# CODE OF ETHICS CLARIFICATION AND REFORM COMMISSION

# COMMISSION REPORT

***PURSUANT TO THE DIRECTIVES OF ACT NO. 2018-431, THE COMMISSION HAS MET AND REPORTS ITS ANALYSIS AS PROVIDED HEREIN.***

**MARCH 2019**

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# 1. INTRODUCTION & SCOPE

### Act 2018-431 – Purpose and General Information Regarding the Commission

The Code of Ethics Clarification and Reform Commission (hereinafter the "Commission") was created by Act 2018-431 (hereinafter, "the Act") of the Alabama Legislature. In establishing the Commission, the Legislature recognized that the current Code of Ethics was originally enacted more than 40 years ago and has been amended at least 25 times since that time, and that the piecemeal amendments combined with evolving interpretations of portions of the code have created confusion regarding the scope and application of numerous sections of the code. The Legislature further recognized in the Act that the Code of Ethics applies to more than 300,000 individuals and their families in our state, from statewide elected officials to local public servants such as teachers and firefighters, and that the public is best served by clearly articulated ethical standards and policies so that our state's public servants, and the general public, can better ensure that our government operates with confidence and integrity.

The Commission is an advisory commission only and was purposed to study and make recommendations to the Legislature regarding the Commission's perceived areas of needed reform and/or clarification to the state's Code of Ethics.

The membership of the Commission was established by the Act, which designated Alabama's Attorney General and the Executive Director of the Alabama Ethics Commission to serve as co-chairs of the Commission. The Commission members included the following (identified by his or her official position and/or by the group designating such individual to the Commission):

Attorney General – Steve Marshall (co-chair)

Executive Director, Ethics Commission – Tom Albritton (co-chair)

State Senator – Arthur Orr

State Senator – Greg Albritton

State Senator – Bobby Singleton

State Representative – David Faulkner

State Representative – Alan Baker

State Representative – Prince Chestnut

Legal Advisor to the Governor – Will Parker

Solicitor General – Andrew Brasher

Chief Examiner – Rachel Riddle

District Attorney – Brian McVeigh

Circuit Judge – Joseph Boohaker

Supernumerary District Attorney – Ellen Brooks

Alabama State Bar Designee – Michael Ermert

Alabama State Bar Designee – Christina Crow

Legislative Services Agency Designee – Bill Rose

Legislative Services Agency Designee – Deborah Long

Association of County Commissions of Alabama Designee – Sonny Brasfield

Alabama League of Municipalities Designee – Mayor Ronnie Marks

Alabama Council of Association Executives Designee – Tom Dart

Alabama Council of Association Executives Designee – Ted Hosp

Alabama Press Association Designee – Michael Marshall

## 2. ACTIVITIES OF THE COMMISSION

**Meetings of the Commission**:

The Commission met monthly beginning in May of 2018 for the remainder of the year, and then met again on January 31, 2019. In addition to these meetings of the full Commission, there were also several meetings of subcommittees that were held on numerous occasions. A full list of Commission meetings and subcommittee meetings is contained in Exhibit A of this Report. The meetings of the full Commission were devoted to, or open to, all aspects of the directives and purposes of the Commission, while the subcommittees were utilized to assist the full Commission by focusing on specific topics or aspects of the Code of Ethics and then reporting back their discussions and ideas to the full Commission.

Every meeting of the Commission or its subcommittees were open to the public and were posted on the Secretary of State's website, as well as the State Legislature's website.

The Commission's initial meetings provided opportunities and forums for any member of the public or the Commission to speak or raise any issue related to the Commission's tasks for consideration by the Commission. The Commission also used these initial meetings to provide the members with an overview of the major directives and purposes of the state's Code of Ethics as established both in Alabama's Constitution and in the provisions of the Ethics Code itself, as well as a review of the major points of emphasis in the Ethics Code. In these initial meetings, the Commission also conducted reviews of various ethics codes from across the country as well as national efforts to establish a "Model Ethics Code." The results of this review revealed that while all of the ethics codes from the states across the country prohibited the use of public office for personal gain and prohibited the conducting of official action in the face of conflicts of interest, the various codes of ethics varied greatly from state to state in the scope, method, and application of these major principles as they relate to contributions, gifts, or benefits of various personal or political occasions, to employment or sources of permissible compensation, or to activities or actions that give rise to impermissible conflicts of interest. The results of this review also showed that Alabama's Code of Ethics tracks the majority of other jurisdictions in the prohibitions against using public office for personal gain or conducting official actions in the face of conflicts of interest, and that it falls somewhere in the middle of the various jurisdictions' approaches to these matters in their scope, method, and application.

For example, it was clear from the research that the various jurisdictions employ a variety of standards regarding the extent to which public officials or public employees can (or should) receive or solicit gifts, contributions, benefits, or other things of value from those who seek to influence state government, such as principals, lobbyists, and vendors. In a very broad sense, the various approaches to this particular issue fall into one of three categories: jurisdictions that are very permissive in terms of what can be received or solicited, but that require stringent disclosure filings of all gifts or benefits over a certain de minimis amount; jurisdictions that prohibit any receiving or soliciting of gifts, benefits, or other favors from such prohibited persons or entities; and the remaining jurisdictions that fall somewhere in the middle. Alabama's Code of Ethics is one of the jurisdictions that falls in the middle, as do most jurisdictions and the federal system.

After receiving and reviewing the aforementioned research, studies, and overviews, as well as the feedback received from the members and from others who chose to voice their concerns or comments, the Commission dedicated the remainder of the Commission's meetings to review, discussion, and analysis of several key areas of the state's ethics code, which are discussed in more detail in the following sections of this report. As previously mentioned, subcommittees were also formed to help inform and drive the discussion and analysis of the full Commission's meetings.

At the final meeting of the Commission, a public hearing was held regarding the issue of whether site selectors, economic developers, and others involved in economic development including chamber of commerce staff and public officials,

should have to register as lobbyists under the ethics law if the activities being conducted are already considered lawful and approved economic development activities, and in light of the often confidential nature of the site selection process. Several spokespersons from various economic development groups spoke about the need to keep those categories separate and encouraged the reauthorization of Act No. 2018-541 (House Bill 317 from the 2018 Regular Session) which specified the exclusion of such economic development activity from the lobbying registration requirements. Exhibit B of this Report contains comments on this topic from various interested parties that were submitted to the Commission.

**Issues and Analysis**:

The Commission opted not to pursue a full scale re-write of the state's ethics laws, and there was no express desire, as a group, to do so. Instead, the Commission chose to take up areas of needed clarification or reform that were specifically identified by the members and to analyze such matters for a presentation of issues and options in this Report.

The Commission identified the following primary areas of concern or interest for the Commission's study and analysis:

- The giving and receiving of gifts, benefits, or other things of value between lobbyists and principals, and public officials and employees, including their family members.
- The definition and scope of who or what constitutes a "principal" under the Code of Ethics.
- The definition and scope of what constitutes a "conflict of interest" under the Code of Ethics.
- The scope and application of ethical prohibitions against employment with a new entity following a term of office or a former public employment position; otherwise known as "Revolving Door" prohibitions.
- Transparency and disclosure requirements for the Statement of Economic Interest Forms for public officials and employees.

The Commission analyzed the above-mentioned topics and has provided its feedback and analysis regarding such matters in the subsequent sections of this Report. Preferences of the co-chairs are noted throughout the Report. Individual comments are included in the various appendices to the Report.

The Commission recognized the important and crucial role that many public and private institutions, organizations, legislative bodies, and citizens play in helping to properly shape the best practices for Alabama's ethical standards for public officials and employees. Oftentimes what works best for the people or institutions of one jurisdiction may not work best for Alabama, and vice versa. The Commission further recognized that while playing an important role in offering advice and feedback to the Legislature, the efforts and information needed to maintain the best set of ethical standards that are both practical and effective must come from the collective wisdom gained by the Legislature from the feedback from all of these identified sources.

Thus, the Commission did not vote to adopt a sole or specific recommendation for statutory changes, especially if there were alternative or competing ideas presented, but instead determined to provide feedback to the Legislature concerning the details of the Commission's study and analysis regarding the various issues addressed, including any general consensus on matters discussed, if applicable.

## 3. GIFTS, BENEFITS, COMPENSATION, OR OTHER THINGS OF VALUE

**Introduction**:

Alabama's Code of Ethics currently prohibits both lobbyists and principals, as those terms are defined, from offering or providing a "thing of value" to public officials, employees, or their family members. In turn, public officials, employees, and their family members are prohibited from soliciting or receiving a "thing of value" from a lobbyist or principal. See §36-25-5.1, Code of Alabama (1975).

The term "Thing of Value" is defined under §36-25-1(34) as "[a]ny gift, benefit, favor, service, gratuity, tickets or passes to an entertainment, social or sporting event, unsecured loan, other than those loans and forbearances made in the ordinary course of business, reward, promise of future employment, or honoraria or other item of monetary value." Although the term "thing of value" is broadly defined, the definition has 18 listed exclusions, among them gifts from family or friends, campaign contributions, loans generally available to the public, and items of little intrinsic value. The provision of meals and other food and beverages is also among the listed exclusions, with certain qualifications and exceptions made for food and beverages of relatively small value. For example, lobbyists and principals can provide meals to public officials or employees at "widely attended events" and "educational functions," but otherwise can only provide food and beverages to public officials or employees up to $25 per day and $150 annually per person for lobbyists, and $50 per day and $250 annually per person for principals.

The Commission began using the term "Gift Ban" to collectively refer to the Ethics Code's statutory prohibitions surrounding the giving and receiving of things of value between lobbyists, principals, and public servants.

**Issues and Concerns with Current Gift Ban Laws**:

Gift ban prohibitions – scope and complexity:

The "Gift Ban" Subcommittee recognized the rise in recent years of concerns regarding the complexity of the current scope and application of the gift ban, given the broad definitional language and the subsequent list of 18 exclusions from that definition – the language of which can be vague and ambiguous under certain circumstances. The subcommittee also recognized that part of these concerns were related to the definition of "Principal" and its potentially broad scope.

The subcommittee looked at how other states treat the giving and receiving of gifts or other things of value between public servants and lobbyists, principals, or other entities with significant public-sector interests. It was clear from the research that various jurisdictions employ a variety of standards regarding the extent to which public officials or public employees can (or should) receive or solicit gifts, contributions, benefits, or other things of value from those who seek to influence state government, such as principals, lobbyists, and vendors. Not only did the proscribed standards vary from state to state, but so did the scope of who or what came under the scope of those standards. In broad and generalized categories, some states have a zero tolerance policy regarding the giving and receiving of gifts or things of value between public servants and other non-public interested parties (sometimes referred to colloquially as a "no cup of coffee" rule), while other states provide very few restrictions on such giving and receiving of gifts and things of value as long as any such items that are over a certain de minimis amount are fully disclosed and do not involve a quid pro quo (i.e., a corrupt exchange of official action in return for receipt of a personal gain or benefit). The remainder of the jurisdictions fall somewhere in the middle of those two categories. Alabama is one of the jurisdictions that falls in the middle of these two categories, as do most jurisdictions and the federal system.

The consensus of the subcommittee was to pursue recommendations that would continue Alabama's middle-ground approach to its gift ban laws in the Ethics Code, and to propose statutory modifications that would hopefully clarify the restrictions and the circumstances under which they apply – especially with regard to the provisions addressing food, beverage, travel, and entertainment.

Statutory modifications were drafted by the subcommittee that were designed to 1) streamline and consolidate the "thing of value" exclusions from the definitions section and insert the terms directly into the gift ban provision itself; 2) provide a separate subsection addressing food and beverages provided at receptions and other events of mutual interest where all members of a legislative body, caucus, or committee are invited; and 3) provide some guidance on when a public official or public employee may receive compensation for outside employment without running afoul of the gift ban.

Penalties for "gift ban" violations:

Another point of discussion by both the subcommittee and the full Commission was the inclusion of a penalties provision specifically within the gift ban section. Under the current law, there is no distinction between violations for an actual use of public office for personal gain (i.e., actual corrupt activity) and violations of the gift ban laws which are designed to discourage areas of potential corruption. For example, under §36-25-27, if a person were convicted of violating the current gift ban by providing a public official with a meal that ended up being $1 more than the allotted meal allowance for the occasion or for the year, then the only two punishment options under the code is a Class B Felony or a Class A Misdemeanor. The co-chairs recognized that this has inevitably led to a watering down of the prohibitions of this section. The consensus of the subcommittee and the full Commission was to recommend including within the gift ban its own set of penalties for violations that included a graduated punishment scale which provided for different levels of penalties depending on the seriousness of the violation, but which maintained the severe Class B Felony punishment for intentional violations of the laws. The co-chairs expressed a desire to ensure that all provisions of the law are enforced and are enforced consistently.

## Proposed and/or Suggested Statutory Modifications

Based on the issues and concerns discussed by the subcommittee and the full Commission, the subcommittee (led by the Ethics Commission Staff and Attorney General's Office) drafted proposed statutory modifications to the gift ban provisions of Alabama's Code of Ethics, including a proposed section regarding penalties for violations of the gift ban laws. The subcommittee presented the proposed statutory recommendations, along with a report of its study and review of the gift ban laws, to the full Commission for its consideration thereof. The full Commission then undertook significant analysis and discussion regarding the issues and concerns related to the gift ban laws and the subcommittee's statutory recommendations regarding the same. During these discussions, the potential need for additional clarity regarding what constitutes an "intentional" violation of the laws was raised and analyzed by the members of the Commission.[1] In light of these discussions, the Commission proposed and considered six additional statutory modifications that added or

[1] For instance, does a person "intentionally" violate the statute if the person intended to give another person a gift or some other thing of value, but either did not know that the gift was prohibited, or that the recipient was a public servant, or that the person himself or herself is considered a "principal" or part of some other restricted class under the ethics code? Or, should it be a prerequisite that the person knew or should have known that some or all of those facts existed at the time the gift was exchanged

potentially added certain qualifications and descriptions for what would give rise to "intentional" violations of the gift ban laws. Many of these alternatives were drafted based on current criminal code sections wherein knowledge was an element of the crime.

Upon completion of the Commission's review and discussion of the gift ban laws, the consensus of the Commission was to include both the subcommittee's proposed statutory modifications in the Commission's Report to the Alabama Legislature, as well as several alternative proposals that were considered by the members to address the issue of proving violations of the gift ban laws. A summary and description of each is included below.

Summary of the proposed statutory modifications to Alabama's current gift ban laws:

- This proposal would replace the "thing of value" definition currently under §36-25-1(34), along with its list of 18 exclusions, as well as the current statutory prohibitions regarding "things of value" under §36-25-5.1, and create an entirely new consolidated gift ban statute with fewer exceptions.

- The proposal prohibits lobbyists and principals from providing "anything" to public officials or employees, or their families, unless a specific exclusion applies to the circumstances. Public officials or employees are also prohibited from receiving anything from such persons or entities unless the same exclusions apply.

- The proposal narrows the list of 18 exclusions currently provided under §36-25-1(34) to 9 consolidated categories.

- The proposal would prohibit public officials and public employees, including their family members, from soliciting anything (no exclusions apply) from any person who is a lobbyist or a principal, except for a campaign contribution.

- The proposal would limit the provision of food and beverages provided by principals and lobbyists to public officials, employees, and their families to the following: 1) food and beverages falling within the definition of "de minimis;" 2) occasions or events, such as dinners, receptions, or educational functions where more than 12 individuals are expected to attend and a diversity of views or interests will be present; or 3) occasions or events where all members of a legislative body, caucus, or committee are invited.

- Regarding employment or compensation outside the public service of officials and public employees, the proposal would establish the permissibility of bona fide business relationships developed prior to public service as long as it is unrelated to the recipient's official position and does not present an irreconcilable conflict of interest, but would require additional qualifications and circumstances to be met if such business relationship was established following the entry into public service.

- The proposal would limit the application of the gift ban restrictions to only those public servants, principals, and lobbyists who are operating or have interests within or before the same governmental body.

- The proposal would establish specific penalties for violations of the gift ban laws. These penalties would maintain the Class B felony punishment for intentional violations of the statute. However, certain unintentional offenses would be subject to civil fines for a first or second offense, respectively, imposed by the Ethics Commission, with a third or more offense constituting a Class A misdemeanor.

- Finally, the proposal includes six alternative statutory modifications that would provide additional clarity as to what circumstances constitute an "intentional" violation of the gift ban laws. All six versions incorporate one or more of

the following three elements, sometimes in differing combinations. Element 1: the person at issue knew or should have known that he or she was covered by the provisions of the gift ban laws (such as a lobbyist, subordinate of a lobbyist, principal, public official, or public employee e c ). Element 2: the person knew or should have known that the gift or benefit he or she provided to another or received from another was prohibited by the gift ban laws (such as a meal that did not fall under one of the permissible categories). Element 3: the person knew or should have known that the person he or she provided the gift or benefit to, or received the gift or benefit from, was an individual covered by the gift ban laws (such as a lobbyist, subordinate of a lobbyist, principal, public official, or public employee, etc.).

As noted below, the Commission co-chairs recommended, instead, that language from the Alabama Criminal Code, found in §13A-2-4(a), be added to the Ethics Act to clarify the intent required for elements of criminal ethics violations.

Proposed statutory modifications:

**Proposed New Section 36-25-XX – Giving and Receiving**.

(a) No lobbyist, subordinate of a lobbyist, or principal shall offer or provide anything to a public official, public employee, or member of the household of a public official or public employee, subject to the following exceptions:

(1) Lawful campaign contributions.

(2) Financial or business transactions made in the ordinary course of business on terms generally available to similarly situated members of the public.

(3) Food and beverages provided in settings permitted by (d).

(4) Payment of or reimbursement for actual and necessary registration and travel expenses, including reasonable food and lodging expenses, incurred by attendance at an educational function of which the lobbyist or principal is a sponsor.[2]

(5) Anything of de minimis value, other than meals and other food and beverages as provided under subsection (d).[3]

(6) Anything offered or provided as the result of a familial relationship.

