STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2009-02

June 22, 2009

Whether the application of O.C.G.A. § 21-5-30.1 to contributions made to "elected executive officer[s]" is affected by the corporate form of the contributor(s) and whether the Insurance Commissioner may accept contributions from entities depending on the extent to which the Insurance Commissioner regulates them.

ADVISORY OPINION:

Section 30.1, Article 2 of the Ethics in Government Act (Act) prohibits regulated entities from making contributions to an elected executive officer, a candidate for the office of an elected executive officer, or the campaign committee of an elected executive officer (collectively, an EEO). Section 30.1 defines "elected executive officer" narrowly, to include only the Secretary of State, Attorney General, State School Superintendent, and the Commissioners of Agriculture, Insurance and Labor. O.C.G.A. § 21-5-30.1(a)(3). The request for an advisory opinion asks eight main questions concerning how Section 30.1 applies to the Insurance Commissioner. The identifying numbers of the questions addressed herein mimic those of the request. The answers in Part I apply to all EEOs and the answers in Part II apply only to the Insurance Commissioner, a candidate for Insurance Commissioner or the campaign committee of such candidate unless otherwise stated.

PART I

Whether the application of O.C.G.A. § 21-5-30.1 to contributions made to EEOs is affected by the corporate form of the contributor(s).

QUESTIONS 1(a), 2(a), 3(a), 4 & 5

Does Section 30.1 prohibit the parent company, subsidiary, affiliate, or sister company of a regulated entity, a holding company of a regulated entity, or a company sharing common ownership with a regulated entity, from contributing to an EEO if that entity itself is not subject to the EEO's jurisdiction, and even though the entity does not have direct control of the regulated entity?

Answer: Section 30.1 prohibits any regulated entity from contributing "to or on behalf of" an EEO, prohibits a person or political action committee "acting on behalf of a regulated entity" from contributing to an EEO, and prohibits an EEO from accepting such contributions. O.C.G.A. § 21-5-30.1(b) & (c). A "regulated entity" is defined as any "person" (1) required by law to be licensed by an EEO or board under the jurisdiction of an EEO, (2) that leases property owned by or for a state department [this Advisory Opinion does not concern itself with this clause], or (3) that engages in a business that is regulated by an EEO or board under the jurisdiction of an EEO. O.C.G.A. § 21-5-

30.1(a)(5). The Act defines a "person" to include individuals, the defined term "business entities," committees, associations, or any other group of persons. O.C.G.A. § 21-5-3(19). The Act's definition of "person" includes the term "business entity," whose definition includes an enterprise, franchise or joint venture along with more typical business forms. O.C.G.A. § 21-5-3(1) & (19).

In addition, Section 40, Article 2A of the Act defines an "affiliated corporation" and applies this definition in determining maximum contribution limits. O.C.G.A. §§ 21-5-40(2) & 21-5-41(c). The term "affiliated corporation" includes any parent, subsidiary or sister company of a business entity, or business entities that share common ownership or control of another. Although the Act extends its purview to affiliated corporations in Article 2A, it does not incorporate affiliated corporations into the framework of Section 30.1. The term is defined in Article 2A; Section 30.1 is found in Article 2. This term is only actually employed in Section 41. O.C.G.A. § 21-5-41(c). Furthermore, "affiliated corporation" is not defined in the Act's main definitions section (Section 3, Article 1) or in Section 30.1. The relationship of an "affiliated corporation" is not included in the definitions of "regulated entity," "person" or "business entity." If the legislature intended for entities defined as affiliated corporations to be bound by Section 30.1, it would have included the term "affiliated" in one or more of these definitions or at least would have employed it within the text of Section 30.1.

Moreover, there are two important consequences associated with the Act's definition of "person" in the context of Section 30.1's definition of "regulated entity" that are relevant to this Advisory Opinion. First, although the Act's definition of a person includes an individual, Section 30.1's mandate prohibiting regulated entities from making contributions to an EEO does not apply to natural persons who contribute their own personal funds, whether or not the natural person is licensed by the EEO or a board under the EEO's jurisdiction. O.C.G.A. § 21-5-30.1(d); 1998 Op. Atty. Gen. No. 98-11.

Second, the Act's definition of "person" includes the term "business entity." O.C.G.A. § 21-5-3(1) & (19). Importantly, the Act's definition of "business entity" was amended in 2006 by adding "limited liability company," "limited liability partnership" and "professional corporation" to a definition that previously only included a "corporation, sole proprietorship, limited partnership, enterprise, franchise, association, trust, [or] joint venture…" *See* Ga. L. 2005 § 2/HB 48. By themselves, these entities do fall under the definition of a "business entity" or "person," but do not fall under the definition of a "regulated entity" unless they are licensed or regulated by an EEO or board under the jurisdiction of an EEO. O.C.G.A. §§ 21-5-3(1), (19) & 21-5-30.1(a)(5).

