

# State Government Ethics and Lobbying

During the 2008 session legislators continued to amend and clarify laws regulating ethics and lobbying. Changes include giving the State Ethics Commission sole jurisdiction over the investigation of ethics violations, clarifying when information is considered confidential, and amending lobbyists' reporting requirements. While lobbying and ethics legislation make up the bulk of this chapter, other acts include changes made to the public duty doctrine.

## Investigation of Improper Governmental Activity

### State Auditor and State Ethics Commission Authority

An investigation initiated in October 2007 by the State Auditor's Office regarding Senator Martin Nesbitt's statement of economic interest (SEI), submitted pursuant to the State Government Ethics Act, spurred legislation designating sole jurisdiction over the investigations of alleged ethics violations to the State Ethics Commission (Commission). Controversy over this issue arose after the Commission refused to provide the State Auditor with information regarding a request from Senator Nesbitt for a Commission advisory opinion on the accuracy of statements made in his SEI. At the conclusion of the Auditor's investigation, the State Auditor and the Commission reached conflicting determinations on what information should have been included in the SEI and the definition of potential conflict of interest. Debate ensued over the impact of political party influence on both entities, the need to clarify the role of the Commission, including

the confidentiality of its documents, and the extent of the State Auditor's authority. This debate resulted in the following legislative directive, which was one of several making clarifying changes to ethics laws.

S.L. 2008-215 (S 1875) enacts a new statute, G.S. 147-64.6B, directing the State Auditor to provide a variety of avenues for receiving reports of alleged improper governmental activities, including a telephone hotline, e-mail, and Internet access. Previously, an abbreviated version of this requirement was stated in G.S. 147-64.6(c)(16). Under the new law the State Auditor must investigate reports of such improper activity within the scope of the authority set forth in G.S. 147-64.6, including misappropriation, mismanagement, or waste of state resources, fraud, violations of state or federal laws, and substantial and specific danger to public safety. However, G.S. 147-64.6B specifically requires the State Auditor to refer a matter to appropriate state agencies or governing entities when it is determined to be outside that scope of authority or involves allegations of improper activity in specific areas. Particularly, the State Auditor must refer allegations of violations of G.S. Chapter 138A (State Government Ethics Act), Article 14 (General Assembly) of G.S. Chapter 120, or G.S. Chapter 120C (Lobbying) to the Commission. Amendments to G.S. 147-64.6 also state that the State Auditor is bound by interpretations issued by the Commission regarding violations of those laws and requires the State Auditor to keep any interpretations, advisory opinions, or other information or materials furnished to or by the Commission related to an investigation confidential. New language added to G.S. 138A-12(b) authorizes the Commission, on its own motion, to conduct an inquiry into a report or referral made by the State Auditor.

Additionally, S.L. 2008-215 amends G.S. 138A-13 to allow the State Auditor to request that the Commission issue an advisory opinion regarding specific questions involving the meaning and application of the ethics laws and an affected person's compliance with those laws. The change requires that the Commission issue an advisory opinion to the State Auditor within sixty days of receiving all necessary information, unless the circumstances involve an advisory opinion requested by a legislator. In that instance the Commission must deliver a recommended advisory opinion to the Legislative Ethics Committee (Committee) within sixty days. The Committee must act upon the opinion within thirty days of its receipt, and the Commission will then deliver the final advisory opinion to the State Auditor. If the Committee fails to act within this time frame, then the Commission must deliver its recommended advisory opinion to the State Auditor.

Finally, the new law makes conforming changes to G.S. 138A-12(n), G.S. 138A-10 (concerning the binding nature of Commission's advisory opinions on all state agencies), and G.S. 126-85(c). The law applies to all information received or collected by the State Auditor concerning alleged violations of G.S. Chapter 138A, G.S. Chapter 120C, or Article 14 of G.S. Chapter 120 on or after January 1, 2007.

## Ethics and Lobbying

In addition to the specific changes discussed below, S.L. 2008-213 (H 2542) makes numerous technical and clarifying changes to the State Government Ethics Act, the Legislative Ethics Act, and lobbying laws. The changes became effective August 15, 2008, unless indicated otherwise.