(7) Anything offered or provided as a result of a friendship, so long as the lobbyist or principal has no direct or specific interest before the recipient and the gift was not paid for or directed to be given by anyone other than the provider. This exception does not include business or professional dealings of any kind.

[2] It is also recommended that the existing definition of "educational function" under §36-25-1(13) be amended to remove the phrase "held within the State of Alabama."

[3] It is also recommended that the existing definition of "de minimis" under §36-25-1(11) be revised to read as follows: "Anything having a value of $25 or less per occasion and an aggregate of $50 or less in a calendar year from any single provider or having no intrinsic value."

Relevant factors in determining whether this exception applies include whether the friendship preexisted the recipient's status as a public official, public employee, or member of the household of a public official or employee, and whether gifts have been previously exchanged between the provider and recipient.

(8) Compensation or business relationships permitted by subsections (e) or (f) of this section.

(9) Anything either paid for by a governmental entity or provided by an association or organization to which the state or a local government pays dues.

(b) No public employee, public official, or member of the household of a public official or public employee shall solicit anything, other than lawful campaign contributions, from a lobbyist, a subordinate of a lobbyist, or a natural person who is a principal.

(c) No public official, public employee, or a member of the household of a public official or public employee shall receive anything from a lobbyist, a subordinate of a lobbyist, or a principal, subject to the following exceptions:

(1) Lawful campaign contributions.

(2) Financial or business transactions made in the ordinary course of business on terms generally available to similarly situated members of the public.

(3) Food and beverages provided in settings permitted by subsection (d) of this section.

(4) Payment of or reimbursement for actual and necessary registration and travel expenses, including reasonable food and lodging expenses, incurred by attendance at an educational function of which the lobbyist or principal is a sponsor.

(5) Anything of de minimis value, other than meals and other food and beverages as provided under subsection (d).

(6) Anything offered or provided as the result of a familial relationship.

(7) Anything offered or provided as a result of a friendship, so long as the lobbyist or principal has no direct or specific interest before the recipient and the gift was not paid for or directed to be given by anyone other than the provider. This exception does not include business or professional dealings of any kind. Relevant factors in determining whether this exception applies include whether the friendship preexisted the recipient's status as a public official, public employee, or member of the household of a public official or employee, and whether gifts have been previously exchanged between the provider and recipient.

(8) Compensation or business relationships permitted by subsections (e) or (f) of this section.

(9) Anything either paid for by a governmental entity or provided by an association or organization to which the state or a local government pays dues.

(d) Food and beverages may be provided by a lobbyist, subordinate of a lobbyist, or principal and received by a public official, public employee, or member of the household of the public official or public employee in the following settings and under the following conditions:

(1) At a gathering, dinner, reception, or other event of mutual interest to a number of parties at which it is reasonably expected that more than 12 individuals will attend and that individuals with a diversity of views or interests will be present.

(2) At an event where all members of a legislative body, legislative caucus registered under Chapter 5 of Title 17, or legislative committee are invited.

(3) At a setting other than those identified in (1) and (2) wherein the meal or other food or beverages provided to the public official, public employee, or member of the household of the public official or employee does not exceed a total of $25 per occasion, and an aggregate of $150 per calendar year.

(e) A public official or public employee may maintain and receive compensation from bona fide business relationships established prior to his or her public service or qualification for office, so long as the compensation meets the following criteria:

(1) It is unrelated to the recipient's official position.

(2) It does not present an irreconcilable conflict of interest or is not otherwise prohibited by law.

(f) A public official or public employee may establish and receive compensation from a bona fide business relationship established following his or her entry into public service or qualification for office, so long as the compensation is unrelated to the recipient's official position, does not present an irreconcilable conflict of interest or is not otherwise prohibited by law, and none of the following circumstances are present:

(1) The employment or partnership is with any individual or business with direct or specific interests before the public official or public employee in his or her official capacity.

(2) The recipient is not reasonably qualified to perform the services.

(3) The compensation is substantially different than that customarily earned by a private citizen for the same services.

(4) The services are for fundraising of any kind or character and the compensation or other benefits include a commission, bonus, or other incentive based in whole or in part on the amount of funds raised by the recipient.

(g) The prohibitions in subsections (a), (b), and (c) of this section do not apply if both the following qualifications are met:

(1) The public official or public employee serves a level of government that is not identified by the lobbyist or principal on a properly filed registration form under Section 36-25-18 of the Code of Alabama (1975).

(2) The lobbyist or principal has accurately identified the level of government on the registration form.

(h) In addition to restitution, violations of this section shall be penalized as follows:[4]

(1) An individual subject to this section who knowingly, recklessly, or with criminal negligence[5] violates any provision of this section shall be fined by the Alabama Ethics Commission in an amount no less than $X for a first offense.

(2) An individual subject to this section who knowingly, recklessly, or with criminal negligence violates any provision of this section shall be fined by the Alabama Ethics Commission in an amount no less than $X for a second offense.

(3) When it is shown that an individual subject to this section has knowingly, recklessly, or with criminal negligence violated this section on more than two occasions, upon conviction, he or she shall be guilty of a Class A misdemeanor. For purposes of this subdivision:

a. Violations committed before the effective date of this act are to be considered in determining whether an individual has violated this section on more than two occasions.

b. Violations occurring in a single transaction may not be treated as separate violations.

c. The previous imposition of a fine is not required to establish that a violation has occurred on more than two occasions.

(4) An individual who intentionally violates any provision of this section shall be guilty, upon conviction, of a Class B felony.

It is the opinion of the co-chairs that the Alabama Criminal Code adequately addresses the culpable mental state required for each element of a crime. Thus, the chairmen recommend simply adding the language of §13A-2-4(a) into the Ethics Code.

**ALTERNATIVE 1** to subsection (h)(4):[6]

(h)(4) Upon a showing of all of the following, a lobbyist or principal who violates this section shall be guilty, upon conviction, of a Class B felony:

[4] The monetary penalties provided for in this section would need to be reconciled with the Ethics Commission's existing authority to resolve minor violations.

[5] Intentionally, knowingly, recklessly, and criminal negligence are defined in §13A-2-2.

[6] All of the following alternatives are based on a combination of two or more of the following elements. Element 1: the person at issue knew or should have known that he or she was covered by the provisions of the gift ban laws. Element 2: the person knew or should have known that the gift or benefit he or she provided to another or received from another was prohibited by the gift ban laws. Element 3: the person knew or should have known that the person he or she provided the gift or benefit to, or received the gift or benefit from, was an individual covered by the gift ban laws.

a. The lobbyist, subordinate of a lobbyist, or principal knew or should reasonably have known that he or she was a lobbyist or principal.

b. The lobbyist, subordinate of a lobbyist, or principal knew or reasonably should have known that the person to whom he or she was offering or providing the thing was a public official or public employee.

c. The lobbyist, subordinate of a lobbyist, or principal knew or reasonably should have known that the thing offered or provided was not permitted under the exceptions set forth in subsection (a).

(5) Upon a showing of all of the following, a public official or public employee who violates this section shall be guilty, upon conviction, of a Class B felony:

a. The public employee or public official knew or reasonably should have known that he or she was a public official or public employee.

b. The public employee or public official knew or reasonably should have known that the person from whom he or she was soliciting or receiving the thing was a lobbyist, subordinate of a lobbyist, or principal.

c. The public employee or public official knew or reasonably should have known that the thing solicited or received was not permitted under subsections (b) or (c).

**ALTERNATIVE 2** to subsection (h)(4):

(h)(4) Upon a showing of all of the following, a lobbyist or principal who violates this section shall be guilty, upon conviction, of a Class B felony:

a. The lobbyist, subordinate of a lobbyist, or principal knew or should reasonably have known that he or she was a lobbyist or principal.

b. The lobbyist, subordinate of a lobbyist, or principal knew or reasonably should have known that the person to whom he or she was offering or providing the thing was a public official or public employee.

(5) Upon a showing of all of the following, a public official or public employee who violates this section shall be guilty, upon conviction, of a Class B felony:

a. The public employee or public official knew or reasonably should have known that he or she was a public official or public employee.

b. The public employee or public official knew or reasonably should have known that the thing solicited or received was not permitted under subsections (b) or (c).

Note: Element 2 is not spelled out in this version.

**ALTERNATIVE 3** to subsection (h)(4):

(h)(4) An individual who knows or should have known that he or she is a lobbyist, subordinate of a lobbyist, or principal and who intentionally offers or provides anything in violation of subsection (a) to a recipient whom the

individual knows or should have known is a public official, public employee, or a household member of a public official or employee, upon conviction, shall be guilty of a Class B felony.

(5) An individual who knows or should have known that he or she is a public official or public employee and who intentionally solicits or receives anything in violation of subsections (b) or (c) from a provider whom the individual knows or should have known is a lobbyist, subordinate of a lobbyist, or principal, upon conviction, shall be guilty of a Class B felony.

Note: Element 2 is not listed in this version.

**ALTERNATIVE 4** to subsection (h)(4):

(h)(4) A lobbyist, subordinate of a lobbyist, or principal who intentionally offers or provides anything which the lobbyist, subordinate, or principal knows or should have known is prohibited under subsection (a) to a recipient whom the lobbyist, subordinate, or principal knows or reasonably should have known is a public official, public employee, or a household member of a public official or employee, upon conviction, shall be guilty of a Class B felony.

(5) A public official or public employee who intentionally solicits or receives anything which the public official or public employee knows or should have known is prohibited under subsection (b) or (c) from a provider whom the public official or public employee knows or should have known is a lobbyist, subordinate of a lobbyist, or principal, upon conviction, shall be guilty of a Class B felony.

Note: Element 1 is not listed in this version.

**ALTERNATIVE 5** to subsection (h)(4):

(4) a. An individual who intentionally violates this section, upon conviction, shall be guilty of a Class B felony.

b. In a prosecution for intentional violations of subsection (a), it is an affirmative and complete defense to the prosecution if the defendant shows that he or she did not know nor reasonably should have known any of the following:

1. That he or she was a lobbyist, subordinate of a lobbyist, or principal.

2. That the thing offered or provided was prohibited under subsection (a).

3. That the recipient was a public official, public employee, or member of the household of the public official or public employee.

c. In a prosecution for intentional violations of subsections (b) or (c), it is an affirmative and complete defense to the prosecution if the defendant shows that he or she did not know nor reasonably should have known any of the following:

1. That he or she was a public official or public employee.

2. That the thing offered or provided was prohibited under subsections (b) or (c).

3. That the provider was a lobbyist, subordinate of a lobbyist, or principal.

**ALTERNATIVE 6** to subsection (h)(4):

(h)(4) a. An individual who intentionally violates this section, upon conviction, shall be guilty of a Class B felony.

b. A lobbyist, subordinate of a lobbyist, or principal has not intentionally violated this section if he or she did not know nor reasonably should have known that he or she offered a thing that is prohibited under subsection (a) or he or she did not know nor reasonably should have known that the recipient was a public official or public employee. The burden of injecting the issue of defense under this paragraph is on the defendant, but this does not shift the burden of proof.

c. A public official or public employee has not intentionally violated this section if he or she did not know nor reasonably should have known that he or she solicited or received a thing that is prohibited under subsections (b) or (c) or he or she did not know nor reasonably should have known that the provider was a lobbyist, subordinate of a lobbyist, or principal. The burden of injecting the issue of defense under this paragraph is on the defendant, but this does not shift the burden of proof.

Note: Element 1 is not listed in this version.

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# 4. DEFINITION AND SCOPE OF "PRINCIPAL"

## Introduction

Alabama's Code of Ethics currently prohibits both lobbyists and principals, as those terms are defined, from offering or providing a "thing of value" to public officials, employees, or their family members. In turn, public officials, employees, and their family members are also prohibited from soliciting or receiving a "thing of value" from a lobbyist or principal. See §36-25-5.1, Code of Alabama (1975). While there are additional restrictions and ethical parameters that apply to the permissible activities of "lobbyists," the only restriction applicable to "principals" is the exchanging of a "thing of value" with public officials, employees, or their families. As such, issues regarding what constitutes or should constitute a "principal" and what constitutes or should constitute a "thing of value" are often discussed together, as both terms impact one another considerably in terms of the application of the Code of Ethics, or lack thereof, to a given circumstance.

The term "Principal" is defined under §36-25-1(24) as "[a] person or business which employs, hires, or otherwise retains a lobbyist." The term "Thing of Value" is defined under §36-25-1(34) as "[a]ny gift, benefit, favor, service, gratuity, tickets or passes to an entertainment, social or sporting event, unsecured loan, other than those loans and forbearances made in the ordinary course of business, reward, promise of future employment, or honoraria or other item of monetary value." Although the term "thing of value" is broadly defined, the definition has 18 listed exclusions, among them gifts from family or friends, campaign contributions, loans generally available to the public, and items of little intrinsic value. The provision of meals and other food and beverages is also among the listed exclusions, with certain qualifications and exceptions made for food and beverages of relatively small value. For example, principals can provide meals to public officials or employees at "widely attended events" and "educational functions," but otherwise can only provide food and beverages to public officials or employees up to $50 per occasion and not more than $250 per year.

## Issues and Concerns with Current Definition of "Principal" Under the Ethics Code

The Commission's "Principal" subcommittee conducted a thorough review and analysis regarding the statutory definition of a "principal" under the ethics code, and there was considerable discussion at both the subcommittee level and before the full Commission regarding the purpose, scope, and application of the ethics laws to a "principal" and what persons, entities, or groups are considered principals under the current statutory language or should be considered principals under the ethics laws.

Both the subcommittee and the full Commission recognized that the purpose of including "principals" within the ethics restrictions is to protect against actual or perceived undue influence or corruption of public officials and employees by those who are seeking to influence or gain other individualized benefits from governmental actions or decisions. The law is intended to help prevent those who want to unduly influence public action from using a paid lobbyist as a shield to hide behind in regard to any specific requests for governmental action, while personally or collectively (as a group or a business) being free to directly influence public officials or employees through substantial gifts or other benefits that would or could create conflicts of interest or a biased perspective on behalf of the public officials or employees.

The subcommittee and the full Commission also recognized that recent court cases, legal proceedings, and other various governmental opinions on who or what is considered a "principal" under the ethics code have revealed the complexities or lack of clarity that the current statutory language presents under various circumstances or potential applications. Under some interpretations of the definition, the scope could be extremely limited in application, under other interpretations of the definition, the scope could be extremely broad in application. In generalized terms, those who expressed concerns

regarding the limited or narrow interpretation focused on the potential avenue such a narrow focus provides for individual bad actors to hide behind a corporate shield, while those who expressed concerns regarding the broad application focused on the potential for many individuals to unknowingly be caught up in the definition of "principal" who are otherwise simply carrying on relationships and related activities in a manner that is normal for them and without any intent to violate the ethics laws.

The difficulty faced by the subcommittee and the full Commission was wrestling with the proper balance between maintaining strong inhibitors to backdoor corruption or undue influence, and trying not to overreach by imposing unnecessary and burdensome restrictions on the daily lives of public servants that do not actually reduce the potential for corruption or undue influence by any significant measure, but rather act only as a strong deterrent to public service from otherwise highly qualified officials and employees. Concern was also expressed about infringing on the constitutional rights to free speech and to petition for redress of grievances in a manner more restrictive than necessary to achieve legitimate government objectives under Section 1 of the U.S. Constitution and Section 25 of the Alabama Constitution.. The subcommittee and full Commission further recognized the challenge presented in trying to establish an all-encompassing definitional standard when the type of undue influence sought to be prevented by the "principal" restrictions is highly subjective and could change in relative importance or significance depending on the circumstances of each particular case. This is especially true given the complexities of the modern world of business and economic activity, as well as the close connectivity of people due to the surge in technological and other advances in recent history. Nevertheless, the consensus of the Commission was to make recommendations that continued the inclusion of both lobbyists and principals within the provisions of the ethics code, but that updated the language so as to provide more clarity and to strike a better balance between its purpose and intent, and the potential for unnecessary overreach.

## Proposed and/or Suggested Statutory Modifications

In light of the issues and concerns raised by the subcommittee, and after the full Commission undertook considerable discussion and analysis on the numerous points of consideration and suggested statutory modifications, the Commission ultimately determined to present two alternate proposals for inclusion in this Report. While some members of the Commission favored one approach over the other, or neither, both versions provide updated language that, in the opinion of the Commission, adds clarity and refines scope. Thus, the Commission approved the inclusion of both of these two proposed statutory modifications in the Commission's Report to the Alabama Legislature.

Summary of the proposed statutory modifications to the definition of "Principal" under Version 1:

- This proposal replaces the current definition under §36-25-1(24) with a newly structured definition.
- The proposal would maintain the inclusion of individuals and businesses that hire or employ a lobbyist, and would add the inclusion of any individual who possesses significant or substantial authority to direct or command the activities of a lobbyist either on his or her own behalf or on behalf of a business connected to the individual through ownership, control, or compensation to the individual or his or her family.
- The proposal clarifies that the authority an individual possesses to act as a principal on behalf of another entity may be expressly granted to the individual by the entity or demonstrated through actions or conduct.

- The proposal excludes members of associations that hire lobbyists unless the member otherwise meets the criteria of the definition individually, and also expresses that an employee of a principal does not become a principal by merely offering subject matter expertise to the principal's lobbyist.

