



**Item 4a—Staff Draft 7.15.08
(June 24, 2008 meeting book)**

June 15, 2008

DRAFT ADVISORY OPINION 08-XXX

Whether members of the Tennessee Commission on Uniform Legislation are “officials in the legislative branch” as defined by Tenn. Code Ann. § 3-6-301(20), and if so whether persons communicating with such members for compensation for the purpose of influencing legislative action or administrative action are engaged in “lobbying” as defined in Tenn. Code Ann. § 3-6-301(15) and must therefore register as lobbyists as required by Tenn. Code Ann. § 3-6-302.

INTRODUCTION

The following Advisory Opinion has been requested by Mr. Mark E. Nebergall, President of the Software Finance and Tax Executives Council (“SoFTEC”).

QUESTIONS

Mr. Nebergall poses the following questions:

1. Are members of the Tennessee Commission on Uniform Legislation (“TCUL”) officials in the legislative branch (“Legislative Officials”) as defined by the Tennessee Ethics Reform Act (“Act”)?
2. If members of the TCUL are Legislative Officials as defined by the Act, must people who communicate with them for compensation register as lobbyists and comply with the Act’s lobbyist reporting requirements?

ANSWERS

1. Yes. Members of the TCUL are Legislative Officials as defined in Tenn. Code Ann. § 3-6-301(20).
2. If a person is paid to communicate with a member of the TCUL *for the purpose of influencing any legislative action or administrative action*,¹ and if the person’s actions go beyond the mere furnishing of information requested by an official or the giving of testimony at an official hearing, then that person is a lobbyist and must register as a lobbyist unless a specific exception applies.

¹ Tenn. Code Ann. § 3-6-101(15)(A)(emphasis added).

FACTS

Information Regarding SoFTEC

SoFTEC provides “public policy advocacy on finance and tax issues,” to federal, state and international bodies regarding the “impact of their activities on software companies,” a “forum for the exchange of ideas between tax and financial executives at software companies worldwide,” and promotion of the “best interests of its members through the development and communication of industry positions.”²

A brief survey of news sources finds that SoFTEC was launched in 1999 as a trade association.³ A portion of SoFTEC’s purpose was to “lobby Congress and conduct public awareness campaigns regarding finance and tax policy issues affecting the software industry.”⁴ SoFTEC is registered as the employer of a lobbyist (“Employer”) on the federal level. It is not registered as an Employer within Tennessee.⁵

Mr. Nebergall’s present communication with TCUL members is presently limited to attending conferences and responding to requests by NCCUL and TCUL members. This activity is specifically excepted from the definition of “influencing legislative or administrative action.” As provided by Tenn. Code Ann. § 3-6-301(13), “influencing legislative or administrative action” does not include:

the furnishing of information, statistics, studies, or analyses requested by an official of the legislative or executive branch to that official or the giving of testimony by an individual testifying at an official hearing conducted by officials of the legislative or executive branch.

Mr. Nebergall’s⁶ present communication with TCUL members is not representative of the contact in which he would like to engage in the future. His proposed contact would include advocating in manners more traditionally associated with lobbying, such as taking a TCUL member out to dinner in order to discuss potential legislation. He would also continue to attend

² <http://www.softwarefinance.org/> (last visited May 30, 2008). Mr. Nebergall verified this information by phone.

³ <http://www.softwarefinance.org/press/softec.htm>. (last visited May 30, 2008). Mr. Nebergall verified this information by phone.

⁴ <http://partners.nytimes.com/library/tech/99/10/cyber/capital/26capital.html>. (last visited May 30, 2008); http://news.cnet.com/Software-firms-assemble-for-political-pull/2100-1040_3-231811.html. (last visited May 30, 2008). Mr. Nebergall verified this information by phone.

⁵ SoFTEC’s United States Senate Lobbying Disclosure can be found at http://www.senate.gov/pagelayout/legislative/b_three_sections_with_teasers/clientlist_page_S.htm (last visited May 30, 2008). Their United States House of Representatives Lobbying Disclosure can be found at <http://lobbyingdisclosure.house.gov/software.html?alpha=83> (last visited May 30, 2008).

