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Ethics Law Summary

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"WHEREAS, THE PEOPLE OF NORTH CAROLINA ENTRUST PUBLIC POWER TO ELECTED AND APPOINTED OFFICIALS FOR THE PURPOSE OF FURTHERING THE PUBLIC, NOT PRIVATE OR PERSONAL, INTEREST..."
STATE GOVERNMENT ETHICS ACT, PREAMBLE

Letter from the Director

On August 4, 2006, Governor Easley signed the "State Government Ethics Act" into law. It is the most comprehensive and sweeping ethics law in the history of the State and was the result of a tremendous bipartisan effort in both the House and Senate. It obviously makes many changes to the current ethics regulatory system in North Carolina. We will attempt to hit some of the highlights of the new law in this newsletter and then follow that up with more detailed discussions of specific areas (like disclosure). This is a long summary, but it deals with a long and complex law. Please bear with us. Some of the major changes include

- A new "Ethics Commission" on October 1, 2006;
- Expanded jurisdiction – more people covered;
- "Mixed boards" eliminated – all are now covered;
- New disclosure forms due March 15, 2007;
- Penalties, including monetary fines, for failure to file Statements of Economic Interest;
- Possible criminal sanctions for false filings;
- Mandatory ethics education;
- A general gift ban with specified exceptions;
- Agency & board "ethics liaisons" required;
- Confidential advisory opinions.

Feel free to contact us when you have questions about the new law. We may not have all of the answers, but we will certainly get them for you as quickly as we can. In many ways we will be learning the new system together.

Perry Y. Newson, Executive Director 

Summary of Major Provisions

House Bill 1843 is comprised of three parts:

- Part I enacts the State Government Ethics Act;
- Part II amends the Legislative Ethics Act, and
- Part III amends the lobbying laws (Chapter 120A).

This newsletter will briefly summarize the *ethics portion* of the new law, the State Government Ethics Act, Chapter 138A of the General Statutes ("Ethics Act" or "the Act"). To see the entire law, go to the General Assembly's web site, <http://www.ncga.state.nc.us/> and search for the bill number: H1843. Please note that the current version on the General Assembly's web site may *not* contain some technical corrections and more significant changes to the lobbying portion of the law. The entire, complete law will be posted on the Board of Ethics' web site as soon as a final engrossed version is available.

Also, it is absolutely critical to remember that this is a summary of some of the major provisions of the Act. It is not, and is not intended to be, a comprehensive listing or analysis of the entire law. Please consult the final version of the law for complete details. We will continue to send you additional information about the law in the ensuing months. Please study it carefully.

The Ethics Act is broken down into five Articles:

- Article 1: General Provisions
- Article 2: State Ethics Commission
- Article 3: Public Disclosure of Economic Interests
- Article 4: Ethical Standards for Covered Persons
- Article 5: Violation Consequences.

We will hit the highlights of each in order.

“North Carolina citizens have the right to know that the power they entrust to public officials is not abused for private gain or personal interest. While this bill will have to be refined and clarified as we go forward, it is a powerful first step at establishing clear ethical standards, oversight and enforcement for public officials.”

-- Governor Michael F. Easley, August 4, 2006, upon signing HB 1843

Article 1: General Provisions

Except for the statement of purpose, Article 1 consists of multiple pages of definitions. North Carolina General Statutes (“N.C.G.S.”) §138A-3. They are quite significant and need to be studied carefully. Based on these definitions and other provisions of the Act, the following individuals are covered by the Act in one way or another:

Legislators; Legislative Employees; Justices and Judges of the General Court of Justice; District Attorneys; Clerks of Court; the Director and Assistant Director of the Administrative Office of the Courts; Any person designated by the Chief Justice who is employed in the Judicial Department and makes \$60,000 a year or more; and “Public Servants” as that term is defined in N.C.G.S. §138A-3 (30).

