S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

November 10, 2008

Opinion No. 08-172

Executive Agency under Tenn. Code Ann. § 3-6-301

QUESTIONS

1. Whether the board members and employees of the Tennessee Student Assistance Corporation are included in the definition of "official in the executive branch" contained in Tenn. Code Ann. § 3-6-301(19) and thus subject to the prohibitions contained in Tenn. Code Ann. §§ 3-6-304 and 305 and the jurisdiction of the Tennessee Ethics Commission.

2. If the answer to Question 1 is no, then are such agencies covered under any other provision of the "Comprehensive Governmental Ethics Reform Act of 2006."

OPINIONS

1. Yes, board members and employees of the Tennessee Student Assistance Corporation qualify as officials "in the executive branch" and are, therefore, subject to the prohibitions contained in Tenn. Code Ann. §§ 3-6-304 and 305, as well as the jurisdiction of the Tennessee Ethics Commission.

2. In light of our response to No. 1, no response is required.

ANALYSIS

You have asked whether the board members and employees of the Tennessee Student Assistance Corporation are included within the definition of "official in the executive branch" contained in Tenn. Code Ann. § 3-6-301(19), making them subject to the prohibitions contained in Tenn. Code Ann. §§ 3-6-304 and 305 and the jurisdiction of the Tennessee Ethics

Commission. In 2006, the Tennessee General Assembly adopted the Comprehensive Governmental Ethics Reform Act of 2006. This Act created the Tennessee Ethics Commission and gave it jurisdiction to administer and enforce the provisions of the Act. Tenn. Code Ann. §§ 3-6-103 and 105. The Act contains a number of provisions regulating the conduct of lobbyists and employers of lobbyists, including a prohibition against providing a gift "directly or indirectly, to a candidate for public office, official in the legislative branch, official in the executive branch or immediate family member of such candidate or official." Tenn. Code Ann. § 3-6-305(a)(1).

The Act defines "official in the executive branch" as:

> the governor, any member of the governor's staff, any member or employee of a state regulatory commission, including, without limitation, directors of the Tennessee regulatory authority, or any member or employee of any executive department or agency or other state body in the executive branch. 'Official in the executive branch' also includes any administrative governmental official or employee of any county exercising the authority set forth in § 8-17-103(b).

Tenn. Code Ann. § 3-6-301(19). The term "executive agency" is further defined as "any commission, board, agency, or other entity in the executive branch of the state government, or *any independent entity of the state government that is not a part of the legislative or judicial branch*." Tenn. Code Ann. § 3-6-301(9). (Emphasis added).

The Tennessee Constitution states that "[t]he powers of the Government shall be divided into three distinct departments: the Legislative, Executive and Judicial," and that "[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Tennessee Constitution, Art. II, §§ 1 and 2. The Tennessee Supreme Court has further defined the roles of the governmental branches stating that the "[l]egislative branch has the authority to make, alter and repeal the law; the executive branch administers and enforces the law; and the judicial branch has the authority to interpret and apply the law." *Richardson v. Tennessee Board of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995). As a matter of practice, it has been found impossible to entirely preserve the theoretical lines between the three departments of government. Judicial or legislative powers are commonly conferred on administrative officers, boards and commissions. *Woods v. State*, 130 Tenn. 100, 169 S.W.558, 559 (Tenn. 1914); *Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n*, 844 S.W.2d 151, 160 (Tenn.Ct.App. 1992). However, the fact that limited judicial or legislative power may be conferred upon an executive or administrative entity does not mean that such entity should be considered as part of the legislative or judicial branches.

The Tennessee Student Assistance Corporation ("TSAC") was created by the General Assembly in 1974 as a non-profit corporation "to administer student assistance programs authorized by law." Tenn. Code Ann. § 49-4-201. The purpose and duties of TSAC are outlined in Tenn. Code Ann. § 49-4-203 and include the duty to receive state funds appropriated for the purpose of guaranteeing student loans; to administer the provisions under law of state awards of

financial assistance to needy students who are residents of Tennessee; to administer the loan and loan scholarship programs established by state law; and to administer the Tennessee academic scholars program. TSAC is specifically authorized and directed to promulgate rules and regulations governing the making and guaranteeing of student or parent loans and the making of awards of financial assistance to students. Tenn. Code Ann. § 49-4-204. In order to fund its programs, TSAC is required to submit requests for appropriations to the higher education commission, and if they are approved, then to the governor for consideration and inclusion in the budget.

Although TSAC is a non-profit corporation, it is statutorily charged with performing administrative functions on behalf of the state, *i.e.*, to administer the state's student assistance programs. Additionally, TSAC has been recognized as an "arm or agency" of the State of Tennessee. *See In re Dodson*, 259 B.R. 635, 638 (E.D. Tenn. 2001) (citing *Seay v. Tennessee Student Assistance Corp.*, 244 B.R. 112, 114 (E.D. Tenn. 2000)). Because its purpose and duties are to administer and enforce the various programs established by law concerning student loans and other student financial assistance, it is the opinion of this office that TSAC performs executive functions and would qualify as an agency of the executive branch of government. TSAC would also qualify as an "independent entity of the state government that is not a part of the legislative or judicial branch" and, therefore, is an "executive agency" as defined in Tenn. Code Ann. § 3-6-301(9).

We conclude, therefore, that TSAC's board members and employees are included in the definition of "official in the executive branch" contained in Tenn. Code Ann. § 3-6-301(19) and are, as a consequence, subject to the prohibitions of Tenn. Code Ann. §§ 3-6-304 and 305, as well as the jurisdiction of the Tennessee Ethics Commission.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JANET M. KLEINFELTER
Senior Counsel

Requested by:

The Honorable Doug Jackson
State Senator
10 Legislative Plaza
Nashville 37243-0025