



STATE ETHICS COMMISSION

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CONFIDENTIAL RECOMMENDED FORMAL ADVISORY OPINION

May 9, 2008

The Honorable Martin Nesbitt
North Carolina General Assembly
Room 300-B
300 N. Salisbury Street
Raleigh, NC 27601

Re: G.S. 138A-24: Disclosure of Extended Family Member's Business and
Customers on Statement of Economic Interest
AO-E-08-0003

Dear Senator Nesbitt:

You requested an informal advisory opinion on certain issues raised by Mr. Les Merritt, the State Auditor, in his April 15, 2008, draft letter to you. On May 7, 2008, I provided you with my informal advisory opinion. You have requested a formal advisory opinion on the same issues. The State Ethics Commission ("Commission") adopted this recommended formal advisory opinion at its May 9, 2008, meeting.

Mr. Merritt's letter concerns your participation in volunteer activities on behalf of Nesbitt Racing Enterprises, Inc. ("Racing Enterprises"), a business in which your adult son has an ownership interest, and the extent to which you were obligated to disclose those volunteer activities on your 2007 Statement of Economic Interest ("SEI"). Mr. Merritt concludes that your involvement with that racing team "is a potential conflict of interest" which should have been disclosed in response to Question 19 on your 2007 SEI. Mr. Merritt also concludes that since Racing Enterprises received funding from Blue Cross Blue Shield ("BCBSNC"), you should have also listed that information, and presumably the identity of other funding sources, in response to Question 19.

I. Recommended Advisory Opinions of the State Ethics Commission.

The Commission has authorized its staff to issue formal advisory opinions pursuant to G.S. 138A-13(b) of the State Government Ethics Act ("the Ethics Act") upon the receipt of a proper request. That provision authorizes the Commission to render "recommended" advisory opinions "on the meaning and application" of the Ethics Act and Article 14, Part 1, of G.S. Chapter 120 ("the Legislative Ethics Act"), "and the legislator's compliance therewith." All opinions are limited to the particular facts presented and confer limited civil immunity upon a requester who follows the advice given. Upon issuance, formal advisory opinions issued to legislators are transmitted to the Legislative Ethics Committee ("Committee") for consideration. Until the Committee takes action, reliance upon a recommended formal advisory opinion on a specific matter arising under G.S. Chapter 138A or Part 1 of the Legislative Ethics Act immunizes the legislator making the request from (1) an investigation by the Commission or the Committee, except for an alleged violation of criminal law, (2) adverse action by the house of which the legislator is a member, or (3) an investigation by the Secretary of State. G.S. 138A-13(b).

Pursuant to G.S. 120-104(b), the Committee has authority to accept, modify, or overrule a recommended advisory opinion issued under G.S. 138A-13(b). The Committee's final action on opinions issued to legislators "shall control."

Once finalized, formal opinions as issued by the Legislative Ethics Committee are published in a redacted format on the Commission's website. 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). However, Commission staff is specifically authorized to share information with the Legislative Ethics Committee staff.

II. The State Auditor's Jurisdiction Over the Ethics Act.

It is unclear why Mr. Merritt, an elected official who is also regulated by the State Government Ethics Act ("the Ethics Act"), initiated an investigation into your compliance with the Ethics Act's SEI filing requirements. Although a comprehensive discussion of Mr. Merritt's lack of jurisdiction over such matters is beyond the scope of this letter, suffice it to say that Mr. Merritt's investigation may potentially undermine the authority of the State Ethics Commission and the complicated statutory scheme established by the Ethics Act. Specifically, the Act places responsibility for its interpretation with the bipartisan State Ethics Commission. Moreover, the Act contains detailed complaint and investigation procedures. Those provisions were designed to enhance equitable ethics enforcement and minimize, to the extent possible, political influence over that process. Those principles are threatened by a partisan elected official's efforts to interpret and investigate violations of the Act.

Moreover, by assigning sole authority for interpreting the provisions of the Act to the Commission, the General Assembly sought to establish one source of guidance for public officials.¹ The designation of one agency with responsibility for the Act's interpretation enhances

¹ Further evidence of this general legislative intent can be found in changes made to the Lobbying Law (Chapter 120C) during the 2007 legislative session. The General Assembly made it clear that the Ethics Commission had sole authority to interpret the Lobbying Law.

enforcement of the Act, provides piece of mind to those officials who endeavor to comply with the Act, and more efficiently utilizes taxpayer resources. To the extent information obtained by Mr. Merritt showed a possible violation of the Ethics Act, the best course would have been for him to alert the Ethics Commission, which could have initiated an investigation under G.S. 138A-12(b),² or file a formal complaint himself under G.S. 138A-12.

In the course of his investigation, Mr. Merritt requested that the Commission disclose "all information" related to your request for an advisory opinion from the State Ethics Commission, including the facts as described by you and the specific advice rendered by the Ethics Commission. However, Mr. Merritt's request sought disclosure of information that was strictly confidential. Specifically, the Ethics Act provides that "requests for advisory opinions, and advisory opinions issued under this section, are confidential and not public records." G.S. 138A-13(e). In addition to being a violation of the Ethics Act, the disclosure of confidential requests made by public officials and any advice rendered by the Commission, whether publicly or to the State Auditor, could significantly reduce the number of public officials that seek guidance from the Commission and would ultimately result in diminished compliance with the Act.