Proposed statutory modification for Version 1 (submitted and supported by the co-chairs):

**Section 36-25-1(24), Code of Alabama (1975), as amended**.

(24) PRINCIPAL. ~~A person or business which employs, hires, or otherwise retains a lobbyist. A principal is not a lobbyist but is not allowed to give a thing of value.~~

a. The term includes:

1. An individual that employs, hires, or otherwise retains a lobbyist.

2. A business that employs, hires, or otherwise retains a lobbyist.

3. An individual who independently has the authority to fire or direct a lobbyist either on his or her behalf or on behalf of a business with which the individual is associated, including a business for which the individual performs compensated work in any capacity or a business on whose board of directors the person serves. For purposes of this paragraph, the business may expressly grant or confer authority upon the individual or his or her position, or the individual may demonstrate their authority in fact by his or her actions or conduct.

b. An employee of a business that hires, employs, or otherwise retains a lobbyist does not become a principal merely by lending subject matter expertise to the business's lobbyist.

c. The term does not include an individual or business that is merely a member of an association unless the individual or business otherwise meets the criteria of paragraph a.

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Summary of the proposed statutory modifications to the definition of "Principal" under Version 2:

- Similar to the other version, this proposal replaces the current definition under §36-25-1(24) with a newly structured definition.

- The proposal would define the term "principal" as including individuals and other "entities" that hire, employ, or otherwise retain a lobbyist. The term "entity" is intended to cover anything that is not an individual human being, such as a business, association, organization, club, or other legal entity.

- The proposal would also apply the restrictions related to "principals" to individuals acting on behalf of a principal. Under this version, individuals would be treated as "principals" where an individual has the responsibility and authority to either fire the principal's lobbyist, or to significantly direct the activities of the lobbyist such that the individual controls the lobbyist's positions, instructions, and process of operations.

- The proposal would clarify that the mere participation in policy determinations or status updates of lobbyist activities by employees, officers, or directors of a business or other organization that is a principal does not itself bring the individual under the scope of the restrictions against "principals" under the ethics code.

- The proposal also expresses that an employee of a principal does not fall within the scope of this statute by merely offering subject matter expertise to the principal's lobbyist.

Proposed statutory modification for Version 2:

**Section 36-25-1(24), Code of Alabama (1975), as amended**.

(24) PRINCIPAL. ~~A person or business which employs, hires, or otherwise retains a lobbyist. A principal is not a lobbyist but is not allowed to give a thing of value.~~

The term includes both all the following:

a. An individual who employs, hires, or otherwise retains a lobbyist.

b. An entity that employs, hires, or otherwise retains a lobbyist.

c. An individual acting on behalf of a principal who has the responsibility and authority to fire or direct the activities of a lobbyist on behalf of the principal. For purposes of this paragraph, the following terms apply:

1. Direct the activities of a lobbyist means to control the positions or directives of the lobbyist's activities and the manner in which those activities are carried out.

2. Participation in the process of determining the policy positions or receiving updates as to the status of lobbying activities related to those policy positions as a member, director, employee, or officer of a principal does not constitute directing the activities of the lobbyist.

3. An employee of a principal is not an individual acting on behalf of a principal merely by lending subject matter expertise to the principal's lobbyist.

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# 5. DEFINITION AND SCOPE OF "CONFLICTS OF INTEREST"

## Introduction

Alabama law has long recognized the public's right to governmental decision-making that is free from the financial entanglements of its public officials or, in the alternative, candor from a public official regarding his or her personal financial interests behind an official act. First adopted in 1901, Article IV, Section 82 of the Constitution of Alabama prohibits members of the Legislature from voting on measures that present a conflict of interest, and instructs that the conflict must be disclosed to the house of which he or she is a member. The failure to disclose a conflict of interest by a public official or public employee was first criminalized in 1977, codified at §13A-10-62.

Subsequently, various conflict of interest provisions were added to the Code of Ethics in 1995. These provisions included adding statutory language prohibiting legislators from voting on legislation under a conflict of interest, a section qualifying certain circumstances under which a conflict of interest would exist, and a definition of the term "conflict of interest." However, recent court cases and legal proceedings addressing the state's ethics laws have called into question the clarity and purpose that the current language of these provisions provide to the scope and application of the Code of Ethics, given how the wording of these sections interact or are intended to interact with the other provisions and prohibitions of the ethics laws. Although voting under a conflict of interest is clearly prohibited in the legislative context, recent cases and legal proceedings have revealed that exactly what constitutes a conflict of interest under the complexities of the modern world of economic and business operations is not well served under the current and somewhat disjointed language and structure of the conflict of interest provisions in the state ethics code. As a result, the Commission agreed that developing a clearer conflict of interest provision should be a priority for the group.

## Issues and Concerns with Current Conflict of Interest Statutory Language

The Commission's Conflict of Interest Subcommittee recognized the critical role that conflict of interest protections play in keeping the ethical operations of all levels of government at their best. The consensus of the subcommittee was that public employees and public officials clearly should have a duty to the public to either refrain from official action in furtherance of a conflict of interest, or at the very least disclose any significant personal interest in a matter over which the employee or official has decision-making power, or both. The subcommittee further recognized the challenge presented in trying to define the appropriate standards for what constitutes a conflict of interest when so much of the analysis is dependent on the circumstances of each particular case. Combined with the complexities of the modern world of business and economic activity, this challenge is further compounded, yet the need for standards that reflect when a conflict or potential conflict should require avoidance of official activities remains a fundamental tenet. The subcommittee determined that the difficulty with the existing conflict of interest provisions under the current language of the ethics code is that there are two similar, but distinguishable, definitions and only one actual prohibition – that of a legislator voting under a conflict of interest. A secondary problem is that the term "business with which a person is associated" is a critical part of the conflict-of-interest analysis and likely should be amended.

The definition of "conflict of interest" under §36-25-1(8) reads:

> "CONFLICT OF INTEREST. A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official

duties which could materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs. A conflict of interest shall not include any of the following:

"a. A loan or financial transaction made or conducted in the ordinary course of business.

"b. An occasional nonpecuniary award publicly presented by an organization for performance of public service.

"c. Payment of or reimbursement for actual and necessary expenditures for travel and subsistence for the personal attendance of a public official or public employee at a convention or other meeting at which he or she is scheduled to meaningfully participate in connection with his or her official duties and for which attendance no reimbursement is made by the state.

"d. Any campaign contribution, including the purchase of tickets to, or advertisements in journals, for political or testimonial dinners, if the contribution is actually used for political purposes and is not given under circumstances from which it could reasonably be inferred that the purpose of the contribution is to substantially influence a public official in the performance of his or her official duties."

The definition of "business with which a person is associated" under §36-25-1(2) reads:

"BUSINESS WITH WHICH A PERSON IS ASSOCIATED. Any business with which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than 5% of the fair market value of the business."

Subsection (b) of §36-25-5, the statutory section prohibiting use of official position of office for personal gain, speaks to a legislator's duty regarding conflicts of interest. Subsection (b) reads as follows:

"(b) Unless prohibited by the Constitution of Alabama of 1901, nothing herein shall be construed to prohibit a public official from introducing bills, ordinances, resolutions, or other legislative matters, serving on committees, or making statements or taking action in the exercise of his or her duties as a public official. A member of a legislative body may not vote for any legislation in which he or she knows or should have known that he or she has a conflict of interest."

Subsection (f) of §36-25-5 reads:

"(f) A conflict of interest shall exist when a member of a legislative body, public official, or public employee has a substantial financial interest by reason of ownership of, control of, or the exercise of power over any interest greater than five percent of the value of any corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation; or who is an officer or director for any such corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation."

## Proposed and/or Suggested Statutory Modifications

In light of the issues and concerns raised by the subcommittee, and after considerable discussion and analysis was given to numerous points of consideration and suggested statutory modifications, the subcommittee ultimately agreed with a proposal submitted by the Attorney General's Office, who presented the language, along with a presentation of its study and review, to the full Commission for its consideration thereof. After receiving the subcommittee's report and suggested statutory modifications, the Commission approved its inclusion in the Commission's Report to the Alabama Legislature.

Summary of the proposed statutory modifications to the "Conflict of Interest" provisions under the Code of Ethics:

- The subcommittee's proposal replaces the current general definition under §36-25-1(8), the legislative voting prohibition under §36-25-5(b), and the qualifying circumstances to establish a conflict of interest under §36-25- 5(f), and creates a new standalone "conflict of interest" provision.

- The proposal would establish a violation of the conflict of interest prohibitions as an additional, separate, and distinct violation of the Code of Ethics, and would require transparency and full disclosure of any material financial interest before any public official or employee could take an official action that affected his or her interest (unless that interest is the same interest shared by a large class or community). The proposed statutory language would also clearly distinguish between the violations of failing to disclose a conflict and using one's office for personal gain.[7]

- The proposal broadens the express scope of the conflict of interest prohibitions under the ethics laws from the legislative context to all public officials and employees. The express scope of the prohibitions are also broadened from voting on legislation under a conflict of interest to the taking of any official action, including the intentional withholding of any action or a decision made in the discharge of official duties, when an undisclosed conflict of interest exists.

- The proposal also includes amending the definition of the term "business with which a person is associated" to include independent contractors and consultants.

Proposed statutory modifications:

**Proposed New Section 36-25-XX – Conflicts of Interest Prohibitions**.

(a) A public official or public employee shall not take any action, withhold any action, or make any decision in the discharge of his or her official duties on a matter in which the public official or public employee has a conflict of interest.

(b) A conflict of interest exists when the public official or public employee:

[7] It is the intent of the Commission to leave intact the remaining statutory language in §36-25-5(a), (c), (d), and (e). In effect, state law would continue to prohibit a public official or public employee from using his or her office or position for personal gain, using office equipment or labor for personal gain, or soliciting a thing of value from a subordinate or person he or she regulates, inspects, or supervises in their official capacity.

(1) has a material and undisclosed financial interest; and

(2) knows or should have known that the action, withholding of action, or decision directly and uniquely affects that interest.

(c) An interest is directly and uniquely affected where the action, withholding of action, or decision affects an individual or a member of a small class, but not equally with other members of a large class or in the same manner as the entire community.

(d) Actions by a public official or public employee that are merely ministerial or are non-discretionary in nature do not give rise to a violation of this subsection.

(e) For purposes of this subsection, the material financial interests of a public official or public employee extend to the material financial interests of a member of his or her household and to any business with which he or she is associated.

(f) For purposes of this subsection, required disclosures by public officials must be made in a manner prescribed by the Alabama Ethics Commission, if the information is not otherwise publicly available in the official's statement of economic interest. Required disclosures by public employees must be made to his or her direct supervisor.

(g) Even when disclosure of a material financial interest has been properly made, it is the responsibility of the public official or public employee to determine whether or not taking the action, withholding the action, or making the decision would result in using his or her office for personal gain, prohibited by 36-25-5(a).

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**Section 36-25-1(2), Code of Alabama (1975), as amended**.

(2) BUSINESS WITH WHICH THE PERSON IS ASSOCIATED. Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee – including an independent contractor or consultant, or holder of more than five percent of the fair market value of the business.[8]

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[8] In the subcommittee meetings, the Ethics Commission highlighted the need for the Legislature to rephrase this term to "Associated Business" or some other similar term for better ease of usage.

# 6. "REVOLVING DOOR" EMPLOYMENT ISSUES

## Introduction

According to a 2017 research report of the National Conference of State Legislatures, the phrase "Revolving door" is one that "describes the practice of legislators leaving public service and heading immediately for lobbying positions." This phrase can also apply to public employees. The report goes on to state that "[e]thics laws in all but nine states limit this practice by setting mandatory waiting periods before a legislator may register as a lobbyist or engage in lobbying activities." Alabama's "Revolving Door" statute is found in Section 36-25-13 of the Code of Alabama (1975). The statute places a two-year waiting period on former public officials and public employees before such persons can act as a lobbyist before their former agency or legislative body. Additionally, for public officials or employees whose work for a governmental agency includes the authority to make purchases or negotiate contracts with third party vendors or service providers, then Alabama's law prohibits those persons from entering into or negotiating a contract or award with their former agency for a period of two years after leaving the governmental agency. The Revolving Door statute also applies the two-year prohibition to public sector auditors, investigators, and regulators of private sector entities, and limits their ability to work for the private interests they audited, investigated or regulated while in public service. See §36-25-13, Code of Alabama (1975).

## Issues and Concerns with Current Revolving Door Statutory Language

The Commission's Revolving Door Subcommittee took no issue with the primary purpose and application of the state's revolving door mandatory waiting periods, as such matters are rooted in the goal of avoiding conflicts of interest and the use of public office for personal gain. However, the subcommittee identified a number of issues and concerns with the potential scope of subsidiary or secondary applications of the laws in light of some actual or perceived ambiguity found in the current drafting of the statutes, as compared to the intent and primary purpose of the prohibitions.

Public to public employment transfers:

The current language of the revolving door statute does not clearly distinguish between former public officials or employees who change employment to the private sector, as differentiated from such officials or employees who merely change to a different public agency or governmental body and are still serving the citizens of the state in a public capacity.[9] In the opinion of the subcommittee, the public-to-public employment transfer context presented reduced conflict of interest concerns (as opposed to a change of employment to a private sector entity), and this was outweighed by the benefit to the public good when officials and employees are free to move and grow within the public sector, and are able to be placed in areas of public service where their particular skill sets and talents can be put to the best use in service of the common good. Thus, the consensus of the subcommittee was to recommend statutory modifications that would clarify that the revolving door prohibitions do not apply to a public employee or official from representing or working on behalf of his or her public agency or governmental body before his or her former public agency or governmental body.

[9] Several opinions of the Alabama Ethics Commission on this matter in the recent past have provided guidance suggesting that the language of the current revolving door statutes provided room for exceptions for certain public to public transfers, as long as the public employee or official was not lobbying for or personally representing private sector interests before his or her former body, and instead was representing the interests of his or her current agency or governmental body.

Rehiring or contractual engagement of former employees:
Subsection (d) of the revolving door statute involves procurements and purchases by agencies or governmental bodies, as well as the approval of contracts, grants, or other awards. This subsection prohibits, for a two-year waiting period, certain former top level agency officials or employees and others within an agency who had significant authority or involvement in such activities from leaving their employment or position with the agency and then re-engaging with their former agency in any of these activities.

Based on the subsection's prohibitive language regarding "contracting" with former members or employees, this subsection has also been interpreted in the past to prohibit those same individuals from being either rehired or contractually engaged by their former public employer for the two-year waiting period. The consensus of the subcommittee was that this particular effect of statutory drafting and interpretation did not match the primary purpose and scope of concern of the revolving door prohibitions, and the subcommittee recommended statutory modifications that would clarify that the two-year revolving door waiting period under subsection (d) of the Revolving Door law does not apply to agencies or governmental bodies who rehire former employees or contract with former employees or officials to provide personal or professional services on behalf the agency.

Ambiguous, vague, and/or duplicative statutory language:
Upon study and review of the state's Revolving Door laws, the subcommittee recognized the existence of ambiguous, vague, and/or duplicative language throughout the various statutory provisions.[10] As the subcommittee developed suggestions for statutory modifications, these instances were addressed therein and resolved or improved in the opinion of the subcommittee. The Revolving Door suggested statutory modifications by the subcommittee are contained in this section of the Commission's Report.

Attorney interactions with judicial proceedings in which the State is a party or has a substantial interest:
Subsection (g) of the revolving door statute requires a two-year prohibition on former public officials or employees from acting as an attorney (other than for himself or herself) in any judicial proceedings where the state is a party or has a substantial interest if the person substantially participated in the litigation, or the matter giving rise to the litigation, as a state employee or official. In the opinion of the subcommittee, the language of this subsection was overly broad and vague in certain places such that its impact was not ascertainable, and that it was largely unnecessary in light of the codes of ethics applicable to attorneys under other laws or regulations. The consensus of the subcommittee was to strike this section in its entirety.

Lobbying prohibitions for elected officials during their term of office under **§36-25-23(a)**:
Alabama Code Section 36-25-23(a) prohibits elected public officials from acting as a paid lobbyist before any branch of state or local government during their term of office. This prohibition applies to the full term of the office to which they were elected, regardless of whether such official leaves or vacates that office prior to the expiration of his or her term.

[10] As the subcommittee continued its review of the issues presented in the revolving door provisions and developed recommendations for needed clarifications, the problems the current language in the statute created became even more clear.

Although technically not a part of Alabama's Revolving Door statute, this code section is often connected to and included in discussions and analysis regarding the permissible activities of public officials both during and after leaving office. Thus, the subcommittee included issues related to this code section in its study and analysis.

The current language of Section 36-25-23(a) makes no distinction between state and local elected public officials and broadly prohibits acting as a paid lobbyist before any state or local branch of government. Additionally, the subcommittee recognized that the phrase "or otherwise represent a client", which follows the statutory language regarding the prohibition against acting as a lobbyist, has been the subject of much confusion as to whether the application of that language was to prevent representing clients in a lobbying capacity, or in any capacity. The consensus of the subcommittee was that the "otherwise represent a client" phrase was unduly broad, confusing, and unnecessary, and that the conflict of interest concerns in which this statutory prohibition is based is minimized at the local level when various local officials are engaging in gainful employment outside of their jurisdictions of influence and authority. Thus, the subcommittee recommended statutory modifications that would eliminate overly broad statutory language and clarify the restriction as being related to acting as a lobbyist before governmental bodies over which the elected official holds significant influence or authority. As a part of its recommendations, the subcommittee considered favorably the suggestion to treat local elected officials differently than elected officials at the state level, due to the wider zone of influence often held by state elected officials.

There was also some discussion among the subcommittee member regarding whether to strike this section completely as adequately covered under Personal Gain and Conflict of Interest prohibitions already contained in the ethics laws. The consensus of the subcommittee was to present the proposed modifications to the statute, along with a report of the existence of the discussions of full repeal of the statute as an alternative to the proposed modifications.

## Proposed and/or Suggested Statutory Modifications

In light of the issues and concerns raised by the subcommittee, the subcommittee drafted the below proposed statutory modifications and presented the language, along with a presentation of its study and review of the Revolving Door laws, to the full Commission for its consideration thereof. After receiving the subcommittee's report and suggested statutory modifications, the Commission approved its inclusion in the Commission's Report to the Alabama Legislature.

