STATE ETHICS COMMISSION

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SUPPLEMENTAL
FORMAL ADVISORY OPINION
UNEDITED WITH APPROVAL OF REQUESTER

August 14, 2009

Mr. Steven Brewer
Manager - Governmental Affairs
Embarq Corporation
150 Fayetteville Street, Suite 2810
Raleigh, NC 27601

Re: Reporting of Lobbyists' and Lobbyist Principals' In-Kind Contributions for the 2009 Southern Legislative Conference Annual Meeting
AO-L-09-008

Dear Mr. Brewer:

On December 23, 2008, in light of recent amendments to the Lobbying Law, you requested that the State Ethics Commission ("Commission") reconsider Parts II.B.2, 4, and 5 of its Formal Advisory Opinion dated February 27, 2008 (AO-L-08-001). That opinion concerned contributions from lobbyists and lobbyist principals to support the Council of State Government's ("CSG's") 2009 Southern Legislative Conference ("SLC") Annual Meeting ("2009 Annual Meeting").

On February 13, 2009, in Formal Advisory Opinion AO-L-09-004, the Commission readdressed Part II.B.2 of AO-L-08-001. The Commission concluded that in-kind contributions made by lobbyists and lobbyist principals to the General Assembly to benefit and support the 2009 Annual Meeting were permitted pursuant to the G.S. 138A-32(e)(5) "gift to the state" exception. In AO-L-08-001 the Commission had previously concluded that, pursuant to G.S. 120C-303(d), it was permissible for lobbyists and lobbyist principals to make cash contributions directly to the CSG for the purpose of supporting the 2009 Annual Meeting.

This opinion reconsiders Parts II.B. 4 and 5 of AO-L-08-001, providing guidance as to the reporting of in-kind contributions from lobbyists and lobbyist principals to support the 2009 Annual Meeting. It was adopted by the Commission at its August 14, 2009, meeting.[1]

[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.

I. Brief Conclusion.

Those in-kind contributions to the General Assembly to support the 2009 Annual Meeting with a value of over $10.00 per legislator or legislative employee per day must be reported by the contributing lobbyist or lobbyist principal. The names of the legislators and legislative employees need not be reported if more than 15 benefit or request the expenditure or if the identity of those benefiting are unknown to the lobbyist or lobbyist principal, although a description of the group benefiting or requesting the expenditure should be provided as more fully outlined below.

II. Background.

You previously sought the Commission's opinion with respect to the reporting of permitted cash and in-kind contributions by lobbyists and lobbyist principals in support of the 2009 Annual Meeting.

In AO-L-08-001, the Commission concluded that cash contributions to CSG were reportable expenditures made for the purpose of lobbying. Therefore, those contributions must be reported to the extent they were greater than $10.00 per designated individual per day. The Commission also found that in-kind contributions to the General Assembly were most likely not reportable because they were made to the General Assembly, and therefore fell within the G.S. 120C-400(b) reporting exemption for certain cash contributions given to a "State agency."

Section 54 of S.L. 2008-213, effective August 15, 2008, clarified that the term "state agency" referred to executive branch agencies only. Thus, the G.S. 120C-400(b) reporting exemption was inapplicable to contributions made to the General Assembly. This required that the Commission reconsider the reporting obligations of lobbyists and lobbyist principals with respect to in-kind contributions to the General Assembly in support of the 2009 Annual Meeting.

III. The Facts.

AO-L-08-001 and AO-L-09-004 provide a comprehensive overview of the CSG, its unique legal status, and the General Assembly's obligations with respect to the 2009 Annual Meeting. In connection with its status as the "Host State" of the 2009 Annual Meeting, legislators and legislative employees have solicited both cash and in-kind contributions from a variety of individuals and entities, including registered North Carolina lobbyists and lobbyist principals. As previously noted, cash contributions will be made directly to CSG and in-kind contributions will be made to the General Assembly for use at the 2009 Annual Meeting.

IV. Applicable Statutory Provisions.

G.S. 120C-402 and 120C-403 require that lobbyists and lobbyist principals file reports of "reportable expenditures" with the Secretary of State. A "reportable expenditure" is defined as anything of value that exceeds "$10 per designated individual per single calendar day," and 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." G.S. 120C-100(a)(12).[2]

The report of each reportable expenditure, including those made "for the purpose of lobbying" and for "gifts" given in accordance with G.S. 138A-32(e), must include the following information:

(1) The fair market value or face value, if shown.
(2) The date of the reportable expenditure.
(3) A description of the reportable expenditure.
(4) The name and address of the payee or beneficiary.
(5) The name of any designated individual or that individual's immediate family member connected with the reportable expenditure.