“Public Servants” is an expanded version of Executive Order Number One’s definition of “Public Official” and will be familiar to all of those currently covered by the Order, with some major changes. Under the new Act, *all* “Council of State” members are covered. In addition, what used to be called “mixed boards” have been eliminated and *all* voting members of covered boards are now covered. This includes voting *ex officio* members, regardless of who appoints them. This specifically impacts the boards of trustees of the various community colleges and the 16 constituent institutions in the University of North Carolina system: all voting trustees are now covered. This will increase the coverage on these boards by two thirds. Also, “contract employees” who work in or against a covered position are now covered.

Other definition highlights include:

Board – Any State board, commission, council, committee, task force, authority, or similar public body, however denominated. This term still does not include *advisory* boards.

Business with which associated – The term “business” here does *not* include a widely held investment fund, including a mutual fund or deferred compensation plan, if certain conditions are met.

Compensation – This term does not include legal campaign contributions.

Extended family – Spouse, lineal descendant, lineal ascendant, sibling, spouse’s lineal descendant and ascendant, spouse’s sibling, and the spouse of any of these persons.

Immediate family – An unemancipated child residing in the household and spouse if not legally separated. In addition, a member of the covered person’s extended family is also considered “immediate family” if they actually reside in the covered person’s household.

Gift – Anything of monetary value given or received without valuable consideration by or from a lobbyist, lobbyist principal, or other interested person as defined elsewhere in the law. Legal campaign contributions are not considered gifts; nor is anything for which fair market value is paid.

Public event – This two-part definition is too long and complex to repeat here, but legislators, legislative employees, and public servants need to study it closely. N.C.G.S. §138A-3 (29).

Article 2: State Ethics Commission

Article 2 establishes the new bipartisan, eight-member State Ethics Commission (“SEC” or “the Commission”). N.C.G.S. §138A-7. It comes into being on October 1, 2006. The Governor appoints four members for staggered terms, and the General Assembly, on the recommendations of the Speaker of the House and President Pro Tempore of the Senate, appoints four. No more than two of the Governor’s and one of the Speaker and President Pro Tem’s appointees can be members of the same political party. After the initial staggered terms, members of the Commission serve four-year terms and can only be removed for misfeasance, malfeasance, or nonfeasance. The Governor appoints the chair annually.

The Commission’s powers and duties are set out in section 138A-10, and include

- Receiving and reviewing all Statements of Economic Interest;
- Receiving and investigating complaints;
- Rendering advisory opinions; and
- Implementing a mandatory ethics education program.

The Commission’s investigative authority and jurisdiction is set out in great detail. N.C.G.S. §138A-12. The Commission receives and conducts inquiries of **complaints** alleging unethical conduct by legislative employees and “covered persons” (legislators, judges, district attorneys, clerks of court, and “public servants”). “Judicial employees” (the director and assistant director of the Administrative Office of the Courts and designated employees in the Judicial Department) are *not* covered under this provision. Complaints must be signed and sworn. Anonymous complaints will not be accepted. Allegations of violations of the Code of Judicial Conduct must be referred to the Judicial Standards Commission.

Complaints must normally be filed within two years of the date the complainant knew or should have known of the conduct upon which the complaint is based. The Commission can refuse to accept frivolous complaints. The Commission must initiate an inquiry into a complaint within 60 days of its filing. If this preliminary inquiry reveals that the complaint does not allege facts sufficient to constitute a violation of the Ethics Act, the Commission must dismiss it. If the complaint is not dismissed, the Commission notifies all parties involved and conducts a probable cause inquiry. If the inquiry does not reveal that there is probable cause to believe that a violation of the Act or other applicable law has occurred, the complaint is dismissed. If the inquiry *does* reveal probable cause to believe a violation has occurred, the ensuing action depends upon the type of public official against whom the complaint is filed:

- (1) For public servants, the Commission conducts a hearing under §138A-12 (i);
- (2) For legislators (except the Lieutenant Governor), the complaint is referred to the Legislative Ethics Committee of Chapter 120 of the General Statutes;
- (3) For judicial officers, the complaint is referred to various judicial officials; and
- (4) For legislative employees, the complaint is referred to their employing entity.