Summary of the proposed statutory modifications to §36-25-13:

- Subsections (a) and (b) were reworded to clarify distinctions between revolving door waiting periods for elected officials versus appointed officials, and the phrase "or otherwise represent clients" was replaced with "or represent his or her private sector contractor or employer." The intended purpose of this replacement phrase is to prohibit representation by a former public official or employee of any entity or business that is regulated by that department or governmental body.[11] Additionally, unnecessary and duplicative language regarding the permissibility of former

[11] According to the subcommittee's support staff, an alternative to the use of this phrase, which could provide more clarity and room for expansion and modification with the changes that come over time, would be to establish "regulated entity" as a defined term and use the phrase "or represent a regulated entity" in lieu of the aforementioned replacement phrase.

judicial officials serving as attorneys before a judicial body was struck and replaced in a single stand-alone section of the statute.

- Subsection (c) was reworded to refine its application to the representation of private sector employers by former officials or employees before their former agencies or governmental bodies. Similar to subsections (a) and (b), the phrase "or otherwise represent clients" was replaced with "or represent his or her private sector contractor or employer," and the language regarding the permissibility of former judicial officials serving as attorneys before a judicial body was struck and replaced in a single stand-alone section of the statute.

- Subsection (d) was rewritten using simplified language that narrowed the scope of this section to procurement related activities. Language was struck that could be interpreted as prohibiting agencies from re-hiring former employees, and the retiree exception under the current statute was deleted as unnecessary under the proposed language.

- Subsection (g) was struck in its entirety as sufficiently covered under subsections (a), (b), and (c).

- A new subsection was added to expressly provide that the revolving door statute does not apply to former employees resuming work with their former agencies or governmental bodies as employees or under consulting contracts, or prohibit public to public employment transfers, or prohibit an attorney from representing clients in a legal capacity.

Proposed statutory modifications:

**Section 36-25-13, Code of Alabama (1975), as amended**.

~~(a) No public official shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, department, or legislative body, of which he or she is a former member for a period of two years after he or she leaves such membership. For the purposes of this subsection, such prohibition shall not include a former member of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity.~~

(a) An appointed public official, for a period of two years after leaving service, may not serve as a lobbyist or represent his or her private sector contractor or employer before the department, agency, regulatory body, or legislative body for which he or she had served.

~~(b) Notwithstanding the provisions of subsection (a), no public official elected to a term of office shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer, before the board, agency, commission, department, or legislative body of which he or she is a former member for a period of two years following the term of office for which he or she was elected, irrespective of whether the member left the office prior to the expiration of the term to which he or she was elected. For the purposes of this subsection, such prohibition shall not include a former member of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity.~~

(b) An elected public official, for a period of two years after the expiration of the term to which he or she was elected, irrespective of whether the public official leaves office before the expiration of the term, may not serve as

a lobbyist or represent his or her private sector contractor or employer before the department, agency, regulatory body, or legislative body for which he or she had served.

~~(c) No public employee shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, or department, of which he or she is a former employee or worked pursuant to an arrangement such as a consulting agreement, agency transfer, loan, or similar agreement for a period of two years after he or she leaves such employment or working arrangement. For the purposes of this subsection, such prohibition shall not include a former employee of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity.~~

(c) A public employee or an individual who works for a department, agency, or regulatory body pursuant to a consulting agreement, agency transfer, loan, or similar arrangement, for a period of two years after leaving the employment or other arrangement, may not serve as a lobbyist or represent his or her private sector contractor or employer before the department, agency, or regulatory body for which he or she had worked.

~~(d) Except as specifically set out in this section, no public official, director, assistant director, department or division chief, purchasing or procurement agent having the authority to make purchases, or any person who participates in the negotiation or approval of contracts, grants, or awards or any person who negotiates or approves contracts, grants, or awards shall enter into, solicit, or negotiate a contract, grant, or award with the governmental agency of which the person was a member or employee for a period of two years after he or she leaves the membership or employment of such governmental agency. Notwithstanding the prohibition in this subsection a person serving full-time as the director or a department or division chief who has retired from a governmental agency may enter into a contract with the governmental agency of which the person was an employee for the specific purpose of providing assistance to the governmental agency during the transitional period following retirement, but only if all of the following conditions are met:~~

~~(1) The contract does not extend for more than three months following the date of retirement.~~

~~(2) The retiree is at all times in compliance with Section 36-27-8.2.~~

~~(3) The compensation paid to the retiree through the contract, when combined with the monthly retirement compensation paid to the retiree, does not exceed the gross monthly compensation paid to the retiree on the date of retirement.~~

~~(4) The contract is submitted to and approved by the Director of the Ethics Commission as satisfying the above conditions prior to the date the retiree begins work under the contract.~~

~~(e) Notwithstanding subsection (d), a municipality may rehire a retired law enforcement officer or a retired firefighter formerly employed by the municipality at any time to provide public safety services if all of the following conditions are satisfied:~~

~~(1) A local law is enacted authorizing the rehire of retired law enforcement officers or firefighters formerly employed by the municipality.~~

~~(2) The municipality rehiring a retiree provides a copy of the local law referenced in subdivision (1) to the Director of the Ethics Commission.~~

~~(3) Upon a determination to rehire a retired law enforcement officer or firefighter, the municipality immediately provides notice to the Director of the Ethics Commission that the former employee is being rehired.~~

(d) A public official or public employee who has authority over procurements or who recommends or materially influences the approval of grants, awards, or contracts for goods or services, for a period of two years after leaving service or employment, may not enter into, solicit, or negotiate a grant, award, or contract for goods or services with the department, agency, or regulatory body for which he or she served or worked.

~~(f)~~(e) A public official or public employee who personally participates in the direct regulation, audit, or investigation of a private business, corporation, partnership, or individual, for a period of two years after leaving service or employment, may not solicit or accept employment with such private business, corporation, partnership, or individual.

~~(g) A public official or public employee of the state, within two years after leaving service or employment, may not act as attorney for any person other than himself or herself or the state, or aid, counsel, advise, consult or assist in representing any other person, in connection with any judicial proceeding or other matter in which the state is a party or has a direct and substantial interest and in which the former public official or public employee participated personally and substantially as a public official or employee or which was within or under the public official or public employee's official responsibility as an official or employee. This prohibition shall extend to all judicial proceedings or other matters in which the state is a party or has a direct and substantial interest, whether arising during or subsequent to the public official or public employee's term of office or employment.~~

(f) Notwithstanding the forgoing, this section does not limit or prohibit any of the following:

(1) A former public employee from resuming employment with his or her former employer, unless otherwise restricted or prohibited by law.

(2) A former public employee from entering into a consulting agreement with his or her former employer to provide personal consulting services, unless otherwise restricted or prohibited by law.

(3) A public official or public employee from accepting employment with another governmental agency or body or another department within the same governmental agency or body and from representing the interests of his or her public employer before the department, agency, or regulatory body for which he or she had served.

(4) An attorney from representing a client in a legal capacity as an attorney.

~~(h)~~(g) Nothing in this chapter shall be deemed to limit the right of a public official or public employee to publicly or privately express his or her support for or to encourage others to support and contribute to any ~~candidate,~~ principal campaign committee as defined in Section 17-5-2, political action committee as defined in Section 17-5-2, referendum, ballot question, issue, or constitutional amendment.
###

Summary of the proposed statutory modifications to §36-25-23(a):

- The current provision was divided into two separate sections that distinguished between statewide elected officials, and local elected officials. For statewide elected officials, the language continues the prohibition against lobbyist activities before all state and local governmental bodies or agencies during their term of office. For local elected officials, the language limits the prohibitions against lobbyist activities to agencies or governmental bodies within the jurisdiction of the local official.
- The overly broad and vague phrase "otherwise represent a client" was struck and not incorporated into either section.
- While the format of the proposed statutory language is written as a repeal of subsection (a) in its entirety and replacing it in a new code section, the subcommittee recognizes that legislative drafters may determine that simply re-formatting the current subsection (a) into two separately numbers sections is a better option.

Proposed statutory modifications:

**Proposed New Section 36-25-XX – Prohibited Actions of Elected Officials During Term of Office**.

(a) An elected public official to a statewide office or member of the Legislature, during his or her term to which he or she was elected irrespective of whether the public official leaves office before the term expires, may not serve as a lobbyist before any department, agency, regulatory body, or legislative body at the state or local level.

(b) An elected public official to a county or municipal office, during his or her term to which he or she was elected irrespective of whether the public official leaves office before the term expires, may not serve as a lobbyist before any department, agency, regulatory body, or legislative body within the jurisdiction of the county or municipal office for which the public official is serving or had served.

###

# 7. STATEMENTS OF ECONOMIC INTERESTS

## Introduction

Every state requires that public officials and/or certain public employees disclose their financial interests, such as holdings and sources of income, in order to provide transparency, deter unethical behavior, and instill public confidence in the integrity of public institutions. State laws differ regarding who such disclosure requirements apply to, and what types of financial details must be disclosed.

Alabama's financial disclosure law, §36-25-14, Ala. Code 1975, requires the filing of a Statement of Economic Interests ("SEI") Form by all elected public officials, and by certain appointed officials and public employees that are listed in the statute. The information that must be disclosed includes, among other things: the name of the individual and the names of their family members; a listing of household income, categorized my amount earned; investments in real estate, categorized by value of property; and a listing of indebtedness, categorized by amount. Additionally, if the filing party or spouse is engaged in a business providing certain professional services, then the number of clients categorized by the type of professional service provided must be disclosed and categorized by amount.

## Issues and Concerns with Current Statement of Economic Interests Disclosure Requirements

Senator Orr spearheaded a discussion and presentation to the Commission regarding the strengths and weaknesses of the current SEI disclosure requirements. The senator's presentations and the ensuing discussions focused on some key areas of the SEI disclosure requirements that were unnecessarily burdensome, without any gain towards the purposes of the disclosures. The presentation also addressed other key areas of the SEI disclosure requirements that could be improved for accountability and transparency purposes by requiring more focused and detailed information in order to better ensure that an accurate picture of a person's significant financial interests are included in the form. Senator Orr presented a proposed statutory revision of the SEI requirements to the Commission that revised and updated the details and types of information that should be disclosed in the SEI Form, and also brought within the scope of the disclosure requirements certain additional appointed officials and public servants.

The general and overall feedback from the Commission was supportive of the issues and points presented and discussed by Senator Orr. While there was some concern expressed that too much financial disclosures and other government red tape may deter the willingness and availability of otherwise qualified individuals to serve in public office, especially in the context of appointed officials at the county and municipal levels, the concerns were not considered a major disincentive to the overall support for the proposal that could not be worked out in the legislative process. Thus, the consensus of the Commission was to include the proposed statutory modifications in its Report.

## Proposed and/or Suggested Statutory Modifications

The following proposed statutory modifications to the Statement of Economic Interests disclosure requirements were drafted and presented by Senator Orr to the Commission for its consideration thereof. The Commission approved its inclusion in the Commission's Report to the Alabama Legislature.

<u>Summary of the proposed statutory modifications to §36-25-14</u>:
The bill proposes numerous substantive changes, the key highlights of which are outlined below.

- Regarding who must file, subsection (a) was modified to: (1) additionally require certain members of local boards and commissions to file; (2) streamline the list of appointed officials and supervisory employees within county and municipal governments who must file; (3) additionally require appointed officials at the statewide K-12 public schools and members of boards of trustees at public colleges and universities to file; and (4) additionally require public employees who award contracts to file.

- Regarding what must be disclosed, subsection (b) was modified to: (1) require the disclosure of all sources of income and correspondingly delete the currently prescribed format for disclosure of such income by a pre-determined categorized dollar amount; (2) additionally require the disclosure of all investment funds of any type; (3) update the categorical descriptions of professional services for which the number of professional service clients must be listed (note: client names are not required currently or in this proposed statutory modification); (4) require the disclosure of all real property and a description of its location, in addition to the disclosure of real property owned or held for investment or income purposes as is currently required; (5) require disclosure of contingent liabilities, in addition to debt, of the filing party; (6) provide that the disclosure requirements apply to activity of dependents of the filing party, in addition to activities of the filing party and their spouse.

- A new section was added that authorizes the State Ethics Commission to waive the filing requirement in case of death, infirmity, or active military service.

- A new section was added that requires the State Ethics Commission to raise the threshold income that triggers the disclosure requirements and the filing of a Statement of Economic Interests by certain public officials and employees when the current threshold has risen by an increment of $2,000 in accordance with the Department of Labor's inflation index.

Proposed statutory modifications:

**Section 36-25-14, Code of Alabama (1975), as amended**.

(a) A statement of economic interests shall be completed and filed in accordance with this chapter with the commission no later than April 30 of each year covering the period of the preceding calendar year by each of the following:

(1) All elected public officials at the state, county, or municipal level of government. ~~or their instrumentalities.~~

(2) Any ~~person appointed as a public official and any person employed as a public employee at the state, county, or municipal level of government or their instrumentalities who occupies a position whose base pay is seventy-five thousand dollars ($75,000) or more annually, as adjusted by the commission by January 31 of each year to reflect changes in the U.S. Department of Labor's Consumer Price Index, or a successor index.~~ appointed public official at the state, county, or municipal level whose total compensation during the preceding calendar year meets or exceeds eighty thousand dollars ($80,000) or a higher threshold amount if the commission sets a higher threshold under subsection (f).

(3) Any public employee at the state, county, or municipal level whose total compensation from public funds during the preceding calendar year meets or exceeds eighty thousand dollars ($80,000) or a higher threshold amount if the commission sets a higher threshold under subsection (f).

~~(3) All candidates, provided the statement is filed on the date the candidate files his or her qualifying papers or, in the case of an independent candidate, on the date the candidate complies with the requirements of Section 17-9-3.~~

(4) In addition to filing a statement under Section 36-25-15, any individual who remains qualified as a candidate as of January 1 of the filing year.

~~(4)~~(5) Members of the Alabama Ethics Commission. ~~; appointed members~~

(6) Members of boards and commissions having statewide jurisdiction, ~~(~~but excluding members of solely advisory boards~~)~~.

(7) Members of local boards and commissions, but excluding members of solely advisory boards that do not have authority to expend public funds in excess of fifty thousand dollars ($50,000) per year, and excluding members of any board that administers a local retirement plan, provided the state has no direct or indirect obligation to participants of the retirement plan.

~~(5) All full-time nonmerit employees, other than those employed in maintenance, clerical, secretarial, or other similar positions.~~

~~(6) Chief clerks and chief managers.~~

~~(7) Chief county clerks and chief county managers.~~

~~(8) Chief administrators.~~

~~(9) Chief county administrators.~~

~~(10)~~(8) Any public official or public employee whose primary duty is to invest public funds.

~~(11)~~(9) Chief county and municipal clerks, managers, administrators, and administrative officers ~~of any political subdivision~~.

~~(12)~~(10) Chief and ~~assistant~~ deputy county and municipal building inspectors.

~~(13)~~(11) Any county or municipal administrator with power to grant or deny land development permits.

~~(14) Chief municipal clerks.~~

(12) Directors and assistant directors of county and municipal regulatory boards, commissions, and authorities.

(13) Directors and assistant directors of county and municipal utility boards, commissions, and authorities.

~~(15)~~(14) Chiefs of police.

~~(16)~~(15) Fire chiefs.

~~(17)~~(16) City and county school superintendents and school board members.

~~(18)~~(17) City and county school principals or administrators.

(18) The superintendent or chief executive officer and members of the board of directors or board of trustees of every state K-12 public school.

(19) Principals or administrators of every state K-12 public school.

(20) Members of the boards of trustees of each public two-year and four-year institution of higher education that receives appropriations.

~~(19)~~(21) Purchasing or procurement agents having the independent authority to make any purchase.

(22) Each public employee whose job responsibility includes the recommendation of contracts for goods or services through competitive bidding or public works contracts.

~~(20)~~(23) Directors and assistant directors of state agencies.

~~(21)~~(24) Chief financial and accounting directors.

~~(22)~~(25) Chief grant coordinators.

~~(23)~~(26) Each employee of the Legislature or of agencies, including temporary committees and commissions established by the Legislature, other than those employed in maintenance, clerical, secretarial, or similar positions.

~~(24)~~(27) Each employee of the Judicial Branch of government, including active supernumerary ~~district attorneys and~~ judges, other than magistrates and those employed in maintenance, clerical, secretarial, or other similar positions.

(28) Each active supernumerary district attorney.

~~(25) Every full-time public employee serving as a supervisor.~~

(b) ~~Unless otherwise required by law, no public employee occupying a position earning less than seventy-five thousand dollars ($75,000) per year shall be required to file a statement of economic interests, as adjusted by the commission by January 31 of each year to reflect changes in the U.S. Department of Labor's Consumer Price Index, or a successor index.~~ Notwithstanding the provisions of subsection (a) or any other provision of this chapter, no coach of an athletic team of any four-year institution of higher education ~~which~~ that receives state funds shall be required to include any income, donations, gifts, or benefits, other than salary, on the statement of economic interests, if the income, donations, gifts, or benefits are a condition of the employment contract. ~~Such~~ The statement shall be made on a form made available by the commission. The duty to file the statement of economic interests shall rest with the ~~person~~ individual covered by this chapter. Nothing in this chapter shall be construed to exclude any public employee or public official from this chapter regardless of whether they are required to file a statement of economic interests. The statement shall contain the following information ~~on the person making the filing~~:

(1) Name, residential address, and business of the filing party; name, address, and business of living spouse and dependents; name of living adult children; name of parents and siblings; name of living parents of spouse. Undercover law enforcement officers may have their residential addresses and the names of family members removed from public scrutiny by filing an affidavit stating that publicizing this information would potentially endanger their families.

