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FORMAL ADVISORY OPINION--EDITED FOR PUBLICATION

November 1, 2013

Re: The Application of the Lobbying Law's "Cooling Off Period" to a Legislator's Employment by a Private Company
AO-L-13-003

Dear Requester:

This is in response to your request for a formal advisory opinion. You sought guidance concerning whether the Lobbying Law, G.S. Chapter 120C, would restrict you from performing your job duties as the employee of a private company.

At its November 1, 2013, meeting, the State Ethics Commission adopted this formal advisory opinion.¹

I. Brief Conclusion.

Although the Lobbying Law would not restrict your employment by a private company, its revolving door restriction would prohibit you from participating in certain lobbying activities.

II. Facts.

You are a member of the North Carolina General Assembly. You are also employed by a private company. Your specific job duties include contacting representatives of various entities to identify business opportunities, performing research, monitoring regulatory developments, and developing business plans.

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.

III. Applicable Statutory Provisions and Analysis.

A. The Lobbying Law.

The Lobbying Law provides that “lobbyists” must register with the Office of the Secretary of State within one business day of “lobbying” unless otherwise exempted. G.S. 120C-200(a). Thus, it is a violation of the Lobbying Law for a “lobbyist” to engage in lobbying without registering as required by that subsection.

This registration requirement applies to certain employee lobbyists and individuals identified by the Lobbying Law as a “contract lobbyist,” defined as an individual who engages in lobbying and “represents another person or governmental unit, but is not directly employed by that person or governmental unit, and receives payment for services.” G.S. 120C-100(a)(10)b. G.S. 120C-100(a)(11k) defines “payment for services” as “[a]ny money, thing of value, or economic benefit conveyed to a lobbyist,” excluding reimbursement for certain expenses.

An employee lobbyist is defined as an individual that “is employed by a person and a significant part of that employee’s duties include lobbying.” G.S. 120C-100(a)(10)d. A “significant part” of an employee’s job duties is found if during any rolling 30 day period either: (1) five percent or more of an employee's actual duties included direct lobbying; or (2) five percent or more of an employee's actual duties included goodwill lobbying. 30 NCAC 10A .0101. An employee lobbyist must register within one business day of reaching that threshold. Id.

G.S. 120C-100(a)(9) defines “lobbying” to include two types of lobbying: “direct lobbying” and “goodwill lobbying.” “Direct lobbying” is “influencing or attempting to influence legislative or executive action, or both, through direct communications or activities with a designated individual or that individual’s immediate family.” G.S. 120C-100(a)(9)a. “Designated individuals” include legislators, legislative employees and public servants. G.S. 120C-100(a)(2). “Public servants” include members of State boards and various State officials.

G.S. 120C-100(a)(3) defines “executive action” as:

The preparation, research, drafting, development, consideration, modification, amendment, adoption, approval, tabling, postponement, defeat, or rejection of a policy, guideline, request for proposal, procedure, regulation, or rule by a public servant purporting to act in an official capacity.

Ministerial functions, public or written comments made in connection with an open meeting, and certain internal administrative functions are excluded from this definition. The following acts are also excluded from the definition of “executive action.”

- a. Present, prior, or possible proceedings of a contested case hearing under Chapter 150B of the General Statutes, of a judicial nature, or of a quasi-judicial nature.
- b. A public servant's communication with a person or another person on that person's behalf with respect to any of the following:
 1. Applying for a permit, license, determination of eligibility, or certification.
 2. Making an inquiry about or asserting a benefit, claim, right, obligation, duty, entitlement, payment, or penalty.
 3. Making an inquiry about or responding to a request for a proposal made under Chapter 143 of the General Statutes.
 4. Ratemaking.

G.S. 120C-100(a)(3).

Legislators are specifically prohibited from "registering as a lobbyist" while in office and before the later of the adjournment sine die of the legislative session in which the legislator serves or six months after leaving office. G.S. 120C-304(a)(1). Although the revolving door restriction will not restrict you from fulfilling your described job responsibilities, you will need to take certain precautions to ensure that you do not engage in "lobbying" activities that would otherwise require that you register as a lobbyist. However, because the definition of lobbying is fairly complex, you should seek guidance from the Ethics Commission and its staff if you are in doubt as to whether an activity would be considered to be lobbying.

Of course, you could completely avoid any concern that your activities would be considered to be lobbying by avoiding contact with individuals who are subject to the Ethics Act in your private capacity. However, you would not be restricted from contacting legislators and executive branch officials who are subject to the Ethics Act in your legislative capacity.

IV. 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 recommended formal advisory opinion.

Pursuant to G.S. 120C-102(d1) an unedited copy of this opinion will also be forwarded to the Secretary of State's Office, which is required to maintain the confidentiality of that opinion.

Formal Advisory Opinions Issued by the State Ethics Commission

G.S. 120C-102(a1) also 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 issued pursuant to the Lobbying Law are published in an edited format on the Commission’s website within 30 days of issuance. G.S. 120C-102(c). The Commission is also 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).