Commission hearings are conducted in closed session, unless the public servant requests that the hearing be held in open public session. The public servant has the right to be represented by counsel, present evidence, call and examine witnesses, cross-examine witnesses, and introduce exhibits. Violations must be established by clear and convincing evidence. If a violation is established by clear and convincing evidence, the Commission can issue a private admonishment and refer its findings to appropriate persons or entities for further action as they deem appropriate.

Complaints, responses to complaints, reports, and all other investigative documents and records are confidential and not matters of public record, unless the person being charged asks that they be made public. When public sanctions are imposed, the complaint, response, and Commission's report are made public.

The Commission has continuing jurisdiction to investigate possible criminal violations of the Act for a period of one year after a public servant or legislative employee ceases to be covered. The Commission may obtain subpoenas to use in its investigations.

The Commission also gives **advisory opinions** to public servants, legislative employees, and legislators. N.C.G.S. §138A-13. This section does not apply to judicial officers. Requests for formal advisory opinions must be in writing, which includes e-mail. Commission staff may issue advisory opinions under procedures adopted by the Commission. Unlike under the current system, requests for advisory opinions and the opinions themselves are confidential and not a matter of public record.

While **ethics education** has been available and encouraged for many years, it is now *mandatory* for certain people. N.C.G.S. §138A-14. All "public servants" and their immediate staffs, legislators and their immediate staffs, and legislative employees must participate in an ethics presentation approved by the Commission within specified timeframes. This requirement does *not* apply to "judicial officers" (Justices, judges, district attorneys, and clerks of court). "Immediate staff" means those individuals who report directly to a public servant.

Legislators and legislative employees must attend an approved ethics presentation within three (3) months of their election, reelection, appointment, or employment. Thus, for the start-up phase of the program, legislators and legislative employees must satisfy this education requirement by March 31, 2007. As a practical matter, however, since schedules are very tight during the session, programs will probably be offered prior to commencement of the 2007 legislative session on January 24, 2007. These programs will be developed and presented jointly with the Legislative Ethics Committee and its staff.

Public servants holding positions on January 1, 2007, must participate in an ethics education presentation on or before January 1, 2008. Section 23.(b) of HB 1843. Thus, during the initial start-up phase only, public servants have one year to fulfill their mandatory ethics education requirement. Thereafter, public servants and their immediate staffs must attend an approved ethics presentation within six (6) months of their election, reelection, appointment, or employment.

The head of each State agency, including the chair of each board subject to the Ethics Act, must designate an **ethics liaison** who must maintain active communication with the Commission on all agency ethical issues. The ethics liaison will be the agency's official "contact person" with the Commission. This is an important role that all agencies should take seriously.

The Commission must also publish a **newsletter** containing summaries of opinions, policies, procedures, and interpretive bulletins as issued from time to time.

Again, the mandatory ethics education requirement does *not* apply to “judicial officers” (Justices, judges, district attorneys, and clerks of court).

The **head of each State agency**, including the chair of each board subject to the Ethics Act, has additional duties and responsibilities under the Act. In addition to designating the official ethics liaison under N.C.G.S. §138A-14, agency heads must “take an active role in furthering ethics in public service and ensuring compliance with this Chapter.” N.C.G.S. §138A-15. Most of the agency head’s responsibilities serve a general education function, but there are some specific actions that are required by this section of the Act. Agency heads and board chairs should study §138A-15 very carefully and discuss any questions with their legal counsel or Commission staff.

We will mention two specific requirements here. The first is the “ethics reminder.” At the beginning of any board meeting, the chair shall remind all members of their duty to avoid conflicts of interest and appearances of conflict and inquire as to whether any member has a known conflict or appearance of conflict with respect to any matters coming before the board at that time. The second requirement is to notify the Commission of all new public servants or other officials covered by the Act and to provide those public servants or officials with copies of the Ethics Act and any necessary financial and personal interest disclosure forms (including Statements of Economic Interest). It is important to understand that the duty and burden to let the Commission know of any new covered officials falls on the respective State agencies and covered boards. This is a critical function, and the Commission depends upon the various agencies and boards to let the Commission know who its “customers” are. This would obviously be one of the main responsibilities of each official ethics liaison.