⁶ Mr. Nebergall discussed by telephone how his proposed action differs from his present action. Mr. Nebergall knows his current action is allowable under the Act. His question is thus only with regard to his proposed action.

the NCCUL meetings when invited, however, and would attempt to influence potential legislation and policy by simply conversing, observing and reporting the NCCUL and TCUL members' activities. Mr. Nebergall's question is whether engaging in the contemplated, future conduct would require him to register as a lobbyist.

Information Regarding the TCUL

The TCUL exists pursuant to Tenn. Code Ann. § 4-9-101, *et seq.*

Its stated purpose is “the promotion of uniformity of legislation in the United States.” It consists of three (3) lawyers appointed by the Governor. The Director of Legal Services or the Director's designee is an associate member.⁷

The TCUL's duties are found in Tenn. Code Ann. §§ 4-9-102 and 4-9-103. They are:

1. To examine the subjects upon which uniformity of legislation is desirable, but which are outside the jurisdiction of Congress.
2. To confer about those matters with the Commissioners from other states and territories.
3. To consider and draft uniform laws to be submitted for approval and adoption by the states.
4. To advise and recommend such other or further course of action as shall accomplish the purposes of Chapter 9 of Title 4.
5. To keep a record of its transactions, and at the session of each General Assembly, make a report of its doings and recommendations.

TCUL members are also members of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”).⁸ A short review of the NCCUL's website finds that the duties of a State Commissioner on Uniform legislation include “work[ing] toward enactment of Conference acts in their home jurisdictions”⁹ and “advocate[ing] the adoption of uniform and model acts in their home jurisdictions.”¹⁰

ANALYSIS

⁷ Tenn. Code Ann. § 4-9-101.

⁸ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 30, 2008).

⁹ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 30, 2008).

¹⁰ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 2, 2008). This section goes on to explain, “[n]ormal resistance to anything ‘new’ makes this the hardest part of a commissioner’s job.”

I. Members of the TCUL as Legislative Officials

A. Definition of Legislative Officials

Tenn. Code Ann. § 3-6-301(20) defines “official in the legislative branch” as, in part, “any member of a commission established by and responsible to the general assembly or either house of the general assembly who takes legislative action.”

Thus, the relevant test for being a Legislative Official is threefold. First, the General Assembly must have established the commission of which the individual is a member. Second, the commission must be responsible to the General Assembly. Third, the commission must take legislative action.

The TCUL was established by the General Assembly.¹¹ The TCUL is statutorily required to “keep a record of its transactions, and shall at the session of each general assembly make a report of its doings and of its recommendations to the general assembly.”¹² Thus, two of the three prongs of the test for being a Legislative Official are met.

In order for the members of the TCUL to meet the third prong of the test to be officials in the legislative branch, the commission's activities must constitute “legislative action.”

B. Meaning of “Legislative Action”

Tenn. Code Ann. § 3-6-301(14) defines “legislative action” as “introduction, sponsorship, debate, voting or any other nonministerial official action or nonaction on any bill, resolution, amendment, nomination, appointment, report or any other matter pending or proposed in a legislative committee or in either house of the general assembly.”

C. Operations and Functions of the TCUL

Mr. Charles Trost, a member of the TCUL, submitted an explanatory letter with attachments before the Commission’s June 24, 2008 meeting. He also appeared at the meeting and explained how the TCUL and NCCUSL operate. The Commission has considered Mr. Trost’s letter, e-mails, oral statements, and the TCUL report he submitted after the meeting.¹³

The members of the TCUL operate at two levels, though their activities at these two levels are largely intertwined.

1. Functions at the National Level

¹¹ Tenn. Code Ann. §§ 4-9-101 - 4-9-104.

¹² Tenn. Code Ann. § 4-9-103.

¹³ Mr. Trost’s letter, e-mails, and the TCUL report he submitted are attached as exhibits to this Opinion.

At the national level, as members of the NCCUSL, they perform the first three (3) functions listed above. Together with the other members of the NCCUSL, they examine the subjects upon which uniformity of legislation is desirable, but which are outside the jurisdiction of Congress; they confer about those matters with the Commissioners from other jurisdictions, they consider and draft uniform laws to be submitted for approval and adoption by the states, and they “seek introduction and enactment of Uniform Acts promulgated by the [NCCUL] that are appropriate for their State.”¹⁴

A short review of the NCCUL’s website finds that the NCCUL takes these duties seriously. As stated on the page describing the work state Commissioners on Uniform Legislation are expected to perform, “[w]hen drafting is completed on an act, a commissioner’s work has only begun. They advocate the adoption of uniform and model acts in their home jurisdictions. Normal resistance to anything ‘new’ makes this the hardest part of a commissioner’s job. But the result can be workable modern state law that helps keep the federal system alive.”¹⁵ However, the NCCUL does note that “the [c]onference can only propose - no uniform law is effective until a state legislature adopts it.”¹⁶

Many of a TCUL member's activities would not constitute “legislative action,” many would. As the TCUL member is expected to advocate for the adoption of any NCCUL enacted legislation in Tennessee, activities such as drafting legislation would be “legislative action” even if the drafting is conducted out of state.

