G.S. Chapter 120C imposes certain reporting responsibilities on lobbyists and lobbyist principals. G.S. 120C-403 specifies the content of the lobbyist principal's report. G.S. 120C-403(b)(3) requires a lobbyist principal to report:

> With respect to each lobbyist registered under G.S. 120C-206, payment for services paid to all lobbyists during that quarter. If the lobbyist is a full-time employee of the principal, or is paid by an annual fee or retainer, the principal shall estimate and report the portion of the salary, fee, or retainer that is reasonably allocated for the purpose of lobbying. The principal may rely upon a statement by the lobbyist estimating the portion of the salary, fee, or retainer that is reasonably allocated for the purpose of lobbying.[2]

G.S. 120C-100(a)(11k) defines "payment for services" as "any money, thing of value, or economic benefit paid to a lobbyist *for the purpose of lobbying* other than reimbursement of actual travel, administrative expenses, or subsistence." The phrase "for the purpose of lobbying" is not defined in G.S. Chapter 120C. However, it clearly includes payments made by a lobbyist principal to a lobbyist for engaging in activities that constitute direct or goodwill lobbying.

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[2] AO-L-08-004 provides advice as to the manner in which fees could be "reasonably allocated."

IV. Determining What Constitutes Payments for Services for the Purpose of Lobbying.

A. AO-L-09-010.

In AO-L-09-010[3] the Commission interpreted the phrase "for the purpose of lobbying" in the definition of "payment for services." The Commission determined that the phrase "for the purpose of lobbying" encompassed more communications and activities than those included under the definition of "lobbying." The Commission concluded that a "but for" test should be applied to determine whether services provided by a lobbyist are related to lobbying communication or activities. If the lobbyist would not be providing those services but for the fact that he or she is engaged in lobbying, direct or goodwill, on behalf of a principal for a **particular** legislative or executive action, those services are "for the purpose of lobbying" and those payments must be reported, in addition to any payments paid to the lobbyist for lobbying communications and activities.

The facts and circumstances underlying the lobbyist's activities are critical to the application of the "but for" test. In applying that test, one must first focus on the central activity in question and whether that activity is "lobbying."[4] If an individual is engaged in "lobbying", a lobbyist principal must report payments made to the individual for (i) communications or activities with a designated individual made with the intent of influencing a particular legislative or executive action and (ii) services connected with those communications or activities.

The latter obligation would require reporting of amounts paid to a lobbyist for services that he or she would not be performing if he or she were not engaged in particular lobbying communications or activities. This would include payments for research, the drafting of communications or other documents, monitoring particular legislative or executive actions, and preparing for and participating in telephone calls, meetings, and other events that relate to lobbying communications or activities. It would not include payments for services that are unrelated to lobbying communications or activities, such as general communications with customers or company personnel concerning pending or current legislation or regulatory matters, or the preparation of studies or reports regarding those matters.

B. Analogous Federal Law Provisions.

The lobbying law's definition of lobbying and the "but for" standard adopted by the Commission in determining what services are "for the purpose of lobbying" are similar to federal tax code provisions restricting the deductibility of lobbying-related expenditures. The payments which AO-L-09-010 requires that a lobbyist principal report are similar to those types of expenditures deemed to be paid or incurred in connection with lobbying under the federal tax code. Specifically, 26 U.S.C 162(e)(1) restricts businesses from deducting certain expenditures that are connected to lobbying, including amounts "**paid or incurred in connection with**:"

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[3] The reporting requirements established in that opinion apply to the reporting period commencing on January 1, 2010.

[4] Lobbying is defined as (i) direct communications or activities with designated individuals or their immediate family members (ii) designed to influence "legislative or executive action."

(1) "Influencing legislation," defined as "any attempt to influence any legislation through communication with any member or employee of a legislative body …;" and

(2) "Any direct communications with a covered executive branch official in an attempt to influence the official actions or positions of such official."

Similar to North Carolina's definition, "lobbying" is interpreted as influencing or attempting to influence specific legislative or executive branch actions. 26 C.F.R. 1.162-29(b)(3)(i). Accordingly, for an expenditure to be "paid or incurred in connection with" lobbying, it must be tied to specific legislative or executive actions. "Legislative bodies" include "state legislatures, and other similar governing bodies." 26 C.F.R. 1.162-29(b)(6).

Regulations adopted to interpret Section 162(e)(1) include within the definition of lobbying-related expenditures "lobbying communications" and other activities "such as research, preparation, planning, and coordination, including deciding whether to make a lobbying communication, engaged in for a purpose of making or supporting a lobbying communication, even if not yet made." 26 C.F.R. 1.162-29(b)(1)(ii). A "lobbying communication" includes a communication that:

(i) Refers to specific legislation and reflects a view on that legislation; or

(ii) Clarifies, amplifies, modifies, or provides support for views reflected in a prior lobbying communication.

