



STATE ETHICS COMMISSION

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CONFIDENTIAL FORMAL ADVISORY OPINION

November 1, 2013

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Post Office Box 629
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Re: Permissibility of NCDENR Division of Energy, Mineral & Land Resources
Program's Acceptance of American Petroleum Institute Standards
AO-E-13-006

Dear Ms. Hauser:

This is in response to your September 10, 2013, letter in which you requested a formal advisory opinion. You have asked whether the State Government Ethics Act ("Ethics Act"), North Carolina General Statutes ("G.S.") Chapter 138A, would restrict the North Carolina Department of Environment and Natural Resources' ("DENR's") Division of Energy, Mineral, & Land Resources ("the Division") from accepting various resource materials from the American Petroleum Institute ("API").

This formal advisory opinion is based upon the information provided in your request and was adopted by the Commission at its November 1, 2013, meeting.¹

I. Brief Conclusion.

The Commission has determined that the Ethics Act would not restrict the Division from accepting the resource materials from API or the use of those materials by Division staff and the members of the Mining Commission in the development of proposed rules.

II. The Facts.

You are legal counsel to the Mining and Energy Commission ("MEC"). The MEC has been charged with the responsibility of adopting rules necessary for the administration of the Oil and Gas Conservation Act and for the further development of the State's oil, gas, and mining

¹ Please see the enclosure entitled "Recommended Formal Advisory Opinions Issued by the State Ethics Commission" for further information regarding the protections offered to individuals receiving those opinions.

resources. G.S. 143B-293.1(a). Once adopted, those rules will regulate pre-drilling exploration activities, prevent the pollution of water supplies and other environmental resources, and establish standards for horizontal drilling and hydraulic fracturing treatments in connection with oil and gas exploration and development. G.S. 113-391(a).

API is a trade association representing the oil and natural gas industry. According to its website, for several years API has been involved in the development of petroleum and petrochemical equipment and operating standards with input from its members. Those standards have served as a source for the development of many state and federal regulations. API sells a variety of publications that include technical standards applicable to various segments of the oil and gas industry.

In order to assist in the development of the proposed rules, API has offered to provide one complimentary copy of the API's Technical Standards on Hydraulic Fracturing, Well Construction, Wellheads, and Well Abandonment ("Technical Standards") to the Division.² The individual members of the MEC, as well as members of the Division staff, may review those standards in connection with the development of the rules. Those Technical Standards are not being provided for the personal use of MEC members or staff. The market value of those Technical Standards is \$1,957.

API is a registered lobbyist principal. The members of the MEC and some of the Division staff are public servants subject to the Ethics Act, including the Act's gift ban.

III. Applicable Statutory Provisions.

The gift ban of the Ethics Act generally restricts public servants from knowingly accepting "gifts" from registered lobbyists, lobbyist principals, and "interested persons" unless a gift ban exception applies. G.S. 138A-32(c) and (d). The term "gift" is defined to include "anything of monetary value given or received without valuable consideration" G.S. 138A-3(15). That term excludes "anything for which fair market value is paid" by a public servant. G.S. 138A-3(15)a.

The gift ban also restricts public servants from accepting a gift given by a lobbyist, lobbyist principal, or interested person to an intermediary, including a State agency, if the public servant knows that the donor intended for "an ultimate recipient of the gift" to be a public servant. G.S. 138A-32(c)(2). The Lobbying Law, G.S. Chapter 120C, similarly restricts the giving of gifts by a lobbyist or a lobbyist principal directly to a public servant, or giving gifts to an intermediary "with the intent that a designated individual be an ultimate recipient," unless an exception applies. G.S. 120C-303(a)(2).

Although the term "ultimate recipient" is not defined by either the Ethics Act or Lobbying Law, the term "ultimate" has been defined as "being or happening at the end of the process, final." *Oxford Dictionaries*. Online. <http://oxforddictionaries.com>. "Recipient" has been

² The standards included in this offer include HF1, HF2, HF3, Standard 65-Part 2, Recommended Practice 51R, Recommended Practice 10B-2, Spec 5CT, Spec 5B, Recommended Practice 5A3, Recommended Practice 10D-2, Spec 10D, Technical Report 10TR4, Spec 10A, Standard 53, Spec 6A, and Bulletin E3 (R2000).

defined as “a person or thing that receives or is awarded something.” Id. Thus, combining those definitions and applying it to the language of the gift ban, it restricts the giving and receipt of both direct gifts and gifts to an intermediary if, at the end of the transaction, it is intended that any public servant receive the gift.

In a prior formal advisory opinion requested by a board official, the Commission determined that the gift ban was inapplicable to donations given “directly to State agencies for any purpose deemed appropriate by those agencies” and that are not given “with the specific intent that a public servant be the ultimate recipient of the gift” and under circumstances where “the public servant knows that the gift was intended to benefit him or her.” AO-E-10-001 (May 14, 2010).³ Thus, the Commission determined that the agency’s acceptance of meeting space for official use by a public servant board was not subject to the gift ban, since it did not provide a “personal benefit” to those public servants attending the board meeting.

Similarly, in AO-L-11-004, the Commission determined that a lobbyist principal’s donation of tents to a State agency for its official use during various public outreach events that may be attended by public servants was not restricted by the gift ban since public servants were not the “ultimate recipients” of the tents. (August 12, 2011).

IV. Analysis.

Since the API will be donating the Technical Standards to the Division for the use of Division staff and MEC members in developing various rules in accordance with a statutory directive, the gift ban does not restrict the Division from accepting those Standards from API. However, this conclusion assumes that the Standards will not be used for the personal benefit of the Division’s public servant staff or the members of the MEC in their private business pursuits.

Although API’s donation of those materials is allowed, the Lobbying Law, G.S. Chapter 120C, may require that the fair market value of the materials be reported by API to the North Carolina Office of the Secretary of State on API’s expenditure report. That would be the case, for instance, if the materials were given to the Division at the specific request of a public servant and were made for lobbying.

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.

³ Following the issuance of that decision, the Ethics Act was amended to restrict the giving of an indirect gift if “any” public servant would be the ultimate recipient. S.L. 2010-169, s. 15(a), effective December 1, 2010.

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).