Article 3: Public Disclosure of Economic Interests

This is the area where the Commission deals with the largest number of public officials. The vast majority of people covered by the Ethics Act have to file a **Statement of Economic Interest** (“SEI”) with the Commission. Certain public servants having less than a threshold amount of annual income are exempt from the filing requirement, but that is very much the exception. Before outlining the specific filing requirements, it is important to focus on the overall purpose of the disclosure and review process, which is to *help* people identify and avoid conflicts of interest in their public service. While universally disliked, the disclosure and review process should be viewed in the proper context and approached with the proper attitude. Moreover, the law requires filing officials to “take an active, thorough, and conscientious role in the disclosure and review process”:

Covered persons have an affirmative duty to provide any and all information that a reasonable person would conclude is necessary to carry out the purposes of this Chapter and to fully disclose any conflict of interest or potential conflict of interest between the covered person’s public and private interests....

N.C.G.S. §138A-21. This is not a game of “cat and mouse” or high-stakes “gotcha.” Commission staff and filers must work together to accomplish the overall purpose of this part of the Act.

Who must file? Generally, every “covered person” (legislators, Justices and judges, district attorneys, clerks of court, and “public servants”) subject to the Ethics Act, including anyone appointed to fill a vacancy in elective office, must *file* an SEI *prior to* their initial appointment, election, or employment. Candidates and nominees for covered elected positions must file SEIs as well. Certain public servants identified in the Act (for example, employees in the Governor’s office, confidential assistants and secretaries, and certain exempt employees) whose annual compensation is less than \$60,000 do not have to file an SEI with the Commission, but they are still subject to the standards of ethical conduct.

When must you file? Persons holding covered positions on January 1, 2007, must file their SEI by March 15, 2007. Section 23.(a) of HB 1843. Thus the initial filing date for all covered persons under the new Ethics Act is March 15, 2007. Thereafter, when you must file depends upon which type of covered person you are. The general annual filing deadline is March 15. However, employees or appointees of constitutional officers have 30 days after their appointment or employment when they are hired or appointed during the first 60 days of the constitutional officer's initial term in office. N.C.G.S. §138A-22 (b). Candidates for offices subject to the Act file their SEIs in the same place and in the same manner as their notice of candidacy for that office within 10 days of the filing deadline for the office the candidate seeks. Certain nominees, candidates, and unaffiliated and write-in candidates have specific filing locations and times set out in N.C.G.S. §138A-22 (d). All candidates for covered positions should study this subsection carefully. Since all information provided in the SEI must be current as of the last day of December of the year preceding the date the SEI was due, you cannot file your SEI prior to January 1 of the filing year.

What needs to be filed? All filers must file a new SEI "Long Form." No supplemental, abbreviated, or "short" forms can be used the first year. Everyone must file the new SEI. You must answer each and every question, even if the answer is "none." Do NOT leave questions blank or your form will be returned to you. This could have serious consequences, including the imposition of fines or sanctions. Please answer every question.

What information needs to be disclosed in the SEI? Section 138A-24 sets out the requirements for SEIs. It is extensive and detailed and should be studied carefully. However, the Commission will prepare appropriate forms to be used by all filing officials. Keep in mind that all information provided in the SEI must be current as of the last day of December of the year preceding the date the SEI was due. So for this initial filing year, all information in the March 15 SEI must be current as of December 31, 2006. Only delineated assets and liabilities with a value of \$10,000 or more need be identified, but assets and liabilities of your "immediate family" are included (generally, spouse and unemancipated child living in the household).