2. Functions at the State Level

At the state level, the TCUL acts according to statutory mandate. The TCUL’s statutory mandate requires the TCUL to:

- (1) Examine the subjects upon which uniformity of legislation in the various states and territories of the union is desirable, but which are outside the jurisdiction of the congress of the United States;
- (2) Confer upon these matters with the commissioners appointed by other states and territories for the same purpose;
- (3) Consider and draft uniform laws to be submitted for approval and adoption by the several states; and

¹⁴ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18> (last viewed July 8, 2008)(quotation taken from Article 6, § 6.1 of the NCCUL’s bylaws).

¹⁵ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 8, 2008).

¹⁶ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 8, 2008).

(4) Generally advise and recommend such other or further course of action as shall accomplish the purposes of this chapter.¹⁷

Further, Tenn. Code Ann. § 4-9-103 mandates the TCUL, “at the session of each general assembly, make a report of its doings and its recommendations to the general assembly.” Making a report to the general assembly could also be viewed as taking nonministerial official action or nonaction” on a report.

D. The TCUL’s Legislative Action

Tenn. Code Ann. §§ 4-9-102(4) and 4-9-103, quoted above, provide that the TCUL is to advise and make recommendations to the Tennessee General Assembly. Those functions must be examined to determine whether they constitute “legislative action.”

As noted, “advise” may mean to advocate, to propose, or simply to provide information or notice as in “advise them of their rights.”¹⁸ The presence of the word “advise” does not per se render members of the TCUL Legislative Officials. Thus, to the extent that the meaning of “advise” is ambiguous, we consider the meaning of “recommend” in conjunction. “Recommend” means “to present as worthy of acceptance or trial” as in “*recommended* the medicine” or “endorse as fit, worthy, or competent” as in “*recommends* her for the position.”¹⁹

The Commission concludes that giving general advice to the general assembly may or may not be “legislative action”²⁰ as contemplated by the Act. However, the Commission also concludes that “recommend[ing] such other or further course of action as shall accomplish the purposes of this chapter”²¹ does rise to the level of “legislative action,” especially when coupled with the NCCUL’s expectation that state commissioners will advocate for the adoption of legislation on the state level.

Since the TCUL was created by the General Assembly, is responsible to the General Assembly and takes legislative action, the members of the TCUL are Legislative Officials.

II. Communications with Members of the TCUL as Lobbying

The answer to Mr. Nebergall’s second question is yes, if Mr. Nebergall wishes to communicate with TCUL members for the purpose of influencing legislative action or

¹⁷ Tenn. Code Ann. § 4-9-102.

¹⁸ <http://www.merriam-webster.com/dictionary/advise> (last visited July 9, 2008).

¹⁹ <http://www.merriam-webster.com/dictionary/recommend> (last visited July 9, 2008). This meaning comports with the NCCUL’s explanation of state commissioner duties, which, as stated above, include “[t]hey advocate the adoption of uniform and model acts in their home jurisdictions.” <http://www.nccul.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last viewed July 8, 2008).

²⁰ Tenn. Code Ann. § 3-6-301(14).

²¹ Tenn. Code Ann. § 4-9-102.

administrative action within the State of Tennessee. Since the statutory definition of “influencing legislative or administrative action” excludes “the furnishing of information . . . requested by an official . . . or the giving of testimony . . . at an official hearing,” Mr. Nebergall’s current activity is not “lobbying.” However, his contemplated activity goes beyond this exclusion and therefore he must register if he engages in that activity.²²

A. General Definition of Lobbying

As stated in Mr. Nebergall’s request, the individuals who would be communicating with the TCUL members would be compensated for their communication. A person who lobbies for compensation is a “lobbyist.”²³

The issue is whether SoFTEC’s communications with TCUL members by SoFTEC members would be lobbying. In the context of this Advisory Opinion, Tenn. Code Ann. § 3-6-101(15)(A) defines “lobby” as “to communicate, directly or indirectly, with any official in the legislative branch . . . for the purpose of influencing any legislative action”

The definition of “lobby” has several exceptions, Tenn. Code Ann. § 3-6-101(15)(B) through (F). It does not appear that whatever contact a representative of SoFTEC would have with the members of the TCUL would be within any of the exceptions to that definition.

