



## STATE ETHICS COMMISSION

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### **FORMAL ADVISORY OPINION** **UNEDITED WITH APPROVAL OF REQUESTER**

August 10, 2012

Louis S. Watson, Jr., Esquire  
General Counsel  
North Carolina Utilities Commission  
4325 Mail Service Center  
Raleigh, NC 27699-4325

Re: Southeastern Association of Regulatory Utility Commissioners' 2013 Annual  
Conference  
AO-E-12-001

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Dear Mr. Watson:

This is in response to your request for a formal advisory opinion as to the permissibility, under the gift ban restrictions of the State Government Ethics Act ("the Ethics Act"), of the acceptance of in-kind contributions by the Southeastern Association of Regulatory Utility Commissioners ("SEARUC") from various individuals and entities that do business with or are regulated by the North Carolina Utilities Commission ("NCUC"). Those contributions will be used in connection with the NCUC's hosting of SEARUC's 2013 Annual Conference ("2013 Conference").

This opinion was adopted by the State Ethics Commission at its August 10, 2012, meeting.<sup>1</sup>

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<sup>1</sup> 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.**

As more fully set forth below, it would be permissible for SEARUC to accept in-kind contributions from lobbyists and lobbyist principals for its 2013 Conference. Those contributions may also be accepted from “interested persons” depending upon the nature of the contributions and the circumstances underlying their receipt. However, contributions from lobbyists and lobbyist principals may need to be reported.

**II. Facts.**

SEARUC is a non-profit corporation founded to educate and protect the interests of consumers and utilities with respect to utility regulation. It is comprised of state utility commissions of 11 Southeastern states. NCUC is a member of SEARUC. In order to further SEARUC’s education mission, SEARUC member states host, on a rotating basis, an annual conference for SEARUC members and the community.

SEARUC is scheduled to hold its annual conference in Asheville from June 9-12, 2013. NCUC Commissioner ToNola Brown-Bland is the SEARUC President for 2012-2013, obligating the NCUC to host the 2013 Conference. You have stated that NCUC members and employees of the NCUC and the NCUC Public Staff plan to attend the 2013 Conference. Thus, conference attendees will include public servants covered by the Ethics Act.

SEARUC commonly solicits and accepts monetary donations from various non-regulated entities to assist with the cost of its annual conferences. SEARUC would like to accept in-kind donations of tangible items and volunteer services from lobbyists, lobbyist principals, interested persons, and attorneys in connection with the 2013 Annual Conference. It would also like to invite those individuals to serve on various planning committees and assist SEARUC with the solicitation of contributions from potential donors.

In addition, members and employees of the NCUC and the NCUC’s Public Staff will serve on those committees and assist with conference planning. However, neither the NCUC Commissioners nor the employees of the Utilities Commission or the Public Staff will solicit monetary or in-kind contributions for the 2013 Conference. NCUC employees will also arrange meals, snacks, and hospitality rooms for conference attendees.

**III. Applicable Statutory Provisions.**

**A. The Ethics Act’s Gift Ban.**

The gift ban restricts the receipt of items of value by public servants from certain restricted donors unless an exception applies. The gift ban applies both to gifts given directly to public servants by restricted donors and those given to intermediaries, including state entities, if the donor intends that an ultimate recipient of the gift be a public servant. What follows is an overview of the gift ban.

**1. “Quid Pro Quo” Solicitations and Gifts from any Donor Prohibited.**

G.S. 138A-32(a) prohibits covered persons from soliciting or accepting anything of value “in return for being influenced” in their “official responsibilities.” However, you have stated that NCUC members and employees covered by the Ethics Act will not be involved in the solicitation of contributions to support the 2013 Conference. Therefore, subsection 32(a) would not apply.

**2. Gifts From Lobbyists, Lobbyist Principals, or Interested Persons to Public Servants Restricted, Unless an Exception Applies.**

Unless an exception applies, G.S. 138A-32(c) prohibits public servants from knowingly accepting a “gift” directly from a registered lobbyist, lobbyist principal, or interested person.<sup>2</sup> “Gift” is defined as “anything of monetary value.” G.S. 138A-3(15). However, that definition excludes certain items, including contractual arrangements and loans made in the normal course of business, scholarships, political contributions, and listed expressions of condolence. Items for which public servants have paid market value are also excluded from the definition of “gift.”

Public servants are also prohibited from knowingly accepting a gift given by a registered lobbyist, lobbyist principal, or interested person to an intermediary (including a State entity) with the knowledge that the gift was given with the intent that a public servant, legislator, or legislative employee be an “ultimate recipient” of the gift. G.S. 138A-32(c)(2) and 138A-32(d1).