Some of the assets and liabilities with a value of \$10,000 or more and other relevant information that need to be disclosed include

Real estate in North Carolina – including a description of each parcel adequate to determine the location by city and county;

The *name* of each publicly owned company – the specific amount of public stockholdings is not required; we are looking for a threshold interest, not total value or net worth;

The name of nonpublicly owned companies or business entities – this includes partnerships and limited partnerships, joint ventures, LLCs, LLPs, and closely held corporations;

The name of nonpublicly owned businesses of which you are an officer, employee, director, partner, owner, or member or manager of an LLC;

A list of all liabilities by type of creditor and debtor – this does *not* include mortgage debt on your personal residence;

A list of non-profit enterprises (including religious, charitable, & educational) of which you are, or any member of your immediate family is, a director, officer, governing board member, employee, or independent contractor – you must also identify which of those entities do business with the State or receive State funds;

Sources of income of more than \$5000 received during the preceding year – again, we are looking for threshold *sources* of income, not specific amounts; we are not trying to establish net worth;

Whether you, your employer, your spouse or unemancipated child, or your spouse or unemancipated child's employer is licensed or regulated by, or has a business relationship with, the board or employing entity with which you are or will be associated – this provision does not apply to legislators or judicial officers;

A list of your or your immediate family's memberships or other affiliations with societies, organizations, or advocacy groups pertaining to subject matter areas over which your agency or board may have jurisdiction – this provision does not apply to legislators or judicial officers;

The Commission will prepare a written evaluation of the SEI, pointing out any areas of conflict or potential conflict of interest. SEIs and the Commission's written evaluations of the same are public records.

What are the consequences of not filing or filing late? There are several. First, on the front end, you do not take your position. A "prospective covered person" who is required to file an SEI cannot be appointed, employed, or receive a certificate of election until the Commission submits its evaluation of the person's SEI. Thus, after all persons holding covered positions on January 1, 2007, *file* their SEIs by March 15, 2007 (just file, not be evaluated), any new covered persons cannot take office until they both file their SEI and it is *evaluated* by the Commission. N.C.G.S. §138A-22 (a). There are some exceptions. Certain University and community college officials who have filed the required SEI may be hired, appointed, or elected provisionally prior to submission of the Commission's SEI evaluation. N.C.G.S. §138A-22 (c).

On the back end, you can be **fined or sanctioned**. Persons who have failed to file their SEI, or whose form has been deemed incomplete, will be given notice that they have 30 days to correct the situation or face a \$250 fine. A filer's failure to file or correct the deficiency within 60 days will be deemed a violation of the Act and grounds for disciplinary action, including violation consequences under Article 5 of the Act.

Perhaps most significantly, filers now face **criminal penalties** for knowingly concealing, omitting, or falsifying material information. It is a Class 1 misdemeanor to knowingly conceal or fail to disclose information that is required to be disclosed on an SEI. N.C.G.S. §138A-26. It is a Class H felony to provide false information on an SEI knowing that the information is false. N.C.G.S. §138A-27.

Article 4: Ethical Standards for Covered Persons

Article 4 sets out the ethical standards or "rules of conduct," if you will, for persons covered by the Act. This is an extremely important section for obvious reasons and should be studied very carefully. One of the most basic rules is that covered persons cannot knowingly use their public position in a manner that will result in a financial benefit to the person, a member of the person's family, or a business with which he or she is associated. N.C.G.S. §138A-31.

Article 4 also contains a **gifts** provision. N.C.G.S. §138A-32. The approach is a general ban on gifts with 10 enumerated exceptions. Public servants, legislators, and legislative employees cannot accept gifts from lobbyists and lobbyist principals. Public servants are also prohibited from accepting gifts from persons doing or seeking to do business with their employing entity, persons engaging in activities that are regulated or controlled by their employing entity, or persons having a financial interest that may be substantially affected by the public servant's official actions.