III. Potential or Actual Conflicts of Interest Under the State Ethics Act.

The purpose of the Ethics Act is to ensure that public officials are not influenced by their personal interests. The Act seeks to accomplish this goal by affirmatively requiring that public officials be educated as to their obligations under the Act and annually disclose financial information on the SEI. The Act also prohibits those officials from accepting certain items of value from individuals and entities who may attempt to influence the officials and from participating in official and legislative actions to the extent those officials may be influenced by their personal interests.

A. The Auditor's Conclusions.

Mr. Merritt concludes that you have a "direct financial interest" in Racing Enterprises. This conclusion appears to be based upon the fact that a garage co-owned by Nesbitt Ventures, Inc., was used as collateral for a \$150,000 line of credit extended to Racing Enterprises. Mr. Merritt does not indicate that Racing Enterprises is indebted to Nesbitt Ventures in return for the provision of collateral. Mr. Merritt does not explain those principles applied in concluding that you have a direct financial interest in Racing Enterprises.

Mr. Merritt further opines that since Nesbitt Ventures' property was used as collateral for the Racing Enterprises' line of credit, and that because BCBSNC is one of Racing Enterprises' sponsors, you have a "potential conflict" as to BCBSNC. Again, however, Mr. Merritt does not explain the basis for this conclusion. Mr. Merritt appears to rely upon broad-based personal philosophical principals, not the specific statutory conflicts provisions contained in the Ethics Act. Indeed, those conflict provisions do not support Mr. Merritt's reasoning. Since BCBSNC has no direct association with you or Nesbitt Ventures, it is unclear how that interest could represent a potential conflict of interest under the Ethics Act.

² Granting the Ethics Commission authority to initiate an investigation "on its own motion."

It is important to note that Mr. Merritt's proposed letter does not assert that you used your legislative position to benefit Racing Enterprises or BCBSNC or that such legislative action was contemplated or reasonably foreseeable. Yet Mr. Merritt concludes that both entities presented "potential conflicts" for you.

B. The Ethics Commission's Interpretation of the Ethics Act.

The Ethics Act's legislative conflict of interest standards are set forth in G.S. 138A-31(a)³ and G.S. 138A-37(a). G.S. 138A-38(a) describes conduct that is permissible even if it otherwise would constitute an actual conflict of interest under G.S. 138A-31(a) or G.S. 138A-37(a). The remedy for an actual conflict of interest that is not subject to the G.S. 138A-38 safe harbor provisions is recusal.

G.S. 138A-31(a) prohibits a legislator from taking legislative action that provides a financial benefit to the legislator, a member of the legislator's extended family, or a business with which the legislator is associated. That provision does not extend to a pledge of collateral by a business with which a legislator is associated to another business owned by an adult family member.

G.S. 138A-37(a) similarly prohibits a legislator's participation in a "legislative action" if (1) the "legislator, a member of the legislator's extended family, the legislator's client," or a business or nonprofit with which the legislator is associated has an "economic interest in," or would derive a reasonably foreseeable benefit from the action, and (2) the "legislator concludes that an actual economic interest" exists and that the interest "would impair the legislator's independence of judgment." In reaching this conclusion, G.S. 138A-37(a) requires that the legislator consider: (a) whether "the legislator's judgment would be substantially influenced by the interest," and (b) "the need for the legislator's contribution" to the matter.⁴

An "economic interest" is defined as "[m]atters involving a business with which associated or a nonprofit corporation or organization with which associated." A business or nonprofit with which associated includes a business or nonprofit in which the legislator or the legislator's immediate family holds a leadership position or owns an interest valued at \$10,000 or more, or for which the legislator or immediate family member is a lobbyist or an employee.⁵ G.S. 138A-3(3) and 138A-3(24).

³ G.S. 138A-31(a) is also applicable to public servants, judicial officers, and legislative employees.

⁴ The conflict provisions as applied to legislators are narrower than those applicable to public servants. As with the conflict provisions applicable to legislators, G.S. 138A-36(a) provides that a public servant should avoid participating in official actions in which the public servant has an economic interest. In addition, G.S. 138A-36(c) requires that a public servant take appropriate steps to ensure that he or she does not participate in matters in which his or her impartiality might be questioned due to a "familial, personal, or financial relationship with a participant in the proceeding." The legislative conflicts provision does not specifically refer to personal relationships.

⁵ An independent contractor relationship with a nonprofit is also included.

Thus, both G.S. 138A-31(a) and G.S. 138A-37(a) require that legislators generally examine legislative actions that would benefit the following individuals or entities:

- The legislator,
- A member of the legislator's extended family, for example siblings, children, and parents of the legislator,
- The legislator's clients (inapplicable to G.S. 138A-31(a)), or
- Businesses or nonprofits with which the legislator or the legislator's immediate family "is associated."

