STATE ETHICS COMMISSION
ADVISORY OPINION
S.E.C. 2008-06

December 4, 2008

Whether commission salespeople are lobbyists for the purposes of the Ethics in Government Act (Act) and whether commission salespeople are prohibited from receiving commission payments from their employers.

ADVISORY OPINION:

(1) Are commission salespersons, which are salespersons compensated contingent upon the sale of goods or services, considered lobbyists under the Act?

The Act defines “lobbyist” to include any natural person who, for compensation, either individually or as an employee of another person “is hired specifically to undertake influencing a public officer or state agency” in the selection of a vendor to supply any goods or services to any public officer or state agency. O.C.G.A. § 21-5-70(5)(G). In reading the Act’s definition of “lobbyist,” the word “specifically” has important significance. According to Black’s Law Dictionary, specifically is the adverb form of the word specific, which means “[o]f, relating to, or designating a particular or defined thing; explicit <specific duties>.” Black's Law Dictionary (8th ed. 2004).

Consequently, if a commission salesperson’s job requires said salesperson to, among his or her explicit duties, influence a public officer or state agency in the selection of a vendor, then such salesperson would be classified as a lobbyist according to the Act. Conversely, if a commission salesperson was hired to, for example, sell newspapers, and such individual contacted a public officer or state agency on his or her own initiative, then such individual would not be classified as a lobbyist because his or her explicit duties do not require influencing a public officer or agency.

(2) Are commission salespersons, and consequently the companies which employ them, prohibited from making sales to government agencies or public officers?

The next question is whether commission salespersons and the companies that employ them are prohibited from making sales to government agencies or public officers as proscribed by the Act’s prohibition for contingent fees. The Act’s prohibition applies to a commission salesperson regardless of whether the commission salesperson is considered a lobbyist under the definition of the Act. The Act states:

> No person, firm, corporation, or association shall retain or employ an attorney at law or an agent to aid or oppose legislation for compensation contingent, in whole or in part, upon the passage or defeat of any legislative measure or upon the receipt or award of any state contract. No attorney at law or agent shall be employed to aid or oppose legislation for compensation contingent, in whole or in part, upon the passage or defeat of any legislation or upon the receipt or award of any state contract.

O.C.G.A. § 21-5-76(a). The Act does not limit such prohibition to lobbyists. Nevertheless, in the present situation, unless the commission salesperson is engaging in action "to aid or oppose legislation," such action would not fall within the scope of the Act's prohibition. Indeed, the phrase "upon the passage or defeat of any legislative measure" and "upon the receipt or award of any state contract" are disjunctive dependent clauses, either of the two being a condition upon which compensation contingent is prohibited in activities that aid or oppose legislation.

As such, unless the commission salesperson is engaging in action to "aid or oppose legislation," such action would not fall within the scope of the Act's prohibition on contingent fees, and, accordingly, a company could employ such commission salesperson.

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