Thus, the gift ban could apply to conference donations made directly to an intermediary if (1) those donations were from a “restricted donor,” which includes a registered lobbyist, lobbyist principal, or interested person, and (2) that donor intended that an ultimate recipient of the gift be any NCUC member or employee covered by the Ethics Act.

**B. The Gift Ban Exceptions.**

If the Ethics Act’s gift ban applies under any of the circumstances outlined above, there are a number of exceptions to the ban that allow a public servant’s receipt of food and beverages and other items of value related to the public servant’s attendance at a conference. If any of those exceptions apply, the public servant may accept the gift. A discussion of the Ethics Act’s exceptions that allow receipt of food and beverages and conference related expenses, and the criteria for meeting those exceptions, follows.

**1. Gifts to a Public Servant Association.**

Pursuant to G.S. 120C-303(e), gifts made by registered lobbyists and lobbyist principals to certain “nonpartisan state, regional, national, or international organizations” are permitted.

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<sup>2</sup> A person or entity that is seeking to do business with, is regulated by, or which has financial interests that may be affected by the public servant’s agency (“interested person”). G.S. 138A-32(d), (d1), and 30 NCAC 07A .0101.

This includes organizations of which a public servant's agency or the public servant is a member in connection with his or her public position, such as SEARUC. Thus, SEARUC's acceptance of monetary and in-kind contributions given to directly to SEARUC by lobbyists and lobbyist principals to support the 2013 Conference would be permissible under this provision, regardless of the nature of the gift or the intent of the donor.

However, G.S. 120C-303(e) is inapplicable to gifts from an "interested person." Therefore, if a monetary or in-kind contribution is given to SEARUC with the intention of benefiting a public servant, and the public servant is aware of the donor's intent; or directly to a public servant, another gift ban exception must apply in order for SEARUC to accept the gift.

## **2. G.S. 138A-32(e)(1) Food and Beverage Exception.**

G.S. 138A-32(e)(1) allows a public servant to accept food or beverages for immediate consumption in connection with the following three types of events:

- An open meeting of a public body as long as the meeting is noticed in accordance with the Public Meetings Act. G.S. 138A-32(e)(1)a.;
- A "gathering" that is attended by at least 10 or more individuals and that is open to the general public as long as a sign or other communication noting that the gathering is open to the general public is displayed at the gathering. G.S. 138A-32(e)(1)b.;
- A "gathering" to which various groups of covered individuals are invited, including all members of a State Board or at least 10 public servants, and 10 individuals associated with the sponsor attend or all shareholders, employees, etc. of the sponsor are invited. G.S. 138A-32(e)(1)c. This provision also includes certain notice requirements.

The G.S. 138A-32(e)(1)c. exception, the last one reviewed above, may apply to the receipt of food and beverages at a particular gathering as long as the requisite number of public servants are invited and sponsor representatives attend; and the event invitation otherwise meets the particular requirements of that exception.

## **3. G.S. 138A-32(e)(12) Public Servant Food and Beverage Exception.**

G.S. 138A-32(e)(12) allows a public servant to accept food or beverages for immediate consumption in connection with a gathering if the public servant is invited to attend for "purposes primarily related to the public servant's public service or position" and 10 individuals attend the gathering or all shareholders, employees, etc. of the sponsor are invited. This exception is similar to the G.S. 138A-32(e)(1)c. exception, discussed above. However, it does not require that the entire board be invited and does not impose specific notice requirements.

Thus, under this exception, covered NCUC members and employees may accept food or beverage that is related to their official position and where at least ten additional individuals are in attendance or the sponsor of the event invites certain groups of individuals, including all of their shareholders, employees, etc. to the event. And the public servant would be limited to the receipt of food and beverages. However, this exception would not allow the receipt of other conference related expenses, such as lodging or registration fees.

**4. G.S. 138A-32(f) Reimbursement Exception.**

G.S. 138A-32(f) provides that public servants may accept a “gift” that represents an “expense appropriate for reimbursement” by the State agency employing a public servant. Under this provision, the “gift” (a) must be consistent with those types of expenses that would otherwise meet the agency’s expense reimbursement policies and (b) the public servant must receive approval from the employing entity prior to receiving such items of value.

Thus, under this exception, covered NCUC members and employees may accept from restricted donors food, lodging, transportation, and other expenses that could otherwise be reimbursed by the State, in accordance with applicable policies. However, they must receive the appropriate agency approval before accepting those items.