Therefore, to the extent that a parent company, subsidiary, affiliate or holding company is not also a person or business entity licensed or regulated by an EEO or board under the jurisdiction of an EEO, and is not "acting on behalf of" a regulated entity, Section 30.1 does not apply to it. Had the legislature intended for parent companies, subsidiaries, affiliates or holding companies of regulated entities to fall under Section 30.1, it would have included such business relationships in its definition of "regulated entity." Additionally, a company sharing common ownership with a regulated entity does not fall

under Section 30.1 unless, as the definition of a business entity includes joint ventures, the joint venture itself is licensed or regulated by an EEO or a board under an EEO's jurisdiction.

Finally, a parent company, subsidiary, affiliate, sister company, holding company, or an entity that shares common ownership of an entity along with a regulated entity, if legitimately registered or incorporated, in existence for a bona fide economic purpose, and not merely a *de facto* corporation, has its own legal personality for the purposes of the Act and it does not matter whether the company is located within Georgia or not. Such a company would be defined as a business entity but not necessarily a regulated entity. Such a business entity can make contributions under the Act to an EEO so long as the entity is not also a regulated entity in its own right or is not making a contribution "acting on behalf of" a regulated entity. O.C.G.A. § 21-5-30.1(b).

However, Section 30.1's prohibition on contributions to an EEO extends to funds or anything of value that was transferred or generated by a regulated entity. This prohibition stands regardless of whether such funds or thing of value first passed to the control of an unlicensed, unregulated entity before being contributed to an EEO, and regardless of whether that unlicensed, unregulated entity is a parent, subsidiary, affiliate, holding company of a regulated entity, or shares common ownership or control with a regulated entity. This is because, if such an unregulated entity were to make a contribution to an EEO with funds transferred or generated by a regulated entity, it would be "acting on behalf of" the regulated entity for the purposes of Section 30.1.

Likewise, if a bona fide unlicensed, unregulated entity were to make a contribution to an EEO at the behest of, or in consultation or coordination with, a regulated entity, even if the funds transferred, or thing of value provided as an in-kind contribution, was not transferred or generated by a regulated entity, then that unregulated entity would be "acting on behalf" of a regulated entity in violation of Section 30.1.

Therefore, the Commission can foresee three scenarios in which an unlicensed, unregulated entity that is a parent company, subsidiary, affiliate, or sister company of a regulated entity, a holding company of a regulated entity, or a company sharing common ownership with a regulated entity, would violate Section 30.1 by making a contribution to an EEO: (1) a bona fide unlicensed, unregulated entity makes a contribution using funds transferred or generated by a regulated entity, (2) a bona fide unlicensed, unregulated entity consults or coordinates with a regulated entity regarding the making of a contribution (regardless of the origin of the funds contributed) and therefore is "acting on behalf of" a regulated entity, or (3) a contribution is made by an entity that exists for no bona fide economic purpose but merely serves to mask a circumvention of the prohibitions or additional reporting requirements contained in Section 30.1. If any of these three elements apply, then a contribution has been made in violation of Section 30.1.

Because bona fide contributions to EEO's are permitted so long as they are made in accordance with the Act, Commission Rules and this Advisory Opinion, there is no need to address questions 1(b), 2(b) and 3(b) of the advisory opinion request.

QUESTION 6

Does Section 30.1 prohibit a political action committee (PAC), which receives contributions from a regulated entity, from contributing to a campaign committee of an EEO even if (1) the PAC does not make the contribution on behalf of the regulated entity, and (2) the regulated entity has no direction or control over the PAC's contributions?

Answer: As stated in the answer above, Section 30.1 prohibits a person or PAC "acting on behalf of" a regulated entity from making a contribution to an EEO. O.C.G.A. § 21-5-30.1(b). Likewise, an EEO is prohibited from accepting any such contribution. O.C.G.A. § 21-5-30.1(c). However, an entity that has received funds from a regulated entity is permitted to make contributions to EEOs so long as the funds or thing of value contributed were not transferred or generated by a regulated entity and are separately accounted for to the extent that the entity can ensure that it is not contributing funds that came from the regulated entity. Similarly, a PAC that is not under the direction or control of a regulated entity but receives contributions from a bona fide unlicensed, unregulated entity may contribute to an EEO so long as the funds contributed to the EEO by the PAC were not transferred or generated by a regulated entity and there was no consultation and coordination between the PAC and the regulated entity. A PAC should account for any funds transferred or generated by a regulated entity in a manner that assures they are not confused with other PAC funds. Conversely, a PAC that is under the direction or control of a regulated entity may not contribute to an EEO because if it were to do so it would be "acting on behalf of" the regulated entity. O.C.G.A. § 21-5-30.1(b).