26 C.F.R. 1.162-29(b)(3).

The federal regulations further identify the following non-exclusive facts and circumstances to be applied in determining whether an activity is "for the purpose of making or supporting" a lobbying communication:

(i) Whether the activity and the lobbying communication are proximate in time;

(ii) Whether the activity and the lobbying communication relate to a similar subject matter;

(iii) Whether the activity is performed at the request of, under the direction of, or on behalf of a person making the lobbying communication;

(iv) Whether the results of the activity are also used for a non-lobbying purpose; and

(v) Whether, at the time the taxpayer engages in the activity, there is specific legislation to which the activity relates.

26 C.F.R. 1.162-29(c)(1). A number of examples of activities that are and are not deemed to be for the purpose of a lobbying communications are set forth in those regulations. Where the activity is engaged in for a lobbying and non-lobbying purpose, the taxpayer may not deduct those costs "that would not have been incurred but for the lobbying purpose."

C. Analytical Framework for Determining if a Service is "For the Purpose of Lobbying."

To determine if a service is for the purpose of lobbying, requiring the reporting of the payment for this service, the following analysis (the AO-L-09-010 "but for" test) should be applied:

(1) Is the principal planning to communicate or currently engaged in communications or activities with a designated individual or his or her immediate family?

If not, the service being provided is not lobbying or for the purpose of lobbying and the payment for those services and any related services need not be reported.

If yes, go to number two.

(2) Are those communications or activities with a designated individual or immediate family intended to influence any particular current or future legislative or executive action?

If not, the communication or activity is not lobbying or for the purpose of lobbying and the payment for those non-lobbying services and any related services need not be reported.

If yes, the communications or activities are lobbying. The payments for the lobbying communications and activities, and for certain services related to the lobbying services, must be reported. Go to number three to determine what related services are "for the purpose of lobbying," requiring that payments to the lobbyist for such related services be reported.

(3) Would the lobbyist be performing this related service for the principal if he or she were not engaged in lobbying communications or activities?

If yes, the related service is not "for the purpose of lobbying" and therefore, payments to the lobbyist for this service need not be reported.

If not, the related service is "for the purpose of lobbying" and payments to the lobbyist for this service must be reported. If the lobbyist is paid by an annual salary, fee, or retainer, the portion of the lobbyist's salary, fee or retainer that is a reasonable allocation for the lobbyist providing this non-lobbying service must be reported by the principal.

V. Specific Questions.

Based on the facts presented, the Principal has developed a process to facilitate the formation of positions, policies, and goals to be used for legislative and regulatory purposes. The Principal's employee-lobbyists are actively involved in all phases of this process including, but not limited to, providing the following non-lobbying services: (1) developing the committee structures; (2) identifying and recommending individuals for appointment to the committees; (3) interacting with other individuals and entities that have an interest in the Principal's legislative and regulatory goals; (4) conducting research and developing positions on issues; (5) presenting to the committees and the Principal's Board; and (6) providing general administrative support for these representative bodies.

You specifically ask whether the above-referenced services, if provided by the Principal's lobbyists, are "services for the purpose of lobbying" requiring the Principal to report that portion of each lobbyist's salary that is reasonably allocated to these services.

(1) Developing the structure of the Principal's committees and identifying and recommending individuals for appointment to these committees?

Probably not. Apply the "but for" test. These appear to be internal functions and services designed, in general, to identify policy issues to be pursued by the Principal. Time spent developing such committees and identifying members for appointment to committees appears to be unrelated to communications or activities designed to influence a particular legislative or executive action.

(2) Assisting with the Principal with increasing its clientele?

Probably not. Apply the "but for" test. These services appear to be unrelated to communications or activities designed to influence a particular legislative or executive action.

(3) Interacting with the Principal's officials, board members, or committees?

Possibly. The answer to this question depends upon whether the interactions are related to lobbying, communications or activities with a designated individual designed to influence a particular current or future legislative or executive action. Apply the "but for" test to determine if the interactions are "for the purpose of lobbying," requiring the Principal to report that portion of the lobbyist's salary that is reasonably allocated to those services. For example, the time an employee-lobbyist spends discussing lobbying strategy or preparing committee members to communicate with designated individuals would need to be reported if those services would not have been provided if the Principal were not engaged in lobbying communications or activities.

(4) Researching and developing the Principal's positions on issues?

Possibly. Apply the "but for test." In the event the time spent researching and developing the Principal's "positions" is related to communications or activities designed to influence a particular current or future legislative or executive action, and would not have occurred if the Principal were not engaged in those lobbying communications or activities, the services are "for the purpose of lobbying" and the Principal is required to report that portion of the lobbyist's salary that is reasonably allocated to these services.

(5) Making presentations to the Principal's officials, board members, or committees?

Possibly. Apply the "but for test." The answer would depend upon the nature of the presentation. For example, in the event a presentation is related to the development of the Principal's lobbying communications or activities, and would not have occurred if the Principal were not engaged in those lobbying communications or activities, these services are "for the purpose of lobbying" and the Principal is required to report that portion of the lobbyist's salary that is reasonably allocated to these services.

(6) Providing general administrative support to the Principal's officials, board members, or committees?

Probably not. Apply the "but for" test. These services appear to be unrelated to communications or activities designed to influence a particular legislative or executive action.

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).