**5. G.S. 138A-32(e)(3) Meeting Exception.**

G.S. 138A-32(e)(3) allows the receipt of food, beverages, registration, travel, lodging, other incidental items of nominal value, and entertainment, in connection with the public servant’s attendance at an educational meeting; a meeting at which the public servant speaks or is a member of a panel; or a meeting of those organizations of which the public servant’s agency is a member or the public servant is a member in connection with his or her official position, if the public servant serves on the board or committee of that organization.

However, the meeting exception only applies to expenses provided by a lobbyist principal. Meeting related expenses paid by an interested person do not qualify for this exception. The exception requires that the meeting be attended by at least 10 individuals, have a formal agenda, and that notice be given at least 10 days in advance. The exception also requires that any food, beverage, transportation, or entertainment be given to at least 10 attendees and that any entertainment provided is incidental to the meeting’s principal agenda.

Thus, if the requirements of this exception are met, covered NCUC members and employees may accept food, beverages, registration, travel, and lodging expenses from lobbyists and lobbyist principals in connection with their attendance at the SEARUC conference.

**C. Reporting Requirements of the Lobbying Law.**

Article 4 of G.S. Chapter 120C, the Lobbying Law, requires that all “reportable expenditures made for lobbying” and reportable expenditures for gifts given under various gift

ban exceptions be reported by lobbyists and lobbyist principals. "Reportable expenditure" is defined to include a "thing of value greater than ten dollars (\$10.00) per designated individual per single calendar day" that is "made to, at the request of, for the benefit of, or on the behalf of a designated individual or that individual's immediate family member." G.S. 120C-100(a)(12).

Since the reporting obligations of each donor would vary according to the individual facts of the donation, the Commission recommends that you urge those donors to consult Commission staff regarding those matters.

#### **IV. Responses to Specific Questions.**

What follows are responses to the questions posed in your request:

1. May regulated entities, their employees, lobbyists, lobbyist principals and other interested persons appearing before the NCUC volunteer to assist SEARUC with the planning and execution of the 2013 Annual Conference?<sup>3</sup>

If those services are provided by registered lobbyists and lobbyist principals and could be considered to be a "gift," as that term is defined in the Ethics Act, SEARUC would be allowed to accept those services under G.S. 120C-303(e), which provides that gifts made directly to public servant organizations such as SEARUC "shall not constitute a violation of" the gift ban of the Ethics Act.

However, if those services are provided by an interested person, they would need to be examined independently in order to determine if they would be a "gift" subject to the indirect gift ban of the Ethics Act and if so, whether an exception would apply to allow SEARUC's acceptance of those services.

2. May NCUC Commissioners, Commission staff and members of the Public Staff attend conference meals open to all attendees?

Yes. If those public servants subject to the Ethics Act pay a registration fee under the same terms as other 2013 Conference attendees, and that registration fee includes conference meals, the meals would not be a gift under the Ethics Act. In addition, in the event lobbyists or lobbyist principals contributed items for those meals to SEARUC, G.S. 120C-303(e) would allow the receipt of those meals by public servants.

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<sup>3</sup> Since you have made this request on behalf of the public servants that may be the indirect recipients of these contributions, the Commission will provide guidance with respect to the permissibility of SEARUC's acceptance of those donations, not the permissibility of a donor making the contribution. The donor's obligations would vary according to the individual facts of the donation, and the Commission recommends that you therefore urge those donors to consult Commission staff regarding those matters.

However, if those meals are funded by interested person contributions to SEARUC or are otherwise directly or indirectly sponsored by a particular restricted donor or a group of restricted donors and the indirect gift ban applies, one of the food and beverage exceptions noted above must apply in order for a public servant to accept the meals.

3. May NCUC Commissioners, Commission staff and members of the Public Staff act as hosts/staff at various conference functions?

The Ethics Act does not restrict public servants from serving as hosts at conference activities.

4. May non-agency volunteers, which could include lobbyists, lobbyist principals, or other interested persons, provide in-kind contributions, such as the donation of labor, services to assist in the planning and execution of SEARUC's 2013 Annual Conference? (Examples might be manning the registration table and assisting with or providing technical services.)<sup>4</sup>

The permissibility of SEARUC's receipt of those contributions would depend upon the nature of the in-kind contributions made, whether they represent items of "monetary value," whether they were given to SEARUC by a lobbyist or a lobbyist principal or an interested person, and, if the latter, whether they were intended to benefit any public servant.