Some of the enumerated exceptions include

Food and beverages for immediate consumption in connection with public events;

Plaques or similar nonmonetary mementos;

Gifts accepted on behalf of the State;

Gifts from the person's extended family or a member of the same household;

Certain gifts associated with the public business of industry recruitment, promotion of international trade, or the promotion of travel and tourism under specified conditions.

Other exceptions are more complex and need to be studied closely. N.C.G.S. §138A-32 (e).

A prohibited gift must be declined, returned, paid for at fair market value, or immediately donated to charity or the State.

There are strict conditions for the acceptance of honoraria. N.C.G.S. §138A-32 (h). An honorarium is defined as the payment for services for which fees are not legally or traditionally required.

Recusal (totally and completely removing oneself from the decision-making process) is the stated way to avoid conflicts of interest. N.C.G.S. §138A-36 (for public servants) & -37 (for legislators). When the following conditions are met, **public servants** must abstain from taking any action, verbal or written, in furtherance of the subject official action:

[I]f the public servant, a member of the public servant's extended family, or a business with which the public servant is associated, has an economic interest in, or a reasonably foreseeable benefit from, the matter under consideration, which would impair the public servant's independence of judgment or from which it could reasonably be inferred that the interest or benefit would influence the public servant's participation in the official action.

N.C.G.S. §138A-36 (a). A potential benefit includes a detriment to a business competitor.

The standard is slightly different for **legislators**:

[N]o legislator shall knowingly participate in a legislative action if the legislator, a member of the legislator's extended family, the legislator's client, or a business with which the legislator is associated, has an economic interest in, or may reasonably and foreseeably benefit from the action, and if after considering whether the legislator's judgment would be substantially influenced by the interest and considering the need for the legislator's particular contribution, including special knowledge of the subject matter to the effective functioning of the legislature, the legislator concludes that an actual economic interest does exist which would impair the legislator's independence of judgment.

N.C.G.S. §138A-37 (a). As with public servants, a potential benefit includes a detriment to a business competitor.

There are seven enumerated situations where otherwise disqualified covered persons (including legislators and public servants) *would* be allowed to participate in official actions, including where the interest or reasonably foreseeable benefit accrues to all members of the particular profession, occupation, or general class equally. N.C.G.S. §138A-38.

While it would be extremely rare, if a public servant has such a significant and pervasive conflict of interest that he or she would be prevented from fulfilling a “substantial function or portion of the public servant’s duties” (called a “disqualifying conflict of interest”), he or she would have 30 days to either eliminate the disqualifying interest or resign the public position. N.C.G.S. §138A-39.

With very limited exceptions, a covered person or legislative employee cannot “cause the employment, appointment, promotion, transfer, or advancement of an extended family member of the covered person to a State office, or a position to which the covered person supervises or manages.” N.C.G.S. §138A-40.

Article 5: Violation Consequences

The final Article outlines what can happen if someone covered by the Act violates it. The potential consequence depends upon who the violator is. A violation by any covered person or legislative employee is grounds for disciplinary action. N.C.G.S. §138A-45 (a).

The willful failure of any **public servant serving on a covered board** to comply with the law is misfeasance, malfeasance, or nonfeasance, subjecting the public servant to removal. N.C.G.S. §138A-39 (b).

The willful failure of any **public servant serving as a State employee** to comply with the law is a violation of a written work order, thereby permitting disciplinary action as allowed by the law, including termination from employment. N.C.G.S. §138A-39 (c).

The willful failure of any **constitutional officer** of the State to comply with the law is malfeasance in office for purposes of G.S. 123-5. N.C.G.S. §138A-39 (d).

The willful failure of a **legislator, other than the Lieutenant Governor**, to comply with the law is grounds for sanctions under the Legislative Ethics Act. N.C.G.S. §138A-39 (e).

Effective Dates

The Ethics Act becomes effective October 1, 2006, and applies to covered persons and legislative employees on or after January 1, 2007; to gifts received on or after January 1, 2007; to acts and conflicts of interest that arise on or after January 1, 2007; and to offenses committed on or after January 1, 2007.