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**CONFIDENTIAL FORMAL ADVISORY OPINION**

November 14, 2014

Re: Conflicts of Interest Associated With Stock Ownership and Official Actions Taken as a Member of a State Board  
AO-E-14-004

Dear Requester:

This is in response to your request for a formal advisory opinion. You have asked whether it would be a conflict of interest for you to take official actions that may affect companies in which you own stock.

This formal advisory opinion is based upon the information provided in your request and was adopted by the State Ethics Commission at its November 14, 2014, meeting.<sup>1</sup>

**I. Brief Conclusion.**

The value of your stock interests in some of the companies does not meet the \$10,000 threshold value for triggering the conflict of interest standards of G.S. 138A-36(a). The value of your stock interests in one company does exceed the \$10,000 threshold. However, it is unlikely that your official actions as a member of the State board would result in a reasonably foreseeable financial benefit to the value of your stock or that companies' overall financial status. And the financial impact, if any, would likely similarly affect other companies with similar business interests. Therefore, you would not be restricted from taking official actions with respect to those matters.

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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.

## **II. Facts.**

You serve on a State board. As a member of the State board you are a public servant subject to the provisions of the Ethics Act. The State board will consider regulatory restrictions affecting a particular industry. You own stock in companies that may engage in activities subject to those regulatory restrictions. Some of your stock holdings in those companies are over the \$10,000 threshold.

## **III. Applicable Statutory Provisions.**

### **A. G.S. 138A-36(a) Conflicts Standards.**

G.S. 138A-36(a) prohibits a public servant “acting in that capacity” from participating in an “official action” if that public servant or a “person with which the public servant is associated” may incur:

- “A reasonably foreseeable financial benefit”
- Which would impair the public servant’s “independence of judgment” or otherwise influence the public servant’s participation in that official action.

“Financial benefit” includes a direct pecuniary gain or loss to a person with which the public servant is associated or a direct pecuniary loss to a business competitor. G.S. 138A-3(14c). “Person with which the public servant is associated” includes a “business with which associated,” defined to include a business in which a public servant or a member of the public servant’s immediate family owns \$10,000 or more in stock. G.S. 138A-3(3).

G.S 138A-36(b) requires that a public servant:

- “Abstain from taking any verbal or written action”
- “[I]n furtherance of the official action.”<sup>2</sup>

The public servant is also required to submit written reasons for the abstention to the employing entity.

### **B. G.S. 138A-36(c) Conflicts Standards.**

G.S. 138A-36(c) also requires that a public servant:

- “Remove himself or herself” from a “proceeding,”<sup>3</sup>

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<sup>2</sup> “Official action” includes “[a]ny decision, including administration, approval, disapproval, preparation, recommendation, the rendering of advice, and investigation, made or contemplated in any proceeding, application, submission, request for ruling or other determination, contract, claim, controversy, investigation, charge, or rule making.” G.S. 138A-3(25).

<sup>3</sup> Defined to include a quasi-judicial or quasi-legislative proceeding.

- “Considering the particular circumstances and type of proceeding involved,”
- “To the extent necessary to protect the public interest and comply with the Ethics Act,”
- If the public servant’s impartiality might reasonably be questioned due to a “familial, personal, or financial relationship” with a participant in the proceeding.

**C. G.S. 138A-38(a)(1) Class Safe Harbor.**

G.S. 138A-38(a)(1) allows a public servant to take an official action, notwithstanding a conflict of interest, if the financial benefit or detriment that would accrue to the public servant, a “person with which associated,” or a “participant” in a proceeding:

- As a member of “a profession, occupation, or general class”
- Is “no greater” than that which would accrue to “all members of that profession, occupation, or general class.”

Thus, in order for the subsection 38(a)(1) safe harbor to apply, the financial benefit (or detriment) resulting from the public servant’s official action would have to be equal to or less than that which would accrue to all members of the class.

**IV. Analysis.**

Those companies in which you own less than \$10,000 in stock would not be a “business with which associated” and therefore your ownership interest in those companies would not trigger the conflict of interest provisions of G.S. 138A-36(a). However, because the value of your stock in one of the companies is at least \$10,000, that company would be considered a “business with which associated” under the G.S. 138A-36(a) conflict of interest standards.

All of the companies in which you own stock are multi-billion companies and it is unclear whether any of those companies will engage in the business activities in question. Therefore, even if the value of a company’s stock reaches the \$10,000 threshold, it does not appear that your official actions with respect to the regulatory restrictions would result in a reasonably foreseeable financial benefit, in terms of increased stock value, to you or those companies. In addition, it is likely that your actions would similarly impact several other companies and individuals who engage in the same business activities and you would therefore be allowed to take official actions notwithstanding a conflict of interest under G.S. 138A-38(a).

The conflicts standards of G.S. 138A-36(c) could apply, since you have a “financial” relationship with these companies. However, it is unlikely that any company will take part in the proceeding before the State board. And, if even if those companies are participants in a proceeding, it is unlikely that your financial relationship with those companies would lead to your impartiality being reasonably questioned. Moreover, the G.S. 138A-38(a) safe harbor would also apply where those actions would affect similarly-situated businesses and individuals.

**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.

**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).