~~(2) A list of occupations to which one third or more of working time was given during previous reporting year by the public official, public employee, or his or her spouse.~~

~~(3)~~(2) A listing of ~~total combined household~~ all sources of income of the ~~public official or public employee during the most recent reporting year as to income~~ filing party and his or her spouse and dependents from salaries, fees, dividends, profits, commissions, and other compensation. ~~and listing the names of each business and the income derived from such business in the following categorical amounts: less than one thousand dollars ($1,000); at least one thousand dollars ($1,000) and less than ten thousand dollars ($10,000); at least ten thousand dollars ($10,000) and less than fifty thousand dollars ($50,000); at least fifty thousand dollars ($50,000) and less than one hundred fifty thousand dollars ($150,000); at least one hundred fifty thousand dollars ($150,000) and less than two hundred fifty thousand dollars ($250,000); or at least two hundred fifty thousand dollars ($250,000) or more. The person reporting shall also name any business or subsidiary thereof in which he or she or his or her spouse or dependents, jointly or severally, own five percent or more of the stock or in which he or she or his or her spouse or dependents serves as an officer, director, trustee, or consultant where the service provides income of at least one thousand dollars ($1,000) and less than five thousand dollars ($5,000); or at least five thousand dollars ($5,000) or more for the reporting period.~~

(3) A listing of all investment funds of any type held by the filing party and by his or her spouse and dependents, whether individually owned or constructively held, for the benefit of the filing party, spouse, or dependent, including, but not limited to, individual stock, equity funds, mutual funds, exchange traded funds, exchange funds, alternative investments, bonds, or other ownership interest or indebtedness in any business; provided, however, the listing need not include the names of individual holdings within any fund or other investment.

(4) If the filing ~~public official or public employee,~~ party or his or her spouse or any dependent ~~, has engaged in a business during the last reporting year which provides~~ provided consulting or other professional services, including, but not limited to, legal, accounting, medical or health related, real estate, banking, insurance, educational, farming, engineering, or architecture, for which the filing party, spouse, or dependent received compensation, ~~architectural management, or other professional services or consultations, then the filing party shall report~~ the number of clients to whom professional services were provided ~~of such business~~ in each of the following categories: ~~and the income in categorical amounts received during the reporting period from the combined number of clients in each category:~~ Electric utilities~~,~~; gas utilities~~,~~; telephone utilities~~,~~; water utilities~~,~~; cable television; ~~companies, intrastate~~ transportation; warehousing; ~~companies, pipeline companies,~~ oil or gas exploration ~~companies, or both, oil and gas retail companies, banks, savings and loan associations, loan or finance companies, or both,~~ and development; banking and finance; manufacturing; ~~firms,~~ mining; ~~companies, life insurance companies, casualty insurance companies, other~~ insurance; ~~companies,~~ retail ~~companies, beer, wine or liquor companies or distributors, or combination thereof,~~ trade; wholesale trade; agriculture, forestry, fishing, and hunting; construction and real estate; information; management of companies and enterprises; sanitary services, waste management, and remediation services; educational services; health care; arts, entertainment, and recreation; accommodation, food services, and alcoholic beverages; professional, scientific, and technical services; public administration; trade associations~~,~~; professional associations~~,~~; governmental associations~~,~~; associations of public employees or public officials~~,~~; ~~counties,~~ county and municipal governments; and any other businesses or associations that the commission may deem appropriate. The statement shall include a requirement that the filing party provide a detailed description of clients that are not fairly and accurately described in any of the categories of clients provided above. For purposes of this subdivision, compensation includes compensation received directly or paid to a business by a client for whom the filing party, spouse, or dependent performed professional services as an owner, employee, or contractor for the business. ~~Amounts received from combined clients in each category shall be reported in the following categorical amounts: Less than one thousand dollars ($1,000); more than one thousand dollars ($1,000) and less than ten thousand dollars ($10,000); at least ten thousand dollars ($10,000) and less than twenty five thousand dollars ($25,000); at least twenty five thousand dollars ($25,000) and less than fifty thousand dollars ($50,000); at least fifty thousand dollars ($50,000) and less than one hundred thousand dollars ($100,000); at least one hundred thousand dollars ($100,000) and less than one hundred fifty thousand dollars ($150,000); at least one hundred fifty thousand dollars ($150,000) and less than two hundred fifty thousand dollars ($250,000); or at least two hundred fifty thousand dollars ($250,000) or more.~~

(5) If retainers are in existence or contracted for in any of the ~~above~~ categories of clients provided in subdivision (4), a listing of ~~the~~ those categories. ~~along with the anticipated income to be expected annually from each category of clients shall be shown in the following categorical amounts: Less than one thousand dollars ($1,000); at least one thousand dollars ($1,000) and less than five thousand dollars ($5,000); or at least five thousand dollars ($5,000) or more.~~

(6) ~~If real estate is held for investment or revenue production by a public official, his or her spouse or dependents, then a listing thereof in the following fair market value categorical amounts: Under fifty thousand dollars ($50,000); at least fifty thousand dollars ($50,000) and less than one hundred thousand dollars ($100,000); at least one hundred thousand dollars ($100,000) and less than one hundred fifty thousand dollars ($150,000); at least one hundred fifty thousand dollars ($150,000) and less than two hundred fifty thousand dollars ($250,000); at least two hundred fifty thousand dollars ($250,000) or more. A listing of annual gross rent and lease income on real~~

~~estate shall be made in the following categorical amounts: Less than ten thousand dollars ($10,000); at least ten thousand dollars ($10,000) and less than fifty thousand dollars ($50,000); fifty thousand dollars ($50,000) or more. If a public official~~ A listing of all real property personally owned by the filing party and by his or her spouse and dependents, adequately described to readily identify the property. If the filing party, spouse, dependent, or ~~a business in which the person is associated~~ an associated business of the filing party, spouse, or dependent received rent or lease income from any ~~governmental agency~~ entity receiving public funds in Alabama, specific details of the lease or rent agreement shall be filed with the commission.

(7) A listing of indebtedness and contingent liability of the filing party and of his or her spouse and dependents to individuals and businesses. ~~operating in Alabama showing types and number of each as follows: Banks, savings and loan associations, insurance companies, mortgage firms, stockbrokers and brokerages or bond firms; and the indebtedness to combined organizations in the following categorical amounts: Less than twenty five thousand dollars ($25,000); twenty five thousand dollars ($25,000) and less than fifty thousand dollars ($50,000); fifty thousand dollars ($50,000) and less than one hundred thousand dollars ($100,000); one hundred thousand dollars ($100,000) and less than one hundred fifty thousand dollars ($150,000); one hundred fifty thousand dollars ($150,000) and less than two hundred fifty thousand dollars ($250,000); two hundred fifty thousand dollars ($250,000) or more. The commission may add additional business to this listing. Indebtedness associated with the homestead of the person filing is exempted from this disclosure requirement.~~

(c) Filing required by this section shall reflect information and facts in existence at the end of the reporting year.

(d) If the information required herein is not filed as required, the commission shall notify the public official or public employee concerned as to his or her failure to so file, and the public official or public employee shall have 10 days to file the report after receipt of the notification. The commission may~~, in its discretion,~~ assess a fine of ten dollars ($10) a day, not to exceed one thousand dollars ($1,000), for failure to file timely.

(e) Upon petition, the commission may waive the filing requirement if the filer is deceased or incapable of filing due to infirmity or due to active service in the military.

(f) By January 31 of any year during which the threshold amount referenced in subdivisions (2) and (3) of subsection (a) increases by an amount of two thousand dollars ($2,000) or more pursuant to the U.S. Department of Labor's Consumer Price Index or a successor index, the commission shall adjust the threshold amount to reflect the two thousand dollar ($2,000) increase.

~~(e)~~(g) ~~A person~~ (1) An individual who intentionally violates any financial disclosure filing requirement of this chapter shall be subject to administrative fines imposed by the commission, or shall, upon conviction, be guilty of a Class A misdemeanor, or both.

(2) ~~Any person~~ An individual who unintentionally neglects to include any information relating to the financial disclosure filing requirements of this chapter shall have 90 days to file an amended statement of economic interests without penalty.

###

## 8. EXHIBITS AND APPENDICES TO THE REPORT

The following exhibits are included in this Report:

**Exhibit A** – List of Commission meetings and subcommittee meetings.

**Exhibit B** – Comments submitted to the Commission from various members of the economic development community regarding Act No. 2018-541 and related economic development activities.

The following appendices are included in this Report:

**Appendix A** – Joint commentary of the Commission Chairmen, submitted by:
Steve Marshall, Attorney General; and
Tom Albritton, Executive Director, Alabama Ethics Commission.

**Appendix B** – Preamble and commentary on proposed statutory revisions contained in the Commission's Report, submitted by:
Honorable Joseph Boohaker, Alabama Association of Circuit Judges;
Christina Crow, Alabama State Bar;
Michael Ermert, Alabama State Bar;
Deborah Long, Alabama Law Institute;
Bill Rose, Alabama Law Institute;
Tom Dart, Alabama Council of Association Executives; and
Ted Hosp, Alabama Council of Association Executives.

**Appendix C** – Comments on proposed statutory revisions contained in the Commission's Report, submitted by:
Tom Dart, Alabama Council of Association Executives.

**Appendix D** – Comments submitted to the Commission regarding unique issues and concerns of state employees, submitted by:
Sally Corley, State Employee.

# EXHIBIT A

# TO THE COMMISSION REPORT

***LIST OF COMMISSION MEETINGS AND SUBCOMMITTEE MEETINGS***

## CODE OF ETHICS CLARIFICATION AND REFORM COMMISSION

## Commission Meetings

1. May 17, 2018 – 1:00 PM – Office of the Attorney General, Multipurpose Room.
2. June 14, 2018 – 1:00 PM – Office of the Attorney General, Multipurpose Room.
3. August 28, 2018 – 1:00 PM – Office of the Attorney General, Multipurpose Room.
4. September 20, 2018 – 1:00 PM – Office of the Attorney General, Multipurpose Room.
5. October 18, 2018 – 1:00 PM – Office of the Attorney General, Multipurpose Room.
6. November 7, 2018 – 1:00 PM – Office of the Attorney General, Multipurpose Room.
7. December 13, 2018 – 1:00 PM – Office of the Attorney General, Multipurpose Room.
8. January 31, 2018 – 2:00 PM – Office of the Attorney General, Multipurpose Room.

## Subcommittee Meetings

1. July 9, 2018 – 1:00 PM – State House, Room 619 (Definitions Subcommittee).
2. July 19, 2018 – 1:00 PM – State House, Room 619 (Definitions Subcommittee).
3. August 9, 2018 – 1:00 PM – State House, Room 619 (Definitions Subcommittee).
4. October 4, 2018 – 10:00 AM – State House, Room 617 (Revolving Door Subcommittee).
5. October 4, 2018 – 1:00 PM – State House, Room 617 (Definitions Subcommittee).
6. November 1, 2018 – 10:00 AM – State House, Room 617 (Revolving Door Subcommittee).
7. November 1, 2018 – 1:00 PM – State House, Room 617 (Definitions Subcommittee).

###

# EXHIBIT B

# TO THE COMMISSION REPORT

## *COMMENTS SUBMITTED TO THE COMMISSION REGARDING ACT NO. 2018-541 & RELATED ECONOMIC DEVELOPMENT ACTIVITIES*

***SUBMITTED BY:***


**GREG CANFIELD, ALABAMA SECRETARY OF COMMERCE**
**JIM SEARCY, EXECUTIVE DIRECTOR, ECONOMIC DEVELOPMENT ASSOCIATION OF ALABAMA**
**MARK WILLIAMS, PRESIDENT, STRATEGIC DEVELOPMENT GROUP**
**DIDI CALDWELL, PRESIDENT, GLOBAL LOCATION STRATEGIES**
**JAY GARNER, PRESIDENT, GARNER ECONOMICS, LLC**
**GREG KNIGHTON, ECONOMIC DEVELOPMENT MANAGER, CITY OF HOOVER**
**DALE GREER, DIRECTOR, CULLMAN ECONOMIC DEVELOPMENT AGENCY**
**LORI HUGULEY, DIRECTOR, OPELIKA ECONOMIC DEVELOPMENT**
**PHILLIP DUNLAP, DIRECTOR, ECONOMIC DEVELOPMENT DEPARTMENT – CITY OF AUBURN**
**ELLEN MCNAIR, SENIOR VICE PRESIDENT, MONTGOMERY AREA CHAMBER OF COMMERCE**


## CODE OF ETHICS CLARIFICATION AND REFORM COMMISSION

OFFICE OF THE GOVERNOR

KAY IVEY
GOVERNOR

STATE OF ALABAMA

DEPARTMENT OF COMMERCE

GREG CANFIELD
SECRETARY OF COMMERCE

January 30, 2019

Othni Lathram
Legislative Services Agency
Alabama State House
Montgomery, AL 36130
Quito, Ecuador

Dear Othni,

In advance of tomorrow's meeting of the Ethics Review Council I have drafted and attached my remarks. Please distribute them to the members of the Council as you see fit.

Thank you for your assistance in tomorrow's hearing.

Sincerely,

Greg Canfield

enclosure

# REMARKS BEFORE THE ETHICS REVIEW COMMISSION

by Greg Canfield, Secretary of Commerce, Alabama Department of Commerce
January 31, 2019

In the December 2010 special session, the Alabama Legislature passed three bills that made sweeping changes in the ethics laws of our State. As these bills were being drafted, debated and amended on the floors of the Alabama House and Senate, a great deal of care and effort was taken so as not to have these laws impede job-creating economic development activity across our state. As a member of the House at that time, I recall our ultimate passage of the ethics reform package - a package that only provided exceptions to two types of activities and clearly reflected the legislative intent to provide safe harbor for education related activities and economic development activities.

Drawing from the exceptions for economic development activities granted in the 2010 ethics reforms and coupled with the fact that the statutes governing the Alabama Department of Commerce explicitly speak to Commerce's authorization to accept and confidentially engage with economic development projects until they become a matter of public record, the normal activity of site consultants and other economic development professionals as projects were negotiated were not considered to be lobbying and were therefore not required to register as lobbyists. It is important to underscore here that the ethics law protections against elected and public officials using their office for unlawful financial gain or the act of a third party providing something of value to unlawfully influence legislative action, regulations or securing of grants or contracts with the State were never in question nor are they in question now.

Over the past several years, a small number of site consultants and competing state economic development agencies began to postulate that Alabama's ethics laws could be interpreted so as to require site consultants and other economic development professionals to register as lobbyists and become subject to the accompanying requirements, such as 1) registration obligations, 2) training requirements, 3) quarterly disclosure obligations, 4) requirements to disclose their clients (who would then be considered principals) and ending any degree of confidentiality, 5) be restricted with their clients from the ability to enter into contingency agreements. This discussion became a competitive disadvantage and a talking point among a number of site consultants who began to question a number of concerns, such as the ease of doing business in Alabama, the lack of clarity on the issue and the potential for uncertain legal exposure of doing business in Alabama and questioning whether the job-creating companies with economic development projects would even consider Alabama with confidentiality remaining uncertain.

In an effort to bring clarity to this issue, the Economic Development Association of Alabama decided to approach the Ethics Commission for an Advisory Opinion on the matter. During a public hearing on the matter before the Alabama Ethics Commission on August 16, 2017, an attorney from the attorney general's office expressed his opinion that a plain-language reading of the Alabama ethics laws could be interpreted such that economic developers could be considered lobbyists. During this hearing, Commissioners heard from a variety of economic developers who expressed concerns that this interpretation would damage the confidential nature of most

projects and that the high degree of regulation requirements and disclosures could result in fewer companies looking to expand or locate in Alabama. Responding to these arguments, the Commission chose to render no Advisory Opinion and laid it before the Alabama Legislature to clarify the matter.

In response to the Alabama Ethics Commission request for legislative action, HB 317 was adopted during the 2018 Legislative Session. HB 317 created a safe harbor for "Economic Development Professionals" to provide that they are not lobbying when seeking economic development incentives, subject to certain exceptions. The law was written with a sunset provision such that it expires on April 1, 2019 absent any action by the Alabama Legislature. HB 317 was crafted as a bridge toward a more permanent solution. The time for advancing a more permanent solution is now, early in the 2019 Regular Session before the April 1st expiration of HB 317.

Much of the focus has been limited to the role of site consultants and while that group of professional economic developers was primary to the language drafted in HB 317, there are others who play a vital role in their support of job-creating economic development whose activities should be articulated so as not to be defined as lobbying. These are: 1) Chamber of Commerce staff and volunteers, 2) professional services providers (e.g., accountants, engineers, attorneys), 3) individual businesses supporting economic development (e.g., employees of banks, utilities, etc.), 4) employees of prospects, 5) public employees supporting economic development projects, and 6) industrial development authority employees/board members.

The economic development community in Alabama recognizes the vital role our ethics laws play in protecting the public trust in state and local government. We support and do not propose to change the ethics law's focus on preventing actions which might be taken by parties to corruptly influence elected officials, public officials or public employees. We support and do not propose to change the ethics law's focus on preventing elected officials or public officials from using the mantle of their office or position for personal financial gain.

At the same time, it can be argued that well-intentioned laws created to establish regulatory boundaries can often result in unintended consequences. The recommendation of the Alabama Ethics Commissioners in 2017 that this issue be addressed and clarified by the Alabama Legislature and the subsequent legislative passage of HB 317 in 2018, clearly recognized that labeling the activity of individuals seeking to advance specific, good faith economic development or trade promotion projects as being engaged in lobbying was not in the best interests of the general welfare of our State and its public who benefit from this job-creating activity. It is now time to advance a more permanent resolution to this issue.

EDAA
ECONOMIC DEVELOPMENT ASSOCIATION OF ALABAMA

**To:** **Mr. Othni Lathram, Director, Legislative Services Agency**

**From:** **Jim Searcy, Executive Director, Economic Development Association of Alabama**

**Subject:** **Comments for Ethics Clarification and Reform Commission January 31 Meeting**

The 500 members of the Economic Development Association of Alabama (EDAA) appreciate the opportunity to appear before the Commission to provide information regarding economic development and ethics issues – especially the economic development professional (EDP) safe harbor established by the Legislature in 2018. By enacting the safe harbor, the Legislature provided much needed confirmation and clarity for the EDPs who are critical to Alabama's nationally-recognized success in economic development in recent years.

