



November 4, 2008

ADVISORY OPINION 08-04, PART I¹

Whether Tenn. Code Ann. § 3-6-305(a)(2), places restrictions on various fundraising activities of a professional association whose membership includes state officials, or upon the participation of those state officials in such activities.

INTRODUCTION

The following Advisory Opinion (“Opinion”) is in partial response to a written request from Mr. Gerry Boaz, Immediate Past President and Chapter Executive Committee member of the Association of Government Accountants (“AGA”). The request asks a series of questions on whether the Comprehensive Governmental Ethics Reform Act of 2006² (the “Act”) prohibits the AGA or “state employees” who belong to the AGA from engaging in certain activities related to fundraising. The request asks these questions in terms of “state employees,” but the prohibitions in the Act do not apply to all state employees.³ For purposes of answering the request, the Tennessee Ethics Commission (“Commission”) assumes that the state employees being referred to come within the Act’s definition of “official in the executive branch” or “official in the legislative branch” (“Officials”). The Act applies only to state employees who fall within either of these definitions.⁴

The request also asks whether the Act prohibits Officials from soliciting, on behalf of AGA, contributions or purchases from “local businesses.” The prohibitions of the Act do not apply to all businesses, but only to businesses that fall within the Act’s definition of an “employer of a lobbyist” (“Employer”).⁵ Thus this opinion will only address solicitation of businesses that are Employers.

¹ A previous staff draft of an opinion responding to this request was numbered 07-08. Since no opinion was issued until 2008, the number has been changed. There will be no Advisory Opinion 07-08.

² 2006 Tenn. Pub. Acts (1st Extr. Session) ch. 1.

³ Executive branch officials include not only the governor and governor’s staff, but also “any member or employee of any executive department or agency or other state body in the executive branch.” Tenn. Code Ann. § 3-6-301(19). Legislative branch officials include not only members of the general assembly, but also any member-elect, any staff person or employee of the general assembly or any member of a commission established by and responsible to the general assembly or either house, as well as employees of the secretary of state, treasurer, and comptroller and any employee of these officials. Tenn. Code Ann. § 3-6-301(20).

⁴ Thus, for example, the Act’s restrictions do not apply to state employees in the judicial branch.

⁵ The Act’s limitations on providing gifts to Officials apply only to “lobbyists” and “employers of lobbyists” as defined under the Act. Tenn. Code Ann. § 3-6-305(a)(1). Thus the Act does not restrict provision of gifts by businesses that do not come within these definitions.

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The issues raised by the request have been the subject of vigorous debate, and the Commission has given them careful consideration. The previously issued Part II⁶ answers questions 6a and 9b.⁷ Those two (2) questions ask whether the Act prohibits Officials from soliciting Employers to make contributions for the benefit of the AGA.⁸ In Part II, the Commission opined that even if it is assumed that the Act's general gift ban prohibits such solicitations, the Act provides an exception to the ban, which would allow solicitations of contributions made for the purpose of supporting the AGA conferences described in the request. With the issuance of this Opinion, the Commission addresses all questions other than 6a and 9b.

QUESTIONS

The request poses the following questions:

1. Does the Act prohibit the AGA from forming a Corporate Sponsorship Committee to solicit contributions from Employers to sponsor an AGA event for the benefit of all AGA members attending the event?
2. a. Does the Act prohibit the AGA from soliciting Employers to purchase services offered by the AGA, such as advertising in the AGA newsletter, on the AGA website, at an educational event, or in brochures?

b. Does the Act prohibit an Employer that contributes to AGA from restricting the use of funds to specific purposes such as an educational event which the Employer wants to sponsor?
3. Does the Act place limits on the use of Employer contributions? For example, does the Act prohibit the AGA from using Employer contributions to provide items for a silent auction, where donations are earmarked for general revenue, to provide scholarships, or to make contributions to a charity or other organization operating pursuant to Section 501(c)(3) of the United States Internal Revenue Code?
4. Is it appropriate for Officials to use state email accounts when acting in the dual role as a board member or committee member of the organization and fundraising?
5. a. Does the Act limit the amount of money that can be solicited from an Employer?

⁶ Although the issues in Part I of this opinion were decided before the issues considered in Part II, the written opinion for Part II was completed earlier.

⁷ A number of Mr. Boaz's nine questions, as submitted, actually contained separate questions or sub-questions. Although this opinion retains the numbering that Mr. Boaz used in his request, the questions are divided into sub-questions for clarity.

⁸ The Commission, unlike other boards and commissions, has no general authority to take action on a majority vote at a meeting at which a quorum, but fewer than all Commissioners, are present. Most actions of the Commission, including issuance of advisory opinions, require affirmative votes from four of the six Commissioners. Tenn. Code Ann. § 3-6-103(f) ("Except as provided in § 3-6-201, four (4) affirmative votes are required for any commission action.").