G.S. 120C-401(b).

G.S. 120C-401(b1) and (b2) outline the following circumstances where the names of designated individuals and immediate family members need not be reported, as otherwise required by G.S. 120C-401(b)(5):

A. 120C-401(b1): When more than 15 designated individuals benefit from or request a reportable expenditure, and the report details:

1. The approximate number of designated individuals benefiting or requesting, and

2. The basis for their selection, including:

i. "the name of the legislative body, committee, caucus, or other group whose membership list is a matter of public record in accordance with G.S. 132-1," or

ii. "a description of the group that clearly distinguishes its purpose or composition from the general membership of the General Assembly."

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[2] Except that gifts given by lobbyist principals pursuant to G.S. 138A-32(e)(10) are only reportable to the extent they have "a value of more than $200."

B. G.S. 120C-401(b2): When the reportable expenditure is a gift given with the intent that a designated individual be the ultimate recipient ("indirect gift") and the lobbyist or lobbyist principal does not know the name or names of the designated individuals, the report must detail:

1. "A description of the designated individuals and those designated individuals' immediate family members connected with the reportable expenditure that clearly distinguishes its purpose or composition," and

2. "An approximate number, if known."

V. Discussion.

A. Is a Lobbyist or Lobbyist Principal Required to Report In-Kind Contributions?

Yes. In AO-L-09-004, the Commission determined that in-kind contributions made to the General Assembly with the intent that legislators and/or legislative employees be the ultimate recipients are most likely indirect gifts for which a gifts ban exception applies. Thus, to the extent the value of those in-kind contributions exceed $10 per designated individual per day, they must be reported as gifts under either G.S. 120C-402(b)(4) or 120C-402(b)(5).

On the other hand, if those contributions were not made with the intent that legislators or legislative employees be the ultimate recipient, they would not be reportable as a gift subject to the G.S. 138A-32(e) gifts ban exceptions. They would, however, appear to be for the purpose of lobbying, particularly considering the breath of "goodwill" lobbying. See G.S. 120C-100(a)(9). Thus, these in-kind contributions must be reported either under G.S. 120C-402(b)(1) or 120C-403(b)(1), to the extent that the value of those in-kind contributions exceed $10 per designated individual per day.

Since the contributing lobbyists and lobbyist principals will not be in a position to know who will benefit from in-kind contributions, determining whether the $10 reporting threshold has been triggered as to individual legislators, legislative employees, or their family members may be difficult. Therefore, where a lobbyist or lobbyist principal is uncertain as to the value received by those individuals, the contribution should be reported by identifying the general nature of the contribution (e.g., "50 cases of water" or "use of 50 computers") along with its total value (e.g. "valued at $200").

B. Does the Name of Each Individual Requesting or Benefiting From the In-Kind Contribution Need to be Included in the Report?

Probably not, but the response to this question would depend upon the circumstances surrounding the in-kind contribution.

The report of each reportable expenditure, including those made "for the purpose of lobbying" and for "gifts" given in accordance with G.S. 138A-32(e), is required to include the name of the legislator, legislative employee, or immediate family member "connected with" the

expenditure. However, as noted above, G.S. 120C-401(b1) and (b2) allow the report to reflect the group of individuals connected with the reportable expenditures in lieu of reporting specific names.

When the reportable expenditure is a gift given to an intermediary, such as the General Assembly, with the intent that a legislator or legislative employee be the ultimate recipient (indirect gift) **and** the lobbyist or lobbyist principal does not know the name or names of the recipients, the lobbyist is required to report a description of the designated individuals and those individuals' immediate family members connected with the gift, and an approximate number, if known. G.S. 120C-401(b2). Thus, if in-kind contributions are given to the General Assembly, and the contributor does not know which individuals will benefit, the contributor should describe the expenditure as follows:

> Legislators, legislative employees, and their immediate family members attending the 2009 Southern Legislative Conference Annual Meeting in Winston-Salem.

In the case of reportable expenditures that the lobbyist or lobbyist principal knows will benefit or was requested by a discrete group of more than 15 designated individuals, names of those individuals need not be reported. However, the report must identify the approximate number of designated individuals benefiting from or requesting the expenditure, and the basis for their selection. The report must list the approximate number of immediate family members connected with the reportable expenditure separately.

Each sponsoring lobbyist and lobbyist principal will need to disclose both in-kind contributions to the General Assembly and cash contribution to the CSG in their September 2009 expenditure report.

VI. Closing.

Thank you for contacting the State Ethics Commission concerning these issues. Please do not hesitate to contact 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 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).