The 2018 EDP safe harbor includes a "sunset" provision such that it expires in April. It is our hope that this provision will be removed soon. Any requirement that site selectors register as lobbyists would place Alabama at a disadvantage with respect to other states. This is due to the confidential nature of the site selection process. EDAA greatly appreciates the Legislature's enactment of the EDP safe harbor and urges that it be renewed as soon as possible. Several site selectors have provided comments on the importance of the EDP safe harbor to their ability to consider Alabama for projects. At their request, I am forwarding you their comments for distribution to the Commission. The comments are from:

**Mark Williams, President, Strategic Development Group**
**Didi Caldwell, Founding Principal, Global Location Strategies**
**Jay Garner, President, Garner Economics**

While the 2018 passage of the EDP safe harbor was essential for Alabama to remain competitive in economic development, there are some technical issues and ambiguities in the original legislation that we believe should be considered moving forward. For example, employees of many municipalities, counties, and other governmental entities (e.g., IDBs) are "public employees" who are involved in ED activities and are expected to work with (and appear before) state agencies and local legislative bodies (including those governing their public employer) regarding incentives and ED projects. There are several economic developers that are dealing with this and other ambiguities who are providing comments which I have also attached at their request for the Commission:

**Greg Knighton, Economic Developer for the City of Hoover**
**Dale Greer, Director of Economic Development, City of Cullman**
**Lori Huguley, Director of Economic Development, City of Opelika**
**Phillip Dunlap, Economic Development Director, City of Auburn**
**Ellen McNair, Senior Vice President, Montgomery Area Chamber of Commerce**

We look forward to sharing our perspective with the Commission. Thank you in advance for your assistance in providing these comments to them.

January 25, 2019

Code of Ethics Clarification and Code Commission
State of Alabama

Ladies and Gentlemen,

It has come to my attention that the legislation known as the Alabama Jobs Enhancement Act, which addresses the need for professional site selectors and other economic development professionals to register as lobbyist, is set to expire on April 1, 2019.

I would encourage the renewal of this legislation to preserve your state's competitiveness in recruitment efforts. As you know, recruitment of impactful industry is highly competitive and the creation of legislation which places additional red tape on the site selection process stands to costs Alabama thousands of future jobs and billions in capital investment.

I also encourage removal of the legislation's sunset provision to avoid confusion and future concerns about Alabama's readiness to compete and business friendly environment.

Best regards,

Mark Williams
President

January 21, 2019

Mr. Greg Canfield
Secretary Alabama Department of Commerce
401 Adams Avenue Montgomery, AL 36130-4106

Dear Mr. Canfield:

It has come to my attention that there is a sunset provision in HB 317 that requires the legislation be renewed by April 1, 2019. This legislation, known as the Alabama Jobs Enhancement Act, addresses the need for site selectors and other economic development professionals to register as lobbyist in order to negotiate project agreements with the state.

Last year, the passage of HB 317 provided clarity for professionals like myself that are representing companies looking to invest billions of dollars of investment and create thousands of jobs. As you know, industrial recruitment is highly competitive and time sensitive. Our clients expect us to be able to help them determine the optimal location for their investment in ever decreasing time frames. I fear that if the legislation is not renewed it will create confusion among my contemporaries, impact our ability to serve our clients in a timely manner, and place Alabama in a less competitive position relative to other states that have no such requirement.

As Chair of the Site Selectors Guild, an organization with 51 of the most respected location strategy advisors from across the globe, I can assure you that site selection professionals, just like their clients, thrive in a business-friendly environment where the playing field is well understood and risks are minimized. We perform our duties with diligence, integrity, and as much transparency as possible given the highly confidential nature of our projects. We need experienced and equally diligent economic development professionals on the local and state side that can help us achieve our client's objectives.

The extension of HB 317 will give confidence to me and to the site selection community that Alabama continues to be a highly competitive location for business and that we will be able to represent Alabama in the best light possible.

Please do not hesitate to reach out to me if you have any further questions or concerns.

Best regards,

Didi Caldwell
President and Founding Principal

January 24, 2019

Code of Ethics Clarification and Code Commission
State of Alabama

Dear Ladies and Gentlemen:

Last year, I offered written testimony advising the Legislature that categorizing site location advisors, such as myself as lobbyists, would be detrimental to the State's efforts in business recruitment. My job, and those that have a similar focus of what I do, is to evaluate on behalf of companies the optimal locations for their potential investment.

Location advisement is a rigorous science that is very analytical in nature. I noted last year that adding another layer of unnecessary bureaucracy, such as registering to be a lobbyist (which we aren't), could cause harm in your state recruitment efforts since individuals such as myself, would normally just find another business-friendly state to do business in. I was thrilled when the Legislature did not require location advisors to register. But here we are again discussing the issue since there is a sunset provision to the legislation.

I would encourage you to make an educated decision on removing the sunset provision for this legislation so that it does not become an annual issue of concern. Please don't hesitate to call me if you have any questions.

Sincerely,

Jay Garner

Jay A. Garner, CEcD
President

City of Hoover
Office of Economic Development

January 23, 2019

Code of Ethics Clarification and Reform Commission
Office of the Attorney General of Alabama
P.O. Box 300152
Montgomery, AL 36130-0152

Dear Commission:

I am employed in a full-time capacity by the City of Hoover as its Economic Development Manager. I work daily to recruit and retain companies and jobs in the city. As an economic development professional, I write to you encouraging the renewal of HB 317 and the inclusion of additional language to further clarify several issues.

I understand that the Economic Development Professional (EDP) safe harbor is unavailable if a person seeks incentives through "legislative action." Legislative action is not defined in Alabama law but likely includes action by city councils and county commissions. Under current law, therefore, the EDP safe harbor appears to be unavailable when someone seeks approval of abatements and incentives at the city council or county commission levels. Also, local financial or in-kind support of a project requires vote by a city council or county commission under Amendment No. 772. These "772 projects" are common in the City of Hoover, possibly meaning that many people would need to be registered as lobbyists.

I understand that the EDP safe harbor currently does not apply to employees of cities and counties or other local government instrumentalities (e.g., IDBs/IDAs). As a "public employee" involved in ED activities, I am expected to work with (and appear before) local legislative bodies – including those governing the City of Hoover - regarding incentives and ED projects. I must also work with officials in Jefferson and Shelby Counties. I also must work with state agencies (Commerce, ADECA, ALDOT) regarding contracts or grants for ED projects.

I understand that the statute creates a situation where members of Hoover's Industrial Development Board, when supporting ED projects before state agencies, would need to register as lobbyists because they are influencing state contracts or grants and are not subject to the EDP safe harbor. The same situation would arise if they are working with (or appearing before) the Hoover City Council or the county commissions of Jefferson or Shelby Counties about an ED project.

I respectfully ask that you consider adding language to 1) extend the EDP safe harbor when someone seeks approval of abatements at the city council or county commission levels; 2) extend the EDP safe harbor to full time economic development professionals who are public employees; and 3) clarify that IDB/IDA Board members need not register as lobbyists when working in their appointed capacities to support ED projects.

Thank you for your consideration.

Respectfully,

Greg Knighton
Economic Development Manager

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CULLMAN ALABAMA
Economic Development Agency

To: Code of Ethics Clarification and Reform Commission

From: Dale Greer, Director
Cullman Economic Development Agency
City of Cullman

Subject: Renewal of HB 317

Dear Sirs:

As an employee of a local government economic development agency, I believe it is important to revise the language in the HB 317 to insure professional economic developers working as employees of cities and counties in Alabama are not classified as lobbyists.

I have spent 29 years with the City of Cullman Economic Development Agency focused on attracting new industry and assisting industry to expand. Most of those successful efforts involve incentivizing the company with a goal of creating jobs and attracting capital investment to Cullman and Alabama.

Our job description includes working with the state, local governments and service agencies to seek grants and other funding sources to foster growth that improve the quality of life of our citizens. Actions taken by local governments are public.

Finally, please consider removing the "sunset" provision in HB 317. Alabama communities face a competitive disadvantage when our competition can point to the fact that our legislation has a set termination date that could negate their incentives.

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CITY OF
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January 22, 2019

Code of Ethics Clarification and Reform Commission
Alabama Legislature

This letter is in support of renewing HB 317 and specifically asking to add some additional language regarding the question of safe harbor for City Economic Development Professionals as well as Industrial Development Board members.

I believe it may have been an oversight in the language to omit City and Industrial Development Board members from the Economic Development Professional safe harbor clause and would like to request it be inserted to clarify any confusion that City Economic Developers should be afforded the same consideration as other Economic Development Professionals.

In my role as Economic Developer for the City of Opelika, I am responsible for evaluating projects and making recommendations to the Mayor, City Council and the Industrial Development Authority. The language of HB 317 seems to inhibit my ability to effectively execute my duties. The City Council looks to me for recommendations for incentives that are in the best interest of our City. A clarification of the language will provide the coverage needed by those Economic Development Professionals who are employed by municipalities.

As far as the effectiveness of HB 317, I believe it enabled the State of Alabama to continue its impressive string of highly desirable project wins. This might not have been possible had HB 317 not been enacted to provide coverage for Site Selectors and Economic Development professionals. I hope that the Legislature will remove the sunset clause and add the additional language that provides City Economic Development professionals and Industrial Development Board members the same safe harbor as others in the State.

Sincerely,

Lori Huguley, CEcD
Director
Opelika Economic Development

OPELIKA
ECONOMIC
DEVELOPMENT

ALABAMA'S 1ST GIG CITY
OPELIKA

City of Auburn

Home of Auburn University

January 18, 2019

To: Code of Ethics Clarification and Reform Commission

From: Phillip Dunlap, Director
Economic Development Department
City of Auburn

Subject: HB 317 Renewal

Gentlemen:

I am writing this memorandum as an employee of the City of Auburn who has served in the capacity of Economic Development Director for over 34 years. In my career, I have been directly involved in numerous projects that have resulted in over a billion dollars in capital investment and have resulted in thousands of jobs being created for residents of Auburn and all of east Alabama.

It is a fact that most of these investments involved some type of incentive package provided either by the State of Alabama or the City of Auburn, or both. In every case, the City of Auburn has worked diligently to ensure that such incentives were provided in an open and transparent manner and were essential to win the project in an intensely competitive arena. This brings me to the subject of this memorandum. I am aware that HB 317 is again being discussed for renewal. It is essential that HB 317 is renewed with some important changes.

1.) The sunset provision should be deleted.

2.) It is important that language be included that ensures that professional economic development employees of municipalities or counties are not considered lobbyists under HB 317. These people are expected to put together economic development packages for their governments and in no way are they functioning as lobbyists. They are employees hired to do a job. In fact, public employees are already covered under the State of Alabama ethics laws.

I appreciate your consideration of this request. The effort to recruit jobs and investment requires hard work and being able to move quickly in an extremely competitive environment. Thank you again!

144 Tichenor Avenue, Suite 2 • Auburn, Alabama 36830
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January 30, 2019

Alabama Ethics Clarification and Reform Commission
Office of the Attorney General of Alabama
Post Office Box 300152
Montgomery, AL 36130-0152

Subject: HB 317 Renewal

Dear Commission,

I am employed full time as Senior Vice President – Corporate Development of the Montgomery Area Chamber of Commerce. In that role, I am responsible for the recruiting of new and expanding industries in Montgomery. I have over 35 years of experience working in the field of economic development. In addition, I am a Certified Economic Developer, certified by the International Economic Development Council. Our Chamber is proud to have served a role in many successful efforts that have helped our community grow including the recruitment of Hyundai and the over 35 Hyundai suppliers that now employ over 15,000 people in our county with a $4.8B annual statewide economic impact.

On behalf of our chamber and many other chambers across the state, we thank the members of this commission for considering this issue and for providing us with the opportunity to provide our perspective on recurring questions about how economic development efforts in this state are affected by various ethics laws and interpretations of those laws. My goal in providing these comments is to ensure that our staff and volunteers will be able to continue their efforts to help create opportunities, jobs, and prosperity in Alabama, as we have done for many decades.

**Background on the Chamber's Role**

Before I review any specific concerns, it may be helpful to provide some context on the economic development role that our Chamber plays in the Montgomery area, which I believe is similar to the role that many chambers play across the state.

The Chamber supports both local industries who are seeking to expand their businesses as well as companies that are considering locating a business in our community. We support businesses and other organizations (such as the U.S. military) considering locating or expanding in this area without regard to whether the group is a member of our organization. A core mission of our Chamber is to seek out and support opportunities for growth and advancement in our community and to work with the public sector to do so.

Due to the complexity involved with business development incentives and the related agreements and approvals, it is common practice for any business expanding or locating a project here to ask us for advice and assistance in understanding and seeking tax/development incentives and the associated public sector agreements and approvals for which they are eligible. The economic growth that our Chamber supports is central to the public interest and we work daily with local government officials in our economic development efforts.



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Our Chamber staff and volunteers regularly participate in economic development activities and routinely work directly with the business and the government bodies with authority over incentives and other business location issues. These efforts may include working with the Department of Commerce on a project agreement, working with other state agencies on issues related to the project, or working with AIDT to assist with worker training. We also work with the City and County when they are providing monetary or in-kind support for an economic development project. Our Chamber may also work with the business and the local IDB to secure sales and property tax abatements for a prospect. Therefore, a core part of our mission is being familiar with these issues and encouraging economic development opportunities in our respective regions.

**Recent Developments – EDP Safe Harbor**

In 2017, economic developers sought to confirm that routine economic development activities that chambers work on every day – such as those discussed above – are not considered "lobbying" under the Ethics Act (as we have understood to be the case for many years). As we understand it, the Ethics Commission staff and Commission could not come to agreement on addressing this issue and asked the Legislature to resolve it. This lead to the 2018 enactment of the economic development professional safe harbor in House Bill 317, which is now codified in Section 36-25-1.2 of the Alabama Code.

On behalf of the Chamber and many others in the economic development field, we want to thank the Governor and legislators who supported this important confirmation of the economic development community's longstanding understanding of how the ethics laws apply to routine economic development activities. We recognize that these are complex and easily politicized issues and appreciate your leadership in helping ensure that this State does not miss a step in pursuing growth opportunities. We continue to believe that the Legislature has never intended to include Chamber staff or volunteers as lobbyists simply because they collaborate and work with businesses on economic development projects in their community and may interact with a public official in doing so.

It is our understanding that the economic development professional safe harbor will expire on April 1, 2019 and that the Legislature will have the opportunity to consider the reauthorization of this exemption during the 2019 Legislative Session. We support this renewal as well as several technical amendments that will provide further clarity and protections to Chamber staff and volunteers.

**The Continued Need for the EDP Safe Harbor**

The Ethics Act defines the term "lobbying" to include the "promoting or attempting to influence the awarding of a grant or contract with any department or agency of the executive, legislative, or judicial branch of state government." The Ethics Act defines the term "lobbyist" to include any person who receives compensation from a business to lobby. The economic development professional safe harbor confirms that Chamber staff and volunteers – **who are <u>not</u> hired by the businesses seeking these incentives and agreements and approvals** – are not considered to be lobbying and are not required to register as lobbyists, but as described in more detail below, there is some question as to whether the exemption in that bill covered Chamber representatives.

The Chamber is a general advocate for economic growth and development in our community, but we are not retained, compensated, or hired to work on economic development projects by the businesses seeking those incentives. Instead, Chambers are fulfilling a core part of their mission in championing and seeking to facilitate economic growth opportunities for their communities. This includes supporting or participating in discussions with state and local public officials to support job creation and capital investment by businesses that do not hire, retain, or compensate us. If these types of actions are classified as lobbying or if Chamber staff or volunteers are required to register as lobbyists, then we are concerned about the impact that this would have on the Chamber and our ability to support important economic development projects that help grow our region.

Chambers of Commerce such as ours, wish to continue providing support to their communities for their continued growth and prosperity. They play a unique role in the civic landscape, but they are not a compensated service provider to the businesses seeking economic development incentives. This issue is of vital importance to the regions we serve so that we can continue helping grow jobs and opportunities.

**Technical Clarifications for the EDP Safe Harbor**

While the provisions enacted in 2018 were essential to Alabama's continued economic growth – and we greatly appreciate the Legislature's enactment of them (and the Governor's signing this law) in response to the Ethics Commission's request – we believe there are additional technical issues to address to ensure that Chamber staff and volunteers are clearly covered by the economic development professional safe harbor. As noted above, Chamber volunteers are not "employed" by the Chamber or the economic development prospect as Section 36-25-1.2 seems to require in order to be covered by the safe harbor. In other words, the incentives are not "for" the Chamber. Instead, the incentives are ***"for"*** the economic development prospect that a Chamber hopes will grow in their area. The Chamber does not receive the incentives. They merely support economic development projects.

As a result, in the course of enacting the extension of this law, we would encourage the Legislature to consider a common sense clarification to make clear that a Chamber employee or volunteer need not be "employed" by the recipient of an economic development incentive in order to qualify for the safe harbor. It should be clear that Chamber staff and volunteers are just as eligible for this safe harbor when they support incentives that benefit their community as the employees of the business who are covered by the safe harbor.

In conclusion, we thank you for the opportunity to share our perspective and ask that you please support the renewal of the safe harbor for economic development professionals. We also ask that you please consider the aforementioned technical issues to ensure that those who work with chambers are able to continue to support economic development efforts in our regions.