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- b. Does the Act limit the value of nominal gifts that can be provided by an Employer to the AGA for use in "goody" bags to be given away to conference attendees or use in a silent auction?
6. a. Does the Act prohibit Officials from soliciting contributions on behalf of the AGA from Employers?
- b. If the Act prohibits Officials from soliciting such contributions, does the Act likewise prohibit Officials who belong to the AGA Chapter Executive Committee from overseeing such solicitations?
7. a. Does the Act prohibit Officials who have solicited donations for the AGA sponsored conference from participating in the conference?
- b. Does the permissibility of Officials' participation in the AGA sponsored conference depend on whether the event is in-state or out-of-state, or whether Officials who solicited donations attend the event?
8. a. Do the restrictions which the Act imposes on Officials apply during off-duty hours as well as on-duty hours?
- b. Do the restrictions which the Act imposes apply when all members of the AGA, not just state Officials, benefit from the contributions?
9. a. Does the Act prohibit Officials from serving as AGA Chapter Executive Committee members when AGA members who are not Officials solicit Employers for contributions to support AGA events?
- b. Does the Act prohibit Officials, while serving in their capacities as AGA Chapter Executive Committee members, from soliciting contributions from Employers?

ANSWERS

For the reasons discussed below, the Commission answers the above questions as follows:

1. No. The Act does not prohibit the AGA from forming a Corporate Sponsorship Committee to solicit contributions from Employers to sponsor an AGA event open to all members.
2. a. No. The Act does not prohibit the AGA from soliciting Employers to purchase services from the AGA, such as advertising in the AGA newsletter, on the AGA website, at an educational event, or in brochures.
- b. No. The Act does not prohibit an Employer that contributes from restricting the use of contributions to specific purposes.

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3. No. The Act does not state how contributions may be used. The Act does not prohibit the AGA from using corporate contributions, including contributions from Employers, to hold a silent auction, to provide scholarships, or to make contributions to a charity or other organization operating pursuant to Section 501(c)(3) of the United States Internal Revenue Code. The AGA should consult the requirements of other applicable law, including state and federal tax law, as regards charitable contributions.
4. The appropriateness of the use of state e-mail accounts to solicit contributions on behalf of the AGA is not within the Commission's jurisdiction.
5. a. No. The Act does not limit the amount of money that can be solicited from an Employer.

b. No. The Act does not limit the value of nominal gifts that can be provided by an Employer to the AGA for the purpose of making goody bags to be given away to conference attendees, or holding a silent auction.
6. a. The Act does not prohibit such solicitations when made for the purpose of supporting the AGA conference described in the request. In Part II of this Opinion, the Commission decided that even if it is assumed that the general gift ban does apply to such solicitations, the Act provides a specific exception allowing Officials to solicit gifts made in connection with such conferences. Tenn. Code Ann. § 3-6-305(b)(7)(B). Neither part of this Opinion addresses the question whether the Act prohibits such solicitation for purposes of supporting other AGA events.

b. No. Even if it is assumed that the Act prohibits Official solicitation of contributions from Employers for purposes other than supporting AGA conferences described in the request, the Act does not prohibit Officials from being in a supervisory position over persons who solicit such contributions.
7. a. No. The Act does not prohibit Officials from participating in the AGA-sponsored conference after soliciting contributions from Employers for the conference

b. No. The Act does not prohibit Officials from participating in the AGA sponsored conference regardless of whether the conference is in-state or out-of-state, or whether those Officials have solicited contributions in support of the conference.
8. a. Yes. Any restrictions on solicitation of Employers by Officials that may apply in a given situation would apply to the Officials during their off-duty hours as well as on-duty hours.

b. Yes. If restrictions on solicitation of Employers by Officials apply in a given situation, it makes no difference whether all members of the AGA, including members who are not Officials, benefit from the contributions. As to the AGA conference, the Act does not prohibit Officials from participating on the same basis as any other member.

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9. a. No. Even if the Act would prohibit solicitation of Employers by Officials for a given event, the Act would not prohibit Officials from serving as members of the AGA Chapter Executive Committee when other AGA members who are not Officials solicit such contributions.
- b. The answer to the question whether the Act prohibits Officials from soliciting contributions from Employers to support AGA events does not depend on whether the soliciting Officials are serving as members of the Chapter Executive Committee. The answer is determined by the factors discussed in the answer to question 6a.

FACTS

The AGA is a national professional organization which promotes government accountability, provides education, fosters professional development and certification, and supports standards and research to advance government accountability. Its membership is comprised of government accountability professionals such as auditors, accountants, budget analysts, chief financial officers, information systems managers, finance directors, inspectors general, professors and students. Officials have received permission from their respective agencies to serve as Chapter Executive Committee members.

Most AGA chapters have fundraising activities. In 2006, the AGA solicited funds from private businesses to sponsor the Southeastern Professional Development Conference, a regional event. The AGA held another conference in January 2008, and plans to hold conferences in 2009. The AGA intends to solicit funds from businesses which have sold goods and services to the State of Tennessee. The AGA wants to start a Corporate Sponsorship Committee to solicit contributions from local businesses to benefit all members of the AGA. As a part of conference participation, attendees will be given a conference “goody bag.” The AGA would also like to conduct a silent auction.