As with G.S. 138A-31(a), G.S. 138A-37(a) does not encompass a business with which the legislator is associated providing collateral to the business of an adult family member not residing in the legislator's household. Thus, neither conflicts provision would support Mr. Merritt's conclusion that securing a loan would directly present a statutory conflict of interest. Nor would the application of those provisions lead one to conclude that the sponsor or customer of an entity whose loan was secured by another entity, which was co-owned by a legislator, would present a conflict of interest as to that legislator. Moreover, Mr. Merritt has not indicated that legislative action with respect to either entity was reasonably contemplated. Therefore, to the extent Mr. Merritt concludes that your association with those entities would be "a potential conflict of interest" under the Ethics Act, I respectfully disagree.

IV. The Required Disclosure of Racing Enterprises and BCBSNC on Your 2007 SEI.

The purpose of the SEI filing requirement is to assist public officials and those who appoint or employ them to "identify and avoid conflicts of interest." G.S. 138A-21. This goal is achieved by encouraging the public official to carefully consider conflicts in the course of completing the SEI, allowing the public to review and consider a public official's interests, and enabling Commission staff to evaluate the SEI and guide the official in order to guard against unrecognized undue influence.

A. Mr. Merritt's Conclusions.

Mr. Merritt, in interpreting G.S. 138A-24(a)(10) and the resulting Question 19 on the 2007 SEI, concludes that you were statutorily required to disclose your interest in Racing Enterprises and the identity of BCBSNC, a funding source of Racing Enterprises, on your SEI. However, in this instance, Mr. Merritt recommends that you consult with the Commission "regarding the need to file revised Statements to include [your] involvement with [your] son's racing team."

B. The Ethics Commission's Interpretation of the Ethics Act.

In fact, you did consult with me as to your obligation to disclose Racing Enterprises on your 2007 SEI.⁶ My advice to you was that you were not obligated to make that disclosure. You relied upon

⁶ G.S. 138A-24(a)(10) requires that the public official disclose "[a]ny other information that is necessary to carry out the purposes of this Chapter or to fully disclose any conflict of interest or potential conflict of interest." In the event the public official is uncertain as to whether certain information should be disclosed, "then the filing person shall consult the Commission for guidance."

that advice, and did not list Racing Enterprises on your SEI. You told Mr. Merritt's staff that you had received that advice from the Ethics Commission. As mentioned above, the Commission and its staff are statutorily prohibited from disclosing confidential communications pertaining to your advisory opinion request. With respect to your obligation to disclose BCBSNC on your SEI, it would have been reasonable for you to conclude that since you were not required to disclose information concerning your adult son's company on your SEI, you would not be required to further disclose the identity of that company's customers or sponsors, such as BCBSNC.

The Ethics Law requires that public officials disclose information about the official and the official's "immediate family" on the SEI:⁷

Any statement of economic interest filed under this Article shall be on a form prescribed by the Commission and sworn to by the filing person. Answers must be provided to all questions. The form shall include the following information about the filing person and the filing person's immediate family.

G.S. 138A-24(a). This is reflected, as it must be, in the SEI itself.⁸ None of the SEI questions directly require that the official disclose information related to members of his or her extended family that do not reside in the official's household, such as your adult son. G.S. 138A-24 delineates the type of information that must be disclosed in the SEI. Those categories of information can generally be summarized to include the legislator or immediate family's direct financial interests (G.S. 138A-24(a)(2)-(5)); associations with non-profits (G.S. 138A-24(a)(11)); the receipt of gifts 138A-24(a)(8)); or the lobbying activities of the legislator or his or her immediate family (G.S. 138A-24(a)(12)).

Question 19, as it existed on the 2007 SEI, sought disclosure of additional information with respect to "potential or actual conflicts of interest" not otherwise disclosed on the SEI. As already noted, the SEI provisions of the Ethics Act specifically require disclosure of information related to a public official's immediate family, a requirement that would exclude information related to the interests of an official's adult child. Moreover, given the vague nature of this disclosure requirement, it is extremely difficult for a public official to determine what must be disclosed in response to this question. You were not required to disclose your son's ownership of Racing Enterprises nor BCBSNC's status as a Racing Enterprises sponsor in response to Question 19 on your 2007 SEI.

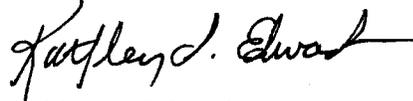
⁷ "Immediate family" generally includes family members who live in the public official's immediate household. It does not include adult children who live outside the public official's household, such as your adult son in the present situation.

⁸ The 2007 SEI form repeats this limitation 14 times, and it was included in the transmittal memo sent to you and all other filers.

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Thank you for contacting the State Ethics Commission concerning these issues. Please do not hesitate to call me if you have any questions about the foregoing recommended formal advisory opinion.

Sincerely,



Kathleen S. Edwards
Assistant Director & Compliance Officer

cc: Legislative Ethics Committee
Robert L. Farmer, Chairman, SEC
Perry Y. Newson, Executive Director, SEC