Because in-kind contributions from lobbyists and lobbyist principals given directly to SEARUC "shall not constitute a violation of" the gift ban of the Ethics Act under G.S. 120C-303(e), they would be permissible regardless of the nature of the gift or the intent of the donor. However, contributions of in-kind services or goods, such as food and beverages or services of which any public servant is intended as the ultimate recipient, could be restricted by the gift ban unless an exception applied.

5. Are lobbyists and/or lobbyist principals that provide monetary donations to SEARUC required to report the monetary donations?

Since you have made this request on behalf of the public servants who may be the indirect recipients of these contributions, the Commission will provide guidance with respect to the permissibility of SEARUC's acceptance of those donations, not the

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permissibility of a donor making the contribution or the donor's reporting responsibilities. The donor's reporting obligations would vary according to the individual facts of the donation, and the Commission recommends that you therefore urge those donors to consult Commission staff regarding those matters.

6. Are lobbyists and/or lobbyist principals that provide in-kind contributions to SEARUC in the nature of planning assistance, labor and/or service for the purpose of the conference required to report such in-kind contributions?

Since you have made this request on behalf of the public servants who may be the indirect recipients of these contributions, the Commission will provide guidance with respect to the permissibility of SEARUC's acceptance of those donations, not the permissibility of a donor making the contribution or the donor's reporting responsibilities. The donor's reporting obligations would vary according to the individual facts of the donation, and the Commission recommends that you therefore urge those donors to consult Commission staff regarding those matters.

7. May Commissioner ToNola Brown-Bland, acting as SEARUC President, but who is also a covered person under the Ethics Act, write and sign thank you letters to donating entities to SEARUC or do the thank you letters need to be sent by SEARUC employees on SEARUC letterhead? If the answer is yes, may she do so on personal stationary that notes her position with the NCUC or is she restricted to using SEARUC stationery?

The Ethics Act would not restrict Ms. Brown-Bland from using NCUC letterhead to thank donors who have already made contributions at the request of SEARUC.

8. Would a private attorney/law firm, who appears before the NCUC on behalf of a client, but who is neither a lobbyist nor lobbyist principal, or consultant who testifies or appears before the NCUC be considered an "interested person"?

A lawyer that appears before the NCUC on behalf of his or her client, and the attorney's law firm, would not be an "interested person" as that term is used in the Ethics Act as a result of his or her representation of a client. There may be circumstances, however, where the lawyer should register as a lobbyist, depending upon the nature of his or her activities and whether they are "lobbying" as defined by the Lobbying Law.

On the other hand, a lawyer or law firm that is seeking to or providing services directly to the NCUC would be an "interested person."

9. May lobbyists and/or lobbyist principals or other interested persons sponsor a portion of the cost of a dinner as to which all attendees have the opportunity to sign up and attend through the registration process? May NCUC Commissioners, Commission

staff and members of the Public Staff attend the dinner? Would the Ethics Commissioner's answers be impacted by the possibility that individual attendees of the dinner would also pay a portion of the cost in the form of a per person attendance charge?

If the dinner was paid for by funds given directly to SEARUC by lobbyists and lobbyist principals, the gift ban would not restrict the acceptance of that dinner by attending public servants under G.S. 120C-303(e). However, if the dinner was paid for by funds given to NCUC or another intermediary by lobbyists, lobbyist principals, or interested persons; or funds given by interested persons to SEARUC; a gift ban exception would need to apply in order for a public servant to attend. The fact that a public servant paid a portion, but not all of the cost of the dinner, would still mean this was a gift, unless the public servant paid the full value of the dinner.

**V. Closing.**

Thank you for contacting the State Ethics Commission. Please do not hesitate to call the Commission's staff if you have any questions about the foregoing formal advisory opinion.

State Ethics Commission

By: \_\_\_\_\_  
Robert L. Farmer  
Chairman

**Formal Advisory Opinions Issued by the State Ethics Commission**  
**Pursuant to the Ethics Act**

Upon the written request of a public servant or legislative employee, G.S. 138A-13(a) of the State Government Ethics Act (“the Ethics Act”) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions on the “meaning and application” of the Ethics Act “and the public servant’s or legislative employee’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. 138A-13(a) and (a2).

Reliance upon a formal advisory opinion immunizes the public servant or legislative employee making the request from (1) investigation by the Commission, except the alleged violation of criminal law while performing his or her official duties, (2) adverse action by his or her employing entity, or (3) investigation by the Secretary of State. G.S. 138A-13(a2).

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. 138A-13(d). Otherwise, requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 138A-13(e).