### Confidentiality

G.S. 120-104, G.S. 138A-13, and G.S. 120C-102 are amended to clarify that documents submitted in connection with requests for advisory opinions are confidential, although the person or governmental unit requesting the opinion may authorize the release of the opinion and documents. G.S. 138A-13 and G.S. 120C-102 are also amended to require the Commission to publish edited opinions within thirty days of the issuance of the opinion and within thirty days of receiving opinions from the Committee. These provisions are retroactive, with a January 1, 2007, effective date.

G.S. 120C-600 is amended to provide that any information obtained by the Secretary of State as part of a systematic review of lobbying reports is confidential and may only be released by a court order. Additionally, G.S. 120C-600 and G.S. 120C-601 are amended to provide that records obtained by the Secretary or the Commission from other entities in the course of an investigation are confidential to the same extent that they would be confidential while in the possession of the entity providing the information.

### Reporting Requirements

The reporting requirements in G.S. 120C-400 are amended to exclude from the lobbyists and lobbyist principals reporting requirements a reportable expenditure of cash, a cash equivalent, or a fixed asset that is made directly to a state agency that maintains an accounting of the expenditure. G.S. 120C-401 is amended to require a lobbyist or lobbyist principal to report the description and approximate number of designated individuals benefiting from a gift when the lobbyist or principal does not know the names of the individuals who will ultimately receive an indirect gift. G.S. 120C-403 is amended to allow a lobbyist principal to rely on a lobbyist's statement estimating the portion of the lobbyist's annual salary, fees, or retainer that are allocated for lobbying for the principal's reporting purposes.

Effective retroactively to January 1, 2007, G.S. 120C-800 is amended to exclude scholarships that are paid for by a nonpartisan state, regional, national, or international legislative organization of which the General Assembly or a legislator is a member of from items that must be reported.

### Lobbying by Court Officials

Amendments to G.S. 120C-500 restrict lobbying by the judicial branch. The statute has been amended to require the chief justice of the Supreme Court to designate one to four liaison personnel to lobby for legislative action. The statute is also amended to clarify that state agencies and constitutional officers of the state may not hire contract lobbyists. A more thorough discussion of these changes can be found in Chapter 5, "Courts and Civil Procedures."

### Allegations of Misconduct

G.S. 138A-12 is amended to require the Commission to immediately notify a covered person or legislative employee when the Commission (1) receives a written allegation that the individual has acted unethically, or (2) initiates an inquiry into unethical conduct by the individual.

### Statements of Economic Interest

G.S. 138A-24 has required legislators to include in their annual SEI "any other economic or financial information that is necessary either to carry out the purposes of this Chapter or to fully disclose any conflict of interest or potential conflict of interest." This broad language resulted in inconsistent reporting. The provision has been amended to now require the reporting of "any other information that the filing person believes may assist the Commission in advising the filing person with regards to compliance with this Chapter." This change is effective retroactively to apply to SEIs filed on or after January 1, 2007.

G.S. 138A-24 is also amended to clarify that the Commission does not have to prepare a written evaluation of a SEI for a legislator or judicial officer. The statute is also amended to require the Commission to prepare a written evaluation of each SEI for nominees of the UNC Board of Governors and the State Board of Community Colleges within seven days of the submission of a completed statement.

### Gift Ban

G.S. 138A-32 is amended to provide that invitations to qualifying public events that are not subject to the open meetings law or open to the general public must contain the date, time, and location of the event, be given at least twenty-four hours in advance, and state whether the event qualifies as a permitted public event.

### Conflicts of Interest

G.S. 138A-36 is amended to prohibit a public servant from participating in an official action by his or her employing entity if the public servant knows that he or she, or a person with whom the he or she is associated, may incur a reasonably foreseeable financial benefit from the matter under consideration. G.S. 138A-37 is amended to make a similar change for legislators concerning legislative actions when the financial benefit from the matter under consideration would impair the legislator's independence of judgment.