Sincerely,

Ellen G. McNair, CEcD
Senior Vice President – Corporate Development

# APPENDIX A

# TO THE COMMISSION REPORT

## *JOINT COMMENTARY OF THE COMMISSION CHAIRMEN*

***SUBMITTED BY:***

**STEVE MARSHALL, ATTORNEY GENERAL**
**TOM ALBRITTON, EXECUTIVE DIRECTOR, ALABAMA ETHICS COMMISSION**

# CODE OF ETHICS CLARIFICATION AND REFORM COMMISSION

# ETHICS REVISION COMMISSION
# JOINT SUBMISSION BY THE CHAIRMEN

## Introduction

Attorney General Steve Marshall and Tom Albritton, Director of the Ethics Commission served as co-chairs of the legislature's Ethics Revision Commission. It is the opinion of the Chairmen that the ethics law is effective and enforceable as currently written. Nonetheless, there are a few areas of the law that should be improved for strength and clarity. Though the Commission discussed and debated a variety of changes to several areas of the law, the Chairmen's priorities can be summarized as follows: 1) the conflict of interest provisions should be rewritten as proposed; 2) brighter lines should be drawn as to what can be given and received between public officials/employees and lobbyists/principals as has been proposed; and 3) the *mens rea* requirements for each provision of the law, and its corresponding punishments, should be explicit.

## Conflict of Interest

First, the conflict of interest provision—as currently written—appears to be unenforceable, as evidenced by *Hubbard v. State*.[1] The term is defined in §36-25-1(8); the concept is implied, but not explicitly used, in §36-25-5(b), and then somewhat defined again in §36-25-5(f). The Legislature is also subject to a separate constitutional provision regarding conflicts of interest.[2] The Attorney General strongly recommends to the Legislature that these provisions be consolidated and rewritten, as proposed below, to clearly prohibit public officials and public employees from concealing their personal interests in matters over which they exercise discretion. The Attorney General's proposal to the Revision Commission was favorably received.

To quote the U.S. Court of Appeals for the First Circuit, "In a conflict of interest situation, the basis for its condemnation is that when a public official [or a public employee] fails to disclose a personal interest in a matter over which he has decision-making power, the public is deprived of its right either to disinterested decision making itself, or as the case may be, to full disclosure as to the official's potential motivation behind an official act."[3] With this in mind, the following language is proposed:

1) *A public official or public employee shall not take any action, withhold any action, or make any decision in the discharge of his or her official duties on a matter in which the public official or public employee has a conflict of interest.*

2) *A conflict of interest exists if the public official or public employee:*

    a. *has a material and undisclosed financial interest; and*
    b. *knows or should have known that the action, withholding of action, or decision directly and uniquely affects that interest.*

3) *An interest is directly and uniquely affected if the action, withholding of action, or decision affects an individual or a member of a small class, but not equally with other members of a large class or in the same manner as the entire community.*

4) *Actions by a public official or public employee that are merely ministerial or are non-discretionary in nature do not give rise to a violation of this subsection.*

[1] No. CR-16-0012, 2018 WL 4079590 (Ala. Crim. App. 2018).
[2] AL. CONST. OF 1901, art. IV, §82 (1901).
[3] 85 F.3rd 713, 724 (1st Cir. 1966).

5) *For purposes of this subsection, the material financial interests of a public official or public employee extend to the material financial interests of a member of his or her household and to any business with which he or she is associated.*

It is recommended that the method and mechanism for disclosure be addressed by the following language:

6) *For purposes of this subsection, required disclosures by public officials must be made in a manner prescribed by the Alabama Ethics Commission, if the information is not otherwise publicly available in the official's statement of economic interest. Required disclosures by public employees must be made to his or her direct supervisor.*

7) *The Alabama Legislature is also subject to the conflict of interest and disclosure requirements found in Article IV, Section 82 of the Alabama Constitution.*

The conduct prohibited by the conflict of interest provision is distinct from that which is prohibited by the provision on using one's office for personal gain. Use of office for personal gain, found in §36-25-5, presumes or implies that a conflict of interest exists, but that personal gain is achieved when the acted-upon conflict of interest results in actual gain (usually financial) to the public official or public employee. Thus, the following language is proposed to clarify the interplay between these two provisions:

8) *Even if disclosure of a material financial interest has been properly made, it is the responsibility of public officials and public employees to determine whether or not taking the action, withholding the action, or making the decision would result in using his or her office for personal gain, as prohibited by §36-25-5(a).*

In other words, an individual may not have violated the conflict of interest, due to proper disclosure, but could still be guilty of using his or her office for personal gain. On the other hand, an individual could be in violation of both provisions if no disclosure was made and he or she profited from the action, withholding of action, or decision.

The term "business with which a person is associated" is defined in §36-5-1(2). In *Hubbard v. State,* the court did not interpret the definition to include part-time contract employees of a business. It is the Attorney General's Opinion that a contract employee or consultant of a business has an interest in that business; therefore, the following improvements to that definition are recommended:

*2) Business with which a person is associated: Any business of which the person or a member of his or her household is an officer, owner, partner, board of director member, employee—including an independent contractor or consultant—or holder of more than 5% of the fair market value of the business.*

**Giving and Receiving**

The Attorney General's Office also recommended to the Revision Commission, and the Ethics Commission supports, improvements to the sections of the ethics law governing giving and receiving between lobbyists/principals and public officials/employees. The objectives of the AGO's proposal were to: 1) eliminate terminology that is not easily understood; 2) remove the primary analysis of what can be given and received from the definitions section of the act; and 3) reduce the number of exceptions to the prohibitions.

First, the term "thing of value" could be replaced with the easily understood word, "anything." Therefore, there is no need for a lengthy definition of "thing of value" that must be referenced when an individual reviews the Act's limitations on giving and receiving. The proposal (attached) reads, "No lobbyist, subordinate of a lobbyist, or principal shall offer or provide anything to a public official, public employee, or member of the household of a public official or public employee, subject to the following exceptions..." As a result, one could reference the newly drafted "Section X" and, in one place, identify everything that can or cannot be given or received between a lobbyist/principal and public official/employee that does not involve corrupt influence or use of office for personal gain.

Second, the number of "exceptions" to the ban on giving and receiving between lobbyists/principals and public official/employee has been reduced from 17 to 9. The proposed exceptions have been simplified and consolidated, while brighter lines are drawn as to what conduct is prohibited.

Third, the Chairmen propose that the existing "friendship exception," found in §36-25-1(34)(b)(3), be tightened.

> *3) Anything offered or provided as the result of a friendship, so long as 1) the lobbyist or principal has no direct or specific interest before the recipient; and 2) the gift was not paid for or directed to be given by anyone other than the provider.*

The proposed change to the "friendship exception" does not include business or professional dealings of any kind, an improvement from the current law. Relevant factors in determining whether the friendship exception applies are taken from existing law and include: a) whether the friendship preexisted the recipient's status as a public official, public employee, or household member of a public official or public employee, and b) whether gifts have been previously exchanged between the provider and the recipient.

Fourth, the Chairmen suggest adding stand-alone language addressing the matter of employment, which has been a source of confusion for public officials and employees (particularly given the Alabama Legislature's part-time status). The Chairmen propose a distinction between employment relationships established *prior to* public service and employment relationships established *after* entry into public service. Of course, any employment relationship that presents an irreconcilable (or inherent, persistent) conflict of interest should be prohibited, regardless of when the relationship was established.

Fifth, the effectiveness of this proposed section depends on a definition of "principal" that extends coverage meaningfully within an organization, that is to individuals. The Chairmen's proposed language and recommendation is contained within the primary report.

Sixth, in exchange for a significant tightening of the giving and receiving exception of the law, the Revision Commission contemplated adding graduated civil penalties for negligent violations of this section of the law, with a presumption that multiple, separate negligent acts carry a criminal penalty. The Attorney General's Office and the Director of the Ethics Commission acknowledged that administrative fines are likely more appropriate in some circumstances and that the consistent levying of fines, if properly designed, could strengthen enforcement of the lesser provisions of the law and thus the Act as a whole.

**Requisite *Mens Rea* and Penalties**

The application and enforcement of Alabama's ethics laws should be clear and consistent. While the real strength of the ethics law is found in provisions that prohibit objectively immoral behavior (known as *malum in se)*, the law as currently written also punishes various "technical" violations of the law (known as *malum prohibitum*), in some cases, to the same degree. To aid in enforcement, the

law itself should carefully reflect the varying severity of the violations that the ethics law sets out and the requisite *mens rea* that must be proven.

Section 36-25-27 prescribes penalties for violations of the ethics law. Intentional violations of the law are Class B felonies[4] and "other" violations (presumably—reckless, knowing, or criminally negligent) are Class A misdemeanors.[5] Disclosure requirements, knowingly committed, are Class A misdemeanors.[6] Other class A misdemeanors include:

- knowingly making or transmitting a false report or complaint[7]
- making false statements to an employee of the commission or to the commission itself without reason to believe the accuracy of the statements[8]
- intentionally failing to disclose information[9]
- intentionally failing to file a statement of economic interest[10]

Sections 36-25-4 and 36-25-7 designate violations relating to secrecy and disclosure as Class C felonies.

The Revision Commission spent a great deal of time discussing both the penalties associated with various violations of law and the *mens rea* (state of mind) that must be proven. It is recommended that intent language be added to all violations, including those involving giving and receiving. As currently written, §36-25-27(a)(2) likely means to invoke the 3 states of *mens rea*, other than intentional, but does not explicitly list them. Section 13A-2-4(b) of the Alabama Criminal Code states that a statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, states a crime of mental culpability. Thus, "knowingly," "recklessly," or "with criminal negligence" should be added to all crimes within the ethics law that do not already include the term "intentionally." Penalties should then be reconciled with the culpable mental state assigned to the violation.

Further, because the ethics law contains criminal violations but is located outside of the criminal code, it is recommended that the definitions of culpable mental state, as defined in §13A-2-2, be adopted and placed in the definitions section at §36-25-1.

A more complex discussion was had by the Revision Commission about the elements of a criminal ethics violation and the culpable mental state required for each element. In other words, which parts of an act must be proven to be "intentional" for a Class B felony or "knowing" for a Class A misdemeanor? As the Attorney General noted during these discussions, the Alabama Criminal Code, in §13A-2-4(a) already addresses this question. It reads: "when a statute defining an offense prescribes as an element thereof a specified culpable mental state, such mental state is presumed to apply to every element of the offense unless the context thereof indicates to the contrary." Because the ethics law contains criminal violations, but is located outside of the criminal code, the Attorney General recommends that the language of §13-2-4(a) be adopted and placed in the penalties section at §36-25-27.

[4] ALA. CODE §36-25-27(a)(1) (1975).
[5] *Id.* at §36-25-27 (a)(2).
[6] *Id.* at §36-25-27 (a)(3).
[7] *Id.* at §36-25-27 (a)(4).
[8] *Id.* at §36-25-27 (a)(5).
[9] *Id.* at §36-25-27 (a)(7).
[10] I*d* at §36-25-14(e).

# APPENDIX B

# TO THE COMMISSION REPORT

## *PREAMBLE REGARDING GUIDING PRINCIPLES OF ALABAMA'S ETHICS LAWS*

## *&*

## *COMMENTS ON PROPOSED STATUTORY REVISIONS CONTAINED IN THE COMMISSION'S REPORT*


***SUBMITTED BY:***

**HONORABLE JOSEPH BOOHAKER, ALABAMA ASSOCIATION OF CIRCUIT JUDGES**
**CHRISTINA CROW, ALABAMA STATE BAR**
**MICHAEL ERMERT, ALABAMA STATE BAR**
**DEBORAH LONG, ALABAMA LAW INSTITUTE**
**BILL ROSE, ALABAMA LAW INSTITUTE**
**TOM DART, ALABAMA COUNCIL OF ASSOCIATION EXECUTIVES**
**TED HOSP, ALABAMA COUNCIL OF ASSOCIATION EXECUTIVES**


## CODE OF ETHICS CLARIFICATION AND REFORM COMMISSION

## Preamble

After serious consideration, we recommend that the Legislature be guided by the following principles which are reflective of current Alabama policy, constitutional principles, and common sense.

1. The Alabama Ethics Laws should promote public confidence in the integrity of government.

2. Misuse of office or station for personal gain by a public official or public employee will not be tolerated.

3. The Alabama Ethics Law must give fair warning of what will be punishable as a criminal act. The punishment should fit the crime, and only corruptly intentional violations of the Alabama Ethics Laws should be punishable as a felony.

4. Transparency is paramount. Important financial relationships and transactions between public officials and public employees with those outside government should be disclosed, and those disclosures should be easily accessible by the public.

5. Information relating to lobbying activities should be disclosed and those disclosures should be easily accessible by the public.

6. Recognizing the First Amendment right of all citizens to petition government for redress of grievances, in addition to Fourteenth Amendment right of due process, the Alabama Ethics Laws must, with clarity, define those persons and transactions which the State seeks to regulate through the imposition of criminal sanctions in furtherance of the compelling State interests of attracting well-qualified persons to serve in government, while providing assurances to the public of the integrity of government processes.

7. The public policy of Alabama should always be to encourage those best qualified to serve. The Alabama Ethics Laws should not be so complicated and vague as to discourage people from serving the people of Alabama and their communities.

8. Persons who serve their government and their communities on a volunteer basis should have appropriate and clear guidance about the application of the Alabama Ethics Laws to their volunteer service. Fear of unintended consequences should not be a deterrent. Prosecutorial discretion should not be viewed as an appropriate substitute for clarity in drafting.

9. In accordance with long-standing public policy and as stated in Alabama Code Section 36-25-2, public officials and public employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests except where conflicts with their responsibility as public officials and public employees to the government cannot be avoided.

10. Where public officials and employees are governed by regulatory schemes and ethical rules unique to their profession, the legislature should consider deferring to those regulatory schemes and professional ethics codes, when appropriate.

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In summary, Alabama's Ethics Act has been plagued by piecemeal revisions over the years. While the Reform and Clarification Commission has worked diligently to consider the law and its consequences, it was difficult to achieve the

goal of clarity in what has been a piecemeal approach. At its best, the Alabama Ethics Act will be complicated, but until the laws are reviewed in context comprehensively, it will continue to be difficult to change parts without considering how they fit into the whole. A comprehensive review would accomplish such and add tremendous value. It would also allow the myriad of confusing opinions and cases to be incorporated into the law, while also addressing unintended consequences. We strongly recommend an Alabama Law Institute drafting committee be established to rewrite the Alabama Ethics Act into a more coherent and clear body of law.

Further below, you will find comments received from various members of the Commission on language that is included in the report as well as language that may have previously been considered by the Legislature but not included in the report. With respect to the latter, the comments are included for considerations if the previous language is considered by the Legislature. The specific comments are identified by the member who contributed the comment; these comments were made in an effort to identify specific (but not necessarily all) concerns that the Legislature should consider. Due to time restrictions, there was no attempt to arrive at consensus on those comments, and thus, no conclusion should be drawn as to whether other members agree or disagree with the identified comments.

## Individual Comments on Proposed Statutory Considerations Included in the Report

General Commentary on Issues Raised by the Commission Members:

**Comments by Deborah Long, Mike Ermert, Bill Rose, and Christina Crow**:

Many Commission members found it difficult to attempt to make a recommendation on individual sections of the Ethics Code without knowing the context of the whole. A piecemeal approach without considering the Ethics Code as a whole led many members to express the preference of having an ALI committee review it as a whole.

In addition, the Commission discussed the dangers inherent in a "one size fits all" approach, with the same laws governing all branches of government and public service at all levels, and many members, if not a full consensus, expressed the view that a more targeted approach would be preferable.

We hope that the body of work included in this Report will be a resource to the Legislature as it confronts the full range of issues in the Code of Ethics and related laws. It is also hoped that this Report – along with the comprehensive research conducted by Othni Lathram, Paula Greene, Jimmy Entrekin and others at the Legislative Services Agency in support of the Commission – will be a resource if the Legislature establishes a comparable commission in the future or charges an organization, such as the Alabama Law Institute, with more comprehensively analyzing the Code of Ethics and related laws over a longer period of time in the future. Finally, we express our gratitude for the hard work and professional work product of the staff at the Legislative Services Agency in support of the Commission.

Proposed Statutory Modifications to the definition of "Principal":

The current definition of "principal" states as follows:

> Ala. Code §36-25-1(24) "Principal. A person or business which employs, hires, or otherwise retains a lobbyist. A principal is not a lobbyist but is not allowed to give a thing of value."

The Alabama Court of Criminal Appeals has specifically requested the Legislature to amend the provision in the Alabama Ethics Act so as to "better circumscribe the class of persons defined as principals. . ."

Regarding **Version 1** of the proposed statutory modifications to "principal" presented in this Report:

**Comments by Judge Boohaker**:
Under the definition in Version 1, a.1. meets the clarity test for any principal other than a business. The provision in a.2. meets the clarity definition for "business" (as defined in Ala. Code § 36-25-1(1) (1975). However, the directive from the Court of Criminal Appeals was for a more clear definition and identity of the persons within a business who are also to be considered within the definition of a "principal."

A "business with which the individual is associated" is also a defined term under the Code of Ethics. Ala. Code §36-25-1(2) (1975) defines the term as follows: "Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent (5%) of the fair market value of the business."

Version 1's definition at Section a.3. of the proposed language, rather than more clearly define the term "principal" actually broadens the scope from a person who may hold 5% or more of the fair market value of the business and be an employee, officer or director, to include persons who also may perform compensated work as an independent contractor, that is "performs compensated work in any capacity".

**Comments by Deborah Long**:
I share the concerns of the Alabama Court of Civil appeals about the lack of clarity, and thus the potentially broad scope, of certain interpretations of the current definition of "principal" under the Ethics Code. We must take great care to avoid unintended consequences and to either unintentionally or unnecessarily add restrictions that impede the successful operation of our government without achieving any of the laudable goals and purposes of the Ethics Code. Moreover, please note that the research conducted by and on behalf of this Commission did not uncover any other state that subjected a broad range of the individual employees and board members of an entity that hires a lobbyist to the same restrictions as the lobbyist. Businesses create compliance programs to ensure compliance, and states that require special compliance programs are viewed negatively for at least two reasons: first, there is a cost to modify a compliance system and, second, the possibility of mistake exists when employees must be trained to pay attention to unusual requirements. Thus, this will be viewed as a burden by future employers, and one would hope that the Legislature is cognizant of and weighs the detriment of this burden against the benefits, if any, to the state of Alabama obtained by the burden.