ANALYSIS

**A. SOLICITATION OF CORPORATE SPONSORSHIPS BY OFFICIALS
(Questions 1, 3, 6b, 7, 8, and 9a)**

Questions 1 and 3 ask whether the Act generally restricts certain fundraising activities by a non-profit organization whose membership includes Officials. The Act does not regulate the activities of non-profit organizations. The Act regulates only the conduct of Officials, candidates, immediate family members of such officials or candidates, employers, and lobbyists. Thus, the Act does not prohibit the AGA from forming a Corporate Sponsorship Committee to solicit contributions from local businesses, including Employers, to sponsor an AGA event which is open to all members. The Act does not prohibit the AGA from using corporate contributions, including contributions from Employers, to provide items for a silent auction, to provide scholarships, to make donations to a charity or other organization operating pursuant to Section 501(c)(3) of the United States Internal Revenue Code, or for any other purpose. The Act does not prohibit Officials from serving on the AGA Chapter Executive Committee.

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Questions 6a and 9b ask whether the Act prohibits Officials from soliciting Employers for contributions to support AGA events. Since the only event described in the request is the AGA educational conference, the Commission has only addressed the permissibility of solicitation for contributions to support that event.⁹ The Commission held, in Part II of this Opinion, that even if the general gift ban of Tenn. Code Ann. § 3-6-305(a)¹⁰ applies to such solicitations, they are nonetheless allowed under a specific exception in the Act. Tenn. Code Ann. § 3-6-305(b)(7)(B).

The remaining parts of these questions (6b and 9a) ask whether, if such solicitation by Officials were prohibited, Officials would likewise be prohibited from serving as members of the AGA Chapter Executive Committee and supervising AGA members who are not Officials and who do solicit contributions from Employers. The Act does not prohibit Officials from belonging to a non-profit organization or serving as members of such an organization's board. The Act does not prohibit Officials from supervising others as AGA members, even when these others are soliciting contributions from Employers on behalf of the AGA.

Questions 7 and 8 ask under what circumstances the Act would prohibit Officials from attending an AGA sponsored conference supported by Employer contributions. The Act does not prohibit Officials who solicited Employer donations for the conference from participating in the conference. Nor does the Act limit such participation to in-state or out-of-state conference locations. Finally, the Official's duty status at the time of the solicitation, and the extent to which the conference benefits members who are not Officials, have no bearing on whether the Act prohibits the soliciting Official's participation in the conference. If the conference meets the requirements of the exception set forth in the Act, Officials may attend and participate in the conference regardless of whether the Officials would participate in soliciting Employers, whether the Officials would be on or off duty at the time of the solicitation, whether the conference would be held in state or out of state, and whether the conference would benefit members other than the soliciting Officials.

B. SALES OF AGA SERVICES TO CORPORATE SPONSORS (Question 2)

There is no restriction on the AGA's selling services to Employers for fair market value. If the AGA sells services to an Employer for fair market value, the payment received from the

⁹ The permissibility of Official solicitation of Employer contributions to support other kinds of events would depend on whether the general gift ban applied to such events, and, if so, whether any of the exceptions set out in Tenn. Code Ann. § 3-6-305(b) applied.

¹⁰ The general gift ban is found in Tenn. Code Ann. § 3-6-305(a), which provides:

- (1) No employer of a lobbyist or lobbyist may provide a gift, directly or indirectly, to a candidate for public office, official in the legislative branch, official in the executive branch, or immediate family of such candidate or official.
- (2) A candidate for public office, an official in the legislative branch, or an official in the executive branch, or the immediate family of such candidate or official, may not solicit or accept, directly or indirectly, a gift from an employer or a lobbyist or a lobbyist.

These provisions are followed by a series of specific exceptions which are set forth in subsections (1) through (12) of subparagraph (b) of the same section.

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Employer is not a “gift” under Tenn. Code Ann. § 3-6-301(11), and the gift restrictions of Tenn. Code Ann. § 3-6-305 do not apply. Therefore, an Official who serves on the Corporate Sponsorship Committee or the AGA’s Chapter Executive Committee may contact Employers in order to sell AGA services for fair market value.

C. USE OF STATE E-MAIL BY STATE OFFICIALS (Question 4)

The Commission can only answer questions about activities regulated by the Act. The Act contains no provisions regarding use of e-mail accounts. Therefore, questions regarding the allowable use of state e-mail accounts are not within the jurisdiction of the Commission.

D. VALUE LIMITS ON CONTRIBUTIONS OF MONEY OR TANGIBLE ITEMS TO THE AGA (Questions 5a, 5b)

The Act does not prescribe limitations on the amount of money that an Employer may contribute to a non-profit organization. Nor does the Act place any limit upon the value of tangible items that an Employer may contribute, including nominal gifts to be used for creating conference goody bags or for holding a silent auction.

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Adopted: May 27, 2008

Issued: November 4, 2008