G.S. 138A-38 is amended to allow a legislator that is employed or retained by a unit of government to take legislative action on behalf of the unit if the legislator is the only member of the house elected from the district where the unit of government is located. The legislator must make a written disclosure to the principal clerk of the nature of the relationship with the governmental unit prior to or at the time that the legislator took the action.

The statute is also amended to provide that a president, chief financial officer, chief administrative officer, or voting member of the board of trustees of a community college who serves on the community college's nonprofit corporation does not have a conflict of interest if the majority of the nonprofit's board of directors is not comprised of the president, chief financial officer, chief administrative officer, or voting member of the board of trustees of the community college for which the nonprofit was created to support.

## Electronic Mail System

Section 6.14 of S.L. 2008-107 (H 2436) requires the State Chief Information Officer to develop a detailed plan providing for the transition of all state agencies, institutions, and departments, with the exception of the General

Assembly, the Judicial Department, and the University of North Carolina, to a single statewide electronic mail system by January 1, 2010. The plan was to be presented to the Joint Legislative Oversight Committee on Information Technology by November 1, 2008.

## State Tire Contract

S.L. 2008-201 (S 1797) requires the Division of Purchase and Contract in the Department of Administration to make the following changes to its request for proposal criteria for a statewide tire retread contract:

- require that the bids remain closed until a designated and advertised bid opening day in which the bids are opened, announced, and recorded in public;
- require that the cost of the tire retread include spot repairs and that there no longer be a separate charge for a spot repair;
- include in the contract that all casings receive a state of the art inspection with the use of industry standard testing methodology;
- include a threshold for the number of times a casing may be retread;
- include a threshold for the age of a casing that may be retread;
- include the number of nail hole repairs that are permissible for a casing to be retread;
- provide assurance that a particular fleet will receive its own casings back after retread completed;
- set minimum tread depths per category or application of the retread tire;
- consider a multiaward contract structure that includes several vendors; the Office of Purchase and Contract will take into account geographic location, proximity of vendor to customer, and the needs of the users when creating a multiaward contract; and
- provide for any method of tire retreading to be bid separately.

## Public Duty Doctrine

S.L. 2008-170 (H 1113) enacts new G.S. 143-299.1A, limiting the use of the public duty doctrine by a state department, institution, or agency as a defense to instances where the injury is a result of (1) the negligent failure of a law enforcement officer to protect a claimant from the acts of another or from an act of God; or (2) the negligent failure of a state officer, employee, involuntary servant, or agent to perform a statutorily required safety or health inspection. The public duty doctrine may not be

asserted when (1) a special relationship exists, (2) a special duty is owed by the state to the victim and is relied upon by the victim, or (3) where the failure to perform the health or safety inspection was the result of gross negligence. The act also states that the statute does not limit the assertion of the public duty doctrine by local governments. The changes became effective for claims arising on or after October 1, 2008. For more information on the public duty doctrine and the changes made in S.L. 2008-170, see Chapter 5, "Courts and Civil Procedures."

## Studies

Section 22.1 of S.L. 2008-107 requires the Office of State Budget and Management (OSBM) to conduct a staffing analysis of the Ethics Commission and the Lobbyist Registration Section of the Secretary of State's Office to determine if staffing is appropriate for the workload. OSBM must report its findings to the House Appropriations Subcommittee on General Government, Senate Appropriations Subcommittee on General

Government and Information Technology, and the Fiscal Research Division by March 1, 2009.

The Studies Act of 2008, S.L. 2008-181 (H 2431) includes the following two studies. First, the State Ethics Commission is required to study the implementation and effectiveness of the State Government Ethics Act and report to the Legislative Ethics Committee by March 1, 2009. Second, the Study Commission on Compensation of the Governor's Cabinet and State Elected Officials is established to study whether compensation is fair and appropriate and whether state officials are paid according to the duties of their office. The eighteen-member commission is required to make a final report to the General Assembly by January 15, 2009.

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