Regarding **Version 2** of the proposed statutory modifications to "principal" presented in this Report:

**Comments by Judge Boohaker**:
I favor Version 2's definition since it deals with an "individual acting on behalf of a principal" in a more defined way. Without having to determine if a person is a holder of 5% of the fair market value of an entity, the identity of such an individual can be determined. For purposes of substantive due process, I believe that since a criminal statute is involved, there needs to be certainty, or an objective way to determine with certainty, the identity of a principal for purposes of applying the substantive provisions of the ethics laws with regard to conflicts of interest and giving and receiving. By basing the definition on the activities of the individual to be designated toward the lobbyist, rather than basing the definition on financial interest of the individual in the entity based on some subjective measure of fair market value, meets the substantive due process requirements needed.

**Comments by Mike Ermert**:
Version 2 addresses more clearly what conduct constitutes directing a lobbyist. In my opinion, this clarification is essential.

Many individuals serve on commissions and charitable or non-profit boards on a voluntary basis. Such laudable public service should not subject such individuals to legal jeopardy due to vague statutory language or by the act of simply voting on a policy position. In my opinion, more action must be required to "direct the activities of a lobbyist."

Proposed Statutory Modifications for Restrictions on Giving and Receiving:

Regarding the proposed statutory modifications to the restrictions on giving and receiving presented in this Report:

**Comments by Judge Boohaker**:
This draft provision moves some of the definitional provisions, with regard to exceptions to the general rule of prohibition, from a definitional to an operative provision of the Code of Ethics. It makes uniform the use of the term "household" of the public official or employee with regard to both giving and receiving. The draft also removes the provision of "for the purpose of corruptly influencing official action" as well as the definition of "to act corruptly" so that any giving, receiving or solicitation of anything by or between public officials/public employees, lobbyist and principals, unless excepted, is a violation.

**Comments by Deborah Long**:
Including "member of the household" in (b) expands the reach of the "lobbyist" restriction currently found in Ala. Code 36-25-23(c). In addition, "principals" are added to the class of persons/entities who can only be solicited for a campaign contribution.

By including "member of the household" in (b) but not including it in all the exceptions catalogued in (c), "members of the household" are subject to more restrictions that the public employee/official, which I doubt is the intent. Note how (c)(8) functions to allow public employees/officials the benefit of an exemption, but members of the household are not so exempted. This could have a number of consequences. Consider also whether the compliance burden on the organization considering employing a member of the household is such that the person is excluded from consideration of employment without regard to the merits of qualification. The Alabama Ethics Commission may receive overwhelming requests for rulings as to compliance from employers or members of households. I wonder whether the public interest requires members of the household to be equally restricted as the public employee/official is. I note that unduly burdensome provisions appear to run counter to Alabama Code 36-25-2(b).

If "members of the household" are to be subject to these restrictions, a de minimis or civic minded solicitation should be considered as an exemption for the household members. As written, a spouse of a public employee, to ensure compliance, could not solicit contributions to charities or other civic-minded organizations (such as the PTA, the local library or the local soccer club) without completing a fair amount of diligence. Individuals are simply not prepared to undertake such an inquiry. Query whether a request for a job interview at the local bank that is a principal or a request for a college recommendation falls within this language.

In (e) and (f), consider whether the term "compensation" encompasses non-taxable benefits, such as health insurance, retirement accruals and other benefits and perquisites of the role under ordinary course of business practices; broader language seems to be necessary to accomplish what I believe is the intent. As pointed out above, a corresponding section may be needed for "members of a household".

Regarding the penalty provisions for violations of the giving and receiving restrictions included in this Report:

**Comments by Judge Boohaker**:
I do favor graduated penalties that start with civil fines and with repeat offenses move into criminal sanctions once the scienter or *res mens* requirement of criminal law violation can be shown by repeated offense. Of the alternatives to subsection h(4), I favor the alternative with the most certainty and clarity.

**Comments by Mike Ermert**:

Under subsection (h)(4), given what other crimes constitute a Class B Felony, it must be inherently clear what an intentional violation of any provision of this section means.

I prefer Alternative 5.

**Comments Deborah Long**: As pointed out in the Preamble, a felony conviction should require proof of *mens rea* and should give actors fair warning of the conduct that is unlawful. In addition, to the extent that interactions with classes of individuals are unlawful, there should be an easy way to identify those individuals, so interactions can be appropriately curtailed.

Proposed Statutory Modifications to Conflicts of Interest:

Regarding the proposed statutory modifications to the definition and scope of conflicts of interest presented in this Report:

**Comments by Judge Boohaker**:
Since elected judicial officers are subject to the Canons of Judicial Ethics, and particularly Canon 3 which covers conflicts of interest for judicial officers, sanctions provided by the Canons should exclude elected judicial officers from this provision which currently is codified at Ala. Code §36-25-5(b) and (f) (1975).

Otherwise, I favor the draft since it ends the duality in the definition that currently exists in Ala. Code §36-25-1(8) [referencing §36-25-1(2)] and Ala. Code §36-25-5(f) (1975).

There is also the current provision at Ala. Code §36-25-5(b) (1975) which was discussed. Currently the subsection provides as follows:

> "(b) Unless prohibited by the Constitution of Alabama of 1901, nothing herein shall be construed to prohibit a public official from introducing bills, ordinances, resolutions, or other legislative matters, serving on commit-tees, or making statements or taking action in the exercise of his or her duties as a public official. A member of a legislative body may not vote for any legislation in which he or she knows or should have known that he or she has a conflict of interest."

Though the Definitional Subcommittee discussed changes to this provision, there was no consensus on any particular draft presented for our comment.

**Comments by Deborah Long**:
The different branches of government operate differently, and the different levels, e.g., municipal, county, state, etc., operate differently, and if Alabama Code 36-25-5(b) is amended, care should be taken not to create unintended consequences. For example, if this section does not exist, would a legislator who attends a meeting and either breaks or creates a quorum be at risk of violating the law? In addition, I note that there was substantial discussion that the levels of government service could warrant different substantive law.

Proposed Statutory Modifications to Revolving Door Provisions:

Regarding the proposed statutory modifications to the Revolving Door provisions presented in this Report:

**Comments by Mike Ermert**:
Revising this section is a needed clarification to align the language with its intent and proper scope, as evidenced by several Advisory Opinions issued by the Ethics Commission. I favor this revision particularly because of the striking of the phrase "or otherwise represent clients" as such a phrase could have different connotations for lawyers representing their clients, thus creating confusion.

###

# APPENDIX C

# TO THE COMMISSION REPORT

***COMMENTS ON PROPOSED STATUTORY REVISIONS CONTAINED IN THE COMMISSION'S REPORT***

***SUBMITTED BY:***

**TOM DART,** ***ON BEHALF OF***
**THE ALABAMA COUNCIL OF ASSOCIATION EXECUTIVES**

## CODE OF ETHICS CLARIFICATION AND REFORM COMMISSION

## Comments on Proposed Revisions from The Alabama Council of Association Executives

Proposed Statutory Modifications to the definition of "Principal":

ACAE favors the formulation of "principal" proposed under Version 2.

With respect to Version 1 of the proposed modifications to the definition of "principal," if that is chosen, ACAE asks that the following changes be incorporated:

> Insert Version 2's subdivision "c.2." as a new subdivision c. in Version 1 so as to read as follows:
>
> "[p]articipation in the process of determining the policy positions or receiving updates as to the status of lobbying activities relating to those policy positions as a member, director, employee or officer of a principal does not constitute directing the activities of the lobbyist."

Additionally, in existing subdivision "c." (which would be "d." if the addition above is accepted) after the words "merely a", insert the phrase "an officer, director or" and include a more specific reference at the end of the sentence to subdivision a.3. of Version 1. With these changes, the new provision would read:

> "d. The term does not include an individual or business that is merely an officer, director or member of an association unless the individual or business otherwise meets the criteria of paragraph a.3.."

**Rationale:** We have concerns that not including officers and directors of an association as positions that do not – standing alone – render the individual a principal will be used to argue that those individuals are per se principals. Actual authority or activity to control the lobbyist should be a condition for determining a person's status as a principal. This should be the case for all organizations, but it is especially true in the context of associations which rely on volunteers for their leadership positions.

Proposed Statutory Modifications to Giving and Receiving:

**Sections (a)(4) and (c)(4):** Insert "and for the duration of" following "attendance at" such that the provision reads as follows:

> "payment of or reimbursement for actual and necessary registration and travel expenses, including reasonable food and lodging expenses, incurred by attendance at and for the duration of an educational function of which the lobbyist or principal is a sponsor."

**Rational:** Educational functions are specifically defined under the law. In order for a public official or public employee to attend that person must either be a meaningful participant (*i.e.* a speaker), or the event must be related to the person's government function. Additionally, educational functions may not be "subterfuge for a purely social event." Thus, the conditions that must be present for an event to be considered an "educational function" are such that the Legislature determined that there is not a significant risk of corruption. Despite this, restrictions which are not included in the language of the ethics laws have been placed on the duration of attendance of public officials and public employees at these functions. We believe that the proposed change would restore the original intent of the Legislature.

**Section (d)(3)**: Insert the following sentence at the end of the current section:

"Notwithstanding the foregoing, the lobbyist's limits herein shall not count against the principal's limits and likewise, the principal's limits shall not count against the lobbyist's limits."

**Rational:** This additional provision would add clarity to the limits of the permissible provision meals or food and beverages that is consistent with current interprations of the law.

**Section (d)(1):** The language we prefer here is from the existing definition of "widely attended event." Rewrite the section to read as follows:

"At a gathering, dinner, reception, or other event ~~of mutual interest to a number of parties~~ at which it is reasonably expected that ~~more than 12~~ 13 or more individuals will attend, and ~~that individuals with a diversity of views or interests will be present~~ at which there will be information presented that is relevant to the public role of the public official or public employee, and which could not reasonably be perceived as a subterfuge for a purely social, recreational, or entertainment function."

**Rational:** With respect to the number of people who must be present, stating "13 or more" is less confusing than "more than 12" but has no substantive impact on the section.

More important, the language in the current definition of "widely attended event" is confusing. The phrases "of mutual interest to a number of parties" and "individuals with a diversity of views will be present" describe any gathering of two or more conscious people. The language suggested above is consistent with the current interpretation of what is permitted for a "widely attended event" based on Ethics Opinions from the Ethics Commission as well as the pattern of events precleared by Ethics Commission staff, and closely follows language used in the definition of "educational function."

**Section (d):** Insert a new section (d)(4) to provide for the preclearance of events:

"At any function or activity pre-certified by the Director of the Ethics Commission as a function that complies with the Act. The Director shall have the authority to request from a party seeking preclearance only such information necessary to determine that the function complies with the Act."

**Rational:** Pre-certification of events is a useful tool for public officials and public employees and allows them to rely on guidance from the Ethics Commission to determine whether a particular course of action – or attendance at a particular event – is permitted. This is one of the core purposes of the Ethics Act. Additionally, pre-certification is helpful to non-government organizations that wish to comply with the Act, but lack the experience or knowledge necessary to know what is permitted and/or the resources to hire an attorney to assist them.

Proposed Statutory Modifications to the Penalties Section of Giving and Receiving:

ACAE starts from the proposition that to constitute a felony for the giving or receiving of anything to or by a public official or public employee it must be alleged and proven beyond a reasonable doubt that there existed an intent to corruptly influence official action.

ACAE appreciates that a legitimate purpose of the Ethics Act is to ensure the public's trust in government, and that the prohibition of lavish gifts, trips and meals to government officials assists in accomplishing this purpose. However, while the provision of a gift without any intent to influence official action may look bad, it is not – absent that intent – actually corrupt.

Our system of justice should not seek to punish individuals with significant time in prison for actions that are not actually bad – but only appear bad. Moreover, we are unaware of any other felony in the Alabama Code that permits a person to be convicted of a felony without proof of a corrupt or bad intent.

With that as the baseline for ACAE, we make the following additional comments:

**Section (h):** Delete the default Section (h)(4).

**Rational:** We appreciate the intent of including a possible stepped up enforcement scheme in subsections, (h)(1-3). However, under subsection (h)(4), every giving or receiving of anything to or by a public official or public employee could be charged as a Class B felony, without respect to that stepped up enforcement regime.

Following multiple discussions about this provision during the Commission meetings, the only reasonable interpretation of proposed default subsection (h)(4) is that a prosecutor would only have to allege that a lobbyist or principal intentionally gave something to a public official or public employee. Intentionally here modifies only the act of giving – *i.e.*, that the person intended to hand the thing to the other person. This could legitimately be alleged in every single instance.

Thus, to constitute a Class B felony, the prosecutor would not have to allege or prove that the lobbyist or principal knew or should have known that they were a lobbyist or principal. The prosecutor would not have to prove that the lobbyist or principal knew the person with whom he or she was interacting was a public official or public employee. Similarly, there would not be any need to demonstrate that either party knew the item being provided was not permitted under the circumstances.

Finally, and most important, there would be no need to allege or prove that either party gave or received the item with any corrupt intent. To charge a person with a Class B felony under such circumstances is inconsistent with the core principals of our system of justice, and we are unaware of any other similar crime/punishment scheme under Alabama law.

**Alternative Penalty Proposals**

Of the alternative proposals, and repeating ACAE's objection to classifying any provision of a thing to a public official or public employee as a felony absent proof of a corrupt intent, ACAE favors them in the following order:

**Alternative 4:** Although it does not require proof of any attempt to corrupt or influence any action, this alternative at least requires the parties to a transaction to have knowledge that they are members of the restricted classes, and that the item being provided is not permitted.

**Alternative 3:** Again, although it does not require proof of corrupt intent or that the item provided is prohibited, this alternative at least requires the parties to know that they are members of the restricted classes.

**Alternative 6:** ACAE objects strongly to this proposed alternative because, despite language intended to ensure that the burden of proof is not shifted to the accused, as a practical matter this alternative appears to do just that.

**Alternative 5:** ACAE vehemently objects to this formulation in its entirety because it very clearly shifts the burden of proving innocence to the accused party, a principal which is wholly inconsistent with the bedrock principals of our criminal justice system.

ACAE is not submitting comments on any additional sections at this time.

###

# APPENDIX D

# TO THE COMMISSION REPORT

***COMMENTS SUBMITTED TO THE COMMISSION REGARDING UNIQUE ISSUES AND CONCERNS OF STATE EMPLOYEES***

***SUBMITTED BY:***

**SALLY CORLEY, STATE EMPLOYEE**

## CODE OF ETHICS CLARIFICATION AND REFORM COMMISSION

## Commentary

As I sit through the hearings cannot help but notice that all of the discussion by the panel runs scenarios through a legislative/elected official filter. While there are several state employees on the panel, there is very little discussion about how this will affect the daily lives of state employees. For this reason, I have listed below the issues that I have spotted as a state employee, who is married to a lobbyist, and the unique application the Ethics Law has/will have to my family. I make no claim that this list is exhaustive – just a humble attempt to bring the perspective of a state employee. Drafting language to address these issues gave us a new respect for the daunting job that is before you.

Background: I am a state employee who is also married to a lobbyist. We have 4 small children (oldest has just started kindergarten) and we live, work and worship in Montgomery. Our community is filled with other state employees, family members of state employees, principals and lobbyists. It is almost impossible for us to avoid interacting with others subject to the ethics law in our everyday lives.

Some of these scenarios will fall under what the Commission refers to as "prosecutorial discretion." The counter point is that most families will face a tremendous financial burden and unnecessary stress when these issues become a matter of "prosecutorial discretion" or even worse a debate of jury instruction. It would be preferable to have clear direction on the front end so that families like mine can steer very clear of inadvertent violations or even the perception of one.

Below are the issues and suggested solutions.

**Issues**:

- Lobbyist work events: Attending work functions with my husband – where my invitation has nothing to do with my employment as a public employee. Think: work dinner with spouses, holiday parties, special events where spouses are included. Does the familial exemption apply to this? It is clear that my invitation has nothing to do with my status as a state employee.
- Raises/Promotions: Can my lobbyist husband as a member of my household ask his lobbyist/principal boss for normal work related requests.
- Joint bank account: A lobbyist's paycheck goes into our family joint account and comingles with my state paycheck? How will our family bank account be treated? Can I take coworkers (state employees) to lunch?
- Social: Can my lobbyist husband as a member of my household invite his contemporaries (other lobbyists) to hunt, fish, socialize. Does he have to wait for an invitation?
- Christmas list: The kids and I can't ask our lobbyist for anything, but he can give us anything. He may be ok living life without a "honey do" list.
- Lobbying lobbyists: Can I discuss legislative issues with husband/friends that are lobbyists and even solicit support from lobbyists whose clients would also benefit from my agency's bill?
- Kids: Now that our kids are starting school, what about carpool, class parties, rides home, normal social interactions with kids whose parents are state employees or lobbyists? What is our role as a family – are we lobbyists or state employees? Again – how will our family bank account be viewed?
- Worship: Similar issue but applied to church setting. Can we provide meals/morning snack or host gatherings for Sunday school – these friends are state employees and lobbyists.

**Solutions**:

- Define lobbyist/principal as someone who has a direct or specific interest before a public official, public employee, or their public employer. Could also be addressed in (g) by clarifying "levels of government" to include a delineation between branches of government. This would help with a lot of the daily life interactions for state employees.

- Remove State Employees from Section X(b) – ban on soliciting anything. With (a) and (c) – state employees still cannot be provided or receive anything unless there is a stated exception. Struggled to find a solution to this one.
- Add an element of intent to the per se violations. Could include in the exceptions for anything: anything solicited or received for a purpose other than corruptly influencing official action. You all are already on track with this – just another way of looking at it.
- Asking for raises – could be addressed by (e) and (f) to include spouses. It may be covered by the familial exemption – not sure how this situation will be handled.

###