B. Influencing Legislative Action

In order for a communication by a representative of SoFTEC to a member of the TCUL to constitute lobbying, the representative of SoFTEC would have to be communicating “for the purpose of influencing any legislative action or administrative action.”²⁴

“Influencing legislative action” is defined in Tenn. Code Ann. § 3-6-101(13) as:

. . . promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including, but not limited to, the provision or use of information, statistics, studies, or analyses, but not including the furnishing of information, statistics, studies, or analyses requested by an official of the legislative or executive branch to that official or the giving of testimony by an individual testifying at an official hearing conducted by officials of the legislative or executive branch.

If a SoFTEC representative approaches a member of the TCUL in order to attempt to persuade that member to advocate SoFTEC’s position with regard to the adoption or amendment of a uniform state law, or a nonuniform provision of a uniform state law, the TCUL member

²² Tenn. Code Ann. § 3-6-101(15)(A).

²³ Tenn. Code Ann. § 3-6-301(15) and (17).

²⁴ Tenn. Code Ann. § 3-6-101(15)(A).

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would decline to do so.²⁵ Instead, the member of the TCUL would refer the representative of SoFTEC to some other entity that does advocate with respect to legislation.²⁶

That the TCUL only advises and recommends the General Assembly to adopt laws which have been developed and thoroughly discussed by the NCCUL has no bearing on whether a person is communicating with the TCUL “for the purpose of influencing any legislative action or administrative action.”²⁷ First, if a communication occurs during the drafting of legislation, in anticipation of the TCUL member’s recommending the legislation to the General Assembly, the communication could very well be communication for the purpose of influencing legislative action.

Second, just as one does not have to be an effective governor in order to govern, one does not have to be an effective lobbyist in order to lobby. In fact, the Act prohibits “fee[s], compensation or bonus[es] for lobbying wherein the amount of the fee, compensation or bonus is contingent upon achievement of an outcome deemed to be successful for the employer.”²⁸ So, while it may be a worthless, futile endeavor for a SoFTEC representative to lobby a TCUL member, if the SoFTEC representative does choose to lobby the TCUL member for the purpose of influencing legislative or administrative action within the State of Tennessee, the SoFTEC representative would be required to register as a lobbyist²⁹ and make the required disclosures.³⁰

C. Sought by Member of TCUL

The definition of “influencing legislative action” excludes “furnish[ing] . . . information, statistics, studies, or analyses requested by an official of the legislative or executive branch to that official or the giving of testimony by an individual testifying at an official hearing conducted by officials of the legislative or executive branch.”

The NCCUSL extends a broad invitation to entities such as SoFTEC to submit information and make recommendations to the NCCUSL during its process of drafting proposed uniform laws and related documents. If a member of the TCUL requested information, statistics, studies or analyses from a representative of SoFTEC, or requested such a representative to give testimony at a legislative hearing, the representative of SoFTEC would not be influencing legislative action.

Therefore, if a representative of SoFTEC responded to such a request, it would not be lobbying under Tenn. Code Ann. § 3-6-301(15)(A). SoFTEC would not be an employer of a

²⁵ See attached information supplied by Mr. Trost, Chairman of the TCUL.

²⁶ See attached information supplied by Mr. Trost, Chairman of the TCUL.

²⁷ Tenn. Code Ann. § 3-6-101(15)(A).

²⁸ Tenn. Code Ann. § 3-6-304(k).

²⁹ Tenn. Code Ann. § 3-6-302.

³⁰ Tenn. Code Ann. § 3-6-303.

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lobbyist under Tenn. Code Ann. § 3-6-301(8); the representative of SoFTEC would not be a lobbyist under Tenn. Code Ann. § 3-6-301(17); and neither would have to register under Tenn. Code Ann. § 3-6-302.

Donald J. Hall, Chair
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