With respect to candidates, unless an EEO knows or should have known that a PAC is contributing funds transferred or generated by a regulated entity, the EEO is entitled to presume that funds contributed were not transferred or generated by a regulated entity. If, however, an EEO knows or should have known that a PAC has received funds transferred or generated by a regulated entity, the EEO is advised to obtain necessary certification from the PAC that it can account for all funds received and that all contributed funds originate from an unregulated source.

PART II

Whether the Insurance Commissioner may accept contributions from entities depending on the extent to which the Insurance Commissioner (IC) regulates them.

QUESTION 7

Does Section 30.1 prohibit each and every entity that is required to obtain a permit of any sort from the IC from contributing to a campaign committee of the IC or is the restriction imposed by law limited to entities actually licensed by the IC? What tests or restrictions

should the campaign committee of the IC employ when determining whether to accept a contribution from an entity subject to oversight or inspection by the IC?

Answer: As stated in the answer under Part I, Section 30.1 prohibits any regulated entity from contributing "to or on behalf of" an EEO and prohibits an EEO from accepting such contributions. O.C.G.A. § 21-5-30.1(b) & (c). A "regulated entity" is defined as any "person" (1) required by law to be licensed by an EEO or board under the jurisdiction of an EEO, (2) that leases property owned by or for a state department [again, this Advisory Opinion does not concern itself with this clause], or (3) that engages in a business that is regulated by an EEO or board under the jurisdiction of an EEO. O.C.G.A. § 21-5-30.1(a)(5).

The Act does not define "license" or "permit." However, several portions of Title 25 that apply to the IC differentiate between the two terms. *See* O.C.G.A. §§ 25-2-4.1, 25-2-14, 25-2-17(d), 25-10-3.1, 25-10-3.2, 25-10-4, 25-11-13, 25-12-2, 25-12-13, 25-12-14 & 25-12-21. For example, O.C.G.A. § 25-12-2 defines both "license" and "permit" distinctively. O.C.G.A. § 25-12-2 (5) & (6). Other sections set different fees for licenses and permits. O.C.G.A. §§ 25-12-7 & 25-12-8. Consequently, it appears that a person required by law to be licensed by the IC is distinct from a person who merely receives a permit from the IC. To this extent, Section 30.1 only applies to licensees or those required to hold a license issued by the IC or an office the IC has authority over. The only exceptions to this guidance are situations where a permit can also be defined as a license or where a permit holder is regulated by the IC or a board under the IC's jurisdiction. Likewise, regarding Question 7, corporations holding licenses in other states but requiring no license to operate in Georgia are not "regulated" for purposes of Section 30.1.

Therefore, the appropriate test to determine, within the scope of Question 7, whether the IC may accept a contribution from a person is whether the person is a licensee of the IC or a board under the IC's jurisdiction. If so, then the IC may not accept a contribution from such person because it is a regulated entity. [As mentioned in Part I above, Section 30.1 does not apply to individuals licensed or regulated by the IC who make contributions with their own personal funds. O.C.G.A. § 21-5-30.1(d); 1998 Op. Atty. Gen. No. 98-11.]

QUESTION 8

If the IC's powers regarding an entity's business are primarily administrative and ministerial, may the entity make a contribution to the IC's campaign committee? If so, what test(s) should be employed to determine whether the IC's powers are more than administrative and ministerial in the context of Section 30.1?

Answer: The Act states that the Commission shall issue an advisory opinion in response to a written request based on a real or hypothetical set of circumstances. O.C.G.A. § 21-5-3(b)(13). In order to be able to provide guidance regarding Question 8, the Commission must be able to determine whether an identifiable, even if theoretical, kind

of business entity, and any regulatory scheme covering it, falls under the IC's jurisdiction: administrative, ministerial or otherwise. Because Question 8 does not present such an identifiable set of real or hypothetical circumstances, the Commission is unable to provide guidance on Question 8 at this time because any answer must consider an identifiable business activity in order for the bounds of regulatory jurisdiction to be determined.

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